STATE OF MICHIGAN
IN THE COURT OF APPEALS

BEN HANSEN,

Plaintiff-Appellant, **C.A. No. 278074**

v. **Lower Court Case No. 06-1033 CZ**

STATE OF MICHIGAN, DEPARTMENT OF COMMUNITY HEALTH

Defendant-Appellee.
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STATEMENT OF FACTS

(A)

NATURE OF THE CASE

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

In late 2005 and early 2006, Plaintiff-Appellant submitted three Freedom of Information Act requests to Defendant-Appellee, the Michigan Department of Community Health ("Department"), in accordance with 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)." (Copies are attached to the Department's Motion to Dismiss, Docket No. 6).

Following the failure of the Department to grant, in full, the third request, a Complaint was filed in the Ingham County Circuit Court on August 11, 2006 (within 180 days of the Department's February 23, 2006 determination. MCLA 15.240). The Department filed a motion to dismiss. Certain records were turned over pursuant to a court-approved stipulation. The parties could not,

however, reach an accord with regard to certain reports. The case was ultimately dismissed by the Circuit Court pursuant to the motion to dismiss. The details of what transpired leading up to the dismissal will be set forth.

(B)

BACKGROUND

Ben Hansen, Plaintiff-Appellant, is a resident of Traverse City, Michigan. The first of the above referenced requests was submitted November 15, 2005. It was, according to the Department, "granted" on December 7, 2005. Plaintiff questioned whether all available documents had been provided. Docket No. 1, Complaint, ¶ 15. A second request, a follow-up to the first, was filed on December 14, 2005, seeking in part what was thought to have been omitted in response to the first request. The Department "granted in part" and "denied in part" the second request. Docket No. 1, Complaint, ¶ 18. The third request, dated February 2, 2006, sought additional related information. Docket No. 1. On February 23, 2006, it also was "granted in part" and "denied in part." Docket No. 1, Complaint ¶ 23. The civil action followed.

PQIP arose out of a three-way agreement between the Department, Comprehensive Neuroscience (CNS) of New Jersey and Eli Lilly and Company. It is designed as and intended to be an educational program which analyzes the prescribing patterns of psychiatric drugs for Medicaid members. Prescription and utilization action trends are reviewed. CNS' role was and is to receive, sort and analyze data. Eli Lilly's exclusive role was to "provide certain funding."[1]

[1]Eli Lilly recently has been the subject of multiple lawsuits with regard to its marketing practices. For example, the State of Pennsylvania filed suit against Lilly (and other pharmaceutical houses) claiming they fraudently marketed antipsychotic drugs and owe the state for prescription costs and harm to patients. The State charged Lilly withheld the risks and exaggerated the benefits of the antipsychotic medication ZYPREXA while persuading doctors to

Docket No.14. The money spent by the Department for the drugs which are the subject of the sought-after reports and data is taxpayer money.

Essentially, this cause of action seeks to obtain specific requested data and documents which are not legitimately exempt from disclosure. It is undisputed that at no time did Mr. Hansen seek any names, addresses or personal data about program participants. (In fact, as a part of the February 2, 2006 request he asked for an "estimate for redacting the exempt information for these documents...." Docket No. 6 (attachment.)) Only raw data was and is sought.

The Department responded to the Complaint with a Motion to Dismiss Complaint Under MCR 2.116 and For Costs, Expenses and Attorney Fees Under MCR 2.114. Following Appellant's reply in opposition, the matter was heard in open court. The Parties stipulated to the "Order for Private Review of Records." Docket No. 12. This Order, in part, provided for time for the parties to seek to resolve these differences, which efforts included:

> Within the next 30 days, Defendant will provide Plaintiff with access to copies of the final versions of existing, nonexempt records falling within the scope of Plaintiff's description of records in his February 2, 2006 FOIA request, namely: 1. (Quarterly) Executive Management Reports in 2005; 2. (Monthly) Michigan Behavioral Pharmacy Reports in 2005; 3. (Monthly) Michigan Targeted Patient Change Report by Quality Indicator, 9/2005 thru 12/2005; 4. (Monthly) Mich. Targeted Prescriber Change Report by Quality Indicator, 9/05 thru 12/2005; 5. (Monthly) Michigan Physician Specialty and Response Reports in 2005; and 6. (Quarterly) PQIP Monthly Mailing Logs in 2005..."
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> A teleconference involving the parties and their counsel to discuss: 1) Plaintiff's February 2, 2006 FOIA request for information that he described as: "[m]inutes and other records of any Pharmacy Quality Improvement Project (PQIP) Workgroup or

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prescribe it for unapproved uses. This is the fifth claim of state medicaid fraud against Lilly. Commonwealth v. Eli Lilly Co., Case No. 00-2836, Feb. Term 2007, Court of Common Pleas, Philadelphia County, P.A. Apparently, an Eli Lilly representative was present during Department meeting raising further questions and concerns about their actual role in PQIP and what information was made available. Docket No 14, Exhibit A.

> Steering Committee meetings which took place in August, September, October or November 2005; and a PQIP committee meeting scheduled for December 15, 2005"; and, 2) Defendant's February 23, 2006 written notice issued in response to the February 2, 2006 FOIA request, which informed Plaintiff, among other things, that records falling under Plaintiff's description do not exist with the Defendant.
>
> Finally, as permitted under section 10(4) of the FOIA and the FOIA case of *Evening News Ass'n v City of Troy*, 417 Mich 481, 516; 339 NW2d 421 (1983), under court-approved special agreement set forth below, Plaintiff's attorney of record is permitted to undertake a restricted private review of certain contested records.

Hundreds of pages of documents were provided to Appellant pursuant thereto and subsequently filed FOIA requests, some of which were the subject of the first and second FOIA requests. These included:

1. Michigan Behavioral Pharmacy Reports;
2. Michigan Concurrent Drug Reports;
3. BPMS Mailing Summary Reports & PQIP Mailing Logs;
4. Michigan Physician Specialty and Response Reports;
5. Michigan Targeted Prescriber Change Reports;
6. PQIP Impact Analysis;
7. PQIP Summary Trend Charts;
8. Michigan Managed Care & Michigan Fee-for-Service Pharmacy Reports
9. Michigan Targeted Patient Change Reports;
10. Executive Management Reports. Docket No. 14., Exhibit B.

A couple of specific examples of what was provided will be helpful and make the existing dispute more understandable. First, there is the Michigan Behavioral Pharmacy Report for Children Under 5 for June 1, 2005-August 31, 2005 which provides detail of the psychiatric/psychotropic drugs being administered to children under 5 years of age, including the following data:

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);[2]

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[2] 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,

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. It details 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)). Docket No.14, Exhibits B and C.

The records and documents provided pertained to the subject matter of Counts I and II of the Complaint. What was not provided and what is 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.

These were specifically requested in the third FOIA request which is the subject of Count III of the Complaint. Docket No. 1, p. 4. Essentially, the names of the drugs are not being provided, which would in turn allow the manufacturers to be identified. (The significance of this will be discussed further in the forthcoming argument and is addressed in the affidavit of Bertrand P. Karon, Professor of Clinical Psychology at Michigan State University and past president of the Psychoanalytical Division of the Psychological Association.) Docket No. 14, Exhibit D.

The reports in dispute were provided to counsel as the Order for Private Review of Records

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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.usdjoj.gov/dea/pubs/abuse/5-STIM.htm. http://www.deadiversion.usdoj.gov/drugs_concern/methylphenidate.htm. Docket No. 14., p.3.

also provided:

> IT IS FURTHER ORDERED that Plaintiff's counsel of record, Alan Kellman, shall be permitted a review of copies of the following records, as described in Plaintiff's February 2, 2006 FOIA request, under the restrictions set forth in this Order:
>
> > 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. Docket No. 12.

The reports (with patient names and identifying information redacted) were received, reviewed and returned. (In fact, the Department allowed Plaintiff-Appellant, himself, to review these reports. He too reviewed and returned the reports.) The Parties, obviously, could not agree on whether or not these reports could or should be formally released. Thereafter argument on the original motion was scheduled and heard.

At no time did the Court review the records in dispute. In fact, Counsel for Appellant specifically offered to have the Court to do so and the Court declined.

> Mr. Kellman: And, I can also point out, just suggest to the Court that the documents in dispute are available, if the Court would like to have them in camera.
>
> The Court: Yes, I am aware of that. I have in other cases been able to review in camera. At this point, I don't think it's necessary. Tr. p. 14., March 21, 2007.

The Court then issued its Order Granting Defendant's Motion to Dismiss.

(C)

THE COURT'S DECISION

The dismissal was based on the Court's opinion, "that Plaintiff failed to state a claim upon which relief can be granted and there are no genuine issues of material fact per MCR 2.116 (c)(10)." Docket No. 21. The Court based its decision on Defendant's written notices denying the FOIA requests being made "in compliance with the statutory notice requirement pursuant to section 5(4)(a), MCL 15.235(4)(a)." Specifically, the Court held Defendant "timely provided Plaintiff a written explanation for the basis of the denials, including why the requested public record is exempt from disclosure and whether or not the public records exists." (The Affidavit of the Department's FOIA Coordinator was cited.) Ultimately, the Court "[b]ased on the reasons cited in this Opinion...," granted the Motion and declared "[t]his Court will not address any further issues." Docket No. 21 p. 4. (emphasis added).

There is nothing in the Record to demonstrate or even suggest that the Court conducted a review of the records in reaching its conclusion and making the determination to dismiss.

With regard to attorney's fees and costs, the Court went on to say it could not award punitive damages for a complaint clearly barred by the statute of limitations but that Defendant was entitled to costs and fees for "having to respond." The Court thus ordered, "Defendant is awarded costs, expenses and attorney's fees pursuant to MCR 2.114 (E) and (F) and MCL 600.2591 in the sum of $3,500." Docket No. 21. The case was then closed. MCR 2.602 (A)(3).

No hearing was conducted and no evidence was offered with regard to the award of attorney's fees and costs. There were no findings by the Court that the suit was filed to harass, embarrass or injure the Department or that Plaintiff had no reasonable basis to believe the facts and that his legal position was void of arguable legal merit. No findings were made with regard to the civil action being frivolous. MCL 600.2591 (1)(3)(i)(ii)(iii), MCR 2.114 (D).

It is also noted that there were no findings, discussion or distinctions with regard to the three separate counts in the Complaint and the Department "having to respond." The Record did not contain any time records of the Department's counsel at the time of the award. Subsequent to the issuance of the award Defendant sought to supplement the record by placing Counsel's time records in the Record. Plaintiff opposed the motion and it was denied. Order Resolving Defendant's Motion to Supplement the Record and Plaintiff's Motions for Stay of Proceedings and Waiver of Stay Bond, June 27, 2006. Docket No. 33.

The Honorable Judge Thomas L. Brown heard this motion as Judge Nettles-Nickerson was no longer hearing cases at that time.

ARGUMENT

I

THE COURT ERRED IN NOT CONDUCTING A DE NOVO REVIEW

Preliminary and simply to set the context it is important to keep in mind the purpose of the Freedom of Information Act, which is:

> (2) 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. MCLA 15.231.

With this in mind, the role of the trial court in FOIA cases logically follows. That is, the trial must review denials and determine the requests de novo.

> The Court shall determine the matter de novo and the burden is on the public body to sustain its burden. The Court, in its own motion, may view the public record in controversy before reaching a decision. MCLA 15.240 (4). (emphasis added)

There is absolutely nothing in the Record to reflect or even suggest that a de novo review was done. The Court, as set forth above, relied on the Department having complied with the statutory notice requirement. MCL 15.234 (4)(a). While this may be true it is not a substitute for the de novo review.

If the role of the Court were simply and only to ensure that the Department fulfilled the statutory notice requirement, there would be no reason to provide for a de novo review. It is not necessary to discuss or review the policy behind the de novo requirement but to simply note that clearly an independent judicial review on the merits is required. The de novo requirement is written in clear "plain language." People v Borchard-Ruhland, 460 Mich 278; 597 NW 2d 1 (1999); Robinson v Detroit, 462 Mich 439; 613 NW 2d 307 (2007). For this reason and regardless of any

other issues and arguments the dismissal should be reversed and the matter remanded to the trial court for a de novo review at least with respect to Count III of the Complaint.

II

PLAINTIFF DID STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND GENUINE ISSUES OF MATERIAL FACTS DO EXIST

(A)

THE CLAIM IS PROPER UNDER MICHIGAN LAW

The Trial Court, as noted, found "Plaintiff has failed to state a claim upon which relief can be granted and there are no genuine issues of material fact per MCR 2.116 (c)(10)." Docket No. 21, p. 3.

The basis for the Court's holding that "Plaintiff did not state a claim upon which relief is granted..." is not clear. The statute, however, is clear as to the available options when an FOIA request is denied. One option is to file a civil action in the circuit court. MCL 15.240 (1)(b). This is what was done.

The Court cited MCL 15.234(4)(a) which simply sets out what a public body is to do upon receipt of a FOIA request. It does not provide that no judicial review is possible or that the Court may simply rely on the public body's determination. Indeed, § 15.235(4)(d) states that the public body shall provide:

> (d) A full explanation of the requesting person's right to do either of the following:
>
> ii. Seek judicial review of the denial under section 10.

The law regarding the summary disposition under MCR 2.116 (C)(8) is well settled.

> A motion for summary disposition under *MCR 2.116 (C)(8)*, tests the legal basis of the claim and is granted if the claim is so manifestly

> unenforceable as a matter of law that no factual progression could possibly support recovery. *Simko v Blake, 448 Mich. 648, 654; 532 N.W. 2d 842 (1995)*. Motions for summary disposition are examined on the pleadings alone, absent consideration of supporting affidavits, depositions, admissions, or other documentary evidence, and all factual allegations contained in the complaint must be accepted as true. *Id. at 654. Sue Ann Dolan v Continental Express, 454 Mich. 373, 380-381, 563 N.W. 2d 23 (1997).*

Plaintiff had every right to file this case. The Court did not analyze the confidentiality statute relied on by the Department or the related exemptions**.** MCL 331.533**;** MCL 331.532 (2). The Court did not find that this action was "manifestly unenforceable as a matter of law." The Court ignored the fact that Count III was filed within 180 days.

Summary disposition was not proper.

(B)

THERE ARE GENUINE ISSUES OF MATERIAL FACT

With regard to whether or not there are any genuine issues of material fact, without the de novo review it is difficult to see how the trial court could come to this conclusion. Nevertheless, the Record, as it now stands, contains genuine issues. For example, the Department argues the data sought is confidential. The statute which provides for confidentiality reads as follows:

> 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 record 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. MCL 331.533. (emphasis added.)

This provision provides quite clearly that: (1) when information is to be released names and

addresses are to be removed (not at issue here); and (2) that the information is to be kept confidential "[e]xcept as otherwise provided in Section 2....". (emphasis added.)

Section 2, MCL 331.532 (2) provides:

> The release or publication of a record of the proceedings or of the reports, findings, and conclusions of a review entity shall be for 1 or more of the following purposes:
>
> (a) To advance health care research or health care education.
> (b) To maintain the standards of the health care professions.
> (c) To protect the financial integrity of any governmentally funded program.

The exceptions do not limit who may receive the reports as long as the purposes set forth are met. These purposes are clear and are exactly what is contemplated as evidenced by Dr. Karon's affidavit. Docket No. 14, Exhibit D.

Plaintiff submitted a sworn affidavit from Dr. Karon (and a statement from Dr. Morrison). Dr. Karon's affidavit states in clear terms that research would be advanced and educational value will be realized from this information. Specifically, he stated:

> 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.
>
> 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. Docket No. 14, Exhibit D.

Keeping in mind the ongoing Lilly litigation brought by various other attorney generals, it

also follows that "financial integrity" is another potential issue.

Given the information provided (such as the class of drugs prescribed and the number and age of patients for each class), why the names of the drugs would be confidential is difficult to comprehend. What is it about the names of the drugs that would cause the Department to withhold this information?[3] What purpose is served? Withholding this information begs multiple questions.

The Department certainly does not, as a matter of law, have unbridled discretion to draw lines without any reason or basis. The People of the State of Michigan are entitled to access information unless there is a legitimate reason for it to be withheld. In any event, a hearing was and is needed. The trial court cannot possibly say there are no genuine issue of material fact with regard to these points.

Michigan law is clear on this issue.

> In deciding a motion under *MCR 2.116 (C)(10),* the trial court must review all the evidence presented, including any depositions, affidavits, admissions and pleadings, and then ascertain whether there is any dispute as to material fact. *Jubenville v West End Cartage, Inc., 163 Mich App 199, 203; 413 NW2d 705 (1987)*, lv den *429 Mich 881 (1987)*. The test is whether the record which might be developed, giving the benefit of any reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ. *Id.* The court should be liberal in finding a question of material fact and must carefully avoid making findings of fact under the guise of determining that no issues of material fact exist. *Id.*

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[3]In June 2007, subsequent to the notice of appeal being filed in this case. Plaintiff obtained a list, as a result of an FOIA request filed by another individual, of approximately 30,000 pages of Michigan Medicaid prescriptions which include, among other items, the **names**, dosages and prices of the psychiatric drugs prescribed in 2005 to children under 18. This public information is available at http://psychrights.org/states/Michigan/FOIA/MIFOIA2006 734.pdf. The PQIP program compiles similar data in a readable, understandable format listing children under 5 and patients on 5 or more concurrent drugs. In other words, the same type of data sought in this case is available and was made available through the same Department FOIA Coordinator involved in this case. The data and materials being held here are clearly not confidential.

> Citizens Insurance Company of America v Automobile Club Insurance Association, 179 Mich. App. 461, 446 N.W. 2d 482 (1989).

Dismissal under (c)(10) was simply not proper at this juncture in the case at least with respect to Count III.

III

THE STATUTORY INTERPRETATION ISSUE

Appellant recognizes the disagreement between the parties on how the confidentiality statute and its exceptions are to be read and implemented. As this issue was not addressed by the trial court and the record not developed it will not be addressed in this opening brief. Should Appellee argue the issue, Appellant will argue and respond accordingly.

IV

THE AWARD OF ATTORNEY'S FEES WAS NOT PROPER - THE STATUTE OF LIMITATIONS ISSUE

The Court's opinion and order is not clear on the statute of limitations issue. Dismissal is not premised on a statute of limitations violation. The Court, as noted, stated dismissal was based on the reasons set forth in its "Opinion". The Opinion spoke of the Department's response, not the statute issue. Nevertheless, fees and costs were awarded because the Department had to "respond."

The applicable statute of limitations provides that:

> Sec. 10 (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> (b) Commence on 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. 15.240 Sec 10(1)(b).

At a minimum, as Count III was commenced within 180 days of the February 23, 2006

decision by the Department there was no statute violation with respect to this Count.[4] It is fundamental that each claim for relief "must be stated in a separately numbered count or defense." MCR 2.113 (E)(3). The Michigan Supreme Court addressed this long ago.

> "Where it is sought to set out two or more causes of action in the same pleading, and joinder of such causes of action in separate counts is permissible, it is not only proper to set out the different causes in separate counts so that each cause of action will constitute a separate count and each count will embrace only one cause of action, but it is also necessary, as a general rule, to do so. Sidlowski v Metropolitan Life Ins. Co., 270 Mich 12; 257 NW 924 (1934). (Emphasis added.)

Moreover, the Department's Brief In Reply and Opposition to Plaintiff's Supplemental Brief In Response to Defendant's Motion to Dismiss, does not contest Count III on this point. Their Brief, in relevant part, provides:

> As stated in Defendant's reply to Plaintiff's response brief, Plaintiff, at page 2 of his response brief, states that he filed his complaint on August 11, 2006. Plaintiff's claims based on MDCH's December 7, 2005, written notice granting Plaintiff's November 14, 2005, request, and on the January 11, 2006, written notice granting in part and denying in part Plaintiff's December 14, 2005, request originated, respectively, 247 days and 212 days prior to Plaintiff's claimed commencement of his FOIA action on August 11, 2006. (*See* Counts I and II of Plaintiff's complaint and copies of the FOIA requests and the FOIA responses appended, respectively, as Attachment A and Attachments 1 and 2 to MDCH's brief in support of dispositive motion.)
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>
> Assuming *arguendo*, that Plaintiff's claim based on MDCH's February 23, 2006, written notice granting in part and denying in part Plaintiff's February 2, 2006, request originated 169 days prior to Plaintiff's claim commencement of his FOIA action on August 11, 2006, this claim, nevertheless, should be dismissed. Docket No. 16,

[4] The Complaint was filed on August 11, 2006; the summons issued August 30, 2006 and the Complaint served on September 12, 2006. Docket Nos. 1-4.

pp. 3-4.

From here, the Department went on to argue about genuine issues of fact and more but not about the timeline of Count III. The award cannot stand as dismissal of Count III was not proper.

There are also other factors to consider. The Court awarded costs, fees and expenses pursuant to MCR 2.114 (E)(F) and MCL 600.2591 in the amount of $3,500.00. These provisions speak in terms of frivolous actions filed with the purpose of harassing or intimidating, no arguable legal merit or basis to believe the underlying facts. The Court made no findings which address any of these points. The Court's only basis for the sanctions was that the Department had to respond. This was not correct as argued. Furthermore, there is nothing in the Record to show how much time was spent by the Department's counsel on Count I and Count II matters as compared to Count III. The fact that in effect the FOIA requests were on-going was not taken into account. (When was there a "final determination" by the Department? MCL 15.210(10)(1)(b)). Moreover, the amount of material turned over pursuant to the private viewing agreement early on effectively rendered the substance of Count I and II moot and resolved the disagreements between the parties as to these Counts. Thereafter, all the time and work of the parties pertained to Count III.

It is certainly not unreasonable to suggest that counsel for the Department understood the defect in the Court's award, as he sought to supplement the Record with his time records. Defendant's Motion to Supplement the Record in Support of the Court's Order Granting Defendant's Motion for Costs, Expenses, and Attorney Fees, Memorandum of Law. Docket No. 29. Clearly, the Court's decision to award $3,500.00 in fees was not premised on any sort of detailed analysis of the work done. The award should be reversed. At least there should be a hearing on this issue for the purpose of distinguishing the work done for the different counts.

RELIEF REQUESTED

This case involves serious matters. Using tax dollars to fund prescriptions of drugs with potentially very significant side effects (and FDA "black box warnings" in some instances) is certainly something that the public has the right to be fully informed about. Making this information available opens the door for further research and education by others who do not have a financial stake in the use of drugs. For the reasons set out above, the order of dismissal and award of fees should be reversed and remanded for further proceedings.

Respectfully submitted,

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ALAN KELLMAN (P15826)
THE JAQUES ADMIRALTY LAW FIRM, P.C.
Attorney for Ben Hansen, Plaintiff-Appellant
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080

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