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

BEN HANSEN, INTERNATIONAL CENTER FOR THE STUDY OF PSYCHIATRY AND PSYCHOLOGY, INC., AND THE LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.

Plaintiffs **Hon. Rosemarie E. Aquilina**

v **Case No. 09-759-CZ**

STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH

Defendant.
_____/

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BRIEF IN OPPOSITION TO THE DEPARTMENT OF COMMUNITY HEALTH'S MOTION TO DISMISS

I

INTRODUCTION

The Department of Community Health's (Department) most fundamental argument in support of dismissal is premised on the law of the case doctrine. To place this opposition and in the case itself in the correct context, it should be understood from the outset that the doctrine is not applicable and does not govern. MCL 7.215(c)(1). This will be examined in some detail. This case should be decided on its own merits. Furthermore, a record in this case needs to be developed as there are a number of factual questions which need to be addressed. Why the Department provided

the disputed information to another and not these Plaintiffs, who actually decided the records in question were not "public records" and the basis for such a conclusion and more are relevant. It could very well be that following discovery the parties may be able to stipulate to the facts which may allow for cross motions to have the case resolved and a judgment entered. However, the case is not ripe for final judgment at this juncture.

This case presents significant questions regarding the authority of the state government, the role of the judiciary and the relationship between the Freedom of Information Act (FOIA) and the Release of Information for Medical Research and Education Act (commonly referred to as the Peer Review Immunity Statute). MCL 15.231, et seq; MCL 331.531. It is the Department's view that they and they alone have the right and the authority to decide that a record is not a "public record," that their decision is final and not subject to judicial review under any circumstances. Such a position is obviously questionable on a number of grounds and clearly contrary to the purpose of FOIA which provides:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.
>
> MCL 15.231(2)

Furthermore, FOIA mandates a judicial de novo review and provide the courts "shall determine the matter de novo and the burden is on the public body to sustain its denial." MCL 15.240(4).

Dismissal is not warranted or appropriate.

II

THE PARTIES / BACKGROUND

Ben Hansen, Plaintiff-Appellant, is a resident of Traverse City, Michigan. The International Center for the Study of Psychiatry and Psychology, Inc. (ICPPS) is a nonprofit 501(c)(3) research and educational entity. Its purposes include research and education in the mental health field and to inform the public and media about the potential dangers of drugs. Its Board of Directors consists of licensed members of the mental health profession. The Law Project for Psychiatric Rights, Inc. is a nonprofit 501(c)(3) public interest law firm whose purposes include informing the public and the courts about psychiatric drugs. Plaintiffs' Complaint, Nos. 1,2,3. Each is a "person" within the FOIA definition. MCL § 15.232(c).[1]

The Pharmacy Quality Improvement Project (PQIP) involves the Department, Comprehensive Neuroscience (CNS) of New Jersey and Eli Lilly and Company. It is designed to be an educational program which analyzes the prescribing patterns of psychiatric drugs for Medicaid participants. Prescription and utilization action trends are reviewed. CNS' role was to receive, sort and analyze data. Eli Lilly's exclusive role was to "provide certain funding."[2] (However, based on the records turned over in the previous case it is clear that an Eli Lilly representative was present

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[1] Mr. Hansen was, but is no longer, a member of the Michigan Department of Community Health Recipient Rights Advisory Committee.

[2] Eli Lilly has been the subject of multiple lawsuits with regard to its marketing practices. For example, Eli Lilly entered into a "Guilty Plea Agreement" in early 2009 in a case filed in the United States District Court, Eastern District of Pennsylvania; United States v Eli Lilly Company, Case No. 09-00020 (U.S.D.C. E.D. Pa.) and paid a $615,000,000 fine having marketed Zyprexa to senior citizens for non-FDA approved purposes. There are other state medicaid fraud cases against Lilly. For example, *Commonwealth v Eli Lilly Co.*, Case No. 00-2836, Feb. Term 2007, Court of Common Pleas, Philadelphia County, P.A.

and participated in PQIP meetings and viewed confidential data.) *Hansen Affidavit, No 5., Exh. 1.*

The money spent by the Department for the drugs is taxpayer money paid through Medicaid.

Plaintiffs are not seeking any names, addresses or personal data about program participants. Plaintiff's Complaint Nos. 13, 15, 20, 23. Prescriber names and license numbers are being sought. Such are already in the public domain having already been released to another. Plaintiff's Complaint No. 20. Plaintiffs are also seeking the names of the drugs which have been given to the medicaid recipients.

In the prior litigation, hundreds of pages of documents were provided to Plaintiff Hansen pursuant to an agreement between the parties and a court order and subsequently filed FOIA requests, including:

a. Michigan Behavioral Pharmacy Reports;
b. Michigan Concurrent Drug Reports;
c. BPMS Mailing Summary Reports & PQIP Mailing Logs;
d. Michigan Physician Specialty and Response Reports;
e. Michigan Targeted Prescriber Change Reports;
f. PQIP Impact Analysis;
g. PQIP Summary Trend Charts;
h. Michigan Managed Care & Michigan Fee-for-Service Pharmacy Reports
i. Michigan Targeted Patient Change Reports;
j. Executive Management Reports.

Hansen Affidavit, No. 4., Exh. 1

The Michigan Behavioral Pharmacy Report for Children Under 5 for June 1, 2005-August 31, 2005 was turned over. It provided details of the psychiatric/psychotropic drugs being administered to children under 5 years of age, as follows:

1. The class of drugs prescribed;
2. The number of patients for each class. (Three thousand sixty-four (3,064) children under 5 were administered some form of psychiatric drug during this

three month period at a cost of $467,343.00);[3]

3. The number of prescribers for each class;
4. The number of claims for each class; and
5. How much state money was spent for each class of drug.

The "Michigan Concurrent Drug Use Report (For All Ages)," for the period of October 1, 2005 through December 31, 2005 is another example. This report detailed the number of patients taking anywhere from 1 to 16 psychiatric/psychotropic drugs during the specified period [in excess of 75,000 people took more than one psychiatric drug; more than 21,000 took three (3); close to 9,000 took four (4); and more than 3,000 took five (5)]. *Hansen Affidavit, No. 4., Exh. 1.*

What was not provided and what was and is one of the focus' of the disagreement are the reports for:

1. Michigan Children Under 5 Years of Age Detail by Drugs and Quality Indicator.

2. Patients on 5 or More Concurrent Behavioral Drugs.

Essentially, the names of the drugs were not provided. These names would in turn allow the manufacturers to be identified. Also, not provided and not the subject of the earlier litigation was:

> An electronic copy of Michigan Medicaid data, listing all fields available on children under age 18 in Medicaid, prescribed atypical antipsychotic medication (drug class including brand names Abilify, Geodon, Risperdal, Seroquel and Zyprexa) in the years 2006 and 2007, including but not limited to:

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[3] The listed side effects for these drugs is extensive. Two examples include, "anticonvulsants/mood stabilizers" - given to 875 children; side effects include but are not limited to liver damage, pancreatitis, anemia, psychosis, congenital neural tube defects, headaches, nausea and many more. http://www.accessdata.fda.gov/scripts/cder/drugsatfda/index.cfm. Certain of these drugs given for "any sympathomimetric/stimulants (given to 391 children under age 5) are listed by the Drug Enforcement Administration as Schedule II Controlled Substances which have effects "similar to cocaine." http://www.usdoj.gov/dea/pubs/abuse/5-STIM.htm. http://www.deadiversion.usdoj.gov/drugs_concern/methylphenidate.htm

Label Name (such as "Seroquel 20 MG tablet"), Approved Amount (dollars), Provider Name and License Number.

Hansen Affidavit, No. 5., Exh. 1

Knowing the drug names and manufacturers has very real education and research potential. *See Karon Affidavit. Exh. 2.* Why the above information was considered to be "public records" (including for example the class of the drugs), while the names of drugs have never been explained. This decision by the Department clearly runs contrary to the purpose of FOIA and has nothing to do with the purpose of the Michigan Release of Information and Medical Research and Education Act, MCL §§331.531-533, as will be explained.

II (a)

RELEVANT DATA/INFORMATION
HAS BEEN RELEASED

Prescriber names and license numbers, as well as the names of the drugs, have already been released. Such information was released pursuant to a FOIA request submitted by another individual. Complaint No. 20. The document is 29,563 pages, not sorted in any particular order and not tabulated. *Hansen Affidavit, No. 6., Exh. 1.*

II (b)

THE PRIOR COURT DECISIONS

The decision of the trial court was not based on the merits of case. See Defendant's Motion to Strike and Dismiss. Exh. 1. While the Court of Appeals recognized the validity of Mr. Hansen's argument it decided "instead of remanding the matter for resolution" to "directly address the issue for purposes of judicial expediency because as reflected in our analysis below, the issue ultimately constitutes a pure legal question." Defendant's Motion to Strike and Dismiss, Exh. 1. The Court of

Appeals proceeded to decide that the records at issue were exempt because they are not "public records" because "defendant has not decided to release the materials." *Id.* Exh. 1 at p. 6. The decision was not published. While the Application For Leave to Appeal to the Michigan Supreme Court was denied, two Justices did agree to hear the case. *Id*, Exh. 1.

ARGUMENT

II

THE LAW OF THE CASE DOCTRINE IS NOT APPLICABLE

The Department recognizes that the previous Court of Appeal's decision is unpublished. Nevertheless the Department did not consider or bring to the court's attention Michigan Court Rule 7.215(c)(1) which provides that unpublished opinions are not binding:

> An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

A search of the case law indicates this Rule is being followed, without exception. See *Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich. App. 264, 282-83 (2009); *Robinson v City of Lansing*, 282 Mich. App. 610, 619 (2009). Furthermore, no cases were found which held or even suggested the law of case doctrine preempts or takes precedence over MCR. 7.215 (c)(1).

This Court is not bound by the decision of the Court of Appeals. The law of the case doctrine does not provide a basis for dismissal.

III

THERE ARE GENUINE ISSUES OF MATERIAL FACT

Certain factual matters need to be addressed and developed. At this juncture there is no record in this case. For example, as noted, the complaint alleges:

> Paragraph 20. The Department has on at least one prior occasion released prescriber names and license numbers.

For purposes of this motion, of course, this must be accepted as true. (There is nothing in the Department's affidavit signed by Mary Greco which challenges or even puts it at issue.) It must also be accepted that the data concerning drugs given to infants and the drug cocktails have also been released. *Hansen Affidavit, No. 6., Exh. 1.* The obvious question is why the information sought was available to one person and not to others. Other questions need also be answered, such as, who actually made this decision, what were their qualifications, why are the names of drugs and their manufacturers not "public record," just how much involvement did Eli Lilly have in this study and more.

The Mary Greco affidavit is simply filled with legal conclusions - the records sought fall within the "confidentiality provisions of the Release of Information for Medical Research and Education Act, M.C.L. 331.531, et seq," they are "non-public, non-discoverable, confidential records . . . " and no "proper purpose" has been shown. These are legal issues which need to be decided by the court, not a Department employee. The underlying facts need to be developed.

Even the Peer Review Immunity Statute provides for the release of information provided a certain purpose or purposes are established. MCL § 331.532. These purposes include research, education, health care standards and financial integrity. A factual record on these points also needs

to be established. Plaintiffs are entitled to have the opportunity to do so.

It is alleged that the release of information could result in the "disclosure of identifiable patient information." Patient information has not been and is not being sought. Should the requested information be provided, the Department would of course be free to raise appropriate objections to follow-up requests.

ARGUMENT

IV

THE DEPARTMENT HAS WAIVED ITS RIGHT TO ASSERT THEIR "PUBLIC RECORD"ARGUMENT

The Department has already released the information sought to another. Accordingly, they have waived whatever right they may have to decide that the information is not a matter of "public record." Waiver is an "intentional relinquishment of a known right. The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting or failing to act as to induce a belief that it was the intention and purpose to waive." *Book Furniture Co. v Chance*, 352 Mich. 521, 526-527, 90 N.W. 2d 651 (1958). Providing the information to another person, not a "peer review" entity, is a relinquishment of whatever right the Department may have. The information is in the public domain. *Hansen Affidavit, No. 6, Exh. 1.*

At the very least, the court needs to allow the discovery process to proceed to get the details and circumstances pertaining to the release of the information.

V

THE PEER REVIEW IMMUNITY STATUTE DOES NOT PREEMPT FOIA

This case is one of first impressions. Research reveals that there are no reported cases within the State of Michigan which involves FOIA and the Peer Review Immunity Statute, other than the non-binding *Hansen* case. Defendant's Motion to Dismiss and Strike, Exh. 1. The effect of the decision of the Department is to render void and meaningless the FOIA provision which allows for the filing of a circuit court action to have the Department's decision reviewed de novo. MCL §215.240. This should not be allowed.

To begin, the FOIA exemption provision does not encompass the Peer Review Immunity Statute at least for the purpose of this case. The Michigan Supreme Court has pointed out, "[t]he purpose of statutory peer review immunity is to foster the free exchange of information in investigations of hospital practices and practitioners, and thereby reduce patient mortality and improve patient care within hospitals." *Feyz v Mercy Memorial Hosp.*, 475 Mich 663, 667; 719 NW2d 1, 4 (2006).

The peer review process is disciplinary or investigative in nature. The statute speaks of peer review entities gathering "information or data relating to [1] the physical or psychological condition of a person, [2] the necessity, appropriateness, or quality of health care rendered to a person, or [3] the qualifications, competence, or performance of a healthcare provider." MCL § 331.531(1). The entity reviewing the performance of a health care professional necessarily must seek out records, data, and knowledge from others with such information in order to proceed with their fact-finding mission. Those people giving such information to a peer review entity are protected from liability

through immunity by the statute, hence the name "Peer Review Immunity Statute." MCL § 331.531(3).

A peer review entity collects all of the information pertinent to their investigation about the performance of a healthcare professional and keeps a record of its "reports, findings, and conclusions." *see* MCL § 331.533. These reports, findings, and conclusions by the reviewing entity about a healthcare professional's performance are confidential and can only be disclosed for approved purposes under the statute. *Id.*, MCL § 331.532. (Performance of a health care professional is not at issue in this case.) And, the peer review entity is also protected from liability through immunity under the statute as long as its disclosure of its proceedings, reports, findings, and conclusions are approved by the statute. MCL § 331.532. Again, this is why the statute is known as the "Peer Review Immunity Statute." (Emphasis added)

The entire Act centers around one unifying purpose–when a situation arises where an investigation or discipline may become necessary in a healthcare setting because a healthcare professional's performance, qualifications, or competence needs to be evaluated, protection from liability is provided to those people who give information to a reviewing entity, and the reviewing entity itself when it discloses information to others.

Every court that has ever looked at this Act and then written a decision discussing it, has always and only ruled consistent with what has been described above–that this Act is about (1) protecting people who disclose information to a peer review entity about a healthcare professional's competence or performance, and (2) about protecting review entities from liability for disclosing their reports, findings, and conclusions to others about a healthcare professional's misconduct or

incompetence.[4]

The facts of the case, as reflected in the complaint have nothing to do with anything that involves the peer review process as contemplated by the Peer Review Immunity Statute. There is no investigation or disciplinary proceeding where reports, findings, and conclusions of a peer review entity are sought by the Plaintiff-Appellant. MCL § 331.531(1). The Peer Review Immunity Statute cannot be a basis to provide the Defendant-Appellee with a defense to a FOIA request under the facts of this case. A plain reading of the Peer Review Immunity Statute necessitates that this is the only viable conclusion.

VI

PLAINTIFFS ARE ENTITLED TO JUDICIAL REVIEW OF THE DEPARTMENT'S DECISION

The Court of Appeals while recognizing the "trial court failed to reach the issue of whether the materials were exempt . . ." went on to rule it was, as noted above, not necessary to do so because the Department had not chosen to release the documents and thus they were not "public records."

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[4] *Feyz v Mercy Memorial Hosp.*, 475 Mich 663, 719 NW2d 1 (2006); *In re Petition of Attorney Gen.*, 422 Mich 157, 369 NW2d 826 (1985); *Dye v St. John Hosp. Med. Ctr.*, 230 Mich App 661, 584 NW2d 747 (1998); *Feyz v Mercy Memorial Hosp*, 264 Mich App 699; 692 NW2d 416 (2005); *Long v Chelsea Community Hosp.*, 219 Mich App 578, 557 NW2d 157 (1996); *Veldhuis v Allan*, 164 Mich App 131, 416 NW2d 347 (1987); *Regualos v Community Hosp.*, 140 Mich App 455, 364 NW2d 723 (1985); *Taylor v Flint Osteopathic Hosp., Inc.*, 561 F Supp 1152 (ED Mich 1983); *Savas v William Beaumont Hosp.*, 102 Fed Appx 447 (6th Cir 2004); *Savas v William Beaumont Hosp.*, 216 F Supp 2d 660 (ED Mich 2002); *Neuber v Tawas St. Joseph Hosp.*, 1991 U.S. App. LEXIS 21980 (6th Cir 1991); *Mathis v Controlled Temperature*, 2008 Mich App LEXIS 626 (2008); *Covin v Grand View Health Sys.*, 2007 Mich App LEXIS 532 (2007); *Ravikant v William Beaumont Hosp.*, 2003 Mich App LEXIS 2477 (2003); *Verma v Giancarlo*, 2000 Mich App LEXIS 1139 (2000); *Phillip M. Sorensen, M.D. & Advanced Pain Mgmt v Sparrow Hosp. Health Sys.*, 1997 Mich App LEXIS 2151 (1997); *Warner v Henry Ford Hosp.*, 1996 Mich App LEXIS 2078(1996); *Hadix v Caruso*, 2006 U.S. Dist. LEXIS 72967 (WD Mich 2006).

This decision stands for the proposition that when the Department says the records are not "public records" they are not "public records." The Court is thus, without putting it into these terms, applying the judicial nonreview doctrine. *Hoffman v Garden City Hospital Osteopathic*, 115 Mich. App. 773, 779; 321 NW2d 810 (1982). However, no supporting authority was provided and there is none for a case such as this.

The only authority cited is the *Dye* case, which in a footnote found that nothing within §§ 2 or 3 of the Peer Review Immunity Statute places a duty on a review entity to release information. Appellant has never argued that a duty arose under these provisions. The duty arises under FOIA. MCL §§ 15.231, et seq.

The *Dye* case is, nevertheless, readily and easily distinguishable. *Dye* involved a medical malpractice case claim and actual peer review or credential committee issues, not a FOIA request seeking names of drugs purchased through the State's Medicaid program. In the *Dye* footnote, the court referenced this Court's decision in the *Bruce* case, which is also not on point. In *Bruce*, the staff privileges of a Dr. Cook were suspended for six months. The issue before the *Bruce* court was whether records requested by the Michigan Board of Medicine were privileged and confidential although they were not "public records." *Attorney General v Bruce and Berrien General Hospital*, 422 Mich. 152, 369 NW2d 826 (1985). Like *Dye*, the *Bruce* case was not a FOIA case and does not address the interplay between FOIA and the Peer Review Immunity Statute.

Even if the Peer Review Immunity Statute, through MCL § 15.243(1) (d) is applicable, it does not preempt FOIA in its entirety and thus remove one's right to have the Department's decision reviewed by the Circuit Court under the applicable standard of review. There is nothing in the Peer Review Immunity Statute or any case law cited by the Department which provides there is to be no

judicial review. In other words, why wouldn't the circuit court review the Department's decision to ensure the records in question fall within the scope of the Peer Review Immunity Statute and also determine if the exceptions apply.

FOIA is specific on this point. A requesting person has the right to commence a circuit court action. MCL §15.240 (4). Indeed, the statute specifically contemplates the circuit court should review, de novo, the exemption issue:

> (4) The court shall determine the matter de novo and the burden is on the public body to sustain its denial. MCL § 15.240(4)

To allow the Department to be the decision maker, the judge and the jury, is not contemplated. The Department does not have unbridled discretion to do as it deems appropriate. To the contrary "claimed exemptions must be supported by substantiated justifications and explanation." *Booth Newspapers Inc. v Board of Regents of the University of Michigan*, 192 Mich. App. 574, 586; 481 NW2d 778, 784 (1992), reversed in part on other grounds 444 Mich. 211; 507 NW2d 422 (1993).

VII

THE RECORDS IN DISPUTE ARE PUBLIC RECORDS

The Peer Review Immunity Statute provides, in part:

> Except as otherwise provided in Section 2, the record of any proceeding and the reports, findings and conclusions of a review entity and data collected by or for a review entity under this act are confidential, are not public records, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding. (Emphasis added)

The language is clear. It states "[e]xcept as provided in Section 2 . . ." That is, the statute

tells us that records which fall within the exceptions are "public." The "exception" language cannot be ignored or read out of the statute. It is unambiguous, clear and "plain." *G.C. Tremmes & Company v Guardian Glass Company*, 468 Mich 416, 435; 662 NW2d 710 (2003) and cases cited. Words are to be given their "common and approved usage." MCL 8.3a. The exception language removes the data, reports, etc. from the "non-public" category when the data, reports, etc. fall within § 331.532(a), (b) or (c). Section 2 deals with health research, education, maintaining professional standards and financial integrity. MCL § 331.532(a), (b), (c). Moreover and specifically turning to MCL 331.532 Section 2, paragraph 2, paragraph (d), such purposes also include:

> "(d) To provide evidence relating to the ethics or discipline of a health care provider, ***entity***, or practitioner." (Emphasis added.)[5]

At this point, in this proceeding, again prior to discovery and prior to an answer being filed, Plaintiff is entitled to the presumption that the data reports fall within the Section 2 exceptions. This must be so until, at least, this court reviews said records and reports.

VIII

THE DATA SOUGHT DOES NOT FALL WITHIN THE PEER REVIEW STATUTE CATEGORIES

FOIA allows for information to be exempted from disclosure when the requested information is "specifically described and exempted from disclosure by statute." MCL § 15.243(1)(d). The Peer Review Immunity Statute as discussed concerns itself with the care provided to persons and the competence of providers.

Subsection (1) of the Peer Review Immunity Statute reads:

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[5] The use of the term "entity" is far broader than other RIMREA terms such as "health facility", "review entity" and more.

> "A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person or the qualifications, competence or performance of a health care provider.

Simply, the data sought does not fit within any of these categories. What is sought are the names of drugs and provider names. Plaintiffs have at no time sought information about a particular "person" or the "qualifications, competence or performance of a health care provider." The information at issue does not fall within the categories covered by this Statute. Thus, MCL § 15.243 (1)(d) is not properly invoked.

IX

PLAINTIFFS ARE BEING DENIED THEIR EQUAL PROTECTION RIGHTS

While the sought-after discovery will help flush out this issue, it certainly appears that Plaintiffs are being denied their equal protection rights. The Department's refusal to provide them with the requested information certainly appears to be an arbitrary decision. The Equal Protection Clause prohibits such treatment. In *Electronic Data Sys Corp v Flint Twp*, 253 Mich. App. 538, 551; 656 N.W.2d 215 (2002), the Court of Appeals set forth the equal protection scope, as follows:

> The Equal Protection Clauses of the United States and Michigan Constitutions provide that no person shall be denied the equal protection of the law, US Const. AM XIV; Const 1963, art 1, § 2. The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment. While the Equal Protection Clauses require that persons in similar circumstances be treated alike, those things which are different in fact or opinion [are not required] to be treated in law as though they were the same. Thus, the Equal Protection Clauses do not prohibit the state from distinguishing between persons, but require that the distinctions

> that are made not be arbitrary or invidious. [*Electronic Data Sys Corp, supra* at 551 (citations and internal quotation marks omitted).]

This serious concern needs to be fully addressed at the appropriate time at this case.

X

JURY DEMAND IS WITHDRAWN

While Plaintiffs do not concede the jury demand argument, the jury demand is withdrawn.

XI

ATTORNEY'S FEES AND COST

The Department's request for attorney's fees is very misplaced and should be withdrawn. To suggest that this matter is not being plead in good faith and that there was some improper purpose is itself not a good faith statement. The Department argues that Plaintiff knew or should have known that "their action lacks merit." Department Brief, p.10; MCR 2.113A. To the contrary, the Department knew or at least should have known that the unpublished opinion was not binding. Indeed, two Michigan Supreme Court Justices have already indicated these issues are significant and warrant consideration. Contrary to what Defendant argues it is the law of the case argument which "has required the unnecessary waste of counsel and judicial resources."

There are a number of important serious questions raised in the proceeding. They include the question of whether a state agency, using taxpayer dollars, has the unbridled discretion not subject to any judicial review, to decide which document and data it will or will not release. The Freedom of Information Act is quite clear as to what its purpose is and what it is trying to achieve.

There is no binding precedent in existence at this time. This case is very worthy of consideration and a proper lead up to trial or a more timely summary disposition motion. The filing

of the Motion to Dismiss was premature at best. Attorney's fees and costs are requested should be awarded in favor of Plaintiffs. It is Plaintiffs' not Defendant who are entitled to costs, expenses and attorneys fees. MCR 2.114(F)

CONCLUSION

WHEREFORE, Plaintiffs' pray that the Defendant's Motion to Dismiss be denied and that attorney's fees and costs be awarded.

Respectfully submitted,

THE JAQUES ADMIRALTY LAW FIRM, P.C.

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Date: August 28, 2009

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

BEN HANSEN, INTERNATIONAL CENTER FOR THE STUDY OF PSYCHIATRY AND PSYCHOLOGY, INC., AND THE LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.

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STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH

Defendant.
_____/

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CERTIFICATE OF SERVICE

Krystle Melquiades, being first duly sworn, deposes and says that on the 28th day of August, 2009, she served *Brief in Opposition to the Department of Community Health's Motion to Dismiss* and this *Certificate of Service* in the above matter by regular USPS mail and by via e-mail, by placing same in an envelope with adequate postage thereupon and depositing in the United States Post Office box at Detroit, Michigan:

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Subscribed and sworn to me this 28th day of August, 2009

James P. Anderzak
NOTARY PUBLIC

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

Krystle Melquiades
KRYSTLE MELQUIADES

EXHIBIT 1

AFFIDAVIT OF BEN HANSEN IN SUPPORT OF OPPOSITION TO DEFENDANTS MOTION TO DISMISS

Ben Hansen, being duly sworn states as follows:

1. My name is Ben Hansen. If called upon to testify to the contents of this affidavit, I will do so based on my personal knowledge, except as otherwise specifically stated.

2. I make this affidavit in support of Plaintiffs' Opposition to Defendant's Motion to Strike.

3. I have made various requests to the State of Michigan, Department of Community Health, over the past few years.

4. The information provided includes what is set forth and detailed in the Brief In Opposition to Motion to Dismiss includes but is not limited to:

   a. Michigan Behavioral Pharmacy Reports;
   b. Michigan Concurrent Drug Reports;
   c. BPMS Mailing Summary Reports & PQIP Mailing Logs;
   d. Michigan Physician Specialty and Response Reports;
   e. Michigan Targeted Prescriber Change Reports;
   f. PQIP Impact Analysis;
   g. PQIP Summary Trend Charts;
   h. Michigan Managed Care & Michigan Fee-for-Service Pharmacy Reports
   i. Michigan Targeted Patient Change Reports;
   j. Executive Management Reports.

5. What was not provided were reports for:

   a. Michigan Children Under 5 Years of Age Detail by Drugs and Quality Indicator.
   b. Patients on 5 or More Concurrent Behavioral Drugs.

Basically, these reports would provide the names of the drugs being referenced in the paragraph 4 documents and reports above.

What was also not provided included:

> An electronic copy of Michigan Medicaid data, listing all fields available on children under age 18 in Medicaid, prescribed atypical

antipsychotic medication (drug class including brand names Abilify, Geodon, Risperdal, Seroquel and Zyprexa) in the years 2006 and 2007, including but not limited to: Label Name (such as "Seroquel 20 MG tablet"), Approved Amount (dollars), Provider Name and License Number.

6. I have seen the Department's reply to a FOIA request submitted by another which did provide drug names as well as prescriber names and license numbers. This report is in excess of 29,000 pages and not sorted in any particular fashion and not tabulated.

7. I have consulted with other health care professionals who advise the information will be useful for educational and research purposes. See Dr. Karon's Affidavit.

8. In my own research of the above referenced reports, I have discovered questions regarding the financial integrity of the use of state funds and am preparing a Medicaid False Claims Act Civil Action for filing.

Ben Hansen

Ben Hansen

Subscribed and sworn to before me
this 11th day of August, 2009.

NOTARY PUBLIC

TORI ANN JELINEK
Notary Public, State of Michigan
County of Grand Traverse
My Commission Expires 09-09-2013

EXHIBIT 2

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

BEN HANSEN,

Plaintiff

v,

Case No. 06-1033-CZ

STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH

Freedom of Information Act Complaint

Defendant.

_____/

AFFIDAVIT IN SUPPORT OF FOIA REQUEST

Bertram P. Karon, PhD being duly sworn, states:

1. Since 1968 I have been a professor of clinical psychology at Michigan State University. I am a past president of the Division of Psychoanalysis of the American Psychological Association, and of the Michigan Psychoanalytic Council. My research focusing on psychoanalytic theory and schizophrenia has been published in more than 150 articles and papers in numerous academic journals spanning over forty years. A copy of my C.V. is attached.

2. I am alarmed by what I see as an over-reliance on psychiatric medications for the treatment of schizophrenia and other mental disorders. These medications, frequently prescribed off-label and mixed in "drug cocktail" combinations, are now being administered to patients at very young ages, a practice virtually unheard of only a couple decades ago.

3. I am also alarmed by the aggressive marketing and promotion of these drugs by an

over-zealous pharmaceutical industry, which invests enormous resources into influencing the prescribing practices of medical professionals. Pharmaceutical industry influence now permeates all levels of academic, medical and scientific research.

4. I fully support Ben Hansen's Freedom of Information Act request for Michigan Department of Community Health documents related to Michigan Pharmacy Quality Improvement Project. The requested documents contain information of useful educational value to researchers such as myself who are eager to study the changing prescribing patterns of psychiatric drugs to young children in our state's Medicaid system, as well as the changing prescribing patterns of psychiatric drug cocktails to patients of all ages. Growing numbers of patients are now prescribed a dozen or more psychiatric drugs concurrently – a practice in no way supported by scientific evidence.

5. It is my understanding that any confidential, identifying information contained in the requested documents would be redacted before their release under FOIA, thus protecting individual privacy and doctor/patient confidentiality. The data contained in these documents (number of patients under age 5 prescribed psychotropics and patients of any aged prescribed 5 of more psychotropics concurrently, listed by drug name) is data that pharmaceutical manufacturers routinely collect and analyze as part of their market research. There is no justifiable reason this information should remain secret from the citizens and taxpayers of our state.

6. Having this data will not only advance healthcare research and thus, education but help ensure that appropriate standards among healthcare providers are maintained.

If called up to testify, I would do so based upon my personal knowledge, experience, education and practice as a clinical psychologist.

Bertram P. Karon, Ph D

Sworn to and Subscribed
Before me this 7th day
of March, 2007.

Janet P. Besaw

JANET P. BESAW
Notary Public, Ingham County, MI
My Comm. Expires July 28, 2007