



COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION __
CASE NO. _____

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES

PLAINTIFF,

v.

EUBANKS & MARSHALL OF LEXINGTON,
P.S.C., d/b/a EMW WOMEN'S CLINIC

DEFENDANT.

Serve via Certified Mail:
Ernest Marshall, M.D.
Registered Agent
Eubanks & Marshall of Lexington, P.S.C.,
d/b/a EMW Women's Clinic
136 W. Market Street
Louisville, KY 40202

COMPLAINT FOR INJUNCTIVE RELIEF AND STATUTORY FINES

Plaintiff Commonwealth of Kentucky, Cabinet for Health and Family Services, hereby comes, by and through counsel, for its Complaint against the Defendant, Eubanks & Marshall of Lexington, P.S.C., d/b/a EMW Women's Clinic, and states as follows:

Introduction

Kentucky law very clearly states that an abortion facility must first be licensed before it can perform abortions. Nevertheless, the Defendant operates—and has operated for some time—an unlicensed abortion clinic in Lexington.

A recent inspection of the Defendant's Lexington facility uncovered that the facility exists solely to perform abortions. Therefore, it does not qualify for the licensure exemption provided to private physicians' offices. It is an abortion facility, and as such, the law requires that it be licensed.

The licensure requirements for abortion facilities exist for the purpose of protecting the health and safety of the women who receive abortions at such facilities. Among these requirements are transfer agreements, which provide a contractual relationship and procedures on which patients can be transferred to a hospital in the event that an emergency occurs during an abortion. Kentucky law requires abortion facilities to have transfer agreements with both a hospital and an ambulance service that can transport patients to the hospital. The Defendant has a transfer agreement with a hospital, but not with an ambulance service. Its only plan is to call “911” in the event of an emergency. This does not comply with Kentucky law and jeopardizes the safety and lives of the Defendant’s patients.

Kentucky law also requires that abortion facilities not maintain expired medication, and that the facilities be kept clean. The Defendant’s facility in Lexington fails these requirements. At the time of the most recent inspection—the first inspection by the Cabinet since 2006—the facility maintained a significant quantity of expired medication, and the facility was unsanitary. Again, the facility falls below the standards required by Kentucky law.

In the interest of enforcing Kentucky law and protecting the health and safety of women who receive services at the Defendant’s Lexington abortion facility, this Court should impose statutory penalties upon the Defendant and enjoin the Defendant from performing abortions at that facility until such time as it is appropriately licensed.

Parties

1. Plaintiff Commonwealth of Kentucky, Cabinet for Health and Family Services (the “Cabinet”) is a state agency that has authority to enforce through legal actions the provisions of KRS Chapter 216B, including the laws of the Commonwealth relative to abortion facilities.

2. Defendant Eubanks & Marshall of Lexington, P.S.C., d/b/a EMW Women's Clinic ("EMW" or "Clinic"), is a professional service corporation existing under the laws of the Commonwealth of Kentucky and having its principal place of business at 161 Burt Road, Lexington, KY 40504, where it operates an unlicensed abortion facility.

Jurisdiction and Venue

3. Jurisdiction is proper in this Court pursuant to KRS 23A.010 because the Plaintiff seeks injunctive relief and fines in excess of the jurisdictional minimum for this Court.

4. Venue is proper in this Court pursuant to KRS 452.405 and KRS 216B.990(6) because the violations that form the basis for this action seeking the imposition of a fine occurred in Fayette County, Kentucky.

Facts

A. EMW operates an unlicensed abortion facility.

5. EMW does not have a license to operate an abortion facility.

6. On or about February 15, 2016, the Cabinet received an anonymous complaint that EMW "failed to provide services other than abortions" and was performing these services without a license.

7. EMW is not a "private physician office," but an "abortion facility," as the term is defined under Kentucky law. Elizabeth Richards and Laurie Heckel, two Cabinet surveyors from the Office of the Inspector General, visited the facility on February 17, 2016. Per an interview with Medical Assistant Rachina Miles, the facility does not provide any care other than abortions. A subsequent interview with Clinic Director Dona Wells and Clinic owner Dr. Ernest Marshall revealed that the facility is an abortion clinic and does not provide any other services or

procedures. Labwork, ultrasounds, and pelvic exams are only performed in conjunction with the abortion procedure.

8. EMW's facility in Lexington had not been inspected by the Cabinet since 2006.

9. According to KRS 216B.010, the policy of Kentucky regarding health facilities is as follows: "[Kentucky's] General Assembly finds that the licensure of health facilities and health services is a means to insure that the citizens off this Commonwealth will have safe, adequate, and efficient medical care; . . ."

10. KRS 216B.105 states that "[u]nless otherwise provided in this chapter [KRS Chapter 216B] no person shall operate any health facility in this Commonwealth without first obtaining a license issued by the Cabinet."

11. Because the EMW facility does not provide care other than abortions, it is an "abortion facility" that is subject to the Commonwealth's licensure requirements and does not fit within the licensure exemption for private physician offices.

12. KRS 216B.020 states that private offices and clinics of physicians, dentists, and other practitioners of the healing arts do not need a license to perform abortions. However, the EMW facility does not fit any of these categories because it does not provide care other than abortions. Therefore, it is an "abortion facility" rather than private physician office.

13. Abortion facilities are health facilities for which a license is required. KRS 216B.0431; KRS 216B.990.

14. As defined in KRS 216B.015, an "abortion facility" means "any place in which an abortion is performed."

15. According to Merriam-Webster Medical Dictionary, “abortion” is defined as “[t]he termination of pregnancy, accompanied by, resulting in, or closely followed by the death of the embryo or fetus.”

16. KRS 311.720(1) defines “abortion” as “the use of any means whatsoever to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death.”

17. EMW’s operation of an abortion facility without a license is unlawful.

B. EMW operates its unlicensed abortion facility without the essential transfer agreements.

18. “Transfer Agreements” are contractual agreements between health facilities, such as abortion facilities, and licensed hospitals and ambulance services that contractually bind the transferee hospital and ambulance service to accept patients of the transferor abortion facility in the event of complications and emergencies that occur as part of an abortion procedure. Such transfer agreements are required by law in order to safeguard and protect the health, safety, and lives of women upon whom abortion are performed.

19. Pursuant to KRS 216B.0435 and 902 KAR 20:360 abortion facilities must file with the Cabinet transfer agreements with a licensed acute-care hospital and a licensed ambulance service. In that regard, KRS 216B.0435 requires that:

- (1) Each abortion facility shall enter into a written agreement with a licensed acute-care hospital capable of treating patients with unforeseen complications related to an abortion facility procedure by which agreement the hospital agrees to accept and treat these patients.
- (2) If unforeseen complications arise prior to or during an abortion facility procedure, the patient shall be transferred to the licensed acute-care hospital with which the abortion facility has a written agreement as provided under subsection (1) of this section or to the hospital selected by the patient, if the patient so chooses.
- (3) Each abortion facility shall enter into a written agreement with a licensed local ambulance service for the transport of any

emergency patient within the scope of subsection (1) of this section to the licensed acute-care hospital.

- (4) The written agreements of an abortion facility with an acute-care hospital and with a local ambulance service shall be filed by the abortion facility with the cabinet.

20. The risk of complications resulting in the need for hospital emergency care for women on whom abortions are performed is not insubstantial. Having legally binding transfer agreements in place is an absolute condition precedent to, and requirement for, being able to legally perform abortions in Kentucky. Failure to have those agreements in place puts the women on whom abortions are performed at extreme risk in the event of complications and emergencies during the abortion operations.

21. Any woman on whom surgery is performed at an abortion facility that does not have the requisite transfer agreements in place is subject to life-threatening health and safety risks.

22. EMW does not have a transfer agreement with a licensed ambulance service.

23. EMW has knowingly, intentionally, fraudulently, deceitfully, with unlawful design, willfully, and with deliberate misrepresentation, or by careless, negligent, or incautious disregard for Kentucky law, operated an abortion facility without an ambulance service transfer agreement.

C. EMW performs abortion in an unsafe and filthy environment.

24. During their visit to EMW, the Cabinet surveyors noted several unsafe and unsanitary conditions.

25. First, observation of the procedure room revealed a procedure table with clear 2” tape covering the bottom portion of the table. Under the clear tape revealed multiple cuts and

open areas to the cover of the table. The tape did not provide a smooth surface, which would inhibit cleaning of the surface and breed bacteria.

26. Second, the procedure room had multiple expired medications, or medications that had no labels or expiration dates. For example, a 60 ml vial of Normal Saline had an expiration date of 10/30/1997, and a 60 ml bottle of Potassium hydroxide 10% (KOH) solution likewise presented an expiration date of 10/30/1997. Additionally, a cabinet contained Misoprostol tablets (100 mcg) in an open bottle without a label, but with an expiration date of 01/2016. An unopened bottle of Misoprostol tablets (100 mcg) also had an expiration date of 01/2016. And a cylinder Emergency Drug kit in the cabinet contained six items: 50 ml syringes of 7.5% Sodium Bicarb, one 50 ml syringe of 50% Dextrose, one 10 ml syringe of 10% Calcium Chloride, two 10 ml syringes of Epinephrine 1:10,000 solution, one 10 ml syringe of 1 mg Atropine, and one 10 ml syringe of 100 mg Lidocaine. The cylinder canister was sealed with the expiration date scratched off. The cylinder packaging appeared to be aged.

27. The surveyors also discovered numerous unsanitary conditions. On the shelf above the sink were numerous plastic bags of individually packaged cures. The bags as well as the shelf were covered in dust, dirt, and grime. The portable oxygen tank had an accumulation of dust on the tank and the gauge as well.

28. Observation of the area for cleaning instruments revealed similarly filthy conditions. The surface of the cabinets and shelves had dust, dirt, and/or grime. On the wall beside the autoclave machine was a sign for instructions on cleaning, care, and use of the machine. The sign stated that the product manufacturer recommended weekly cleaning. However, a pink sticky note stated that the machine was cleaned on "2/13/15; 5/29/15 and 10/9/15." There was no evidence that the machine had been cleaned since October, 2015.

Count I – Injunctive Relief

29. The Cabinet adopts, reiterates, and re-alleges the allegations in the foregoing paragraphs as if fully set forth herein.

30. EMW is in violation of the Kentucky statutes governing the operation of abortion facilities, namely KRS 216B.105, KRS 216B.0435, and KRS 216B.990.

31. The Cabinet and the citizens of the Commonwealth are suffering irreparable harm as a result of the foregoing violations, and will continue to suffer such harm if EMW is not enjoined from operating its abortion facility without a license.

32. The Cabinet has no adequate remedy at law for the foregoing violations.

33. The equities weigh in favor of permanently enjoining EMW from operating its abortion facility without a license, and the public interest will be furthered by such an injunction.

Count II – Statutory Fines

34. The Cabinet adopts, reiterates, and re-alleges the allegations in the foregoing paragraphs as if fully set forth herein.

35. KRS 216B.990(1) provides:

(1) Any person who, in willful violation of this chapter, operates a health facility or abortion facility without first obtaining a license or continues to operate a health facility or abortion facility after a final decision suspending or revoking a license shall be fined not less than five hundred dollars (\$500) nor more than ten thousand dollars (\$10,000) for each violation.

36. KRS 216B.990(6) provides:

(6) Any person or entity establishing, managing, or operating an abortion facility or conducting the business of an abortion facility which otherwise violates any provision of this chapter or any administrative regulation promulgated thereunder regarding abortion facilities shall be subject to revocation or suspension of the license of the abortion facility. In addition, any violation of any provision of this chapter regarding abortion facilities or any administrative regulation related thereto by intent, fraud, deceit, unlawful design, willful and deliberate misrepresentation, or by careless, negligent, or

incautious disregard for the statute or administrative regulation, either by persons acting individually or in concert with others, shall constitute a violation and shall be punishable by a fine not to exceed one thousand dollars (\$1,000) for each offense. Each day of continuing violation shall be considered a separate offense. The venue for prosecution of the violation shall be in any county of the state in which the violation, or any portion thereof, occurred.

37. EMW has violated—and continues to violate—KRS 216B.990(1) by operating, and conducting the business of, an abortion facility in Fayette County, Kentucky, without first obtaining a license.

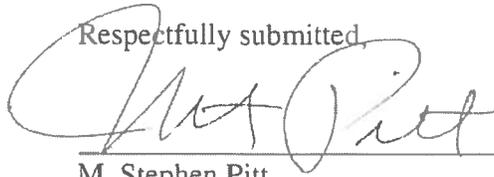
38. EMW has violated—and continues to violate—KRS 216B.990(6) by operating an abortion facility and conducting the business of an abortion facility in Fayette County, Kentucky, without a license and without the required ambulance service transfer agreement, and it has done so—and continues to do so—by intent, fraud, deceit, unlawful design, willful and deliberate misrepresentation, or by careless, negligent, or incautious disregard for applicable statutes and/or administrative regulations, including but not limited to, KRS 216B.0435.

39. To penalize it for the foregoing violations, EMW should be fined the maximum amount permitted under the law.

WHEREFORE, the Cabinet respectfully requests the following relief:

1. That the Court permanently enjoin EMW from operating an abortion facility until such time as it receives from the Cabinet a license to operate an abortion facility;
2. That the Court fine EMW the maximum amounts permitted by KRS 216B.990(1) and KRS 216B.990(6);
3. That the Court grant any and all other relief to which the Cabinet is entitled, including by not limited to a restraining order and temporary injunction prior to final judgment.
4. That the Cabinet be granted its reasonable costs.

Respectfully submitted,



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