

STATE OF MICHIGAN
IN THE SUPREME COURT

IN THE MATTER OF THE PETITION OF
THE ATTORNEY GENERAL FOR
SUBPOENAS,

Supreme Court No. 159690

Court of Appeals No. 342680

Plaintiff-Appellant,

Ingham Circuit Court
No. 17-000021-PZ

v

VERNON EUGENE PROCTOR, M.D.,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF¹

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¹ Plaintiff-Appellant resubmits its original application for leave to appeal filed on May 31, 2019, with one additional case citation and accompanying commentary noted on pages 20, 22, and 23 of this brief.

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STATEMENT OF JURISDICTION

On February 14, 2018, the Ingham County Circuit Court issued an order denying Respondent-Appellee Vernon Proctor, M.D.'s motion to vacate its order authorizing Petitioner-Appellant the Department of Licensing & Regulatory Affairs, Bureau of Professional Licensing (Department) to subpoena requested patient substance abuse treatment records. On February 26, 2019, the Court of Appeals issued a published opinion reversing the Ingham County Circuit Court's order. The Court of Appeals denied the Department's motion for reconsideration on April 19, 2019. This Court has jurisdiction to consider the Department's application for leave to appeal pursuant to MCL 600.232 and MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

Whether the Department properly complied with federal law in obtaining a subpoena to search the patient files of a doctor who is suspected of abusing his prescription authority. This question is predicated on three subordinate questions:

1. Whether the plain language of federal regulatory law, 42 CFR 2.66, requires a hearing before a court may authorize a subpoena that requires disclosure of protected substance abuse treatment records as part of an investigation of a federally-assisted drug treatment program?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: No.

Court of Appeals' answer: Yes.

2. Whether the Department demonstrated "good cause" to support the authorization of the requested substance abuse treatment records?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Yes.

Court of Appeals' answer: No.

3. Whether the circuit court order properly provided for the disclosure of confidential communications, where that order guaranteed the protection from disclosure identifying information for the patients and provided an opportunity for the patient or record holder to seek revocation or modification of the court order?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Yes.

Court of Appeals' answer: No.

STATUTES AND REGULATIONS INVOLVED

42 USC § 290dd-2

(a) Requirement

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) Permitted disclosure

(1) Consent

(2) Method for disclosure

Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives written consent, the content of such record may be disclosed as follows:

(c) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

42 CFR § 2.12 Applicability

(a) General—

(1) Restrictions on disclosure. The restrictions on disclosure in the regulations in this part apply to any information, whether or not recorded, which:

(i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and

(ii) Is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

42 CFR § 2.13 Confidentiality and safeguards

(a) General. The patient records subject to the regulations in this part may be disclosed or used only as permitted by the regulations in this part and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any federal, state, or local authority. Any disclosure made under the regulations in this part must be limited to that information which is necessary to carry out the purpose of the disclosure.

42 CFR § 2.63 Confidential communications

(a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious

bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

42 CFR § 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

42 CFR § 2.66 Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a part 2 program or other person holding the records

(a) Application.

(1) An order authorizing the disclosure or use of patient records to investigate or prosecute a part 2 program or the person holding the

records (or employees or agents of that part 2 program or person holding the records) in connection with a criminal or administrative matter may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

(2) The application may be filed separately or as part of a pending civil or criminal action against a part 2 program or the person holding the records (or agents or employees of the part 2 program or person holding the records) in which the applicant asserts that the patient records are needed to provide material evidence. The application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny or the patient has provided written consent (meeting the requirements of § 2.31) to that disclosure.

(b) Notice not required. An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c).

(c) Requirements for order. An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64.

(d) Limitations on disclosure and use of patient identifying information.

(1) An order entered under this section must require the deletion of patient identifying information from any documents made available to the public.

(2) No information obtained under this section may be used to conduct any investigation or prosecution of a patient in connection with a criminal matter or be used as the basis for an application for an order under § 2.65.

INTRODUCTION

The decision below frustrates the ability of the Department to effectively combat the opioid epidemic in this state. The doctor's patient charts are the best evidence of whether a provider is prescribing controlled substances within the standard of care. For that reason, it is imperative that health regulatory and law enforcement agencies be able to subpoena patient medical records in an unencumbered manner when conducting an investigation into whether a doctor's drug prescribing practices are proper. Federal law provides heightened privacy protections for individuals receiving substance abuse treatment. But it also recognizes these agencies need to quickly and thoroughly access medical records when investigating possible misconduct by a health provider. That is the case here. Specifically, 42 CFR 2.66 provides a procedural mechanism for these agencies to petition a court for an order authorizing disclosure of the substance abuse treatment records relevant to its investigation of a health care provider.

In particular, the Department petitioned the court to subpoena substance abuse patient charts from Dr. Vernon Proctor as part of its investigation of his potentially abusive drug prescribing practices. The Court of Appeals vacated the court order on the grounds that it failed to make a determination of "good cause" for disclosure, failed to conduct a pre-authorization hearing as required by the federal regulations, and erred in finding that the national opioid epidemic justified the disclosure of confidential communications made between the patients and Dr. Proctor noted within the patient charts. The decision was wrong on all three points. And it misinterpreted federal regulatory law and the cases examining it.

First, the plain language of 42 CFR 2.66 allows law enforcement or a health regulatory agency to obtain an ex parte order authorizing disclosure of substance abuse treatment records when the health provider providing the treatment is the subject of the agency's investigation or prosecution. To compound this error, the Court of Appeals misinterpreted *United States v Shinderman*, 515 F3d 5 (CA 1, 2008) and *Hicks v Talbott Recovery Sys, Inc.*, 196 F3d 1226 (CA 11, 1999) to apply the closed hearing requirement of 42 CFR 2.64 and 42 CFR 2.65 to applications for disclosure requests filed under 42 CFR 2.66.

Second, the Court of Appeal's decision that "good cause" had not been shown to authorize disclosure of the substance abuse treatment records is inconsistent with the analysis in *In re The August, 1993 Regular Grand Jury*, 854 F Supp 1380 (1994).

Third, the Court of Appeals erred in finding that the existence of the national opioid epidemic or the risk of serious injury or death to the patients themselves did not justify disclosure of provider/patient communications contained within the records.

Accordingly, the lower court opinion – which was published – is clearly erroneous, is of significant public interest, and will cause material injustice by impeding the Department and law enforcement agencies ability to promptly investigate health care providers for improper controlled substance prescribing practices. The Department respectfully requests this Court grant its application for leave to appeal.

STATEMENT OF FACTS AND PROCEEDINGS

The Department is a health oversight regulatory agency charged with licensing and regulating health professionals in order to protect the public. The Department petitioned the Ingham County Circuit Court for an order authorizing it to subpoena eleven confidential substance abuse treatment patient records from Dr. Vernon Proctor as part of its investigation of his controlled substance prescribing practices and treatment of his patients. (App'x 1-3.)

In its petition, the Department identified the patients at issue by fictitious names and ensured that the petition was devoid of any patient identifying information. The Department's petition further advised the circuit court that it was seeking only records (eleven patient charts) that were necessary to the investigation, that all unique identifiers of Dr. Proctor's patients would be deleted from the patient records, and that the records would only be disclosed to those who had a need for the information as necessary for the investigation. Although the Department did not specifically use the term "good cause" in its petition seeking disclosure, it did factually plead the requisite "good cause" criteria specified in 42 CFR § 2.64(d).

Namely, the Department pled in its petition that the eleven patient charts being requested from Dr. Proctor were the most effective means to investigate whether he was providing those patients with treatment that met the standard of care for the profession and complied with the Public Health Code. The Department also advised the court in its petition that the public interest in disclosing the eleven

patient charts to enable the Department to investigate improper drug prescribing practices outweighed any potential injury to the patients, the physician-patient relationship, and the treatment services. (App'x 1-3.)

Thereafter, the Ingham County Circuit Court issued an order authorizing the disclosure of the requested patient records. (App'x 4.) The Department mailed Dr. Proctor a subpoena dated December 19, 2017, an exhibit referencing the patients in question, and a copy of the Court's order authorizing the subpoena. (App'x 5-7.)

Dr. Proctor filed a motion to vacate the order authorizing the subpoena, and a hearing on the motion was held before the court on February 14, 2018. After oral argument, the circuit court opined from the bench, ruling as follows:

- 42 CFR 2.66 governed the Department's petition;
- the February 14, 2018 hearing provided Dr. Proctor with his opportunity to seek revocation or amendment of the disclosure order;
- the Department's petition and the court's December 13, 2017 order complied with the applicable federal regulations; and
- the opioid epidemic was evidence of a threat to life or serious bodily injury that justified disclosure of confidential communications made between Dr. Proctor and his patients as he was being investigated for abusive controlled substance prescribing practices. (App'x 21-25.)

Although the Ingham County Circuit Court did not specifically employ the words "good cause" in rendering its decision from the bench, it did state "that the requirements of 2.64(d)(1) and (2) [the provisions delineating the good cause criteria] have been met." (App'x 22-24.) Moreover, the circuit court's written order denying Dr. Proctor's motion to vacate reiterated that it was based, in part, upon the reasons articulated on the record. (App'x 28-29.)

Dr. Proctor filed a claim of appeal with the Court of Appeals on March 5, 2018. He sought a stay of the circuit court's order on March 16, 2018, which the Court of Appeals denied on April 9, 2018.

The Court of Appeals consolidated this case with Docket No. 342086,² and it scheduled both matters for oral argument on February 12, 2019. On February 26, 2019, the Court of Appeals issued a published opinion affirming the circuit court's order in Docket No. 342086, but reversing and remanding for further proceedings of the circuit court order at issue in this application for leave to appeal. (App'x 35-41.) In so doing, the Court of Appeals found that in issuing its order authorizing disclosure, the circuit court did not comply with the applicable federal regulations. In particular, it found that the circuit court failed to properly assess the factors for determining "good cause," failed to conduct a pre-authorization hearing, failed to impose appropriate safeguards to protect against unauthorized disclosure, and improperly authorized disclosure of confidential communications when such disclosure is limited to circumstances similar to suspected child abuse or verbal threats. The Department timely filed a motion for reconsideration, which the Court of Appeals denied on April 19, 2019. (App'x 42.)

² Mark Mortiere, M.S., D.D.S., filed a claim of appeal of the Ingham County Circuit Court's order denying his motion to quash subpoena, arguing the Public Health Code did not vest the Department with authority to initiate an investigation and subpoena a patient chart based upon a malpractice settlement award less than \$200,000. The Court of Appeals affirmed the circuit court order, finding that the plain language of the Code authorized the Department to initiate an investigation.

STANDARD OF REVIEW

Appellate courts review a trial court's decision to quash a subpoena for an abuse of discretion. *Castillon v Roy*, 412 Mich 873 (1981). A trial court abuses its discretion if it renders a decision that is not within the range of reasoned and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006) (citing *People v Babcock*, 469 Mich 247, 269 (2003)).

Moreover, questions of statutory construction are reviewed de novo. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 519 (2004). Courts have long held that “[t]he primary goal of statutory interpretation is to give effect to the intent of the Legislature.” *Id.* In doing so, the court must examine the language of the statute itself. If the statute is unambiguous, it must be enforced as written. *Id.*

ARGUMENT

- I. The plain language of federal regulatory law, 42 CFR 2.66, authorizes a court as here to issue ex parte orders authorizing disclosure of drug treatment records for an investigation into alleged misconduct of a health provider without a prior hearing.**

The opioid prescription problem is rooted in the action of health care providers who abusively prescribed medication that is either unwarranted or unnecessary. The Department here suspects Dr. Vernon Proctor of engaging in that very activity and properly sought an order from the circuit court to examine the records of eleven patients, while protecting their identifying information. Nothing in the federal regulations requires a public hearing before a court authorizes such disclosure. And the federal case law supports this conclusion as well. This Court should reverse.

- A. The plain language of 42 CFR 2.66 does not require a hearing prior to a court order authorizing disclosure.**

Federal law protects the identity, diagnosis, prognosis, or treatment of any patient receiving alcohol or substance abuse treatment from a federally assisted substance abuse treatment program. 42 USC § 290dd-2. These patient records can only be disclosed with the informed written consent of the patient or through a procedural process specified by federal law. The applicable statutory provision that allows for disclosure without patient consent is 42 USC § 290dd-2(b)(2)(C), which provides that such a disclosure may be made after a showing of good cause:

If authorized by an appropriate order of a court of competent jurisdiction granted *after application showing good cause* therefor, including the need to avert a substantial risk of death or serious bodily

harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure. [Emphasis added.]

The federal regulations, 42 CFR 2.61 *et seq.*, set forth the procedures and criteria for obtaining the disclosure of confidential substance abuse patient records when the person seeking disclosure does not have patient consent and requires an order authorizing disclosure from a court of competent jurisdiction. Moreover, under 42 CFR 2.66(a), they allow regulatory agencies, such as the Department, to apply for a court order of disclosure as part of an investigation of a licensee/program it has jurisdiction over. Whereas, 42 CFR 2.67 provides the procedure for law enforcement seeking disclosure of records as part of a criminal investigation of employees or agents of a substance abuse treatment program. And 42 CFR 2.64 provides the procedure for all other persons seeking disclosure that have a legally recognized interest in the information being sought.

The Department is a health regulatory agency that investigated Dr. Proctor for possible violations of the Public Health Code relating to improper controlled substance prescribing practices. The Department has jurisdiction over his medical license and his medical practice constitutes a federally assisted drug treatment program. In accordance with 42 CFR 2.66, the Department sought and obtained an order from the Ingham County Circuit Court to obtain the charts of the patients believed to be at issue in its investigation. Dr. Proctor filed a motion to vacate, arguing the circuit court was required to conduct a hearing prior to issuing an order

authorizing disclosure against him. The Ingham County Circuit Court denied his motion, finding that 42 CFR 2.66(b) applied and the only hearing Dr. Proctor was entitled to was one that provided him with an opportunity to seek revocation or amendment of the order after authorization but prior to implementation. The Court of Appeals reversed the circuit court, holding that a “closed judicial hearing” was required:

In this case, the court determined that no hearing was required before issuing the subpoena. However, at this time, the only available authority is that a closed judicial hearing is required before a court may order the release of a substance abuse patient’s confidential medical records. Thus, the court erred when it determined that no hearing was required and when it failed to hold a hearing. [*In re Petition of Attorney General for Subpoenas*, ___ Mich App ___, ___ (2019) (Docket No. 342680); slip op at 10.]

This is wrong. The Court of Appeals misread 42 CFR 2.66(b), which provides as follows:

Notice not required. An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, *upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.66(c).* [Emphasis added.]

In other words, nothing here requires a pre-authorization hearing.

The inaccuracy in the Court of Appeals' holding is the result of its reliance on an inapplicable federal regulation. Unlike 42 CFR 2.64³ and 42 CFR 2.65, in which disclosure is sought for civil/noncriminal purpose and the reasoning for the request is unclear or is based on the prosecution of the patient, the regulation at issue here – 42 CFR 2.66 – contains no pre-authorization closed hearing requirement. To the contrary, 42 CFR 2.66 is fact specific and only applicable to law enforcement and regulatory agencies, such as the Department, seeking patient records from a provider who is the subject of the agency's authorized investigation. By its plain language, 42 CFR 2.66 vests the courts with authority to issue ex parte orders of disclosure. The only hearing required is post issuance of the court's disclosure order, and that hearing is limited to a determination of compliance with the regulatory criteria. 42 CFR 2.66(b).

When interpreting federal regulations, rules of statutory construction can provide us with guidance. In *Barnhart v Sigmon Coal Co*, 534 US 438, 450 (2002), the United States Supreme Court stated:

As in all statutory construction cases, we begin with the language of the statute. The first step “is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). The inquiry ceases “if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’” [519 US at 340, 117 S Ct at 843.]

³ The provision the Court of Appeals erroneously relied upon in making its decision that a closed hearing was required.

In as much as 42 CFR 2.66's regulatory language is unambiguous and clear, it should be interpreted as written, and the Court of Appeals should have affirmed the circuit court's order authorizing disclosure. *Id.*

B. Federal courts recognize that 42 CFR 2.66 does not require a closed hearing prior to a court issuing an ex parte order for disclosure.

Federal courts that have looked at 42 CFR 2.66 have recognized its limited scope. In fact, even the federal cases cited by the Court of Appeals support the Department and Ingham County Circuit Court's interpretation. In holding that the court must conduct a closed hearing before issuing an order authorizing disclosure of substance abuse treatment records to law enforcement or health regulatory agencies investigating or prosecuting the provider or holder of the records, the Court of Appeals relied upon the decisions rendered in *United States v Shinderman*, 515 F3d 5 (2008), and *Hicks v Talbott Recovery Sys, Inc.*, 196 F3d 1226 (CA 11, 1999). That reliance, however, was misplaced. These cases do not support the decision of the Court of Appeals.

In *Shinderman*, with facts similar to this appeal, federal law enforcement initiated an investigation of Dr. Shinderman for, among other things, improper controlled substance prescribing practices at a methadone treatment clinic. 515 F3d at 9. In accordance with 42 CFR 2.66, the federal law enforcement agency sought and obtained not one but three ex parte orders from the federal magistrate authorizing the disclosure of the requested methadone treatment patient records. *Id.* at 10. In each request, the federal magistrate found law enforcement had

demonstrated good cause. *Id.* On appeal of his criminal conviction, the issue was whether Dr. Shinderman had been given proper notice of the magistrate’s ex parte order *after* its issuance. *Id.* at 9. Although the issue of the appropriateness of the magistrate’s issuance of the ex parte orders without a closed hearing was not raised by the parties, the federal appellate court reaffirmed that all that is required for disclosure under this provision is that a hearing be provided to a provider or patient after the court’s issuance of an ex parte order. *Id.* at 12 (“[Section 2.66(b)’s] text demands that a court issuing a disclosure order afford protected parties with an opportunity to contest the underlying validity and scope of the disclosure—nothing more”).

In *Hicks*, the Texas Board of Medicine sought Dr. Hick’s personal substance abuse treatment records as part of a disciplinary investigation initiated against *his* medical license. *Id.* at 1231-1232. Because the Texas Board was seeking Dr. Hick’s own personal treatment records to be used against him in a disciplinary proceeding and not those of his patients, the board was required to seek a court order authorizing disclosure in accordance with 42 CFR 2.64, *id.* at 1242 n 32, not 42 CFR 2.66(b). Section 2.64 requires a court to hold a closed hearing to establish compliance with the regulatory criteria prior to issuance of the disclosure order. In contrast, here the Department sought the disclosure order in accordance with 42 CFR 2.66, which contains no closed hearing requirement. Therefore, the *Hicks* decision is not on point and does not support the Court of Appeals’ decision to reverse the Ingham County Circuit Court’s ex parte order authorizing disclosure.

In sum, based upon the foregoing, neither a clear reading of 42 CFR 2.66 nor the *Hicks* and *Shinderman* decisions provide support for the Court of Appeals' holding that a closed judicial hearing is required before a court may order the release of a substance abuse patient's confidential medical records. In fact, reading such a requirement into the regulations could frustrate or impede a regulatory agency investigation into an overprescribing physician, Dr. Proctor is a case in point as it is possible that some patients would not want the volume of controlled substances being prescribed to them disrupted. The federal regulations do not require a hearing prior to the issuance of the disclosure order.

II. The Department's petition established good cause to support the authorization of the disclosure of the requested substance abuse treatment records, and the failure of the circuit court's ex parte order to specifically use the phrase "good cause" was harmless error.

The decision of the Court of Appeals below elevates form over substance. The petition filed by the Department established good cause under federal regulatory law to allow a disclosure of the information sought as a part of the Department's licensing investigation. The circuit court noted that the petition met the proper legal standard, and the fact that it did not expressly state the phrase "good cause" does not affect the legal validity of the order. The federal case law supports this conclusion as well. The order was proper.

A. The Department’s petition and circuit court order satisfy the “good cause” requirement.

The Court of Appeals erred when it found that the Ingham County Circuit Court’s order failed to make a finding of good cause, because it did not weigh the “good cause” mandatory factors before authorizing disclosure, and did not provide appropriate protections to safeguard the patient records. *In re Petition of Attorney General for Subpoenas*, ___ Mich App at ___; slip op at 9.

The requirements for an order authorizing disclosure are set forth in 42 CFR § 2.66(c):

(c) Requirements for order. An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs d and e of § 2.64.

42 CFR § 2.64(d) and (e) provide as follows:

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

- (1) Other ways of obtaining the information are not available or would not be effective; and
- (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:

- (1) Limit disclosure to those parts of the patient’s record which are essential to fulfill the objective of the order;
- (2) Limit disclosure to those persons whose need for information is the basis for the order; and
- (3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient’s record has been ordered.

As evidenced by a review of the Department's petition and the Ingham County Circuit Court's disclosure order, these criteria were met. Specifically, the court's order refers to the Department's petition as the basis for issuance of the order. The petition, in turn, contained the following key information, which included the fact of the licensing investigation against Dr. Proctor and the fact that the Department was only seeking the documents necessary to determine whether he was engaged in abusive prescription practices:

- The Department of Licensing & Regulatory Affairs is a health oversight agency and pursuant to Michigan Board of Medicine authorization initiated an investigation of Dr. Proctor's practice of medicine.
- The focus of the Department's investigation centered on the treatment rendered to, and the controlled substance prescribing practices for, eleven identified patients of Dr. Proctor.
- The purpose for requesting disclosure of the eleven patient charts was to determine Dr. Proctor's compliance with appropriate prescribing practices, and the requested patient charts were the most effective means to determine compliance.
- The Department was only seeking records that were necessary for the investigation (i.e., 11 identified patient records, not all of Dr. Proctor's patient records) and all unique patient identifiers would be deleted from disclosure.
- The public interest in investigating errant health practices that involved an abuse of prescribing controlled substances outweighed any potential injury to the patients, especially considering unique patient identifiers were removed from disclosure. (App'x 1-3.)

The Ingham County Circuit Court's order authorizing disclosure reiterated the above referenced information contained in the Department's petition and further ordered:

- The Department to limit the subpoenas to its investigation of the treatment and controlled substance prescribing practices of Dr. Proctor in regard to the eleven patients identified.
- The preclusion of the use of the patient charts being produced for prosecution of the patients themselves.
- The blocking, or deleting, of all unique patient identifiers from the patient charts prior to disclosure.
- The limitation of disclosure of the patient charts to that what was necessary to comply with the court order and to those persons having a need for the information in relation to the investigation.⁴
- An opportunity for a provider, patient, or record holder to seek revocation or modification of the order. (App'x 4.)

In finding that the Ingham County Circuit Court's orders were "devoid of any determination of good cause ...[and] did not weigh the mandatory factors of whether injury would result to the patient, physician-patient relationship, and treatment services before authorizing disclosure," slip op, p 9, the Court of Appeals failed to appreciate that such a determination and weighing was included in the circuit court's order as it incorporated the contents of the Department's petition and did not require further discussion on the record. In particular, the Department advised the circuit court that it was investigating Dr. Proctor for potentially abusive controlled substance prescribing practices, which if true posed a risk of injury to the patients as well as to the public's health, safety, and welfare. The likelihood of injury to the patient, the physician-patient relationship and treatment services was

⁴ MCL 333.16238 provides that all information obtained in an investigation is confidential and not subject to public disclosure. All Department staff, including the Michigan Office of Administrative Hearings & Rules, and board members are bound by this provision.

negligible given the Department was only seeking copies of the patient charts, all patient identifying information was being deleted from disclosure, and the Public Health Code protects all information obtained during an investigation from disclosure to the public by the Freedom of Information Act, search warrant or subpoena. MCL 333.16238; *Meier v Awaad*, 299 Mich App 655, 664 (2013); *In re Investigation of Ruth Lieberman*, 250 Mich App 381, 388 (2002); *Messenger v Consumer Industry Services*, 238 Mich App 524, 531 (1999). Thus, it is clear that the Department did not have other ways of obtaining the information and that the public need outweighed the potential injury to the patient, the relationship with Dr. Proctor, and the treatment services. The prescriptions themselves exposed the patients to possible risk.

Given that only copies of patient records were being requested, as opposed to original files, there should have been no disruption to the patient-physician relationship or treatment services unless an investigation determined Dr. Proctor was practicing illegally or below the standard of care. And if that turned out to be the case, then Dr. Proctor's patients were more likely to suffer injury than if the Department was not able to thoroughly investigate the conduct. The Court of Appeals erred in finding that the circuit court failed to weigh the mandatory factors for disclosure. The petition was supported by good cause under federal law under 42 CFR § 2.66(c) to order the disclosure.

B. Omission of the words “good cause” from the Department’s petition and the circuit court’s order was harmless if error and did not warrant reversal.

In denying Dr. Proctor’s motion to vacate, the circuit court specifically stated on the record “that the requirements of 2.64(d)(1) and (2) (the provisions delineating the good cause criteria) have been met.” (App’x 22-24, 28-29.) This ruling was sufficient to explain that the order met the standard of federal regulatory law. The Court of Appeals failed to account for this fact.

Moreover, any possible error is harmless in any event. When the error does not require reversal and is not inconsistent with substantial justice, it is harmless and should not be modified by a reviewing court. MCR 2.613(A). Although the Department’s petition and the circuit court’s order did not use the words “good cause,” if such omission was error, it was harmless and did not warrant reversal because, as discussed, information pled in the petition was enough for the circuit court to make a finding of good cause. The Ingham County Circuit Court’s ability to appropriately weigh the factors pled by the Department in its petition was not diminished simply because the court did not have Department staff personally testify to those very same facts in a closed hearing.

C. Federal case law relied upon by the Court of Appeals confirms the circuit court satisfied the “good cause” requirement.

Rather than support the decision below, the federal cases on which the Court of Appeals relied only support the circuit court’s decision here that there was good cause to issue the ex parte order.

In *Shinderman*, the U.S. Court of Appeals for the First Circuit held that the lower court properly found good cause to issue ex parte orders allowing the disclosure of Medicaid records, methadone treatment records, and other records seized by execution of a search warrant to the federal law enforcement agency criminally investigating Shinderman for illegal controlled substance prescribing practices. 515 F3d at 10. The same federal regulatory provision was at issue there, 42 CFR § 2.66(c), and the court found good cause for the same kinds of reasons that were present here.

Similarly, in *In re The August*, the U.S. District Court for the Southern District of Indiana found good cause existed to allow a grand jury to subpoena the substance abuse treatment records of patients of a psychotherapist being investigated for billing fraud. *In re The August, 1993 Regular Grand Jury (Hospital Subpoena)*, 854 F Supp 1380, 1385–1387 (1994). The *August* court specifically found that the psychotherapist’s patient records were the most effective source of information for investigating the psychotherapist’s billing practices, and it did not matter if less effective alternative sources were available. *Id.* at 1386. The same is true here.

In as much as the federal courts have already determined that these referenced factors satisfy the “good cause” requirement, there was no need for the Ingham County Circuit Court to hold a hearing on them. The Court of Appeals should have affirmed the circuit court’s order.

III. The court's order providing for the disclosure of confidential communications was proper.

The Department argued, and the circuit court agreed, that to the extent any patient confidential communications were disclosed when obtaining copies of Dr. Proctor's patient charts, such disclosure was necessary to protect against the existing threat to life or of serious bodily injury caused by the national opioid epidemic. Namely, abusive controlled substance prescribing practices allow large numbers of controlled substances to be disseminated to the general public illegally. These actions were supported by the federal regulations.

Under federal law, patient records may contain confidential communications between the patient and provider, which is distinguishable from objective data consisting of physician diagnostic impressions, treatment recommendations, referrals, and diagnostic tests. See *In re The August*, 854 F Supp at 1384; *Ohio State Dental Board v Healthcare Venture Partners, LLC*, 14 N.E.3d 470, 476 (Ohio Ct of App. 2014).

For example, confidential communications could include statements made by a patient detailing trauma that may have contributed to the alcohol or substance abuse. Confidential communications contained within substance treatment records are given a heightened level of protection and are disclosable only if good cause has been shown and one of the criteria specified in 42 CFR § 2.63(a) have been met. *Id.* 42 CFR 2.63(a) provides that a court may order disclosure of confidential communications made by a patient to a federally assisted substance abuse treatment program in the course of treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

The Department's purpose in seeking to obtain disclosure of the patient confidential communications was based in its effort to investigate potentially abusive prescribing practices to protect against an existing threat to life or of serious bodily injury caused by misuse, diversion or illegally sold controlled substances; it complies with 42 CFR 2.63(a)(1). These are significant threats to the community's safety generally, and to these patients in particular. Thus, the circuit court's order providing for disclosure of patient confidential communications within the Dr. Proctor's eleven requested patient charts was proper.

However, the Court of Appeals disagreed, stating that the opioid crisis is too diffuse to warrant the circuit court decision:

Here, the court determined that redaction was not required because the national opioid epidemic was such a threat. A national epidemic does not fall within the same types or kinds of threats to life as child abuse and neglect or threats against third parties, which are personal threats of harm *by the patient*. A national epidemic is neither personal nor will it be found in a patient communication. [*In re Petition of Attorney General for Subpoenas*, ___ Mich App ___, ___ (2019); slip at 11. (emphasis in original).]

In so holding, the Court of Appeals relied upon the statutory analysis from this Court in *Neal v Wilkes*, 470 Mich 661,669 (2004).

This Court's analysis in *Neal*, however, actually lends support for the Department's position that the confidential communication exemption found within 42 CFR 2.63(a)(1) is not just limited to threats of loss of life or serious bodily *caused* by the patient. In *Neal*, this Court overruled prior caselaw interpreting the Recreational Use Land Act and held that application of the act should not be limited when nothing in the statute indicates that it should be. 470 Mich at 667. Likewise, there is nothing in 42 CFR 2.63(a)(1) that limits disclosure of confidential communications to only those situations where the threats to life or of serious bodily injury are made against third parties by the patient, nor has any other court interpreted this provision in such a restrictive way. It applies equally where the *patients themselves* are threatened with loss of life or serious bodily injury.

Case in point, in *Ohio State Dental Board v Healthcare Venture Partners, LLC*, the Ohio Court of Appeals for the 10th District interpreted 42 CFR 2.63(a)(1) broadly and held that disclosure of confidential communications made by an oral surgeon to a substance abuse treatment provider as part of a board ordered evaluation was appropriate to protect *both* the oral surgeon's patients and the public at-large. *Ohio State Dental Board*, 14 N.E.3d at 477. In so holding, the court stated that "the federal confidentiality regulations are strict, but not absolute." *Id.* The court reasoned that "the interest in protecting the public from an impaired oral surgeon" was "intuitively obvious" and the oral surgeon's impaired status

represented an identifiable and serious risk to his patients and the public. *Id.* Equally here, it is also “intuitively obvious” that Dr. Proctor’s alleged wayward controlled substance prescribing practices pose an identifiable and serious risk of loss of life or serious bodily injury to both his patients and the public. As such, the Department’s requests for disclosure of the confidential communications contained within the 11 patient charts subpoenaed meets the threshold requirement for disclosure under 42 CFR 2.63(a)(1) and was proper.

The Court of Appeals restrictive ruling, if allowed to stand, would frustrate the intent and purpose of the federal regulations. The intent of the federal confidentiality provisions is to encourage patients to seek substance abuse treatment without fear that their privacy will be compromised or they will be subjected to criminal prosecution. *United States v Hughes*, 95 F Supp 2d 49, 57 (2000). The intent of the legislation is not to shield errant health professionals. The circuit court clearly understood the intent and purpose of the federal confidentiality regulations and found that the Department’s petition and order authorizing disclosure complied with these provisions. Thus, the Court of Appeals erred in holding that disclosure of confidential communications contained within the requested patient charts was not justified and the circuit court’s order should have been affirmed. These are significant issues of law that merits this Court’s review.

CONCLUSION AND RELIEF REQUESTED

The Department respectfully requests this Court grant its application for leave to appeal and find the Court of Appeals erred in holding that: (1) a court must hold a closed hearing before issuing an order authorizing disclosure of substance abuse treatment records to law enforcement and/or health regulatory agencies investigating or prosecuting the substance abuse treatment provider; (2) the Ingham County Circuit Court's order authorizing disclosure warranted reversal for a failure to make a specific finding of good cause; and (3) the national opioid epidemic did not justify the disclosure of confidential communications contained within the protected patient records. Leaving the Court of Appeals published opinion as written conflicts with the plain language of 42 CFR 2.66, is inconsistent with the case law relied upon by the Court of Appeals, and will result in material injustice.

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