

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

HOPE MEDICAL GROUP FOR WOMEN, K.P., M.D.)
AND D.B., M.D.)

Plaintiffs,)

v.)

Case No. 07-CV-879-RET-SCR

LORRAINE LEBLANC, in her official capacity as)
Executive Director of the Louisiana Patients')
Compensation Fund Oversight Board, CLARK)
COSSE, in his official capacity as a member of the)
Louisiana Patients' Compensation Fund Oversight)
Board, MELANIE FIRMAN, M.D., in her official)
capacity as a member of the Louisiana Patients')
Compensation Fund Oversight Board, VINCENT)
CULOTTA, M.D., in his official capacity as a)
member of the Louisiana Patients' Compensation)
Fund Oversight Board, WILLIAM SCHUMACHER,)
M.D., in his official capacity as a member of the)
Louisiana Patients' Compensation Fund Oversight)
Board, JOSEPH DONCHESSE, in his official capacity)
as a member of the Louisiana Patients')
Compensation Fund Oversight Board, DIONNE)
VIATOR, in her official capacity as a member of)
the Louisiana Patients' Compensation Fund)
Oversight Board, DANIEL LENNIE, R.N., in his)
official capacity as a member of the Louisiana)
Patients' Compensation Fund Oversight Board,)
and MANUEL DEPASCUEL, in his official capacity)
as a member of the Louisiana Patients')
Compensation Fund Oversight Board)

Defendants.

FIRST AMENDED COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the above-named defendants, their employees, agents, and successors in office, and in support thereof allege the following:

I. PRELIMINARY STATEMENT

1. This is a civil rights action brought under the Constitution of the United States and 42 U.S.C. § 1983, challenging La. Rev. Stat. § 9:2800.12 (“strict liability statute”) (a) on its face; (b) as applied by defendants to physicians enrolled in the Louisiana Patients’ Compensation Fund (“PCF”) who currently face or will face medical malpractice claims related to abortion; and (c) as applied by defendants to plaintiffs in determining that Dr. K.P. and Dr. D.B. are ineligible for the protections of the Louisiana Medical Malpractice Act, La. Rev. Stat. §§ 40:1299.41–40:1299.49 (“LMMA”), with respect to an abortion-related malpractice claim initiated against Dr. K.P. in 2006.

2. The strict liability statute deprives plaintiffs and their patients of their rights under the Fourteenth Amendment to the United States Constitution by (a) subjecting abortion providers to vague standards and thereby denying plaintiffs due process; (b) subjecting abortion providers, but no other physicians, to strict civil liability for their performance of legal medical procedures and excluding abortion providers, but no other physicians, from the protections of the LMMA without any legitimate or rational basis for this differential treatment and thereby denying plaintiffs equal protection of the laws; and (c) subjecting abortion providers to strict civil liability for their performance of abortions and excluding abortion providers from the protections of the LMMA and thereby creating substantial obstacles to the provision of professional abortion services, which impose an undue burden on women seeking abortion care in Louisiana.

3. Plaintiffs seek declaratory and injunctive relief from these constitutional deprivations.

II. JURISDICTION AND VENUE

4. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3).

5. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202; by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

6. Venue is appropriate under 28 U.S.C. § 1391(b) because defendant LeBlanc resides in this district, and all defendants reside in this state.

III. PARTIES

7. Plaintiff Hope Medical Group for Women ("Hope") is a health care facility located in Shreveport, Louisiana, that is licensed to provide abortion care by the Louisiana State Department of Health and Hospitals ("DHH"). Plaintiff Hope sues on its own behalf and on behalf of its patients seeking professional abortion services.

8. Plaintiff K.P., M.D., is a physician licensed to practice medicine in the state of Louisiana who performed first-trimester abortions at Hope during the years 2004 through 2006. She sues using only her initials to prevent public disclosure of her identity, which would expose her to a significant risk of anti-abortion harassment or violence. Plaintiff K.P. sues on her own behalf and on behalf of her patients seeking professional abortion services.

9. Plaintiff D.B., M.D., is a physician licensed to practice medicine in the state of Louisiana who provides abortion care at Hope. He sues using only his initials to prevent public disclosure of his identity, which would expose him to a significant risk of anti-abortion harassment or violence. Plaintiff D.B. sues on his own behalf and on behalf of his patients seeking professional abortion services.

10. Defendant Lorraine LeBlanc is sued in her official capacity as Executive Director of the Louisiana Patients' Compensation Fund Oversight Board ("PCFOB").

11. Defendants Clark Cosse, Melanie Firman, M.D., Vincent Culotta, M.D, William Schumacher, M.D., Joseph Donchess, Dionne Viator, Daniel Lennie, R.N., and Manuel DePascuel are each sued in his or her official capacity as a member of the PCFOB.

IV. STATUTORY BACKGROUND

A. The Strict Liability Statute

12. The strict liability statute makes an abortion provider liable to an abortion patient for any harm to the patient or the fetus resulting from an abortion, regardless of whether the physician complied with the applicable standard of care. La. Rev. Stat. § 9:2800.12(A).

13. The statute explicitly states that civil actions brought under it are not subject to the State's medical malpractice laws. La. Rev. Stat. § 9:2800.12(C)(2).

14. The constitutionality of the strict liability statute was previously challenged in an action brought in the Eastern District of Louisiana. The district court struck down the statute as unconstitutional. *Okpalobi v. Foster*, 981 F. Supp. 977 (E.D. La. 1998). That ruling was affirmed by a panel of the United States Court of Appeals for the Fifth Circuit, *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), but subsequently reversed by the Fifth Circuit in an *en banc* decision on the ground that plaintiffs in that action lacked standing, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (*en banc*). The strict liability statute was then challenged in a state court action. The Louisiana Court of Appeals similarly ruled that the plaintiffs in that action lacked standing. *Women's Health Clinic v. State of Louisiana*, 02-0016 (La. App. 1 Cir. 5/10/02); 825 So.2d 1208 (La. 2002).

B. The LMMA and the PCF

15. The LMMA is a broad statutory scheme of medical malpractice reform. La. Rev. Stat. §§ 40:1299.41–40:1299.49. The Act defines medical malpractice as, *inter alia*, “any

unintentional tort . . . based on health care or professional services rendered . . . by a health care provider, to a patient[.]” La. Rev. Stat. § 40:1299.41(A)(8).

16. The LMMA provides a number of protections to participating Louisiana physicians including the imposition of a \$500,000 cap on total damages (apart from future medical expenses), a statutory limit of \$100,000 on the financial responsibility of individual providers, for which the providers can self-insure, and the creation of the PCF, which pays for medical malpractice damages awards beyond the physician’s liability limit. La. Rev. Stat. §§ 40:1299.41–40:1299.49.

17. One of the key protections of the LMMA is the requirement that any medical malpractice claim against a qualified provider be presented to a medical review panel (“review panel”), to obtain the panel’s expert opinion on whether the provider violated the standard of care, before a plaintiff may file a civil suit. La. Rev. Stat. § 40:1299.47(A)(1)(a).

18. A physician who files with the PCF the requisite proof of financial responsibility and pays the surcharge assessed by the PCF is deemed to be “qualified” for purposes of the Act. La. Rev. Stat. § 40:1299.42(A).

V. FACTUAL ALLEGATIONS

19. Dr. K.P. has, since 2005, provided proof of her financial responsibility to the PCF, paid her annual surcharges, and been certified by the board as an enrollee in the PCF. The enrollment certificates issued to K.P. by the PCF are incorporated herein by reference and annexed hereto as Exhibit A.

20. Dr. D.B. has, since 1985, provided proof of his financial responsibility to the PCF, paid his annual surcharges, and been certified by the board as an enrollee in the PCF.

21. On June 26, 2006, a woman on whom Dr. K.P. allegedly performed an abortion (“complainant”) initiated a medical malpractice action against Dr. K.P., Dr. D.B, and Hope.

22. The malpractice action was initiated by complainant’s filing of a request to the PCF for the convening of a review panel to consider the complainant’s claim that defendants failed to meet the applicable standard of care. The request filed by complainant is incorporated herein by reference and annexed hereto as Exhibit B.

23. By letter dated July 25, 2007, the PCF subsequently informed complainant that her claims were not “medical malpractice” for purposes of the LMMA. The PCF’s letter dated July 25, 2007 is incorporated herein by reference and annexed hereto as Exhibit C.

24. In correspondence and phone calls, the PCF explained to Dr. K.P. its position that abortion-related claims are not considered malpractice, but are instead governed by the strict civil liability statute.

25. Dr. K.P. urged the PCF to reconsider its determination, asserting that complainant’s claim was clearly based on malpractice, not on the strict liability statute. Dr. K.P. provided the PCF with a letter from complainant’s counsel stating that complainant only asserted a malpractice claim. The letter from complainant’s counsel is incorporated herein by reference and annexed hereto as Exhibit D.

26. By letter dated November 7, 2007, the PCF refused Dr. K.P.’s request to reconsider its determination, standing by its position that abortion-related claims are excluded from the malpractice scheme by the civil liability statute. The PCF’s letter dated November 7, 2007 is incorporated herein by reference and annexed hereto as Exhibit E.

27. Following the PCF’s determination not to initiate the convening of a review panel, complainant filed a civil action against Dr. K.P. and Hope in state court. Hope was served with

the complaint in that action on approximately July 24, 2007. Dr. K.P. was served with the complaint in that action on approximately October 15, 2007. The complaint is incorporated herein by reference and annexed hereto as Exhibit F.

28. If the PCF is not enjoined from enforcing or relying upon the strict liability statute, or applying it to plaintiffs, plaintiffs and their patients will be deprived of their constitutional rights; Dr. K.P. and Dr. D.B. will be forced to pay all legal fees and costs necessary to defend themselves on the merits of the state malpractice action initiated by complainant (and any other medical malpractice action filed against them in connection with the performance of an abortion) without having the benefit of a medical review panel's expert opinion (and any incentives that such review and opinion might create for a complainant to settle or dismiss); plaintiffs will be exposed to strict civil liability - without malpractice coverage or protections - for performing any legal abortion procedure; and plaintiffs' patients will be deprived of access to abortion by the daunting, if not insurmountable, financial obstacles placed by the strict liability statute on the provision of abortion services.

FIRST CLAIM FOR RELIEF
(Vagueness)

29. The allegations of paragraphs 1 through 28 are incorporated as though fully set forth herein.

30. The strict liability statute fails to give plaintiffs notice of the conduct that will subject abortion providers to civil liability, and of the conduct that will subject abortion providers to civil liability that is not governed by the limits and protections of the LMMA. This imposition of vague standards on abortion providers deprives plaintiffs of their right to due process guaranteed by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

SECOND CLAIM FOR RELIEF
(Equal Protection)

31. The allegations of paragraphs 1 through 30 are incorporated as though fully set forth herein.

32. The strict liability statute subjects abortion providers, but no other physicians, to strict civil liability for their performance of legal medical procedures and it excludes abortion providers, but no other physicians, from the protections of the LMMA. This differential treatment of abortion providers and of all other providers of legal medical procedures has no legitimate or rational basis, and it therefore deprives plaintiffs of the right to equal protection guaranteed by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

THIRD CLAIM FOR RELIEF
(Privacy)

33. The allegations of paragraphs 1 through 32 are incorporated as though fully set forth herein.

34. The strict liability statute exposes abortion providers to strict liability for performing legal abortion procedures, and it denies abortion providers the protections of the LMMA with respect to any medical malpractice action filed against them in connection with an abortion procedure. The imposition of these staggering financial obstacles on the provision of abortion care will deter, if not prevent, physicians from providing abortion care, thus reducing or eliminating the availability of professional abortion services in Louisiana , thereby imposing an undue burden on plaintiffs' patients in contravention of those patients' right to privacy guaranteed by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

ATTORNEY'S FEES

35. Plaintiff is entitled to an award of reasonable attorney's fees and expenses pursuant to 42 U.S.C. § 1988.

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court:

36. Issue a declaratory judgment that

(a) the strict liability statute violates the rights of abortion providers and their patients under the Fourteenth Amendment to the United States Constitution and is void and of no effect; and/or

(b) the strict liability statute, as applied by defendants to Dr. K.P., Dr. D.B. and other physicians enrolled in the PCF who currently face or will face medical malpractice claims related to abortion violates the rights of plaintiffs and their patients under the Fourteenth Amendment to the United States Constitution, and is void and of no effect; and/or

(c) the strict liability statute, as applied by defendants to plaintiffs in determining that Dr. K.P. and Dr. D.B. are ineligible for the protections of the LMMA with respect to an abortion-related malpractice claim brought against plaintiffs violates plaintiffs' rights under the Fourteenth Amendment to the United States Constitution, and is void and of no effect; and

37. Issue permanent injunctive relief, without bond,

(a) restraining defendants from enforcing, relying upon, or applying the strict liability statute; and/or

(b) restraining defendants from enforcing, applying, or relying upon the strict liability statute in making any determination about whether a claim presented to the PCFOB is governed by the LMMA; and/or

(c) restraining defendants from enforcing, applying, or relying upon the strict liability statute in making any determination about whether any claim that is brought against Dr. K.P., Dr. D.B., or any other doctor who provides medical services at Hope, and that is presented to the PCFOB is governed by the LMMA; and

38. Grant plaintiffs attorney's fees, costs and expenses pursuant to 42 U.S.C. § 1988;

and

39. Grant such other and further relief as the Court may deem just and proper.

Dated: January 4, 2007

Respectfully submitted,

/s/ William E. Rittenberg

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