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QUESTIONS PRESENTED FOR REVIEW

- I. **Did the Court of Appeals correctly affirm the trial court's dismissal of Count III of Ben Hansen's complaint, which alleged entitlement to information that is exempt from disclosure under the FOIA?**

- II. **Did the Court of Appeals correctly affirm the trial court's exercise of its discretion in granting the Department of Community Health's motion for costs and attorney fees as to Count III of Hansen's complaint, where Plaintiff's litigation of the Count caused an unnecessary waste of the Department's resources?**

**COUNTER-STATEMENT OF ORDER APPEALED FROM,
GROUNDS, AND RELIEF SOUGHT**

Ben Hansen (Hansen) appeals from the unpublished, unanimous opinion of the Court of Appeals issued on March 13, 2008, affirming an Order of the Ingham County Circuit Court granting the Department of Community Health's (Department) motion to dismiss Hansen's Freedom of Information Act¹ (FOIA) complaint and motion for costs and attorney fees.²

Hansen submitted to the Department three FOIA requests for copies of records. The Department granted the requests in part and denied them in part. Notwithstanding the Department's granting Hansen access to existing, nonexempt records responsive to the requests, Hansen filed a complaint. The Department filed its motions to dismiss and for costs and attorney fees, with brief in support. The Department presented evidence that Hansen's claims were barred by the FOIA's 180-day period of limitations,³ and showed that even if Hansen's claims were not time-barred, the Department's written notices issued in response to Hansen's FOIA requests articulated with specificity the statutory basis for the nondisclosure of certain records.

The trial court granted the Department's motion to dismiss and motion for costs and attorney fees. Hansen appealed the trial court's order.⁴ Finding that Hansen's first two FOIA requests were litigated after the expiration of the 180-day period of limitations, the Court of Appeals affirmed the dismissal of the complaint as to the FOIA requests alleged respectively under Counts I and II of the complaint. The Court of Appeals determined that Hansen's third

¹ MCL 15.231 *et seq.*

² Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074); copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

³ Section 10(1)(b) of the FOIA, MCL 15.240(1)(b), provides that a person must "[c]ommence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request."

⁴ Copy of trial court order appended as Exhibit B to Appellant's Application for Leave to Appeal.

FOIA request (Count III of the complaint) was brought in a timely manner but, nevertheless, was properly dismissed because the request sought records not subject to public disclosure. The Court of Appeals also determined that reversal of the award of the Department's costs and attorney fees was unwarranted.⁵

Because that Court of Appeals' opinion correctly identifies and applies settled rules of statutory construction, Hansen has not established the grounds set forth at MCR 7.302(B)(2) or (3). The Department requests that this Court deny Hansen's Application for Leave to Appeal.

⁵ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), pp 2-3, 6; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Hansen's Statement of Facts is replete with information irrelevant to his FOIA action. The Department, therefore, presents the following facts that support the Court of Appeals' decision affirming the trial court's grant of the Department's dispositive motion and motion for attorney fees and costs.⁶

Hansen litigated FOIA requests dated November 18, 2005, December 14, 2005, and February 2, 2006, for which the Department issued, respectively, its written notices of final disclosure determinations on December 7, 2005, January 11, 2006, and February 23, 2006. The Department's dispositive motion sought the dismissal of the complaint because the three FOIA requests were time-barred under section 10(1) of the FOIA.⁷ At trial court argument, however, the Department noted that Hansen commenced his action by filing a complaint *without* a summons on or about August 11, 2006, and filed what appeared to be the same version of the complaint *with* a summons on or about August 30, 2006. The third FOIA request was either time-barred under the August 11, 2006 date or just within the period of limitations under the August 30, 2006 date—the initial date was used by the trial court and the latter date was recognized by the Court of Appeals.⁸

The Court of Appeals determined that the trial court correctly found that Hansen's first two FOIA requests, alleged respectively under Counts I and II of the complaint, were time-barred, but reversed as to the trial court's finding that the third FOIA request, Count III of the

⁶ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074); copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

⁷ MCL 15.240(1).

⁸ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

complaint, was untimely litigated.⁹ In his Application, Hansen states that he is not appealing the dismissal of his complaint as to his first two FOIA requests. Hansen states that his Application is based solely on the Court of Appeals' opinion involving the February 2, 2006 FOIA request.¹⁰

Hansen's Application also seeks leave to appeal the Court of Appeals' affirming the trial court's award of the Department's costs and attorney fees.¹¹ Hansen's Application, however, does involve the award of costs and fees as to Counts I and II of his complaint, where he limits the appeal to Count III of his complaint. Thus, the Court of Appeals' affirming the trial court's granting of the Department's motion for costs and attorney fees for having to defend against FOIA claims made after the expiration of the act's period of limitations is not before this Court.

The Application, therefore, only involves Hansen's third FOIA request, dated February 2, 2006 (Count III of Hansen's complaint), which sought access to Pharmacy Quality Improvement Project (PQIP) records. By way of background, PQIP is a collaborative effort that involves the Department's Mental Health and Substance Abuse Administration and its Medical Services Administration, and Comprehensive NeuroScience, Inc. Eli Lilly and Company has provided funding in support of the independent program. As a three-year educational program, PQIP was established to analyze the prescribing of mental health medications for Medicaid members. When needed, physicians are provided with educational materials and client specific information as well as peer-to-peer consultation.

The PQIP process begins with a review by Comprehensive NeuroScience, Inc. of Medicaid patient pharmacy claims data to identify prescribing and utilization trends for mental health and psychotropic medications. Specific pharmacy claims are identified that may be

⁹ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), pp 2-3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

¹⁰ Application for Leave to Appeal, p 6.

¹¹ Application for Leave to Appeal, p 18.

inconsistent with evidence-based best practice guidelines. Once a specific patient's claims are identified, the prescriber is sent a letter addressing the concerns. This gives the prescriber an opportunity to verify the concern and address it with the identified patient. In summary, PQIP is an educational peer review activity with oversight from physicians.

The Court of Appeals determined that Hansen's claim of entitlement under the FOIA to PQIP records "was not sustainable under established case law," and this was grounds to sustain the award of costs and attorney fees as to Count III of the complaint.¹²

¹² Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 6; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

ARGUMENT

I. The Court of Appeals correctly affirmed the trial court's dismissal of Count III of Ben Hansen's complaint, which alleged entitlement to information that is exempt from disclosure under the FOIA.

A. Standard of Review

This case concerns the interpretation of statutes, MCL 15.243(1)(d) and MCL 331.531 *et seq*; it presents questions of law that are reviewed *de novo*.¹³

B. Analysis

According to Hansen's Application, the dismissal of Count III of Hansen's complaint alleging the February 2, 2006 FOIA request—the only count at issue in Hansen's Application—presents two issues: 1) whether a *de novo* review was conducted by the trial court, and 2) whether the records described in the FOIA request are subject to disclosure under the FOIA.¹⁴

The Court of Appeals reviewed Hansen's claim that the trial court failed to conduct a *de novo* review of the records at issue, and found that in this particular instance the trial court was not required to personally review the records.¹⁵ The Court of Appeals discussed the trial court's November 6, 2006 order, which permitted Hansen's counsel a restricted review of the records at issue.¹⁶ The trial court's order provided in pertinent part¹⁷:

IT IS FURTHER ORDERED that Hansen's counsel of record, Alan Kellman, shall be permitted a review of copies of the following records, as described in Hansen's February 2, 2006 FOIA request, under the restrictions set forth in this Order:

¹³ *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

¹⁴ Application for Leave to Appeal, p 2.

¹⁵ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 4; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

¹⁶ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), pp 3-4; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

¹⁷ Application for Leave to Appeal, p 5.

Comprehensive Neuroscience, Inc. reports deemed exempt from disclosure by statute or reasons of privacy per MCL 331.533 13(1)(a) and 13(1)(d) . . .

1. (Monthly) Michigan Under 5 Detail by Drug and Quality Indicator in 2005;
2. (Monthly) Patients on 5 or More Concurrent Behavioral Drugs in 2005.

IT IS FURTHER ORDERED that Department, through defense counsel, shall provide the aforementioned records to Mr. Kellman; that the review of these records shall be conducted solely by Mr. Kellman; that Hansen shall not be permitted to view the records, and Mr. Kellman shall not divulge the contents of the records to Hansen or other persons; that neither copies of the records nor memoranda or abstracts of the records shall be made by Mr. Kellman or by any person under his direction; and, that the records provided to Mr. Kellman shall be returned to defense counsel immediately upon the completion of the review.

The Court of Appeals determined that the trial court's order satisfied the "strict standard of review" required by *Evening News Ass'n v Troy*.¹⁸ In *Evening News*, this Court determined that in resolving a FOIA disclosure dispute a trial court may conduct an *in camera* hearing or consider "allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement 'whenever possible.'"¹⁹

In support of the second issue raised in the Application — whether PQIP records are subject to FOIA disclosure — Hansen's Application seeks to support disclosure by indicating his *motivations and purposes* for making the FOIA request. Hansen states that he was a member of Department's Recipient Rights Advisory Committee; that the PQIP records contain information about the side effects of drugs; and that third parties have an interest in the information being sought.²⁰ A person's motivation, purpose, or reason for making a FOIA request generally is not a

¹⁸ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 3; copy appended as Exhibit A to Appellant's Application for Leave to Appeal. *Evening News Ass'n v Troy*, 417 Mich 481; 339 NW2d 421 (1983).

¹⁹ *Evening News Ass'n*, 417 Mich at 516, quoting *Ray v Turner* 587 F2d 1187, 1205 n 24, 1212 (1978).

²⁰ Application for Leave to Appeal, pp 4 and 6-7.

relevant consideration in determining whether information is subject to disclosure under the FOIA.²¹

The Court of Appeals correctly determined²² that Hansen's request under the FOIA must fail because the Department properly invoked section 13(1)(d) of the act, which provides for the exemption of public disclosure of "[r]ecords or information specifically described and exempted from disclosure by statute"²³ The Department's notice issued in response to Hansen's FOIA request informed Hansen that the exemption of PQIP records is justified under the Release of Information for Medical Research and Education Act (Release of Information Act).²⁴

The parties do not dispute²⁵ that PQIP records fall within section 3 of the Release of Information Act as "the record of a proceeding and the reports, findings, and conclusions of a review entity and data collected by or for a review entity."²⁶ The dispute is whether the statutory scheme exempts the records from public disclosure under the FOIA.²⁷ While the FOIA generally provides for public disclosure of a public body's records, section 2(e)(i) of the act provides that there is a class of public records "exempt from disclosure under section 13 [of the act]."²⁸

²¹ *State Employees Ass'n v Dep't of Mgt and Budget*, 428 Mich 104, 121, 125-126; 405 NW2d 606 (1987); *Clerical-Technical Union v Bd of Trustees of Michigan State Univ*, 190 Mich App 300, 303; 476 NW2d 373 (1991); *Mullin v Detroit Police Dep't*, 133 Mich App 46, 52-53; 348 NW2d 708 (1984).

²² Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 6; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

²³ MCL 15.243(1)(d).

²⁴ MCL 331.531 *et seq.*

²⁵ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 4; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

²⁶ MCL 331.533.

²⁷ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 4; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

²⁸ MCL 15.232(e)(i).

Section 3 of the Release of Information Act provides that "[e]xcept as otherwise provided in section 2, [the records] *are confidential, are not public records*, and are not discoverable and shall not be used as evidence in a civil action or administrative proceeding."²⁹

The Court of Appeals properly began its analysis by examining the interaction between the FOIA and the Release of Information Act.³⁰ Citing *Dye v St John Hosp & Medical Ctr*,³¹ the Court of Appeals determined that Hansen misconstrued the interaction between [sections 2 and 3 of the Release of Information Act.] Reading sections 2 and 3 together, the Court of Appeals stated³²:

[I]t is evident that a review entity [the Department] can release or publish reports if a proper purpose is established under § 2, and upon doing so, the provisions in § 3 that dictate that the records are confidential, are not public records, and are not discoverable become inoperable . . . [However] the documents remain confidential, not discoverable, and they are not public under § 3 until the review entity [the Department] chooses to release the documents.

Properly invoking the exemption under section 13(1)(d) of the FOIA³³ in responding to Hansen's FOIA request, the Department deemed the PQIP records to be confidential, non-public records, and declined to release the records under section 2 of the Release of Information Act.³⁴ Recognizing the confidentiality provision of the Release of Information Act, this Court stated in *Feyz v Mercy Memorial Hosp* that the act is part of a statutory process protecting the confidentiality of the class of records identified in the act.³⁵

²⁹ MCL 331.533; emphasis added.

³⁰ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 4; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

³¹ *Dye v St John Hosp & Med Ctr*, 230 Mich App 661, 672, n 10; 584 NW2d 747 (1998).

³² Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 6; copy appended as Exhibit A to Appellant's Application for Leave to Appeal

³³ MCL 15.243(1)(d).

³⁴ MCL 331.532.

³⁵ *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 681-683; 719 NW2d 1 (2006).

Thus, the Court of Appeals correctly affirmed the trial court's dismissal of Count III of Hansen's complaint, and the Department asks this Court to deny Hansen's Application for Leave to Appeal.

II. The Court of Appeals correctly affirmed the trial court's exercise of its discretion in granting the Department of Community Health's motion for costs and attorney fees as to Count III of Hansen's complaint, where Plaintiff's litigation of the Count caused an unnecessary waste of the Department's resources.

A. Standard of Review

The standard of review of an order granting costs and attorney fees under a statute or court rule giving a court the discretion to make the award is abuse of discretion.³⁶ The abuse of discretion standard of review acknowledges that there are circumstances in which there is no single correct result and when a trial court selects one of the principled outcomes, it has not abused its discretion and the appellate court should defer to its judgment.³⁷

B. Analysis

In his Application, Hansen seeks leave to appeal the Court of Appeals' affirming the trial court's award of the Department's costs and attorney fees. Hansen's Application, however, does not seek to appeal the award of costs and fees as to Counts I and II of his complaint. In his Application, Hansen states that he is not appealing the dismissal of his complaint as to his first two FOIA requests (Counts I and II of his complaint). Hansen states that his Application is based solely on the Court of Appeals' opinion involving the February 2, 2006 FOIA request (Count III of his complaint).³⁸ Thus, the Court of Appeals' affirming the trial court's granting of the Department's motion for costs and attorney fees for having to defend against FOIA claims made after the expiration of the act's period of limitations is not before this Court.

³⁶ *Riethmiller v Blue Cross and Blue Shield of Michigan*, 151 Mich App 188, 203; 390 NW2d 227 (1986).

³⁷ *Maldonado v Ford Motor Company*, 476 Mich 372, 388; 719 NW2d 809 (2006).

³⁸ Application for Leave to Appeal, p 6.

The Court of Appeals determined that Hansen's February 2, 2006 FOIA request was properly dismissed because the request sought records not subject to public disclosure by law. The Court of Appeals also determined that reversal of the award of the Department's costs and attorney fees as to Count III of Hansen's complaint was unwarranted because Count III could not be sustained based on established case law.³⁹

Hansen does not dispute that before the commencement of his FOIA action he was notified by the Department of the Application of the Release of Information Act.⁴⁰ Because Hansen's action caused an unnecessary dissipation of judicial and agency resources, the Department was entitled to an award of its costs, expenses, and attorney fees under the Michigan Rules of Court.

In conjunction with MCR 2.113(A), which governs the verification of all pleadings covered by the Court Rules, MCR 2.114(D) provides:

The signature of an attorney or party on a pleading is a certification by the signer that⁴¹:

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCR 2.113(E), which sets forth the penalty for filing a pleading in violation of the requirements of this Rule, provides⁴²:

³⁹ Unpublished opinion per curiam, issued March 13, 2008 (Docket No. 278074), p 6; copy appended as Exhibit A to Appellant's Application for Leave to Appeal.

⁴⁰ MCL 331.531 *et seq.*

⁴¹ MCR 2.114(D)(1), (2), and (3).

⁴² See also MCL 600.2591.

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Finally, in his Court of Appeals brief, Hansen stated that "the [trial court's] decision to award \$3,500.00 in fees was not premised on any sort of detailed analysis of the work done."⁴³

Hansen, however, opposed the Department's trial court motion to file the affidavit of defense counsel, bills of costs and expenses, and a statement of attorney fees, which were attached to the Department's filed and served motion.⁴⁴

The Court of Appeals properly affirmed the award of the Department's costs and fees, where the record shows that the trial court properly exercised its discretion to grant the Department's motion for costs and attorney fees, and award the Department \$3,500.00, which was considerably less than the Department's actual costs and attorney fees of \$8,138.00.

⁴³ Plaintiff's brief on appeal, p 16.

⁴⁴ Department's brief on appeal, pp 10-11.

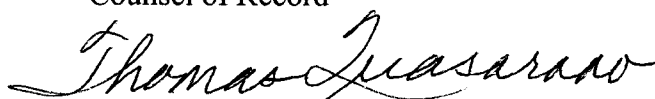
CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the Application fails to establish the necessary grounds under MCR 7.302(B). Therefore, the Department of Community Health respectfully requests that this Honorable Court deny Hansen's Application for Leave to Appeal.

Respectfully submitted,

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2006-021202-C Hansen v DCH SC brief in opposition to appl for leave