

IN THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI

UNITED FOR MISSOURI, DAN)
RAKERS, AND JOHN DOE,)
)
)
Plaintiffs,)

Case No. _____

vs.)

ST. CHARLES COUNTY,)

Serve:)
Steve Ehlmann, County Executive)
100 North Third Street)
St. Charles, MO 63301)

ST. CHARLES COUNTY DEPARTMENT)
OF PUBLIC HEALTH,)

Serve:)
Hope Woodson, Director)
1650 Boone's Lick Road)
St. Charles, MO 63301)

AND)

HOPE WOODSON, THE DIRECTOR)
OF THE ST. CHARLES COUNTY)
DEPARTMENT OF PUBLIC HEALTH,)
IN HER OFFICIAL CAPACITY,)

Serve:)
Hope Woodson, Director)
1650 Boone's Lick Road)
St. Charles, MO 63301)

Defendants.)

PETITION FOR DECLARATORY JUDGMENT

COME NOW Plaintiffs, United for Missouri, Dan Rakers, and John Doe, by and through
counsel, and for their Petition for Declaratory Judgment, state as follows:

1. United for Missouri is a Missouri Non Profit Corporation, registered with the Missouri Secretary of State and in good standing, with its primary business location in Jefferson City, Missouri. United for Missouri is committed to educating and mobilizing citizens about the impact of limited government and economic policy on the state and the impact of the federal government exceeding its Constitutional limits on achieving growth, opportunity and prosperity.

2. Plaintiff Dan Rakers is a resident, citizen, taxpayer and registered voter of St. Charles County, Missouri.

3. Plaintiff John Doe is a resident, citizen, taxpayer and registered voter of St. Charles County, Missouri. *See* Affidavit, attached as Exhibit 1.

4. Defendant St. Charles County is a first class charter county and a political subdivision of the state of Missouri, operating under a County Charter, first approved by voters on April 7, 1992.

5. Defendant St. Charles County Department of Public Health (formerly Community Health & the Environment) is a Department of Defendant St. Charles County and consists of three divisions – Health Services, Environmental Health and Protection, and Human Services.

6. Hope Woodson is the Director of the St. Charles County Department of Public Health and has served in that role since January 2015.

7. Rule 87.04 requires the naming of a municipality as a defendant when the validity of an ordinance is in question.

8. Jurisdiction and venue is proper in the Circuit Court of St. Charles County, Missouri.

FACTS

9. On September 26, 2016, the St. Charles County Council passed Bill No. 4381, establishing the “St. Charles County Narcotics Control Act” (hereinafter the “Narcotics Control Act”). The bill is codified at Chapter 280.010 – 280.110 of the St. Charles County Code. A copy of Bill No. 4381 is attached as Exhibit 2.

10. The main provision of the Act is the “Establishment of a monitoring program” by the St. Charles County Department of Public Health (hereinafter “the Department”). See Bill No. 4381, Section 3.

11. Section 3(2) requires that within seven (7) business days of having dispensed a Schedule II, III, or IV controlled substance, a dispenser shall submit the following to the Department, electronically:

- (1) The pharmacy’s Drug Enforcement (DEA) number;
- (2) The date of dispensation;
- (3) If dispensed via prescription, (a) the prescription number or other unique identifier;
(b) whether the prescription is new or a re-fill; and (c) the prescriber’s DEA or National Provider Identifier (NPI) number;
- (4) The National Drug Code (NDC) of the drug dispensed;
- (5) The patient’s name, address and date of birth; and
- (6) An identifier for the patient to whom the drug was dispensed, including but not limited to any one of the following: (a) driver’s license number; (b) the patient’s government-issued identification number; or (c) the patient’s insurance cardholder identification number.

(hereinafter this information will be referred to collectively as “dispensing information”).

12. Section 6 requires the Director of the St. Charles County Department of Public Health (hereinafter “the Director”) to “review” the information transmitted. If the Director develops a “reasonable belief that a breach of professional standards has occurred” the Director is required to notify the appropriate law enforcement agency or regulatory agency and is permitted to provide “any dispensing information requested...when advised that such information is required for conduct of an official investigation.”

13. Section 7 authorizes dispensation information to be provided to a litany of other persons “upon a duly made request”:

- (a) Persons who are authorized to prescribe or dispense controlled substances...;
- (b) The State Board of pharmacy;
- (c) Any state board charged with regulating a professional authorized to prescribe or dispense controlled substances...in the course of a current and open investigation...;
- (d) Local, state and federal law enforcement or prosecutorial officials...who are engaged in the administration, investigation or enforcement of laws governing prescription drugs based on a specific case and under a subpoena issued pursuant to court order;
- (e) Local or state departments of public health who have adopted narcotic monitoring programs that contain substantially the same elements and requirements...;
- (f) The MO HealthNet division of the Missouri Department of Social Services regarding MO HealthNet program recipients; and

(g) A judge or other judicial officer under a subpoena issued pursuant to a court order.

14. Section 7(2) allows the Director to provide certain dispensation information to public or private entities for statistical or educational purposes.

15. Section 11 allows the County Executive to enter into an intergovernmental agreement with St. Louis County and other political subdivisions for prescription drug monitoring.

16. Because of the sensitive nature of the information collected and transmitted under Section 3(2), the Ordinance contains certain privacy protections, such as shielding the information from disclosure under Missouri Open Records laws. *See* Section 4.

17. Many of Schedule II, III, or IV controlled substances are associated with the conditions they treat and can reveal diagnoses for individuals.

18. On or about April 24, 2017, the monitoring program outlined in the Narcotics Control Act became fully operational.

19. St. Charles County has estimated there are approximately eighty-two (82) dispensers and seven hundred and seven (707) potential registered users. See Memorandum from Hope Woodson to Members of the County Council, attached as Exhibit 3.

COUNT I

Declaratory Judgment

The St. Charles County Narcotics Control Act Violates the Fourth Amendment of the Constitution of the United States of America

20. Plaintiffs reincorporate the preceding paragraphs as if fully restated herein.

21. Plaintiffs seek to protect the constitutional rights of St. Charles County citizens, as patients, and their medical providers, to prevent confidential and sensitive prescription records

from being disclosed through warrantless searches in violation of both the U.S. Constitution and the Missouri Constitution.

22. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

23. “The Fourth Amendment of the United States Constitution preserves the right of individuals to be free from unreasonable searches and seizures. *State v. Tackett*, 12 S.W.3d 332, 337 (Mo. App. 2000). Its ‘prohibition against unreasonable searches and seizures is enforceable against the states through the due process clause of the Fourteenth Amendment.’ *State v. Toolen*, 945 S.W.2d 629, 631 (Mo.App.1997) (citing *State v. Burkhardt*, 795 S.W.2d 399, 404 (Mo. banc 1990)).” *Ashworth v. City of Moberly*, 53 S.W.3d 564, 579 (Mo. App. W.D. 2001)

24. Missouri law currently protects the privacy and security of prescription records. See 195.375, RSMo.

25. Existing Missouri law recognizes the sensitive nature of the prescription records. See 195.375, RSMo.

26. Section 195.375, RSMo, guarantees the privacy of prescription drug information by imposing a warrant requirement for access to such records.

27. When a person has a reasonable expectation of privacy, a search is per se unreasonable unless conducted with a properly issued warrant based on probable cause.

28. Plaintiff Rakers and Doe have a reasonable expectation of privacy in their prescription drug information, including the dispensing information monitored through the Narcotics Control Act.

29. The sensitive information about prescription drugs and the mental and physical health information they reveal is information Plaintiff Rakers and Doe consider private and confidential.

30. A reasonable person would believe that such information should be kept confidential and should not be disclosed to the public or without a warrant.

31. St. Charles County patients and medical providers have a reasonable expectation of privacy in their prescription records covered by the monitoring program of the St. Charles County Narcotics Control Act.

32. The possibility of increased investigations of medical providers has created a fear of prescribing controlled substances, even when best for the patient, interfering with the doctor-patient relationship.

33. Plaintiff John Doe suffers from attention deficit disorder. In order to help him improve and maintain focus, his physician has prescribed Adderall.

34. Adderall is a Schedule II Controlled Substance.

35. Plaintiff John Doe considers his prescription drug records to be private information about his physical and mental health that such drugs may reveal to be private; he is distressed by the possibility that persons may access and/or disclose the information in the monitoring program without a warrant.

36. “A municipal ordinance authorizing a search of property in a civil context does not violate the Fourth Amendment, providing it does not authorize a search or seizure to be done without the consent of the owner or without the issuance of a warrant.” *Ashworth v. City of Moberly*, 53 S.W.3d 564, 579 (Mo. App. W.D. 2001) (citing *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 234-35 (Mo. App. E.D. 1997)).

37. Section 6 purportedly allows the Director to search dispensing information and disclose dispensing information to law enforcement officials (and regulatory agencies) without probable cause or a warrant.

38. Section 7 purportedly allows the Director to search dispensing information and disclose dispensing information to medical professionals, regulatory entities, local, state and federal law enforcement officials, other local or state departments of public health, the MO HealthNet division and judicial officers without probable cause or a warrant.

39. Section 7 purportedly allows the Director to search dispensing information and disclose dispensing information to law enforcement officials and judicial officers with only a subpoena.

40. The St. Charles County Narcotics Control Act violates Plaintiffs Rakers and Doe's reasonable expectations of privacy related to their prescription drug information and physical and mental health information revealed from such prescription drug information.

41. If, as part of the St. Charles County Narcotics Control Act, individuals are allowed to access personally identifiable prescription drug information without a warrant, Plaintiffs, in addition to St. Charles County citizens and medical professionals, will suffer irreparable injury to their constitutional rights to be free from unreasonable searches.

WHEREFORE, Plaintiffs pray that this Court enter its judgment and declare that Bill No. 4381 is unconstitutional under the Fourth Amendment to the United States Constitution and order such other relief as this Court deems appropriate, including all costs incurred by Plaintiffs, including reasonable attorney fees.

COUNT II

Declaratory Judgment

The St. Charles County Narcotics Control Act Violates the Article I, Section 15 of the Missouri Constitution

42. Plaintiffs reincorporate the preceding paragraphs as if fully restated herein.

43. The Missouri Constitution, Article I, Section 15 states:

That the people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, or access electronic data or communication, shall issue without describing the place to be searched, or the person or thing to be seized, or the data or communication to be accessed, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

44. “Missouri's constitutional guarantee against unreasonable searches and seizures, found in Mo. Const. art. I, § 15, is coextensive with that of the Fourth Amendment. *State v. Hernandez*, 954 S.W.2d 639, 642 (Mo.App.1997) (citation omitted). ‘Unless a search falls within certain narrowly defined exceptions, the general rule is that any search or seizure without a warrant based upon probable cause is *per se* unlawful.’ *State v. Metz*, 43 S.W.3d 374, 382 (Mo. App. 2001) (citation omitted).” *Ashworth v. City of Moberly*, 53 S.W.3d 564, 579 (Mo. App. W.D. 2001).

45. On August 5, 2014, the voters of Missouri overwhelmingly approved a ballot measure which added “electronic communications and data” to Article I, Section 15. The Ballot Title for the Measure read:

Shall the Missouri Constitution be amended so that the people shall be secure in their electronic communications and data from unreasonable searches and seizures as they are now likewise secure in their persons, homes, papers and effects?

46. For the same reasons set forth in Count I, the St. Charles County Narcotics Control Act is violative of the Missouri constitutional provision prohibiting unreasonable searches found in Article I, Section 15.

WHEREFORE, Plaintiffs pray that this Court enter its judgment and declare that Bill No. 4381 is unconstitutional under Article I, Section 15 of the Missouri Constitution and order such other relief as this Court deems appropriate, including all costs incurred by Plaintiffs, including reasonable attorney fees.

COUNT III

Declaratory Judgment

The St. Charles County Narcotics Control Act Violates Section 195.375, RSMo

47. Plaintiffs reincorporate the preceding paragraphs as if fully restated herein.

48. Section 195.375, RSMo, provides, in part:

1. A judge, upon proper oath or affirmation showing probable cause, may issue warrants for controlled premises for the purpose of conducting administrative inspections authorized by this chapter, and seizures of property appropriate to the inspections...

...

5. Prescriptions, orders, and records, required by this chapter and chapter 579, and stocks of controlled substances shall be open for inspection only to federal, state, county, and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his or her office of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party.

49. Section 6 of Bill No. 4381 purports to allow the Director to divulge prescription information to law enforcement or a professional licensing agency if he or she “develops a reasonable belief that a breach of professional standards occurred.”

50. Section 6 contravenes Section 195.375.5, RSMo, in that the statute only allows a municipal officer whose duty it is to enforce the laws of this state relating to narcotic drugs to divulge such information if there is an active prosecution or licensing case.

51. The Director of the Department of Public Health is not charged with the duty to enforce the laws relating to narcotic drugs. See St. Charles County Code, Section 134.050.

52. Section 7(1)(a) purports to allow the Director to divulge dispensing information to “Persons...who are authorized to prescribe or dispense controlled substances, if the requesting person demonstrates that the request is made for the purpose of providing medical or pharmaceutical care for a patient.”

53. Section 7(1)(a) contravenes Section 195.375.5, RSMo, in that the statute only allows a municipal officer whose duty it is to enforce the laws of this state relating to narcotic drugs to divulge such information if there is an active prosecution or licensing case.

54. Section 7(1)(c) allows the Director to divulge dispensing information to the State Board of Pharmacy.

55. Section 7(1)(c) contravenes Section 195.375.5, RSMo, in that the statute only allows a municipal officer whose duty it is to enforce the laws of this state relating to narcotic drugs to divulge such information if there is an active prosecution or licensing case.

56. Section 7(1)(e) allows the Director to divulge dispensing information to local or state departments of public health who have adopted similar narcotic monitoring programs.

57. Section 7(1)(e) contravenes Section 195.375.5, RSMo, in that the statute only allows a municipal officer whose duty it is to enforce the laws of this state relating to narcotic drugs to divulge such information if there is an active prosecution or licensing case.

58. Section 7(1)(g) allows the Director to divulge dispensing information to the MO

HealthNet division of the Missouri Department of Social Services.

59. Section 7(1)(g) contravenes Section 195.375.5, RSMo, in that the statute only allows a municipal officer whose duty it is to enforce the laws of this state relating to narcotic drugs to divulge such information if there is an active prosecution or licensing case.

60. Section 7(2) purports to allow the Director to divulge prescription information to “public or private entities for statistical or education purposes” but requires the Director to delete any individually identifiable data.

61. Section 195.375.5, RSMo provides no exception for the Director to divulge such information, provided he or she redacts individually identifiable data.

62. Neither Sections 6 or 7 require probable cause or the issuance of a warrant for the searches authorized therein as required by Section 195.375, RSMo.

63. Furthermore, a county ordinance cannot invade the province of general legislation involving the public policy of the state as a whole. *Missouri Bankers Ass’n, Inc. v. St. Louis County*, 448 S.W.3d 267, 271 (Mo. banc 2014). Section 195.375, RSMo, as part of Missouri’s “Comprehensive Drug Control Act,” makes clear the regulation of prescription drug information is a matter of statewide concern.

WHEREFORE, Plaintiffs pray that this Court enter its judgment and declare that Bill No. 4381 is null and void and violative of Section 195.375, RSMo, and order such other relief as this Court deems appropriate, including all costs incurred by Plaintiffs, including reasonable attorney fees.

COUNT IV

Declaratory Judgment

St. Charles County, the Department, and the Director, through the Narcotics Control Act,
have violated Section 338.210, RSMo

64. Plaintiffs reincorporate the preceding paragraphs as if fully restated herein.

65. Section 338.210, RSMo, defines “Pharmacy” as:

[A]ny location where the practice of pharmacy occurs or such activities are offered or provided by a pharmacist or another acting under the supervision and authority of a pharmacist, including **every premises or other place:...**(4) **Where patient records or other information is maintained** for the purpose of engaging or offering to engage in the practice of pharmacy or **to comply with any relevant laws regulating** the acquisition, possession, handling, transfer, sale or destruction of drugs, chemicals, medicines, **prescriptions** or poisons.

(emphasis added).

66. Pursuant to Bill No. 4381, the Department is a location where “information is maintained...to comply with any relevant laws regulating...prescriptions.”

67. In maintaining the dispensing information, the Department meets the definition of “Pharmacy” in Section 338.210, RSMo.

68. Section 338.220 makes it unlawful for any person or entity to operate or maintain a “pharmacy” without first obtaining a permit or license from the Missouri Board of Pharmacy.

69. On information and belief, neither the County, the Department, nor Director, possess a permit or license from the Missouri Board of Pharmacy.

WHEREFORE, Plaintiffs pray that this Court enter its judgment that the Department has violated Section 338.220, RSMo, in that it has operated a pharmacy without a license, and order such other relief as this Court deems appropriate, including all costs incurred by Plaintiffs, including reasonable attorney fees.

