



2023 OK 111
IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ORIGINAL

OKLAHOMA CALL FOR REPRODUCTIVE)
JUSTICE, on behalf of itself and its members;)
TULSA WOMEN'S REPRODUCTIVE CLINIC,)
LLC, on behalf of itself, its physicians, its staff, and)
its patients; ALAN BRAID, M.D., on behalf of)
himself and his patients; COMPREHENSIVE)
HEALTH OF PLANNED PARENTHOOD GREAT)
PLAINS, INC., on behalf of itself, its physicians, its)
staff, and its patients; and PLANNED)
PARENTHOOD OF ARKANSAS & EASTERN)
OKLAHOMA, on behalf of itself, its physicians, its)
staff, and its patients,)

Plaintiffs/Appellants,)

v.)

GENTNER DRUMMOND, in his official capacity as)
Attorney General for the State of Oklahoma; VICKI)
BEHENNA, in her official capacity as District Attorney)
for Oklahoma County; STEVE KUNZWEILER, in)
his official capacity as District Attorney for Tulsa)
County; LYLE KELSEY, in his official capacity as)
Executive Director of the Oklahoma State Board of)
Medical Licensure and Supervision; BRET S.)
LANGERMAN, in his official capacity as President)
of the Oklahoma State Board of Osteopathic)
Examiners; KEITH REED, in his official capacity as)
the Commissioner of the Oklahoma State Board of)
Health; and JASON WILLEFORD, in his official)
capacity as the President of the Oklahoma State)
Board of Pharmacy; as well as their employees,)
agents, and successors,)

Defendants/Appellees.)

FILED
SUPREME COURT
STATE OF OKLAHOMA

NOV 14 2023

JOHN D. HADDEN
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Case No. 119,918

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ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

The Honorable Cindy H. Truong

¶0 The appellants filed an action to permanently enjoin enforcement of five Acts of the Oklahoma Legislature. Each Act concerns the termination of a pregnancy. The appellants' challenges are based upon Oklahoma law and not federal law. They assert there is a constitutional right to terminate a pregnancy under the Oklahoma Constitution. The trial court denied a temporary injunction on three of the Acts, which is the basis of this appeal. We retained this appeal and granted a temporary injunction pending appeal. We now vacate the trial court's order denying temporary injunction, direct it to grant a temporary injunction and remand the matter for further proceedings on the merits.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS; TRIAL COURT DIRECTED TO GRANT TEMPORARY INJUNCTION; THIS COURT'S TEMPORARY INJUNCTION IS LIFTED ONCE THE TRIAL COURT'S TEMPORARY INJUNCTION BECOMES EFFECTIVE

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Meghan Agostinelli, Dechert LLP, Chicago, Illinois, for Plaintiffs/Appellants Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, L.L.C., and Alan Braid, M.D.

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Jonathan Tam, Dechert LLP, San Francisco, California, for Plaintiffs/Appellants Oklahoma Call for Reproductive Justice, Tulsa Women's Reproductive Clinic, L.L.C., and Alan Braid, M.D.

Diana O. Salgado, Planned Parenthood Federation of America, Washington, DC, for Plaintiffs/Appellants Comprehensive Health of Planned Parenthood Great Plains, Inc. and Planned Parenthood of Arkansas & Eastern Oklahoma.

Mithun Mansinghani, Zach West, Office of Attorney General, State of Oklahoma, Oklahoma City, Oklahoma, for Defendants/Appellees.

COMBS, J.:

¶1 This opinion addresses only the trial court's denial of a temporary injunction to enjoin the enforcement of three Oklahoma Acts: House Bill 1904, 2021 Okla. Sess. Laws ch. 211 (effective November 1, 2021); Senate Bill 778, 2021 Okla. Sess. Laws ch. 577 (effective November 1, 2021); and Senate Bill 779, 2021 Okla. Sess. Laws ch. 578 (effective November 1, 2021). On September 2, 2021, the appellants - Oklahoma Call for Reproductive Justice; Tulsa Women's Reproductive Clinic, LLC; Alan Braid, M.D.; Comprehensive Health of Planned Parenthood Great Plains, Inc.; and Planned Parenthood of Arkansas & Eastern Oklahoma (Appellants) - petitioned the trial court to find that five Oklahoma Acts relating to abortion were unconstitutional under the due process section of the Oklahoma Constitution (article II, section 7). In addition, they asserted S.B. 778 and S.B. 779 violated the single-

subject rule found in article V, section 57 of the Oklahoma Constitution and the Acts were enacted for an improper purpose. The appellants did not assert any federal claims. Contemporaneous with their petition, the appellants filed a motion for a temporary injunction requesting the trial court enjoin enforcement of the Acts. The trial court held a hearing on the motion and filed its order on October 7, 2021. The court granted a temporary injunction on two of the Acts but denied a temporary injunction on H.B. 1904, S.B. 778, and S.B. 779. The appellants have appealed the denial of the temporary injunction on the three Acts. They filed a petition in error on October 13, 2021, and filed a motion for temporary injunction pending appeal in this Court. We retained the appeal and granted their motion for temporary injunction pending appeal on October 25, 2021.¹

STANDARD OF REVIEW

¶2 Matters involving the grant or denial of injunctive relief are of equitable concern. *Dowell v. Pletcher*, 2013 OK 50, ¶5, 304 P.3d 457, 460. Injunction is an extraordinary remedy and relief by this means should not be granted lightly. *Id.* A temporary injunction protects a court's ability to render a meaningful decision on the merits of the controversy. *Okla. Pub. Emps. Ass'n v. Okla. Military Dep't*, 2014

¹ The names of the Attorney General of Oklahoma, District Attorney of Oklahoma County, President of the Oklahoma State Board of Osteopathic Examiners, Commissioner of the Oklahoma State Board of Health, and the President of the Oklahoma State Board of Pharmacy have been updated to reflect the current persons serving in those positions. 12 O.S. 2021, § 2025 (D).

OK 48, ¶15, 330 P.3d 497, 504. The purpose of a temporary injunction is to preserve the status quo and prevent the perpetuation of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured, or endangered. *Id.* Equity courts exercise discretionary power in granting or withholding extraordinary remedies, particularly where injunctive relief is sought, and its granting rests in the sound discretion of the court to be exercised in accordance with equitable principles and in light of all circumstances. *Dowell*, 2013 OK 50, ¶5, 304 P.3d at 460. The right to injunctive relief must be established by clear and convincing evidence. *Id.* ¶7, 304 P.3d at 460. To obtain a temporary injunction, a plaintiff must show that four factors weigh in their favor: 1) the likelihood of success on the merits; 2) irreparable harm to the party seeking the relief if the injunction is denied; 3) their threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest. *Okla. Pub. Emps. Ass'n*, 2014 OK 48, ¶9, 330 P.3d at 502-03. Granting or denying injunctive relief is within the sound discretion of the trial court and a judgment issuing or refusing to issue an injunction will not be disturbed on appeal unless the lower court has abused its discretion or the decision is clearly against the weight of the evidence. *Dowell*, 2013 OK 50, ¶¶5-6, 304 P.3d at 460; *Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, ¶4, 925 P.2d 546, 549. The temporary injunction is not itself a decision on the merits. *Edwards v. Bd. of Cty. Comm'rs of Canadian Cty.*, 2015 OK 58, ¶34, 378

P.3d 54, 64. Neither appellate affirmance nor reversal of an interlocutory injunction decree could, without more, become an adjudication on the merits of the action. *Smith v. State ex. rel. Bd. of Regents of Okla. State Univ.*, 1993 OK 1, ¶7, 846 P.2d 370, 372. Issues resolved at this interim stage are never res judicata of the claim. *Id.* When they are retendered on trial of the plaintiff's quest for permanent injunction, both parties are free to offer different or additional proof. *Id.*

ANALYSIS

¶3 The appellants assert they have demonstrated a likelihood of success on the merits concerning their arguments challenging the constitutionality of the three Acts under the Oklahoma Constitution. The constitutionality of the three challenged Acts goes to the merits of the underlying action. Our duty at this interlocutory stage is to review only the trial court's decision denying a temporary injunction and to determine whether the court abused its discretion or the decision was clearly against the weight of the evidence.

¶4 The appellants claim the three Acts violate the Oklahoma Constitution. They do not assert their arguments are based upon the federal Constitution. The appellants assert the Acts place undue burdens on a woman's right to terminate her pregnancy in violation of article II, section 7 of the Oklahoma Constitution, the state due process section. This section provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Therefore, we must first determine whether the Oklahoma Constitution provides a right - or at least some right - to terminate a pregnancy and, if so, what is the appropriate standard for determining when a state regulation violates that right. We recently answered these questions in *Oklahoma Call for Reproductive Justice v. Drummond (OCRJI)*, 2023 OK 24, 526 P.3d 1123.

¶5 *OCRJI* was this Court's first opinion concerning abortion rights following the United States Supreme Court's holding that there was no longer a right to terminate a pregnancy under the federal Due Process Clause. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). *Dobbs* held that, in order for a fundamental right to be recognized as a component of the liberty protected in the Due Process Clause, such right must be deeply rooted in our Nation's history and tradition. *Id.* at 2246, 2260. The Court determined that was not the case when considering abortion had been outlawed in every single state prior to *Roe v. Wade*, 410 U.S. 113 (1973). *Id.* at 2248. We determined that if this Court were to adopt the *Dobbs* analysis we would have to find a limited right to terminate a pregnancy was deeply rooted in Oklahoma's history and tradition. *OCRJI*, 2023 OK 24, ¶7. Since the days of the Oklahoma Territory and until *Roe*, Oklahoma outlawed abortion; however, such criminal statutes also provided a limited exception to allow an abortion if it was "necessary to preserve her life." *See* Okla. (Terr.) Stat. § 2187 (1890); 12 O.S. 2021 § 861. *Id.* We found that *Dobbs* did not account for such

exceptions and our history and tradition had long recognized such right. *Id.* ¶8. This right is protected under Sections 2² and 7³ of Article II of the Oklahoma Constitution. *Id.* Therefore, we held that the Oklahoma Constitution protects a limited right to an abortion, i.e., one that creates an inherent right of the mother to terminate a pregnancy when necessary to preserve her life. *Id.* ¶9. This inherent right to preserve the life of the mother was defined to mean: a woman has an inherent right to choose to terminate her pregnancy if, at any point in the pregnancy, the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy. Absolute certainty is not required; however, mere possibility or speculation is insufficient. *Id.* In addition, we held the standard that should be applied when reviewing challenges to state laws affecting the inherent right to preserve the life of the mother is strict scrutiny. *Id.* ¶11. We made no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy. *Id.* ¶10.

² Okla. Const. art. II, § 2:

All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.

³ Okla. Const. art. II, § 7:

No person shall be deprived of life, liberty, or property, without due process of law.

¶6 The appellants assert the three Acts severely and intentionally restrict access to abortions and are unrelated to any purported interest in patient health. H.B. 1904 provides a new requirement that a physician who performs an abortion must be board-certified in obstetrics and gynecology. S.B. 779 requires a physician who is certified to provide an abortion-inducing drug either to have admitting privileges at a hospital in the county or contiguous to the county where the abortion-inducing drug was administered or to have a written agreement with an associated physician in such location. S.B. 778 requires an Ultrasound be performed at least 72 hours prior to providing an abortion-inducing drug, but it does make an exception if such requirement would pose a greater risk of death or impairment. Both S.B. 778 and S.B. 779 provide for criminal and civil penalties for failure to comply with any provision in the Acts. Both Acts have, among other things, stringent reporting requirements. For example, S.B. 778 requires a physician to provide a report within three days of an Adverse Event to the FDA and the state health department, and S.B. 779 has a similar requirement. Failure to comply would appear to be a crime under the Acts and would also expose the physician to potential civil action.

¶7 The appellees assert these Acts are designed to benefit women's health. The parties have provided competing affidavits concerning the safety of medication abortion. The appellants assert research consistently shows that medication abortion is safer than many other common medications, including

antibiotic and over-the-counter drugs, like Advil or Tylenol.⁴ This Court has previously acknowledged there have been no significant health-related problems with using the current FDA protocol in medication abortion. *Okla. Coal. for Reproductive Justice v. Cline*, 2019 OK 33, ¶36, 441 P.3d 1145, 1158.

¶8 Under H.B. 1904, the requirement for a board certified OB/GYN to be the only authorized physician capable of performing the procedure would greatly reduce access to patients where such a specialty is not readily available or timely available once the patient's medical team has made a determination that the procedure is necessary to preserve the life of the mother. Any additional delay in access to the procedure once the necessity has been determined is clearly detrimental to the health of the patient and her constitutionally protected right to terminate the pregnancy to preserve her life.

¶9 S.B. 779 requires a physician who is certified to provide abortion-inducing drugs to have admitting privileges at a hospital in the county or contiguous county of where the abortion-inducing drug was provided. In 2016, this Court found such admitting privileges requirements were an impermissible hurdle for women seeking lawful abortion and there was no evidence to persuade this Court that such provisions advance women's health. *Burns v. Cline*, 2016 OK 121, ¶¶18-19, 387

⁴ ROA at 218 (Aff. of Ushma Upadhyay, Ph.D., M.P.H.).

P.3d 348, 353-54. Having previously determined this requirement to be an impermissible hurdle for women seeking lawful termination of a pregnancy and that there was no evidence to persuade us that such provisions advance women's health, we therefore find such restriction would likely fail under a strict scrutiny review in light of both our decision in *OCRJI* and a woman's constitutional right to terminate a pregnancy to preserve her life.

¶10 S.B. 778 requires an ultrasound be conducted 72 hours prior to the day of the abortion. Mandating an ultrasound to be performed 72 hours prior to any procedure that a woman's medical team has already determined is necessary to preserve her life, would increase the risk of harm to the woman and limit her access to necessary and timely healthcare to preserve her life - necessary and timely healthcare for which she has a constitutionally protected right.

¶11 In addition, both S.B. 778 and 779 have stringent reporting requirements and penalties for any violations of the Acts, including criminal sanctions. A violation of the Acts can be the cause for a civil malpractice action for actual and punitive damages, professional disciplinary action, and attorney fee awards. S.B. 779 also requires certification before one can distribute or provide an abortion-inducing drug. The penalties for failure to receive certification equals \$5,000,000 per violation for a manufacturer or distributor and \$250,000 per violation for a physician. The chilling effect of these new laws is such that no physician would

likely risk providing constitutionally protected care for fear of violating these statutes.

¶12 The clear weight of the evidence presented showed the apparent effect of the three Acts would place unnecessary burdens on the lawful termination of a pregnancy and therefore we hold that the trial court erred by not granting the temporary injunction.

CONCLUSION

Currently, we granted a temporary injunction to prevent enforcement of the Acts pending appeal. Maintaining the status quo would further the public interest of protecting a woman's right to terminate a pregnancy in order to preserve her life. The trial court denied the appellants' requested temporary injunction during the pendency of the action on the merits. We hold this was against the clear weight of the evidence. We hereby direct the trial court to enter a temporary injunction. The temporary injunction entered by this Court on October 25, 2021, shall remain in effect until the trial court's temporary injunction becomes effective. Having determined the trial court's order denying the temporary injunction was against the clear weight of the evidence, we need not rule on the appellants' other allegations of constitutional error. The matter is remanded to the trial court for further proceedings on the merits.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS; TRIAL COURT DIRECTED TO GRANT TEMPORARY INJUNCTION; THIS

**COURT'S TEMPORARY INJUNCTION IS LIFTED ONCE THE TRIAL
COURT'S TEMPORARY INJUNCTION BECOMES EFFECTIVE**

Kauger (**by separate writing**), Winchester, Edmondson, Combs and Gurich, JJ.,
concur;

Kane, C.J. (**by separate writing**), Rowe, V.C.J. (**by separate writing**), Darby (**by
separate writing**) and Kuehn (**by separate writing**), JJ., dissent.