IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL BLACKARD, SHARON BLACKARD, and ASHLEY BLACKARD,

Plaintiffs,

vs.

MEMPHIS AREA MEDICAL CENTER FOR WOMEN, INC., JOHN DOE, and JANE DOE,

Defendants.

No. 98-2996 Ml/A

ORDER

This matter is before the Court on Plaintiffs' December 10, 1998 Motion to Strike Defenses, Defendant Memphis Area Medical Center for Women, Inc.'s (MAMCW) January 5, 1999 Motion to Dismiss the Plaintiffs Michael Blackard and Sharon Blackard, MAMCW's January 7, 1999 Motion to Dismiss, MAMCW's February 2, 1999 Motion for Summary Judgment, Defendant University of Tennessee Medical Group, Inc. (UTMG) and Dr. Fazel Manejwala's March 30, 1999 Motion to Dismiss Plaintiffs Michael Blackard and Sharon Blackard, UTMG and Dr. Manejwala's March 30, 1999 Motion for Summary Judgment, and UTMG and Dr. Manejwala's March 30, 1999 Motion to Dismiss.

Background.

This diversity suit arises from the performance of an abortion upon a minor without obtaining the consent of her parents or a judicial waiver. The now-adult minor and her parents seek damages

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against the individuals who assisted in the abortion procedure and their associated corporate entities for battery and tortious interference with family relations as set forth at Tennessee Code Annotated § 37-10-307.[1]

Plaintiff Ashley Blackard is the natural daughter of her legal guardians Michael and Sharon Blackard. All are residents of Mississippi.

In March 1998, Ashley, then seventeen years old, learned that she was pregnant. With the assistance of her boyfriend, Ashley contacted MAMCW and made an appointment for March 26, 1998. That day, she traveled to MAMCW in Memphis, Tennessee where Dr. Manejwala, a Tennessee resident, performed an abortion upon Ashley. Ashley's parents were not aware of her pregnancy or abortion at the time of the procedure, nor had Ashley sought a judicial waiver of their consent.

At the time of these events, UTMG was under contract with MAMCW to provide physicians to the clinic. Plaintiffs allege that Dr. Manejwala, a resident at the University of Tennessee, was working at MAMCW on March 26, 1998 pursuant to that contract.

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[1] "Failure to obtain consent pursuant to the requirements of this part is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions." TENN. CODE ANN. § 37-10-307 (1998).

The laws regulating the provision of abortions to minors have experienced a tortuous history in Tennessee. In 1979, the Tennessee legislature enacted a statute requiring parental notification, but not consent, before an abortion could be performed on a minor. 1979 Tenn. Pub. Acts Ch. 334. A Tennessee trial court soon held this law unconstitutional; Tennessee did not appeal its order. See Planned Parenthood of Nashville, Inc. v. Alexander, No. 79-843-II (Tenn. Ch. Ct. Oct. 24, 1979).

In 1988, the Tennessee legislature enacted a law requiring parental consent before a minor could be provided with an abortion. 1988 Tenn. Pub. Acts Ch. 929. A federal district court soon held this law unconstitutional after finding it impermissibly vague. See Planned Parenthood Assoc. of Nashville, Inc. v. McWherter, 716 F.Supp. 1064, 1069 (M.D. Tenn. 1989). While the appeal of the State of Tennessee was pending before the Court of Appeals for the Sixth Circuit, the Tennessee legislature enacted another law requiring parental notification before a minor could be given an abortion. See 1989 Tenn. Pub. Acts Ch. 591. Perceiving a possible conflict between the 1988 consent law and the 1989 notification law, the Court of Appeals for the Sixth Circuit certified a question to the Supreme Court of Tennessee. See Planned Parenthood Assoc. of Nashville, Inc. v. McWherter, 923 F.2d 474 (6th Cir. 1991). In answer to the question of the Sixth Circuit, the Supreme Court of Tennessee held that the 1989 notification law impliedly repealed the 1988 consent law. See Planned Parenthood Assoc. of

Nashville, Inc. v. McWherter, 817 S.W.2d 13, 16 (Tenn. 1991).

In 1995, the Tennessee legislature passed a law which purported to re-enact the 1988 consent law, with slight modifications not here relevant. 1995 Tenn. Pub. Acts Ch. 458 (the "Consent Act"). Memphis Planned Parenthood, Inc. then filed suit against the State of Tennessee in the Middle District of Tennessee to enjoin enforcement of the criminal provisions of the Consent Act. The Middle District issued a preliminary injunction in 1997, preventing Tennessee from bringing a prosecution under the Consent Act. Tennessee appealed and, because of changes in the procedures for obtaining a judicial waiver, the Court of Appeals for the Sixth Circuit vacated the injunction as moot and remanded the case to the Middle District for further consideration. See Memphis Planned Parenthood, Inc. v. Sundquist, 121 F.3d 708, 1997 WL 436566 (6th Cir. Aug. 1, 1997).

Upon remand, the Middle District again concluded that the Consent Act unconstitutionally burdened a minor's right to obtain an abortion, Memphis Planned Parenthood, Inc. v. Sundquist, 2 F.Supp.2d 997 (M.D. Tenn. 1997), and issued a preliminary injunction stating:

> It is FURTHER ORDERED that, pending further order of this Court, the defendants, their respective officers, agents, servants, employees, and attorneys and all other persons in active concert or participation with them, are hereby restrained and enjoined from enforcing Tenn. Code Ann. §§ 37-10-301 through 37-10-307, the Parental Consent for Abortions by Minors Act.

> This amended Order shall be effective nunc pro tunc August 26, 1997.

Memphis Planned Parenthood, Inc. v. Sundquist, No. 3:89-0520 (M.D. Tenn. Sep. 15, 1997)(emphasis in original). On May 5, 1999, the Court of Appeals for the Sixth Circuit reversed the Middle District's order and remanded the matter. See Memphis Planned Parenthood, Inc. v. Sundquist, - F.3d - , 1999 WL 26667 (6th Cir. May 5, 1999).

Discussion.

A. Effect of the Middle District's injunction.

Several of the motions pending before the Court raise the issue of whether the alleged reliance of the various defendants upon the preliminary injunction issued by the Middle District should control the outcome of this case. The Court finds that the preliminary injunction that was outstanding at the time of the events underlying this litigation has no legal relevance to the duties imposed by Tennessee law upon the parties to this action.

Federal Rule of Civil Procedure 65(d) states that "[e]very order granting an injunction ... is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." This rule "codifies the well-established principle that, in exercising its equitable powers, a

court 'cannot lawfully enjoin the world at large.'" New York v. Operation Rescue Nat'l, 80 F.3d 64, 70 (2d Cir. 1996)(quoting Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930)). See also Regal Knitwear Co. v. National Labor Relations Bd., 324 U.S. 9, 14 (1945)(noting that an injunction may not operate against an entity acting independently from the parties to a litigation); Additive Controls & Measurement Sys. v. Flowdata, Inc., 96 F.3d 1390, 1394 (Fed. Cir. 1996)("Courts do not write legislation for members of the public at large; they frame decrees and judgments binding on the parties before them.").

By its very terms, the 1997 injunction of the Middle District does not affect the rights of Plaintiffs. At issue in the ongoing litigation in the Middle District is the effect of the criminal provisions of the Consent Act, not the effect of possible civil remedies as sought by Plaintiffs in the matter sub judice. This Court cannot give an unwarranted breadth to the Middle District's injunctive order. See Zepeda v. United States Immigration and Naturalization Serv., 753 F.2d 719, 728 (9th Cir. 1983)(stating the "traditional rule that injunctive relief should be narrowly tailored to remedy the specific harms shown by plaintiffs, rather than to enjoin all possible breaches of the law" (quotations omitted)).

Defendants also contend that Tennessee represented the interests of Plaintiffs in the Middle District litigation and that

binding them to the terms of the 1997 injunction therefore works them no disservice. In support of this argument, MAMCW cites Craft v. Memphis Light, Gas and Water Div., 534 F.2d 684, 686 (6th Cir. 1976), for the proposition that "injunctive and declaratory relief against a state law, predicated on constitutional grounds, automatically accrues to the benefit of others situated similarly to the plaintiff." (MAMCW's Resp. to Pl.'s Mot. to Strike at 8-9.)

Craft, however, stands for no such point. In Craft, the Court of Appeals for the Sixth Circuit merely found no error in a district court's refusal to certify a class action by customers of a utility alleging due process violations. See id. That court noted that the district court need not certify a class of plaintiffs because the utility would be bound to conform its conduct to comply with an order entered by the court whether or not a class were certified. Id.

An analogous situation in this matter would occur if, while the 1997 injunction were valid, Tennessee sought to prosecute an abortion provider for violating the Consent Act. That defendant could rely for its defense on the injunction against Tennessee issued in the Middle District, regardless of its own involvement in that litigation. The Middle District, therefore, had no need to certify a class in order to prevent Tennessee from carrying on criminal prosecutions under the Consent Act while its injunction was in effect. This matter is very different from that presented

in Craft. Plaintiffs at bar, the Blackards, are not similarly situated to Tennessee - they seek relief through a civil remedy and allege very personal injuries. Therefore, the order enjoining the actions of people representing Tennessee cannot run against the Blackards, who act entirely separately from Tennessee. See Zepeda, 753 F.2d at 728.

MAMCW also asserts that "[w]hen a state is a party to litigation involving matters of general public interest, the state represents all citizens." (MAMCW's Resp. to Pl.'s Mot. to Strike at 9.) MAMCW's assumption that this suit raises only matters of general public interest is wrong, however. Plaintiffs do not seek relief because Defendants performed an abortion in Tennessee and that this tangential act has caused them some vague harm. On the contrary, Ashley seeks damages because an abortion was performed upon her without obtaining valid consent and she and her parents seek further relief because of the effect this battery has had upon their family relations. It would be an unconscionable result to find that Tennessee could adequately represent the very personal and important interests of Plaintiffs and that they are now precluded from presenting their own arguments and claims. The arguments and cases proffered by Defendants on this point are therefore unhelpful.

Accordingly, the Court GRANTS Plaintiffs' Motion to Strike Defenses on this point, DENIES MAMCW's Motion to Dismiss Based on

Injunction Prohibiting Enforcement of the Tennessee Statute, and DENIES UTMG and Dr. Manejwala's Motion to Dismiss Based on Injunction Prohibiting Enforcement of the Tennessee Statute.

B. Motions to Dismiss Plaintiffs Michael Blackard and Sharon Blackard.

Defendant MAMCW filed a motion to dismiss Plaintiffs Michael Blackard and Sharon Blackard from this matter on January 5, 1999. Defendants Dr. Manejwala and UTMG filed a substantially similar motion on March 30, 1999. Defendants note that, in the original complaint, Michael Blackard and Sharon Blackard sued as next friends and legal guardians of their then-minor daughter Ashley and that Ashley reached her majority on December 30, 1998. Defendants therefore assert that the presence of Michael Blackard and Sharon Blackard is now unnecessary.

On January 29, 1999, Plaintiffs filed an amended complaint with leave of the Court. In this complaint, Michael Blackard and Sharon Blackard each assert claims for interference with family relations against Defendants. They contend that they have directly suffered compensable injuries because of the acts of Defendants. Additionally, they have withdrawn in the amended complaint their claims asserted as next friends or guardians to Ashley. As the standing of Michael Blackard and Sharon Blackard to assert their current claims does not derive from their daughter's earlier status as a minor, the Court finds these motions moot and, therefore,

DENIES them.[2]

C. Revival of Consent Act.

Defendants argue that the attempt by the Tennessee legislature to re-enact the Consent Act was insufficient under the Tennessee Constitution because of a defective caption.

The Tennessee Constitution requires that "acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended." Tenn. Const. art. 2, § 17. When a caption fails to give proper notice to the legislators and the public of the content of an act, the courts of Tennessee have found that the act violates this provision of the Tennessee Constitution and refused to enforce the act. See, e.g., Tennessee Municipal League v. Thompson, 958 S.W.2d 333, 338 (Tenn. 1997); Armistead v. Karsch, 237 S.W.2d 960, 962 (Tenn. 1951).

The caption of Chapter 458 of the Tennessee General Assembly Public Acts of 1995, which enacted the Consent Act, stated its purpose as, "[a]n act to amend Tennessee Code Annotated, Section 37-10-303 and Section 39-15-202, relative to parental consent for abortions performed on minors." 1995 Tenn. Pub. Acts Ch. 458.

[2]As no party raised the issue in its motion to dismiss or for summary judgment, the Court expressly does not rule on whether Tennessee recognizes an action in tort for interference with family relations. See McGlothin v. Bristol Obstetrics, No. 03A01-9706-CV-00236, 1998 WL 65459, at *4-5 (Tenn. Ct. App. Feb. 11, 1998).

Within the act, however, the legislature declared its intention to "revive and place in full effect the provisions" of Tennessee's earlier Consent Act. 1995 Tenn. Pub. Acts Ch. 458, § 1.

In this matter, however, the Court need not determine whether the 1995 act violates the Tennessee Constitution. Even if a caption to an act is inadequate, Tennessee has consistently held that codification of that act remedies any deficiency in the caption. See Tennessee v. Chastain, 871 S.W.2d 661, 666 (Tenn. 1994)("The law in Tennessee is well-established that codification of a legislative enactment cures all defects in the caption of the bill from the effective date of the codification forward."); Harmon v. Angus R. Jessup Assocs., Inc., 619 S.W.2d 522, 523 (Tenn. 1981).

Here, the Consent Act was passed by the Tennessee legislature in June, 1995 and codified by act of the legislature in February, 1996. 1996 Tenn. Pub. Acts Ch. 554. The acts giving rise to this suit occurred in 1998, well after the codification of the Consent Act. Accordingly, the codification of the Consent Act cured any defects in the enactment of the bill before the occurrence of any of Defendants' allegedly tortious acts. The Court, therefore, DENIES Defendants' Motions for Summary Judgment on this point.

C. Constitutionality of the Consent Act.

Plaintiffs in their Motion to Strike Defenses and Defendants in their motions for summary judgment have raised the issue of the

constitutionality of Tennessee's Consent Act. As there is no question of fact material to resolution of this issue, the Court now resolves it, although it has arisen in several settings in the progress of this case.

The Court finds the recent decision of the Court of Appeals for the Sixth Circuit in Memphis Planned Parenthood, Inc. v. Sundquist, - F.3d - , 1999 WL 266677 (6th Cir. May 5, 1999), controlling on this point. In that matter, the Middle District of Tennessee had found the Consent Act unconstitutional because it unduly burdened a minor's right to have an abortion. The district court had found five provisions of the Consent Act problematic: 1) the twenty-four hour appeal period; 2) the suggested statement of mental capacity; 3) the venue restriction; 4) the de novo hearing by the circuit court; and 5) the suggested pre-petition physician consultation. See Memphis Planned Parenthood, Inc. v. Sundquist, 2 F.Supp.2d 997, 1001-1007 (M.D. Tenn. 1997).

The Sixth Circuit, however, reversed the district court's conclusions as to each of these issues and found the Consent Act constitutional. See Memphis Planned Parenthood, Inc. v. Sundquist, - F.3d - , 1999 WL 266677, at *4-8 (6th Cir. May 5, 1999). Although the Sixth Circuit's review of the constitutionality of the Consent Act arose in the context of an appeal from the Middle District's injunction order, its review of these legal issues was de novo. See id., 1999 WL 266677, at *2, n.1.

The issues and arguments raised by Defendants in their briefs addressing the constitutionality of the Consent Act are precisely those that have been considered and rejected by the Sixth Circuit. As there is no question under the law of this circuit that the Consent Act is constitutional, the Court DENIES Defendants' motions for summary judgment on this point and GRANTS Plaintiffs' Motion to Strike Defenses.

Conclusion.

In summary, the Court: 1) GRANTS Plaintiffs' Motion to Strike Defenses; 2) DENIES MAMCW's Motion to Dismiss the Plaintiffs Michael Blackard and Sharon Blackard, 3) DENIES MAMCW's Motion to Dismiss; 4) DENIES MAMCW's Motion for Summary Judgment; 5) DENIES UTMG and Dr. Manejwala's Motion to Dismiss Plaintiffs Michael Blackard and Sharon Blackard; 6) DENIES UTMG and Dr. Manejwala's Motion for Summary Judgment; and 7) DENIES UTMG and Dr. Manejwala's Motion to Dismiss.

ENTERED this 28 day of June, 1999.

JON P. McCALLA
UNITED STATES DISTRICT JUDGE