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. 142692

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

v.

DEPARTMENT OF COMMUNITY HEALTH,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' REPLY BRIEF TO OPPOSITION TO APPLICATION FOR LEAVE

CERTIFICATE OF SERVICE

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NOW COMES Plaintiffs-Appellants, pursuant to MCLA 7.302(E), in reply to Defendant-Appellee's Brief in Opposition to Application For Leave. Two particular arguments raised by the Department will be addressed. Corrections on a limited number of statements will also be made.

I

THE MATTER IS OF "SIGNIFICANT PUBLIC INTEREST"

The Department argues "there is nothing jurisprudentially significant about this case." Defendant-Appellee's Brief in Opposition to Application For Leave to Appeal, p. 1. The only support for this position is that the decisions of the Courts of Appeals are not published. The history of this case teaches us otherwise. There are now two decisions obviously well known to the Department and available to all practitioners. While they may not be technically binding, they do provide precedent which the Courts will make use of and rely upon just as the Court of Appeals did in this instance.

More important, however, are the actual merits of this case, what they stand for and what they mean in the real world. The question whether this case is "significant public interest" against a State department. MCR 7.302(B)(2). The dispute in this case focuses on the release of the names of the psychotropic drugs given to children under five (infants in some instances) and people receiving up to 12 or more of these drugs on a daily basis. (As noted, the PQIP program was funded by Eli Lilly, a company in the business of selling such drugs. Eli Lilly has paid hundreds of millions of dollars in fines and pled guilty to charges regarding their marketing practices. *United States v Eli Lilly Company* (U.S.D.C.E.P. Case No. 0900020); Appellant's Opening Brief, p. 3, fn 2.) The well being of Michigan children, the role of "watchdog" organizations and the public policies served by the Freedom of Information Act (FOIA) are significant. MCL § 15.231, et seq. Moreover, the

current decisions effectively eliminate FOIA requests or leave their viability to the discretion of a State of Michigan employee. Accordingly, these matters not only pertain to the relationship between the branches of government but address the question of just how much discretion does a state employee have to determine what records are exempt and what role should the judiciary really play in this process.

The Department did not address these points in their Opposition.

II

THE DE NOVO REVIEW

The Department points to the *Evening New Ass'n v. Troy*, 417 Mich 481; 339 NW2d 421 (1983) as providing a "three-step procedure Courts should follow when reviewing a FOIA challenge...." Appellee's Brief, p.11. It is correct that the Court speaks to a three-step procedure, however, the State's interpretation and application of these guidelines is completely erroneous. To the contrary this case supports and demonstrates that a proper de novo review was not done. The three-step procedure is set forth at 417 Mich at 515-516.

In reviewing this challenge, the *Vaughn* court had this to say:

> "The simple fact is that existing customary *procedures* foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information. To possible ways of achieving this goal we now turn our attention." (Emphasis added.) 157 US App DC 346.
>
> From these premises, it would appear that the following three-step procedure should be followed by Michigan trial courts:
>
> 1. The court should receive a complete particularized justification as

> set forth in the six rules above (Part IC); or
>
> 2. The court should conduct a hearing *in camera* based on *de novo* review to determine whether complete particularized justification pursuant to the six rules exists, *Vaughn v Rosen, supra*, pp 346-348; *Ray v Turner, supra*, p 311; or
>
> 3. The court can consider "allowing plaintiff's counsel to have access to the contested documents *in camera* under special agreement 'whenever possible'." *Ray v Turner, supra*, p 308, fn 24, and p 315.
>
> The objective, of course, is to secure disclosure of all pertinent information that is not exempt.

Id at 515-516

Here no "particularized justification" was received and no evaluation was done. This is the exact problem. Even though Plaintiff's counsel saw some of the contested documents in the first Hansen case (not in this case), this was a meaningless gesture, as no argument on the merits was even considered by the Court. Excuse the redundancy but the decisions simply stand for the proposition that the Department can decide and whatever is decided (whether the records are "confidential" and thus public) is not subject to a review on the merits.

What Appellee did not and could not legitimately do was distinguish the argument and authority provided which clearly stands for the proposition that a de novo hearing is one where all matters are considered "anew, afresh; over again".... Department of Civil Rights, ex rel *Mary H. Johnson v. Silver Dollar Café, et al*, 441 Mich 110, 115, 116, 490 NW2d 337 (1992). If the trial court chooses not to review the names of drugs that does not relieve the trial court of its obligations to review the matter "afresh."

III

CORRECTIONS

Appellee's argue "Appellants do not even mention "this issue ("collateral estoppel") in their Application." Appellee's Brief, p. 1. This is erroneous. This is addressed in footnote 5, page 14, with Michigan Supreme Court precedent. Appellants' Brief, p. 14 fn 5.

The Department opens its presentation by arguing this case involves the "same exact plaintiff." This is also obviously wrong. The other Plaintiffs are established watchdog groups, organized, staffed and run by professionals.[1]

[1] It is also noted that in their Counter-Statement Facts that "[w]hen needed, physicians are provided with educational materials and client specific information as well as peer-to-peer consultation." Appellee's Brief, p. 3. It is noteworthy that there is no reference to the record to support this statement. Whether this actually took place is not known and if so to what extent. The point being that there has never been an opportunity in this case to develop an actual record.

IV

CONCLUSION

This case involves fundamental legal principles addressing the authority of the State of Michigan and the role of the judiciary in reviewing decisions made pursuant thereto. This case involves taxpayer money (hundreds of millions of dollars) being spent to purchase psychotropic drugs which are given to very young children who are the children of medicaid recipients and other medicaid recipients. While the Department does not want someone reviewing judgment, this is exactly the purpose of FOIA. The public interest is very much involved.

It is prayed that this Honorable Court will consider this matter on the merits.

Respectfully submitted,

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Dated: April 18, 2011

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DEPARTMENT OF COMMUNITY HEALTH,

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_____/

CERTIFICATE OF SERVICE

I, Krystle Constantine, being first duly sworn, deposes and states that on the 18th day of April, 2011, she served *Plaintiffs-Appellants' Reply Brief To Opposition to Application For Leave* and this *Certificate of Service* in the above matter to the following via UPS Overnight mail to the following:

Kevin L. Francart
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Lansing, MI 48909

Krystle Constantine
KRYSTEE CONSTANTINE

Subscribed and sworn to before me this 18th day of April, 2011.

Sherri R. D'Angelo
NOTARY PUBLIC

SHERRI R. D'ANGELO
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Sep 30, 2012
ACTING IN COUNTY OF WAYNE