

CHILDREN’S MERCY,

Petitioner,

v.

STATE OF MISSOURI
ATTORNEY GENERAL,

Respondent.

**FILED
DIVISION 9**

13-Feb-2024 10:30

CIRCUIT COURT OF JACKSON COUNTY, MO

BY Jennifer Johnson

Pending before the Court is Children’s Mercy d/b/a the Children’s Mercy Hospital’s Motion for Judgment on the Pleadings and the Attorney General for the State of Missouri’s Cross Motion for Judgment on the Pleadings. For the following reasons, Children’s Mercy d/b/a the Children’s Mercy Hospital’s Motion is denied and the Attorney General for the State of Missouri’s Motion is granted.

On April 14, 2023, Children’s Mercy d/b/a the Children’s Mercy Hospital (“CMH”) filed the pending Petition concerning Civil Investigative Demand 23-21 (“CID”) issued by Andrew Bailey, Attorney General for the State of Missouri (“AG”) arising out of an investigation entitled “In the matter of Washington University Pediatric Transgender Center at St. Louis Children’s Hospital” seeking information related to the AG’s investigation of Washington University Pediatric Transgender Center at St. Louis Children’s Hospital (“Washington University”) “and others.” CMH alleged the AG lacked statutory authority under the Missouri Merchandising Practices Act (“MMPA”) to investigate and enforce standards of medical care, the CID does not

comply with Missouri Statute Section 407.040, the CID would require CMH to violate its fiduciary duty to protect confidential information, and the CID violates the United States and Missouri Constitutions. On June 9, 2023, the AG filed an Answer to CMH's Petition and a Counterclaim requesting the Court enter judgment in its favor and order CMH to produce all information responsive to the CID. CMH filed a Reply and alleged affirmative defenses consistent with its Petition on July 7, 2023. On September 7, 2023, the parties filed a stipulation representing the facts were undisputed and the issues and claims raised by the parties could be decided as a matter of law based the pleadings. The parties stipulated to a briefing schedule to place all issues before the Court through cross-dispositive motions.¹ That briefing has been completed. After review of the pleadings, the parties' briefs, and the law, the Court rules as follows.

Legal Standard

When reviewing a motion for judgment on the pleadings, the Court treats all well-pleaded facts in the opposing party's pleadings as true. *Madison Block Pharmacy, Inc. v. United States Fid. & Guar. Co.*, 620 S.W.2d 343, 345 (Mo. banc 1981) (internal citations omitted). "The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss, i.e., assuming the facts pleaded by the opposite party to be true, these facts are nevertheless insufficient as a matter of law." *Id.* (internal quotation and citations omitted). The Court can only sustain a motion for judgment on the pleadings where a material issue of fact does not exist. *Id.* (internal citations omitted). "[A] motion for judgment on the pleadings should

¹ The parties agreed there are no disputed facts. Facts included in the analysis were either not disputed, were taken from the pleadings, or the dispute did not preclude the entry of judgment on the pleadings. The AG included some facts outside of the pleadings, but the Court did not consider those facts.

be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.” *Id.* (internal citations omitted).

Analysis

The MMPA makes unlawful “[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri.” Mo. Rev. Stat. § 407.020. Missouri courts have noted the MMPA “cover[s] every practice imaginable and every unfairness to whatever degree.” *Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001). Under this statute, “unfair practice” includes a practice that

(A) Either:

1. Offends any public policy as it has been established by the Constitution, statutes or common law of this state, or by the Federal Trade Commission, or its interpretive decisions; or
2. Is unethical, oppressive or unscrupulous; and

(B) Presents a risk of, or causes, substantial injury to consumers.
15 C.S.R. § 60-8.020(1) (cited in *Soetaert v. Novani Flips, LLC*, 631 S.W.3d 580, 588 (Mo. Ct. App. 2021) and *Binkley v. Am. Equity Mortg., Inc.*, 447 S.W.3d 194, 198 n.9 (Mo. 2014)).

“Merchandise” is defined as “any objects, wares, goods, commodities, intangibles, real estate or services.” *Soetaert*, 631 S.W.3d at 587. Effective August 28, 2020, the Missouri Legislature amended the MMPA to state, “[n]o action may be brought under this section to recover damages for personal injury or death in which a claim can be made under chapter 538.” Mo. Rev. Statute § 407.025.3. Chapter 538 outlines “Missouri’s torts based on improper healthcare.” It is against this backdrop CMH contends the AG has exceeded its authority.

CMH first argues the MMPA provides no authority to the AG to investigate provisions of medical care. CMH urges the Court to limit the MMPA to “public transactions” of which it contends medical care is not. However, CMH did not provide legal support for this limitation, instead citing to a general statement concerning the overall purpose of the MMPA. The cited case did not address “public” versus “private” transactions, and importantly, the language of the MMPA “does not . . . distinguish between ‘private’ and ‘public’ transactions.” *State v. Simmons*, 270 S.W.3d 523, 532 (Mo. Ct. App. 2008). Further, Courts have held that “medical goods and services meet the statutory definition of merchandise as defined by Section 407.010(4).” *Freeman Health Sys. v. Wass*, 124 S.W.3d 504, 507 (Mo. Ct. App. 2004); *Gregory v. Barton*, 510 F. Supp. 3d 829, 836 (E.D. Mo. 2020); *Dorgan v. Ethicon, Inc.*, 4:20-00529-CV-RK, 2020 WL 5372134, at *4 (W.D. Mo. Sept. 8, 2020); *Nation v. Moore*, No. 3:22-cv-05063-MDH, 2023 U.S. Dist. LEXIS 176809, at *7 (W.D. Mo. Oct. 2, 2023).

CMH then argues the MMPA is limited to at most “unfair practice regarding how the cost of the [medical] services were communicated or collected.” Although the *Freeman Health* and *Taylor* cases contained allegations concerning billing and collection issues, the courts did not so restrict the MMPA.² CMH’s reliance on cases concerning the Tennessee Consumer Protection Act is also misplaced. While the cases held a plaintiff could not recast a malpractice lawsuit as a consumer protection claim, they also did not exempt professionals such as doctors and lawyers from consumer protection suits when the claims related to their business practices. *Proctor v. Chattanooga Orthopedic Grp., P.C.*, 270 S.W.3d 56 (Tenn. Ct. App. 2004); *Constant v. Wyeth*,

² CMH questions whether these cases addressing “medical services” are still “good law” after the 2020 Amendments. However, the court in *Nation v. Moore*, citing to the Missouri Supreme Court, sets out persuasive reasoning undercutting CMH’s position. *Nation v. Moore*, No. 3:22-cv-05063-MDH, 2023 U.S. Dist. LEXIS 176809, at *7 (medical malpractice and MMPA claims allowed to proceed in tandem based on complaint allegations subsequent to 2020 amendment).

352 F. Supp. 2d 847 (M.D. Tenn. 2003); *see also Nation v. Moore*, No. 3:22-cv-05063-MDH, 2023 U.S. Dist. LEXIS 176809, at *7. Here, even assuming the 2020 Amendments apply to the AG, the AG has not alleged “an action” to “recover damages for personal injury or death.” The AG alleges it seeks to investigate CMH’s business practices (“methods, acts, uses, practices, or solicitations”) that may have been “unlawful under the Merchandising Practices Act.”³

Similarly, CMH’s arguments concerning the Missouri Board of Healing Art’s exclusive authority to investigate alleged improper medical care do not prevail. As noted, the AG contends it is not pursuing a medical malpractice case, but rather investigating potential MMPA violations as permitted by the MMPA.⁴ *Schulte v. Conopco, Inc.*, 997 F.3d 823, 826 (8th Cir. 2021) (quoting *Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237, 240 (Mo. 2001)) (terms of the statute are “unrestricted, all-encompassing and exceedingly broad”). While healthcare agency oversight and a MMPA investigation could overlap and both may examine the actions of healthcare providers, one would not preclude the other. *See, e.g., Breeden v. Hueser*, 273 S.W.3d 1, 6 (Mo. Ct. App. 2008) (MMPA claim brought against doctor for business practices related to chemical doses he administered to patients). CMH has not demonstrated that the investigation of alleged MMPA violations and healthcare agency oversight operate independently or that their purposes are in

³ CMH also cites to a temporary restraining order entered in Case Number 23SL-CC01673 due to a finding by the court that, in part, “[t]he Court finds that the Plaintiffs have met their burden regarding their likelihood of success on the merits, as this is novel use of the Attorney General’s power to promulgate emergency rules under ~~for~~ the Missouri Merchandising Practices Act that has never previously been subjected to judicial scrutiny and may impermissibly invade a function reserved to the legislature” (strikethrough included in original). This case does not involve emergency rule making and thus presents a different factual and legal scenario.

⁴ CMH has pointed to certain CID requests it claims implicate medical malpractice type claims; however, they equally could apply to business practice violations for “deception, fraud, false promises, misrepresentation, unfair practices, and/or the concealment, suppression, or omission of material facts within the scope of the Missouri Merchandising Practices Act.” CMH has not demonstrated the requests apply only to Chapter 538 type claims to the exclusion of potential MMPA violations.

conflict.⁵ *Compare Ports Petroleum Co., Inc. v. Nixon*, 37 S.W.3d at 240-41 (purposes of the MMPA and MFMA are divergent); *see, e.g., Nation v. Moore*, No. 3:22-cv-05063-MDH, 2023 U.S. Dist. LEXIS 176809.

Next, CMH contends the CID is unconstitutional because it is facially deficient with the MMPA's requirements, and overly broad, unduly burdensome, and unjust for seeking private and confidential information and documents. "The Fourth Amendment's reasonableness requirement mandates that: (1) the investigative demand comply with the statute authorizing it; (2) the information sought is relevant to the administrative inquiry; and (3) the investigative demand is not too indefinite or too broad." *State ex rel. Koster v. Charter Communs., Inc.*, 461 S.W.3d 851, 859 (Mo. Ct. App. 2015) (internal citations omitted). Further, a CID shall (1) state the statute or section thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation; (2) describe the class or classes of information, documentary material, or physical evidence to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded; (3) prescribe a return date by which the information, documentary material, or physical evidence is to be produced; and (4) identify the members of the AG's staff to whom the information, documentary material or physical evidence requested is to be made available. Mo. Rev. Stat. § 407.040.2.

⁵ CMH also cites to the SAFE Act that dictates "[t]he performance of a gender transition surgery or the prescription or administration of cross-sex hormones or puberty-blocking drugs to an individual under eighteen years of age in violation of the section shall be considered unprofessional conduct and any health care provider doing so shall have his or her license to practice revoked by the appropriate licensing entity or disciplinary review board with competent jurisdiction in this state." Mo. Rev. Stat. § 433.070.3. However, there is no language creating any limitation on, or conflict with, a private individual pursuing a medical malpractice case against a healthcare provider, a private individual alleging MHRA violations against a healthcare provider for business practices, or the AG investigating or alleging MHRA violations related to the provision of such care. These matters can proceed in parallel fashion as they have done historically in other provision of care contexts.

CMH maintains the AG failed to “allege the violation of which is under investigation.” The CID stated the AG “believes it to be in the public interest that an investigation be made to ascertain whether the Washington University Pediatric Transgender Center at St Louis Children’s Hospital (“Subject”), its agents or employees, or others in the state providing similar services have engaged in or are engaging in any practices declared to be unlawful by § 407.020, RSMo.” The AG further stated it “has reason to believe that Subject or others in the state may have used deception, fraud, false promises, misrepresentation, unfair practices, and/or the concealment, suppression, or omission of material facts within the scope of the Missouri Merchandising Practices Act.” The authorizing statute does not require the AG to provide details of an investigation or provide facts in support of each area of inquiry, for that is the purpose of an investigation and a CID – to gather such facts, if they exist, or establish allegations are unfounded. *State ex rel. Danforth v. Indep. Dodge, Inc.*, 494 S.W.2d 362, 365 (Mo. Ct. App. 1973) (purpose of the CID procedure “was to provide a form of pretrial discovery for the benefit of the attorney general”). CMH has provided no legal support to the contrary.⁶

CMH next argues the CID requires it to act inconsistently with its fiduciary duty to protect its patients’ medical information from disclosure and it violates CMH’s patients’ statutory and constitutional privacy rights by requiring release of their protected, sensitive medical information without justification. As noted by the AG, however, under Missouri law, no CID shall:

- (1) Contain any requirement which would be unreasonable or improper if contained

⁶ CMH argued that to the extent a violation was alleged, the violation could only relate to Washington University. However, the AG indicated the investigation concerned Washington University “and others” and alleged in its Counterclaim, “[b]ased on information uncovered from the investigation into Subject, as well as other information, the Attorney General also believes that the Hospital [CMH] may have engaged in or is engaging in methods, acts, uses, practices, or solicitations declared to be unlawful under the Merchandising Practices Act.”

in a subpoena duces tecum issued by a court of this state; or

(2) Require the disclosure of any documentary material which would be privileged or which, for any other reason, could not be required by a subpoena duces tecum issued by a court of this state.

Mo. Rev. Stat. § 407.040.3. The AG represented privileged information is not sought pursuant to Missouri law, and CMH is under no obligation to provide such information.⁷ CMH takes issue with the AG's request to provide a privilege log. In the context of CIDs and subpoenas, courts have "long recognized, the proper way to address claims of privilege . . . is for the objecting party to submit a privilege log." *Consumer Fin. Prot. Bureau v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 185 (2d Cir. 2023); *Mo. Baptist Med. Ctr. v. United States DOJ*, No. 4:22-MC-871 RLW, 2023 U.S. Dist. LEXIS 9295 (E.D. Mo. Jan. 19, 2023).

For the foregoing reasons, it is hereby,

ORDERED Children's Mercy d/b/a the Children's Mercy Hospital's Motion for Judgment on the Pleadings is denied and the Attorney General for the State of Missouri's Motion for Judgment on the Pleadings is granted.

IT IS FURTHER ORDERED Judgment is entered for the Attorney General for the State of Missouri on its Counterclaim and against Children's Mercy d/b/a the Children's Mercy Hospital's Motion on its Petition.

IT IS FURTHER ORDERED Children's Mercy d/b/a the Children's Mercy Hospital is Compelled to comply with the CID within 30 days, or as otherwise agreed by the parties.

⁷ CMH alleged compliance with the CID would result in "massive discovery and legal costs to respond to an unlawful request" but did not provide any information in support of this assertion beyond stating that requests were overly burdensome for seeking private information.

IT IS SO ORDERED.

February 13, 2024

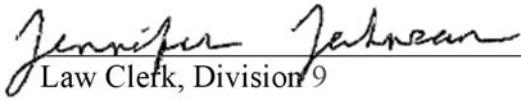
Date



HONORABLE JOEL P FAHNESTOCK

CERTIFICATE OF SERVICE

I hereby certify that notice of the above and foregoing was sent through the Court's e-filing system to all attorneys of record on 13-Feb-2024.



Law Clerk, Division 9