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State of Florida v. Presidential Women's Center

MARSHAL: ALL RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING, LADIES AND GENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT. I WOULD ALSO LIKE TO WELCOME THE JUSTICE OVERTON CONSTITUTIONAL LAW SEMINAR FROM THE UNIVERSITY OF FLORIDA LAW SCHOOL. THE FIRST CASE ON OUR DOCKET IS THE STATE OF FLORIDA VERSUS PRESIDENTIAL WOMEN'S CENTER. PARTIES READY?

MAY IT PLEASE THE COURT. LOUIS HUBENER WITH THE OFFICE OF THE ATTORNEY GENERAL, REPRESENTING THE PLAINTIFFS. IN THIS CASE, THE LOWER COURTS HELD THE WOMAN'S RIGHT TO KNOW ACT, WHICH "WOMAN'S RIGHT TO KNOW" ACT, WHICH REQUIRES THE PHYSICIAN TO OBTAIN CONSENT BEFORE PERFORMING A WOMAN'S ABORTION SURGERY, UNDER THE CONSTITUTIONAL LEAST INTRUSIVE MEANS TEXT. THEY, ALSO, HELD PART OF THE ACT ADOPTING THE WELL RECOGNIZED REASONABLE PATIENT STANDARD, UNCONSTITUTIONALLY VAGUE. WE SUBMIT THAT THE COURT ERRED IN EVEN APPLYING THE COMPELLING INTEREST TEST. THE PLAINTIFFS NEVER PROVED AND NEVER REALLY ATTEMPTED TO PROVE THAT THE ACT RESTRICTED A WOMAN'S DECISION.

CHIEF JUSTICE: AS FAR AS THIS COURT'S GENERAL CONSENT, MEDICAL STATUTES THAT APPLY AND APPLY TO ABORTIONS AS A PROCEDURE, ARE THERE OTHER EXAMPLES IN THE STATE STATUTE OF OTHER SPECIFIC INFORMED CONSENT STATUTES?

I AM NOT AWARE OF ANY AND NONE OF THEM ARE ARGUED IN THE BRIEF.

CHIEF JUSTICE: DO WE KNOW WHAT THIS WAS, WHAT, LET'S JUST ASSUME THERE IS A TEST WITH STRICT SCRUTINY. WHAT IS THE COMPELLING STATE INTEREST IN HAVING THIS STATUTORY SCHEME?

WELL, THE, IT IS LIKE ANY OTHER MEDICAL SURGICAL PROCEDURE. THE STATE HAS AN INTEREST IN HAVING THE PERSON WHO IS GOING TO UNDERGO OR POTENTIALLY UNDERGO A SURGICAL PROCEDURE, BE FULLY INFORMED ABOUT WHAT IS GOING TO HAPPEN AND THE CONSEQUENCES.

CHIEF JUSTICE: THAT IS COVERED, THOUGH, GENERALLY BY THE MEDICAL CONSENT STATUTE.

WELL, NOT NECESSARILY. THERE ARE DIFFERENCES, AND THE MOST SIGNIFICANT ONE IS THAT THE GENERAL MEDICAL CONSENT STATUTE, WHICH IS 766.103, DOESN'T ACTUALLY REQUIRE INFORMED CONSENT. WHAT IT IS, IS A BAR TO AN ACTION FOR DAMAGES AGAINST A PHYSICIAN, IF THE PHYSICIAN COMPLIES WITH THAT STATUTE.

CHIEF JUSTICE: SO, THEN, WHY PICK OUT ABORTION OR TERMINATION OF PREGNANCY, HOWEVER IT IS FRAMED, AS THE ONE MEDICAL PROCEDURE THAT REQUIRES A SPECIFIC INFORMED WRITTEN CONSENT? I AM JUST HAVING TROUBLE, AND THERE IS CERTAINLY MANY

MORE HIGH-RISK VOLUNTARY SURGERIES THAT PEOPLE GO THROUGH EVERYDAY.

WELL, ONE REASON YOU MAY BE HAVING TROUBLE IS A CASE DECIDED ON MOTION FOR SUMMARY JUDGMENT, ARGUING THAT THE STATUTE WAS FACIALLY UNCONSTITUTIONALLY UNCONSTITUTIONAL, AND THE LOWER COURTS CONSIDERED NO EVIDENCE. NOW, THERE IS IN THE RECORD FROM THE STATE, AN AFFIDAVIT OF A PHYSICIAN WHO PRACTICES IN THIS AREA, THAT EXPLAINS JUST HOW VULNERABLE WOMEN ARE IN THIS SITUATION, AND THAT THEY DO NOT ORDINARILY, IF EVER, REPORT SUBSTANDARD CARE. THEY DO NOT REPORT THE FACT THAT THEY MAY NOT HAVE BEEN INFORMED, FULLY INFORMED OF WHAT WAS GOING TO HAPPEN TO THEM. THEY DIDN'T KNOW EXACTLY WHAT THEY WERE FACING AND THE POTENTIAL FOR CONSEQUENCES.

I WONDER IF YOU ARE RIGHT THAT THERE IS NO OTHER INFORMED CONSENT STATUTE.

NO, I DIDN'T SAY THERE WASN'T. I JUST SAID

I NOTICE IN JUDGE KLEIN'S OPINION, IN THIS CASE, ON THE TEMPORARY INJUNCTION, THAT HE REFERS TO 458.324, WHICH IS AN INFORMED CONSENT FOR WOMEN WITH BREAST CANCER, IN WHICH IT IS PROVIDED THAT THE PHYSICIAN MUST TAKE INTO CONSIDERATION THE EMOTIONAL STATE OF THE PATIENT, PHYSICAL STATE OF THE PATIENT, AND THE PATIENT'S ABILITY TO UNDERSTAND THE INFORMATION.

WELL, THAT IS WHAT, ALSO, THAT IS LIMITED TO THAT SITUATION. THE "WOMAN'S RIGHT TO KNOW" ACT ADDRESSES A SITUATION WHERE A WOMAN IS CONSIDERING ABORTION SURGERY, AND SHE HAS THE SAME RIGHT AS THE WOMAN IN THAT SITUATION, TO BE FULLY INFORMED ABOUT WHAT IS GOING TO HAPPEN AND THE CONSEQUENCES.

THERE IS A STATUTE THAT DEALS WITH IT.

YES, THAT IS ONE, BUT I AM NOT FULLY FAMILIAR WITH THE RANGE OF THEM, BUT IF THAT IS AN EXAMPLE, THEN THEY ARE CONFINED TO PARTICULAR SITUATIONS. BUT IN ANY CASE, I THINK THEY RECOGNIZE THAT

WHAT WE ARE DEALING WITH ALTHOUGH YOU HAVEN'T ARTICULATED IT OUT LOUD, IS THE RIGHT TO PRIVACY, IS THAT CORRECT?

THAT'S CORRECT.

ALL RIGHT. SO THAT IS WHERE YOU ARE TALKING ABOUT WHETHER OR NOT THE STRICT SCRUTINY STANDARD ALIES TO AN ANALYSIS, WHETHER OR NOT THIS STATUTE VIOLATES A WOMAN'S RIGHT TO PRIVACY, IS THAT CORRECT?

I THINK THAT IS THE ARGUMENT OF THE APPELLATES, BUT WHAT I

ISN'T THAT - - OKAY. WE WOULDN'T BE TALKING ABOUT, IF WE WEREN'T TALKING ABOUT THE RIGHT OF PRIVACY. WHAT IS THE CURRENT STATE OF THE LAW? FOR INSTANCE, OUT OF THE U.S. SUPREME COURT, MUCH LESS OUT OF THIS COURT, WITH REFERENCE TO, FOR INSTANCE, THE STATE'S AUTHORITY DURING THE FIRST TRIMESTER OF A PREGNANCY, TO PUT ANY BURDEN ON THE WOMAN'S RIGHT TO CHOOSE OR RIGHT TO PRIVACY, AS IT HAS BEEN ARTICULATED? WHAT IS THE CURRENT STATE OF THE LAW, WITH REFERENCE TO THE STATE'S AUTHORITY TO PLACE ANY BURDEN ON THAT, EXERCISING THAT?

WELL, THE CURRENT STATE OF THE LAW IS ARTICULATED IN PLANNED PARENTHOOD VERSUS CASEY, IN WHICH THE COURT WENT FROM A STRICT SCRUTINY STANDARD TO AN D O BURDEN STANDARD. THIS COURT, HAS IN ITS RECENT CASE LAW, ADHERED TO THE STRICT SCRUTINY

STANDARD, WHEN THE RIGHT IS IMPLICATED. NOW, THE SUPREME COURT SAID, LONG AGO IN THE DANFORTH CASE AND CITY OF AKRON, WHICH WAS DECIDED IN 1983, THAT FIRST TRIMESTER REGULATIONS ARE PERMISSIBLE, IF THEY HAVE NO SIGNIFICANT IMPACT ON THE WOMAN'S RIGHT, AND THEY MUST SUORT A HEALTH-RELATED IS SUE, SO YOU MUST START WITH TRYING TO FIND OUT WHETHER THE REGULATION AT ISSUE HAS A SIGNIFICANT IMPACT ON THE WOMAN'S OR SIGNIFICANTLY RESTRICTS THE WOMAN'S DECISION.

YOU ARTICULATED THAT, IF THE RIGHT TO PRIVACY IS IMPLICATED, THAT WE HAVE SAID THAT YOU HAVE TO EMPLOY THE STRICT SCRUTINY STANDARD TO EMPLOY THE STRICT SCRUTINY STANDARD, AND ISN'T THAT EXACTLY WHAT WE HAVE SAID IN CHILES VERSUS STATE EMPLOYEES.

IN RENE VE RSUS STATE AND MOST RECENTLY IN THE NORTH FLORIDA WOMEN'S HEALTH AND COUNSELING CENTER CASE, WHICH WAS THE PARENTAL NOTIFICATION REQUIREMENT, IS THAT YOU, FIRST, HAVE TO CONSIDER WHETHER THE REGULATION OR THE STATUTE SIGNIFICANTLY RESTRICTS THE WOMAN'S DECISION. THAT IS WHERE YOU BEGIN.

IT AEARNS THAT WE CAPITAL EVEN AGREE ON WHAT THE STANDARD IS IN THIS AREA, SO IT AEARNS THAT WE DO NEED TO HAVE SOME CLARIFICATION, THEN, BECAUSE YOU DO FIND THOSE WORDS "NTW", BUT HOW DO YOU SQUARE THAT

ABSOLUTELY.

WITH THE NORTH FLORIDA CASE THAT REJECTED THE UNREJECTED THE UNDUE BURDEN STANDARD OF CASEY. IS IT A SIGNIFICANT RESTRICTION STANDARD. WE KNOW WE DON'T LOOK AT AN UNDO BURDEN, WHICH SEEMS TO BE LESS AFTER STANDARD, SO WHY NOT ACKNOWLEDGE WHEN IT IS IMPLICATED, THAT LEVEL OF SCRUTINY BECOMES ALICABLE, SO WE NEED TO CLARIFY.

IN THE NORTH FLORIDA WOMEN'S HEALTH AND COUNSELING CENTER CASE, THAT CONCERNED A REQUIREMENT OF PARENTAL NOTIFICATION.

RIGHT.

NOW, THAT OBVIOUSLY, RESTRICTS THE DECISION, SO, AND THAT IS WHAT YOU SAID, SO THEREFORE YOU ALY THE COMPELLING STATE INTEREST LEAST INTRUSIVE MEANS TEST TO THAT.

BUT DO WE NOT REJECT THE UNDUE BURDEN STANDARD OF CASEY?

YES, YOU DID.

HOW CAN WE SQUARE THESE TWO? YOUR ARGUMENT THAT IT MUST BE SIGNIFICANT.

WELL, YOU SAID THAT THE UNDUE BURDEN STANDARD WAS INHERENTLY VAGUE, BUT NOW YOU, IN THE SAME CASE, ALIED THE SIGNIFICANT RESTRICTION TO DETERMINE THAT THE RIGHT WAS AFFECTED, WAS RESTRICTED, AND THEREFORE YOU ALY, ALIED THE COMPELLING STATE INTEREST DECEMBER.

WHAT DOES INTEREST TEST.

WHAT DOES LOR SAY ABOUT THE STATE'S REGULATORY POWER, WITH REGARD TO INFORMED CONSENT. IN THE REGULATION OF MEDICAL, PROVIDING MEDICAL SERVICES IN THIS AREA, WHAT DOES ROESAY ABOUT THAT?

WELL , ROWE SAYS THAT THE STATE DOES NOT HAVE A COMPELLING INTEREST IN THE WOMAN'S HEALTH , AND THE FIRST TRIM ESTER AND THEREFORE IT BECOMES INCREASINGLY SIGNIFICANT IN THE SE COND TRIMESTER , AND IN THE THIRD , THE STATE CAN PROHIBIT ABORTI ONS , WITH CERTAIN EXCEPTIONS FOR LI FEAND HEALTH. IN SUBSEQUENT DECISIONS , THE C ITY OF AKRON AND THE DANFORTH DECISION , THE COURT HAS CLEARLY SAID THAT YOU CAN , THAT INFORMED CONSENT IS PERMISSIBLE. IT IS RECOGNIZED THE IMP ORTANCE OF IT , AND IT IS SAID THAT , EVEN IN THE FIRST TRIMESTER , THE STATE CAN REQUIRE INFORMED CONSENT .

CHIEF JUSTICE: BUT WHAT ABOUT THORNBERG ?

THORNBURGH IS NO DIFFERENT.

IT SAY S REQU IRED MATERIALS , MA KING THE STATE

IT DEPENDS ON THE CON TENT OF THE MATERIALS.

CHIEF JUSTICE: BUT PART OF THE STATUTE IS HAVING TO PRO VIDE PRI NTED MATERIALS TO THE , THAT ARE PROVIDED BY THE DEPARTMENT, THAT INCLUDES SOMETHING , I AM NOT SURE, WASN'T ABLE TO QUICKLYLOCATE IT , BUT A F ETUS PICTURE.

WELL , THAT , YOUR HONOR , HAS NOT, TO THIS PO INT , REALLY BEEN AN ISSU E IN THE CASE. IT WAS NOT RAISED BY THE MOTIONS FOR SUMMARY JUDGMEN T , AND THE REASON WAS , WAS BECAUSE THAT THESE MATERIALSHAD NOT BEEN PREPARED . THE U.S. SUPREME COURT HAS RECOGNIZED THAT MATE RIALS THAT SI MPLY PROVIDE INFORMATION ABOUT PO SSIBLE FINANCIAL RESOURCES TO THEWOMAN , IF SHE CHOOSES NOT TO HAVE THE ABORTION , OR PROVIDE INFORMATION ON ALTERNATIVE AG ENCIES THAT PROVIDE ALTERNATIVES AND AREWILLING TO A S SIST , IS PERMITTED, AND THAT IS THECITY OF AKRON , FOOTNOTE 37.

BUT HOW DO YOU DEAL, WITH YOU ARE ONLY DEALING WITH ONE PORTION BE FORE WHAT A KRON SAYS , AND THAT IS CORRECTLY , THAT THE STATE D OES HAVE AN INTEREST ANDFURTHER INTEREST IN INFORMED CONSENT , BUT THEN IT GOES ON IN QUOTES , EVEN THIS M INOR REGULATION DURING THE FIRST TRIMESTER, MAY NOT INTERFERE WITH A PHYSICIAN/PATIENT CONSULTATION, SO HOW DO YOU SQUARE? I T HAS GOT TWO PARTS. H OW DO YOU SQUARE THE OTHERPART?

I THINK YOU HAVE TO LOOK AT WHAT YOU ARE TALKING ABOUT A S AN INTERF ERENCE , AND THAT MAY REQUIRE SOME EVIDENCE. WHAT IS THE INTERFERENCE HERE ? I DON'T THIN K THAT THAT HAS BEEN ARTICULATED , AND IT HAS CERTAINLY NOT BEEN PROVED AND HAS BEEN THE SUB JECT OF EVIDENCE. THE MATERIALS THAT MR. CHIEF JUSTICE

JUST SO I UNDERSTAND THE PROCEDURAL POSTURE, BECAUSE IF WE PRESUME THE COMPELLING STATE INTEREST STANDARD AND WHAT WE SAID I N NORTH FLORIDA , THE STATE WO ULD HAVE THE BURDEN TO PROVE THAT , WHY THIS REGU LATION , WHY THE STATUTE WAS NECESSARY . WAS THERE , DID YOU HAVE EVIDENCE THAT YOU WERE PREPARED TO PRESENT AT A HEARING?

WE WERE WORKING ON. THAT WE WERE DEVELOPING IT. WE WERE UNDE RTAKING DISCOVERY.WE HAD , THERE IS THE AFFIDAVITS F ROM TWO PHYSICIANS THAT SUP PORT THIS LAW. WHEN, I THINK I MAY SAY THIS , WHEN THE OTHER SIDE SAW WHERE WE WERE G OING , THAT WE WANTED TO DEVEL OP AN EVIDENTIARY CASE , THEY CEASED COOPER ATING IN DISCOVERY, FI LED THE M OTION FOR SUMMARY JUDGMENT ARGUING THAT THE STATUTE WAS FACIALLY UNCONSTITUTIONAL , AND THAT IS HOW THE COURT D ECIDED , THE LO WER COURT IS TAKING, SAYING THAT EVIDENCE WAS SIMPLY NOT RELEVANT , AND I THINK THAT THAT IS AN ISSUE. I THINK EVIDENCE IS AN ISSUE .

SO WHAT WOULD THE EVIDENCE, WHAT WOULD IT BE RELEVANT TO?

WELL , I THINK IT WOULD BE RELEVANT TO , NUMBER ONE , THE N ATURE O F THE POPULATION , THE WOMEN YOU ARE DEALING WITH IN THE PARTICULARLY VULNERABLE SITUATION THAT YOU ARE IN, THE CONSEQUENCES TO THEM IF THEY ARE NOT F ULLY INFORMED OF THE RISKS THEY ARE TAKING, AND WHAT IS GOING TO MA NY TO THEM. JUST AS ANY OTHER MEDICAL SITUATION.

BUT YOU ALREADY HAVE THAT , DON'T YOU? I ME AN, WITH OUT THE STATUTE, YOU STILL HAVE THEREQUIREMENT THAT THERE BE AN INFORMED CONSENT , DO YOU N OT?

NO.

YOU DO NOT FOR MEDICALCARE?

YOU HAVE 766.103 , WHICH IS THE GENERAL STATUTE, WHICH IS NOT THEREQUIREMENT. IT SIMPLY IN HAVE YOU LATES , PROTECTS THE PHYSICIANS FROM A - - IN SULATES , PROTECTS THE PHYSICIANS FROM A DAMAGES ACTION. THAT PROVISION HAS NO PENALTY, IF THE PHYSICIANDOES NOT COMPLY WITH IT.

CHIEF JUSTICE: DID THE LEGISLATURE TAKE TESTIMONY , I MEAN, DO WE KNOW WHAT MOTIVATED THEM , BECA USE TO BE PERFECTLY HONEST AS YOU READ IT , REA D THE STATUTE , HAVE THE FE ELING THAT WHAT THIS IS ATTEMPTING TO DO IS TO CONVINCE A WOMAN THAT SHE SHOULD NOT HAVE AN ABORTION AND SH OULD TAKE THE CHILD TO HAVE A PREGNANCY, THAT IT IS REALLY NOT CONTENT -NEUTRAL, SO THE QUESTION I HAVE IS, DO WE , AND , AGAIN , I CAN THINK OF SO MANY MEDICAL PROCEDURES. WE HAVE YOUNG WOMEN THAT ARE HAVING BREAST ENHANCEMENTS , YOU KNOW , PLASTIC SURGERY THAT COULD BE VERY HARMFUL TO THEM PSYCHOLOGICALLY, SO THAT IS WHERE I WAS GE TTING BACK TO WHAT DO WE HAVE , AS FAR AS WHAT THE LEGISLATURE WAS THINKING , TO, IN ENACTING THIS STATUTE?

I AM NOT SURE THAT THERE WAS ANY REL EVANT LEGISLATIVE HISTORY ON THIS.

SO ON ITS F ACE , THEY JUST PICKED OUT ABORTI ON, AND WE DON'T HAVE ANY IDEA WHY THEY DID .

NO. I CAN'T SAY THAT THAT IS IN THE RECORD.IT IS NOT. BUT I THINK IT IS C LEAR THAT THEY ARE INTE NDING TO EN SURE THAT WOMEN WHO ARE CONSIDERING AN ABORTION JUST BE FULLY INFORMED OF WHAT IS GOING TO HAEN, AND I DON'T THINK MR. CHIEF JUSTICE

DO YOU, IS THE NATURE AND THE RISKS OF UNGOING OR NOT UNDERGOING OF UNDERGOING OR NOT UNDERGOING , POST PROCEDURE , ARE THOSE MEDICAL OR PS YCH BE LO GICAL RISKS.

THEY ARE MEDICAL RISKS.

HOW CAN THAT BE , BECAUSE C SAYS MEDICAL RISKS .

BECAUSE THIS IS A MEDICAL CONSENT STATUTE.

A DO CTOR IS IRRELEVANT?

PAR DON?

SO HOW DOES "A" AND " C" DIFFER?

"C" IS THE RISK OF THE FETUS AND THE WOMAN , MEDICAL R ISK OF CAR RYING THE F ETUS TO TERM, AND THE "A" IS THE RISK OF UNDERGOING THE PROCEDURE, WHICH I THINK IS, OBVIOUSLY, THE MEDICAL RISK . I JUST THINK IT IS AN UNREASONABLE INTERPRETATION , TO I THAT , AS HAS BEEN ARGUED, THAT THAT , THAT THAT M EANS SO CIAL AND ECONOMIC RISKS.

CHIEF JUSTICE: SO A DOCTOR WOULD , FROM THE NORTH FLORIDA CASE, WE KNOW THAT THERE ARE MORE RISKS IN T AKING , GOING TO TERM THAN IT IS TO HAVE AN ABORTION , IF A DOCTOR SAID, YOU KNOW , IT IS REALLY RISKER IF YOUHAVE THE CHIL D OR NOT , THAT WOULD BE SUFFICIENT INFORMED CONSENT?

NO , I DON'T THINK SO. I THINK THE DOCTOR NEEDS TO EXPLAIN WHAT IS GOING TO HAEN, THE PARTICULAR RISKS OF THE ABORTION PROCEDURE. THEY MAY B E LESS THAN CARRYING TO TERM , BUT THAT DOES NOT, REAL LY, INFORM THEPATIENT OF WHAT IS GOING TO HAEN IN A PARTICULAR RISK TO HER. I MEAN, THE PATIENT FOR EXAMPLE , MAY HAVE HAD FOUR OR FIVE PRE VIOUS ABORTION S, AND THAT, HER MEDICAL CONDITION MAY BE SUCH THAT A FIFTH OR SI XTH ONE WOULD P OSE A SIGNIFICANT RISK O F HARM TO HER , AND D RINK THINGS LIKE THAT HAVE TO BE HELOUS AND THINGS LIKE THAT HAVE TO BE ELUCIDATED.

CHIEF JUSTICE: AND THAT WOULDN'T BE PART OF A DOCTOR'S NORMAL DUTY OF C ARE THAT WOULD BE CO VERED BY INFORMED CONSENT GENERALLY?

IT SHOULD BE , BUT 766.103DOESN'T ENSURE THAT.

CHIEF JUSTICE: I SEE YOUARE IN YOUR REBUTTAL, IF YOU WANT TO SAVE SOME TIME.

THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS MARSHAL OSOFSKY , AND ALONG WITH BEBE ANDERSON , WE REPRESENT THE DOCTOR AND WOMEN'S CENTER. AND BARRY SI LVER HAS GRACIOUSLY G IVEN ME HIS TIME TODAY .

LET ME ASK YOU A QU ESTION , J USTICE SAID A DECISION TO ABORT IS ONE THAT IT IS IMPERATIVE THAT BE MADE WITH FULL KNOWLEDGE OF ITS CONSEQUENCES, AND IN T W , IT WAS SAID THAT EXAMPLES OF REGULATIONS PERMISSIBLE D URING THE FIRST TRI FEST MESSTER ARE TRIMESTER ARE REQUIRING INFORMED CONSENT AND THE MAINTENANCE OF CERTAIN RECORDS. GIVEN THE STATEMENTS O F BLACKMON AND EHRlich , HOW IS THERE A WAY O F ENSU RING INFORMED CONSENT IN THESE CIRCUMSTANCES?

BECAUSE THE GENERAL CONSENT THAT IS ALREADY ON THE BOOKS , PROT ECTS THE WOMEN TO DAY, BECAUSE THE INFORMATION GIVEN TO THEWOMEN IS BY , THROUGH MEDICAL JUDGMENT, BA SED UPON THE PARTICULAR CIRCUMSTANCES OF THE WOMAN IN HERETIC LAR PLACE IN LI FE.

IN HER PARTICULAR PLACE IN LIFE .

YOU HAVE TO PROVE IT I S SOMETHING MORE THAN JUST REDUNDANT , RIGHT? IF ALL IT DOES IS OFFER THE SAME PROTECTIONS THAT THE GENERAL MEDICAL CONSENT DOES , SO WHAT? THAT DOESN'T MAKE IT CONSTITUTIONAL.

BUT YOU CAN USE THESTATUTE THAT EX ISTS COMP ARED TO THIS STATUTE , AND YOU CAN S EE THAT THIS STATUTE IS VOID FOR VAGUENESS , BECAUSE WHEN YOU COMPARE THE TWOSTATUTES, CLEARLY THE GENERAL MEDICAL CONSENT STATUTE THAT IS ON THE BOOKS IS NARR OWLY TAILORED TO THE INDIVIDUAL PATIENT AND PROVIDES THE DOCTOR WITH THE PROPER GUIDELINES TO GO BY , TO GIVE THE PROPER INFORMATION TO THE PATI ENT.

OKAY , WELL, THEN , YOU WOULD AG REE THAT THE STATE HAS THE PO WE R TO PA SS AN INFORMED CONSENT STATUTE .

YES, AS LO NG AS THAT INFORMED CONSENT STATUTE

AND IT AFFECTS WOMEN.

AS LONG AS IT AFFECTS ALL PATIENTS EQUALLY, IS WHAT WE ARE, IS THE POINT. IF YOU ARE GOING TO

WHAT, I JUST WONDER HOW, WHERE WE ARE GOING WITH ALL OF THIS, IS WHAT CONCERNS ME, BECAUSE I HAVE A HARD TIME SEEING THE LOGIC OF NOT BEING ABLE TO REQUIRE AN INFORMED CONSENT, IN RESPECT TO THE TERMINATION OF PREGNANCY, AND YET BE ABLE TO HAVE INFORMED CONSENT IN RESPECT TO BREAST SURGERY. NOW, DO YOU THINK THAT THE BREAST SURGERY INFORMED CONSENT STATUTE IS UNCONSTITUTIONAL, AS AN INVASION OF PRIVACY?

NO, YOUR HONOR, BECAUSE I THINK THAT THE BREAST STATUTE TAKES INTO CONSIDERATION THE PATIENT'S CIRCUMSTANCES AS IT WAS READ TO US. THE STATUTE AS WRITTEN FOR THE, THAT IS IN THE "WOMAN'S RIGHT TO KNOW" ACT, DOESN'T ALLOW A DOCTOR TO TAKE INTO CONSIDERATION, THE

SO, REALLY, WHAT I AM TRYING TO UNDERSTAND, THEN, IS WHETHER WE ARE DEALING WITH SOMETHING THAT IS READILY DONE AS A MATTER OF LAW, WITH NO RECORD. IF WE ARE DEALING WITH WHAT IS UNDER THE CIRCUMSTANCES, OR WHETHER THERE NEEDS TO BE DEVELOPED, A RECORD, IN ORDER TO MAKE THAT DETERMINATION. IF WE CAN LOOK AT ONE STATUTE ON BREAST SURGERY AND SAY THAT IT DOESN'T INVADE PRIVACY, WE LOOK AT ANOTHER ONE, AND ALL WE ARE TALKING ABOUT, WHAT IS UNDER THE CIRCUMSTANCES, IT SEEMS TO ME WE ARE INTO AN INCONSISTENCY.

WELL, I DON'T BELIEVE IT IS INCONSISTENT, BECAUSE I THINK THAT THE BREAST CANCER STATUTE THAT YOU WERE REFERRING TO SETS FORTH THE SPECIAL CIRCUMSTANCES THAT A DOCTOR WOULD CONSIDER, MUCH LIKE THE SAME SPECIAL CIRCUMSTANCES GENERIC TERM USED IN THE GENERIC MEDICAL CONSENT STATUTE. THIS STATUTE DOES NOT HAVE, UNDER THE CIRCUMSTANCES, IT DOESN'T LAY OUT ANY OF THE SPECIFICS. IT DOESN'T DO ANYTHING EXCEPT SET FORTH SOME REASONABLE PATIENT STANDARD THAT NO ONE KNOWS WHAT THAT MEANS, AND

THAT IS A PRETTY COMMON STANDARD, THOUGH, ISN'T IT, I MEAN, FOUND IN THE STATUTES, HASN'T THAT BEEN FOUND CONSTITUTIONAL IN OTHER STATES, REASONABLE PATIENT AND OTHER KIND OF OBJECTIVE IN DICIA IN STATUTES, HAVEN'T THOSE BEEN UPHOLD AS CONSTITUTIONAL?

AS FAR AS A REASONABLE PATIENT STANDARD GOES IN OTHER STATES, THE MAJORITY OF THE CASES, THAT MAJORITY, ALMOST ALL OF THE CASES CITED BY THE PLAINTIFFS, WERE CASES DEVELOPED IN COMMON LAW, WHEN THEY WOULD TALK ABOUT THE REASONABLE PATIENT. THEY WOULD ALWAYS HAVE THE FOLLOW-UP UNDER THE CIRCUMSTANCES OR IN HER CIRCUMSTANCES, OR, BUT THEY WOULD ALWAYS HAVE THAT QUALIFYING LANGUAGE.

WELL, HOW CAN YOU READ IT OTHERWISE, THEN, IN THOSE CIRCUMSTANCES? I MEAN, WHEN YOU TALK ABOUT THE REASONABLE PATIENT IN A STATUTE, YOU ARE NOT TALKING ABOUT A REASONABLE PATIENT GOING IN FOR AN AENECTOMY. YOU ARE TALKING ABOUT A REASONABLE PERSON GOING IN FOR AN ABORTION.

BUT WHAT IS THE REASONABLE PERSON COMING IN FOR ABORTION? IS IT A RAPE VICTIM? A MATURE WOMAN WHO IS SEEKING ABORTION FOR SEVERAL REASONS, IS IT IN SAYS? YOU DON'T KNOW WHAT KIND OF PATIENT.

CHIEF JUSTICE: SO YOU ARE SAYING THE STATUTE, UNDER "A", FIRST OF ALL THE STATE HAS CONCEDED THAT THIS IS ONLY MEDICAL RISKS NOT PSYCHOLOGICAL RISKS, WHICH SEEMS TO ME A BIG CONCESSION, AND THE SECOND IS THAT I WOULD THINK THAT, FURTHER, IF THEY

CONCEDED , THEN YOU WOULD READ "A" THAT IT WOULD BE MEDICAL RISKS , REASONABLE PATIENT UNDER THE CIRCUMSTANCES , SO A 35-YEAR-OLD WOMAN WOULDN'T GET THE SAME DISCUSSION AS AN 18 YEAR-OLD . NOW , IS THAT NOT , YOU READ IT AS YOU HAVE TO SAY THE SAME THING TO EV EVERY PATIENT THAT COMES IN?

AS W RITTEN , YOU WOULD , AND I THINK THAT IS THEPROBLEM WITH THE STATUTE, IS WHAT, THAT GOES TO OUR WHOLEPOINT ABOUT THE VAGU ENESS , THAT A DOCTOR LOOKING AT THIS, WON'T KNOW THAT THE STATE HAS CONCEDED ITS MEDICAL RISK .

CHIEF JUSTICE: ONCE YOU HAVE MA DE THE STATEMENT, NOW YOU ARE JUST TALKING ABOUT PRIVACY.

RIGHT. TWO ISSUES, ONE A VAGUENESS AND ONE A PRIVACY ISSU E.

CHIEF JUSTICE: LE T'S GO BACK TO THE PRIVACY ISSUE , IF WE INTERPRET THE STATUTE AS ONLY BEING MEDICAL RISKS AND ONLY BEING REASONABLE PATIENT UNDER THE CIRCUMSTANCES, WHICH YOU SAY IS SIMILAR TO BREAST CANCER,THEN WHAT IS WR ONG WITH THAT? AN ENHANCEMENT, THEN , OF THE GENERAL MEDICAL CONSENT STATUTE.

AG AIN, IT DOESN'T SAY UNDER THE CIRCUMSTANCES. THAT LANGUAGE BEING MISSING IS A K EY E LEMENT, BECAUSETHE REASONABLE PATIENT MR. CHIEF JUSTICE

WHAT ISIT , BUT HOW DOES THAT , IN OTHER WO RDS , IF , HO W DOES THAT INFRINGE ON THE RIGH T TO PRIVACY? I AM JUST TALKING ABOUT PRIVACY. MEDICAL RISK. NOT PSYCHOLO GICAL , SO CIAL RISKS. AND NOW WE ARE NOT TALKING ABOUT THE PRINTED MATERIALSPART BUT JUST SUBSECTION ONE, THEN , HOW IS THAT A PRIVACY INVASION , WHICH WAS REALLY WHAT JUSTICE BELL WAS ASKING INITIALLY .

RIGHT. WELL , IF IT WAS WRITTENEXACTLY LIKE THE MEDICALCONSENT STATUTE, THEN WEWOULD HAVE HARD TIME AR GUING PRIVACY , BECAUSE IT IS NOT DICTATING WHAT A DOCTOR SAYS. IT IS LEAVING DISCRETION TOTHE DOCTOR, WHICH IS NOT INTERFERING WITH THE DOCTOR/PATIENT RELATIONSHIP .

CHIEF JUSTICE: SO IF WE INTERPRET THE STATUTE THAT WAY , THEN IT WOULD BE CONSTITUTIONAL .

IF YOU INTERPRET THE IT IF YOU INTERPRETED IT THAT WAY

CHIEF JUSTICE: AS BEING MEDICAL RISK AND TAILORED TO THE CIRCUMSTANCES, AS JUSTICE BELL SAID IT WOULD BE COMPARED TO THE MEDICAL CONSENT STATUTE , BUT THESTATUTE IS NOT A MANDATORY CONSENT STATUTE.

IT MAY C URE SOME OF THE PRIVACY ISSUES , BUT YOU WOULD STILL HAVE SOME OF THEOTHER ISSUES, AS THE VAGUENESS ISSUES, BECAUSE A DOCTOR LOOKING AT IT WOULDN'T, ON ITS F ACE MR. CHIEF JUSTICE

AGAIN , THE QUESTION IS WHAT LE EWAY THE COURT HAS TO TAKE SOMETHING THAT COULD BE V AGUE , AND WITH THE CONCESSIONS BITE STATE, READ IT AS TO BE CONCESSIONS BY THE STATE , READ IT AS TO MEDICAL RISK AND READ IT AS TO BEING UNDER THE CIRCUMSTANCES. BECAUSE CERTAINLY YOU WOULD AGREE, IN THE EXAMPLE CI TED BY THE STATE, THAT , IF IT WAS A WOMAN THAT HAD HAD FIVE PRIOR ABORTIONS , THEN THERE WAS A DANGER IN THENEXT ONE , CERTAINLY YOU WOULD AGREE THAT THOSE RISKS S HOULD BE COMMUNICATED TO THE PATIENT .

I CERTAINLY AGREE THOSE RISKS S HOULD BE COMMUNICATED TO THE PATIENT, BUT THE

DOCTOR WOULD HAVE TO KNOW THAT PARTICULAR PATIENT'S CIRCUMSTANCES , WHICH IS WHY I AM SO RRY. I DIDN'T MEAN T O INTERRUPT, BUT THER E IS THAT C ATCH ALL PROVISION , I GUESS AT THEEND OF THE STATUTE , THATSAYS THAT NOTHING IN THIS STATUTE SHALL PROHIBIT THE PHYSICIAN FROM ADVISING THE PATIENT OF ANYTHING ELSE THAT THE PHYSICIAN DE EMS RELEVANT , SO EVEN I F WE INTERPRET IT THAT WAY , THE PHYSICIAN CAN, STILL , SAY, LOOK, UNDER YOUR PARTICULAR CIRCUMSTANCES, THIS IS WHAT I AD VISE , AND THE STATUTE SEEMS, TO ME , VERY EMPHATIC IN SAYING WE ARE NOT TRYING TO KEEP THE PHYS ICIAN FROM INFORMING THE PATIENT OF ANYTHING THE PHYSICIAN DEEMS RELEVANT.

WELL , WHAT THAT PROVISION DOES IS IT ALLOWS THE DOCTOR TO ADD MORE , BUT IT DOESN'T ALLOW THE DOCTOR TO SUBTRACT THE STANDARDIZED LANG UAGE WHICH EX ISTS I N " B" AND " C" , WHICH WOULD BE AN OTHER ISSUEAS TO JUSTICE PARIENTE'S QUESTION THAT IT MAY SOLVEPROBLEMS WITH RESPECT TO SUBSECTION A BUT NOT TO "B" AND "C" , SO NOW YOU ARE TELLING THE PATIENT ALL OF THE STANDARDIZED LANGUAGE AND ARE STRAIGHT JACKETINGTO TELL HIM YOU HAVE GOT TO SAY ALL O F " A , B AND C AND YOU CAN ADD MORE TO IT , BUT IF IT CONFLICTS WITH A , B , AND C , WHAT YOU ARE A D DING , YOU ARE GOIN G TO HAVE A VERY CONFUSED AND STR ESSED OUTPATIENT.

THE DOCTOR CAN SAY THIS IS A NORMAL RISK. HOWEVER , YOU HAVE U N IQUE CIRCUMSTANCES.YOU ARE 35 YE AR S OLD AND HAVE TWO ABORTIONS AND TWO CHILDREN AND IT MAY BE DANGEROUS FOR YOU TO UNDER G LOW AN ABORTION TO UNDERGO AN ABORTION , AND DANGEROUS TO RENDER YOU STERILE , THOSE THIN GS SEEM TO BE WHAT THE CA TCH ALL PROVISION AT THE EN D IS ALL ABOUT.

BUT , A GAIN , IT ONLY ALLOWS YOU TO ADD THINGS. YOU STILL HAVE TO GIVE THE STANDARDIZED

RIGHT.

- - INFORM ATION, AND THE STANDARDIZED INFORMATIONWOULD NOT BE AROPRIATE FORTHAT PARTICULAR PATIENT ANDYOU HAVE TO GI VE IT, ANYWAY, IT IS GOIN G TO BE HARMFUL TO THE PATIENT.

WEREN 'T THERE TWO AFFIDAVIT BY EXPE RTS , PRESENTED BY THE STATE, THAT SAID THAT, AS WRITTEN, THIS IS AROPRIATE AND WHAT A PHY SICIAN SHOULD DO UNDER THE CIRCUMSTANCES?

WE DON'T THINK THE AFFIDAVIT IS EVEN BEING CONSIDERED, BECAUSE ON THEFACE OF THE STATUTE, YOU CAN SEE THAT IT VIOLATES PRIVACY AND IS V OI D FOR VA GUENESS , BECAUSE WHEN YOU COMPARE IT

HOW DOES IT VI OLATE PRIVACY , IF THE INTENT IS TO PROVIDE INFORMED CONSENT? IT IS NOT SAYI NG THAT THE ABORTION CANNOT BE UNDERTAKEN. THE QUESTION IS WHE THER OR NOT THE DECISION IS AN INFORMED ONE. THAT IS WHAT IS HERE , ANDLET ME BACK UP . I THINK YOU CAN ANSWER THAT Q UESTION BY RESPONDING TOTHE STATE'S AR GUMENT THAT THE GENERAL MEDICAL CONSENT PROVISION IS A PROVISION IN ORDER TO PROTECT PHYSIC IANS F ROM SUIT . IE , AS LONG AS THEY DO THESE THINGS, THEN THERE IS LIMITATIONS ON YOUR ABILITY TO SUE THEM. WHEREAS THE BREAST SURG ERY AND THIS PRO CEDURE , IS FOCUSING ON THE PATIENT'SNEED IN MAKING THE PATIENT INFORMED , SO SPEAK TO THAT.

THE GENERAL MEDICAL CONSENT STATUTE, ALTHOUGH IT IS THERE TO PROT ECT THE DOCTOR, ALSO PROVIDES THE GUIDELINES FOR THE PROVIDING OF CONSENT, BY TELLING THE DOCTOR THAT THEY CAN USE THEIR MEDICAL JUDGMENT IN THE PATIENT'S PARTICULAR CIRCUMSTANCES.THE HARM WITH THIS STATUTE IS THAT IT IS INTERFERINGW ITH THAT RELATIONSHIP , BECAUSE PRIVACY , WHICH WAS YOUR CONCERN INITIALLY , I S IMPACTED BY

THIS , IN THAT ROWE AND IN RE TW , THEY ALL SAY THAT THE MOST IMPORTANT THING IS NOT TO INTERFERE WITH THAT PATIENT

HOW IS INTERFERING WITH THE RELATIONSHIP ANY DIFFERENTLY, BECAUSE I ASSUME YOU ALLY THE SAME STANDARD TO THE BREAST SURGERY, WOULD YOU NOT? DOES THE SAME STANDARD ALYON THE RIGHT OF PRIVACY AS TO THE BREAST SURGERY?

I BELIEVE IT WOULD. WE HAVE N'T EXAMINED THE BREAST STATUTE IN ITS ENTIRETY, BUT IN ITS ENTIRETY, BUT FROM WHAT I UNDERSTAND AND HAVE HEARD AND READ , IT WOULD SEEM THAT THAT STATUTE IS CLOSER TO THE GENERAL MEDICAL CONSENT STATUTE, IN THAT IT DOES ALLOW A PHYSICIAN TO CONSIDER THE PARTICULAR NEEDS AND SPECIAL POSITION THAT THAT PATIENT IS IN. THIS STATUTE DOES NOT, BECAUSE IT DOES NOT HAVE, UNDER THE CIRCUMSTANCES OR ANYTHING DIRECTED TO THAT PARTICULAR PATIENT. ALL IT DOES IS PROVIDE A STANDARDIZED CHECKLIST FOR THE THIS DOCTOR TO GO THROUGH UNDER SOME HYPOTHETICAL REASONABLE PATIENT STANDARD, WHEN IS THAT REASONABLE PATIENT WHEN THAT REASONABLE PATIENT , WHO KNOWS WHAT THAT IS.

CHIEF JUSTICE: IS SUBSECTION 2 IMPLICATED IN THIS DISCUSSION? THAT IS THE ISSUE OF THE PRINTED MATERIALS PREPARED AND PROVIDED BY THE DEPARTMENT HAVE TO BE GIVEN TO THE PREGNANT WOMAN.

WE DID NOT ADDRESS THAT MATTER IN OUR MOTION FOR SUMMARY JUDGMENT. OUR MATTERS WERE DIRECTLY JUST TO SUBSECTION A. THE , AS COUNSEL TOLD YOU , THE PRINTED MATERIALS WERE NOT COMPLETED . WE DIDN'T FEEL A NEED TO ADDRESS THAT, BECAUSE WE FELT THAT , JUST ON ITS OWN , SUBSECTION A VIOLATED THE RIGHT TO PRIVACY AND WAS, ALSO, VOID FOR MR. CHIEF JUSTICE

SO YOU HAVE NO ARGUMENT ON SUBSECTION 2 AT ALL.

WELL , WE HAVEN'T MADE THE ARGUMENT, BECAUSE WE DON'T BELIEVE AT THIS PARTICULAR JUNCTURE WE HAVE HAD TO YET BECAUSE OF THE CONSTITUTIONAL PROBLEMS WITH SUBSECTION A. AS I , WHEN I FIRST STARTED , I WANTED TO TOUCH ON SOMETHING THAT JUSTICE PARIENTE BROUGHT UP, WHICH WAS THE PROBLEMS WITH SUBSECTIONS A VERSUS "C " , BECAUSE THAT GOES TO ONE OF THE ISSUES THAT WE HAVE WITH OUR MAJOR VAGUENESS ARGUMENT. THE STATUTE IS VAGUE, NOT ONLY BECAUSE OF THE REASONABLE PATIENT STANDARD WHICH WE HAVE ALREADY TALKED ABOUT , BUT BECAUSE THE NONMEDICAL RISKS , WHICH , AGAIN , ONLY ASSUME TO BE NONMEDICAL RISKS IN SUBSECTION A, ARE DIFFERENT THAN THE MEDICAL RISKS IN SUBSECTION C. THE PLAIN LANGUAGE OF " A " , THE PLAIN LANGUAGE OF "A" IS NOT LIMITED TO MEDICAL RISKS , BUT THEN THE STATUTE PROVIDES NO GUIDANCE AS TO WHAT NONMEDICAL RISKS ARE TO BE DISCLOSED , SUCH AS ECONOMIC, SOCIAL OR EMOTIONAL PROBLEMS. THE STATE'S POSITION

OBVIOUSLY I DON'T THINK THE LEGISLATURE INTENDED FOR THE PHYSICIANS TO BE ECONOMISTS , THEY ARE PHYSICIANS, SO WOULDN'T, ESPECIALLY GIVEN THE DOCTOR WOULD INTERPRET A STATUTE IN ORDER TO FIND IT CONSTITUTIONAL NOT UNCONSTITUTIONAL, DOESN'T THAT HAVE TO BE INTERPRETED AS SAYING YOU HAVE TO INFORM THEM OF THE RISKS THAT ARE WITHIN YOUR COMPETENCE TO INFORM THEM ABOUT, NOT THAT YOU HAVE TO BE A COUNSELOR AND ADVISOR AND SPIRITUAL ADVISOR TO THIS PERSON, BUT YOU ARE A MEDICAL DOCTOR. YOU INFORM THEM OF THE RISKS AS YOU KNOW THEM , UNDER YOUR EXPERTISE.

THAT IS PART OF THE PROBLEM WITH THE STATUTE, IS THAT IT DOESN'T SAY THAT. IT SAYS , IT USES THE TERM RISKS , AND IT USES THE TERM MEDICAL RISKS, AND YOU , ALSO , HAVE TO PRESUME THAT THE LEGISLATURE MEANT WHAT IT SAID, WHEN IT DISTINGUISHED THOSE TWO. IT COULD HAVE PUT MEDICAL RISKS BUT CHOSE NOT TO. IT JUST PUT RISKS , AND THIS IS A HIGHLY VOLATILE AREA .

IF THE INTERPRETATION IS MEDICAL RISKS , THEN YOU AGREE THAT IT IS NOT PROBLEMATIC?

I WOULD STILL THINK IT IS PROBLEMATIC, BECAUSE I THINK ON THE FACE OF THE STATUTE , A REASONABLE DOCTOR COULDN'T BE ABLE TO TELL DOES THAT MEAN , WHAT KIND OF RISKS DOES THAT MEAN ? IF THEY HAD MEANT MEDICAL RISKS , THEY COULD HAVE PUT MEDICAL RISKS AND THEN THE DOCTOR WOULD KNOW.

CHIEF JUSTICE: IT WOULD SEEM THAT THIS WOULD BE , NOW , RIDICULOUS, BECAUSE IF THE ISSUE WERE MEDICAL RISKS, AND THEY HAVE GOT MEDICAL RISKS OF THE WOMAN CARRYING THE FETUS TO TERM, THEN , THE DOCTOR SAYING , WOULD THE DOCTOR SAY FOR EVERY KIND OF PROCEDURE YOU UNDERGONE , THE UNDER GO , THE RISKS ARE FOR BLEEDING , A ONE PER CENT RISK. THAT IS WHAT IT IS. IF YOU CARRY TO TERM THERE , IS A 10 PERCENT RISK THAT EXISTS , AND IF THAT IS, AGAIN, CONSIDERING IT AS THE PHYSICIAN , AND IT IS RESTRICTED TO THAT , THEN IT IS HARD TO SEE WHERE THE BURDEN IS .

WELL , THE BURDEN WOULD BE ON IF THE LEGISLATURE HAD WANTED, YOU HAVE TO MAKE THE STATUTE CLEAR. AND ON ITS FACE , SO THAT A PHYSICIAN LOOKING AT THIS DOESN'T HAVE TO CULL THROUGH CASE LAW .

THAT IS THE PRINCIPLE, BUT IF THIS COURT INTERPRETS IT AS ACCORDING TO THE PRINCIPLE, THAT WE HAVE A DUTY TO UPHOLD A STATUTE WHERE POSSIBLE , WE CAN'T READ TERMS INTO IT , AGAIN , THE STATE, TO DAY , HAS CONCEDED THAT IT IS ONLY LIMITED TO MEDICAL RISKS , AND I DON'T KNOW WHAT THEY WILL SAY ABOUT WHETHER IT NEEDS TO BE UNDER THE CIRCUMSTANCES THAT THAT IS PART OF IT. AT THAT POINT, THEN , REALLY, THE VAGUENESS AND PRIVACY ARGUMENTS , YOU KNOW , IT IS SORT OF LIKE IT IS NOT A BIG DEAL SITUATION, BECAUSE THAT COULDN'T TAKE VERY LONG TO EXPLAIN , AND IT IS PART OF WHAT YOU PROBABLY DO ANYWAY , AS A DOCTOR .

WELL , I THINK THE POINT THAT WE ARE MAKING IS THAT THE STATUTE , FOR WHEN A PERSON READS A STATUTE, HAS TO BE CLEAR ENOUGH , ESPECIALLY WHEN YOUR LICENSE IS AT STAKE .

CHIEF JUSTICE: I GUESS I CAN UNDERSTAND WHEN IT IS FIRST PASSED AND YOU READ THE WHOLE THING TOGETHER, IT LOOKS LIKE MAYBE SOMETHING ELSE WAS BEHIND IT , BUT SINCE THERE IS NO LEGISLATIVE HISTORY ABOUT WHAT IS BEHIND IT , AS I SAID IF I READ ONE AND TWO TOGETHER, I HAVE THE IMPRESSION THAT THE LEGISLATURE IS TRYING TO DISCOURAGE ABORTIONS, BUT YOU SAID, WELL ACTION WE ARE NOT LOOKING AT TWO TODAY YOU SAID, WELL , WE ARE NOT LOOKING AT TWO TODAY , SO I JUST LOOK AT SUBSECTION ONE AND LOOK AT THAT AS MEDICAL RISKS , THERE DOESN'T SEEM TO BE MUCH OF A PROBLEM AT ALL.

IF THAT IS WHAT IT SAYS .

LET ME ASK YOU , YOU KEEP REFERRING TO THE PHYSICIAN , THE PHYSICIAN, THE PHYSICIAN , AND I DON'T HEAR YOU TALKING ABOUT THE WOMAN'S RIGHT OF PRIVACY, AND THE RIGHT TO BE INFORMED, DULY INFORMED , FULLY INFORMED OF THE PROCESS , SO MAKE YOUR ARGUMENT HOW THIS STATUTE DOES NOT ACHIEVE WHAT HAS BEEN RECOGNIZED BY BLACKMON AND OTHERS, AS THE NEED TO HAVE FULLY INFORMED CONSENT. HOW DOES THIS IMPAIR THAT?

AN ELEMENT OF FULLY INFORMED CONSENT , IS THE RELATIONSHIP BETWEEN THE PHYSICIAN AND THE PATIENT, AS RECOGNIZED IN ROWE AND IN RETW, BY THIS COURT , THAT IN THAT , ESPECIALLY IN THAT FIRST TRIMESTER , THAT THAT RELATIONSHIP, WHICH IS INHERENT IN THE FUNDAMENTAL RIGHT TO PRIVACY FOR THE WOMAN, IS TO BE ABLE TO HAVE A FRANK DISCUSSION WITH HER DOCTOR , WHO IS NOT STRAIGHT JACKETED AND NOT BEING DICTATED TO WHAT HE CAN SAY OR SHE CAN SAY TO THE PATIENT , SO ON THE PRIVACY ISSUE , THE WOMAN'S

SO YOUR POSITION IS THE PHYSICIANS WOULD BE THE SOLE DETERMINENANT OF WHAT INFORMATION SH OULD BE GIVENTO THE WOMAN, AND THE STATEHAS NO ROLE IN ASSURING THAT THERE IS A MINIMAL STANDARD OF CONSENT , BUT IT IS SIMPLY AT THE DISCRETION OF THE PHYSICIAN.

THE STATE HAS , THR OUGHTHE GENERAL MEDICAL CONSENT STATUTE, PROVIDED GUIDELINES FOR THE DOCTOR TO FOLLOW. THAT IS MEDICAL JUDGMENT WIT HIN THAT PARTICULAR COMMUNITY FOR PEOPLE WHO PERFORM THAT

BUT , AGAIN , THAT WOULDAROPRIATE THE PHYSICIAN F ROM SUIT, BUT AS THE BREAST CANCER OR BREAST SURG ERY AND THIS, I S THERE NOT A REASON TO ARGUE THAT THE STATE MIGHT WANT TO ASSURE THAT THE WOMAN GETS A SUFFICIENT OR THE PATIENT GETS SUFFICIENT NOTICE?

WELL , THE SUFFICIENT NOTICE TO THE PATIENT IS PROTECTED BY THE GENERAL MEDICAL CONSENT STATUTE, BECAUSE IT DOES SAY THAT THE DOCTOR IS TO TAYLOR WHAT HE OR TO TA ILOR WHAT HE OR SHE SAYS TO THE PATIENT , T AILOR THE PARTICULAR CIRCUMSTANCES

AND IF THERE ARE OTHER CIRCUMSTANCES , LIKE TERMINATION OF PREGNANCYTHAT, THERE IS SUFFICIENT NOTICE BEING GIVEN , AND IN YOUR POSITION , THEY CANNOT PASS STATUTE TO ADDRESS THOSE UNIQUE NE EDS?

MY POSITION IS THAT THERE IS AL READY A STATUTE ON THEBOOKS THAT PRO TECT THE PATIENT THROUGH THE GENERAL MEDICAL CONSENT STATUTE, AND THAT IS AL L WE CAN ASK FOR , IS THAT ALL PATIENTS BE TREATED EQUALLY. THANK YOU.

CHIEF JUSTICE: YOUR TIMEIS EXPIRED . THANK YOU.

YOUR HO NOR, JUST ONE OR TWO QU IC K POIN TS. THIS STATUTE AND SOLVES THE REASONABLE ABSOLVES THE REASONABLE PATIENT STANDARD,WHICH IS WELL-ESTABLISHED IN MANY STATES , AND THAT STANDARD, IF YOU READ THE CASE LAW, IS THAT THE PHYSICIAN EX PLAIN MATE RIAL RISKS , AND I QUOTED THIS IN THE BRIEF , IF A REASONABLE PERSON I N A PATIENT'S POSITION WOULD ATTACH SIGNIFICANCE TO A RISK AND DECIDING TREATMENT, THE RISK IS MATERIAL , THEN THE PHYSICIAN MUST DISCUSS IT, S O THAT IS THE STANDARD THAT THIS ADOPTS.

CHIEF JUSTICE: O N OKAY. SO YOU ARE AGREEING THAT , AGAIN , I T IS NOT WRITTEN AS CLEARLY AS WE MIGHT WANT, THAT BECAUSE IT IS THE PHYSICIAN THAT IS SUOSED TO PROVIDE THIS INFORMATION , THAT SUBS ECTION A IS LI MITED TO MEDICAL RISKS , AND IT IS A REASONABLE PATIENT UNDERTHE CIRCUMSTAN CES .

EXACTLY.

SO THAT , WOULD AN 18 YEAR-OLD WHO HAS NE VER HADAN ABORTION MIGHT BE DIFFERENT THAN A 30-YEAR-OLD, MARRIED WOMAN.

RIGHT. THE REASONABLE PATIENT STANDARD REQUIRES THE PHYSICIAN TO ADDRESS THAT PATIENT , THE CIRCUMSTANCESOF THAT PATIENT PRESENTING HERSELF. THAT IS WELL- ESTABLISHED INTHE LAW OF MA NY STATES.

CHIEF JUSTICE: I AM TRYING, THEN, WHAT WAS , WHY WAS THIS NECESSARY? YOU DON'T KNOW .

I DO N'T HAVE ANY LEGISLATIVE HISTORY THAT WOULD REQUIRE THAT , BUT THIS STATUTE , COMPARED TO THE GENERAL MEDICAL CONSENT LAW, ENSURES CONSENT. YOU HAVE, IN THE GENERAL LAW , AN AMBIGUOUS STANDARD THAT REFERENCES, BOTH A REASONABLE PATIENT

AND THE STANDARD THAT PHYSICIANS IN THAT COMMUNITY WOULD APLY , SO WHICH CONTROLS? IS IT WHAT THE PHYSICIANS WANT TO TELL THE PATIENT, OR IS IT WHAT A PERSON IN THAT PATIENT'S CIRCUMSTANCES WOULD NEED TO KNOW? THIS CLARIFIES THAT AMBIGUITY .

EVERYBODY IS REFERRING TO YOUR POSITION , YOU , TO THE GENERAL CONSENT STATUTE, THOUGH , AND WHAT IS THE NUMBER THAT YOU FELLOWS ARE REFERRING TO ? OF THIS GENERAL CONSENT STATUTE. IS IT THE NEGLIGENCE STATUTE? IS THAT IT?

NO. IT IS 766.103 SUB3.

OKAY. WELL, IT SAYS THE STANDARD BY WHICH IT IS IN THE MEDICAL MALPRACTICE SECTION OF THE STATUTE.

YES . WE WOULD ASK THAT THE COURT

LET ME ASK YOU THIS, WAS THERE A PREVIOUS STATUTE TO THIS ONE ON CONSENT FOR ABORTION?

I AM NOT AWARE OF ONE, YOUR HONOR . WE WOULD ASK THAT THE COURT REVERSE AND REMAND FOR ANY FURTHER NECESSARY PROCEEDINGS AND RECORD ELEMENTS.

CHIEF JUSTICE: AS FAR AS THE REMEDY YOU WANT , ONE IS THAT THE PHYSICIAN BE OF RECORD, BUT I DON'T KNOW THAT WE GO BACK AND I GUESS WE HAVE TO DISCUSS IN CONFERENCE, THAT THE STATE CONCEDES THAT REALLY IT DOES NOT USE THE TERM MEDICAL AND IT MAY BE A STRETCH , THAT , REALLY ALL WE HAVE GOT TO DO IS SAY , THAT , "A" , THE RISKS MAY BE MEDICAL RISKS OF UNDER GOING THE PROCEDURE OR CARRYING IT TO TERM , AND THAT IS ALL THAT THIS STATUTE WOULD ENTAIL. THAT WOULDN'T REQUIRE A RECORD, WOULD IT?

NO , IT WOULDN'T, AND I AM NOT SURE THAT A RECORD IS NECESSARY , BUT WHEN YOU ASK ME TO JUSTIFY WHY WE HAVE THIS LAW AT ALL , IF YOU THINK THIS , THESE PATIENTS ARE NOT VULNERABLE AND THEY ARE NOT ENTITLED TO ANY PARTICULAR ASSURANCE OF INFORMED CONSENT, THEN MAYBE WE NEED RECORD DEVELOPMENT ON THAT, BUT I THINK THAT

WOULD THERE BE A REASON TO REMAND THE CASE FOR CONSIDERATION OF ANY OUTSTANDING? ARE THERE ANY OTHER OUTSTANDING DISPUTES, OTHER PARTS OF THE STATUTE THAT NEED TO BE ADDRESSED?

WELL, I GUESS THERE MIGHT BE AN ISSUE AS TO THE MATERIALS THAT ARE TO BE PROVIDED, BUT KEEP IN MIND THAT THOSE ARE VOLUNTARY, AND THE WOMAN DOES NOT EVEN HAVE TO LOOK AT THEM.

BUT MY QUESTION WOULD BE , IS THAT SOMETHING THAT WOULD STILL BE OPEN AS A DISPUTE, IF WE JUST CENTER ON ONE TODAY.

POSSIBLE .

THEORETICALLY AND THAT THE DISPUTE REMAINS .

THEORETICALLY .

BUT IT REALLY ISN'T VOLUNTARY , UNDER THE TERMS THAT THE DOCTOR UNDER THIS STATUTE, IS REQUIRED TO GIVE THEM TO HER. UNDER THIS STATUTE , ACTUALLY MUST PROVIDE

MUST OFFER TO THE WOMAN AND THE WOMAN CAN SAY , I DON'T WANT TO SEE THEM, OR SHE MAY LOOK AT THEM. THANK YOU.

CHIEF JUSTICE: THANK YOU V ERY MU CH. THANK YOU TO BOTH S IDES FOR BEING RESPON SIBLE I
HAVE TO RESPONSIVE TO OUR QUESTIONS TODAY.WE WILL TAKE THE CASE UNDER ADVISEMENT.