

Ohio high court rules against Toledo abortion clinic

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Volunteer clinic escorts Kristen Robideaux, left, and Laurel Hanson, stand outside the Capital Care Network abortion clinic, 1160 West Sylvania Ave.

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COLUMBUS — The Ohio Supreme Court on Tuesday upheld the state's order to end surgical abortions at northwest Ohio's last abortion clinic, while ProMedica officials said they're re-examining their longstanding policy of staying out of the contentious issue.

The court upheld the Department of Health's position that Capital Care Network's agreement with the University of Michigan Health Center in Ann Arbor some 50 miles away does not satisfy the state's legal requirement that it have an emergency patient transfer agreement in place with a local hospital.

Its 5-2 decision reverses prior rulings by Lucas County Common Pleas Court and the Sixth District Court of Appeals that had sided with the abortion clinic. The high court noted that Capital Care had been without a written transfer agreement for five months before reaching a deal with UMHC.

ProMedica has previously refused to sign an agreement, but issued a statement saying that it is re-examining its position. A transfer agreement is required for Capital Care to legally perform surgical abortions.

"At this point, ProMedica has not changed its position; obviously we're considering it," spokesman Tedra White said. "We feel like this Ohio Supreme Court decision warrants a review of the issue, but we have not changed our position [at this time]."

A statement from the health system earlier in the day read, in part: "We understand the urgency of this issue and will be expeditious in our review."

Activists have been pushing ProMedica to sign an agreement with Capital Care for months, NARAL Pro-Choice Ohio Executive Director Kellie Copeland said, and that campaign is not going to end anytime soon.

"I know ProMedica and St. Luke's would prefer to remain neutral on abortion, and I am appalled that Governor Kasich, and now the Supreme Court of Ohio, has put them in this position," Ms. Copeland said. "However, ProMedica or St. Luke's must either sign a transfer agreement with Capital Care Network or admit they are a part of Kasich's quiet strategy to eliminate abortion access in Ohio. In the interest of women's health, they must sign a transfer agreement with Capital Care Network."

St. Luke's has not been approached recently by any abortion provider seeking a transfer agreement, hospital spokesman Jean Gillen said, and any such agreement would need to be vetted by the hospital's board.

Local anti-abortion groups were pleased with the ruling, which, as the law currently stands, eliminates surgical abortion access in Toledo.

"We are delighted that the court decided to rule on the law. They didn't rule on peripheral stuff to obscure the real issue," said Ed Sitter, executive director of Foundation for Life Northwest Ohio.

Justice Terrence O'Donnell, writing for the majority, said Capital Care owner Terrie Hubbard admitted Capital Care lacked a written transfer agreement with a hospital between August 1, 2013, and January 20, 2014. She also testified that, although a helicopter could be used to transfer patients 52 miles to the Ann Arbor hospital, the clinic had no contract with an air-ambulance provider to ensure that one would be available when needed, Justice O'Donnell wrote.

"Even if one were available, she admitted it could take an hour for it to reach her facility before flying another 15 to 20 minutes to Ann Arbor," he wrote.

Jennifer Branch, the Cincinnati-based attorney representing the clinic, said she is still evaluating a set of "creative" next steps. One alternative is to have some group of individual doctors with admitting privileges at a local non-public hospital sign an agreement with Capital Care, a workaround that the Ohio Department of Health has previously allowed.

"Maybe we will get some local doctors to step forward," she said. "I don't think any hospital in Toledo will enter into any agreement."

The clinic will remain open, she said, as it can still provide abortions through medication, though that option is not available past 70 days of pregnancy.

"It's a pretty narrow window," she said.

In 2016, 774 Lucas County residents had abortions, which made up the majority of the 1,144 total abortions performed in the county. Of the 1,144 performed, 898 were surgical abortions.

Capital Care did not comment on the decision when reached by phone.

When asked when or if the department of health planned to enforce their order, a spokesman responded: "No comment, period."

Over the last few years, the number of abortion clinics in Ohio has dropped from 16 to eight. Three are in the Cleveland-Akron area, two in Columbus, and one each in Toledo, Dayton, and Cincinnati. There are other abortion clinics in Detroit and Ann Arbor.

The administrative rule that the court upheld when it came to Capital Care's closing order was enacted in 1996. Capital Care had an agreement with the University of Toledo Medical Center, the former Medical College of Ohio hospital, but the hospital notified the clinic in 2013 that it would not be renewed.

The majority in the Supreme Court decision found that it was not necessary to jump to questions of whether the General Assembly acted constitutionally in cementing a prior administrative rule into state law because the clinic had already violated the administrative rule.

The clinic struggled to find another willing to take its place, particularly after the state cemented the department rule into state law and added the requirement that the agreement be with a "local" hospital. The state also prohibited publicly funded hospitals from participating.

Eventually, Capital Care reached its agreement with UHMC, but the department determined that a hospital 52 miles away could not qualify as “local.” Later, the General Assembly specifically defined “local” as being within 30 miles.

Joining Justice O’Donnell in the majority were Sharon Kennedy, Pat Fischer, Pat DeWine, and Judith French. Chief Justice Maureen O’Connor and recently resigned Justice William O’Neill dissented.

The chief justice said she would have found that the UHMC agreement complied with the state’s requirement and would have gone on to find that lawmakers acted unconstitutionally by stuffing the restrictions into the massive state budget.

She also would have determined that the restriction placed an undue restriction on a woman’s right to an abortion.

“[Former department director Dr. Ted] Wymyslo admitted that when his own private practice experienced an emergency, the office would call 911 to transport the patient to the emergency room,” Chief Justice O’Connor wrote.

“He stated that in a life-threatening situation, emergency services would take a patient to the nearest hospital, which would be obligated to take care of the patient,” she wrote.

The chief justice also found that the law unconstitutionally delegates state authority to third-party doctors and hospitals that can refuse transfer agreements to clinics.

In a separate case filed by another clinic, Pre-Term Cleveland, the court found that the clinic did not have standing to challenge the emergency transfer law or restrictions on abortion enacted in recent years through the budget process.

The clinic had not shown that it “suffered or is threatened with direct and concrete injury in manner or degree different from that suffered by general public,” the court found.

Two complaints had been filed seeking Justice Kennedy’s recusal from this case because she had spoken at Greater Toledo Right to Life’s annual breakfast legislative briefing fund-raiser. The complaints were dismissed as the justice insisted she could decide the case objectively.

Last week an ethics complaint was filed by the high court’s Office of Disciplinary Counsel against Justice DeWine, questioning his sitting on cases in which the office of his father, Attorney General Mike DeWine, is involved as the state’s attorney. That complaint is still pending.

Justice DeWine has insisted he may consider cases involving his father’s office as long as his father is not personally arguing.

Although the decision was not released until Tuesday, these cases were decided before then-Justice O’Neill resigned from the court on Jan. 26 to run for governor.

Blade staff writer Lauren Lindstrom contributed to this report.

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