

**IN THE DISTRICT COURT OF MORRIS COUNTY, KANSAS
EIGHTH JUDICIAL DISTRICT OF KANSAS**

NEIL LITKE,

Plaintiff,

vs.

**THE BOARD OF COUNTY
COMMISSIONERS OF MORRIS COUNTY,
KANSAS, *in their official capacity*,
Defendant.**

Case No. MR 2021 CV 13

ORDER

NOW, on this the 13th day of September, 2021, the Court issues this Order denying the Defendant's Motion to Dismiss.

The Defendant argues that Plaintiff's Petition, filed on September 3, 2021, is deficient for failing to comply with the Eighth Judicial District's Administrative Order 2021-13, Procedures for Civil Actions Under 2021 SB (Senate Bill) 40. The Defendant argues paragraph number 3 of said Administrative Order requires the Plaintiff's factual allegations, as to how he is aggrieved by the Mask Order, be specific and not conclusory. Paragraph number 3 states, "To the extent possible allegations should recite how the petitioner's burden is substantially different from the burden upon persons or entities similarly situated who are not included on the petition." (Eighth Judicial Administrative Order 2021-13 is attached for clarification.) The Defendant alleges that the Plaintiff's Petition is nothing more than "I don't like the Order. District Court rewrite it."

The Court finds that in the Kansas Supreme Court Administrative Order 2021-RL-032, in paragraph number 9, states "A form to assist petitions with filing the petition is attached to this order... the filing should be in substantial compliance with the information on the form." Said


Administrative Order also states, "Failure to include some or all of the information listed in this order does not deprive the reviewing court of jurisdiction over the action."

Senate Bill 40, Sec. 12 states any "party aggrieved by an order issued pursuant to subsection (b) may file a civil action...". Plaintiff has alleged the Morris County Mask Order negative impacts is daily like. Further, Plaintiff alleges he is also aggrieved the lack of an expiration date on said Mask Order. While the Plaintiff's Petition is a bit vague on his daily life, the Court finds it to be sufficient. The Court further finds the Plaintiff's allegation as to the lack of any expiration date is specific. The Plaintiff's Petition is in substantial compliancy with the form suggested by 2021-RL-032.

The Court denies the Defendant's Motion to Dismiss.

IT IS SO ORDERED.

Done in Chambers on the 14th day of September, 2021.


BEN J. SEXTON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, Connie J. Franklin, do hereby certify that a true and correct copy of the above and foregoing Order was forwarded by: () placing the same in the U.S. Mail, first-class postage prepaid; () in the Court Mailbox; () facsimile transmission; () hand delivery; (X) e-mail; or () electronically served via eFlex filing system, on the 14th day of September, 2021 to:

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IN THE EIGHTH JUDICIAL DISTRICT

STATE OF KANSAS

ADMINISTRATIVE ORDER NO. 2021-13

**PROCEDURES FOR CIVIL ACTIONS
UNDER 2021 SB 40**


In 2021 SB 40, following publication in the Kansas Register, by New Sections 1(d)(3) and 2(d)(3) and Sections 6(g)(3), 8(e)(3), and 12(d)(3), the Supreme Court is authorized to “adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection.” In its Administrative Order 2021-RL-032 filed April 13, 2021, the Supreme Court has adopted Emergency Rules of Procedure for Hearing under 2021 Senate Bill 40, which order supersedes portions of this District’s Administrative Order 2021-11. This order supersedes and repeals Eighth Judicial District Administrative Order 2021-11 and is supplemental to the aforementioned Supreme Court Administrative Order. Subsequent to the effective date of this Order, the following procedures are adopted for the Eighth Judicial District as supplemental to Supreme Court Administrative Order 2021-RL-032:

1. Petitions filed under SB40, New Sections 1(d)(1) and 2 (d)(1) and under Sections 6(g)(1), 8(e)(1), and 12(d)(1) must prominently show, immediately following the case caption that the Petition is filed pursuant to 2021 SB 40. The Petition must otherwise comply in all respects with the provisions of Supreme Court Administrative Order 2021-RL-032.
2. Petitions should attach a copy of the order(s) under which the petitioner is aggrieved showing the date of adoption or issuance.
3. Factual allegations claiming the petitioner is substantially burdened or inhibited by the order under consideration burdened should be specific and not include mere conclusory language. To the extent possible allegations should recite how the petitioner’s burden is substantially different from the burden upon persons or entities similarly situated who are not included on the petition.
4. If a prayer for relief seeks injunctive relief either of a temporary or permanent nature, the petition must also include all of the factual allegations necessary to support the elements of injunctive relief.
5. Petitioner shall provide actual notice to respondent of the filing of the petition within 24 hours of filing. Proof of service must be filed immediately following completion of service. The respondent shall have not more than 24 hours after service to file and serve a response to the petition.
6. Relief sought in petitions under 2021 SB 50 should specify how the order which is the subject of the action could be more narrowly tailored to respond to the disaster emergency addressed by the order under review and suggest less restrictive means, if any, to achieve such purpose(s).

7. Petitions should contain information as to whether they had an opportunity to appear and be heard prior to the adoption or issuance of the order under review and, if so whether they did appear and express their aggrieved burden and whether they suggested the alternatives expressed in the petition.
8. Hearings shall be commenced in the time mandated by the statute after receipt of the petition by the Clerk of the District Court. The clerk shall promptly advise the District Judge of the assigned Division of the filing.
9. The respondent shall be the entity or party issuing or adopting the order under review as named in the petition. The petitioner and respondent shall be notified by the Court of the time and date for commencement of the hearing.
10. Both parties shall exchange witness and exhibit lists as soon as practicable given the time restraints upon conduct of the hearing. To the extent possible, petitioners should attach any exhibits intended to be used to the Petition. Both parties shall provide the assigned judge with a list of intended exhibits immediately prior to commencement of any hearing which list shall specifically identify and number each exhibit and provide columns for court use to record offering of any exhibit and admission or denial thereof.
11. A copy of this Administrative Order shall be provided by the Clerk of the District Court to each petitioner upon filing. In the event filing occurs by deposit in the Court's drop box, a copy shall be provided via an email sent to the address provided by the petitioner.
12. The Court will issue its decision with findings of facts based upon verified pleadings, affidavits, sworn testimony, or documents received in evidence within the statutory time after conclusion of the hearing. The hearing timely started under the statute may be continued as necessary to hear the facts before conclusion and submission when the time starts for the Court to issue its ruling.

These rules of procedure may be modified by the assigned Judge hearing the case as necessary. They will remain in effect until such time as they are superseded by additional rules adopted by The Kansas Supreme Court or further Order of the Court.

Dated this 27 day of April, 2021



Michael F. Powers
Chief Judge
Eighth Judicial District

**IN THE DISTRICT COURT OF MORRIS COUNTY, KANSAS
EIGHTH JUDICIAL DISTRICT OF KANSAS**

NEIL LITKE,)	
Plaintiff,)	
)	
vs.)	Case No. MR 2021 CV 13
)	
THE BOARD OF COUNTY)	
COMMISSIONERS OF MORRIS COUNTY,)	
KANSAS, <i>in their official capacity,</i>)	
Defendant.)	

ORDER

NOW, on this the 13th day of September, 2021, the Court denies the relief requested by the Plaintiff.

On September 3, 2021 at 1:16 PM, the Plaintiff, Neil Litke (Litke) filed a Petition in the Morris County District Court pursuant to Senate Bill 40 (SB 40 and Kansas Supreme Court Administrative Order 2021-RL-032. Litke's Petition was a response to a Health Order issued by Morris County Health Officer, Dr. Frese, and adopted by the Morris County Board of Commissioners (Board) on August 4, 2021. The Board was served on September 3, 2021. The Board timely filed its answer on September 7, 2021 at 9:14 AM. (KSA-60-206(a)(2)(c)).

The Court conducted a brief Pretrial/Scheduling Conference with counsel for both parties on September 7, 2021 at 11:45 AM. The parties were ordered to submit witness and exhibit lists. The Trial took place timely via Zoom on September 7, 2021 at 1:00 PM within the time constraints set forth in SB 40, Sec. 12. Litke appeared via Zoom as did

his attorneys, Joshua A. Ney and Ryan K. Krieghauser, of the Krieghauser Ney Law Group. The Board appeared by and through attorney, William A. Kassebaum, Morris County Counselor, via Zoom.

The Board presented Dr. Frese, Morris County Health Officer, and Kevin Leeper, Morris County Hospital Administrator as witnesses. Litke testified for Plaintiff. Court admitted Defendant's Exhibit #1 without objection.

The Court ordered the parties to submit Findings of Fact by 5:00 PM on September 9, 2021.

The Court makes the following Findings of Fact:

1. Litke is a resident of Morris County, Kansas.
2. Dr. Frese, MD., is a licensed practicing physician.
3. Pursuant to KSA 65-201(a) the Board had appointed Dr. Frese as the Morris County Health Officer.
4. Dr. Frese issued a Morris County wide mask ordinance which was adopted and approved by the Morris County Commissioners on August 4, 2021. (See Mask Order attached to Litke's Petition.)
5. The Mask Order is an Order that qualifies as an Order under SB 40, Sec. 12(d).
6. There have been 748 COVID cases and 23 COVID deaths in Morris County. (See Defendant's Exhibit #1.)
7. Morris County's recent 7-day metric on CDC website shows 14 cases, 10.29% positivity rate, eight (8) new hospital admissions, and 54.5 of the eligible Morris County population is not vaccinated.

8. CDC rates US counties into four (4) categories: Low, Moderate, Substantial, and High. The rate of transmission is based on new cases per 100,000 people. Morris County is in the High category.
9. Vaccination takes six (6) weeks for an individual to be fully vaccinated.
10. COVID pandemic has escalated to the point that all referral hospitals are full and not accepting patients.
11. Individuals with Non-COVID illness such as heart conditions and strokes, can not be sent to the appropriate referring hospital because there are no beds.
12. That Dr. Frese and Kevin Leeper monitor the referring hospitals often.
13. Requiring individuals to mask is the quickest and most effective tactic to reduce the spread of COVID.
14. The Delta Variant is three (3) times more transmissible.
15. That there was not a numerical statistic that Dr. Frese relied upon. Dr. Frese considered trends including number of positive cases in Morris County, number of hospitalized, and number of hospital beds available.
16. Dr. Frese testified this was a long process, that there were many meetings prior to August 4, 2021 with the Board.
17. Dr. Frese did not know the specific number of beds available at the hospital.
18. Dr. Frese stated they tried to convince the public to wear masks without a Mask Order, but people were too selfish to comply.
19. Vaccinations will take two (2) months to be effective, while masks can be effective immediately.

20. A COVID carrier without a mask has a 70% chance of transmitting the virus to a healthy person. A COVID carrier with a mask has a 1.5% chance of transmitting the virus.
21. The Mask Order will be rescinded or scaled back when Dr. Frese sees fewer cases, trends show progress, and more hospital beds available.
22. There is no expiration date of the Mask Order, it depends on the number of cases, vaccination rate, and availability of referral hospitals.
23. Litke is engaged in civic activities of shopping, attending children's events, and public events.
24. Order obligates Litke to wear a mask throughout the day.
25. Litke believes in freedom and that one (1) individual, Dr. Frese, should not be able to infringe upon his freedom.
26. Litke believes there should be a time limit set on the Mask Order. The indefinite period of time makes him unable to challenge the Mask Order.
27. Dr. Frese did not consider religious exemptions, indoor exercise, or swimming.
28. Order applies to all indoor spaces and outdoor if individuals can't exercise six (6) foot social distancing.
29. Litke believes there is no exemption for private offices.
30. Law Enforcement in Morris County refuses to enforce the mask ordinance.

CONCLUSIONS OF LAW

Litke claims he is aggrieved a result of the mask ordinance in Morris County. SB 40, Sec. 12(d)(1) states:

“Any party aggrieved by an order issued pursuant to subsection (b)(2) may file a civil action in the district court of the county in which the order was issued within 30 days after such order is issued.”

Subsection (b)(2) of SB 40, Section 12 states:

“if a local health officer determines it is necessary to issue an order mandating the wearing of face masks...”

Both parties agree the Morris County Order is an order defined by SB 40, Sec. 12(b)(2), and is subject to be challenged by (d)(1) of the same section. The time constraints as set forth in SB 40 have been met by each party.

Litke alleges that the Mask Order is not narrowly tailored to the purpose stated in the Order and does not use the least restricting means to achieve such purpose. Litke argues the lack of a time limit makes this Order indefinite and not subject to challenge. Litke suggests reviewing the Order every 30 days would be less restrictive and it would allow an aggrieved party to challenge the issuance of a new order every 30 days. This argument by Litke fails.

SB 40, Section 12(b)(1) reads:

“Except as provided in paragraph (2), any order issued by the local health officer, including orders issued as a result of an executive order of the governor, may be reviewed, amended or revoked by the board of county commissioners. Any order reviewed or amended by the board shall include an expiration date...”

The plain language of (b)(1), “Except as provided in paragraph (2)” clearly indicates that expiration dates are not required with mask orders. (b)(1) explicitly exempts the mask order from the requirement of expiration dates.

The logic is clear as Dr. Frese testified there is great difficulty in determining when this COVID pandemic will decline. By exempting the expiration date from (b)(2),

it is clear the Kansas Legislature also thought mask orders must be dealt with without a time limit.

Pursuant to (d)(1) a “court shall grant the request for relief unless the court finds such order is narrowly tailored to the purpose stated in the order and uses the least restrictive means to achieve such purpose.” The purpose of the Mask Order is to prevent the spread of COVID in Morris County and to protect its citizens.

From the evidence produced by witnesses and Defendant’s Exhibit #1, there is no doubt Morris County has a sincere need to prevent the COVID spread. Dr. Frese testified to the escalating cases in Morris County, coupled with 55% of eligible residents being unvaccinated. Dr. Frese and Kevin Leeper discussed the lack of hospital beds not only in Morris County, but in its referral hospitals, putting health compromised residents of Morris County in danger.

The use of vaccinations is the most effective but could take up to 8 weeks to be effective. Requiring individuals to either be vaccinated or show proof of vaccination is certainly more restrictive than the Mask Order. Dr. Frese discussed that the Morris County Health Department public relations request to wear masks had fallen on deaf ears. The mask ordinance is the least restrictive tool that Morris County has to prevent the spread of COVID.

Litke alleges the Order is not narrowly tailored. That there are not exemptions for swimming, religious activity, private offices, protect constitutional free speech, or strenuous exercise. The testimony Litke offers is that he doesn’t like wearing a mask while shopping in the grocery store, watching his kids play volleyball, basketball, or working out. The mask does not prevent Litke from doing any of these activities. The

masks do prevent the spread of COVID carries to 1.5% chance compared to 70% chance without a mask.

Litke also argues the lack of expiration date proves it is not narrowly tailored. However, as set forth earlier, the legislature exempted the mask order from an expiration date. Dr. Frese testified that setting an expiration date is arbitrary with reviewing trends, positive test numbers, hospitalization numbers, and space at referring hospitals. It is a fluid situation that must be monitored closely.

Litke wants to be heard and the Court certainly appreciates this desire. Litke wants a new Mask Order every 30 days so that a new appeal could be filed. Litke has the ability to attend Board meetings and question and challenge the Board.

Litke challenges the Mask Order is too broad because it does not exempt swimming, religious activity, private offices, or indoor exercising. The Court agrees with Dr. Frese, that common sense must be applied. There is not one (1) thing in the Mask Order that prevents Litke from doing any of these activities.

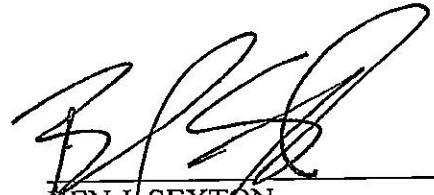
The Mask Order states, "All businesses and organizations in Morris County must require all employees, customers, visitors, members or members of public to wear a mask or face covering inside public spaces." A private office is not a public place and therefore not subject to the Mask Order.

Litke does not provide any suggestive language on how the Order needs to be narrowed, only broad conclusions. Litke failed to prove the Mask Order is not narrowly tailored.

The Court finds the Morris County Board of Commissioners and the Morris County Health Office, that Dr. Frese's Mask Order is narrowly tailored to prevent the spread of COVID and is the most restrictive means to achieve this purpose.

IT IS SO ORDERED.

Done in Chambers on the 14th day of September, 2021.


BEN J. SEXTON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

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