

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

K. P. : CIVIL ACTION
VERSUS : NO. 07-CV-879
LORRAINE LEBLANC, ET AL : CHIEF JUDGE RALPH E. TYSON
: AUGUST 26, 2009

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ORAL ARGUMENT

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A P P E A R A N C E S

FOR THE PLAINTIFFS:

MR. WILLIAM E. RITTENBERG, ESQ.
MS. STEPHANIE TOTI, ESQ.

FOR THE DEFENDANTS:

MR. CARLTON JONES, III, ESQ.

REPORTED BY: JUDY Y. FRANCISCO, CCR

UNITED STATES COURTHOUSE
777 FLORIDA STREET
BATON ROUGE, LOUISIANA 70801
(225) 389-3566

1 8-26-09 - K. P. V. LORRAINE LEBLANC, ET AL 07-CV-879

2 THE COURT: GOOD MORNING. BE SEATED.

3 THE COURTROOM DEPUTY: CIVIL ACTION 07-879-RET; K.P.
4 VERSUS HOPE MEDICAL GROUP FOR WOMEN, ET AL.

5 THE COURT: COUNSEL, WOULD YOU ALL MAKE APPEARANCES,
6 PLEASE?

7 MR. JONES: GOOD MORNING, YOUR HONOR. CARLTON JONES
8 HERE FOR THE DEFENDANTS.

9 THE COURT: OKAY.

10 MR. RITTENBERG: GOOD MORNING, YOUR HONOR. BILL
11 RITTENBERG. I REPRESENT THE PLAINTIFFS FROM NEW ORLEANS. AND
12 I WOULD LIKE TO INTRODUCE TO THE COURT STEPHANIE TOTI FROM NEW
13 YOUR CITY, WHO WILL BE MAKING THE ORAL ARGUMENT.

14 MS. TOTI: GOOD MORNING, YOUR HONOR.

15 THE COURT: GOOD MORNING, MS. TOTI. DO YOU HAVE A
16 CARD, MA'AM?

17 MS. TOTI: YES.

18 THE COURT: WHY DON'T YOU GIVE IT TO THE COURTROOM
19 DEPUTY.

20 ALL RIGHT. THIS COMES UP ON MOTIONS TO DISMISS AND
21 MOTIONS FOR SUMMARY JUDGMENT. SINCE THE MOTION TO DISMISS
22 RAISES JURISDICTIONAL QUESTIONS, LET'S START WITH THAT MOTION,
23 AND GO FROM THERE.

24 MR. JONES: GOOD MORNING, JUDGE.

25 THE COURT: GOOD MORNING.

1 **MR. JONES:** WE FILED THESE MOTIONS TO DISMISS IN THE
2 EARLY PARTS OF THIS CASE AS TO ALL OF THE DEFENDANTS, TWO
3 SEPARATES MOTIONS, THOUGH. THE MEMBERS OF THE PATIENTS'
4 COMPENSATION FUND OVERSIGHT BOARD, AND THEN MS. LEBLANC,
5 EXECUTIVE DIRECTOR OF THE PATIENTS' COMPENSATION FUND.

6 THESE CLAIMS, AS YOUR HONOR KNOWS FROM THE BRIEFS FROM
7 THE PLAINTIFFS, ARE CHALLENGE TO THE CONSTITUTIONALITY OF THE
8 LOUISIANA REVISED STATUTE 9:2800.12. AND THESE CLAIMS ARE
9 RELATED TO -- ARE A CHALLENGE TO THAT STATUTE, AND
10 PARTICULARLY, REVISIONS IN THERE THAT REMOVE A CERTAIN CAUSE
11 OF ACTION FROM THE MEDICAL MALPRACTICE ACT. CITING EX PARTE
12 YOUNG, JUDGE, I FILED THESE MOTIONS TO DISMISS EARLY IN THE
13 CASE TO INDICATE THAT THERE IS NOT SUFFICIENT CONNEXITY
14 BETWEEN THESE DEFENDANTS, AND THAT STATUTE, WHICH IS THE
15 SUBJECT OF THE CONSTITUTIONAL CHALLENGE.

16 JUDGE, I COULD POINT YOU TO THE STATUTE ITSELF, WHICH IS
17 PROBABLY THE BEST EVIDENCE WHY I BELIEVE THE MOTION TO DISMISS
18 SHOULD BE GRANTED IN THIS CASE. THIS STATUTE, WHICH WAS
19 ENACTED IN 1997, CREATES A PRIVATE CAUSE OF ACTION FOR A WOMAN
20 SEEKING ABORTION AGAINST AN ABORTION PROVIDER IN CERTAIN
21 CIRCUMSTANCES. THAT CAUSE OF ACTION SPECIFICALLY ALLOWS
22 DAMAGES TO AN EXTENT THAT INFORMED CONSENT IS NOT GIVEN PRIOR
23 TO THE ABORTION PROCEDURE. THE PCF -- AND THE JUDGE MAY KNOW
24 THIS FROM SERVING ON THE STATE BENCH -- IS CREATED BY TITLE 40
25 OF THE LOUISIANA REVISED STATUTES. AND THE PCF IS A VOLUNTARY

1 PROGRAM FOR PROVIDERS IN THE STATE WHEREAS THEY CAN PROVE
2 FINANCIAL RESPONSIBILITY, PAY A SURCHARGE. AND THEN THEY ARE
3 ENTITLED TO TWO PARTICULAR ASPECTS OF THE MEDICAL MALPRACTICE
4 ACT. ONE OF THOSE IS A MEDICAL REVIEW PANEL. AND THAT IS A
5 PRESCREENING PANEL WHERE IT GOES THROUGH THE PROCESS PRIOR TO
6 LITIGATION BEING FILED.

7 THE SECOND PART OF THAT IS LIMITATION OF LIABILITY ON THE
8 BACK END ONCE THE MEDICAL MALPRACTICE CLAIM IS MOVED THROUGH
9 FRUITION.

10 THE CIVIL ACTION THAT'S PRESCRIBED BY 9:2800.12, IS A
11 PRIVATE CIVIL ACTION. IT'S ONE BROUGHT BY A WOMAN WHO GOES TO
12 SEEK AN ABORTION AND FILED AGAINST THE ABORTION PROVIDER
13 SEEKING DAMAGES. IT IS NOT ONE THAT INVOLVES THE PCF IN ANY
14 RESPECT. THE ONLY PART OF THE STATUTE WHICH EVEN ARGUABLY
15 TRIGGERS THE MEDICAL MALPRACTICE ACT IS PART (C)(2). AND
16 THAT'S WHERE THEY SAY THAT THE CAUSE OF ACTION DELINEATED DOES
17 NOT FALL UNDER THE MEDICAL MALPRACTICE ACT.

18 JUDGE, THESE PARTICULAR DEFENDANTS, AND THAT'S MS.
19 LEBLANC AND THE BOARD, THE OVERSIGHT BOARD, HAVE ABSOLUTELY
20 NOTHING TO DO WITH THE CIVIL PRIVATE ACTION BROUGHT BY AN
21 INJURED PART. THE PCF DOES NOT BRING THESE ACTIONS. THE PCF
22 DOES NOT RECEIVE THOSE ACTIONS. THE PCF SERVES TWO PURPOSES:
23 ONE IS TO ORGANIZE A MEDICAL REVIEW PANEL ON THE FRONT END;
24 AND TO SERVE AS A BANK OR AN ACCESS INSURER FOR MEDICAL
25 MALPRACTICE CLAIMS ON THE BACK END. AND SO TO CHALLENGE THE

1 CONSTITUTIONALITY OF THIS STATUTE AS TO THESE DEFENDANTS DOES
2 NOT SATISFY THE REQUIREMENTS OF EX PARTE YOUNG.

3 EX PARTE YOUNG, AS YOUR HONOR PROBABLY KNOWS, REQUIRES
4 THAT THERE BE SOME CONNECTION BETWEEN THE STATE ACTOR AND THE
5 CONSTITUTION, THE STATUTE THAT'S BEING CHALLENGED. AND THAT'S
6 THE VERY LIMITED EXCEPTION TO THE ELEVENTH AMENDMENT IMMUNITY
7 OF A STATE ACTOR. THERE'S NO DISPUTE THAT MS. LEBLANC IS A
8 STATE ACTOR AS THE EXECUTIVE DIRECTOR OF THE FUND. AND
9 THERE'S NO DISPUTE THAT THE BOARD MEMBERS ARE STATE ACTORS,
10 ALTHOUGH NOMINATED BY THE GOVERNOR AND APPOINTED THERE, THEY
11 ARE ACTING IN THE CAPACITY, AS APPOINTED, TO RELEGATE THE
12 OVERSIGHT BOARD.

13 THE NECESSARY FICTION OF EX PARTE YOUNG, AS IT'S BEEN
14 CALLED, REQUIRES THAT THERE BE SOME ACT OR THREATENING OF ACT,
15 OR AT LEAST THE ABILITY TO ACT BY THE STATE ACTOR. THE
16 OVERSIGHT BOARD HAS BEEN ESTABLISHED THROUGH THE DEPOSITIONS
17 NOW THAT WERE FILED -- FRANKLY WERE TAKEN AFTER THIS MOTION TO
18 DISMISS WERE FILED, SHOWS THAT THE BOARD HAS NOTHING TO DO
19 WITH THE PANEL PROCESS. AND THE BOARD MEMBERS HAVE NOTHING TO
20 DO WITH EVEN THE DISPOSITION OR THE CLAIMS ON THE BACK END.
21 THE BOARD APPROVES A BLANKET OF CLAIMS AT THE BOARD MEETINGS,
22 BUT THOSE ARE HANDLED BY THE PCF. MS. LEBLANC, ON THE OTHER
23 HAND, AS EXECUTIVE DIRECTOR, HAS NOTHING TO DO WITH THE CIVIL
24 ACTIONS EITHER. AND QUITE FRANKLY, ONCE THE MEDICAL REVIEW
25 PANEL IS SET UP, THE PCF HAS VERY LITTLE TO DO WITH A MEDICAL

1 REVIEW PANEL REQUEST, OTHER THAN JUST TO MONITOR IT, AND THE
2 PARTIES TAKE CARE OF THAT. AND REALLY HAS NOTHING TO DO WITH
3 THE MEDICAL MALPRACTICE CLAIM UNTIL THE BACK END WHEN THE
4 CLAIM IS BROUGHT TO FRUITION. THERE'S NOTHING IN THIS CASE TO
5 SHOW THAT THE BOARD OR MS. LEBLANC ARE THREATENING TO ACT OR
6 ACTING, OR EVEN HAVE THE ABILITY TO ACT TO SOMEHOW ENFORCE,
7 FIRST, THE CIVIL ACTION UNDER 9:2800.12 (A)(B) AND (C)(1). OR
8 NOW THAT A MEDICAL REVIEW PANEL HAS BEEN SET UP ON THE CLAIM,
9 THE UNDERLINE CLAIM IN THIS CASE, THAT THEY CAN DO ANYTHING TO
10 STOP THAT. THE ONLY REMAINING PART OF THIS CASE THAT REALLY
11 COULD EVER -- AND THIS GOES TO THE SUMMARY JUDGMENT MOTIONS
12 LATER -- PERHAPS BECOME RIPE SOMETIME IN THE FUTURE, IS THE
13 LIMITATION OF LIABILITY ISSUE. JUDGE, AND I'LL SAVE THAT FOR
14 THE SUMMARY JUDGMENT ARGUMENT, IF WE GET TO THAT, THAT'S
15 SIMPLY NOT RIGHT RIGHT NOW.

16 WHAT THEY HAVE TO OVERCOME IN ORDER TO BRING THESE
17 DEFENDANTS INTO THIS COURTROOM TODAY, IS TO SHOW THAT THESE
18 DEFENDANTS ARE EITHER ACTED OR THREATENING TO ACT OR HAD THE
19 ABILITY TO ACT TO ENFORCE THIS STATUTE, WHICH THEY CLAIM IS
20 UNCONSTITUTIONAL. AND I THINK, JUDGE, IF YOU READ EX PARTE
21 YOUNG AND ALL THE CASES THAT HAVE COME OUT UNDER EX PARTE
22 YOUNG, YOU WILL SEE THAT THE ELEVENTH AMENDMENT IMMUNITY HERE
23 STILL APPLIES TO THESE DEFENDANTS, AND THE JURISDICTION OF
24 THIS COURT, FRANKLY, IS NOT PROPER. THANK YOU.

25 **THE COURT:** JUST ONE QUESTION. IT'S NOT DIRECTLY

1 RELEVANT TO THE ISSUES ON THE MOTION TO DISMISS, BUT MY
2 IMPRESSION WAS THAT THE BOARD WOULD NOT CONVENE A PANEL FOR A
3 CLAIM SUCH AS THIS. AND I SEE IN YOUR BRIEF THAT A PANEL WAS
4 CONVENED, AND I'M JUST CURIOUS.

5 **MR. JONES:** YES, SIR. AND THAT GOES TO THE MOOTNESS
6 ARGUMENTS IN THE SUMMARY JUDGMENT IF WE GET THERE AS WELL.
7 BUT I'LL CONCEDE TO YOU, JUDGE, THAT INITIALLY WHEN THIS
8 LAWSUIT WAS FILED THE PCF HAD REFUSED, NOT THE BOARD, BUT THE
9 PCF, WHICH IS RUN BY THE EXECUTIVE DIRECTOR, HAD REFUSED TO
10 CONVENE A PANEL. AT SOME POINT A MEDICAL REVIEW PANEL WAS PUT
11 IN PLACE FOR THESE CLAIMS, AND THE PANEL WAS STILL PENDING.

12 **THE COURT:** WHO PUT THE PANEL IN PLACE?

13 **MR. JONES:** THE PCF IS WHO, UNDER STATE LAW,
14 ADMINISTERS THE MEDICAL REVIEW PANEL PROCESS. THEY CONVENE
15 THE PANEL, AND THEN IT'S REALLY PARTY DRIVEN AT THAT POINT
16 UNTIL IT COMES TO A CONCLUSION. AND THEN UNDER THE TYPICAL
17 SCENARIO A LAW SUIT IS FILED AND THE MEDICAL MALPRACTICE CLAIM
18 CONTINUES IN STATE COURT.

19 **THE COURT:** SO THESE DOCTORS ARE COVERED UNDER THE
20 MALPRACTICE ACT?

21 **MR. JONES:** WELL, THAT'S A DIFFICULT QUESTION TO
22 ANSWER THAT WAY. THE MEDICAL REVIEW PANEL PART OF THIS HAS
23 BEEN SATISFIED. THE PANELS HAVE BEEN SET UP AS TO THESE
24 PARTICULAR POSITIONS. SO THAT PROCESS IS UNDER WAY. NOW,
25 WHAT COMES OF THAT IS REALLY HARD TO SAY.

1 **THE COURT:** I UNDERSTAND THAT, BUT IF THE POSITION
2 IS NOT, AT LEAST IT'S MY UNDERSTANDING OF THE STATUTORY
3 SCHEME, WAS IF THE POSITION WAS NOT COVERED UNDER THE ACT,
4 THEY HAD NO RIGHT TO CONVENE A PANEL.

5 **MR. JONES:** WELL, SOME DECISIONS THAT HAVE COME OUT
6 OF STATE COURTS HAVE TOLD US OTHERWISE. THEY BASICALLY SAID
7 THAT THE PCF IS A MINISTERIAL ANIMAL. AND IF YOU DID A PANEL
8 REQUEST YOU HAVE TO PUT A PANEL IN PLACE.

9 **THE COURT:** OKAY. THANK YOU.

10 **MR. JONES:** AND SO I GUESS WE REALIZED OUR ERROR, IS
11 THE BEST WAY TO SAY IT, SET UP THE PANEL. AND IT'S CURRENTLY
12 PENDING.

13 **THE COURT:** OKAY. THAT ANSWERS IT. THANK YOU.

14 **MR. JONES:** THANK YOU, JUDGE.

15 **THE COURT:** MS. TOTI?

16 **MS. TOTI:** GOOD MORNING, YOUR HONOR.

17 **THE COURT:** GOOD MORNING.

18 **MS. TOTI:** THE CONDITION FOR ABROGATING A STATE
19 OFFICER'S ELEVENTH AMENDMENT IMMUNITY UNDER EX PARTE YOUNG.
20 EX PARTE YOUNG DOES NOT REQUIRE THAT THE OFFICER BE THE SOLE
21 OR EVEN THE PRIMARY PERSON RESPONSIBLE FOR ENFORCEMENT OF THE
22 ACT. EX PARTE YOUNG REQUIRES ONLY THAT STATE OFFICER HAVE,
23 QUOTE, SOME CONNECTION TO THE ENFORCEMENT OF THE STATUTE, AND
24 THAT REQUIREMENT IS MET HERE. THE DEFENDANTS ARE THE MEMBERS
25 OF THE PATIENT COMPENSATION FUND OVERSIGHT BOARD, AND THE

1 FUND'S EXECUTIVE DIRECTOR. THOSE DEFENDANTS HAVE ADMITTED
2 THAT THEY PLAY A GATEKEEPING FUNCTION UNDER THE CHALLENGED
3 STATUTE. SO WHEN AN INDIVIDUAL MAKES A CLAIM OF MALPRACTICE
4 AGAINST A PHYSICIAN, THE OVERSIGHT BOARD MAKES AN INITIAL
5 DETERMINATION ABOUT WHETHER THE POSITION IS QUALIFIED TO
6 OBTAIN BENEFITS UNDER THE MEDICAL MALPRACTICE ACT. AND THOSE
7 BENEFITS INCLUDE A LIMITATION OF THE PHYSICIAN'S LIABILITY,
8 AND THE CONVENING OF A MEDICAL REVIEW PANEL TO SCREEN CLAIMS.

9 HERE, WHAT HAPPENED IN THIS CASE, IS THAT THE DEFENDANTS
10 DENIED THE PLAINTIFFS THOSE BENEFITS BASED ON THE STATUTE THAT
11 WE ARE CHALLENGING. AND THE DEFENDANTS EXPLAIN THAT THAT
12 STATUTE, LOUISIANA REVISED STATUTE 9:2800.12, BARS PHYSICIANS
13 FROM OBTAINING THE BENEFITS OF THE MEDICAL MALPRACTICE ACT FOR
14 CLAIMS RELATED TO THE POSITION OF ABORTION SERVICES. AND ON
15 THAT BASIS THE DEFENDANTS DEEMED DR. K.P. AND DR. D.B.
16 NON-QUALIFIED FOR PURPOSES OF A CLAIM THAT WAS FILED AGAINST
17 THEM.

18 AND LATER ON THE DEFENDANTS INFORMED AN INSURANCE AGENT
19 WORKING ON BEHALF OF THE OTHER PLAINTIFF IN THIS CASE, HOPE
20 MEDICAL GROUP FOR WOMEN, WHICH IS A MEDICAL FACILITY, THAT
21 COVERAGE WOULD NOT BE AVAILABLE FOR ABORTION PROVIDERS; THAT
22 THE CLINIC WHERE ITS PHYSICIANS COULD JOIN, BUT THEY WOULD NOT
23 BE COVERED FOR ANY ABORTION RELATED CLAIMS. THAT'S ALL THAT'S
24 REQUIRED TO SATISFY EX PARTE YOUNG. CLEARLY THE DEFENDANTS
25 HAVE SOME CONNECTION TO THE ENFORCEMENT OF THE THIS ACT

1 BECAUSE THEY HAVE ENFORCED IT TO THE PLAINTIFF'S DETRIMENT.

2 **THE COURT:** THEY HAVE WHAT?

3 **MS. TOTI:** I'M SORRY, YOUR HONOR. THEY HAVE ALREADY
4 ENFORCED IT TO THE PLAINTIFF'S DETRIMENT IN PREVENTING DR.
5 K.P. AND DR. D.B. AND HOPE MEDICAL GROUP FOR WOMEN FROM
6 OBTAINING THE BENEFITS TO WHICH THEY WOULD OTHERWISE BE
7 ENTITLED UNDER THE MEDICAL MALPRACTICE ACT.

8 **THE COURT:** AND THOSE BENEFITS BEING THE PANEL AND
9 THE LIMITATION OF LIABILITY?

10 **MS. TOTI:** YES, YOUR HONOR. AND ALSO FUND COVERAGE
11 FOR ANY CLAIM IN EXCESS OF THE ONE HUNDRED THOUSAND DOLLAR CAP
12 OR AN INDIVIDUAL PHYSICIAN'S LICENSE.

13 **THE COURT:** THAT'S WHAT I MEANT BY THE LIMITATION OF
14 LIABILITY.

15 **MS. TOTI:** RIGHT. EXACTLY, YOUR HONOR.

16 **THE COURT:** WELL, PUTTING ASIDE THE -- DO YOU
17 DISPUTE THE FACT THAT A PANEL HAS SUBSEQUENTLY BEEN CONVENED?

18 **MS. TOTI:** YOUR HONOR, A PANEL HAS NOW BEEN
19 CONVENED, BUT THAT PANEL WAS CONVENED MONTHS AFTER THIS
20 LITIGATION WAS COMMENCED.

21 **THE COURT:** AND I'M GOING TO PUT THAT ON THE SIDE
22 FOR NOW, BUT HOW IS IT THAT THESE DEFENDANTS ARE ENFORCING A
23 STATUE WHICH GRANT CIVIL RIGHT OF ACTION?

24 **MS. TOTI:** WELL, THERE ARE A COUPLE OF REASONS WHICH
25 THEY ARE DOING THAT. NUMBER ONE, ALTHOUGH THEY HAD GRANTED A

1 PANEL IN THIS PARTICULAR CASE --

2 **THE COURT:** LET'S PUT THAT ASIDE. AT THE TIME YOU
3 ALL FILED THIS THAT HADN'T BEEN DONE.

4 **MS. TOTI:** RIGHT. THEY HAVE RESERVED THE RIGHT TO
5 DENY COVERAGE TO THE PHYSICIANS FOR ANY LIABILITY THAT THEY
6 ULTIMATELY HAVE FOR MEDICAL MALPRACTICE PATIENT, FOR MEDICAL
7 MALPRACTICE CLAIMANT. SO THEY ARE -- SO PART OF THE WAY THEY
8 ARE ENFORCING THE STATUTE IS BY WITHHOLDING THOSE BENEFITS,
9 WITHHOLDING THE COVERAGE FROM THE PLAINTIFFS IN THIS CASE.

10 **THE COURT:** I THOUGHT THEY HAD RESERVED THE RIGHT TO
11 LATER POSSIBLY WITHHOLD THE COVERAGE?

12 **MS. TOTI:** WELL, THEY HAVE RESERVED THE RIGHT TO
13 WITHHOLD COVERAGE, AND THEY HAVE INDICATED THAT IT'S THEIR
14 READING OF THE STATUTE THAT THE PLAINTIFFS ARE NOT ENTITLED TO
15 COVERAGE IN THIS CASE OR ANY OTHER CASE THAT ARISES UNDER THE
16 STATUTE. SO IT'S NOT JUST AN ISSUE OF THIS PARTICULAR MEDICAL
17 MALPRACTICE CLAIMANT, BUT FOR ALL OF THE OTHER PROCEDURES THAT
18 WERE PERFORMED DURING THE PERIOD WHEN THE TWO PLAINTIFFS WERE
19 COVERED BY THE PATIENTS' COMPENSATION FUND WHEN THEY WERE
20 PAYING THEIR SURCHARGES, AND WHEN THEY HAD FILLED OUT ALL
21 THEIR PAPERWORK. DURING ALL THAT CLAIMS PERIOD THE TWO
22 PLAINTIFFS COMBINED, PERFORMED THOUSANDS OF PROCEDURES. AND
23 NOW THERE'S A QUESTION ABOUT WHETHER THEY HAVE INSURANCE
24 COVERAGE FOR ANY OF THOSE PROCEDURES THAT WERE PERFORMED, OR
25 ANY PROCEDURES THAT THEY PERFORM IN THE FUTURE.

1 **THE COURT:** THE STATUTE 9:2800.12 OF THE LOUISIANA
2 REVISED STATUTE PROVIDES THAT, "THE MEDICAL MALPRACTICE LAWS
3 OR THE LIMITATIONS OF LIABILITY CONTAINED IN THOSE LAWS ARE
4 NOT APPLICABLE TO, BASICALLY NOT APPLICABLE TO THE PCF." SO
5 IF THE LAW DOESN'T APPLY TO THEM, HOW ARE THEY SOMEHOW
6 ENFORCING THE LAWS?

7 **MS. TOTI:** YOUR HONOR, THE DEFENDANTS HAVE ADMITTED
8 THAT THEY PLAY A GATEKEEPING ROLE; THAT THAT PROVISION OF THE
9 STATUTE THAT YOU JUST READ GIVES THEM A GATEKEEPING FUNCTION,
10 AND IT REQUIRES THEM TO KEEP PHYSICIANS WHO PERFORM ABORTIONS
11 FROM OBTAINING THOSE BENEFITS, THE BENEFITS OF THE MEDICAL
12 MALPRACTICE ACT, INCLUDING THE LIMITATIONS ON LIABILITY AND
13 THE MEDICAL REVIEW PANEL. SO THEY ARE ENFORCING THE STATUTE
14 BY ACTING AS GATEKEEPER IN KEEPING THOSE PHYSICIANS FROM
15 OBTAINING BENEFITS.

16 **THE COURT:** THE LAWS SAYS THAT IF YOU PERFORM
17 ABORTIONS YOU'RE NOT COVERED UNDER THE MEDICAL MALPRACTICE.
18 AND PUTTING THE OTHER ANCILLARY ISSUES ASIDE, IT'S THE LAW
19 THAT SAYS THEY'RE NOT COVERED. NOW, IT DOESN'T SAY, PCF, YOU
20 SHALL DO THIS OR YOU SHALL DO THAT. THE PCF JUST ADMINISTERS
21 PEOPLE THAT ARE COVERED, I GUESS. SO HOW IS THAT, AGAIN, HOW
22 ARE THEY ENFORCING THE STATUTE UNDER YOUNGER BY BASICALLY
23 DECIDING WHO WILL OR WILL NOT BE COVERED PURSUANT TO THE
24 STATUTE?

25 **MS. TOTI:** YOUR HONOR, THE PLAINTIFFS ARE SEEKING AN

1 INJUNCTION AGAINST THE LAW ON THE GROUNDS THAT IT'S
2 UNCONSTITUTIONAL. AND AN INJUNCTION AGAINST THE DEFENDANTS
3 WOULD PREVENT THEM FROM DENYING BENEFITS TO PLAINTIFFS AND
4 OTHER ABORTION PROVIDERS. SO THEY ARE THE PROPER DEFENDANTS
5 UNDER EX PARTE YOUNG, BECAUSE THEY ARE THE DEFENDANTS WHO --
6 AN INJUNCTION AGAINST THOSE DEFENDANTS WOULD DIRECTLY REDRESS
7 INJURIES SUFFERED BY PLAINTIFF.

8 **THE COURT:** I WOULD STOP THEM FROM DOING WHAT?

9 **MS. TOTI:** YOU WOULD STOP THEM FROM ENFORCING THE
10 STATUTE TO DENY PLAINTIFFS' BENEFITS UNDER THE MEDICAL
11 MALPRACTICE ACT ON THE BASIS THAT THE STATUTE IS
12 UNCONSTITUTIONAL.

13 **THE COURT:** HERE WE COME AROUND AGAIN, THOUGH.
14 OKAY. I'M NOT CONVINCED THAT THESE DEFENDANTS ARE DENYING
15 YOUR PLAINTIFFS ANYTHING. NOW, THERE IS A STATUTE THAT
16 APPEARS TO DENY THEM SOMETHING, BUT I'M JUST NOT CONVINCED
17 THAT YOU'RE AIMING AT THE RIGHT PARTY IN TERMS OF ATTACKING
18 THAT. GO ON AND FINISH YOUR ARGUMENT.

19 **MS. TOTI:** OKAY. I UNDERSTAND YOUR HONOR'S CONCERN.
20 BUT IN THIS CASE THE DEFENDANTS ARE THE PARTIES THAT ARE
21 CAUSING INJURY TO THE PLAINTIFFS, BECAUSE -- I UNDERSTAND YOUR
22 HONOR'S POINT THAT THE STATUTE GIVES THE DEFENDANTS AN
23 INSTRUCTION, BUT IT'S THE DEFENDANTS --

24 **THE COURT:** ACTUALLY, IT DOESN'T. THE STATUTE
25 SAYS THAT THE LAWS THAT THESE DEFENDANTS ADMINISTER ARE NOT

1 APPLICABLE TO THE SITUATION OF AN ABORTION PROVIDER. SO IT
2 DOESN'T TELL THEM TO DO ANYTHING. IT SAYS, YOU'RE NOT
3 INVOLVED. GET OUT OF THE WAY, SO TO SPEAK.

4 **MS. TOTI:** THAT'S CORRECT, YOUR HONOR. BUT ON ITS
5 FACE, THE STATUTE -- THAT DIRECTION SEEMS ONLY TO APPLY TO THE
6 CAUSE OF ACTION THAT'S SET FORTH IN THAT STATUTE. IN OTHER
7 WORDS, THE CAUSE OF ACTION FOR STRICT LIABILITY, NOT FOR
8 STANDARD MEDICAL MALPRACTICE. SO THE STATUTE APPEARS TO BE
9 SAYING THAT THE TORT REFORMS THAT APPLY TO MEDICAL MALPRACTICE
10 CLAIMS WILL NOT APPLY TO STRICT LIABILITY CLAIMS UNDER THIS
11 STATUTE. DEFENDANTS HAVE TAKEN IT A STEP FURTHER AND THEY
12 INTERPRET THE STATUTE TO SAY THAT ANY MEDICAL MALPRACTICE
13 CLAIM THAT'S BROUGHT AGAINST AN ABORTION PROVIDER IS KICKED
14 OUT OF THE TORT REFORM REGIME, AND HAS TO COME UNDER THIS
15 OTHER REGIME.

16 **THE COURT:** STRICT LIABILITY.

17 **MS. TOTI:** UNDER STRICT LIABILITY. THAT'S CORRECT.
18 AND SO WE ARE CHALLENGING BOTH THE STATUTE -- THE PLAINTIFFS
19 ARE CHALLENGING BOTH THE STATUTE ON ITS FACE, AND DEFENDANT'S
20 INTERPRETATION OF IT.

21 **THE COURT:** I'M NOT -- I HAVE NO PROBLEM WITH YOUR
22 CHALLENGE OF THE STATUTE ON ITS FACE. THERE'S PROBABLY A LOT
23 THAT COULD BE SAID ABOUT THAT, BUT THE PROBLEM I KEEP COMING
24 BACK TO IS NOT WHAT YOU ARE SHOOTING, BUT WHO YOU'RE SHOOTING
25 AT. I THINK YOU'RE AIMING AT THE WRONG TARGET. YOU HAVE GOT

1 THE WRONG DEFENDANTS.

2 **MS. TOTI:** YOUR HONOR, IT APPEARS TO THE PLAINTIFFS
3 THAT THERE ARE NO OTHER APPROPRIATE DEFENDANTS.

4 **THE COURT:** THERE'S THE GOVERNMENT. THERE'S THE
5 ATTORNEY GENERAL. WELL, THE ATTORNEY GENERAL, THE GOVERNMENT.
6 I'M NOT -- THERE ARE PROBABLY A COUPLE OF OTHERS THAT I'M NOT
7 THINKING OF RIGHT NOW.

8 **MS. TOTI:** IN THE OKPALOBI CASE, YOUR HONOR, THE
9 FIFTH CIRCUIT HAD STATED THAT THE GOVERNOR AND THE ATTORNEY
10 GENERAL WERE NOT THE PROPER DEFENDANTS.

11 **THE COURT:** UNLESS THEY WERE DIRECTLY INVOLVED IN
12 THE ENFORCEMENT OF THE STATUTE.

13 **MS. TOTI:** THAT'S CORRECT, YOUR HONOR. AND NOW, IT
14 IS THE CASE THAT THIS CURRENT LAWSUIT IS DISTINGUISHABLE FROM
15 THE OKPALOBI LAWSUIT, BECAUSE THE STATUTE IS BEING ENFORCED TO
16 PLAINTIFFS' DETRIMENT. THERE'S NO LONGER A SPECULATIVE
17 INJURY. THE INJURY HAS ACTUALLY OCCURRED AND CONTINUES TO
18 OCCUR.

19 **THE COURT:** WELL, THAT BRINGS US BACK TO THE
20 GRANTING OF THE PANEL. BUT AGAIN, WE ARE PUTTING THAT ASIDE
21 FOR PURPOSES OF THIS ARGUMENT. THE FACT THAT -- TELL ME HOW
22 YOU THINK THE STATUTE CHARGES THESE DEFENDANTS WITH THE
23 OBLIGATION OF ENFORCING IT?

24 **MS. TOTI:** WELL, THESE DEFENDANTS HAVE INTERPRETED
25 THE STATUTE --

1 **THE COURT:** NO, NO. TELL ME WHAT THE STATUTE SAID,
2 NOT WHAT THE DEFENDANT SAID.

3 **MS. TOTI:** WELL, THE STATUTE TELLS THE DEFENDANTS
4 THAT PHYSICIANS --

5 **THE COURT:** THE LAWS GOVERNING MEDICAL MALPRACTICE
6 LIMITATIONS FOR LIABILITY ARE NOT APPLICABLE.

7 **MS. TOTI:** RIGHT.

8 **THE COURT:** IT TELLS THAT TO ANYBODY INVOLVED WITH
9 THE STATUTE.

10 **MS. TOTI:** RIGHT. SO, YOUR HONOR, IT'S TELLING
11 THESE DEFENDANTS TO PREVENT PHYSICIANS WHO PERFORM ABORTIONS
12 FROM ACCESSING THE BENEFITS THAT THESE DEFENDANTS ADMINISTER.

13 **THE COURT:** OR IS IT TELLING A PERSON INTENDING TO
14 FILE A CLAIM BASED ON AN ABORTION PROCEEDING THAT THEIR REMEDY
15 WOULD BE UNDER STRICT LIABILITY RATHER THAN MEDICAL
16 MALPRACTICE? DOES IT TELL -- RATHER THAN TELLING THE
17 DEFENDANTS WHAT TO DO OR NOT TO DO, DOESN'T THE STATUTE
18 INSTEAD TELL THE PLAINTIFF WHAT KIND OF CASE HE OR SHE SHOULD
19 FILE, OR WHAT KIND OF CAUSE OF ACTION THEY HAVE FOR A CLAIM
20 INVOLVING ABORTION?

21 **MS. TOTI:** RESPECTFULLY, YOUR HONOR, I THINK THE
22 STATUTE GIVES AN INSTRUCTION TO THE DEFENDANTS, AND IT TELLS
23 THE DEFENDANTS TO WITHHOLD THESE BENEFITS FROM PHYSICIANS WHO
24 PERFORM ABORTIONS FOR ANY CLAIMS RELATED TO ABORTION SERVICES.

25 **THE COURT:** OKAY. POINT ME TO THAT LANGUAGE IN THE

1 STATUTE? I KNEW YOU WERE GOING TO SAY THAT. THE LANGUAGE
2 ISN'T THERE. THE LANGUAGE JUST ISN'T THERE.

3 **MS. TOTI:** THAT'S TRUE, YOUR HONOR. BUT IT SEEMS TO
4 THE PLAINTIFF THAT THAT IS -- THAT THAT IS THE INTENT OF THE
5 STATUTE, AND THAT IS WHAT THE STATUTE IS INTENDED TO CONVEY.
6 THAT'S THE INSTRUCTION THAT THE STATUTE IS INTENDED TO CONVEY
7 TO THE DEFENDANTS, AND THAT -- AND THAT IS HOW DEFENDANTS HAVE
8 INTERPRETED THE STATUTE AND THEN APPLIED IT TO THE PLAINTIFFS
9 IN THIS CASE.

10 **THE COURT:** OKAY. THANK YOU.

11 **MS. TOTI:** THANK YOU, YOUR HONOR.

12 **THE COURT:** COUNSEL?

13 **MR. JONES:** JUDGE, I'LL BE BRIEF. I THINK YOU'VE
14 HIT TO RIGHT ON TARGET, JUDGE. THIS STATUTE PROVIDES A CIVIL
15 REMEDY. AND EVEN IN THE OKPALOBI CASE THE COURT THERE WRITING
16 RECOGNIZED THAT -- AND THIS IS THE REDRESSABILITY ISSUE THAT
17 COMES UNDER EX PARTE YOUNG -- EVEN IF YOU ALLOW THE INJUNCTION
18 IN THIS CASE, JUDGE, YOU CAN'T STOP, WE CAN'T STOP CIVIL
19 LITIGANTS FROM FILING THESE LAWSUITS. AND THEY FILED THESE
20 LAWSUITS IN STATE COURTS IN LOUISIANA, THAT'S WHEN YOU BRING
21 THIS ACTION. IF SOMEBODY SAYS I'M BRINGING AN ACTION UNDER
22 9:2800.12, THAT'S WHEN YOU CHALLENGE THE CONSTITUTIONALITY OF
23 THIS STATUTE.

24 **THE COURT:** NO CAUSE OF ACTION.

25 **MR. JONES:** YEAH. AND YOU GO ON AND MAKE THE

1 CONSTITUTIONAL CHALLENGE AT THAT POINT. AND SO AT THIS POINT
2 THE PCF, IF ANYTHING, IS JUST SUCH A BIT PLAYER HERE. BECAUSE
3 WE DON'T GET INVOLVED UNTIL LATER. AND IF THERE'S GOING TO BE
4 AN ACTION, OR IF THERE'S GOING TO BE SOME CHALLENGE TO WHETHER
5 THE PCF APPLIES OR DOESN'T APPLY, IT FALLS WITH THE STATE
6 COURT ACTION, MEDICAL MALPRACTICE ACTION.

7 AND SO EVEN AN INJUNCTION HERE JUST WON'T DO THE TRICK.
8 SO, YOUR HONOR, I SUGGEST THAT THAT SHOULD BE BROUGHT IN A
9 STATE COURT LAWSUIT. AND THE COURT SEEMS TO BE VERY WELL
10 FAMILIAR WITH THE STATUTE THAT IT JUST CLEARLY DIRECTS THAT
11 THIS IS A CIVIL ACTION BETWEEN A PRIVATE PARTY AND THE
12 ABORTION PROVIDER.

13 SO I WOULD SUGGEST THAT THESE DEFENDANTS ARE NOT THE
14 PROPER DEFENDANTS FOR THIS CASE, JUDGE.

15 **THE COURT:** I AGREE. THE STATUTE IN THIS CASE DOES
16 NOT CHARGE THESE DEFENDANTS WITH THE OBLIGATION OF ENFORCING
17 ANYTHING. AS I SAID, THE STATUTE AT ISSUE IS MORE OF A
18 DIRECTION TO A PRIVATE LITIGANT OF THE CAUSE OF ACTION THAT IS
19 PROVIDED. THE STATUTE DOES NOT CHARGE THESE DEFENDANTS, THE
20 LOUISIANA PCF BOARD, WITH THE OBLIGATION OF ENFORCING ANYTHING
21 IN CONNECTION WITH THE STATUTE THAT THEY ARE NOT CHARGED WITH
22 OR REQUIRED TO ENFORCE ANYTHING, AND HAVE NO CONNECTION TO THE
23 ENFORCEMENT OR APPLICATION OF THE STATUTE AT ALL.

24 FOR THOSE REASONS, THE COURT FEELS THAT THE ELEVENTH
25 AMENDMENT IMMUNITY CLAIMS ASSERTED BY THESE DEFENDANTS ARE


1 PROPERLY ASSERTED, AND THE COURT WILL GRANT THE MOTION TO
2 DISMISS FINDING THAT AS STATE OFFICIALS THEY ARE IMMUNE FROM
3 SUIT UNDER THE ELEVENTH AMENDMENT FOR THIS CAUSE OF ACTION.

4 JUDGMENT WILL BE RENDERED ACCORDINGLY. THE COURT MAY
5 ASSIGN WRITTEN REASONS SUPPLEMENTARY TO THE ORAL REASONS JUST
6 GIVEN AT A LATER DATE. THE JUDGMENT WILL BE RENDERED IN FAVOR
7 OF THE DEFENDANTS AND AGAINST THE PLAINTIFFS.

8 NOW, THE MOTION FOR SUMMARY JUDGMENT, THE COURT WILL
9 DISMISS AS MOOT IN VIEW OF THE RULING ON THE MOTION TO
10 DISMISS. OKAY. THANK YOU ALL.

11 C E R T I F I C A T E

12
13 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
14 FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE-ENTITLED
15 NUMBERED MATTER.

16 
17 _____
18 JUDY Y. FRANCISCO, CCR
19 OFFICIAL COURT REPORTER
20
21
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23
24
25

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1	ANYBODY [1] 16/8	CALLED [1] 5/14 CAN [2] 4/1 6/9 CAN'T [2] 17/18 17/18 CAP [1] 10/11 CAPACITY [1] 5/11 CARD [1] 2/16 CARE [1] 6/2 CARLTON [2] 1/16 2/7 CASE [21] CASES [1] 6/21 CAUSE [10] 3/10 3/19 3/21 4/16 14/6 14/7 16/19 17/24 18/18 19/3 CAUSING [1] 13/21 CCR [2] 1/18 19/17 CERTAIN [2] 3/10 3/20 CERTIFY [1] 19/13 CHALLENGE [8] 3/7 3/9 3/15 4/25 14/22 17/22 18/1 18/4 CHALLENGED [2] 5/5 9/2 CHALLENGING [3] 9/11 14/18 14/19 CHARGE [2] 18/16 18/19 CHARGED [1] 18/21 CHARGES [1] 15/22 CHIEF [1] 1/6 CIRCUIT [1] 15/9 CIRCUMSTANCES [1] 3/21 CITING [1] 3/11 CITY [1] 2/13 CIVIL [11] 1/4 2/3 4/10 4/11 4/20 5/23 6/7 10/23 17/14 17/18 18/11 CLAIM [14] 4/8 6/3 6/4 6/8 6/9 6/19 7/3 7/17 9/3 9/16 10/11 14/13 16/14 16/19 CLAIM UNTIL [1] 6/3 CLAIMANT [2] 11/7 11/17 CLAIMS [14] 3/6 3/8 4/25 5/20 5/21 7/11 9/8 9/14 9/23 11/21 14/10 14/10 16/24 18/25 CLEARLY [2] 9/24 18/10 CLINIC [1] 9/22 COMBINED [1] 11/22 COME [4] 6/21 8/5 13/13 14/14 COMES [4] 2/20 7/16 7/25 17/17 COMING [1] 14/23 COMMENCED [1] 10/20 COMPENSATION [4] 3/4 3/5 8/25 11/19 CONCEDE [1] 7/7 CONCERN [1] 13/19 CONCLUSION [1] 7/16 CONDITION [1] 8/18 CONNECTION [5] 5/4 8/23 9/25 18/21 18/22 CONNEXITY [1] 3/13 CONSENT [1] 3/22 CONSTITUTION [1] 5/5 CONSTITUTIONAL [2] 3/15 18/1 CONSTITUTIONALITY [3] 3/7 5/1 17/22 CONTAINED [1] 12/3 CONTINUES [2] 7/18 15/17 CONVENE [4] 7/2 7/10 7/14 8/4 CONVENED [4] 7/4 10/17 10/19 10/19 CONVENING [1] 9/8 CONVEY [2] 17/5 17/6 CONVINCED [2] 13/14 13/16 CORRECT [4] 14/4 14/17 15/13 19/13 COULD [4] 3/16 6/11 9/22 14/23 COUNSEL [2] 2/5 17/12 COUPLE [2] 10/24 15/6 COURT [13] 1/1 2/12 6/24 7/18 17/15 18/6
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3	ARE [41] ARGUABLY [1] 4/14 ARGUMENT [5] 1/9 2/13 6/14 13/18 15/21 ARGUMENTS [1] 7/6 ARISES [1] 11/15 AROUND [1] 13/13 AS [16] 3/2 3/6 4/24 5/1 5/3 5/8 5/11 5/13 5/23 7/3 7/6 7/23 12/14 18/17 19/2 19/9 ASIDE [4] 10/16 11/2 12/18 15/20 ASPECTS [1] 4/3 ASSERTED [2] 18/25 19/1 ASSIGN [1] 19/5 ATTACKING [1] 13/17 ATTORNEY [3] 15/5 15/5 15/9 AUGUST [1] 1/7 AVAILABLE [1] 9/21	
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<p>C</p> <p>COURT... [7] 18/9 18/9 18/24 19/1 19/4 19/8 19/18 COURTHOUSE [1] 1/19 COURTROOM [2] 2/18 6/17 COURTS [2] 8/6 17/20 COVERAGE [8] 9/21 10/10 11/5 11/9 11/11 11/13 11/15 11/24 COVERED [8] 7/19 8/3 9/23 11/19 12/17 12/19 12/21 12/23 CREATED [1] 3/24 CREATES [1] 3/19 CURIOUS [1] 7/4 CURRENT [1] 15/14 CURRENTLY [1] 8/11 CV [2] 1/5 2/1</p>	<p>ENFORCED [3] 10/1 10/4 15/15 ENFORCEMENT [5] 8/21 8/23 9/25 15/12 18/23 ENFORCING [9] 10/22 11/8 12/6 12/13 12/22 13/9 15/23 18/16 18/20 ENTITLED [4] 4/3 10/7 11/14 19/14 ENTITLED TO [1] 4/3 ERROR [1] 8/10 ESQ [3] 1/13 1/13 1/16 ESTABLISHED [1] 5/16 ET [3] 1/6 2/1 2/4 EVEN [7] 4/14 5/20 6/6 8/21 17/15 17/17 18/7 EVER [1] 6/11 EVIDENCE [1] 3/17 EX [12] 3/11 5/2 5/3 5/13 6/20 6/21 8/19 8/20 8/22 9/24 13/5 17/17 EXACTLY [1] 10/15 EXCEPTION [1] 5/6 EXCESS [1] 10/11 EXECUTIVE [5] 3/5 5/8 5/23 7/9 9/1 EXPLAIN [1] 9/11 EXTENT [1] 3/22</p>	<p>GOVERNING [1] 16/5 GOVERNMENT [2] 15/4 15/5 GOVERNOR [2] 5/10 15/9 GRANT [2] 10/23 19/1 GRANTED [2] 3/18 10/25 GRANTED IN [1] 3/18 GRANTING [1] 15/20 GROUNDS [1] 13/1 GROUP [3] 2/4 9/20 10/5 GUESS [2] 8/10 12/21</p>
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