STATE OF MICHIGAN
IN THE COURT OF APPEALS

ANTHONY SPALLONE, on behalf of all similarly situated plaintiffs,

Plaintiff-Appellee,

v

STATE OF MICHIGAN DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, And SARA DUNNE, Administrator of Grand Rapids Home for Veterans,

Defendants-Appellants.

Court of Appeals No.

Ingham County Circuit Court
No. 11-1041-CZ

IMMEDIATE ACTION IS REQUIRED ON OR BEFORE OCTOBER 31, 2011 5:00 P.M. UNDER MCR 7.205(E)(2).

MICHIGAN DEPARTMENT OF MILITARY AND VETERANS AFFAIRS AND SARA DUNNE'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

Joseph T. Froehlich (P71887)
Margaret A. Nelson (P30342)
Assistant Attorneys General
Attorneys for Defendants-Appellees
Public Employment, Elections & Tort Div.
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

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STATEMENT OF QUESTION PRESENTED

1. A preliminary injunction is extraordinary relief and should be issued only upon a determination the Plaintiff meet four specific factors establishing entitlement to the requested relief. Did the Trial Court abuse its discretion by issuing a preliminary injunction enjoining Defendants from implementing an approved contract privatizing certain services at the Grand Rapids Home Veterans because Plaintiff failed to meet the requisite burden on each factor and failing to establish entitlement to the requested relief?

Appellants' answer: Yes.

Appellee's answer: No.

Trial Court's answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

US Const, Amend XIV, due process clause;

Const 1963, art 1, §17

STATEMENT OF JUDGMENT / ORDER APPEALED FROM, ALLEGATIONS OF ERROR, AND RELIEF SOUGHT

The Michigan Department of Military and Veteran's Affairs ("DMVA") is a statutorily created Department of the Executive Branch of the State of Michigan. MCL 16.225. The Grand Rapids Home for Veterans ("GRHV"/"the Home") is a unique institution, operated by the DMVA under statutory authority to provide housing and minimal medical care to the State's indigent and disabled military veterans. MCL 36.1; MCL 16.229; *Winklepleck v Michigan Veterans' Facility*, 195 Mich App 523, 491 NW2d 251 (1992). Sara Dunne is the Acting Administrator of GRHV.

Due to a reduction in the Fiscal Year ("FY") 2012 state general fund budget for GRHV of $4.2 million, DMVA was required to either make significant cuts to staff, programs, and services that would effectively close the Home, or look at alternative savings. The only viable alternative was to privatize a large group of state classified positions. Only one group would provide the necessary costs savings—the Resident Care Aides ("RCA"). As a result, a contract between the DMVA and J2S HealthForce Group ("J2S") was executed, and the RCA positions were set to be replaced with competency evaluated nurse aides ("CENAs") provided by J2S on October 1, 2011.

On September 30, 2011, Plaintiff-Appellee Anthony Spallone ("Spallone") filed the instant case in the Ingham County Circuit Court. The present case alleges violations of the due process clauses of the U.S. and Michigan Constitutions relative to the care that may be provided by contracted nursing aide staff CENAs at the

GRHV. On October 12, 13, and 14, 2011, an evidentiary hearing was conducted in the Ingham County Circuit Court, Judge Paula J. M. Manderfield presiding.

On October 14, 2011, the Trial Court entered a preliminary injunction enjoining Defendants-Appellants from "having a private contractor come into the Grand Rapids Home for Veterans to perform the nursing assistant services, in a manner greater than that performed prior to October 1, 2011," and further enjoining Defendants-Appellants from "laying off the state employed Resident Care Aides." (Emergency Application Ex 1, Preliminary Injunction Order).

The Trial Court decision is erroneous on several grounds. First, significant preliminary legal issues were raised by Defendants, including subject-matter jurisdiction and venue. These issues were not addressed by the Trial Court. Further, the Trial Court failed to address the legal deficiencies and efficacy of the due process claims asserted in the Complaint concluding only that the court has not had time to "adequately really delve" into Plaintiff's claims. (Emergency Application, Ex 9—Hearing Tr, Vol II, pp 221-222). The Trial Court also erroneously held "there is a negligence claim" and affidavits addressing different injuries suffered by potential class members resulting in negligent conduct of contract employees." (*Id,* p 222). Yet, no negligence claims have been alleged against these Defendants. (Emergency Application, Ex 3, Complaint, ¶¶ 32-34). Rather, the Complaint alleges that Plaintiff and the putative class members are the "victims" of poor treatment by contract employees who are not parties to this action. (Emergency Application Ex 3, Complaint ¶ 35). As Defendants' response argued,

none of the elements of negligence have been pled. (Emergency Application Ex 5—Response Brief, pp 21, 22). The Trial Court's analysis of the likelihood of success on the merits factor is erroneous, unsupported by the record and the applicable law.

Second, the Trial Court erred in determining that Plaintiff established irreparable harm. Plaintiff's alleged harm is speculative, based on isolated, individual incidents that have occurred with temporary contract staff provided under different contract terms and that may or may not arise in the future. "It is well-settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Dunlap v City of Southfield*, 54 Mich App 398, 403 (1974); see also *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9 n 15. Further, it is again based on the alleged negligence of contract employees who are not parties to this action—conduct for which Plaintiff and putative class members have a legal remedy, if it occurs. Additionally, the Trial Court ignored the evidence establishing that state RCAs also have been involved in incidents of abuse and neglect of individual residents and have otherwise caused injury to the residents similar in nature and kind to that of the contract employees relied on by Plaintiff—indicating the residents are no more likely to be subject to harm by the contract employees than by the state employees. (Emergency Application Ex 5—Defendants' Response Ex 3C, E, F; Ex 9, Tr, Vol II, pp 264, 265). The Trial Court's analysis of the irreparable harm factor is erroneous, and is unsupported by the record and the law.

The Trial Court also made erroneous findings with regard to the balance of harms factor. The evidence indicates the TRO and the preliminary injunction cost the GRHV $18,000 per day in lost savings; that the savings realized from the October 1, 2011 contract will be lost by the end of the first quarter; that the costs related to the continued use of the RCAs will result in a cash shortfall and the expenditure of all appropriated funds for the Home by the beginning of the FY 2012 third quarter, which would require a supplemental appropriation from the Legislature or require closing the Home. (Emergency Application, Ex 9—Hearing Tr, Vol II, pp 204, 205, 212, 214, 215). The Trial Court stated that, "budgets can be adjusted," and that "the home can make cuts in other areas, or perhaps they can get some more money from the state." (Emergency Application, Ex 9, Tr, p 222). This conclusion is contrary to the record. A supplemental appropriation would be required to keep the Home functioning; no other staff, program, or service cuts are available or would achieve the required savings and still leave the Home able to function. (Emergency Application, Ex 9, Tr, pp 210, 211, 215, 216). Additionally, the preliminary injunction will harm the residents because the Home will not be able to make the capital expenditures planned for FY 2012—purchases of medical and physical therapy equipment and remodeling and updating of residents' rooms. (*Id,* Tr, pp 200, 201). Additional cuts to staff, programs, and services and ultimately closing the Home will harm all veterans who are residents and who are potential residents. Further, the Trial Court cited concerns about the staff oversight, training, credentialing, and drug testing—none of which directly impact the

Plaintiff or other residents; all of which can be rectified with policy and systemic changes.

Unless relief is granted by this Court, Defendants will be continue to incur a significant budget impact that will substantially hinder the administration of the Home requiring significant reductions in programs and services, dramatic staff reductions, and potentially downsizing and even closing the facility.

STATEMENT OF FACTS

The GRHV is a residential facility that provides independent living and long-term nursing home services to veterans and their spouses. The Home contains one "domiciliary unit" for independent living, which currently has 84 residents. The Home has 13 (thirteen) nursing units. Three of these nursing units are secured. Two of the secured units service elderly dementia patients who require a secure environment because they wander, can get lost, and are unable to independently function. The third unit houses Alzheimer patients who require a secure environment and are combative with staff and other residents. This is the "Courtyard" unit. Currently the Home has 500 residents in these thirteen nursing units. (Emergency Application Ex 5—Response Ex 3, Cripps Affidavit, ¶ 3; Ex 9, Tr, Vol II, 244, 245). Admission to the Home is voluntary. No involuntary or other court commitments are accepted for admission to the Home. (*Id,* Cripps Aff ¶ 10). Residents are free to leave the Home if they choose. If a resident chooses to leave the Home, staff provides assistance in locating another residence and in making the move. (*Id,* Cripps Aff, ¶ 10).

GRHV staffs its nursing units based on its current resident population. The current nursing care staff for the Home consists of the following positions: Director of Nursing; Assistant Director of Nursing; 7- Nurse Manager 14s; 4 - Nurse Manager 13s (2 are House Supervisors; 1 is the Infection Control Coordinator; 1 is currently vacant); 43 Nurse Manager 12s; 6 LPN Supervisors; 3 RNs; 82 LPNs (8 are currently vacant); and 170 Resident Care Aides (RCA). These are all state classified service positions and are filled by state employees. In addition, the Home

contracts four full-time, permanent nurse aide positions—CENAs—for the Courtyard Unit, and for temporary fill-in nursing aides for the other twelve units. (*Id,* Cripps Aff, ¶ 4). The Home requires a minimum of 130 RCAs per day—more if special assignments are required. (Emergency Application, Ex 9, Tr, Vol II, p 244). Twelve of those positions are filled by contracted CENAs and permanently assigned to the Courtyard Unit. (Emergency Application, Tr, Vol II, pp 244, 245). The remaining 118 staff the other 12 nursing units. (*Id)* These are the positions filled by the state RCA employees. On average during the week (Monday through Friday), 48 of these RCA positions are temporarily filled by contract employees because the state employees are on leave or otherwise absent. On average during the weekends (Saturday – Sunday), 58 positions are temporarily filled by contract employees because the state employees are on leave or otherwise absent. (Emergency Application Ex 9, Tr, Vol II, p 245).

J2S HealthForce Group (J2S) is the contractor that provides the CENA staff for the Courtyard Unit and the temporary fill-in CENA staff for all other units. The temporary CENA aides fill-in for the state RCAs who call in sick, are on other approved leave, are absent for other reasons, and for vacant positions. (Emergency Application, Ex 5—Response Ex 3, Cripps Aff, ¶ 4). J2S has contracted with GRHV to provide CENAs since at least 2001. (Emergency Application Ex 5—Response Ex 2, Alderman Aff, ¶ 6).

GRHV receives its funding from several sources. A portion comes from the residents' payments (only 47 of who pay the full assessment); a small portion comes

from Medicaid and Medicare reimbursements; a portion is provided by the state in its general fund budget; and a portion comes from the Veterans Administration. (*Id,* Alderman Aff, ¶ 4). For FY 2012, which began October 1, 2011, the State Legislature cut the Home's general fund budget allocation by $4.2 million. (*Id,* Alderman Aff, ¶ 5). In addition, the Home anticipates being assessed a negative supplemental appropriate for FY 2012 in the amount of $921,300 for its allocated share of $145 million wage and fringe benefits cost reductions. As a result, GRHV was required to either make significant cuts to staff, programs, and services that would effectively close the Home, or look at alternative savings. (*Id,* Alderman Aff, ¶ 5). The only viable alternative was to privatize a large group of state classified positions. Only one group would provide the necessary costs savings—the Resident Care Aides (RCAs). (*Id,* 2, Alderman Aff ¶ 6, Emergency Application Ex 9, Tr, Vol II, pp 204, 205, 209-210).

RCAs are not licensed, and are not required to be certified to meet State Civil Service qualifications. However, Veterans Administration regulations require all nursing aides be competency certified. As a result, all RCA and contract CENAs are certified nurse aides. (*Id,* Alderman Aff ¶ 6; Emergency Application Ex 5—Response Ex 3, Cripps Aff ¶ 4).

The Michigan Civil Service Commission (CSC) must first approve all disbursements for the purchase of services outside the classified service before an appointing authority (state employer) may contract for such services. (Emergency Application Ex 5—Response Ex 1, Graham Aff ¶ 3 and Affidavit Ex A, CSC Rule 7-

1). CSC Rule 7 provides the procedure and the standard under which a state agency may request approval to purchase services outside the classified service. (*Id,* Graham Aff ¶ 3, Ex A). On June 22, 2011, the DMVA submitted its CS 138 request for approval to purchase contract services for GRHV in the place of its classified RCA positions. (*Id,* Graham Aff ¶ 3 and Aff Ex B). The request was based on CSC Rule 7-3(d)—the personal services would be obtained at substantial savings when compared with the same services performed by the classified work force. On July 20, 2011, Civil Service approved the request. (*Id,* Graham Aff ¶ 3). As a result, DMVA initiated the contracting process. A Request for Proposal was prepared and posted to solicit bidders. (*Id,* Graham Aff ¶ 4). Ten bids were submitted. The bidders and bids were reviewed by a Joint Evaluation Committee and J2S HealthForce Group was awarded the contract. (*Id, Graham* Aff ¶ 5). The contract was then submitted to the State Administrative Board and was approved September 15, 2011. (*Id,* Graham Aff ¶ 5).

There are substantive differences between the prior contract with J2S under which CENA contract employees were provided to staff the Courtyard Unit, and as fill-ins in other units, and the new October 1, 2011 contract. The October 1, 2011 contract requires the contractor provide only certified nurse aides; with a minimum of one-year of experience in a long-term care facility. This one-year of experience was not previously required. The CENA employees must be drug tested at the time of employment and criminal background checks are required. Additionally, 2% of the CENA contract employees will be subject to monthly random drug testing—a

higher percentage than is required of the RCA state employees. The CENA contract employees are also required to complete 16 hours of orientation training—8 hours of classroom instruction and 8 hours of job shadowing at the Home. The contractor is also required to provide two CENA supervisors per shift. This supervision was not previously required. The CENA employees are also supervised by the nursing staff of the Home. The contractor is also required to provide the employment files for each CENA employee containing credentials and verification of the drug testing and background check. The Contractor will assign staff consistent with the Homes' practices and scheduling. Unlike the temporary staff previously provided, each CENA employee will be permanently assigned to a specific position on an assigned nursing unit at the Home to provide continuity of care. (*Id,* Graham Aff ¶ 7, E and D, Contract Articles 1.021 – 1.031; Emergency Application, Ex 5—Response Ex 3, Cripps Aff ¶ 8; Emergency Application Ex 9, Tr, Vol II, pp 241-242).

The final contract price approved by the State Administrative Board results in savings of $5.8 million annually over the 5-year period of the contract. This results in a net benefit to the Home of $1.6 million for FY 2012 after offsetting the $4.2 million reduction in state general funds. This net benefit will be used to cover the anticipated $921,300 wage and fringe benefits cost reductions being allocated to the Home in the proposed FY 2012 negative supplemental appropriation. The application of savings from the October 1, 2011 contract to this negative supplemental appropriation will avoid further staff lay-offs and any reduction in members' services. The remaining $700,000 is budgeted for unemployment

payments and leave balance payouts to employees affected by the privatization of the RCA services. (Emergency Application Ex 5—Response Ex 2, Alderman Aff ¶ 9; Emergency Application Ex 9, Tr, Vol II, pp 204, 205).

Currently, the cost to the Home for wages and fringe benefits for the state RCAs is $36,000 per day. The daily costs for the October 1, 2011 contract is $18,000, resulting in a net savings per day of $18,000. However, this daily net savings is lost and total net savings for the year are reduced by the additional $18,000 daily cost if state RCAs are retained after September 30, 2011. (Emergency Application Ex 9, Tr, Vol II, pp 211-212). This loss will continue as long as the state RCAs continue to work at the Home. Because of the budget uncertainty created by the retention of the state RCAs after September 30, 2011, other capital improvements and purchases scheduled for FY 2012 must be delayed. This includes the purchase of medical equipment and the scheduled conversion of 4-bed rooms to 2-bed rooms, all which impact the residents' quality of life. (Emergency Application Ex 5—Response Ex 2, Alderman Aff ¶ 10; Ex 9, Tr, Vol II, pp 200-201).

Plaintiff's complaint is premised on this anticipated change from state employee RCAs to contracted CENAs. Plaintiff alleges the residents of GRHV will not receive adequate care from the contract CENAs provided by J2S Group. Spallone alleges that he and his fellow residents of GRHV face "significant injury, and certainly abuse and neglect at the hands of a private company which is contracted by the state to provide nursing assistant care." (Emergency Application Ex 3, Complaint, ¶ 1). However, Plaintiff does not claim to have actually been

injured or mistreated himself. No such allegations appear in the Complaint. Plaintiff's Affidavit indicates he takes care of himself.

Plaintiff speculates that by using J2S Group employees to provide RCA services, GRHV will violate federal standards governing the administration of veterans' homes. (Emergency Application Ex 3, Complaint ¶¶ 24-27). The alleged future violations regard the quality and condition of the facility, the quality of services provided, training and evaluation of employees, and staffing levels. (*Id,* Complaint ¶¶ 24-27). Plaintiff also asserts that Veterans Administration rules regarding the administration of the home will be violated by J2S Group employees. (*Id* Complaint ¶¶ 28-29).

Physical injuries to residents are not limited to contract staff, though. State employees, including RCAs have been reported and investigated for similar incidents, physical injuries, and abuse or neglect of residents. (Emergency Application Ex 9, Tr, Vol II, pp 265, 266). **For** example, between June 7, 2010, and September 12, 2011, a total of 8 "sentinel" events—incidents required to be reported to the Veterans Administration—occurred and were identified. Sentinel events are incidents resulting in physical injury or impacting quality of life. Of these eight sentinel events, two were the incidents identified by Mr. Skorupski involving J2S staff. Four incidents involved state RCA staff and two involved multiple state employees, including at least one RCA. (Emergency Application Ex 5—Response Ex 3, Cripps Aff ¶ 9 and Affidavit Ex C). Additionally, three complaints were investigated in August 2011 involving a claim of sexual harassment by a state RCA

toward J2S staff resulting in a suspension; retaliation/threatening behavior against another state employee for reporting an incident to administration resulting in a suspension; and verbal abuse of a resident reported by a state employee also resulting in a suspension. *(Id,* Cripps Aff Ex E, F).

The attendance and care issues alleged in the Complaint occur with state RCAs as well. (*Id,* Ex E). Between September 1 and September 26, 2011, state RCAs routinely called in at the time of their shifts to report their absence from work—use of leave. The numbers were above the average staff call-ins on many days, one day as high as 26. (*Id,* Cripps Aff, ¶ 9, Exs D, E). Attendance, conduct toward other employees or residents, language issues, failures to complete assignments, sleeping on duty, and other similar conduct and care issues resulted in 110 verbal or written counsel or written reprimands to state RCAs in 2010 and 79 in 2011 to date. (*Id,* Cripps Aff ¶ 9 and Affidavit Exs E, F).

In 2009, 15 complaints involving nursing staff were received from residents or family members. Only one involved contract staff. Twenty-six complaints involving nursing staff were received from residents or family members in 2010. Only two involved contract staff. (*Id,* Cripps Aff ¶ 9).

Incidents such as falls, care, and feeding issues identified in the Complaint were often not reported to administration. (*Id,* Cripps Aff ¶ 9). As a result, administration initiated an independent examination of the nursing care issues that was conducted by Bradford Slagle, Administrator of the Dominic J. Jacobetti Home for Veterans (DJJHV) in Marquette, Michigan. He is familiar with all

Veterans Administration regulations, and the Home's policies and procedures. His review included all deaths that occurred between September 1, 2010 and September 23, 2010; sentinel events, recent staff performance issues, transfers to other skilled nursing facilities, falls, and hospitalizations. Mr. Slagle notes that 288 reported falls occurred in the last 90 days of his review period at GRHV. He concludes this is a typical number given the population and is consistent with the fall rate at DJJHV. He also noted that none of the sentinel events involved staff error. He also reviewed two recent "employee incidents" involving contract staff—one occurring August 23, 2011, involved failure to follow feeding requirements; one occurring on September 21, 2011, which involved the resident's fall off the bed fracturing a vertebra in his neck. Each was investigated and resulted in removal of the individual from the site. He also discusses the incidents involving staff RCAs that resulted in suspensions. (Emergency Application Ex 5—Response Ex 3, Cripps Aff ¶ 9 and Affidavit Ex G).

The Home has a process in place for reporting complaints involving J2S Group contract employees. A J2S complaint form is completed by the Unit Charge Nurse (LRN) and a Unit LPN describing the incident. It is submitted to the Unit Coordinator and J2S. If the complaint involved a "sentinel" event or other serious issue, it is reported to the Director of Nursing by the Unit Coordinator. Otherwise, the incident is reported to the Director of Nursing only if the Unit Coordinator is dissatisfied with the contractor's resolution. (Emergency Application Ex 9, Tr, Vol III, pp 5, 7). Over the past 2½ years, the Director of Nursing has directed the

contractor to terminate people from the Home on 5 or 6 occasions. *(Id,* Tr, Vol III, p 6).

Plaintiff's Complaint and the motion for preliminary injunction also rely on perceived or potential violations of federal regulations that may occur if the state RCAs are replaced. For example, Plaintiff alleges and argues that contract staff is not properly trained; that the facility will not be kept clean; and that the quality of life for the residents will be severely impacted. The Veterans Administration in its most recent survey of the Home concluded otherwise, though. The last annual survey, conducted October 22, 2010, concluded that the Home met all training, competency, and proficiency requirements for its permanent and temporary nurse aides. (*Id,* Ex 3, Cripps Aff ¶ 6 and Affidavit Ex A, pp 5, 6). The survey also concluded the Home met the nursing staff requirement of 2.5 hours of direct care for every resident in a 24-hour period. (*Id,* Ex 3, Affidavit Ex A, p 42). Currently, the Home staff exceeds the minimum hours required. Current staffing provides 2.85 hours of direct nursing care per resident 24 hours per day, 7 days per week. (*Id,* Ex 3, Cripps Aff ¶ 4; Ex 9, Tr, Vol II, pp 254-256).

Spallone also alleges and argues the contractor will not be able to provide CENA staff for the Home because of the compensation being paid. However, J2S recently hired 201 CENA employees to fill its obligations under the October 1, 2011, contract. J2S pays its CENA employees $10-$11 per hour, which is consistent with the average statewide starting salary for this job. (*Id,* Ex 3, Cripps Aff ¶ 5; Emergency Application Ex 5—Response Ex 4, 2011 Salary Survey).

The Home is concerned about continuity of care for the residents during the transition period from state RCAs to contract CENAs. (Emergency Application, Tr, Vol II, p 246). Based on experience with new hires and other replacement staff, the Director of Nursing expects a 2 to 4 week period for the CENAs to learn the routine and the residents on their assigned shift and unit. (*Id,* Tr, Vol II, p 249). This change and transition is typical of what residents experience with other staff changes resulting, for example, from transfers to a different unit, transfers to a different facility altogether, transfers to and from the hospital, when caregivers go on extended leave, and with new hires. GRHV has 15-20 RCAs on extended medical leave currently and hired 12 RCAs in December 2010 to replace recent retirees. (*Id,* Tr, Vol II, pp 250, 251). Other direct care staff will remain, though. This includes the RNs and LPNs assigned to each unit. Only the RCAs are being replaced. (*Id,* 246, 247*).* Additionally, the Home has been working with the residents on the transition for the past two months. The residents will be monitored and assessed for any problems when the transition begins. (*Id,* pp 252-253).

After a multiple day hearing, the Trial Court made the following findings:

- J2S has put out online advertising for nursing aides indicating three months experience and six months experience required to work at the GRHV, contrary to the contract requirements; (*Id,* Tr, Vol III, p 217).
- The Trial Court expressed concern that one particular contract employee who had been the subject of several complaints was still working at the Home;
- The training of J2S employees is minimal;

- The drug testing procedure used by J2S is inadequate;
- There is no direct oversight by the Director of Nursing regarding complaints involving contract employees where the resident fell or was physically injured;
- There are a variety of incidents that concern the court with quality and competency of the CENAS provided by J2S; the court is not confident they can provide adequate direct patient care;
- That one former J2S employee who was hired in June 2008 testified that of the 20 CENAs, she oriented with, only three are left; another testified there was never any annual evaluations, and that no specific training on the use of the various types of lifts was provided. (*Id,* Tr, Vol III, pp 217-221).

Based on these findings the Trial Court concluded Plaintiff established irreparable injury if the injunction is not issued; although the court indicated it did not have time to adequately delve into the legal issue, it believed there was a negligence claim pled and that the conduct of the contract employees indicates a likelihood of success on the merits of that claim; with respect to the balance of harms, the court concluded Defendants' only harm is budgetary and because budgets can be adjusted and the Home can make cuts in other areas and perhaps get more money from the state, the Plaintiff prevailed on this factor; that because the public constitutes the people, part of whom are living in the Home, Plaintiff also prevails on this factor. (*Id,* Tr, Vol III, pp 221-223).

A Preliminary Injunction Order enjoining Defendants from laying-off the state RCAs and replacing them with the contract CENAs was signed October 14, 2011. Defendants moved for a stay of the Preliminary Injunction Order that was denied that same date. That Order was also signed October 14, 2011, and entered by the Clerk on October 17, 2001.

PROCEEDINGS BELOW

Spallone filed his Complaint on September 30, 2011, and obtained a Temporary Restraining Order that same day without notice. A hearing on Plaintiff's request for a preliminary injunction was scheduled for October 12, 2011. An evidentiary hearing was held on October 12, 13, and 14, 2011. At the conclusion of the hearing and argument, the Trial Court granted and signed the preliminary injunction enjoining Defendants-Appellants from "having a private contractor come into the Grand Rapids Home for Veterans to perform the nursing assistant services, in a manner greater than that performed prior to October 1, 2011," and further enjoining Defendants-Appellants from "laying off the state employed Resident Care Aides." (Emergency Application, Exhibit 1). A motion to stay the preliminary injunction and all other proceedings in the Trial Court was denied. This appeal of the grant of the preliminary injunction and denial of stay followed.

ARGUMENT

I. A preliminary injunction is extraordinary relief and should issue only upon a determination the Plaintiff meet four specific factors establishing entitlement to the requested relief. The Trial Court erred in concluding Plaintiff met this burden and is entitled to the issuance of a preliminary injunction.

A. Issue Preservation

The issues specific to the issuance of the preliminary injunction were raised and preserved below in the written response filed by Defendants; the evidentiary hearing before the Trial Court and the oral argument presented below.

B. Standard of Review

A trial court's decision to grant a preliminary injunction is reviewed for an abuse of discretion. *Alliance for Mentally Ill of Michigan v Dep't of Community Health,* 231 Mich App 647, 661 (1998).

C. Analysis

A preliminary injunction is extraordinary relief and "should issue only in extraordinary circumstances." *Michigan State Employees Ass'n v Dept of Mental Health,* 421 Mich 152, 157, 158 (1984); *Michigan Coalition of State Employee Unions, et al v Civil Service Commission,* 465 Mich 212, 226, n 11 (2001). The issuance of this extraordinary relief is determined by a four-factor analysis:

> [H]arm to the public interest if an injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and the demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. [Citation omitted]. This inquiry

> often includes the consideration of whether an inadequate legal remedy is available to the applicant.

Michigan State Employees Ass'n, 421 Mich at 157, 158. Plaintiff had the burden of proof on each of these factors. MCR 3.310(A)(4). Plaintiff failed to meet this burden in all respects.

1. Likelihood of success on the merits.

On this factor the Trial Court concluded it "is at somewhat of a disadvantage to try to rule on this issue because it's complicated." (Ex 9 Tr, Vol III, p 222). The Trial Court believed it hadn't had enough time to "delve" into the due process claim premised on alleged violations of various federal regulations governing the operations of the Home. (*Id* at 222). Not only did the Trial Court fail to address the legal validity of Plaintiff's due process claims, it also ignored other significant legal issues raised by Defendants, including standing and jurisdiction. Rather, the Trial Court gratuitously concluded "But there is also a negligence claim, but there's been affidavits by potential class members resulting from negligent conduct of contract employees. So I believe that Plaintiff has established that the likelihood to proceed on one or more of the claims in the complaint on the merits." (*Id,* at p 222).

This ruling is a clear abuse of discretion. First, as noted, the Trial Court failed to address the Complaint's significant legal deficiencies—the court's jurisdiction, venue, and the very justiciability of the claim. Second, the Trial Court erroneously concluded that Plaintiff had pled a negligence claim against these Defendants. Third, the Trial Court applied the wrong standard. This factor does

not analyze the "likelihood to proceed on one or more of the claims . . . on the merits." It requires analysis of the likelihood of success on the merits, which requires a different result here.

a. Plaintiff's due process claims fail as a matter of law.

Plaintiff alleges that Defendants will deprive him and the putative class members of their "due process rights" under the 14th Amendment of the U.S. Constitution and Article I, Section 17 of the Michigan Constitution. This claim is based on the allegation that "residents of a government run long-term care facility have a due process right not to be abused or face a significant risk of mental or physical harm." (Ex 3, Complaint, ¶ 33). The Complaint also alleges that "residents have a right of notice and opportunity to be heard," presumably regarding the change of RCAs from state employees to contract employees. (*Id,* Complaint, ¶ 33). Finally, the Complaint states that "the continued reliance on contract employees, who abuse residents at GRHV, even though residents have complained on numerous occasions, is a deprivation of life and liberty." *Id,* Complaint, ¶ 33). But there are no protected liberty interests and no procedural due process rights under the facts extant. The federal regulations relied on by Plaintiff do not, as a matter of law, create the claims substantive or procedural interest. Nor is the asserted fundamental or "liberty" interest inherent in the interests protected by the respective due process clauses.

Due process, which is similarly defined under both constitutions, specifically enforces the rights enumerated in the Bill of Rights, and it also provides for

substantive and procedural due process. *Palmer v Bloomfield Hills Bd of Ed*, 164 Mich App 573, 576 (1987); *Daniels v Williams*, 474 US 327, 337 (1986). The Fourteenth Amendment also contains within it "a substantive component," which protects "fundamental rights and liberties" that are not expressly mentioned in the Bill of Rights but that are objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Planned Parenthood v Casey,* 505 US 833, 846 (1992); *Washington v Glucksberg,* 521 US 702, 720-271 (1997) (internal quotation marks and citations omitted). Such rights have been deemed to include, for example, the rights to marry, to have children, to direct the education/upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. *Glucksberg,* 521 US at 720 (internal citations omitted). The United States Supreme Court has cautioned, though, that it has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Glucksberg,* 521 US at 720 (quoting *Collins v Harker Heights*, 503 US 115, 125 (1992)). No such fundamental interests are at issue here.

In argument below, Plaintiff relied on *Wyatt v Poundstone*, 892 F Supp 1410, 1412 (MD Ala 1995), for the proposition that "due process has been interpreted to substantively protect the right to safe conditions in a government operated mental health facility." (Emergency Application Ex 4 –Brief in Support, p 4). The facility in the *Wyatt* case was an adolescent "penal" facility for "antisocial adolescent,

conduct disorder patients who get in trouble with the law, and are sent to a secure psychiatric facility as a less restrictive alternative to incarceration." *Id*. at 1412-1413. The Center was essentially a "correctional facility" with a "penal atmosphere." *Id*. at 1413. Its program was "punitive" and "not nearly so therapeutic as it might have been." *Id*. "There was an excessive reliance on seclusion, a large number of patient injuries, allegations of staff abuse, programming that was overly restrictive and punitive in nature." *Id.*

In finding that the residents of the Center had a due process right to safe conditions, the Alabama Court relied on *Youngberg v Romeo*, 457 US 307, 324 (1982), which held that persons involuntarily committed to state institutions have a constitutionally protected liberty interest under the due process clause of the Fourteenth Amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably might be required by these interests. *Id.*

The *Wyatt* Court stated that the right to safe conditions in institutions where persons are not free to leave "constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Id.* at 315 (quoting *Ingraham v Wright*, 430 US 651, 673 (1977)). Most importantly, the Court found that "this right applies to those civilly committed for non-penal purposes." *Wyatt*, 892 F Supp at 1421, (*citing Youngberg*, 457 US at 315; *Society for Good Will to Retarded Children, Inc v Cuomo*, 737 F2d 1239, 1246 (2d Cir 1984). The *Wyatt* Court did not establish a due

process right that applies to persons who are voluntarily receiving care from an institution, and are otherwise free to leave or seek treatment elsewhere.

The GRHV is not a "government operated mental health facility." The GRHV is a unique institution, operated by the DMVA under statutory authority to provide housing and medical care to the state's military veterans. But even if it were a "government operated mental health facility," neither Plaintiff nor any other resident of the GRHV have been involuntarily committed to the Home for non-penal purposes. Residency at the Home is completely voluntary, and the residents are free to leave at any time they wish. The fact that some residents may not be physically or mentally able to leave without assistance, does not change the voluntary nature of their residency at GRHV.

Only when the state takes a person into its custody and holds him against his will, restricting his ability to protect himself, does the Constitution impose upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg, supra*, 457 US at 317. The rationale for this principle is simple enough. When the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Due Process Clause. See *Youngberg, supra*, 457 US, at 315-316. Thus, the affirmative duty to protect asserted here arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help

him, but from the limitation that it has imposed on his freedom to act on his own behalf. *Estelle v Gamble*, 429 US 97, 103 (1976). In the substantive due process analysis, it is the state's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—that is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means. Thus, no substantive due process right extends to the situation presented here—a voluntary residence.

Because Plaintiff has no substantive due process right regarding the care he receives at GRHV, his procedural due process claim is also without merit. A procedural due process claim can only be maintained where there exists a constitutionally cognizable liberty or property interest with which the state has interfered. *Bd of Regents of State Colls v Roth*, 408 US 564, 569 (1972).

Procedural due process claims are examined under a two-part analysis. First, the Court must determine whether the interest at stake is a protected liberty or property interest under the Fourteenth Amendment. *Mathews v Eldridge*, 424 US 351, 332 (1976). Only after identifying such a right will the Court continue to consider whether the deprivation of that interest contravened the notions of due process. *Roth*, 408 US at 570-571; *Kentucky Dep't of Corrections v Thompson*, 490 US 454, 460 (1989); *Ferencz v Hairston*, 119 F3d 1244, 1247 (6th Cir, 1997). No protected interest arises under the facts here—the cited federal regulations relied

on here do not create a substantively protected interest, nor do they recognize any right to notice or opportunity to be heard when the Home changes its staffing.

Similarly, no state protected interest that would be accorded substantive or procedural protection exists. State-created liberty interests arise only when the state places "substantive limitations on official discretion." *"Tony" L. and "Joey" L. v Childres,* 71 F3d 1182, 1185 (6th Cir, 1995); *Kentucky Dep't of Corr v Thompson,* 490 US 454, 462 (1989). Such substantive limitations on official discretion require the establishment of "substantive predicates" to govern official decision-making, as well as mandating "outcomes to be reached upon a finding that the relevant criteria have been met." *Id.* State statutes or regulations "must use 'explicitly mandatory language' requiring a particular outcome if the articulated predicates are present." *Id.*

Here, Plaintiff's Complaint does not rely on any state law or regulation imposing such limitations on the Home. No state regulation or law providing official discretion in how to staff the GRHV or who to staff it with is identified. Further, the federal regulations relied on do not impose such limitations either. There is no mandate to use only state employees at the GRHV. If that were the case, the Home would be in continuous violation because it uses contract staff now and has since at least 2001 to provide direct care services to residents. Neither Plaintiff nor any other resident has a due process right to service from only state employees. Further, the facts establish the same or similar violations by state employees that Plaintiff attributes to contract staff and relies on in support of this

claim. In other words, requiring the GRHV to use only state employees as RCAs would not provide any greater protection to the residents or eliminate the possibility of any injury in the future. Finally, Plaintiff's claim is premised on the services to be provided by contract employees under a different contract that provides for different qualifications, supervision, and staffing than was previously in effect. Even under those different terms, though, the GRHV met all the federal regulations regarding competency of staff, training, care, and other proficiency requirements. That is not likely to change under the more comprehensive qualifications and supervision required by the October 1, 2011 contract.

Even if the law recognized a substantive or fundamental interest here, adequate procedures exist to protect those rights. First, the Home has a complaint process utilized by residents, family members, and others. Second, the care staff is mandatory reporters of suspected abuse and neglect of the residents under the Vulnerable Adult Protective Services Act. MCL 400.11. Third, Plaintiff could have contested Civil Service's approval of the purchase of personal services to replace the state RCAs but did not. CSC Rule 7-6.3. In addition, Article 11, Section 5 of the Michigan Constitution provides that "violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by *any citizen of the state*." (Emphasis added). As a citizen of Michigan, Plaintiff could have brought a suit challenging the Civil Service Commission's approval of the purchase of personal services to replace the state employee RCAs. As with his other procedural remedies, Plaintiff failed to avail himself of the

process. Finally, Plaintiff could have voiced his concerns regarding the J2S Group RCAs by appearing before the Board of the GRHV. The Board holds open meetings several times per year where any person can appear and voice their concerns over any issue involving GRHV.

This due process claims fail as a matter of law. The Trial Court abused its discretion in failing to decide this issue in Defendants' favor.

b. The Complaint does not plead a negligence claim—contrary to the Trial Court's conclusion.

The Trial Court erroneously concluded ". . .there is also a negligence claim" in this action. (Ex 9, Tr, Vol III, p 222). Yet, the only allegation referencing negligence is found in Complaint ¶ 34, "[T]he transfer of the facility to being operated by J2S Group will dramatically worsen the negligence which the veterans are already the victims of now." This allegation does not state a claim for negligence against these Defendants. *Haliw v Sterling Hts*, 464 Mich 297, 309-310 (2001); *Schultz v Consumers Power Co*, 443 Mich 445, 459 (1993).

The Complaint merely alleges negligent conduct by the contract employees. It is this "negligent conduct" Plaintiff relies on to support his due process claim, which the Trial Court concluded was too "complicated" to decide on a preliminary injunction. (E 9, Tr, Vol III, pp 211, 222).

c. Plaintiff lacks standing.

Plaintiff lacks standing to bring these claims. Plaintiff has not alleged a requisite injury-in-fact to support standing to bring the asserted due process claims on his own behalf or as the putative representative of the class identified in the Complaint. (Ex 3, Complaint, ¶ 10). Because Plaintiff is unable to establish a claim against the Defendants under the alleged legal theories, he lacks standing to pursue this matter. Under the most recent iteration of Michigan's standing doctrine, a litigant has standing only when there is a legal cause of action. *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 (2010). Furthermore, a plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties. *Fieger v Commissioner of Ins*, 174 Mich App 467 (1998), *citing Warth v Seldin*, 422 US 490, 499 (1975); *Tileston v Ullman*, 318 US 44 (1943).

Here, Plaintiff has no legal cause of action. He has no claim for negligence, and no due process claim under either the U.S. or Michigan Constitutions. Furthermore, he has no legal right to otherwise assert the interests of the other GRHV residents. As such, he lacks standing to pursue these claims. The Trial Court erred by not considering this issue.

d. The Trial Court lacks jurisdiction over this Complaint and, alternatively, venue is improperly laid in Ingham County.

The Court of Claims has exclusive jurisdiction over claims against the State of Michigan arising *ex contractu* and *ex delicto*. MCL 600.6419. The administrator of the GRHV, a public officer, may also be within the exclusive jurisdiction of the Court of Claims when sued in her official capacity for the performance of her official duties and responsibilities. *Hamilton v Reynolds,* 129 Mich App 375 (1983), app den 422 Mich 891 (1985).

Defendants here are the DMVA, which is unquestionably a Department of the State, and Sara Dunne, the Acting Administrator of GRHV, who is sued in her official capacity. Undoubtedly, though, the real party in interest is the DMVA and/or the State of Michigan. Plaintiff's Complaint is devoid of any allegation against Dunne and relies exclusively on decisions and actions taken by the DMVA regarding the replacement of the state RCAs. It is that decision the Complaint seeks to enjoin.

The fact Plaintiff's Complaint seeks only equitable relief does not remove it from the Court of Claims' exclusive jurisdiction. As the Michigan Supreme Court has observed, "[t]he plain language of § 6419(1)(a), the primary source of jurisdiction for the Court of Claims, does not refer to claims for money damages or to claims for declaratory relief." *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 772; 664 NW2d 185 (2003). The *Parkwood* Court makes clear that whether a plaintiff seeks money damages or other monetary relief

is entirely irrelevant to determining whether the Court of Claims possesses exclusive jurisdiction. In short, it is the essential nature of the claim—and not the particular type of relief sought—that determines whether the Court of Claims possesses exclusive subject-matter jurisdiction.

Plaintiff's Complaint is founded upon an alleged wrong or tort and, thus, arises *ex delicto*. *Lowery v Dep't of Corrections*, 146 Mich App 342, 347-348; 380 NW2d 99 (1985), quoting Black's Law Dictionary (4th Ed), p 660. It is within the exclusive jurisdiction of the Court of Claims. Plaintiff apparently agreed with this analysis because on October 12, 2011, the identical Complaint was filed in the Court of Claims and assigned Docket No. 11-113. It too was assigned to Judge Manderfield. However, she took no action when this new case was brought to her attention continuing with the Trial Court case. The Preliminary Injunction Order was entered in the Trial Court action.

The Trial Court erred and abused its discretion in failing to address this issue. It acted without jurisdiction. As such, the Preliminary Injunction Order signed October 14, 2011 is void; this case should be dismissed. *Fox v Board of Regents of the University of Michigan*, 375 Mich 238, 242 (1965).

Alternatively, should this Court conclude jurisdiction lies in the Trial Court; venue was improperly laid in Ingham County. The Home is located in Kent County; the actions on which the Complaint is based occurred or "will occur" in Kent County; the Defendant is located in Kent County; the Plaintiff and putative class members are located in Kent County as are all witnesses. The Ingham Circuit

Court lacked venue. MCL 600.1653; MCR 2.223. The Trial Court abused its discretion by failing to address this issue, transferring the case to Kent County and proceeding with the motion for preliminary injunction.

For these reasons, Plaintiff failed to demonstrate a substantial likelihood success on the merits of his claim.

2. Irreparable Injury

Plaintiff has not demonstrated the requisite irreparable injury. Plaintiff has offered nothing more than general legal conclusions, speculation, and conjecture that his rights are being violated, and have not pled or demonstrated that he himself is being harmed in any way by contracted CENAs employed by J2S Group or even a reasonable likelihood of harm if the staff transition occurs.

In finding for the Plaintiff on this factor, the Trial Court relied on erroneous findings: the fact the contractor was advertising for individuals with 3-6 months of experience when the contract required 12; that a contract employee who was identified in several complaints was still working at the Home; the amount of training J2S provided was inadequate; the pre-employment drug screening done by J2S was a "joke;" the lack of direct oversight from the Director of Nursing on complaints against J2S employees; two incidents involving J2S employees in which residents were injured; turnover; and that no regular evaluations were done on J2S employees. (Ex 9, Tr, Vol III, pp 217-221).

The Trial Court's factual findings are clearly erroneous. First, the Trial Court ignored Cripps' (Director of Nursing) testimony she reviewed the credentials

of every J2S employee who was hired to work at the GRHV under the October 1, 2011 contract and they had the required experience, with the exception of one who only had 10 months—she was rejected; that contract employees are removed from the Home when appropriate; that J2S employees are not only required to comply with pre-employment drug screening, but are also subject to monthly random testing at the rate of 2% per month; the amount of training provided to J2S employees is identical to the training required of and provided to state RCAs; the two incidents involving J2S employees in which residents were injured resulted in their being terminated from the home—additionally, during the period of June 10, 2010 and September 12, 2011, 8 incidents resulting in physical injury to members involving state RCAs occurred—one employee was terminated and subsequently reinstated during the grievance process; Cripps receives copies of all complaints involving "sentinel" events and serious incidents and those where the Unit Coordinator is dissatisfied with the discipline imposed by J2S; the turnover rate for J2S for 2011 is 3.65%. (Emergency Application Ex 8—Defs' Hearing, Ex 5). Further, the Trial Court's findings do not identify "irreparable harm." Each of these "facts" can be or have already been remedied by the Home and/or the contractor. Further, as the evidence indicates, the residents are not more likely to be injured or harmed by a contract employee than by a state RCA.

The irreparable-harm factor is considered an indispensable requirement for a preliminary injunction. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11; 753 NW2d 595 (2008). It requires a particularized showing of

irreparable harm. *Id.* "It is well settled that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Dunlap v City of Southfield*, 54 Mich App 398, 403 (1974); see also *Pontiac Fire Fighters Union Local 376*, 482 Mich at 9 n 15.

Here, the harm complained of by Plaintiff—future injuries to the residents, attributable to the contract employees—is entirely speculative as previously argued. Additionally, because the claim at issue is based on the negligent conduct of the contract employees, Plaintiffs have an adequate legal remedy—a tort action against the contract employee and the contractor. The existence of an adequate legal remedy precludes a finding in Plaintiff's favor on this factor. *Pontiac Fire Fighters Union Local 376 v City of Pontiac,* 482 Mich 1, 11 (2008).

Finally, Plaintiff may argue the Home has no authority under the contract to impose any specific staffing requirements on the contractor, to assure that qualified individuals are hired or to terminate any contract employee from the facility. Such an argument is incorrect based on the provisions in the contract. For example, in Article 2.062 (c) and (d) the state reserves the right to approve the initial assignment and subsequent reassignment of any contract personnel—the Home has required the contract assign staff in the same manner as state RCAs were assigned, that is, permanently assigned to a unit and residents. The contract employee cannot be removed from their assigned position without the state's consent. Under Article 2.063, the state reserves the right to require the removal of contractor personnel. Additionally, even after the contract has been implemented, the state

has the right to terminate services for cause, Article 2.152, or for the convenience of the state, Article 2.153. (Emergency Application Ex 7—Pl's Hearing, Ex 2, 10/01/11 Contract).

The Trial Court clearly erred in its factual findings and thus abused its discretion in concluding Plaintiff has met this factor, and should be reversed.

3. Balance of Harms

This factor requires a court to balance the harm to the moving party if an injunction is not issued, against the harm to the non-moving party. The Trial Court here clearly erred in concluding the balance of harms favored Plaintiff.

As demonstrated above, Plaintiff cannot and did not establish irreparable harm. Defendants, on the other hand, will suffer substantial and specific harm that will affect both the residents at the Grand Rapids Home for Veterans (GRHV) and the public at large.

The GRHV receives approximately 25% of its operating budget from Michigan's general fund. (Ex l9, Tr, Vol II, pp 208, 209). From FY 2011 to FY 2012, the general fund money budgeted for the GRHV was cut by $4.2 million dollars. In addition, the Home will suffer an additional $921,300.00 under a negative supplemental appropriation cutting wages and fringe benefits. As a result of these cuts, the DMVA sought and received approval to contract out the Home's RCA services. The contract for RCA services would result in gross savings of $5.8 million and a net savings of $1.6 million. *The implementation of the contract results in a net savings to the Home of $18,000.00 per day.* These savings will be used to absorb the

anticipated $921,300.00 negative supplemental appropriation and pay the costs of unemployment and leave payouts to the effected employees. It will also avoid further layoffs for FY 2012. If the Home is not allowed to implement the contract that was approved by the State Administrative Board on September 15, 2011 and signed by the parties, the Home will lose its savings, have to absorb the $4.2 million cut by reducing services, resulting in more extensive lay-offs, reducing the number of residents, and cancelling scheduled capital improvements including purchases of medical equipment and room renovations. The inability to make these capital improvements will negatively impact the residents' quality of life.

J2S hired an additional 201 employees to meet the requirements of the October 1, 2011 contract. Those contract employees are not working as expected and may leave J2S for work elsewhere, creating problems when the contract is implemented.

The Trial Court failed to properly consider the issues, noting instead "budgets can be adjusted" and the Home "can make cuts in other areas or perhaps they can get some more money from the State." (Ex 9, Tr, Vol III, p 222). The Trial Court's speculation ignores the facts and the law, relying instead on the testimony of Plaintiff's witness about a budget "transfer" process. (Ex 9, Tr, Vol III, pp 148, 150). The Trial Court ignored the facts that $4.2 million was cut from the general fund appropriation for the Home, a specific line item within the DMVA's budget; that general funds cannot be transferred from one line item to another without legislative approval; that no line item in DMVA's budget has excess funds to

transfer to the Home; that the Home cannot just go to the State for more money—that requires both legislative and executive action.

4. Public Interest

A decrease in the level of services provided by the Home will have a severe adverse impact on the public at large, including the Veterans who the Trial Court noted are members of the public. (Ex 9, Tr, Vol III, pp 222, 223). Veterans will not receive the medical and social services needed and will be forced to enter an already burdened public health system that may not be able to provide the necessary care. It will have an obvious negative impact on J2S employees hired to work at the Home. Furthermore, taxpayer dollars will not be utilized in the most efficient manner possible, which harms the state's general fund as a whole. This harm to the public and to the members at GRHV is adverse, substantial, and substantiated. Conversely, the harm alleged by the Plaintiff is speculative at best and there is no evidence that even if proven, would be prevented by prohibiting GRHV from using contract RCA services. Additionally, any disruption to the residents while the contract staff learn their positions and learn about them is limited in duration, probably 2 to 4 weeks, and will be eased by the presence of other direct care staff who assist in the transition.

The Trial Court's conclusion that the balance of harms weighs in favor of the Plaintiff and that the public interest will be harmed if a preliminary injunction does not issue is clearly erroneous and should be reversed.

CONCLUSION AND RELIEF REQUESTED

The Trial Court erred and abused its discretion in determining that Plaintiff met the requisite factors for issuance of a preliminary injunction. Plaintiff is not likely to succeed on the merits of this Complaint, a factor not even analyzed by the Trial Court; has not established, and will not suffer, irreparable injury; the balance of harms clearly weighs against issuance of the preliminary injunction; and, the public interest is harmed by its issuance.

Defendants request that this Honorable Court grant this Emergency Application for Leave to Appeal the Preliminary Injunction Order signed October 14, 2011.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

s/Joseph T. Froehlich
Joseph T. Froehlich (P71887)
Margaret A. Nelson (P30342)
Assistant Attorneys General
Attorneys for Defendants-Appellees
Public Employment, Elections & Tort Div.
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

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