

Commonwealth of Kentucky

Court of Appeals

NO. 2022-CA-0906-I

DANIEL CAMERON, IN HIS
OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE
COMMONWEALTH OF KENTUCKY

MOVANT

ON MOTION FOR INTERLOCUTORY RELIEF
ARISING FROM JEFFERSON CIRCUIT COURT
v. HONORABLE MITCH PERRY, JUDGE
ACTION NO. 22-CI-03225

EMW WOMEN'S SURGICAL
CENTER, P.S.C., ON BEHALF OF
ITSELF, ITS STAFF, AND ITS
PATIENTS; ERNEST MARSHALL, M.D.,
ON BEHALF OF HIMSELF AND HIS
PATIENTS; PLANNED PARENTHOOD
GREAT NORTHWEST, HAWAI'I, ALASKA,
INDIANA, AND KENTUCKY, INC.,
ON BEHALF OF ITSELF, ITS STAFF,
AND ITS PATIENTS; ERIC FRIEDLANDER,
IN HIS OFFICIAL CAPACITY AS SECRETARY
OF KENTUCKY'S CABINET FOR HEALTH
& FAMILY SERVICES; MICHAEL S. RODMAN,
IN HIS OFFICIAL CAPACITY AS EXECUTIVE
DIRECTOR OF THE KENTUCKY BOARD OF
MEDICAL LICENSURE; AND THOMAS B. WINE,
IN HIS OFFICIAL CAPACITY
AS COMMONWEALTH'S ATTORNEY
FOR THE 30TH JUDICIAL CIRCUIT OF KENTUCKY

RESPONDENTS

ORDER
GRANTING MOTION FOR EMERGENCY RELIEF

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This matter comes before the Court on motion of Daniel Cameron, in his official capacity as Attorney General of the Commonwealth of Kentucky (Movant), for emergency relief pursuant to Kentucky Rule of Civil Procedure (CR) 65.07(6). Movant seeks an emergency stay of the July 22, 2022, temporary injunction entered by the Jefferson Circuit Court in the underlying matter. Having reviewed the record, including the motion and response thereto, and the Court being in all ways sufficiently advised; IT IS HEREBY ORDERED that the motion for emergency relief under CR 67.07(6) shall be, and hereby is, GRANTED.

The underlying complaint was brought by Respondents EMW Women’s Surgical Center, P.S.C.; Ernest Marshall, M.D.; and Planned Parenthood Great Northwest, Hawai’i, Alaska, Indiana, and Kentucky, Inc. (collectively, the Plaintiffs). Therein, the Plaintiffs challenge the constitutionality of Kentucky Revised Statute (KRS) 311.772, known as the Human Life Protection Act, and KRS 311.7701-7711, known as the Heartbeat Law. Movant notes that the former law “prohibits most abortions in the Commonwealth[,]” while the latter “prohibits abortions after an unborn human life ‘has a detectible fetal heartbeat.’”

The underlying matter first came before this Court on Movant's request for intermediate relief attendant with his June 30, 2022, petition for a writ of mandamus and prohibition. At that time, Movant requested intermediate relief from a June 30, 2022, restraining order entered by the circuit court enjoining him from enforcing the laws at issue. By Order dated July 5, 2022, this Court denied the application for intermediate relief, noting that the case was not appropriately before this Court at that juncture because Movant had not yet pursued, and the circuit court had not yet ruled upon, any request for relief through the channels set forth in CR 65.01 *et seq.*¹ On July 22, 2022, the circuit court granted a temporary injunction consistent with its previous restraining order, and, pursuant to CR 65.07, the above-styled motion for emergency relief and motion for interlocutory relief followed. Therefore, procedurally, this matter is now properly before the Court for consideration of the request for emergency relief.²

Under CR 65.07(6), where a party moves the Court of Appeals for interlocutory relief from a temporary injunction, he may obtain an emergency

¹ The Court additionally notes that, at time of our July 5, 2022, Order, the opinion in *Dobbs v. Jackson Women's Health Organization*, ___ U.S. ___, 142 S. Ct. 2228 (2022), did not appear to be final under the procedural rules of the Supreme Court of the United States. See SUP.CT. R. 45.

² Movant's petition for a writ of mandamus and prohibition remains pending before this Court. On July 5, 2022, Movant filed a separate petition for a writ of mandamus and prohibition in the Kentucky Supreme Court, docketed as 2022-SC-0266-OA. On August 1, 2022, Movant filed, within that original action, a motion to transfer the CR 65.07 action and to consolidate. The status of that motion in the Kentucky Supreme Court is unclear as of entry of our present Order.

order upon showing he “will suffer irreparable injury before [his] motion [for interlocutory relief] will be considered by a panel” of this Court. The Court agrees that Movant has met this burden for the following reasons.

First, Movant is the chief law enforcement officer of the Commonwealth and therefore tasked with enforcement of these statutes; he may further choose to defend their constitutionality. *See* KRS 15.700; KRS 15.020; KRS 418.075. Our Supreme Court has explained:

The required showing for issuance of a[n] injunction is relaxed when an injunction is sought by a governmental entity to enforce its police powers. In such case, any alternative legal remedy is ignored and irreparable harm is presumed. Where the government is enforcing a statute designed to protect the public interest, it is not required to show irreparable harm to obtain injunctive relief; the statute’s enactment constitutes [the General Assembly’s] implied finding that violations will harm the public and ought, if necessary, be restrained.

Boone Creek Properties, LLC v. Lexington-Fayette Urb. Cty. Bd. of Adjustment, 442 S.W.3d 36, 40 (Ky. 2014) (citations omitted). “In situations such as this irreparable harm is presumed.” *Id.* at 41.

Second, although the Court recognizes that the constitutionality of the statutes has not been determined by the circuit court, which must have the first say on that issue, generally, “[i]n Kentucky, a statute carries with it the presumption of constitutionality[.]” *Caneyville Vol. Fire Dep’t v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009).

Third, one cannot discount the reality that any abortions performed in the interim period, in which the pending CR 65.07 motion and the issue of constitutionality of the statutes make their way through the courts, cannot be undone should Movant prevail on the merits in his defense of the statutes. The Court emphasizes, however, that it expresses no opinion whatsoever as to the merits of the underlying dispute or Movant's request for interlocutory relief under CR 65.07.

Finally, nothing in this Order shall be construed to limit medical providers' ability to act to protect maternal health in the Commonwealth under KRS 311.772(4)³; KRS 311.7705(2)(a) (abortion not prohibited, even where a detectable fetal heartbeat exists, where physician "who performs or induces the abortion . . . believes that a medical emergency exists that prevents compliance" with statute); and KRS 311.7706(2)(a) (detectable fetal heartbeat abortion prohibition not applicable "to a physician who performs a medical procedure that,

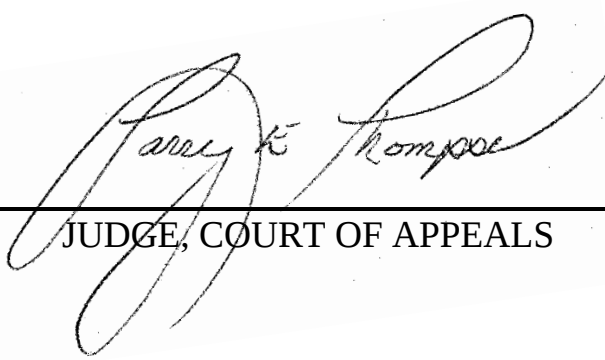
³ KRS 311.772(4) states that the following are not violations of the Human Life Protection Act:

- (a) For a licensed physician to perform a medical procedure necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman. However, the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of the unborn human being in a manner consistent with reasonable medical practice; or
- (b) Medical treatment provided to the mother by a licensed physician which results in the accidental or unintentional injury or death to the unborn human being.

in the physician's reasonable medical judgment, is designed or intended to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.'').

WHEREFORE, for the foregoing reasons, Movant's motion for emergency relief is GRANTED. The motion for interlocutory relief under CR 65.07 shall be assigned to a three-Judge panel of this Court following expiration of the response time provided in the Civil Rules.

ENTERED: 08/01/2022



JUDGE, COURT OF APPEALS