Circuit Court for Washington County
Case No. C-21-CV-21-000048

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1402

September Term, 2020

RYAN EAD

v.

HAGERSTOWN REPRODUCTIVE HEALTH SERVICES, *ET AL.*

Nazarian,
Beachley,
Wells,

JJ.

Opinion by Nazarian, J.
Concurring Opinion by Beachley, J.

Filed: September 21, 2021

On February 9, 2021, K.R. traveled to Hagerstown Reproductive Health Services ("HRHS") with her fiancé, Ryan Ead.[1] Ms. R had decided to terminate her pregnancy, and she went to the clinic to seek an abortion. After Ms. R left the clinic without obtaining an abortion, Mr. Ead, the putative father, filed in the Circuit Court for Washington County a motion for a "temporary injunction" against HRHS and Ms. R that asked the court to enjoin Ms. R from obtaining the procedure. After holding a hearing, the court denied the motion as moot. Mr. Ead timely appealed. We dismiss the appeal as moot because in the interim, Ms. R obtained an abortion from a different provider.

I. BACKGROUND

On February 9, 2021, Ms. R traveled to HRHS with Mr. Ead. He initially had offered his support, but he became emotionally distressed while she was inside the clinic and he was in the waiting room, and he attempted to prevent Ms. R from obtaining the abortion. The clinic called the police, who arrived on the scene. Ms. R ultimately left the clinic without obtaining an abortion.

Mr. Ead called his attorney, and counsel came to the clinic at some point before Ms. R left. The attorney informed an HRHS employee that he intended to file a motion for an injunction to prevent Ms. R from obtaining the procedure. Mr. Ead concedes that neither he nor his attorney had provided or attempted to provide notice to Ms. R of his intent to seek an injunction at that point.

Mr. Ead's attorney left the clinic and filed a motion in the circuit court requesting a

[1] We use Ms. R's initials out of respect for her privacy.

"temporary injunction precluding the termination of the life of his preborn child." The circuit court held a hearing at which only Mr. Ead's attorney was present. The court denied the motion on the record both in open court and in a written order. The written order did not state the reason for the ruling, but at the hearing, after some discussion about the question of whether Mr. Ead had provided adequate notice of the motion for temporary restraining order ("TRO") to HRHS and Ms. R,[2] the circuit court ultimately denied the motion on the ground that it was moot, without prejudice to filing again if Mr. Ead believed she would change her mind:

> I'm going to find at this time because of the facts I've heard that [Ms. R] did voluntarily under her own volition leave the abortion clinic without attempting to follow through with it, that there is not standing at this time for the Court to act. In other words, [Ms. R] had the intention to go seek an abortion. Mr. Ead, as indicated through [] his verified complaint, had indicated that he did in fact drive her to the clinic, that he pleaded with her not to have the abortion, that for whatever

[2] At the hearing, Mr. Ead's attorney recounted his statements to clinic staff:

> Oh, I should have told you, your Honor, I told them at the window, "I'm going to go to court and seek[] an injunction to preclude this." I guess that's why they told her to go home. I said, "Put her at the bottom of your list today and do not do the abortion until you hear from the court." I did tell them that.

A temporary restraining order "may be granted without written or oral notice only if the applicant or the applicant's attorney certifies to the court in writing, and the court finds, that specified efforts commensurate with the circumstances have been made to give notice." Md. Rule 15-504(b). As noted above, Mr. Ead concedes that neither he nor his attorney provided or attempted to provide notice to Ms. R before filing the motion for a TRO. Mr. Ead contends that the circuit court made a finding that his attempt to provide notice to HRHS was adequate for purposes of Rule 15-504(b). We do not read the transcript to support that contention. Instead, the court recognized its authority under Rule 15-504(b) to reach out to HRHS "to see if they intended to be here," but the court did not do so, and instead concluded that the matter was moot.

> reason goes on in her mind, she did decide not to go through with it and to leave the clinic, and at that point, the Court is without a jusdistical [sic] [3] issue on which to proceed with this ex parte injunction. If Mr. Ead, after communications with her, believes that she had changed her mind and intends to go back, that would be the time for the appropriate injunction. But at this time, she has left and not indicated that she intends to go back.

Later on February 9, 2021, after the written order was entered on the docket, Mr. Ead filed a "Supplemental Filing" representing that counsel had emailed a message to Ms. R stating that Mr. Ead filed "a motion for temporary injunction to prevent you from having an abortion."

On February 12, 2021, Mr. Ead filed a revised motion for "temporary injunction" that included a request for reconsideration of the denial of the original motion. That motion is not before us because the court did not rule on it before Mr. Ead filed his Notice of Appeal on February 16, 2021. Instead, the court denied the motion as moot in open court at a hearing held February 26, 2021. At that hearing, after presenting Mr. Ead's testimony concerning the events of February 9, his counsel represented to the court that Ms. R had already undergone the abortion at a different clinic.[4]

[3] We can't tell whether the court said "justiciable" or "jurisdictional" here.

[4] In the exchange between the court and Mr. Ead regarding Ms. R's abortion, the court stated that he was "disappointed" that Mr. Ead's counsel hadn't "had more candor with the court":

> THE COURT: [Counsel], if it has more to do with opinions that you are drawing out and trying to force feed Mr. Ead so that he fits the narrative you want to state, then no, the Court's not interested in that. If you want to make argument or present facts, the Court will hear those.

We supply additional facts as needed below.

II. DISCUSSION

Mr. Ead lists six questions in his brief, but the only question before us is whether the circuit court erred in denying Mr. Ead's February 9 motion for temporary restraining order.[5] Mr. Ead's brief seeks to raise substantive arguments concerning his due process

> [MR. EAD'S COUNSEL]: Will the Court offer this man an apology because of the Court's [] lack of diligence, the life of his child was taken, not that day, but without us having an order to serve her, what happened? Her mother got her down to Shady Grove, they gave her the - - it's been called the world's first human pesticide, the pills. She came home. He saw the bleeding. She said, "I have to take a - - What did she say? Do what?
>
> THE COURT: Do not do that to Mr. Ead. That is not - - That is not appropriate. Are you saying that the abortion was had?
>
> [MR. EAD'S COUNSEL]: Pardon?
>
> THE COURT: Are you saying that the fetus was aborted?
>
> [MR. EAD'S COUNSEL]: That would make the Court happy so you could say it's moot, you won't have to rule. The Court of Special Appeals - - What I'm saying is - -
>
> THE COURT: There's nothing to rule on. If that is a fact, there's nothing to rule on.
>
> ***
>
> THE COURT: Well [counsel], I'm disappointed you weren't more - - had more candor with the Court.
>
> [MR. EAD'S COUNSEL]: I've told you everything I know, I put everything in that - -
>
> THE COURT: Well today, yes, but however, if that did in fact happen, and I'm going on your proffer, [] this proceeding is for naught.
>
> [MR. EAD'S COUNSEL]: I did not know until today.

[5] Mr. Ead states the Questions Presented as follows:

1. Does notice to an abortuary amount to constructive notice to their parent actively seeking an abortion and secreted in the back room of the abortuary for purposes of satisfying the requirement of notice "commensurate with the [emergency] circumstances" under Maryland R Gen. Rule 1-351(b) and Maryland Rule Spec. Procedure 15-504(b), or is authority for issuance of an *ex parte* injunction without notice to temporarily halt an abortion and thereby prevent irreparable harm to the federal due process rights of the father "necessarily implied by these rules *or other law*" under Maryland R Gen Rule 1-351(a)?

2. In evaluating whether the circuit court erred in denying a temporary injunction, and given that Ryan stood to suffer great irreparable harm, should this Court, instead of applying the "likelihood of success" standard, determine whether Ryan′s application raised "serious, substantial, difficult and doubtful" questions regarding whether a father must consent to the killing of his unborn child (abortion), where the abortion would deprive him of his fundamental constitutional right to fatherhood under the Due Process Clause of the Fourteenth Amendment and would likely cause him serious emotional and/or mental harm?

3. Did the balance of harms weigh in favor of the grant of the temporary injunction, where the irreparable harm to father's constitutional rights and to his emotional and mental health outweighed the temporary delay in the exercise of the mother's right to abort the unborn child pending resolution of the father's challenge to the abortion?

4. While Mary Doe's life has already been lost and the irreparable harm to father's constitutional rights and emotional and mental health has already occurred, may this Court nevertheless address the fundamental constitutional issues raised by this appeal under the "capable of repetition yet evading review" exception to the doctrine of mootness applied in *Roe v. Wade*, 410 U.S. 113 (1973)?

5. Does the father of a preborn child have standing to assert his unborn child's right to life under the Due Process Clause of the Fourteenth Amendment, as recognized by President Reagan in 1988 by his promulgation of Presidential Proclamation No. 5761, commonly referred to as the "Declaration of

right to parent his own children, but the circuit court did not consider those arguments. Instead, as explained above, the circuit court denied the February 9 motion on the ground that it was moot. And we reach the same conclusion as the circuit court for the same reason.[6]

"An appeal is moot if, as a result of time or circumstances, 'any judgment or decree the court might enter would be without effect.'" *Voters Organized for the Integrity of City Elections v. Balt. City Elections Bd.* ("*VOICE*"), 451 Md. 377, 392 (2017) (*quoting Hayman v. St. Martin's Evangelical Lutheran Church*, 227 Md. 338, 343 (1962)); *Attorney General v. Anne Arundel Cnty. Sch. Bus Contractors Assoc., Inc.*, 286 Md. 324, 327 (1979) ("A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide."). Although this Court has some authority to address the merits in certain narrow categories of moot cases, the more common outcome is that we dismiss a moot appeal. *VOICE*, 451 Md. at 392 (*citing Mercy Hosp., Inc. v. Jackson*, 306 Md. 556, 562

Independence for the Preborn"?

6. Should this Court "follow the science" and hold that the life of a human being begins at the point of conception?

[6] This case is beset with procedural problems other than mootness. As a foundational matter, Mr. Ead has filed no complaint. *See* Md. Rule 2-101(a) ("A civil action is commenced by filing a complaint with a court."). There is a February 9 docket entry labeled "Complaint / Petition", and the circuit court must have treated the TRO motion as a complaint for administrative purposes. But the motion neither lists nor references any cause of action or claims for relief beyond the TRO remedy itself. In addition, the docket does not reveal that any summons has issued, been served on, or returned as to either HRHS or Ms. R. *See* Md. Rules 2-112, 2-121 & 2-126. Ms. R never made an appearance in this case. HRHS's attorney filed an appearance in the appeal only.

(1986)). That is the correct result here. Mr. Ead has represented to this Court that Ms. R has obtained an abortion. There is no relief we could provide to Mr. Ead, and whatever controversy ever existed between him and Ms. R or HRHS is now moot. *See Hagerstown Reproductive Health Servs. v. Fritz*, 295 Md. 268, 272 (1983) (holding that case in which a husband had sought to enjoin his wife from obtaining an abortion was moot where, prior to oral argument, she obtained an abortion).

We may, in rare instances, address the merits of a moot case when "there is an imperative and manifest urgency to establish a rule of future conduct in matters of important public concern, which may frequently recur, and which, because of inherent time constraints, may not be able to be afforded complete appellate review." *Anne Arundel Cnty. Sch. Bus Contractors*, 286 Md. at 328. In determining whether a moot case falls within the public interest exception from the general rule of dismissal, we consider the potential public impact the question presents and the likelihood the issue will recur:

> [I]f the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight.

Lloyd v. Bd. of Supervisors of Elections of Balt. Cnty., 206 Md. 36, 43 (1954).

To the extent he argues that this case falls within the public interest exception,[7] Mr. Ead has not succeeded in establishing that it does. Almost forty years ago, the Court of Appeals dismissed as moot the appeal of a husband who had sought to prevent his wife from seeking an abortion. *Fritz*, 295 Md. at 272. In that case, the circuit court had granted the TRO. *Id.* at 270. This Court stayed the TRO, and then the Court of Appeals stayed this Court's order pending an oral argument that it scheduled for the following day. But the wife did not receive notice of the Court of Appeals's stay and, acting pursuant to this Court's order, she obtained an abortion. *Id.* at 270–71. The Court of Appeals dismissed the appeal as moot and held that it did not fall into the public interest exception because "[u]nlike many controversies with respect to abortion, this case involves no state or local statute dealing with abortions." *Id.* at 272. That observation applies here as well. Although Mr. Ead's motion purportedly raised important constitutional issues—a woman's right to choose to have an abortion[8] among them—the case arose from a conflict between two individuals and not from the government's application of an unconstitutional law.

Even more importantly, *Fritz* went on to hold that there was no showing that the issues raised in the case would recur and the trial record was otherwise inadequate to support the husband's various contentions. *Id.* And so too here. Mr. Ead has not

[7] Mr. Ead does not expressly make this argument, but we can see in a generous reading of the argument he does.

[8] *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846, 895–96 (1992); *see also Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976).

demonstrated that the situation here will recur frequently, let alone that it presents an imperative and manifest urgency to establish a rule of future conduct. Based on his counsel's representations, Mr. Ead wanted the circuit court, and now us, to recognize the right of putative fathers to enjoin their pregnant women partners from obtaining abortions. On the merits, of course, this theory is "flagrantly unconstitutional." *See Whole Woman's Health v. Jackson*, 594 U.S. ___, No. 21A24, slip op. at 1 (Sept. 1, 2021) (Sotomayor, J., dissenting). But even if it weren't, it could not rationally be applied to a woman who already had left a health clinic without obtaining an abortion, especially in the absence of any evidence that she intended to seek an abortion later. And the fact that Ms. R obtained an abortion later is irrelevant—what matters is the evidence before the circuit court at the time it considered Mr. Ead's TRO motion, and that record, such as it was, contained no allegation or evidence or even speculation that Ms. R would seek to have an abortion later, at HRHS or anywhere else.

Mr. Ead argues that this case falls into another exception to the mootness doctrine, *i.e.*, that the issue here is "capable of repetition but evading review." Under that exception, a case is not considered moot if "(1) the challenged action was too short in its duration to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again." *State v. Parker*, 334 Md. 576, 585 (1994) (*citing Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Even if we assume that the first element has been met, the second element hasn't been. This is not like *Roe v. Wade*, where the plaintiff was no longer pregnant by the time

the case reached the U.S. Supreme Court. 410 U.S. 113, 125 (1973). The Court held that the case was capable of repetition yet evading review because the plaintiff could again face charges under Texas's criminal abortion laws if she were to become pregnant again. 410 U.S. at 118–19, 125. In this case, Mr. Ead does not challenge any statute—instead, he sought to enjoin Ms. R from obtaining an abortion on the ground that it infringes on his constitutional right to parent his own children. And assuming that he could state a viable cause of action, he has made no showing that Ms. R will again become pregnant with his child. In short, he has failed to establish that the "capable of repetition, but evading review" exception applies.

Finally, our decision to dismiss this appeal as moot is consistent with the principle that an appellate court should not reach a constitutional issue when a case can be properly disposed of on a non-constitutional ground. *In re Juliana B.*, 407 Md. 657, 667–68 (2009).

APPEAL DISMISSED. APPELLANT TO PAY COSTS.

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I concur in the majority opinion, but write separately to point out that Mr. Ead apparently only sought an injunction against HRHS. At the hearing before the circuit court, Mr. Ead's counsel stated:

> We'd be getting an injunction against one plaintiff.[1] [Ms. R.] could easily, West Virginia, Frederick, you know, it's - - it's not as though she needs to be told what's going on or even know about it. We just - - *We just want this door to be closed to her if she goes to the Hagerstown - -*

(Emphasis added).

Thus, Mr. Ead expressly acknowledged that Ms. R. could obtain an abortion at another facility. In light of the uncontroverted fact that Ms. R. left HRHS—the only party Mr. Ead sought to enjoin—the circuit court determined that there was no pending issue for the court to decide. In my view, the circuit court correctly denied the requested TRO as moot because 1) it properly construed Mr. Ead's TRO request as being limited to HRHS and 2) there was no evidence that Ms. R. intended to return to HRHS for medical services. The court therefore properly ruled on the limited issue presented.

[1] Presumably Mr. Ead's counsel meant "one defendant" rather than "one plaintiff."