

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000444

COMMONWEALTH OF KENTUCKY  
CABINET FOR HEALTH AND FAMILY SERVICES

MOVANT

v.

FAYETTE CIRCUIT COURT  
ACTION NO. 16-CI-00813

EUBANKS AND MARSHALL OF LEXINGTON, P.S.C.  
d/b/a EMW WOMEN'S CLINIC

RESPONDENT

OPINION AND ORDER

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BEFORE: COMBS, JONES, AND D. LAMBERT, JUDGES.

JONES, JUDGE: This action originated in Fayette Circuit Court when the Cabinet for Health and Family Services ("the Cabinet") filed an action seeking to enforce the healthcare facility licensure requirements of Kentucky Revised Statutes ("KRS") Chapter 216B pertaining to abortion facilities. The Cabinet named

Eubanks and Marshall of Lexington, P.S.C., d/b/a EMW Women's Clinic ("EMW Lexington"), as the sole defendant in its action. According to the Cabinet, EMW Lexington is operating an abortion facility in Lexington, Kentucky, without a license. EMW Lexington claims it is exempt from the licensure requirement because it is operated as a private physician office/clinic. *See* KRS 216B.020(2)(a). When EMW Lexington failed to respond to the Cabinet's request for it to voluntarily stop performing abortions until it sought and obtained a license, the Cabinet filed a motion for a temporary injunction pursuant to Kentucky Rules of Civil Procedure ("CR") 65.04(1). Following an evidentiary hearing, the circuit court denied the Cabinet's request for an injunction. This appeal followed.<sup>1</sup>

Having carefully reviewed the record and applicable legal authorities, we agree with the Cabinet that the circuit court's findings and conclusions are clearly erroneous. Specifically, we have determined that: 1) the circuit court's conclusion that the Cabinet did not present a substantial question with a substantial possibility of success on the merits was a product of its misinterpretation of the licensing requirements; 2) the circuit court failed to recognize that the Cabinet was entitled to a rebuttable presumption of irreparable harm; and 3) the circuit court's factual findings with respect to the equities are not supported by the evidentiary

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<sup>1</sup> CR 65.07(1) permits immediate appeal "[w]hen a circuit court by interlocutory order has granted, denied, modified, or dissolved a temporary injunction." "Although they do not share all the characteristics of typical appeals, CR 65.07 or 65.09 actions are, in fact, appeals." *Courier-Journal, Inc. v. Lawson*, 307 S.W.3d 617, 622-23 (Ky. 2010).

record. Accordingly, for the reasons more fully explained below, we reverse the circuit court and grant the Cabinet's request for a temporary injunction.

### **I. Standard of Review**

"A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown . . . that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual." CR 65.04(1). "This rule has been construed as requiring the circuit court to deny injunctive relief unless it finds (1) that the movant's position presents 'a substantial question' on the underlying merits of the case, *i.e.* that there is a substantial *possibility* that the movant will ultimately prevail; (2) that the movant's remedy will be irreparably impaired absent the extraordinary relief; and (3) that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public." *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008) (emphasis added); *see also Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). "In granting, denying, or modifying a temporary injunction, the court shall set forth findings of fact and conclusions of law which constitute the grounds of its action, as required by Rule 52.01." CR 65.04(5).

Our review of a circuit court's decision to grant or deny a temporary injunction is limited. *Rogers v. Lexington-Fayette Urban Cty. Gov't*, 175 S.W.3d

569, 571 (Ky. 2005). "In requesting interlocutory relief pursuant to 65.07, a party is arguing that, by granting or denying an injunction under CR 65.04, the trial court's decision is not based on substantial evidence and is clearly erroneous." *Kindred Hosps. Ltd. P'ship v. Lutrell*, 190 S.W.3d 916, 919 (Ky. 2006). "On appellate review, the appellate court may determine that findings are clearly erroneous if they are without adequate evidentiary support or occasioned by an erroneous application of the law." *Id.*

## **II. Summary of Evidentiary Hearing**

Before ruling on the Cabinet's motion for a temporary injunction, the circuit court conducted an evidentiary hearing at which both parties presented testimony and other documentary proof. Four witnesses testified at the hearing: three for the Cabinet--Lori Heckell, Elizabeth Richards, and Paul Franklin Royce--and one for EMW Lexington--Dr. Ernest Marshall.

Ms. Lori Heckell is a registered nurse. She is currently employed by the Office of Inspector General ("OIG") for the Cabinet. She serves as OIG's Assistant Regional Program Manager. Part of Ms. Heckell's job responsibilities include conducting surveys to determine if health care facilities are in compliance with the Cabinet's regulations. In early February 2016, she was directed by her supervisor to conduct a site visit at EMW Lexington to "determine ownership of the facility and whether or not the facility was licensed." Ms. Heckell's understanding was that the Cabinet had received an anonymous telephone

complaint that EMW Lexington performed only abortions and was not licensed as an abortion facility.<sup>2</sup>

On February 16, 2016, Ms. Heckell and a colleague, Ms. Elizabeth Richards, also a registered nurse employed by OIG, traveled to EMW Lexington, but found that it was not open. The two returned on February 17, 2016, at which time they were able to enter the facility and speak with Ms. Rachina Miles, the receptionist. Ms. Miles was the only person in the clinic on that day.

Ms. Heckell and Ms. Richards interviewed Ms. Miles. Ms. Miles told them that EMW Lexington was owned by Ernest W. Marshall, M.D., but she was unable to produce any documentation of ownership. Ms. Miles indicated that EMW Lexington performed only abortions and related procedures. She explained that EMW Lexington performs both medical and surgical abortions up to twelve weeks of gestation<sup>3</sup>; women who are beyond twelve weeks of gestation are referred to EMW's sister facility in Louisville.<sup>4</sup> Ms. Miles explained that EMW Lexington performs abortions on Thursdays and Fridays and is not staffed by any medical personnel the remainder of the week. Ms. Miles is in charge of scheduling patients. She explained that generally twenty to thirty women schedule

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<sup>2</sup> It was subsequently revealed at the hearing that the "anonymous" complaint was made by Melanie Poynter, an Assistant Director for the Cabinet.

<sup>3</sup> "Medical Abortion" refers to a type of non-surgical abortion in which oral pharmaceutical drugs are used to induce abortion. "Surgical abortion" refers to the operative removal of the embryo or fetus.

<sup>4</sup> EMW Louisville, also owned by Dr. Marshall, is licensed by the Cabinet as an abortion facility.

appointments for each week, but typically not all the women show up for their appointments. EMW Lexington accepts only cash payment.

After speaking with Ms. Miles, Ms. Heckell and Ms. Richards requested permission to inspect the facility, which Ms. Miles granted. Ms. Heckell and Ms. Richards both testified at the evidentiary hearing that their inspection revealed substandard cleanliness and raised other concerns. Ms. Heckell testified:

One thing that particularly was not--was substandard, I--I suppose, was the examination table, procedure table itself, which was cut. The--the covering was--the upholstery was torn and gouged, and someone had taken a clear plastic tape and taped over all these torn areas. There was also a lot of dust in the storage areas where the instruments were stored. The oxygen tanks had a buildup of dust. There was a concern about how often they were performing maintenance on their Autoclave, which is used to sterilize the instruments. There was no evidence that they were cleaning it, as recommended by the manufacturer.

Ms. Heckell indicated that they also discovered several medications with expiration dates that were scratched off and several other medications that were expired-- some of which had expired as long ago as 1997. Ms. Heckell testified that they returned the following day to take some pictures of the facility and to speak with Dr. Marshall. Dr. Marshall told them that he had been the sole owner of EMW Lexington since the death of his partner in 2013, and that EMW Lexington performs only abortions.

Ms. Richards was the next witness to testify at the hearing. She testified that she is employed by OIG as the Complaint Coordinator for the Eastern

Enforcement Branch. She previously served as a surveyor for OIG. She testified that she took the complaint concerning EMW Lexington and recognized that it was from Melanie Poynter, one of the Cabinet's Executive Directors.

Ms. Richards indicated that she reviewed the Cabinet's records as related to EMW Lexington. From those records, she was able to ascertain that the Cabinet had performed a prior survey of EMW Lexington in 2006 after receiving a complaint about unhygienic conditions. At that time, it was the surveyor's impression that EMW Lexington was exempt from the licensure requirement because it was physician owned and provided general gynecological care for patients in addition to offering abortions.

Ms. Richards testified that based on her training and experience, she was very troubled by the state of EMW Lexington, particularly the dust buildup and tears in the table and floor. She believes that EMW Lexington's conditions increase the risk of infection to patients and make infection control more difficult. She is also concerned that some of the emergency equipment, such as the intubation kit, did not appear functional. She also indicated that while EMW Lexington had a transfer agreement in place with the University of Kentucky, it did not have an agreement in place for ambulance transport at the time of her inspection.<sup>5</sup>

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<sup>5</sup> During the later portion of the hearing, Dr. Marshall testified that EMW Lexington now has a transport agreement in place with American Medical Response.

The Cabinet's last witness was Paul Franklin Royce. Mr. Royce serves as the Assistant Director of Epidemiology for the Cabinet. He collects all vital records for events that occur in Kentucky such as births, deaths, marriages, divorces, stillbirths and induced terminations of pregnancies. He explained that by statute each abortion facility in the Commonwealth must report any abortions it performs to the Cabinet on a monthly basis. EMW Lexington reports its abortions to the Cabinet.

Mr. Royce testified that according to his records, only three facilities in Kentucky reported performing abortions in 2015: (1) Norton Hospital reported performing 3 abortions; (2) EMW Lexington reported performing 411 abortions; and (3) EMW Louisville reported performing 2,773 abortions. Mr. Royce does not currently have the abortion statistics broken down by the women's counties of residence, but it could be compiled in this manner.

EMW Lexington called Dr. Marshall as its sole witness. Dr. Marshall is a certified obstetrician/gynecologist and is licensed to practice medicine in the Commonwealth of Kentucky. He obtained his undergraduate degree from Columbia University and his medical degree from the University of Louisville. Dr. Marshall did his residency in obstetrics and gynecology through the University of Louisville. Dr. Marshall resides in Louisville, Kentucky. Dr. Marshall is the sole owner of EMW Lexington and has been since his partner died in December of



2013. Dr. Marshall retired from private practice in 2011 because he did not want to see private patients any longer.

Dr. Marshall testified that in the past, especially when his partner was alive, EMW Lexington performed some general gynecological care for patients such as PAP smears and contraception in addition to performing abortions. Over the years, that type of care has greatly diminished. Dr. Marshall doubted that EMW Lexington has provided any service other than performing abortions during the last six months to a year. He testified that if a patient requested that type of care, he would not be opposed to providing it.

He testified that EMW Lexington's patients used to be primarily referred from other physicians. He indicated, however, that in the last few years, the source of referrals has changed. Of late, most women find EMW Lexington by searching the internet or by word-of-mouth and therefore, call the office directly to schedule an appointment for an abortion.

According to Dr. Marshall, EMW Lexington performs medical abortions, which use pills to induce expulsion of the pregnancy, and surgical abortions using the suction curettage procedure. EMW Lexington does not perform any abortions beyond twelve weeks of gestation. When a patient presents for an abortion, medical staff will screen the patient's medical history and perform an ultrasound to document gestational age and uterine position. In the case of a surgical abortion, local anesthetic is applied, the cervix is dilated, and then a

physician performs the suction curettage. Afterwards, the patient recovers for approximately thirty minutes before she is cleared to leave. In addition to Dr. Marshall, who performs abortions on Thursdays, two other physicians perform abortions at EMW Lexington on alternating Fridays, Dr. Franklin and Dr. Bergin.

Dr. Marshall testified that EMW Lexington has never been licensed as an abortion facility because it "originated as a doctor's office." Dr. Marshall testified that he relied on the advice of counsel and prior representations from the Cabinet that he did not need a license. Dr. Marshall testified that he does not believe that EMW Lexington should be required to have a license because it performs only minor procedures, is small, and is in the nature of a doctor's office. He explained that he also owns EMW Louisville, which does have a license. He believes the two facilities are vastly different in that EMW Louisville is much larger, performs far more abortions, and performs abortions that are more complicated.

### **III. The Circuit Court's Opinion**

Following the evidentiary hearing, the circuit court issued a five-page order denying the Cabinet's motion for temporary injunction. The circuit court first determined that the Commonwealth has the authority under KRS 216B.040 to pursue this action.<sup>6</sup> However, the circuit court determined that "the

<sup>6</sup>KRS 216B.040(1)(d) vests the Cabinet with the authority to "enforce, through legal actions on its own motion, the provisions of this chapter [Chapter 216B governing the licensure and regulation of health facilities and services] and its orders and decisions issued pursuant to its functions."

Commonwealth has not met its burden for obtaining a temporary injunction under CR 65.04."

First, the circuit court determined that "the Commonwealth has not established a likelihood of prevailing on its claim that EMW is operating contrary to the law." This conclusion was based on the circuit court's belief that "EMW has a strong argument that it is exempt from licensing pursuant to the private office provision of KRS 216B.020(2)(a), especially since OIG so decided during its last inspection in 2006."

The circuit court next observed, based on Dr. Marshall's testimony, that "it is within the standard of care to perform first trimester abortions in a doctor's office and that these procedures are less dangerous than others routinely performed in an office setting." The circuit court noted that the procedures performed at EMW Lexington "do not require sedation or the services of an anesthesiologist," factors that the circuit court believed indicate that "EMW is a private physician's office exempt from the licensing requirements for ambulatory surgical centers."<sup>7</sup> The circuit court also observed that "there is no indication that

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<sup>7</sup> In support of this proposition, the circuit court cited *Cabinet for Human Res. v. Women's Health Servs., Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994). The discussion in *Women's Health Servs.* regarding ambulatory surgical centers is totally inapplicable to the dispute at hand. While *Women's Health Servs.* concerned abortions, the issue there did not involve whether *Women's Health Servs.* had to be licensed as an abortion facility. The issue was whether the facility qualified as ambulatory surgical center requiring it to obtain a certificate of need ("CON") from the Cabinet. The current version of the statute specifically exempts abortion facilities from the CON requirement. See KRS 216B.020(1) ("The provisions of this chapter that relate to the issuance of a certificate of need shall not apply to abortion facilities as defined in KRS 216B.015."). This portion of the statute was added in 1998, four years after the *Women's Health*

the equipment in the EMW office exceeds the \$1.5 million threshold that would necessitate licensing."

Lastly, the circuit court determined that the "equities involved do not justify enjoining EMW from operating." To this end, the circuit court noted that "closing the clinic is against the public interest [because] EMW is the only physician's office that routinely provides abortion services in the Eastern half of the state [and] closing EMW would have a severe, adverse impact on the women in the Eastern part of the state."

#### **IV. Analysis**

##### ***A. Substantial Question***

"To support a temporary injunction, one must show that a substantial question exists that tends to create a 'substantial *possibility*' that the Appellant will ultimately prevail on the merits." *Norsworthy v. Kentucky Bd. of Med. Licensure*, 330 S.W.3d 58, 63 (Ky. 2009) (emphasis added). The circuit court should not decide the underlying merits of the case as part of a temporary injunction. *Com. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 161 (Ky. 2009) ("[I]t is important to remember that '[a] motion for a temporary injunction does not call for, or justify, an adjudication of the ultimate rights of the parties.'" (internal citations omitted)). Nevertheless, the circuit court must review the complaint and develop an accurate understanding of the legal issues raised by it before it can determine if the movant *Servs. Inc.* opinion was issued in 1994.

has presented a substantial question that tends to create a substantial possibility that it will ultimately prevail on the merits. *See Norsworthy*, 330 S.W.3d at 63.

It is apparent to us from reviewing the circuit court's opinion that it did not develop a proper understanding of the legal issues. The circuit court's opinion devotes a good deal of attention to a number of issues that are extraneous under the current statutory scheme such as the type of abortion performed. The circuit court's legal misunderstandings resulted in an incorrect determination that the Cabinet failed to present a substantial issue on which it had a substantial possibility of success. A brief review of the statutory scheme is necessary to place the legal issues in the proper analytic framework.

An "abortion facility" is defined by statute as "any place in which an abortion is performed." KRS 216B.015(1). An abortion is defined as "the use of any means whatsoever to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death." KRS 311.720. Abortion facilities, like other health facilities, must be licensed by the Cabinet to lawfully operate in the Commonwealth. *See* KRS 216B.0431, KRS 216B.990, and KRS 216B.105(1). However, "private offices and clinics of physicians" are exempt from the licensure requirement." KRS 216B.020(2)(a).<sup>8</sup>

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<sup>8</sup>This statute provides: "(2) Nothing in this chapter shall be construed to authorize the licensure, supervision, regulation, or control in any manner of: (a) Private offices and clinics of physicians, dentists, and other practitioners of the healing arts, except any physician's office that meets the criteria set forth in KRS 216B.015(5) or that meets the definition of an ambulatory surgical center as set out in KRS 216B.015." KRS 216B.020(2)(a). In turn, KRS 216B.015(5) provides: "'Applicant' means any physician's office requesting a major medical equipment expenditure of one million five hundred thousand dollars (\$1,500,000) or more after July 15, 1996, adjusted

The circuit court's opinion relied heavily on the fact that EMW Lexington only performs first trimester abortions, which can be performed in a doctor's office without sedation. Apparently, the circuit court believed that whether sedation is used is relevant in determining whether a facility is an abortion facility and/or is exempt from licensure. While the use of sedation might affect whether a facility qualifies as an ambulatory surgical center, the Cabinet is not claiming that EMW Lexington is an ambulatory surgical center. It is claiming that it is an abortion facility and must be licensed as such.

Pursuant to the applicable statutory definitions, a facility which performs any type of procedure, medical or surgical, on a pregnant woman, at any gestational stage, for the purpose of terminating the pregnancy and causing fetal death qualifies as an abortion facility. There is no exception for abortions performed during the first trimester or abortions performed without sedation. To the extent the circuit court focused on the type of abortions being performed at

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annually, or any person, health facility, or health service requesting a certificate of need or license." KRS 216B.015(5). An ambulatory surgical center is defined as: a health facility: "1. Licensed pursuant to administrative regulations promulgated by the cabinet; 2. That provides outpatient surgical services, excluding oral or dental procedures; and 3. Seeking recognition and reimbursement as an ambulatory surgical center from any federal, state, or third-party insurer from which payment is sought." KRS 216B.015(4)(a). However, "an ambulatory surgical center does not include the private offices of physicians where in-office outpatient surgical procedures are performed as long as the physician office does not seek licensure, certification, reimbursement, or recognition as an ambulatory surgical center from a federal, state, or third-party insurer." KRS 216B.015(4)(b). Although the circuit court devoted attention to these sections; the Cabinet has not asserted that EMW Lexington incurred expenditures that would meet KRS 216B.015(5) or that it qualifies as an ambulatory surgical center.

EMW Lexington to justify its conclusion that the Cabinet had not presented a substantial question with a possibility of success, it erred as a matter of law.

The circuit court also incorrectly focused on the fact that there was no evidence showing that EMW Lexington has \$1.5 million or more in equipment. The Cabinet is not arguing that EMW Lexington is a physician's office that lost its exemption because of its expenditures; the Cabinet is arguing that EMW Lexington, while owned by a private physician, does not qualify as a private physician's office because its sole purpose is to perform abortions.

The ultimate question in this case is not what types of abortions EMW Lexington performs or the amount of its expenditures on medical equipment; the ultimate question is whether EMW Lexington is exempt from the licensure requirement because it is a private physician's office/clinic. There is not a litmus test to answer this question. Neither the applicable statutes nor the regulations instruct us on how to determine what type of facility qualifies as a private physician office or clinic.

The court's ultimate job is to determine whether the facility at issue is "*primarily* a private physician's office." *Women's Health Servs., Inc.*, 878 S.W.2d at 808 (emphasis added). "Three factors are important in determining whether a facility is exempt: the ownership of the facility; the activity that takes place in the facility; and the source of patient referrals to the facility." *Fleming Cty. Hosp. Dist. v. Fleming Reg'l Med. Imaging, PLLC*, 354 S.W.3d 149, 153 (Ky. App. 2011).

However, physician ownership is not conclusive. *Id.* Likewise, active participation by the physician-owner in the subject office is not a requirement. *Gilbert v. Commonwealth, Cabinet for Health & Family Servs.*, 291 S.W.3d 712, 717 (Ky. App. 2008).

While the circuit court is correct that the OIG determined that EMW Lexington met the office exemption in 2006, this is not determinative of whether the exemption still applies.<sup>9</sup> The undisputed testimony revealed that prior to the death of Dr. Marshall's partner in 2013, EMW Lexington performed some level of general gynecological care. It is also undisputed that prior to 2011, Dr. Marshall had a private gynecological practice. However, at the evidentiary hearing, the Cabinet demonstrated that EMW Lexington has not performed any service other than abortions in the last six months to a year. Additionally, the Cabinet demonstrated that none of EMW Lexington's abortion patients is referred to it by its own physicians. EMW Lexington's patients are generated entirely from (1) outside physicians who refer their patients to EMW Lexington solely for the purpose of obtaining an abortion; or (2) patient self-referrals based on EMW Lexington's own advertisements. Although Dr. Marshall testified that EMW

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<sup>9</sup> It is difficult to appreciate how an exemption decision in 2006 would be determinative as to the existence of that exemption a decade later, especially when the circumstances have changed with respect to ownership (death of Dr. Marshall's partner in 2013) and type of care provided (far less general gynecological care). The administrative regulations require that a license renewal must be filed each year. *See* 902 KAR 20:360 ("A license shall be renewed upon payment of the prescribed fee and compliance with the licensure administrative regulations."). Thus, even licensure is not determinative from one year to the next. We see no reason why an exemption determination should be determinative a decade later.



Lexington would provide PAP smears or contraception, if requested, as a practical matter, there was no evidence presented that EMW Lexington currently has any patients who utilize it for anything other than abortion-related services.

Additionally, the Cabinet adduced evidence at the injunction hearing that EMW Lexington advertises itself primarily (if not solely) as an abortion provider. There was no evidence presented at the evidentiary hearing that EMW Lexington holds itself out to the public as performing anything other than abortions.

While the exemption could apply to a private physician's office which performs abortions as part of its overall all gynecological practice, we cannot accept that the facts adduced at this preliminary stage show that the abortions provided by EMW Lexington are incidental to the general gynecological care EMW Lexington provides to its own patients. Rather, we believe the evidence presented at the evidentiary hearing preliminarily established that EMW Lexington's main purpose and main service is providing abortion-related services to the general public without any true quantum of other patient-related gynecological care. Having reviewed the statutory scheme, we believe it is impossible to say that the Cabinet did not present a substantial issue with a substantial possibility of success.

### ***B. Irreparable Harm***

"A temporary injunction should issue only where it is clearly shown that one's rights will suffer immediate and irreparable injury pending trial."

*Thompson*, 300 S.W.3d at 161. While generally the party seeking an injunction bears the burden of coming forward with proof that its interests will be irreparably harmed in the absence of the injunction, such proof is presumed where the government seeks to enforce a law enacted by the General Assembly. *Boone Creek Properties, LLC v. Lexington-Fayette Urban Cty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014). This presumption of irreparable harm may be rebutted by the opponent. *Id.*

The General Assembly expressly declared that the statutes at issue were enacted as a "means to insure that the citizens of this Commonwealth will have safe, adequate, and efficient medical care." KRS 216B.010. "If a governmental unit enacts a law . . . and the government cannot promptly compel compliance by enjoining an ongoing violation, the power and dignity of that governmental body is diminished." *Boone Creek Properties*, 442 S.W.3d at 40. "Consequently, the irreparable harm which would occur in this case in the absence of an injunction is the genuine but intangible harm relating to the power and right of the [Cabinet] to correct open violations of the applicable [statutes and regulations]." *Id.*

The circuit court did not consider or address the irreparable injury that would occur to the Cabinet and to the citizens of this Commonwealth if the Cabinet is not allowed to correct the alleged violations of its licensing requirements. While EMW Lexington could have rebutted this presumption, it

failed to do so. EMW Lexington did not present any evidence on the element of irreparable harm. In fact, even before this Court, EMW Lexington takes a "no harm, no foul" approach to its conduct. It asserts the Cabinet cannot prevail because it has not shown "a particularized or heightened risk to any woman seeking out the services offered by the physicians at EMW Women's Clinic for which the protection of a CR 65.04 injunction needs to be imposed." This is exactly the same type of argument our Supreme Court rejected in *Boone Creek Properties*. *Id.* at 41. We, too, reject it.

### ***C. Equities***

Finally, the circuit court did not properly weigh the equities. First, the circuit court declared that "closing EMW would have a severe, adverse impact on the women in the Eastern part of the state." As a preliminary matter, there is no testimony or other evidence of record to support this conclusion. Neither EMW Lexington nor the Cabinet produced any evidence with respect to the location of the women EMW Lexington serves. In fact, other than the argument of counsel, no evidence was submitted regarding the effect a temporary closure of EMW Lexington would have on Dr. Marshall or the community. Additionally, it seems to us that the evidence adduced at the hearing actually belies the circuit court's conclusion that the women seeking abortions at EMW Lexington would be unable or unwilling to travel to EMW Lexington's sister facility in Louisville given the

fact that EMW Lexington routinely refers women over twelve weeks of gestation to its sister facility in Louisville.

Additionally, the circuit court failed to recognize the many important elements the regulations impose on abortion facilities. The regulations require far more than the presence of transfer and transport agreements. They mandate cleanliness standards, education, and other protocols designed to protect the safety and well-being of women. *See* 902 KAR 20:360. The licensure requirement is designed to make sure that abortions occur in a safe and hygienic environment after proper education and counseling. Given the expired medications, defective equipment, torn examination table, and dust accumulation found at EMW Lexington, we believe the evidence compelled a conclusion that allowing the facility to operate without the Cabinet's oversight presents a substantial risk of harm to EMW Lexington's patients. In fact, while EMW Lexington demonstrated at the hearing that it had obtained a transport agreement since the Cabinet's inspection, there was no evidence presented that it had taken action to remove and replace the expired medications, procure a new examination table, repair the floor in the procedure room, or clean the premises.

## **V. Conclusion**

As the Cabinet points out, this case is not about a woman's right to an abortion. The Cabinet is not seeking to prevent women from obtaining abortions. It is seeking, however, to enforce its right to regulate the manner in which

abortions are performed in this Commonwealth. This is a right the Supreme Court of the United States recognized belongs to the Commonwealth. It is permissible for the Commonwealth to impose requirements "as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like." *Roe v. Wade*, 410 U.S. 113, 163, 93 S. Ct. 705, 732, 35 L. Ed. 2d 147 (1973).

Long before the Cabinet initiated this suit, the Commonwealth, through its elected representatives, determined that all abortion facilities should be licensed. While private physicians' offices are exempted from Cabinet oversight, there is a substantial legal issue as to whether EMW Lexington qualifies as a private physician's office where it performed only abortions over the last year. In our opinion, the Cabinet put forth substantial, convincing, and un rebutted evidence entitling it to the requested injunction.

## **VI. Order**

For the reasons set forth above, the Fayette Circuit Court's Order in Civil Action No. 2016-CI-813 is REVERSED; and the Cabinet for Health and Family Services' motion for interlocutory relief pursuant to CR 65.07 is GRANTED.

IT IS FURTHER ORDERED that Eubanks & Marshall of Lexington, P.S.C., d/b/a EMW Women's Clinic, is temporarily enjoined from operating an abortion facility as that term is defined in KRS 216B.015(1) until it receives an abortion facility license from the Cabinet, or until a final judgment is rendered in this case, whichever occurs first.

IT IS FURTHER ORDERED that EMW Lexington's motion for a second extension of time to reply is GRANTED; EMW Lexington's third motion for an extension of time is also GRANTED; and the Cabinet's motion for leave to file a reply to EMW Lexington's response, which motion is unopposed, is also GRANTED.

ALL CONCUR.

ENTERED: June 15, 2016

/s/ Allison Jones  
JUDGE, COURT OF APPEALS