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APPEAL No. 23-127124-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HODES & NAUSER, MDs, P.A., on behalf of itself, its patients, physicians, and staff; TRACI LYNN NAUSER, M.D.; TRISTAN FOWLER, D.O.; and COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself, its patients, physicians, and staff,

Plaintiffs-Appellees,

v.

KRIS KOBACH, in his official capacity as Attorney General of the State of Kansas; STEPHEN M. HOWE, in his official capacity as District Attorney for Johnson County; MARC BENNETT, in his official capacity as District Attorney for Sedgwick County; MARK A. DUPREE SR., in his official capacity as District Attorney for Wyandotte County,

Defendants-Appellants,

SUSAN GILE, in her official capacity as Executive Director of the Kansas Board of Healing Arts; JERRY DEGRADO, D.C., in his official capacity as President of the Kansas Board of Healing Arts; and JANET STANEK, in her official capacity as Secretary of the Kansas Department of Health and Human Services,

Defendants.

Appeal from the District Court of Johnson County,
Honorable K. Christopher Jayaram, Judge
District Court Case No. 23CV03140

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiffs cannot justify the district court's error in its decision below—that the court abdicated its gatekeeper duty to evaluate expert evidence and explain its reasoning, instead disregarding the State's experts through an unexplained credibility determination. Plaintiffs urge this Court to ignore the district court's error, arguing that it could only be reviewed had the State preemptively filed a motion—a requirement not found in law or common sense. And Plaintiffs cannot explain away the court's error, as its unexplained credibility finding pervaded its entire analysis and was essential to its finding of substantial likelihood of prevailing on the merits. Putting to one side Plaintiffs' erroneous claim that the district court's decision was supported by the law and by substantial evidence, the relevant question here is whether it properly discharged its gatekeeper and factfinding duties in providing a reasoned decision for its extraordinary grant of preliminary relief. It plainly did not, and this Court should reverse.

ARGUMENT

I. The district court's improper credibility determination is properly before this Court.

Plaintiffs allege that the district court held no gatekeeper duty regarding expert evidence absent a *Daubert* objection. Pls.' Br. at 24. Thus, Plaintiffs allege that, since the State never filed a *Daubert* motion, the district court committed no error for this Court to review. Pls.' Br. at 24–25. But Plaintiffs

misunderstand the State's point of error on appeal. The State does not object to the *admission* of expert evidence, which would have properly been raised through a *Daubert* objection to the district court. Rather, the State objects to the district court's disregard of the admitted expert evidence presented to it—that is, the district court's blanket dismissal of the State's expert evidence through the improper use of a credibility determination. State's Br. at 18. The gatekeeper duty matters not because the district court admitted unreliable evidence, but because it effectively ignored reliable evidence without giving any adequate reason for doing so.

Plaintiffs' objection that this Court does not reweigh factual evidence or make credibility determinations is irrelevant. Pls'. Br. at 20. The State does not ask this Court to make any such determination but rather to correct the district court's error in failing to provide any basis for its own determination. This Court reviews de novo a district court's decision for legal errors. *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 192, 273 P.3d 709, 713 (2012). And a district court commits legal error when it improperly frames its legal conclusions "under the rubric of a 'credibility' determination." *Campbell v. Sec'y of Health & Hum. Servs.*, 90 Fed. Cl. 369, 384 (2009) (quoting *Andreu ex rel. Andreu v. Sec'y of Dep't of Health & Hum. Servs.*, 569 F.3d 1367, 1379 (Fed. Cir. 2009)).

This Court may therefore review and reverse the district court's improper credibility determination. This theory is at the heart of the decisions cited in the State's opening brief: Plaintiffs' reframing notwithstanding, none of the State's cases about improper credibility determinations arose from a ruling on a *Daubert* motion. *See Campbell*, 90 Fed. Cl. at 378–79; *Andreu*, 569 F.3d at 1373; *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 570–71 (1985); *State v. Nelson*, 488 N.W.2d 600, 604 (N.D. 1992). And that makes sense—unlike in the context of a *Daubert* motion, where a party is able to preemptively attack the admissibility of evidence and bar it from consideration, a party cannot divine that a court will improperly rely on credibility and preemptively attack a future decision. That is why under Plaintiffs' theory—that the State could only raise its objections if it had brought a *Daubert* motion to the district court—a party could *never* appeal the improper use of a credibility determination. But that theory contradicts precedent and common sense. *See Campbell*, 90 Fed. Cl. at 378–79; *Andreu*, 569 F.3d at 1373. A district court's legal error when issuing a temporary injunction is reviewable by this Court, *Downtown Bar & Grill*, 294 Kan. at 192, and the State's appeal is properly before the Court.

Plaintiffs say the key federal cases on this question—*Andreu* and *Campbell*—are inapposite because they were decided under the National Childhood Vaccine Act, which involves a lower standard of proof. Pls.' Br. at

29–30. But Plaintiffs do not explain why the underlying standard of proof should permit a court to rely on an unexplained credibility determination to disregard expert evidence. If anything, this is yet another parallel with this case—in both situations, the courts made improper credibility determinations against the party with the lesser burden of proof on the relevant motion.

In any event, *Andreu* and *Campbell's* rejection of the fact-finder's improper use of a "credibility" finding was not dependent on the standard of proof. *Andreu*, 569 F.3d at 1373 (reviewed questions of law de novo and factual findings for clear error); *Campbell*, 90 Fed. Cl. at 379 (set aside factual findings and conclusions of law for abuse of discretion and if not in accordance with law). Here, as in *Andreu* and *Campbell*, the district court attempted to "cloak the application of an erroneous legal standard in the guise of a credibility determination." *Andreu*, 569 F.3d at 1379; *Campbell*, 90 Fed. Cl. at 379. That was a reversible legal error.

II. The district court failed to uphold its gatekeeper duty by disregarding the State's experts through an unexplained credibility determination.

Plaintiffs argue that the lower court's legal conclusions are supported by substantial evidence. Pls.' Br. at 16, 19. But the question is not what evidence *could have* supported the district court's ruling, but rather what evidence *did* support it. *Cf. Andreu*, 569 F.3d at 1373; *Campbell*, 90 Fed. Cl. at 379. And here, the district court conducted a one-sided analysis that credited Plaintiffs'

experts while dismissing the conflicts presented by the State's experts through a conclusory credibility determination. That legal error permeated the district court's analysis, and this Court should correct it.

A. The district court's unexplained credibility determination pervaded its analysis of the legal issues.

Plaintiffs suggest that any improper credibility determination was immaterial because some aspects of their case were undisputed. But as the State explained in its opening brief, the district court relied almost exclusively on unexplained credibility determinations to disregard the State's experts, to find that the State failed to demonstrate the Act advanced the State's asserted compelling interests, and to hold that Plaintiffs were likely to prevail on the merits of their claims. And contrary to Plaintiffs' suggestion, the district court did so on several critical, disputed issues that were integral to its ruling in Plaintiffs' favor.

Maternal Health. Plaintiffs point out that their experts argued that abortion is safe and common—specifically, that it is safer than childbirth and that the abortion drug Mifepristone is safer than Tylenol. R. Vol. 1 at 181; Pls.' Br. at 21. The district court credited this claim despite the FDA's own black box label warning for mifepristone which (unlike Tylenol) causes "serious and sometimes fatal infections or bleeding." R. Vol. 3 at 377–80 (Wubbenhorst ¶¶ 74–78) (quoting FDA label). Plaintiffs urge that their proffered evidence

was sufficient to support the district court's finding that the State likely could not show that the Act was narrowly tailored to advancing a compelling interest in protecting maternal health. Pls.' Br. at 21; R. Vol. 1 at 209. But the State's experts directly rebutted this evidence explaining that Mifepristone carries high risks and is *not* safer than Tylenol, R. Vol. 3 at 377 (Wubbenhorst ¶ 74), 560–61 (Mulcaire-Jones ¶¶ 30–31); that abortion is not safer than childbirth, 382–94 (Wubbenhorst ¶¶ 85–115); that abortion carries an increased risk of future preterm birth, 570–72 (Mulcaire-Jones ¶¶ 60–62), 395–97 (Wubbenhorst ¶¶ 116–17, 121–23); and that abortion carries an increased risk of future suicide, drug, and alcohol abuse, and accidental death, 397–402 (Wubbenhorst ¶¶ 124–38). The district court, however, dismissed this evidence out of hand on an unexplained credibility determination, stating, “the State has not provided sufficient credible evidence to demonstrate that ‘promotion of patient/maternal health’ is a ‘compelling’ governmental interest.” R. Vol. 1 at 211.

Informed Consent and Protecting the Fetus. Plaintiffs go so far as to allege that the district court relied only on *unrebutted* evidence to conclude that the Act likely is not narrowly tailored to advancing a compelling interest in informed consent and protecting the fetus. Pls.' Br. at 18–19; R. Vol. 1 at 204. Not so. The State's ample evidence was rejected out of hand by the court with the conclusory assertion that “there is no credible evidence before the

[c]ourt reflecting a demonstrable and real problem or shortcoming with respect to informed consent in the context of abortion.” R. Vol. 1 at 213.

The State proffered substantial expert evidence to the contrary. Dr. Curlin explained that “[i]n light of what abortion does, the disclosures mandated by the statutes provide factual and relevant information that the Plaintiffs otherwise would withhold.” R. Vol. 3 at 253 (Curlin ¶ 11). The State’s experts explained that life begins at conception, R. Vol. 3 at 352–57 (Wubbenhorst ¶ 30); 303 (Pierucci ¶ 6), and that because abortion ends a human life, informed consent requires that additional information be provided before the procedure is performed, 265–66 (Curlin, ¶¶ 49–50); 373–75 (Wubbenhorst ¶¶ 66–68). The State’s experts presented evidence that Plaintiffs fail to uphold the proper informed consent standards, R. Vol. 3 at 253, 264, 266 (Curlin ¶¶ 11, 45, 51). The district court disregarded this evidence, finding the State provided no “credible and persuasive evidence” to support its compelling interest. R. Vol. 1 at 207.

Preventing Fetal Pain. Plaintiffs note that the district court relied on their expert evidence to conclude that a fetus cannot experience pain and that the State was unlikely to show the Act furthered a compelling interest in preventing fetal pain. Pls.’ Br. at 22, R. Vol. 1 at 215. However, the State’s experts demonstrated through thorough analysis how a fetus experiences pain at as early as 12 weeks gestation. R. Vol. 3 at 495–506; 363–70 (Wubbenhorst

¶¶ 43–58); 309–27 (Pierrucci ¶¶ 30–62). Nevertheless, the court brushed aside the State’s experts with a conclusory statement that Plaintiffs’ experts’ opinions better aligned with “current mainstream medical/scientific thought.” R. Vol. 1 at 215.

Regulating Professional Conduct and Providing Relevant Information.

The district court found that the State was unlikely to show that the Act was narrowly tailored to advance compelling interests in regulating professional conduct and in providing relevant information. R. Vol. 1 at 238. To support this conclusion, the court found that the Act contained what it viewed as “factually inaccurate” and “viewpoint-related” statements, such as statements concerning the risks of cancer and preterm birth associated with abortion and the statement that abortion involves the taking of a human life. R. Vol. 1 at 236–37. But the State’s experts directly rebutted this evidence by demonstrating how abortion carries an increased risk of breast cancer, R. Vol. 3 at 436–44 (Brind ¶¶ 12–27); how abortion carries an increased risk of preterm birth, 570–72 (Mulcaire-Jones ¶¶ 60–62), 395–97 (Wubbenhorst ¶¶ 116–17, 121–23); and that “[t]here is universal consensus that life begins at conception and that the embryo and fetus are human,” 352 (Wubbenhorst ¶ 30). The court simply disregarded this evidence, stating that “[n]o evidence exists in the record” showing that informed consent is undermined by a lack of

factually accurate information being presented. R. at Vol. 1 at 238. It gave no reason for rejecting the State's case to the contrary.

Compelling Interests and “Unrebutted” Evidence. Plaintiffs say certain conclusions about the State's compelling interests rely on unrebutted expert evidence—specifically, their evidence that the Plaintiffs are already subject to professional regulations and already provide the information necessary to foster informed consent. Pls.' Br. at 18. But the State *did* submit rebuttal evidence showing that the Act contains the requisite information to foster informed consent and that Plaintiffs are not willing to provide patients with that information. R. Vol. 3 at 253, 264, 266 (Curlin ¶ 11, 45, 51); 574 (Mulcaire-Jones ¶ 71).

Despite this conflict of evidence which they ignore, Plaintiffs claim that the court could have relied on their evidence to conclude that the State had not demonstrated compelling interests in protecting fetal life and maternal health. Pls.' Br. at 19, 32. But the error is that the district court failed to engage the evidence and instead explicitly relied on unexplained credibility determinations for its findings regarding both compelling interests—elements of the case that were disputed. *See* R. Vol. 1 at 211; 213.

Plaintiffs further argue that even if the district court had adopted the State's expert evidence, it still would have concluded that the Act was not the least restrictive means of advancing the State's compelling interests under the

Kansas Constitution's free speech protections. Pls.' Br. at 32. But again, the court only came to this conclusion through its finding that the Act contains likely "misleading, unscientific, and inaccurate information," R. Vol. 1 at 239, a position fiercely rebutted by the State's experts, *see, e.g.*, R. Vol. 3 at 271 (Curlin ¶ 67), 564 (Mulcaire-Jones ¶ 36). And it based that finding on the reversible error of dismissing the State's evidence through an unexplained credibility determination.

2023 Amendment. The district court separately analyzed the State's compelling interests as applied to the Act's 2023 Amendment, which requires disclosure about Abortion Pill Reversal ("APR"), a protocol employed by medical professionals to reverse the effects of Mifepristone for women who change their mind and decide they no longer want an abortion after taking the first abortion drug in the two-drug protocol. R. Vol. 1 at 238. In finding that the 2023 Amendment was likely not narrowly tailored to achieve the State's compelling interests, the district court concluded that the Amendment's statements about APR were "misleading, unscientific, and inaccurate." R. Vol. 1 at 239. Plaintiffs say their experts' evidence supports this conclusion, Pls.' Br. at 23, but that is not the relevant question here. What matters is that the court ignored evidence directly rebutting Plaintiffs' experts' assertions and explaining that APR is a safe and often effective treatment. R. Vol. 3 at 585–90 (Scrafford ¶¶ 7–14); 267–72 (Curlin ¶¶ 56–68); 404–14 (Wubbenhorst

¶¶ 141–163). Rather than evaluate the merits of experts’ contentions, the district court dismissed the State’s experts on an unexplained credibility finding, stating that “[t]here simply is no credible reliable evidence that this ‘reversal’ theory, in fact, actually accomplishes the stated purpose.” R. Vol. 1 at 220.

The district court’s gatekeeper duty for expert evidence and its duty to explain the reasons for an injunction require more than conclusory rejections of the State’s evidence on these critical questions. Without addressing these hotly disputed points, Plaintiffs’ showing on any other narrow aspect of their case—such as whether the law affects protected rights—would not have been sufficient for the court to grant relief. This Court should correct the error and reverse the district court’s decision.

B. The district court’s unsupported credibility findings amounted to reversible legal error.

Plaintiffs argue that the district court explained its rationale at times and that the term “credible” was used appropriately “to describe the quality of scientific research or literature.” Pls.’ Br. at 28. Neither is true.

First, there is no reason to read the court’s use of the word “credible” as departing from its plain meaning; in fact, the court’s nearly complete lack of discussion of the reliability, relevance, and accuracy of the experts’ opinions suggests it used the term to *avoid* “describ[ing] the quality of scientific research

or literature.” Pls.’ Br. at 28. Indeed, the court repeatedly used the term to dismiss the States’ experts without reference to the quality of their opinions. *See, e.g.*, R. Vol. 1 at 186 (“There is no credible evidence in the record that abortion increases the risk of preterm delivery or labor”); 187 (“There is no credible evidence in the record that abortion increases the risk of breast cancer”). The court underscored that it meant what it said by accusing the State’s experts of using “somewhat flamboyant rhetoric, questionable logic/logical leaps, and hyperbolic statements.” R. Vol. 1 at 212 n.27. But a court cannot “insulate [its] decision from review by the incantation of magic words,” as Plaintiffs seem to believe the district court did. *Campbell*, 90 Fed. Cl. at 384.

Second, that the district court occasionally elaborated on its conclusions does not convert its unsupported credibility determinations into something more robust. For example, Plaintiffs raise the court’s conclusion that APR is “speculative, risky, and experimental, at this juncture” and that nociception “is not the same thing as a subjective appreciation of ‘pain.’” Pls.’ Br. at 28–29 (quoting R. Vol. 1 at 220, 216). These explanations are to no avail because the district court stated that it came to these conclusions *because of its* improper credibility determination, which is itself unexplained. R. Vol. 1 at 186 (“There is no credible scientific/medical evidence that the ‘reversal’ therapy proposed in the Amendment actually ‘reverses’ the effects of mifepristone. . . . The weight

of credible evidence reflects that nociception is not ‘pain’ as understood in the medical and/or scientific community.”).

Plaintiffs say that the State’s objection here is “premature” because a temporary injunction is a preliminary procedure that does not resolve a dispute. Pls. Br. at 25–26. But that uncontroversial fact in no way lessens a court’s responsibility to properly evaluate expert evidence, as the temporary injunction analysis still requires a court to determine whether there is “a substantial likelihood of eventually prevailing on the merits.” *Downtown Bar & Grill*, 294 Kan. at 191. Just because a temporary injunction is preliminary does not mean that a court may abdicate its duty to analyze the evidence. This is particularly true because a temporary injunction is an “extraordinary remedy” that “temporarily deprives another of a right.” *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 499, 173 P.3d 642, 652 (2007).

In fact, as the State explained in its opening brief, the court’s unexplained credibility determinations are all the more inappropriate at the temporary injunction stage, where the court is presented with only a paper record. This Court ordinarily defers to a district court’s credibility findings because of the district court’s “ability to observe witnesses and . . . to assess detachment, objectivity, and professionalism.” *Cresto v. Cresto*, 302 Kan. 820, 839, 358 P.3d 831, 844 (2015). But at the temporary injunction stage where the district court relies on a paper record, this Court is “in as good a position as the

district judge to determine the propriety of granting a preliminary injunction.”
Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1381
(6th Cir. 1995) (internal quotation omitted). Thus, the district court’s reliance
on an unexplained credibility determination at this stage is particularly
erroneous, and its decision does not warrant this Court’s deference.

Finally, Plaintiffs argue that because, in their view, evidence supports
each of the factors for a temporary injunction, the State cannot show that the
district court erred in granting a temporary injunction. Br. at 31. But the
court’s conclusions about the first factor of the preliminary injunction
analysis—a substantial likelihood of eventually prevailing on the merits—
were erroneous because they were based on an unexplained credibility
determination. *See supra* §§ II.A., II.B. “Because this element is an essential
predicate for a temporary injunction, the [district] court erred in its issuance.”
Downtown Bar & Grill, 294 Kan. at 199.

CONCLUSION

This Court should reverse and vacate the district court's order granting a temporary injunction.

Dated: April 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on April 24, 2024, the foregoing document was served via electronic mail to the following:

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