

**ENTERED**  
JAN 31 2014

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO



D105070765

**LEBANON ROAD SURGERY CENTER**  
**APPELLANT**

**CASE No. A1400502**

**JUDGE JEROME METZ, JR.**

**-vs-**

**STATE OF OHIO DEPARTMENT OF HEALTH,**  
**APPELLEE.**

**ENTRY GRANTING APPELLANT'S MOTION TO  
SUSPEND THE ORDER OF THE OHIO  
DEPARTMENT OF HEALTH FROM WHICH  
APPELLANT APPEALS**

This matter came before the Court for a hearing on the record of January 30, 2014, on Appellant Lebanon Road Surgery Center's emergency motion to suspend the order of the Ohio Department of Health from which Appellant now appeals. The Court has reviewed the briefs and has heard the arguments of counsel. As discussed below, the Court hereby grants the motion.

R.C. 119.12 provides that "[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 determination of the appeal, the court may grant a suspension and fix its terms." Courts have considered four factors when determining whether suspension of the agency's licensing or other order is appropriate. "Those factors are: (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."<sup>1</sup> These factors are not a checklist of items that each must be met, rather they are to be considered and weighed together in reaching a determination.

As to likelihood on of success on the merits, the department argues that the issues are narrow, and that it will be impossible for the appellant to prove compliance with the licensing requirements.

<sup>1</sup> *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC*, 141 Ohio App. 3d 777 , 783 (10<sup>th</sup> Dist.).

Appellant argues that its procedures are sufficient to satisfy the safety concerns of the department. While the balance may seem at this point to tip in favor of the state on this issue, courts have consistently ruled that the factor of likelihood of success on the merits can have little weight where the merits of the appeal have yet to be developed. Here, the court has not yet received the record of the proceedings and the court and parties cannot really know what the issues in the case will be. Accordingly, the Court cannot say that appellant is substantially unlikely to prevail on this appeal, and finds that this factor weighs slightly in favor of denying suspension pending appeal.

Irreparable harm has been shown by Appellant here. The State argues that Appellant has not demonstrated an unusual hardship because it is expected that a failure to obtain the proper licensure by a medical professional may result in the medical facility being closed. However, appellant argues that it provides some medical services not otherwise available, so that closing its doors may cause irreparable injury to Appellant and the patients it serves. Courts have consistently evaluated the potential for impact on the physician's patients in weighing this factor. This weighs in favor of suspension of the Department of Health's order pending the outcome of this appeal.

As to potential harm to others, the Department argues, in general terms, that patients *may* be harmed if Appellant is permitted to operate without the appropriate transfer agreement in place. A general concern for public safety of the community and the precautions that a medical facility must take to ensure that its patients are safe in an emergency situation is significant, but the Department has not shown an immediate and particularized likelihood of harm. Appellant argues that the procedures it has in place have shown to be adequate to protect its patients from harm in the past, and further that its patients, and its potential patients, will be harmed if it is forced to abruptly close its doors. The court finds that the factor of harm to others is balanced.


Finally, the factor of the public interest is equally balanced in this case. Appellant has an interest in continuing to provide medical care to its patients and in being available to the community to provide medical care. The Department of Health has an interest in ensuring that medical facilities do not operate without the appropriate licenses and agreements that are required by law. However, no immediate threat to the public safety has been shown.

Balancing all of the factors above, the Court finds that a suspension of the order of the Department of Health is appropriate in this case. The suspension will maintain the status quo until the merits of this appeal can be determined by the Court. The Court finds that based on all of the above considerations, "an unusual hardship will result from the execution of the order pending determination of the appeal."<sup>2</sup>

The Court grants Appellant's emergency motion to suspend the order of the Ohio Department of Health under R.C. 119.12. The Court hereby suspends the order of the Ohio Department of Health pending the outcome of this administrative appeal. As a condition of that suspension, Appellant must maintain adequate safety policies and procedures for admittance of any patient to a hospital as may be needed. In furtherance of that condition, Appellant shall report any change in its current procedures or protocols or any change in its back-up doctors to the Court, to the Department of Health, and to the Department's counsel of record. If it appears that any such change would be substantially detrimental to public safety, the Department may petition to alter or terminate the suspension.

SO ORDERED.

JAN 31 2014

  
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JEROME J. METZ, JR., JUDGE

cc: counsel of record

<sup>2</sup> *Hudson Township Trustees v. SERB*, 1986 WL 295943, C.P. Summit County.