

CIRCUIT COURT FOR THE STATE OF MICHIGAN
INGHAM COUNTY CIRCUIT COURT
THIRTIETH JUDICIAL DISTRICT

BEN HANSEN,

Plaintiff

v.

STATE OF MICHIGAN, DEPARTMENT OF
COMMUNITY HEALTH

Defendant.

Case No. 06-1033 CZ

COA No. 278074

Hon. Beverley Nettles-Nickerson

Freedom of Information Act
Complaint

AG#2006021202

Alan Kellman (P15826)
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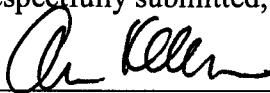
NOTICE OF HEARING

TO: CLERK OF THE COURT
THOMAS QUASARANO

PLEASE TAKE NOTICE that Plaintiff Ben Hansen, through his counsel undersigned, will bring the attached Motion and Memorandum for Stay of Execution and Waiver of Appellant Bond and Proposed Order Staying Execution of May 1, 2007, on for hearing in the above titled cause on **Wednesday, June 27, 2007 at 1:30 p.m.**, or as soon thereafter as parties may be heard, before the

Honorable Beverley Nettles-Nickerson, Circuit Judge.

Respectfully submitted,



ALAN KELLMAN (P15826)

THE JAQUES ADMIRALTY LAW FIRM, P.C.

Attorney for Plaintiff

1370 Penobscot Building

Detroit, Michigan 48226

(313) 961-1080

Dated: June 8, 2007

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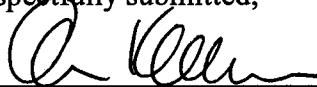
**MOTION AND MEMORANDUM FOR STAY OF EXECUTION AND WAIVER OF
APPELLANT BOND**

Plaintiff-Appellant, through his counsel undersigned, moves the Court for an Order Staying Execution in any further proceedings for the enforcement of the Opinion and Order entered on May 1, 2007, pending disposition of the appeal taken in this cause.

In support of this motion, Plaintiff-Appellant notes that this matter does not involve a money judgment but rather a request for documents sought pursuant to the Freedom of Information Act. M.C.L. 15.231 et. seq. The award of attorney's fees (which are actually sanctions) is the subject of the appeal, as well as the Court refusing to order the release of certain documents. The Order regarding attorney's fees is not clear as to whether Plaintiff or his counsel are responsible for the payment of the award, although based on the authority cited it is clear that sanctions are involved. In any event, counsel has been a member in good standing of the State Bar of Michigan dating back to 1969 and thus, respectfully requests that the posting of an appeal bond in the amount of thirty-five hundred dollars (\$3,500.00) should not be required.

WHEREFORE, it is prayed that an order be entered staying the execution of the collection of attorneys' fees and providing that the filing of an appellant bond is not necessary under the facts and circumstances of this matter.

Respectfully submitted,



ALAN KELLMAN (P15826)
THE JAQUES ADMIRALTY LAW FIRM, P.C.
Attorney for Plaintiff-Appellant
1570 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

Dated: June 8, 2007

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**BRIEF IN SUPPORT OF OPPOSITION TO DEFENDANT'S MOTION TO
SUPPLEMENT THE RECORD**

In support of his Response in Opposition to Defendant's Motion to Supplement the Record,
Plaintiff states, as follows:

ARGUMENT

There is no legal basis to supplement the Record at this time. First, the Court's May 1, 2007 decision, which is on appeal (COA No. 278074), was premised on the Record as it existed at that time. The decision was not premised on the time records of the Defendant's counsel. To grant the relief requested would allow for the creation of the Record after the fact.

To be more specific as to how such a supplement would affect the pending appeal: the current award is in the nature of sanctions, having been premised in M.C.R. 2.114 (E)(F) as well as M.C.L. § 600.2591. The statute provides for such an award when the Court finds the action was "frivolous." "Frivolous" is specifically defined in the statute. M.C.L. 600 § 2591 (3)(a)(i)(ii)(iii). Either, the Court's Order will stand up on appeal or it will not. To change or recreate the Record

at this time opens up a whole new set of circumstances and would, to be fair, require a hearing on this issue at the trial level, which would now be untimely. Indeed, it is noted, as the existing Record reflects, Plaintiff sought and was not provided the opportunity to be heard on this issue.

Defendant's authority does not help their argument and is not on point. The Johnson case simply stands for the proposition that the trial court erred in not allowing a bill of particulars to be amended before dismissal, not after a judgment and the filing of an appeal. Johnson v. Patmon, Young & Kirk, 119 Mich. App. 362, 367, 368, 326 N.W. 2d § 11, 513-514 (1982), The Michner case also did not involve supplementing the record after judgment. Rather, the portion of Michner that Defendant relies upon specifically refers to an *issue* that was raised at trial and actually "*litigated.*" *Id.* at 365. In the present case, the issue of awarding of attorney fees/sanctions was never litigated by either party. No evidence was ever taken by the Court on this matter.

Actually, what the Michner Court did recognize was the Comment to then G.R.C. 118.3, which provided:

"Diligent counsel will, however, always move to have such variances corrected by actual amendment, in order to eliminate any necessity for troubling the Appellate Court with the matter and to have the Record clearly show what was actually litigated for purposes of res judicata." Michner Plating Co. v. David Drilling Co, Inc., 10 Mich. App. 358, 365, 159 N.W. 2d 366 (1968).

Quite to the contrary of what Defendant is arguing, supplementing the Record at this time would not show "what was actually" litigated. Rather it would change the Record to reflect what was not before the Court and thus the appeal would be "troubling" for the Appellate Court.

Plaintiff strenuously objects to the award and, in fact, takes the view that in light of the fact that Defendant turned over 500 pages of documents that Defendant was not even the prevailing

party.¹ A timely appeal has been filed and Plaintiff is entitled to have it heard on the Record existing as of the May 1st decision.

Accordingly, the relief sought should not be granted.

WHEREFORE, it is prayed that the Motion to Supplement the Record in Support of the Court's Order Granting Defendant's Motion for Costs, Expenses and Attorneys Fees be denied.

Respectfully submitted,



ALAN KELLMAN (P15826)
Attorney for Plaintiff-Appellant
1570 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

Dated: *June 8, 2007*

¹ While Plaintiff does not believe it necessary for the Court to get into any great detail on the Court's order on the merits of the decision, it is noted that it is undeniable that Count III of the Complaint was filed in timely fashion and that there was no statute of limitations violation.

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ORDER STAYING EXECUTION OF MAY 1, 2007 ORDER

At a session of said Court, held in
the City of Lansing, Ingham County,
Michigan on _____

PRESENT: HON. _____
CIRCUIT COURT JUDGE

Plaintiff has filed a Motion requesting a stay of execution with regard to the collection of attorney's fees awarded in the above captioned proceeding. The Court having considered the Motion and being more fully advised in the premises.

Now therefore, it is HEREBY ORDERED that the Motion is Granted. Collection of the attorney's fees is hereby stayed until further order of the Court. The posting of a bond is not required.

HON.

Date:

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CERTIFICATE OF SERVICE

Krystle Melquiades, being first duly sworn, deposes and says that on the 8th day of June, 2007, she served *Brief in Support of Opposition to Defendant's Motion to Supplement the Record, Motion and Memorandum for Stay of Execution and Waiver of Appellant Bond and Proposed Order Staying Execution of May 1, 2007 Order* and this *Certificate of Service* in the above matter by regular mail, by placing same in an envelope with adequate postage thereupon and depositing in the United States Post Office box at Detroit, Michigan::

Thomas Quasarano (P27982)
State of Michigan
Department of Attorney General
525 W. Ottawa St.
Lansing, MI 48909

Subscribed and sworn to me
this 8th day of June, 2007


NOTARY PUBLIC


KRYSTLE MELQUIADES

JAMES P. ANDERZAK
NOTARY PUBLIC, STATE OF MI
COUNTY OF WAYNE
MY COMMISSION EXPIRES Apr 14, 2011
ACTING IN COUNTY OF