NAMSDL Case Law Update

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In This Issue

This issue of *NAMSDL Case Law Update* focuses on several ongoing cases related to the access to and use of prescription monitoring program ("PMP") records. Summarized cases include a recent, appellate-level decision from Washington state regarding the constitutionality of accessing those records. In upcoming issues of the *Case Law Update*, NAMSDL will focus on cases involving lawsuits against pharmaceutical manufacturers/distributors, drugged driving and marijuana.

CASES IN THIS ISSUE

Eve Davis vs. Wal-Mart Stores East, L.P., et al., U.S. Court of Appeals for the Fourth Circuit, Case No. 16-1677.

Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. The Plaintiff is a woman who spent 16 days in jail after arrest for attempting to fill a suspected fraudulent prescription at a Wal-Mart pharmacy in Virginia. The state dropped the charges after determining that the prescription was valid. Plaintiff sued Wal-Mart, the Wal-Mart pharmacist who reported the Plaintiff to the police, and the deputy who arrested her. In her complaint, Plaintiff asserted, among other things, that: (1) Wal-Mart and the pharmacist committed negligence and negligence *per se* in knowingly disclosing Plaintiff's prescription monitoring program ("PMP") information to individuals not allowed under Virginia law to receive such information; and (2) Wal-Mart failed to adequately train its employees on the proper uses of the PMP. In April 2016, the court dismissed (without prejudice) all counts against Wal-Mart and the pharmacist. The court dismissed all claims against the police officer (with prejudice) in May 2016. The Plaintiff appealed the decision to the U.S. Court of Appeals for the Fourth Circuit. Since our last update on this case, the

parties have finished filing appellate briefs. The Fourth Circuit has not issued a decision to date, nor has it scheduled any oral argument.

Oregon Prescription Drug Monitoring Program, et al. vs. United States Drug Enforcement Administration, U.S. Court of Appeals for the Ninth Circuit, Case No. 14-35402. Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. In 2012, the Oregon PMP sought a declaratory judgment against the U.S. Drug Enforcement Administration ("DEA") that the PMP is not obligated to respond to DEA's administrative subpoenas for PMP information because Oregon law requires law enforcement to possess a search warrant for it. The American Civil Liberties Union ("ACLU") intervened as a plaintiff in the matter on behalf of five individuals (four patients and one physician) to argue with respect to their specific protected health information and Fourth Amendment rights. In 2014, the federal district court granted ACLU's motion for summary judgment on grounds that patients and physicians each have a subjective expectation of privacy in their prescription and prescribing records. As a result, law enforcement must obtain a search warrant before receiving PMP information in Oregon. DEA appealed the decision to the U.S. Court of Appeals for the Ninth Circuit. Although the parties filed their main briefs on appeal with the Ninth Circuit more than two years ago, the court only held oral argument in November 2016. In addition, in November 2016, the court approved an *amicus curiae* brief filed in support of the Plaintiffs-Appellees by the Oregon, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, and Washington State Medical Associations, as well as the American Medical Association. To date, the Ninth Circuit has not issued a decision.

Alwin Lewis vs. Superior Court for the State of California and the Medical Board of California, Supreme Court of California, No. S219811. Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. The Plaintiff, a doctor, filed this case in September 2012, alleging that the Medical Board of California ("Board") violated his patients' privacy rights when the Board accessed his prescription records for all patients through the state's PMP during the Board's investigation into an administrative complaint against him. After the investigation, the Board disciplined Plaintiff for failing to maintain accurate prescription records. Subsequently, Plaintiff sought judicial review of the Board's ruling. At the trial level, Plaintiff argued that the Board violated his patients' informational privacy rights under the California Constitution by accessing their prescription records in the PMP. The trial court denied his petition, stating that the right to privacy is not absolute and must be weighed against the compelling state interest in preventing prescription drug abuse. At the intermediate appellate level, Plaintiff argued that the law allowing the Board to review patient records in the PMP without a warrant or subpoena violated the Fourth Amendment of the U.S. Constitution and Article I of the California Constitution. The Court of Appeals disagreed and found that there is a lowered expectation of privacy in prescription records and, further, that even if the expectation of privacy is heightened as it is for medical records, the State has a compelling interest in controlling the diversion and abuse of controlled substances and such interest would trump any such expectation of privacy. Plaintiff then asked the Supreme Court of California for review.

Since the case progressed to the Supreme Court, numerous *amicus curiae* have filed briefs in support of the Plaintiff, including the American Civil Liberties Union and various California and American medical associations. The Center for Public Interest Law filed an *amicus* brief in support of the Board. In November 2016, the court advised the parties that oral argument would be set "within the next few months." To date, the court has not scheduled oral argument in the matter.

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Dale E. Alsager, D.O. v. Board of Osteopathic Medicine and Surgery, Department of Health, State of Washington, Court of Appeals of Washington, 196 Wash.App. 653, 384 P.3d 641, November 15, 2016, Case No. 47367-4-II (published in part). In 2008, the Washington Board of Osteopathic Medicine ("Board") sanctioned Plaintiff, a doctor, for "inappropriately prescribing potentially dangerous medications without conducting necessary patient examinations." As part of the sanction, the Board prohibited Plaintiff from prescribing certain controlled substances until he completed an approved residency or pain management training course. Over the next several years, the Board investigated Plaintiff multiple times for violating the prescribing restriction. During each investigation, Plaintiff refused to turn over his patients' medical records and prescribing information on grounds that his Fourth and Fifth Amendment rights protected him from compelled cooperation. In the absence of Plaintiff's cooperation, the Board's investigator obtained the prescription records through Washington's PMP. Ultimately, in 2014, the Board revoked Plaintiff's license to practice medicine for unprofessional conduct.

Plaintiff sought judicial review to overturn the Board's decision. A Washington trial court denied the request and Plaintiff appealed. According to the state appellate court, Plaintiff's main arguments on appeal were: (1) the Board violated his constitutional right against compelled self-incrimination by requiring his cooperation in the investigation; and (2) the Board engaged in a constitutionally unlawful search and seizure by searching PMP records for the prescriptions he wrote. The appellate court rejected both arguments. With respect to Plaintiff's contention about the constitutionality of the search of PMP records, the court expressly adopted the reasoning of *Murphy v. State*, 115 Wash.App. 297, 62 P.3d 533 (2003), and "extend[ed] it to apply to prescribing physicians." In *Murphy*, the Supreme Court of Washington held that a patient has only a limited expectation of privacy in prescription records, which "must be balanced against the need for comprehensive and effective governmental oversight of prescription narcotic use and distribution." With respect to Plaintiff's prescribing records, the court held that "prescription records kept under the prescription monitoring program, either by a pharmacist or as part of the state database, are not protected from all governmental examination by the Fourth Amendment" or Washington's Constitution. Instead, prescriptions involving controlled substances are "subject to legitimate oversight by appropriate agents of the State if reasonably tailored to the enforcement of state law and if effective safeguards against unauthorized further disclosure are present."

Daniel Maddox vs. City of Brandon, Mississippi, et al., U.S. District Court for the Southern District of Mississippi, Case No. 3:15-cv-00866. Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. Plaintiff filed this case against the City of Brandon, Mississippi and others asserting that one Defendant, an investigator with the Brandon Police Department, improperly accessed Plaintiff's PMP records without a warrant, subpoena, or other judicial process. Plaintiff alleges violations of the Fourth Amendment prohibition against unreasonable search and seizure; Fifth and Fourteenth Amendment prohibitions against deprivation of life, liberty, or property without due process of law; and invasion of privacy. Defendants answered the Complaint and denied any wrongdoing. In the fall of 2016, both sides filed motions for summary judgement, which are pleadings that assert that the moving party is entitled to judgment as a matter of law regardless of any facts the other side can prove. Both motions were filed "under seal" (presumably due to the presence of individual health records), and thus cannot be reviewed by the public. In November 2016, the district court judge cancelled a scheduled settlement conference and advised that he would schedule another conference after his decision on the motions, if necessary. To date, the court has not issued a ruling.

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