



FILED IN DISTRICT COURT
OKLAHOMA COUNTY

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

(1) LARRY A. BURNS, D.O., on behalf of himself)
 and his patients)
)
 Plaintiff,)
)
 vs.)
)
 (2) TERRY L. CLINE, in his official capacity as)
 Oklahoma Commissioner of Health)
 (3) CARL B. PETTIGREW, D.O., in his official)
 Capacity as President of the Oklahoma State Board)
 of Osteopathic Examiners, and)
 (4) GREG MASHBURN, in his official capacity as)
 District Attorney for Cleveland, Garvin, and)
 McClain Counties;)
)
 Defendants.)

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 TIM RHODES
 COURT CLERK
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Case No. CV-2014-1896

Judge Graves

**ORDER AND JUDGMENT AS TO PLAINTIFF'S MOTION FOR
 TEMPORARY INJUNCTION OR ALTERNATIVELY A RESTRAINING ORDER**

Plaintiff seeks herein a Temporary Injunction or Restraining Order against enforcement of 12 O.S. §1382 which was enacted as Senate Bill 1848 ("S.B. 1848"). S.B. 1848 requires in part that physicians performing abortions in Oklahoma to have admitting privileges at a general hospital within thirty (30) miles of the facility at which abortions are performed. Dr. Burns asserts that the law, which is effective November 1, A.D. 2014, targets abortion providers, physicians, and patients for the imposition of unique burdens that are not imposed on other physicians performing outpatient surgical procedures in Oklahoma or other outpatient surgical patients. Dr. Burns operates an abortion clinic. He states that for reasons stated below, the law may cause him to have to close his clinic and he and his patients would suffer irreparable harm if S.B. 1848 is to take effect. Dr. Burns asserts that the new law deprives him of due process, violates the single subject rule, the rule against special laws, and improperly delegates legislative functions to hospitals. Defendants assert that Plaintiff does not have standing to assert herein violations as to anyone but himself.

No witnesses were presented by either party, but evidence was submitted by Affidavit. The Court heard only oral arguments on October 17, 2014.

A. Plaintiff's Standing As the Rights of Third Parties

Plaintiff asserts that SB 1848 violates not only his rights as an abortionist, but also sues on behalf of his patients. The Oklahoma Supreme Court has held that a plaintiff cannot vicariously assert the constitutional rights of someone else.¹ In *Oklahoma Education Ass'n v. State*, 2007 OK 30, 158 P.3d 1058, the OEA and several school districts sued the State of Oklahoma, claiming that the Oklahoma Legislature had failed, *inter alia*, to adequately fund public education in violation of Oklahoma students' equal protection rights. The Oklahoma Supreme Court rejected the OEA's and school districts' attempt to assert a claim based on the equal protection rights of Oklahoma students. The Court held:

“As the OEA's members cannot vicariously assert injury to the constitutional rights of Oklahoma's students, neither can the OEA.....(likewise) (t)he plaintiff school districts have failed to present us with any authority to show that they have standing to assert the violation of the constitutional rights of students generally across this state.

Certainly, Plaintiff has standing as to assert his own rights. However, based on the foregoing this Court FINDS and HOLDS that he has no standing to assert a violation of the rights of his own patients or those of third parties.

B. The Due Process Claim

Plaintiff claims he is deprived of a property interest without due process of law because the law does not give him time to acquire admitting privileges. This was also an issue in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014) where the 5th Circuit Court of Appeals considered a Texas law, similar to SB 1848. The law was very similar to SB 1848 which required that doctors who perform abortions must have admitting privileges at a hospital within 30 miles of the abortion clinic. The Texas law provided a grace period of over 100 days for an abortion doctor to gain admitting privileges to a hospital and thus did not infringe on any due process rights. However, the Court held that because in Texas a hospital has 170 days from the date of application to make a determination regarding admitting privileges, the 100 days grace period was in practice not enough time for an abortion doctor who timely applied for admitting privileges to receive a response. Thus, the Court held in *Abbott* that the Texas law

¹ See *Barzellone v. Presley*, 2005 OK 85, fn. 32, 126 P.3d 588; *Forest Oil Corp. v. Corporation Comm'n*, 1990 OK 58, fn. 31, 807 P.2d 774.

could not be enforced against doctors who had timely applied for privileges but were awaiting a decision.

In case at bar, Plaintiff did not timely apply for admitting privileges to a hospital. Of the 16 hospitals from which Plaintiff sought admitting privileges, 12 have already denied his request. He has gotten responses, but just not the one he wants. S.B. 1848 was signed into law on May 29, 2014 with an effective date of November 1, 2014. This gave Plaintiff 157 days to apply for privileges and get responses from hospitals. According to Plaintiff himself, he did not apply for admitting privileges to a single hospital until July 18th – 51 days after S.B. 1848 was enacted and signed into law. Then, he waited another month, or until August 13 before he applied to a second hospital. This means Plaintiff waited 77 days before applying for admitting privileges. If he has not heard back from all of the places to which he applied, it is his own fault and there is no violation of due process.

Moreover, SB 1848 at §1(B) does not require Plaintiff himself to have admitting privileges at a hospital. It only requires that someone on the premises of his clinic have admitting privileges. Plaintiff has not testified or demonstrated that he has made any attempt to locate or hire a physician with admitting privileges who can be on the premises when abortions are performed. This was an issue in *Abbott, supra*. Although Plaintiff's lawyer herein scoffed at the idea of hiring another doctor who had hospital admitting privileges, the plaintiff doctor in *Abbott* testified he had tried to get doctors with admitting privileges to join his practice. No such evidence is present. Plaintiff Burns herein has not attempted to obtain the services of another doctor who does have such admitting privileges. Thus, in *Abbott*, after determining that the law did not substantially burden a woman's right to abortion, the Court found a rational basis for the Texas Legislature's decision to require admitting privileges for abortion doctors. This Court does the same herein as to SB 1848. The Court FINDS that Plaintiff has failed to show that he is likely to succeed on the merits as to his Due Process claims.

C. Single Subject, Special Laws and Non-Delegation Provisions
As to Legislative Powers

Plaintiffs also argue that SB 1848 violates Art. V, §57, the single subject rule of the Oklahoma Constitution (and logrolling) as well as Art. V, §59 of the Oklahoma Constitution, the provision as to Special Laws and Art. IV, §1, Art. V, §1, of the Oklahoma Constitution,

the provisions as to non-delegation of Legislative authority. This Court FINDS that Plaintiff has not shown that he is likely to succeed on the merits as to these claims.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that Plaintiff's petition or motion for a Temporary Injunction or Restraining Order herein as to enforcement of SB 1848 against him is denied and overruled.

DATED this 24th day of October, A.D. 2014.

A handwritten signature in black ink, appearing to read "Bill Graves", written over a horizontal line.

BILL GRAVES
Judge of the District Court

CERTIFICATE OF SERVICE

This is to certify that on this 24th day of October, A.D., 2014, a true and correct copy of the above and foregoing document was mailed, by regular U.S. mail, with postage thereon fully prepaid, to the following counsels of record:

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TIM RHODES, COURT CLERK


Deputy Court Clerk