

Abortion Provider Secures Win To Block Activist's Videos

By Adam Lidgett

Law360 (April 7, 2021, 7:48 PM EDT) -- A California federal judge on Wednesday permanently blocked an anti-abortion activist from posting surreptitiously recorded videos of the National Abortion Federation's providers, finding the primary issue has already been decided against the activist.

U.S. District Judge William Orrick granted NAF's bid for summary judgment on its breach of contract claim and a permanent injunction against David Daleiden and his co-defendant organizations, the Center for Medical Progress and BioMax Procurement Services.

The judge said the matter came down to issue preclusion, finding that the issue of whether the defendants broke legally-binding confidentiality agreements was already decided against them in a separate case brought by Planned Parenthood.

Counsel for Daleiden has argued that the First Amendment and the Copyright Act protect against the permanent injunction.

While the defendants said that NAF couldn't prove that they knowingly waived their First Amendment rights by signing those confidentiality pacts, the judge said "that does not prevent application of issue preclusion or undermine NAF's 'success on the merits' showing."

"I rejected that argument at the preliminary injunction stage and defendants had a full opportunity to raise it in the [Planned Parenthood] case," the judge wrote. "The defendants' First Amendment arguments do not defeat preclusion or otherwise weigh against entry of judgment on the breach of contract claim."

While the judge granted the permanent injunction, he narrowed the injunction's scope from what was sought.

The judge said that NAF's attempt to have the injunction "cover 'any' NAF meeting no matter where or when held or how defendants may access them is overbroad," and said that a future prohibition against entering any NAF offices or events through misrepresentations about their intentions was also deficient.

In the end, the injunction barred the defendants from releasing recordings from annual NAF meetings in 2014 and 2015, according to the judge's decision.

Derek Foran, an attorney for National Abortion Federation, told Law360 on Wednesday that he was thrilled with the judge's permanent injunction decision.

"It's a great day for the client, and a great day for its members," he said. "It's a huge win."

Daleiden said in a statement that "this decision hides the most incriminating and damning footage under the fig leaf of trade show exhibit agreements, which explicitly permitted exhibitor recording."

"This transparent attempt to skew the law and suppress free speech to protect the worst wrongdoing must stop, and the truth must be revealed," he said.

Daleiden's counsel said in a statement they were preparing to appeal the decision.

Representatives for Center for Medical Progress and Biomax did not immediately respond to requests for comment.

The National Abortion Federation sued the Center for Medical Progress and Daleiden, its leader, in 2015, seeking to stop the organization and others from releasing smear videos purporting to show abortion providers agreeing to sell fetal body parts for profit. Planned Parenthood filed a similar suit the following year.

In February 2016, Judge Orrick granted a preliminary injunction barring the activist and his organization from releasing "misleadingly edited" videos, finding raw footage showed no wrongdoing and that the CMP members broke confidentiality agreements when they recorded the NAF representatives.

The judge also found that concerns about the videos spurring violence against abortion providers outweighed First Amendment claims. The injunction order came three months after a gunman attacked a Colorado Springs Planned Parenthood clinic, killing three. At the time, the CMP denounced that attack.

Judge Orrick sanctioned Daleiden and his attorneys \$195,000 in 2017 after his attorneys posted some of the videos to the internet in violation of the injunction.

In November 2019, a California federal jury found Daleiden and his co-conspirators, including the Center for Medical Progress, **liable on** dozens of claims. The verdict put to rest a hotly contested six-week trial that touched on the national debate over abortion rights and questions about what constitutes journalism.

Judge Orrick refused to undo the jury's \$2 million award in favor of Planned Parenthood.

The National Abortion Federation is represented by Derek Foran, Spencer McManus and Karen Leung of Morrison & Foerster LLP.

The Center for Medical Progress, Daleiden and Biomax are represented by Charles S. LiMandri, Paul M. Jonna, Jeffrey M. Trissell and Milan L. Brandon of the Freedom of Conscience Defense Fund and Harmeet K. Dhillon and Mark P. Meuser of Dhillon Law Group Inc.

Daleiden is represented by Thomas Brejcha, Peter Breen, Matthew F. Heffron and Adam Hochschild of the Thomas More Society.

The case is National Abortion Federation et al. v. Center for Medical Progress et al., case number 3:15-cv-03522, in the U.S. District Court for the Northern District of California.

--Additional reporting by Cara Bayles, Jeff Overley, Dani Kass, Andrew Strickler and Hannah Albarazi.
Editing by Amy Rowe.

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