

Montana State Legislature

Exhibit Number: 9

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SENATE PUBLIC HEALTH, WELFARE & SAFETY	
EXHIBIT NO.	9
DATE	MARCH 11, 2005
BILL NO.	HB 737

No. 98-066

IN THE SUPREME COURT OF THE STATE OF MONTANA

1999 MT 261

296 Mont. 361

989 P.2d 364

JAMES H. ARMSTRONG, M.D.; SUSAN
 CAHILL, P.A.; BARBARA POLSTEIN, D.O.;
 MINDY OPPER, P.A.; and BLUE MOUNTAIN
 CLINIC, on behalf of themselves and their patients
 throughout Montana, the surrounding states and
 Canada,

Plaintiffs and Respondents,

v.

THE STATE OF MONTANA and JOSEPH P.
 MAZUREK, in his official capacity as Attorney
 General for the State of Montana and his agents
 and successors,

Defendants and Appellants.

APPEAL FROM: District Court of the First Judicial District,

In and for the County of Lewis and Clark,

The Honorable Jeffrey M. Sherlock, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Joseph P. Mazurek, Attorney General, Clay R. Smith, Solicitor (argued), Helena, Montana

For Respondent:

Janet Benshoof, Simon Heller (argued), Julie F. Kay, The Center for Reproductive Law & Policy, New York, New York; Bruce Measure, Law Offices of Ambrose Measure, Kalispell, Montana

Heard: October 15, 1998

Submitted: July 1, 1999

Decided: October 26, 1999

Filed:

Clerk

Justice James C. Nelson delivered the Opinion of the Court.

¶1. Plaintiffs James H. Armstrong, M.D.; Susan Cahill, P.A.; Barbara Polstein, D.O.; Mindy Opper, P.A.; and Blue Mountain Clinic, filed suit in this matter seeking a determination that § 37-20-103, MCA (1995), and § 50-20-109, MCA (1995), prohibiting physician assistants-certified from performing abortions, violates the privacy, equal protection and bill of attainder provisions of the Montana Constitution. The District Court for the First Judicial District, Lewis and Clark County, granted Plaintiffs' motion for a preliminary injunction, protecting the abortion practice of Armstrong and Cahill. The State appeals. We affirm.

Introduction

Standing

¶2. The core constitutional right which is under attack in the case at bar is the fundamental right of individual privacy guaranteed by Article II, Section 10, of the Montana Constitution. Quite simply, the statutory amendments at issue prevent a woman from obtaining a lawful medical procedure--a pre-viability abortion--from a health care provider¹ of her choosing. In so doing, these amendments unconstitutionally infringe a woman's right to individual privacy under Montana's Constitution.

¶3. Before we begin our substantive discussion setting forth our rationale for this conclusion, we must first note the obvious. Plaintiffs Armstrong, Cahill, Polstein and Opper are not women who were prevented from obtaining a pre-viability abortion. Rather, they are health care providers who perform such abortion services, or who provide counseling and referrals related to such services. Plaintiff Blue Mountain Clinic, an institutional health care provider, employs Polstein and Opper. In all instances, the plaintiffs brought suit on their own behalf as well as on behalf of their patients. Thus, we are faced with a threshold question: Do the plaintiff health care

providers have standing to assert the privacy rights of their women patients? We conclude that they do.

¶4. Standing was not raised by the parties. Rather, this case was briefed and argued to the District Court and to this Court on appeal on the basis that the statutory amendments either did or did not violate women's constitutional right to privacy. Presented in that posture, we would, as a general rule, decline to address on appeal an issue not raised by the parties. *See Custody of N.G.H.* (1998), 1998 MT 212, ¶ 19, 290 Mont. 426, ¶ 19, 963 P.2d 1275, ¶ 19. Standing, however, is an exception to that rule. *See Matter of Paternity of Vainio* (1997), 284 Mont. 229, 235, 943 P.2d 1282, 1286 (identifying standing as a "threshold requirement of every case"); *Rieman v. Anderson* (1997), 282 Mont. 139, 144, 935 P.2d 1122, 1125 (stating that objections to standing cannot be waived and may be raised by the court *sua sponte*).

¶5. Moreover, since this case involves important issues of first impression in Montana, our failure to raise and to address standing may leave open to further challenge via that argument the constitutional rights at issue. We are not willing to leave that stone unturned, and, therefore, choose to articulate the rationale which makes it appropriate that we decide this case on the basis that it was presented to us.

¶6. In the context of challenges to government action, we have stated that the following criteria must be satisfied to establish standing: (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. *See Olson v. Department of Revenue* (1986), 223 Mont. 464, 470, 726 P.2d 1162, 1166 (concluding that the appellants lacked standing to challenge the constitutionality of statutes requiring county residency to run for county office, or obtain a hunting or fishing license, where the record reflected that they had not attempted to run for office or obtain hunting or fishing licenses); *Lee v. State* (1981), 195 Mont. 1, 7, 635 P.2d 1282, 1285 (concluding that the appellant, as a licensed Montana motorist, was directly affected by 55-mile-an-hour speed limit law, and therefore had standing to challenge its constitutionality although the law generally applied to all motorists).

¶7. Although we followed *Lee* in *Helena Parents v. Lewis & Clark County* (1996), 277 Mont. 367, 922 P.2d 1140, we also extensively relied on numerous United States Supreme Court decisions in articulating whether a parents' organization had standing to challenge a county and school district's investment practices that allegedly violated state law. In concluding that the organization had standing, we effectively broadened the second prong of the above two-part rule to include harm that is common to the general public but that can still affect the individual taxpayer in ways that are not common to the public. *See Helena Parents*, 277 Mont. at 371-74, 922 P.2d at 1142-44 (citing *Worth v. Saltine* (1975), 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343; *Flast v. Cohen* (1968), 392 U.S. 83, 99-100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947; *Virginia v. American Booksellers Ass'n.* (1988), 484 U.S. 383, 392-93, 108 S.Ct. 636, 642-43, 98

L.Ed.2d 782; *United States v. SCRAP* (1973), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254; *Sierra Club v. Morton* (1972), 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636).

¶8. The case at bar--involving constitutional issues related to abortion and privacy--presents a standing question of first impression in Montana. It is one which does not fit precisely within the parameters of the broadened two-part rule set out above. Specifically, the standing question can be phrased as: Where governmental regulation directed at health care providers impacts the constitutional rights of women patients, may a health care provider litigate the infringement of these rights on behalf of the women or must the women aggrieved assert their own rights?

¶9. Finding no relevant authority in Montana on this question we again turn, as we did in *Helena Parents*, to federal case law. The federal courts have thoroughly addressed and resolved whether the special relationship between a physician and patient afford the former standing to litigate the constitutional rights of the latter. See *Singleton v. Wulff* (1976), 428 U.S. 106, 117-18, 96 S.Ct. 2868, 2875-76, 49 L.Ed.2d 826 (concluding that based on the "closeness of the relationship," physicians have standing to maintain, on behalf of their women patients, a suit challenging the constitutionality of certain Missouri abortion laws). See also *Cruzan v. Director, Missouri Dep't of Health* (1990), 497 U.S. 261, 340 n.12, 110 S.Ct. 2841, 2884 n.12, 111 L.Ed.2d 224 n.12 (Stevens, J., dissenting) (stating that the United States Supreme Court has "recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause," and citing *Griswold v. Connecticut* (1965), 381 U.S. 479, 481, 85 S.Ct. 1678, 1679, 14 L.Ed.2d 510, and *Roe v. Wade* (1973), 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147). See also *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52, 59, 96 S.Ct. 2831, 2836, 49 L.Ed. 788 (noting that once the lower court deemed physicians had standing to bring suit on behalf of patients, it was "unnecessary to determine whether Planned Parenthood also had standing").

¶10. It is especially noteworthy that the federal courts have not refrained from according to physicians, threatened with the personal risk of prosecution, standing to challenge abortion restrictions by asserting the rights of their patients. The holding and analysis in *Singleton* unequivocally established that right three years after the Court decided *Roe v. Wade*. Citing prior case law where physicians had been allowed to assert the rights of their patients, the *Singleton* Court stated:

A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. See *Roe v. Wade*, 410 U.S. 153-156, 93 S.Ct. 726-728. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the

State's interference with, or discrimination against, that decision.

....

For these reasons, we conclude that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision

Singleton, 428 U.S. at 117-18, 96 S.Ct. at 2875-76.

¶11. Even the concurring-dissenting justices in *Singleton* (who disagreed with part of the Supreme Court's decision on the facts of the case) nevertheless conceded the correctness of the Court's analysis and holding in situations where the "State directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures." *Singleton*, 428 U.S. at 128, 96 S.Ct. at 2881 (Powell, J., concurring and dissenting).

¶12. That is, of course, precisely the situation in the case *sub judice*. The statutes challenged by the health care providers here directly interdict the normal functioning of the physician-patient relationship by criminalizing certain procedures.

¶13. Accordingly, on the basis of the foregoing and in the context of this case, we resolve the standing issue by adopting the approach of the federal courts. We hold that the Plaintiff health care providers have standing to assert on behalf of their women patients the individual privacy rights under Montana's Constitution of such women to obtain a pre-viability abortion from a health care provider of their choosing.

Scope of Opinion

¶14. Having thus resolved the standing issue, we also conclude that in the context of this case, Article II, Section 10 of the Montana Constitution broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference. More narrowly, we conclude that Article II, Section 10, protects a woman's right of procreative autonomy--i.e., here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice.

¶15. Importantly, this case requires that we decide who should set the standards for reasonable medical practice and procedure in this State. As in the case at bar, should legislators determine these standards based upon prevailing political ideology, personal values and beliefs, and under pressure from a vocal and powerful constituency? Or, should these standards be set by the medical community in the exercise of its collective professional expertise and judgment, acting through the state's medical examining and licensing authorities, and after taking into consideration the education, training,

experience and skills of the health care provider and the patient's health interests?²

¶16. Finally, we must decide whether, in the case before us, the government has demonstrated a compelling state interest for infringing women's right of procreative autonomy guaranteed under Article II, Section 10 of the Montana Constitution. In this regard, we conclude that it has not.

Factual and Procedural Background

¶17. To place the challenged legislation in proper perspective, we review the history and evolution of the related statutory provisions. In response to the United States Supreme Court's decision in *Roe v. Wade*, the Montana Legislature enacted the Montana Abortion Control Act (the Act), Title 50, Chapter 20 of the Montana Code Annotated. Included in that legislation were the following provisions:

Control of practice of abortion. (1) No abortion may be performed within the state of Montana:

(a) except by a licensed physician;

(b) after the first 3 months of pregnancy, except in a hospital licensed by the department;

...

(4) No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

Section 50-20-109, MCA (1991).

¶18. In December 1992, Arlette Randash (Randash), Executive Director of the Montana Right to Life Association, and Charles Lorentzen (Lorentzen), President of Flathead Pro-Life, began writing letters to various individuals in state and local government arguing that criminal charges should be brought against Dr. Armstrong and P.A. Cahill. In a December 7, 1992 letter to then Attorney General Marc Racicot, Randash asked Racicot to investigate the performance of abortions by a physician assistant working at Dr. Armstrong's office and for Racicot to inform Randash of his findings. Randash alleged that the abortions were being performed in violation of § 50-20-109, MCA.

¶19. In March 1993, Lorentzen sent similar letters regarding Dr. Armstrong to Racicot, who by then was Governor of Montana, to Flathead County Attorney Tom Esch, and to Eleanor Parker, Montana Department of Health and Environmental Sciences

counsel. Lorentzen alleged that Dr. Armstrong had violated the Act, specifically §§ 50-20-109(1)(a), (b) and (4), MCA. Parker referred the letter to Attorney General Joe Mazurek who referred the matter to Esch. On April 9, 1993, Esch asked Detective Ron Fredenberg of the Kalispell Police Department to investigate the performance of abortions at Dr. Armstrong's office by a person other than a licensed physician and the performance of second-trimester abortions outside of a hospital.

¶20. Dr. Armstrong and P.A. Cahill, the only physician assistant in the State performing abortions, challenged various provisions of the Act in federal court. Subsequently, the State stipulated to a permanent injunction prohibiting enforcement of Montana's requirement that abortions be performed only by licensed physicians as well as a permanent injunction against the second-trimester hospitalization requirement and the ban on advertising.

¶21. In 1995, Representative Susan Smith (Smith) of Kalispell, sponsored House Bill 442 to amend § 37-20-103, MCA (a portion of the Montana Code regulating physician assistants-certified), and § 50-20-109, MCA, to specifically exclude physician assistants-certified from performing abortions. Ch. 321, L. 1995. Thus, as noted by District Judge Sherlock, these amendments trace their genesis to the complaints and demands addressed to county and state officials by certain anti-abortion groups operating in the Flathead Valley of northwestern Montana.

¶22. Smith contended in hearings before the House Committee on Human Services and Aging, and the Senate Committee on Public Health, Welfare & Safety, that HB 442 was intended to protect women who are seeking abortions from possible complications and that the legislation was a women's health and safety issue. However, at the hearings, Smith and other proponents of the legislation failed to relate any complications or problems encountered by patients of P.A. Cahill during the more than twenty years that P.A. Cahill has been performing abortions.

¶23. Furthermore, those testifying in support of HB 442 during the February 10, 1995 hearing before the House Committee on Human Services and Aging, and the March 10, 1995 hearing before the Senate Committee on Public Health, Welfare and Safety, failed to give any medical justification for excluding physician assistants-certified from performing abortions. Moreover, none of the proponents of HB 442 testifying before the House Committee and only one of the proponents of HB 442 testifying before the Senate Committee was a licensed physician. Instead, those testifying in favor of HB 442 included representatives of the Montana Right to Life Association, the Montana Catholic Conference, and Eagle Forum, as well as the Executive Director of the Montana Christian Coalition.

¶24. Opponents of HB 442 testified that, since there were no medical reasons why physician assistants-certified could not perform abortions, HB 442 was just another obstacle to affordable health care for women. Those testifying against HB 442 included both current and former members of the Montana Board of Medical Examiners, the

Executive Director of the American Civil Liberties Union of Montana, and the President of the Montana Academy of Physician Assistants, as well as representatives of the Montana Women's Lobby, the Montana Business and Professional Women's Association, the Center for Reproductive Law and Policy, and the National Abortion and Reproductive Rights Action League.

¶25.HB 442 was passed by the Montana Legislature and signed into law by Governor Racicot on April 3, 1995. Through the passage of this bill, § 37-20-103, MCA, was amended to include the following sentence: "A physician assistant-certified may not perform an abortion." And, § 50-20-109, MCA, was amended to include a new subsection (5) that provides: "The utilization plan of a physician assistant-certified may not provide for performing abortions." In addition, such conduct was criminalized as a felony. Section 50-20-109(6), MCA. Passage of HB 442 also effectively re-enacted the provisions requiring second trimester abortions to be performed in a hospital and banning advertising.

¶26.Dr. Armstrong and P.A. Cahill, along with various other abortion providers, responded to the amendment of § 37-20-103, MCA, and § 50-20-109, MCA, by filing suit in federal court to prevent enforcement of the amended statutes regarding physician assistants. They also sought to prevent the enforcement of the second trimester hospitalization requirement and the ban on advertising which were re-enacted by the amendment of the statute. The trial court enjoined enforcement of the re-enacted abortion restrictions, but declined to grant a preliminary injunction against enforcement of the ban on Dr. Armstrong's utilization of P.A. Cahill to perform abortions. *Armstrong v. Mazurek* (D. Mont. 1995), 906 F.Supp. 561.

¶27.On appeal, the Ninth Circuit vacated the District Court's denial of a preliminary injunction against enforcement of the statutes restricting the performance of abortions to licensed physicians and remanded the case to the District Court. *Armstrong v. Mazurek* (9th Cir. 1996), 94 F.3d 566. On November 5, 1996, the State consented to an injunction against enforcement of the Act while the State sought review by the United States Supreme Court. The Supreme Court, by a 6-3 vote, determined that Plaintiffs failed to establish the likelihood of prevailing on the merits of their claim that the statutory provisions violated due process by imposing an undue burden on a woman's right to choose to terminate a pregnancy prior to the viability of the fetus, and thus, Plaintiffs were not entitled to preliminary injunctive relief. *Mazurek v. Armstrong* (1997), 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162.

¶28.On October 1, 1997, following the Supreme Court's ruling, Respondents filed the instant case in the District Court for the First Judicial District, Lewis and Clark County, contending that HB 442 violated Montana's constitutional provisions regarding privacy, due process, and equal protection of the laws. On November 25, 1997, the District Court granted Plaintiffs' motion for a preliminary injunction, but limited the scope of the injunction to Dr. Armstrong and P.A. Cahill. The District Court found that the Act affects a woman's constitutional right to obtain a first

trimester abortion and that the State had advanced no compelling interest to justify prohibiting P.A. Cahill from performing abortions as she has safely done for the past twenty years. The State appeals the court's order granting Plaintiffs' motion for a preliminary injunction.

Discussion

I.

¶29. Article II, Section 10 of the Montana Constitution provides:

Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

¶30. Modern legal notions of the right of privacy trace their roots to the political theory of English philosopher John Locke. Locke's concept of "liberty" was prevalent in colonial America and significantly influenced the framers of this country's foundation documents, including the United States Constitution. Among other things, this philosophy holds that the laws of nature require that each individual has an inherent property interest in his own person and has the capacity for and the right of rational self-determination which must be promoted and protected by civil society and political institutions. See Larry M. Ellison and Dennis NettikSimmons, *Right of Privacy*, 48 Mont. L. Rev. 1, 17-19 (1987) (hereafter, Ellison); Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 Ind. L.J. 723 (1990).

¶31. John Stuart Mill recognized this fundamental right of self-determination and personal autonomy as both a limitation on the power of the government and as principle of preeminent deference to the individual. He stated:

[T]he only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because, it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.

Mill, *On Liberty*, 43 Great Books of the Western World 271 (R. Hutchins ed. 1952) (quoted in *Brophy v. New England Sinai Hospital* (1986), 398 Mass. 417, 430, 497 N.E.2d 626, 633).

¶32. Despite prior judicial recognition of this general "liberty interest" or right of privacy by both the United States Supreme Court and this Court³, the delegates to Montana's 1972 Constitutional Convention viewed the textual inclusion of this right in Montana's new constitution as being necessary for the protection of the individual in

"an increasingly complex society . . . [in which] our area of privacy has decreased, decreased, decreased." This "right to be let alone . . . the most important right of them all," as Delegate Campbell put it, "produces . . . a semipermeable wall of separation between individual and state" in much the same fashion that a constitutional wall⁴ separates church and state. Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1681.

¶33. Furthermore, it is clear from their debates that the delegates intended this right of privacy to be expansive--that it should encompass more than traditional search and seizure. The right of privacy should also address information gathering and protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private. *Elison*, at 11-13.

¶34. With this background, and as correctly noted by Judge Sherlock, Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States--exceeding even that provided by the federal constitution. *State v. Burns* (1992), 253 Mont. 37, 40, 830 P.2d 1318, 1320 (citing *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 439, 649 P.2d 1283, 1286). Indeed, since the right of privacy is explicit in the Declaration of Rights of Montana's Constitution, it is a fundamental right. *Gryczan v. State* (1997), 283 Mont. 433, 449, 942 P.2d 112, 122. It is,

perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives.

Gryczan, 283 Mont. at 455, 942 P.2d at 125. For this reason, legislation infringing the exercise of the right of privacy must be reviewed under a strict-scrutiny analysis--i.e., the legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest. *Gryczan*, 283 Mont. 449, 942 P.2d at 122 (citing *State v. Siegal* (1997), 281 Mont. 250, 263, 934 P.2d 176, 184, overruled in part by *State v. Kuneff* (1998), 291 Mont. 474, 970 P.2d 556).

II.

¶35. As noted, Article II, Section 10 of the Montana Constitution was intended by the delegates to protect citizens from illegal private action and from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private. However, it was not until our decision in *Gryczan* that this Court directly addressed and judicially recognized this "personal autonomy" component of Montanans' fundamental constitutional right of individual privacy. *Gryczan*, 283 Mont. at 450-51, 942 P.2d at 123. See also *Elison*, at 13 n.83; Scott A. Fisk, *The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy*, 59 Mont. L. Rev. 301, 323-25 (1998) (hereafter, *Fisk*). In *Gryczan*, we held that the personal autonomy