

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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The Michigan Medical Marijuana Act Does Not Permit The Selling Of Marijuana

By Shannon Ozga

As speculation continues to surround the issues of what activity may or may not be allowed by the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq.*, the question of whether the MMMA permits the selling of marijuana by patient to patient has recently been laid to rest by the Michigan Court of Appeals in *Michigan v McQueen*, ___ Mich App ___ (issued August 23, 2011). In *McQueen*, the Court held, in no uncertain terms, that the MMMA does not permit the selling of marijuana, and therefore, does not allow dispensaries.

In *McQueen*, the defendants Brandon McQueen and Matthew Taylor owned and operated a medical marijuana dispensary known as Compassionate Apothecary, LLC (CA). CA permitted qualified patients and caregivers to pay a membership fee and rent lockers that were used to store marijuana, which was available for sale to other member patients. In essence, the lockers were used by patients and caregivers who grew more marijuana than he or she needed to treat his or her debilitating medical condition and who wanted to sell the excess marijuana to other patients. CA facilitated the sale of the marijuana and retained a percentage of the sale price.

Shortly after the opening of CA, the Isabella County Prosecuting Attorney filed a complaint against the defendants seeking a temporary restraining order, preliminary injunction and permanent injunction, asserting that the operation of CA was not in accordance with the provisions of the MMMA and was a public nuisance in violation of the Public Health Code (PHC), MCL 333.1101 *et seq.* The trial court denied the request for a temporary restraining order, and after a two-day hearing denied the request for a preliminary injunction. Instead, the court found that the defendants' operation of CA was in compliance with the MMMA because the patient-to-patient transfers of marijuana facilitated by CA fell within the scope of the "medical use" of marijuana.

On appeal, in a unanimous published decision authored by Judge Hoekstra, the Court of Appeals reversed the trial court's order denying plaintiff's request for a preliminary injunction and remanded the matter for entry of judgment in favor of the plaintiff. The Court first found that because the defendants exercised dominion and control over the marijuana that was stored in the lockers that CA rented to its members, the defendants "possessed" the marijuana. Second, the Court found that the defendants were actively engaged in the selling of marijuana that the CA members stored in the rented lockers. The Court then distinguished the PHC from the MMMA, finding that the MMMA stands in sharp contrast to the PHC because the PHC classifies marijuana as a schedule 1 controlled substance. The Court cited recent decisions in *People v Redden*, 290 Mich App 65 (O'Connell, P.J., concurring) and *People v King*, ___ Mich App ___ (2011), finding that the MMMA operates "under the framework, established by the PHC, that it is illegal to possess, use, or deliver marijuana." Further, "the MMMA sets forth very limited circumstances in which persons involved with the use of marijuana, and who are thereby violating the PHC, may avoid criminal liability." So, in effect, all the MMMA provides is immunity for certain individuals who qualify.

SECRET WARDLE NOTES:

The Michigan Court of Appeals is continuing to clarify issues under the poorly written, voter-initiated Michigan Medical Marijuana Act (MMMA). This time, the Court has ruled in no uncertain terms that patient-to-patient sales and marijuana dispensaries are not authorized by the MMMA. The Court continues to hold true the findings made in *People v Redden* and *People v King*, that marijuana is still a controlled substance under the Public Health Code and there is no legal "right" to possess, use, or deliver marijuana. The MMMA merely sets forth very limited circumstances in which certain persons may avoid criminal liability. The Michigan Supreme Court has accepted an application from the defendant appealing the decision in *King*, so it remains to be seen whether the Supreme Court will provide further clarification of the MMMA.

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In response to the defendants' contention that they were entitled to the presumption under Section 4(d) of the MMMA that they were engaged in the "medical use" of marijuana when operating the CA, the Court found that presumption to be rebutted because the defendants' conduct was not in accordance with the MMMA since the MMMA does not authorize patient-to-patient sales of marijuana. The Court then explained that while the definition of "medical use" under the MMMA allows for the "delivery" and "transfer" of marijuana, it does not allow for the "sale" of marijuana, which is the equivalent of "the conveyance of marijuana for a price." Accordingly, the Court found that the "medical use" of marijuana does not include patient-to-patient "sales" and the defendants' operation of CA was not in accordance with the provisions of the MMMA.

Finally, the Court opined that even if the "medical use" of marijuana included the "sale" of marijuana, the defendants were not entitled to immunity under Section 4(i) of the MMMA, which provides "a person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege . . . solely for being in the presence or vicinity of the medical use of marijuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marijuana." According to the Court, the defendants were engaged in the selling of marijuana, which is not the "using or administering" of marijuana as described in the Act.

On the above basis, the Court agreed with the plaintiff that because the defendants' operation of CA was not in accordance with the provisions of the MMMA, the defendants' operation of CA was a public nuisance that must be enjoined. The Court summarized its opinion as follows:

"Because defendants possess marijuana, and they possess it with the intent to deliver it to CA members, defendants' operation of CA is in violation of the PHC. Further, their violation of the PHC is not excused by the MMMA because defendants do not operate CA in accordance with the provisions of the MMMA. Through CA, defendants actively participate in the 'sale' of marijuana between CA members, but the 'medical use' of marijuana does not include the 'sale' of marijuana. In addition, even if defendants were engaged in the 'medical use' of marijuana, they would not be entitled to the immunity granted by Section 4(i) because defendants are not assisting registered qualifying patients with 'using or administering' marijuana."

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