**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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

**Plaintiffs-Appellants,**

**SC No.**

**v.**

**C.A. No. 294415**
**Ingham County Circuit Court**
**No. 09-759-CZ**

**DEPARTMENT OF COMMUNITY HEALTH,**

**Defendants-Appellee.**

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**PLAINTIFFS-APPELLANTS'**
**APPLICATION FOR LEAVE TO APPEAL**

**CERTIFICATE OF SERVICE**

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## INTRODUCTION

The necessity for this Application For Leave to Appeal arises because the decision by the Court of Appeals does not follow rulings of this Court with regard to two fundamental legal principles. What were straightforward Freedom of Information Act (FOIA) requests have evolved to the point where the Court of Appeals' decision affects fundamental legal principles which go far beyond whether the information being sought should or should not be released. MCL §15.231 et seq. The real life effect of the decision allows a State of Michigan employee (whose name and qualifications are unknown) to decide whether or not records are to be released. The decision moreover leaves the matter solely to the discretion of the employee and is not subject to judicial review despite the requirement for a "de novo" review. MCL §15.240.

One set of issues address the applicability of Release of Information for Medical Research and Education Act, MCL § 331.531 et seq. (commonly referred to as the "Peer Review Immunity Statute") in relation to FOIA exemptions and whether it provides the basis for a FOIA exemption under the particular facts and circumstances of this case. Exhibit F. The other focuses on the role of the judiciary in reviewing decisions made by State of Michigan employees where the employee is charged with the responsibility of responding to FOIA requests. The applicable standard of review, what it actually means and how it was used in this case are at issue.

This case is of "significant public interest," involves a State of Michigan agency and is of "major significance to the state jurisprudence;" in view of the application of the legal principles which are at issue. Moreover, as will be shown herein, the decision of the Court of Appeals does conflict with prior decisions of the Michigan Supreme Court. MCL § 7.302(**B**)(2)(3)(5).

## I. STATEMENT OF THE FACTS

### A. NATURE OF THE CASE

This matter involves a case brought pursuant to the Michigan Freedom of Information Act. MCL §15.231, et seq.

In late 2009, Plaintiffs-Appellants submitted Freedom of Information Act requests to Defendant-Appellee, the State of Michigan Department of Community Health ("Department"), in accordance with and pursuant to the Freedom of Information Act ("FOIA"). MCL §15.231, et seq. These requests sought information, data and documents pertaining to a Department program entitled "Pharmacy Quality Improvement Project" ("PQIP").

The Department denied, in part, the requests. A Complaint was then filed in the Ingham County Circuit Court on May 29, 2009. The Department responded by filing a motion to dismiss. Court of Appeals Docket, No. 7. The Circuit Court granted the motion to dismiss, which decision was affirmed by the Court of Appeals. Exhibit A. This appeal addresses the dismissal. The relevant details of what transpired leading up to the dismissal will be set forth below.

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## B. BACKGROUND

Appellants are Mr. Ben Hansen, a resident of Traverse City, Michigan; the International Center for the Study of Psychiatry and Psychology, Inc. (ICSPP); and the Law Project for Psychiatric Rights, Inc. ICSPP is a non-profit 501(c)(3) research and educational entity. Its Board of Directors consists of licensed members of the mental health profession. The Law Project informs the public and the courts about psychiatric drugs. Exhibit A, p. 1. Each is a "person" within the FOIA definition. MCL §15.232(C).[1] Each filed FOIA request seeks records from Appellee, the State of Michigan Department of Community Health (the "Department"). The Department was a party to a project funded by Eli Lilly and Company entitled the Pharmacy Quality Improvement Project (PQIP).[2] Comprehensive Neuroscience of New Jersey (CNS), also a party, was to analyze the prescribing pattern of psychiatric drugs for Medicaid recipients for the purpose of improving the "effectiveness" of the taxpayers' dollars spent on psychotropic drugs, "patient adherence to medication plans" and the "quality of psychotropic practices based on evidence based guidelines." Exhibit A.

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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. Exhibit A, p.2.

[2] Eli Lilly's exclusive role was supposed to be to provide certain funding. Exhibit A. p.2 Records turned over in the first Hansen case wherein indicate that an Eli Lilly representative was present and participated in PQIP meetings and viewed confidential data. Exhibit C, Circuit Court Docket No. 19, Brief In Opposition to Dismiss, Hansen Affidavit.

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. 0900020 (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, see *Commonwealth v Eli LIlly Co.*, Case No. 00-2836, Feb. Term 2007, Court of Common Pleas, Philadelphia County, P.A

Appellant Hansen's November 2008 FOIA request sought:

> All Michigan "Children Under Age 5 Detail by Drug Name" reports issued monthly by Comprehensive Neuroscience of New Jersey Inc. during the life of PQIP program, listing Prescriber Name, Prescriber ID, and Drug Name. It is understood that Patient Name and Patient ID shall be redacted from these reports before they are released. Exhibit A, p. 2.
>
> All Michigan "Patients on 5 or more Concurrent Behavioral Drugs" reports issued monthly by Comprehensive Neuroscience, Inc. during the life of the PQIP program, listing Prescriber Name, Prescriber ID, and Drug Name. It is understood that Patient Name and Patient ID shall be redacted from these reports before they are released. Exhibit A p 2.

The Department denied this request, stating, "your request is denied as the information you are requesting is exempt from disclosure pursuant to Section 13(1)(a) and (d) of the Freedom of Information Act. Specifically, the information is exempt pursuant to MCL §333.533." Exhibit A p. 2. Essentially this denial is based on the Department's decision to not release the records, thereby making said records not "confidential" or "public" as those terms are used in the Peer Review Immunity State. MCL §331.533. This provision provides:

> The identity of a person whose condition or treatment has been studied under this act is confidential and a review shall remove the person's name and address from the record before the review entity releases or publishes a record or its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in section 2 [MCL § 331.532], the record of a 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. MCL §331.533.

Mr. Hansen also sought

> An electronic copy of Michigan Medicaid data, listing all fields available children under age 18 in Medicaid, prescribed atypical antipsychotic medication (drug class including brand names Abilify, Geodon, Risperda, Seroquel and Zyprexa) in the years 2006 and 2007, including but not limited to: Lable [sic] Name (such as "Seroquel 20 MG tablet"), Approved Amount (dollars), Provider Name and License Number. Exhibit A, p. 2.

The Department "granted (the request) as to existing non-exempt records," after asking for and receiving additional information. A deposit for the expense of producing the records was sent. The Department then "reneged on its approval" and stated that "the disclosure of Prescriber Name and License Number could be used with other public data to produce identifiable information." Exhibit A, pp. 2-3.

ICSPP and the Law Project for Psychiatric Rights also made separate FOIA requests for the information relating to children under age five and the information relating to persons of five or more concurrent behavioral drugs. The Department denied the requests, again citing MCL § 331.533. Exhibit A, p. 3.

Appellants filed suit in the Ingham County Circuit Court claiming the Department's denials were unlawful under FOIA. Defendant filed a motion for summary disposition under MCL § 2.116(C)(7), (8), and (10), claiming primarily that plaintiffs' claims were barred by the law of the case doctrine because similar issues had been decided by the Court of Appeals in *Hansen v Michigan Dep't Community Health*, unpublished opinion per curium of the Court of Appeals issued March 13, 2008. 2008 Mich App LEXIS 542 (Docket No. 278074). Exhibit B. An application for leave to appeal was filed and denied. Two justices would have granted leave. Exh. G.

To be able to fully evaluate the current requests and the denials, some of the detail of the requests from the earlier Hansen litigation must be considered, where hundreds of pages of documents were provided. These included:

a. Michigan Behavioral Pharmacy Reports
b. Michigan Concurrent Drug Reports;
c. BPMS Mailing Summary Reports and PQIP Mailing Logs;
d. Michigan Physician Specialty and Response Reports;

e. Michigan Targeted Prescriber Change Reports;
f. PQIP Impact Analysis;
g. PQIP Summary and Trend Charts;
h. Michigan Managed Care & Michigan Fee-for-Service Pharmacy Reports;
i. Michigan Targeted Patient Change Reports;
j. Executive Management Reports.

Included also were the Michigan Behavior Pharmacy Report for Children Under 5 for June 1, 2005-August 31, 2005, as follows:

1. The class of drugs prescribed;
2. The number 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. 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 drugs.

*Circuit Court Docket., No. 10, Brief In Opposition to Motion for Summary Disposition, Hansen Affidavit.*

In other words, the reports detailed the purposes of the drugs; (depression; anxiety; bi-polar, etc.), provided the number of patients receiving each drug, the number of claims, amount spent on each, summaries, impact analysis and more.

The Michigan Concurrent Drug Use Report (For All Ages) for the period of October 1, 2005 through December 31, 2005 is another example of what was provided. 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)]. *Circuit Court Docket., No. 19, Brief In Oppositions to Motions for Summary Disposition, Hansen Affidavit.*

These details are provided to enable the Court to evaluate whether it was proper for the

Department to exempt the information not released. What was not provided were the names of the drugs. The Department simply decided not to release these records and thus they were deemed by the Department to be "confidential" and "public" records under the Peer Review Immunity Statute. Accordingly they were exempt under FOIA. (Why is that the class of drugs, number of patients for each class, number of prescribers, dollars spent and more are not confidential and the names of the drugs are not is obviously based on an arbitrary decision. No rationale has been provided.) Not provided also and not the subject of the earlier litigation were: the prescribing doctors' names; and the prescribers' identification numbers. Each request indicated that patient information was to be redacted. At no time has personal information been requested.

Once the November 2008 FOIA requests were turned down, Plaintiffs filed their Complaint in the Circuit Court of Ingham County. On July 2, 2009, the Appellee brought a Motion for Summary Disposition based on several theories, including that the records sought were exempted from disclosure under FOIA by the Peer Review Immunity Statute. Circuit Court Docket No. 7. The Trial Court agreed. The Trial Court heard oral argument, granted the Appellee's motion and dismissed the Plaintiffs' Complaint on September 23, 2009, essentially basing its entire analysis on an unpublished Michigan Court of Appeals decision. Exhibits 2, 4.

An appeal was taken. The Court of Appeals affirmed in an unpublished per curium opinion. Exhibit A. The decision held that the Peer Review Immunity Statute can be invoked as a defense to a FOIA request, the Department has complete unbridled discretion in determining what and what not to release, and that it is not necessary for the court to consider anew the determination that the records are not "confidential." The Court of Appeals held that the trial

court did conduct a "de novo" review by way of reviewing the pleadings and hearing oral arguments. Exhibit A, p. 6. In other words, it is not necessary for the trial court in conducting a "de novo" review to take a fresh look at the facts and circumstances and make its own findings and conclusions.

These holdings violate well settled precedent and decisions of this Court. Fundamental rules of statutory construction were not applied and the wrong "de novo" standard of review was used. Accordingly, as noted, an unidentified State of Michigan employee is being given the right and full unbridled discretion to decide whether to release documents and thus determine what is "confidential" and "public" under the Peer Review Immunity Statute. Moreover the Courts in Michigan need not consider the requests anew. In other words, it is not necessary for the Court to stand in the shoes of the Department and review the requests as if the request were brand new. These holdings need to be corrected.

## II. ARGUMENT

The Court of Appeals decision on the interpretation and applicability of the Peer Review Immunity Statute reads, in its entirety, as follows:

> Plaintiffs claim that *Hansen* was wrongly decided because MCL § 331.533, as a part of the peer review immunity statute, MCL § 331.533 *et seq*., is only applicable to information used for disciplinary or investigative proceedings regarding a health care professional's competence. Plaintiffs claim that the statutory scheme is designed solely to protect individuals who disclose information about a health care professional's job performance. However, plaintiffs' "statutory purpose" argument is contrary to the plain language of the statutes at issue. As noted in *Kilda v Braman*, 278 Mich App 60, 64; 748 NW2d 244 (2008). "If [statutory] language is clear and unambiguous, it is assumed that the Legislature intended its plain meaning and the statute is enforced as written." There is nothing in the statutes at issue indicating that they apply solely to information relating to the purpose described by plaintiffs. Exhibit A., pp5-6.

It is correct that Appellants' argued that the statute was designed to address peer review and

disciplinary proceedings, with the release of information provisions arising out of such circumstances. This will be addressed in detail. However, the Court of Appeals did not address all arguments presented. Even if this Court were to conclude the Peer Review Immunity Statute does provide for exemptions under FOIA outside the framework of a peer review or disciplinary proceeding, the decision in this case should not stand.

## A. THE PEER REVIEW IMMUNITY STATUTE DOES NOT APPLY TO THE FACTS AND CIRCUMSTSANCES OF THIS CASE

There is no basis to invoke the Peer Review Immunity Statute, at least under these facts and circumstance. Section one of the Statute provides:

> (1) 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.

MCL §331.531 (emphasis added)

No information of any sort about any "person" who was being treated has been sought at any time. The names of the drugs being prescribed were requested; not who took which drug. The Department, as detailed above, provided a great deal of information from the PQIP program including the class of drugs. Yet, at some point they simply decided to not provide the names of the drugs.

The confidentiality provision also provides no support for the decision. It reads.

> The identity of a person whose condition or treatment has been studied under this act is confidential and a review entity shall remove the person's name and address from the reord before the review entity releases or publishes a record of its proceedings, or its reports, findings, and conclusions. Except as otherwise provided in section 2, the record of a 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)

Here again the emphasis is on keeping a person's condition and treatment "confidential." Nothing is said which could reasonably be construed to incorporate the names of drugs into the basic purpose of the statute or the confidentiality provisions.[3]

The Department decided it was not going to release the names of the drugs and that therefore the records sought were not "public." The lower courts have agreed, holding that the Department has the discretion to make the decision. This conclusion does not fairly examine how the Statute reads.

The Court of Appeals correctly recites the well established principle "[i]f [statutory] language is clear and unambiguous, it is assumed that the legislature intended the plain meaning and the statute is enforced as written." *Kilda v Braman*, 278 Mich App 60, 64; 748 NW2d 244 (2008). However, two key words are ignored in their analysis. The Statute speaks of persons not the names of drugs. Appellants, as stated, were not and are not seeking information about any "person" or disciplinary or investigative proceedings regarding a health professional's competence. Thus, the question becomes, what is "confidential" about the drug names, especially given all the other information which had been released. Appellants' view is, obviously, nothing is confidential about the names of the drugs. There is nothing in the Record which indicates otherwise.

It is understood that the Statute says the Department "may provide… information…" MCL § 331.531. Having such discretion does not mean that it has the discretion to redefine or in

[3] Appellants have not and do not argue they are "review entities" as the term is defined. MCL § 331.531(2).

effect rewrite the statute when it chooses to do so.

> The statute should be read in its entirety. The Court has made this quite clear. It is a well-established rule of statutory construction that provisions of a statute must be construed in light of the other provisions to carry out the apparent purpose of the legislature. *Dagenhardt v Special Machine and Engineering, Inc.*, 418 Mich 520; 345 NW2d 164 (1984); *Workman v Dalle*, 404 Mich 477, 507; 274 NW2d 373 (1979).

*Farrington v Total Petroleum, Inc. and Hartford Insurance Co.*, 442 Mich 201; 501 NW2d 76 (2003).

> Further guidance by this Court was provided in 1998. In construing the act in accordance with its purposes, the text of each section should be read in light of the purpose and policy of the rule or principle in question.

*Sharlow and Shurhoff Development Company v Thomas Bornthuis*, 456 Mich 730, 737, 576 NW2d 159 (1998).

To read the statute to mean that the Department can choose to release or not release records without regard to the purpose of the statute or whether the information could be considered "confidential" and therefore not "public" adds a whole new meaning or dimension to the statute. Such an interpretation does not consider the entire statute.

It must also be remembered that the claimed exemptions tie back to FOIA. The broad purpose behind the FOIA statute is certainly well known. Michigan's Freedom of Information Act, MCL § 15.231 et seq., exists to give the people of the State of Michigan "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees. The people shall be informed so that they may fully participate in the democratic process." The Peer Review Immunity Statute should not be read outside for the purpose of the FOIA as it is being invoked as a FOIA exemption. In any event, the records sought cannot be considered "confidential" as they are not personal.

## B. DISTINGUISHING BRAND NAMES FROM PRESCRIBER NAMES AND LICENSE NUMBERS

Appellants certainly recognize that a portion of the matter involves their request for prescriber names and license numbers. Clearly names and license numbers are distinct from the names of drugs. Appellants do not believe that providing these names and/or license numbers gives rise to an exemption pursuant to the Peer Review Immunity Statute as again, no health care professional's competence or performance is in question. Nevertheless, should the Court make such a distinction, the question of the drug names remain a separate and distinct matter.

## C. THE PURPOSE OF THE PEER REVIEW IMMUNITY STATUTE IS TO DEAL WITH DISCLOSURE OF INFORMATION ABOUT DISCIPLINARY PROCEEDINGS AGAINST MEDICAL PERSONNEL

The purpose of the Peer Review Immunity Statute has been addressed by the Court in a number of cases. In *Feyz*, this Court pointed out: "[t]he purpose of statutory peer review immunity is to foster the free exchange 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 statute is set up to provide an apparatus whereby healthcare professionals are evaluated by a peer review entity in order to "reduce patient mortality and improve patient care within hospitals." *Id.* The peer review process is disciplinary or investigative in nature.

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 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. 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. This is why the statute is known as the "Peer Review Immunity Statute."

Every court that has ever looked at this Act and then written a decision discussing it, has always, only, ever 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 job performance.[4]

When a situation arises where an investigation or discipline may become necessary, 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 approved by statute. Release of

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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. Cir*., 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 Carukso*, 2006 U.S. Dist. LEXIS 72967 (WD Mich 2006).

Information under the statute does not arise outside of a peer review circumstance. The facts of the case at bar 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 Plaintiffs-Appellants. MCL§331.531(1). The Appellee seeks to invoke sections two and three of the Peer Review Immunity Statute without understanding the purpose behind the statute as interpreted by every court in the last twenty years. The Appellee ignores or glosses over the entirety of section one that sets out the applicability of the statute and its reach.

It is also noteworthy that the Peer Review Immunity Statute has been amended recently (January 1, 2009) to add a section. *See* MCL § 331.534. This relatively new section, Section 4, further details the Statute's purpose, which is to create a system to collect data confidentially for "the purpose of improving patient safety and to facilitate the safe delivery of health care in hospitals in this state." This new section buttresses the Appellants' position that this Statute exists to shield (1) people who come forward with information relating to a health care professional's job performance, and (2) shield the bodies that receive such information from people. The new section testifies to the Appellants' interpretation of how the Statute ought to be applied and essentially rejects the Appellee's position that this statute somehow applies to FOIA requests about the names of the drugs being given to the unidentified individuals, including children under (five) 5 years of age.[5]

[5] The Court of Appeals, in a footnote addressed the applicability of the doctrine of collateral estoppel. Exh. A., p.6. As noted, there are new plaintiffs and in any event as we are addressing questions of law Appellants cause should not be barred. This Court recognized this in not allowing the doctrine of res judicata to bar a plaintiff's cause of action. *Young v Detroit City Clerk*, 389 Mich 333, 337-341; 207 NW2d 126 (1973). Appellant's position would, if allowed, "avoid (the) inequitable administration of justice." *Id.* p. 339.

## D. THE TRIAL COURT DID NOT CONDUCT A "DE NOVO" REVIEW IN ACCORDANCE WITH MICHIGAN LAW

Appellants' argument that the trial court failed to hold a de novo review was rejected by the Court of Appeals, as follows:

Plaintiffs contend that the trial erred in failing to hold a de novo review. Plaintiff cites MCL § 15.240(4). The statute states:

In an action commenced under subsection (1)(b), a court that determines a public record is not exempt from disclosure shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld, regardless of the location of the public record. The circuit court for the county in which the complainant resides or has his or her principal place of business, or the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

> Contrary to defendant's implication, the trial court was not *required* to review the contested records. Indeed, the statute states that the court "*may* view the public record in controversy in private." *Id*. (emphasis added). We find that the court did indeed conduct a de novo review, by way of pleadings and oral arguments, before reaching its decision and did not act improperly in deciding that review of the contested records was not necessary to resolve this case.

Affirmed. Exhibit A.

It is correct to note that the trial court is not obliged to review the "contested records." The fact that the Court decided not to view the records does not however mean that a de novo review was not required. The question is what constitutes a "de novo" review. The trial court was not sitting

as an appellate court reviewing questions of law. The correct standard or method of conducting a de novo review under these circumstances was set forth by this Court in 1992.

> The Civil Rights Commission would read out of the clause "tried de novo" the words "de novo" as well as the word "tried."
>
> The term "de novo" has been defined as "anew; afresh; again; a second time; once more; in the same manner; or with the same effect." It has been said:
>
> > The very concept, "de novo" hearing, means that all matters therein in issue are to be considered "anew' afresh; over again,"…[*People v Bourdon, 10 Cal App* 3d 878, 881; 89 Cal Rptr 415 (1970)].
>
> To give meaning to the term "de novo," we must hold that a circuit court, in reviewing a decision of the Civil Rights Commission, may substitute its assessment for the findings, conclusion, and decision of the Civil Rights Commission. *Department of Civil Rights, ex rel Mary H. Johnson v Silver Dollar Café; et al.*, 441 Mich 110, 115, 116, 490 NW2d 337 (1992)

The trial court was obliged to do such a review and consider what transpired, what was being sought, what had been provided, what had not been released and make it's own determination as to whether or not the release of the names of the drugs was a violation of the confidentiality provision, etc. It did not do so. The trial court ruled before discovery took place to address any of these points. The trial court ruled that the "*Dye* and *Bruce* case, cited in the Court of Appeals unpublished Ben Hansen opinion, support the interpretation that the release of information falling within in the Peer Review Immunity Statute is solely at the review entity's discretion; otherwise it remains confidential." Exhibit B, p 3.

Both *Dye* and *Bruce* involved peer review/disciplinary proceeding. Specifically, in *Dye* information was sought about the competency and qualifications of a doctor collected during a peer review. *Dye v St. John Hosp. Med. Cir.*, 230 Mich App 661, 584 NW2d 747 (1998). In *Bruce*, the State of Michigan Department of Michigan Department of Licensing and Registration sought

records from a hospital that had conducted a peer review process of a doctor being investigated for malpractice. *Attorney General v Bruce and Berrien General Hospital,* 422 Mich 152; 369 NW 2d 826. Neither of these cases does anything to discredit or undermine the arguments set forth regarding how the Statute is to be applied, its scope, or when it applies. Simply, Appellants have not had their day in court.

## CONCLUSION

This matter goes beyond whether the names of the drugs will be released. It is known that the rights set forth in FOIA have been eroded over the years. This should not be allowed here. While the Department plays a very important role they should not be allowed to, in effect, rewrite the Peer Review Immunity Statute to expand the scope. They are not entitled to complete unbridled discretion to make arbitrary decisions which are not reviewable in a meaningful manner by the courts.

WHEREFORE it is prayed that this Application For Leave be granted, the decision of the lower courts reversed and the case remanded for trial.

Respectfully submitted,

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