

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Wayne County Circuit Court
Hon. David F. Breck, presiding

WILLIAM MILLER,
Plaintiff-Appellee

Supreme Court
No.: 134393

ALLSTATE INSURANCE COMPANY,
Defendant,
Cross-Defendant-Appellant
and

Court of Appeals
No.: 259992

PT WORKS, INC.
Cross Plaintiff-Appellee,

Wayne County Circuit
No. 03 325 030 NF

WILLIAM MILLER,
Plaintiff-Appellee

Supreme Court
No.: 134406

ALLSTATE INSURANCE COMPANY,
Defendant,
Cross-Defendant-Appellee
and

Court of Appeals
No.: 259992

PT WORKS, INC.
Cross Plaintiff-Appellant,

Wayne County Circuit
No. 03 325 030 NF
Hon. David F. Breck

CROSS-DEFENDANT/APPELLEE ALLSTATE'S BRIEF

ORAL ARGUMENT REQUESTED

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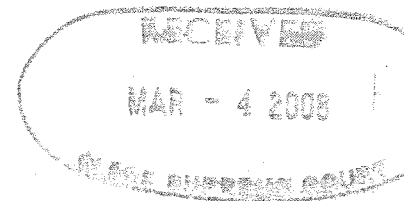


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STATEMENT OF APPELLATE JURISDICTION

Cross-Defendant/Appellee Allstate agrees that PT Work's Application for Leave to Appeal was timely filed within 42 days of the Court of Appeals May 31, 2007 decision pursuant to MCR 7.302(C)(2). This Court has exercised jurisdiction under MCR 7.301(A)(2) by grant of the Application in its Order of November 21, 2007.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Where the Michigan Public Health Code Requires Licensure for the Providing of Physical Therapy Services and Where Those Services Are Provided Through a Corporate Entity, the Corporate Entity must Be Incorporated under the Professional Service Corporation Act and under That Act, Each Shareholder must Be Licensed.

Where the Shareholders of Pt Works Inc. Were Not Licensed and That Corporate Entity Provided Physical Therapy Services Was Pt Works Subject to the Professional Service Corporation Act's Requirement That All Shareholders Be Licensed?

Appellant Allstate says: "Yes"

Appellee PT Works Inc. says: "No"

Trial Court says: "No"

Court of Appeals says: "No"

II

Where the Michigan Public Health Code Requires Licensure for the Providing of Physical Therapy Services and Where Those Services Are Provided Through a Corporate Entity, the Corporate Entity must Be Incorporated under the Professional Service Corporation Act and under That Act, Each Shareholder must Be Licensed.

Under Mcl 500.3157 Services Are Not Lawfully Rendered If Licensing Requirements Are Not Met by the Entity Charging for the Service.

Did the Court of Appeals and Trial Court Err in Ruling That the "Lawfully Rendering Treatment" Requirement under Mcl 500.3157 Was Met Where the Person Performing the Treatment Was Licensed, Even Though the Corporate Entity Through Which the Services Were Rendered and Which Charged for the Service Had Not Complied with Licensing Requirements?

Appellant Allstate says: "Yes"

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Appellee PT Works Inc. says: “No”

Trial Court says: “No”

Court of Appeals says: “No”

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

PREFACE

In that assertions and arguments in PT Works' Appellant Brief distorts Allstate's position Allstate, as Appellee, is compelled to file a response. In addition, PT Works paints an over broad consequence to the Court of Appeal's decision on incorporation under the Professional Services Corporation Act. While Allstate's Brief as Appellant (Docket 134393) contains Allstate's position on the issues, this brief is meant to respond to certain points asserted by PT Works, and not to overly repeat the arguments already articulated in Allstate's Appellant Brief.

COUNTER-STATEMENT OF FACTS

Generally speaking, PT Works Statement of Facts, except for the colored derogatory commentary, correctly relates dates and events, but omits key material facts. Allstate's Statement of Facts in its Appellant Brief should be consulted for comparison. PT Works brief contains no information about the corporate nature of PT Works and fails to acknowledge that none of the shareholders of PT Works are physical therapists.

PT Works was originally incorporated as Rehab Works Inc. on September 20, 1995 and the name was changed to PT Works Inc. on August 16, 1996. (PT Works Articles of Incorporation, **Appellant Allstate's Appx 7a**). PT Works Inc. was incorporated under the general Business Corporation Act (BCA) not the Professional Service Corporation Act (PSCA). The annual corporate information update forms from 1996 through 2002 established that PT Works Inc. is not a PC. (**Allstate's Appellant Appx 9a-16a**). The incorporators were:

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Rochelle Freedman
Susan Osenko (a/k/a Susan Keller)
Barry A. Steinway

PT Works Inc. is a physical therapy clinic owned by Rochelle Freedman, the wife of Mr. Miller's referring attorney Marvin Freedman. (Keller Dep, p 57, Allstate's Appellant Appx 45a).¹ None of the incorporators or shareholders are licensed physical therapists. (Keller dep, p 18, Allstate's Appellant Appx 44a). All the charges for physical therapy treatment rendered to Mr. Miller were charged by the corporation. (P.T. Works' bills, Allstate's Appellant Appx 27a).

PROCEDURAL BACKGROUND

Again, for comparison as to the procedural background, please refer to Appellant Allstate's Brief on Appeal.

With regard to denial of Allstate's application for leave in PT Works v. Kathy Sauro and Allstate Insurance Company, 16th Judicial District Court docket 02-02960-GC, Court of Appeals No. 253388, contrary to PT Works' assertion, the denial was not an adjudication on the merits; the order denied leave on the ground that there was a "failure to persuade the court of the need for immediate appellate review." Such a denial is not an adjudication on the merits. *Malooly v Heating & Vent Corp.*, 270 Mich 240, 247 (1935); *Frishett v State Farm Mut Auto Ins. Co.*, 378 Mich 733, 734 (1966). Only a denial for "lack of merit" constitutes an adjudication on the merits. *People v Hayden*, 125 Mich App 650, 662-663 (1983), concurring opinion of M.J. Kelly.

PT Works reference to and attachment of briefs from the Sauro case are not record documents here and cannot be considered. *Coburn v Coburn*, 240 Mich App 118, 122 (1998). Allstate has not misrepresented the record or the rulings of the court's below and PT Works'

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¹At the time of his deposition, plaintiff William Miller testified that he was referred to PT Works by a Dr. Victor Gordon. However, the records reflect that Mr. Miller began his physical therapy at PT Works on April 2, 2003 and that he was first seen by Dr. Victor Gordon 16 days later on April 18, 2003. Obviously, Dr. Gordon had not referred the plaintiff to PT Works.

characterization of Allstate's position is skewed. The issues before this Court are matters of first impression and strictly involve statutory interpretation.

ARGUMENT

I.

Where the Michigan Public Health Code Requires Licensure for the Providing of Physical Therapy Services and Where Those Services Are Provided Through a Corporate Entity, the Corporate Entity must Be Incorporated under the Professional Service Corporation Act and under That Act, Each Shareholder must Be Licensed.

Where the Shareholders of Pt Works Inc. Were Not Licensed and That Corporate Entity Provided Physical Therapy Services Pt Works Was Subject to the Professional Service Corporation Act's Requirement That All Shareholders Be Licensed, and Thus Was Unlawfully Rendering Professional Services.

Questions of statutory interpretation are reviewed *de novo*, as are decisions on summary disposition motions. *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 62 (2002); *State Farm v Old Republic*, 466 Mich 142, 145-146 (2002); *Koontz v Ameritech Services Inc.*, 466 Mich 304, 309 (2002). "A statutory definition supersedes the commonly-accepted, dictionary, or judicial definition. Where an act passed by the legislature embodies a definition, it is binding on the courts." *Erlandson v Retirement Commission*, 337 Mich 195, 204 (1953); *Campbell v Sullins*, 257 Mich App 179, 187 (2003) ("when the Legislature defines a term used in the statute, the court must accept the statutory definition.").

Again, Allstate's Appellant Brief more fully addresses this issue and counters PT Works argument, however response is necessary to certain aspects of PT Works' Brief.

The Public Health Code specifically requires licensure to engage in the practice of physical therapy. MCL 333.17820. The Professional Service Corporation Act specifically requires "all

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shareholders of the corporation **shall be licensed . . .**” where that corporation renders a professional service that is included under the Public Health Code (as are physical therapists). MCL 450.224(3). The word “shall” is unambiguous and denotes a mandatory rather than a discretionary action. *Roberts, supra*, at 65. The Professional Service Corporation Act, MCL 450.222(c), itself defines the term “professional service.” Under the Act, the term “professional service” means:

“(c) ‘professional service’ means **a type of personal service to the public that requires as a condition precedent to the rendering of the service the obtaining of a license or other legal authorization.** Professional service includes, **but is not limited to**, services rendered by certified or other public accountants, chiropractors, dentists, optometrists, veterinarians, osteopaths, physicians and surgeons, doctors of medicine, doctors of dentistry, podiatrists, chiropodists, architects, professional engineers, land surveyors, and attorneys at law.” MCL 450.222(c). (Emphasis added).

PT Works argument equating the *defined* term “professional service” as meaning “learned profession” (claiming that it is a technical term with special interpretive rules under MCL 8.3a) is nothing less than an invitation to judicial legislating. None of the words in the definition are terms of art. The language is plain and unambiguous. A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Roberts, supra* p, 63.

“The mere fact a statute appears impolitic or unwise is not sufficient for judicial construction but is a matter for the legislature.”

* * * *

The duty of the Court is to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere. *City of Lansing v. Twp of Lansing*, 356 Mich 641, 648 (1959).

If PT Works has a problem with the statutory language it should take it up with the Legislature, not ask this court to read into the definition language that does not exist [learned profession], or to read

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out of the statute language that does exist [including but not limited to].

In addition, PT Works has expanded the scope of its position to encompass occupations irrelevant to the issue here and which are not occupations subject to regulation under the Public Health Code, claiming the Court of Appeals' decision will lay waste to other businesses, "such as builders, insurance agents, liquor licensees for restaurants, manicurists and others required to be licensed by the State of Michigan, . . .". (PT Works Brief p. 8) The contention is over-broad, spurious and unsupported; none of those occupations are subject to licensing requirements under the Public Health Code. Nor do they fall within the categories of occupations licensed under the Occupational Code or the State Bar of Michigan.

As aptly pointed out in its July 23, 2007 notification the Corporation Division of the Department of Labor and Economic Growth expressly did consider the list of other businesses referenced by PT Works, which are not licensed under the Public Health Code, and stated those businesses are **not** affected. See **Allstate's Appellant Appx 205a** - DLEG July 23, 2007 memo regarding services required to form under the PCA and those which are not. The notification articulates those categories of "professional service" subject to the PCA:

"The professions listed in section 2(c) of the Professional Service Corporation Act are licensed under Article 15 of the Public Health Code, the Occupational Code, or by State Bar of Michigan." **Id, Appx 206a**

As a consequence, PT Works' contention that all licensed occupations are now subject to incorporation under the Professional Service Corporation Act is without merit.

In response to PT Works reference to the Attorney General Opinion No. 6592 (1989) (an Opinion commented on by Allstate in its first application for leave in relation to Judge Colombo's reliance on it, but not referenced in its Brief on Leave), the issue there was whether professionals

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licensed in their particular field could join and incorporate with professionals licensed in other fields to provide more than one professional services under the umbrella of one professional service corporation. The Opinion stated they could not unless all the shareholders were professionals licensed in the all the areas where services were offered. The nature of the services was not identified in the Opinion. The language quoted by PT Works (at page 17 of its brief) about only the specifically listed professions, in the “including but not limited to” examples in MCL450.222(c), being required to incorporate under the PSCA is not a holding or ruling in that opinion. In fact the language quoted is a recitation of the Corporation and Securities Bureau’s then view of the provision, not the holding of the Attorney General. **(Allstate’s Appellant Apx, p. 133a)**. The Department of Labor and Economic Growth’s current view of the provision is now different. **(Allstate’s Appellant Apx, p. 206a-209a, DLEG Notification)**

Allstate’s reference to OAG 6592 related to Judge Colombo’s decision in Sauro, where he articulated that even if he were incorrect, he would still reverse based on an Attorney General Opinion, No. 6592 (1989), which indicated that if a corporation was improperly incorporated under the Business Corporation Act, and should be incorporated under the Professional Service Corporation Act, the corporation should be notified and given an opportunity to comply. **(Allstate’s Appellant Apx, p. 77a)**. PT Works remains a corporation under the Business Corporation Act.

As this Court is well aware, Opinions of the Attorney General are not binding on the courts as precedent. *Dance Corp v City of Madison Heights*, 466 Mich 175, 182 fn 6 (2002); *Auto Owners v Stenberg Bros.*, 227 Mich App 45, 49, fn 1 (1997). More importantly, in no way does the Attorney General ever opine that its office can ignore the plain mandate of controlling statutes. In addition, any subsequent corrective actions by PT Works Inc. to properly incorporate does not avoid the fact

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that it has been rendering services illegally. The Attorney General Opinion in no way touches on this point; it only addresses whether a corporation can correct its corporate form. The opinion does not imply that a corrected form retroactively makes lawful what was unlawful.

At issue here is solely incorporation of a entity providing physical therapy services. Allstate's Appellant Brief on Appeal here discusses this issue at length, responding to PT Works arguments and should be consulted. See Allstate's Brief on Appeal, pp 13-28.

PT Works threats of dire consequence to every business requiring a license is an overly broad interpretation of a specific statute, MCL 450.222. Not all licensed persons are performing a professional service as that term is defined in the PCA, MCL 450.222(c). Builders, manicurists, insurance agents, insurance carriers, and other entities not licensed under the Public Health Code, the Occupational Code, the State Bar of Michigan or who are not referred to as "professionals" in their enabling statutes do not fall under the incorporation provisions of the PCA. See DLEG notification. **(Allstate's Appellant Appx 206a - 209a)**

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II.

Where the Michigan Public Health Code Requires Licensure for the Providing of Physical Therapy Services and Where Those Services Are Provided Through a Corporate Entity, the Corporate Entity must Be Incorporated under the Professional Service Corporation Act and under That Act, Each Shareholder must Be Licensed.

Under Mcl 500.3157 Services Are Not Lawfully Rendered If Licensing Requirements Are Not Met by the Entity Charging for the Service.

The Court of Appeals and Trial Court Erred in Ruling That the “Lawfully Rendering Treatment” Requirement under Mcl 500.3157 Was Met Where the Person Performing the Treatment Was Licensed, Even Though the Corporate Entity Through Which the Services Were Rendered and Which Charged for the Service Had Not Complied with Licensing Requirements.

Questions of statutory interpretation are reviewed *de novo*, as are decisions on summary disposition motions. *Roberts v Mecosta County Gen Hosp*, 466 Mich 57, 62 (2002); *State Farm v Old Republic*, 466 Mich 142, 145-146 (2002); *Koontz v Ameritech Services Inc.*, 466 Mich 304, 309 (2002).

Again, Allstate’s Appellant Brief addresses this issue more fully and responds to PT Works arguments. It bears repeating, however, under the Michigan No Fault Act, Section 3157, an insurer is responsible only to pay charges for medical services lawfully rendered:

“A physician, hospital, clinic or other person or institution *lawfully rendering treatment* to an injured person . . . may charge a reasonable amount for products, services and accommodations rendered.” MCL 500.3157, emphasis added.

P.T. Works, as a general business corporation is not legally authorized or permitted to offer or perform professional health services such as physical therapy even through licensed personnel. The Court of Appeals decision in *Healing Place v. Allstate Ins Co*, 277 Mich App 51 (2007), interpreting MCL 500.3157 in the context of treatment performed for which the facility rendering (and billing)

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was not licensed, stated:

The statute focuses on natural persons (such as physicians) *or* institutions. **We find no basis to conclude that the phrase “lawfully rendering treatment” permits an institution providing treatment to avoid licensure on the basis that a natural person providing the treatment at the institution is licensed. Similarly, the fact that an institution is licensed would not permit an unlicensed individual to provide treatment at the institution’s facility.** In our judgment, the plain language of MCL 500.3157 requires that **before compensation for providing reasonable and necessary services can be obtained, the provider of treatment, whether a natural person or an institution, must be licensed in order to be “lawfully rendering treatment.”** If both the individual and the institution were each required to be licensed and either was not, the “lawfully render[ed] requirement would be unsatisfied.” Id at 59, emphasis added.

PT Works contends that *Healing Place* supports its position because the Court distinguished its analysis from that in *Miller v Allstate (On Rem)*, 275 Mich App 649 (2007). It should be noted that the basis for the decision in *Healing Place* was on licensure; it is evident corporate structure was not at issue - there is no mention of any party in that case arguing improper incorporation as impacting on their positions. PT Works reasoning is bootstrapping - that because the *Healing Place* court distinguished *Miller II*, the incorporation issue must have had relevance, and having distinguished the case, *Healing Place* must support PT Works position. The *Healing Place* opinion is devoid of any reference to any party arguing the incorporation issue.²

While *Healing Place* is a licensure case, this does not negate the application of the decision’s focus on the § 3157 language as requiring its application to both the institution and individual, especially when it is the institution which is billing for the service. Here it is the institution - a business entity - providing a medical service and billing for that service. That the individual

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² The entities in *Healing Place*, New Start, Inc and The Healing Place, Ltd. are, according to the Michigan Department of Commerce on-line records, entities incorporated under the Business Corporation Act.

performing the service was licensed does not obliterate the necessity of the institution qualifying to perform and charge for the service. If this were the case a gas station could hire a physical therapist, have treatments performed in the backoffice and charge for that service. This is illegal and in violation of the public policy of the State of Michigan in regulating health professions and entities which perform professional services governed by the Public Health Code.

The individuals owning a general business corporation are insulated from personal liability for the conduct its agents or of the corporation, *Klager v Robert Meyer Co*, 415 Mich 402, 411 (1982); shareholders and officers of Professional Service Corporations are not so insulated and remain personally liable for the conduct of persons under their direct supervision and control, MCL 450.226. The No Fault Act's provision MCL 500.3157 recognizes by its utilization of the language "hospital, clinic . . . or institution lawfully rendering treatment . . . may charge" that entities too treat and charge, not just physicians and other persons. The requirement of "lawfully rendering" encompasses the concept that public policy principles are to be honored in enforcing the statute. Incorporation of an entity which performs a professional health service requires compliance with statutes governing those health professions, allowing payment for amounts charged by entities which are illegally performing health services invites violation of the public policy prohibiting the corporate practice of medicine.

As to the remainder of PT Works arguments, Allstate relies on its Appellant Brief.

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RELIEF REQUESTED

For the above reasons and those stated in its Appellant Brief, Cross-Defendant/Appellant/Appellee Allstate requests this Honorable Court reverse, *in part*, the Court of Appeals' May 31, 2007 decision, and reverse the trial court's October 28, 2004 order denying Allstate's Motion for Summary Disposition, vacate the December 20, 2004 Judgment and direct entry of summary disposition in Cross-Defendant/Appellant Allstate's favor against Cross-Plaintiff PT Works.

Respectfully submitted,

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