STATE OF MICHIGAN
IN THE COURT OF APPEALS

BEN HANSEN,

Plaintiff-Appellant,

v.

STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH

Defendant-Appellee.
_____/

C.A. No. 278074

Lower Court Case No. 06-1033 CZ

PLAINTIFF-APPELLANT'S REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

JAQUES ADMIRALTY LAW FIRM, P.C.

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Now comes Appellant, Ben Hansen, and replies to Defendant-Appellee's Brief as set forth below. (Defendant-Appellee, the State of Michigan, Department of Community Health, will be referred to at times as the "Department.")

I

THE COUNTER-STATEMENT OF FACTS

The "Counter-Statement of Facts" is not truly a counter-statement of facts. Rather, argument challenging the relevancy of a portion of Appellant's Statement of Facts and the statute of limitations issue are presented.

Taking the statute issue first; Michigan law is clear. Once a complaint is filed the statute of limitations is tolled as long as a copy of the summons and complaint are served on the defendant in accordance with Supreme Court Rules. The Revised Judicative Act provides:

> Sec. 5856. The statutes of limitations or response are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> MCL 600.5856 (a)

The Michigan Court Rules provide a summons expires 91 days after the date the complaint was filed. MCR 2.102 (D). Plaintiff's complaint was filed on August 11, 2006. The summons was issued on August 20, 2006 and served on September 11, 2006. There certainly was no statute of limitations violation with respect to Count III of the Complaint, which, as detailed in Appellant's Opening Brief, specifically addressed and dealt with the Department's February 23, 2006 determination.

One last point with regarding to the Counter-Statement of Facts: the Department argues Plaintiff's motivation, purpose and reason for making the requests are not relevant. What is being looked at here are the references to Dr. Karon's Affidavit, Eli Lilly's problems with multiple states attorneys general, discussion on the FDA "black box" warnings, Lilly's participation in the PQIP program and more. The problem with this argument is that the Department itself made these matters relevant by invoking the confidentiality provision of the Release of Information for Medical Research and Education Act. MCL 331.533. This opens the door for an analysis as to whether or not the exceptions apply. MCL 331.532. These exceptions encompass education, research and maintaining standards to ensure financial integrity. MCL 331.532. What was presented (the questions about Eli Lilly's fraudulent marketing practices and the use of psychotropic drugs for "off-label" purposes, Dr. Karon's specific statements regarding education and research and Lilly's presence at the table during PQIP meetings) are absolutely relevant.[1] Had the Department not defended on these grounds, the materials presented may or may not be relevant. Under these circumstances, however, there should be no question about it (again demonstrating the need for a de novo review and why summary disposition was not appropriate).

[1]The use of psychiatric drugs is the subject of much scrutiny these days. Articles about the honesty of the manufacturers and the effectiveness of the drugs are now being routinely reported. Specific articles not part of this Record will not be referenced, however, what is in the Record is sufficient to show the seriousness of the situation and why such matters are not only relevant but should not be ignored.

II

ARGUMENT

A. THE STATUTE OF LIMITATIONS ISSUE

Appellee's first argument addresses the statute issue. As this was just reviewed, it need not be reiterated. However, it is noted that the statement that the "trial court granted Defendant's motion to dismiss finding that Plaintiff filed a complaint clearly barred by the statute of limitations" is not correct. Appellee's Brief, p. 2. This totally misconstrues the decision.

The Court's Opinion specifically spoke to Defendants' written notices partially denying Plaintiff's FOIA requests, dated January 11 and February 23, 2006, as being in compliance with the statutory notice requirement pursuant to section 5(4)(a). MCL 15.235 (4)(a). The Court held that "Defendant timely provided Plaintiff a written explanation for the basis of the denials, including why the requested record is exempt from disclosure and whether or not public records exists." Docket No. 21, pp. 3-4. This was the only basis for the dismissal. The Court specifically stated "it will not address any further issues." Docket No. 21, p. 4. It was in the Court's subsequent discussion regarding punitive damages where the Court determined it could not award punitive damages for a clear statute violation. *Id.* Nothing more was said. The actual dismissal language is clear.

B. THE GENUINE ISSUE OF MATERIAL FACT ISSUE

Appellee next argues that because the Department responded to the requests in a timely fashion and explained certain records did not exist and certain records were exempt that there were no genuine issues of material fact. MCL 15.235(4)(a)(b). In effect, the Department is arguing that because it says records do not exist or are exempt that it is so. This is not the law. As reviewed in Appellate's Opening Brief, one has the absolute right to obtain a judicial review if a FOIA request

is denied. MCL 15.253(4)(d). Appellate's Opening Brief, p. 10. Such a review of the denials requires an actual review of the merits of the matter and not simply an acceptance of the adversary's conclusion. The fact that the Department responded to the FOIA requests in a timely fashion does not mean there are no issues of material fact. The fact of a response is not the issue. The actual issues pertain to the exceptions of confidentiality.[2]

C. REVIEW ENTITY

Appellee goes on to review MCL 331.533, the confidentiality provision, arguing Plaintiff is not a "review entity." The problem and error in this analysis is that there is no requirement that information be released only to a "review entity." The statute speaks specifically of the release of reports for specified purposes "of a review entity" not to a "review entity." (emphasis added)

> The release or publication of a record of the proceedings or of the reports , findings and conclusions of a review entity shall be for one or more of the following purposes: . . .(emphasis added)
>
> MCL 331.532(2)

(The argument that Mr. Hansen argued that he is a "review entity" is false. This never occurred. The Department does not accurately read the referenced pages. Tr. pp. 9-10, March 21, 2007.)

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[2] Appellee goes on to describe the PQIP program without referencing any documents, testimony or pleadings in the Record. Whether this is a complete and accurate description of PQIP is not a matter of record. In this portion of the papers, the Department states PQIP as an "educational peer review committee." Appellee's Brief, p. 4. While there is reference to "peer review committee" with regard to care rendered to "a person or the qualifications , competence, or performance of a health care provider," there is no mention of "peer review" with regard to releasing reports and findings "of a review entity." MCL 331.531, 532. Whether there is an applicable definition of "peer review" (if relevant) has not been addressed. The trial court never covered any of these matters. With regard to the Feyz case, it involved a dispute over nursing orders and peer review immunity. There are no issues of immunity is this case. *Feyz v. Mercy Memorial Hospital, et al.*, 475 Mich. 663, 682, 719 NW2d 1 (2006).

The only reference to releasing information "to" review entities in this Act is found in MCL 331.532(1) which speaks to releasing information about persons or the competence, qualifications or performance health care providers to "review entities." No information about individuals or health care providers has ever been sought.

1. INFORMATION RELEASED

Appellant noted in its Opening Brief that at least some of the information sought had been provided to another by the Department. The reply that another was provided "non-exempt records" is simply not accurate. This statement is not true. The data in dispute includes "Michigan Children Under 5 Year of Age Detail by Drugs and Quality Indicator." Appellant's Brief, p. 5. Essentially, this means the names of the drugs are not being provided. Yet what was released to another was the "Label Name" (and much, much more). The label name is the name of the drug. As set forth in Appellate's Opening Brief, the released information is available online and this can be verified. Appellant's Opening Brief, p. 13, fn. 3.

Appellee seems to suggest that because the information they sought is part of the information gathered for the PQIP program that this somehow distinguishes this request from the other. No authority is offered for this proposition. Moreover, the Department has already provided over 1000 pages of PQIP records. If the information falls within the "confidentiality" provision it falls within the "confidentiality" provision. If it does not, it does not. Why would the name of a drug (again no personal information about any person was or is being sought) be confidential in a PQIP settlement and not in a medicaid setting? It would not. No authority is offered as there is none.

What this dispute does is simply demonstrate a further reason as to why a de novo review is needed.

D. THE *DE NOVO* REVIEW QUESTION

The statute is clear.

> The Court shall determine the matter de novo . . . . MCL 15.240(4).

Case law recognizes this. As the Court said in *Schroeder*:

> When a requesting party files a circuit court action, the court is to determine de novo, whether disclosure should be compelled. MCL 15.240(1); MSA 4.1801 (10)(1)
>
> *Schroeder v City of Detroit*, 221 Mich App. 364, 531 NW2d 497 (1997).

The *Grady* court reiterated this standard and addressed how the *Evening News* (cited by Appellee) procedures were to be applied. As the Court spells this out in a very logical complete manner, it will be quoted at some length.

> Plaintiff first argues that the trial court erred by failing to apply the procedures set forth in *Evening News Ass'n v troy, 418 Mich 481, 516; 339 NW2d 421 (1983)* for reviewing nondisclosure of records sought under the FOIA. We agree.
>
> When a public body denies an FOIA request, the requesting person may commence an action in circuit court to compel disclosure. *MCL 15.235(7);* MSA 4.1801(5)(7), *MCL 15.240(1)*; MSA 4.1801(10)(1), *Grebner v Oakland Co Clerk, 220 Mich App 512, 515*; *560 NW2d 351 (1996).* The circuit court is to determine by de novo review whether disclosure should be compelled. *MCL 15.240(4)*; MSA 4.1801(10)(4); *Schroeder v Detroit, 221 Mich App 364, 365; 561 NW2d 497 (1997).* A public body does not waive the applicability of an exemption by failing to raise it before litigation. *Residential Ratepayer Consortium v Public Service Comm No 2, 168 Mich App 476, 480-481;* [*5] *425 NW2d 98 (1987).*
>
> In determining whether information satisfies an FOIA exemption, the court should: (1) receive a complete particularized justification

> for the exemption; (2) conduct a hearing in camera to determine whether justification exists; or (3) consider allowing the plaintiff's counsel access to the information in camera under a special agreement whenever possible. *Evening News, supra at 516.* The burden is on the public body to justify the exemption, *MCL 15.240(4)*; MSA 4.1801(10)(4), *Swickard v Wayne Co Medical Examiner, 438 Mich 536, 544; 475 NW2d 304 (1991)*, and claimed exemptions must be supported by substantial justification and explanation. *Booth Newspapers, Inc v Bd of Regents of the University of Michigan, 192 Mich App 574, 586; 481 NW2d 778 (1992)*, rev'd in part on other grounds *444 Mich 211; 507 NW2d 422 (1993).* The court may not make conclusory or generic determinations regarding claimed exemptions, but must specifically find that particular parts of the information would be exempt for particular reasons. *Post-Newsweek Stations v Detroit, 179 Mich App 331, 335;* [*6] *445 NW2d 529 (1989). Grady v. Department of State Police*, 1998 Mich. App. LEXIS 1595. (copy attached). (emphasis added);

The *Evening News* decision does not relieve a trial court of the statutory responsibility of making its own de novo determination. *Evening News Assoc'n v. Troy*, 418 Mich 481, 339 NW2d 421 (1983) Rather, it provides possible methods for examining the issue. In this case, the now withheld information was turned over to Plaintiff's counsel and returned. This did no more than lead to the conclusion that it was necessary to continue the litigation. It was not put into the record and never reviewed by the Court. The statute is clear. It was not followed.

E. COSTS AND FEES

Appellee's argument began with discussion about the statute violation. Clearly this cannot hold-up, again, at least with respect to Count III. A number of related points need be considered:

1. There is nothing in the Record to demonstrate how much time was spent on matters relating to Count III, as opposed to Counts I and II.

2. The "finality" argument with regard to Counts I and II was not addressed by the trial court.

3. The information sought in Counts I and II was provided while the civil action was pending, resulting from discussion between the parties' representatives. Count I and II thus became non-issues.

The Court never held a hearing and made no findings that there was any improper purpose or effort to harass by Plaintiff. No matter Counts I and II, the Department needed to respond.

Appellee argues the action addressed the "form or content of the records." This argument is hard to follow as no reference to any pleading is provided and what is meant by "form" is not spelled out. With respect to the "content" remark, this is exactly what is at issue. There is nothing abusive about filing and seeking to obtain the records withheld. It was Plaintiff's right.

Finally, Appellees argue Plaintiff opposed their effort to bootstrap their argument and file an affidavit covering fees, costs and expenses. Of course this is so and there was good reason. The trial court (not the judge granting summary disposition) agreed and denied their motion. The decision regarding sanctions had been reached without these records and it must stand or fall on the record as it existed at the time.

III

CONCLUSION AND REQUEST FOR RELIEF

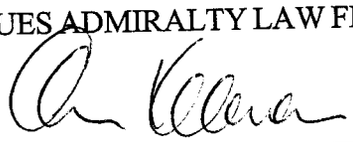
Sight of what this information is about must not be lost. Millions of dollars are being spent (paid to drug manufacturers) on psychotropic drugs being given to children under five (5) years of age. No information about any child or infant is being sought. Rather, simply, the names of the drugs. The Department is willing to provide information about the types of drugs prescribed and for what purpose but not the drug name. Why not? What purpose is being served by withholding this information? What harm could possibly result? Who is at risk and for what? Why wouldn't the Department welcome

others' research results and opinions? Simply responding by saying we are the Department and we told you what is exempt and what is not violates the letter and spirit of FOIA.

For the reasons set forth above and in Appellant's Opening Brief, it is requested that the decision of the trial court be reversed, including the award of attorneys' fees, and the case remanded for a *de novo* review by the trial court of the disputed documents and a trial on the merits of the matter.

Respectfully submitted,

THE JAQUES ADMIRALTY LAW FIRM, P.C.

By: 

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Dated: January 24, 2008

LEXSEE

DENNIS GRADY, Plaintiff-Appellant, v DEPARTMENT OF STATE POLICE, Defendant-Appellee.

No. 198594

COURT OF APPEALS OF MICHIGAN

1998 Mich. App. LEXIS 1595

May 26, 1998, Decided

PRIOR HISTORY: Wayne Circuit Court. LC No. 96-608317 CZ.

DISPOSITION: Reversed and remanded for proceedings consistent with this opinion.

JUDGES: Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

OPINION

PER CURIAM.

Plaintiff, a Michigan State Police officer, appeals as of right a September 27, 1996, order dismissing plaintiff's complaint pursuant to MCR 2.116(C)(10) in this case brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.;* MSA 4.1801(1) *et seq.* [1] We reverse and remand.

1 This case was concluded before the effective date of 1996 PA 553, which amended the FOIA effective March 31, 1997. Consequently, the analysis in this opinion is based on the preamendment version of the FOIA.

In September 1995, plaintiff requested, in writing, a plethora of information from defendant Michigan State Police. [2] In November [*2] 1995, defendant responded by providing a packet of materials consisting of 295 pages and a booklet and informing plaintiff that certain information was not included because it was exempt from disclosure under MCL 15.243(1)(b)(iii); MSA 4.1801(13)(1)(b)(iii), which permits nondisclosure of investigating records compiled for law enforcement purposes to the extent that disclosure would constitute an invasion of personal privacy. Plaintiff then filed suit in circuit court, claiming a violation of the FOIA. Plaintiff alleged that defendant failed to forward a timely response to his request and acted arbitrarily and capriciously by refusing or delaying full disclosure. Defendant moved for summary disposition, alleging that by failing to properly reply to defendant's affirmative defenses and request for admissions, plaintiff admitted seeking employment information from defendant's employees' personnel files. Defendant alleged that because personnel records are exempt from disclosure under MCL 15.243(1)(b)(iii), (t)(iii) and (ix); MSA 4.1801(13)(1)(b)(iii), (t)(iii) and (ix), it was entitled to summary disposition. In response, plaintiff alleged [*3] that defendant waived any exemption under §§ 13(t)(iii) and (ix) because defendant failed to raise the exemptions as an affirmative defense or in any responses to plaintiff's complaint.

2 Plaintiff requested (1) Code of Conduct and all official orders defining or implementing the Code of Conduct; (2) all documentation that defines the practice, procedure, and rules of the MSP Discipline Panel and/or Appeal Board; (3) MSP/MSPTA collecting bargaining agreements from January 1991 to September 18, 1995; (4) identity of all persons to whom bulletin 20-94 was sent; (5) all documents that define or detail the practice, procedure, and rules for MSP Internal Affairs; (6) all documents related to complaint against employee IA-99-93; (7) all documents related to the creation and staffing of the MSP Trooper Development Section including the names and positions filled by all those persons initially appointed or assigned to the MSP Trooper Development Section; (8) and all docu-

ments related to complaints against employee IA 067-93.

[*4] Plaintiff's counsel did not attend the hearing on defendant's motion due to illness. Without analysis or explanation, the trial court granted defendant's motion to dismiss plaintiff's complaint.

Plaintiff first argues that the trial court erred by failing to apply the procedures set forth in *Evening News Ass'n v Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983) for reviewing nondisclosure of records sought under the FOIA. We agree.

When a public body denies an FOIA request, the requesting person may commence an action in circuit court to compel disclosure. MCL 15.235(7); MSA 4.1801(5)(7), MCL 15.240(1); MSA 4.1801(10) (1), *Grebner v Oakland Co Clerk*, 220 Mich App 513, 515; 560 NW2d 351 (1996). The circuit court is to determine by de novo review whether disclosure should be compelled. MCL 15.240(4); MSA 4.1801(10)(4); *Schroeder v Detroit*, 221 Mich App 364, 365; 561 NW2d 497 (1997). A public body does not waive the applicability of an exemption by failing to raise it before litigation. *Residential Ratepayer Consortium v Public Service Comm No 2*, 168 Mich App 476, 480-481; [*5] 425 NW2d 98 (1987).

In determining whether information satisfies an FOIA exemption, the court should: (1) receive a complete particularized justification for the exemption; (2) conduct a hearing in camera to determine whether justification exists; or (3) consider allowing the plaintiff's counsel access to the information in camera under a special agreement whenever possible. *Evening News, supra* at 516. The burden is on the public body to justify the exemption, MCL 15.240(4); MSA 4.1801(10)(4), *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 544; 475 NW2d 304 (1991), and claimed exemptions must be supported by substantial justification and explanation. *Booth Newspapers, Inc v Bd of Regents of the University of Michigan*, 192 Mich App 574, 586; 481 NW2d 778 (1992), rev'd in part on other grounds 444 Mich 211; 507 NW2d 422 (1993). The court may not make conclusory or generic determinations regarding claimed exemptions, but must specifically find that particular parts of the information would be exempt for particular reasons. *Post-Newsweek Stations v Detroit*, 179 Mich App 331, 335; [*6] 445 NW2d 529 (1989).

Here, the trial court dismissed plaintiff's complaint without employing the guidelines set forth in *Evening News* to decide whether the information plaintiff requested was exempt from disclosure. There are no particularized reasons given why the claimed exemptions are appropriate, and no analysis or explanation was provided at the hearing or in the trial court's order. Accordingly, we vacate the September 27, 1996, order and remand for particularized findings of fact as to why defendant's claimed exemptions are justified.

However, if the trial court finds that plaintiff has already received the requested documents through discovery in his employment discrimination case, plaintiff's FOIA case should be dismissed. *Densmore v Dep't of Corrections*, 203 Mich App 363, 364; 512 NW2d 72 (1994). Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made. *Densmore, supra* at 366.

Plaintiff next argues that defendant failed to timely respond to plaintiff's request and failed to process the request in conformity with [*7] MCL 15.233(1); MSA 4.1801(3)(1) and MCL 15.235(2); MSA 4.1801(5)(2). We agree. Because plaintiff did not have to initiate this lawsuit to compel disclosure of the records that he has already received, however, plaintiff is unable to receive damages for defendant's delay in disclosing those records. *Michigan Council of Trout Unlimited v Michigan Dep't of Military Affairs*, 213 Mich App 203, 221; 539 NW2d 745 (1995). Therefore, the controversy with regard to those records is moot. *Densmore, supra* at 366. The delay with regard to the records not disclosed shall be addressed on remand.

Plaintiff also argues that defendant is not exempt from complying with the FOIA solely because discovery is available to plaintiff as a result of his filing of a subsequent employment discrimination case against defendant. Because plaintiff has failed to cite any authority, the issue is considered abandoned on appeal. *Speaker-Hines & Thomas, Inc v Dep't of Treasury*, 207 Mich App 84, 90; 523 NW2d 826 (1994). Further, there is no indication in the record that the trial court dismissed [*8] plaintiff's complaint on the ground that the information sought was available through discovery.

Finally, plaintiff argues that defendant should be sanctioned for willful misrepresentations that it made at the hearing on its summary disposition motion and in written filings made in the lower court. However, issues raised for the first time on appeal are not subject to review unless exceptional circumstances exist. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Such exceptional circumstances are not present here.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Donald E. Holbrook, Jr.

/s/ Mark J. Cavanagh

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

(ON APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF INGHAM)

BEN HANSEN,

Plaintiff-Appellant,

C.A. No. 278074

Lower Court Case No. 06-1033 CZ

v.

STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH

Defendant-Appellee.

_____/

CERTIFICATE OF SERVICE

Eileen M. Chmielewski, being first duly sworn, deposes and says that on the 25th day of January, 2008 she served a copy of the *Reply Brief on Appeal of Plaintiff-Appellant*, Ben Hansen and this *Certificate of Service* in the above matter to the following via regular mail by depositing same in the United States Postal Service box at Detroit, Michigan to the following:

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

Eileen M. Chmielewski
EILEEN M. CHMIELEWSKI

Subscribed and sworn to me
this 25th day of January, 2008.

Sheri R. D'Angelo
NOTARY PUBLIC

SHERRI R. D'ANGELO
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Apr 03, 2012
ACTING IN COUNTY OF WAYNE