IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 11-0475

MONTANA MARIJUANA GROWERS ASSOCIATION, INC.; COURIER 1; COURIER 2; CAREGIVER 1; CAREGIVER 2; AND CAREGIVER 3,

Plaintiffs and Appellants,

v.

ED CORRIGAN, COUNTY ATTORNEY FOR THE COUNTY OF FLATHEAD,

Defendant and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Stewart E. Stadler, Presiding

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STATEMENT OF THE ISSUE

Did the district court properly grant the Appellee's (Flathead County Attorney's) motion for summary judgment against Appellants who asked the district court to declare that under the 2009 Medical Marijuana Act, caregiver to caregiver transactions, including those conducted through an agent, such as buying, selling, and transporting marijuana, were lawful?

STATEMENT OF THE CASE AND FACTS

On March 23, 2011, the Montana Marijuana Growers Association, Inc.; Courier 1; Courier 2; Caregiver 1; Caregiver 2; and Caregiver 3 (Appellants)[1] filed a complaint for declaratory judgment in district court against the Flathead County Attorney, Ed Corrigan (Corrigan). (D.C. Doc. 1.) Appellants asked for a declaratory judgment that pursuant to the 2009 Medical Marijuana Act (MMA): (1) a caregiver, as defined by the 2009 MMA could deliver, transport, or transfer marijuana and paraphernalia to another caregiver; (2) a caregiver could deliver, transport, or transfer marijuana to another caregiver through an agent; and (3) a caregiver was allowed to cultivate and manufacture marijuana as an agent or contractor for another caregiver. (D.C. Doc. 1 at 6-7.)

[1] Due to the number of and the anonymity of most of the Appellants, the State will refer to them collectively as "Appellants" throughout the brief.

Courier 1 is a resident of and caregiver in Flathead County. Courier 2 is a resident of and patient in Flathead County. Caregivers 1 and 2 are residents of and caregivers in Flathead County. Caregiver 3 is a resident of and caregiver in Cascade County. (D.C. Doc. 1 at 3.) On February 4, 2011, Couriers 1 and 2 were arrested while they were transporting several pounds of marijuana from Kalispell to Caregiver 3 in Cascade County. The Flathead County Attorney's Office subsequently charged Couriers 1 and 2 with criminal possession of dangerous drugs with intent to distribute. (D.C. Doc. 1 at 3.)

On April 18, 2011, Corrigan filed an answer. (D.C. Doc. 6.) Corrigan subsequently filed a motion for summary judgment and supporting brief. Corrigan asked that the district court grant summary judgment in Corrigan's favor and enter a declaratory judgment that the 2009 MMA did not permit the activities Appellants advocate that it allowed. (D.C. Doc. 8.) Appellants filed a brief in response and objected to Corrigan's motion for summary judgment and requested the court set the matter for a hearing. (D.C. Docs. 11, 13.)

The district court held a hearing on July 6, 2011. (7/6/11 Transcript of Hearing [Tr.].) The parties did not present testimony at the hearing but rather orally argued their respective legal positions, after which the parties and the court deemed the matter submitted. (D.C. Doc. 18.) During the hearing, one of the Appellants' attorneys advocated not only caregiver to caregiver transactions were

permissible under the 2009 MMA, but an agent, who may not be licensed or registered under the MMA, could act on the caregiver's behalf. (Tr. at 7-9.)

On July 21, 2001, the district court entered an order, with its rationale, granting Corrigan's motion for summary judgment in all regards except with respect to Corrigan's request for an award of attorney's fees and costs. (D.C. Doc. 19, attached as App. A.) The district court concluded that the 2009 MMA

> does not permit a caregiver to deliver, transport, or transfer marijuana and its paraphernalia to another caregiver, either individually or through an agent or contractor; nor does it permit a caregiver to cultivate and manufacture marijuana as an agent or contractor for another caregiver.

(App. A at 12.) Appellants filed a notice of appeal. (D.C. Doc. 20.)

SUMMARY OF THE ARGUMENT

The plain and unambiguous language of the 2009 MMA supports the district court's order granting Corrigan summary judgment. The 2009 MMA did not explicitly or implicitly allow for caregiver to caregiver transactions. Moreover, there is no factual record to support Appellants' claim that the 2009 MMA was wholly unworkable without caregiver to caregiver transactions. If the 2009 MMA was, in the Appellants' experience, unworkable without caregiver to caregiver transactions, then the proper avenue for Appellants to pursue was to seek

amendment of the 2009 MMA through the legislative process, which would have insured healthy public debate and a reasoned outcome.

ARGUMENT

BASED ON THE 2009 MMA THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE FLATHEAD COUNTY ATTORNEY AND CORRECTLY DENIED APPELLANTS RELIEF ON THEIR REQUEST FOR DECLARATORY JUDGMENT.

I. THE STANDARD OF REVIEW

This Court reviews for correctness a district court's interpretation of law pertaining to a declaratory judgment ruling. Billings Gazette v. City of Billings, 2011 MT 293, ¶ 362, 362 Mont. 522, __ P.3d __, citing In re Estate of Marchwick, 2010 MT 129, ¶ 8, 356 Mont. 385, 234 P.3d 879.

II. DISCUSSION

A. Background

The federal Controlled Substance Act (CSA) (Title II of the Comprehensive Drug Abuse Prevention Act; 21 U.S.C. §§ 801 et seq.) generally criminalized the manufacture, distribution, or possession of marijuana. Under federal law, marijuana is classified as a Schedule I substance. 21 U.S.C. § 812(c). This classification is based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. 21 U.S.C.

§ 812(b)(1). This classification renders the manufacture, distribution, or possession of marijuana a criminal offense. 21 U.S.C. §§ 841(a)(1), 844(a). Under federal law, there is no provision for medical marijuana.

On November 2, 2004, Montana voters approved of the limited use of medical marijuana by passing I-148. (Def.'s Ex. A attached to D.C. Doc. 14, attached hereto as App. B.) The text of I-148 provided, in pertinent part:

> This initiative would allow the production, possession and use of marijuana by patients with debilitating medical conditions. . . . A patient or the patient's caregiver could register to grow and possess limited amounts of marijuana by submitting to the State written certification by a physician that the patient has a debilitating medical condition and would benefit from using marijuana.

(App. B.)

The initiative left in place those provisions in Montana's criminal code that make it illegal to cultivate, possess, distribute or use marijuana but created legal protections for authorized users and providers of medical marijuana who comply with all provisions of the MMA. See Mont. Code Ann. §§ 50-46-101 through -210 (2009). Despite the passage of the MMA in 2004, marijuana was and is still classified as a dangerous drug, as defined in Mont. Code Ann. § 50-32-101.

The 2011 Legislature repealed the MMA, originally passed by voter

initiative. (SB 423, 57th Leg., Reg. Sess. § 34 (Mont. 2011)).[2] After the 2011 legislative session, limited use of medical marijuana is still permissible but highly regulated. See Mont. Code Ann. §§ 50-46-301 through -344 (2011). Appellants filed their declaratory judgment action under the 2009 MMA.

The 2011 Montana Legislature significantly overhauled the MMA, and with the exception of Mont. Code Ann. §50-46-341, the 2011 Marijuana Act went into effect on July 1, 2011. See Part Compiler's Comments, 2011 Marijuana Act, Mont. Code Ann. § 50-46-301 et seq. The purpose of the 2011 Marijuana Act, in pertinent part, allows, "for the limited cultivation, manufacture, delivery, and possession of marijuana as permitted by this part by persons who obtain registry identification cards." Mont. Code Ann. § 50-46-301(2)(b). Unlike the 2009 MMA, the definitional section of the 2011 Marijuana Act does not define "medical use." See Mont. Code Ann. § 50-46-302. It does, however, define "registered premise" as: "the location at which a provider . . . has indicated the person will cultivate or manufacture marijuana for a registered cardholder." Mont. Code Ann. § 50-46-302(13). Moreover, the term "caregiver," as used in the 2009 MMA, does not appear in the 2011 Marijuana Act, but instead the term "provider" is defined as

[2] An appeal from a preliminary injunction order the Honorable Judge Reynolds issued in which the court preliminarily enjoined certain provisions of the new law while upholding the law as a whole is presently pending before this Court in Cause No. DA 11-0460. The district court did not enjoin any provisions that would impact the availability of caregiver to caregiver transactions. See Brief of Appellant, Montana Cannabis Industry Association v. State of Montana, No. DA 11-460.

"a Montana resident 18 years of age or older who is authorized by the department to assist a registered cardholder as allowed under this part." Mont. Code Ann. § 50-46-302(10)(a).

Under the 2011 Marijuana Act, Mont. Code Ann. § 50-46-308 provides:

> (1) The department [DPHHS] shall issue a registry identification card to or renew a card for the person who is named as a provider . . . in a registered cardholder's approved application if the person submits to the department:
>
> . . . .
>
> (d) a written agreement signed by the registered cardholder that indicates whether the person will act as the cardholder's provider . . . ;
>
> (e) a statement, on a form prescribed by the department, that the person will not divert to any other person the marijuana that the person cultivates or manufactures for a registered cardholder;
>
> (f) A statement acknowledging that the person will cultivate and manufacture marijuana for the registered cardholder at only one location as provided in subsection (7). The location must be identified by street address.
>
> (7)(a) A person registered under this section may cultivate and manufacture marijuana for use by a registered cardholder only at one of the following locations:
>
> (i) a property that is owned by the provider. . . ;
>
> (ii) with written permission of the landlord, a property that is rented or leased by the provider. . . ;
>
> (iii) a property owned, leased or rented by the registered cardholder pursuant to the provisions of 50-46-107.
>
> (b) No portion of the property used for cultivation and manufacture of marijuana may be shared with or rented to another provider. . . .

As the above referenced statutes reflect, caregiver to caregiver, or provider to provider, transactions are not allowed under the current Marijuana Act.

B. Applicable Statutory Provisions From the 2009 MMA

Montana Code Annotated § 50-46-102 (2009) defined terms critical to the implementation and interpretation of the 2009 MMA, and pertinent to this appeal, as follows:

> (1)(a) "Caregiver" means an individual 18 years of age or older who has agreed to undertake responsibility for managing the well-being of a person with respect to the medical use of marijuana. A qualifying patient may have only one caregiver at a time.
>
> (b) The term does not include the qualifying patient's physician.
>
> . . . .
>
> (4) "Marijuana" has the meaning provided in 50-32-101.
>
> . . . .
>
> (5) "Medical use" means:
>
> (a) the acquisition, possession, cultivation, manufacture, delivery, transfer, or transportation of marijuana or paraphernalia by a qualifying patient or a caregiver relating to the consumption of marijuana to alleviate the symptoms or effects of a qualifying patient's debilitating medical condition:
>
> (b) the use of marijuana or paraphernalia by a qualifying patient to alleviate the symptoms or effects of the patient's debilitating medical condition; or
>
> (c) the use of paraphernalia by a caregiver for the cultivation, manufacture, delivery, transfer, or transportation of marijuana for use by a qualifying patient.
>
> . . . .

> (8) "Qualifying patient" means a person who has been diagnosed by a physician as having a debilitating medical condition.
>
> . . . .
>
> (10) (a) "Usable marijuana" means the dried leaves and flowers of marijuana and any mixture or preparation of marijuana.
>
> (b) The term does not include the seeds, stalks, and roots of the plant.

Pursuant to the 2009 MMA, the Department of Public Health and Human Services (DPHHS) was charged with the responsibility to establish and maintain a program for the issuance of registry identification cards for both qualifying patients and caregivers. Mont. Code Ann. § 50-46-103. Montana Code Annotated § 50-46-103(4)(a)(i) provided that a caregiver can only be issued a registration identification card **if** the caregiver is named in a qualifying patient's approved application and if the caregiver signs "a statement agreeing to provide marijuana **only to qualifying patients who have named the applicant as caregiver.**" (Emphasis supplied.)

DPHHS developed a registration form for application to the Medical Marijuana Program. Directly below the "caregiver" signature line of the form it reads:

> As the caregiver for the qualifying patient, I agree to provide marijuana only to this qualifying patient. I acknowledge that possession of the caregiver registry identification card does not allow me to engage in the use of marijuana or to use paraphernalia for any purpose other than cultivating, manufacturing, delivering, transferring, or transporting marijuana for medical use by a qualifying patient. I

have never been convicted of a felony drug offense and I understand that I am subject to a mandatory background check.

(Def.'s Ex. A. attached to D.C. Doc. 8, attached hereto as App. C.)

Montana Code Annotated § 50-46-201 (2009) defines the limits for medical use of marijuana as follows:

> (1) A person who possesses a registry identification card issued pursuant to 50-46-103 may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, if:
>
> (a) the qualifying patient or caregiver acquires, possess, cultivates, manufactures, delivers, transfers, or transports marijuana not in excess of the amounts allowed in subsection (2); or
>
> (b) the qualifying patient uses marijuana for medical use.
>
> (2) A qualifying patient and that qualifying patient's caregiver may not possess more than six marijuana plants and 1 ounce of usable marijuana each.
>
> (3)(a) A qualifying patient or caregiver is presumed to be engaged in the medical use of marijuana if the qualifying patient or caregiver:
>
> (i) is in possession of a registry identification card; and
>
> (ii) is in possession of an amount of marijuana that does not exceed the amount permitted under subsection (2).
>
> (b) The presumption may be rebutted by evidence that the possession of marijuana was not for the purpose of alleviating the symptoms or effects of a qualifying patient's debilitating medical condition.

Montana Code Annotated § 50-46-206 (2009) provides:

> Except as provided in 50-46-205, it is an affirmative defense to any criminal offense involving marijuana that the person charged with the offense:
>
> (1)(a) has a physician who states that or has medical records that indicate that, in the physician's professional opinion, after having completed a full assessment of the person's physician-patient relationship, the potential benefits of medical marijuana would likely outweigh the health risks for the person: or

(b) provides marijuana to a person described in subsection (1)(a) if the person does not provide marijuana to anyone for uses that are not medical;

(2)(a) is engaged in the acquisition, possession, cultivation, manufacture, delivery, transfer or transportation of marijuana or paraphernalia relation to the consumption of marijuana to alleviate the symptoms or effects of the medical condition of the person identified in subsection (1)(a) if the person charged with the offense is a qualifying patient or a caregiver; or

(b) is engaged in the use of marijuana if the person charged with the offense is a qualifying patient; and

(3) possesses marijuana only in an amount that is reasonably necessary to ensure the uninterrupted availability of marijuana for the purpose of alleviating symptoms or effects of the medical condition of the person identified in subsection (1)(a).

C. The Now-Repealed 2009 MMA Did Not Specifically Provide for or Implicitly Authorize Caregiver to Caregiver Transactions.

1. The Plain Language of the 2009 MMA Controls.

Rules of statutory construction dictate that, "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101. "The starting point for statutory construction is the plain language of the statute and if the plain language is clear and unambiguous no further interpretation is required." PPL Mont., LLC v. State, 2010 MT 64, ¶ 138, 355 Mont. 402, 229 P.3d 421, citing Vader v. Fleetwood Enters., 2009 MT 6, ¶ 30, 348 Mont. 344, 201 P.3d 139. This Court has explained that with respect to statutory construction, the function of the court, if at all possible, is to interpret the intention of the statute from the plain meaning of the

words. Glendive Med. Ctr. v. Montana Dep't of Pub. HHS, 2002 MT 131, ¶ 15, 310 Mont. 156, 49 P.3d 560 (citations omitted.) Absent ambiguity in the language of the statute, a court may not consider legislative history or any other means of statutory construction. Id.

To support their assertions that the 2009 MMA allowed for caregiver to caregiver transactions, Appellants primarily argue that the broad definition of "medical use" found at Mont. Code Ann. § 50-46-102(5) necessarily included such transactions. They further argue that pursuant to the 2009 MMA, a caregiver had a duty to possess medical marijuana in an amount reasonably necessary to ensure the uninterrupted availability of marijuana to assist a qualifying patient in alleviating symptoms of a qualifying medical condition. Appellants assert the caregiver's duty under the MMA is impossible to meet without the ability to conduct caregiver to caregiver transactions.

Appellants additionally claim Art. II, § 3 of the Montana Constitution requires an interpretation of the 2009 MMA that allows for caregiver to caregiver transactions. Moreover, Appellants argue that definitions within Montana's Controlled Substance Act, (CSA), Mont. Code Ann. § 50-32-101 et seq., suggest that the term "delivery" of marijuana used in the MMA means delivery from one caregiver to another. Finally, Appellants argue that the district court's ruling renders the affirmative defense set forth in the 2009 MMA meaningless.

In granting Corrigan's motion for summary judgment, the district court observed that all of these arguments in support of Appellants' request for a declaratory judgment were predicated on the assumption that the 2009 MMA is ambiguous with respect to caregiver to caregiver transactions. The district court disagreed and stated:

> However, no such ambiguity exists; rather, the clear and unambiguous language of [the] Act permits caregivers "to provide marijuana *only to qualifying patients who have named the applicant as caregiver*. § 103(4)(a)(ii). The intention evinced by this language is straightforward. Entertaining Plaintiffs' invitation to engage in further interpretation of the Act would necessarily entail turning a blind eye to one of its explicit provisions. This the Court may not do.

(App. A at 6.) After careful consideration, the district court rejected all the arguments Appellants advanced to support a theory that the 2009 MMA provided for caregiver to caregiver transactions either directly or through an agent.

a. Definition of Medical Use

Appellants argue since the definition of "medical use" in the 2009 MMA allowed for a caregiver to "acquire" marijuana, acquiring necessarily means obtaining from another source. Appellants assert that each of the permitted activities in the definition of "medical use" were separate and distinct, and thus, terms such as "acquire" and "transport" necessarily applied to transactions between caregivers and/or their agents. Obviously, under the 2009 MMA when either qualifying patients or caregivers **initially** embarked on the operation of growing

marijuana, they would have to "acquire" what they needed to grow from somewhere. The 2009 MMA allowed for that initial acquisition. Moreover, qualifying patients could have opted never to grow any of their marijuana and instead "acquired" the medical marijuana from their personal caregivers.

The definition of "medical use" in the 2009 MMA must be construed together with Mont. Code Ann. § 50-46-102(1)(a), which provided that a qualifying patient could only have one caregiver at any time, and Mont. Code Ann. § 50-46-103(4)(a)(i), which required a caregiver to sign a statement agreeing to provide marijuana only to "qualifying patients who have named the applicant as caregiver." See Oster v. Valley County, 2006 Mont. 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079. ("[T]his Court must harmonize statutes relating to the same subject, as much as possible, giving effect to each.")

Appellants' interpretation of "medical use" conflicts with the above two provisions of the 2009 MMA. Montana Code Annotated § 1-2-101 provides, "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

b. Caregiver's Duty to Patient

Appellants also argue that pursuant to the 2009 MMA, caregivers had a duty to keep up with qualifying patients' need for medical marijuana, and that need is unpredictable. Thus Appellants suggest that the six plants and one ounce of

useable marijuana that both caregivers and each of their qualifying patients were allowed to possesss **may** not have been sufficient for caregivers to have met their duty to their qualifying patients. This argument is not based on any facts in the record but, rather, is speculation on what could have happened.

There is nothing in the record to suggest that any of the unidentified caregivers were unable to meet their qualifying patients' use of medical marijuana based upon the amounts allowed under the 2009 MMA. Moreover, in the event that caregivers around the State of Montana could have demonstrated that the number of marijuana plants coupled with the amount of usable marijuana each caregiver and each qualifying patient were allowed to possess was insufficient to have met the "unpredictable" needs of qualifying patients, the remedy was to make that factual record before the legislature and seek amendment of the 2009 MMA. A qualifying patient's "need" does not trump the limitations set by statute.

c. Definition of "Delivery"

The definition in the 2009 MMA of "medical use" included the acquisition, possession, cultivation, manufacture, delivery, transfer or transportation of marijuana. Mont. Code Ann. § 50-46-102(5)(2009). Appellants argue that "delivering" marijuana under the 2009 MMA meant transferring marijuana from one caregiver to another caregiver. In order to support this argument, Appellants

rely upon the definitions of "deliver," "dispense," and "distribute" found in Montana's CSA.

Pursuant to the CSA, "dispense" means, "to deliver a dangerous drug to an ultimate user. . . ." Mont. Code Ann. § 50-32-101(9). Under the CSA, "distribute" means, "to deliver other than by . . . dispensing a dangerous drug." Mont. Code Ann. § 50-32-101(11). Finally the CSA defines "deliver" as "the actual, constructive, or attempted transfer from one person to another of a dangerous drug, whether or not there is an agency relationship." Mont. Code Ann. § 50-32-101(7). Based upon these definitions in the CSA, Appellants argue it is thus clear that since "dispense" meant to deliver a drug to an "ultimate user" --a qualified patient, then "deliver" had to be referring to caregiver to caregiver transactions since another caregiver is not the "ultimate user."

The word "dispense" however, does not appear in the 2009 MMA's "medical use" definition. Thus under the 2009 MMA the verb "dispense" was not available to caregivers. If "dispense" had been the only way for caregivers to get the marijuana to the ultimate users--the qualifying patients, pursuant to the 2009 MMA, then it would have been impossible for caregivers to ever provide marijuana to their qualified patients. Thus, caregivers only had the ability to "transfer" medical marijuana to **their** qualifying patients or "deliver" marijuana to **their** qualifying patients under the 2009 MMA. Applying the logical meaning to

these common terms, marijuana was "transferred," when qualified patients came to their caregivers to obtain the marijuana. Marijuana was "delivered," when caregivers took the marijuana to their qualifying patients.

The definitions of "deliver," "distribute," and "dispense" have precise definitions for purposes of the CSA that may not necessarily transfer to the purpose of the 2009 MMA. See Mont. Code Ann. § 1-2-107. The definitions from the CSA should not provide the mechanism for allowing caregiver to caregiver transactions when the 2009 MMA itself did not explicitly provide for such activities but did explicitly provide that a qualifying patient can only have **one** caregiver at a given time, and a caregiver **can only provide, i.e. deliver or transfer, marijuana to qualifying patients who have named that person as their caregiver**.

d. Qualifying Patient's Constitutional Right

The Montana Constitution guarantees the right to "seek[]. . .safety, health and happiness in all lawful ways." Mont. Const. art. II, § 3. Appellants argue that the district court's interpretation of the 2009 MMA frustrates qualifying patients' constitutional right to seek health. (Appellant's Br. at 34-35.) There is nothing in the record, however, to demonstrate that the caregivers' qualifying patients in this case could not "seek health" because they were unable to obtain an adequate

supply of medical marijuana from their caregivers. Thus, no constitutional analysis is necessary.

Moreover, the operative word in art. II, § 3 is "lawful." Marijuana remains a "dangerous drug" listed in Schedule I of the CSA. Mont. Code Ann. § 50-32-232(4)(t). Under the 2009 MMA, it is not "lawful" to exceed the limits of marijuana provided for under the Act. The legislature has made a policy determination that a limit of six plants and one ounce of useable marijuana each for caregivers and qualifying patients is sufficient to meet qualifying patients' medical need for marijuana. It is up to the caregivers and their qualifying patients to work out the logistics of complying with the MMA without exceeding the amounts allowable under the MMA. If six plants and one ounce of useable marijuana for each caregiver and each qualifying patient were insufficient to allow qualifying patients to "seek" treatment, then the answer would not be to allow caregiver to caregiver transactions. Rather, the answer would have been to seek a legislative amendment increasing the number of marijuana plants qualified patients and their caregivers could each possess.

The right to "seek health" is not unlimited. A patient, whether a qualifying patient under the 2009 MMA, or a medical patient in the traditional sense of the word, is not necessarily entitled to the amount of medication the patient believes he or she needs. For example, in the area of pain management, physicians routinely

limit the quantity and potency of medication the patient may have within a defined period. When physicians do so, they are not infringing upon a patient's constitutional right to seek treatment but rather are acting in the best interest of their patient's overall well being.

e. Affirmative Defense in the MMA

Finally, Appellants argue the district court's conclusion that the 2009 MMA does not allow for transactions between caregivers and their agents, overlooks the plain language of the affirmative defense set forth in Mont. Code Ann. § 50-46-206. There was no language in the affirmative defense statute, however, that specifically provided for caregiver to caregiver transactions. Nonetheless, if the State charged a caregiver or a caregiver's agent with a drug related offense, as it did with two of the Appellants in the instant case, there is nothing in the district court's order that would prohibit that caregiver or the caregiver's agent from relying upon Mont. Code Ann. § 50-46-206 to present an affirmative defense in accord with the statute. The State agrees with Appellants' assessment that whether a caregiver's or qualified patient's conduct that has resulted in the filing of criminal charges falls within the 2009 MMA's affirmative defense is a question for a jury to resolve. Nothing in the district court's order prohibits a jury from doing so.

As previously established, the 2009 MMA does not explicitly allow for caregiver to caregiver transactions. Thus, a court can only interpret the 2009 MMA in the manner Appellants advocate by finding ambiguity in the statutory language. Montana Sports Shooting Ass'n v. State, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003, citing State v. Letasky, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288. If the 2009 MMA was ambiguous regarding caregiver to caregiver transactions, legislative intent, as evidenced first by the language of Initiative 148 and, second, by the legislative overhaul of the MMA, does not support Appellants' position.

In the construction of a statute, the intention of the legislature is to be pursued if possible. Mont Code Ann. § 1-2-102. The MMA was initially passed by voter initiative. The approved ballot language for Initiative 148 declares that it concerned "the limited use of marijuana, under medical supervision, by patients with debilitating medical conditions to alleviate the symptoms of their conditions." (App. B.) The ballot statement allows that "[a] patient or the patient's caregiver could register to grow and posses limited amounts of marijuana. . ." (App. B.) The words in the initiative, providing for "limited" use of marijuana do not support the expansive interpretation of the 2009 MMA for which Appellants advocate.

Moreover, the 2011 Montana Legislature made significant changes to the MMA, including changing the name to the Montana Marijuana Act. See Mont.

Code Ann. § 50-46-301. The recent legislative overhaul of the 2009 MMA supports a conclusion that legislative intent does not favor an expansive interpretation of the 2009 MMA to allow for caregiver to caregiver transactions.

2. Appellants' Argument That the 2009 MMA Implicitly Authorized Caregiver to Caregiver Transactions Is Based on Their Interpretation of Facts That Were Not Developed in the District Court.

Appellants base much of their argument that the 2009 MMA allowed for caregiver to caregiver marijuana transactions on facts that were never presented or developed in the district court and were not tested through the adversarial process. The State therefore respectfully requests this Court refrain from considering any facts that Appellants did not develop or present at a hearing in the district court despite having the opportunity to do so.

For example, Appellants did not establish in the district court that any of the plaintiff caregivers were unable to meet the medical marijuana needs of one or more of their qualifying patients. Appellants argue in their brief, however, "Where a patient's needs outpace a caregiver's ability to cultivate sufficient quantities of medical marijuana from six plants, it would be necessary for the caregiver to exercise his privilege of acquiring marijuana from another source on behalf of the patient(s)." (Appellants' Br. at 22.) At the hearing, Appellants could have presented testimony which they believed support their factual claim, but for whatever reason, they did not do so. The State urges this Court not to assume that

any of the caregivers in the instant case were unable to meet the medical marijuana "needs" of their qualifying patients.

Appellants further devote about a page of their brief setting forth "facts" related to growing and harvesting marijuana. (Appellants' Br. at 23-24.) Appellants, however, did not develop their factual claims at a hearing in the district court. This Court should decline to entertain Appellants' factual claims that were not developed in the district court, and therefore are not properly before it. Appellants' argument that the 2009 MMA implicitly allowed for caregiver to caregiver transactions is primarily based upon their view of facts related to growing, harvesting and providing marijuana to qualified patients. Since Appellants' version of facts were not presented at a hearing or tested through the adversarial process, they cannot be used to support an argument that the 2009 MMA implicitly allowed caregiver to caregiver transactions.

The district court properly granted summary judgment in Corrigan's favor.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm the district court's order granting summary judgment in Corrigan's favor.

Respectfully submitted this _____ day of _____, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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DATED_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

_____

TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-11-0475

MEDICAL MARIJUANA GROWERS ASSOCIATION, INC.; COURIER 1; COURIER 2; CAREGIVER 1; CAREGIVER 2; AND CAREGIVER 3,

Plaintiffs and Appellants,

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ED CORRIGAN, COUNTY ATTORNEY FOR THE COUNTY OF FLATHEAD,

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APPENDIX
