STATE OF MICHIGAN

COURT OF APPEALS

BEN HANSEN, Plaintiff-Appellant,	UNPUBLISHED March 13, 2008
v	No. 278074 Ingham Circuit Court
DEPARTMENT OF COMMUNITY HEALTH, Defendant-Appellee.	LC No. 06-001033-CZ

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Plaintiff submitted three requests under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., to defendant Michigan Department of Community Health (MDCH) in 2005 and early 2006. Defendant responded to plaintiff's requests on December 7, 2005, January 11, 2006, and February 23, 2006, respectively. Not satisfied with defendant's responses, plaintiff filed an action in the trial court, seeking copies of records that defendant stated were exempt from disclosure and more complete records on requests that had been granted. The three counts contained in the complaint correlated, chronologically, to the three FOIA requests. Defendant brought a motion for summary disposition, and it sought sanctions. The trial court granted defendant's motion for summary disposition, and the court awarded defendant costs, expenses, and attorney fees. Plaintiff appeals as of right. We affirm.

This case arises out of plaintiff's attempt to obtain documents regarding the Pharmacy Quality Improvement Project (PQIP) that was designed and intended to be a program that analyzed the prescribing patterns of psychiatric drugs for Medicaid members. Eli Lilly and Company (Lilly), Comprehensive NeuroScience, Inc. (CNS), and MDCH entered into an agreement that set forth program initiatives. Under the agreement, Lilly was obligated to provide certain funding that would be paid to CNS to carry out the program's initiatives on behalf of Michigan Medicaid, which is operated by MDCH. The agreement further provided:

> A fundamental goal of Lilly's business is to promote excellence in patient healthcare. Similarly, Michigan Medicaid also believes in this goal. Lilly and Michigan Medicaid believe that the Program Initiatives should further this mutual goal by helping to ensure that patients obtain the most appropriate medicines that such patients may need based on the medical judgment of such patients' physicians. Therefore, this Agreement is being entered into solely for the purpose of attempting to further this aligned goal of the parties and has nothing to do with

> nor is it intended to obligate Michigan Medicaid in any way to provide Lilly with any form of preferential treatment for any Lilly product.

The language in the agreement also indicated that medical cost reductions could result from the program.

The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(7), (8), and (10). The court found that defendant, in denying requests, complied with the statutory notice requirements by timely providing plaintiff with appropriate written explanations for the denials in the form of claiming either an exemption or nonexistence.[1] This, however, did not answer the basic question whether the denials were proper under the law. But the trial court proceeded to award defendant costs, expenses, and attorney fees under MCR 2.114(E) and (F) and MCL 600.2591, indicating that plaintiff had filed "a complaint clearly barred by the statute of limitations." Considering this language with the fact that the order provided for summary dismissal, in part, under MCR 2.116(C)(7), we can presume that the court was also of the opinion that the statute of limitations supported dismissal of the entire action.

Defendant argued that plaintiff's claims were barred by the statute of limitations pursuant to MCR 2.116(C)(7). When a public body makes a final determination to deny all or a portion of a particular request, the requesting person may "[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." MCL 15.240(1)(b). Plaintiff's first two FOIA requests garnered final responses from defendant that were more than 180 days before plaintiff filed his complaint. In plaintiff's appellate brief, the failure of the first two counts in the complaint, which pertained to the first two FOIA requests, is essentially conceded because of the statute of limitations. Plaintiff focuses instead on count III. Plaintiff's third FOIA request, as addressed in count III, received a response from defendant on February 23, 2006, and plaintiff filed a complaint on August 11, 2006, which was within 180 days of defendant's response. See MCR 2.101(B)("A civil action is commenced by filing a complaint with a court"). However, the record is somewhat unclear regarding the filing of a complaint. As indicated, the record contains a complaint that is date stamped August 11, 2006, but that complaint is immediately followed in the record by another complaint, not titled an amended complaint, which is date stamped August 30, 2006. The complaints are identical, and the sole summons was issued August 30, 2006. Defendant, referencing the August 30, 2006, date, argues that all three counts were time-barred,

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[1] The trial court cited MCL 15.235 in its ruling. MCL 15.235(2) indicates that a public body must reply in some form to a FOIA request within 5 business days after receipt of the request. MCL 15.235(4) addresses full or partial denials of FOIA requests, and it requires the public body to send a written notice to the requesting individual that explains the basis for the denial, such as the record is exempt from disclosure or the requested record does not exist. Interestingly, a review of plaintiff's complaint reveals that plaintiff never even claimed that defendant had failed to timely submit a response to the requests, nor that defendant had failed to give an explanation why some requests were denied. Rather, plaintiff alleged that either documents were not fully provided despite the granting of a request, or that a denial predicated on a claimed exemption was improper.

and it is true that if August 30, 2006, is the point of demarcation, the complaint would be untimely (189 days). We note, however, that at the hearing on the summary disposition motion, counsel for defendant stated, "This third FOIA request[] was just under the wire, just within 169 days." But then this statement conflicts with defendant's own argument in its summary disposition brief that all three counts were time-barred based on a complaint filing date of August 30, 2006. We conclude that, because the record contains a complaint that was filed on August 11, 2006, and because an action is commenced with the filing of a complaint, the third count was timely, and the court erred in dismissing it pursuant to the statute of limitations.[2] The statute of limitations, however, dictated the dismissal of the first two counts. Accordingly, the remainder of this opinion will solely address count III.

Plaintiff has narrowed his demands relative to count III, seeking only PQIP documents pertaining to psychiatric drugs prescribed to Michigan children under the age of 5 years old and psychiatric drugs prescribed to patients who were using five or more of these drugs concurrently.[3] Plaintiff did not seek the names of the patients taking the drugs, acknowledging that such information would be properly redacted. Pursuant to an order for private review of records, plaintiff and plaintiff's counsel were given the opportunity to review the documents at issue, which were then returned to defendant. The parties do not agree, however, on whether the documents can or should be formally released.

Plaintiff first argues that the trial court failed to conduct a de novo review as required by the FOIA. "The court shall determine [whether a public record is exempt from disclosure] de novo and the burden is on the public body to sustain its denial." MCL 15.240(4). "The trial court's review of these records is to be a de novo review which connotes a strict standard of review." *The Evening News Ass'n v Troy*, 417 Mich 481, 501 n 17; 339 NW2d 421 (1983). Although the trial court did not reach the question whether the documents at issue were exempt, which constituted error on the court's part with respect to count III, the issues that were determined by the court were certainly addressed and reviewed de novo. We note that, in the judicial process of determining whether a FOIA request was properly denied by the public body on the basis of a claimed exemption, the court should receive information from the public body showing a complete particularized justification for the denial, or the court should conduct an *in camera* hearing to determine whether there was justification, or the court can allow a plaintiff's attorney to have access to contested documents *in camera*. *Id.* at 516. MCL 15.240(4) provides

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[2] We note that, to some extent, we are giving plaintiff the benefit of the doubt on this issue considering our final resolution in favor of defendant. We further note that, in general, a statute of limitations is tolled "[a]t 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). Here, the summons and complaint were served on defendant before the summons's expiration date. The summons does not differentiate between the two complaints.

[3] More specifically, plaintiff had requested: "1. (Monthly) Michigan Under 5 Detail by Drug and Quality Indicator in 2005; and 2. (Monthly) Patients on 5 or More Concurrent Behavioral Drugs in 2005." In response, defendant stated that the request had been reviewed "and it has been determined that the above records, in their entirety, are protected from disclosure pursuant to MCL 331.533."

that "[t]he court, on its own motion, may view the public record in controversy in private before reaching a decision." Here, plaintiff and plaintiff's counsel were permitted to review the requested documents. To the extent that plaintiff complains that the court did not personally review documents associated with plaintiff's third request, it was not required, nor necessary, and ultimately it has no bearing on proper resolution of this case.

Turning to the issue of whether the third request was properly denied and whether the requested documents were exempt, we first acknowledge our standards of review. In *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 471-472; 719 NW2d 19 (2006), our Supreme Court enunciated the various standards relative to FOIA actions:

> First, we continue to hold that legal determinations are reviewed under a de novo standard. Second, we also hold that the clear error standard of review is appropriate in FOIA cases where a party challenges the underlying facts that support the trial court's decision. In that case, the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court. Finally, when an appellate court reviews a decision committed to the trial court's discretion, such as the balancing test at issue in this case, we hold that the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes.

The application of an exemption that involves a legal determination is reviewed de novo. *Federated Publications, Inc v Lansing*, 467 Mich 98, 106; 649 NW2d 383 (2002), mod on other grounds in *Herald Co, supra.* Again, the trial court failed to reach the issue of whether the materials were exempt, but instead of remanding the matter for resolution, we shall directly address the issue for purposes of judicial expediency because, as reflected in our analysis below, the issue ultimately constitutes a pure legal question.

Defendant claims that the documents are exempt under MCL 331.531 *et seq*., commonly referred to as Michigan's peer review immunity statute, while plaintiff maintains that the documents are subject to release under the same statutory scheme, although patient names must be redacted. Defendant specifically claimed that the documents were exempt under MCL 331.532 and MCL 331.533. The FOIA is a "prodisclosure statute," *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 558; 475 NW2d 304 (1991), under which a defendant bears the burden of establishing an exemption, MCL 15.240(4). In a circuit court action to compel a public body's disclosure of public records, "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." MCL 15.240(4). The FOIA exempts from disclosure any documents that are "specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). The exemptions, however, are to be "narrowly construed." *Swickard, supra* at 558.

MCL 331.531(1) provides:

> 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.

"A person, organization, or entity is not civilly or criminally liable" for providing information or data under the statute, or for, in general, releasing or publishing records and reports. MCL 331.531(3). A "review entity" includes "[a] state department or agency whose jurisdiction encompasses the information described in subsection (1)." MCL 331.531(2)(d). Both parties proceed on the basis that defendant is a "review entity" under the statute, and given the lack of any dispute on the matter and the nature of the PQIP and the MDCH, we shall treat defendant as a "review entity" for purposes of our analysis. Defendant argues that plaintiff is not a "review entity," and we agree with this assessment. Regardless, plaintiff makes no claim that he is a "review entity." MCL 331.533 provides:

> 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 [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.

Plaintiff cites MCL 331.532(a)-(c) as establishing the relevant exceptions in this case to MCL 331.533. MCL 331.532(a)-(c) provide:

> 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.

In his attempt to establish the applicability of the exceptions, plaintiff relies on the affidavit of Bertram P. Karon, Ph.D., a professor of clinical psychology at Michigan State University, who averred that he fully supports plaintiff's document request as the documents "contain information of useful educational value to researchers . . . 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." Karon further averred that '[t]here is no justifiable reason this information should remain secret from the citizens and taxpayers of our state." Finally, Karon stated that "[h]aving this data will not only advance healthcare research and thus . . . education[,] but help ensure that appropriate standards among healthcare providers are maintained." We note that plaintiff

alleged that he "sits as a member of the [MDCH] Recipient Rights Advisory Committee having been appointed by the Director of the Department."

Plaintiff misconstrues the interaction between MCL 331.532 and MCL 331.533. In *Dye v St John Hosp & Med Ctr*, 230 Mich App 661, 672 n 10; 584 NW2d 747 (1998), this Court observed:

> [W]e find nothing within §§ 2 [MCL 331.532] or 3 [MCL 331.533] that places a duty on a review entity to release information. Instead, § 3 provides confidentiality protection. That protection is subject to exceptions listed in § 2. Thus, a disclosure falling within one of [the] specified purposes of § 2 does not run afoul of the confidentiality provisions of § 3. Nothing within these sections, however, mandates the release of information within a category excepted from the confidentiality protection. It is one thing to exempt information from guaranteed confidentiality but quite another to require disclosure of that information.

Reading MCL 331.532 and MCL 331.533 together, it is evident that a review entity 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. Thus, plaintiff's claim that review entity reports are subject to release if plaintiff shows a proper purpose for him or others to have access to the documents under § 2 fails because it is defendant, i.e., the review entity, which must first decide whether to release or publish the reports under § 2. In other words, the documents remain confidential, not discoverable, and not public under § 3 until the review entity chooses to release the documents. Here, defendant has not chosen to release or publish the relevant documents under § 2; therefore, they remain confidential, not discoverable, and they are not public records. Therefore, taking into consideration the FOIA exemptions, the documents sought by plaintiff are "specifically described and exempted from disclosure by statute." MCL 15.243(1)(d). Moreover, the FOIA in general pertains to requests for "public records," MCL 15.233, and MCL 331.533 dictates that the records at issue here are not public as defendant has not decided to release the materials. Accordingly, the trial court did not err in dismissing plaintiff's complaint as to count III, albeit for the wrong reasons. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Finally, on the issue of sanctions pursuant to MCR 2.114(E) and (F), as well as MCL 600.2591, which concern frivolous complaints or pleadings not well grounded in fact nor warranted by existing law, our review is under the clearly erroneous standard. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002); *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). Given that the first two counts were clearly time-barred and that the third count was not sustainable under established case law issued in 1998, i.e., *Dye*, *supra*, reversal is unwarranted.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio