Stuart v. Camnitz:
Setting the Standard of Care for Abortion Providers in North Carolina
By: Paul Stam and Amy O'Neal[1]

> "Requiring an offer [to view the ultrasound], on the other hand, . . . would be more in line with providing information to the woman. . .
>
> For example, the statute itself does have an offer in there. It has the offer of trying to make the heart tone audible if it's present, . . . if the state were simply requiring that the physician tell the woman that if you want me to, I can try to see if the heartbeat is audible, do you want me to? We would not be challenging that."[2]

I. Background

In 2011, North Carolina passed the Woman's Right to Know Act.[3] It required informed consent and a mandatory twenty-four hour waiting period prior to an abortion.[4] The Act also required that an ultrasound (required since 1994) be displayed and explained to the woman no less than four hours and no more than seventy-two hours before the abortion.[5] This requirement is known as the "Display of Real Time View Requirement." Several abortion providers asked the federal courts to enjoin enforcement of the Act.[6]

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[2] Joint Appendix, Volume I of II (Pages 1-282), Transcript of Preliminary Injunction Hearing Before the Honorable Catherine C. Eagles United States District Judge, 159-160. This was a statement made by Bebe Anderson (The Center for Reproductive Rights), the attorney for plaintiffs in *Stuart v. Huff* 834 F.Supp.2d 424 (2011).

[3] Woman's Right to Know Act, H.B. 854 (N.C. 2011); the bill history is available at http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=h+854&submitButton=Go. For a full legislative history of the Act *see generally* Paul Stam, *Woman's Right to Know Act: A Legislative History*, 28 ISSUES L. AND MED. 3 (2012).

[4] N.C. Gen. Stat. § 90-21.82 (2011). S.L. 2015-62 extended the waiting period to seventy-two hours beginning on October 1, 2015. Women and Children's Protection Act of 2015, H.B. 465, *available at* http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=H465.

[5] N.C. Gen. Stat. § 90-21.85 (2011).

[6] Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011).

After winning preliminary injunction and summary judgment only on the "Display of Real Time View Requirement," the case went to the Fourth Circuit Court of Appeals. The Fourth Circuit held that the "Display of Real Time View Requirement" is unconstitutional under the First Amendment.[7] On June 15, 2015, the United States Supreme Court denied a petition for certiorari to review the Fourth Circuit's ruling.[8] While abortion providers must still perform ultrasounds prior to an abortion (under regulations adopted in 1994),[9] there is no longer the statutory requirement that the abortion provider must display and explain the image as the provider performs the ultrasound. The question addressed in this article is whether common law now requires abortion providers to offer to display and explain the ultrasound as a part of the "standard of care."

The Court's opinion relies on several statements made in Declarations by the plaintiff abortionists (while under penalty of perjury) regarding the practices of abortion providers in North Carolina, specifically that abortion providers typically *offer* the woman an opportunity to view the ultrasound and to ask questions about it. The Court's reliance necessarily entails that those statements were describing the standard of care for abortion providers in North Carolina.

II. Standard of Care and Stuart v. Camnitz

The standard of care is set out by N.C. Gen. Stat. § 90-21.12. This provision states that physicians must act in accordance with the

> "standards of practice among members of the same health care profession with similar training and experience situated in the same or similar

[7] Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014).
[8] Walker-McGill v. Stuart, 135 S.Ct. 2838 (2015).
[9] 10A N.C. Admin. Code 14E.0305(d). This regulation was not challenged in this regulation and was cited by the District Court's order.

> communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action."[10]

This statute does not abrogate common-law duties of physician; it simply provides a basis by which compliance with those duties could be determined.[11]

Determining the standard of care typically requires highly specialized knowledge. The courts require it to be established through expert testimony in medical malpractice cases.[12] The Fourth Circuit's reliance on expert testimony in *Stuart v. Camnitz* is similar. In order for the Court to analyze the requirement to explain and display the ultrasound image, it first determined that the typical practice of abortion providers is to perform and offer to display and explain the ultrasound.

The Fourth Circuit had to rely on the abortionists' declarations and the briefs of the parties regarding what the standard practice was when it made the following statements. First, that "[t]he most serious deviation from standard practice is requiring the physician to display an image and provide an explanation and medical description to a woman who has through ear and eye covering rendered herself temporarily deaf and blind"[13] Second, that "[t]he three elements discussed so far -- requiring the physician to speak to a patient who is not listening, rendering the physician the mouthpiece of the state's message, and omitting a therapeutic privilege to protect the health of the patient -- markedly depart from standard medical practice."[14] In order to determine what constitutes a "deviation from standard practice," the Fourth Circuit necessarily determined first what constituted standard practice.

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[10] N.C. Gen. Stat. § 90-21.12 (2015).
[11] *Id*.
[12] *See* Smith v. Whitmer, 159 N.C.App. 192, 195, 582 S.E.2d 669, 671-72 (2003).
[13] Stuart v. Camnitz, 774 F.3d 238, 252 (4th Cir. 2014).
[14] *Id*. at 254.

The Fourth Circuit made these determinations based on the experts' testimony. For example, Dr. James Dingfelder, the owner of Eastowne OB/GYN and Infertility, stated, "[a]s required by North Carolina law, all of my abortion patients already receive an ultrasound before the procedure."[15] Dr. Dingfelder "ask[s] every woman if she wants to see a print out of the ultrasound."[16] Dr. Gretchen Stuart is the head of the Family Planning Division of the School of Medicine at UNC-Chapel Hill. She states that she performs ultrasounds on her abortion patients and that "[i]t is her practice to offer [her] patients the opportunity to view the ultrasound."[17] The only time she does not perform an ultrasound on a patient before performing an abortion is when the patient gives her "a detailed ultrasound report that they have discussed with another physician."[18]

The Court's major concern was that there was no therapeutic privilege exception to the "Display of Real Time View Requirement."[19] A therapeutic privilege exception

> "permits physicians to decline or at least wait to convey relevant information as part of informed consent because in their professional judgment delivering the information to the patient at a particular time would result in serious psychological or physical harm. *It is an important privilege, albeit a limited one to be used sparingly.* It protects the health of particularly vulnerable or fragile patients, and permits the physician to uphold his ethical obligations of benevolence."[20]

While an abortion provider performing an ultrasound could exercise the therapeutic privilege exception in order to not offer the woman an opportunity to view the ultrasound and ask questions, the provider would need a very good reason to believe that simply

[15] Dingfelder Decl. 4:12, Sept. 27, 2011. Dr. Dingfelder has been providing abortion services for approximately four decades. *Id*. at 2:4.

[16] *Id*. at 4:15.

[17] Stuart Decl. 4:10-11, Sept. 28, 2011.

[18] *Id*. at 9:25.

[19] Stuart v. Camnitz, 774 F. 3d 238, 254 (2014). The Fourth Circuit emphasized the importance of the therapeutic privilege exception since the *Casey* court found it relevant that the Pennsylvania statute contained such an exception.

[20] *Id*. (emphasis added)(citations omitted).

offering the woman this opportunity would be harmful to her. As the Court pointed out, this exception is to be used sparingly.[21]

The Brief for the Plaintiffs-Appellees that the Fourth Circuit relied upon consistently emphasized that difference between the "Display of Real Time View Requirement" and simply offering the patient the opportunity to view the ultrasound and ask questions.[22] The Plaintiff-Appellees stated that

> "[t]he Physicians' practice also generally involved asking patients if they wanted to view ultrasound images, showing the images to patients who wanted to see them, and answering questions about the ultrasound. Thus, *offering* patients the option to view an ultrasound was part of the Physicians' practice even before the Act. . . . And, in rare circumstances, consistent with best medical practices, the Physicians would not offer to display and describe ultrasound images to patients who, in their medical judgment, were at significant risk of suffering psychological harm as a result of the offer itself.[23]

The Brief went on to acknowledge that the Plaintiff-Appellees recognized that the offer to view the ultrasound and listen to any heartbeat has been in effect since 2011 (the Act's effective) date by stating, "other portions of the Act to which the Physicians do not object *already* require the Physicians to *offer* their patients the opportunity to view ultrasound images . . . (as in *Casey*)."[24]

These doctors and the Brief of the Plaintiff-Appellees clearly established the standard of care for the performance of abortion in North Carolina: ultrasounds are (1) always performed prior to an abortion, and (2) that it is the practice to at least offer the woman the opportunity to view the ultrasound and ask questions. The Court took these

[21] *Id.*
[22] Brief of Plaintiffs-Appellees at 3, 7-9, 14, 18-19, 25-26, 34, 37, 52, 54, Stuart v. Camnitz, 774 F. 3d 238 (2014) (No. 14-1150).
[23] *Id.* at 8-9.
[24] *Id.* at 52.

statements at face value in order to determine that the additional requirements of the Woman's Right to Know Act were not necessary.

North Carolina courts would apply this same standard of care should a woman file a medical malpractice claim against an abortion provider for not *offering* to display the ultrasound. While the woman would then have to satisfy the other elements of a medical malpractice claim, the first element of demonstrating the standard of care would be satisfied by looking to the precedent set in *Stuart v. Camnitz*.

III. Conclusion

It is not simply that the abortion providers made these statements, but rather that they asked the Court to rely on them as the actual practice in abortion clinics throughout North Carolina. This can be seen in their Brief in Opposition to the Petition to the U.S. Supreme Court. The Brief emphasizes what these abortionists consider typical, stating that even before the Act:

> "[c]onsistent with this law and their ethical obligations, respondents and/or their staff informed each patient about the nature of the abortion procedure, its risks and benefits, and the alternatives available to the patient and their respective risks and benefits; they likewise counseled the patient to ensure that she was certain about her decision to have an abortion. Moreover, even before the Act, respondents' general practice was to *offer* patients the option to view the ultrasound and ask questions."[25]

Moreover, the plaintiffs' arguments at the trial court level also indicate that requiring that providers *offer* the ultrasound image is the standard of care.[26] Throughout the entire case, the plaintiffs' consistent argument was that the standard of care is to offer the woman the opportunity to view the ultrasound and ask questions before an abortion.

[25] Brief in Opposition at 2, Walker-McGill v. Stuart, 135 S.Ct. 2838 (2015) (No. 14-1172) (citations omitted).

[26] *See supra* note 1 and accompanying text.

Now all abortion providers have clear warning that they must offer the woman the opportunity to view the ultrasound image unless the provider can document that the therapeutic privilege exception applies. If not, these are at least prominent abortion practitioners who will testify that they have been negligent in violating the accepted standard of care.