

2018 DEC 31 P 4:41

IN THE THIRD JUDICIAL DISTRICT
DISTRICT COURT, SHAWNEE COUNTY, KANSAS
DIVISION 7

TRUST WOMEN FOUNDATION, INC.)
d/b/a SOUTH WIND WOMEN'S)
CENTER d/b/a TRUST WOMEN)
WICHITA,)

Plaintiff,)

v.)

Case No. 2018-CV-844

DEREK SCHMIDT, in his)
official capacity as)
Attorney General of the)
State of Kansas,)

Defendant.)

**MEMORANDUM OPINION AND ENTRY OF JUDGMENT
ON PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION
AND TEMPORARY RESTRAINING ORDER**

NATURE OF THE CASE:

Pending before this Court is Plaintiff's Motion for a Temporary Injunction and Temporary Restraining Order. The Plaintiff provides abortion services, the extent of which is not of concern, but includes providing the means for drug induced abortions which the proffered

evidence advances must occur within the first ninety days of the pregnancy, absent some exigency. The Plaintiff's challenge is to Section 6 of 2018 Senate Sub. for HB 2028, which it is alleged purports to establish a ban on the provision of drug induced abortions by means of telemedicine, which Plaintiffs assert constitutes an "undue burden" on eligible patients seeking such form of abortion. The Court heard arguments on this motion on December 14, 2018. Plaintiff appeared by Leah Wiederhorn and Robert Eye. Defendant appeared by Assistant Attorney General Shon Qualseth and Assistant Solicitor General Bryan Clark.

CONCLUSIONS OF LAW:

Having considered the arguments, briefing, and evidence presented, the Court believes the following considerations apply, the result of which moots, and avoids, any of the injunctive relief prayed for in this suit.

Nothing in the text of 2018 Senate Sub. for HB 2028 purports to authorize the practice of telemedicine

rather it merely assures that, when telemedicine is practiced, other statutes impacting the practice of medicine apply. Accordingly, standing alone, Section 6 of 2018 Senate Sub. for HB 2028 can only be read in like fashion and does not, nor need not, "authorize" the practice of telemedicine.

Accordingly, to have a meaningful purpose, or intent, Section 6 of 2018 Senate Sub. for HB 2028, which states that "nothing in this act shall be construed to authorize the delivery of any abortion procedure via telemedicine" must be construed, as this Court does, in conjunction with other relevant statutes that restrict the practice of medicine.

Here, K.S.A. § 65-4a10 impacts medical abortion practices by requiring the prescribing physician be in the same room as the patient when the abortion drugs are administered, subject to exceptions for certain in-hospital induced abortions and other emergencies. Clearly neither 2018 Senate Sub. for HB 2028, nor its Section 6 itself, contains an independent prohibition

on the provision of abortion through the use of medications nor by telemedicine. The contents of 2018 HB 2512 were converted by the legislature into Senate Sub. for HB 2028 and testimony in support of HB 2512 supports the above view as it reflects recognition of its tie-in to K.S.A. 65-4a10. See *Defendant's Response Opposing Plaintiff's Motion for Temporary Injunction and Temporary Restraining Order* at Exhibit A.

If, in legal fact, Section 6 of 2018 Senate Sub. for HB 2028 was to be construed as intending an independent ban on the use of telemedicine in the delivery of medically induced abortions, hence, without reference to K.S.A. 65-4a10, its principally time limited use for the first ninety days of a pregnancy would constitute an absolute ban, one without emergency provisions. This fact, itself, would be an additional factor impacting scrutiny of it in light of accepted constitutional guarantees surrounding abortion procedures, if, and when, the merits were tested in regard to their constitutionality. See *Stenberg v.*

Carhart, 120 S.Ct. 2597 (2000). The strength of the medical evidence regarding the lack of a health exception would be determinative. See *Gonzales v. Carhart*, 127 S.Ct. 1610, 1636 (2007).

In case 11CV1298, now pending in the District Court of Shawnee County, and in which the Kansas Attorney General was a named party, as well as independently representing the State's interests, the Court entered an *Agreed Order* (attached) temporarily enjoining the enforcement of House Substitute for SENATE BILL NO. 36 - "the Act" - which subsequently was codified as K.S.A. 65-4a01-4a12. Section 10 of the latter Act was codified as K.S.A. 65-4a10. The latter Act provided for severability of its sections should any be found invalid. See Section 12 at K.S.A. 65-4a12. As originally enacted in 2011, *Section 10* had no emergency exceptions. The 2015 legislature amended K.S.A. 65-4a10 (L. 2015, ch. 84), such that its provisions were not to be seen as an absolute ban on non-complying abortion procedures in cases of certain in-hospital or

other medical emergencies. L. 2015, ch. 84, § 1(b)(1) and (2). It also expanded the range of abortion inducing drugs subject to the in-person administration requirement. *Id.* at § 1(b)(1)B. The remainder of the Act remained textually as it was, other than a necessary renumbering of its *Sections*.

The December 2, 2011 *Agreed Order* stated that during the pendency of the proceedings in what was then captioned *Hodes & Nauser v. Moser*, now *Anderson*, No. 11-C-1298, the Attorney General would not seek to enforce the Act, *i.e.*, K.S.A. §§ 65-4a01-4a12, as well as the associated implementing regulations. As noted, the proceedings in that case are still pending and still in the discovery phase. No party has moved to modify the *Agreed Order*. Hence, all provisions of the Act, particularly those remaining textually unchanged from the 2011 version, still stand as under challenge in that suit and are enjoined from enforcement as a matter of fact. The 2015 legislative amendment may

have altered the focus of review, but did not moot the Agreed Order. See K.S.A. 77-201 First:

" . . . the provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of the prior provisions and not a new enactment."

See also *Sunflower Racing, Inc. v. Board of County Comm'rs of Wyandotte County*, 256 Kan. 426, 439-440 (1994).

While the Attorney General has challenged his status as a defendant in this case, his position can be seen to lose its efficacy if Section 6 of 2018 Senate Sub. for HB 2028 is necessarily required to be construed with K.S.A. 65-4a10 to give it any effective meaning. He was a named Defendant in 11CV1298 because he is the State's chief law enforcement officer and the Act, by designating a violation of K.S.A. 65-4a10 as "unprofessional conduct", contains criminal sanctions (K.S.A. 65-2862), the prosecution of which can be controlled by the Attorney General. See *State, ex rel. Foster v. City of Kansas City*, 186 Kan. 190, 194-196

(1960). Further, the Attorney General, acting in his capacity as the State's attorney presenting a defense to the Act, stipulated and agreed to the *Agreed Order* entered in 11CV1298 enjoining its enforcement and is ethically bound to honor it as long as it stands.

Foster at 196-197.

Hence, given the necessary symbiosis between Section 6 of 2018 Senate Sub. for HB 2028 and K.S.A. 65-4a10, the *Agreed Order* entered in 11CV1298 not only necessarily thwarts independent enforcement of Section 6 as a matter of law, but also embeds the Attorney General properly in this case either as a proper defendant as an enforcement officer, and/or, as well, binds him ethically in his capacity as the State's attorney in 11C1298. Thus, until that *Agreed Order* is modified through a proper, yet separate; proceeding, his complaint of improvident or misplaced involvement here should not be recognized. *Koch Engineering Co. v. Faulconer*, 227 Kan. 813, 829-830 (1980). The Attorney General, as reflected in the *Defendants' Answer to*

Plaintiff's Second Amended Verified Petition entered December 29, 2015, recognized that if the above was his position, he knew the proper procedure for doing so (*Id.* at ¶ 99).

The above is buttressed, as noted, by the fact that the challenged language of K.S.A. 65-4a10, notwithstanding the 2015 legislative amendment adding emergency exceptions to the requirement that the prescribing physician must be present in the room when the abortion inducing drugs are administered, nevertheless, remains intact. Hence, the *Agreed Order* has not been mooted in regard to that provision's enforcement as has been argued by the Attorney General. His further claim that the Plaintiffs in 11CV1298 only challenged Section 10 of the 2011 Act (K.S.A. 65-4a10) based on its lack of emergency provisions is simply not correct as a matter of the pleadings in 11CV1298, even through its Second Amended Petition, by example only:

"SIXTH CLAIM FOR RELIEF (Patients' Privacy Rights - Medication-in-Person Requirement)

81. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 80 above.

82. Section 10 of the Act violates Plaintiffs' patients' privacy rights under Section 1 of the Kansas Bill of Rights because it imposes significant and medically unjustified burdens on the provision of 'abortion-inducing' drugs, making it extremely difficult, if not impossible, for physicians to provide such drugs, even in situations where prompt termination of pregnancy is necessary to protect a woman's life or health. K.S.A. § 65-4a10(a)."

Petition at ¶¶'s 81-82. Also see First Amended

Petition at ¶¶'s 83-84; Second Amended Petition at ¶¶'s 81-82.

Simply, unquestionably, the 11CV1298 Plaintiffs were, and are, challenging the physician being present requirement of K.S.A. 65-4a10 as a medically unnecessary - undue burden - to the attainment of an abortion within the first ninety days of a pregnancy. e.g., *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

Further, any argument that the Agreed Order entered in 11CV1298 was limited to enforcement efforts

against only those Plaintiffs is wrong. The "Act" itself and any implementing regulations were enjoined of enforcement. Hence, there is no basis to argue that enforcement against others with like interests somehow were excepted. Again, unless and until the *Agreed Order* is modified in a properly noticed proceeding, the Plaintiff in this case is entitled to enjoy that umbrella of protection and safe harbor provided by the *Agreed Order* and, therefore, not be exposed to any threat of selective enforcement because of, perhaps, of a change in position by the State, a position that should not, and will not, be recognized by the Court in the context of this current proceeding.

Based on the reasons stated above, it must be concluded that as the prescribing physician in the room when the abortion inducing drugs are administered requirement still exists, but is presently barred of enforcement by an *Agreed Order* of the Court in 11CV1298, Section 6 of 2018 Senate Sub. for HB 2028 has no anchor for operation. As such, Section 6, not

itself establishing a prohibition, leaves Plaintiff's claims - so long as the *Agreed Order* exists in 11CV1298 - requesting Section 6 of 2018 Senate Sub. for HB 2028 be enjoined states no present relief necessarily to be derived, or to be presently delivered, from this suit hence, not ripe for review, leaves Plaintiff without the necessary present standing to call for review because K.S.A. 65-4a10 is presently inoperative. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897 (2008).

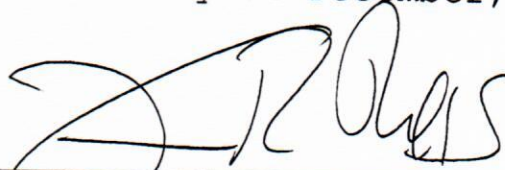
Accordingly, this case is dismissed without prejudice for failure to state a claim that is now jurisdictionally competent for review.

ENTRY OF JUDGMENT

Judgment is entered for the Defendant, Derek Schmidt, in his official capacity as Attorney General of the State of Kansas, and against the Plaintiff, Trust Women Foundation, Inc. d/b/a South Wind Women's Center d/b/a Trust Women Wichita, dismissing this case without prejudice for the reasons stated in the foregoing *Memorandum Opinion*. Costs are taxed to the

Plaintiff. This Entry of Judgment shall be effective when filed with the Clerk of the District Court and no further journal entry is required.

IT IS SO ORDERED t2his 31st day of December, 2018.

A handwritten signature in black ink, appearing to read 'F. R. Theis', written over a horizontal line.

Franklin R. Theis
Judge of the District Court
Division Seven

cc: Leah Wiederhorn
Jessica Sklarsky
Robert V. Eye
Shon Qualseth
Jeffrey A. Chanay
Bryan C. Clark

AM

CLERK
DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS

2011 DEC -2 P 1:42

Hodes & Nauser, MDs, P.A.,
et al.,

Plaintiffs,

v.

Case No. 11 C 1298
Division No. 7

Robert Moser, M.D., in his official
Capacity as Secretary of the Kansas
Department of Health and Environment,
et al.,

Defendants.

Pursuant to K.S.A. Chapter 60


AGREED ORDER

The parties have agreed and jointly stipulated that the Temporary Restraining Order entered on November 10, 2011, shall remain in effect pending the Court's issuance of a final judgment in this matter. During the pendency of these proceedings, defendants shall not seek to enforce either the statutory Act or the Permanent Regulations promulgated by the Kansas Department of Health and Environment.

Therefore, upon this agreement and joint stipulation of the parties, the Court cancels the Temporary Injunction Hearing scheduled on December 6-7, 2011. The Court shall conduct a Status & Scheduling Conference beginning at 9:30 a.m. on December 6, 2011, or as soon thereafter as the matter may be heard.

IT IS SO ORDERED.

12/2/11
Date


Hon. Franklin R. Theis
District Court Judge

Am

CLERK
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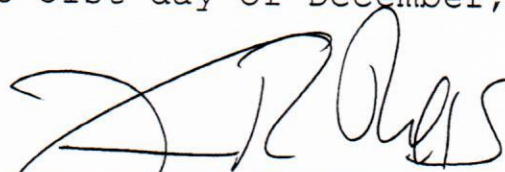
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12/2/11
Date


Hon. Franklin R. Theis
District Court Judge

Plaintiff. This Entry of Judgment shall be effective when filed with the Clerk of the District Court and no further journal entry is required.

IT IS SO ORDERED t2his 31st day of December, 2018.

A handwritten signature in black ink, appearing to read 'FR Theis', written over a horizontal line.

Franklin R. Theis
Judge of the District Court
Division Seven

cc: Leah Wiederhorn
Jessica Sklarsky
Robert V. Eye
Shon Qualseth
Jeffrey A. Chanay
Bryan C. Clark