CASE NO. 15-6134

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CLAYTON LOCKETT, The Estate by and through its personal representative GARY LOCKETT,

Plaintiff/Appellant,

v.

MARY FALLIN, Governor in her individual capacity, ROBERT PATTON, in his individual capacity, ANITA K. TRAMMELL, in her individual capacity, DR. JOHN DOE,

Defendants/Appellees.

APPELLEES' RESPONSE TO THE DOCTORS OF THE ETHICAL PRACTICE OF MEDICINE'S BRIEF OF *AMICI CURIAE*

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September 8, 2015

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CLAYTON LOCKETT, The Estate of by and through its personal representative GARY LOCKETT, Plaintiff/Appellant, v. MARY FALLIN, Governor in her individual capacity, *et al.*, Defendants/Appellees.	**Case No: 15-6134**

APPELLEES' RESPONSE TO THE DOCTORS OF THE ETHICAL PRACTICE OF MEDICINE'S BRIEF OF AMICI CURIAE

State Appellees, by and through their attorneys, respectfully submit their Response to the Doctors of the Ethical Practice of Medicine's ("DEPM") Brief of *Amicus Curiae*. In support of this response, Appellees state the following:

INTRODUCTION

The Doctors of the Ethical Practice of Medicine ("DEPM") face the task of cramming square pegs into round holes as they try to classify the actions of doctors participating in executions. The DEPM fail to arrive at a workable theory. Doctors participating in executions are not engaged in the typical practice of medicine, nor can missteps be properly categorized as classical medical negligence. The DEPM also cannot impose their interpretations of medical ethics on Oklahoma, and cannot turn this Court's docket into source for a licensing investigation. The DEPM has spontaneously generated these claims, but they do not fit into any valid legal theory.

I. DR. DOE WAS NOT ENGAGED IN MEDICAL PRACTICE AS CONTEMPLATED BY THE STATE'S MEDICAL REGULATIONS.

The DEPM's attempts to treat Dr. Doe's actions as medical practice do not mesh with the definitions and principles contained in the State's medical regulations. The DEPM cite the purpose of the Oklahoma Board of Medical Licensure ("OBML"), which is to promote the health, safety, and well-being of the citizens of Oklahoma. The implication is that the physicians supervised by the OBML are performing tasks intended to promote the health, safety, and well-being of the citizens. The type of supervision the OBML provides does not contemplate monitoring how executions are carried out. The logical reason is that executions are not medical practice. This is buttressed by OKLA. STAT. tit. 59, § 4001, which prevents the OBML from affecting the license of a doctor that participates in an execution. Ordinarily, causing the death of an individual would certainly be cause for the OBML to take notice, but not in the case of executions.

The reason for this distinction is simple. When a doctor causes the death of a patient normally, the OBML steps in because the doctor is supposed to treat his patient and improve the patient's health, but instead the doctor causes death. But when a doctor participates in an execution, the doctor is supposed to help ensure that the inmate dies. In essence, the OBML disciplines doctors for actions that do not line up with the desired outcome for the patient. In the case of executions, desired

outcome is the execution. Even if some of the actions (setting intravenous lines or checking consciousness) are medical in nature, it does not follow that doctors participating in executions are engaged in medical practice.

The procedure is also distinct from normal medical practice because doctors participating in executions are constrained by the execution protocol. While doctors are given some discretion as to inserting intravenous lines or checking consciousness, the protocol provides timelines, procedures, and facilities that the doctor must work within. This is different from a situation where a doctor has full control and discretion over the patient.

Oklahoma explicitly allows doctors to participate in executions. The DEMP attempts to carve this exemption thinly, claiming that the OBML cannot discipline "for the reason" of participating in executions, but can for how the execution is performed. This position would treat an execution just like a medical procedure, despite the fact that the entire process of an execution is the complete antithesis of the practice of medicine.

This approach would also lead to other unfavorable outcomes. For instance, execution team members that push drugs through the syringes into the body could be prosecuted for unlicensed practice of medicine, if the DEPM's argument were taken to its logical conclusion. They certainly are administering drugs. Similarly, every

doctor taking part in executions, whether there are issues or not, could be stripped of their license for "treating" an inmate without consent. OKLA. ADMIN. CODE § 435:10-7-4(48)-(49). The very nature of executions shows that they are completely different procedures from "medical practice" which the OBML is concerned with regulating.

II. DR. DOE'S ACTIONS DO NOT FIT INTO THE RUBRIC OF NEGLIGENCE.

Not only can the DEPM not fit a doctor's actions during an execution into the category of medical practice, the DEPM also cannot classify Dr. Doe's actions as "negligent."

a. Doctors participating in executions do not owe a duty to the condemned inmate.

Oklahoma law requires a physician-patient relationship to establish the duty element of a medical malpractice claim. *Jennings v. Badgett*, 230 P.3d 861, 866 (Okla. 2010). The statutes regarding the OBML do not address the elements of negligence for disciplinary purposes, but it is logical to assume that a duty is still required. A physician-patient relationship is established in Oklahoma when "a physician agrees by direct or indirect contact with a patient to diagnose or treat any condition, illness or disability presented by a patient to that physician, whether or not such a presenting complaint is considered a disease by the general medical community." OKLA. ADMIN. CODE § 435:10-1-4.

Doctors who participate in executions do not have a physician-patient relationship with the inmate that is being executed. There is no condition to treat or diagnosis to give. Instead, the doctor is present to help ensure that the inmate is executed. There is no physician-patient relationship, and there is no duty.

b. There is no applicable standard of care.

The DEPM asserts that Dr. Doe was negligent in his handling of Offender Lockett's execution. But DEPM wrongly assumes that Dr. Doe would be held to the standard of care applicable to a doctor performing medical services. Indeed, no reasonable doctor, performing medical services, would place intravenous lines for the purpose of injecting 240 milliequivalents of potassium chloride into a patient. That type of administration is only appropriate for inducing death. Therefore, the applicable standard of care must be something different. Of course it is ridiculous to assume that the OBML would be applying a standard of the "reasonable executioner" to a doctor to determine whether the doctor was negligent in helping carry out an execution.

The DEPM's attempt to equate missteps in an execution to medical negligence is plainly inadequate. The actions taken in an execution, even if performed by a doctor, cannot be accurately or fairly compared to the standards for medical negligence. The DEPM's insistence that the doctor's name be public is not supported by any actual interest.

III. BROAD PRINCIPLES OF MEDICAL ETHICS ARE INAPPLICABLE.

The DEPM seeks to import their own interpretation of the Hippocratic Oath and its requirements and impose that interpretation on Oklahoma's regulations. The DEPM insists that the broad principles of the Hippocratic Oath bar physicians from participating in executions.

"It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power." *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 449 (1954). As such, it is up to the State of Oklahoma to apply the Hippocratic Oath to its medical licensees. While some states have prohibited doctors from participating in executions, Oklahoma has not. Instead, Oklahoma has explicitly barred the OBML from taking licensure action against doctors for participating in executions.[1] While the DEPM may take issue with Oklahoma's decision, it is still Oklahoma's decision.

IV. THE PURPOSE OF THIS COURT IS NOT TO SERVE AS A REPOSITORY FOR INFORMATION.

The DEPM apparently seeks to use this Court's docket as a public forum where physicians can gather information to discipline one of their own. This proposed airing of dirty laundry has nothing to do with the appeal before this Court,

[1]The DEPM insist that the OBML can take other actions, such as sending a reprimand letter. It would seem odd for the OBML to reprimand a doctor for behavior that the OBML cannot actually punish.

and fundamentally contorts the very purpose of a court of law. The case before this Court is based on qualified immunity and the Eighth Amendment. The case has nothing to do with access to identities of execution team members.

a. Appellants should not be able to moot out the State's confidentiality concerns by ignoring them.

The DEPM insists that the sealing order no longer matters, because the cat is already out of the bag. As an initial observation, this argument also cuts against the DEPM's argument that these documents must stay unsealed or they will not know the identity of the doctor alleged to take part in the execution. It seems that intervening in an appeal to file an amicus brief to unseal information that is already in the public realm is a monumental waste of time and resources if the goal is truly to know the identity of the doctor.

Aside from the two-edged argument that the information is already available, the DEPM's position is the confidentiality statute should not be respected because it has already been violated. This is a specious argument that has absurd real-world consequences. For instance, under the DEPM's argument, a party can obviate the need to protect a rape victim's identity by filing the full name in a court pleading. Protective orders regarding confidential documents can be nullified by just ignoring them. This Court should reject this argument, as it merely encourages bad behavior by providing perverse incentives.

b. The requirement that doctors report misconduct does not carry with it a right to obtain information about misconduct.

The DEPM also argues that because physicians must report professional misconduct, they must be allowed to discover misconduct. This argument is marred by severe overreach. In Oklahoma, unprofessional conduct includes failure to report misconduct by another physician. OKLA. ADMIN. CODE § 435: 10-7-4(43). The obvious implication is that a physician must actually be able to report misconduct, meaning the physician must have knowledge of the misconduct. If a physician does not have information to report, he has no obligation. If a physician knows of misconduct, but not the identity of the physician, it is preposterous to think that he is failing in his ethical obligations not to report the unknown physician. The reporting requirement does not carry with it an investigation requirement, or a right to obtain information to supplement the physician's knowledge, just like an attorney could not rifle through another attorney's confidential documents looking for misconduct.

CONCLUSION

None of the DEPM's arguments find a home within the bounds of any legitimate legal theory. This case does not involve medical practice or negligence. The DEPM's interpretation of the Hippocratic Oath is inapplicable. And this Court is not the forum to seek information to supplement their claims. Therefore, this Court should grant Appellees' Motion to Seal.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Tenth Circuit Court of Appeals' General Order on Electronic Submission of Documents (March 18, 2009), I hereby certify that:

1. There are no required privacy redactions (Fed. R. App. P. 25(a)(5)) to be made to the attached ECF pleading; and

2. This ECF submission is an exact copy of the additional hard copies of Appellee's Response Brief; and

3. This ECF submission was scanned for viruses with Sophos Endpoint Security and Control, version 9.7, a commercial virus scanning program that is updated hourly, and, according to the program is free of viruses.

CERTIFICATE OF SERVICE

I certify that on this 8th day of September 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing; and a copy to be served via the ECF System to:

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