STATE OF MICHIGAN

COURT OF APPEALS

STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRANDON MCQUEEN and MATTHEW TAYLOR, d/b/a COMPASSIONATE APOTHECARY, LLC,

Defendants-Appellees.

FOR PUBLICATION
August 23, 2011
9:00 a.m.

No. 301951
Isabella Circuit Court
LC No. 2010-008488-CZ

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

HOEKSTRA, J.

This case requires us to decide whether the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, permits the selling of marihuana. Defendants Brandon McQueen and Matthew Taylor own and operate Compassionate Apothecary, LLC (CA), a medical marihuana dispensary. It is a place where CA members, who are either registered qualifying patients or their primary caregivers, purchase marihuana that other CA members have stored in lockers rented from CA. Through their operation of CA, defendants provide the mechanism for the sale of marihuana and retain at least 20 percent of the sale price. Plaintiff, through the Isabella County Prosecuting Attorney, filed a complaint against defendants for injunctive relief. It claimed that defendants' operation of CA was not in accordance with the provisions of the MMMA and, therefore, was a public nuisance because it violated the Public Health Code (PHC), MCL 333.1101 *et seq.* After a two-day hearing, the trial court held that defendants operated CA in accordance with the provisions of the MMMA. Consequently, it denied plaintiff's request for injunctive relief. We hold that defendants' operation of CA is an enjoinable public nuisance. The operation of CA violates the PHC, which prohibits the possession and delivery of marihuana. Defendants' violation of the PHC is not excused by the MMMA because defendants do not operate CA in accordance with the provisions of the MMMA. Specifically, the "medical use" of marihuana, as defined by the MMMA, does not include patient-to-patient "sales" of marihuana, and no other provision of the MMMA can be read to permit such sales. Therefore, defendants have no authority to actively engage in and carry out the selling of marihuana between CA members. Accordingly, we reverse the trial court's order denying plaintiff's request for a preliminary injunction and remand for entry of judgment in favor of plaintiff.

I. FACTS AND PROCEDURAL HISTORY

The facts regarding defendants' operation of CA are generally undisputed. They were established at a two-day hearing at which both McQueen and Taylor testified.

McQueen is a "qualifying patient" who has been issued a "registry identification card" by the Michigan Department of Community Health (MDCH). He is also the registered "primary caregiver" for three qualifying patients.[1] Taylor is not a "qualifying patient," but he is the registered "primary caregiver" for two qualifying patients. Together, McQueen and Taylor operate CA, which can be described as a medical marihuana dispensary.[2] The goal of CA is to provide an uninterrupted supply of marihuana to registered qualifying patients. It does this by "facilitating" patient-to-patient transfers of marihuana between its members.

There are approximately 345 members of CA. To be a member of CA, an individual must either be a qualifying patient or a primary caregiver and must possess a registry identification card from the MDCH. In addition, a caregiver can only be a member if a qualifying patient to whom he or she is connected through the MDCH registration process is a member. A CA membership costs $5.00 per month. CA retains the right to revoke a membership if the member uses marihuana for a purpose other than the treatment of a medical condition.

CA has 27 lockers that it rents to its members. The cost to rent one locker is $50 per month.[3] Either patients or caregivers may rent lockers, but the majority of CA members that rent lockers are patients. A patient who rents a locker has grown more marihuana than the patient needs to treat his or her debilitating medical condition and the patient wants to make the "excess" marihuana available to other patients. Similarly, a caregiver rents a locker when the caregiver's patient does not need all the marihuana that was grown by the caregiver.[4] When a caregiver rents a locker, the caregiver's patient must provide an attestation giving the caregiver permission to store the marihuana in the locker and allowing CA to distribute the marihuana to other members. CA limits the amount of marihuana that a patient or caregiver can place in a locker. A patient may store 2.5 ounces of marihuana, while a caregiver may store 2.5 ounces of marihuana for each of his or her patients. According to McQueen and Taylor, the marihuana placed in the rented lockers belongs to a patient—either the patient who rented the locker or the patient of the caregiver who rented the locker. CA does not purchase marihuana from its members or from third parties.

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[1] McQueen was the primary caregiver for a fourth patient but that patient "lapsed." The record does not indicate when the patient lapsed.

[2] During the course of the proceedings below, defendants learned that the word "apothecary" can only legally be used in the name of pharmacies. Thus, they changed the name of their operation to "CA." They were in the midst of filing paperwork to finalize the name change.

[3] Additional lockers may be rented at a lower monthly price.

[4] McQueen testified that he assumes the marihuana placed in a locker by a member was grown by that patient or caregiver. However, he admitted that he could not be sure that the member did not obtain the marihuana from some other place or source.

When a patient comes to CA to purchase marihuana, one of CA's four employees verifies that the patient has been issued a registry identification card by the MDCH and is a CA member. A caregiver may also purchase marihuana from CA for his or her patients. The patient or caregiver is escorted into the display room by a CA employee, where the member is permitted to view, smell, and touch samples of the different "strains" of marihuana that are currently stored in the lockers.[5] The member, however, may not smoke the marihuana at CA; CA is a no-grow and no-smoke facility. The number of marihuana strains available to CA members fluctuates. The number of available strains has been as high as 26 but as low as five or six. After the patient or caregiver selects a strain of marihuana to purchase, a CA employee retrieves the marihuana from the locker, weighs and packages the marihuana, and records the purchase. CA limits the amount of marihuana that a member may purchase to 2.5 ounces in a 14-day period. The price of the marihuana is set by the member who rented the locker, but CA keeps, at a minimum, a 20 percent "service fee" for each transaction.

Defendants opened CA in May 2010. In the first two and a half months of its operation, it sold approximately 19 pounds of marihuana. Its "farmers" made more than $76,000.[6] Before expenses were paid, CA earned approximately $21,000.

In July 2010, plaintiff, through the Isabella County Prosecuting Attorney, filed a complaint for a temporary restraining order, preliminary injunction, and permanent injunction against defendants. Plaintiff alleged that defendants' operation of CA did not comply with the provisions of the MMMA because the MMMA does not allow patient-to-patient transfers or sales of marihuana, nor does it allow marihuana taken from one caregiver to be dispensed to patients who are not the registered qualifying patients of the caregiver. Plaintiff claimed that defendants' operation of CA was a public nuisance because it was contrary to the provisions of the MMMA and, therefore, in violation of the PHC.

The trial court denied plaintiff's request for a temporary restraining order. Then, after a two-day hearing, it denied the request for a preliminary injunction. According to the trial court, defendants' operation of CA was in compliance with the MMMA because the patient-to-patient transfers of marihuana that CA facilitates fall within the scope of the "medical use" of

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[5] "Strains" of marihuana refer to different genetic varieties of marihuana. Taylor explained that each "strain" of marihuana requires different growing conditions and, therefore, it is "very ineffective" for a person to grow more than one or two strains of marihuana. By making different strains available to its members, CA allows patients to use a "trial and error" method to determine which strain works best for him or her.

[6] McQueen used the term "farmers" while speaking before the Mount Pleasant City Commission, and he did not explain the term. It appears that the term "farmers" refers to the members who rent lockers and allow CA to distribute their marihuana to other members.

marihuana. The trial court stated that its order resolved the last pending claim and closed the case.[7]

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in denying it injunctive relief. According to plaintiff, the provisions of the MMMA do not authorize patient-to-patient sales of marihuana. Therefore, plaintiff claims that defendants' operation of CA, which carries out patient-to-patient sales of marihuana, is not in accordance with the provisions of the MMMA. Plaintiff asserts that, without the protection of the MMMA, defendants' operation of CA is an enjoinable nuisance because it violates the PHC.

A. STANDARDS OF REVIEW

We review a trial court's denial of injunctive relief for an abuse of discretion. *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008). We review a trial court's factual findings for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). We review de novo the trial court's interpretation of the MMMA. *People v Redden*, 290 Mich App 65, 76; ___ NW2d ___ (2010).

> "The words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995). We presume that the meaning as plainly expressed in the statute is what was intended. *Id.* [*Id.*]

B. PRELIMINARY ISSUES

In its opinion, the trial court made two findings of fact that were critical to its determination that defendants operated CA in accordance with the MMMA. First, it found that even though defendants, in their operation of CA, owned the lockers that CA rents to its members, it was the members who rent the lockers, and not defendants, that possess the marihuana stored in the lockers. Second, it found that defendants did not own, purchase, or sell the marihuana stored in the lockers but merely "facilitated its transfer from patients to patients."

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[7] At the conclusion of the two-day hearing, defendants urged the trial court that if it viewed its order on plaintiff's request for a preliminary injunction to be a final order, such that it only intended to issue one opinion regarding whether any injunctive relief was available to plaintiff, to indicate in its order that it was a final order so that the losing party could immediately exercise its appellate rights.

Reviewing these two findings under the proper definitions for "possessing" and "selling," we are left with a definite and firm conviction that the trial court made mistakes.

1. POSSESSION

The term "possession," when used in regard to controlled substances, "signifies dominion or right of control over the drug with knowledge of its presence and character." *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000) (internal quotation marks and citation omitted). Possession may be actual or constructive, and may be joint or exclusive. *People v McKinney*, 258 Mich App 157, 166; 670 NW2d 254 (2003). "The essential issue is whether the defendant exercised dominion or control over the substance." *Id.* A person can possess a controlled substance and not be the owner of the substance. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992).

Here, defendants exercise dominion and control over the marihuana that is stored in the lockers that CA rents to its members. A member, either a patient or a caregiver, rents a locker when the member has excess marihuana that he or she wants to make available for purchase by other CA members. The member gives consent to CA to convey the marihuana to other members. Defendants, while they may not actually own the marihuana that is stored in the lockers, have access to and control over the marihuana. When a member comes to CA to purchase marihuana, the member, under the supervision of a CA employee, inspects samples of the available strains of marihuana, and after the member selects a strain of marihuana to purchase, the CA employee retrieves the marihuana from the respective locker, weighs and packages the marihuana, and provides it to the member in exchange for monetary payment. Under these circumstances, defendants, in their operation of CA, exercise dominion and control over the marihuana. They possess the marihuana that is stored in the lockers. The trial court's finding to the contrary, that defendants did not possess the marihuana because they did not have an ownership interest in it, was clearly erroneous.

2. SELLING

Likewise, defendants are engaged in the selling of the marihuana that CA members store in the rented lockers. See part II.C.3.b, *infra*, where we define a "sale" as "the transfer of property or title for a price." Admittedly, defendants do not sell marihuana that they themselves own, but they intend for, make possible, and actively engage in the sale of marihuana between CA members. Defendants rent lockers to members who want to sell their excess marihuana. They, or another CA employee, supervise members' inspections of the samples of the marihuana strains stored in the lockers, and after a member selects a strain of marihuana to purchase, they weigh and package the marihuana. They also collect the purchase price. After a 20 percent service fee is deducted for CA, the remainder of the purchase money is given to the CA member who supplied the marihuana. Without defendants' involvement, there would be no sales. Under these circumstances, defendants are not just "facilitating" the transfers of marihuana between CA members, but they are full participants in the selling of marihuana.

C. THE SELLING OF MARIHUANA

The heart of this case is whether patient-to-patient sales of marihuana are in accordance with the provisions of the MMMA. To answer this question, we must examine not only the provisions of the MMMA but also article 7 of the PHC, MCL 333.7101 *et seq.*, which governs the manufacturing, distributing, prescribing, and dispensing of controlled substances.

1. THE PUBLIC HEALTH CODE

The PHC is designed to protect the health, safety, and welfare of the people of the state of Michigan. MCL 333.1111(2); *People v Derror*, 475 Mich 316, 329; 715 NW2d 822 (2006), overruled on other grounds *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010). In furtherance of that mandate, article 7 of the PHC regulates "controlled substances." "Controlled substances" are those drugs, substances or immediate precursors included in schedules 1 to 5. MCL 333.7104(2).

Controlled substances are assigned to one of five schedules according to their potential for abuse, the level of dependency to which abuse may lead, and medically accepted uses. The controlled substances listed in schedule 1 have been found by the Michigan board of pharmacy to have a "high potential for abuse" and have "no accepted medical use in treatment in the United States or lack[] accepted safety for use in treatment under medical supervision." MCL 333.7211. Schedule 2 controlled substances have "currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions." MCL 333.7213(b). They have a high potential for abuse, and abuse of them may lead to severe psychic or physical dependence. MCL 333.7213(a), (c). The controlled substances listed in schedules 3, 4, and 5 have currently accepted medical use in treatment in the United States and have lessening potential for abuse and dependence. MCL 333.7215; MCL 333.7217; MCL 333.7219.

The PHC regulates who may "manufacture," "distribute," "prescribe," or "dispense" controlled substances. See, e.g., MCL 333.7303(1) (requiring that anyone who engages in these activities shall obtain a license issued by the Michigan board of pharmacy); MCL 333.7331(1) (stating that only a "practitioner" who holds a license to prescribe or dispense controlled substances may purchase from a licensed manufacturer or distributor a schedule 1 or 2 controlled substance). Specifically, we note that a "practitioner"[8] may dispense a schedule 2 controlled

[8] A "practitioner" is defined as:

> (a) A prescriber or pharmacist, a scientific investigator as defined by rule of the administrator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state . . . .
>
> (b) A pharmacy, hospital, or other institution or place of professional practice licensed, registered, or otherwise permitted to distribute, prescribe, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state. [MCL 333.7109(3).]

substance on the receipt of a prescription of a practitioner on a prescription form. MCL 333.7333(2). A "practitioner" may dispense schedule 3, 4, or 5 controlled substances on the receipt of a written or oral prescription of a practitioner. MCL 333.7333(4). However, MCL 333.7333 contains no provision for the dispensing of schedule 1 controlled substances.

The PHC prohibits a person from knowingly or intentionally possessing or using a controlled substance unless the substance "was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article." MCL 333.7403(1); MCL 333.7404(1). In addition, the PHC prohibits a person, unless authorized by article 7, from manufacturing, creating, delivering, or possessing a controlled substance, or possessing the substance with the intent to do any of those acts. MCL 333.7401(1). The PHC imposes criminal sanctions for the unauthorized possession, use, manufacture, creation, and delivery of controlled substances. The severity of the sanctions generally depends on which schedule the controlled substance is placed and the amount (in grams) of the controlled substance. See MCL 333.7401(2); MCL 333.7403(2); MCL 333.7404(2).

The PHC classifies marihuana as a schedule 1 controlled substance. MCL 333.7212(1)(c). This means that the Michigan board of pharmacy has found that marihuana "has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." MCL 333.7211. Except as authorized by article 7 of the PHC, which allows, under certain circumstances, a "practitioner" to conduct research with schedule 1 controlled substances, MCL 333.7306(3), the possession and use of marihuana are misdemeanor offenses, MCL 333.7403(2)(d); MCL 333.7404(2)(d), and the manufacture, creation, and delivery of marihuana are felony offenses, MCL 333.7401(2)(d).

2. THE MICHIGAN MEDICAL MARIHUANA ACT

The MMMA stands in sharp contrast to the PHC. Unlike the PHC's classification of marihuana as a schedule 1 controlled substance, the MMMA, which was enacted as the result of an initiative adopted by voters in the November 2008 election, *Redden*, 290 Mich App at 76, declares that as discovered by modern medical research there are beneficial uses for marihuana in treating or alleviating the symptoms associated with a variety of debilitating medical conditions. MCL 333.26422(a). Nonetheless, the MMMA operates under the framework, established by the PHC, that it is illegal to possess, use, or deliver marihuana. The MMMA did not legalize the possession, use, or delivery of marihuana. *People v King*, ___ Mich App ___; ___ NW2d ___ (2011); see also *Redden*, 290 Mich App at 92 (O'CONNELL, P.J., concurring) ("The MMMA does not repeal any drug laws contained in the Public Health Code, and all persons under this state's jurisdiction remain subject to them."). Rather, the MMMA sets forth very limited circumstances in which persons involved with the use of marihuana, and who are thereby violating the PHC, may avoid criminal liability. *King*, ___ Mich App at ___; see also *People v Anderson*, ___ Mich App ___; ___ NW2d ___ (2011) (M. J. KELLY, J., concurring).

To provide a limited exemption from the PHC's regulations and criminal sanctions for the possession, use, and delivery of marihuana, the MMMA provides that "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of th[e] act." MCL 333.26427(a). It further provides that "[a]ll other acts and parts of

acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427(e). The MMMA broadly defines the "medical use" of marihuana as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(e).[9]

The MMMA provides a registration system for "qualifying patients" and "primary caregivers." The MDCH shall issue a "registry identification card" to a "qualifying patient," defined as "a person who has been diagnosed by a physician as having a debilitating medical condition," MCL 333.26423(h), who submits the necessary application and information. MCL 333.26426(a), (c). If the qualifying patient has a "primary caregiver," defined as "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana . . . ," MCL 333.26423(g), the qualifying patient shall inform the MDCH of the primary caregiver and state whether the qualifying patient or the primary caregiver will possess marihuana plants for the qualifying patient's medical use. MCL 333.26426(a)(5), (6). If the MDCH approves the qualifying patient's application and the qualifying patient has identified a primary caregiver, the MDCH shall also issue a registry identification card to the primary caregiver. MCL 333.26426(d). The registry identification cards must have a clear designation whether the qualifying patient or the primary caregiver is allowed to possess marihuana plants. MCL 333.26426(e)(6). "[E]ach qualifying patient can have no more than 1 primary caregiver, and a primary caregiver may assist no more than 5 qualifying patients with their medical use of marihuana." MCL 333.26426(d).

The issues raised in this appeal directly involve several provisions of § 4 of the MMMA. Section 4 grants immunity to qualifying patients and primary caregivers who have been issued a registry identification card. MCL 333.26424(a), (b); see also *Anderson*, ___ Mich App at ___ (M. J. KELLY, J., concurring). MCL 333.26424(a) provides:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of that does not exceed

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[9] The MMMA does not allow for the "medical use" of marihuana in all circumstances. See MCL 333.26427(b). A person may not possess marihuana or engage in the "medical use" of marihuana in a school bus, on the grounds of a preschool or a primary or secondary school, or in a correctional facility, MCL 333.26427(b)(2); a person may not smoke marihuana on any form of public transportation or in a public place, MCL 333.26427(b)(3); a person may not operate a motor vehicle, aircraft, or motor boat while under the influence of marihuana, MCL 333.26427(b)(4); and a person may not use marihuana if the person does not have a serious or debilitating medical condition, MCL 333.26427(b)(5).

> 2.5 ounces or usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

Similar immunity is granted to a primary caregiver. MCL 333.26424(b) provides:

> A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the [MDCH's] registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of that does not exceed:
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> (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the [MDCH's] registration process; and
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> (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and
>
> (3) any incidental amount of seeds, stalks, and unusable roots.

"A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana." MCL 333.26424(e). This compensation does not constitute the sale of marihuana. *Id.*

If a qualifying patient or primary caregiver is in possession of a registry identification card and an amount of marihuana that does not exceed that allowed by the MMMA, § 4(d) provides a presumption that the qualifying patient or the primary caregiver "is engaged in the medical use of marihuana in accordance with th[e] act[.]" MCL 333.26424(d)(1), (2). "The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with th[e] act." MCL 333.26424(d)(2).

In addition, § 4(i) provides immunity for a "person" who assists a registered qualifying patient with "using or administering marihuana." MCL 333.26424(i) provides:

> A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

Finally, § 4(k) imposes criminal sanctions on any registered qualifying patient or registered primary caregiver who sells marihuana to a person that is not allowed to use marihuana for medical purposes. MCL 333.26424(k). The patient's or caregiver's registry identification card shall be revoked and the person is guilty of a felony punishable for not more than 2 years' imprisonment or a fine of not more than $2,000, or both, in addition to any other penalties for the distribution of marihuana. *Id.*[10]

3. DEFENDANTS' OPERATION OF CA

Having set forth the relevant statutory provisions of the MMMA and the PHC, we now apply the provisions of the MMMA to defendants' operation of CA to determine whether it is in accordance with the MMMA or remains illegal under the PHC.[11] Unlike the PHC, which contains provisions for dispensing schedule 2, 3, 4, and 5 controlled substances, the MMMA has no provision governing the dispensing of marihuana. While the MMMA indicates that a qualifying patient may obtain marihuana from his or her primary caregiver, see MCL 333.26424(b)(1), the MMMA does not state how a primary caregiver or a qualifying patient, if the patient does not have a primary caregiver, is to obtain marihuana. Specifically, in regard to this case, the MMMA does not authorize marihuana dispensaries. In addition, the MMMA does not expressly state that patients may sell their marihuana to other patients. Defendants, therefore, are left with inferring the authority to operate a dispensary from various provisions of the MMMA.

Defendants rely on various provisions of § 4 to argue that the MMMA authorizes patient-to-patient sales of marihuana and that they, as registered primary caregivers and a registered qualifying patient in operating CA, may actively participate in and carry out those sales and receive compensation for their assistance. Defendants argue that because the "medical use" of marihuana permits the "delivery" and "transfer" of marihuana, patients can transfer marihuana between themselves. They assert that § 4(i) entitles them to assist registered qualifying patients with patient-to-patient transfers and that § 4(e) allows them to be compensated for their assistance. Defendants also assert that they are entitled to the presumption of § 4(d) that they are engaged in the "medical use" of marihuana.

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Initially, we address defendants' contention and the trial court's finding that defendants are entitled to the presumption under § 4(d) that they are engaged in the "medical use" of marihuana when operating CA. Under § 4(d), there is a presumption that a qualifying patient or a primary caregiver is engaged in the "medical use" of marihuana in accordance with the

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[10] Section 8 of the MMMA provides an affirmative defense of "medical purpose" for any prosecution involving marihuana. MCL 333.26428. Defendants do not rely on § 8 in arguing that their operation of CA is accordance with the provisions of the MMMA and, therefore, it is not at issue in this case.

[11] Defendants do not dispute that the operation of CA is prohibited by the PHC.

MMMA if the patient or caregiver is in possession of (1) a registry identification card and (2) an amount of marihuana that does not exceed the amount allowed by the MMMA. MCL 333.26424(d)(1), (2).

However, the presumption may be rebutted. It "may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, *in accordance with this act.*" MCL 333.26424(d)(2) (emphasis added). It is well established that in construing a statute a court must give effect to every provision, if possible. *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 558; 777 NW2d 1 (2009). In order to give meaning to the phrase "in accordance with this act," we hold that the presumption may be rebutted with evidence that the conduct of the patient or the caregiver was not in accordance with the provisions of the MMMA. The inclusion of the phrase "in accordance with the act" reiterates the overarching principle of the MMMA, stated in § 7(a), that the "medical use" of marihuana is only permitted to the extent that it is carried out in accordance with the provisions of the MMMA.

Assuming that defendants, who are in possession of registry identification cards, possess an amount of marihuana that does not exceed the amount allowed under the MMMA,[12] the resulting presumption that defendants are engaged in the "medical use" of marihuana is rebutted.

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[12] The trial court held that defendants were entitled to the presumption based on its erroneous finding that defendants do not possess the marihuana that CA members place in the rented lockers. We observe that although there were no findings by the trial court on whether the amount of marihuana stored in the lockers ever exceeded the amount that defendants are entitled to possess under the MMMA, based on the evidence presented, it could reasonably be inferred that defendants possessed more marihuana than allowed by the MMMA.

McQueen, as a registered qualifying patient and the current primary caregiver for three qualifying patients, may possess 10 ounces of usable marihuana. Taylor, as the primary caregiver for two qualifying patients, may possess five ounces of marihuana. CA has 27 lockers available for rent. If each locker is rented, and each member renting a locker places 2.5 ounces of marihuana in the locker, then defendants possess as much as 67.5 ounces of marihuana. This greatly exceeds the amount of marihuana that defendants are allowed to possess. However, McQueen testified that the number of lockers rented fluctuates; the number of rented lockers has been as high as 23 or 24 and as low as seven or ten. Taylor testified that he did not believe the amount of marihuana placed in the lockers ever exceeded the amounts that he and McQueen were allowed to possess. Nonetheless, there was no evidence that defendants have instituted any procedure or plan to ensure that the amount of marihuana stored in the lockers does not exceed the amount that defendants may possess. In addition, the evidence established that in the first two and a half months of operating CA, defendants sold 19 pounds—or 304 ounces—to CA members. This large amount of marihuana that has passed through defendants' possession provides a strong inference that defendants in their operation of CA have, in fact, possessed more marihuana than they are authorized to possess under the MMMA.

It is rebutted because defendants' conduct relating to marihuana is not in accordance with the MMMA. As this opinion establishes, *infra*, defendants, through their operation of CA, are actively engaged in patient-to-patient sales of marihuana, and the MMMA does not authorize those sales. Accordingly, defendants are not entitled to the presumption that they are engaged in the "medical use" of marihuana.[13]

b

Although defendants are not entitled to the presumption that they are engaged in the "medical use" of marihuana, we must still determine whether, in fact, their operation of CA is in accordance with the provisions of the MMMA. The foundation of defendants' argument for why the operation of CA complies with the MMMA is that because the "medical use" of marihuana includes the "delivery" and "transfer" of marihuana. MCL 333.26423(e). According to defendants, patients are engaged in the "medical use" of marihuana when they transfer marihuana to other patients.

The MMMA does not define the terms "delivery" or "transfer." But these two words have been given or have acquired peculiar meanings in regard to controlled substances, and we construe them according to those meanings. MCL 8.3a; *People v Edenstrom*, 280 Mich App 75, 80; 760 NW2d 603 (2008). The "delivery" of a controlled substance is the "actual, constructive, or attempted transfer from 1 person to another of [the] controlled substance, whether or not there is an agency relationship." MCL 333.7105(1); *People v Williams*, 268 Mich App 416, 422; 707 NW2d 624 (2005).[14] The "transfer" of a controlled substance is the conveyance of the controlled substance from one person to another. *People v Schultz*, 246 Mich App 695, 703-704; 635 NW2d 491 (2001). In this case, there was no dispute before the trial court that members, utilizing the services that defendants provide in operating CA, deliver or transfer marihuana to

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[13] We note that, although not raised below or on appeal, there is evidence from which one could conclude that defendants' operation of CA is for a purpose other than alleviating patients' debilitating medical conditions. Defendants organized CA as a limited liability company, and implemented a business plan whereby they operate CA by obtaining possession of and selling marihuana. Although defendants make members' excess marihuana available to other patients who may not have the ability to grow marihuana themselves, the evidence shows that this occurs through defendants' operation of CA as a business. The operation of CA is indistinguishable from the operation of a neighborhood pharmacy. The purpose of CA and that of a neighborhood pharmacy is to provide medications to alleviate the medical needs of their customers. However, a pharmacy could not continue to operate without charging for its services. Likewise, defendants must and do charge for the services offered by CA. And just as is the case with a neighborhood pharmacy, CA could not continue to operate without charging for its services. This evidence of a business purpose indicates that defendants' purpose for operating CA is pecuniary.

[14] A person constructively delivers a controlled substance when he or she "directs another person to convey the controlled substance under [his or her] direct or indirect control to a third person or entity." *People v Plunkett*, 281 Mich App 721, 728; 760 NW2d 850 (2008), rev'd on other grounds 485 Mich 50 (2010).

other CA members. A member rents a locker and places his or her excess marihuana in a locker because the member wants to make it available to other members, and the member gives CA consent to convey the marihuana to other CA members.

However, members, aided by the services of defendants, do not simply "deliver" or "transfer" marihuana to other members. Rather, the members and CA employees "deliver" or "transfer" the marihuana to other members for a price. A "sale" is "[t]he transfer of property or title for a price." Black's Law Dictionary (7th ed); see also MCL 440.2106(1) (a "sale," as defined by the Uniform Commercial Code, MCL 440.1101 *et seq.*, is "the passing of title from the seller to the buyer for a price"). Here, the marihuana that a member has placed in a CA locker is only delivered to another member if that member pays the purchase price for the marihuana. After a 20 percent service fee is deducted and retained by CA, the remainder of the purchase money is given to the CA member that rented the locker. Accordingly, members of CA that supply the marihuana, in utilizing the services that defendants provide through their operation of CA, are not just delivering or transferring their excess marihuana; they are selling their excess marihuana.

The question becomes whether the "medical use" of marihuana permits the "sale" of marihuana. We hold that it does not because the "sale" of marihuana is not the equivalent to the "delivery" or "transfer" of marihuana. The "delivery" or "transfer" of marihuana is only one component of the "sale" of marihuana—the "sale" of marihuana consists of the "delivery" or "transfer" *plus* the receipt of compensation. The "medical use" of marihuana, as defined by the MMMA, allows for the "delivery" and "transfer" of marihuana, but not the "sale" of marihuana. MCL 333.26423(e). We may not ignore, or view as inadvertent, the omission of the term "sale" from the definition of the "medical use" of marihuana. See *People v Burton*, 252 Mich App 130, 135; 651 NW2d 143 (2002) ("It is not the job of the judiciary to write into a statute a provision not included in its clear language."). Therefore, the "medical use" of marihuana does not include the "sale" of marihuana, i.e., the conveyance of marihuana for a price.[15]

We note that two other provisions of the MMMA, § 4(e) and § 4(k), speak of the sale or of the selling of marihuana. However, neither provision supports defendants' proposition that the MMMA authorizes the "sale" of marihuana.

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[15] We emphasize that our conclusion that the "medical use" of marihuana does not include the "sale" of marihuana does not lead to the conclusion that the "sale" of a controlled substance is not prohibited by the PHC, as argued by amicus curiae Michigan Association of Compassion Center. The PHC does not expressly prohibit a person from engaging in the "sale" of a controlled substance. It only states that, except as authorized by article 7 of the PHC, a person shall not "deliver" or possess with intent to deliver a controlled substance. MCL 333.7401(1). However, because the "delivery" of a controlled substance is a necessary component to the "sale" of a controlled substance, one cannot engage in the "sale" of marihuana without violating the PHC. A person who sells a controlled substance necessarily "delivers" the controlled substance, whether it be an actual, constructive, or attempted delivery, and he or she has, therefore, engaged in a criminal offense.

First, § 4(e) authorizes a registered primary caregiver to receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. MCL 333.26424(e). However, § 4(e) goes on to state that "[a]ny such compensation shall not constitute the sale of controlled substances." *Id.* This quoted sentence would not be needed if the definition of the "medical use" of marihuana included the "sale" of marihuana. No statutory provision should be rendered nugatory. *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007). Consequently, § 4(e) actually supports the conclusion that the "medical use" of marihuana does not include the "sale" of marihuana.

Second, § 4(k) states that any registered qualifying patient or registered primary caregiver who sells marihuana to someone who is not permitted to use marihuana for medical purposes shall have his or her registry identification card revoked and is guilty of a felony. MCL 333.26424(k). We agree with Judge O'CONNELL that the fact that § 4(k) "specifies a particular punishment for a specific type of violation does not mean that, by default, the sale of marijuana to someone who *is* allowed to use marijuana for medical purposes under this act is permitted." If the drafters of the MMMA intended to authorize the sale of marihuana from one qualifying patient to another, "they would have included the term 'sale' in the definition of 'medical use.'" *Redden*, 290 Mich App at 115 (O'CONNELL, P.J., concurring) (emphasis in original).

In conclusion, the "medical use" of marihuana does not include patient-to-patient "sales" of marihuana, and neither § 4(e) nor § 4(k) permits the sale of marihuana. Defendants, therefore, have no authority under the MMMA to operate a marihuana dispensary that actively engages in and carries out patient-to-patient sales of marihuana.[16] Accordingly, defendants' operation of CA is not in accordance with the provisions of the MMMA.[17]

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[16] In addition, because the "medical use" of marihuana does not include the "sale" of marihuana, defendants are not entitled to receive compensation for the costs of assisting in the "sale" of marihuana between CA members. See MCL 333.26424(e) ("A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana."). Also, in regard to § 4(e), the parties disagree whether a registered primary caregiver may receive compensation for the costs associated with assisting *any* registered qualifying patient in the "medical use" of marihuana or whether a registered primary caregiver may only receive compensation for assisting the qualifying patients with whom he or she is connected through the MDCH registry process. Because of our conclusion that the "medical use" of marihuana does not include the "sale" of marihuana, we need not, and therefore do not, resolve this dispute.

[17] Plaintiff and the Attorney General, as amicus curiae, ask us to hold that patient-to-patient conveyances of marihuana that are without compensation are not permitted by the MMMA. Their position is that the only conveyance of marihuana permitted by the MMMA is the conveyance of marihuana from a primary caregiver to his or her patients. Because defendants' operation of CA involves the selling of marihuana, and because the selling of marihuana is not permitted by the MMMA, we need not, and do not, reach the issue whether the MMMA permits uncompensated patient-to-patient conveyances of marihuana.

c

Further, even if the "medical use" of marihuana included the "sale" of marihuana, defendants are not entitled to immunity afforded under § 4 from arrest, prosecution, penalty in any manner, or the denial of any right or privilege.

We note that sections 4(a) and 4(b) grant immunity to qualifying patients and primary caregivers who have been issued and possess a registry identification card. And while defendants are primary caregivers who have been issued and possess registry identification cards, and McQueen is also a qualifying patient who has been issued and possesses a registry identification card, defendants do not claim they are entitled to immunity under either § 4(a) or § 4(b). Rather, they claim that they are entitled to immunity under § 4(i).

Under § 4(i), "[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 marihuana in accordance with this act, *or* for assisting a registered qualifying patient with *using or administering* marihuana." MCL 333.26424(i) (emphasis added). The word "or" is a disjunctive term. *People v Kowalski*, ___ Mich ___; ___ NW2d ___ (2011). It indicates a choice between two alternatives. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). Thus, § 4(i) provides immunity to distinctly two different persons: (1) to the person who is "in the presence or vicinity of the medical use of marihuana" and (2) to the person who is "assisting a registered qualifying patient with using or administering marihuana." Defendants do not claim immunity based on being in the vicinity of the "medical use" of marihuana; they claim immunity based on their assistance to registered qualifying patients with "using or administering" marihuana. According to defendants, they assist registered qualifying patients with using or administering marihuana when they transfer marihuana between CA members.

The MMMA does not define the phrase "using or administering" marihuana. Importantly, the phrase cannot be given the same definition as the "medical use" of marihuana. The inclusion of the phrase "medical use" in the vicinity clause of § 4(i) and its omission and the presence of the phrase "using or administering" in the assistance clause must be viewed as intentional. See *People v Barrera*, 278 Mich App 730, 741-742; 752 NW2d 485 (2008) ("The omission of a provision in one part of a statute that is included in another should be construed as intentional, and provisions not included by the [drafters of the statute] should not be included by the courts.") (internal quotation marks and citation omitted). Accordingly, the phrase "using or administering" marihuana must be given a meaning distinct from the definition of the "medical use" of marihuana.

Because the word "administering" is grouped with the word "using," the two words must be given related meaning. See *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (stating that words grouped in a list must be given related meaning). The word "use" is included in the definition of the "medical use" of marihuana. MCL 333.26423(e). Accordingly, we hold that whatever the phrase "using or administering marihuana" means, the phrase has a more limited meaning than that of the "medical use" of marihuana.

The word "use" has numerous dictionary definitions, as does the word "administer." However, each word has a definition that relates directly to controlled substances or medicines, and we find those definitions to be the most relevant. To "use" means "to drink, smoke, or ingest habitually: *to use drugs*." *Random House Webster's College Dictionary* (1992). To "administer" means "to give or apply: *to administer medicine*." *Id.* This definition of "administer" is consistent with the PHC definition of "administer." The PHC defines "administer" as "the direct application of a controlled substance, whether by injection, inhalation, ingestion, or other means, to the body of a patient or research subject by a practitioner . . . ." MCL 333.7103(1). Employing these definitions, we hold that a person assists a registered qualifying patient with "using or administering" marihuana when the person assists the patient in preparing the marihuana to be consumed in any of the various ways that marihuana is commonly consumed or by physically aiding the patient in consuming the marihuana.

Here, defendants, through the operation of CA, participate in the "sale" of marihuana between CA members. There is no evidence that defendants assist purchasing registered qualifying patients in preparing the marihuana to be consumed. Likewise, there is no evidence that defendants physically aid the purchasing patients in consuming marihuana. Because defendants are engaged in the selling of marihuana, which is not the "using or administering" of marihuana, defendants are not entitled to immunity granted by § 4(i).

D. PUBLIC NUISANCE

For the reasons discussed above, defendant's operation of CA is not in accordance with the provisions of the MMMA. We, therefore, agree with plaintiff that defendants' operation of CA is a public nuisance and must be enjoined.

A public nuisance is "an unreasonable interference with a common right enjoyed by the general public." *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 427; 770 NW2d 105 (2009) (internal quotation marks and citation omitted). "Unreasonable interference" includes conduct that "(1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting significant effect on these rights." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). Actions in violation of law constitute a public nuisance, and the public is presumed harmed from the violation of a statute enacted to preserve public health, safety, and welfare. *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 44; 783 NW2d 515 (2010).

Because defendants possess marihuana, 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 marihuana between CA members, but the "medical use" of marihuana does not include the "sale" of marihuana. In addition, even if defendants were engaged in the "medical use" of marihuana, they would not be entitled to the immunity granted by § 4(i) because defendants are not assisting registered qualifying patients with "using or administering" marihuana.

The PHC is designed to protect the health, safety, and welfare of the people of the state of Michigan, MCL 333.1111(2); *Derror*, 475 Mich at 329, and, therefore, the public is presumed harmed by defendants' violation. *PowerPick Player's Club of Mich*, 287 Mich App at 44-45. Accordingly, we conclude that defendants' operation of CA is a public nuisance, *Id.*; *Cloverleaf Car Co*, 213 Mich App at 190, and the trial court erred in holding otherwise. The trial court's order denying plaintiff's request for a preliminary injunction is reversed. We remand for judgment in favor of plaintiff on its claim that defendants' operation of CA is a public nuisance. The judgment shall include the entry of any order that may be necessary to abate the nuisance and to enjoin defendants' continuing operation of CA. See *PowerPick Player's Club of Mich*, 287 Mich App at 48, 54.

Reversed and remanded for entry of judgment in favor of plaintiff and further proceedings not inconsistent with this opinion. We do not retain jurisdiction. This opinion is to have immediate effect. MCR 7.215(F)(2).

No taxable costs pursuant MCR 7.219, a public question involved.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens