

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

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MICHAEL BLACKARD and SHARON )  
BLACKARD, as parents, )  
individuals, guardians, and )  
next friends to ASHLEY )  
BLACKARD, a minor, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
MEMPHIS AREA MEDICAL CENTER )  
FOR WOMEN, INC., et al. )  
 )  
Defendants. )

No. 98-2996 M1/A

ORDER DENYING MOTION FOR A NEW TRIAL

This case is before the Court on Plaintiff's Motion for a New Trial. The parties presented this case to a jury, and the jury found for Defendants. For the reasons stated below, the Motion for a New Trial is DENIED.

Plaintiff's Motion argues that the Court erred by refusing to apply the tort liability provision of the Tennessee Parental Consent to Abortion by Minors Act, Tenn. Code Ann. § 37-10-307, to this case. Specifically, Plaintiff argues that the Court should have instructed the jury that Defendants' failure to insure that Plaintiff received either parental or judicial consent prior to obtaining an abortion is prima facie evidence of battery.

The Tennessee Parental Consent to Abortions by Minors Act requires that minors who wish to have an abortion must first obtain

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the consent of either a parent or a juvenile judge. See Tenn. Code Ann. §37-10-303. The Act outlines the requirements of a judicial bypass procedure, and authorizes the Tennessee Supreme Court to promulgate rules necessary to implement the bypass procedure for those minors who desire to obtain consent from a juvenile judge. See Tenn. Code Ann. § 37-10-304. The tort liability section that is the subject of this motion provides:

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. The law of this state shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this part. Nothing in this part shall be construed to limit the common law rights of parents.

Tenn. Code Ann. § 37-10-307.

It is not disputed that Defendant Fazel Manejwala performed an abortion upon Plaintiff Ashley Blackard without ensuring that she obtain consent to the procedure from a parent or from the juvenile court. However, at the time that the abortion was performed, the Parental Consent to Abortions for Minors Act was preliminarily enjoined from enforcement by an Order of Judge Nixon of the Middle District of Tennessee.<sup>1</sup> In a previous Order of this Court, the Court held that:

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<sup>1</sup> The parties disputed whether Judge Nixon's injunction was in fact broad enough in scope to enjoin the juvenile judges of Tennessee from implementing an abortion bypass procedure. In the Order entered November 19, 1999, however, this Court found that the juvenile courts of Tennessee were in fact enjoined from implementing the judicial bypass procedure contemplated by the Consent Act. See Order entered November 19, 1999 at 8-12.

It is clear to the Court, from the record now presented, that Judge Nixon's injunction effectively blocked enforcement of the judicial bypass procedure contemplated by the Consent Act, and that no such bypass procedure existed at the time of Ashley Blackard's abortion. For this reason, the Defendants cannot be charged with violating § 37-10-307 for failing to comply with Tennessee's abortion judicial bypass procedure. See, e.g., Eubanks v. Brown, 604 F.Supp. 141, 149 (W.D.Ky. 1984) (refusing to apply to defendants an abortion tort liability statute that had previously been found unconstitutional).

Plaintiff, however, argues that the opposite result is compelled by the reasoning contained in Justice Stevens' concurrence in Edgar v. Mite Corp., 457 U.S. 624. Edgar involved an Illinois statute imposing certain requirements (such as prior notification to the Secretary of State and the target company) prior to a stock tender offer intended as a "take-over" of the target company. The District Court entered a preliminary injunction against enforcement of the statute, finding a likelihood that the statute violates the Commerce Clause. Shortly thereafter, Mite Corp. published a tender offer for all outstanding shares of a publicly traded corporation. See Edgar, 457 U.S. at 626-630 (discussing the facts of the case). The District Court's injunction was appealed, and both the Court of Appeals and the Supreme Court upheld the findings of the District Court. In deciding the issue of mootness, both appellate courts addressed Mite's contention that the preliminary injunction was a complete defense to civil or criminal liability under the statute. The Supreme Court declined to decide the issue, however, holding that the issue was not ripe for consideration until the State of Illinois initiated a criminal

action against Mite. Id. at 630.

Justice Stevens, however, in a well-reasoned concurrence, addressed the merits of the issue and found that the preliminary injunction was not a complete defense to criminal or civil prosecution. Justice Stevens found that "federal judges have no power to grant such blanket dispensation from the requirements of valid legislative enactments." Edgar, 457 U.S. at 649. He further wrote: "[a]n individual who is imminently threatened with prosecution for conduct that he believes is constitutionally protected should not be forced to act at his peril. One purpose of the federal declaratory judgment statute is to permit such an individual to test the legality of a state statute before engaging in conduct that is prohibited by its terms." Id. at 651.

Apart from the fact that Justice Stevens' views were not endorsed by a majority of the Court, his reasoning in Edgar is not controlling for two reasons. The first reason is that the Illinois statute made the underlying activity (engaging in corporate take-overs) more difficult, but not impossible to perform without violating the statute. While the preliminary injunction was in effect, individuals who desired to tender a take-over offer without risking violation of the statute needed only to comply with the statute's requirements by registering with the appropriate state entities, giving the required notice, etc.

In the case *sub judice*, however, Judge Nixon's preliminary injunction made it not just difficult, but impossible for some minors (including Ashley Blackard) to receive abortions without

violating the statute. As this Court previously found, the effect of Judge Nixon's Order was to prevent the implementation of the Tennessee judicial bypass procedure. Yet, the Consent Act required minors with unconsenting parents to obtain judicial consent prior to obtaining an abortion. This consent was simply impossible to obtain due to the absence of a bypass procedure. In such circumstances, minors with unconsenting parents were required to violate the statute in order to exercise their fundamental right to an abortion.

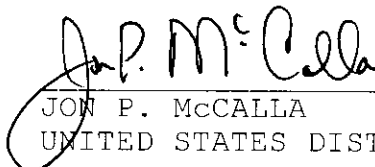
A second reason that the Edgar case is not analogous is that reliance upon a declaratory judgment action is not constitutionally sufficient recourse in the context of abortion. The right to an abortion is constitutionally protected. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869 (1992). States may impose certain restrictions upon the right to an abortion, but those restrictions may not impose an "undue burden" on a woman's right to receive an abortion. Id. at 874. States may constitutionally require minors to obtain a parent's consent to an abortion, but only if the state also provides a judicial bypass procedure by which the minor may obtain judicial consent to an abortion. See Bellotti v. Baird, 443 U.S. 622, 643 (1979). To be constitutional, such a bypass procedure must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." Bellotti, 443 U.S. at 644. It cannot be reasonably disputed that requiring a minor to file a declaratory judgment action in federal court in order to

obtain an abortion would not meet the constitutional requirements of expediency or confidentiality. See, e.g., Planned Parenthood of Southern Arizona v. Lawall, 180 F.3d 1022, 1027-1030 (9<sup>th</sup> Cir. 1999) (holding that a bypass scheme which did not contain specific deadlines within which the court must rule on the consent request is an "undue burden" on the right to an abortion).

Under Bellotti, the constitutionality of Tennessee's parental consent requirement hinged upon the actual implementation of a judicial bypass procedure. The mere theoretical provision of a bypass procedure in an enjoined statute is not sufficient. Even though Judge Nixon's preliminary injunction was ultimately overturned, the fact remains that his injunction had the practical effect of preventing the bypass procedure from becoming a reality during the time that the injunction was in effect. Until such time as the judicial bypass procedure was actually implemented, Tennessee could not constitutionally require minors to obtain parental consent to an abortion, and could not impose civil liability upon persons who failed to comply with the Consent Act.

The Court's refusal to instruct the jury according to § 37-10-307 was not in error. The Motion for a New Trial is DENIED.

ENTERED this 10 day of February, 2000.

  
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JON P. McCALLA  
UNITED STATES DISTRICT JUDGE