

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court Case No. 150882

Court of Appeals Case No. 317406

Plaintiff-Appellee,

Montcalm County Circuit Court
Case No. 2012-016830-CZ

v

LAURELS OF CARSON CITY, L.L.C.,

Defendant-Appellant.

**BRIEF OF *AMICI CURIAE* MICHIGAN ELDER JUSTICE INITIATIVE, THE
NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE, STATE LONG
TERM CARE OMBUDSMAN PROGRAM, AND MICHIGAN PROTECTION AND
ADVOCACY SERVICE, INC. IN SUPPORT OF APPELLEE'S RESPONSE TO
APPLICATION FOR LEAVE TO APPEAL**

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Table of Contents

TABLE OF AUTHORITIES iii

AMICI CURIAE’S STATEMENT OF QUESTIONS PRESENTED v

STATEMENT OF INTEREST..... 1

INTRODUCTION 5

 I. Factual Framework..... 5

 II. Legal Framework 7

BACKGROUND 9

ARGUMENT..... 9

 I. The Court of Appeals Properly Reversed The Circuit Court’s Order Granting Summary Disposition Because The Lower Court Erroneously Determined That The Existence Of MCL 700.5508(2) – A Provision That Is Inapplicable To The Instant Case – Was Dispositive..... 9

 A. Pursuant to MCL 700.5510(1)(d), Individuals Who Can Communicate An Intent to Revoke A PAD May Do So Regardless Of Whether They Have Been Determined to Have The Ability To Make Medical Decisions..... 9

 B. There is No Legitimate Dispute Regarding Ms. Roush’s Intent To Revoke Her PAD 10

 C. Once Ms. Roush Revoked Her PAD, She Was No Longer Subject To The Provisions of MCL 700.5508(2)..... 12

 D. Since MCL 700.5508(2) Was Inapplicable Once Ms. Roush Revoked Her PAD, The Trial Court Erred In Determining The Existence Of The Statutory Provision Was Dispositive In This Matter..... 15

 II. Once Ms. Roush Revoked Her PAD, Appellant Nursing Facility Violated Her Rights Under State and Federal Law By Preventing Her From Returning Home Or Appearing At Her Court Hearings 16

A. The Michigan Public Health Code Guarantees Nursing Home Residents The Right To Discharge Themselves..... 16

B. The Michigan Public Health Code Guarantees Nursing Home Residents The Right To Exercise His or Her Rights As A Citizen, To Participate in the Planning Of His Or Her Medical Treatment, And To Refuse Treatment..... 18

C. The Federal Nursing Home Reform Law Similarly Guarantees Nursing Home Residents the Right To Self-Determination As Well As The Right To Be Free From Interference By The Facility, To Participate In Care Planning, To Refuse Medical Treatment And To Exercise Their Rights As Citizens..... 19

D. Pursuant To Common Law, Case Law, and Constitutional Law, Individuals Have The Right To Bodily Integrity Which Includes The Right To Refuse Treatment..... 20

E. If Appellant Believed That Ms. Roush Would Be At Risk If She Returned Home Or Lacked Capacity To Make Well-Reasoned Decisions, It Had The Option Of Contacting Adult Protective Services and Supporting a Guardianship Petition, Two Systems Designed To Determine If Individuals At Risk Need Immediate Protection..... 21

III. Individuals Whose PAD Was Activated But Who Recovered Or Revoked Their PADs Without Seeking a Determination in Probate Court Retain Their Right To Pursue A Whole Range of Legal Remedies..... 22

CONCLUSION AND REQUESTED RELIEF 23

TABLE OF AUTHORITIES

Cases

Cruzan v. Director, Missouri Health Dep't, 497 U.S. 261; 110 S Ct 2841, 111 L Ed 2d 224 (1990) 20

In re Hurd-Marvin Drain, 331 Mich. 504, 509; 50 NW2d 143 (1951)..... 13

In re Martin, 450 Mich. 204, 216; 538 N.W.2d 399, 405 (1995)..... 20

Johnson v. Recca, 492 Mich. 169, 177; 821 NW2d 520, 525 (2012)..... 14

Whitman v City of Burton, 493 Mich 303, 311; 831 NW2d 223, 229 (2013)..... 14

Zoski v. Gaines, 271 Mich. 1, 9–10; 260 N.W. 99 (1935)..... 20

Statutes

42 USC 1395i-3 17, 19

42 USC 1396r 17, 19

42 USC 3058g..... 2

MCL 333.20201 8, 16, 17, 18, 19

MCL 333.21703..... 17

MCL 333.21773..... 18

MCL 333.21774..... 18

MCL 333.21775..... 18

MCL 333.21776..... 17, 18

MCL 400.11a..... 21

MCL 400.11b..... 9

MCL 400.586g..... 2

MCL 600.605..... 23

MCL 600.841 22

MCL 700.5302 *et seq.*..... 9

MCL 700.5306..... 15

MCL 700.5506..... 5, 11

MCL 700.5506, *et seq.*,..... 5, 22

MCL 700.5507..... 6, 10

MCL 700.5508..... 1, 3, 7, 9, 12, 14, 15, 16, 22, 23

MCL 700.5509..... 13

MCL 700.5510..... 1, 6, 7, 8, 10, 22, 23

MCL 700.5510(1)(d)..... 14

Other Authorities

Const 1963, art 6, § 13..... 23

Liberty from Transfer Trauma: A Fundamental Life and Liberty Interest, 9 HASTINGS
CONST. L. Q. 429 (1982) 18

State Operation Manual, Appendix PP—Guidance to Surveyors for Long Term Care
Facilities (Rev. 70, Issues 01-07-11, Effective:10-01-10 Implementation:10-01-10.) . 17

State Operations Manual, Appendix PP—Guidance to Surveyors for Long Term Care
Facilities (Rev. 149, Issued: 10-09-15, Effective: 10-09-15, Implementation: 10-09-15).
..... 18, 20

Regulations

42 CFR 483.10..... 8, 19, 20

42 CFR 483.12..... 17, 18

AMICI CURIAE'S STATEMENT OF QUESTIONS PRESENTED

- 1. DID THE COURT OF APPEALS PROPERLY REVERSE THE TRIAL COURT'S ORDER GRANTING SUMMARY DISPOSITION BECAUSE MCL 700.5508(2) IS NOT DISPOSITIVE ON ANY OF THE CLAIMS RAISED BY THE PLAINTIFF-APPELLEE?**

Plaintiff-Appellee answers "Yes"

Defendant-Appellant answers "No"

The Circuit Court answered "No"

The Court of Appeals answered "Yes"

Amici answer "Yes"

- 2. DO INDIVIDUALS WHO REVOKE PATIENT ADVOCATE DESIGNATIONS AFTER THOSE DOCUMENTS HAVE BEEN ACTIVATED REMOVE THEMSELVES FROM THE PATIENT ADVOCATE DESIGNATION STATUTORY FRAMEWORK IN THE ESTATES AND PROTECTED INDIVIDUALS CODE AND, IN THE ABSENCE OF ANOTHER LEGAL REPRESENTATIVE, IMMEDIATELY REGAIN ALL RIGHTS THEY ENJOYED BEFORE THE PATIENT ADVOCATE DESIGNATION WAS ACTIVATED?**

Plaintiff-Appellee answers "Yes"

Defendant-Appellant answers "No"

The Circuit Court did not address but implied "No"

The Court of Appeals did not address

Amici answer "Yes"

- 3. AFTER PLAINTIFF-APPELLEE REVOKED HER PATIENT ADVOCATE DESIGNATION, SHOULD SHE HAVE BEEN ENTITLED TO EXERCISE ALL OF THE RIGHTS GUARANTEED TO HER AS A NURSING HOME RESIDENT AND AS A CITIZEN UNDER STATE AND FEDERAL LAW, INCLUDING THE RIGHTS TO REFUSE TREATMENT AND DISCHARGE HERSELF?**

Plaintiff-Appellee answers "Yes"

Defendant-Appellant answers “No”

The Circuit Court did not address but implied “No”

The Court of Appeals did not address

Amici answer “Yes”

STATEMENT OF INTEREST

The Michigan Elder Justice Initiative, The National Consumer Voice for Quality Long-Term Care, the State Long Term Care Ombudsman Program, and Michigan Protection and Advocacy Service have requested permission to appear as *amici* in this matter. These organizations—three Michigan non-profit organizations and a national non-profit organization all of which advocate on behalf of nursing facility residents—support the Appellee and ask the Court to deny the Appellant’s Motion for Leave to Appeal or, in the alternative, to grant Leave to Appeal and affirm the decision of the Court of Appeals. *Amici* argue that 1) MCL 700.5510(1)(d) guarantees individuals the right to revoke a patient advocate designation (PAD) at any time and in any manner in which they are able to communicate an intent to revoke; 2) when a patient has communicated a clear intent to revoke, such revocations must be given immediate effect and no hearing to determine the patient’s ability to participate in medical treatment decisions is contemplated in law or required before the revocation is given effect; 3) MCL 700.5508(2) which pertains to a patient advocate’s authority to act is not applicable after the PAD has been revoked; 4) even if MCL 700.5508(2) were applicable to this case, it would not be determinative of every issue and therefore cannot be used as a basis for summary disposition; 5) state and federal statutes and regulations guarantee nursing home residents the right to participate in decisions regarding their own care, including the right to be discharged from the facility; and 6) when nursing facilities are concerned that individuals without a legal representative—including someone who revokes a PAD and has no other legal representative—are at risk, instead of holding residents without any legal authority, they may contact Adult Protective Services (APS) and APS and/or another interested party may seek guardianship of the individual.

The Michigan Elder Justice Initiative (MEJI) is a project of the Michigan Poverty Law Program (MPLP). Since 1997, MPLP has provided state support services to local legal aid programs and other poverty law advocates and engaged in systemic advocacy to help alleviate barriers faced by low income individuals. MEJI focuses on issues related to long term care, health law, public benefits, elder abuse, civil rights, and other issues that are critically important to vulnerable older adults and people with disabilities. MEJI serves as counsel to the State Long Term Care Ombudsman Program and, through contracts with local Area Agencies on Aging, offers local long term ombudsman services in six counties in Michigan. MEJI also serves as the Ombudsman for the MI Health Link program, a demonstration project that provides health, mental health, and long term care services to more than 30,000 older Michigianians and people with disabilities who are eligible for Medicare and Medicaid. MEJI has played an active role in shaping state and federal policy regarding services and benefits for older adults and is committed to upholding the rights of older adults across the state.

The State Long Term Care Ombudsman Program (SLTCOP) is authorized and funded under the federal Older Americans Act, 42 USC 3058g (2010) and the Older Michigianians Act of 1981, MCL 400.586g (2016), to serve as a strong and independent advocate for residents of nursing facilities, adult foster care facilities, and homes for the aged. The State Long Term Care Ombudsman works with a cadre of local ombudsman staff across the state to resolve problems of individual residents and to bring about changes at the local, state, and national levels that will improve residents' care and quality of life. Long term care ombudsman visit every nursing home in the state on a regular basis as well as making visits as time permits to homes for the aged and adult foster care facilities. They frequently deal with issues involving residents' rights, advance directives, guardianship, and end of life care.

The National Consumer Voice for Quality Long-Term Care was formed as NCCNHR (the National Citizens' Coalition for Nursing Home Reform) in 1975 due to public concern for substandard care in nursing facilities. Since that time, Consumer Voice has become the leading national voice representing consumers in issues relating to long-term care and has become the primary source of information and tools for consumers, families, caregivers, ombudsmen and other advocates to help insure quality care for all residents. Consumer Voice also houses the National Long Term Care Ombudsman Resource Center which is funded by the federal Administration on Aging to provide support, technical assistance and training to state and local ombudsman across the country. Consumer Voice is dedicated to advocating for quality care, quality of life, and protection of rights for all individuals receiving long-term services and supports.

The Michigan Protection and Advocacy Service, Inc. (MPAS) is the agency designated by the governor of the State of Michigan to advocate and protect the legal rights of people with disabilities. MPAS works to fulfill its mission by (1) working toward systemic changes that advance the rights of all people with disabilities and (2) advocating for the individual rights of people with disabilities in particular cases that meet its guidelines, including the right for individuals to make their own health care decisions. Operating out of offices in Lansing and Marquette, MPAS provides a variety of services to people living with disabilities, including people living in nursing facilities.

Amici assert this Court should deny leave to appeal because the Court of Appeals decision reversing the circuit court was correct in determining that the statutory interpretation of MCL 700.5508(2) is not dispositive in this case and numerous unresolved issues remain. In the alternative, if this Court grants leave to appeal, we urge the Court to affirm the decision of the

Court of Appeals and to provide clarification on a core issue raised by this case: that individuals who exercise their statutory right to revoke PADs and direct their own care are free to do so without assuming the significant additional burden of pursuing a determination in probate court that they have regained their ability to participate in medical or mental health decisions. If the Court of Appeals decision is reversed, Michigan residents who have executed PADs with the understanding from the unambiguous language of the statute that they can revoke them at any time may find themselves in a state of limbo in which neither they nor their health care providers are clear who has the authority to make medical and mental health treatment decisions for them unless and until they assume the burden of pursuing a determination in probate court, a burden never contemplated by the Legislature. Moreover, if these individuals reside in long term care facilities, confusion about the impact of a revocation will, as in the present case, prevent residents from exercising the array of rights under state and federal law that guarantee residents the right to self-determination, to direct their own medical care, and to enjoy the full range of civil rights available to any citizen. Moreover, reversal of the Court of Appeals decision would result in the individuals who have revoked a PAD but not obtained a subsequent determination in probate court regarding their ability to participate in medical or mental health treatment decisions being barred from seeking relief for a vast array of tort actions to which all other individuals have access. If the Court grants leave to appeal, we respectfully urge the Court to preserve the rights of individuals to revoke PADs consistent with the broad language of the statute and thereafter to pursue any and all appropriate tort claims in circuit court.

INTRODUCTION

The instant case concerns a 98 year old nursing home resident who sought, with the support of her family and her lawyer, to return home but was prevented from doing so by Appellant nursing facility. *Amici*, non-profit entities dedicated to advocating for nursing facility residents, write to illuminate the landscape of rights under the Estates and Protected Individuals Code, MCL 700.5506 *et seq.*, and other state and federal law that should have protected Appellee Margaret Roush's ability to decide for herself where she lived.

I. Factual Framework

Ms. Roush was admitted to Appellant Laurels of Carson City, L.L.C. on October 16, 2012. Six days later, two doctors asserted that she was incapable of making medical decisions for herself. As a result of this determination, Ms. Roush's designated patient advocate, family friend Robert Gallagher, was empowered to make care, custody, and medical and mental health decisions on her behalf. MCL 700.5506(2). Subsequently, however, Ms. Roush's mental status appeared to improve and, several weeks after her admission, Ms. Roush and her granddaughter began expressing to facility staff that Ms. Roush wished to return home because Ms. Roush's doctor asserted that she required on-going professional care and because Mr. Gallagher had concerns about Ms. Roush's family, the care she received at home, and the conditions in the home, he instructed Appellant facility that Ms. Roush was to remain in the facility.

Ms. Roush and her family then embarked on a variety of strategies to secure her release. On November 13, 2012, Ms. Roush's daughter and granddaughter summoned two police officers to Appellant facility to assist Ms. Roush in returning home. According to the report prepared by one of the officers, "Margaret [Roush] was able to hold a very good conversation...and seemed to know exactly what was going on. It seemed to Officer Houser and I that Margaret was

mentally fit at that point in time.” Appellee’s Suppl. Br. Exhibit 2, 5. The officers left the facility with the mistaken understanding that Mr. Gallagher would authorize Ms. Roush’s discharge. *Id.*

When the facility persisted in detaining her, Ms. Roush next met with her lawyer who assisted her in revoking the PAD pursuant to MCL 700.5507(4)(7) and MCL 700.5510(1)(d). Despite the revocation which should have terminated Mr. Gallagher’s authority to block her discharge, Appellant facility still refused to release Ms. Roush.

Ms. Roush’s attorney then filed a habeas corpus petition in Montcalm County Circuit Court. However, the circuit court did not hear testimony from Ms. Roush because, according to the Judge who presided in that case and served as the trial judge in the instant case, “there was a statement from the physician who said that her physical condition was so tenuous to the point that she really shouldn’t be able to go.” Appellee’s Supp. Br. Ex. 4, 6/25/2013 Hr’g Tr. 30. The circuit court denied the petition and determined that probate court was a more appropriate venue to resolve the dispute. The facility then assisted Mr. Gallagher in filing for guardianship of Ms. Roush but the facility once again blocked Ms. Roush’s attendance at the hearing. Appellee’s Supp. Br. Ex 2, Hardy Aff. 1. After Ms. Roush’s lawyer filed a motion to show cause against the facility, the probate court directed the facility to produce Ms. Roush.

When Ms. Roush was finally able to appear at the temporary guardianship hearing on November 21, 2012, Mr. Gallagher himself advised the court that Ms. Roush was competent. Appellee’s Supp. Br. Ex 7, Guardianship Hr’g Tr. 7. Ms. Roush’s guardian ad litem also related that Ms. Roush was oriented to time and place including the month, year, season, and next holiday; that there were many things she could recall and state consistently; and that she was able to discuss whom she voted for by absentee ballot in the Presidential election. Appellee’s Supp. Br. Ex. 7, Guardianship Hr’g Tr. 5-6. The guardian ad litem asserted that Ms. Roush was “a

woman who[se] liberty interests are being compromised based on the opinion of one doctor.” *Id.* at 5. Like her colleague who had visited Ms. Roush at Appellant facility, the lawyer who represented Ms. Roush in the guardianship hearing believed she was “competent to make her own decisions concerning her health care.” Appellee Supp. Br, Ex. 6, Aff. of Keeley D. Heath 1. The probate judge denied the petition for a temporary guardian and, more than five weeks after her admission to the facility, instructed Mr. Gallagher that Ms. Roush could finally decide for herself to go home. Ms. Roush returned home that day and spent her final months with her family where she was able to enjoy the last Thanksgiving and Christmas of her life.

Although Ms. Roush had impressed the police officers, two different lawyers, the guardian ad litem, and her own former patient advocate that she had capacity to make her own decisions and despite her consistent and insistent demands to leave Appellant facility, she was not permitted to go home until she had pursued a half dozen different strategies to win her freedom.

II. Legal Framework

As discussed more fully below, the Estates and Protected Individuals Code (EPIC) includes a provision that guaranteed Ms. Roush the right to revoke her PAD regardless of her ability to participate in medical treatment decisions. MCL 700.5510(1)(d). Her revocation of the PAD should have ended the Appellant’s reliance on Mr. Gallagher’s authority to make custody and care decisions for her and restored her rights as if she had never executed a PAD. No hearing pursuant to MCL 700.5508(2), a provision that pertains to the patient advocate’s authority to act when there is a dispute regarding a patient’s ability to participate in medical treatment decisions, was appropriate or necessary because, once the PAD was revoked, she no longer had a patient

advocate. Moreover, no judicial determination regarding her ability to participate in medical treatment decisions was required to assure the validity of her revocation.

Once Ms. Roush revoked her PAD, she should have benefitted from a host of other protections. The Michigan Public Health Code requires that “Each nursing home patient shall be afforded the opportunity to discharge himself or herself from the nursing home.” MCL 333.20201(3)(d). It also provides that a resident is entitled to refuse treatment, exercise his or her rights as a citizen, and be involved in his or her discharge planning, MCL 333.20201(2)(f) to (j). Moreover, it mandates that “A patient’s or resident’s civil...liberties, including the right to independent personal decisions and the right to knowledge of available choices, shall not be infringed and the health facility or agency shall encourage and assist in the fullest possible exercise of these rights.” MCL 333.20201(2)(k).

Similarly, federal law guarantees nursing facility residents the right to self-determination and requires facilities to protect and promote the rights of each resident. 42 CFR 483.10 (2013). Among the relevant enumerated rights is the right to exercise the resident’s rights as a citizen of the United States, to be free from interference from the facility, to participate in planning care, and to refuse medical treatment. *Id.*

Once Ms. Roush revoked her PAD consistent with MCL 700.5510(1)(d), she, like other residents without a legal representative, was entitled to exercise the same civil and constitutional rights as any other citizen. If such individuals are perceived to be at risk, the Michigan legislature created both Adult Protective Services and a guardianship system to protect them.¹ See MCL

¹ It should be noted that both these systems were available and involved in Ms. Roush’s case. After Ms. Roush revoked her PAD, Ms. Roush’s Patient Advocate filed a temporary guardianship petition. Appellees Supp. Br. Ex. 7, Transcript of Hearing re Petition for Appointment of Temporary Guardian. The court in that matter determined there were no grounds to appoint a temporary guardian. *Id.* at 11. Moreover, after Ms. Roush returned home, the facility allegedly contacted Adult Protective Services and Ms. Roush’s family was contacted by that agency. Appl. for Leave to Appeal, Ex. D, Complaint 4; Appellee’s Supp. Br. Ex. 2, Aff. of Cynthia Hardy 3.

400.11b and MCL 700.5302 *et seq.* But residents like Ms. Roush have neither been civilly committed to the nursing facility nor are they prisoners. Whether they are 38 or 98, in the absence of a patient advocate or other legal representative, they are not required to accept care or treatment they do not want or remain in the custody of facilities they wish to leave.

BACKGROUND

Amici adopt and incorporate by reference the Statement of Jurisdiction found in Appellee's Supplemental Brief at p. v and the Counterstatement of Facts in Appellee's Supplemental Brief at 3-8. Facts relating to Appellant's efforts to detain Ms. Roush in the facility and Ms. Roush's efforts to leave are highlighted in the introduction above.

ARGUMENT

I. The Court of Appeals Properly Reversed The Circuit Court's Order Granting Summary Disposition Because The Lower Court Erroneously Determined That The Existence Of MCL 700.5508(2)—A Provision That Is Inapplicable To The Instant Case—Was Dispositive

Appellant contends that every issue in this case could have been properly resolved if Ms. Roush had petitioned the probate court pursuant to MCL 700.5508(2). This position was adopted by the circuit court and rejected by the Court of Appeals. The Court of Appeals determined that numerous issues for each of Appellee's tort claims remained unclear and could likely have been resolved through discovery. None was resolved by the existence of MCL 700.5508(2), which, as discussed below, was not applicable to the facts of this case.

A. Pursuant to MCL 700.5510(1)(d), Individuals Who Can Communicate An Intent to Revoke A PAD May Do So Regardless Of Whether They Have Been Determined to Have The Ability To Make Medical Decisions

MCL 700.5510(1)(d) states plainly, “*even if the patient is unable to participate in medical treatment decisions*, a patient may revoke a patient advocate designation at any time and in any manner by which he or she is able to communicate an intent to revoke the patient advocate designation.” (Emphasis added). This language must be included in the acceptance of a designation as a patient advocate. MCL 700.5507(4)(7). Indeed, Ms. Roush’s PAD included the language, “I reserve the power to revoke this designation at any time by communicating my intent to revoke it in any manner in which I am able to communicate.” Appl. for Leave to Appeal on Behalf of Defendant-Appellant, Ex. A 9, and the Acceptance by the Patient advocate that Mr. Gallagher signed included similar language. *Id.* at 11. Thus, Ms. Roush’s ability to participate in medical decisions at the time she revoked her PAD is simply not relevant to determining the validity of her revocation.

B. There is No Legitimate Dispute Regarding Ms. Roush’s Intent To Revoke Her PAD

The Court of Appeals asserted that whether Ms. Roush revoked her PAD remained an unresolved issue. Amici take the position that there is no legitimate dispute about Ms. Roush’s intent to revoke. Ms. Roush’s revocation of the PAD was an effort to disempower the only person who had legal authority to prevent her from going home. It was accomplished with the assistance of counsel. It was entirely consistent with every action she took throughout her battle to obtain her release from the facility and her statement to the judge in the temporary guardianship hearing, “All I want to do is get [Mr. Gallagher’s] name off from there.” Appellee’s Supp. Br., Ex. 7, Transcript of Hearing on Petition for the Appointment of Temporary Guardian, 11/21/12, 13.

Appellant asserts that there was reason to question Ms. Roush's intent to revoke the PAD. In support of this premise, Appellant asserts that Ms. Roush might have been the victim of undue influence by her family, that there was a genuine dispute about whether she had the requisite capacity to designate a new patient advocate, and that the new PAD her attorney prepared for her did not contain the two witness signatures required by MCL 700.5506(4). These arguments are simply unpersuasive. There is no evidence that Ms. Roush revoked the PAD because of undue influence on the part of her family. Moreover, if individuals who wish to block patients from revoking PADs could easily defeat the revocation by merely raising the possibility of undue influence without any evidence that such influence actually occurred, the Legislature's intent to make revocation as available as possible would be significantly thwarted.

Although MCL 700.5506(4) does require individuals who wish to *execute* PADs to be "of sound mind," the Legislature made absolutely clear, as noted above, that no such requirement existed for an individual to *revoke* a PAD. Ms. Roush might well have been of sound mind at the time she revoked the original PAD and attempted to execute a second one, but, pursuant to the statute, her ability to execute a valid new PAD had no bearing on her ability and clear intent to revoke her original PAD.²

Similarly, the fact that Ms. Roush failed to obtain the signature of a second witness on the new PAD can hardly be construed as evidence that she lacked the intent to revoke her initial PAD. Indeed, it stretches credulity to suggest a technical error is an indication of wavering or uncertain intent. In any case, the lack of a second signature was likely due to the fact that the document was executed at the nursing facility. MCL 700.5506(4) prohibits numerous individuals

² It is true that if individuals who revoke PADs lack the requisite capacity to execute a valid new PAD, they are left in a difficult situation and may ultimately have a guardian appointed to make medical decisions for them. Nevertheless, the Legislature must have anticipated and accepted this possibility when it created entirely different standards for execution and revocation of PADs.

including the “patient's child, grandchild, sibling, presumptive heir, known devisee at the time of the witnessing, physician, or patient advocate or an employee of a...health facility that is treating the patient...where the patient resides, or of a community mental health services program or hospital that is providing mental health services to the patient” from serving as a witness. There may not have been anyone in the facility, other than Ms. Roush’s lawyer who served as the first witness, who was eligible to serve as a witness at the time Ms. Roush attempted to execute the new document.

C. Once Ms. Roush Revoked Her PAD, She Was No Longer Subject To The Provisions of MCL 700.5508(2)

MCL 700.5508 is entitled “Determination of *advocate’s* authority to act.” (Emphasis added). Thus, it pertains to the patient advocate. Once Ms. Roush revoked her PAD, she no longer had an advocate and MCL 700.5508 had no further bearing on her situation. By revoking the PAD, she returned to the situation she would have been if she had never executed a PAD. At that point, if Appellant nursing facility believed Ms. Roush was not able to participate in medical decisions, it was in the same position that it would have been in had she never executed a PAD and that nursing facilities face all the time with the many residents who lack a legal representative but may be of questionable capacity. As noted below, both the Adult Protective Services system and the guardianship system are available to protect individuals in that circumstance.

The circuit court and Appellant suggest that MCL 700.5508(2) required Ms. Roush to resolve any dispute about whether she was able to participate in medical or mental health treatment decisions by filing a petition in court. But because this section pertains to the patient advocate’s authority to act, it can apply in only two situations: either when a dispute arises about

whether a PAD should be activated³, thus empowering the patient advocate to act, or when there is a question whether a person whose PAD has been activated has recovered sufficiently so that the PAD should be suspended pursuant to MCL 700.5509(2). Neither situation applied to Ms. Roush once she revoked her PAD and thus no hearing under this section would have been appropriate. The correct probate proceeding for an individual who is alleged to lack capacity to make medical decisions and does not have a PAD is guardianship.

Amicus State Bar of Michigan Elder Law and Disability Rights Section (ELDRS) argues that “Once a patient advocate designation has been activated through the statutory procedure, the patient advocate’s authority must be recognized as continuing until either another determination is made using the statutory criteria, or a court order is entered.” ELDRS Amicus Br. 12. Similarly, Appellant asserts 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.” Appellant’s Appl. for Leave to Appeal 17. Under this interpretation, individuals who revoke a PAD but whose doctors fail to document their capacity to participate in medical decisions can be detained indefinitely and will be thrust into a state of limbo unless and until they seek a determination in probate court that they have regained their ability to participate in medical decisions. This imposes a significant burden on people who execute a PAD that the Legislature nowhere articulates (since MCL 700.5508 does not apply) and it would be error for a court to require it. “The courts may not read into the statute a requirement that the Legislature has seen fit to omit.” *In re Hurd-Marvin Drain*, 331 Mich. 504, 509; 50 NW2d 143 (1951). The ELDRS’ interpretation defeats the Legislature’s clear intent and deliberate policy choice to make it exceptionally easy to revoke a PAD. What would be the advantage or impact of revoking

³ The time at which two doctors certify that an individual is unable to make or communicate medical decisions is often referred to as the time at which the PAD is “activated.”

the PAD if doing so does not remove the patient advocate or restore a person's rights unless and until a court rules on the ability of the principal to participate in medical decisions or all doctors agree that the person has recovered? Why would the Legislature insert a provision about revocation if the act of revocation has no effect? As the ELDERS' brief itself notes, "[e]ffect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory." ELDRS Amicus Br. 26 (citing *Johnson v. Recca*, 492 Mich. 169, 177; 821 NW2d 520, 525 (2012)). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223, 229 (2013). Thus, the provision enabling patients – including those who are unable to participate in medical treatment decisions – to revoke their PADs "at any time and in any manner," MCL 700.5510(1)(d), must be given its plain and unambiguous meaning.

The ELDRS' interpretation of the law would also make it difficult for attorneys to draft and explain PADs consistent with the statute and with the new understanding that revocation can simply thrust individuals into a state of limbo. Moreover, PAD forms are widely distributed by hospitals, health care providers, and a number of government entities including the Legislature with the obvious intent that they be completed by lay people. When lay individuals read the clear language of the document and the required language in the advocate's acceptance, they will assume that the plain words of those documents regarding their right to revoke at any time and in any manner mean what they say. If they do not, Michigan citizens will be deceived.

Finally, the Appellants' and ELDRS' position would mean that once a PAD is activated, patients who recover assume the burden of proving they are able to participate in medical decisions pursuant to MCL 700.5508 even if they have revoked their PAD and attempted to

remove themselves from the PAD statutory framework. This is troubling because it creates a significantly more onerous burden on individuals who have executed a PAD than they would face if guardianship proceedings were instituted against them. Indeed, in guardianship proceedings, the party seeking to have an individual declared incapacitated has the burden of proving by clear and convincing evidence that the individual for whom guardianship is sought is incapacitated and that the guardianship is necessary. MCL 700.5306. But under Appellant's and ELDRS' interpretation, the patient himself or herself would assume the burden of proof. In addition to the singular impropriety of imposing on a person who has never been adjudicated incapacitated the legal burden of proving his or her ability to participate in medical decisions, Appellees' and ELDRS' proposal also would impose significant practical barriers on individuals like Ms. Roush. Indeed, individuals who reside in nursing facilities may not have access to telephones, funds, legal advice, or other resources necessary to learn of the alleged requirement that they petition the probate court or to carry out that effort. Under Appellant's and ELDRS' understanding, the consequences for an individual like Ms. Roush who failed, after revoking a PAD, to assume the heavy legal and practical burdens of obtaining a determination in probate court are grave—they allegedly lose the right to pursue causes of action that all other individuals may litigate.

D. Since MCL 700.5508(2) Was Inapplicable Once Ms. Roush Revoked Her PAD, The Trial Court Erred In Determining The Existence Of The Statutory Provision Was Dispositive In This Matter.

It is unclear why the circuit court believed that the application of MCL 700.5508(2) was dispositive in this case. The case concerns a number of tort claims, the elements of which have to be proven in circuit court. See the discussion of probate court jurisdiction below. Many elements

of the claims were factual issues that could have been developed through discovery if that process had been allowed to proceed. But because MCL 700.5508(2) did not, for the reasons set forth above, apply in any case, the trial court committed clear error in granting the motion for summary disposition.

II. Once Ms. Roush Revoked Her PAD, Appellant Nursing Facility Violated Her Rights Under State and Federal Law By Preventing Her From Returning Home Or Appearing At Her Court Hearings

When Ms. Roush revoked her PAD, she took herself out of the whole statutory framework related to advance directives. Because she had no patient advocate or other legal representative authorized to make decisions for her, she was entirely free to make her own decisions regarding where she lived and what treatment she received. She should have enjoyed a host of state and federal protections that guarantee nursing home residents and all citizens the right to liberty and self-determination.

A. The Michigan Public Health Code Guarantees Nursing Home Residents The Right To Discharge Themselves

The Michigan Public Health Code contains the explicit, unqualified provision that, “Each nursing home patient⁴ shall be afforded the opportunity to discharge himself or herself from the facility.” MCL 333.20201(3)(d). This requirement is included in the “rights and responsibilities of patients” section of the Code. The same provision requires that each nursing home resident is “entitled to the opportunity to participate in the planning of his or her medical treatment,” *id.*,

⁴ Although individuals who live in nursing facilities are generally referred to as “residents,” the Public Health Code provision, first adopted in 1978, still uses the word “patient” which was the term for these individuals in common usage at the time the provision was enacted.

and is consistent with numerous provisions that ensure residents are accorded the right to self-determination.

Appellant contends that because MCL 333.20201(5) states that the “patient’s representative” *may* exercise the right to discharge a resident, “the reality is that this right also is subject to the decision of the appointed patient advocate.” Appellant’s Appl. for Leave to Appeal 18, n.2. There is no support for this in the statute. First, the provision relates to a representative’s ability to arrange a discharge; it does not speak to the representative’s authority to *block* a discharge. Second, the language in MCL 333.20201(3)(d) is permissive, not mandatory. It does not *require* that a resident’s rights be exercised by her representative. Third, a “patient’s representative” is defined as “the person, designated in writing by a resident...or, if a written designation of a representative is not made, the guardian of the resident.” MCL 333.21703(2). Although Mr. Gallagher was Ms. Roush’s patient advocate at one time, after she revoked the PAD, she had neither a representative who was designated in writing nor a guardian. Thus, after Ms. Roush revoked the PAD, she alone had the right to discharge herself. Because Appellant is a licensed nursing facility, the effort to block her from leaving the facility violated the Public Health Code.

Amicus ELDRS’ brief argues that “A licensed nursing home is prohibited by state and federal law from discharging a patient without an adequate discharge plan approved by the patient’s doctor.” See MCL 333.21776, 42 CFR 483.12, 42 USC 1395i-3(c)(2), 42 USC 1396r(c)(2), and State Operation Manual, Appendix PP—Guidance to Surveyors for Long Term Care Facilities, F284 (Rev. 70, Issues 01-07-11, Effective:10-01-10 Implementation:10-01-10.) . ELDRS Amicus Br. 21. The brief erroneously states, “the nursing home could not simply release Ms. Roush to her home contrary to her doctor’s orders....” *Id.* The cited provisions are

protections for individuals subject to *involuntary* discharges when a nursing facility is evicting a resident, not barriers designed to block residents' exercise of their rights to self-determination.⁵ Moreover, if ELDRS' understanding of the requirement were accurate, any nursing home that failed to create an adequate discharge plan or any doctor who refused to approve the plan would be empowered to block any resident's decision to leave a nursing facility indefinitely, thus permitting the facility and doctor to assure the confinement of any individual under any circumstances without any due process.

B. The Michigan Public Health Code Guarantees Nursing Home Residents The Right To Exercise His or Her Rights As A Citizen, To Participate in the Planning Of His Or Her Medical Treatment, And To Refuse Treatment

The Michigan Legislature intended to assure nursing home residents that their residence in a facility did not infringe on the rights they would enjoy if they were receiving care in the community. To that end, MCL 333.20201(2)(g) mandates that "A patient or resident is entitled to exercise his or her rights...as a citizen...free from restraint, interference, coercion, discrimination, or reprisal." In addition, MCL 333.20201(2)(l) states that, "A patient's or resident's civil...liberties, including the right to independent personal decisions and the right to knowledge of available choices, shall not be infringed and the health facility...shall encourage and assist in the fullest possible exercise of these rights." Detaining Ms. Roush against her will

⁵ The cited Michigan Public Health provision follows requirements relating to legitimate reasons and procedural protections for involuntary discharge, MCL 333.21773, appeal rights in involuntary discharge, MCL 333.21774, and continuing Medicaid funding during involuntary discharge proceedings, MCL 333.21775. MCL 333.21776 itself discusses minimizing transfer trauma which is generally associated with the adverse impact of *involuntary* discharges. See, e.g., Colette I. Hughes, *Liberty from Transfer Trauma: A Fundamental Life and Liberty Interest*, 9 HASTINGS CONST. L. Q. 429 (1982): "Transfer trauma is the medically accepted term of art used to describe the dangerous effects of *involuntary* relocation on nursing home patients." (emphasis added, additional citations omitted). *Id.* at 429. Similarly, 42 CFR 483.12 discusses legitimate reasons for involuntary discharge and procedural protections for individuals who are being evicted. The provision in Appendix PP, the federal Surveyors' Guidelines, refers to 42 CFR 483.12. And while that guideline could apply to voluntary discharges as well as involuntary discharges, it is clearly intended as a benefit for residents, not a barrier.

and preventing her from attending both the hearing on her Writ of Habeas Corpus and, initially, her own guardianship hearing are striking violations of the facility's obligation to assist her in the fullest possible exercise of her rights.

Residents are also guaranteed the right to participate in their care planning, MCL 333.20201(3)(d) and to refuse treatment. MCL 333.20201(2)(f). Since Ms. Roush's most pressing goal for her care was to receive it at home, she was clearly not permitted to participate effectively in her care planning at the facility or to refuse the treatment she received every day at Appellant facility during the period of time she attempted to leave.

C. The Federal Nursing Home Reform Law Similarly Guarantees Nursing Home Residents the Right To Self-Determination As Well As The Right To Be Free From Interference By The Facility, To Participate In Care Planning, To Refuse Medical Treatment And To Exercise Their Rights As Citizens

Federal law mirrors many of the provisions in state law that ensure nursing facility residents do not surrender any of their most basic civil rights when they enter a nursing facility. The introductory statement to the Nursing Home Reform Law's primary resident rights regulation, 42 CFR 483.10, mandates that, "The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident." See also 42 USC 1396r(c) and 42 USC 1395i-3(c). That regulation further provides, "The resident has the right to exercise his or her rights as a...citizen or resident of the United States....The resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights." 42 CFR 483.10(a)(1) to (2). It also requires that residents must be advised of their rights pursuant to the state's Advance Directive law, 42 CFR 483.10(b)(8) and

be free to refuse treatment, 42 CFR 483.10(b)(4), and participate in care planning. 42 CFR 483.10(d)(3). In the federal guidelines for the surveyors responsible for inspecting nursing facilities, surveyors are directed to “Pay close attention to resident or staff remarks and staff behavior that may represent deliberate actions to promote or to limit a resident’s autonomy or choice.” State Operations Manual, Appendix PP—Guidance to Surveyors for Long Term Care Facilities, F151 (Rev. 149, Issued: 10-09-15, Effective: 10-09-15, Implementation: 10-09-15).

D. Pursuant To Common Law, Case Law, and Constitutional Law, Individuals Have The Right To Bodily Integrity Which Includes The Right To Refuse Treatment

One of the most cherished and long-standing rights is an individuals’ right to bodily integrity. The common law recognized the right to freedom from unwanted interference with bodily integrity and the right to informed consent, and these rights have been adopted and enforced in Michigan and throughout the country. If a physician treats a patient without consent, the physician has committed a battery and may be liable for damages. *Zoski v. Gaines*, 271 Mich. 1, 9–10; 260 N.W. 99 (1935). The U.S. Supreme Court and Michigan Supreme Court have recognized that the corollary of the right to informed consent is the right *not* to consent. *Cruzan v. Director, Missouri Health Dep’t*, 497 U.S. 261; 110 S Ct 2841, 111 L Ed 2d 224 (1990); *In re Martin*, 450 Mich. 204, 216; 538 N.W.2d 399, 405 (1995).

Nursing facilities often provide residents the most intimate daily care including assisting them with toileting, bathing, dressing, eating, and a host of other services. Once Ms. Roush revoked her PAD, she alone had the right to provide informed consent before she received care or treatment in Appellant’s facility. She alone also had the right *not* to consent to any and all treatment by the Appellant.

E. If Appellant Believed That Ms. Roush Would Be At Risk If She Returned Home Or Lacked Capacity To Make Well-Reasoned Decisions, It Had The Option Of Contacting Adult Protective Services and Supporting a Guardianship Petition, Two Systems Designed To Determine If Individuals At Risk Need Immediate Protection.

Appellant creates the impression that keeping Ms. Roush in the nursing home against her will was necessary to protect her and that the facility's hands were tied. However, if the facility had concerns about Ms. Roush's safety and welfare or her ability to make well-reasoned decisions about going home, the correct course of action was *not* to make decisions for her or continue to rely on the directions of a former patient advocate who had no continuing legal authority after the PAD was revoked. Instead, the nursing facility was clearly aware of the two appropriate systems available to protect at-risk individuals: Adult Protective Services and the guardianship system. Since Appellant's social worker, Alissa Zank, allegedly acknowledged that she filled out the petition for the appointment of a guardianship for Ms. Roush, Appellee's Supp. Br. Ex. 6, Aff. of Keeley D. Heath, 1-2, the facility was well aware of the opportunity for those who were concerned about Ms. Roush to seek a guardian for her if that was necessary to protect her. Moreover, since the facility reported their concerns to Adult Protective Services after Ms. Roush went home, see Appellant's Appl. for Leave to Appeal, Ex. E, Compl. 4, the facility was also aware of the opportunity to seek protection for Ms. Roush from that agency. Indeed, staff of the nursing facility are mandatory reporters under the state Adult Protective Services provision. MCL 400.11a. Both the guardianship system and the Social Welfare Act in which the Adult Protective Services provisions are found offer individuals considered to be at risk significant due

process protections, a far superior circumstance to facility staff simply deciding for Ms. Roush what was best for her or continuing to confine her because they were not sure.

III. Individuals Whose PAD Was Activated But Who Recovered Or Revoked Their PADs Without Seeking a Determination in Probate Court Retain Their Right To Pursue A Whole Range of Legal Remedies

Appellant erroneously suggests that because Ms. Roush did not seek a determination pursuant to MCL 700.5508(2) at the time she revoked her PAD, the facility should not now be subject to civil litigation arising out of its actions at that time. Appellant's Appl. for Leave to Appeal 17-18. This is a creative but unpersuasive defense even if the Court holds—as Amici dispute—that the hearing available through MCL 700.5508(2) was available after Ms. Roush revoked her PAD. References to the probate court in MCL 700.5506 *et seq.* are grants of power to hear particular issues related to PADs, as authorized by MCL 600.841(1)(a), not exclusive grants of authority over any claims in which the existence of a PAD is a factual issue. The fact that the probate court *may* make a determination on issues related to a patient advocate's authority to act or the intent of a patient to revoke a PAD pursuant to MCL 700.5508(2) or MCL 700.5510(1)(d) cannot be construed to prevent litigants from pursuing any action that must be brought in circuit court simply because that action includes factual issues related to the plaintiff's PAD. Put another way, while the probate court can be an arbiter of a person's ability to make his or her own medical decisions in some circumstances, there is no basis in the law for suggesting that a person must always seek that determination as a prerequisite to sustaining a tort claim under the theories advanced by Appellee.

Indeed, Ms. Roush's tort claims must be brought in circuit court as the court of general jurisdiction, pursuant to Const 1963, art 6, § 13; MCL 600.605. That court is perfectly capable of determining whether she meets the burden of proving the elements of her case.

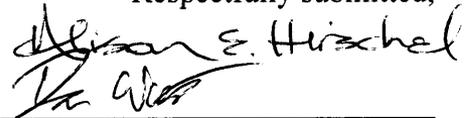
CONCLUSION AND REQUESTED RELIEF

An individual who revokes his or her PAD is removed from the statutory framework provided in the Estates and Protected Individuals Code. The Legislature made clear that individuals are able to revoke a PAD at any time and in any manner. Once the PAD is revoked, the individual is free to exercise the numerous rights afforded to him or her by state and federal statutes, regulations, and case law, including the right to refuse treatment. To impose additional requirements on this power to revoke ignores the clear and plain language of the statute, creates additional burdens that the Legislature did not intend, and would cause confusion among citizens and their health care providers. This does not mean, however, that vulnerable individuals who may lack the capacity to make medical treatment decisions are simply left to their own devices and thereby endangered. For those individuals, the Michigan Legislature saw fit to create both the Adult Protective Services system and the guardianship system, both of which are available to provide necessary and appropriate protections.

Accordingly, Amici respectfully request that the Court deny Appellant's Application for Leave to Appeal and affirm the Court of Appeals decision. In the alternative, Amici ask that the Court grant leave in order to clarify that MCL 700.5508 is not applicable to this case; that MCL 700.5510 provides broad and unambiguous powers for individuals to revoke a PAD; that when a patient has communicated a clear intent to revoke, such revocations must be given immediate effect and no hearing to determine the patient's ability to participate in medical treatment decisions is contemplated in law or required before the revocation is given effect; and that the

absence of a determination in probate court after an individual revokes a PAD regarding that individual's ability to participate in medical treatment decisions does not bar that individual from pursuing a full range of claims available to all other individuals.

Respectfully submitted,



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