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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2011-CV-001298

Court: Shawnee County District Court

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Case Title: Hodes & Nauser MDs PA, et al. vs. Lee A Norman MD - Acting Secretary, et al.

Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.

/s/ Honorable Mary E Christopher, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION EIGHT

HODES & NAUSER, MDs, P.A. and TRACI LYNN NAUSER, M.D.,	)	
Plaintiffs,	)	2011-CV-1298
vs.	)	
LEE NORMAN, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment; STEPHEN HOWE, in his official capacity as District Attorney for Johnson County, Kansas; and DEREK SCHMIDT, in his official capacity as Attorney General for the State of Kansas,	)	
Defendants.	)	

MEMORANDUM DECISION AND ORDER

This matter comes before the Court on the defendants' Motion for Protective Order and Motion to Quash Corporate Deposition Subjects, and the Response filed by the plaintiffs. The defendants appear through Robert Curtis Hutchinson of Thompson Warner P.A. Plaintiffs appear through Teresa Woody of Woody Law Firm and Hillary Schneller and Kirby Tyrell of The Center for Reproductive Rights.

I. BACKGROUND

Plaintiffs filed this action to dispute a new statutory and regulatory scheme put in place in 2011 for the licensure and regulation of clinicians and facilities providing abortions in Kansas. This case is remarkable in that the parties' litigation of this matter has continued for nine years.

On behalf of themselves and their patients, plaintiffs seek both declaratory and injunctive relief. Plaintiffs' Petition asks the Court to issue a declaratory judgment finding the statutory Act, K.S.A. 2011 65-4a01, *et seq*., and the permanent regulations, K.A.R. 28-34-126-44, violate the constitutional rights of plaintiffs and their patients. Plaintiffs also request the Court grant them a temporary and then a permanent injunction restraining defendants from enforcing the Act and regulations.

After plaintiffs filed this case, the Court approved an Agreed Order restraining defendants from enforcing the statutory and regulatory scheme while litigation continued. Enforcement was enjoined pending a final ruling in this case.

In January 2019, defendants filed a motion arguing the plaintiffs lacked standing to challenge the "medication in person" provision of the statutory scheme, K.S.A. 2011 65-4a10. Defendants further argued since plaintiffs lacked standing, the Agreed Order restraining enforcement didn't apply, rendering the medication in person provision of the statutory scheme enforceable. After the Hon. Franklin R. Theis ruled on the motion (*see* Order filed April 12, 2019), defendants filed an appeal with the Court of Appeals specific to the medication in person requirement provision set forth in K.S.A. 2011 65-4a10.

This Court found the appeal would not affect the parties' ability to conduct discovery as to the remaining issues presented in this case. *See Harsch v. Miller*, 288 Kan. 280, 286, 200 P.3d 467 (2009) ("appeal under the civil code does not automatically stay further proceedings in the court below.").

The parties agreed to proceed informally with certain depositions, but a dispute arose. The defendants filed a motion to quash plaintiffs' K.S.A. 60-230(b)(6) depositions of KDHE

corporate representatives, which is currently before this Court. Defendants' chief argument is they are entitled to absolute legislative immunity.

II. SUMMARY OF RELEVANT FACTS

Plaintiffs, a private obstetrics and gynecology practice and a licensed physician, brought this action seeking declaratory and injunctive relief against measures enacted that regulate abortion clinic licenses. The regulatory scheme challenged by plaintiffs consists of Kansas House Substitute for Senate Bill No. 36 (2011), codified as K.S.A. (2011) 65-4a12, *et seq.*(the Act), and regulations promulgated by the Kansas Department of Health and Environment, K.A.R. 28-34-126-44 (Permanent Regulations), published October 27, 2011 (Kan. Register pp. 1471-78.) The parties refer to the Act and Permanent Regulations collectively as "the Regulatory Scheme."

Plaintiffs moved to stay discovery in March 2018 pending the Kansas Supreme Court's decision in *Hodes & Nauser v. Schmidt,* 309 Kan. 610, 440 P.3d 461 (2019). However, in June 2018, the district court ruled nothing precluded the parties from conducting depositions of the parties, to be followed by depositions of experts. The parties agreed to proceed with informal notices of deposition, to be exchanged over email.

Defendants arranged to depose plaintiff Hodes and plaintiff Nauser, as corporate representative of plaintiff Hodes & Nauser, MDs, P.A., over three days in mid-October 2018. Plaintiffs anticipated taking K.S.A. 60-230(b)(6) depositions of corporate representatives of KDHE over the course of two days in late-October 2018.

On October 4, 2018, the plaintiffs sent an email to defendants concerning the depositions scheduled for late-October. Plaintiffs' email included a list of topics they intended to cover during the KDHE corporate representatives' depositions, as is required by K.S.A. 60-230(b)(6).

Discovery stalled when defendants expressed displeasure with several of the topics plaintiffs intended to inquire about during the depositions of corporate representatives of KDHE. The parties met and conferred but the parties were unable to come to any agreement. As a result, the parties postponed the depositions of all of the named corporate representatives, and defendants filed their *Motion for Protective Order and Motion to Quash Corporate Deposition Subjects*.

In their motion, defendants object to the designated corporate representatives of KDHE having to testify to the following three topics:

- The Department's involvement in the development, drafting, enactment, and/or enforcement of the Act and Permanent Regulations.

- Any research, discussion, and/or analysis engaged in or completed by the Department, or otherwise relied on by the Department, related to the development, drafting, enactment, enforcement, subject matter, effects, or impact of the Regulatory Scheme, and/or any amendments made or proposed to the Regulatory Scheme.

- The state interests served by the Regulatory Scheme, and any research, discussion, and/or analysis engaged in or relied on by the Regulatory Scheme relevant to these interests.

(*See* Df's Mot. Prot. Order, pp. 3-4 and attached Ex "A.")

In their motion, defendants request the Court for a protective order pursuant to K.S.A. 60-226(c) that will:

A. Protect against the discovery or disclosure of evidence encompassed by absolute legislative immunity or legislative privilege;

B. Protect the defendants from having to respond to discovery requests that are unduly burdensome and not calculated to lead to the discovery of relevant evidence;

C. Limit discovery to information concerning the enforcement of the Final Regulations as follows:

Prohibit the discovery of information regarding the legislative process of developing and promulgating the Temporary, proposed Permanent, and Final Regulations, including but not limited to the creation, drafting, revising, reviewing, and adopting those regulations, as well as the intent, motivations, and/or thought processes underlying those actions.

D. Prevent the disclosure of information otherwise protected by attorney-client privilege, deliberative-process privilege, and work-product protections.

(D. Motion, p. 18.)

At a status hearing in September 2020, the parties informed this Court of defendants' pending Motion to Quash. The Court received oral argument from the parties on November 5, 2020.

III. ANALYSIS

Standard of Review

Under K.S.A. 60-226(c), courts consider whether to issue an order to protect a defendant from annoyance, embarrassment, oppression or undue burden or expense, forbidding inquiry into certain matters or limiting the scope of disclosure to certain matters. *See* K.S.A. 60-226(c)(1)(D). "'Control of discovery is entrusted to the sound discretion of the district court, and orders concerning discovery will not be disturbed on appeal in the absence of clear abuse of discretion.'" *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 618, 244 P.3d 642 (2010).

During discovery, the scope of relevant information is broader than at trial. *Svaty*, 291 Kan. at 620; *Gleichenhaus v. Carlyle,* 226 Kan. 167, 170, 597 P.2d 611 (1979). Discoverable

information is "relevant if there is any possibility that the information sought may be relevant to the subject matter of the lawsuit." *Gleichenhaus*, 226 Kan. at 170.

K.S.A. 60-226(b)(1) provides:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The trial court has discretion in supervising discovery, including making relevancy determinations. *Miller v. Glacier Dev. Co.*, 284 Kan. 476, 498, 161 P.3d 730 (2007); *Walder v. Bd. of Comm'rs of Jackson Cty.*, 44 Kan. App. 2d 284, 286, 236 P.3d 525 (2010).

A. Legislative Immunity

Defendants seek a protective order under K.S.A. 60-226(c) and to quash inquiry during depositions of designated corporate representatives of KDHE having to testify to the following three topics:

- The Department's involvement in the development, drafting, enactment, and/or enforcement of the Act and Permanent Regulations.

- Any research, discussion, and/or analysis engaged in or completed by the Department, or otherwise relied on by the Department, related to the development, drafting, enactment, enforcement, subject matter, effects, or impact of the Regulatory Scheme, and/or any amendments made or proposed to the Regulatory Scheme.

- The state interests served by the Regulatory Scheme, and any research, discussion, and/or analysis engaged in or relied on by the Regulatory Scheme relevant to these interests.

(*See* Df's Mot. Prot. Order, pp. 3-4 and attached Ex "A.")

Defendants' chief argument is that any involvement by the Secretary and/or the Department related to the "pre-decisional and deliberative actions" in the development, enactment, drafting, revising, reviewing, adoption or promulgation of the Regulatory Scheme constitutes "legislative activity" subject to the *legislative immunity privilege*. (Def's Mot., p. 5.) Notably, this would include any agency involvement in either development of statutes or of regulations.

Defendants contend absolute legislative immunity protects them from inquiry into "pre-decisional and deliberative thought processes involved in the development and promulgation of the challenged Regulations." (Def's Mot., p. 12.) The defendants do not contend they are immune from suit; in fact, they state they are "not claiming immunity for their respective roles in enforcing the challenged Act or Regulations." (D. Reply Brief, pp. 4-5.) In addition, defendants contend a protective order is appropriate arguing the information sought by plaintiffs bears no relevance to the lawsuit and plaintiffs' discovery requests are unduly burdensome.[1]

Plaintiffs oppose defendants' motion, maintaining the defendants seek to restrict discovery of two categories of information clearly relevant to the claims and defenses in this case: (1) the state interests served by the Regulatory Scheme, and (2) the development of the Regulatory Scheme. Plaintiff's chief arguments are these topics fall squarely within the scope of discovery, and are not subject to legislative privilege.

1. **The Legislative Immunity Privilege – Scope and Nature**

[1] Defendants did not submit a privilege log or Affidavit in support of their motion.

We turn first to the legislative immunity privilege. Generally, the party asserting a privilege bears the burden of proof for establishing all of the essential elements. *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 374, 22 P.3d 124, 140–41 (2001), *citing Matter of Bevill, Bresler & Schulman Asset Manag.*, 805 F.2d 120, 126 (3d Cir.1986); *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 53–54 (E.D.N.Y. 1991); *R.I.M.C.*, 114 F.R.D. at 675.

The principle of legislative immunity for legislators is well established. *See Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (state legislators); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979) (regional legislators). "Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott–Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (internal quotation marks omitted).

Legislative immunity has been held applicable not only to members of Congress and state legislators, but also extended to local-government legislators. *See Bogan v. Scott–Harris*, 523 U.S. at 49; *see also Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980) (recognizing immunity for state judges acting in legislative capacity).The Supreme Court of the United States has recognized and applied legislative immunity to regional and local legislators. See *Tenney v. Brandhove*, 341 U.S. 367, 372-75, 71 S. Ct. 783 (1951) (state); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405, 99 S. Ct. 1171 (1979) (regional). The Court has also held that individuals outside of the legislative branch can be protected by legislative immunity. See *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 734, 100 S. Ct. 1967 (1980) (finding Virginia Supreme Court members entitled to legislative immunity when acting in

their "legislative capacity."); *Bogan v. Scott-Harris,* 523 U.S. 44, 55, 118 S. Ct. 966, 973 (1998) (finding mayor and member of city council protected by legislative immunity).

The Supreme Court, however, "has been careful not to extend the scope of [legislative immunity] protection further than its purposes require," *Forrester v. White,* 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), and the government official seeking immunity bears the burden of showing that an exemption from personal liability is justified. *See id.* Thus, generally, federal courts have applied the doctrine of legislative immunity to "legislators acting in the sphere of legislative activity." *Kamplain,* 159 F.3d 1248, 1251 (10th Cir.1998).

The privilege traditionally is applied to legislators acting in the sphere of legislative activity at the time the actions took place.

> "In order to determine whether Defendants should be cloaked in legislative immunity, we look to the function that the [Defendants] were performing when the actions at issue took place." *Id.* "[T]he Supreme Court has instructed us, in admittedly differing contexts, that, at its core, the legislative function involves determining, formulating, and making policy." *Id.*

Keys Youth Servs., Inc. v. City of Olathe, 38 F. Supp. 2d 914, 919 (D. Kan. 1999).

Under Kansas law, Article 2, § 22 of the Kansas Constitution provides immunity to legislators akin to the protection federal legislators enjoy under Article I, § 6 of the United States Constitution. *State v. Neufeld,* 260 Kan. 930, 939, 926 P.2d 1325 (1996). Legislative immunity applies to the functions of legislators including "words spoken within chambers and also to committee reports, resolutions, voting, and all things generally done in a legislative session in relation to the business at hand." *Neufeld,* 260 Kan. at 939-40. This protection provides its

beneficiaries from the consequences of litigation and also from any related burdens.[2] *Neufeld,* 260 Kan. at 942.

> Legislative immunity was not written into the Kansas Constitution for the purpose of protecting the private or personal benefits of legislators. Rather, immunity was provided to "'"protect the integrity of the legislative process by insuring the independence of individual legislators."'" 236 Kan. at 55, 687 P.2d 622 (quoting *Eastland,* 421 U.S. at 502-03, 95 S.Ct. at 1820-21, quoting *Brewster,* 408 U.S. at 507, 92 S.Ct. at 2535). Further, legislative immunity was developed to reinforce the carefully established separation of powers doctrine.

State v. Neufeld, 260 Kan. 930, 942, 926 P.2d 1325, 1334 (1996).

2. Have Defendants Met Their Burden to Prove That Legislative Immunity Shields the Secretary and Corporate Representatives of a State Agency from Discovery of its Process of Development and Promulgation of Temporary, Proposed and Final Regulations?

The defendants contend absolute legislative immunity shields KDHE representative(s) and the Secretary from inquiry into "the pre-decisional and deliberate thought processes involved in the development and promulgation of the challenged Regulations." (D. Motion, p. 12.)

a. Defendant KDHE, a State Agency and Part of the Executive Branch

While it is true the Kansas Supreme Court has stated *legislators* are absolutely immune from *lawsuits* if the underlying activity falls within "the sphere of legitimate legislative activity," [*Stephan,* 236 Kan. at 57] defendants do not identify any Kansas case law extending the doctrine of legislative immunity to state agencies. The government official seeking immunity bears the

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[2] Kansas courts consider the function being performed to determine if the activity is legislative in nature: .
"'In determining whether particular activities other than literal speech or debate fall within the "*legitimate legislative sphere* " we look to see whether the activities took place "in *a session of the House by one of its members in relation to the business* before it." *Kilbourn v. Thompson,* 103 U.S. at 204. More specifically, we must determine whether the activities are'"

> '"'"an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States,* 408 U.S. at 625, 92 S.Ct. at 2627.' " *Stephan, **1335* 236 Kan. at 56, 687 P.2d 622 (quoting *Eastland,* 421 U.S. at 503-04, 95 S.Ct. at 1821-22). (Emphasis added.)

State v. Neufeld, 260 Kan. 930, 943, 926 P.2d 1325, 1334–35 (1996).

burden of showing that an exemption from personal liability is justified. *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

The overarching purpose of legislative immunity is to ensure that "legislators may perform legislative functions independently, free from outside interference or fear of such interference." *Neufeld*, 260 Kan. at 941. A state agency such as the defendant KDHE is not traditionally viewed as part of the legislature; rather, it falls under the executive branch of state government. Defendant KDHE does not fully address separation of powers issues if legislative immunity is extended to an executive branch state agency.

Significantly, federal courts have held that, while absolute legislative immunity may be asserted by an individual, the privilege does not apply to the legislative body. The Tenth Circuit Court of Appeals remarked in *Sable v. Myers*, 563 F.3d 1120, 1123 (10th Cir. 2009), that legislative immunity applies only to legislators sued in their individual capacities, not to the legislative body itself. *See also Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 133 (5th Cir.1986) (finding absolute legislative immunity doctrine protects individuals acting within bounds of their official duties, not governing bodies which they serve). Although the federal cases analyzing the U.S. Constitution are not binding, although they do provide guidance. *Neufeld*, 206 Kan. at 939.

b. Sphere of Legislative Activity

Federal cases indicate legislative immunity accrues only when legislators are acting in the sphere of legislative activity. *Kamplain v. Curry County Bd. of Comm'rs*, 159 F.3d 1248, 1251 (10th Cir.1998). The Tenth Circuit Court of Appeals has stated the core of "legislative function involves determining, formulating, and making policy." *Kamplain*, 159 F.3d at 1251 (10th Cir.

1998). As noted by the Court in *Kamplain,* the United States Supreme Court "has been careful not to extend the scope of [legislative immunity] protection further than its purposes require." 159 F.3d at 1251 *citing Forrester v. White,* 484 U.S. 219, 224, 108 S. Ct. 538 (1988).

Kansas cases overwhelmingly hold that the power to promulgate rules and regulations is administrative in nature, not legislative. *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 264 Kan. 293, 304, 955 P.2d 1136 (1998); *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 60, 687 P.2d 622 (1984); *Woods v. Midwest Conveyor Co.*, 231 Kan. 763, 771, 648 P.2d 234 (1982); *Willcott v. Murphy*, 204 Kan. 640, 648, 465 P.2d 959 (1970) ("The power to regulate, though declared to be broad, nevertheless, falls short of the power to legislate.").

In *Stephan*, the Supreme Court considered whether a statute allowing the legislature to adopt, modify, or revoke administrative rules and regulations by concurrent resolution was an unconstitutional usurpation of executive powers. 236 Kan. at 880. The Court found that the litigation would have been dismissed pursuant to legislative immunity if the petitioner "merely challenged the constitutionality of the statute on the ground that it violated the separation of powers doctrine." *Stephan,* 236 Kan. at 58. In contrast, the Court held that the litigation could not be barred by legislative immunity because the petitioner challenged the "*enactment of rules and regulations pursuant to the statute[,] . . . a function exclusively vested in the executive*." *Stephan,* 236 Kan. at 58 (emphasis in original).

In *Tomasic*, the Court considered a separation of powers case involving the delegation of legislative power. 264 Kan. at 302-03. The Court indicated ***legislative power "is the power to make a law, as opposed to the power to enforce a law."*** *Tomasic*, 264 Kan. at 303. According to

the Court***, the power to enforce or administer the law rests in administrative power***. *Tomasic*, 264 Kan. at 303. The *Tomasic* Court admitted that it is "often difficult to determine" if something rests in legislative or administrative power. 264 Kan. at 303. The difference, the Court held, is as follows:

> The difference between the two types of delegated powers depends upon the amount of specific standards included within the delegation. If the legislature has included specific standards in a delegation, then it has already enacted the law and it is simply delegating the administrative power to administer the law, based on the standards included in the delegation. On the other hand, if the legislature has not included specific standards within a delegation, then the legislature has delegated the legislative power to make the law.
>
> *Tomasic*, 264 Kan. at 303-04.

Here, the Act requires the Secretary of KDHE to "adopt rules and regulations for the licensure of facilities for the performance of abortions." K.S.A. 65-4a09. The defendants concede K.S.A. 65-4a09 is the primary authorizing statute relevant to the Act. (D. Reply Brief, p. 15.) K.S.A. 65-4a09 is extensive in its instructions to the Secretary, containing no less than 14 subsections and more than 60 sub-subsections. By enacting the Act, including K.S.A. 65-4a09, the Kansas Legislature acted legislatively by "determining, formulating, and making policy." *See Kamplain*, 159 F.3d at 1251 (at core, legislative function involves determining, formulating and making policy). Once the Legislature executed its function, it then delegated to the Secretary the authority to "fill in the details." *Tomasic*, 264 Kan. at 304. The delegation contained "sufficient policies and standards to guide" the Secretary. *Tomasic*, 264 Kan. at 304.

Defendants have provided no evidence that either the Secretary or KDHE attempted to legislate outside of their authority to regulate, as delegated by the Legislature. See *Marcotte Realty & Auction, Inc. v. Schumacher*, 225 Kan. 193, 197, 589 P.2d 570 (1979) (finding the Real

Estate Commission attempted to legislate "that which is clearly beyond its authority to regulate.")

In *Turner v. National Council of State Boards of Nursing, Inc.,* the plaintiff brought claims against several defendants, including the Kansas State Board of Nursing, alleging the defendants failed to provide reasonable accommodations. No. 11-2059-KHV, 2012 WL 1435295 (D. Kan. 2012) (unpublished opinion). As in this case, the defendant agency in *Turner* asserted that legislative immunity was available to executive branch officials who participated in the development and promulgation of regulations. Judge Vratil noted the State Board members failed to cite any supporting authority "for the proposition that legislative immunity extends to the drafting and approval of administrative regulations by a state agency." *Id*. Further, the State Board failed to provide information to the Court as to how and when members participated in drafting and/or passage of statutes or regulations. The Court also noted the case law cited by the agency did not involve a challenge to *administrative* action. *Id*. Ultimately, Judge Vratil concluded the Board had not met its burden of establishing legislative immunity. *Turner,* 2012 WL 1435295, at *8.

Defendants cite to numerous federal cases, some of which have found that legislative immunity is more sweeping than recognized by the *Turner* Court. See e.g. *Supreme Court of Virginia v. Consumers Union of U.S., Inc.,* 446 U.S. 719, 100 S.Ct. 1967 (1980) (finding legislative immunity applied to court's adoption of ethics rules); *Bagley v. Blagojevich,* 646 F.3d 378 (7th Cir. 2011) (granting legislative immunity to Governor regarding his decision to exercise line item veto power); *Redwood Village Partnership v. Graham,* 26 F.3d 839, 840-41 (8th Cir. 1994) (adopting functional approach outlined in *Harlow v. Fitzgerald,* 457 U.S. 800, 810, 102

S.Ct. 2727 (1982) and finding rulemaking undertaken by the Department of Human Services qualified as legislative, which was subject to immunity for liability for damages); *Miles-Un-Ltd., Inc. v. Town of New Shoreham, R.I.,* 917 F. Supp. 91 (D.N.H. 1996) (finding city council members could not be deposed with respect to their motives behind the implementation of a specific ordinance). Notably, the cases cited by the defendants, except for *Miles-Un-Ltd*., do not contemplate legislative immunity applying to a state agency or its officials.

After careful review and thorough consideration, this Court concludes that, while the absolute legislative immunity doctrine protects individuals acting within bounds of their official duties, defendants have failed to demonstrate any basis for extending the doctrine of legislative immunity to the drafting and approval of regulations by KDHE, a state administrative agency. An individual legislator may assert the doctrine of legislative immunity, but not a governmental entity or agency.

In addition, the Court finds defendants may not utilize legislative immunity with respect to the development or promulgation of state agency regulations since that function is purely administrative in nature.

Further, defendants provide no information as to how or when KDHE members or K.S.A. 60-230(b)(6) corporate representatives participated in drafting and/or passage of the Act or statutory scheme. To determine whether a particular task is legislative, executive or judicial, a court looks to the function performed. Without specific information concerning the nature of defendants' participation, if any, the Court is unable to make a clear determination as to whether a particular individual's activity falls within the sphere of legislative activity. A government official seeking immunity bears the burden of showing immunity is justified for the function in

question. *Borde*, 423 F. App'x. 798, 801 (10th Cir.2011). After careful review, this Court finds defendants have not met their burden of proof to establish their entitlement to the legislative immunity privilege.

B. Is the Information Sought Irrelevant and/or Overly Burdensome?

As mentioned above, defendants oppose the plaintiffs' requests to depose their corporate representatives regarding the following:

- The Department's involvement in the development, drafting, enactment, and/or enforcement of the Act and Permanent Regulations.

- Any research, discussion, and/or analysis engaged in or completed by the Department, or otherwise relied on by the Department, related to the development, drafting, enactment, enforcement, subject matter, effects, or impact of the Regulatory Scheme, and/or any amendments made or proposed to the Regulatory Scheme.

- The state interests served by the Regulatory Scheme, and any research, discussion, and/or analysis engaged in or relied on by the Regulatory Scheme relevant to these interests.

The defendants maintain that "[n]one of the mental processes of individuals at KDHE have any impact on the constitutionality of the Regulations, and they certainly have no bearing on the facial validity of the Act." (D. Motion, p. 14.) Plaintiffs contend that "the state's rationale for its laws is nearly always relevant in constitutional litigation challenging those laws." (P. Brief, p. 6.)

The relevant governmental interest alleged to justify a given statute or regulation is determined by objective factors such as the language of the statute or regulation, the effect of the statute or regulation, facts surrounding the enactment of the statute or regulation, and the record of proceedings. *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984). However, an otherwise constitutional statute or regulation will not be invalidated because of an alleged illicit

motive or intent. *City of Las Vegas,* 747 F.2d at 1297. Regulations are constitutional "unless clearly arbitrary and unreasonable, meaning they have no substantial relation to public health, safety, morals, or general welfare. *Harris v. Missouri Dept. of Conservation,* 895 S.W.2d 66, 71 (Mo. Ct. App. 1995).

Here, any subjective thoughts, motives or subjective intentions of any of the individual employees of KDHE are not relevant to the constitutionality of the regulations. However, plaintiffs' K.S.A. 60-230(b)(6) notice asks for information from "the Department," not from specific individuals. Further, plaintiffs' requests do not focus on the subjective motives or intents of KDHE.

Defendants also argue "it is not for KDHE to decide which interests are served by the Regulations" because the Act directs KDHE to promulgate the permanent regulations. (D. Reply, p. 15.) First, plaintiffs' notice requests more information than the state interests served. The deposition notice requests that the KDHE corporate representative testify as to "any research, discussion, and/or analysis engaged in or relied on by the Regulatory Scheme relevant to these [state] interests." Testimony from defendants as to whether the permanent regulations bear a substantial relation to public health, safety, morals, or general welfare would appear to be highly relevant to the constitutionality of the Regulatory Scheme. And, as counsel are aware, litigants are not required to provide the information outside their care, custody and control.

Defendants' final contention is that the requested information sought by the plaintiffs is overly burdensome. To support this claim, defendants note the longstanding nature of this litigation and staffing changes faced by KDHE. This litigation has been somewhat lengthy, although that, in and of itself, is no reason to deny plaintiffs' discovery requests. Additionally,

while staff turnover can make it more difficult to find someone with direct knowledge to testify regarding the information sought by plaintiffs, the key will be locating records kept by KDHE. As noted, the subjective beliefs of individual representatives or employees are irrelevant. Instead, plaintiffs can find out about the research completed, discussions that may have occurred with outside consultants, or other analysis regarding the development, drafting, and enactment of the Permanent Regulations using information found in the record maintained by KDHE.

IV. CONCLUSION

The doctrine of legislative immunity may be asserted by individuals, but not by a governmental entities or agency such as defendant KDHE. In addition, defendants may not utilize legislative immunity with respect to the development or promulgation of regulations since that function is purely administrative in nature. Finally, because defendants provide no information as to how and when they may have participated in drafting and/or passage of statutes and/or regulations, the Court cannot determine whether a specific activity of a specific individual falls within the sphere of legislative activity. Thus, the Court concludes defendants have not met their burden of proof concerning the legislative immunity privilege.

The Court additionally concludes the complained-of portions of plaintiffs' K.S.A. 60-230(b)(6) corporate representative deposition notice are neither irrelevant nor overly burdensome.

ORDERS

For all of the reasons stated herein, the Court DENIES defendants' *Motion for Protective Order and Motion to Quash Corporate Deposition Subjects*. This Memorandum Decision and

Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS SO ORDERED.

This Order is effective on the date and time shown on the electronic file stamp.

HON. MARY E. CHRISTOPHER
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

Hillary Schneller
Kirby Tyrrell
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038-3533
Phone: (917) 637-3777
hschneller@reprorights.org
ktyrrell@reprorights.org
*Admitted *pro hac vice*

Teresa A. Woody
THE WOODY LAW FIRM, P.C.
1621 Baltimore Avenue 3
Kansas City, MO 64108
Phone: (816) 421-4246
teresa@woodylawfirm.com
Attorneys for Plaintiffs

Robert C. Hutchison
Thompson-Hall P.A.
333 W. 9th Street, Suite B
Lawrence, KS 66044
Phone: 785-841-4554
robert.hutchison@333legal.com

Jeffrey A. Chanay
Chief Deputy Attorney General
Office of Kansas Attorney General Derek Schmidt
Memorial Building, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1597
Phone: 785-368-8435
Jeff.chanay@ag.ks.gov
Attorney for Defendants

/s/ Anson Pruneda
Anson Pruneda
Administrative Assistant