
**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

MKB MANAGEMENT CORP, d/b/a RED)
 RIVER WOMEN'S CLINIC, KATHRYN L.)
 EGGLESTON, M.D.,)

Plaintiffs and Appellees,)

v.)

BIRCH BURDICK, in his official capacity as)
 State Attorney for Cass County, TERRY)
 DWELLE, M.D., in his official capacity as the)
 chief administrator of the North Dakota)
 Department of Health,)

Defendants,)

TERRY DWELLE, M.D., in his official capacity)
 as the chief administrator of the North Dakota)
 Department of Health,)

Appellant.)

Supreme Ct. No. 20130259

**District Ct. No. 09-2011-CV-
02205**

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING

Joseph Turman
 N.D. Bar # 03128
 Katrina Lang
 N.D. Bar #06119
 TURMAN & LANG, LTD.
 505 North Broadway, Suite 207
 P.O. Box 110
 Fargo, ND 58107
 Phone: (701) 293-5592
 Fax: (701) 293-8837

Autumn Katz*
 David Brown*
 CENTER FOR
 REPRODUCTIVE RIGHTS
 120 Wall St., 14th Fl.
 New York, NY 10005
 Phone: (917) 637-3600
 Fax: 917-637-3666

*Out-of-State Registered Attorneys

ATTORNEYS FOR PLAINTIFFS AND APPELLEES

November 12, 2014

TABLE OF CONTENTS

	Paragraph
I. STATEMENT OF ISSUE.....	1
II. STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE	7
III. ARGUMENT AND AUTHORITIES.....	17
IV. CONCLUSION.....	21

TABLE OF AUTHORITIES

CASES	Paragraph(s)
<i>Birst v. Sanstead</i> , 493 N.W. 2d 690, 695 (ND 1992)	18
<i>MKB Mgmt. Corp. v. Burdick</i> , No. 09-2011-CV-02205, (N.D. Dist. Ct., Cass Cnty., July 15, 2013)	5, 8, 9, 10
<i>MKB Mgmt. Corp. v. Burdick</i> , 2014 ND 197	11
 RULES, STATUTES, OTHER AUTHORITIES	
2011 N.D. Sess. Laws ch. 109, § 6	3, 4
2013 N.D. Sess. Laws ch. 118, § 1	4
N.D.C.C. § 1-02-09.1	18

I. STATEMENT OF ISSUE

[¶1] On October 28, 2014, this Court reversed the judgment of the district court declaring House Bill 1297 unconstitutional and permanently enjoining its enforcement. Pursuant to this Court’s opinion, House Bill 1297 (“H.B. 1297” or the “Act”) has not been declared unconstitutional by a sufficient majority of the Court; therefore, the Act took effect on October 29, 2014 (the date of entry of final judgment). The controlling opinion of the Court held that the district court erred in construing H.B. 1297 to ban all medication abortions. As construed by this Court, H.B. 1297 does *not* impose a ban on all medication abortions. Based on this understanding of H.B. 1297’s practical effect, the Court further held that the Act does not violate the “undue burden” standard laid down by the United States Supreme Court in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

[¶2] Appellees now seek clarification from the Court as to a narrow issue of statutory construction regarding Section 6 of H.B. 1297, the emergency contract provision.

[¶3] Section 6 of H.B. 1297 makes it illegal for physicians to provide medication abortions unless they have entered into a signed contract with another physician who has “active admitting privileges and gynecological and surgical privileges” and “who agrees to handle emergencies associated with the use or ingestion of the abortion-inducing drug” (hereinafter the “Emergency Contract”). 2011 N.D. Sess. Laws ch. 109, § 6.

[¶4] The requirements of H.B. 1297 are closely intertwined with the requirements of Senate Bill 2305 (“S.B. 2305”), enacted on March 27, 2013. S.B. 2305 imposes criminal penalties on physicians in North Dakota who perform abortions unless they obtain “admitting privileges ... and staff privileges to replace hospital on-staff physicians” at a hospital within 30 miles of the abortion facility. 2013 N.D. Sess. Laws ch. 118, § 1.

Although H.B. 1297 is applicable only to physicians who provide abortion-inducing drugs, S.B. 2305 applies more broadly to “[a]ll physicians performing abortion procedures” in the state of North Dakota. *Compare* H.B. 1297 § 6 *with* S.B. 2305 § 1.¹

[¶5] The district court determined that it would be impossible for Appellees to satisfy H.B. 1297’s Emergency Contract requirement for several reasons, including that no physician willing to sign such a contract could be located, and that the contracting physician, whose name and contact information “would be available to many upon demand,” could face professional and physical harm by being associated publicly with the provision of abortion services. *MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-02205, Mem. Op. & Order for Perm. Inj. (N.D. Dist. Ct., Cass Cnty., July 15, 2013) (hereinafter “Dist. Ct. Op.”), at 39. This Court’s controlling opinion does not address these factual findings of the district court. Therefore, Appellees’ petition for rehearing seeks clarification on how the Court has construed the emergency contract provision so that it is not a *de facto* ban on medication abortion, given that the district court’s findings of fact have not been challenged and are fully supported by the record.

[¶6] In providing such clarification, Appellees also request confirmation from the Court that, consistent with North Dakota rules of statutory construction, the provisions of H.B. 1297 and S.B. 2305 should be construed together and as a whole. Provided that the term “active admitting privileges and gynecological and surgical privileges” in H.B. 1297 has the same meaning as the term “admitting privileges ... and staff privileges to replace

¹ S.B. 2305 was previously the subject of a lawsuit brought by Appellees. After determining that S.B. 2305 would not, under current conditions, prevent them from performing abortions, Appellees reached a settlement agreement with Appellant and dismissed their lawsuit. Appellant filed an interlocutory appeal of a preliminary injunction against the law in this Court before that lawsuit was dismissed.

hospital on-staff physicians” in the subsequently-enacted S.B. 2305, then the Emergency Contract provision, like the rest of the Act as construed by the controlling opinion in this case, will not operate as a *de facto* ban on medication abortion. Harmonizing the provisions of H.B. 1297 and S.B. 2305 in this manner would further support this Court’s determination that the district court erred in construing the emergency contract provision as a *de facto* ban.

II. STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

[¶7] H.B. 1297 was enacted April 19, 2011, and preliminarily enjoined before its effective date of August 1, 2011. The district court permanently enjoined the Act on July 15, 2013. On October 28, 2014, this Court reversed the district court’s ruling, allowing H.B. 1297 to take effect.

[¶8] In its opinion, the district court found that Appellees would be unable to perform medication abortions if the Emergency Contract provision required them to locate a physician willing to handle, on an exclusive basis, any emergencies that might arise. Dist. Ct. Op. at 38.

[¶9] The district court also found that, in the rare event a patient were in need of emergency care to treat a complication arising from a medication abortion, such treatment would involve a dilation and curettage, or, in extremely unusual cases, a blood transfusion, which are “all relatively common and simple medical procedures ... routinely performed at most medical centers.” *Id.* at 37.

[¶10] In addition, the court determined that any physician entering into the required contract, which would be “available to many upon demand,” could be subject to physical and/or professional harm. *Id.* at 39 (noting that physicians who provide abortion or

otherwise associate themselves with the provision of abortion services face “protestors, harassment, potential violence, and professional isolation”). Given these serious repercussions, the district court found that no physician willing to sign the contract could be located, and concluded that because the Emergency Contract’s requirements were “impossible to meet,” they would operate as a *de facto* ban on medication abortion. *Id.* at 38-39.

[¶11] This Court determined that the district court erred in construing H.B. 1297’s Emergency Contract requirement as imposing a total ban on all medication abortions. *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 49. Specifically, this Court found that the Emergency Contract need not be “exclusive,” nor does it “preclude the prescribing or providing physician from giving a pregnant woman other additional information for dealing with emergencies.” *Id.* According to the Court, when construed in such a manner, H.B. 1297 does not “impose[] a substantial obstacle on a woman’s right to an abortion before viability.” *Id.* ¶ 58.

[¶12] However, the Court’s construction of the Emergency Contract is silent as to certain key findings of fact made by the district court in support of its conclusion that the Act operates as a *de facto* ban; namely, that the Emergency Contract requirement would be “impossible to meet.” Therefore, rehearing is warranted to clarify the Court’s basis for determining that the Emergency Contract requirement does not impose a ban on medication abortions in North Dakota.

[¶13] In addition, rehearing is warranted because the Court’s opinion does not address the interaction between H.B. 1297’s requirements and S.B. 2305’s requirements, or whether the type of privileges required by H.B. 1297’s Emergency Contract provision

can be satisfied by a physician who has obtained privileges in compliance with S.B. 2305's requirements.

[¶14] S.B. 2305 was passed March 26, 2013 and was scheduled to take effect on August 1, 2013. Because Plaintiff-Appellee Dr. Eggleston and the other physicians who work for Plaintiff-Appellee Red River Women's Clinic were unable to obtain hospital admitting privileges prior to S.B. 2305's effective date, Appellees brought suit to enjoin the act's enforcement. During the course of litigation, the physicians were granted admitting privileges at a hospital within thirty miles of Red River Women's Clinic's facilities. Accordingly, the parties entered into a stipulation and Appellees voluntarily dismissed their claim without prejudice.

[¶15] The admitting and clinical privileges that the physicians at Red River Women's Clinic have been granted include "core privileges" (which allow them, *inter alia*, to admit, diagnose, and work up patients, including ordering a blood transfusion), as well as "special privileges" to perform a dilation and curettage. Thus, a physician with admitting and clinical privileges that satisfy S.B. 2305 would be able to care for any patient experiencing a complication of medication abortion requiring treatment on an emergency basis.

[¶16] Accordingly, Appellees' petition for rehearing seeks confirmation that—in order to avoid H.B. 1297 operating as a *de facto* ban on medication abortion—the privileges required by the Emergency Contract can be satisfied by the privileges required by S.B. 2305.

III. ARGUMENT AND AUTHORITIES

[¶17] The district court found that, based upon the evidentiary record, the Emergency Contract provision of H.B. 1297 would operate as *de facto* ban on the performance of

medication abortion. It is clear that when this Court ruled upon the constitutionality of H.B. 1297 – including its Emergency Contract provision – it construed the Act as permitting the performance of medication abortion when administered according to mifepristone’s label protocol. However, if the Emergency Contract requirement has the effect of barring the provision of all medication abortions, then the outcome of the case would be at odds with the Court’s apparent intent.

[¶18] Statutory provisions should be “harmonized, if possible, so that effect may be given to each.” N.D.C.C. § 1-02-09.1. Thus, when considering the constitutionality of two statutes “relating to the same subject matter,” the statutes must be construed together and as a whole, making every effort to harmonize them if possible, “without rendering one or the other useless.” *Birst v. Sanstead*, 493 N.W. 2d 690, 695 (ND 1992) (citation omitted).

[¶19] Appellant asserts that the purpose of H.B. 1297’s Emergency Contract provision is to ensure that a patient experiencing a complication “knows a physician she can contact if an emergency arises.” Appeal Br. of Def.-Appellant Terry Dwelle, M.D., at 26. Like H.B. 1297, S.B. 2305 imposes heightened requirements related to emergency care on physicians performing abortions. Accordingly, and in light of N.D.C.C. § 1-02-09.1, it is appropriate to construe H.B. 1297’s Emergency Contract requirement as capable of being satisfied by any physician who has the requisite privileges under S.B. 2305.

[¶20] Harmonizing S.B. 2305 and H.B. 1297—which both purport to serve the same underlying purpose of protecting women’s health—in this manner is entirely consistent with the controlling opinion of this Court, finding that H.B. 1297 does not impose a ban on all medication abortion.

IV. CONCLUSION

[¶21] For the foregoing reasons, Appellees respectfully request that this Court, in order to give effect to its earlier opinion in this case and to both statute's requirements, resolve any lingering ambiguity about the practical effect of H.B. 1297, and confirm that a physician who has obtained the necessary privileges required by S.B. 2305 would also have the ability to enter into the Emergency Contract required by H.B. 1297.

Dated this 12th day of November, 2014.

/s/ Joseph Turman
Joseph Turman, N.D. Bar # 03128
Katrina Lang, N.D. Bar #06119
Turman & Lang, Ltd.
505 North Broadway, Suite 207
P.O. Box 110
Fargo, ND 58107-0110
(701) 293-5592
jturman@turmanlaw.com
katrina@turmanlaw.com

Autumn Katz*
David Brown*
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600
akatz@reprorights.org
dbrown@reprorights.org

* Out-of-state Registered Attorneys

Attorneys for Plaintiffs/Appellees

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

MKB MANAGEMENT CORP, d/b/a RED)	
RIVER WOMEN’S CLINIC, KATHRYN L.)	
EGGLESTON, M.D.,)	CERTIFICATE OF
)	COMPLIANCE
)	
Plaintiffs and Appellees,)	Supreme Ct. No. 20130259
)	
vs.)	District Ct. No. 09-2011-CV-
)	02205
)	
BIRCH BURDICK, in his official capacity as)	
State Attorney for Cass County, TERRY)	
DWELLE, M.D., in his official capacity as the)	
chief administrator of the North Dakota)	
Department of Health,)	
)	
Defendants,)	
_____)	
)	
TERRY DWELLE, M.D., in his official capacity)	
as the chief administrator of the North Dakota)	
Department of Health,)	
)	
Appellant.)	

1. The undersigned certifies that, pursuant to N.D. R. App. P. 32(a)(7)(A)-(B), the text of Plaintiffs/Appellees’ Brief (excluding the caption, table of contents, table of authorities, and signature blocks) contains 1,791 words.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Times New Roman 12 point font.

Dated this 12th day of November, 2014.

/s/ Joseph Turman

Joseph Turman, N.D. Bar # 03128
Katrina Lang, N.D. Bar #06119
Turman & Lang, Ltd.
505 North Broadway, Suite 207
P.O. Box 110
Fargo, ND 58107-0110
(701) 293-5592
jturman@turmanlaw.com
katrina@turmanlaw.com

Autumn Katz*
David Brown*
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600
akatz@reprorights.org
dbrown@reprorights.org

* Out-of-state Registered Attorneys

Attorneys for Plaintiffs/Appellees

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

MKB MANAGEMENT CORP, d/b/a RED
RIVER WOMEN'S CLINIC, KATHRYN L.
EGGLESTON, M.D.,

Plaintiffs and Appellees,

vs.

BIRCH BURDICK, in his official capacity as
State Attorney for Cass County, TERRY
DWELLE, M.D., in his official capacity as the
chief administrator of the North Dakota
Department of Health,

Defendants,

TERRY DWELLE, M.D., in his official capacity
as the chief administrator of the North Dakota
Department of Health,

Appellant.

Supreme Ct. No. 20130259

District Ct. No. 09-2011-CV-02205

AFFIDAVIT OF SERVICE

Sarah Beth Weintraub, being first duly sworn upon oath, deposes and says that she is of legal age; that on November 12, 2014, she served the attached:

1. Plaintiffs-Appellees' Petition for Rehearing

Upon the following person(s):

Birch Burdick
Cass County State's Attorney

Email: burdickb@casscountynd.gov

Douglas Bahr
Office of Attorney General

Email: dbahr@nd.gov

Wayne Stenehjem
Office of Attorney General

Email: wstenehjem@nd.gov

Douglas B. Anderson
Office of Attorney General

Email: dbanders@nd.gov

Jeanne Steiner
Office of Attorney General

Email: jmsteiner@nd.gov

Christopher Dodson
Amicus Curiae

Email: cdodson@csicable.net

Don R. Grande
Amicus Curiae

Email: don@grandefrisk.com

Thomas Brejcha
Amicus Curiae, *Pro Hac Vice*

Email: brejcha@aol.com

Paul B. Linton
Amicus Curiae, *Pro Hac Vice*

Email: pblconlaw@aol.com

Mailee R. Smith
Amicus Curiae, *Pro Hac Vice*

Email: mailee.smith@aul.org

Sarah Andrews Herman
Amicus Curiae


Email: herman.sarah@dorsey.com

LaRoy Baird III
Amicus Curiae

Email: laroybaird@midco.net


By electronically sending the above documents to the e-mail addresses noted above,
pursuant to all parties' consent to electronic service.

Dated this 12th day of November.



SARAH BETH WEINTRAUB

Subscribed and sworn to before me on November 12, 2014.



NOTARY PUBLIC

STEPHANIE TOTI
NOTARY PUBLIC-STATE OF NEW YORK
No. 02TO6265377
Qualified in Kings County
My Commission Expires July 09, 2016

IN THE SUPREME COURT
STATE OF NORTH DAKOTAMKB MANAGEMENT CORP, d/b/a RED)
RIVER WOMEN'S CLINIC, KATHRYN L.)
EGGLESTON, M.D.,)

Plaintiffs and Appellees,)

vs.)

BIRCH BURDICK, in his official capacity as)
State Attorney for Cass County, TERRY)
DWELLE, M.D., in his official capacity as the)
chief administrator of the North Dakota)
Department of Health,)

Defendants,)

TERRY DWELLE, M.D., in his official capacity)
as the chief administrator of the North Dakota)
Department of Health,)

Appellant.)

Supreme Ct. No. 20130259

District Ct. No. 09-2011-CV-02205

AFFIDAVIT OF SERVICE

Sarah Beth Weintraub, being first duly sworn upon oath, deposes and says that she is of legal age; that on November 13, 2014, she served the attached:

1. Plaintiffs-Appellees' Petition for Rehearing (with corrected Table of Contents)

Upon the following person(s):

Birch Burdick
Cass County State's Attorney

Email: burdickb@casscountynd.gov

Douglas Bahr
Office of Attorney General

Email: dbahr@nd.gov

Wayne Stenehjem
Office of Attorney General

Email: wstenehjem@nd.gov

Douglas B. Anderson
Office of Attorney General

Email: dbanders@nd.gov

Jeanne Steiner
Office of Attorney General

Email: jmsteiner@nd.gov

Christopher Dodson
Amicus Curiae

Email: cdodson@csicable.net

Don R. Grande
Amicus Curiae

Email: don@grandefrisk.com

Thomas Brejcha
Amicus Curiae, *Pro Hac Vice*

Email: brejcha@aol.com

Paul B. Linton
Amicus Curiae, *Pro Hac Vice*

Email: pblconlaw@aol.com

Mailee R. Smith
Amicus Curiae, *Pro Hac Vice*

Email: mailee.smith@aul.org

Sarah Andrews Herman
Amicus Curiae

Email: herman.sarah@dorsey.com

LaRoy Baird III
Amicus Curiae

Email: laroybaird@midco.net

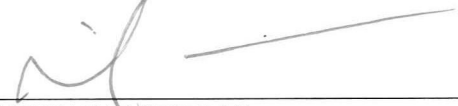
By electronically sending the above documents to the e-mail addresses noted above,
pursuant to all parties' consent to electronic service.

Dated this 13th day of November.


SARAH BETH WEINTRAUB

Subscribed and sworn to before me on November 13, 2014.

DAVID P. BROWN
NOTARY PUBLIC-STATE OF NEW YORK
No. 02BR6300542
Qualified in New York County
My Commission Expires April 07, 2018


NOTARY PUBLIC