STATE OF MICHIGAN
IN THE 67TH DISTRICT COURT, GENESEE COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

No. 17T-01355-FY

vs.

Hon. David J. Goggins

NICOLAS LEONARD LYON,

Defendant.

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT 4 OF FIRST AMENDED COMPLAINT

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INTRODUCTION

The preliminary exam began in this case on September 21, 2017. On July 3, 2018, some nine months later and only weeks before a bindover decision, the prosecutor amended the charges to add a new count 4: "Willful Neglect of Duty in Office" as defined by MCL 333.2221, a misdemeanor under MCL 750.478. One would expect that, in light of the thousands of pages of testimony and exhibits introduced during the preliminary exam, the amended charge would include considerable detail explaining how Director Lyon "willfully neglected" to perform his duty of "protecting the health of the citizens of the County of Genesee." Not so. The prosecutor fails to describe even one specific act of Director Lyon that constituted willful neglect.

That lack of specificity is not even the worst defect in the new charge. To give rise to a conviction under MCL 750.478, the duty the state official is charged with neglecting must be ministerial or nondiscretionary. *People v Parlovecchio*, 319 Mich App 237, 242; 900 NW2d 356 (2017); *People v Waterstone*, 296 Mich App 121, 140; 818 NW2d 432 (2012). And there are no ministerial or nondiscretionary duties in MCL 333.2221. As far as the MDHHS director is concerned personally, the statute requires only that he "be qualified in the general field of health administration." MCL 333.2202. Indeed, an MDHHS director's oversight of his epidemiologist and health officers in the event of a Legionnaires' outbreak is the epitome of discretion.

Based on this legal defect in the charge, the lack of any evidence of willful neglect, and the additional reasons described below, the defense now moves to dismiss Count 4.

DIRECTOR LYON'S DISCRETIONARY AUTHORITY

Testimony regarding public-health officials' responsibilities arose throughout the preliminary exam. Some witnesses acknowledged there was a general duty to protect the public health, but no one testified as to the director's specific responsibilities, and the prosecution did not introduce Director Lyon's appointment or position description. No one testified that the director has a specific duty to provide notice of an outbreak, either. The testimony revealed that there are no specific mandates or standards, *see, e.g.,* Vol 1 at 57 (Becker); Vol 23 at 36 (Reilly), and many entities and people share that responsibility, including local health departments, Vol 6 at 41-42 (Kilgore); Vol 2 at 105-07 (Miller); Vol 19 at 39-41 (Band). What evidence was offered established that whether to give notice is a matter of professional judgment and discretion. Vol 19 at 34, 45, 140 (Band); Vol 23 at 75, 170, 185 (Reilly). Testimony also established that the notice provided to the medical community on multiple occasions by the Genesee County Health Department (GCHD) at MDHHS' urging was appropriate. Vol 6 at 98-99 (Kilgore); Vol 19 at 34 (Band). There was no testimony that Director Lyon had any ministerial or nondiscretionary duty.

ARGUMENT

To sustain a conviction under MCL 750.478, the prosecution must prove: "(1) that the defendant was a public officer or 'any person holding any public trust or employment,' (2) that the defendant had a duty that is '*enjoined by law*,' and (3) that 'the defendant willfully neglected to perform that duty.'" *People v Parlovecchio*, 319

Mich App 237, 241; 900 NW2d 356, 358 (2017) (emphasis added, citing MCL 750.478 and *People v Medlyn*, 215 Mich App 338, 340-341, 544 NW2d 759 (1996)).

Regarding the phrase "a duty that is 'enjoined by law,'" courts require the defendant to have had "a clear legal duty to perform" the act at issue and turn to the law of mandamus to determine whether an official has such a duty. *Parlovecchio*, 319 Mich App at 242 (citation omitted). That is, "MCL 750.478 addresses *ministerial or nondiscretionary acts*, because it speaks of performing duties 'enjoined by law.'" *People v Waterstone*, 296 Mich App 121, 140; 818 NW2d 432 (2012) (emphasis added).

So, while Director Lyon is undoubtably a public officer, the Public Health Code does not create a ministerial or nondiscretionary duty that can give rise to a conviction under MCL 750.478, the *ex post facto* creation of such a duty would violate due process, and the duty alleged by the prosecution defines an offense which is unconstitutionally vague.

A. The Michigan Public Health Code Does Not Impose on the Director the Duties Alleged by the Prosecution.

1. MCL 333.2221 does not create a duty on the part of the director.

For the source of the alleged duty, the first amended complaint provides no specifics. It simply cites the relevant criminal statute, MCL 750.478, and one portion of the Michigan Public Health Code, MCL 333.2221, as an ostensible source of the duty that Director Lyon willfully neglected. But MCL 333.2221(1) says only that "the *department* shall continually and diligently *endeavor* to prevent disease, prolong life, and promote the public health through organized programs." (emphasis added). And MCL 333.2221(2) provides that "[t]he *department* shall:

(a) Have general supervision of the interests of the health and life of the people of this state.

(b) Implement and enforce laws for which responsibility is vested in the department.

(c) Collect and utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.

(d) Make investigations and inquiries as to:

(i) The causes of disease and especially of epidemics.

(ii) The causes of morbidity and mortality.

(iii) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness.

(e) Plan, implement, and evaluate health education by the provision of expert technical assistance and financial support.

(f) Take appropriate affirmative action to promote equal employment opportunity within the department and local health departments and to promote equal access to governmental financed health services to all individuals in the state in need of service.

(g) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the department and which are not otherwise prohibited by law.

(h) Plan, implement, and evaluate nutrition services by the provision of expert technical assistance and financial support.

There is no argument that the MDHHS director is personally responsible for carrying out each and every one of these functions himself. To begin, MCL 333.2204 mandates "the director's full time shall be devoted to the performance of the functions of the director's office," rather than on carrying out anything specifically listed in MCL 333.2221. And the legislature did not require the director personally to have the ability to collect and use statistics, provide for epidemiological research, conduct investigations, provide expert technical assistance and financial support to health education and nutrition services. Rather, the Legislature required only that the director "be qualified in the general field of health administration." MCL 333.2202. Presumably the prosecutor is not arguing that Director Lyon willfully neglected to be qualified.

The Legislature knows how to create mandatory duties for the director to perform: it directly references the Director and uses the word "shall." For example:

- "The *director shall* report biennially to the legislature on the effect and enforcement of" the Michigan Clean Indoor Air Act." MCL 333.12614.
- "The *director shall* appoint, subject to civil service rules, a state registrar to administer the system of vital statistics." MCL 333.2813.
- "The *director* of the department *shall* enter into contracts with qualified cord blood stem cell banks to assist in the establishment, provision, and maintenance of the network." MCL 333.2682.

Reading MCL 333.2221 and MCL 333.2205 to impose a duty on the part of the director is inconsistent with the statutory scheme and language. The Public Health Code also provides for the creation of local health departments, MCL 333.2431, and assigns nearly identical duties to those local entities. MCL 333.2433. And MCL 333.2235 actually requires that the director consider the local health department "to be the primary organization responsible for the organization, coordination, and delivery of those services and programs" in MCL 333.2221 and MCL 333.2433.

2. <u>MCL 333.2221 Does Not Create a Ministerial Duty</u>.

To be considered ministerial under the mandamus standard, and "enjoined by law" under MCL 750.478, a duty must "[i]nvolv[e] no exercise of discretion or judgment." *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243, 252 (2006) (quoting *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 655; 584 NW2d 743, 745 (1998)). There is no evidence or even an allegation that Director Lyon willfully failed to perform any nondiscretionary (i.e., mandatory) duty. Quite the opposite, the department's actions under MCL 333.2221 necessarily entail

exercise of discretion, which is why they are reviewed under the provisions of the Administrative Procedures Act. *See, e.g., Huron Behavioral Health v Dept of Community Health*, 293 Mich App 491, 497; 813 NW2d 763, 767 (2011).

3. No Evidence Supports Count IV.

Any evidence of Director Lyon's express duties and obligations is completely lacking. All that the prosecution offered is evidence of the Director's general duties to protect the public health under the Public Health Code. And the Public Health Code requires only that the department "endeavor" to achieve certain general goals. There is no evidence of any abandonment of that duty. To the contrary, the evidence is that Director Lyon relied on staff in the Population Health division of MDHHS – an "organized program" established by regulations – to conduct the public health investigation, apprise him of developments and advise him about any recommended courses of action.

As to the issue of whether to give notice, the testimony has universally established that such decisions are committed to the sound discretion of any number of people under the Public Health Code, including MDHSS and GCHD officials, and that the decision is a matter of professional judgment. Those are discretionary decisions outside the purview of MCL 750.478.

B. Construing the Public Health Code to Impose Criminal Liability Violates Due Process Prohibitions on Retroactive Criminal Laws.

Any argument that MCL 333.2221 imposes duties of the department on the director personally would independently fail under the Due Process Clause of the Fourteenth Amendment, which makes "ex post facto principles . . . applicable to the

judiciary." *People v Doyle*, 451 Mich 93, 100; 545 NW2d 627, 630 (1996). "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v Lanier*, 520 US 259, 266 (1997). Courts "may add a clarifying gloss to otherwise unclear words," *People v Dempster*, 396 Mich 700, 715-16; 242 NW2d 381 (1976), but a judicial decision imposing criminal liability cannot "be given retroactive effect" if it "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v City of Columbia*, 378 US 347, 354 (1964) (citation and quotation marks omitted).

Since MCL 333.2221's enactment in 1978, no court has ever read the statute to create liability even for the department, let alone the director personally. The only time the provision has been referenced in a reported case is *Fluoroscan Imaging Sys v Dept of Public Health*, No. 171354, 1997 WL 33354581, at *2 (Mich Ct App, Jan 10, 1997), and then only to describe the general functions of the government. To construe MCL 333.2221 now as imposing personal, non-ministerial duties on the MDHHS director is the very type of novel construction that due process prohibits.

C. Any Implied Statutory Duty Would Be Unconstitutionally Vague.

The duty alleged in Count 4 – that Director Lyon must "protect[] the health of the citizens of the County of Genesee, State of Michigan," – is also unconstitutionally vague. "Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v City of Jacksonville*, 405 US 156, 162 (1972) (quoting *Lanzetta v New*

Jersey, 306 US 451, 453 (1939)). "[T]o pass constitutional muster, a penal statute must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994) (quoting *Kolender v Lawson*, 461 US 352, 357 (1983)).

Perhaps presciently, the United States Supreme Court once remarked that the paradigm of an unconstitutionally vague statute is one that "merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *United States v L Cohen Grocery Co*, 255 US 81, 89 (1921). Yet that is precisely the kind of duty that the prosecutor attempts to use to penalize Director Lyon. The Court should reject that attempt as unconstitutional.

D. There is No Evidence of Willfulness as Required by Statute.

Wholly independent of the lack of any duty, there is also no evidence of willfulness. In *Detroit v Pillon*, 18 Mich App 373, 376; 171 NW2d 484 (1969), the Court of Appeals held that to give rise to criminal sanctions, the term "willful" must include "some element of a 'bad purpose.'" Accord e.g., *People v Medlyn*, 215 Mich App 338; 544 NW2d 759 (1996), quoting *People v Lerma*, 66 Mich App 566, 570; 239 NW2d 424 (1976) ("wilfully," at least when used in a criminal context, implies a knowledge and a purpose to do wrong").

Here, there has been no evidence introduced during the entirety of the nine-month preliminary exam suggesting that Director Lyon deliberately tried to do something bad or wrong. While there is testimony that various MDHHS and GCHD officials may have done things differently, there is no evidence that Director Lyon

deliberate chose a particular action for an improper purpose. This is yet another, independent reason to dismiss Count 4.

CONCLUSION

For the above reasons, the defense respectfully requests that the court dismiss Count 4 of the First Amended Complaint in its entirety.

Respectfully Submitted,

Dated: July 6, 2018

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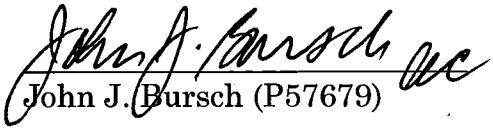
Attorneys for Defendant Lyon



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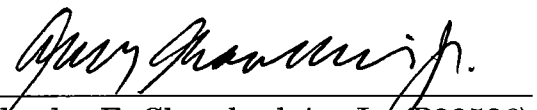

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1997 WL 33354581
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

FLUOROSCAN IMAGING SYSTEM, Plaintiff-Appellant,
v.
DEPARTMENT OF PUBLIC HEALTH, Defendant-Appellee.

No. 171354.
|
Jan. 10, 1997.

Before: SMOLENSKI, P.J., and HOLBROOK, Jr., and F.D. BROUILLETTE, * JJ.

UNPUBLISHED

PER CURIAM.

***1** Plaintiff appeals as of right from an Ingham Circuit Court order affirming a declaratory ruling issued by defendant Department of Public Health. We affirm the circuit court's order.

The essential facts of this matter are undisputed. In October 1987, the Michigan Radiation Advisory Board (RAB) unanimously approved a resolution advising defendant Department of Public Health that extremity fluoroscopy machines were not warranted for human medical application because of the limited benefits to patients in comparison to the potential risks of radiation. Since early 1988, defendant has disseminated the RAB's resolution in letters to known manufacturers and users of extremity fluoroscopy equipment and indicated its acceptance of and concurrence with the RAB's position. The resolution notwithstanding, defendant has continued to register and license extremity fluoroscopy machines for use in this state. Plaintiff Fluoroscan Imaging Systems, Inc., [1] a manufacturer and marketer of extremity fluoroscopy machines, requested that RAB members attend a demonstration of plaintiff's equipment and that they reconsider their position. Two RAB members attended a demonstration of plaintiff's equipment, resulting in the board unanimously reaffirming its resolution.

Plaintiff then requested a declaratory ruling from defendant regarding the applicability of certain provisions of the Public Health Code, M.C.L. § 333.2601 *et seq.;* MSA 14.15(2601) *et seq.,* to defendant's action. Defendant issued a declaratory ruling that disputed certain facts as set forth by plaintiff and addressed the applicability of some, but not all, of the statutory provisions cited in plaintiff's written request. In November 1992, plaintiff filed a complaint in Ingham Circuit Court seeking a declaratory judgment that defendant should have promulgated rules governing its action and an injunction against further dissemination of the resolution, which plaintiff claimed was based on incomplete data and had caused a number of its customers to cancel orders for equipment. Following a hearing on plaintiff's request for a preliminary injunction and defendant's motion for summary disposition, the court remanded the matter to defendant for an evidentiary hearing, if deemed necessary, to resolve disputed facts, and for issuance of a declaratory ruling. On remand, the parties agreed to a set of stipulated facts rather than conduct an evidentiary hearing and defendant issued a second declaratory ruling. On plaintiff's petition for review, a hearing was held after which the court affirmed defendant's declaratory ruling. Plaintiff now appeals as of right to this Court.

Plaintiff challenges defendant's dissemination of the resolution of its statutorily created advisory board by a two-pronged argument. First, plaintiff argues that the resolution be set aside on procedural grounds because defendant failed to promulgate the policy as a rule pursuant to its statutory authority under Parts 26 and 135 of the Public Health Code. Second, plaintiff argues that if indeed this Court concludes that the resolution is a "rule" it is invalid pursuant to M.C.L. § 333.13521(2); MSA 14.15(13521)(2), which precludes defendant from issuing rules that limit radiation exposure to patients for lawful therapeutic or research purposes. Under these facts, we find no merit to plaintiff's arguments.

***2** This Court reviews a declaratory ruling issued by an administrative agency in the same manner as an agency final decision or order in a contested case, i.e., pursuant to the judicial review provisions of the Administrative Procedures Act. M.C.L. § 24.263; MSA 3.560(163), M.C.L. § 24.306; MSA 3.560(206); *Michigan Ass'n of Intermediate Special Educ Administrators v Dep't of Social Services,* 207 Mich.App 491, 494; 526 NW2d 36 (1994). Because the facts of this case are undisputed, the scope of this Court's review is limited to the questions of law addressed in defendant's declaratory ruling. Legal rulings of administrative agencies are not accorded the deference that is accorded to factual findings. An agency's legal rulings will be set aside on appeal if they are in violation of the constitution or a statute, or are affected by substantial and material error of law. *Amalgamated Transit Union, Local 154, AFL-CIO v Southeastern Michigan Transportation Authority,* 437 Mich. 441, 450; 473 NW2d 249 (1991). See also M.C.L. § 24 .306(1)(a), (f); MSA 3.560(206)(1)(a), (f).

Plaintiff first argues that defendant's adoption of the RAB's resolution should have been promulgated as a rule pursuant to defendant's statutory authority under Parts 26 and 135 of the Public Health Code.

Pursuant to the Public Health Code, defendant "shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health" through its statutory authority of "general supervision of the interests of the health and life of the people of this state." MCL 333.2221(1), (2)(a); MSA 14.15(2221)(1), (2)(a). Under Part 135 of the PHC-entitled "Radiation Control"-defendant is designated as "the radiation control agency of this state and shall coordinate radiation control programs of state departments acting within their statutory authorities." MCL 333.13515; MSA 14.15(13515). The Radiation Advisory Board was created under Part 135 as an independent advisory board whose members are appointed by the governor with the advice and consent of the senate. MCL 333.13531; MSA 14.15(13531). The RAB's sole statutory duty is to "furnish to the department technical advice the board deems desirable or the department may reasonably request on matters relating to the radiation control program." MCL 333.13531; MSA 14.15(13531).

The rule promulgation requirements regarding radiation control are set forth in § 13521 of Part 135, which provides, in pertinent part:

> The department shall promulgate rules providing for general or specific licenses or registration, or exemption from licensing or registration, for radioactive materials and other sources of ionizing radiation. The rules shall provide for amendment, suspension, or revocation of licenses. In connection with those rules, the department may promulgate rules to establish requirements for record keeping, permissible levels of exposure, notification and reports of accidents, protective measures, technical qualifications of personnel, handling, transportation, storage, waste disposal, posting and labeling of hazardous sources and areas, surveys, and monitoring. [MCL 333.13521(1); MSA 14.15(13521)(1).]

***3** The plain import of § 13521 is to mandate that defendant promulgate rules regarding registration and licensing of radioactive materials and other sources of ionizing radiation. However, where registration and licensing are not directly implicated, defendant is accorded discretion regarding rule promulgation. Plaintiff concedes that, notwithstanding defendant's concurrence with the RAB resolution, defendant has continued to register and license extremity fluoroscopy machines for use in this state. Thus, the RAB's technical advice which was directed to defendant pursuant to its statutory authority and which did not directly implicate the registration or licensing of extremity fluoroscopy machines was not subject to the mandatory rule promulgation requirements of Part 135.

Plaintiff argues, however, that certain provisions of Part 26 of the PHC also apply in this instance, requiring defendant to promulgate rules to ensure that the collection and dissemination of medical data and research by the RAB was accurate, valid, and reliable. Plaintiff argues that Parts 26 and 135 must be read together to effectuate fully the Legislature's intent. [2] We disagree. First, although the PHC encompasses numerous articles, parts, and sections that address numerous divergent topics, no general provision of the statute indicates that all articles, parts, and sections are to be read in conjunction with all other articles, parts, and sections. Thus, the Legislature has not indicated its intent that the dissemination of technical advice by the RAB to defendant be constrained by the rule promulgation requirements of Part 26 of the PHC. Second, given the specificity of rule promulgation requirements set forth in § 13521 regarding radiation control programs, there is no need to look to the general requirements of rule promulgation set forth in Part 26. See *Gebhardt v. O'Rourke,* 444 Mich. 535, 542-543; 510 NW2d 900 (1994) (where a statute contains both a general provision and a specific provision, the specific provision controls). Finally, we acknowledge that § 2601 of the code provides: "Unless otherwise provided, this part [Part 26] applies to all data made or received by the department." However, we do not agree with plaintiff that mere technical advice provided to defendant by the RAB constitutes "data," as that term is defined in § 2603(1):

"Data" means items of information made or received by the department which pertain to a condition, status, act, or omission, existing independently of the memory of an individual, whether the information is retrievable by manual or other means and whether or not coded. It includes the normal and computer art meanings of the word data. [MCL 333.2603(1); MSA 14.15(2603)(1).]

We construe the term "data" as including information that is of an empirical or fact-based nature, not mere technical advice or opinions of an advisory board. [3] Thus, we decline to impose the rule promulgation requirements of Part 26 on the RAB resolution. Accordingly, for the reasons set out above, we conclude that defendant was not required to promulgate the RAB resolution as a rule before dissemination.

***4** In the second prong of its challenge to defendant's action, plaintiff argues that, given the substantial impact of the resolution on the use of extremity fluoroscopy machines in Michigan, the RAB resolution constitutes a "rule" under the Administrative Procedure Act, and, as such, it is invalid pursuant to M.C.L. § 333.13521(2); MSA 14.15(13521)(2), which provides:

> (2) The rules [promulgated by defendant pursuant to § 13521(1)] shall not limit the intentional exposure of patients to radiation for the purpose of lawful therapy or research conducted by licensed health professionals.

We find plaintiff's argument to be based on two faulty premises.

First, the RAB resolution cannot be construed as a "rule." The APA defines a "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof." MCL 24.207; MSA 3.506(107). The label an agency gives to a directive is not determinative of whether it is a rule under the APA. *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services,* 431 Mich. 172, 188; 428 NW2d 335 (1988). Instead, this Court must review the "actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id.,* quoting *Schinzel v. Dep't of Corrections,* 124 Mich.App 217, 219; 333 NW2d 519 (1983).

Here, defendant's adoption of the RAB resolution does not "implement[ ] or appl[y] law enforced or administered by the agency," and therefore it does not come within the definition of a rule. *American Federation of State, County & Mun Employees v Dep't of Mental Health,* 452 Mich. 1; 550 NW2d 190 (1996). To reiterate, defendant has expressed its *opinion* that the disadvantages of extremity fluoroscopy outweigh its benefits, but this opinion has not prevented defendant from continuing to register and license the machines for use in this state. Moreover, an exception to the statutory definition of

a "rule" includes "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j); MSA 3.560(107)(j). Although plaintiff has a valid interest in maintaining a market for its extremity fluoroscopy machines in this state, defendant's acceptance of the RAB's resolution flowed directly from its statutory authority under Part 135 of the PHC to furnish defendant with technical advice. Therefore, defendant's action constituted a permissive exercise of statutory authority that was excepted from the rule promulgation requirements of the APA. See *Pyke v. Dep't of Social Services,* 182 Mich.App 619, 630-631; 453 NW2d 274 (1990); *Hinderer v. Dep't of Social Services,* 95 Mich.App 716; 291 NW2d 672 (1980). This holding is entirely consistent with the language of § 13521(2) which permits the medical profession to retain a large measure of control and discretion, in the context of patient radiation therapy, to determine the nature and amount of radiation exposure that is beneficial for medical purposes.

***5** Second, even if defendant's adoption of the resolution constituted a "rule" under the APA, § 13521(2) would not necessarily be implicated. The limit imposed on defendant by § 13521(2) concerns regulatory action (i.e., licensing or registration) that would either ban certain types of radiation exposure or would place specific limits on the amount of radiation exposure permitted. Thus, defendant's dissemination of its opinion that extremity fluoroscopy machines are generally not warranted for human medical applications does not constitute the type of regulatory action contemplated by § 13521(2). Accordingly, for the reasons outlined above, defendant's declaratory ruling is upheld.

Affirmed.

All Citations

Not Reported in N.W.2d, 1997 WL 33354581

Footnotes

* Circuit judge, sitting on the Court of Appeals by assignment.

1 Fluoroscan Imaging Systems, Inc., was formerly known as HealthMate, Inc. For purposes of this opinion, we consider the corporate entities as interchangeable.

2 Plaintiff relies on §§ 2611, 2614, and 2621 of Part 26 of the PHC in support of its argument.

3 Addressing this question in its declaratory ruling, defendant ruled that "information received by the RAB does not come within the description of 'data' defined in M.C.L. § 333.2603; MSA 14.15(2603) because that definition of 'data' applies exclusively to 'items of information made or received by the *department,*" ' not by the RAB. Moreover, defendant ruled that the RAB resolution was not data "even if it was 'received by the department,' because it constitutes the advice and position provided by the RAB pursuant to its authority and duty under M.C.L. § 333.13531; MSA 14.15(13531)."

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STATE OF MICHIGAN
IN THE 67TH JUDICIAL DISTRICT COURT

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Hon. David J. Goggins

NICOLAS LEONARD LYON,

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PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNT 4 OF FIRST AMENDED COMPLAINT

NOW COME THE PEOPLE, by and through their attorneys, TODD FLOOD and the MICHIGAN DEPARTMENT OF THE ATTORNEY GENERAL, and for the reasons discussed in the attached brief, respectfully request that this Honorable Court deny Defendant's Motion to Dismiss Count 4 of the People's First Amended Complaint.

Respectfully Submitted,

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Dated: July 10, 2018

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BRIEF IN SUPPORT OF PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNT 4 OF FIRST AMENDED COMPLAINT

Defendant brings this Motion to Dismiss Count 4 of the People's First Amended Complaint, a misdemeanor charge of willful neglect of duty added at the conclusion of the preliminary examination, on four separate bases. Defendant's motion must be denied because, as a matter of law, dismissal of a misdemeanor charge at this stage of the proceedings would be improper and, regardless, Defendant's arguments fail on their merits.

I. DISMISSAL OF A MISDEMEANOR CHARGE BEFORE BINDOVER WOULD BE IMPROPER

First and foremost, Defendant's Motion to Dismiss Count 4 of the People's First Amended Complaint should be denied as beyond this Court's authority. Count 4 of the People's

First Amended Complaint alleges willful neglect of duty, a violation of MCL 750.478 and a misdemeanor charge. Defendant is not even entitled to a preliminary examination on a misdemeanor charge, and this Court is not required or even permitted to dismiss Count 4 at this early stage of the proceedings. See MCL 600.8311 (prescribing jurisdiction of the district court limited to preliminary examinations of "felony cases and misdemeanor cases not cognizable by the district court," of which violation of MCL 750.478 is not); MCL 766.13 (permitting the district court's bindover of *felony* charges at the conclusion of a preliminary examination). Although in an unpublished opinion, the Michigan Court of Appeals has interpreted the language of MCL 600.8311, which delineates the district court's jurisdiction, as prohibiting any preliminary examination for misdemeanors punishable by imprisonment not exceeding one year. *People v Dicker*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 1999 (Docket No. 215173), slip op at 4, citing MCL 600.8311(a), (d); *People v Barbara*, 390 Mich 377, 382c-382d; 212 NW2d 14 (1973) (additional citation omitted). The penal statute under which Defendant is charged, MCL 750.478, specifically states that willful neglect of duty "constitutes a misdemeanor punishable by imprisonment for not more than one year."

The lack of legal support for Defendant's request is sufficient to support this Court's denial of Defendant's motion. Nevertheless, for this Court's convenience, and because the People anticipate that it may present an issue in the future, the People will address Defendant's arguments regarding failure to prove statutory duty.

II. DEFENDANT'S MINISTERIAL AND NONDISCRETIONARY DUTIES ARISE FROM STATUTE, AND INTRODUCTION OF LAW IS NOT REQUIRED

MCL 750.478 provides that "when a duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to

perform such a duty, where no special provision shall be made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00." A bindover on this charge requires evidence that establishes probable cause to believe that (1) the defendant was a public officer, (2) the defendant had a duty "enjoined by law," and (3) the defendant willfully neglected to perform that duty. *People v Parlovecchio*, 319 Mich App 237, 241; 900 NW2d 356 (2017). Defendant takes no issue with his status as a public officer, but argues that he is subject to no duty "enjoined by law." This is simply untrue.

The duties of the DHHS are defined by the Legislature in MCL 333.2221 and *vested in the Director* under MCL 333.2205(1).[1] In pertinent part, MCL 333.2221 provides:

> (1) Pursuant to section 51 of article 4 of the state constitution of 1963, the department *shall* continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and agencies and health services delivery systems; and regulation of health care facilities and agencies and health services delivery systems to the extent provided by law.
>
> (2) The department *shall*:
>
> (a) Have general supervision of the interests of the health and life of the people of this state.
>
> (b) Implement and enforce laws for which responsibility is vested in the department.
>
> (c) Collect and utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.
>
> (d) Make investigations and inquiries as to:
>
> (*i*) The causes of disease and especially of epidemics.
>
> (*ii*) The causes of morbidity and mortality.

[1] MCL 333.2205(1) states that "[a] function assigned by this code to the department vests in the director[.]"

(*iii*) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness. [Emphasis added.]

Defendant cites *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006), and suggests that for a duty to be "enjoined by law," it must "[i]nvolve no exercise of discretion of judgment." However, as Defendant acknowledges, *Carter* involves application of the mandamus standard,[2] and although it provides a definition of "ministerial," it places no limitation on the scope of a duty "enjoined by law." Although addressing the application of mandamus principles, the *Carter* opinion is instructive. The *Carter* plaintiff sought a writ of mandamus forcing his own appointment as assistant city attorney. The Court held that the plaintiff was not entitled to a writ of mandamus because he failed to show that the defendant had "the clear legal duty to perform such an act"—a prerequisite to mandamus relief. *Id.* at 438; quoting *Vorva v Plymouth-Canton Community Sch Dist*, 230 Mich App 651, 655; 584 NW2d 743 (1998).

In *Carter*, the Court stated that "[a]n act is ministerial in nature if it is prescribed by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Id.* at 439. But in *Carter*, the Court expressly distinguished the mandatory nature of a duty to perform an act from the discretion permissibly exercised in carrying out that act. Distinguishing *McMullen v Saginaw City Manager*, 300 Mich 166; 1 NW2d 494 (1942), a case cited by the plaintiff as supporting his requested relief, the Court explained:

---

[2] Defendant's assertion that *People v Parlovecchio*, 319 Mich App 237, 242; 900 NW2d 356 (2017) supports the conclusion that courts "turn to the law of mandamus to determine whether an official has [a ministerial] duty" is a blatant mischaracterization of that opinion, where such a holding is nowhere to be found. In *Parlovecchio*, the Court considered whether a contractual duty, if enforced by a governmental entity, could constitute a duty "enjoined by law" for purposes of MCL 750.478. The Court simply noted that "an analogy can be made to the law of mandamus" for purposes of that case. As expected, the Court's holding was limited to the issues before it: "If a public officer, which is how the prosecution seeks to treat defendant, cannot be compelled in a mandamus action to perform a duty arising solely out of a contract, *because it does not constitute a legal duty or a duty created by law*, we fail to see how that same officer can be held criminally liable under MCL 750.478 for failing to perform a contractual duty." *Parlovecchio*, 319 Mich App at 359-360 (emphasis added). The *Parlovecchio* Court nowhere indicated or even implied that examination of duty for purposes of MCL 750.478 requires application of mandamus principles.

> In *McMullen*, the trial court issued a writ of mandamus requiring the managing officer of the city to appoint two civil service commissioners to regulate the employment of members of the city fire department. Under a public act adopted and made operative in that city, the civil service commission was to consist of three members, two of whom were to be appointed by the person or group acting as a mayor, city manager, council, or common council. The other member was to be selected by the paid members of the fire department. The paid members of the fire department made their selection, but the city manager, by refusing to appoint the other two members of the commission, prevented operation of the act. The city appealed the issuance of the writ arguing, among other things, that the writ "abridge[d] the right of municipal home rule." Our Supreme Court held that the writ was properly issued because the act was operative in the city and the act "command[ed] appointment of commissioners by the city."
>
> *McMullen* is clearly distinguishable from the case at hand. *The act in McMullen required the managing officer to appoint two commissioners—an action that was mandatory and, thus, ministerial. The writ of mandamus did not, however, require appointment of any specific individuals (a decision presumably left to the discretion of the managing officer) but rather required simply that commissioners be appointed as required by the operative act.* [*Id.* at 440-441 (citations omitted, emphasis added).]

As noted, the *McMullen* Court found mandamus appropriate to enforce the mandatory action of appointing a commissioner even though the defendant had the discretion to choose *which* individual to appoint. See *id.* The *Carter* Court, in its reliance on *McMullen*, therefore recognized that an action itself can be mandatory and therefore "enjoined by law" even though the carrying out of that action involves some discretion. Indeed, the Court held that the plaintiff in that case was not entitled to a writ of mandamus because "neither the Ann Arbor charter nor the VPA required defendant to hire *any assistant city attorneys at all*." *Id.* at 440-441 (emphasis added).

The *Carter* opinion is clearly distinguishable in its facts, but its discussion of *McMullen* is on point. In this case, as in *McMullen*, Defendant's duties under the Public Health Code are ministerial and nondiscretionary in nature even though carrying out these duties involves some exercise of discretion. Indeed, the Legislature's use of the word "shall" in MCL 333.2221

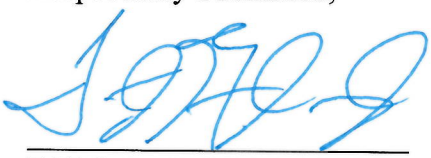
constitutes "clear language designating a mandatory course of conduct." *In re Estate of Weber*, 257 Mich App 558, 562; 669 NW2d 288 (2003). As DHHS Director, Defendant was *required* to "continually and diligently endeavor to prevent disease." MCL 333.2221(1). He was *required* to exercise the same diligence to "prevent[] and control [] health problems of particularly vulnerable population groups." MCL 333.2221(1). And he was *required* to "[c]ollect and utilize vital and health statistics . . . for the purpose of protecting the public health." MCL 333.2221(2)(c). And he was *required* to "*make investigations and inquiries as to . . . the causes of disease and especially epidemics*." MCL 333.2221(2)(d) (emphasis added). That Defendant had discretion in choosing a means to perform his duty does not render his obligation to actually perform the duty less mandatory.

Defendant also argues that the People's Count 4 should be dismissed because "no one testified as to the director's specific responsibilities" and "the prosecution did not introduce Director Lyon's appointment or position description." But Defendant's duties arise in statute, and introduction of the statutes outlining Defendant's duties into evidence was not required. Again, Defendant is not entitled to any preliminary examination for a misdemeanor punishable by imprisonment for less than one year. MCL 600.8311. Additionally, the question of whether a defendant owes a legal duty is one of law to be decided by the court, *Hill v Sears, Roebuck and Co*, 492 Mich 651, 659; 822 NW2d 190 (2012), and "courts are required to take judicial notice of all statutes of the state," *Cassibo v Bodwin*, 149 Mich App 474, 477; 1386 NW2d 559 (1986); see also MCR 202 (permitting the court to take judicial notice without request by a party of "the common law, constitutions, ad public statutes in force in every state"). The fact that the People did not introduce a list of Defendant's job responsibilities would create no bar to this Court's determination that probable cause exists to support a bindover.

III. CONCLUSION

WHEREFORE, for the reasons discussed herein, the People respectfully request that this Honorable Court deny Defendant's Motion to Dismiss Count 4 of the People's First Amended Complaint.

Respectfully Submitted,



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Dated: July 10, 2018

STATE OF MICHIGAN
IN THE 67TH DISTRICT COURT, GENESEE COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, No. 17T-01355-FY

vs. Hon. David J. Goggins

NICOLAS LEONARD LYON,

Defendant.

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REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT 4 OF FIRST AMENDED COMPLAINT

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INTRODUCTION

As the Michigan Association of Health Plans recognized in presenting its Eugene Farnum Award last week, Director Nick Lyon has been a champion for health policy and program initiatives, particularly those protecting Michigan's most vulnerable citizens. (MIRS Press Release, attached as Ex 1.) It is not possible to say that he has "willfully neglected to perform the duty of protecting the health" of Genesee County citizens, as the prosecutor alleges. But it is unnecessary for the Court to independently reach either of those conclusions to dismiss Count IV, because the charge is legally insufficient on multiple grounds. Nothing the prosecutor says in his response to Director Lyon's motion to dismiss changes that reality.

ARGUMENT

A. Dismissal is appropriate.

The prosecutor first argues that dismissal would be improper before a decision to bind over other counts. (Pros Br at 1-2.) Not so. MCL 764.9d allows for the dismissal of misdemeanors before trial, and it directs courts to dismiss any complaint that is "not sufficient on its face" and cannot be drawn "on the basis of the available facts or evidence." This is just such a case.

B. The prosecutor failed to allege any specific duty on the part of Director Lyon or how Director Lyon violated any duty.

To sustain a conviction under MCL 750.478, the prosecution must prove that the defendant "willfully neglected to perform" a "duty enjoined by law." *People v Parlovecchio*, 319 Mich App 237, 241; 900 NW2d 356, 358 (2017) (citing MCL 750.478 and *People v Medlyn*, 215 Mich App 338, 340-341, 544 NW2d 759 (1996)). Without

amending the complaint, the prosecutor's brief alleges that Director Lyon failed to do four duties that MCL 333.2221 actually assigns to the department:

- "continually and diligently endeavor to prevent disease;"
- "prevent and control health problems of particularly vulnerable populations;"
- "collect and utilize vital health statistics for the purposes of protecting the public health;" and
- "make investigations and inquiries as to the causes of disease and especially epidemics." (Pros Br at 6 (internal citations and alterations omitted).)

The prosecutor provides gives no detail as to how Director Lyon failed to perform these duties, but the crux of his legal argument is that that these duties were enjoined by law on Director Lyon because, under 333.2205(1), "[a] function assigned by [the Public Health Code] to the department vests in the director." (Pros Br at 3-4.) But that is not what MCL 333.2205 says. The provision assigns departmental functions to the director *or his designees*:

> (1) A function assigned by this code to the department vests in the director *or in an employee or agent of the department designated by the director, or in any employee or agent of the department who is assigned the function* in accordance with internal administrative procedures of the department established by the director. A function vested by law in a nonautonomous entity of the department may be exercised by the director.
>
> (2) As provided in section 7 of Act No. 380 of the Public Acts of 1965, being section 16.107 of the Michigan Compiled Laws, and except as otherwise provided by law, *the director* with the approval of the governor *may* establish the internal organization of the department and to *allocate and reallocate duties and functions to provide economic and efficient administration and operation of the department.* [MCL 33.2205 (emphasis added).]

So any duties the prosecutor alleges necessarily "vest" in the appropriately

designated employees and internal organizations of the department, such as the Bureau of Disease Control, Prevention, and Epidemiology, headed by Corinne Miller. (II Miller 72-73.) These are not all "personal" duties of Director Lyon.

C. The prosecutor failed to present any evidence of a willful failure to perform these duties.

The preliminary examination yielded no evidence that Director Lyon and his staff failed to "endeavor" to prevent disease or conduct an investigation. Quite the opposite, the proofs show that the appropriate expert staff at MDHHS, in conjunction with local and federal agencies, conducted an extensive epidemiological investigation of the Legionnaires' disease outbreak. To find criminal liability under these circumstances would run contrary to the plain language of MCL 750.478, which requires "willful neglect to perform [a] duty," rather than performing a duty in a negligent manner. It would also subject state employees to liability simply for performing their job in manner contrary to the views of a prosecutor.

D. The prosecutor failed to allege a refusal to perform ministerial or nondiscretionary duty.

The prosecutor's charge fails for the independent reasons that any alleged duties are not ministerial or nondiscretionary. *People v Waterstone* held that "MCL 750.478 addresses *ministerial* or *nondiscretionary* acts, because it speaks of performing duties 'enjoined by law.'" 296 Mich App 121, 140; 818 NW2d 432 (2012) (emphasis added). *Parlovecchio* made explicit the propriety of using the law of mandamus to determine when a duty is ministerial or nondiscretionary and thereby "enjoined by law" and capable of providing the basis for a charge under MCL 750.478. 319 Mich App at 242. Notwithstanding, the prosecutor argues "[t]hat Defendant had

discretion in choosing a means to perform his duty does not render his obligation to actually perform the duty less *mandatory*." (Pros Br at 6 (emphasis added).) This misses the point – the duty must be *ministerial*.

"A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hillsdale Co Sr Services, Inc v Hillsdale Co*, 494 Mich 46, 58 n11; 832 NW2d 728 (2013) (quotation omitted). To determine whether a duty is ministerial, courts examine not just the statutory text, but "the nature of the thing to be done." *Marbury v Madison*, 5 US (1 Cranch) 137, 170 (1803) (cited with approval in *Makowski v Governor*, 495 Mich 465, 479; 852 NW2d 61 (2014), as amended on reh (Sept. 17, 2014)). "If the *act requested* by the plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate." *Hanlin v Saugatuck Tp*, 299 Mich App 233, 248; 829 NW2d 335 (2013) (citing *Lickfeldt v Dept of Corrections*, 247 Mich App 299, 302, 636 NW2d 272 (2001) (emphasis added)).

While statutory language such as "shall" is *necessary* to compel action under mandamus, it is not alone *sufficient*. Mandamus is unavailable – and prosecution under MCL 750.478 would fail – if a statute requires a government official to perform an act that entails discretion in *how* it is performed. *LM v State*, 307 Mich App 685; 862 NW2d 246 (2014), makes this point clear.

The petitioners in *LM* sought a writ of mandamus compelling a school district to provide "special assistance" to certain students. 307 Mich App at 691. Specifically, MCL 380.1278(8) provides that "a pupil who does not score satisfactorily on the fourth or seventh grade state assessment program reading test *shall be provided special*

assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months." (Emphasis added.) The Court of Appeals rejected the petition because "the act to be performed" – providing assistance to students – "cannot be considered ministerial in nature, as the school district is afforded wide-ranging discretion." 307 Mich App at 703. While MCL 380.1278(8) is in some sense mandatory, the duty is not *ministerial* because "the actual method to be used is undefined and quite subjective," making mandamus inappropriate. *Id.*

Similarly, the Public Health Code defines certain goals for the Department, including "endeavor[ing] to prevent disease... through organized programs," MCL 333.2221(1), and "mak[ing] investigations and inquiries as to... the causes of disease and especially epidemics." MCL 333.2221(2)(d). But these "duties" are not ministerial because the statute gives no guidance, let alone definition, as to *how they are to be performed.* See *LM*, 307 Mich App at 703. This is particularly applicable here. Presumably to satisfy its burden the prosecutor will contend that the health department did not ensure that notice was given. The evidence has shown, however, that notice was, in fact, given. The prosecutor simply quarrels with the method and scope of delivery.

And, again, any Department action would be reviewed under the deferential standards of the Administrative Procedures Act, which accords great deference to the agency's decisions. See, e.g., *Huron Behavioral Health v Dept of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011). A writ of mandamus would be unavailable to enforce these duties, and a charge under MCL 750.478 therefore fails as a matter of law.

E. The prosecutor failed to respond to arguments raised in the motion to dismiss.

In his opening brief, Defendant Lyon moved to dismiss the Count 4 as unconstitutional for two reasons: first, it would violate *ex post facto* principles applicable to the judiciary through the Due Process Clause; second, the alleged duty to "protect[] the health of the citizens of the County of Genesee, State of Michigan," would amount to an unconstitutionally vague criminal law. (Def Brf pp 6-8.) The prosecutor completely failed to respond to these arguments despite ample notice, and the new duties alleged in the prosecutor's brief would, in any event, suffer from the same defects. Any argument he makes against these positions should be deemed waived and Count 4 should be dismissed as a result.

CONCLUSION

As outlined in Director Lyon's closing preliminary-exam brief, there is a large gap between the prosecutor's statements and the media reports on the one hand, and what actually happened in Flint on the other.[1] The same is true with respect to the prosecutor's allegations of willful neglect in duty in Count 4. But the Court need not resolve who is right and who is wrong regarding what happened. The legal shortcomings in Count 4 are clear and irrefutable as a matter of Michigan law.

Accordingly, for the above reasons and those stated in Director Lyon's motion to dismiss, the defense respectfully requests that the court dismiss Count 4 of the First Amended Complaint in its entirety.

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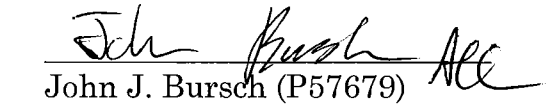
[1]Although these proceedings are about Legionnaires' disease, the hyperbole problem extends equally to the lead issue. *See, e.g.*, Dr. Hernán Gómez and Dr. Kim Dietrich, *The Children of Flint Were Not 'Poisoned,'* N.Y. Times (July 22, 2018), attached as Ex 2.

Respectfully Submitted,

Dated: July 23, 2018

BURSCH LAW PLLC
Attorneys for Defendant Lyon



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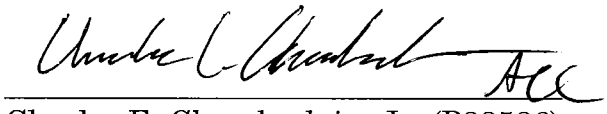

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EXHIBIT 1

Vicki Miller <vicki@mirsnews.com>

MEDIA RELEASE: Michigan Association of Health Plans Recognizes Health Care Leaders at Annual Conference

1 message

Andrea Kerbuski <akerbuski@martinwaymire.com> Fri, Jul 20, 2018 at 2:00 PM
To: release@mirsnews.com

Michigan Association of Health Plans Recognizes

Health Care Leaders at Annual Conference

TRAVERSE CITY, Mich. — Gov. Rick Snyder, Sen. Jim Ananich, Rep. Hank Vaupel, Nick Lyon and Beverly Allen were recognized today for their contributions to addressing important state health care issues. The awards were presented during the Michigan Association of Health Plans' annual conference at Grand Traverse Resort.

Gov. Rick Snyder received the 2018 MAHP Presidential Recognition Award for his outstanding service and collaboration consistent with the MAHP mission to provide affordable and accessible health care for all citizens of Michigan. His leadership and passion to create the Healthy Michigan Plan has improved the lives of many.

"Gov. Snyder has been an important leader on health care legislation," said MAHP Executive Director Dominick Pallone. "We appreciate his leadership in improving Michigan's health care through the Healthy Michigan Plan and ensuring proper funding and continued operation."

Sen. Jim Ananich (D-Flint) and Rep. Hank Vaupel (R-Fowlerville) received the 2018 Legislator of the Year awards. This award recognizes lawmakers who have demonstrated initiative and leadership in support of issues that advocate for high quality, affordable and accessible health care for Michigan citizens.

Ananich has advocated for improved access of care for Michigan citizens, particularly through Medicaid and the Healthy Michigan expansion. He has also provided leadership and continues to work tirelessly on the Flint water crisis. Vaupel has been willing to take a strong position on many important health care issues facing Michigan citizens including the biosimilar substitution bill, drug price transparency and opioid overdose safeguards and his participation on the House Community, Access, Resources, Education and Safety (CARES) Taskforce.

"Sen. Ananich and Rep. Vaupel have been leaders on difficult issues to improve health care in the state," said Pallone. "They have been willing to speak about what they stand for and we are thankful for their leadership."

MAHP awarded Michigan Department of Health and Human Services Director Nick Lyon the Eugene Farnum Award. This award honors those who throughout their lifetime of work reflecting the values that Gene Farnum exemplified: collaboration, a sense of balance, fairness and integrity — and who share his vision of access to quality, affordable health care for Michigan citizens.

Lyon's unprecedented dedication and commitment to improve the quality of life for all Michigan citizens and for being a champion for health policy and program initiatives to assure that the public's interest is always served and Michigan's most vulnerable citizens are protected

"Without his values, integrity, and commitment many of the policy advances for Michigan and for the manged care industry would not have taken place, " said Pallone. "This award conveys our deep appreciation for his service not just to MAHP, but to Michigan citizens who benefited from his work."

MAHP's most prestigious award, the Ellis J. Bonner Outstanding Achievement Award, was given to Beverly Allen, CEO of Aetna Better Health of Michigan.

The Bonner award recognizes a MAHP member who has been nominated by colleagues based upon exemplary service, leadership and contributions to the managed care industry and community. The late Ellis Bonner was a father of the health maintenance organization movement in Michigan, a mentor to many and a tireless promoter of accessible health care system for Michigan citizens.

Allen has served in leadership roles for MAHP, including board president, and has provided guidance on many challenges facing the health care industry. She has shown leadership in the development of many partnerships with local agencies and community organizations to benefit Michigan citizens.

"Beverly has been a positive force in our association and in Michigan's health care industry," said Pallone. "She continues to lead and innovate to help us reach our mission to provide quality, affordable and accessible health care in Michigan."

###

The Michigan Association of Health Plans (MAHP) is an industry voice for 13 health care plans, covering over 2.5 million Michigan residents, and 50 businesses affiliated with the health care industry. MAHP facilitates communication among members, government, and the industry regarding health care issues of common concern. The mission of the Michigan Association of Health Plans is to provide leadership for the promotion and advocacy of high quality, affordable, accessible health care for the citizens of Michigan.

MAHP%202018%20awards%20FINAL.pdf
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EXHIBIT 2

The New York Times

The Children of Flint Were Not 'Poisoned'

By Hernán Gómez and Kim Dietrich
Dr. Gómez and Dr. Dietrich are experts in toxicology and environmental health.

July 22, 2018

FLINT, Mich. — Words are toxic, too. Labeling Flint's children as "poisoned," as many journalists and activists have done since the city's water was found to be contaminated with lead in 2014, unjustly stigmatizes their generation.

Let's be clear. It's unacceptable that any child was exposed to drinking water with elevated lead concentrations. We know that lead is a powerful neurotoxicant, that there is no safe level, that the very young are particularly vulnerable and that long-term exposure to low to moderate levels of lead is associated with decreased I.Q.s and other cognitive and behavioral problems, including criminal behavior.

But there is no reason to expect that what happened for a year and a half in Flint will inevitably lead to such effects. The casual use of the word "poisoned," which suggests that the affected children are irreparably brain-damaged, is grossly inaccurate. In a city that already battles high poverty and crime rates, this is particularly problematic.

[**ANOTHER VIEW ON FLINT: How a Pediatrician Became a Detective**]

In the mid-1970s, the average American child under the age of 5 had a blood lead level of 14 micrograms per deciliter. The good news is that by 2014 it had fallen dramatically, to 0.84 micrograms per deciliter, largely because of the banning of lead in paint and the phaseout of lead in gasoline, among other measures.

The Centers for Disease Control and Prevention now considers a blood lead level in children of 5 micrograms per deciliter and higher to be a "reference level." This measure is intended to identify children at higher risk and set off communitywide prevention activities.

It does not suggest that a child needs medical treatment. In fact, the C.D.C. recommends medical treatment only for blood lead levels at or above 45 micrograms per deciliter. Not a single child in Flint tested this high. This was a surprise for several visiting celebrities, who requested a visit to the "lead ward" of Hurley Children's Hospital.

Nonetheless, the reference level has been misinterpreted by laypeople — and even public health officials — as a poisoning threshold.

After Flint's water was switched from Detroit's municipal system to the Flint River, the annual percentage of Flint children whose blood lead levels surpassed the reference level did increase — but only from 2.2 percent to 3.7 percent. One of us, Dr. Gómez, along with fellow researchers, reported these findings in a study in the June issue of The Journal of Pediatrics, which raised questions about how risks and statistics have been communicated regarding this issue.

Moving from evaluating percentages to examining actual blood lead levels in children, we found that levels did increase after the water switched over in 2014, but only by a modest 0.11 micrograms per deciliter. A similar increase of 0.12 micrograms per deciliter occurred *randomly* in 2010-11. It is not possible, statistically speaking, to distinguish the increase that occurred at the height of the contamination crisis from other random variations over the previous decade.

For comparison, consider the fact that just 20 years ago, nearly 45 percent of young children in Michigan had blood lead levels above the current reference level. If we are to be consistent in the labeling of Flint children as "poisoned," what are we to make of the average American who was a child in the 1970s or earlier? Answer: He has been poisoned and is brain-damaged. And poisoned with lead levels far above, and for a greater period, than those observed in Flint.

People were understandably dismayed by the government's apparent failure to act quickly to switch back the water once concerns were raised in Flint. But based on this more comprehensive view of the data, we are forced to admit that the furor over this issue seems way out of proportion to the actual dangers to the children from lead exposure.

Furthermore, the focus on Flint seems to be distracting the public from a far more widespread problem. Although blood lead levels have long been declining nationwide, there remain many trouble spots. Right now in Michigan, 8.8 percent of children in Detroit, 8.1 percent of children in Grand Rapids and an astounding 14 percent of children in Highland Park surpass the C.D.C. reference level. Flint is at 2.4 percent. A comprehensive analysis of blood lead levels across the United States reveals at least eight states with blood lead levels higher than Flint's were during the water switch.

It is clear that lead exposure is not one city's problem, but the entire nation's.

In the case of Flint, even when taking into account the change in the water supply, the decrease in blood lead levels over the last 11 years has actually been a public health success. The Journal of Pediatrics study found that between 2006 and 2015, the percentage of Flint children testing above the reference level decreased substantially, to 3.7 percent from 11.8 percent.

It is therefore unfair and inaccurate to point a finger at Flint and repeatedly use the word "poisoned." All it does is terrify the parents and community members here who truly believe there may be a "generation lost" in this city, when there is no scientific evidence to support this conclusion.

Hernán Gómez, an associate professor at the University of Michigan, emergency medicine pediatrician and medical toxicologist at Hurley Medical Center, was the lead author of the study "Blood Lead Levels of Children in Flint, Michigan: 2006-2016." Kim Dietrich, a professor of epidemiology and environmental health at the University of Cincinnati College of Medicine, is the principal investigator of the Cincinnati Lead Study.

A version of this article appears in print on July 23, 2018, on Page A19 of the New York edition with the headline: Flint Kids Were Not 'Poisoned'

STATE OF MICHIGAN
IN THE 67TH DISTRICT COURT, GENESEE COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, No. 17T-01355-FY

vs. Hon. David J. Goggins

NICOLAS LEONARD LYON,

Defendant.

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Attorney for the State

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

Andrew C. Chamberlain, being first duly sworn, deposes and says that he is in the employ of the law firm of Willey & Chamberlain LLP, and that he served a true copy of the attached:

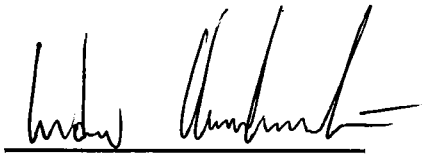
REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT 4 OF FIRST AMENDED COMPLAINT

Upon:

Todd F. Flood, Esq.
FLOOD LAW PLLC
401 North Main Street
Royal Oak, Michigan 48067

SPECIAL ASSISTANT ATTORNEY GENERAL
Attorney for the State

by email and fax on the 23rd day of July, 2018.



Andrew Chamberlain