

FILED

JUL 22 2015

HEATHER L. SMITH
CLERK OF APPELLATE COURTS

**IN THE COURT OF APPEALS
OF THE STATE OF KANSAS**

Case Caption:

Hodes & Nauser, MDs, P.A.;
Herbert C. Hodes, M.D.;
and Traci Lynn Nauser, M.D.,

Plaintiffs/Appellees,

v.

Derek Schmidt, in his official capacity as
Attorney General of the State of Kansas;
and Stephen M. Howe, in his official
capacity as District Attorney for Johnson
County,

Defendants/Appellants,

County Appealed From: Shawnee

District Court Case No.: 2015-CV-490

Proceeding Under Chapter: 60

Parties Filing Appeal: Derek Schmidt, in
his official capacity as Attorney General of
the State of Kansas; and Stephen M.
Howe, in his official capacity as District
Attorney for Johnson County

Parties Who Will Appear as Appellees:
Hodes & Nauser, MDs, P.A.; Herbert C.
Hodes, M.D.; and Traci Lynn Nauser, M.D.



DOCKETING STATEMENT – CIVIL

Civil Classification: Constitutional Law.

2. Proceedings in the District Court:

a. Trial Judge from whose decision this appeal is taken: _____
Hon. Larry D. Hendricks.

b. Other judges who have signed orders or conducted hearings: None.

c. Was this case disposed of in the district court by:

- _____ Jury trial
- _____ Bench trial
- _____ Summary Judgment
- _____ Dismissal
- X Other (Temporary Injunction: See K.S.A. 60-2102(a)(2).)

d. Length of trial: Not applicable.

e. Court reporters and/or transcriptionists who have reported or transcribed
any or all of the record for the case on appeal: _____
Tracy E. Woodward, CCR

f. Entities NOT listed in the case caption who are parties or who have a
direct involvement in the case on appeal: None.

15-114153-A1

- g. Attorneys who have represented a party in the district court whose name does NOT appear on the certificate of service attached to this docketing statement: None.

3. Jurisdiction:

- a. Date journal entry or judgment form filed: June 30, 2015.
- b. Is the order appealed from a final order, *i.e.*, does it dispose of the action as to all claims by all parties?
- No. The appealed order is an Order Granting Temporary Injunction. See K.S.A. 60-2102(a)(2); see also *Smith v. Kansas City*, 167 Kan. 684, Syl. ¶ 5, 208 P.2d 233 (1949) ("An order granting or refusing a temporary injunction pending final hearing is appealable ..."); *Hayward v. State Corp. Comm'n*, 151 Kan. 1008, Syl. ¶ 2, 101 P.2d 1041 (1940) (stay order in that case "was tantamount to a 'temporary injunction' and hence was an 'appealable order'").
- c. If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment in accordance with K.S.A. 60-254(b)? No.
- d. Date any post-trial motion filed: Not applicable.
- e. Date disposition of any post-trial motion filed: Not applicable.
- f. Date notice of appeal filed in district court: July 1, 2015.
- g. Other relevant dates necessary to establish this court's jurisdiction to hear the appeal: None.
- h. Statutory authority for appeal: K.S.A. 60-2102(a)(2).
- i. Are there any proceedings in any other court or administrative agency, state or federal, which might impact this case or this court having jurisdiction?

The same legal question presented here (in addition to various different claims) is also raised in two other pending cases in Shawnee County District Court: *Hodes & Nausser, MDs, P.A. et al. v. Robert Moser, M.D., et al.*, Case No. 2011-CV-1298 (Division 7); and *Hodes & Nausser, MDs, P.A. et al. v. Derek Schmidt, et al.*, Case No. 2013-CV-705 (Division 1). Those cases, brought by the same plaintiffs here,

involve challenges to different statutes and regulatory frameworks adopted at different times, but they raise the question of whether the Kansas Constitution provides a right to abortion independent and distinct from the federal Constitution.

4. Constitutional Challenges to Statutes or Ordinance:

Was any statute or ordinance found to be unconstitutional by the trial court? Yes.

If "yes", what statute or ordinance? S.B. 95 (Kan 2015) (L. 2015, ch. 22).

5. Related Cases/Prior Appeals:

a. Is there any case now pending or about to be filed in the Kansas Appellate Courts which:

(1) Arises from substantially the same case or controversy? No.

(2) Involves an issue that is substantially the same, similar or related to an issue in this appeal? No.*

*But see response to ¶3(i). There are two cases in Shawnee County District Court that present similar questions to the one raised in this appeal.

b. Has there been any prior appeal involving this case or controversy? No.

6. Brief statement, without argument, of the material facts:

The Kansas Unborn Child Protection from Dismemberment Abortion Act ("the Act") was adopted in 2015 and concerns "dismemberment abortions." Specifically, the Act defines "dismemberment abortion" as:

with the purpose of causing the death of an unborn child, knowingly dismembering a living unborn child and extracting such unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors or similar instruments that, through the convergence of two rigid levers, slice, crush or grasp a portion of the unborn child's body in order to cut or rip it off.

S.B. 95, § 2(b)(1) (Kan. 2015).

The Act prohibits this abortion method—when performed while the unborn child is still alive—except in instances to preserve the life of the pregnant woman, or if the continuance of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the woman. S.B. 95, § 3(a). The Act does not prohibit the dismemberment method when the child already is deceased, or when a physician induces the death of the child by other means

before dismembering the parts of the fetus and removing them from the woman's uterus.

The dismemberment abortion method is commonly referred to in the medical context as a dilation-and-evacuation ("D & E") abortion. To comply with the Act, plaintiffs are required either to end the child's life through one of various alternative, more humane methods before performing the dismembering procedure or to perform a medication-induction abortion.

The Act passed both chambers of the legislature by significant margins: 31-9 in the Senate and 98-26 in the House. (Senate Journal, 29th day, at 141 (Feb. 20, 2015); House Journal, 49th day, at 547 (Mar. 25, 2015).) The Act was signed by the Governor on April 7, 2015, and was scheduled to go into effect on July 1. One Kansas senator, joined by 10 others, explained that he voted in favor of the Act because "To destroy an unborn child by employing the barbaric and immoral practice of dismemberment is deplorable." (Explanation of Vote, Senate Journal, 29th day, at 141 (Feb. 20, 2015).) Senators also described dismemberment abortion as "a brutal and inhumane procedure." (Explanation of Vote, Senate Journal, 29th day, at 141 (Feb. 20, 2015).)

The plaintiffs challenged the Act in Shawnee County District Court, asserting several facial challenges based entirely on Kansas law—not under the federal jurisprudence under *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Gonzales v. Carhart*, 550 U.S. 124 (2007). The plaintiffs also sought a temporary injunction based entirely on Kansas law, even though no Kansas court had ever found that Kansas has an independent right to abortion under state law.

During a hearing on June 25, 2015, the district court, Hon. Larry Hendricks, granted a temporary injunction enjoining any enforcement of the Act during the pendency of this case. In particular, Judge Hendricks found—for the first time in Kansas history—that Sections 1 and 2 of the Kansas Constitution Bill of Rights include an independent, "fundamental right to abortion," and that this right mirrors the federal right described in *Casey* and its progeny. Judge Hendricks then ordered a temporary injunction, ruling that the United States Supreme Court's decision in *Gonzales* established a bright-line rule against any restriction on D&E abortions.

These rulings were memorialized in a written Order, filed June 30, 2015. Defendants filed a notice of appeal under K.S.A. 60-2102(a)(2) on July 1, 2015.

7. Concise statement of the issues proposed to be raised:

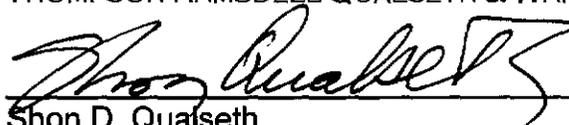
- a. In analyzing whether an alleged right is protected under the Kansas Constitution, the Kansas Supreme Court has directed courts to consider the constitution's language and the circumstances surrounding the relevant provision's enactment. When Sections 1 and 2 of the Kansas Constitution were adopted in 1859, and indeed until the U.S. Supreme

Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), abortion was illegal in Kansas. The Kansas Constitution contains *no* reference to abortion, and the Kansas Supreme Court has never recognized a state-law abortion right. Did the district court err in concluding that Sections 1 and 2 of the Kansas Constitution Bill of Rights includes a state-law right to abortion?

- b. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the U.S. Supreme Court held that a State could prohibit a particular abortion procedure (to further the legitimate interest in promoting human dignity and respect for life) when alternative procedures existed. Here, the Kansas Legislature only prohibited *one* abortion *method* while a number of safe alternative methods remain available. Did the district court misinterpret *Gonzales* when it held that federal law establishes a bright-line rule against a State legislature prohibiting dismemberment abortions?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by electronic mail on the 22nd day of July, 2015, addressed to:

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