STATE OF MICHIGAN

COURT OF APPEALS

BEN HANSEN, INTERNATIONAL CENTER FOR THE STUDY OF PSYCHIATRY AND PSYCHOLOGY, INC., and LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.,

Plaintiffs-Appellants,

v

DEPARTMENT OF COMMUNITY HEALTH,

Defendant-Appellee.

UNPUBLISHED
January 20, 2011

No. 294415
Ingham Circuit Court
LC No. 09-000759-CZ

Before: METER, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a grant of summary disposition to defendant. We affirm.

This case involves an attempt by plaintiffs to obtain certain records from defendant under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. According to plaintiffs' complaint:

> 2. The International Center for the Study of Psychiatry and Psychology, Inc. (ICPPS) is a non-profit . . . research and educational entity. Its purposes include research and education in the mental health field and to inform the public and media about the potential dangers of drugs. Its Board of Directors consists of licensed members of the mental health profession.
>
> 3. The Law Project for Psychiatric Rights, Inc. is a non-profit . . . public interest law firm whose sole purposes include informing the public and the courts about psychiatric drugs.
>
> * * *
>
> 6. In 2004, [defendant] created the Pharmacy Quality Improvement Project (PQIP).

> 7. PQIP[’s] stated purposes included improving the “effectiveness” of the taxpayer’s dollars spent on psychotropic drugs, “patient adherence to medication plans” and the “quality of psychotropic prescribing practices based on evidence based guidelines.”
>
> 8. Comprehensive Neuroscience (CNS), of White Plains, New York, has received a grant from Eli Lilly and Company to partner with [defendant] with regard to PQIP. Its role is to receive, sort and analyze data.

Plaintiff Ben Hansen[1] made a FOIA request in November 2008. According to the complaint, Hansen sought:

> All Michigan “Children Under Age 5 Detail by Drug Name” reports issued monthly by Comprehensive NeuroScience Inc. during the life of the PQIP program, listing Prescriber Name, Prescriber ID, and Drug Name. It is understood that Patient Name and Patient ID shall be redacted from these reports before they are released.
>
> All Michigan “Patients on 5 or more Concurrent Behavioral Drugs” reports issued monthly by Comprehensive NeuroScience Inc. during the life of the PQIP program, listing Prescriber Name, Prescriber ID, and Drug Name. It is understood that Patient Name and Patient ID shall be redacted from these reports before they are released.

Defendant denied this request, stating, “Your request is denied as the information you are requesting is exempt from disclosure pursuant to Section 13(1)(a) and (d) of the FOIA. Specifically, the information is exempt pursuant to MCL 333.533.”

Hansen also sought

> An electronic copy of Michigan Medicaid data, listing all fields available on children under age 18 in Medicaid, prescribed atypical antipsychotic medication (drug class including brand names Abilify, Geodon, Risperdal, Seroquel and Zyprexa) in the years 2006 and 2007, including but not limited to: Lable [sic] Name (such as “Seroquel 20 MG tablet”), Approved Amount (dollars), Provider Name and License Number.

Defendant responded that this request was too vague in a number of respects and requested additional information. Plaintiffs claim that Hansen provided the additional information and that defendant informed him that the request was “granted as to existing non-exempt records.” Plaintiffs claim that after Hansen sent a deposit for the expense of producing the records,

---

[1] According to plaintiffs’ appellate brief, “Mr. Hansen was, but is no longer, a member of the Michigan Department of Community Health Recipient Rights Advisory Committee.”

defendant "reneged on its approval" and stated that "the disclosure of Prescriber Name and License Number could be used with other public data to produce identifiable information."

The two additional plaintiffs aside from Hansen also made separate FOIA requests for the information relating to children under age five and the information relating to persons on five or more concurrent behavioral drugs. Defendant denied the requests, again citing MCL 331.533, which states:

> The identity of a person whose condition or treatment has been studied under this act is confidential and a review entity[2] 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[3]], the record of a proceeding and the reports,

---

[2] MCL 331.531(1) states:

> (1) 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 "review entity" includes an entity such as defendant. See MCL 331.531(2).

[3] MCL 331.532 states:

> 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.
>
> (d) To provide evidence relating to the ethics or discipline of a health care provider, entity, or practitioner.
>
> (e) To review the qualifications, competence, and performance of a health care professional with respect to the selection and appointment of the health care professional to the medical staff of a health facility.
>
> (f) To comply with section 20175 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20175 of the Michigan Compiled Laws.

(continued…)

> 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.

In their complaint, plaintiffs claimed that defendant's denials were unlawful under the FOIA and sought release of the information.

Defendant filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10), claiming, primarily, that plaintiffs' claims were barred by the law of the case doctrine because similar issues had been decided by this Court in *Hansen v Michigan Dep't of Community Health*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 278074). Plaintiffs responded, in part, that that law of the case doctrine did not apply because the earlier opinion in *Hansen* was unpublished.[4]

The trial court granted defendant's motion, finding that the issues in question had been previously, and correctly, decided.[5]

In *Hansen*, *supra*, slip op at 3, Hansen had sought the same information he currently seeks that pertains to children under five and to persons taking five or more behavioral drugs. Hansen cited MCL 331.532(a)-(c)[6] as providing a basis for the release of the information. *Hansen*, *supra*, slip op at 5. The *Hansen* Court stated:

> 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." [*Id.* at 5-6.]

(…continued)

[4] We note that the parties do not discuss or rely on the law of the case doctrine in this appeal.

[5] We review de novo both grants of summary disposition and issues of statutory interpretation. *Universal Underwriters Ins Grp v Auto Club Ins Ass'n*, 256 Mich App 541; 543-544; 666 NW2d 294 (2003).

[6] See footnote 3, *supra*.

The *Hansen* Court held:

> 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 . . . . [*Hansen*, *supra*, slip op at 6.]

Plaintiffs claim that *Hansen* was wrongly decided because MCL 331.533, as a part of the peer review immunity statute, MCL 331.531 *et seq*., is only applicable to information used for disciplinary or investigative proceedings regarding a health care professional's competence. Plaintiffs claim that the statutory scheme is designed solely to protect individuals who disclose information about a health care professional's job performance. However, plaintiffs' "statutory purpose" argument is contrary to the plain language of the statutes at issue. As noted in *Klida v Braman*, 278 Mich App 60, 64; 748 NW2d 244 (2008), "If [statutory] language is clear and unambiguous, it is assumed that the Legislature intended its plain meaning and the statute is enforced as written." There is nothing in the statutes at issue indicating that they apply solely to information relating to the purpose described by plaintiffs. *Hansen* accurately set forth the law and its application to the requested information. As noted in *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010), unpublished decisions may be considered "instructive and persuasive" by this Court. Given the nearly identical factual situation, and the similarity of parties, in *Hansen* as compared to this case, we find *Hansen*

highly persuasive and adopt its reasoning as our own.[7] The trial court did not err in granting defendant's motion.

Plaintiffs contend that the trial court erred in failing to hold a de novo review. Plaintiff cites MCL 15.240(4). This statute states:

> In an action commenced under subsection (1)(b), 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. The circuit court for the county in which the complainant resides or has his or her principal place of business, or the circuit court for the county in which the public record or an office of the public body is located has venue over the action. The court shall determine the matter de novo and the burden is on the public body to sustain its denial. The court, on its own motion, may view the public record in controversy in private before reaching a decision. Failure to comply with an order of the court may be punished as contempt of court.

Contrary to defendant's implication, the trial court was not *required* to review the contested records. Indeed, the statute states that the court "*may* view the public record in controversy in private." *Id*. (emphasis added). We find that the court did indeed conduct a de novo review, by way of pleadings and oral arguments, before reaching its decision and did not act improperly in deciding that a review of the contested records was not necessary to resolve this case.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly

---

[7] In addition, Hansen's claims are barred by collateral estoppel because the parties in this case and in *Hansen* were identical, at least with regard to his particular claims. See *Arim v General Motors*, 206 Mich App 178, 195; 520 NW2d 695 (1994). Although Hansen made an additional FOIA request in the instant case, aside from the two involving children under five and involving persons taking five or more behavioral drugs, the pivotal issue was essentially the same and involved the interplay of the same statutes.