

IN THE SUPERIOR COURT OF FULTON COUNTY  
ATLANTA JUDICIAL CIRCUIT  
STATE OF GEORGIA

FILED IN OFFICE

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Deputy Clerk Superior Court  
Fulton County, Georgia

FEMINIST WOMEN'S HEALTH  
CENTER, et al,

Plaintiffs,

v.

TIM BURGESS, et al,

Defendants.

CIVIL ACTION FILE  
NO. 2003CV78487

JUDGE BRASHER

DIVISION F

ORDER

The above-styled case comes before the Court to determine whether the Plaintiffs have standing to bring this case. After considering the record, the law and the arguments of the parties, the Court rules as set forth below.

The Plaintiffs bring a facial challenge to Georgia's Medicaid payment scheme, arguing that Georgia's refusal to pay for medically necessary abortions violates Georgia's constitutional right to privacy, Georgia's constitutional guarantee of equal protection, and impermissibly discriminated on the basis of sex. There are two classes of Plaintiffs: (1) medical provider facilities and doctors who are Medicaid payees who have performed what they deem are "medically necessary abortions" on low-income women in the past and have been refused payment by Georgia's Medicaid scheme; and (2) a Medicaid recipient who received an arguably medically-necessary abortion after obtaining a loan.

It is incumbent upon the Court, before addressing the merits of the Plaintiffs' contentions, to determine whether the case is in the proper procedural posture. If the

Plaintiffs do not have standing; if the case is not yet ripe; or if the Plaintiffs have not exhausted required administrative remedies, then the case cannot go forward.

**Group One: The Medical Providers**

“The only prerequisite to attacking the constitutionality of a statute is a showing that it is hurtful to the attacker. The general rule is that a party has standing to challenge the constitutionality of a statute only if the statute has an adverse impact on that party’s own rights.” Agan v. State, 272 Ga. 540, 542, 533 SE2d 60 (2000).

Before a statute can be attacked by anyone on the ground of its unconstitutionality, he must show that its enforcement is an infringement upon his right of person or property, and that such infringement results from the unconstitutional feature of the statute upon which he bases his attack. He must show that the alleged unconstitutional feature of the statute injur[es] him, and so operates ... to deprive him of rights protected by the Constitution of this State or by the Constitution of the United States, or by both.

(Citations and punctuation omitted.) Crumley v. Head, 225 Ga. 246, 247, 167 SE2d 651 (1969).

Georgia has recognized third-party representation in a constitutional challenge. In Ambles v. State, 259 Ga. 406, 406, 383 SE2d 555 (1989), the Georgia Supreme Court permitted the State to challenge the constitutionality of a statute which rendered a witness incompetent to testify in a criminal trial, finding that the “state’s rights are adversely affected by the competency statutes to the extent that they limit the state’s ability to present evidence of the crime. The state therefore has standing to challenge the statutes.” Id. at 407.

The United States Supreme Court has also recognized third-party standing. In Singleton v. Wulff, 428 US 106, 96 S. Ct. 2868 (1976), two physicians challenged the denial of Medicaid benefits for non-medically indicated abortions. The “plaintiffs[’] complaint and affidavit allege[d] that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program were it not for the limitation of reimbursable abortions to those that are ‘medically indicated.’ If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for their abortions.” (Citation and punctuation omitted.) Pacemaker Monitor Corp. v. U.S. Government, 440 F. Supp. 473, 482 (DC Fla. 1977) (discussing the holding of Singleton, supra). Thus, the Supreme Court held, the doctors had suffered an injury-in-fact because they could not get reimbursement for the procedures.

Like the plaintiffs in Singleton, supra, the medical providers in the instant case argue that they have been injured in fact, in that they cannot receive payment from Medicaid for performing medically necessary abortions unless those abortions are needed as a result of rape or incest, or because the life of the mother is endangered. Singleton, however, does not interpret Georgia law. It is of course true that Georgia courts are bound by decisions of the United States Supreme Court, see Davita, Inc. v. Othman, 270 Ga. App. 93, 95, 606 SE2d 112 (2004), but only when those decisions are relevant in Georgia.

In the case at bar the Plaintiffs have specifically limited their claims to seeking relief under only the Georgia Constitution. Singleton thus becomes persuasive but not binding authority. “Questions of the construction of the State Constitution are strictly matters for the highest court of this State.” Pope v. City of Atlanta, 240 Ga. 177, 178, 240 SE2d 241 (1977). See also Harris v. Duncan, 208 Ga. 561, 67 SE2d 692 (1951).

In Ambles, supra, the Georgia Supreme Court found that the State not only had a duty, but also the “*right* to protect the security of its citizens by prosecuting crime. Georgia Constitution of 1983, art. I, sec. I, para. II; OCGA § 17-1-2. Because the purpose of criminal law is to serve the public functions of deterrence, rehabilitation and retribution, it is the state, not the victim, which has an interest in criminal prosecutions. In aid of the right to prosecute, the state has the corresponding *right* to compel the attendance of witnesses, including the victim, and to call those witnesses to testify about their knowledge of the crime. OCGA § 17-7-190.” (Emphasis supplied.) Ambles, supra at 407. Thus, Georgia has extended third-party standing for constitutional challenges only when the statute infringes upon the constitutional rights of that third party. While it may be true that the medical providers here have a monetary interest in the constitutionality of the challenged statute, they have not advanced, and the record does not support, an argument that they also have a constitutional right to receive this money.

In addition, in Ambles the Georgia Supreme Court focused on the fact that “[w]ithout the testimony of this witness, the state may not be able to make out its case against the defendant.” Thus, the statute arguably made it impossible for the State to do its job. Id.

The medical providers in the case sub judice are in an entirely different position. It is by no means impossible for them to perform the services described in the Complaint, even if they are not paid by the Defendants for doing so. The challenged statute merely addresses payment by the State after the service is performed. The statute in Ambles, on the other hand, restricted the performance of the state’s duties.

The Court therefore finds that the medical provider Plaintiffs do not have standing to bring this challenge and DISMISSES the case as to them.

**Group Two: The Medicaid Recipient**

As stated above, one of the Plaintiffs is a Medicaid recipient who obtained an allegedly medically-necessary abortion through a loan, because she was told that Medicaid would not pay for the procedure. This Plaintiff has standing to bring this case to the Court, as she is directly affected by the Medicaid regulations at issue.

However, at no time did this Plaintiff submit a claim to Medicaid seeking payment for the abortion, or seek any other administrative remedy. Thus, the Court must determine whether her petition is ripe for determination.

It is well-settled that,

[u]nder the separation of powers under the Georgia Constitution, the judicial branch lacks jurisdiction to deal with an executive branch function until there has been an exhaustion of administrative remedies, i.e., the executive branch has no further remedy. The specific legislative empowerment for judicial review of executive action is strictly followed. The rationale is that resort to the administrative process will permit the agency to apply its expertise, protect the agency's autonomy, allow a more efficient resolution, and result in the uniform application of matters within the agency's jurisdiction. A plaintiff is prohibited from doing by indirection that which it is prohibited from doing directly, i.e., bypassing the exhaustion of administrative appeals.

Long-standing Georgia law requires that a party aggrieved by a state agency's decision must raise all issues before that agency and exhaust available administrative remedies before seeking any judicial review of the agency's decision. As long as there is an effective and available

administrative remedy, a party is required to pursue that remedy before seeking equitable relief in superior court.

(Citations and punctuation omitted.) USA Payday Cash Advance Ctrs v. Oxendine, 262 Ga. App. 632, 234-235, 585 SE2d 924 (2003). Thus, for example, “[w]here a constitutional challenge can be raised in an administrative proceeding, [courts] have not permitted a party to the administrative proceedings to disrupt the administrative proceedings by seeking a declaratory judgment on constitutional grounds while the party is engaged in administrative proceedings which would be affected by the ruling on the petition for declaratory judgment.” Agan, 272 Ga. at 543.

It is also well-settled that a facial constitutional challenge to an ordinance or law does not require the exhaustion of administrative remedies. See, e.g. King v. City of Bainbridge, 272 Ga. 427, 531 SE2d 350 (2000); Greater Atlanta Homebuilders Ass’n v. DeKalb County, 277 Ga. 295, 588 SE2d 694 (2003).

This case involves a facial challenge to a regulation, not a facial challenge to a law or ordinance. Thus, the Court finds persuasive the rationale that the agency should be given the first opportunity to interpret its own regulation. After all, the Court cannot ascertain in advance whether the agency’s interpretation would be constitutional.

Furthermore, the Court does not accept this Plaintiff’s argument that in posing a facial challenge to the regulation she is also facially challenging the enacting legislation. OCGA § 49-4-142 (a) states that the Medicaid agency is authorized to “establish such rules and regulations as may be necessary or desirable in order to execute the state plan and to receive the maximum amount of federal financial participation available.” Though this statute may be unconstitutional as applied to the instant Plaintiff, it is by no means

unconstitutional on its face. As-applied challenges, as discussed above, must be brought first at the agency level.

This Plaintiff did not apply for Medicaid funds to pay for her abortion. "When an adequate administrative remedy exists that has not been taken, dismissal of any declaratory judgment or equitable action is appropriate." USA Payday, supra at 235.

The Court therefore DISMISSES the case.

This 12<sup>th</sup> day of December, 2006.



The Honorable Christopher S. Brasher  
Fulton County Superior Court  
Atlanta Judicial Circuit

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