

REPUBLIC OF COLOMBIA

CONSTITUTIONAL COURT
FIRST REVIEWING CHAMBER
JUDGMENT No. T-310 DATED 2010

Reference: Case T-2570939

Civil rights action of Estrella Mórrigan¹ v. Coomeva EPS

Opining Judge: María Victoria Calle Correa

Bogotá, D.C., thirtieth (30) of April, two thousand and ten (2010)

Bearing in mind that the legal problem in this fundamental rights lawsuit has been subject to two rulings by this Court, the First Reviewing Chamber of the Constitutional Court decides to repeat the matters provided by case law in these types of cases.² For this reason, pursuant to constitutional and legal powers, we will summarize the reasoning of the present judgment.³

I. BACKGROUND

1. On December 4, 2009, Estrella Mórrigan, a 25-year old woman brought a fundamental rights lawsuit against Coomeva EPS, an insurance entity. She claimed that the failure to provide the service ordered by her physician (*ninfoplasty*) to treat her health problem (*hypertrophy of vaginal labia*), violated her right to health. Her attending physician prescribed the procedure;⁴ but it was later denied by the Scientific Technical Committee because it considered that this service was outside the service plan (the Obligatory Health Plan, POS, for its initials in Spanish) and that, once the clinical history had been reviewed, “*the procedure’s functional objective was not apparent.*” The plaintiff, who earns minimum wage, argued that she lacks the necessary resources to pay for the health service, one million pesos (\$1,000,000), “*as her income is barely sufficient to help support her family.*”⁵

¹ The name of the plaintiff has been changed to protect her right to privacy.

² The Third Selection Chamber, constituted by Judges Mauricio González Cuervo and Gabriel Eduardo Mendoza Martelo of the Constitutional Court selected this case for review on March 16, 2010.

³ Based on Decree 2591 dated 1991 (article 35), the Constitutional Court has noted that the reasoning of reviewing decisions that limit themselves to repeating case law can be “summarized”. It has done so on a series of occasions, including, for example, Judgments T-549 of 1995 (MP. Jorge Arango Mejía), T-396 of 1999 (MP. Eduardo Cifuentes Muñoz), T-054 of 2002 (MP. Manuel José Cepeda Espinosa), T-392 of 2004 (MP. Jaime Araujo Rentería), T-959 of 2004 (MP. Manuel José Cepeda Espinosa), T-689 of 2006 (MP. Jaime Córdoba Triviño), T-1032 of 2007 (MP. Mauricio González Cuervo), T-366 of 2008 (MP. Manuel José Cepeda) and T-108 of 2009 (MP. Clara Elena Reales Gutiérrez).

⁴ The physician recommended performing the health service (*ninfoplasty*) to treat the plaintiff’s hypertrophy of the left vaginal labia. The plaintiff requested a physician’s analysis due to “vaginal disturbances, pain, itching, among others [...]”

⁵ See case record, main volume, page 2.

2. On January 18, 2010, the Municipal Judge of Santa Rosa de Osos decided to deny the fundamental rights action. It considered that EPS did not disregard the plaintiff's fundamental right to health and life by denying a health service that, while useful, was not essential. The Judge based his decision on the opinion presented in the case by the attending physician who ordered the health service requested by the plaintiff. This opinion ratified (i) the existence of a health affection and (ii) the service ordered was the adequate clinical answer. Nonetheless, he clarified that the "*procedure was not essential to improve her health condition. Failing to perform it did not put her health or dignified life at risk. Performing it did not have any consequence. It is more aesthetic than functional.*"⁶

II. CONSIDERATIONS AND ARGUMENTS

1. According to repeated case law, every person has a constitutional right to access the health services that he or she *needs*, depending on the respective form and manner of access, and that person's condition within the system.⁷ Case law has ensured the access to health service that a person needs when the corresponding EPS has not guaranteed it; at the same time, it has denied ordering access to the service when it is not necessary.⁸
2. The service requested by the plaintiff in this case, namely, *ninfoplasty*, forces the Health System to make a careful decision, to ensure the effective enjoyment of her right to health. Indeed, this type of 'plastic' services may imply, for example, merely 'aesthetic' cases or cases in which the service is clearly 'reconstructive' or necessary to ensure a person's personal integrity. In the former, when the service is purely aesthetic, we must understand that it is not included within the obligatory health plan (POS), that it is excluded from this plan and that, therefore, the attending physician cannot order its provision by the Health System, much less, the constitutional judge. In the second case, when the 'plastic' intervention is clearly 'reconstructive' or necessary to ensuring a person's personal integrity,

⁶ See case record, main volume, page 35.

⁷ In this regard, see Judgment T-760 of 2008 (MP. Manuel José Cepeda Espinosa). In this case, the court decided, among other matters, that "every person has a right to an authorization by the entity in charge of guaranteeing health services, EPS of access to the services that said person *needs* and those that he or she *requires with need*, even if they are not under the obligatory health plan; impeding access in such cases implies a disrespect of the person's right to health. Access to services should be *timely, efficient and of good quality*." The way that the constitutional case law was picked up in this case has been repeated on a series of occasions. For example, see Judgments T-320 of 2009 (MP. Jorge Iván Palacio Palacio) and T-346 of 2009 (MP. María Victoria Calle Correa).

⁸ On a series of occasions, the Court has considered unnecessary health services and it has denied a writ protecting fundamental rights even in the case of minors. For example, Judgment T-985 of 2008 (MP. Manuel José Cepeda Espinosa) was decided as follows: "the minor's father claims that she requires an orthodontic treatment after her upcoming surgery. Nevertheless, as claimed by EPS before the appellate judge, the attending physician never ordered this treatment. The attending physician's order shows that she considers that the minor requires health treatment (*surgical window*) and that another complementary service might be useful (*orthodontic treatment*). In fact, as claimed by the plaintiff, EPS offers a financing plan for the cost of the service, so that the plaintiff can assume it and it can guarantee the complementary orthodontic service to his daughter. Thus, as the orthodontic treatment is a health treatment that the minor does not need, EPS did not violate her right to health when it failed to order said treatment."

access to the disputed service must be assured by the respective entity, and in the event of breach, the constitutional judge can order it.

3. Breast surgeries present a similar dilemma, and they have also been reviewed by constitutional case law. Thus, in Judgment T-1251 of 2000, a physical education teacher's right to have breast surgery was protected, because she suffered from hyperplasia of her right breast that affected her body, causing strong backaches that prevented her from performing her job properly.⁹ The Court took into account, in particular, that the plaintiff was a woman "whose marked asymmetry caused psychosexual difficulties to her."¹⁰ Throughout the constitutional case law, the various Constitutional Court Review Chambers have protected plaintiffs' rights in similar cases.¹¹ This jurisprudential position has also been picked up by health regulations that clearly establish, since 2005, that necessary breast surgeries, not purely aesthetic ones, are understood to be included by the POS.¹² Bariatric surgery is another example of these types of services. Indeed, on occasion, the Constitutional Court has found that this service is necessary and has

⁹ Constitutional Court, Judgment T-1251 of 2000 (MP Alejandro Martínez Caballero).

¹⁰ Constitutional Court, Judgment T-1251 of 2000 (MP Alejandro Martínez Caballero).

¹¹ This decision has been repeated in Judgment T-935 of 2001 (MP Marco Gerardo Monroy Cabra), which considered that "The surgery requested by Ms. Escobar Calderón from Coomeva E.P.S., cannot be considered "aesthetic surgery" and thus be excluded from the P.O.S., since the diagnoses issued by the physicians and contained by the file demonstrate that the surgery requested by the plaintiff is required to improve the afflictions that affect her. This Chamber considers that the surgery required by the plaintiff seeks to ensure the rights to health, dignity, social security and physical integrity and that her case is similar to the decision issued in T-1251/00. Said case law is in harmony with other case law cited in this ruling." Judgments T-119 of 2000 (MP. José Gregorio Hernández Galindo); T-070 of 2001 (MP. Alvaro Tafur Galvis); T 461 of 2001 (MP. Marco Gerardo Monroy Cabra); T-531 of 2004 (MP. Jaime Araujo Rentería); T-822 of 2007 (MP Jaime Córdoba Triviño); T-517 of 2008 (MP. Clara Inés Vargas Hernández) are similar. In all these cases, the plaintiff's right to breast surgery was protected, except when it had to do with a matter that was moot.

¹² In Judgment T-755 of 2007 (MP Manuel José Cepeda Espinosa), the Court ruled as follows: "*The National Health Social Security Council, via Agreement 289 of 2005 interpreted the scope of the exclusion of certain plastic surgeries in the POS and the POSS. In the recitals of this Agreement, it noted: "We must clarify and specify the contents of the Obligatory Health Plan of the Contributory Regime, POS, and the Subsidized Regime POS-S as it relates to the coverage for reconstructive or functional Plastic Surgery procedures, in light of certain interpretations of the contents of the POS and POS-S that have led to difficulties in the provision of services to members; That, in accordance with medical practice, reconstructive and functional plastic surgeries are defined as those that seek to repair the capacity to function, looking to correct, to the extent possible, anatomical alterations that cause a body or system to function poorly. These services must be provided in the terms of the Activities, Procedures and Interventions Manual contained in Resolution 5261 of 1995 (...).*" Finally, article 1 of the Agreement provides: '*The Obligatory Health Plans of the Contributory and Subsidized Regime include the Plastic, Maxillofacial procedures, and other specialty procedures described in Resolution 5261 of 1994, listed below, provided that they have functional reconstructive purposes, per the terms set forth in this Agreement. – Breast repair surgeries. –Treatment for cleft lip and palate. – Treatment for a large burn. The above procedures are included by the terms and conditions of each regime established in the rules that define the respective benefits plan; in no case does this imply an increase in current coverage.*'" In this case, the court decided to protect the plaintiff's right, considering the following: "*the opinions of the EPS attending oncologist, the EPS plastic surgeon, and legal medicine, both state that the surgery requested by the petitioner is functional and not aesthetic. The trial judge granting the writ for protection of fundamental rights ruled in this manner. This procedure is not excluded from POS; it comprises a part of it according to the Agreement of the referenced National Health Social Security Council.*"

ordered that its practice be guaranteed.¹³ In other cases, it believes that the service is not necessary and has denied it.¹⁴

4. Similarly, when the health service requested is a plastic surgery that is not ordered because of a risk of a person's life or health, constitutional jurisprudence has denied access to said service via a writ of fundamental rights. Thus, in cases of a sumptuary service, or even a useful service, the Court has determined that the service is not necessary, and thus, it cannot be protected via a writ for the protection of fundamental rights. For example, Judgment T-476 of 2000¹⁵ denied a reductive *breast surgery* because it was not therapeutic and it did not affect the plaintiff's health; a breast reconstruction surgery was denied in Judgment T-749 of 2001¹⁶ to a woman who wanted to improve her breasts' physical appearance; and Judgment T-539 of 2007¹⁷ denied a breast reduction surgery because there was no imminent or serious risk, and the plaintiff's health was not affected. This very rule has been applied in similar situations, in cases involving various health services.¹⁸
5. Finally, in certain cases, courts are not able to decide whether the service is necessary or not. In this situation, the Courts have divided their decisions into two. In the first, courts seek to adopt adequate and necessary measures to resolve the medical uncertainty on the matter. In the second, courts order the practice of the service if it is proven to be necessary.¹⁹ In the case of breast surgery, Judgment

¹³ In Judgment T-365 of 2002 (MP. Jaime Córdoba Triviño) the court decided that, among other matters, Salud Colmena EPS' legal representative had to perform the bariatric surgery on the plaintiff through a laparoscopy. *See also*, T-1229 of 2005 (MP. Jaime Araujo Rentería), T-060 of 2006 (MP. Alvaro Tafur Galvis), T-384 of 2006 (MP. Clara Inés Vargas Hernández), T-663 of 2008 (MP. Rodrigo Escobar Gil), T-1022A of 2008 (MP. Nilson Pinilla Pinilla) and T-1108 of 2008 (MP. Mauricio González Cuervo, SPV Mauricio González Cuervo).

¹⁴ In Judgment T-828 of 2005 (MP. Humberto Antonio Sierra Porto) the court decided to affirm the trial Judgment denying protection.

¹⁵ Constitutional Court, Judgment T-476 of 2000 (MP Alvaro Tafur Galvis).

¹⁶ Constitutional Court, Judgment T-749 of 2001 (MP Marco Gerardo Monroy Cabra).

¹⁷ Constitutional Court, Judgment T-539 of 2007 (MP Nilson Pinilla Pinilla)

¹⁸ *See for example*, among other cases, Judgment T-198 of 2004 (MP Eduardo Montealegre Lynett) (denying a woman plastic surgery when, after having received treatment for infectious herpes, she was diagnosed with an irregular anti-aesthetic scar on the left side of her nose. This Corporation claimed that, as per the attending physician, this operation was not aimed at achieving the plaintiff's functional recovery, and instead, it sought purely aesthetic ends. In Judgment T-490 of 2006 (MP Marco Gerardo Monroy Cabra) the court denied laser hair removal in the case of a man who suffered from Pseudo-folliculitis of the beard, an illness in which beard hair grew inside the skin and the plaintiff was forced to use a pin to remove ingrown hair.

¹⁹ In Judgment T-264 of 2003 (MP. Jaime Córdoba Triviño), the Court decided, among other matters, to order the Legal Representative of SaludCoop EPS to schedule an appraisal by a multi-disciplinary team composed of specialists within its service network designated by Dr. Hernán Yupanqui (attending physician) in order to define a treatment for Ms. Glaris María Roa Sánchez. As a result, all of the procedures that she needed, *including bariatric surgery*, would be performed if the medical team concluded that they were necessary. Similarly, EPS was ordered to provide comprehensive treatment to the woman to improve her quality of life. In a similar sense, see Judgments T-027 of 2006 (MP. Alfredo Beltrán Sierra), T-469 of 2006 (MP. Humberto Antonio Sierra Porto), T-867 of 2006 (MP. Marco Gerardo Monroy Cabra), T-1201 of 2008 (MP. Marco Gerardo Monroy Cabra) and T-037 of 2010 (MP. Jorge Iván Palacio Palacio).

T-760 decided, among other matters, to protect a woman's health, in a case where the plaintiff did not clearly prove whether she needed the service or not.²⁰

6. In principle, determining whether a health service is required or not, including plastic surgery, is a matter that must be performed by the attending physician of the respective entity. However, this decision can also be questioned or suggested by another System physician, even if he or she is not a member of this entity, but has treated the person and made justified technical decisions. The Reviewing Chamber has considered, in this regard, that “*when a medical service has not been clearly excluded from the POS and said procedure is ordered by a physician that is outside the Service network of the entity in charge of providing the service, EPS has the obligation, if it denies provision of the service, of evaluating and proving, on the basis of scientific techniques (i) that the medical service is not within the POS, (ii) how to evaluate and contradict, in medical and scientific terms, the order issued by the attending physician who is outside the service network of the defendant entity.*”²¹
7. Now, the Chamber should highlight that, on a series of occasions, the constitutional case law on the right to health has addressed illnesses that can affect a woman's reproductive or sexual health.²² The Constitutional Court, for example, has been sensitive to the impact that these affectations could have on a woman's emotional life, even affecting her mental health, on occasion.²³
 - 7.1. The Court has not only protected the right to sexual health when it is directly affected, but also in such cases when it could be subject to an indirect risk or threat. Thus, for example, the Constitutional Court protected a person's right to health, among other reasons, because it considered that a partner (a

²⁰ Constitutional Court, Judgment T-760 of 2008 (MP Manuel José Cepeda Espinosa), the Court decided to protect a woman's right to breast surgery, as it deemed that the surgery was necessary. The Court said, “this Court considers that Famisanar EPS violated the plaintiff's fundamental right to health, denying her access to a *necessary* health service, contemplated in the obligatory service plan, without taking the adequate and necessary measures to establish whether a person really required the treatment, from a medical perspective. EPS justified its decision via three arguments, namely, that the service (i) was not included in obligatory plans, (ii) it was unclear whether it was medically required or not and (iii) the plaintiff did not demonstrate her lack of resources.” The Chamber, via an injunction, ordered the plaintiff's proper diagnosis. In another case studied by the Court, the court ruled the following: “The Court considers that the Administrative District Health Department of Cartagena, DADIS, for its initials in Spanish, *disrespected* the plaintiff's daughter's right to health – by failing to adopt the adequate and necessary measures to determine whether the child needs a health service or not (therapeutic breast surgery), and orders a guarantee of effective access to the surgery in the event that the Court rules that she does need it [...]”

²¹ Constitutional Court, Judgment T-838 of 2009 (MP. María Victoria Calle Correa) Holding that the adequate measures must be adopted to medically establish whether the service *Sleeve Gastrectomy via Laparoscopy using a Ligasure T. Mechanical Suture* was necessary.

²² On a series of occasions, the Constitutional Court has protected a woman's right to access health services that involve, in one way or another, her sexual and reproductive health. Among other matters, see for example, Judgments T-605 of 2007 (MP Humberto Antonio Sierra Porto) (guaranteeing the practice of a *maternal and paternal karyotype exam*; T-870 of 2008 (MP. Manuel José Cepeda Espinosa), in this case, the plaintiff's right to medication *Acetato de Leuprolide* was guaranteed; T-890 of 2009 (MP. Luis Ernesto Vargas Silva), in this case, an operating laparoscopic video was ordered.

²³ In the concrete case, even though the court held that the plaintiff did not have a right to the requested health service, in Judgment T-424 of 2009 (MP. Jorge Ignacio Pretelt Chaljub) the Court held that a functional affectation could impact a woman's reproductive health, and affect her mental health.

woman) could be infected with the human papilloma virus.²⁴ The Court has protected the right to reproductive and sexual health, even in such cases where the situation has been consummated, such as, when a 13-year old rape victim is precluded from interrupting her pregnancy.²⁵

- 7.2. It is worth emphasizing that sexual health ensures the ability to have an active and pleasurable sexual life. A writ for protection of fundamental rights has also addressed access to health services to allow the effective enjoyment of this right.²⁶
- 7.3. Judges or physicians can be ignorant about the protection of a woman's right to sexual health, for cultural reasons. They can undermine its physiological and psychological factors, and these can affect a woman's right to enjoyment of her sexual life. The existence of certain schools of thought that even questioned women's rights to freely enjoy their sexuality, requires that health system operators and constitutional judges give special protection to cases where it can be at risk. In other words, under the constitutional legal framework, when a woman requests a medical service that her sexual health can depend on and, eventually, her reproductive health, the constitutional protection implies a specific evaluation and analysis of this dimension of her health, regardless of her sexual orientation.
8. In the present case, the Chamber observes that the assessments performed by the attending physicians and certified by the Scientific Technical Committee allow us to clearly establish that the plaintiff's problem is a matter that seriously affects her health, and, in particular, her reproductive and sexual health.

Although the plaintiff holds that the main importance of performing the operation is, above all, the long-term consequences that could arise if the hypertrophy were to considerably increase, she also references the pain and disturbances caused by her physical condition. The attending physician confirmed to the trial judge that (i) the plaintiff suffers from the illness that she indicated in the protective action (hypertrophy of vaginal labia); (2) that *ninfoplasty* is the indicated treatment to

²⁴ In Judgment T-816 of 2008 (MP. Clara Inés Vargas Hernández) the Court decided to protect the plaintiff's rights and, as a result, order the health entity in charge to perform a new medical assessment, to determine the comprehensive treatment of the 'condyloma injuries on the penis', that he suffers from, guaranteeing the provision of necessary procedures or medication to cure his illness, including the treatment designated as "peniscopy" pursuant to the prescriptions of the entity's physicians. The Court notes: "These injuries greatly affect his personal integrity, as they violate his right to sexuality as part of the fundamental right to free development of his personality, to the extent that the plaintiff cannot fully develop his sexual life as he must manage a complex virus that he could spread to his wife and which could lead to cancer, according to referenced information. For this reason, and without greater deliberations, the Chamber finds that the first requirement of the Court's case law, for the provision of non-POS procedures has been proven."

²⁵ In Judgment T-209 of 2008 (MP. Clara Inés Vargas Hernández) the Court decided, among other matters, to *order* Coomeva EPS, and the IPS of its network, as well as the health professionals who treated the case and did not act pursuant to their obligations, to pay for the harm caused to the minor, because it violated her fundamental rights.

²⁶ In Judgment T-492 of 2004, for example, the Court protected a the right of a person and his or her spouse to access a "phallic reconstruction" service, when the person had suffered serious injuries to his sexual organs, caused by common delinquents. At this time, the Court considered how the situation caused a serious deterioration of the plaintiff's sexual health and the couple's sexual life. Constitutional Court, Judgment T-492 of 2004 (MP. Alfredo Beltrán Sierra).

achieve a ‘comprehensive recovery’ or a partial resection of the lower labia; and (iii) that the procedure is not essential to improve her health condition, considered as a general matter. Not performing it, he assures, does not put her health or dignified life at risk.

The Review Chamber does not discard the fact that the physician who evaluated Estrella Mórrigan considered, in particular, the affectation of her illness on her reproductive health on one hand and her sexual health on the other. Nonetheless, because of the general nature of the opinion, this Chamber cannot clearly establish whether the physician considered this matter or not. This absence implies that the Court, following its case law, has to protect the plaintiff’s right to health; must request a new evaluation, considering, in particular, her sexual health, and, in the event that the service is necessary, it orders that performance of the service.

9. As a result, the Chamber decides that EPS violated a woman’s right by denying the *ninfoplasty* (a medical service on which her sexual health, and eventually, her reproductive health depend), when it considered that she did not need said service because it did not affect her life and health. However, the medical opinion on which it is based did not perform a specific evaluation of the woman’s reproductive and sexual health. Thus, the court decides to deny the writ for protection of fundamental rights and instead, issue the referenced orders.

III. DECISION

In light of the foregoing, the First Review Chamber of the Constitutional Court, administering justice on behalf of the people and by mandate of the Political Constitution,

RESOLVES:

First. –**TO REVOKE** the judgment issued by the Municipal Court of Santa Rosa de Osos, on January 18, 2010, in the referenced case and, instead, **PROTECT** the right to health of Estrella Mórrigan.

Second. –**TO ORDER** EPS Coomeva, within a 48-hour term, counted from service of this judgment, to adopt all necessary and appropriate measures to evaluate the impact of the *hypertrophy of labia minora* on the health of Estrella Mórrigan, in particular, her reproductive and sexual health. In the event that the affectation is *serious* (a considerable and not simply aesthetic impact), the practice of surgery on the plaintiff within the next 48 hours after the medical opinion is issued shall be performed. The Municipal Court of Santa Rosa de Osos and this Review Chamber of the Constitutional Court must be informed of decision adopted by EPS on the day after it is adopted.

Third. – The Municipal Court of Santa Rosa de Osos shall **SERVE** this judgment within five (05) days from receipt of the communication, pursuant to article 36 of Decree 2591 of 1991.

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Fourth. –The Secretary General shall ISSUE the communication contemplated by
article 36 of Decree 2591 of 1991.

Notice, communication, and publication in the Constitutional Court's Gazette and
performance is hereby ordered.

Signature

MARÍA VICTORIA CALLE CORREA

Judge

Signature

MAURICIO GONZÁLEZ CUERVO

Judge

Signature

JUAN CARLOS HENAO PÉREZ

Judge

Signature

MARTHA VICTORIA SACHICA MÉNDEZ

Secretary General

(T-310 of 2010)