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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH
COUNTY, FLORIDA

PRESIDENTIAL WOMEN'S CENTER,
et al.,

Plaintiffs,

CASE NO.: CL-97-5796-AG

v.

STATE OF FLORIDA, et al.,

Defendants.
_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT/ SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Plaintiffs' Motion for Summary Judgment/Supplemental Motion for Summary Judgment. Defendants oppose the granting of the motion on a number of grounds. One of the Defendants' arguments is that the affidavits offered in opposition to the Plaintiffs' motion present questions of fact that prevent summary judgment from being entered. The Court disagrees.

It is the duty of the Court to interpret statutes. "Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of "expert opinion." *Lee County v. Barnett Bank, Inc.*, 711 So.2d 34 (Fla. 2d DCA 1997), citing, *Edward J. Seibert v. Bayport Beach and Tennis Club Ass'n, Inc.*, 573 So. 2d 889 (Fla. 2d DCA 1990), review denied, 583 So. 2d 1034 (Fla. 1991); *Devin v. City of Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976). Additionally, a Court should interpret statutes in such a manner as to

uphold their constitutionality, if reasonably possible and consistent with constitutional rights. State v. Wershow, 343 So. 2d 605, 607 (Fla.1977).

The Court reviewed the pertinent pleadings, the memoranda of law and the argument of counsel. Based upon these considerations, the Court states the following conclusions of law:

1. Plaintiffs, PRESIDENTIAL WOMEN'S CENTER and MICHAEL BENJAMIN, M.D., filed a Motion for Summary Judgment/Supplemental Motion for Summary Judgment seeking a permanent injunction prohibiting the Defendants from enforcing subsection (3) of Section 390.0111, Florida Statutes ("Amended Statute");

2. Plaintiffs seek a permanent injunction through a facial challenge to the Amended Statute based on the language of the Amended Statute;

3. Plaintiffs argue that the Amended Statute fails the test of constitutionality because it:

(a) violates the right to privacy guaranteed by the Florida Constitution; and
(b) is constitutionally vague;

4. Article I, Section 23 of the Florida Constitution provides:

> Right of privacy. – Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein.

5. The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible.

In re T.W., 551 So.2d at 1191;

6. Further, "the amendment [to the Florida Constitution] embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *In re T.W.*, 551 So.2d at 1192;

> 7. Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy. We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime...
> *In re T.W.*, 551 So.2d at 1192;

8. "[T]he Florida constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated." *In re T.W.*, 551 So. 2d at 1195;

9. Where a statute implicates a person's right to privacy under the Florida Constitution, the statute must satisfy a highly stringent test to be valid. The state must show that the statute furthers a compelling state interest through the least intrusive means. *In re T.W.*, 551 So. 2d at 1192;

10. By interfering with the right of a woman seeking an abortion "to be alone and free from governmental intrusion into [her] private life", the Amended Statute clearly implicates the right to privacy, Fla. Const., art. I, § 23. By not allowing a physician to tailor the [provided] information to the woman's circumstances, [the Act] infringes on the woman's ability to receive her physician's opinion as to what is best for her, considering her circumstances. *State v. Presidential Women's Ctr.*, 707 So. 2d 1145, 1150 (Fla. 4th DCA 1998), *as corrected by* 23 Fla. L. Weekly D953 (Fla. 4th DCA Apr. 15, 1998);

11. The Amended Statute imposes a barrier or obstacle between a woman and her physician;

12. The Florida Supreme Court recognized two compelling state interests with respect to a woman's decision concerning abortion, which interests are:

(a) protecting the health of the mother; and,
(b) the potentiality of life in the fetus.

In re T.W., 551 So. 2d at 1193-94;

13. During the first trimester, the state must leave the abortion decision to the woman and her doctor. The State's interest in protecting the woman's health does not become compelling until the end of the first trimester. Moreover, the State's interest in fetal life does not become compelling until the fetus is viable. During the period following viability, the State may possibly forbid abortions altogether. *In re T.W.*, 551 So.2d at 1193-94;

14. The State does not have a compelling interest in the health of a pregnant woman during the first trimester. In the second trimester, while the State does have a compelling interest in maternal health, the restriction still has to be accomplished through the use of the least intrusive means. *State v. Presidential Women's Center*, 707 So.2d 1145, 1149 (Fla. 4th DCA 1998); *In re T.W.*, 551 So.2d at 1193;

15. The Legislature has made no distinction in the Amended Statute between first or second trimester, nor has it made any distinction between viability and pre-viability. This is significant in considering the issue of the Amended Statute's constitutionality.

The State's interest in safeguarding a woman's health becomes compelling only after the first trimester of pregnancy. However, the subject Amended Statute is not limited to any stage of pregnancy, but rather intrudes upon a woman's right to obtain abortion at any stage, be it during the first, second or third trimester. The Amended Statute does not further a compelling state interest. Therefore, the Amended Statute violates Florida's constitutional protected right of privacy;

16. The language of the Amended Statute restricts the categories of physicians authorized to provide informed consent information to an abortion patient and infringes on a woman's ability to receive her physician's opinion as to what is best for her considering her particular circumstances. This is constitutionally impermissible. *Presidential Women's Center*, 707 So.2d at 1149-1150.

17. The Amended Statute requires *inter alia* that:

> 1. The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, in person, informed the woman of: (a) the nature and risk of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.

By imposing the restriction that informed consent is obtained ***only*** if the physician performing the abortion or referring physician orally informs the woman, the State is not employing the least intrusive means of serving an interest in a woman's health. The Amended Statute allows a referring physician, who may be a pediatrician or an orthopedic surgeon, and who may have no training or experience in the field, to provide the information, but prohibits a board certified obstetrician/gynecologist who works with the physician performing the abortion from informing the woman of this important information. The language of the Amended Statute restricts the categories of physicians allowed to give the required information;

18. The Amended Statute requires that the physician must orally and in person inform the woman of:

> a. [t]he nature and risks of undergoing or not undergoing the proposed procedure that *a reasonable patient would consider material* to making a knowing and willful decision to terminate a pregnancy. (emphasis added).

19. Prior to the amendment of the subject statute, physicians performing abortions were allowed to comply with the general informed consent statute which requires the physician to tailor the information given to the patient to the *circumstances of that patient* and to *comport with the standard of conduct within the medical community* in doing so. Presidential Women's Center, 707 So.2d at 1150; *see also* Section 766.103, Fla. Stat.;

20. Under Florida's Medical Consent Law, physicians are to provide information that would enable a "reasonable individual, ... under the circumstances, [to] have a general understanding of. . . . the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians. . . . in the same or similar community who perform similar treatments or procedures." Section 766.103(3)(a)(2), Fla. Stat.;

21. The Amended Statute contains neither provision. It does not allow physicians to conform the information to the patient's circumstances or to the accepted standard of medical practice in the same or similar community. Instead, the Amended Statute standardizes the information being given to all women and removes the discretion accorded physicians in all circumstances other than abortion;

22. The Amended Statute "infringes on the woman's ability to receive her physician's opinion as to what is best for her, considering her circumstances." Presidential Women's Center, 707 So.2d at 1150;

23. The Amended Statute is an attempt by the State to affirmatively impose some barrier or obstacle between a woman and her physician in regard to the woman's right as to whether to have an abortion;

24. The Amended Statute does not use the least intrusive means as a matter of law. Thus, the statute is facially unconstitutional;

25. The test of vagueness of a statute is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. . . . The statute must give reasonable notice that a person's conduct is restricted by the statute.

Presidential Women's Center, 707 So. 2d at 1150;

26. The Amended Statute mandates that a physician performing an abortion must satisfy a unique and confusing "reasonable patient" standard or risk disciplinary proceedings. Statutes that pose the risk of license sanctions must be strictly construed in determining whether they violate the due process clause of the Florida Constitution. *See, e.g.*, *Whitaker v. Department of Insurance & Treasurer*, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); *cf. D'Alemberte v. Anderson*, 349 So. 2d 164, 168 (Fla. 1977);

27. The Amended Statute requires a physician to provide information that a "reasonable patient would consider material." The Amended Statute fails to provide any guidance as to how a physician can meet that requirement. The Amended Statute requires the physician to venture into the mind of another, who could be a 14-year old rape victim who is pregnant or a mature woman who could have a variety of reasons for seeking an abortion, and venture out with what that other person deems "material." An envious and laudable goal, but physicians are not readers of minds. The language of the Amended Statute requires that a physician provide information targeted to some hypothetical "reasonable patient" rather than the patient who is actually in front of him or her, without any guidance on how to do so;

28. As previously noted, prior to the amendment of the subject Amended Statute, physicians performing abortions were required to comply with the general informed consent statute which requires the physician to tailor the information given to the patient to the *circumstances of that patient* and to *comport with the standard of conduct within the medical community* in doing so. Under Florida's Medical Consent Law, physicians are to provide information that would enable a "reasonable individual, ... under the circumstances, [to] have a general understanding of... the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians... in the same or similar community who perform similar treatments or procedures." Section 766.103(3)(a)(2), Fla. Stat. "By changing informed consent from what a reasonable physician would do under the circumstances, to what a reasonable patient would want to know, but without the traditional informed consent language 'under the circumstances,' leaves the physicians with no standards to comport to." *Presidential Women's Center*, 707 So.2d at 1151;

29. By changing the informed consent law applicable to abortion providers from what a reasonable physician would do under the circumstances to what a reasonable patient would want to know, but without the traditional informed consent language, the Amended Statute is vague in that it leaves the physician with no standards with which to conform. As such, by requiring the physician to guess as to how to comply with the Amended Statute, or risk penalties including licensure penalties, the Amended Statute violates due process and is otherwise void for vagueness;

30. The vagueness of the Amended Statute is increased by the ambiguity created by its reference to "medical risks" in Section 390.0111(3)(a)1.c, but then making reference simply to "risks" in Section 390.0111(3)(a)1.a. It is unclear whether the physician is required to inform the patient of non-medical risks associated with undergoing or not undergoing an abortion. The

Amended Statute provides no guidance as to what types of non-medical risks a physician must disclose nor on how to determine which economic, social, emotional or other risks associated with childbirth or terminating a pregnancy would be "material" to a "reasonable patient.";

31. The Court considered the possibility of severance under the Florida Supreme Court guidelines regarding severability which were recently reaffirmed in the case of *Ray v. Mortham*, 742 So.2d 1276 (Fla. 1999). In determining whether a part of a statute can be severed, a court must consider whether:

> (1) the unconstitutional provisions can be separated from the remaining valid provisions;
> (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void;
> (3) the good and the bad features are not so inseparable in substance that it can be said that the legislature would have passed the one without the other; and
> (4) an act complete in itself remains after the invalid provisions are stricken.

Ray, 742 So.2d at 1281.

32. To sever the challenged portions of the Amended Statute would be to sever subsections of the informed consent section. To do so would reduce the section to being nonsensical and incomplete. Accordingly, the constitutional defects of Section 390.0111(3) cannot be cured by severing portions of it.

Based upon the foregoing, the Plaintiffs' Motion for Summary Judgment is **GRANTED**. A permanent injunction is entered against any enforcement of Section 390.0111(3), as said Amended

Statute is unconstitutional as a matter of law.

DONE and ORDERED in Chambers, West Palm Beach, Palm Beach County, Florida this 13th day of September, 2002.

SIGNED AND DATED
SEP 13 2002
Ronald W. Alvarez
CIRCUIT COURT JUDGE
JUDGE RONALD V. ALVAREZ

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