

HOUSE BILL 271

~~ROBINSON V. MO DHSS:~~
A THREAT TO PUBLIC HEALTH PREPAREDNESS

Rob Gatter

Center for Health Law Studies

Saint Louis University School of Law

ROBINSON FOLLOWED AFTER
MO RESTAURANT ASSOCIATION V. LASATER
MISSOURI COURT OF APPEALS—ED109312

- Restaurants and bars objected to STL County’s “*Safer-At-Home*” order, arguing that the St. Louis County’s health officer is authorized under the County Charter only to recommend to the County Council policies designed to preserve or promote public health.
- Lost in circuit court and petitioned for writ of mandamus.
- *Petitioners did not account for state statutes and DHSS regulations that separately empower all local health officials to take actions necessary to protect against diseases and that effectively deputize those local health officials to carry out state public health functions.*
- Court of Appeals denied the petition (Dec. 20, 2020).

ROBINSON V. MO DHSS
COLE COUNTY CIR. CT. 20AC-CC00515

- Plaintiffs are a STL county resident, restaurant and church seeking to have declared legally void the series of “*safer-at-home*” orders issued by County’s health official.
- Plaintiffs claim that DHSS regulations do not authorize local health authorities to issue those “blanket” orders.
 - The “orders” were actually rules that were not properly promulgated; binding agency action of “general applicability” is a “rule” subject to rule-making procedures.
 - Some of the regulatory language authorizing local health officials to write orders is in singular form (“patient” or “facility”), suggesting that local health agencies have the power to issue only individualized orders.
- Plaintiffs argue that statutory and/or regulatory authority to issue rules or orders as “necessary to protect public health” violates Missouri’s non-delegation doctrine, which requires a “definite standard” so as to avoid arbitrary exercise of discretion.

ROBINSON LIKELY MOOT AFTER PASSAGE OF H.B. 271

- H.B. 271 signed into law by Gov. Parson on June 15, 2021, and the provisions related to the power of local officials to issue public health orders that address contagious disease threats became effective the same day.
- Adds new sec. 67.275 to Title VI (local government) and amends sec. 192.300 of Title XII (public health) of Missouri's Statutes.
- *Limits the duration of local public health orders related to actual or perceived communicable disease threats, and empowers local legislative bodies to "terminate" those public health orders.*
- Court is likely to declare Robinson moot as a result of the legislation on theory that the political rebalancing under HB 271 makes future litigation very unlikely. Technically, however, the legal issues could arise again.

HB 271

30-DAY SUNSET DURING EMERGENCIES

“Any order issued during and related to an emergency declared pursuant to chapter 44 that directly or indirectly closes, partially closes, or places restrictions on the opening of or access to any one or more business organizations, churches, schools, or other places of public or private gathering or assembly, including any order, ordinance, rule, or regulation of general applicability or that prohibits or otherwise limits attendance at any public or private gatherings, shall not remain in effect for longer than thirty calendar days in a one hundred eighty-day period, including the cumulative duration of similar orders issued concurrently, consecutively, or successively . . .” Mo Stat. Ann 67.265.1(1)

- “Order” is limited by definition to orders in response to communicable disease threats.
- Encompasses both orders aimed at one person and blanket orders.
- Local legislative bodies may extend an emergency order for another 30 days, but only once (Mo Stat. Ann 67.265.1(1)) and may terminate an emergency order at any time by a simple majority vote (Mo. Stat. Ann. 67.265.2).

HB 271

21-DAY SUNSET WHEN NO EMERGENCY

“Any order of general applicability issued at a time other than an emergency declared pursuant to chapter 44 that directly or indirectly closes an entire classification of business organizations, churches, schools, or other places of public or private gathering or assembly shall not remain in effect for longer than twenty-one calendar days in a one hundred eighty-day period, including the cumulative duration of similar orders issued concurrently, consecutively, or successively . . .” Mo Stat. Ann 67.265.1(2).

- Encompasses ONLY orders of general applicability.
- Local legislative bodies may extend an order for another 21 days by a two-thirds majority vote, but only once (Mo Stat. Ann 67.265.1(1)), and they may terminate an order at any time by a simple majority vote (Mo. Stat. Ann. 67.265.2).

HB 271 ADDITIONAL PROVISIONS

- Prior to or concurrent with the filing of a public health order that falls under the Act, the local health official “shall provide a report to the governing body containing information supporting the need for such order.” Mo. Stat. Ann. 67.265.4
- All of these requirements are codified in Title VI, which relates to local government.
- Title XII (concerning public health authority) amended to prohibit local health officials from acting and Mo DHSS from authorizing local health officials to act in any way inconsistent with the Act. This changes the statutes at issue in MRA and Robinson.

HB 271

PUBLIC HEALTH PREPAREDNESS EFFECTS

- Shifts power over local disease control:
 - from executive to legislative branches;
 - from appointed experts to elected politicians.
- Creates uncertainty about viability of public health orders during a disease threat when time is of the essence.
- Premium on early local response to identify, track and isolate/quarantine individual cases to control disease in 30-60 days. Resources?
- Makes Missourians more dependent on State to act at the 30-60 day mark of any disease threat.
- Makes Missourians more susceptible to second and third wave infections as political will in support of restrictive public health action fades.

H.B. 271 AND ROBINSON REFLECT NATIONAL TREND

- Many state legislatures have passed or are considering bills limiting state and/or local authority to issue public health orders.
 - Hodge & Piatt, *COVID'S Counterpunch: State Legislative Assaults on Public Health Emergency Powers*, __ BYU J. Pub. L. __ (Forthcoming 2021), avail. SSRN
- Many lawsuits challenging state and local COVID orders based on rule/order distinction, non-delegation doctrine, and lack of explicit statutory authority.
 - Wisconsin Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020) (order set aside)
 - Beshear v. Acree, 615 S.W.3d 780 (Ky. 2020) (order upheld)
 - Grisham v. Romero, 483 P.3d 545 (N. Mex. 2021) (order upheld)
 - State v. Becerra, 2021 WL 2514138, __ F. Supp. 3d __ (M.D. Fla. 6/18/2021) (order set aside)