

ORIGINAL

IN THE SUPREME COURT OF OHIO

W. DAVID LEAK, M.D., : Case No. 2011-1113
Appellant, : On Appeal from the Franklin
County Court of Appeals,
vs. : Tenth Appellate District
STATE MEDICAL BOARD OF OHIO, : Court of Appeals
Appellee. : Case No. 09AP-1215
:
:

APPELLEE STATE MEDICAL BOARD OF OHIO'S
MEMORANDUM IN RESPONSE TO APPELLANT'S JUNE 29, 2011 MOTION FOR
STAY OF EXECUTION OF JUDGMENT DURING APPEAL, AND
MEMORANDUM IN RESPONSE TO APPELLANT'S JUNE 29, 2011 MOTION TO
EXPEDITE AND REQUEST FOR ORAL HEARING

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APPELLEE'S MEMORANDUM CONTRA TO
APPELLANT'S MOTION FOR STAY
OF ADMINISTRATIVE ORDER

Appellant, W. David Leak, M.D., has moved this Court for an order staying the execution of Appellee State Medical Board of Ohio's (hereinafter "Board") August 13, 2008 Order permanently revoking his certificate to practice medicine and surgery in the State of Ohio. Dr. Leak has already practiced for almost three years following the Board's revocation of his certificate. His continued practice presents a threat to the health and safety of his patients. This Court should not grant this Motion because Dr. Leak has not shown that the Tenth District Court of Appeals abused its discretion when it denied Dr. Leak's Motion to Continue the Stay pending appeal to this Court.

I. PROCEDURAL OVERVIEW

Dr. Leak is a board certified anesthesiologist and a diplomat of the American Board of Pain Medicine. *Leak v. State Medical Board of Ohio* (10th Dist.), 2011-Ohio-2483. In August of 2006, the Board notified Dr. Leak of its proposal to discipline his license based upon allegations of practicing below the minimal standard of care in violation of R.C. 4731.22(B)(6) with respect to his treatment of twenty four patients, among other violations. Following a 17-day administrative evidentiary hearing, the Board voted to permanently revoke Dr. Leak's certificate to practice medicine and surgery in Ohio after finding that he committed numerous violations of the *Medical Practices Act* in his care and the patients alleged, including practicing below the standard of care on numerous patients.

Dr. Leak appealed the Board's Order to the Franklin County Court of Common Pleas pursuant to R.C. 119.12 on August 25, 2008. The Court of Common Pleas granted a stay of the Board's Order on September 9, 2008. The Common Pleas Court stayed the

Board's Order for the duration of the appeal, or the expiration of fifteen (15) months, whichever occurred first. Upon a motion to extend the stay filed on November 19, 2009, Judge Reece issued a second stay in this matter after the fifteen (15) month period had expired. A decision on the merits came shortly after on December 15, 2009, affirming the Board's Order of permanent revocation of Dr. Leak's license.

Dr. Leak appealed the decision to the Tenth District Court of Appeals on December 31, 2009. It is important to note that, pursuant to the express language set forth in the decision by lower court, Dr. Leak's stay expired once the decision was rendered by the Common Pleas Court.¹ Once again, however, Dr. Leak sought a stay and Judge Reece issued an order on January 13, 2010 staying the Board's Order pending the appeal to the Tenth District Court of Appeals. The Board opposed each request for stay in this matter. The Tenth District issued a decision affirming the Board's Order on May 24, 2011. A judgment entry was issued on May 25, 2011. The Order of the Board is now finally in effect and Dr. Leak's license is permanently revoked.

The Tenth District held that Dr. Leak routinely ran patients through his "program" at Pain Control Consultants, Inc., a program which consists of subjecting patients to many useless and medically meaningless tests, shooting them up with steroids and finally prescribing narcotic pain medications. There was no apparent attempt to actually heal these patients through exercise and/or rehabilitation. As the State's two experts, Dr. Katirji and Dr. Chelimsky testified, many of these tests ordered by Dr. Leak were worthless from a diagnostic standpoint.

¹ Dr. Leak erroneously claims in his Motion for Stay that the Court of Appeals decision to deny his request for stay to that court was contrary to law because the court did not find that the Common Pleas Court abused its discretion. The Court of Appeals was not reviewing the lower court's decision to grant the stay, since the stay expired when the lower court rendered its decision.

Dr. Leak has avoided the revocation of his license for almost three years. At this point, following the ruling of the Tenth District upholding the Board's order and denying Dr. Leak's motion for continued stay, it is almost impossible for him to argue a likelihood of success on the merits as required by R.C. 119.12. Even if he were to successfully argue this point, he still has failed to show that an unusual hardship will result if the Board's Order is not stayed. Finally, the safety and welfare of the public will not be protected if a stay of the Board's Order is granted.

II. LAW AND ARGUMENT

Revised Code 119.12 sets forth very specific standards which must be met before the Court may grant a suspension of a Board order:

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. *** In the case of any appeal from the state medical board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending the termination of the appeal, and the health, safety and welfare of the public will not be threatened by suspension of the order.***

R.C. 119.12 (emphasis added). Revised Code 119.12 also specifically enumerates a fifteen month limit on the length of a stay granted by the Court of Common Pleas for Orders issued by the Medical Board. This limitation indicates that the legislature recognized the significant potential for risk to the public's safety caused by allowing a physician to continue to practice after an order issued by the Board revoking this license. Dr. Leak has far exceeded this fifteen month limit.

This motion is governed by *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corporation* (10th Dist. 2001), 141 Ohio App.3d 777, 783. The *Krihwan* court concluded that, "when reviewing whether a trial court properly granted or denied a motion to stay an administrative order, the standard of review employed is an abuse of

discretion.” Id. at 782 (citing *Carter Steel & Fabricating Co. v. Danis Bldg. Construction Co.* (3rd Dist. 1998), 126 Ohio App.3d 251, 254).

Kriwhan also establishes the standard for determining whether an unusual hardship exists as required by R.C. 119.12. The *Kriwhan* court adopted the federal standard articulated in *Hamlin Testing Labs, Inc. v. United States Atomic Energy Comm.* (6th Cir. 1964), 337 F.2d 221, concluding that there were four factors to be considered:

(1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay.

Id. at 783. In determining whether to issue a stay of an agency order, “courts give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme.” Id. at 782 (citation omitted).

Dr. Leak is not able to meet any of the above requirements. In fact, the only thing he argues in support of his request is that the denial of a stay would “ruin his professional life”. Appellant’s Motion, p. 6. Nor has he provided this Court with any indication that he has changed his medical practice, which the lower court and the Tenth District have acknowledged is below the minimal standard of care. In fact, Dr. Leak acknowledges that his professional situation has not altered since his original 2008 appeal. Id. Therefore, the Board respectfully requests that his Motion be denied.

A. Dr. Leak Has Not Met the Legal Requirements for a Stay Pursuant to R.C. 119.12.

1. Dr. Leak has not shown that he will suffer an unusual hardship if the Board's Order is not stayed

The language of R.C. 119.12 makes clear that an appellant must show more than the financial hardship inherent and expected in losing his professional license; the statute requires that the appellant prove that he will suffer an unusual hardship. As explained by Judge John W. Reece of the Summit County Court of Common Pleas in *State Medical Board vs. Alsleben* (Mar. 17, 1980), Summit Cty. C.P. No. CV80-3-0614, unreported:

There is a dearth of authority in Ohio defining what constitutes 'unusual hardship'. However, some reasonable analysis may be helpful. The very term itself presupposes that the legislature foresaw that there would be a hardship in every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective 'unusual' was included. That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.

Id. at p. 1-2. Unusual hardship also means more than the loss of the right to practice medicine:

While it can hardly be denied that the loss of one's license to practice his chosen profession constitutes hardship, it is equally clear that something more and unusual is required to satisfy the statute.

Id. at p. 2-3.² Courts throughout Ohio have repeatedly held that the mere denial of the right to practice medicine is not an 'unusual' hardship as contemplated by the General Assembly. *Randall Leuvoy v. State Medical Board* (Oct. 10, 2006), Franklin Cty C.P. No. 06CVF10-1247, unreported (Frye, R.).

² Copies of all unreported decisions cited herein are attached.

The rulings of the Franklin County Common Pleas Court in similar cases support this conclusion.³ See, e.g. *Benjamin Gill, D.O. v. State Medical Board of Ohio* (Sep. 14, 2007), Franklin Cty. C.P. No. 07CVF09-11839, unreported (Brown, E.) (loss of income, property, clients, employees, and reputation are inherent results of loss of license and do not constitute unusual hardship); *Hazem S. Garada, M.D. v. State Medical Board of Ohio* (Jul. 9, 1998), Franklin Cty. C.P. No. 98CVF06-4873, unreported (Sadler, J.) (loss of practice does not constitute “unusual hardship”); *Roy v. State Medical Board of Ohio* (Aug. 9, 1993), Franklin Cty. C.P. No. 93CVF05-3734, unreported (McGrath, J.) (“‘unusual hardship’ means more than the loss of the right to practice medicine”); *Williams v. State of Ohio Department of Insurance* (Jan. 12, 1994), Franklin Cty. C.P. No. 93CVF08-5808, unreported (Reece, J.) (“That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one”); *Essig v. State Medical Board* (Nov. 2, 1994), Franklin Cty. C.P. No. 94CVF10-7097, unreported (Sheward, J.) (“The Court is not persuaded that Appellant’s claim of injury to his practice and loss of income constitutes ‘unusual hardship’ as contemplated in R.C. 119.12”).

Dr. Leak claims that, “a stay is essential to prevent any further ruin of Dr. Leak’s personal and professional life.” (Appellant’s Motion, p. 6). As the Franklin County Court of Common Pleas has consistently ruled on these matters, there must be a showing of something more than the usual professional and personal consequences that would naturally flow from the loss of a professional license. The Tenth District Court of Appeals reviewed Dr. Leak’s request and found that no such unusual hardship has been

³ Although the State acknowledges that Common Pleas Court decisions are not typically relied on by this Court as a matter of course, on this issue these are the only cases that analyze what constitutes unusual hardship pursuant to R.C. 119.12.

shown by Dr. Leak. Dr. Leak has failed to show unusual hardship as required under the first prong of the test set forth in R.C. 119.12, therefore, his motion for a stay of the Board's Order should be denied.

2. Dr. Leak's continued practice would threaten the public's health, safety and welfare.

Since Dr. Leak has failed demonstrated that he will suffer an unusual hardship if the Court denies his request for a stay, it is not necessary to consider the impact a stay might have on the health and safety of the public. *Essig, supra*. However, even if it were necessary to reach this part of the test, Dr. Leak could not demonstrate that his continued practice would not pose a danger to the public.

The facts noted in the Tenth District's decision clearly establish that Dr. Leak's continued practice is a threat to the public's health, safety and welfare. The State's expert medical witnesses presented testimony that Dr. Leak had performed unnecessary and invasive tests on patients, had failed to adapt his treatment methods and recommendations based on the results of these tests, and that Dr. Leak had general engaged in pain management treatment that maximized fees rather than providing critical, individualized treatment to patients. *Leak*, 2011-Ohio-2483 at ¶ 4. Both of the State's experts also testified that these tests were ineffective or worthless from a diagnostic standpoint and that each of Dr. Leak's patients was referred for the same array of tests regardless of pain symptoms or otherwise assessable factors and circumstances underlying the complaints of pain. *Id.* at ¶ 11. The experts further opined that the testing ordered and conducted by Dr. Leak lacked sufficient documentation in the patients' medical records, establishing fundamental reasoning or medical judgment underlying the

need for the tests and little follow up or invocation of the test results when proceeding to prescribe pain medication and treatment for those patients. *Id.*

The Board's Order in his case was issued on August 13, 2008. Dr. Leak was granted a stay starting in September of 2008 and running all the way until the Tenth District Court of Appeals decision issued on May 25, 2011, a period of approximately thirty-three (33) months. The potential for abuse if another stay is granted by this Court is significant. By failing to meet the minimal standard of care with the patients at issue, Dr. Leak demonstrated that he cannot be trusted to safely practice medicine. The Board's Order has now been reviewed and upheld by two different courts on appeal. Dr. Leak has not presented any evidence in his Motion to Stay that would show that he has discontinued the dangerous prescribing and treatment that caused the Tenth District to affirm the Board's revocation Order. In fact, Dr. Leak acknowledges in his Motion that he has not altered his practice since the Board found it to be below the standard of care. Appellant's Motion, p. 6. Keeping Dr. Leak in a position where he still has access to patients creates a risk to his patients' safety.

B. Dr. Leak Has Not Demonstrated a Strong or Substantial Probability of Success on the Merits.

It is virtually impossible for Dr. Leak to demonstrate a strong or substantial likelihood of success on the merits of this case prior to filing his Memorandum in Support of Jurisdiction or a brief on the merits. In fact, it is unlikely that the Court will even choose to review the Tenth District's decision in this case because it does not present an issue of general or great public interest and does not invoke a substantial constitutional question.

Furthermore, this matter is a companion case to *Brian Frederic Griffin, M.D. v. State Medical Board of Ohio* (10th Dist.), 2009-Ohio-4849. A discretionary appeal was filed October 9, 2009 with the Court. Dr. Leak's case is nearly identical to that of Dr. Griffin in that the same allegations were made against each physician. However, the Board issued different disciplinary sanctions for Dr. Griffin since he was a student working under Dr. Leak's direction and was not responsible for setting up the illegitimate nerve testing scheme that Dr. Leak was exclusively responsible for instituting. This Court declined to review Dr. Griffin's discretionary appeal of the Tenth District's decision upholding the Board's Order and issued a decision dismissing Dr. Griffin's appeal on December 30, 2009. Therefore, it is unlikely that this Court will choose to review the decision by the Tenth District in this case.

Should the Court choose to review this case, however, Dr. Leak cannot show a likelihood of success on the merits given his unsuccessful challenge of the Board's Order revoking his certificate to practice on both the Common Pleas Court level and on the Appellate Court level. Dr. Leak raised four assignments of error to the Tenth District, all of which were unanimously overruled.

C. Neither the Court of Appeals nor this Court is Bound by the Decision of the Common Pleas Court to Grant a Stay of the Board's Order.

Dr. Leak argues in his Motion for Stay that the Court of Appeals was required to grant him a stay because the lower court found him entitled to a stay. He argues that the Court of Appeals is bound by the lower court's decision unless it finds an abuse of discretion.

On January 13, 2010, the Court of Common Pleas granted Dr. Leak's third request for a stay pending his appeal to the Tenth District. The decision expressly states

that enforcement of the Court's decision "will be stayed during the appeal of this matter to the Tenth District Court of Appeals or further order by that court." Thus, once the Court of Appeals rendered its decision, the lower court stay automatically expired. At that point, the decision by the Tenth District to deny Dr. Leak's stay was not a review of the lower court's actions, but a new action by the reviewing court. There has been no showing by Dr. Leak that the Tenth District Court of Appeals abused its discretion in denying Dr. Leak's most recent attempt to stay the Board's Order.

MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION TO EXPEDITE AND REQUEST FOR ORAL HEARING

Dr. Leak filed a request for a stay on June 29, 2011 accompanied by a motion for expedited relief and request for an oral argument or informal conference. The Board submits that no oral hearing is necessary, as Appellant's motion and the state's response provide sufficient information for the Court to issue a decision.

As to the application of the Board's Order, the Board's original Order, mailed on August 15, 2008, states that it "shall become effective thirty days from the date of mailing" of the Board's Order. The thirty days began to run on the date of mailing, August 15, 2008. Dr. Leak obtained a stay of the Board's Order on September 9, 2008, thus, twenty-four days had run before the Board's Order was stayed. In accordance with R. C. 119.12, the Common Pleas Court's entry of September, 9, 2008 stated that the stay would expire fifteen months after the filing of the notice of appeal, or when the court issued its decision, whichever came first. The notice of appeal was filed on August 25, 2008, and the fifteen-month period required by statute expired on November 25, 2009. On November 23, 2009, the common pleas court extended the stay over the Board's objections that the statute did not permit extension of the stay.

The common pleas court issued a decision on the merits on December 15, 2009, affirming the Board's Order permanently revoking Dr. Leak's license. Dr. Leak appealed to the Tenth District Court of Appeals and filed a request for additional stay pending appeal with the common pleas court. The common pleas court issued an entry granting the motion on January 13, 2010. The Tenth District Court of Appeals unanimously affirmed the lower court and Board Order in a decision issued May 24, 2011. The entry was issued on May 25, 2011, thus ending Dr. Leak's stay. Dr. Leak filed a motion for expedited consideration of yet another request for stay pending his appeal to this Court. The Tenth District Court of Appeals denied that request, ruling that Dr. Leak had not demonstrated entitlement to a stay pursuant to R.C. 119.12.

As discussed above, twenty-four days passed between the original mailing of the Board's Order and the common pleas court's first stay. Further, more than six days have passed since the expiration of the common pleas court's most recent stay. Thus, the thirty-day period provided in the Board's Order has already expired, and there is no need for oral argument on this issue. The Tenth District Court of Appeals correctly determined that Dr. Leak has not demonstrated that he is entitled to further stay of the Board's Order.

III. CONCLUSION

Based on the foregoing, the Board respectfully requests this Court deny Dr. Leak's motion for a conditional stay of the Board's August 13, 2008 Order which permanently revoked his certificate to practice medicine and surgery in Ohio. Dr. Leak has been granted almost three years of practice since the Medical Board permanently revoked his medical license. He has had no success in arguing his appeal. The companion physician in this case, Dr. Griffin, had no success in his appeal. The

likelihood of success on any further appeal is remote. To allow Dr. Leak the ability to practice during the duration of this appeal could endanger the health, safety and welfare of the public. The Board respectfully requests that this Court deny Dr. Leak's motion for stay. Moreover, the Board asks this Court to deny Dr. Leak's motion for oral argument.

Respectfully submitted,

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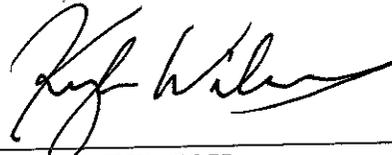
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Appellee State Medical Board of Ohio's Memorandum in Response to Appellant's June 29, 2011 Motion for Stay of Execution of Judgment During Appeal, and Memorandum in Response to Appellant's June 29, 2011 Motion to Expedite and Request for Oral Hearing* was served via regular United States mail, postage prepaid this 5th day of July, 2011, to Douglas E. Graff, Esq., James M. McGovern, Esq., Levi J. Tkach, Esq., 604 East Rich Street, Columbus, Ohio 43215, counsel for W. David Leak, M.D.



KYLE C. WILCOX

IN THE COURT OF COMMON PLEAS

Ms 17
SUMMIT COUNTY, OHIO

SUMMIT COUNTY

CLERK OF COURTS CASE NO. CV80-3-0514

STATE MEDICAL BOARD OF OHIO,

Appellee,

vs.

H. RUDOLPH ALSLEBEN, D.O.,

Appellant.

ORDER

This cause came on to be heard on the plaintiff-appellant's Motion for Suspension of Order, filed herein on March 4, 1980. The Court granted a temporary restraining order which is effective through March 17, 1980.

The motion is brought pursuant to Section 119.12, O.R.C., claiming to the Court that an unusual hardship will be suffered by the plaintiff from the execution of the appellee's order pending the determination of the merits of the appeal herein.

There is a dearth of authority in Ohio defining what constitutes "unusual hardship." However, some reasonable analysis may be helpful. The very term itself presupposes that the legislature foresaw that there would be a hardship in practically every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective "unusual" was included. That there will be a hardship in this case is certainly true, as in

every case. The question is whether there has been a showing that it is an unusual one.

The appellant argues that a hardship will result to the patients of the appellant if the order is not stayed. A reading of the statute shows this to be an invalid consideration. Section 119.12, O.R.C. provides in pertinent part: "If it appears to the Court that an unusual hardship to the appellant will result--" (Emphasis added).

Therefore, the statute is not intended to cover hardships except to the appellant.

In addition, the statements of counsel during argument reveal that the appellant is associated with at least one other doctor who can service any emergency needs of patients. For non-emergency cases, there are many other doctors available in the community for medical services.

The Court finds that there just has not been a concrete showing of an unusual hardship. There is nothing on which to judge whether the appellant will suffer a disastrous financial loss or just undergo an economic and financial readjustment. For example, there is no knowledge of what his financial arrangement may be with his associate. He may very well be entitled to some income from that arrangement. The appellant may have other sources of income which could sustain him with some adjustment in lifestyle.

... that the loss of one's

license to practice his chosen profession constitutes a hardship, it is equally clear that something more and unusual is required to satisfy the statute.

Accordingly, the motion is overruled. The appellant's companion motion to permit additional evidence, argued also on March 14, 1980, is taken under advisement by the Court until such time as the hearing transcript is filed and can be reviewed by the Court.

The temporary restraining order issued by the Court originally on March 7, 1980, is hereby ordered dissolved.

It is so ordered.

Judge John W. Reece

cc: Joseph C. Winner
Jeffrey Jurca

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

RANDALL LEUVOY,

Plaintiffs,

vs.

STATE MEDICAL BOARD,

Defendant.

CASE NO. 06CVF-09-12477

JUDGE FRYE

CLERK OF COURTS

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FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO

JOURNAL ENTRY DENYING STAY PENDING APPEAL

Appellant Randall D. LeuVoy, D.O., has appealed an order of the Medical Board revoking his right to practice in the state of Ohio. While that appeal is pending he seeks a stay, so that he can remain in active practice. Dr. LeuVoy has also submitted a letter "to whom it may concern" dated October 3, 2006 from Deborah Rockwood, M.S.W., L.I.S.W.¹ Ms. Rockwood is employed by the Lancaster City Schools and, based on her experience, states "this will be a real health care crisis" if low income families served by Dr. LeuVoy do not have his services. That problem is compounded, she continues, because "our local health department physician has just retired." The Medical Board opposes the Doctor's request to remain in practice pending appeal.

State law explicitly sets out two criteria for this court to apply in deciding whether a licensed medical professional may remain in practice pending an appeal from the Medical Board. Dr. LeuVoy is only entitled to a stay of the license revocation if he demonstrates: "that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal," and that "the health, safety and welfare of the public will not be threatened by suspension of the order." R.C. §119.12.

The material before this court does not demonstrate any "unusual hardship" to the appellant, as that phrase has been construed in a number of

¹ Appellant first submitted Ms. Rockwood's letter to the court with no indication it had been shared with counsel for the Medical Board. The court's staff has confirmed that it has now been served on Board counsel. The court is filing the letter for the record, and considers it in ruling on the stay request.

prior court decisions reviewed by counsel for the Medical Board in their legal brief. More importantly, a preponderance of the evidence before this court does not demonstrate that the health and safety of the public would not be threatened if this court suspends the Medical Board order.

No court takes suspension of a doctor's license lightly. Furthermore, grave concerns have been expressed by Ms. Rockwood concerning possible harm that may be caused to the low-income community in Fairfield County. However, this case has already been thoroughly examined. In every case the decision of the Medical Board is entitled to weight because the Board includes practicing members of the profession whose education and experience contribute to their work. Beyond that, deference is due the Board simply because that is how Ohio law is written: the Board, not the court system, has primary jurisdiction over professional licensure within this state.

As is customary, here a Medical Board hearing examiner first received evidence. Following that, he wrote a report to the full Board in which he recommended sanctions against the Doctor. Thereafter, a second hearing was held before the full Board at which Dr. LeuVoy's case was reexamined. Prior to the full Board's consideration of his case, Dr. LeuVoy filed written objections to the hearing examiner's Report and Recommendation. Dr. LeuVoy was also permitted to address the full Board.

Beyond the deference ordinarily given to a Board decision in evaluating a stay request, in this particular case the court believes additional deference is due the Board because they gave unusual, heightened review to the case. At least in part, this heightened review occurred because some Board members had difficulty understanding "the story" using only their hearing officer's Report and Recommendation. (pp. 6 and 9, "Draft Minutes" of the Board's Sept. 16, 2006 hearing.) As a result Dr. Egner and Dr. Steinbergh, in particular, reexamined for themselves the underlying evidence in individual instances of patient care. They focused upon practical things like the time of day when a pediatric patient's medicine was prescribed by Dr. LeuVoy (since late in the day the drug Ritalin causes sleeping problems), and how the Doctor's charts memorialized his basis for diagnosing patients with "ADHD, or diabetes, or hyperlipidemia." As to the

latter, they concluded "the results of [Appellant's patient] testing aren't in the record." (p.10 of the "Draft Minutes" of Sept. 16, 2006.)

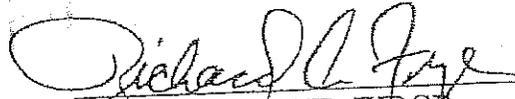
Thoroughness is plainly evident in the way individual members of the Medical Board examined and discussed this case. The Board was in no sense merely "rubber-stamping" the work of a hearing examiner. (Sometimes, in this court's experience, administrative agencies are unable to offer such a thorough review over and above the work of their hearing examiner.)

Individual comments by Board members are not necessarily dispositive, but viewed collectively they reflect what appear to be fair, well-documented criticisms of Dr. LeuVoy's patient care. For instance, Dr. Steinbergh expressed the view that "the number of patients that Dr. LeuVoy saw per day *** confirmed for her that he sees entirely too many people a day and doesn't have the time to provide what this Board considers to be appropriate care for the patients in Ohio." (p. 9.) Ms. Sloan made the same observation about how Dr. LeuVoy was seeing 50 patients a day. (p.11.) Adjectives used by Board members to describe their professional reaction to Dr. LeuVoy's standard of practice are also instructive: "it's heinous" (p. 12); "He's not kept up, whether he was ever 'up'." (p. 13); "his practice knowledge base is just deplorable" (p. 13); "what he has given is not appropriate care." (p. 13) Based upon the Draft Minutes, Dr. LeuVoy is fortunate that the Board did not permanently revoke his right to practice.

So far as the court can tell from the record presently before it, those like Ms. Rockwood who perceive Dr. LeuVoy should be permitted to continue to serve the underserved, low-income population of Fairfield County ought to have no illusion that the Medical Board was hasty, or somehow predisposed against Dr. LeuVoy. To be sure, Ms. Rockwood has identified serious needs of an apparently underserved population. However, the risk of harm to those patients will not be lessened - and indeed may be enhanced - if someone whom the state Medical Board finds lacks basic knowledge, experience, and judgment is allowed to continue providing substandard medical care to that population. It is no answer to a medically under-served group to say "we'll let you keep a bad doctor." Other medical providers in Fairfield County who could step up and fill a public health need must understand that Dr. LeuVoy is no longer the answer.

Appellant has not justified a stay pending appeal. The motion for a stay pending full review of Dr. LeuVoy's appeal is, therefore, DENIED.

IT IS SO ORDERED.


RICHARD A. FRYE, JUDGE

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY OHIO
CIVIL DIVISION

Benjamin Gill, D.O., : Case No. 07 CVF-09-11839
Appellant, : Judge Brown
vs. :
State Medical Board of Ohio, :
Appellee, :

FILED COURT
COMMON PLEAS CO. OHIO
FRANKLIN CO.
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CLERK OF COURTS-CV

DECISION AND ENTRY DENYING APPELLANT'S MOTION FOR STAY,
FILED JUNE 9, 2006

This matter is before the court on appellant's Motion for Stay filed on September 7, 2007. Appellee filed its Memorandum Contra Appellant's Motion for Stay on September 10, 2007. In his motion, appellant Benjamin Gill, D.O. moves the court to stay the August 8, 2007 order of appellee the State Medical Board of Ohio ("the Board"), permanently revoking his license to practice medicine.

This appeal is governed by R.C. 119.12, which provides that in an appeal from an order of the Board, a stay of Board order may be granted:

[I]f it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending the termination of the appeal, and the health, safety and welfare of the public will not be threatened by stay of the order.

The filing of an administrative appeal does not automatically entitle an appellant to a stay of execution of the administrative order pending judicial review.

Dr. Gill argues that he will suffer unusual hardship and HEALTH & HUMAN

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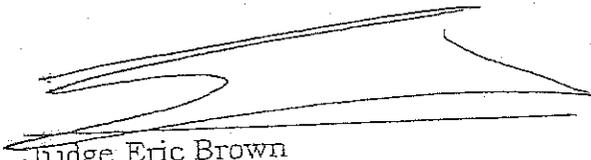
SERVICES SECTION

irreparable injury if the Board's order is allowed to take effect while this administrative appeal is pending. Dr. Gill asserts that, as a solo practitioner, he will suffer unusual hardship consisting of loss of income, loss of his property related to his practice, loss of his client base, loss of his employees, and loss of standing in the community. Dr. Gill further asserts that the public health, safety, and welfare will not be threatened if the order is stayed because Dr. Gill was permitted by the Board to practice medicine during the three years that his case was pending before the Board.

In response, the Board argues that Dr. Gill has not demonstrated either of the necessary requirements, and therefore, is not entitled to a stay of the Board's order. The Board asserts that Dr. Gill has presented no evidence or argument to establish that the hardships he has identified are "unusual" as required by R.C. 119.12. According to the Board, Dr. Gill's loss of income, property, employees, clients, and practice are all the natural result of the revocation of his medical license. Additionally, the Board asserts that the public health, safety, and welfare will be threatened if Dr. Gill is permitted to continue to practice medicine. Although the Board allowed him to practice while the administrative proceedings were pending, the Board asserts that the administrative proceedings ultimately demonstrated the serious deficiencies with Dr. Gill's practice, and that, in order to protect the public, such deficient practices should not be permitted to continue.

Upon review of the evidence and arguments before the court, the court finds that Dr. Gill has failed to demonstrate that he will suffer an unusual hardship if the Board's order is not stayed. The loss of income, property, clients, employees, and reputation are all inherent results of the revocation of a medical license. Dr. Gill has not demonstrated that he will suffer some additional hardship as a result of the court's failure to stay the revocation of his license. The court further finds that the Board found several instances in which Dr. Gill's medical practice fell below the accepted standard of practice, including deficient recordkeeping and misuse of prescription drugs in treating patients. Given the Board's ultimate findings regarding the state of Dr. Gill's practice, the court concludes that, based on the limited record before it, there is reason to believe that the public health, safety, and welfare could be harmed by Dr. Gill's continued practice of medicine.

For the foregoing reasons, the court finds that Dr. Gill has not demonstrated that a stay is appropriate in this case. Therefore, Dr. Gill's Motion to Stay is DENIED.


Judge Eric Brown

Date

14 Sept 2007

Copies to:

Elizabeth Collis, counsel for appellant

Kyle Wilcox, assistant attorney general

Hazem S. Garada, M.D.,

Appellant,

Case No. 98CVF06-4873

v.

Judge Lisa L. Sadler

State Medical Board of Ohio,

Appellee.

DECISION AND ENTRY OVERRULING APPELLANT'S MOTION FOR STAY

Rendered this 9th day of July, 1998.

SADLER, JUDGE.

This matter is before the court upon a motion seeking an order staying the decision of the State Medical Board ("the Board") which is the subject of this administrative appeal. Appellant argues that an undue hardship will result if the Board's order is allowed to take effect.

This appeal is governed by R.C. 119.12, which provides that in an appeal from an order of the State Medical Board, a stay can be granted "if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending the termination of the appeal, and the health, safety and welfare of the public will not be threatened by suspension of the order." The Board argues that appellant has not satisfied both of these requirements, and therefore is not entitled to a stay of the order.

On June 9, 1998, the Board issued its order revoking appellant's certificate authorizing him to practice medicine in the State of Ohio. The revocation was stayed,

and appellant's certificate was instead suspended for an indefinite period of time, not less than six months. The basis for the Board's decision was that appellant had been sanctioned by the West Virginia Board of Medicine, had failed to report a disciplinary action before the West Virginia Board, and failed to report a complaint which had been filed against him with the Kentucky Board of Medical Licensure.

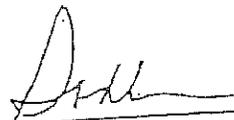
Appellant argues that failure to stay execution of the Board's order in this case will work an unusual hardship on him. Appellant no longer practices medicine in Ohio, but continues to practice in Virginia. Under Virginia law, the suspension of appellant's Ohio license will automatically lead to suspension of his Virginia license. Appellant claims that this automatic suspension in Virginia is an undue hardship which would justify the stay. In addition, appellant argues that since he practices in Virginia, the health, safety, and welfare of the people of Ohio will not be threatened if the order is stayed.

As pointed out by the Board in its memorandum contra, courts throughout Ohio have repeatedly held that the mere denial of the right to practice medicine is not an "unusual" hardship as contemplated by the General Assembly. The fact that appellant's Virginia license will be automatically suspended as a result of the action of the Ohio Board does not make the hardship imposed upon him "unusual." The hardship created is exactly the same hardship which would exist if appellant was still practicing in Ohio, and this court is in agreement with those courts which have found that something greater than the obvious hardship is required by the statute.

In addition, appellant's argument that the health, safety and welfare of the people of Ohio is not affected if appellant is allowed to continue to practice in Virginia is

not persuasive. R.C. 119.12 does not limit the consideration which must be given to the public safety to those people who actually live in Ohio. It appears that the Virginia Legislature adopted the measure automatically suspending licenses of those doctors whose licenses have been suspended in other states as a way of protecting its own citizens. The mere fact that the only persons who may potentially be affected by appellant's continued practice of medicine reside in Virginia does not, without more, lead to the conclusion that a stay issued in this case would not harm the public health, safety and welfare.

Accordingly, appellant's motion for an order staying execution of the order of the State Medical Board is hereby OVERRULED.



LISA L. SADLER, JUDGE

Copies to:

Eric J. Plinke
Counsel for Appellant

James M. McGovern
Assistant Attorney General

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Sukumar Roy, M.D.,

Appellant,

vs.

The State Medical Board of Ohio,

Appellee.

Case No. 93CVF-05-37

JUDGE McGRATH

THOMAS J. ENRIGHT
CLERK OF COURTS
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COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO

D E C I S I O N

Rendered this 9th day of August, 1993.

McGRATH, J.

This matter came before the Court upon Appellant's Motion for Suspension of Administrative Order Pending Appeal filed June 9, 1993, Appellee's Memorandum Contra and Appellant's Reply. Appellant seeks from this Court an order suspending the order of The State Medical Board of Ohio ("the Board"), which revoked Appellant's license to practice medicine. Appellant argues that the suspension of his medical license during the appeal process would be an unusual hardship and that he will present "strong grounds" for reversal of the Board's Order. Appellant notes that the Court of Appeals has reversed and remanded the Board's first order, and thus hopes he will be successful on the appeal of the second order.

In contrast, the Board argues against the suspension because it believes no unusual hardship exists for Appellant. Furthermore, the Board argues that Appellant's appeal is barred by the doctrine of res judicata.

Upon review, the Court finds Appellant's motion to lack merit for the following reasons. First, the Court finds no unusual hardship exists for the Appellant, as set forth in O.R.C. §119.12. In pertinent part, R.C. §119.12 provides:

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. * * * In the

case of any appeal from the state medical board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending the termination of the appeal, and the health, safety and welfare of the public will not be threatened by the suspension of the order * * * (Emphasis added).

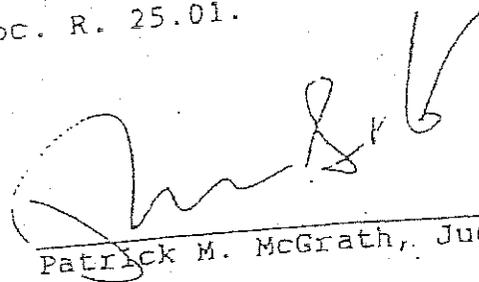
As observed in the unreported opinion State Medical Board v. Alsleben (March 17, 1980), Summit County Common Pleas Case No. CV80-3-0614, there is very little case law or statutory help concerning a definition of "unusual hardship". However, previous cases have held that "unusual hardship" means more than the loss of the right to practice medicine. Slabochova v. State Medical Board (March 15, 1984), Mahoning County Common Pleas Case No. 84CV-393, unreported. The removal of a license to practice medicine inherently means that the person whose license is being removed will be unable to make a living practicing medicine because in order to practice medicine, a license is necessary. In the statute, "hardship" is modified with the word "unusual". This Court interprets that as meaning the legislature intended a more unusual consequence in order to suspend the order of removal than simply not being able to practice medicine.

Furthermore, the Court must also take into consideration the health, safety and welfare of the public if appellant's motion is granted. Appellant was convicted by a jury of two felony counts of theft in violation of O.R.C. §2913.02. The thefts were committed in the course of Appellant's medical practice. Specifically, appellant was convicted of deceiving and depriving Community Mutual Insurance Company and Blue Cross/Blue Shield of Ohio of money. The Court finds that because Appellant's medical license has been revoked due to the Board's finding that Appellant committed a felony in the course of and arising out of his practice, this is a prima facie threat to the health, safety

and welfare of the public. The Court believes that to allow Appellant to continue to practice medicine during the pendency of the appeal would be ipse facto a threat to the health, safety and welfare of the citizens of Ohio. It bears being repeated that Appellant's felony convictions were committed in the course of his medical practice, and not in some other sector of his life unconnected to his profession.

As for Appellant's argument that he has a "strong likelihood of succeeding on his appeal," the Court finds this to be tenuous at best. In Roy v. Ohio State Medical Board (1992), 610 N.E.2d 562, the Court of Appeals reversed and remanded the Board's original revocation order. However, it was a very narrow reversal. The Court of Appeals held at P. 567 that "[b]ased upon the holding of Brost, we conclude that the instant action must be remanded to the board to ensure that the board has taken into consideration all of the proper statutory sanctions irrespective of the board's disciplinary guidelines." In essence, the Court of Appeals did the same thing in this matter as it did in Brost v. Ohio State Medical Bd. (1991), 62 Ohio St.3d 218. It remanded the case to the Board with the instruction that, although the Board may impose the sanction of revocation, it also has the power to consider all of the sanctions as provided in R.C. §4731.22(B). The Court is extremely doubtful of the likelihood of Appellant persuading the Board to not revoke his license when it has already revoked it once and when revocation is a sanction as provided in R.C. §4731.22(B). Furthermore, the Court finds no merit in Appellant's argument that because this Court has stayed the revocation order once before, this Court should do the same again. The posture of the case is completely different now than it was when Judge Millard granted the stay the first time. Accordingly, the Court hereby DENIES Appellant's Motion for Suspension of Administrative Order Pending Appeal.

Counsel for Appellee shall prepare and submit an appropriate judgment entry within ten (10) days of receipt of this Decision, pursuant to Loc. R. 25.01.



Patrick M. McGrath, Judge

Copies to:

N. Victor Goodman
Orla E. Collier
Jeremy Gilman
Attorneys for Appellant

Anne C. Berry
Assistant Attorney General

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

WILLIAM E. WILLIAMS,

Appellant,

vs.

STATE OF OHIO DEPARTMENT OF
INSURANCE,

Appellee.

:
:
: Case No. 93CVF08-5803
: JUDGE REECE
:

DECISION AND JUDGMENT ENTRY

Rendered this 12 day of January, 1994.

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COMMON PLEAS COURT
FRANKLIN CO., OHIO
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CLERK OF COURTS

REECE, J.

This matter is before the Court upon Appellant's Motion for Suspension of Order filed on September 2, 1993. In response, Appellee filed a Memorandum in Opposition to Appellant's Request for Suspension of Order on August 20, 1993.

Pursuant to R.C. § 119.12, Appellant moves this Court for an order staying the State of Ohio Department of Insurance's order revoking all of the Appellant's licenses. Appellant asserts that execution of the Appellee's orders and suspension of his insurance licenses pending the determination of this Appeal herein would be an unusual hardship. In contrast, the Appellee argues against the suspension because it believes no unusual hardship exists for Appellant.

The authority for granting a suspension order pending appeal is found in R.C. § 119.12 which provides in pertinent part:

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the

Court that an unusual hardship to the Appellant will result from the execution of the agency's order pending determination of the appeal, the Court may grant a suspension and fix its terms. (Emphasis added.)

As observed in the unreported opinion State Medical Board v. Asleben (March 17, 1980), Summit County Common Pleas, Case No. CV80-3-0614, there is very little case law or statutory help concerning a definition of "unusual hardship." However, some reasonable analysis may be helpful. The term itself presupposes that the legislature foresaw that there would be a hardship in practically every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective "unusual" was included.

This Court interprets that as meaning the legislature intended a more unusual consequence in order to suspend the order of removal than simply not being able to sell insurance. That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.

The Appellant explains in his Motion he has only received seven (7) complaints out of the over 900 health and accident policies he has sold. He represents he was licensed with American Service Life Insurance Company and left them in October of 1991 because of the Company's inadequacy in serving its policy. Now Appellant asserts that a regional manager of that company was very bitter over the Appellant's resignation and that several of the persons who complained to the department were encouraged to do

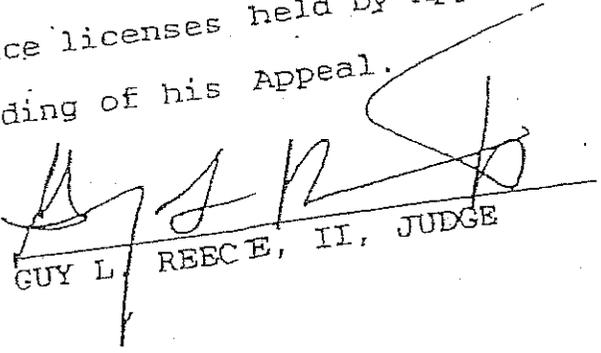
so by competitors or by people who have a cross to bear against Mr. Williams. In addition, Mr. Williams contends that business earned by the insurance company because the revocation of his license is a breach of contract and as such permits the insurance company to keep the commission once the license is revoked.

A review of the foregoing leaves the Court with only one query: Where is the unusual hardship?

The Court finds that there just has not been a concrete showing of an unusual hardship. There is nothing on which to judge whether the Appellant will suffer a disastrous financial loss or just undergo an economic and financial readjustment. Regarding the holding of the \$11,000.00 in earned commission, Appellant fails to not only mention which insurance company he is referring to, but also fails to clarify if whether a stay would remedy his predicament.

Accordingly, based upon the foregoing review and consideration of the submitted memoranda, the law and other relevant evidence, the Court finds the Motion not well-taken and hereby DENIES the same. All insurance licenses held by Appellant shall remain revoked during the pending of his Appeal.

IT IS SO ORDERED.


GUY L. REECE, II, JUDGE

Copies to:

David McCreary, Esq.
Ava W. Serrano, Esq.

RECEIVED
Attorney General's Office
NOV 7 1994
Health & Human
Services Section

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

George W. Essig,

Appellant,

Case No: 94CVF10-7097 (Sheward, J.)

v.

The State Medical Board of Ohio

Appellee.

FILED
COMMON PLEAS COURT
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FRANKLIN COUNTY, OHIO
THOMAS J. ENRIGHT
CLERK OF COURTS

DECISION DENYING APPELLANT'S MOTION FOR SUSPENSION OF
AGENCY ORDER FILED OCTOBER 11, 1994

Rendered this 2 day of November, 1994. Sheward, J.

This matter is before the Court upon Appellant George W. Essig's Motion for Suspension of Agency Order filed on October 11, 1994, and Appellee State Medical Board's Memorandum in Opposition to Motion for Suspension of Agency Order.

The motion is brought pursuant to R.C. 119.12 which states, in pertinent part:

In the case of an appeal from the state medical board or chiropractic examining board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order, pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order.

R.C. 119.12 provides two specific factors for the courts to consider when determining whether to stay the execution of an agency's order. First, the court shall ascertain the existence of "unusual hardship" to the appellant from compliance with the order. The moving party has the burden of proving unusual hardship. Gallia-Jackson-

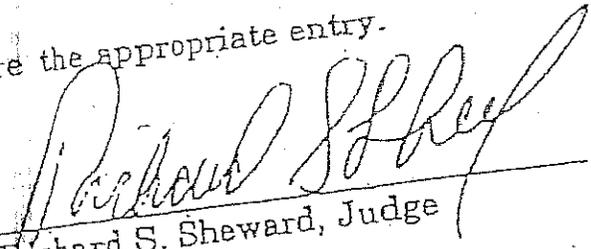
87).

Here, Appellant insists that he will suffer undue hardship and disastrous financial loss if the suspension is not granted. The Court is not persuaded that Appellant's claim of injury to his practice and loss of income constitutes "unusual hardship" as contemplated in R.C. 119.12. See State Medical Board v. Alsleben (Mar. 17, 1980), Summit C.P. No. CV80-3-0614, unreported. Therefore, upon consideration of the memoranda submitted, the Court concludes that Appellant has failed to meet his burden of proving unusual hardship.

The second factor examined by the Court concerns whether the health, safety, and welfare of the public will be threatened by suspension of the order. Having determined that Appellant failed to satisfy "unusual hardship," the Court need not ponder whether the public will be threatened by the suspension of the order.

Based upon the foregoing, the Court hereby DENIES Appellant's Motion. Further, Appellant's request for oral hearing on the issue of unusual hardship is DENIED.

Counsel for Appellee shall prepare the appropriate entry.


Richard S. Sheward, Judge

COPIES TO:

Kevin P. Byers
Attorney for Appellant

Lili C. Kaczmarek
Attorney for Appellant