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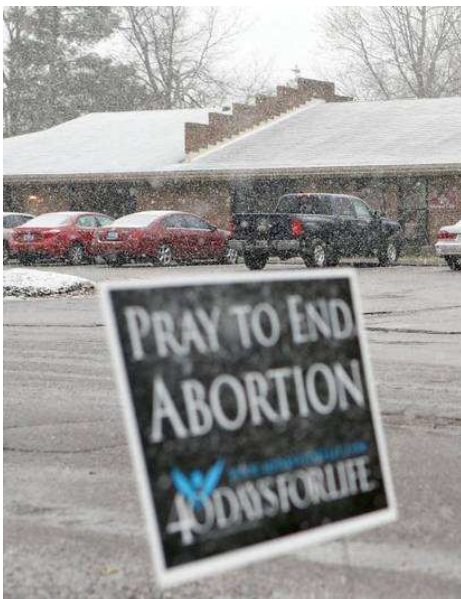
Appellate court grants Bevin's request to close Lexington abortion clinic

HIGHLIGHTS

Kentucky Court of Appeals ruling reverses Fayette Circuit Court ruling on temporary injunction

Bevin says ruling is 'important victory for rule of law in Kentucky'

Attorney for clinic expresses disappointment for Eastern Kentucky women seeking abortion



Sign across the street from the EMW Women's Clinic, 161 Burt Rd. in Lexington, Ky., Thursday, March 3, 2016.

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BY JACK BRAMMER

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FRANKFORT — The Kentucky Court of Appeals reversed a Fayette Circuit Court ruling Wednesday and granted the Bevin administration's request to temporarily close a

Lexington abortion clinic.

The appellate court said EMW Women's Clinic on Burt Road is "temporarily enjoined from operating an abortion facility" until it receives a license from the Cabinet for Health and Family Services or until a final judgment is rendered in the case.



Gov. Matt Bevin. Bill Estep - bestep@herald-leader.com

The appellate court in its unanimous decision said it agreed with Gov. Matt Bevin's argument "that the circuit court's findings and conclusions are clearly erroneous."

"As the cabinet points out, this case is not about a woman's right to an abortion," the court said in its 24-page order. "The cabinet is not seeking to prevent women from obtaining abortions. It is seeking, however, to enforce its right to regulate the manner in which abortions are performed in this commonwealth."

At issue is whether the clinic may operate as an unlicensed doctor's office that performs abortions, as it has for many years, or whether it is a full abortion clinic that requires state licensing.

Bevin called the ruling an "important victory for the rule of law in Kentucky."

"We are pleased by the court's recognition that an unlicensed abortion clinic is prohibited from performing abortions," he said in a statement. "This has been our administration's stance from the beginning. This is the right and necessary ruling to ensure that the health and safety of women are protected."

Scott White, an attorney for the clinic, said “we respect the judges who decided the case, but believe the analysis is incorrect.”

He said the clinic is assessing whether to let the case continue in Fayette Circuit Court or to make an immediate appeal to the Kentucky Supreme Court. Meanwhile, White said he will advise the clinic to stop offering abortions.

That means women in Eastern Kentucky now “can exercise their constitutional right to terminate a first trimester pregnancy” in only one Kentucky location — Louisville, he said.

“We think it is disingenuous for the court to agree with the administration and say this case is not about a woman’s right to an abortion ... it most certainly is, and it was made so by Gov. Bevin,” White said.

In March, Fayette Circuit Judge Ernesto Scorsone denied the state’s request for a temporary injunction to close the clinic.

The state claimed the lower court misinterpreted and misapplied relevant state laws and relied on unwarranted assumptions and facts that were not in the court record.

Scorsone said the state cabinet failed to present adequate evidence during a hearing that it eventually would prevail in the lawsuit or that allowing the clinic to remain open as the lawsuit proceeds would cause “irreparable injury.”

Scorsone also said closing the clinic would be against the public interest because it is the only physician’s office that routinely provides abortion services in the eastern half of Kentucky.

The state sued the clinic in early March, alleging that it lacked a required state license. The clinic stopped performing abortions March 9 pending a judge’s ruling, but resumed offering the procedure after Scorsone’s ruling.

The state has said the clinic performed more than 400 abortions in 2015.

At the circuit court hearing, clinic owner Ernest

Marshall said the clinic used to do more regular gynecological health care, but its primary work has been providing abortions since his partner died a few years ago.

On Feb. 17, state inspectors visited the clinic, where they reported that employees told them the clinic only performed abortions. Inspectors also found what they said were dirty conditions and expired medicine.

Marshall, a retired obstetrician-gynecologist in good standing with the Kentucky Board of Medical Licensure, also owns EMW Women's Surgical Center in Louisville. It is the only fully licensed abortion provider in Kentucky.

The Lexington clinic does only first-term abortions using surgical procedures and medical inducement.

Under Kentucky law, physicians' offices that perform a variety of services do not have to be licensed separately to perform abortions. Abortion clinics also are required to have agreements with a local hospital and an ambulance service. The EMW clinic now has both, though the state said the clinic did not have an agreement with an ambulance service at the time of its inspection.

Steve Pitt, Bevin's general counsel, told Scorsone it was clear the clinic performed only abortions and thus must be licensed by the state. But Scorsone said evidence indicated the clinic operated as a private doctor's office, despite the fact that abortions are done there.

The state appellate court said on Wednesday that "it is apparent to us from reviewing the circuit court's opinion that it did not develop a proper understanding of the legal issues."

"The circuit court's opinion devotes a good deal of attention to a number of issues that are extraneous under the current statutory scheme such as the type of abortion performed," the ruling said. "The circuit court's legal misunderstandings resulted in an incorrect determination that the cabinet failed to present a substantial issue on which it had a substantial

possibility of success.”

The appellate court ruling was written by Allison Jones of Newport. Other members of the three-member panel were Sara Combs of Stanton and Debra Lambert of Somerset.

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