

STATE OF MICHIGAN  
IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and  
The Circuit Court for the County of Montcalm)

CYNTHIA HARDY, Personal Representative  
For the Estate of MARGARET MARIE ROUSH,

Plaintiff-Appellee,

Supreme Court No: \_\_\_\_\_

COA Case No. 317406

L.C. Case No. 2012-K-16830-CZ

-vs-

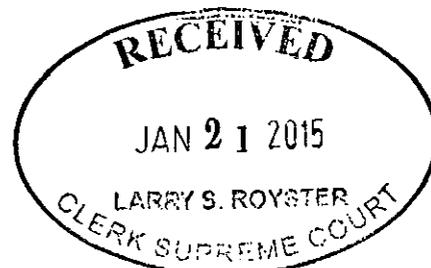
LAURELS OF CARSON CITY, LLC,

Defendant-Appellant.

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**APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT-  
APPELLANT THE LAURELS OF CARSON CITY, LLC**

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**STATEMENT OF ORDER APPEALED FROM AND OF NEED FOR SUPREME COURT REVIEW**

Defendant-Appellant The Laurels of Carson City, LLC seeks either leave to appeal or peremptory reversal of an Opinion of the Michigan Court of Appeals dated, December 11, 2014 (see: **Exhibit H**). In this Opinion, the Court of Appeals: (1) vacated an Order of the Montcalm County Circuit Court dated July 10, 2013, which had granted Defendant's Motion for Summary Disposition; and (2) reinstated all the causes of actions alleged in the Complaint, including those which had been abandoned by Plaintiff by failing to address the validity of those claims in her Appellants Brief filed with the Court of Appeals (see: **Exhibits A and H**).

Defendant operates a licensed skilled nursing facility known as The Laurels of Carson City. Plaintiff's deceased, Margaret Roush, was a 98 year old resident at the facility who executed a Patient Advocate designation form that came into effect during the Fall of 2012. This dispute arose after Ms. Roush desired to be discharged from the facility, against the directives of the Patient Advocate. In initially granting summary disposition, the trial court held that Plaintiff could not sustain her cause of action for false imprisonment, intentional infliction of emotional distress, abuse of process and civil conspiracy because Defendant's action in requesting that Ms. Roush's family and the Patient Advocate to seek judicial intervention to resolve their dispute was consistent with applicable law. Specifically, Defendant desired a judicial ruling on the contested issues regarding whether Ms. Roush's designated Patient Advocate's authority, rights, and responsibilities were effective, and what Defendant was required to do after receiving competing instructions as to Ms. Roush's course of care.

Notwithstanding the foregoing, the Court of Appeals reversed the trial court and Defendant's reliance on judicial procures authorized by both statute and the Michigan Court

Rules was insufficient to insulate it from potential liability due to specified issues of fact. **In this regard, the Court of Appeals committed reversible error in two obvious and succinct manners in applying the controlling statutes contrary to their plain language.**

First, the Court of Appeals erroneously held that an issue of fact existed as to whether the Patient Advocate' powers were properly invoked on October 24, 2012, after the attending physician and a second physician documented Ms. Roush's inability to contribute to medical decision-making (Exhibit H, pp.2-3). As explained, *infra*, the Court of Appeals ignored the clear statutory mandate that, as a matter of law, when the two physicians make this written declaration, the patient advocate's powers are indeed invoked and the facility has a statutory obligation to comply with the Patient Advocate's decisions that are made for the best medical interests of the patient.

**Secondly**, as also explained, *infra*, because the legislature and the court created a different set of procedures for this purpose, the Court of Appeals committed reversible error in holding that this false imprisonment litigation is the appropriate venue to determine and resolve existing issues of fact as to whether Ms. Roush regained her ability to make medical decisions on her own behalf or otherwise intended to revoke the authority of the Patient Advocate sometime after October 24, 2012 (**Exhibit H**, p.3).

Finally, the Court of Appeals erroneously reinstated the remaining claims which had been abandoned by Plaintiff on appeal, without permitting Defendant to provide legal arguments as to why reinstatement would be erroneous.

Issues regarding the potential liability of a medical provider or nursing home facility which relies upon authorized judicial procedures to resolve contested issues regarding the validity of an appointment and/or purported revocation of a designated Patient Advocate and

which complies with the directives of the Patient Advocate during the interim are significant to the jurisprudence of the state. As an overlapping issue, the extent to which these issues may be resolved retroactively in false imprisonment litigation, as opposed to the procedures set forth by statute and the court rules is also significant to the jurisprudence of the state. Also, for the reasons set forth, *infra*, the manner in which the Court of Appeals resolved these issues and characterized them as issues of fact is contrary to the plain language of the controlling statutes and palpably erroneous.

Supreme Court review is necessary to provide needed guidance and rectify the legal errors committed by the Court of Appeals.

**STATEMENT OF THE QUESTIONS PRESENTED**

- I. DID THE TRIAL COURT PROPERLY GRANT DEFENDANT-APPELLANT THE LAURELS OF CARSON CITY, LLC'S MOTION FOR SUMMARY DISPOSITION REGARDING THE FALSE IMPRISONMENT CLAIM WHERE DEFENDANT INSTRUCTED ALL PERTINENT PARTIES TO SEEK THE GUIDANCE OF THE PROBATE COURT, PURSUANT TO MCL § 700.5508(2) AND PARTICPATED IN A PETITION FOR HABEAS CORPUS WHEN A DISPUTE AROSE REGARDING WHETHER MARGARET ROUSH'S DESIGNATED PATIENT ADVOCATE'S AUTHORITY, RIGHTS, AND RESPONSIBILITIES WERE EFFECTIVE?**

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

The trial court said "Yes."

The Court of Appeals said "No."

- II. DID THE COURT OF APPEALS ERRONEOUSLY ACT SUA SPONTE TO REINSTATE THE REMAINING TORT CLAIMS WHICH HAD BEEN ABANDONED BY PLAINTIFF?**

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

The Court of Appeals said "No."

**COUNTER STATEMENT OF THE FACTS**

**A. INTRODUCTION**

Plaintiff Cynthia Hardy, personal representative for the estate of Margaret Roush, appeals as of right from the July 10, 2013 Order of the Montcalm County Circuit Court, which granted Defendant-Appellant The Laurels of Carson City, LLC's motion for summary disposition. [Order, dated July 10, 2013, attached hereto as **EXHIBIT A**]. The trial court held that Plaintiff could not sustain her cause of action for false imprisonment, intentional infliction of emotional distress, abuse of process and civil conspiracy because Defendant's actions were consistent with the applicable law in a situation where a dispute arose regarding whether Ms. Roush's designated patient advocate's authority, rights, and responsibilities were effective, and where Defendant-Appellant was receiving competing instructions as to Ms. Roush's course of care.

**B. BACKGROUND**

This action arises out of the care 98-year-old Margaret Roush received during her Autumn 2012 residency at Defendant's licensed skilled nursing facility known as The Laurels of Carson City. At the time of her admission to The Laurels of Carson City, Ms. Roush had been diagnosed with several conditions, including coronary artery disease, depression, hypertension, neuropathy, hypothyroid, gastro esophageal reflux disease, gout, dementia, urinary tract infections, atrial fibrillation, hyperlipidemia, and congestive heart failure.

Pursuant to a Designation of Patient Advocate for Health Care dated September 10, 2010 (the "Designation"), Ms. Roush designated Robert Gallagher as her patient advocate, to have authority to make medical decisions on her behalf if and when she was unable to make decisions for herself. (see; designation of Patient Advocate, 9-10-10, attached hereto as

**Exhibit I).**<sup>1</sup> In accordance with the terms of the Designation and MCL § 700.5508(1), the Designation became effective on or about October 24, 2012 following the documented opinions of Ms. Roush's attending physician, Robert Seals, D.O., and another physician, Srinivasa Madireddy, M.D., that Ms. Roush was incapacitated to make and communicate medical and financial decisions due to dementia (see: Statements of Decision Making Capacity, attached hereto as **Exhibit J**).

Ms. Roush was admitted to Defendant-Appellant's facility on three separate occasions. The first admission was from August 9, 2012 to September 15, 2012, when she was discharged to her home. Upon information and belief, Ms. Roush's daughter, Yvonne Olds, and granddaughter, Cynthia Hardy, also lived at Ms. Roush's home. After only a few days at home, on September 19, 2012, Ms. Roush was re-admitted to Defendant's facility.

Following a three-week stay at Defendant's facility, Ms. Roush was again discharged to her home on October 11, 2012. Once again, after a brief stay at home, Ms. Roush went to the emergency room for treatment of a urinary tract infection and was ultimately re-admitted to Defendant-Appellant's facility on October 16, 2012.

Mr. Gallagher, Ms. Roush's designated patient advocate, informed Defendant that while she was at her home, Ms. Roush was not receiving her medication on an appropriate schedule, and among other things, Ms. Roush developed urinary tract infections because her briefs were not being timely changed. According to Mr. Gallagher, the conditions in the home were deplorable.

As noted above, on October 22, 2012, Ms. Roush's long-time physician Dr. Robert Seals performed an assessment and documented that Ms. Roush was incapable of making and

<sup>1</sup> A "patient advocate" is "an individual who is named in a patient advocate designation to exercise powers concerning care, custody, and medical or mental health treatment decisions" for the individual making the patient advocate designation. MCL § 700.5506(2).

communicating medical and financial decisions due to dementia. Similarly, on October 24, 2012, Dr. Srinivasa Madridy reached the same conclusion (**Exhibit J**). At that time, Defendant had a legal duty to rely on and comply with the instructions received from Mr. Gallagher, in his capacity as Ms. Roush's designated patient advocate, as to Ms. Roush's course of care. See: MCL 700.5508(1), 700.5511(3).

On November 1, 2012, a family care conference was held at Defendant's facility. Mr. Gallagher and Ms. Hardy were both in attendance. At the care conference, it was discussed and agreed that Ms. Roush required long-term care in a professional setting.

Later during November 2012, Ms. Hardy repeatedly requested that Ms. Roush be discharged from Defendant's facility to her home. From time to time in November 2012, Ms. Roush herself also indicated that she wanted to leave the facility. Mr. Gallagher, the designated patient advocate, was kept informed of Ms. Hardy's intentions to have Ms. Roush discharged from the facility, as well as Ms. Roush's own indications that she wanted to go home. Dr. Seals, Ms. Roush's long-time treating physician, was also kept informed of Ms. Hardy's and Ms. Roush's requests, and Dr. Seals repeatedly made clear that discharging Ms. Roush from Defendant-Appellant's facility would be against his professional medical advice. Mr. Gallagher's consistent instruction to Defendant was that Ms. Roush was to remain at Defendant's facility.

On November 15, 2012, Plaintiff's attorney, Scott Millard, met with Ms. Roush at Defendant's facility. Plaintiff's attorney informed Defendant's staff that, in his opinion, Ms. Roush was fully competent to make her own decisions, that Ms. Roush had revoked the Designation of Mr. Gallagher as her patient advocate, and that Ms. Roush demanded that she be discharged to her home. During this conversation, Attorney Millard handed to Defendant's staff

Ms. Roush's purported "Revocation of Designation of Robert Gallagher as Patient Advocate" (a copy of which is attached as **EXHIBIT B**). Included in the Revocation is a purported appointment of Cynthia Hardy as Ms. Roush's successor Patient Advocate. However, Defendant's staff had reason to question the effectiveness of Ms. Hardy's purported appointment as the successor Patient Advocate, and therefore the Revocation instrument in its entirety, for multiple reasons, including (i) the purported appointment of successor patient Advocate was not witnessed by two qualified individuals, as required by MCL § 700.5506(4); and (ii) at the time, there was a genuine dispute as to whether Ms. Roush had the requisite mental capacity and intent required by MCL § 700.5506(1) to designate a new patient advocate.

Defendant advised Plaintiff's attorney that in light of (i) Ms. Roush's physicians' opinion that she was incapable of making her own health care decisions, (ii) the purported Revocation of Designation, and (iii) the purported appointment of Ms. Hardy as successor Patient Advocate, there was inherent uncertainty as to who had authority to make medical decisions on behalf of Ms. Roush. Defendant further advised Plaintiff's attorney that due to this inherent uncertainty, as well as Defendant's receipt of competing instructions as to Ms. Roush's course of care, Plaintiff's attorney should petition the probate court for judicial guidance pursuant to MCL 700.5508.

Later that same day, on November 15, 2012, Plaintiff's attorney filed a petition for a writ of habeas corpus pursuant to MCR 3.303 the Montcalm County Circuit Court, requesting a determination of the propriety of Ms. Roush's continued confinement at the home. In response to Plaintiff attorney's petition, Judge Charles W. Simon, III issued a writ of habeas corpus against Defendant, with a hearing scheduled for the following day, November 16, 2012.

In its answer to the writ of habeas corpus, Defendant repeatedly stated that Defendant itself was also requesting judicial guidance for this difficult circumstance because it was receiving competing instructions as to a facility resident whose competency was in question. For example, Defendant's answer to the writ of habeas corpus concluded with the following:

WHEREFORE, Respondent seeks direction from the Court. Respectfully, this matter seems to be a matter covered under the Estates and Protected Individuals Code, MCL § 700.1101, et. seq., and therefore within the jurisdiction of the Probate Court (MCL 700.1103(j)); **however, Respondent will welcome either this Court's or the Probate Court's guidance as to the best interests of Mrs. Roush and the person who is legally authorized to make medical decisions for Mrs. Roush including a determination that she be discharged from Respondent's facility Against Medical Advice.**

[Defendant's Answer to the Writ of Habeas Corpus, attached as **EXHIBIT C**] (emphasis added).

At the hearing on November 16, 2012, Montcalm County Circuit Judge Suzanne Hoseth Kreeger found, among other things, that the Probate Court was the better forum to address the issue due to questions of Ms. Roush's competency, and denied the writ of habeas corpus. [Order Denying Writ of Habeas Corpus, attached hereto as **EXHIBIT D**].

Shortly before the hearing regarding the writ of habeas corpus on November 16, 2012, Mr. Gallagher filed a petition for appointment of guardian of alleged incapacitated individual with the Montcalm County Probate Court. Upon information and belief, on November 21, 2012, Judge Charles W. Simon, III found that no emergency existed to warrant the appointment of a temporary guardian at that time.

Promptly following the November 21, 2012 hearing at the Probate Court, Ms. Roush's family arranged for Ms. Roush's immediate discharge from Defendant's facility. Ms. Roush's daughter, Yvonne Olds, signed Defendant's "Release of Responsibility for Discharge Against

Medical Advice” form, in the purported capacity as Ms. Roush’s “authorized responsible party.”

**C. PROCEDURAL HISTORY**

On or about December 11, 2012, a Complaint was filed, purportedly on behalf of Ms. Roush, against Defendant-Appellant for false imprisonment, intentional infliction of emotional distress, abuse of process and civil conspiracy. [Complaint, attached hereto as **EXHIBIT E**].

On March 7, 2013, Ms. Roush passed away. Thereafter, Cynthia Hardy was appointed personal representative of Ms. Roush’s estate.

On April 26, 2013, Defendant moved for summary disposition. Defendant’s motion was heard on June 25, 2013. During the hearing, the trial court, relying upon MCL § 700.5508(2), held that Plaintiff could not sustain her cause of action because Defendant had properly advised all pertinent parties to petition the probate court to resolve their dispute regarding whether Ms. Roush’s patient advocate’s authority, rights, and responsibilities were effective. The trial court ruled in pertinent part:

But what I find dispositive in this matter as I went through the law that each side has cited in this matter is MCL § 700.5508(2) where it does very clearly indicate -- and I note that Counsel has highlighted the respective provisions here but I do find that the very last 2 sentences of that paragraph indicate that, ‘If the Court determines that the patient is unable to participate in the decisions, the patient advocate’s authority, rights, and responsibilities are effective. If the Court determines that the patient is able to participate in the decisions, the patient advocate’s authority, rights, and responsibilities are not effective.’

So I think there was an issue as to whether or not the patient advocate designate had been revoked or rescinded and whether or not she was competent to make that finding. I recognize and respect the fact that Mr. Millard is an officer of the Court and came to his own conclusion as it relates to his ability to be able to represent her. But in light of the competing interests and the fact

that this statute indicates that where there is a dispute, then that means the Court makes a determination. If in fact, the Court determines that she is able to participate in decisions, then at that point in time the advocate's authority, rights, and responsibilities are not effective.

So again, if this was a situation where she was indicating that she wanted to leave and there was no supporting authority for The Laurels of Kent (sic) to say, gosh we have a concern here. But we have 2 physician's statements and a designated patient advocate.

So in light of those concerns I think that The Laurels of Carson City did what they should in terms of seeking some sort of legal determination which as I understand it, is not disputed here today, that they encouraged a finding by the Court through a Court order.

So for that reason, I'm relying upon MCL § 700.5508(2), I do find that this (C)(1) motion should be granted and find that to allow this to continue through depositions and discovery would engaged in unnecessary expenditure of funds when it appears as though this is a dispositive issue in light of application of that statute to this case.

\* \* \*

[Transcript, 6/25/13, pp. 30-32, attached hereto as **EXHIBIT F**].

By way of Order dated July 10, 2013, Defendant's motion for summary disposition was granted. [**EXHIBIT A**].

On July 25, 2013, Plaintiff filed a claim of appeal from the July 10, 2013 Order with the Michigan Court of Appeals. In her Appellant's brief, Plaintiff only contested the dismissal of the false imprisonment claim. Plaintiff did not contest the dismissal of the other causes of actions and effectively abandoned those claims. Consequently, Defendant did not brief any issues regarding those other claims in its Appellee's Brief filed in the Court of Appeals.

Nonetheless, in its Opinion of December 11, 2014, the Court of Appeals reversed and reinstated the lawsuit in its entirety (see: **Exhibit H**). The Court of Appeals held that triable

issues of fact warranted reinstatement of the entire lawsuit, without acknowledging that Plaintiff had abandoned the claims of intentional infliction and abuse of process on appeal and therefore that the viability of those claims were not briefed by either party on appeal. (Id, pp. 3-6).

ARGUMENT I

THE TRIAL COURT PROPERLY GRANTED DEFENDANT-APPELLANT THE LAURELS OF CARSON CITY, LLC'S MOTION FOR SUMMARY DISPOSITION BECAUSE DEFENDANT-APPELLANT PROPERLY INSTRUCTED ALL PERTINENT PARTIES TO SEEK THE GUIDANCE OF THE PROBATE COURT, PURSUANT TO MCL § 700.5508(2), WHEN A DISPUTE AROSE REGARDING WHETHER MS. ROUSH'S DESIGNATED PATIENT ADVOCATE'S AUTHORITY, RIGHTS, AND RESPONSIBILITIES WERE EFFECTIVE.

A. STANDARD OF REVIEW

Defendant-Appellant sought and was granted summary disposition pursuant to MCR 2.116(C)(10), for the lack of a genuine issue of material fact.

The trial court's decision to grant or to deny summary disposition is to be reviewed de novo on appeal. Altairi v Alhaj, 235 Mich App 626, 628; 599 NW2d 537 (1999).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999). "The trial court must consider the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the nonmoving party." Maiden, supra.

A trial court should consider the substantively admissible evidence actually proffered in opposition to the motion; however, a trial court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. id. A mere promise that the claim will be supported by evidence at trial is insufficient. id. The non-moving party must produce admissible evidence in response to the motion. Amorello v Monsanto, 186 Mich App 324, 329; 463 NW2d 487 (1990); DeSot v ACIA, 174 Mich App 251, 253; 435 NW2d 442 (1987). "[W]hen the proffered evidence fails to establish a genuine issue as to any material fact," the moving party is entitled to summary disposition as a matter of law. Maiden, supra.

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**B. CONTROLLING PRINCIPLES OF STATUTORY INTERPRETATION**

With respect to statutory interpretation the Supreme Court has stated:

The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent.

*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011) (citations and quotation marks omitted).

Thus, if the statute's language is clear and unambiguous, judicial construction is not required or permitted. *In re Certified Question (Kenneth Henes, Special Projects Procurement v Continental Biomass Indus, Inc)*, 468 Mich 109, 113; 659 NW2d 597 (2003) (quotation marks and citation omitted). In addition, "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011).

**C. THE COURT OF APPEALS ERRONEOUSLY VACATED THE TRIAL COURT'S PROPER SUMMARY DISMISSAL OF PLAINTIFF'S CAUSE OF ACTION FOR FALSE IMPRISONMENT BECAUSE DEFENDANT'S ACTIONS WERE CONSISTENT WITH THE DIRECTIVES OF THE ESTATES AND PROTECTED INDIVIDUALS CODE, WHICH CONTROL THIS ACTION**

The elements of false imprisonment are "(1) an act committed with the intention of confining another, (2) the act directly or indirectly results in such confinement, and (3) the person confined is conscious of his confinement." *Moore v Detroit*, 252 Mich App 384, 387; 652 NW2d 688 (2002). The confinement element of false imprisonment involves "an unlawful restraint on a person's liberty or freedom of movement." *Walsh v Taylor*, 263 Mich App 618, 627; 689 NW2d 506 (2004).

The issue of the lawfulness of the Defendant's decision to keep Ms. Roush at the facility must be analyzed with regard to application of the statutes governing the appointment and scope of authority of patient advocates and the revocation of such an appointment.

A "patient advocate designation" is a type of durable power of attorney whereby an individual voluntarily chooses another individual to make medical decisions for him at any time when he or she is "unable to participate in medical treatment decisions." MCL 700.5506(6), etc. The document must be signed by the individual and witnessed by two persons. MCL 700.5506(4). The person designated is called the "patient advocate."

Once the designation is accepted, the patient advocate gains the authority to act when the individual becomes "unable to participate in medical treatment...decisions. MCL 700.5508(1). This determination is made by the individual's attending physician and another physician or psychologist. MCL 700.5508(1). They must put their determination in writing, which is then to be made part of the resident's medical record. *Id.* This determination must be reviewed at least once a year. *Id.*

If a durable power of attorney for health care is properly signed and witnessed, if a proper determination has been made the resident is unable to participate in medical treatment decisions, if the patient advocate is acting in the resident's best interest, and if the directions of the patient advocate are within sound medical practice, a nursing home is obligated to follow those directions. MCL 700.5511(3). However, if the individual regains the ability to participate in medical treatment decisions, the authority of the patient advocate is suspended for such time as the individual remains able to participate. MCL 700.5509(2). Or, the patient may choose to revoke the appointment even if he or she is incapable of participating in medical decisions. MCL 700.5010 (1)(d).

Of critical importance, the Michigan legislature understood that there would be occasions when disputes would arise as to a patient advocate's authority, including in situations where a principal's competence is in question although that person may not have been formally adjudicated incompetent. The Michigan legislature did not intend for health care providers to be the arbiters of such disputes. Rather, the Estates and Protected Individuals Code repeatedly states that when such a dispute arises, the parties are to go to probate court for further guidance. See MCL § 700.5508(2), 700.5510(1)(d), and 700.5511(5).

MCL 700.5508(2) is particularly instructive for the facts of this case, and states in its entirety:

**“If a dispute arises as to whether the patient is unable to participate in medical or mental health treatment decisions, a petition may be filed with the [probate] court in the county in which the patient resides or is located requesting the court’s determination as to whether the patient is unable to participate in decisions regarding medical treatment or mental health treatment, as applicable. If a petition is filed under this subsection, the court shall appoint a guardian ad litem to represent the patient for purposes of this subsection. The court shall conduct a hearing on a petition under this subsection as soon as possible and not later than 7 days after the court receives the petition. As soon as possible and not later than 7 days after the hearing, the court shall determine whether or not the patient is able to participate in decisions regarding medical treatment or mental health treatment, as applicable. If the court determines that the patient is unable to participate in the decisions, the patient advocate’s authority, rights, and responsibilities are effective. If the court determines that the patient is able to participate in the decisions, the patient advocate’s authority, rights, and responsibilities are not effective.”** (emphasis added.)

Likewise, MCL 700.5510 (1)(d) states that questions regarding a patient's intent to revoke a Patient Advocate appointment are to be brought to the Probate Court for resolution.

In the context of determining the validity of a patient's confinement, a petition for writ of habeas corpus may also be filed in the county circuit court. MCR 3.302.

In applying the controlling statutes, the following set of relevant facts are undisputed:

Plaintiff Margaret Roush designated Robert Gallagher as her patient advocate under a Designation of Patient Advocate for Health Care dated September 10, 2010 (the "Designation"). On October 22, 2012, Ms. Roush's long-time physician, Dr. Seals, documented his opinion that Ms. Roush was incapable of making medical and financial decisions, and on October 24, 2012, a second physician, Dr. Srinivasa Madireddy, concurred with that assessment (see: **Exhibit J**). At that time, the Designation became effective, and The Laurels had a duty to comply with the instructions received from Mr. Gallagher as to Ms. Roush's course of care. See MCL § 700.5511(3), which provides that a health care provider is bound by a patient advocate's instructions if compliant with MCL § 700.5506 to MCL § 700.5515.

Unfortunately, as is not uncommon, a dispute arose among the loved ones of a skilled nursing facility resident and the resident herself, regarding the extent of the resident's health care needs and corresponding beliefs about the appropriate course of care. In this case, in November 2012 Plaintiff, Ms. Hardy, and occasionally Ms. Roush herself, expressed their desire that Ms. Roush be discharged from Defendant's facility. Ms. Roush's attorney presented a written revocation of the appointment on November 15, 2012 (see: **Exhibit B**). **In light of her mental condition, Ms. Roush's intent at the time was and remains unclear.** Conversely, Ms. Roush's designated Patient Advocate, Mr. Gallagher, consistently instructed that Defendant not discharge Ms. Roush from its facility.

Of note, Ms. Roush's long-time physician, Dr. Seals, made clear that any discharge from the facility would be against his professional medical advice. Based on the most recent physician's assessment, Ms. Roush's ability to make her own medical decisions and known intent to revoke the Patient Advocate appointment remained in question. For example, on November 15, 2012, the day of the presentment of the written revocation prepared by Plaintiff's counsel, Dr. Seals documented that "[Ms. Roush] has had cognitive impairments that waxes and wanes...I don't feel [Ms. Roush] fully understands the potential ramifications of her decisions and I am concerned that going home would be risky." [Physician Progress Note, dated November 15, 2012, attached hereto as **EXHIBIT G**]. Therefore, and as Defendant clearly and repeatedly expressed to Ms. Roush, Ms. Hardy, Mr. Gallagher and Attorney Millard, the parties' dispute had created an inherent uncertainty as to who had authority to make medical decisions on Ms. Roush's behalf.

In granting Defendant's Motion for Summary Disposition, the trial court held that Plaintiff could not sustain her cause of action for false imprisonment, intentional infliction of emotional distress, abuse of process and civil conspiracy because Defendant's actions were consistent with applicable law to resolve a dispute regarding whether Ms. Roush's designated patient advocate's authority, rights, and responsibilities were effective, and where Defendant was receiving competing instructions as to Ms. Roush's course of care. Specifically, the trial court relied upon the invocation of the above cited authorized procedures in granting summary disposition in favor of Defendant, which, along with Plaintiff, both requested the circuit court's guidance as to the lawfulness of its continued retention of Ms. Roush at its facility pursuant to the directives of her Patient Advocate. Indeed, in its response to Plaintiff's November 2012 Motion for Writ of Habeas Corpus, Defendant wrote to the circuit court: "[Defendant] will

welcome either this Court's or the Probate Court's guidance as to the best interests of Mrs. Roush and the person who is legally authorized to make medical decisions for Mrs. Roush including a determination that she be discharged from [Defendant's] facility Against Medical Advice." [EXHIBIT C]. To re-emphasize the trial court's reasoning:

In this matter, as I've looked through the issues and legal aspect here, I did find myself concurring with the argument that was made on behalf of The Laurels of Carson City in the sense they were essentially in a lose/lose situation. Two physicians were indicating that this individual should not be discharged. We also had a patient advocate who felt very strongly and I'm mindful of the testimony that I heard from him regarding the role that he was to play to protect the best interests of Ms. Roush, going back to when her husband was alive.

...

So in light of those concerns I think that The Laurels of Carson City did what they should in terms of seeking some sort of legal determination which as I understand it, it not disputed here today, that they encouraged a finding by the Court through a Court order.

So for that reason, I'm relying upon MCL § 700.5508(2), I do find that this (C)(10) motion should be granted and find that to allow this to continue through depositions and discovery would engage in unnecessary expenditure of funds when it appears as though this is a dispositive issue in light of application of that statute to this case.

[EXHIBIT F, pp.29, 32.]

However, the Court of Appeals reversed the trial court and Defendant's reliance on MCL 700.5508(2) due to specified issues of fact that precluded such reliance as a matter of law. **In this regard, the Court of Appeals committed reversible error in two obvious and succinct manners in applying the controlling statutes contrary to their plain language.**

**First**, the Court of Appeals held that an issue of fact existed as to whether the Patient Advocate' powers were properly invoked on October 24, 2012, after the attending physician

and a second physician documented Ms. Roush's inability to contribute to medical decision-making (Exhibit H, pp.2-3). The Court of Appeals however ignored the clear statutory mandate that, as a matter of law, when the two physicians make this written declaration, the patient advocate's powers are indeed invoked as a matter of law and, at that point, the facility has a statutory obligation to comply with the Patient Advocate's decisions that are made for the best medical interests of the patient. See MCL 700.5511(3): ["A person providing care, custody, or medical or mental health treatment is bound by...a patient's advocate instructions if the patient advocate complies with sections 5506 to 5515..."].

Thus, contrary to the Court of Appeals ruling, there is no issue of fact regarding the creation of the Patient Advocate's authority upon compliance with MCL 700.5508(1). The Court of Appeals committed reversible error in finding the existence of this issue of fact.

**Secondly**, the Court of Appeals committed reversible error in holding that this false imprisonment litigation is the appropriate venue to determine and resolve existing issues of fact as to whether Ms. Roush regained her ability to make medical decisions on her own behalf or otherwise intended to revoke the authority of the Patient Advocate sometime after October 24, 2012 (Exhibit H, p.3). In this context, MCL 700.5508(2), *supra*, controls and authorizes any concerned individual or entity to petition the county's probate court to make this decision:

"If a dispute arises as to whether the patient is unable to participate in medical or mental health treatment decisions, a petition may be filed with the court in the county in which the patient resides or is located requesting the court's determination as to whether the patient is unable to participate in decisions regarding medical treatment or mental health treatment, as applicable...

MCL 700.5508(2).

This statute also contemplates the continued retention of the Patient Advocate's authority and powers until a decision is made upon this petition by the probate court. The

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statute thus further contemplates that the Patient Advocate does not lose his powers to decide the best option for the patient until an adverse ruling removing his authority is issued by the probate court:

If the court determines that the patient is unable to participate in the decisions, the patient advocate's authority, rights, and responsibilities are effective. If the court determines that the patient is able to participate in the decisions, the patient advocate's authority, rights, and responsibilities are not effective."

Id.

And, as otherwise previously stated, MCL 700.5510 (1)(d) states that questions regarding a patient's intent to revoke a Patient Advocate appointment are similarly to be brought to the Probate Court for resolution.

**The very issues of fact that the Court of Appeals has identified as needing to be resolved at the trial court are exactly some of the issues that the legislature directs to be brought before the Probate Court in a petition authorized by the Estates and Protected Individuals Act. (Alternately, the issues may be raised in a Petition for writ of Habeas Corpus when confinement of an individual is involved. MCR 3.302, supra.) Accordingly, the Court of Appeals ruling below effectively permits a patient's family to forego these authorized statutory procedures in favor of litigating the issue of the patient's ability to make medical decisions retroactively in a false imprisonment lawsuit. Statutory dictate and supporting policy require a finding by the Supreme Court that, as a matter of law, disputes regarding the issues of the patient's abilities to participate in medical decisions and/or intent to revoke a patient advocate designation, be resolved contemporaneously by the probate court pursuant to the statutory procedures set forth above and that health care facilities and providers which rely upon the directives of the Patient Advocate subject to the completion of these probate court procedures should not be subject to liability by retroactive**

**guesswork by a jury in civil litigation.** Leave to appeal should be granted to review the unfounded precedent set by the Court of Appeals below.<sup>2</sup>

Accordingly, the trial court properly granted summary disposition in favor of Defendant The Laurels of Carson City, LLC, and the July 10, 2013 Order should be reinstated.

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<sup>2</sup> Plaintiff's argument invoking her right to discharge from the facility, under MCL § 333.20201(3)(d), does not alter the controlling analysis. MCL § 333.20201(5) provides that "In the case of a nursing home patient, the rights enumerated in subsection (2)(c), (g), and (k) and subsection (3)(d), (g), and (h) may be exercised by the patient's representative." (emphasis added). Thus, even given the apparently-unlimited language of MCL § 20201(3)(d) that "Each nursing home patient shall be afforded the opportunity to discharge himself or herself from the nursing home", the reality is that this right also is subject to the decision of the appointed patient advocate.

ARGUMENT II

**PLAINTIFF ABANDONED HER CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, ABUSE OF PROCESS, AND CIVIL CONSPIRACY BY NOT ADDRESSING THE DISMISSAL OF THOSE CLAIMS IN HER COURT OF APPEALS' BRIEF; MOREOVER, THE COURT OF APPEALS APPARENTLY RELIED UPON AN UNSWORN-UNNOTARIZED AFFIDAVIT TO FIND TRIABLE ISSUES OF FACT REGARDING THESE CLAIMS. THUS, THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY REVERSING THE DISMISSAL OF THOSE CLAIMS WITHOUT PERMITTING DEFENDANT TO BRIEF THOSE ISSUES**

"When an appellant fails to dispute the basis of the trial court's ruling, this Court need not even consider granting plaintiffs the relief they seek." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation marks, brackets, ellipses, and citation omitted). Further, as Plaintiff provided no argument in her Appellant's Brief filed in the Court of Appeals regarding how she is able to sustain claims for abuse of process and intentional infliction of emotional distress. she should have been deemed to have abandoned those claims. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008) (an appellant abandons an issue by failing to address its merits).

Also at issue is the required enforcement of the requirement of the nonmoving party to provide admissible evidence to create a triable issue of fact in order to defeat a motion for summary disposition. In this regard, an affidavit must be signed, based upon personal knowledge and properly notarized in order to receive proper consideration by the reviewing court(s). MCR 2.113(A), 2.119(B), *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 711-712; 620 NW2d 319 (2000). Consistently, "an unsworn, unsigned affidavit may not be considered by the trial court on a motion for summary disposition." *Gorman v American Honda*

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*Motor Co, Inc*, 302 Mich App 113, 120; 839 NW2d 223 (2013). An unsigned, unnotarized "affidavit" does not qualify as a proper affidavit. *Holmes*, supra, at 711.

Here, the Court of Appeals also reversed the trial court's dismissal of the causes of actions of intentional infliction of emotional distress, abuse of process and civil conspiracy and directed reinstatement of those claims due to the existence of triable issues of fact. Implicit in these rulings are several points of reversible error, both procedurally and substantively, which warrant scrutiny by the Supreme Court.

First, Plaintiff abandoned these additional causes of actions on appeal by failing to address their validity and request their reinstatement in her Appellant's Brief filed with the Court of Appeals. *Derderian*, supra. As a result, Defendant had no need to justify the dismissal of those claims in its own Appellee's Brief filed with the Michigan Court of Appeals. **The Court of Appeals nonetheless sua sponte reversed the summary disposition order of the trial court for reasons not addressed by the trial court without offering Defendant an opportunity to defend the dismissal of those claim.** Defendant's due process rights were compromised as a result. *Haji v Prevention Ins. Agency, Inc*, 198 Mich App 84, 88-90; 492 NW 2d 460 (1992) (J. Corrigan concurring). The Court of Appeals Opinion should be vacated for this reason as well.

Also erroneous was the Court of Appeals apparent reliance upon the unsworn and unnotarized affidavit of Plaintiff' Counsel Scott Millard to conclude that issues of fact precluded the proper grant of summary disposition as to these additional claims (see: **Exhibit K**). In addition Mr. Millard's affidavit was not based upon "first- hand knowledge"; rather, it was based in pertinent part upon "information (sic) belief" in accusing Defendant's representatives and the Patient Advocate of acting with improper pecuniary motives. Due to

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these defects, the affidavit was improper and could not properly serve to create any issues of fact. This error likewise warrants Supreme Court review.

Substantive errors are also apparent within the Court of Appeals' *sua sponte* reinstatement of the abandoned claims.

**Abuse of Process**

For example, The Court of Appeals held that a triable issue of fact existed to support the abuse of process claim. The Court stated that the filing of the petition of guardianship may have been improper given the conflicting evidence of Ms. Roush's mental capacity (**Exhibit H, p. 5**). The Court also stated that there was conflicting evidence regarding possible ulterior motives of an employee of Defendant in helping to fill out the petition (*Id.*).

In *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 322; 788 NW 2d 679 (2010) the Court of Appeals described the required elements of a claim for abuse of process:

In a case alleging abuse of process, the pleadings must allege with specificity an act committed in the use of process "that is improper in the regular prosecution of the proceeding." *Early Detection Center, PC v. New York Life Ins Co*, 157 Mich. App 618, 629; 403 NW2d 830 (1986). A complaint must allege more than the mere issuance of the process, because an "action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue." *Friedman v. Dozorc*, 412 Mich. 1, 31; 312 NW2d 585 (1981) (internal quotation omitted). A claim asserting nothing more than an improper motive in properly obtaining process does not successfully plead an abuse of process. *Young v. Motor City Apartments Ltd Dividend Housing Ass'n No 1 & No 2*, 133 Mich. App 671, 681; 350 NW2d 790 (1984).

287 Mich App at 322.

The analysis of the Court of Appeals below was incomplete and erroneous. The Court of Appeals did not cite to or apply the requirement that the guardianship process was improperly used after its filing; the Court of Appeals cited to no facts demonstrating the commission of an improper act after the filing of the guardian petition to support an ulterior

motive. *Dalley*, supra. All the Court of Appeals cited was a possible ulterior motive in the filing of the petition (**Exhibit H**, p. 5). This was insufficient as a matter of law to create a triable issue of fact. *Id.*

### Intentional Infliction

The Court of Appeals' reversal of the intentional infliction claim was also palpably erroneous for substantive reasons.

The Court of Appeals cited as possible "extreme and outrageous conduct" [which caused emotional distress to Ms. Roush] Defendant's actions in contacting the Montcalm County Adult Protective Services ("APS") following Ms. Roush's discharge from Defendant's facility (against medical advice) However, the Court of Appeals did not acknowledge that Defendant was required by law to notify APS due to possessing a reasonable basis for its concerns over Ms. Roush's safety, and that failure to so notify APS could have subjected Defendant, as well as Defendant's employees, to civil liability and civil penalties.

Specifically, MCL § 400.11a(1) provides in relevant part: "[a] person who is employed, licensed, registered or certified to provide health care, educational, social welfare, mental health, or other human services . . . who suspects or has reasonable cause to believe that an adult has been abused, neglected, or exploited shall make immediately, by telephone or otherwise, an oral report to the county department of social services of the county in which the abuse, neglect, or exploitation is suspected of having or believed to have occurred."

MCL § 400.11e(1) provides: "A person required to make a report pursuant to section 11a who fails to do so is liable civilly for the damages proximately caused by the failure to report, and a civil fine of not more than \$500.00 for each failure to report."

Finally, in light of the obligations placed upon health care providers such as Defendant and Defendant's employees under MCL § 400.11a and MCL § 400.11e, MCL § 400.11c(1) provides in relevant part: "[a] person acting in good faith who makes a report or who assists in the implementation of sections 11 to 11b, 11d to 11f, and this section **shall be immune from civil liability which might otherwise be incurred by making the report or by assisting in making the report.** A person making a report or assisting in the implementation of sections 11 to 11b, 11d to 11f, and this section **shall be presumed to have acted in good faith.**" (emphasis added).

The Court of Appeals ignored the following undisputed facts which triggered the duty to notify the APS: Ms. Roush was discharged from Defendant's facility against the professional medical advice of her long-time treating physician. Per the reports of Mr. Gallagher, Ms. Roush had not received appropriate care during her brief stays at home in September and October 2012, and that conditions within the home were deplorable. Objectively, Defendant was aware that on the previous two occasions when Ms. Roush had been discharged to her home, after only a few days she would need to be re-admitted to Defendant's facility in significantly worse condition than she had been in before leaving Defendant's facility.

Under these facts, Defendant had reasonable suspicion as a matter of law that Ms. Roush being neglected, or at least not receiving appropriate medical attention, while at her home. Accordingly, Defendant was obligated to notify APS of the situation: that Ms. Roush had been discharged against medical advice, and that the person who had previously served as Ms. Roush's patient advocate had expressed concerns about the conditions in her home. The Court of Appeals ignored that, accordingly, Defendant is entitled to civil immunity under MCL 400.11c(1), and the grant of summary disposition as a matter of law.

Finally, the Court of Appeals held that Defendant could be potentially liable for intentional infliction arising from the refusal of Ms. Rousch's physician to provide further treatment to Ms. Rousch after she insisted on her discharge from the Defendant's facility against the physician's professional medical advice. For purposes of clarification, the physician was not an employee of Defendant. More importantly, however, the Court did not state how a skilled nursing facility could be liable for the actions of a physician in failing to continue to treat a former resident who does not want treatment or care from that facility. This ruling as well is palpably erroneous.

#### Civil Conspiracy

The validity of the civil conspiracy claim, by definition, depends upon the validity of the other pleaded tort claims; civil conspiracy alone is not an actionable tort. See, e.g. *Admiral Ins Co. v Columbia Casualty Co.*, 194 Mich App 300, 313; 486 NW 2d 351 (1992). This claim was also abandoned by the Plaintiff during the Court of Appeals proceedings and, along with the other pleaded tort claims, is invalid as a matter of law.

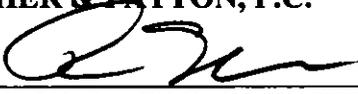
**CONCLUSION**

WHEREFORE, for the foregoing reasons, Defendant-Appellant The Laurels of Carson City, LLC respectfully requests that this Honorable Court grant leave to appeal from or peremptorily reverse the Court of Appeals opinion of December 11, 2014 and reinstate the July 10, 2013 Order of the Montcalm County Circuit Court.

Respectfully submitted,

**SULLIVAN, WARD,  
ASHER & PATTON, P.C.**

BY:

  
\_\_\_\_\_  
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SULLIVAN, WARD, ASHER & PATTON, P.C.

Dated: January 20, 2013

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**STATE OF MICHIGAN  
IN THE SUPREME COURT  
(On Appeal from the Michigan Court of Appeals and  
The Circuit Court for the County of Montcalm)**

CYNTHIA HARDY, Personal Representative  
For the Estate of MARGARET MARIE ROUSH,

Plaintiff-Appellee,

Supreme Court No: \_\_\_\_\_

COA Case No. 317406

-vs-

L.C. Case No. 2012-K-16830-CZ

LAURELS OF CARSON CITY, LLC,

Defendant-Appellant.

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**NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL**

TO: Attorneys of Record  
Clerk, Michigan Court of Appeals  
Clerk, Montcalm County Circuit Court

PLEASE TAKE NOTICE that on this date, Defendant-Appellant Laurels of Carson City, LLC, filed an Application for Leave to Appeal in the Michigan Supreme Court.

Respectfully submitted,

**SULLIVAN, WARD,  
ASHER & PATTON, P.C.**



---

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Dated: January 20, 2014

**STATE OF MICHIGAN  
IN THE SUPREME COURT  
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The Circuit Court for the County of Montcalm)**

CYNTHIA HARDY, Personal Representative  
For the Estate of MARGARET MARIE ROUSH,

Plaintiff-Appellee,

Supreme Court No: \_\_\_\_\_

COA Case No. 317406

L.C. Case No. 2012-K-16830-CZ

-vs-

LAURELS OF CARSON CITY, LLC,

Defendant-Appellant.

---

**NOTICE OF HEARING**

**TO: COUNSEL OF RECORD**

**PLEASE TAKE NOTICE** that the Application for Leave to Appeal filed on behalf of Defendant-Appellant Laurels of Carson City, LLC, will be presented to this Honorable Court for a determination on Tuesday, the 17th day of February, 2015, or at such date and time thereafter as is determined by the Court.

Respectfully submitted,

**SULLIVAN, WARD,  
ASHER & PATTON, P.C.**

  
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Dated: January 20, 2014

STATE OF MICHIGAN  
IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and  
The Circuit Court for the County of Montcalm)

CYNTHIA HARDY, Personal Representative  
For the Estate of MARGARET MARIE ROUSH,

Plaintiff-Appellee,

Supreme Court No: \_\_\_\_\_

COA Case No. 317406

-vs-

L.C. Case No. 2012-K-16830-CZ

LAURELS OF CARSON CITY, LLC,

Defendant-Appellant.

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**PROOF OF SERVICE**

Terry Lichko says that on January 20, 2014, she served a copy of NOTICE OF HEARING, NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL, APPLICATION FOR LEAVE TO APPEAL and this PROOF OF SERVICE on counsel of record by placing same in envelope(s) properly addressed to:

SCOTT G. MILLARD  
MIEL & CARR, PLC  
125 West Main Street P.O. Box 8  
Stanton, Michigan 48888

and depositing the said envelope(s) in the United States mail, postage thereon fully prepaid.

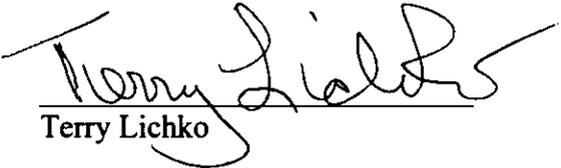
On this date I served a copy of the NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL and this PROOF OF SERVICE on the following Clerks by placing same in envelopes properly addressed to:

Clerk of the Court  
Michigan Court of Appeals  
P.O. Box 30022  
Lansing, MI 48909-7522

Clerk of the Court  
Montcalm County Circuit Court  
631 N. State St.  
Stanton, MI 48888

and depositing the said envelope(s) in the United States mail, postage thereon fully prepaid.

I hereby declare that the statement above is true to the best of my knowledge,  
information and belief.

  
Terry Lichko

W1566608.DOCX

SULLIVAN, WARD, ASHER & PATTON, P.C.

# SULLIVAN, WARD, ASHER & PATTON, P.C.

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RICHARD G. WARD (RETIRED)

RONALD S. LEDERMAN  
[rlederman@swappc.com](mailto:rlederman@swappc.com)  
(248) 746-2705

January 20, 2015

*Via FedEx Overnight Mail*

Clerk of the Court  
Michigan Supreme Court  
925 W. Ottawa St.  
Lansing, MI 48915

RE: Cynthia Hardy, p/r for the Estate of Margaret Marie Rousch  
vs. Laurels of Carson City, LLC  
Supreme Court No: \_\_\_\_\_  
Court of Appeals No: 317406  
Montcalm Case No: 2012-K-16830-CZ

Dear Clerk:

Enclosed for filing with the court please find eight copies of:

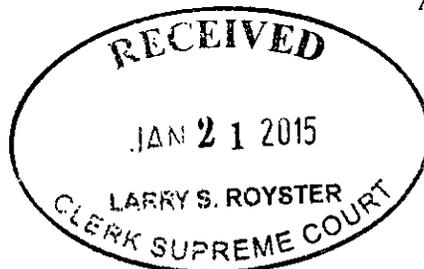
- Notice of Hearing;
- Notice of Filing Application for Leave to Appeal;
- Application for Leave to Appeal On Behalf of Defendant-Appellant The Laurels of Carson City, LLC; and,
- Proof of Service.

Also enclosed is a check in the amount of \$375.00 for filing fees.

Very truly yours,

**SULLIVAN, WARD  
ASHER & PATTON, P.C.**

Ronald S. Lederman  
Jonathan M. Jaffa



RSL/tl  
Enclosures