IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Allegheny Reproductive Health Center, Allentown Women's Center, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania, Petitioners | : | |
| v. | : | No. 26 M.D. 2019 |
| | : | ARGUED: October 14, 2020 |
| Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs, and Sally Kozak, in her official capacity as Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs, Respondents | : | |

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE CEISLER

FILED: March 26, 2021

I concur with the outcome reached by the majority. However, I respectfully disagree with the majority's conclusion that Petitioners lack standing to bring this action.

Petitioners (Providers) are medical providers asserting that Pennsylvania's statutory restriction under 18 Pa. C.S. § 3215(c) (Coverage Ban) on public abortion funding for recipients of publicly funded medical benefits (Medical Assistance) is a violation of patients' rights under the Pennsylvania Constitution's equal rights and equal protection guarantees. *See* Pa. Const. art. I, §§ 1, 26, 28; art. III, § 32. Respondents, various Commonwealth parties (Commonwealth), contend Providers lack standing to assert claims on behalf of non-party patients. However, applicable precedents demonstrate that Providers have standing based on their connection to their patients and their allegations of direct harm to themselves.

Providers aver that they collectively provide about 95% of all abortions performed in Pennsylvania. Pet. for Review, ¶ 56. Providers further aver that they are suing on behalf of their patients receiving Medical Assistance who seek abortions but are ineligible for Medical Assistance coverage of the cost because of the Coverage Ban. *Id.*, ¶ 39. Providers also assert that they themselves are directly harmed by the Coverage Ban's funding limitation for abortions, because they have to divert money and staff time from other work to help their patients who cannot afford an abortion, they subsidize abortions for women who cannot afford them, they expend staff resources to assist patients in securing private funding for abortions, and they are required to explore personal matters with their patients to determine whether one of the Coverage Ban's exceptions applies. *Id.*, ¶¶ 36, 58, 84-87.

The Commonwealth argues these averments are insufficient to confer third-party standing for Providers to assert constitutional challenges on behalf of non-

party patients. In my view, Providers have standing, and the Commonwealth's preliminary objection on this issue should be overruled.

The Commonwealth cites authorities for the general proposition that standing requires allegations of direct harm. The Commonwealth argues Providers have not pleaded sufficient direct harm. However, the Commonwealth offers no analysis or authority relating specifically to medical providers and their patients.

By contrast, Providers offer detailed analysis and citations of authorities directly on point. Providers argue persuasively that analogous United States Supreme Court authority, adopted by this Court as applicable in Pennsylvania, confers standing in the circumstances of this case.

***Singleton v. Wulff***

In *Singleton v. Wulff*, 428 U.S. 106 (1976), two physicians challenged a Missouri statute that limited public funding of abortions to cases where abortion was medically indicated. The defendants filed a pre-answer motion challenging the plaintiffs' standing. A plurality of the United States Supreme Court held that the physicians had standing to bring constitutional claims on behalf of Medical Assistance patients seeking abortions. *Id.* at 118.

The plurality observed that the standing issue raised two distinct questions. The first question was whether the plaintiffs had alleged an "injury in fact," a sufficiently concrete interest in the outcome of the litigation to invoke a federal court's jurisdiction. *Id.* at 112. The plurality concluded that the physicians had alleged a sufficiently concrete interest in the outcome, because they stated they had performed and would continue to perform abortions for which they would be entitled to reimbursement if not for the challenged statute. If the physicians prevailed, the plurality reasoned, they would benefit by receiving payment from the state.

However, because this first inquiry relates solely to invoking ***federal*** jurisdiction, it is not involved here.

The second standing question is "whether, as a prudential matter, the plaintiff[s] are proper proponents of the particular legal rights on which they base their suit." *Id.* The plurality easily concluded that the physicians had standing to the extent they were asserting ***their own*** "constitutional rights to practice medicine." *Id.* at 113. The real issue was whether the physicians had standing to assert claims based on ***the rights of their patients***. *Id.*

The plurality observed that standing to assert constitutional rights of third parties should be accorded sparingly. The true holders of the rights at issue may not wish them asserted, and in any event, they themselves are usually the best proponents of their own rights. *Id.* at 114. Therefore, the plurality formulated a two-part test for standing to assert the rights of third parties:

First, the relationship between the litigant and the third party whose rights are asserted must be such that "the right is inextricably bound up with the activity the litigant wishes to pursue. . . ." *Id.* Further, the relationship between the litigant and the third party must be such that the litigant is "fully, or very nearly, as effective a proponent of the right" as the third party. *Id.* at 115 (citing doctor-patient relationships in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), and *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973)).

Second, the third party must lack the ability to assert her own right. There must be "some genuine obstacle to such assertion, [such that] the third party's absence from court loses its tendency to suggest that [her] right is not truly at stake, or truly important to [her], and the party who is in court becomes by default the right's best available proponent." *Id.* at 116 (noting, for example, that forcing a third

party to assert her own right to remain anonymous "'would result in nullification of the right at the very moment of its assertion.'" *Id.* (quoting *NAACP v. Alabama*, 357 U.S. 449, 459 (1958)).

Applying the first factor, the parties' relationship, the plurality found:

> The closeness of the relationship is patent . . . . ***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. [113,] 153-156 [(1973)]. ***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***.

*Singleton*, 428 U.S. at 117 (emphasis added).

Applying the second factor, the plurality recognized "several obstacles" to women's ability to assert their own abortion rights, including their desire to maintain the privacy of their decisions and the "imminent mootness" of any individual claim. *Id.* The plurality acknowledged these obstacles could be overcome: a woman might bring suit under a pseudonym; she might avoid mootness and retain her right to litigate after pregnancy because the issue was "capable of repetition yet evading review"; and a class action might be possible. *Id.* Regarding the class action, however, the plurality observed that "if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician." *Id.* at 117-18.

Accordingly, applying the two factors it had identified, the plurality concluded "that ***it generally is appropriate to allow a physician to assert the rights***

***of women patients as against governmental interference with the abortion decision*** . . . ." *Id.* at 118 (emphasis added).

***Harrisburg School District v. Harrisburg Education Association***

*Singleton*, standing alone, is not binding authority here for three reasons: it was a plurality opinion, it related only to claims under the federal constitution, and it analyzed standing only in relation to claims in federal courts. However, in *Harrisburg School District v. Harrisburg Education Association*, 379 A.2d 893 (Pa. Cmwlth. 1977) (*en banc*), ***this Court expressly adopted the Singleton plurality's two-factor analysis*** for determining standing to assert a third party's constitutional rights in Pennsylvania courts. *Id.* at 896.

In *Harrisburg School District*, the school district sued the teachers' union, seeking injunctive relief to stop striking teachers from picketing the school board members' private homes. The claim asserted the board members' privacy rights under the Pennsylvania Constitution. The union filed preliminary objections challenging the school district's standing to assert the board members' individual constitutional rights.

After quoting extensively from the *Singleton* plurality opinion, this Court held:

> Singleton . . . offers two "factual elements" for consideration in determining whether the general rule that one may not claim standing to vindicate the constitutional rights of others should not apply[:] the first, whether the relationship of the litigant to the third party is such that enjoyment of the right by the third party is inextricably bound up with the activity the litigant seeks to pursue; and the second, whether there is some obstacle to the assertion by the third party of his own right. ***We adopt this rule for standing to assert third party constitutional rights.***

*Id.* (emphasis added).

This Court found standing absent under the facts of *Harrisburg School District*. However, this Court expressly acknowledged the conclusion in *Singleton* that under the two-factor test, physicians had standing to assert a constitutional challenge to an abortion funding restriction on behalf of their patients. *Id.*

In short, the analysis of the United States Supreme Court plurality in *Singleton* concluded that physicians have standing to assert constitutional claims on behalf of their clients in federal court. This Court in *Harrisburg School District* concluded that the analytical framework applied in *Singleton* is also applicable to constitutional standing in Pennsylvania. Taken together, *Singleton* and *Harrisburg School District* strongly support Providers' standing to assert their patients' constitutional rights here.

***Pennsylvania Dental Association v. Department of Health***

In *Pennsylvania Dental Association v. Department of Health*, 461 A.2d 329 (Pa. Cmwlth. 1983) (*en banc*), the Pennsylvania Dental Association (PDA) alleged that statutory and regulatory amendments to reporting and file inspection requirements for dentists would violate the constitutional privacy rights of dental patients. The Department of Health (DOH) challenged the PDA's standing to assert the constitutional rights of patients. Citing *Singleton* and *Harrisburg School District*, this Court found that dentists had standing to assert their patients' constitutional rights:

> [U]nless individual patients had some means of knowing that the effect of the [new] regulation may be to disclose some medical information which they may be entitled to withhold by invoking their constitutional claim of privacy, the only way those rights could be protected would be by the dentist who is responsible for the patient's records. We are of the opinion that the exception set forth in *Singleton* applies and that PDA has standing to raise this issue.

*Pa. Dental Ass'n*, 461 A.2d at 331.

***Fischer v. Department of Public Welfare***

This Court's evenly divided decision in *Fischer v. Department of Public Welfare*, 444 A.2d 774, 776 (Pa. Cmwlth. 1982) (*en banc*), is not to the contrary. In *Fischer*, the petitioners challenged the Coverage Ban's limitations on Medical Assistance for abortions. They argued that public funding should be available to women whose physicians recommended abortions to preserve their health, even if their lives were not in imminent danger. Further, they contended that abortion coverage should be available to Medical Assistance recipients seeking abortions on religious grounds.[1] They also challenged the notice provisions that were part of the Coverage Ban at that time, which required a woman to notify criminal authorities within 72 hours of a rape or discovery of a pregnancy resulting from incest, in order to be eligible for Medical Assistance coverage for the related abortion.

In addition to women who were receiving Medical Assistance, the petitioners in *Fischer* included physicians and nonprofit providers of counseling and other services to Medical Assistance recipients. The physicians asserted the Coverage Ban would cause them direct economic hardship and would prevent them from providing necessary medical services according to their best medical judgment. *Id.* at 776.

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[1] One petitioner in *Fischer v. Department of Public Welfare*, 444 A.2d 774, 776 (Pa. Cmwlth. 1982) (*en banc*), claimed the tenets of her faith supported the abortion she was seeking. As one three-judge opinion (Craig opinion) in *Fischer* explained, "certain religious sects deem abortion to be the only moral response to certain pregnancies including those which will result in great suffering on the part of the pregnant woman or great danger to her health short of the threat of death necessary for reimbursement under the [statutory restriction on public abortion funding contained in 18 Pa. C.S. § 3215(c) (Coverage Ban)]." *Id.* at 782. Thus, the religious argument was closely aligned with the health preservation argument.

The respondents filed preliminary objections challenging the standing of the physicians and counseling entities to assert claims relating to the Coverage Ban's reporting requirements. This Court's *en banc* panel was evenly split three to three on that issue. Thus, neither three-judge opinion is precedential.

**1. Blatt Opinion**

One three-judge group (Blatt opinion) would have upheld the challenge to standing. The Blatt opinion reasoned:

> There are clearly no allegations that the petitioner-doctors are in any way harmed or that the nonprofit organizational petitioners suffer any direct harm to themselves as a result of the reporting requirements. Absent such allegations of direct, substantial and immediate injury to such petitioners themselves we must conclude that the doctors and these organizations do not have standing to bring this action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, . . . 346 A.2d 269 ([Pa.] 1975).

*Fischer*, 444 A.2d at 779. The Blatt opinion observed, "[W]e cannot say that mere concern for or attempts to aid a certain class of persons automatically endows [sic] an organization with standing to sue on their behalf." *Id.* Notably, the Blatt opinion did not mention the analysis of *Singleton* or *Harrisburg School District*. Thus, it appears the Blatt opinion was issued without the benefit of considering the most closely applicable precedents. Its reasoning is arguably contrary to those decisions.

Moreover, the Blatt opinion is distinguishable. First, in *Fischer*, the only challenge to standing related to reporting requirements for victims of rape and incest who were seeking to terminate the resulting pregnancies. The reporting requirements did not bear the same close relation to physicians' services that the abortions themselves did. Further, here, Providers expressly pleaded that they do and will continue to incur direct damages of the same type alleged in *Singleton* due

to providing abortion services for which they are not reimbursed. Therefore, the Blatt opinion's reasoning against standing is inapplicable here.[2]

**2. Craig Opinion**

By contrast, the other three-judge panel in *Fischer* (Craig opinion) would have overruled the preliminary objection to standing. Relying on *Singleton* and *Harrisburg School District*, the Craig opinion concluded that the physicians in *Fischer* were alleging the same kinds of direct financial damages that helped to confer standing in *Singleton* and *Harrisburg School District*. *Fischer*, 444 A.2d at 781-82.

As stated above, Providers here pleaded the same sorts of direct financial damage. *See* Pet. for Review, ¶¶ 36, 58, 84-87. The Craig opinion therefore offers persuasive authority that Providers have standing here.

**Conclusion**

Based on all of the authorities discussed above, I conclude that Providers have standing to maintain this action. Therefore, I respectfully dissent on that issue.

Ellen Ceisler

ELLEN CEISLER, Judge

[2] In addition, although not mentioned in the Blatt opinion, it is notable that in *Fischer*, a number of patients were parties and were asserting their own constitutional rights, thus undermining the existence of any genuine obstacle to their assertion of such rights. Therefore, the rationale behind the plurality rule in *Singleton v. Wulff*, 428 U.S. 106 (1976), was at least partially absent.