

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2022 CA 1042

JUNE MEDICAL SERVICES, LLC D/B/A HOPE MEDICAL GROUP FOR WOMEN,
KATHALEEN PITTMAN, MEDICAL STUDENTS FOR CHOICE, ON BEHALF OF ITSELF
AND ITS MEMBERS, AND CLARISSA HOFF, M.D.

VERSUS

JEFF LANDRY, IN HIS OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF LOUISIANA, AND COURTNEY N. PHILLIPS, IN
HER OFFICIAL CAPACITY AS SECRETARY OF THE
LOUISIANA DEPARTMENT OF HEALTH

Judgment Rendered: AUG 16 2023

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 720988

HONORABLE DONALD R. JOHNSON, JUDGE PRESIDING

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BEFORE: McCLENDON, HOLDRIDGE, AND GREENE, JJ.

McCleendon, J. concurs
Holdridge, J. concurs with reasons

GREENE, J.

This is an appeal of a district court judgment that granted a preliminary injunction restraining the State from enforcing criminal statutes regarding abortion. After review, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

At issue herein is the enforcement of La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8.¹ These statutes prohibit and restrict abortion. Each of these statutes contains trigger language, specifically, that they shall “become effective immediately upon . . . [a]ny decision of the Supreme Court of the United States which overrules . . . **Roe v. Wade**, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973).” That day came on June 24, 2022, when the United States Supreme Court handed down its decision in **Dobbs v. Jackson Women’s Health Organization**, 142 S.Ct. 2228, 2242, ___ U.S. ___, 213 L.Ed.2d 545 (2022), which overruled **Roe v. Wade**, finding that the U.S. Constitution makes no reference to abortion and that no such right was implicitly protected by any constitutional provision.

On June 27, 2022, three days after the **Dobbs** decision, June Medical Services, LLC d/b/a Hope Medical Group for Women, Kathaleen Pittman, Medical Students for Choice, on behalf of itself and its members, and Clarissa Hoff, M.D. (the plaintiffs) filed a petition in the Civil District Court for the Parish of Orleans, naming as defendants Jeff Landry, in his official capacity as Attorney General of Louisiana, and Courtney N. Phillips, in her official capacity as Secretary of the Louisiana Department of Health (collectively the State), asking for a temporary restraining order and preliminary and permanent injunction, restraining the State from implementing or enforcing La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8. The plaintiffs maintained that they would suffer irreparable harm if the temporary restraining order was not granted. On that same day, the Civil District Court granted

¹ The text of these statutes is provided in Appendix A.

the temporary restraining order, prohibiting the State from enforcing or implementing La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8, and setting the matter for hearing on July 8, 2022.

On July 1, 2022, the State filed an exception raising the objection of improper venue in the Civil District Court, requesting that the matter be transferred to the Nineteenth Judicial District Court. The plaintiffs filed an opposition to that exception. However, thereafter, on July 10, 2022, the plaintiffs filed a motion in the Nineteenth Judicial District Court requesting to immediately transfer the matter to that court and asking for an order temporarily restraining the State from enforcing La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8. The matter was transferred to the Nineteenth Judicial District Court on July 11, 2022.

On July 19, 2022, the Nineteenth Judicial District Court signed a judgment temporarily restraining the enforcement of La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8, which was to expire upon a ruling on the preliminary injunction, or after ten days, unless it was extended. On July 21, 2022, the Nineteenth Judicial District Court issued a preliminary injunction enjoining the enforcement of La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8 until trial on the plaintiffs' request for a permanent injunction.

The State filed a motion for a suspensive appeal. The Nineteenth Judicial District Court denied the motion for a suspensive appeal and granted a devolutive appeal. The State applied for supervisory writs to this Court. The writ was granted, with this Court finding:

The district court has granted a preliminary injunction “which may restrain the execution or enforcement” of enacted laws of the legislature of Louisiana, and any defendant or defendants or any person or persons affected thereby may suspensively appeal the judgment pursuant to La. R.S. 13:4431. Accordingly, the district court is ordered to grant relators' motion for suspensive appeal pursuant to La. R.S. 13:4331. See **Womack v. Louisiana Commission on Governmental Ethics**, 193 So.2d 777 (La. 1967); See also **Manuel v. State**, 95-2189 (La. 3/8/96), 692 So.2d 320.

Thereafter, the Nineteenth Judicial District Court granted a suspensive appeal.

ASSIGNMENTS OF ERROR

In its assignments of error, the State asserts that the Nineteenth Judicial District Court erred in granting the plaintiffs' application for preliminary injunction:

- 1) without requiring the plaintiffs to show irreparable injury and without properly considering whether the harm to the State and the public interest is greater than the harm caused by refraining from granting injunctive relief;
- 2) by finding that Louisiana's abortion statutes improperly delegate legislative power;
- 3) by finding Louisiana's abortion statutes are unconstitutionally vague;
- 4) by failing to find that the plaintiffs lack standing to bring their claim for injunction relief, in whole or in part;
- 5) by relying on the plaintiffs' and other witnesses' subjective affidavit testimony and other outside statements, and by failing to grant defendants' motion in limine to exclude such evidence;
- 6) by altering the status quo vis-à-vis La. R.S. 40:1061;
- 7) by entering a state-wide preliminary injunction that encompasses conduct within the "hard core" of the challenged statutes; and,
- 8) by failing to require the plaintiffs to post security.

DISCUSSION

Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury if the injunction does not issue and must show entitlement to the relief sought; this must be done by a prima facie showing that the party will prevail on the merits of the case. **Concerned Citizens for Proper Planning, LLC v. Parish of Tangipahoa**, 2004-0270 (La. App. 1 Cir. 3/24/05), 906 So.2d 660, 664.

The issuance of a preliminary injunction addresses itself to the sound discretion of the trial court and will not be disturbed on review unless a clear abuse of discretion has been shown. **Morris v. Trust Technologies, LLC**, 2018-0831 (La.

App. 1 Cir. 2/28/19), 274 So.3d 15, 19. Nevertheless, if a trial court's decision was based on an erroneous interpretation or application of law, rather than a valid exercise of discretion, such an incorrect decision is not entitled to deference. **Singleton v. East Baton Rouge Parish School Board**, 2022-0667 (La. App. 1 Cir. 9/16/22), 353 So.3d 164, 177.

As a general rule, the equity arm of civil courts is not empowered to prevent enforcement of criminal statutes by injunction. The authority to enforce criminal laws is vested in those tribunals created for that purpose. It is an authority to be exercised according to laws provided for the just administration of criminal proceedings. La. Const. art. I, IX, X; La. C.Cr.P. art. 2; **LaBauve v. Louisiana Wildlife and Fisheries Commission**, 289 So.2d 150, 151 (La. 1974).

Ever present as a basic precept of the judicial function is the elementary and fundamental proposition that the government of Louisiana is constituted as a tripartite system involving three coordinate branches or departments: the executive, legislative and judicial. See La. Const. art. II, §1. Each branch to subserve the ends for which it is instituted must be separate, free, and independent of the other. The judicial department, therefore, does not, except for most weighty or grave reasons, interfere in the administration of the executive or legislative branches. See La. Const. art. II, §2. **LaBauve**, 289 So.2d at 151.

In the case at bar, as in **LaBauve**, the judicial authority is sought to be invoked to deny the executive branch the right to appear in a court of justice to prosecute as a crime a violation of laws enacted by the legislature. The same threshold question is presented herein, as in **LaBauve**, not whether the laws are good or bad, constitutional or unconstitutional, but whether the executive or coordinate branch should be deprived of its inherent, constitutional and statutory right to demand the enforcement of these laws in the ordinary course of a criminal judicial proceeding. See **LaBauve**, 289 So.2d at 151-52.

In a proper exercise of judicial restraint and to limit the improper exercise of equity powers by the judiciary, the Louisiana Supreme Court has established three conditions, all of which must be fulfilled before equity powers will be invoked to restrain the enforcement of criminal statutes. The complaining party must establish: 1) the clear invasion of a property right; 2) threatened irreparable injury; and 3) the manifest unconstitutionality of the statute whose enforcement is sought to be enjoined. **LaBauve** 289 So.2d at 152.

It is well settled that a court may not declare a statute unconstitutional in the context of a summary proceeding such as a preliminary injunction hearing. **Barber v. Louisiana Workforce Commission**, 2015-1700 (La. 10/9/15), 176 So.3d 398 (per curiam). There is nothing in the record to suggest that the parties agreed to try the merits of the constitutionality issue at the hearing on the preliminary injunction. See Barber, 176 So.3d at 398-99; **Farmer's Seafood v. State ex rel Dept. of Public Safety**, 2010-1534 (La. 9/3/10), 44 So.3d 676, 678. As the prerequisite to show that the statutes in question were manifestly unconstitutional has not been satisfied, we find that the equity powers of the trial court were improperly invoked.

CONCLUSION

For the foregoing reasons, the July 21, 2022 district court judgment granting a preliminary injunction restraining the State from enforcing La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8 is reversed, and the matter is remanded. Costs of this appeal are assessed against the plaintiffs, June Medical Services, LLC d/b/a/ Hope Medical Group for Women, Kathaleen Pittman, Medical Students for Choice, on behalf of itself and its members, and Clarissa Hoff, M.D.

REVERSED AND REMANDED.

APPENDIX A

Louisiana Revised Statute 40:1061

A. The provisions of this Act shall become effective immediately upon, and to the extent permitted by, the occurrence of any of the following circumstances:

(1) Any decision of the Supreme Court of the United States which overrules, in whole or in part, **Roe v. Wade**, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit or limit abortion.

(2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit or limit abortion.

(3) A decision of the Supreme Court of the United States in the case of **Dobbs v. Jackson Women's Health Organization**, Docket No. 19-1392, which overrules, in whole or in part, **Roe v. Wade**, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit or limit abortion.

B. The provisions of this Act shall be effective relative to the appropriation of Medicaid funds, to the extent consistent with any executive order by the President of the United States, federal statute, appropriation rider, or federal regulation that sets forth the limited circumstances in which states must fund abortion to remain eligible to receive federal Medicaid funds pursuant to 42 U.S.C. 1396 et. seq.

C. No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.

D. Any person in violation of this Section shall be prosecuted pursuant to the effective provisions of R.S. 14:87.7, and shall be subject to the penalties provided in R.S. 40:1061.29.

E. Nothing in this Section may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure is sold, used, prescribed, or administered in accordance with manufacturer instructions.

F. It shall not be a violation of Subsection C of this Section 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 her unborn child in a manner consistent with reasonable medical practice.

G. Medical treatment provided to the mother by a licensed physician which results in the accidental or unintentional injury or death to the unborn child is not a violation of Subsection C of this Section.

H. Nothing in this Section may be construed to subject the pregnant mother upon whom any abortion is performed or attempted to any criminal conviction and penalty.

I. The terms as used in this Section have the same meaning as the definitions provided in R.S. 14:87.1.

J. This Section shall be known, and may be cited, as the Human Life Protection Act.

Louisiana Revised Statute 14:87.7

A. It shall be unlawful for a physician or other person to perform an abortion, with or without the consent of the pregnant female.

B. The terms used in this Section have the same meaning as the definitions provided in R.S. 14:87.1.

C. Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one year nor more than ten years and shall be fined not less than ten thousand dollars nor more than one hundred thousand dollars.

D. This Section does not apply to a pregnant female upon whom an abortion is committed or performed in violation of this Section, and the pregnant female shall not be held responsible for the criminal consequences of any violation of this Section.

E. This Section shall not apply to the sale, use, prescription, or administration of a contraceptive or an emergency contraceptive.

F. The provisions of this Section shall become effective immediately upon, and to the extent permitted by, the occurrence of any of the following circumstances:

(1) Any decision of the Supreme Court of the United States which overrules, in whole or in part, **Roe v. Wade**, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit or limit abortion.

(2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit or limit abortion.

(3) A decision of the Supreme Court of the United States in the case of **Dobbs v. Jackson Women's Health Organization**, Docket No. 19-1392, which overrules, in whole or in part, **Roe v. Wade**, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit or limit abortion.

Louisiana Revised Statute 14:87.8

A. It shall be unlawful for a physician or other person to perform a late term abortion, with or without the consent of the pregnant female.

B. Whoever commits the crime of late term abortion shall be imprisoned at hard labor for not less than one year nor more than fifteen years and shall be fined not less than twenty thousand dollars nor more than two hundred thousand dollars.

C. This Section does not apply to a pregnant female upon whom an abortion is committed or performed in violation of this Section, and the pregnant female shall not be held responsible for the criminal consequences of any violation of this Section.

D. This Section shall not apply to the sale, use, prescription, or administration of a contraceptive or an emergency contraceptive.

E. The provisions of this Section shall become effective immediately upon, and to the extent permitted by, the occurrence of any of the following circumstances:

(1) Any decision of the Supreme Court of the United States which overrules, in whole or in part, **Roe v. Wade**, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit, limit, or regulate abortion.

(2) Adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit or limit abortion.

(3) A decision of the Supreme Court of the United States in the case of **Dobbs v. Jackson Women's Health Organization**, Docket No. 19-1392, which overrules, in whole or in part, **Roe v. Wade**, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), thereby restoring to the state of Louisiana the authority to prohibit or limit abortion.

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CLARISSA HOFF, M.D.

VERSUS

JEFF LANDRY, IN HIS OFFICIAL CAPACITY AS ATTORNEY
GENERAL OF LOUISIANA, AND COURTNEY N. PHILLIPS, IN
HER OFFICIAL CAPACITY AS SECRETARY OF THE
LOUISIANA DEPARTMENT OF HEALTH

GA
HOLDRIDGE, J., concurring.

I concur with the result. I further write to clarify the proper procedure to be followed in a case where the constitutionality of a criminal statute is in question. In the present case, the petitioners sought injunctive relief prohibiting the State from enforcing criminal statutes, La. R.S. 40:1061, La. R.S. 14:87.7, and La. R.S. 14:87.8. After a hearing, the trial court granted a preliminary injunction that prohibited the State from enforcing the statutes. The State appealed. In accordance with La. R.S. 13:4331, this court converted the State's appeal of the granting of the preliminary injunction to a suspensive appeal. See Womack v. Louisiana Commission on Governmental Ethics, 193 So.2d 777 (La. 1967); see also Manuel v. State, 95-2189 (La. 3/8/96), 692 So.2d 320.

The granting of a suspensive appeal from a preliminary injunction order in accordance with La. R.S. 13:4331 or La. C.C.P. art. 3612(B) actually denies the

preliminary injunction. See Parker v. Senate of the State, 2015-0048 (La. App. 1 Cir. 9/21/15) 2015 WL 5547476 (unpublished) (even though the trial court granted the preliminary injunction, the suspension of the injunction by the trial court had the effect of a denial of injunctive relief). On appeal of the preliminary injunction in this case, the only issue to be considered was whether the moving party had met its burden of proving irreparable injury and that it was likely to prevail on the merits. See, e.g., General Motors Acceptance Corp. v. Daniels, 377 So.2d 346, 347 (La. 1979). The merits of the unconstitutionality of the statutes in question was not before the court. The constitutionality issue must be decided in an ordinary proceeding at the trial of the permanent injunction or an action for declaratory judgment. See Barber v. Louisiana Workforce Commission, 2015-1700 (La. 10/9/15), 176 So.3d 398 (*per curiam*); Farmer's Seafood Co., Inc. v. State ex rel. Dep't of Pub. Safety, 2010-1534 (La. 9/3/10), 44 So.3d 676, 678 (*per curiam*). Since there is nothing in the record to support the parties' agreement to try the constitutionality issue at the preliminary injunction hearing, the court erred in granting injunctive relief in halting the enforcement of a criminal statute. See LaBauve v. Louisiana Wildlife and Fisheries Commission, 289 So.2d 150, 151 (La. 1974); Farmer's Seafood Company, Inc., 44 So.3d at 678.

In cases where plaintiffs challenge the constitutionality of a criminal statute, the plaintiffs should set the matter for a full trial on the merits either in a permanent injunction action or an action for declaratory judgment. The only other remedy would be for the plaintiffs to violate the statutes and test the constitutionality of the criminal statutes at a motion to quash the criminal proceedings. See LaBauve, supra.

Furthermore, the trial court should NOT stay any further proceedings after the appeal from an order relating to a preliminary injunction until the appeal has been decided. See La. C.C.P. art. 3612(C). To do so would prohibit the plaintiffs from seeking a trial on the issue of the constitutionality of the statutes until the appeal of

the preliminary injunction is decided, and would further delay any possible permanent injunctive relief to halt the enforcement of the criminal statutes.