

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PLANNED PARENTHOOD OF
KANSAS AND MID-MISSOURI,
et al.,

Docket No. 16-2284-JAR
Kansas City, Kansas
Date: 05/17/2016

Plaintiffs,

v.

SUSAN MOSIER, Secretary
Kansas Department of Health
and Environment, in her
official capacity,

Defendant.

.....

TRANSCRIPT OF
TELEPHONE STATUS CONFERENCE
BEFORE THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Mr. Arthur A. Benson, II
Arthur Benson & Associates
4006 Central
Kansas City, Missouri 64111

Ms. Diana O. Salgado
Planned Parenthood Federation
of America
1110 Vermont Avenue, NW
Suite 300
Washington, DC 20005

Mr. Douglas N. Ghertner
Slagle, Bernard & Gorman, P.C.
4600 Madison Avenue
Suite 600
Kansas City, Missouri 64112

Mr. Robert V. Eye
Robert V. Eye Law Office, LLC
4840 Bob Billings Parkway
Suite 1010
Lawrence, Kansas 66049

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:
(Continued)

For the Defendant: Ms. Sarah E. Warner
Mr. Shon D. Qualseth
Mr. Stephen R. McAllister
Thompson, Ramsdell, Qualseth
& Warner, P.A.
333 West Ninth Street
Suite B
Lawrence, Kansas 66044-2803

Mr. Darian P. Dernovish
Attorney at Law
Kansas Department of Health
and Environment
1000 Southwest Jackson
Suite 560
Topeka, Kansas 66612-1371

Court Reporter: Kelli Stewart, RPR, CRR, RMR
Official Court Reporter
259 U.S. Courthouse
500 State Avenue
Kansas City, Kansas 66101

1 (2:02 p.m., proceedings commenced).

2 THE COURT: All right. We'll call this
3 case. It is on the record. Planned Parenthood of
4 Kansas and Mid-Missouri versus Susan Mosier, Secretary,
5 Kansas Department of Health. Case No. 16-2284. And for
6 plaintiff; Mr. Benson, Ms. Salgado, Mr. Ghertner, Mr.
7 Eye. And for defendants; Ms. Warner, Mr. Qualseth, Mr.
8 McAllister and Mr. Dernovish.

9 And this has been noticed as a status
10 conference. At least one member of the press asked if
11 they could listen. It is a public hearing, so I don't
12 know, there may be one or more members of the press
13 and/or public on the line as well, but obviously they
14 don't enter an appearance.

15 So I-- there's no motion pending in front of
16 me obviously, other than the underlying motion for
17 preliminary injunction. And as you know, defendant's
18 response brief was due today at noon. Plaintiff's reply
19 due May 24th at noon and we've scheduled this for a
20 preliminary hearing for next Tuesday afternoon,
21 May 25th. And this, of course, was something-- these
22 deadlines we established on May 10th at the joint
23 request of the parties.

24 Yesterday late in the day, Mr. Qualseth
25 contacted chambers by phone to advise that he and his

1 co-counsel would be withdrawing from the case and that
2 they understood that the response brief deadline was
3 today, but that they would not be filing a response
4 brief. And at that point at least Mr. Qualseth was not
5 sure if substitute counsel would be entering an
6 appearance today.

7 And then today Mr. Qualseth and Ms. Warner
8 and Mr. Dernovish called chambers and asked that this
9 matter be set for a status conference today. So that
10 brings us to where we are at now. I don't know who
11 wants to speak on behalf of the defendant to let us know
12 what's going on.

13 MR. DERNOVISH: Your Honor, this is Darian
14 Dernovish, if I may speak, if that would be all right.

15 THE COURT: Yes.

16 MR. DERNOVISH: At this point I-- I would
17 obviously be entering my appearance at this time,
18 substituting counsel, I would be replacing Mr. Qualseth
19 and Ms. Warner on the case and I'll be entering my
20 appearance.

21 We called earlier before noon today to try
22 to inform the parties and you were in hearing, I
23 appreciate you setting this this afternoon. So I will
24 be entering my appearance, I'm in the process of doing
25 that, substituting counsel for Mr. Qualseth and Ms.

1 Warner. I'll be in the process of getting the paperwork
2 from them, the files from them and be handling the case
3 at this point forward, so as far as-- that goes as far
4 as the entry of appearance.

5 As far as the continuance of these,
6 obviously the defendant would be requesting a
7 continuance of all deadlines. We would request a 30-day
8 continuance. The 30 days would also apply to the
9 deadlines-- the termination deadlines that were set
10 forth. They were continued to June 7th. We would move
11 those to July 7th. We'd ask everything be moved 30 days
12 so counsel, myself, can get caught up.

13 I would advise the Court that my chief
14 counsel, Brant Laue, is in the hospital with an
15 appendicitis. He had a stomachache over the weekend and
16 it got worse so he went in the hospital. So I've had
17 very limited contact with him. But I would be
18 requesting a continuance for 30 days. And again, none
19 of the parties would be prejudiced because we would be
20 extending the deadlines so I could have an opportunity
21 to review the file, the information, get it back from
22 counsel, and to go forward.

23 THE COURT: And, Mr. McAllister, are you
24 still going to be in the case?

25 MR. McALLISTER: No, I'm not, Your Honor. I

1 would be-- our law firm, Thompson, Ramsdell & Qualseth
2 would be withdrawing.

3 THE COURT: Okay. All right. Ms. Salgado,
4 do you want to address this?

5 MS. SALGADO: Yes, Your Honor. Thank you so
6 much. If I may, Your Honor, I mean, I-- I'd like to
7 walk you through the chain of events that have occurred
8 over the last couple of months. You know, plaintiffs
9 received the initial notice of intent to terminate on
10 March 10th. And shortly thereafter, we were told that
11 all of the communication with the agency had to be with
12 Mr. Dernovish or another attorney at KDHE. And we
13 communicated with those attorneys for weeks to try to
14 resolve this informally, but we were unable to do that.

15 And ultimately, Your Honor, as stated in
16 our-- in the pleadings and in the motion for preliminary
17 injunction, you know, counsel, including myself, Mr.
18 Ghertner, Mr. Eye, we represented the plaintiffs at the
19 informal administrative review on April 29th, at which
20 Mr. Dernovish was present.

21 And at that time we also requested that if
22 the agency proceeded with the termination, that those
23 terminations be effective 30 days after the issuance of
24 the termination letter, given the critical services that
25 were at stake here. Obviously the agency refused and--

1 refused and, instead, issued the final termination
2 letters on May 3rd, which will be effective on May 10th.

3 And then on May 4th, plaintiffs filed suit.
4 And that afternoon we e-mailed copies of the complaint,
5 the motion, to several attorneys, including Mr.
6 Dernovich and the Chief Deputy Attorney General.

7 We advised them that plaintiffs would be
8 filing the motion for the TRO and the PI, the
9 preliminary injunction, and we requested that they
10 advise-- or I requested in that e-mail that they advise
11 me with whom I should communicate. And Mr. Chaney
12 e-mailed back and said that we should communicate with
13 him and Mr. Qualseth and Ms. Warner. And we did that,
14 Your Honor.

15 And then, you know, we received a notice on,
16 you know, May 4th that those terminations could be
17 extended, the effective date of the terminations would
18 be extended until May 24th. And then on May 9th, we
19 were told they would be extended to June 7th. And then
20 yesterday late afternoon, we were told they would not--
21 you know, that the defendant would not be filing a
22 response. And then everyone understood that this motion
23 would be uncontested and understood that the Court, you
24 know, could enter a preliminary injunction at that time
25 because the motion would be uncontested. And we were

1 told that the Attorney General's Office was aware of
2 this.

3 And then today, Your Honor, one hour, you
4 know, before the noon deadline, we get a call that there
5 will be, you know, a new counsel and that there's a
6 request to make-- to postpone, you know, the preliminary
7 injunction deadlines by 30 days. There's been no
8 explanation for the reason for this last-minute change
9 of counsel. You know, we-- we understand that the
10 decision for this change of counsel-- I mean, I think we
11 were told that it was made on Friday.

12 And as of this moment, you know, nearly two
13 hours later there has been-- I mean, I understand Mr.
14 Dernovish is now entering an entry of appearance. But,
15 you know, at this time defendant remains represented by
16 Mr. Qualseth and Ms. Warner and Mr. McAllister and
17 they-- the defendant has not contested the plaintiffs'
18 preliminary injunction motion by the deadline that all
19 the parties agreed upon.

20 So, Your Honor, for this reason, you know,
21 we believe that the Court, you know, pursuant to Local
22 Federal Rule 7.4(b) and because plaintiffs have
23 demonstrated that based on, you know, the arguments in
24 the memorandum of law and the accompanying exhibits that
25 were filed in support of our motion, we respectfully

1 request that the Court enter the preliminary injunction
2 order.

3 There's clearly no harm to the state if this
4 Court enters the order since the agency has already been
5 willing to postpone the effective date of the
6 termination, I think up to almost 30 days at this point,
7 is willing to extend those termination dates another 30
8 days.

9 You know, but for the provider plaintiffs,
10 Your Honor, you know, there is this looming cloud over
11 them. They don't know whether they're going to be
12 terminated. They're left with the uncertainty of the
13 status-- of their status as a Medicaid provider, not
14 being protected by a court order. So, you know, given--
15 given the-- the defendant remains represented by counsel
16 and there has been no response filed to the motion by
17 the deadline that all the parties agreed upon, you know,
18 we request that the Court enter the preliminary
19 injunction order.

20 THE COURT: Ms. Salgado, who represented to
21 you that-- at least as of yesterday that the defendants
22 were not going to contest entry of the preliminary
23 injunction on a default basis?

24 MS. SALGADO: We were told by Mr. Qualseth
25 and Ms. Warner that there would be no response filed and

1 that they understood that that meant that the Court--
2 that the Court could enter a preliminary injunction
3 order because it would be uncontested.

4 THE COURT: All right. So they didn't--
5 just a minute. They didn't stipulate to entry of that,
6 but they-- they told you they understood the
7 consequences could be that, entry of--

8 MS. SALGADO: That's correct.

9 THE COURT: All right. Understood. All
10 right. So Ms. Warner.

11 MS. WARNER: Yeah, just one quick
12 clarification on that, Your Honor. Mr. Qualseth and I
13 spoke to Ms. Salgado and Mr. Eye yesterday. And what we
14 informed them is that we had-- as of Friday, that it had
15 been determined that our firm was to withdraw and that
16 there had not been outside counsel retained yet as of
17 that time. We informed them that we would not, so our
18 firm would not be filing a response.

19 We also said, you know, if KDHE were to hire
20 substitute counsel, we had no-- we didn't know whether
21 that counsel would be filing a response, but our firm
22 would not be filing a response. And that's how we left
23 it.

24 THE COURT: All right. I understand. So
25 with Mr. Dernovish - I know I'm butchering your name -

1 Mr. Dernovish's entry of appearance, the Thompson firm
2 is-- is moving to withdraw or noticing withdrawal; is
3 that correct?

4 MS. WARNER: That is correct. Once Mr.
5 Dernovish has entered his appearance, we will be
6 noticing our withdrawal.

7 THE COURT: All right. Mr. Dernovish, it
8 sounds like you're not new to this case, at least you
9 were involved in the administrative proceeding. Why
10 should I grant an extension of time for a hearing? And
11 you're not asking for an extension of time to file a
12 responsive brief either; is that correct?

13 MR. DERNOVISH: Judge, I'm asking for an
14 extension, yes, to-- of 30 days for everything, to file
15 the brief, 30 days for the deadlines. And since we
16 would continue the deadlines 30 days, there wouldn't be
17 any harm to the plaintiff.

18 THE COURT: And why should I-- given that
19 this was, you know, negotiated-- a negotiated extension,
20 negotiated briefing and a hearing, why should I grant
21 that if you're-- I mean, you're not-- KDHE is not new to
22 this case. Why do you need 30 days?

23 MR. DERNOVISH: Judge, the-- the previous
24 administrative hearing was a show cause. It was not
25 adversarial. It was nothing that I took part in, I was

1 just present as a spectator just to watch it. It was an
2 open hearing. I didn't take part in it, I didn't argue,
3 I didn't prepare anything. I just was there to watch it
4 while the-- the counsel at the time, Bob Eye, Doug
5 Ghertner, and Diane Salgado presented evidence why the
6 termination shouldn't take place. Consequently, that
7 hearing was also continued 30 days at the request of
8 those parties, and KDHE did not object to that
9 continuance.

10 Once they requested a 30-day letter--
11 30-day-- the termination be effective 30 days, it's--
12 the normal process is five days. That was sent out. At
13 which point when the defense-- they contacted us, the
14 AG's office then reached out to Mr. Qualseth and Ms.
15 Warner's firm to represent them. At that point, I mean,
16 as a government attorney, I was not involved. I was
17 just more the liaison, like, "Here's the case."

18 Once-- now that they're withdrawing and I
19 will be taking the case, I will need to physically go to
20 Lawrence and get the files that they had and review the
21 documentation and prepare a response, which I-- I have
22 not-- I don't have all the documentation, I don't have
23 it. As KDHE is a government agency and we are the
24 defendant in the case, more times than not, the case
25 is-- I should say the great majority of the time the

1 case is farmed out to the Attorney General's Office, at
2 which they point the handle the litigation.

3 In this particular circumstance, counsel is
4 withdrawing that's been retained to handle this case, I
5 will be substituting. So basically this is a new case
6 for me as respect to-- with respect to the litigation.
7 So that's why I would respectfully ask for the
8 continuance.

9 THE COURT: So you're-- the state of Kansas
10 is not intending to hire outside counsel to replace the
11 Thompson firm, they're going to handle it in-house now?

12 MR. DERNOVISH: Judge, I honestly-- I don't
13 know. At this point I'm-- I've had to enter my
14 appearance. My boss is in the hospital and my-- my
15 contact with him is sporadic because of the
16 appendicitis. So I wanted to make-- get my entry of
17 appearance. And at some point we may retain outside
18 counsel prior to then. I can't speak to that, Judge. I
19 have to speak to my client about that. I don't know if
20 they would want me to continue to handle the case. I
21 know they want me to do it-- I enter my appearance today
22 and handle this hearing.

23 THE COURT: Well, what I don't want to have
24 happen is I grant an extension and then the state
25 decides they want to hire another law firm and then

1 they're back asking for more extensions.

2 MR. DERNOVISH: Yeah, I-- I understand,
3 Judge.

4 THE COURT: Let me broach this-- this avenue
5 with you all. What do you anticipate in terms of
6 discovery in this case? If we were to try to expedite
7 this to be heard on the merits and enter an injunction
8 until that time and maybe hear it on the merits this
9 fall, would that be possible? Ms. Salgado?

10 MS. SALGADO: Your Honor, you know, we-- we
11 thought you might ask that question, and we, you know,
12 briefly discussed that prior to getting on this phone.
13 I mean, I think-- I mean, I would want to have the
14 opportunity to consult with my client, but I believe
15 that we would be-- that that would be fine with us, with
16 the plaintiffs, at least the plaintiffs that I
17 represent. Mr. Eye may want to speak on behalf of the
18 individual providers.

19 THE COURT: Mr. Eye.

20 MR. EYE: Thank you, Your Honor. Your
21 Honor, I think we could-- we can work with what you
22 propose.

23 THE COURT: Mr.--

24 MS. SALGADO: I guess, Your Honor, if I may
25 just jump in one more time. You know, I think we-- did

1 you say that we would-- this would be expedited with a
2 hearing in the fall?

3 THE COURT: Yes. And my fall-- well, the--
4 the entire summer and fall is very booked, so I'm
5 looking at just sort of the logistics of how to do this.
6 But I would think we-- and I don't-- you know, I don't
7 know how much time we'd be talking, a day, several days,
8 but we would have a block of time the last week in
9 September to actually have a trial on the merits.

10 Beyond that, it would probably have to go to
11 the last week in November right after Thanksgiving to
12 have, you know, a multiple-day block of time, but those
13 are some options. Mr. Dernovish?

14 MR. DERNOVISH: Yes, Judge.

15 THE COURT: What's your--

16 MR. DERNOVISH: Well, I mean, speaking to--
17 could we be ready in the fall? Yes. I mean, but
18 obviously the state would still request a continuance of
19 today for the 30 days obviously.

20 THE COURT: No, no, what I'm asking is
21 collapse the preliminary-- I mean, enter an injunction
22 that carries us to a hearing on the merits. And this is
23 not something that's unique to this case. In cases that
24 involve, you know, primarily legal issues, I often
25 suggest to the parties that it might be more efficient

1 and less costly, et cetera, to have a hearing on the
2 merits. Not wait a couple of years and act like it's a
3 normal civil case with two years of discovery, but to
4 expedite a trial on the merits and forego a preliminary
5 injunction. Enter an injunction that carries us until
6 the time of the trial on the merits. So, you know,
7 forget the briefing deadlines and all that, we would
8 schedule different briefing deadlines, but what we would
9 be talking about is a trial on the merits at the end of
10 September.

11 MR. DERNOVISH: Judge, well, without-- you
12 know, kind of what Ms. Salgado said, without speaking to
13 my client, my client instructed me that we do not-- we
14 are obviously opposed to the entrance of the injunction
15 at this time. As far as the date for-- expediting the
16 date for the fall, I don't see why that couldn't be
17 worked with, but we would-- we would object or oppose
18 the entering of the injunction at this time.

19 THE COURT: Well, there's-- there's really
20 only two options. The option is that you consent to an
21 injunction pending a hearing on the merits. And if
22 you're not willing to do that, then we're going to need
23 to have a preliminary injunction hearing. And my time
24 is really committed in terms of having-- we have -- as
25 you know, we have a judicial vacancy in this district

1 and very, very busy with criminal trials that have
2 speedy trial considerations. So it's very hard.

3 So I'm inclined to proceed with-- here's the
4 options: Proceed with the hearing on the 25th, grant
5 the state maybe an extra couple of days to file a brief,
6 if they choose to. If they don't choose to, that's
7 fine, we can still have the hearing on the 25th. And I
8 will get a decision out before the-- the law becomes
9 effective on June 7th.

10 A different option would be to have the
11 hearing on June 28th and give the state a little bit
12 more response time that way. So that's a date that's
13 available, June 28th. Not the entire day, but most of
14 the day. And then I also have the afternoon of June 7th
15 open. Again, would buy you just a few days to file a
16 response brief. So those are the options.

17 Ms. Salgado, I take it that you object to
18 any of them. But of these potential dates, June 7th for
19 a hearing, or June 28th, is there one that works better
20 for you?

21 MS. SALGADO: June-- no, I don't-- I don't
22 have any restrictions on either of those. I mean, June
23 7th is a little bit better for me.

24 THE COURT: All right. Mr. Eye.

25 MR. EYE: Your Honor, June 7 is a much

1 better date for me. I actually-- I've got a trial set
2 in Judge Melgren's court that begins on the 21st and it
3 actually got moved over to the first part of the
4 following week of the 27th to finish up. So if I could
5 avoid kind of getting double booked on that, I would
6 appreciate it. So I think the 7th is probably the
7 better-- better date.

8 THE COURT: All right. Well, I'm going to
9 defer to plaintiff since they are ready to go and
10 defendants are not. But if we have a hearing on the
11 afternoon of June 7th, then that would mean, Mr.
12 Dernovish, I could give you until a week from today to
13 file a response brief, if you choose to. That would be
14 May 24th. And then how much-- wait a minute, just a
15 minute. We had--

16 (The Court and law clerk conferred).

17 THE COURT: All right. So what I could do
18 is make the plaintiff's response brief due on June 6th
19 and your-- that would be plaintiff's reply brief. But
20 your response brief would be due on May 31st, Mr.
21 Dernovish, so it essentially gives you two weeks.

22 MR. DERNOVISH: Okay. Okay.

23 THE COURT: So why don't we just plan on
24 that. Response brief due May 31st, reply brief due
25 June 6th, PI hearing June 7th. And the law cannot go

1 effective, I need time to-- to decide this after the
2 hearing obviously. So since you're willing to go 30
3 days out to July 7th, I would get a decision out before
4 July 7th.

5 MR. DERNOVISH: Very good, Judge. And this
6 is Darian Dernovish. So just to be clear; we'll
7 obviously get-- the deadline will be continued to July
8 7th for the termination, to let all parties know.

9 THE COURT: Correct.

10 MR. DERNOVISH: And I have a-- the state's
11 response due May 31st, the-- sorry, yeah, the
12 defendant's response due May 31st. The plaintiff's
13 response to that June 5th, and then the-- the hearing on
14 that on the 7th; is that correct?

15 THE COURT: Right. Plaintiff's reply
16 June 6th, hearing June 7th. And we'll set it for 1:00
17 on June 7th. So we'll have the whole afternoon. And I
18 assume-- I mean, before you had told us two hours, I
19 assume that won't change, even with change of counsel,
20 but we'll get it done that afternoon.

21 MS. SALGADO: Yes, Your Honor. We're not--
22 this is Diana Salgado on behalf of the plaintiffs. We
23 are not anticipating an evidentiary hearing.

24 THE COURT: Okay. That's good, because I
25 start a jury trial on the 8th, so we're going to need to

1 be finished on the 7th.

2 Okay. So we'll send out a little scheduling
3 order that has these revised dates in it and we'll look
4 forward to seeing you at 1:00 here in Kansas City on
5 July-- or I'm sorry, on June 7th at 1:00. All right?

6 MR. DERNOVISH: Thank you, Your Honor.

7 MR. EYE: Thank you, Your Honor.

8 THE COURT: All right.

9 MS. SALGADO: Thank you.

10 THE COURT: Thank you all. We'll
11 disconnect.

12 (2:24 p.m., proceedings recessed).

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Kelli Stewart, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 20 pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED September 15, 2016.

/s/ Kelli Stewart

Kelli Stewart, CSR, RPR, CCR, RMR