

STATE OF MICHIGAN
IN THE SUPREME COURT

THE ESTATE OF MARY ANN MALLOY, a
Legally Incapacitated Individual, by Darren
Findling, As Guardian, and the DARREN
FINDLING LAW FIRM, PLC,

MSC: **165018**

MSC: 163553 closed

COA: 358006

TC: 20-393904-CZ

Plaintiffs-Appellees,

-v-

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

**Appendix to
Defendant-Appellant Auto-Owners Insurance Company's
Supplemental Brief**

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Appendix Attachment 1

**STATE OF MICHIGAN
PROBATE COURT FOR THE COUNTY OF OAKLAND**

Estate of Mary Ann Malloy
v
Auto Owners Insurance Co.
_____ /

Case No: 2020-393904-TV
Hon. Daniel A. O'Brien

**OPINION AND ORDER
DENYING MOTIONS FOR RECONSIDERATION**

This matter comes before the Court on Defendant Auto Owners Insurance Company's Motions for Reconsideration of this Court's March 12, 2021 Orders granting Motions for Partial Summary Disposition filed on behalf of the Estates of Dana Jenkins and Mary Ann Malloy and denying Auto Owners' Counter Motions for Partial Summary Disposition.

Motions for Reconsideration are governed by MCR 2.119(F). The purpose of MCR 2.119(F) is to give the trial court an opportunity to immediately correct any obvious errors which might otherwise require a costly appeal. *Bers v Bers*, 161 Mich App 457, 462 (1987). The moving party must show that the court erred and that correction of the error would result in a different disposition of the motion. MCR 2.119(F)(3). A motion for rehearing or reconsideration generally will not be granted if the motion merely presents the same issues ruled on by the court, either expressly or by reasonable implication. *Cason v Auto Owners Insurance, Co*, 181 Mich App 600; 450 NW2d 6 (1989). Further, the court may deny a motion for

reconsideration that rests on a legal theory and facts which could have been raised prior to the trial court's original order. *Charbeneau v Wayne County General Hospital*, 158 Mich App 730, 733 (1987).

Unfortunately, Auto Owners has completely mischaracterized this Court's rulings. Instead of directly addressing each of the mischaracterizations, this Court will clearly explain its ruling, again.

Auto Owners by letter had informed Darren Findling, who is the guardian of both Jenkins and Malloy, that Auto Owners would not pay certain line items in the billing statements Findling submitted to Auto Owners because "[i]t does not appear [that the] guardian performed the guardianship services being claimed. Should [L]etters of [A]uthority exist for the individuals providing the services, please forward them for consideration."

Findling filed separate Complaints in this Court on behalf of Jenkins and Malloy against Auto Owners to obtain payment of the fees that Auto Owners had denied, and subsequently filed a Motion for Partial Summary Disposition in each case solely on the issue of the defense raised by Auto Owners described above.

Findling argued:

"It is clear from the developed case law in Michigan that a Guardian may employ an attorney, perform work themselves, and/or employ[] others, and all those services are compensable under the no-fault act if they are for the care, recovery and rehabilitation of the ward. [...]

"Defendant's argument that Darren Findling cannot delegate guardianship duties under MCL 700.5103 completely ignores MCL 700.[5106], specifically subsections (5) and (6) which mandate a professional guardian 'shall ensure that there are a **sufficient number of employees assigned to the care of wards** for the purpose of performing necessary duties.' [] 'The rules of statutory construction require the courts to give effect to the Legislature's intent. [Courts] should first look to the specific statutory language to determine the intent of the Legislature. The

Legislature, of course, is presumed to intend the meaning that the words of the statute plainly express. If [] the language is clear and unambiguous, the plain an ordinary meaning of the statute reflects the legislative intent and judicial construction is neither necessary nor permitted.’ *Rinke v Poltrzebowski*, 254 Mich App 411, 414; 657 NW2d 169 (2002)(citations omitted).” (Findling Motion, pp 7-8, emphasis in Findling’s).

Auto Owners filed a Response to Findling’s Motion, including a Counter-Motion for Summary Disposition under MCR 2.116(I)(2). Relying on MCL 700.5103(1) & (4), Auto Owners argued:

“Auto Owners, not Findling Law, is entitled to summary disposition. Attorney Findling cannot delegate his guardianship duties to people in his law firm without a validly executed power of attorney. Nor can he delegate his duties for more than 180 days and without notification to the Court. No law supports Findling Law’s argument otherwise, and its business model defies public policy. This Court should enter summary disposition in favor of Auto Owners.” (Auto Owner’s Response/Counter-Motion, p 5).

Before addressing the only issue properly before this Court, i.e., whether Auto Owners properly denied payment for the specific reason that “[i]t does not appear [that the] guardian performed the guardianship services being claimed,” this Court will address a couple of the “red herrings” Auto Owners served up in its counter-motion.

Apparently without ever investigating the circumstances of Findling’s appointment and continued service as guardian in either case, Auto Owners attacked this Court’s appointment of Findling as guardian as if this Court has no awareness of the laws governing appointment of professional guardians. (Auto Owners Counter-Motion, p 10, *et alibi*). Auto Owners attack is particularly unfounded in these two cases, considering that Mr. Jenkins himself has stated at hearings in this Court his desire to have Findling serve as his guardian, and Findling serves as co-guardian with a family member in Ms. Malloy’s case. In fact, the Malloy

case began in 2008 with a family member serving alone as guardian. In 2012, however, Ms. Malloy's mother, Kathern Malloy, specifically requested that this Court appoint a professional guardian to serve with her as co-guardian for her daughter, because she was concerned about the complexities of managing treatment for her daughter's traumatic brain injury and securing payment for that treatment from the No Fault insurer, Auto Owners.¹

Auto Owners also alleges that Findling "makes a profit by charging attorney rates for non-attorney duties that EPIC prioritizes family members to perform." (Auto Owners Counter-Motion, p 8). Aside from the fact that Auto Owners is just tossing this argument into the mix without ever considering the Ward's and the family's wishes as to who should serve as guardian, which is clearly relevant to the issue of priority when appointing a guardian, see MCL 700.5313, the reasonableness of Findling's fees and the propriety of Findling's appointment are not before this Court at this time. Further, the accusation that Findling "makes a profit" is a disingenuous charge coming from Auto Owners and its attorneys, who presumably are also in the profit-making business. It is unclear to this Court the reason for Auto Owners and its attorneys repeatedly injecting these irrelevant arguments into their response to Findling's narrowly focused motion, except the possibility that they may prefer dealing with family members like Kathern Malloy who may be less knowledgeable than Findling of their legal rights and less likely to challenge Auto Owners' denial of their claims.

¹ Ms. Malloy and her family and Mr. Jenkins may change their minds their minds in the future, just as they have in the past. That is the nature of guardianships. For now it is clear that the issue of priority is not an issue in this case, and further it has already been decided by the wards and their families in favor of Findling serving as their guardian.

Regarding the issue actually before this Court, the two parties offer different interpretations and applications of the relevant statutes, MCL 700.5103(1) & (4), and MCL 700.5106(5) & (6). Neither party, however, uses the actual language of section 5103, which states:

“Sec. 5103. (1) By a properly executed power of attorney, . . . a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the [] guardian’s powers regarding care, custody, or property of the [] ward [].

“(4) If a guardian [] delegates any power under this section, the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact.”

The quoted section clearly concerns a delegation of the “guardian’s powers,” yet both parties repeatedly refer to “duties” when referring to the section’s requirements.

This Court had an extended discussion with Auto Owner’s attorney concerning the legislature’s use of the words “power” and “duty” in different sections of the statutes concerning guardianships. Auto Owners’ attorney claimed during oral argument that the legislature used the words power and duty interchangeably and that the legislature did not recognize any legal difference between them. (See, e.g., Trans, pp 13, 28-29.) This Court rejected that argument when it granted Findling’s Motion and denied Auto Owners’ Counter-Motion.

Auto Owner’s apparently now believes it has found unassailable legal authority for its argument. Michigan’s State Court Administrative Office (SCAO) has created a form for Letters Of Guardianship, specifically SCAO Form PC 633, which states:

“DELEGATION OF DUTIES: You are required by law to notify the court when you delegate duties under a durable power of attorney.”

It is clear that the SCAO forms committee is referring here to Section 5103(1) & (4). It is unfortunate that SCAO, like the attorneys in this case, did not use the actual language of the section to which it was referring. More importantly, however, SCAO does not have the **power** to make substantive law, nor does it have the **power** to alter existing law. SCAO merely has a **duty** to create forms for use by this and other Courts. Further, Auto Owners’ argument ignores the actual language of the form. The form does not place any duty on guardians to execute a durable power of attorney. It simply refers the guardian to the law on the issue stated, i.e., MCL 5103(1) & (4), which states that the guardian must notify the court “[i]f [the] guardian delegates any **power**.”²

This Court took great pains at the hearing to explain its ruling that the legislature understood the words power and duty to have different meanings and intended they be interpreted and applied by this Court accordingly. This Court quoted directly from the relevant statutes:

“... In 5103(1), it states, ‘by a properly executed power of attorney a guardian of a ... legally incapacitated individual may delegate to another person the guardian’s powers regarding care, custody, or property.’

“In (4), it says, the guardian must give notice to the court of doing that, [i.e., delegating powers pursuant to a power of attorney]. There’s a reason for doing that. [T]he Court in making a decision as to who to appoint a guardian and as to who to empower with the authority conferred by ... EPIC, the Court has to make a finding as to suitability of the person. So if the guardian were to delegate a power ... to consent to medical care, to consent to psychiatric care, to enter into a binding lease, [i]f the guardian delegates that power to another person, the Court should certainly have the right and opportunity to pass on whether that person selected is suitable. ... That’s the purpose of that statute, but it refers to power.

² MCL 700.5103 is cited in the footer of the form.

“In 5106(6), it states, ‘A professional guardian . . . shall ensure that there are a sufficient number of employees assigned to the care of wards for the purpose of performing necessary duties associated with ensuring that proper and appropriate care is provided.’ The Legislature used the word duties here.” (Transcript, pp 44-45.)

This Court noted that “it’s presumed, when interpreting a statute, that the Legislature chose it’s words for a purpose . . . and that the Court . . . should enforce legislative statutes, sections, subsections as written, period. Therefore, . . . when the Legislature uses different words, the Court is compelled to apply their appropriate meaning. If it happens to be a legal term, it is the legal meaning that applies.” (Trans, p 45.)

This Court then quoted *Black’s Law Dictionary, 10th Edition*, stating:

“The specific one that I find applies in the case of a guardian and the power granted to them is ‘the legal right or authorization to act or not act. A person’s or organization’s ability to alter by an act of will the rights, duties, liabilities, or other legal relations either of that person or of another.’ And then, it goes on and says, ‘A power is the capacity to change a legal relationship.’

“And it defines duty as a ‘legal obligation that is owed or due to another and that needs to be satisfied. That which one is bound to do and for which somebody else has a corresponding right.’ So, we see in law they have different meanings.” Trans, p 46.)

Power denotes authority. Duty denotes obligation. Power may be granted along with certain related obligations, and tasks incidental thereto, as in the case of guardianships, but power and duty are not the same.

This Court reviewed in detail the relevant provisions of EPIC which specifically state the different powers and duties of a guardian and clearly show the Legislature’s understanding that power and duty have different meanings, (Trans, pp 47-51.) and concluded:

“This Court finds it’s crystal clear in the statute that the Legislature knew that there was a difference between the word ‘power’ and the word ‘duty’ [in] the law, and it intended their [specific] meanings when using each word.” (Trans, p 51.)

This Court ruled, therefore, “to the extent . . . [the performance of a particular task] is simply the assignment of a duty, this Court finds that it is not in violation . . . of EPIC, specifically section 700.5103, because it is not a delegation of a power [-] the ability to change the ward’s legal relations with another person or another entity. It is simply an assignment of an employee to the care of the wards of certain duties.” (Trans, pp 51.) This was the basis of this Court’s decision to grant Findling’s Motion and deny Auto Owners’ Counter-Motion.

Contrary to Auto Owners’ claims in its Motion for Reconsideration, this Court never ruled that Findling and his employees should be compensated for any service they provided, regardless of whether they had legal authority to provide the service. For example, this Court stated:

“Darren Findling’s secretary cannot provide medical care to the ward or psychiatric services” and expect to be compensated. (Trans, p 15.)

This Court had an extended discussion with Auto Owners’ attorney on whether the No Fault Act, MCL 500.3101, specifically provides authority for Auto Owners to deny compensation for the specific reason that “[the guardian did not] perform[] the guardianship services claimed.” The attorney claimed at length that “the No-Fault Law does, in fact, direct us to define guardianship services according to the Guardianship Law, EPIC. . . . it describes the word, in fact, guardianship services . . . The No-Fault Law describes guardianship . . . I will give you the specific cite.” (Trans, pp 16-20.) There is no such provision in the No Fault Act.

The point is that Auto Owners and its attorneys are relying entirely on their claim that there is no difference in guardianship law between the words “power” and “duty” for their claim that Findling cannot make a claim for payment of services provided by persons other than Findling himself. There is nothing in the No Fault Act to support this argument. This argument also misses the point of the No Fault Act’s provisions concerning the payment of first party no fault benefits.

This Court quoted three provisions of the No Fault Act in its decision, specifically MCL 500.3105, 3107 and 3112:

“MCL 500.3105(1) provides: ‘... an insurer is liable to pay benefits for accidental bodily injury arising out of [a motor vehicle accident].’

“The next relevant section is 500.3107(1), ‘Personal protection insurance benefits are payable for ... Allowable expenses consisting of reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person’s care, recovery, or rehabilitation.’

“And the next relevant section is 500.3112, ‘Personal protection insurance benefits are payable to or for the benefit of an injured person.’ (Trans, pp 39-40.)

Thus, an insurer is liable to pay **to or for the benefit of Ms. Malloy and Mr. Jenkins** all reasonable expenses incurred by them for services provided to them for their care, recovery, or rehabilitation. That is, unless there is some law prohibiting payment, such as services illegally performed by an unlicensed provider, (see Trans, p 15), Auto Owners is liable to pay for any services that meet the requirements of the No Fault Act. As their Guardian, i.e., their lawfully appointed legal representative, Findling is the person legally entitled on behalf of Ms. Malloy and Mr. Jenkins to receive payment from Auto Owners for services which meet the requirements of the No Fault Act. In fact, EPIC supports this understanding in that MCL 700.5314(i) specifically provides the guardian with the following “power”:

“If a conservator for the ward’s estate is not appointed, the power to do any of the following:

“(i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward’s welfare to perform that duty.

“(ii) Receive money and tangible property deliverable to the ward and apply the money and property for the ward’s support, care and education.”

There is simply no basis in the law for Auto Owners to deny its liability to Malloy and Jenkins to make payment directly to Findling for work that was performed for the benefit of Jenkins and Malloy solely on the basis that Findling himself did not provide the service. In effect, Auto Owners and its attorneys are arguing that Jenkins and Malloy cannot be reimbursed for work that any non-guardian person can perform simply because a guardian was appointed. This is nonsense.

Auto Owners and its attorneys have now filed eight pleadings in this Court raising these arguments – an Answer to Complaint, a Response/Counter-Motion, a Reply to Response to Counter-Motion, and a Motion for Reconsideration in each case – and despite having filed all those pleadings and having argued their case at length in court during oral argument, they have yet to cite a single instance in Findling’s billing statements in either Jenkins’ or Malloy’s case where it appears that a person other than Findling exercised any specific legal authority of a guardian or performed a legal act that only a guardian can perform. This Court, however, took the time to review Findling’s billing statements in both cases. There were plenty of instances where someone other than Findling performed apparently necessary tasks incidental to caring for Mr. Jenkins and Ms. Malloy, such as talking to them about their needs, escorting them to doctor appointments, corresponding with the social security office, reading bills, gathering information and preparing documents,

communicating with care providers, appearing in court for hearings, obtaining orders and other documents from the court, communicating with family members, and other similar tasks. There were other instances where Findling signed documents that only the guardian may sign. This Court did not find a single instance where it appeared that someone other than Findling exercised any specific legal authority of a guardian or performed a legal act that only a guardian can perform.

Auto Owners and its attorney not only mischaracterized this Court's ruling concerning this issue, they miscomprehend the Court of Appeals' rulings in *Hoffman v Auto Club Ass'n*, 211 Mich App 55 (1995) and *Cherry v State Farm*, 195 Mich App 316 (1992) as applied to this issue. Yes, "[t]o be sure, only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit. *Cherry*[, 195 Mich App at 320]." *Hoffman*, 211 Mich App at 64. Auto Owners and its attorneys apply their shallow understanding of this rule broadly throughout their argument to exclude every single activity that the guardian himself did not perform from payment of no fault benefits. They argue as if any activity that could be lawfully performed by anyone outside of a guardianship, regardless of licensing or court-appointed authority, suddenly becomes unlawful the moment a guardian is appointed. This reveals a gross misunderstanding of the rule in *Hoffman* and *Cherry*.

The Court of Appeals explained at length the proper application of that rule in the context of chiropractic and related services. The Court quoted the following important passage from *Atty Gen'l v Beno*, 422 Mich 293 (1985):

“[T]he purpose of the licensing statute is not to prohibit the doing of those acts that are excluded from the definition of chiropractic, but to make it unlawful to do without a license those things that are within the definition.

“The chiropractic statute does not prohibit the exercise of any non-chiropractic health-care activity.” *Beno*, 422 Mich at 303-304; *Hoffman*, 211 Mich App at 65.

Analyzing the No Fault Act, the *Hoffman* Court stated:

“[N]othing in the language of [MCL 500.]3107 suggests that a product or service must be provided by a licensed health-care provider in order to constitute an allowable expense. To the contrary, the focus of 3107 is on whether a given product or service is ‘reasonably necessary . . . for an injured person’s care, recovery, or rehabilitation,’ not whether it was provided by a licensed health-care provider. . . . Decisions from this Court likewise indicate that a product or service provided by someone other than a licensed health-care provider may be subject to payment as no fault benefits.

“Accordingly, to the extent that plaintiffs are found to have engaged lawfully in the exercise of an activity that is excluded from the scope of chiropractic, then the expense for that activity will be payable as a no fault benefit if it constitutes an allowable expense under 3107 of the no fault act.” *Hoffman*, 211 Mich App at 66-67.


This is precisely what this Court was saying throughout its discussion with Auto Owners’ attorney and this Court’s ruling. The appointment of a guardian under EPIC does not prohibit the provision of services by persons other than the guardian, it merely provides that services requiring the authority of the guardian must be performed by the guardian or a suitable person designated by the guardian in accordance with the requirements of EPIC. Accordingly, to the extent that a service can be performed lawfully by a non-guardian, i.e., does not require the legal authority of a guardian to perform, then the expense for that activity is payable as a no fault benefit if it constitutes an allowable expense under MCL 500.3107 of the No Fault Act, whether it was performed by the guardian, Mr. Findling, or not.

This Court at this time is limiting its decision to this specific holding just stated: to the extent that a service can be performed lawfully by a non-guardian, the expense for that activity is payable as a no fault benefit if it constitutes an allowable expense under MCL 500.3107 of the No Fault Act, whether it was performed by the guardian, Mr. Findling, or not. Therefore, this Court reiterates its decision granting the Motions for Partial Summary Disposition on behalf of the Estates of Dana Jenkins and Mary Ann Malloy and denying Auto Owners' Counter-Motion for Summary Disposition.

Having found no error,

IT IS HERBY ORDERED that Auto Owners' Motions for Reconsideration are DENIED.

Date: July 20, 2020



Hon. Daniel A. O'Brien
Probate Court Judge

Appendix Attachment 2

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE ESTATE OF MARY ANN MALLOY,
a Legally Incapacitated Individual, by
Darren Findling and Kathern Malloy, as Co-Guardians, and
THE DARREN FINDLING LAW FIRM, PLC,

Case No. 2020-393904-CZ
Hon. Daniel A. O'Brien

Plaintiffs,

-vs-

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

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**ORDER REGARDING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
DISPOSITION, DEFENDANT'S COUNTER-MOTION FOR PARTIAL SUMMARY
DISPOSITION AND DEFENDANT'S REVISED MOTION FOR RELIEF IN LIGHT OF
DECLARATORY ACTION**

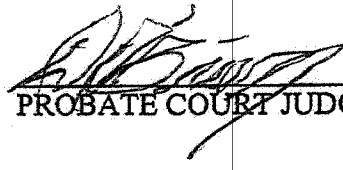
This matter having come before the court on Plaintiffs' Motion for Partial Summary
Disposition, Defendant's Counter-Motion For Partial Summary Disposition, and Defendant's
Revised Motion For Relief In Light Of Declaratory Action, and the court having conducted a
hearing on the same on March 2, 2021;

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Disposition is granted for
the reasons set forth on the record.

IT IS FURTHER ORDERED that the Defendant's Counter Motion for Partial Summary
Disposition is denied for the reasons set forth on the record.

IT IS FURTHER ORDERED that Defendant's Revised Motion For Relief In Light Of
Declaratory Action is denied for the reasons set forth on the record.

Dated: 3-27-21



PROBATE COURT JUDGE

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Appendix Attachment 3

Court Explorer



Available Documents

[← Go Back](#)

Case Number

2020-393904-CZ

Entitlement

MARY MALLOY

Judge Name

DANIEL A. O'BRIEN

Date	Code	Desc
07/20/2021	POS	PROOF OF SERVICE
07/20/2021	NOH	NOTICE OF HEARING
07/20/2021	OPN	OPINION/ORDER FILED
06/30/2021	WTL	WITNESS LIST
03/29/2021	MFR	MOTION FOR RECONSIDERATION AND REHEARING
03/15/2021	POS	PROOF OF SERVICE
03/12/2021	ORD	ORDER FILED
03/04/2021	POS	PROOF OF SERVICE
03/04/2021	NE7	NOTICE ENTRY 7 DAY ORDER
03/02/2021	DPN	DISPOSITION SHEET
02/16/2021	REP	REPLY FILED
02/16/2021	POS	PROOF OF SERVICE
02/16/2021	SDO	SCHEDULING ORDER
02/10/2021	STO	STIPULATION/ORDER FILED
02/04/2021	POS	PROOF OF SERVICE
02/04/2021	ADJ	ADJOURNMENT
02/01/2021	WTL	WITNESS LIST
02/01/2021	POS	PROOF OF SERVICE
02/01/2021	REP	REPLY FILED
01/29/2021	POS	PROOF OF SERVICE

Date	Code	Desc
01/29/2021	SDO	SCHEDULING ORDER
01/19/2021	RSP	RESPONSE FILED
01/15/2021	POS	PROOF OF SERVICE
01/08/2021	NOH	NOTICE OF HEARING
01/08/2021	MOT	MOTION FILED
01/08/2021	POS	PROOF OF SERVICE
01/08/2021	SDO	SCHEDULING ORDER
01/08/2021	STO	STIPULATION/ORDER FILED
01/06/2021	DPN	DISPOSITION SHEET
01/05/2021	STO	STIPULATION/ORDER FILED
12/23/2020	POS	PROOF OF SERVICE
12/21/2020	WTL	WITNESS LIST
12/21/2020	POS	PROOF OF SERVICE
12/21/2020	MSD	MOTION SUMMARY DISPOSITION
12/15/2020	POS	PROOF OF SERVICE
12/15/2020	RSP	RESPONSE FILED
11/04/2020	WTL	WITNESS LIST
10/16/2020	NOH	NOTICE OF HEARING
10/16/2020	MOT	MOTION FILED
09/02/2020	POS	PROOF OF SERVICE
09/02/2020	SDO	SCHEDULING ORDER
09/02/2020	DPN	DISPOSITION SHEET
07/28/2020	POS	PROOF OF SERVICE
07/28/2020	NOH	NOTICE OF HEARING
06/10/2020	POS	PROOF OF SERVICE
05/08/2020	DFN	DEMAND FOR NOTICE
04/24/2020	ATC	ANSWER TO COMPLAINT
03/05/2020	CMP	COMPLAINT
03/05/2020	SUM	SUMMONS ISSUED

Appendix Attachment 4

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE ESTATE OF MARY ANN MALLOY,
a Legally Incapacitated Individual, by
Darren Findling and Kathern Malloy, as Co-Guardians, and
THE DARREN FINDLING LAW FIRM, PLC,

Case No. 2020-393,904CZ
Hon.

DANIEL A. O'BRIEN

Plaintiffs,

-vs-

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

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A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the Complaint has been previously filed in this court, where it was given docket numbers 2008-316364-GA and was assigned to Judge Daniel A. O'Brien. The action remains open and active.

PLAINTIFF'S ATTORNEY

**COMPLAINT FOR PAYMENT OF PERSONAL INJURY PROTECTION BENEFITS,
ATTORNEY FEES, COSTS, AND INTEREST**

Plaintiffs, the Estate of Mary Ann Malloy, a Legally Incapacitated Individual, by Darren Findling and Kathern Malloy, as Co-Guardians, and The Darren Findling Law Firm, PLC, for their Complaint, state as follows:

The Parties

1. Plaintiff, the Estate of Mary Ann Malloy, a Legally Incapacitated Individual, is pending in the Oakland County Probate Court, Case No. 2008-316364-GA, administered by Darren Findling and Kathern Malloy.
2. Plaintiff, The Darren Findling Law Firm, PLC, is a Michigan Professional Corporation.
3. Defendant, Auto-Owners Insurance Company, is a Florida Corporation, doing business in

-00PC-EST-BY-

THE
PROBATE
PRO

the County of Oakland, State of Michigan.

Venue and Jurisdiction

- 4. This cause of action is within the jurisdiction of this Court pursuant to MCL 700.1302, MCL 700.1303 and/or MCL 300.1604.
- 5. Venue for this action is appropriate under MCL 600.1621.

General Allegations

- 6. On August 10, 1979, Mary Ann Malloy sustained serious injuries as the result of an automobile accident.
- 7. Her injuries included a traumatic brain injury.
- 8. Darren Findling and Kathern Malloy are the duly appointed Co-Guardians of Mary Ann Malloy, and are represented by The Darren Findling Law Firm, PLC, in their role as fiduciary.
- 9. The necessity of the Guardianship results from the automobile accident.
- 10. Defendant, Auto-Owners Insurance Company ("hereinafter referred to as Auto-Owners or Defendant") is the personal injury protection carrier for Mary Ann Malloy.
- 11. Under the terms and conditions of the applicable automobile insurance policy, Auto-Owners became obligated to pay, on behalf of Mary Ann Malloy, certain expenses or losses in the event he sustained bodily injury in a motor vehicle accident.
- 12. As a result of the accident, the Co-Guardians and The Darren Findling Law Firm, PLC, have rendered services to the ward, thus the Estate has incurred reasonable and necessary attorney and fiduciary fees and costs.
- 13. Proof for full payment of the above-mentioned obligations has been provided to Auto-Owners on a monthly basis.
- 14. For services rendered, the Estate has incurred fees and costs in the amount of \$8,040.45

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from March 27, 2019 through February 1, 2020, and continues on an ongoing basis.

Exhibit A, *Billing Statements*.

15. The fiduciary and attorney fees and costs incurred are allowable expenses as defined by Michigan Law and were required to be paid by Defendant upon submission.

Count I-Payment of No Fault Benefits, Interest and Attorney Fees

16. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as though fully stated herein.

17. Pursuant to MCL 500.3107 and the applicable insurance policy, Defendant is responsible for payment of fiduciary and attorney fees and costs incurred which are allowable expenses and that are reasonably necessary for an injured person's care, recovery or rehabilitation.

18. The services of the Co-Guardians and counsel as laid out in Exhibit A fall within the parameters described herein.

19. Defendant has unreasonably refused to pay, or has unreasonably delayed in making proper payments, of no-fault benefits to the Estate, Co-Guardians, and/or The Darren Findling Law Firm, PLC.

20. Plaintiffs are entitled to, and request a grant of, attorney fees and costs incurred in bringing this Complaint, as a result of the insurer unreasonably refusing to pay the claim or unreasonably delaying in making the proper payment pursuant to MCL 500.3148(1).

21. Plaintiffs are entitled to 12% per annum simple interest on the overdue portion of the bill pursuant to MCL 500.3142.

Count II - Breach of Contract Claim

22. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as though fully stated herein.

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- 23. On or about August 10, 1979, Plaintiff was insured with Defendant under the provisions of an automobile insurance policy issued by Defendant that was then in effect in accordance with the provisions of the Michigan No-Fault Automobile Insurance Act (No-Fault Act), MCL 500.3101 *et seq.*, and for which applicable premiums were paid.
- 24. Under the terms and conditions of the automobile insurance policy, Defendant became obligated to pay to or on behalf of Plaintiff certain expenses or losses if Plaintiff sustained bodily injury or death in an accident arising out of the ownership, operation, maintenance, or use of a motor vehicle.
- 25. Plaintiff was an occupant of a motor vehicle that was involved in a collision in which Plaintiff sustained accidental bodily injuries within the meaning of Defendant's policy and MCL 500.3105. Plaintiff's injuries necessitated the appointment of a co-guardians and/or conservator which resulted in the Estate incurring reasonable and necessary attorney and fiduciary fees and costs for administration related to the care, recovery and rehabilitation of Mary Ann Malloy.
- 26. Defendant has refused to pay Plaintiff all personal protection insurance benefits in accordance with the applicable no-fault and contract provisions related to reasonable and necessary attorney and fiduciary fees and costs for administration related to the care, recovery and rehabilitation of Mary Ann Malloy.
- 27. Reasonable proof for full payment of all personal protection insurance benefits has been or will be supplied, but Defendant has failed, refused, or neglected to pay.
- 28. Defendant has unreasonably refused to pay or has unreasonably delayed making proper payments to Plaintiff contrary to MCL 500.3142 and MCL 500.3148 and continues to do so.

Count III - Declaratory Relief

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29. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as though fully stated herein.

30. An actual controversy exists between Plaintiffs and Defendant.

31. The court must determine the following:

- a. the applicability of the No-Fault Act to Plaintiff's claims;
- b. The reasonableness of attorney and fiduciary fees and costs for administration and that they are related to the care, recovery and rehabilitation of Mary Ann Malloy;
- c. That the failure to pay was "overdue" and not paid within 30 days of submission; and
- d. other determinations, orders, and judgments necessary to fully adjudicate the rights of the parties.

32. Plaintiffs seek payment and are entitled to \$8,040.45, plus interest of 12% per annum simple interest on the overdue portion of the bill pursuant to MCL 500.3142, of reasonable and necessary attorney and fiduciary fees and costs for administration related to the care, recovery and rehabilitation of Mary Ann Malloy.

WHEREFORE, Plaintiffs, the Estate of Mary Ann Malloy, a Legally Incapacitated Individual, by Darren Findling and Kathern Malloy, as Co-Guardians, and The Darren Findling Law Firm, PLC, ask that this Court grant the following relief:

- A) Compel Auto-Owners to pay the Co-Guardians and/or The Darren Findling Law Firm, PLC's fees and costs associated with the care, recovery and rehabilitation of the ward in the amount of \$8,040.45 plus interest;
- B) Award Plaintiffs' attorney fees and costs incurred in this matter; and
- C) Any other relief deemed appropriate.

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Dated: February 14, 2020

Respectfully submitted,
The Darren Findling Law Firm, PLC



Andrew J. Black (P64606)
Attorneys for Plaintiffs

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EXHIBIT A

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A Division of The Darren Findling Law Firm, PLLC

414 W. Fifth Street
Royal Oak, MI 48067

July 9, 2019

Estate of Mary Ann Malloy, LII
Auto Owners
PO BOX 30512
Lansing, MI 48909
Jennifer Bulling

Claim #: 004-0004547-1979

(248)399-3300
- (248)556-9771
www.TheProbatePro.com

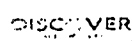
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Billing Summary

Attorney Fees	\$4,496.00
Costs and Expenses	\$132.58
Payments (and credits)	\$0.00
Previous Balance	\$0.00

BALANCE DUE \$4,628.58

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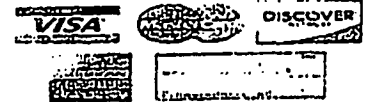
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Estate of Mary Ann Malloy, LLI
Auto Owners
PO BOX 30512
Lansing, MI 48909
Jennifer Bulling



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July 9, 2019

File Name: Estate of Mary Ann Malloy, LLI

Claim #: 004-0004547-1979

File Type: Conser/Guard-PIP

Contact Person: Esselly, Angola

Professional Services

		<u>Time</u>	<u>Amount</u>
3/27/2019	PL	Receipt and review of intake sheet to open file within system. Place information into computer to correctly reflect client information, address, contact information, assigned attorney and prepare sticker for physical file. Return file with task information for proper follow up.	1.00 \$140.00
4/17/2019	AE	Phone call from Rochelle Greenburg at Medical Alternatives Inc. Discussed file and Schedule in-person meeting at facility.	0.50 \$117.50
4/23/2019	AE	Prepared for hearing in Oakland County Probate Court	0.40 \$94.00
4/24/2019	PL	Telephone call from R. Greenburg regarding upcoming meeting with A. Esselly; correspondence to A. Esselly regarding the same.	0.20 \$25.00
	AE	Attended hearing at Oakland County Probate Court regarding Petition to Modify Guardianship. Attended to necessary follow-up. Attempted to contact co-guardian regarding Petition. Spoke with Rochelle at Medical Alternatives regarding same.	2.60 \$611.00
4/30/2019	PL	Team meeting at Medical Alternatives.	1.80 \$270.00
	AE	Preparation for meeting at Medical Alternatives. Team meeting at Medical Alternatives regarding Mary's care, recovery, and rehabilitation.	2.50 \$587.50
	PL	Telephone conference with Interested Party, Patrick Malloy, regarding Ward's care.	0.10 \$14.00

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Estate of Mary Ann Malloy, LII

			<u>Time</u>	<u>Amount</u>
5/1/2019	AE	Review of notes and Medical status from Medical Alternatives. Phone call with Pat Malloy regarding Mary's care, recovery, and rehabilitation. Letter to Kathern enclosing Acceptance of Appointment, Email to Pat Malloy regarding same.	1.00	\$235.00
5/2/2019	PL	Communication with PM&R office.	0.20	\$30.00
5/6/2019	AE	Receipt of email from Ward's care manager regarding ward's needs	0.10	\$23.50
5/7/2019	AE	Phone conference with Jennifer at Siporin's office regarding Ward's care	0.10	\$23.50
5/8/2019	AE	Receipt of authorizations from MAM. Review of same. Receipt of signed Acceptance of Appointment from co-guardian. Task to VR to Acceptance of Appointment with the Court.	0.50	\$117.50
5/9/2019	AE	Receipt of email from care manager regarding Ward's care. Review of executed medical authorizations	0.20	\$47.00
	PL	Prepared letter to Interested Parties with service of Order Regarding Modification of Guardian; prepared Proof of Service for filing; scanned all documents to file; Preparation of Acceptance of Appointment for filing.	0.90	\$112.50
5/10/2019	PL	Receipt and review of status reports from Medical Alternatives.	0.40	\$60.00
	AE	Conference with AO regarding ward's needs	0.20	\$47.00
5/13/2019	PL	Travel to Probate Court. Filed Acceptance of Appointment with probate clerk. Qualified Fiduciary. Obtained 2 certified copies of Letters of Authority. Returned certified copy to The Probate Pro.	1.00	\$95.00
5/15/2019	PL	Correspondence to the Co-Guardian with a copy of the Letter of Guardianship; scanned in letters to file; correspondence to A. Esselly regarding the same.	0.20	\$25.00
5/21/2019	PL	Team meeting with PM & R doctor. Guardianship visit.	3.00	\$450.00
	AE	Review of Medical Alternatives Summary of Ward's care	0.30	\$70.50
	PL	Team meeting with family and attorney/Guardian.	0.70	\$105.00
	AE	Team meeting regarding Ward's care. Attended to necessary follow up regarding same.	1.40	\$329.00
	PL	Letter to litigation counsel, Bob Logeman, enclosing Letters of Guardianship for his records.	0.30	\$42.00
5/22/2019	PL	Correspondence with L. Vaara-Lewis regarding Social Security.	0.10	\$15.50

Estate of Mary Ann Malloy, LII

Page 3

			<u>Time</u>	<u>Amount</u>
5/22/2019	PL	Meeting at Social Security Administration.	1.50	\$225.00
	AE	Receipt of email from Ward's brother regarding ward's care and documentation received from Court. Response to the same. Conference with LVL regarding coordination of payment for ward's care and Guardianship review.	0.40	\$94.00
5/24/2019	PL	Monthly progress notes received and reviewed from Feinburg Consulting.	0.30	\$45.00
5/30/2019	AE	Email correspondence with Med Alternatives regarding correspondence from Auto Owners	0.20	\$47.00
6/3/2019	PL	Dr. Perlman notes received and reviewed.	0.20	\$30.00
	AE	Phone call from Guardian ad Litem regarding Guardianship review.	0.10	\$23.50
6/13/2019	PL	Receipt and review of two status reports from Medical Alternatives.	0.30	\$45.00
6/24/2019	PL	Communication with brother. Communication with case manager.	0.40	\$60.00
	AE	Phone call from Jeff regarding Guardianship Review. Email correspondence with Pat Malloy regarding same. Conference with Lilsa regarding ward's care.	0.40	\$94.00
6/25/2019	PL	Meeting at Social Security office.	0.50	\$75.00
	AE	Phone conference with Co-GA and son regarding Ward's care.	0.20	\$47.00
6/28/2019	AE	Email correspondence from interested party regarding ward's care.	0.10	\$23.50
Total Time Charges			24.30	\$4,496.00

4/23/2019	MARY ANN MALLOY:LOG Check # 27390	\$24.00
4/24/2019	MILEAGE REIMBURSEMENT FEDERAL RATE: .58 per mile TOTAL MILES: 12	\$6.96
4/30/2019	MILEAGE REIMBURSEMENT FEDERAL RATE: .58 per mile TOTAL MILES: 46	\$26.68
5/9/2019	Postage.	\$3.00

Estate of Mary Ann Malloy, LII

	<u>Amount</u>
5/20/2019 MILEAGE REIMBURSEMENT FEDERAL RATE: .58 per mile TOTAL MILES:92	\$50.14
5/31/2019 MILEAGE REIMBURSEMENT FEDERAL RATE: .58 per mile TOTAL MILES:36	\$19.62
4-30-19	
6/25/2019 MILEAGE REIMBURSEMENT FEDERAL RATE: .58 per mile TOTAL MILES:4	\$2.18
Total Filing Fees and Costs	<u>\$132.58</u>
Total Amount of this Bill	<u>\$4,628.58</u>
 BALANCE DUE	 <u><u>\$4,628.58</u></u>

Effective Billing Rate

<u>Name</u>	<u>Time</u>	<u>Avg Rate</u>
Angela Esselly	71.20	\$235.00
Amy Pomponio	1.00	\$140.00
Liisa Vaara-Lewis	9.30	\$150.00
Sharon McCarthy	0.40	\$140.00
Tracy McGinnis	0.10	\$155.00
Vernetia Roddy	1.30	\$125.00
Marvin Urbas	1.00	\$95.00

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A Division of The Darren Findling Law Firm, PLLC

414 W. Fifth Street
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September 6, 2019

Estate of Mary Ann Malloy, LII

Auto Owners

PO BOX 30512

Lansing, MI 48909

Jennifer Bulling

Claim #: 004-0004547-1979

(248)399-3300

- (248)556-9771

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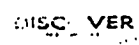
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Billing Summary

Attorney Fees	\$502.50
Costs and Expenses	\$0.00
Payments (and credits)	(\$1,204.96)
Previous Balance	\$4,628.58

BALANCE DUE \$3,926.12

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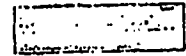
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Estate of Mary Ann Malloy, LII
Auto Owners
PO BOX 30512
Lansing, MI 48909
Jennifer Bulling



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September 6, 2019

File Name: Estate of Mary Ann Malloy, LII

Claim #: 004-0004547-1979

File Type: Conser/Guard-PIP

Contact Person: Esseily, Angela

Professional Services

		<u>Time</u>	<u>Amount</u>
7/1/2019	AE Reviewed documentation related to Ward's care.	0.20	\$47.00
7/3/2019	AE Receipt of correspondence regarding wards care	0.10	\$23.50
7/8/2019	AE Phone conference with Co-GA regarding coordination of ward's needs.	0.50	\$117.50
7/10/2019	PL Requested HIPPA release requests for client, and media release for recreational therapy from NeuroRestorative completed. Guardian signature obtained. Mailed completed forms in envelope provided.	0.30	\$45.00
7/12/2019	AE Receipt of status up date on Mary's care.	0.10	\$23.50
7/15/2019	PL Receipt and review of June and July status reports from Medical Alternatives.	0.20	\$30.00
7/16/2019	AE Coordination of wards care needs	0.60	\$75.00
	PL Conference with A. Esseily regarding wards care and needs.	0.10	\$15.50
8/22/2019	AO Spoke with Rebekah (Auto Owners) regarding status of PIP claims/benefits.	0.20	\$57.00
8/26/2019	PL Receipt and review of therapeutic status report from Cassell and Associates.	0.30	\$45.00
	AE Receipt of medical record regarding Ward's treatment and work program.	0.10	\$23.50

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Estate of Mary Ann Malloy, LII

	<u>Time</u>	<u>Amount</u>
Total Time Charges	2.70	\$502.50
Previous Balance		\$4,628.58
8/19/2019 Thank you for your Payment!. Check No. 358456540		(\$1,204.96)
Total Payments and Credits		(\$1,204.96)
BALANCE DUE		\$3,926.12

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Estate of Mary Ann Malloy, LII

<u>Name</u>	<u>Effective Billing Rate</u>	<u>Time</u>	<u>Avg Rate</u>
Amanda Orlando		0.20	\$285.00
Angela Esselly		1.60	\$193.75
Lilisa Vaara-Lewis		0.80	\$150.00
Tracy McGinnis		0.10	\$155.00

<u>Current</u>	<u>30 Days</u>	<u>90 Days</u>	<u>180 Days</u>	<u>Collections</u>
\$502.50	\$3,423.62	\$0.00	\$0.00	\$0.00

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October 29, 2019

Estate of Mary Ann Malloy, LII
Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz
Claim #: 004-0004547-1979

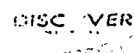
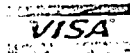
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Billing Summary

Attorney Fees	\$717.50
Costs and Expenses	\$12.00
Payments (and credits)	\$0.00
Previous Balance	\$3,907.62

BALANCE DUE \$4,637.12

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Estate of Mary Ann Malloy, LLI
Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz



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October 29, 2019

File Name: Estate of Mary Ann Malloy, LLI

Claim #: 004-0004547-1979

File Type: Conser/Guard-PIP

Contact Person: Essolly, Angola

Professional Services

		<u>Time</u>	<u>Amount</u>
10/8/2019	AE	Began preparation of Annual Report of Guardian. Prepared and mailed letter to coGuardian enclosing report. Email correspondence with CM and brother regarding same.	0.90 \$211.50
10/12/2019	PL	Receipt and review of Cassell and Associates status report. Communication with case manager.	0.60 \$90.00
10/14/2019	AE	Assisted in preparation of Annual Report of Guardianship. Phone call from Ward's brother regarding coordination of same.	0.20 \$47.00
10/16/2019	AE	Receipt of email from ward's family. Review of completed Annual Report. Task to Lilsa to file, serve, and file Proof of Service.	0.40 \$94.00
	PL	Meeting with case manager to assist with the completion of the Annual Report.	0.30 \$45.00
10/17/2019	PL	Prepared correspondence to Interested Parties and mailed Annual Report of Guardianship. Prepared Proof of Service. Filed Annual Report of Guardianship with Oakland County Probate Court.	0.50 \$75.00
10/21/2019	PL	Letters of Authority received from Oakland County Probate Court. Prepared correspondence to Guardian with same. Communication with brother and team and provided them with updated Letters of Authority.	0.40 \$60.00
	PL	Travel to Probate Court. Filed Annual Report of Guardian with probate court clerk. Returned time-stamped copy to The Probate Pro.	1.00 \$95.00

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Estate of Mary Ann Malloy, LII

	<u>Time</u>	<u>Amount</u>
Total Time Charges	4.30	\$717.50
<hr/>		
10/17/2019 MARY A MALLOY:ANNUAL RPT/UPDATED LOA Check # 29401		\$12.00
Total Filing Fees and Costs		\$12.00
Total Amount of this Bill		\$729.50
Previous Balance		\$3,907.62
BALANCE DUE		<u>\$4,637.12</u>

Estate of Mary Ann Malloy, LI

Name	Effective Billing Rate	Time	Avg Rate
Angela Esseily		1.50	\$235.00
Lilsa Vaara-Lewis		1.80	\$150.00
Joe Kassab		1.00	\$95.00

Current	30 Days	90 Days	180 Days	Collections
\$813.00	\$502.50	\$0.00	\$3,321.62	\$0.00

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October 4, 2019

Estate of Mary Ann Malloy, LII

Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz

Claim #: 004-0004547-1979

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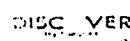
Billing Summary

Attorney Fees	\$83.50
Costs and Expenses	\$0.00
Payments (and credits)	(\$102.00)
Previous Balance	\$3,926.12

BALANCE DUE \$3,907.62



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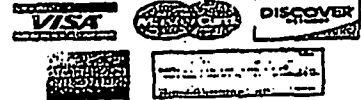
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Estate of Mary Ann Malloy, LII
Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz



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October 4, 2019

File Name: Estate of Mary Ann Malloy, LII

Claim #: 004-0004547-1979

File Type: Consor/Guard-PIP

Contact Person: Essolly, Angela

Professional Services

	<u>Time</u>	<u>Amount</u>
9/5/2019 AE Receipt of correspondences regarding Ward's care.	0.10	\$23.50
9/6/2019 PL Reports from Medical Alternatives received and reviewed.	0.40	\$60.00
Total Time Charges	0.50	\$83.50
Previous Balance		\$3,926.12
9/19/2019 Thank you for your Payment!. Check No. 358561310		(\$45.00)
9/19/2019 Thank you for your Payment!. Check No. 358561300		(\$57.00)
Total Payments and Credits		(\$102.00)
 BALANCE DUE		 \$3,907.62

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Estate of Mary Ann Malloy, LII

Name	Effective Billing Rate	Time	Avg Rate
Angela Esseily		0.10	\$235.00
Lisa Vaara-Lewis		0.40	\$150.00

Current	30 Days	90 Days	180 Days	Collections
\$586.00	\$0.00	\$3,321.62	\$0.00	\$0.00

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December 3, 2019

Estate of Mary Ann Malloy, LII

Auto Owners

PO BOX 30512

Lansing, MI 48909

Rebekah Moritz

Claim #: 004-0004547-1979

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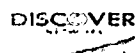
Billing Summary

Attorney Fees	\$2,845.00
Costs and Expenses	\$102.88
Payments (and credits)	\$0.00
Previous Balance	\$3,907.62

BALANCE DUE \$6,855.50



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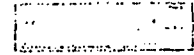
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Estate of Mary Ann Malloy, LII
Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz



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December 3, 2019

File Name: Estate of Mary Ann Malloy, LII

Claim #: 004-0004547-1979

File Type: Conser/Guard-PIP

Contact Person: Esseily, Angela

Professional Services

			<u>Time</u>	<u>Amount</u>
10/8/2019	AE	Began preparation of Annual Report of Guardian. Prepared and mailed letter to coGuardian enclosing report. Email correspondence with CM and brother regarding same.	0.90	\$211.50
10/12/2019	PL	Receipt and review of Cassell and Associates status report. Communication with case manager.	0.60	\$90.00
10/14/2019	AE	Assisted in preparation of Annual Report of Guardianship. Phone call from Ward's brother regarding coordination of same.	0.20	\$47.00
10/16/2019	PL	Meeting with case manager to assist with the completion of the Annual Report.	0.30	\$45.00
	AE	Receipt of email from ward's family. Review of completed Annual Report. Task to Liisa to file, serve, and file Proof of Service.	0.40	\$94.00
10/17/2019	PL	Prepared correspondence to Interested Parties and mailed Annual Report of Guardianship. Prepared Proof of Service. Filed Annual Report of Guardianship with Oakland County Probate Court.	0.50	\$75.00
	DF	Prepared the final draft of the Annual Report of Guardian on Condition of Legally Incapacitated Individual for filing with the Probate Court.	0.50	\$175.00
10/21/2019	PL	Letters of Authority received from Oakland County Probate Court. Prepared correspondence to Guardian with same. Communication with brother and team and provided them with updated Letters of Authority.	0.40	\$60.00

Estate of Mary Ann Malloy, LII

Page 2

		<u>Time</u>	<u>Amount</u>
10/21/2019	PL Travel to Probate Court. Filed Annual Report of Guardian with probate court clerk. Returned time-stamped copy to The Probate Pro.	1.00	\$95.00
10/30/2019	PL Prepared Notice of Hearing and court filing memo for filing of Petition to Compel Payment of PIP Benefits.	0.30	\$42.00
11/1/2019	PL Prepared a cover letter to the interested parties to serve the Petition and Notice of Hearing. Also served the resident agent for Auto Owners. Prepared a Proof of Service for filing with probate court and mailed.	1.50	\$210.00
	PL Travel to Probate Court. Met with clerk to file Petition. Filed documents with probate court. Paid filing fee. Returned Notice of Hearing with hearing date to The Probate Pro.	1.50	\$142.50
11/4/2019	PL Receipt and review of Medical Alternatives progress note for ward's care, recovery and rehabilitation.	0.20	\$30.00
11/6/2019	PL Drafted proposed order.	0.20	\$28.00
11/7/2019	AE Receipt of medical summaries regarding Mary's care, recovery and rehab. Follow up with social worker regarding same.	0.30	\$70.50
11/12/2019	PL Guardian visit and doctor appointment.	3.50	\$525.00
	AE Receipt of documentation regarding ward's care.	0.20	\$47.00
11/15/2019	PL Case management service agreement received and reviewed from Feinburg consulting for ward's care. Guardian signature obtained. Returned to Feinburg via email as requested.	0.30	\$45.00
11/18/2019	AE Conference with AB regarding Petition to Compel.	0.20	\$47.00
11/19/2019	PL Phone call with Ominique regarding request for an adjournment. Prepared memo to file owner regarding the same.	0.10	\$13.50
	AE Email correspondence with Defense Counsel regarding hearing at Oakland County Probate Court. Receipt of Objection and Appearance.	0.20	\$47.00
	AE Preparation of Petition to Compel at Oakland County Probate Court.	0.50	\$117.50
11/20/2019	AE Attended hearing at Oakland County Probate Court regarding Petition to Compel. Attended to necessary follow-up.	2.50	\$587.50
Total Time Charges			16.30 \$2,845.00

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	<u>Amount</u>
10/17/2019 MARY A MALLOY:ANNUAL RPT/UPDATED LOA Check # 29401	\$12.00
10/30/2019 MARY A MALLOY:PET TO COMPEL PYMT Check # 29537	\$20.00
11/1/2019 Postage.	\$9.40
11/12/2019 MILEAGE REIMBURSEMENT FEDERAL RATE: .58 per mile TOTAL MILES:88	\$51.04
11/20/2019 MILEAGE REIMBURSEMENT FEDERAL RATE: .58 per mile TOTAL MILES:18	\$10.44
 <i>Total Filing Fees and Costs</i>	 <u>\$102.88</u>
 <i>Total Amount of this Bill</i>	 <u>\$2,947.88</u>
 <i>Previous Balance</i>	 <u>\$3,907.62</u>
 BALANCE DUE	 <u><u>\$6,855.50</u></u>

Effective Billing Rate

<u>Name</u>	<u>Time</u>	<u>Avg Rate</u>
Darren Findling	0.50	\$350.00
Angela Esseily	5.40	\$235.00
Amy Pomponio	2.00	\$140.00
Desiree Hippler	0.10	\$135.00
Liisa Vaara-Lewis	5.80	\$150.00
Joe Kassab	2.50	\$95.00

<u>Current</u>	<u>30 Days</u>	<u>90 Days</u>	<u>180 Days</u>	<u>Collections</u>
\$2,947.88	\$0.00	\$586.00	\$0.00	\$3,321.62

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January 13, 2020

Estate of Mary Ann Malloy, Lll
Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz

Claim #: 004-0004547-1979

Thank you for entrusting your important legal matters to The Darren Findling Law Firm. Attached is a billing statement. My firm accepts payment in the form of check, cash, money order, VISA, MasterCard, DiscoverCard and American Express. Please make all checks payable to "The Darren Findling Law Firm, PLC" and reference your file name on the check. Our Tax ID is 46-0739550.

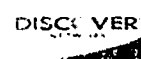
Billing Summary

Attorney Fees	\$785.50
Costs and Expenses	\$0.00
Payments (and credits)	(\$814.50)
Previous Balance	\$6,855.50

BALANCE DUE \$6,826.50



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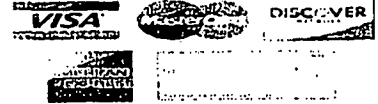
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Estate of Mary Ann Malloy, LII
Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz

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January 13, 2020

File Name: Estate of Mary Ann Malloy, LII

Claim #: 004-0004547-1979

File Type: Conser/Guard-PIP

Contact Person: Esseily, Angela

Professional Services

		<u>Time</u>	<u>Amount</u>
12/2/2019	PL Preparation of correspondence to Interested Parties with service of Order; preparation of correspondence and Proof of Service for Oakland County Probate Court for filing; scanned all documents to file.	0.80	\$100.00
12/3/2019	PL Receipt and review of Dr. Perlman notes.	0.20	\$30.00
12/16/2019	PL Communication with court about adjournment of hearing. Email to File Owner and attending attorney.	0.20	\$23.00
12/19/2019	PL Telephone call from Interested Party regarding updated address.	0.10	\$12.50
12/23/2019	ES Review of file to determine necessity for tax letter.	0.20	\$47.00
12/26/2019	AJB Receipt and review of response and research and preparation of Reply.	1.50	\$487.50
12/27/2019	KB Review and revise reply to response to petition to compe	0.30	\$85.50
	Total Time Charges	3.30	\$785.50
	Previous Balance		\$6,855.50
12/18/2019	Thank you for your Payment!. Check No. 358838936		(\$814.50)
	Total Payments and Credits		(\$814.50)

Estate of Mary Ann Malloy, LII

Page 2

Amount

BALANCE DUE

\$6,826.50

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Name	Effective Billing Rate	Time	Avg Rate
Andrew Black		1.50	\$325.00
Kristy Biddinger		0.30	\$285.00
Eryka Symington		0.20	\$235.00
Liisa Vaara-Lewis		0.20	\$150.00
Vernetia Roddy		0.90	\$125.00
Sean Boughton		0.20	\$115.00

Current	30 Days	90 Days	180 Days	Collections
\$785.50	\$2,947.88	\$0.00	\$83.50	\$3,009.62

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Estate of Mary Ann Malloy, LII

Auto Owners

PO BOX 30512

Lansing, MI 48909

Rebekah Moritz

Claim #: 004-0004547-1979

February 6, 2020

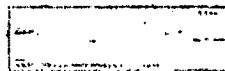
Billing Summary

Attorney Fees	\$1,202.50
Costs and Expenses	\$11.45
Payments (and credits)	\$0.00
Previous Balance	\$6,826.50

BALANCE DUE \$8,040.45



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Please be advised of certain changes to our billing practices.

1. Effective January 1, 2020, we have implemented modest increases to some attorneys' hourly rates.
2. Effective February 1, 2020, we have implemented a three percent administrative fee for expenses such as postage, copying, and legal research. This fee does not include certain file-specific costs which will be separately detailed on your bill, such as certified mail, FedEx, UPS, filing fees, courier services, people searches and mileage fees.

If you have any questions about the changes, please don't hesitate to contact us via phone or email.

Thank you for entrusting your important legal matters to The Darren Findling Law Firm, PLC.

We accept payment in the form of check, cash, money order, VISA, MasterCard, DiscoverCard and American Express.

Pay online at www.TheProbatePro.com/Payment.

Please make all checks payable to "The Darren Findling Law Firm, PLC" and reference your file name on the check.

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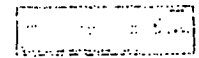
414 W. Fifth Street

Royal Oak, MI 48067

Estate of Mary Ann Malloy, LII
Auto Owners
PO BOX 30512
Lansing, MI 48909
Rebekah Moritz



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February 6, 2020

File Name: Estate of Mary Ann Malloy, LII

Claim #: 004-0004547-1979

File Type: Conser/Guard-PIP

Contact Person: Esseily, Angela

Professional Services

		<u>Time</u>	<u>Amou.</u>
1/2/2020	PL Served Reply to Response to Petition to Compel on Interested Parties. Prepared Proof of Service. Prepared court filing memo.	0.6	\$90.00
	AE Receipt of correspondence regarding ward's care.	0.2	\$49.00
1/3/2020	PL Travel to Probate Court. Filed Proof of Service with probate court clerk. Returned filed-stamped copy to The Probate Pro.	0.7	\$66.50
1/6/2020	AJB Preparation and appearance in Oakland County Probate Court for hearing on Petition.	2.0	\$700.00
1/21/2020	PL Receipt and review of NeuroRestorative report.	0.2	\$30.00
1/23/2020	AE Review of documentation regarding ward's care.	0.2	\$49.00
1/24/2020	AE Email correspondence regarding care of ward.	0.2	\$49.00
1/29/2020	PL Communication with Medical Alternatives regarding ward's care and recovery.	0.2	\$30.00
	AE Receipt of numerous emails regarding concerns for ward's care. Follow up regarding same.	0.2	\$49.00
1/30/2020	PL Prepared letter to Kathrin regarding tax documents.	0.3	\$45.00
1/31/2020	PL Phone conference with Social Security Administration discussing benefits for ward's care. Communication with attorney.	0.3	\$45.00

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Time Amou.

Total Time Charges

5.10 \$1,202.50

1/2/2020 Postage.

\$7.80

1/3/2020 Postage.

\$3.60

12/2/19

Total Filing Fees and Costs

\$11.40

Total Amount of this Bill

\$1,213.90

Previous Balance

\$6,826.50

BALANCE DUE

\$8,040.40

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Average Billing Rate

<u>Name</u>	<u>Time</u>	<u>Avg Rate</u>
Andrew Black	2.00	\$350.00
Angela Esseily	0.80	\$245.00
Amy Pomponio	0.60	\$150.00
Desiree Hippler	0.30	\$150.00
Liisa Vaara-Lewis	0.70	\$150.00
Joe Kassab	0.70	\$95.00

<u>Current</u>	<u>30 Days</u>	<u>90 Days</u>	<u>180 Days</u>	<u>Collections</u>
\$1,999.45	\$0.00	\$2,947.88	\$0.00	\$3,093.12

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Appendix Attachment 5

THE PROBATE PROSM

December 23, 2020

Sent by first class mail and email

Lauren Frederick

Collins, Einhorn Farrell PC

4000 Town Center, Suite 909

Southfield, MI 48075

lauren.frederick@ceflawyers.com

benjamin.demsky@ceflawyers.com

maryrachel.dysarz@ceflawyers.com

ominique.rogers@ceflawyers.com

stacy.czech@ceflawyers.com

Re: Estate of Mary Malloy v Auto-Owners (CZ action)

Dear Ms. Frederick:

Enclosed with regards to the above-referenced matter, please find the following documents:

- Notice of Hearing
- Plaintiff's Motion for Summary Disposition

Please contact the office if you have any questions. Thank you.

Sincerely,

THE PROBATE PRO



Amy L. Pomponio

Paralegal

/alp

THE PROBATE PRO

414 W. Fifth St.

Royal Oak, MI 48067

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ILLINOIS

MICHIGAN

OHIO

Appellant Appendix 060

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Approved, SCAO		JIS CODE: NOH
STATE OF MICHIGAN PROBATE COURT COUNTY OF OAKLAND	NOTICE OF HEARING	FILE NO. 2020-393904-CZ

In the matter of The Estate of Mary Ann Malloy v Auto-Owners Insurance Company
First, middle, and last name

TAKE NOTICE: A hearing will be held on Tuesday, January 19, 2021 at 10:00 a.m.
Date Time
 at 1200 N. Telegraph Rd., Pontiac, MI 48341 before Judge Daniel A. O'Brien
Location Bar no.
 for the following purpose(s): (state the nature of the hearing)

Plaintiff's Motion for Partial Summary Disposition

If you require special accommodations to use the court because of a disability, or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

		<u>December 21, 2020</u> <small>Date</small>
<u>The Darren Findling Law Firm, PLC</u> <u>Darren M. Findling</u> <small>Attorney name</small>	<u>P64606</u> <small>Bar no.</small>	<u>Andrew J. Black</u> <small>Petitioner name</small>
<u>414 W. Fifth St.</u> <small>Address</small>		<u>414 W. Fifth St.</u> <small>Address</small>
<u>Royal Oak, MI 48067</u> <small>City, state, zip</small>	<u>(248) 399-3300</u> <small>Telephone no.</small>	<u>Royal Oak, MI 48067</u> <small>City, state, zip</small>
		<u>(248) 399-3300</u> <small>Telephone no.</small>

USE NOTE TO COURT: If this hearing is for a guardianship matter involving an Indian child as defined in MCR 3.002(12), you must comply with MCR 5.109(2).

USE NOTE: If this form is being filed in the circuit court family division, please enter the court name and county in the upper left-hand corner of the form.

Do not write below this line - For court use only

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE ESTATE OF MARY ANN MALLOY,
a Legally Incapacitated Individual, by
Darren Findling and Kathern Malloy, as Co-Guardians, and
THE DARREN FINDLING LAW FIRM, PLC,

Case No. 2020-393904-CZ
Hon. Daniel A. O'Brien

Plaintiffs,

-vs-

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

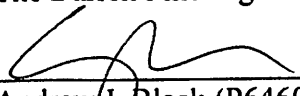
Andrew J. Black (P64606)
The Darren Findling Law Firm, P.L.C.
Attorneys for Plaintiff
414 W. Fifth Street
Royal Oak, MI 48067
(248) 399-3300

Lauren A. Frederick (P75167)
MaryRachel Dysarz (P77780)
Benjamin A. Demsky (P81055)
Collins Einhorn Farrell PC
Attorneys for Defendant
4000 Town Ctr Ste 909
Southfield, MI 48075
(248) 355-4141

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION

For the reasons more particularly set forth in the accompanying brief, Plaintiffs, Estate of Mary Ann Malloy, a Legally Incapacitated Individual, by Darren Findling and Kathern Malloy, as Co-Guardians, and The Darren Findling Law Firm, PLC, asks the Court to grant partial summary disposition under MCR 2.116(C) (9) & (10), on Defendant's defense that because Guardian, Darren Findling, did not personally perform the service they are not compensable under Michigan's No-Fault Act.

Respectfully submitted,
The Darren Findling Law Firm, P.L.C.



Andrew J. Black (P64606)
Attorneys for Plaintiffs

Dated: December 21, 2020

Brief in Support

Procedural History

Plaintiffs filed this action on March 5, 2020 seeking a determination that Defendant, Auto-Owners Insurance Company, (“Defendant” or “Auto-Owners”) was responsible for attorney and fiduciary fees incurred by the Guardian under the Michigan No-Fault Act as the Personal Injury Protection provider for Mary Ann Malloy. Defendant served its Answer and Affirmative Defenses on April 20, 2020.

On September 8, 2020, Auto-Owners filed a Complaint for Declaratory Relief in the Kent County Circuit Court referencing this matter and several others involving The Darren Findling Law Firm, PLC, filed in probate courts across the state. It appears that one of the principal defenses tendered by Defendant in this matter is that Darren Findling as co-guardian delegated certain task and/or did not personally provide the services. Plaintiffs now seek partial summary disposition of this issue.

Facts

On August 10, 1979, Mary Ann Malloy was an unrestrained passenger in an automobile accident. Mary Ann went through the windshield, sustained a severe traumatic brain injury, was in a coma for 3 months, and required plastic surgery. Her injuries, specifically the traumatic brain injury, necessitated a guardianship to provide for her care. Mary Ann lived with her mother as her co-guardian and caregiver for the majority of time in the last 40 years since her accident. She has been a participant in the Medical Alternatives’ Supported Community Program for Brain Injury. In August of 2020, Mary Ann had to move to a group home for 24-hour care and supervision after her 97-year old mother sustained a fall.

On May 6, 2015, Siporin & Associates, Inc. (“Siporin”), was appointed as Guardian for

Mary Ann Malloy. Siporin filed a Petition to Modify the Guardianship citing “There is a conflict between the current co-guardian and Ms. Malloy’s insurance provider regarding her care.” On April 24, 2019, Darren Findling was appointed as Successor Co-Guardian in Oakland County Probate Case No. 2008-316364-GA. Following his appointment Darren Findling regularly submitted bills to Auto-Owners which were unpaid citing “The above charges are not being considered as it does not appear Ms. Malloy’s guardian performed the guardianship services being claimed, these charges are being formally denied. Should letters of authority exist for the individuals providing these services, please forward them for further consideration.” (Exhibit A, *Six Denial Letters 8/13/19-7/23/20*).

Argument

Standard of Review

A motion for summary disposition pursuant to MCR 2.116(C)(9) is properly granted where the party opposing the motion has failed to state a valid defense to the claim against him or her. The motion is tested by the pleadings alone and may not be granted unless the non-moving party's defenses are “so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery.” *Grebner v. Clinton Twp*, 216 Mich.App 736, 740; 550 NW2d 265 (1996).

A party may move for summary disposition when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The opponent must, by documentary evidence, set forth specific facts showing that there is a genuine

issue for trial.

Barber v SMH (US), Inc., 202 Mich App 366, 368; 509 NW2d 791 (1993) (citations omitted).

I. Guardianship fees and costs are allowable expenses compensable by the No-Fault Insurance Carrier under the no fault act no matter who provides them.

Understanding why Auto-Owners defense is so deeply flawed and frivolous requires one only to look at the development of the law mandating that Personal Injury Protection Carriers are liable for payment of Guardianship fees and costs regardless of who is providing them. The Michigan Court of Appeals and Michigan Supreme Court have specifically held that guardianship services incurred for the care, recovery and rehabilitation of an insured are compensable regardless of whom they are performed by including attorneys for the guardian.

Michigan courts have consistently ruled that expenses associated with both guardianship and conservatorship can be allowable expenses under the Michigan No Fault Act. “The no-fault insurance act is remedial in nature and must be liberally construed in favor of persons intended to benefit thereby.” *Maloney ex rel Gauntless v. Auto Owners Ins.*, 242 Mich App 172, 179; 617 NW2d 735 (2000). “[S]ubject to other provisions of the act, ‘an insurer is liable to pay [personal injury protection] benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle...’” *Sprague v. Farmers Ins Exch*, 251 Mich App 260, 266; 650 NW2d 374 (2002), quoting MCL 500.3105(1). These PIP benefits “are payable only for ‘allowable expenses.’” MCL 500.3107 defines allowable expenses as ‘consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.’” *Id.* at 267.

In *Heinz v. Auto Club Ins. Ass’n*, 214 Mich App 195; 543 NW2d 4 (1985), the Michigan Court of Appeals addressed specifically the expenses related to both guardianship and other services and expenses. The Court held that “the no-fault act is not limited strictly to the payment

of medical expenses,” and furthermore MCL 500.3107(1)(a) “provides for the payment of expenses incurred for the reasonably necessary services for an injured person’s care.’ *Id.* at 197-

198. The Court explained:

In short, § 3107(1)(a) provides for the payment of expenses incurred for the reasonably necessary services for an injured person's care. It is clear to us that if a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian and conservator for that person, the services performed by the guardian and conservator are reasonably necessary to provide for the person's care. Therefore, they are allowable expenses under § 3107. *Id.* at 198.

“Relying on *Heinz*, the trial court concluded that if it is deemed necessary to appoint a guardian or conservator for the injured person, then the services performed by the guardian or conservator are by definition ‘reasonably necessary.’ We agree.” *In re Larry Jerome LeBoeuf*, unpublished opinion per curiam of the Court of Appeals, decided October 27, 2009 (Docket No. 286499) (Exhibit B).

In *In re Geror*, the Court of Appeals continued to clarify stating, “Defendant also contends that the attorney fees of petitioner's attorney, Craig L. Wright, are not “allowable expenses” under the no-fault act, MCL 500.3101 et seq. We disagree.” *In re Geror*, 286 Mich App 132, 134; 779 NW2d 316 (2009). “The question, therefore, is whether, pursuant to *Heinz*, Wright's legal services were ‘reasonably necessary services for an injured person's care.’” *Id.* at 135, citing *Heinz v Auto Club Ins Assn.* “Wright's legal services were directly related to petitioner's care, and therefore Wright's attorney fees are allowable expenses pursuant to MCL 500.3107(1)(a).” *Id.* at 136.

In *In re Carroll (May v ACIA)*, 292 Mich App 395; 807 NW2d 70 (2011), vacated on other grounds, 493 Mich 899; 822 NW2d 790 (2012), the court held, “[T]he type of care provided by a guardian could constitute “care” within the meaning of MCL 500.3107(1)(a). And

we conclude that there is little basis for distinguishing the “care” provided by a guardian from that provided by a conservator.” *Id.* The court concluded in its ruling:

The expenses for the service provided by the conservator were ... expenses incurred for [the ward’s] care under MCL 500.3107(1)(a). For that reason, the probate court erred when it concluded that Auto–Club was not liable to pay the full amount of the conservator’s fee. *Id.*

In *Pirgu v. United Services Auto. Ass’n*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2014 (Docket No. 314523), reversed on other grounds *Pirgu v. United Services Auto. Ass’n*, 499 Mich 269, 884 NW2d 257 (2016) (Exhibit C), the Court of Appeals addressed the specific issue of whether attorneys of guardians and conservators can recover fees as an allowable expense. The court stated as follows:

The plain language of MCL 500.3107(1)(a) provides, in pertinent part, that allowable expenses consists of “all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” (Emphasis added). The word “all,” is used in reference to the reasonable charges that will be compensable, provided that the reasonable expenses are incurred for reasonably necessary products, services, and accommodations for a person’s care, recover, or rehabilitation. “All” is typically defined to mean “1. the whole or full amount of ... 2. the whole number of ... 8. the whole quantity or amount ... 10. everything ... Random House Webster’s College Dictionary (2001). The use of the term “all” in regard to reasonable charges demonstrates the Legislature’s intent to provide recovery for the full amount of charges, provided that the charges meet the requirements noted above for allowable expenses. Thus, although the statute places limitations on what may be considered allowable expenses, the plain language of the statute does not place restrictions on who may perform allowable expenses. Indeed, the statute contains no prohibitions on the individuals who may recover for services; it simply mandates that the services fall within the term “allowable expenses.” Although the cases did not consider this same issue, both our Court and the Supreme Court have recognized as much. See *Douglas*, 492 Mich. at 261 (“while the no-fault act specifies and limits what types of expenses are compensable, it places no limitation on who may perform what is otherwise an allowable expense.”); *In re Carroll* (On Remand), 300 Mich. App at 169 (citation and quotation omitted) (recognizing “that the no-fault act does not limit who may perform what is otherwise an allowable expense under MCL 500.3107(1)(a).”).

The plain language of MCL 500.3107(1)(a) compels the conclusion that the trial court erred when it determined, as a matter of law, that plaintiff could not be

compensated for Findling's services [as attorney] rendered to plaintiff in her role as guardian and conservator.

Indeed, MCL 500.3107(1)(a) makes no reference as to who performs services that result in reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. Rather, it simply mandates that: "(1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable." *Douglas*, 492 Mich. at 259. **Consequently, pursuant to the plain language of the statute, so long as the attorney's services on behalf of a guardian or conservator meet those four requirements, there is no statutory prohibition against an attorney recovering fees for representing a guardian or conservator under MCL 500.3107(1)(a).** *Pirgu, supra*, pp. 8-9 (emphasis added).

It is clear from the developed case law in Michigan that a Guardian may employ an attorney, perform work themselves, and/or employ others, and all of those services are compensable under the no-fault act if they are for the care, recovery and rehabilitation of the ward. Defendant's argument that because Darren Findling himself did not perform the service and therefore it is not compensable is not consistent with existing law and summary disposition of this issue is appropriate.

II. *Defendant's argument regarding the delegation of services ignores MCL 700.5104.*

Defendant's argument that Darren Findling cannot delegate guardianship duties under MCL 700.5103¹ completely ignores MCL 700.5104², specifically subsections (5) and (6) which mandate a professional guardian "shall ensure that there are a **sufficient number of employees assigned to the care of wards** for the purpose of performing the necessary duties" (emphasis added). "The rules of statutory construction require the courts to give effect to the Legislature's intent. This Court should first look to the specific statutory language to determine the intent of the Legislature. The Legislature, of course, is presumed to intend the meaning that the words of the statute plainly express. If, as here, the language is clear and unambiguous, the plain and ordinary meaning of the statute reflects the legislative intent and judicial construction is neither necessary nor permitted." *Rinke v. Potrzebowski*, 254 Mich App 411, 414; 657 NW2d 169 (2002)(citations omitted).

Defendant's assertion that the fees are not compensable because they were not personally performed by Darren Findling or he did not properly delegate authority is frivolous

¹ MCL 700.5103 provides:

(1) By a properly executed power of attorney, a parent or guardian of a minor or a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release of a minor ward for adoption.

(2) A parent shall not knowingly and intentionally delegate his or her powers under this section regarding care and custody of the parent's minor child for longer than 180 days for the purpose of permanently transferring custody of the child in violation of section 136c(3) of the Michigan penal code, 1931 PA 328, MCL 750.136c.

(3) If a parent or guardian is serving in the armed forces of the United States and is deployed to a foreign nation, and if the power of attorney so provides, a delegation under this section is effective until the thirty-first day after the end of the deployment.

(4) If a guardian for a minor or legally incapacitated individual delegates any power under this section, the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact.

² MCL 700.5104 provides in pertinent part:

(5) A professional guardian appointed under this section shall establish and maintain a schedule of visitation so that an individual associated with the professional guardian who is responsible for the ward's care visits the ward within 3 months after the professional guardian's appointment and not less than once within 3 months after each previous visit.

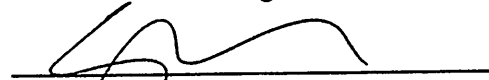
(6) A professional guardian appointed under this section shall ensure that there are a sufficient number of employees assigned to the care of wards for the purpose of performing the necessary duties associated with ensuring that proper and appropriate care is provided.

under the Estate and Protected Individuals Code as well as the established case law. The plain language of the statute not only contemplates that a professional guardian will have staff assigned to assist in the discharge of their duties but mandates it. For this reason as well, partial summary disposition is appropriate on this issue.

Conclusion

Plaintiffs, Estate of Mary Ann Malloy, a Legally Incapacitated Individual, by Darren Findling and Kathern Malloy, as Co-Guardians, and The Darren Findling Law Firm, PLC, asks the Court to grant partial summary disposition under MCR 2.116(C) (9) & (10), on Defendant's defense that because Guardian, Darren Findling, did not personally perform the service they are not compensable under Michigan's No-Fault Act.

Respectfully submitted,
The Darren Findling Law Firm, PLC



Andrew J. Black (P64606)
Attorneys for Plaintiffs
414 W. Fifth Street
Royal Oak, MI 48067
(248) 399-3300

Dated: December 14, 2020

EXHIBIT A

Auto-Owners
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Michigan Catastrophic PIP Claims Branch
PO Box 30512 | Lansing MI 48909-8012
p. 800.445.4185 ext. 54450 | f. 517.886.8752
auto-owners.com | Catmipip.clm@aoins.com

August 13, 2019

The Probate Pro
Darren Findling, Esq.
414 W. Fifth Street
Royal Oak, MI 48067

Re: **Our File #:** 004-0004547-1979
Our Insured: Roger F. Lydon
Date of Accident: 08/10/1979
Claimant: Mary Ann Malloy

Dear Account Manager:

We are in receipt of an Itemized invoice for the above referenced claim. The Itemized activities have been reviewed for relatedness, reasonable necessity and compensability as outlined by the Michigan No-Fault Statute.

For your records, enclosed is a copy of the submitted invoice with an itemization of any reductions taken. There are several activities that may have been invoices for which we will not consider for reimbursement. These activities include:

- Any activities considered to be replacement services. These activities include but are not limited to: Social Security Administration activities and corresponding mileage.
- Letters/documentation to litigation counsel

There are also several activities that may have been invoiced for which we will not consider reimbursement without additional information and/or documentation. In order to consider payment for these activities, please include the corresponding documents referenced in the activity with the itemized invoices. These activities include but are not limited to:

- Telephone call from R. Greenburg regarding upcoming meeting with A. Esseily
- Telephone conference with Interested Party, Patrick Malloy, regarding Ward's care.
- Mary Ann Malloy Log
- 05/20/2019 Mileage Reimbursement

Lastly, at this time the documentation that we have on file indicates that Darren M. Findling, Esq. is the co-guardian for Ms. Mary Ann Malloy. Charges that have been labeled on the enclosed invoice by "i" are not being considered. It does not appear Ms. Malloy's guardian performed the guardianship services being claimed. Should letters of authority exist for the individuals providing these services, please forward them for further consideration.

If you have any questions or concerns regarding this, please contact me at the number listed below.

Sincerely,



Rebekah Moritz
MICHIGAN CATASTROPHIC PIP CLAIMS
(517) 323-8870 or
(800) 445-4185 Ext. 58870
CATMIPIP.CLM@AOINS.COM

RM/ra

Enclosure

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auto-owners.com | Catmipip.clm@aoins.com

September 16, 2019

The Probate Pro
Darren Findling, Esq.
414 W Fifth Street
Royal Oak, MI 48067

Re: **Our File #:** 004-0004547-1979
Our Insured: Roger F. Lydon
Date of Accident: 08/10/1979
Claimant: Mary Ann Malloy

Dear Account Manager:

We are in receipt of an itemized invoice for the above referenced claim. The itemized activities have been reviewed for relatedness, reasonable necessity and compensability as outlined by the Michigan No-Fault Statute.

For your records, enclosed is a copy of the submitted invoice with an itemization of any reductions taken. There is an activity that may have been invoiced for which we will not consider reimbursement without additional information and/or documentation. In order to consider payment for this activity, please include the corresponding documents referenced in the activity with the itemized invoices. These activities include but are not limited to:

- Receipt of status update on Mary's care.
- Receipt of medical record regarding Ward's treatment and work program

Lastly, at this time the documentation that we have on file indicates that Darren M. Findling, Esq. is the co-guardian for Ms. Mary Ann Malloy. Charges that have been labeled on the enclosed invoice by (i) are not being considered. It does not appear Ms. Malloy's guardian performed the guardianship services being claimed. Should letters of authority exist for the individuals providing these services, please forward them for further consideration.

If you have any questions or concerns regarding this, please contact me at the number listed below.

Sincerely



Rebekah Moritz
MICHIGAN CATASTROPHIC PIP CLAIMS
(517) 323-8870 or
(800) 445-4185 Ext. 58870
CATMIPIP.CLM@AOINS.COM

RM/dm

Enclosure
(007)



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RECEIVED by MSC 6/8/2023 2:58:43 PM

November 11, 2019

The Probate Pro
Re: Darren Findling, Esq.
Jason Wagner
414 W Fifth Street
Royal Oak, MI 48067

Re: Our File #: 004-0004547-1979
Our Insured: Roger F. Lydon
Date of Accident: 08/10/1979
Claimant: Mary Ann Malloy

Dear Mr. Wagner:

We are in receipt of your recent correspondence dated 09/05/2019. After review of your correspondence our position at this time remains the same.

In order for further consideration to your request to be made, please provide what legal authority Darren Findling, Esq. is relying upon that allows him to delegate his guardian and conservator duties, when he has been appointed in an individual capacity. Once this information is received and reviewed, further consideration may be made at that time.

If you have any questions or concerns regarding this, please contact me at the number listed below.

Sincerely,

A handwritten signature in black ink, appearing to be "RM", with a long horizontal line extending to the right.

Rebekah Meritz
MICHIGAN CATASTROPHIC PIP CLAIMS
(517) 323-8870 or
(800) 445-4185 Ext. 58870
CATMIPIP.CLM@AOINS.COM

RM/dm
(007)

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December 13, 2019

The Probate Pro
Darren Findling, Esq.
414 W Fifth St
Royal Oak MI 48067

Re: Our File #: 004-0004547-1979
Our Insured: Roger F. Lydon
Date of Accident: 08/10/1979
Claimant: Mary Ann Malloy

Dear Account Manager:

We are in receipt of an itemized invoice for the above referenced claim. The itemized activities have been reviewed for relatedness, reasonable necessity and compensability as outlined by the Michigan No-Fault Statute.

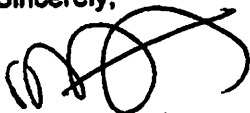
Please be advised, charges on 10/30/2019 including filing fees and cost are not being considered as they do not appear reasonable and necessary related to Ms. Malloy's care, recovery and rehabilitation.

At this time the documentation that we have on file indicates that Darren M. Findling, Esq. is the co-guardian for Ms. Mary Ann Malloy. Charges that have been labeled on the enclosed invoice by (i) are not being considered. It does not appear Ms. Malloy's guardian performed the guardianship services being claimed. Should letters of authority exist for the individuals providing these services, please forward them for further consideration.

In addition, in review of the report it appears that updated Letters of Authority may exist. Should this be the case, please forward the updated Letters of Authority for Ms. Malloy's claim file.

If you have any questions or concerns regarding this, please contact me at the number listed below.

Sincerely,



Rebekah Moritz
MICHIGAN CATASTROPHIC PIP CLAIMS
(517) 323-1550 Ext. 58870 or
(844) 359-4573 Ext. 58870
CATMIPIP.CLM@AOINS.COM

RM/dlb

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auto-owners.com | Catmipip.clm@aoins.com

February 14, 2020

The Probate Pro
Darren Findling, Esq.
414 W. Fifth Street
Royal Oak, MI 48067

Re: **Our File #:** 004-0004547-1979
Our Insured: Roger F. Lydon
Date of Accident: 08/10/1979
Claimant: Mary Ann Malloy

Dear Account Manager:

We are in receipt of an itemized invoice for the above referenced claim. The itemized activities have been reviewed for relatedness, reasonable necessity and compensability as outlined by the Michigan No-Fault Statute.

For your records, enclosed is a copy of the submitted invoice with an itemization of any reductions taken. There are several activities that may have been invoiced for which we will not consider for reimbursement. These activities include:

- Any activities considered to be replacement services. These activities include but are not limited to: Social Security Administration activities and corresponding mileage.
- Legal charges associated with Motion to Compel Payment

There are also several activities that may have been invoiced for which we will not consider reimbursement without additional information and/or documentation. In order to consider payment for these activities, please include the corresponding documents referenced in the activity with the itemized invoices. These activities have been indicated on the enclosed invoice by (ii).

Lastly, at this time the documentation that we have on file indicates that Darren M. Findling, Esq. is the co-guardian for Ms. Mary Ann Malloy. Charges that have been labeled on the enclosed invoice by (i) are not being considered. It does not appear Ms. Malloy's guardian performed the guardianship services being claimed. Should letters of authority exist for the individuals providing these services, please forward them for further consideration.

If you have any questions or concerns regarding this, please contact me at the number listed below.

Sincerely,

 for

Rebekah Moritz
MICHIGAN CATASTROPHIC PIP CLAIMS
(517) 323-1550 Ext. 58870 or
(844) 359-4573 Ext. 58870
CATMIPIP.CLM@AOINS.COM

RM/ra

Enclosure
(007)

CC: Collins Einhorn Farrell
Lauren Frederick
4000 Town Center Suite 909
Southfield MI 48075



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PO Box 30512 | Lansing MI 48909-8012
p. 844.359.4573 ext. 54450 | f. 517.886.8752
auto-owners.com | Catmipip.clm@aoins.com

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July 23, 2020

The Probate Pro
Darren Findling Esq
414 W Fifth Street
Royal Oak, MI 48067

Re: Our File #: 004-0004547-1979
Our Insured: Roger F. Lydon
Date of Accident: 08/10/1979
Claimant: Mary Ann Malloy
Subject: Formal Denial - Invoice 07/10/2020

Dear Account Manager:

We are in receipt of an itemized invoice for the above referenced claim dated 07/10/2020. The itemized activities have been reviewed for relatedness, reasonable necessity and compensability as outlined by the Michigan No-Fault Statute. At this time, the submitted invoice is being formally denied.

For your records, enclosed is a copy of the submitted invoice. At this time the documentation that we have on file indicates that Darren M. Findling, Esq. is the co-guardian for Ms. Mary Ann Malloy. The following charges are not being considered:

- 06/01/2020 - Team meeting. Receipt and review of medical status report for May for ward's care and recovery.
- 06/02/2020 - Receipt and review of Feinburg Consulting Case Management service agreement for ward's care and recovery.
- 06/11/2020 - Communication with team regarding ward's care and recovery
- 06/18/2020 - Receipt and review of Neuro Restorative report for ward's care and recovery.
- 06/19/2020 - Receipt and review of Karring Group case management report for ward's care and recovery.
- Received and reviewed reports from Medical Alternatives May and June for ward's care and recovery.

The above charges are not being considered as it does not appear Ms. Malloy's guardian performed the guardianship services being claimed, these charges are being formally denied. Should letters of authority exist for the individuals providing these services, please forward them for further consideration.

In addition, any activities considered to be replacement services will not be considered. These activities include but are not limited to:

- 06/03/2020 - Completed unemployment certification.

Lastly, the charge indicated as "Prepared Proof of Service as to service of the Summons and Complaint. Faxed to court for filing." on 06/10/2020 will not be considered as it does not appear to be for Ms. Malloy's care, recovery, or rehabilitation for injuries arising out of the 08/10/1979 motor vehicle accident.

If you have any questions or concerns regarding this, please contact me at the number listed below.

Sincerely,

Rebekah Moritz

Rebekah Moritz
MICHIGAN CATASTROPHIC PIP CLAIMS
(517) 323-1550 Ext. 58870 or
(844) 359-4573 Ext. 58870
CATMIPIP.CLM@AOINS.COM

RM/ra

Enclosure
(007)

CC: Collins Einhorn Farrell
Lauren Frederick
4000 Town Center Suite 909
Southfield MI 48075

EXHIBIT B

Westlaw.

Page 1

Not Reported in N.W.2d, 2009 WL 3466006 (Mich.App.)
(Cite as: 2009 WL 3466006 (Mich.App.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
In re Larry Jerome LeBOEUF, LIP.
William I. McDonald, Conservator for Larry
Jerome Leboeuf, a Legally Incapacitated Person,
Petitioner-Appellee,
v.
Auto Owners Insurance Company, Respondent-Appellant.

Docket No. 286499.
Oct. 27, 2009.

West KeySummaryLimitation of Actions 241 
46(6)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense

241k46 Contracts in General
241k46(6) k. Breach of Contract in General. Most Cited Cases

A conservator's fees were incurred when services were rendered, not when the probate court approved them, for purposes of the one-year-back rule of Michigan's no-fault act. That rule limits recovery for personal protection insurance benefits to those losses incurred within the one year preceding the filing of the action. Unlike another case in which reimbursement was claimed for a future expense, the estate had become liable to the conservator for some amount, and the probate court's approval of the fees only served to determine the amount of the estate's liability. M.C.L.A. § 500.3145.

Marquette Probate Court; LC No. 96-028300-CY.

Before: HOEKSTRA, P.J., and BANDSTRA and
SERVITTO, JJ.

PER CURIAM.

*1 Respondent appeals as of right the probate court's order approving compensation for petitioner's conservator fees in the amount of \$9,840. Respondent also challenges an earlier order of the court denying application of the one-year-back rule, MCL 500.3145, of Michigan's no-fault act, MCL 500.3101 *et seq.*, to petitioner's fees. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

We first turn to respondent's challenge to the trial court's refusal to apply the one-year-back rule to this case. The trial court concluded that, even though petitioner performed his services more than one year before filing his petition, the fees for his services had not been "incurred" by the estate under MCL 500.3145 until the court approved them. Therefore, the oneyear-back rule was held not to be applicable to this case. We review *de novo* a trial court's decision on a motion for summary disposition.^{FN1} *Holmes v. Michigan Capital Medical Ctr.*, 242 Mich.App. 703, 706, 620 N.W.2d 319 (2000). Likewise, we review *de novo* questions of law, including statutory interpretation and application. *Ford Motor Co. v. Woodhaven*, 475 Mich. 425, 438, 716 N.W.2d 247 (2006).

FN1. While the probate court did not frame it as such, the parties agree that its ruling on the oneyear-back rule was a denial of respondent's motion for partial summary disposition under MCR 2.116(C)(7).

The "one-year back rule" of the no-fault act, MCL 500.3145(1), provides, in pertinent part, as follows:

An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced

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Not Reported in N.W.2d, 2009 WL 3466006 (Mich.App.)
(Cite as: 2009 WL 3466006 (Mich.App.))

later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.

Thus, the one-year back rule limits recovery "to those losses incurred within the one year preceding the filing of the action." *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 574, 702 N.W.2d 539 (2005).

Again, the probate court concluded that conservator fees are not incurred for purposes of MCL 500.3145 until the probate court approves them. However, our Supreme Court has defined incurred as follows:

"Incurred" means' " '[t]o become liable or subject to, [especially] because of one's own actions.' " *Proudfoot v. State Farm Mut. Ins. Co.*, 469 Mich. 476, 484, 673 N.W.2d 739 (2003), quoting *Webster's II New College Dictionary* (2001). "Liable" is defined as "legally responsible[.]" *Random House Webster's College Dictionary* (1991). Generally, one becomes liable for the payment of services once those services have been rendered.... [*Community Resource Consultants, Inc. v. Progressive Michigan Ins. Co.*, 480 Mich. 1097, 1098, 745 N.W.2d 123 (2008) (dealing with medical expenses).]

*2 See also *Henry Ford Health System v. Titan Ins. Co.*, 275 Mich.App. 643, 647, 741 N.W.2d 393 (2007) (concluding that the plaintiff's claim for payment of medical services was barred by the one-year-back rule because it was filed more than one

year after the services were rendered).

Applying the "general rule" to this case, petitioner's conservator fees were incurred when the services were rendered, not when the probate court approved them. Therefore, the probate court erred in refusing to apply the one-year-back rule to this case.

The probate court relied on *Proudfoot, supra*, to support its decision. It reasoned that the *Proudfoot* standard for incurred, i.e., that incurred means that services have been rendered and payment has been made by the insured, "seemed most appropriate" for this case. However, in *Proudfoot*, the plaintiff had neither begun modifying her home, nor had she paid for or contracted for the planned modifications. *Proudfoot, supra* at 484, 673 N.W.2d 739. Thus, because the plaintiff was claiming reimbursement for a future expense, the expense had not yet been incurred. *Id.* Here, at the time the services were rendered by petitioner, the estate had become liable to him for some amount. The probate court's approval of the fees only served to determine the amount of the estate's liability.

Further, the probate court's interpretation of "incurred" contravenes the purpose of the one-year-back rule, which is to "compel action within a reasonable time so the opposing party has a fair opportunity to defend" and to protect defendants against stale claims and from the fear of protracted litigation. *Walden v. Auto-Owners Ins. Co.*, 105 Mich.App. 528, 533, 307 N.W.2d 367 (1981). Therefore, we reverse the trial court's order denying application of the one-year-back rule to this case.

Next, respondent argues that the probate court erred in awarding conservator fees because petitioner failed to present reasonable proof of the services he rendered as required by MCL 500.3107 and MCL 500.3142. More specifically, respondent argues that, because petitioner failed to provide a detailed invoice for his services, respondent was unable to assess its liability under MCL 500.3107. We disagree. Again, we review questions of stat-

Not Reported in N.W.2d, 2009 WL 3466006 (Mich.App.)
(Cite as: 2009 WL 3466006 (Mich.App.))

utory interpretation and application de novo. *Ford Motor Co, supra* at 438, 716 N.W.2d 247.

The no-fault act dictates the scope of PIP benefits. *In re Shields Estate*, 254 Mich.App. 367, 369, 656 N.W.2d 853 (2002). MCL 500.3107(1)(a) provides, in pertinent part, as follows:

(1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

Accordingly, there are three requirements that must be met in order for an item to be considered an "allowable expense": (1) the expense must have been incurred; (2) the expense must have been for a product, service, or accommodation reasonably necessary for the injured person's care, recovery, or rehabilitation; and (3) the amount of the expense must have been reasonable. *Nassar v. Auto Club Ins. Ass'n*, 435 Mich. 33, 49-50, 457 N.W.2d 637 (1990), quoting *Manley v. DAIE*, 425 Mich. 140, 169, 388 N.W.2d 216 (1998) (Boyle, J, concurring in part). The burden of proving that an expense is reasonably necessary lies with the plaintiff. *Manley, supra*; *Hoffman v. Auto Club Ins. Ass'n*, 211 Mich.App. 55, 94, 535 N.W.2d 529 (1995).

*3 At issue here are the second and third requirements established in *Nassar, supra*. As to the second, this Court has held that the fees associated with a guardian or conservator being appointed as a result of an incapacity arising out of injuries sustained in an automobile accident are allowable expenses under MCL 500.3104(1)(a). *Heinz v. Auto Club Ins. Ass'n*, 214 Mich.App. 195, 197-198, 543 N.W. 2d 4 (1995). In *Heinz*, the plaintiff's decedent was injured in an automobile accident and, as a result, required the services of a guardian for two years before his death. *Id.* at 196, 543 N.W. 2d 4. The defendant refused to pay the guardian's

fees, arguing that the plain meaning of MCL 500.3107(1)(a) provided only for medical care. *Id.* at 197, 543 N.W. 2d 4. This Court rejected the defendant's argument, concluding that the no-fault act was not limited strictly to the payment of medical expenses and that guardianship and conservator fees were allowable expenses under MCL 500.3107(1)(a). *Id.* at 197-198, 543 N.W. 2d 4. Relying on *Heinz*, the trial court concluded that if it is deemed necessary to appoint a guardian or conservator for the injured person, then the services performed by the guardian or conservator are by definition "reasonably necessary." We agree.

With respect to the third requirement, we conclude that the trial court did not err in awarding conservator fees despite petitioner's failure to present detailed evidence in support of his claim. While the claim was not as detailed as respondent would have liked, the memorandum of services provided by petitioner did outline the types of services he rendered to the estate during the period in question, as well as estimate the time he spent each month rendering these services. All of this appeared to be consistent with the day-to-day duties generally rendered by a conservator. We do not conclude that the trial court erred in considering this to be sufficient evidence to support the fees requested.

We affirm in part, reverse in part, and remand for application of the one-year-back rule to the trial court's award of petitioner's conservator fees. We do not retain jurisdiction. No taxable costs should be imposed pursuant to MCR 7.219, neither party having prevailed in full.

Mich.App.,2009.
In re LeBoeuf
Not Reported in N.W.2d, 2009 WL 3466006
(Mich.App.)

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EXHIBIT C

STATE OF MICHIGAN
COURT OF APPEALS

LINDITA PIRGU, Guardian and Conservator of
FERIDON PIRGU, a Legally Incapacitated
Person,

UNPUBLISHED
December 16, 2014

Plaintiff-Appellant,

v

No. 314523
Oakland Circuit Court
LC No. 2011-119378-NI

UNITED STATES AUTOMOBILE
ASSOCIATION, d/b/a USAA INSURANCE
AGENCY, INC.,

Defendant-Appellee.

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

In this action by plaintiff, Lindita Pirgu, guardian and conservator of Feridon Pirgu, a legally incapacitated person, to determine Feridon's entitlement to no-fault personal protection insurance (PIP) benefits, plaintiff appeals as of right the trial court's January 9, 2013 order that granted judgment in favor of plaintiff in the amount of \$70,237.44 for attendant care benefits, wage loss benefits, and penalty interest. In addition, the order granted plaintiff \$23,412.48 in attorney fees against defendant, United Service Automobile Association, d/b/a USAA Insurance Agency, Inc., for defendant's unreasonable failure to pay PIP benefits. Plaintiff challenges the amount of attorney fees awarded, the propriety of the jury's determination that Feridon was not entitled to future PIP benefits, and the trial court's denial of attorney fees for services provided by the Findling Law Firm, the firm retained to represent plaintiff in her role as guardian and conservator. We affirm in part, reverse in part, and remand in part for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On approximately October 15, 2008, Feridon, who did not have no-fault insurance, was riding his bicycle and was struck by one of defendant's insureds. Feridon sustained a closed head injury in the accident. In December of 2008, Lindita, Feridon's wife, was appointed guardian and conservator for Feridon. Plaintiff sought PIP benefits for Feridon shortly after the accident in the form of: (1) reasonable charges incurred for products, services, and accommodations that were reasonably necessary for Feridon's care; (2) loss of wages because Feridon was unable to work; and (3) daily expenses for attendant care for Feridon. Plaintiff

alleged that Feridon required 24-hour attendant care. Because Feridon was uninsured, his claim for no-fault benefits was originally assigned to the Michigan Assigned Claims Facility, which assigned the claim to Citizens Insurance Company. Citizens initially paid PIP benefits to plaintiff. Following a priority dispute between Citizens and defendant, defendant was determined to have first priority for the payment of PIP benefits. Thereafter, defendant conducted surveillance on Feridon and required him to submit to independent medical examinations. As a result of its investigations, defendant ceased paying PIP benefits in approximately October 2010.

The matter proceeded to trial and the jury awarded relief to plaintiff as noted above. The extent of Feridon's injuries and the amount of the jury award for attendant care benefits is not at issue on this appeal.

II. ATTORNEY FEES UNDER MCL 500.3148(1)

The trial court awarded attorney fees to plaintiff pursuant to MCL 500.3148(1) for defendant's unreasonable delay and/or failure to pay PIP benefits. Plaintiff argues that the trial court abused its discretion in awarding only \$23,412.48 in attorney fees and that the trial court should have engaged in the analysis set forth by our Supreme Court in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). We review the trial court's decision to award attorney fees and its determination as to the reasonableness of the fees for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012) (citation and quotation omitted).

"The general 'American rule' is that attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Smith*, 481 Mich at 526 (citation and quotation omitted). "In no-fault personal injury protection insurance cases, MCL 500.3148(1) permits a claimant to obtain attorney fees from an insurer 'if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.'" *Brown v Home-Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012), quoting MCL 500.3148(1).

Plaintiff contends that the trial court was required to follow the framework that our Supreme Court set forth in *Smith*, 481 Mich at 528-530, for determining the reasonableness of attorney fees in certain situations. This framework requires a trial court to "begin its analysis by determining the fee customarily charged in the locality for similar legal services" *Id.* at 530. "Once the trial judge has determined this hourly rate, the judge must multiply this rate by the reasonable number of hours expended in the case. The product of this calculation serves as the starting point for calculating a reasonable attorney fee." *Adair v Michigan (On Fourth Remand)*, 301 Mich App 547, 552; 836 NW2d 742 (2013). This amount can then be adjusted based on a variety of factors, including those set forth in *Wood v DAIIE*, 413 Mich 573, 588; 321

NW2d 653 (1982)¹, Michigan Rules of Professional Conduct 1.5(a)², and other relevant factors. *Smith*, 481 Mich at 529-531.

In the case at bar, the trial court did not begin its analysis of plaintiff's attorney fee award by multiplying a reasonable hourly rate by a reasonable number of hours. Rather, the trial court noted that the jury awarded plaintiff approximately 33 percent of the amount she requested and awarded attorney fees by calculating approximately 33 percent of the jury verdict. Upon objections by plaintiff's counsel, and over the course of two hearings and much discourse on the topic, the trial court acknowledged many of the factors set forth in *Wood* and MRPC 1.5(a) and concluded that its award of attorney fees was reasonable. The trial court also found that plaintiff's counsel "fumbled around" during trial and *de bene esse* depositions, and that some of the hours billed by plaintiff's counsel were unnecessary.

In light of binding precedent to the contrary, plaintiff is incorrect in contending that the trial court was required to follow the *Smith* framework when assessing attorney fees. *Univ Rehab Alliance, Inc v Farm Bureau General Ins Co of Michigan*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008). A panel of this court in *Univ Rehab Alliance* expressly rejected the

¹ The *Wood* factors are: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood*, 413 Mich at 588 (internal quotation marks and citation omitted).

² MRPC 1.5(a) sets forth the following factors to be considered in determining the reasonableness of a fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

defendant's argument that *Smith* applies when determining an award of attorney fees under MCL 500.3148(1) and that, pursuant to *Smith*, a trial court must first determine a "baseline" fee by multiplying the reasonable hourly-rate—the fee customarily charged in the locality for similar legal services—and then adjust the fee upward or downward according to the factors set forth in *Wood* and MRPC 1.5(a). *Id.* Unless and until a conflict panel determines otherwise or our Supreme Court weighs in on the issue of whether *Smith* applies to a determination of attorney fees under MCL 500.3148(1), we are bound by *Univ Rehab Alliance*.³

In *Univ Rehab Alliance*, this Court applied the factors set forth in *Wood*, which specifically dealt with the reasonableness of an award of attorney fees under MCL 500.3148(1), as well as the factors set forth in MRPC 1.5(a). *Id.* at 698-699. A court is not precluded from considering additional factors, and it "need not detail its findings as to each specific factor considered." *Id.* at 699, quoting *Wood*, 413 Mich at 588. In *Univ Rehab Alliance*, this Court affirmed a trial court's attorney fee award under MCL 500.3148 consistent with the plaintiff's contingent-fee agreement with her counsel, even though it amounted to, according to defendant, "over \$1,600 an hour." *Id.* at 698. Noting that consideration of a contingent-fee agreement is one of the factors set forth in MRPC 1.5(a) and was considered in several other cases assessing a reasonable attorney fee under MCL 500.3148(1), this Court held that "a reasonable attorney fee is determined by considering the totality of the circumstances. While a contingent fee is neither presumptively reasonable nor presumptively unreasonable, multiplying the reasonable number of hours worked by a reasonable hourly rate [which it dubbed the "lodestar" method] is not the preferred method." *Id.* at 700.⁴ The Court noted that the trial court employed the required

³ Although plaintiff cites to *Prins v Michigan State Police*, 299 Mich App 634; 831 NW2d 867 (2013) for the proposition that *Smith* applies in the instant case, *Prins* pertained to a plaintiff's entitlement to attorney fees pursuant to the Freedom of Information Act, and relied on a Supreme Court order in *Coblentz v City of Novi*, 485 Mich 961; 774 NW2d 526 (2009). Notably, in his dissenting opinion in *Smith*, Justice Michael Cavanagh criticized the majority for leaving unclear the issue of whether *Smith* applies when determining reasonable attorney fees outside the context of MCR 2.403: "[t]he majority opinion does not define the scope of its new law. The majority has articulated a new rule for attorney-fee awards under MCR 2.403; yet that new test's application to other attorney-fee contexts is left for its readers to ponder. . . . does this new rule apply to other fee-shifting provisions?" *Smith*, 481 Mich at 554-555. The Supreme Court denied leave in *Univ Rehab Alliance* and has not otherwise held that *Smith* applies when determining attorney fees under MCL 500.3148(1). Thus, we are bound by *Univ Rehab Alliance*.

⁴ In concluding that the analysis set forth in *Smith* does not apply to an award of attorney fees under the no-fault act, we acknowledge another panel of this Court's decision in *Augustine*, 292 Mich App at 429, wherein the Court opined that the *Smith* analysis must be applied to an award of attorney fees under MCL 500.3148(1). However, that opinion was non-binding dictum because it was unnecessary to a resolution of that case. See *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (citation and quotations omitted) ("[D]ictum is a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . ."). At issue in *Augustine*, 292 Mich App at 413, was whether the trial court followed the panel's directive on remand to undertake an

multifactor analysis and did not abuse its discretion awarding the contingent fee as a reasonable fee within the range of reasonable and principled outcomes. *Id.* at 702.

In light of the conclusion that the analysis in *Smith* does not apply, the issue becomes whether, under *Univ Rehab Alliance*, the trial court's award of attorney fees was reasonable. Because we may only reverse when a trial court has abused its discretion, wherein its ruling falls outside the range of reasonable and principled outcomes, we affirm the trial court's attorney fee award. The crux of the trial court's reasoning concerning the reasonableness of plaintiff's attorney fee award was to take into consideration the results achieved. Plaintiff requested approximately \$200,000 or approximately \$400,000, depending on whether attendant care benefits were calculated at \$12 per day or \$24 per day. Plaintiff was ultimately awarded \$70,237.44, which is approximately 35 percent of a \$200,000 award, and approximately 18 percent of a \$400,000 award. Thus, as the trial court recognized, the results achieved were considerably less than the amount in question; this was an appropriate factor for the trial court to consider. *Univ Rehab Alliance*, 279 Mich App at 698-699; *Wood*, 413 Mich at 588; MRPC 1.5(a)(4). The attorney fee award is also commensurate with what plaintiff's counsel would receive under the contingent fee agreement, which is another fair consideration. See *Univ Rehab Alliance*, 279 Mich App at 699; MRPC 1.5(a)(8). Further, although the trial court awarded plaintiff's counsel considerably less than the amount sought, the trial court expressly found that not all of the hours expended by counsel in this case were necessary. The trial court noted, "I sat through the trial, I watched the depositions, you fumbled around, forever, at times, took much longer than it had to take." The trial court was permitted to consider the time spent on the case in determining the reasonableness of the fee award, *Wood*, 413 Mich at 588, as well as any other relevant factors, such as the attorney's skill and efficacy. In addition, the record reveals that the

analysis under *Smith* in order to determine the reasonableness of attorney fees sought under MCL 500.3148(1). The prior panel in *Augustine* concluded that the analysis set forth in *Smith* must be applied to an award of attorney fees under MCL 500.3148(1). *Augustine v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2008 (Docket No. 276537), at 3. On remand, the trial court did not follow the *Smith* framework. *Augustine*, 292 Mich App at 427-428. This Court held that the law of the case doctrine, which applies regardless of the correctness of the prior decision, required the trial court to follow its directive to undertake the analysis set forth in *Smith*. *Id.* at 428-429. In addition, the panel opined that "even were it not the law of this case as a result of *Augustine I*, the trial court should have applied *Smith*, because the framework outlined in *Smith* is the proper standard to be applied in cases brought pursuant to MCL 500.3148(1) when a party seeks hourly attorney fees." *Id.* at 429. This conclusion is non-binding dictum because the dispositive issue in *Augustine*, 292 Mich App at 413, 428-429, was whether the trial court followed the panel's directive on remand to undertake an analysis under *Smith* in order to determine the reasonableness of attorney fees sought under MCL 500.3148(1). Given that this issue was dispositive, any analysis of whether the *Smith* analysis applied to a fee award under MCL 500.3148(1) is dictum, and, while it may be considered for its persuasive value, it is not binding on this Court. *Carr*, 259 Mich App at 383-384. Instead, we remain bound by *Univ Rehab Alliance*. Accordingly, plaintiff's contention that the analysis in *Smith* controls the outcome in this case and compels this Court to remand for the trial court to first determine a reasonable hourly rate and reasonable number of hours is without merit.

trial court was aware of the remaining factors set forth in *Wood* and MRPC 1.5(a) because the trial court recited the factors during different exchanges with plaintiff's counsel. Although the trial did not expressly make findings on every factor, it was not required to do so. See *Wood*, 413 Mich at 588. And, although the trial court did not comment on every factor, the record reveals that the trial court recognized the appropriate factors and was cognizant of the factors in reaching its decision. While a more extensive analysis on the record would certainly be helpful for purposes of appellate review, *Wood* does not require it, and based on the record evidence and the totality of the circumstances, we cannot conclude that trial court's ruling was outside the range of principled outcomes. See *Edge*, 299 Mich App at 127.

III. ATTORNEY FEES FOR SERVICES PERFORMED ON BEHALF OF PLAINTIFF IN HER ROLE AS GUARDIAN AND CONSERVATOR

Attorney Darren Findling represented plaintiff in her role as guardian and conservator, but did not represent her in the no-fault action. Plaintiff sought to recover fees owed or paid to Findling as "allowable expenses" under MCL 500.3107(1)(a). On a partial motion for directed verdict, the trial court concluded, as a matter of law, that plaintiff could not recover such fees as allowable expenses under the no-fault act. "We review de novo the trial court's grant or denial of a directed verdict." *Aroma Wines & Equip v Columbia Distrib Servs, Inc*, 303 Mich App 441, 446; 844 NW2d 727 (2013). The trial court granted a directed verdict to defendant because it determined, as a matter of law, that attorney fees incurred by a guardian could not be recovered under MCL 500.3107. "This Court reviews de novo the proper interpretation of the no-fault act, MCL 500.3101 et seq." *In re Carroll (On Remand)*, 300 Mich App 152, 159; 832 NW2d 276 (2013).

"A person injured in an automobile accident is entitled to a variety of personal protection insurance benefits—often referred to as PIP benefits—from his or her insurance carrier under MCL 500.3107." *Id.* (citation and quotation omitted). In order to be compensable, a claim for PIP benefits must fit within certain enumerated categories. *Douglas v Allstate Ins Co*, 492 Mich 241, 258; 821 NW2d 472 (2012); *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). "PIP benefits are payable for four general categories of expenses and losses: survivor's loss, allowable expenses, work loss, and replacement services." *Johnson*, 492 Mich at 173. See also MCL 500.3107; MCL 500.3108. Two categories are pertinent in this case: "allowable expenses," as set forth in MCL 500.3107(1)(a), and "replacement services" as provided in MCL 500.3107(1)(c).

Concerning "allowable expenses," MCL 500.3107(1)(a) provides, in pertinent part, that PIP benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." "That is, the Legislature required no-fault insurers to compensate injured persons for the expenses associated with 'products, services and accommodations' that were reasonably necessary for the 'injured person's care, recovery, or rehabilitation" *In re Carroll (On Remand)*, 300 Mich App at 159-160, quoting MCL 500.3107(1)(a).

In *Douglas*, 492 Mich at 259, our Supreme Court explained that:

the plain language of [MCL 500.3107(1)(a)] imposes four requirements that a PIP claimant must prove before recovering benefits for allowable expenses: (1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable.

Concerning the first requirement, i.e., that the expense is for an injured person's care, recovery, or rehabilitation, the terms "recovery" and "rehabilitation" are generally understood in accordance with their common meanings, but the term "care," has been the subject of several decisions from our Supreme Court. See, e.g., *Griffith*, 472 Mich at 532-536. In examining the term, "care," the Court concluded that "care" that is compensable under MCL 500.3107(1)(a) "must be related to the insured's injuries." *Id.* at 534. The Court also explained that the term "care" must have a meaning that is broader than the meaning of "recovery" and "rehabilitation," but not a meaning that is so broad as to render those terms nugatory:

"Care" must have a meaning that is broader than "recovery" and "rehabilitation" but is not so broad as to render those terms nugatory. As noted above, both "recovery" and "rehabilitation" refer to an underlying injury; likewise, the statute as a whole applies only to an "injured person." It follows that the Legislature intended to limit the scope of the term "care" to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident. "Care" is broader than "recovery" and "rehabilitation" because it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state. [*Id.* at 535.]

As explained by this Court in *In re Carroll (On Remand)*, 300 Mich App at 164, under *Griffith*, "if the product, service, or accommodation would not have been necessary but for the injuries sustained in the accident, then it is compensable as an allowable expense for the injured person's care under MCL 500.3107(1)(a)." Further, as explained by this Court in *In re Carroll (On Remand)*:

Notably, the Legislature provided that allowable expenses included expenses reasonably necessary for the care of the injured *person*; it did not limit this category to those expenses necessary to care for the injured person's *injury*. In its broadest sense, the phrase "for an injured person's care," as used in MCL 500.3107(1)(a), can refer to any product, service, or accommodation that one might use to provide for another's well-being. [*Id.* at 160.]

In addition to allowable expenses, the Legislature required no-fault insurers to cover "replacement services," which are defined as:

Expenses not exceeding \$20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [MCL 500.3107(1)(c).]

Recently, our Supreme Court has clarified the difference between allowable expenses under MCL 500.3107(1)(a) and replacement services under MCL 500.3107(1)(c):

Services that were required both before and after the injury, but after the injury can no longer be provided by the injured person himself or herself *because* of the injury, are “replacement services,” not “allowable expenses.” They are services “in lieu of those that, if he or she had not been injured, an injured person would have performed... for the benefit of himself or herself...” MCL 500.3107(1)(c). [*Johnson*, 492 Mich at 180.]

As the parties point out, we have decided similar issues to the one raised in the case at bar, but have not decided the precise issue raised in this case. In *In re Carroll (On Remand)*, 300 Mich App at 172, we explained that services provided by a guardian could comprise allowable expenses under MCL 500.3107(1)(a), provided that such services were reasonably necessary and that they did not otherwise constitute replacement services under MCL 500.3107(1)(c). In addition, in *In re Geror*, 286 Mich App 132, 136; 779 NW2d 316 (2009), we concluded that services performed by an attorney on behalf of an injured individual who has had a guardian appointed for him may be compensable as allowable expenses under MCL 500.3107(1)(a).

Although *In re Carroll (On Remand)* and *In re Geror* provide some guidance, they do not address the precise issue in this case, i.e., whether an attorney who represents a guardian can recover his or her fees incurred in that representation as an allowable expense under MCL 500.3107(1)(a). Thus, we turn to the plain language of MCL 500.3107(1)(a). The plain language of MCL 500.3107(1)(a) provides, in pertinent part, that allowable expenses consists of “*all reasonable charges* incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” (Emphasis added). The word “all,” is used in reference to the reasonable charges that will be compensable, provided that the reasonable expenses are incurred for reasonably necessary products, services, and accommodations for a person’s care, recover, or rehabilitation. “All” is typically defined to mean “1. the whole or full amount of . . . 2. the whole number of . . . 8. the whole quantity or amount . . . 10. everything *Random House Webster’s College Dictionary* (2001). The use of the term “all” in regard to reasonable charges demonstrates the Legislature’s intent to provide recovery for the full amount of charges, provided that the charges meet the requirements noted above for allowable expenses. Thus, although the statute places limitations on *what* may be considered allowable expenses, the plain language of the statute does not place restrictions on *who* may perform allowable expenses. Indeed, the statute contains no prohibitions on the individuals who may recover for services; it simply mandates that the services fall within the term “allowable expenses.” Although the cases did not consider this same issue, both our Court and the Supreme Court have recognized as much. See *Douglas*, 492 Mich at 261 (“while the no-fault act specifies and limits what types of expenses are compensable, it places no limitation on *who* may perform what is otherwise an allowable expense.”); *In re Carroll (On Remand)*, 300 Mich App at 169 (citation and quotation omitted) (recognizing “that the no-fault act does not limit who may perform what is otherwise an allowable expense under MCL 500.3107(1)(a).”).

The plain language of MCL 500.3107(1)(a) compels the conclusion that the trial court erred when it determined, as a matter of law, that plaintiff could not be compensated for Findling’s services rendered to plaintiff in her role as guardian and conservator. Indeed, MCL

500.3107(1)(a) makes no reference as to *who* performs services that result in reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. Rather, it simply mandates that: "(1) the expense must be for an injured person's care, recovery, or rehabilitation, (2) the expense must be reasonably necessary, (3) the expense must be incurred, and (4) the charge must be reasonable." *Douglas*, 492 Mich at 259. Consequently, pursuant to the plain language of the statute, so long as the attorney's services on behalf of a guardian or conservator meet those four requirements, there is no statutory prohibition against an attorney recovering fees for representing a guardian or conservator under MCL 500.3107(1)(a).

In the case at bar, there is no dispute that Findling's fees were incurred. Thus, the issue becomes: (1) whether Findling's fees were for Feridon's care, recovery, or rehabilitation; (2) whether Findling's fees were reasonably necessary; and (3) whether Findling's fees were reasonable. These are normally questions of fact that we review for clear error. See *Douglas*, 492 Mich at 247, 265. Because the trial court precluded admission of Findling's billing records, which detailed the reasons the various fees were incurred in this matter, the record is void of any evidence for us to determine whether Findling's fees were necessary for Feridon's care, recovery, or rehabilitation, whether Findling's fees were reasonably necessary or reasonable, or whether they might otherwise constitute replacement services. Accordingly, we remand to the trial court with instructions to determine: (1) whether Findling's fees were for Feridon's care, recovery, or rehabilitation; (2) whether Findling's fees were reasonably necessary; and (3) whether Findling's fees were reasonable. In addition, consistent with our opinion in *In re Carroll (On Remand)*, 300 Mich App at 172-174, we note that the court should consider whether the fees for Findling's services fall within the category of "allowable expenses," "replacement services" or neither. Findling and plaintiff testified that some of Findling's fees were for managing the funds of the conservatorship. As set forth in *In re Carroll (On Remand)*, if such activities only pertain to ordinary management services that existed before Feridon was injured, such activities would be compensable under MCL 500.3107(1)(c) as replacement services, but they would not be allowable expenses under MCL 500.3107(1)(a). See *id.* If the fees were for replacement services, defendant's liability for such fees would be subject to the \$20 per day limit set forth in MCL 500.3107(1)(c), and would be subject to the three-year limitation imposed under the statute. However, if Findling's fees were for services that went beyond what Feridon required before his injury, they could constitute allowable expenses under MCL 500.3107(1)(a). Further, if Findling's fees did not fall under either category, they would not be compensable.

In reaching this conclusion, we caution that our interpretation of MCL 500.3107(1)(a) does not conflict with attorney fee provisions found elsewhere in the no-fault act and that this interpretation does not provide another opportunity for the recovery of attorney fees in a no-fault action. MCL 500.3148(1) provides that an attorney is entitled to a reasonable attorney fee award "for advising and representing a claimant *in an action* for personal or property protection insurance benefits which are overdue" "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." (Emphasis added). Thus, pursuant to the plain language of MCL 500.3148(1), an award of attorney fees is only warranted for advising a client in *an action seeking PIP benefits* if PIP benefits are overdue and the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. This should be distinguished from an attorney who represents a guardian/conservator and charges a fee for reasonably necessary products, services, and accommodations for an injured person's

care, recovery, or rehabilitation. Otherwise, MCL 500.3107(1)(a) could be read to allow attorney fees in a manner that conflicts with MCL 500.3148(1). When construing statutes, “[i]f statutes lend themselves to a construction that avoids conflict, that construction should control.” *Walters v Leech*, 279 Mich App 707, 710; 761 NW2d 143 (2008). Accordingly, we do not read MCL 500.3107(1)(a) so as to allow the recovery of attorney fees in an *action* for PIP benefits. Rather, MCL 500.3107(1)(a) only permits recovery of attorney fees if the attorney fees were incurred “for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation[.]” where such services do not constitute an action for PIP benefits.

IV. QUESTION 11 ON THE VERDICT FORM

Next, plaintiff argues that the jury should have been precluded from considering Question 11 on the verdict form, which read, “Will Plaintiff continue to incur allowable expenses in the future?” The jury answered this question in the negative. Plaintiff’s counsel originally requested this question, stating, “I’d like a declaratory, you know, statement to the jury” concerning whether plaintiff was entitled to PIP benefits in the future for Feridon’s attendant care. The following day, after attempting to draft a verdict form that was agreeable to both parties, plaintiff’s counsel again raised the issue of his desire for the jury to decide whether plaintiff was entitled to future PIP benefits for Feridon’s attendant care. This prompted the following exchange between plaintiff’s counsel and the trial court:

MR. SHULMAN: And then—the other issue is the declaration of whether he’s—continues to require the need for the allowable services, we want a declaration that he will continue in the future to require these—these benefits—

THE COURT: Okay.

MR. SHULMAN: —and I think it should be a real [sic] simple question, just [sic] does, [“]will plaintiff continue into the future to require the allowable expenses enumerated above.[”]

Following a short recess, the parties submitted a verdict form to the trial court and indicated on the record that they both agreed to the form as written. The form contained Question 11, the question to which plaintiff now objects.

“It is settled that error requiring reversal may only be predicated on the trial court’s actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.” *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). Here, because plaintiff expressly requested that Question 11 be submitted to the jury and subsequently failed to object to the verdict form as written, she waived appellate review of this issue. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 168; 761 NW2d 784 (2008) (“A party may not waive objection to an issue and then argue on appeal that the resultant action was error.”). Indeed, to conclude otherwise would be to allow plaintiff to harbor the error, if any, as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Thus, we find this issue to be waived. *Id.* Moreover, even if we considered the matter, we

would find plaintiff's claims to be meritless. *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 295; 732 NW2d 160 (2006).

Affirmed in part and reversed and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra

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Appendix Attachment 6

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE ESTATE OF MARY ANN MALLOY,
A Legally Incapacitated Individual, by
Darren Findling and Kathern Malloy, as Co-
Guardians, and THE DARREN FINDLING
LAW FIRM, PLC,

Plaintiffs,

Case No.: 2020-393904-CZ
Hon. Daniel A. O'Brien

vs

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

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**AUTO-OWNERS' RESPONSE TO FINDLING LAW'S
MOTION FOR PARTIAL SUMMARY DISPOSITION AND
COUNTER-MOTION FOR SUMMARY DISPOSITION UNDER (I)(2)**

Interested Party Auto-Owners requests that this Court deny Findling Law's motion for partial summary disposition brought under MCR 2.116(C)(9) and (C)(10) and grant summary disposition in favor of Auto-Owners under MCR 2.116(I)(2). In support, Auto-Owners relies on the attached brief.

THEREFORE, Auto-Owners requests that the Court deny Findling Law's motion and enter summary disposition in Auto-Owners' favor.

Respectfully submitted,

COLLINS EINHORN FARRELL PC

/s/ Lauren A. Frederick

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Dated: January 15, 2020

**BRIEF IN SUPPORT OF AUTO-OWNERS' COUNTER-MOTION FOR
SUMMARY DISPOSITION UNDER (I)(2)**

Auto-Owners is entitled to summary disposition, not Findling Law. No authority exists to support Findling Law's claim that attorney Darren Findling can delegate guardianship duties to employees at his firm in the manner that he has – that is, without a power of attorney, without court notification and supervision, and for a period greater than 180 days. Findling Law cites five cases, none of which address the issue. Findling Law also cites two statutes that don't apply. So neither the statutes nor any case law lend support to Findling's argument. To that end, delegating guardianship duties in the business model that Darren Findling has created defies public policy. It misplaces the trust in which courts and families have in a guardian by permitting a delegatee to make life-impacting decisions without court supervision and outside the court's reach

indefinitely.

Because no law supports Findling Law's argument that Darren Findling can delegate his guardianship duties and because delegation of those crucial duties defies public policy, Auto-Owners is entitled to summary disposition on the bills in which someone else performed Darren Findling's guardianship duties.

Factual Background

Mary Ann Malloy has been legally incapacitated from a car accident since August 10, 1979. This Court appointed attorney Darren Findling, a professional fiduciary, as her legal guardian on April 24, 2019. Darren Findling delegated his duties as guardian to other employees in his law firm without executing a valid power of attorney. Those employees performed guardianship duties from April 29, 2019, through June 3, 2020 (401 days) and continue to do so.¹ The employees charged attorney rates ranging from \$165 to \$295 an hour for guardianship duties that family members generally perform without legal training. Darren Findling never notified this Court that others were performing his guardianship duties.

Findling Law sought reimbursement for those services performed by Darren Findling's delegates under MCL 500.3107, which requires insurers to reimburse guardians of their insureds for reasonable and reasonably necessary guardianship expenses. Auto-Owners refused to reimburse Findling Law for guardianship duties performed by anyone other than Darren Findling absent a validly executed and short-term power of attorney in compliance with MCL 700.5103. Findling Law now seeks

¹ See Findling Law's Exhibit A

partial summary disposition under MCR 2.116(C)(9) because it believes that Auto-Owners has failed to state a valid defense.

Darren Findling also serves as professional fiduciary in 17 other cases in which Auto-Owners is the no-fault insurer and has also delegated his guardianship duties in those cases as well. This is one of the issues in a declaratory judgment action pending in Kent County.

Legal Standard

Under MCR 2.116(C)(9), a plaintiff may seek summary disposition if the opposing party fails to state a valid defense to the asserted claim. *Nicita v Detroit*, 216 Mich App 746, 750; 550 NW2d 269 (1996), on remand. A motion brought under (C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991). If the defenses are "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under (C)(9) is proper." *Id.* (quotations and citations omitted).

Under MCR 2.116(C)(10), a party may move for summary disposition on the grounds that, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). For a motion brought under (C)(10), courts must consider documentary evidence submitted by the parties, if

its content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. MCR 2.116(G)(5)-(G)(6). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Under MCR 2.116(I)(2), courts may render summary disposition in favor of the opposing party, if it appears that the opposing party, rather than the moving party, is entitled to judgment. *Enbridge Energy, LP v State*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 351366); slip op at 1.

Argument

Auto-Owners, not Findling Law, is entitled to summary disposition. Attorney Darren Findling cannot delegate his guardianship duties to people in his law firm without a validly executed power of attorney. Nor can he delegate his duties for more than 180 days and without notification to the Court. No law supports Findling Law's argument otherwise, and its business model defies public policy. This Court should enter summary disposition in favor of Auto-Owners.

A. None of the cases that Findling Law cites support its argument that a guardian may delegate guardianship duties

Findling Law argues that it can delegate Darren Findling's guardianship duties to others. It's wrong, and a brief review of every case that Findling Law cites reveals that no authority exists to support its proposition.

Findling Law cites *Heinz v Auto Club Ins Ass'n*, 214 Mich App 195; 543 NW2d 4 (1985), to support the proposition that Darren Findling can delegate his guardianship duties. (Brief at 4). But *Heinz* doesn't address delegating a guardian's duties. *Heinz*

simply recognizes that guardians can be entitled to reimbursement under MCL 500.3107, which Auto-Owners doesn't contest. Findling Law's use of *Heinz* is a red herring.

Next, Findling Law cites *In re Larry Jerome LeBoeuf*, unpublished per curium opinion of the Court of Appeals, issued October 27, 2009 (Docket No. 286499). (Brief at 5). Like *Heinz*, *LeBoeuf* says that the guardian may receive reimbursement under MCL 500.3107 so long as it meets the criteria established in *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 49-50; 457 NW2d 637 (1999), which, again, is not disputed here. *LeBoeuf* does not address the question of whether a guardian may delegate guardianship duties. *Id.*

Findling Law also cites *In re Geror*, 286 Mich App 132, 134; 779 NW2d 316 (2009), to support its assertion that Darren Findling can delegate his guardianship duties. (Brief at 5). But again, *Geror* is a red herring. *Geror* doesn't address the delegation question.

In *Geror*, the court appointed the mother as guardian. *Id.* at 134. But the dad, believing that the mother's actions as guardian negatively affected the protected individual, hired an attorney to conduct discovery and file three emergency petitions. *Id.* at 136. *Geror* held that the attorney could receive reimbursement under MCL 500.3107 because those actions were reasonably necessary for the protected person's care. *Id.* *Geror* did not address whether the mother could delegate her duties. So Findling Law's use of this case to support its argument is misplaced.

Findling Law also cites *In re Carroll*, 292 Mich App 395; 807 NW2d 70 (2011). (Brief at 5). That case was vacated. *In re Carroll*, 493 Mich 899; 822 NW2d 790 (2012). Findling Law notes that it was vacated on other grounds, but that doesn't matter: a

vacated opinion has no precedential value. *People v Akins*, 259 Mich App 545, 550 n 8; 675 NW2d 863 (2003). But irrespective of this technicality, neither the original *Carroll* opinion nor the subsequent *Carroll* opinion supports Findling Law's proposition that Darren Findling may delegate his guardianship duties. *In re Carroll*, 300 Mich App 152; 832 NW2d 276 (2013). In fact, neither case even addresses the issue.

Carroll is closely related to *Heinz* and *LeBoeuf* in that applies the framework for analyzing reimbursement under MCL 500.3107 for services performed by conservators instead of guardians. *Id.* at 175. *Carroll* ultimately held that the insurance company only had to reimburse the conservator for services performed as a conservator, not for other care-taking roles. *Id.* *Carroll* does not address whether a guardian or conservator can delegate duties. So the case provides no support to Findling Law's argument.

Last, Findling Law cites *Pirgu v United States Auto Ass'n*, unpublished per curium opinion of the Court of Appeals, issued December 16, 2014 (Docket No. 314523), reversed by *Pirgu v United States Auto Ass'n*, 499 Mich 269; 884 NW2d 257 (2016). (Brief at 6). But that case doesn't support Findling Law's argument either. In *Pirgu*, the guardian retained her duties and in performing them, she hired an attorney to obtain PIP benefits from the insurer. The dispute in *Pirgu* centered on how to calculate attorney's fees under MCL 500.3148, which grants attorney's fees for recovering overdue PIP benefits. *Pirgu* does not address delegating guardianship duties because the guardian in that case never delegated her duties. The case, along with all of the others that Findling Law cited, does not support Findling Law's argument. So Auto-Owners is entitled to summary disposition on the bills in which Darren Findling

permitted someone else to perform his duties as court-appointed guardian.

B. Findling Law mishandles MCL 700.5103 and MCL 700.5106.

Findling Law says that Auto-Owners ignores the delegation-of-services provision in MCL 700.5103 and 5106.² (Brief at 7). In footnotes 1 and 2, Findling Law cites what it believes are the relevant provisions of the statute that permit Darren Findling to delegate his guardianship duties. (*Id.*, n. 1-2). But neither statute authorizes Findling Law's conduct.

Findling Law's first statute, MCL 700.5103, allows delegation under certain conditions—and Findling Law has not complied with those conditions. It allows a delegation of duties through a “properly executed power of attorney.” MCL 700.5103(1). Findling has not executed power-of-attorney forms for his employees. Even if he had, MCL 700.5103(1) only allows delegation “for a period not exceeding 180 days.” That's a far cry from Findling's indefinite delegations to his employees in this case and the 17 other cases in which he is guardian. Findling Law also fails to comply with MCL 700.5103(4), which requires a guardian to notify the court “within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact.” MCL 700.5103(4).

Findling Law's business model is fundamentally at odds with this statute. He gets himself appointed in as many cases across the state as possible. Then, to maintain his guardianship volume, he permits various people in his firm to handle his

² Findling Law's brief mistakenly cites MCL 700.5104, but the statutory language at issue is from MCL 700.5106.

guardianship duties, in violation of MCL 700.5103. He then makes a profit by charging attorney rates for non-attorney duties that EPIC prioritizes family members to perform. See e.g., MCL 700.5106(2)(b) and *In re Guardianship of Gerstler*, 324 Mich App 494; 922 NW2d 168 (2018) (holding that the probate court abused its discretion by appointing a professional fiduciary instead of a capable family member).

So section 5103 does not apply here—Findling never executed powers of attorney and his business model belies the short-term, court-monitored delegations that the Legislature allowed in MCL 700.5103.

Likewise, Findling Law mishandles MCL 700.5106. First, Findling Law mistakenly cites MCL 700.5104, but the statutory language in footnote 2, (Brief at 7), actually comes from MCL 700.5106(5)-(6). Next, the statute does not speak to the delegation of guardianship duties. Rather, it imposes the duty on the guardian, *in performing guardianship duties*, to establish a schedule of visitation for care-providers and ensure the protected individual has enough care-providers:

(5) A professional guardian appointed under this section *shall establish and maintain* a schedule of visitation so that an individual associated with the professional guardian who is responsible for the ward's care visits the ward within 3 months after the professional guardian's appointment and not less than once within 3 months after each previous visit.

(6) A professional guardian appointed under this section *shall ensure* that there are a sufficient number of employees assigned to the care of wards for the purpose of performing the necessary duties associated with ensuring that proper and appropriate care is provided. [MCL 700.5106(5)-(6) (italics added).]

Findling Law provides protected individuals with guardianship services and does not purport to provide care to Findling's wards. So the statute does not address Darren Findling's conduct in delegating his duties, and to construe it as doing so, does violence to the statute. *Malone v Lambrect*, 305 Mich 58, 62; 8 NW2d 910 (1943) (holding that construing the wording of a statute to say something it doesn't does violence to the statute); see also *Nelson v Assoc Financial Services Co. of Indiana, Inc*, 253 Mich App 580, 590; 659 NW2d 635 (2002) (holding same). This Court should deny Findling Law's motion and grant summary disposition in favor of Auto-Owners.

C. Darren Findling's delegation of guardianship duties defies legislative intent and public policy.

Darren Findling has devised a business model that takes advantage of a novel area between Michigan's EPIC statutes and its no-fault law. But his business model defies legislative intent and public policy, and this Court should put an end to it.

MCL 700.5106(2)(b) says that a professional guardian may only be appointed, if "there is no other person that is competent, suitable, willing, to serve that fiduciary in accordance with section 5212, 5313, or 5409." *Id.* MCL 700.5313(3)(a)-(e) prioritizes spouses, adult children, parents, certain other relatives, or someone nominated by a caretaker to serve as legal guardian of the incapacitated person. A professional guardian may only serve as a last resort: "If none of the persons as designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106." MCL 700.5313(4). *In re Guardianship of Gerstler*,

324 Mich App at 514 (holding that the probate court abused its discretion by appointing a professional fiduciary instead of the ward's sole adult child); *Matter of Estate of Williams*, 133 Mich App 1; 349 NW2d 247 (1984) (holding that the probate court abused its discretion by appointing professional guardian in lieu of capable adult daughter).

Furthermore, if a guardian needs to delegate guardianship duties because the guardian cannot perform them, MCL 700.5103(1) requires a properly executed power of attorney and restrains the delegation to a period of fewer than 180 days:

By a properly executed power of attorney, a parent or guardian of a minor or a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward

And Section (4) mandates that the guardian must notify the Court of the delegation within 7 days.

If a guardian for a minor or legally incapacitated individual delegates any power under this section, *the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact.* [MCL 700.5103].

So a plain reading of the statutes indicates that the Legislature wanted family involvement, properly executed, short-term powers of attorney, if necessary, and court notification if anyone other than legal guardian performs guardianship duties.

Here, however, Darren Findling's conduct defies not only the plain requirements of the statutes but also their overall purpose. He has made a mint by being a professional guardian in lieu of capable family members. He charges attorney rates for

non-attorney duties that family members with no legal training can perform. And then to maintain his volume of court appointments, (18 cases with Auto-Owners alone), he delegates his guardianship duties to various staff members of his law firm for an indefinite period of time and without a validly executed power of attorney. He has never notified any court of any of these delegations. His conduct disregards the intent of the legislature that prioritizes family members to serve as guardians, properly executed, short-term delegations, and court supervision.

This Court should discard Findling Law's bills for guardianship duties performed by staff members at Findling Law's firm in defiance of the statutes and their purpose. Auto-Owners is entitled to summary disposition on those bills.

Request for Relief

Auto-Owners requests that this Court deny Findling Law's motion based on Findling Law's inability to cite any law to support its argument and enter summary disposition in favor of Auto-Owners.

Respectfully submitted,

COLLINS EINHORN FARRELL PC

/s/ Lauren A. Frederick

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Dated: January 15, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of January, 2021, she caused to serve the following foregoing pleadings upon counsel of record listed on the above-referenced caption, *via Regular U.S. Mail*:

- Auto-Owners' Response To Findling Law's Motion For Partial Summary Disposition And Counter-Motion For Summary Disposition Under (I)(2);
- Brief in Support of Auto-Owners' Counter-Motion For Summary Disposition Under (I)(2);
- Certificate of Service.

/s/ Stacy Czech

Stacy Czech
for Collins Einhorn Farrell PC

Appendix Attachment 7

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE ESTATE OF MARY ANN MALLOY,
a Legally Incapacitated Individual, by
Darren Findling and Kathern Malloy, as Co-Guardians, and
THE DARREN FINDLING LAW FIRM, PLC,

Case No. 2020-393904-CZ
Hon. Daniel A. O'Brien

Plaintiffs,

-vs-

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

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PLAINTIFFS' REPLY/RESPONSE TO DEFENDANT'S RESPONSE AND COUNTER-MOTION FOR PARTIAL SUMMARY DISPOSITION

Introduction

Defendant, Auto-Owners Insurance Company, ("Defendant" or "Auto-Owners") in response to Plaintiff's Motion for Partial Summary Disposition has filed a counter-motion essentially arguing that it is not responsible for the fees incurred because a guardian cannot delegate a duty without execution of a power of attorney and notice to the court as described in MCL 700.5103, and because Darren Findling, as Guardian, did not follow this procedure and did not perform all services Auto-Owners is not responsible for payment of fees. Defendant's argument ignores practical application and demonstrates a misunderstanding of probate law, but

it ultimately fails because Defendant ignores the difference between a duty¹ and a power.²

Argument

Standard of Review

A trial court has the authority to grant summary disposition to the opposing party on a motion for summary disposition under MCR 2.116(I)(2). The Michigan Court of Appeals in *Glass v. Goeckel* stated: “The trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law.” *Glass v. Goeckel*, 262 Mich.App. 29, 33; 683 N.W.2d 719, 722 (2004) (citations omitted).

I. *Defendant’s argument fails as it does not differentiate between a power and a duty.*

Defendant’s entire argument comes from a misunderstanding of MCL 700.5103 entitled “Delegation of powers by parent or guardian”, which provides:

(1) By a properly executed power of attorney, a parent or guardian of a minor or a guardian of a legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the parent's or guardian's powers regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward or to release of a minor ward for adoption.

* * *

(4) If a guardian for a minor or legally incapacitated individual delegates any power under this section, the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact.
(Emphasis added).

¹ “Duty” is defined as “Legal or moral obligation. An obligation that one has by law or contract. Obligation to conform to legal standard or reasonable conduct in light of apparent risk. Obligatory conduct or service.” Black’s Law Dictionary 6th Ed. (1991)(citations omitted).

² “Power” is defined as “The right, ability, authority, or faculty of doing something. Authority to do any act which the grantor might himself lawfully perform.” Black’s Law Dictionary 6th Ed. (1991).

The Estates and Protected Individuals Code (“EPIC”) does not define “powers”, however, MCL 700.5314³ is entitled “Powers and duties of guardian”. Thus EPIC clearly recognizes the difference between a power and a duty. A reading of MCL 700.5314 further clarifies this issue; for example a guardian has “...the power to establish the ward's place of residence...”, but “...the duty to make provision for the ward's care, comfort, and maintenance...” While a guardian’s powers cannot be transferred without complying with MCL 700.5103, a guardian’s duties by their very nature are assignable, transferrable, and dischargeable by others. Reviewing the reporter’s comment to MCL 700.5103 further clarifies its purpose as it says: “It is designed for anticipated absences for travel, medical care, or other interruptions in the availability of the parent or guardian.” Reporter’s Comment to MCL 700.5103. This is further clarified by MCL 700.5106, which was fully addressed in Plaintiff’s original brief.

Defendant’s argument fails because it chooses to ignore that a power is unique from a duty. Darren Findling has never transferred or assigned his powers in this matter, he is the ultimate decision maker when it comes to the care of Mary Ann Malloy. He has assigned others to discharge his duties to provide for her care and these services are compensable under the No-Fault Act. Defendant’s counter-motion must be denied.

II. The common law regarding a Personal Injury Protection carrier's liability for Guardianship services also creates a distinction to Defendant's argument.

This issue was thoroughly addressed in Plaintiff’s original brief, however, the established case law states that more than simply a guardian is entitled to compensation for guardianship services and expressly states that attorney fees for guardianship services are also compensable. See *Pirgu v. United Services Auto. Ass'n*, unpublished opinion per curiam of the Court of

³ Attached as Exhibit A for reference.


Appeals, issued December 16, 2014 (Docket No. 314523), reversed on other grounds *Pirgu v. United Services Auto. Ass'n*, 499 Mich 269, 884 NW2d 257 (2016). The fees of the attorney supporting Darren Findling are compensable against Auto-Owner's and, by definition, that allowance gives authority to someone other than the guardian performing the legal service.

It is clear from the developed case law in Michigan that a Guardian may employ an attorney, perform work themselves, and/or employ others, and all of those services are compensable under the no-fault act if they are for the care, recovery and rehabilitation of the ward. Defendant's argument that because Darren Findling himself did not perform the service and therefore it is not compensable is not consistent with existing law and summary disposition of this issue is appropriate.

Conclusion

Plaintiffs, Estate of Mary Ann Malloy, a Legally Incapacitated Individual, by Darren Findling and Kathern Malloy, as Co-Guardians, and The Darren Findling Law Firm, PLC, asks the Court to grant partial summary disposition under MCR 2.116(C) (9) & (10), on Defendant's defense that because Guardian, Darren Findling, did not personally perform the service they are not compensable under Michigan's No-Fault Act.

Respectfully submitted,
The Darren Findling Law Firm, PLC



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Dated: January 31, 2021

EXHIBIT A

ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)
Act 386 of 1998

700.5314 Powers and duties of guardian.

Sec. 5314. If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within 3 months after the guardian's appointment and not less than once within 3 months after each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property.

(c) The power to give the consent or approval that is necessary to enable the ward to receive medical, mental health, or other professional care, counsel, treatment, or service. However, a guardian does not have and shall not exercise the power to give the consent to or approval for inpatient hospitalization unless the court expressly grants the power in its order. If the ward objects or actively refuses mental health treatment, the guardian or any other interested person must follow the procedures provided in chapter 4 of the mental health code, 1974 PA 258, MCL 330.1400 to 330.1490, to petition the court for an order to provide involuntary mental health treatment. The power of a guardian to execute a do-not-resuscitate order under subdivision (d), execute a nonopioid directive form under subdivision (f), or execute a physician orders for scope of treatment form under subdivision (g) does not affect or limit the power of a guardian to consent to a physician's order to withhold resuscitative measures in a hospital. As used in this subdivision, "involuntary mental health treatment" means that term as defined in section 400 of the mental health code, 1974 PA 258, MCL 330.1400.

(d) The power to execute, reaffirm, and revoke a do-not-resuscitate order on behalf of a ward. However, a guardian shall not execute a do-not-resuscitate order unless the guardian does all of the following:

(i) Not more than 14 days before executing the do-not-resuscitate order, visits the ward and, if meaningful communication is possible, consults with the ward about executing the do-not-resuscitate order.

(ii) Consults directly with the ward's attending physician as to the specific medical indications that warrant the do-not-resuscitate order.

(e) If a guardian executes a do-not-resuscitate order under subdivision (d), not less than annually after the do-not-resuscitate order is first executed, the duty to do all of the following:

(i) Visit the ward and, if meaningful communication is possible, consult with the ward about reaffirming the do-not-resuscitate order.

(ii) Consult directly with the ward's attending physician as to specific medical indications that may warrant reaffirming the do-not-resuscitate order.

(f) The power to execute, reaffirm, and revoke a nonopioid directive form on behalf of a ward.

(g) The power to execute, reaffirm, and revoke a physician orders for scope of treatment form on behalf of a ward. However, a guardian shall not execute a physician orders for scope of treatment form unless the guardian does all of the following:

(i) Not more than 14 days before executing the physician orders for scope of treatment form, visits the ward and, if meaningful communication is possible, consults with the ward about executing the physician orders for scope of treatment form.

(ii) Consults directly with the ward's attending physician as to the specific medical indications that warrant the physician orders for scope of treatment form.

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:

(i) Visit the ward and, if meaningful communication is possible, consult with the ward about reaffirming the physician orders for scope of treatment form.

(ii) Consult directly with the ward's attending physician as to specific medical indications that may warrant reaffirming the physician orders for scope of treatment form.

(i) If a conservator for the ward's estate is not appointed, the power to do any of the following:

(i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward's welfare to perform that duty.

(ii) Receive money and tangible property deliverable to the ward and apply the money and property for the ward's support, care, and education. The guardian shall not use money from the ward's estate for room and board that the guardian or the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by court order made on notice to at least 1 of the ward's next of kin, if notice is possible. The guardian shall exercise care to conserve any excess for the ward's needs.

(j) The duty to report the condition of the ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision must contain all of the following:

(i) The ward's current mental, physical, and social condition.

(ii) Improvement or deterioration in the ward's mental, physical, and social condition that occurred during the past year.

(iii) The ward's present living arrangement and changes in his or her living arrangement that occurred during the past year.

(iv) Whether the guardian recommends a more suitable living arrangement for the ward.

(v) Medical treatment, including mental health treatment, received by the ward.

(vi) Whether the guardian has executed, reaffirmed, or revoked a do-not-resuscitate order on behalf of the ward during the past year.

(vii) Whether the guardian has executed, reaffirmed, or revoked a nonopioid directive form on behalf of the ward during the past year.

(viii) Whether the guardian has executed, reaffirmed, or revoked a physician orders for scope of treatment form on behalf of the ward during the past year.

(ix) Services received by the ward.

(x) A list of the guardian's visits with, and activities on behalf of, the ward.

(xi) A recommendation as to the need for continued guardianship.

(k) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education. The guardian shall account to the conservator for the amount expended.

History: 1998, Act 386, Eff. Apr. 1, 2000;—Am. 2000, Act 54, Eff. Apr. 1, 2000;—Am. 2000, Act 313, Eff. Jan. 1, 2001;—Am. 2000, Act 467, Eff. June 1, 2001;—Am. 2000, Act 469, Eff. June 1, 2001;—Am. 2012, Act 173, Eff. Oct. 1, 2012;—Am. 2013, Act 157, Eff. Feb. 3, 2014;—Am. 2017, Act 155, Eff. Feb. 6, 2018;—Am. 2018, Act 555, Eff. Mar. 28, 2019;—Am. 2018, Act 594, Eff. Mar. 28, 2019.

Compiler's note: In subdivision (h), the reference to "subdivision (f)" evidently should be "subdivision (g)."

Popular name: EPIC

Appendix Attachment 8

STATE OF MICHIGAN
IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE ESTATE OF MARY ANN MALLOY,
A legally incapacitated individual, by
Darren Findling and Kathern Malloy, as Co-
Guardians, and THE DARREN FINDLING LAW
FIRM, PLC,

Plaintiffs,

Case No.: 2020-393904-CZ
Hon. Daniel A. O'Brien

vs.

AUTO-OWNERS INSURANCE COMPANY, a
foreign corporation,

Defendant.

THE DARREN FINDLING LAW FIRM PLC
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**AUTO-OWNERS' REPLY TO FINDLING LAW'S RESPONSE TO AUTO-OWNERS'
COUNTER-MOTION FOR SUMMARY DISPOSITION UNDER (1)(2)**

Findling Law's response falls short in three ways and makes a fatal concession. Auto-Owners is entitled to summary disposition.

A. Findling Law's argument regarding MCL 700.5103 functions as a concession.

In its motion, Findling Law relied on MCL 700.5103 as the authority by which Darren Findling could delegate duties. (Brief at 7). But now it says MCL 700.5103 does not apply. (Response at 2-3). It says MCL 700.5103 does not apply because it only pertains to the delegation of powers, not duties. (Response at 2). Auto-Owners agrees that MCL 700.5103 does not apply, albeit for different reasons. (Auto-Owners' Brief at 7-9). And if section 5103 does not apply, as

Findling Law now concedes, Findling Law has no statutory authority to support its motion for summary disposition—leaving its motion devoid of any provision under EPIC that permits Darren Findling to delegate his duties. So Auto-Owners is entitled to summary disposition.

Findling Law attempts to salvage its motion by saying in its response that Darren Findling can delegate his duties as guardian because “duties by their very nature are assignable, transferable, and dischargeable by others.” (Response at 3). But this conclusion also falls short. First, Findling Law does not cite any law in support of the statement. So its claim is unsupported. Second, the issue of delegation at play here isn’t a common law issue. The issue turns on whether EPIC permits delegation of duties. Findling Law concedes that section 5103 doesn’t apply and doesn’t point to any other provision in EPIC permitting Darren Findling to delegate his guardianship duties. If the Legislature wanted to permit delegation of duties in the manner that Darren Findling has practiced, it could have said so. It didn’t, and this should be the end of the matter.

Auto-Owners is entitled to summary disposition on the bills in which Darren Findling delegated his guardianship duties. This Court should grant Auto-Owners’ counter-motion for partial summary disposition.

B. Findling Law continues to conflate different issues

Like in its Motion for Partial Summary Disposition, Findling Law continues to conflate the issue of whether guardianship duties are reimbursable under the no-fault act and the issue of whether a guardian can delegate duties. (Response at 3-4). No one contests that guardianship duties are reimbursable under the no-fault act. The issue here is whether EPIC allows a guardian to delegate duties in the manner that Darren Findling has. Findling law still hasn’t pointed to any applicable statute or case law that says EPIC permits delegation. And Findling Law’s continued conflation of the delegation and reimbursement issues is a distraction.

C. *Pirgu* has no precedential value, but even if it did, it would not apply.

To support its argument that it can delegate guardianship duties, Findling Law again cites *Pirgu v United States Auto Ass'n*, unpublished per curium opinion of the Court of Appeals, issued December 16, 2014 (Docket No. 314523), reversed by *Pirgu v United States Auto Ass'n*, 499 Mich 269; 884 NW2d 257 (2016). But this case does not apply.

First, *Pirgu* has no precedential value because it's unpublished. MCR 7.215(C)(1). But even if the Court of Appeals published it, it still wouldn't have any precedential value, since the Michigan Supreme Court reversed it. *Dunn v DAHE*, 254 Mich App 256, 262; 657 NW2d 153 (2002) (holding that "a prior court of appeals decision that has been reversed on other grounds has no precedential value.").

Second, as Auto-Owners pointed out in its response and counter-motion for partial summary disposition, *Pirgu* doesn't address delegation. In fact, it doesn't even address reimbursement for guardianship duties.

In *Pirgu*, the guardian, who was the wife of the incapacitated individual, retained her duties as guardian, and in performing them, she hired an attorney to obtain reimbursement for attendant care, lost wages, and medical expenses—not guardianship fees. The dispute in *Pirgu* centered on how to calculate attorney's fees under MCL 500.3148, which grants attorney's fees for recovering overdue PIP benefits. ***Pirgu* does not address delegation because the guardian in *Pirgu* never delegated her duties. To that end, *Pirgu* doesn't even address reimbursement for guardianship duties because the wife wasn't seeking reimbursement for her duties as guardian.** So *Pirgu* doesn't apply, and this Court should dismiss Findling Law's use of it.

Auto-Owners is entitled to summary disposition on the bills in which Darren Findling unlawfully delegated his guardianship duties. This Court should grant its counter-motion.

Respectfully submitted,

COLLINS EINHORN FARRELL PC

/s/ Lauren A. Frederick

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Dated: February 12, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of February, 2021 she caused to serve the following foregoing pleadings upon counsel of record listed on the above-referenced caption, *via E-Mail and US First Class Mail*:

- Auto-Owners' Reply To Findling Law's Response To Auto-Owners' Counter-Motion For Summary Disposition Under (I)(2); and
- Certificate of Service.

/s/ Stacy Czech

STACY CZECH

for Collins Einhorn Farrell PC

Appendix Attachment 9

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE GUARDIANSHIP ESTATE OF
DANA JENKINS,

Plaintiff,

v

File No. 2020-393903-CZ

AUTO OWNERS INSURANCE COMPANY,

Defendant.
_____ /

THE GUARDIANSHIP ESTATE OF
MARY MALLOY,

Plaintiff,

V

File No. 2020-393904-CZ

AUTO OWNERS INSURANCE COMPANY,

Defendant.
_____ /

MOTION HEARING

BEFORE THE HON. DANIEL A. O'BRIEN, PROBATE JUDGE

Pontiac, Michigan - Tuesday, March 2, 2021

APPEARANCES:

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None

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None

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Pontiac, Michigan

Tuesday, March 2, 2021 - 1:35 p.m.

THE COURT: The Guardianship Estate of Dana Jenkins versus Auto Owners Insurance, 2020-393903-CZ and Guardianship Estate of Mary Malloy versus Auto Owners Insurance Company, 2020-393904-CZ.

Your appearances, please?

MR. BLACK: Good afternoon. Good afternoon, Your Honor, Andrew Black appearing on behalf of the Plaintiffs in both matters.

MS. DYSARZ: Good afternoon, Your Honor. MaryRachel Dysarz appearing in behalf of the Defendants in both matters.

THE COURT: Okay. All right. Well, I can tell you my disposition sheet says I have a December 21, 2020 motion for partial summary disposition, I believe it is. Yeah. And a January 19th, 2021 countermotion for -- or cross-motion, whatever, countermotion for summary disposition up. Is there anything else up today?

MS. DYSARZ: Your Honor, we do have our two motions for release; however, we can address those after the summary disposition motions if that's Your Honor's preference?

Web 3-2-21 1:38:00

1 THE COURT: That's fine with me.

2 So, why don't we have -- there's nobody on
3 Judge online, right?

4 DEPUTY CLERK: No.

5 THE COURT: Mr. Black, why don't you -- why
6 won't this shut off?

7 Why don't you go ahead with your motion,
8 please?

9 MR. BLACK: Sure, Your Honor.

10 So, the purpose of this motion, and it's a
11 partial motion, was to address one of the principal
12 arguments that Auto Owners had put forth, and that's
13 that because Mr. Findling, who is the appointed
14 Guardian, did not perform services that they would not
15 be compensable.

16 And a lot of that analysis relies on 700.5103.
17 We addressed it in our brief, but briefly, I'll state
18 that 700.5103 addresses the delegation of powers of the
19 Guardian, the ultimate decision-making power. And it
20 does not address delegation of duties. Delegation of
21 duties is handled by 700.5106, and clearly a Guardian
22 can delegate their duties to have them performed by
23 someone else. So, I believe their argument simply is
24 incorrect as it pertains to 5103.

25 I think it's further incorrect as it applies

1 to the established case law around what is compensable.
2 We went over that pretty thoroughly in our brief. I --
3 I don't know that there's any point in -- in belaboring
4 it. I'm happy to discuss it if the Court wants to, but
5 that is essentially our argument, and I'll rely on my
6 brief beyond that.

7 THE COURT: Okay. So, it's strictly a de --
8 you're -- you're attacking a defense because you haven't
9 put in front of me any arguments related to any specific
10 billing entries. It's just the general defense to all
11 billing entries other than those directly attributed to
12 Mr. Findling as being not properly -- not performed by
13 the Guardian and not properly designated -- delegated to
14 someone else.

15 MR. BLACK: That -- that's correct --

16 THE COURT: And therefore, not --

17 MR. BLACK: -- Your Honor. And I --

18 THE COURT: -- and therefore, not compensable.

19 You're seeking --

20 MR. BLACK: That's correct.

21 THE COURT: -- summary disposition of that.

22 Okay.

23 MR. BLACK: Yeah, I -- I -- I view that --

24 THE COURT: All right.

25 MR. BLACK: -- as what would still be

1 outstanding the issues of were -- was it related to the
2 care, recovery, and rehabilitation, therefore
3 compensable, and then obviously, any arguments they
4 would have about the time spent, the rate charged, all
5 those things would still survive this. It is -- it is
6 only against that particular defense.

7 THE COURT: Okay. All right. Then, Auto
8 Owners, go ahead.

9 MS. DYSARZ: Thank you, Your Honor. I'll
10 begin by what we agree on.

11 Counsel and I agree that the issues that are
12 not in dispute in this -- in this current Plaintiffs'
13 motion for summary disposition and our countermotion.
14 We are not disputing whether or not Guardianship fees
15 are compensable under no fault, not at issue, and we're
16 also not in this motion addressing any claims for
17 reimbursement or work that Darren Findling himself
18 performed in his Guardianship role, none of those at
19 all. We are only discussing those claims in which
20 Darren Findling himself delegated those -- those powers
21 and duties, and therefore, are now seeking
22 reimbursement.

23 So, let me address Counsel's -- I'll try and
24 go in the same order that he did and respond to those.
25 The first is that Counsel suggests that there is a

1 difference between powers and duties in EPIC. He agrees
2 with our position that if a Guardian is going to
3 delegate powers under EPIC that, in fact, the Guardian
4 needs to issue a Power of Attorney. The Court needs to
5 be put on notice. And that Power of Attorney should
6 last no more than a hundred and eighty days, which of
7 course, we know is what is contained within 5103.

8 The question then becomes is -- is --
9 Plaintiffs' counsel then tries to create a distinction
10 and says but duties do not need to meet the requirements
11 of 5103, and duties can be delegated at the Guardian's
12 discretion with no -- no involvement with the court, no
13 requirements. They are -- they can be delegated without
14 any parameters, is what the -- is what Counsel is asking
15 this Court to adopt, therefore, saying that the
16 delegation of Mr. Findling's duties was appropriate
17 under EPIC.

18 First, Your Honor, we submit that there is no
19 case law to suggest that that interpretation of EPIC is
20 correct. Plaintiff does not cite any. We also would
21 state that that --

22 THE COURT: There is no -- there is no what?

23 MS. DYSARZ: There is no case law that
24 specifically indicates that that is how EPIC should be
25 interpreted.

1 In addition to that, Your Honor, it is not
2 specifically -- the fact that the words powers and
3 duties are used as two separate words, Plaintiffs'
4 counsel offers to the Court an interpretation that that
5 then means that there is a distinction when it comes to
6 delegation, but that also is not articulated in EPIC.
7 EPIC does not say that, Your Honor. And I would argue
8 that the words power and duties are intrinsically
9 related so much so that they are -- truly cannot be
10 separated.

11 And Your Honor, I would also add that at the
12 -- at the very, very tail end of this, we come to the
13 idea of what was the Legislature's intent with EPIC.
14 Your Honor, we see throughout the entire EPIC, including
15 the statutes, that it is -- the priorities in EPIC are
16 having families first involvement, and then of course,
17 there's a list of priorities. And next is having --

18 THE COURT: Okay. Could you hold on a second?
19 Right there. Okay. Before you go any farther with
20 that, please explain to me how that argument -- I -- I
21 don't even understand the argument. It's as if you're
22 saying that Mr. Findling should not have been appointed
23 the Guardian. But the fact is that he was appointed the
24 Guardian, not in this case, but in a different case, for
25 example, Dana Jenkins. He was appointed Guardian in the

1 Dana Jenkins Guardianship case. A decision was made by
2 the Court, by me specifically, after appointing an
3 attorney for Mr. Jenkins, after advising him of all his
4 rights, and at a hearing, he agreed. In fact, I think
5 even in the Petition, it was indicated that he wanted
6 Darren Findling.

7 But however it happened, he is the Guardian.
8 And that's nothing -- not something you can argue
9 against in this case. It is a -- it is a fact, a given
10 fact that he is Guardian. So any argument about
11 priorities for appointment and so on is completely
12 outside the bounds of this case, this civil action. It
13 just is.

14 MS. DYSARZ: Your Honor, I -- oh.

15 THE COURT: Go ahead, disagree.

16 MS. DYSARZ: Your Honor, I actually was going
17 -- I'm -- I'm going to agree with you. So, I apologize
18 if you misheard me. My -- my description of family
19 first was just starting to outline the principles of
20 EPIC, which I was then going to go to another point.

21 THE COURT: So, what's the point? What is the
22 point of arguing the priority statute?

23 MS. DYSARZ: Your Honor, I'm --

24 THE COURT: What does that have to do with
25 whether an insurer under the No-Fault Act is liable to

1 pay for expenses incurred by or on behalf of the ward
2 for services -- for -- for products, services, or
3 accommodations for the care, recovery, and
4 rehabilitation of that injured person. What does that
5 priority statute --

6 MS. DYSARZ: I agree with you, Your Honor.

7 THE COURT: -- have to do with it?

8 MS. DYSARZ: I agree with you, Your Honor,
9 that is not an issue in this motion.

10 THE COURT: All right.

11 MS. DYSARZ: It is -- I agree with you, Your
12 Honor. The -- the issue is that one of the overarching
13 principles throughout EPIC is the Court's involvement in
14 what is occurring between the wards and the Guardian,
15 and we can see the -- the slew of requirements that the
16 Guardian has to report to advise the Court what's
17 happening, to, you know, file all the annual reports, et
18 cetera that we see that seems to have. But the Court
19 needs to have a very close eye on what's going on,
20 obviously, due to the responsibility of -- of what's
21 going -- occurring.

22 And so, the idea that Darren Findling could
23 delegate any and all of his duties without ever telling
24 the Court flies in the face of all of the principles of
25 EPIC, Your Honor. For -- for example, one of the -- if

1 -- if we -- if we assume that Plaintiffs' Counsel's
2 argument is true, and there's a difference between duty
3 and powers, in EPIC, filing the annual report is
4 technically listed as a duty, not a power. So if we
5 adopted Plaintiffs' Counsel's argument, that would mean
6 that Darren Findling could appoint Jim-Bob to file the
7 annual report, would not have to have any permission
8 from the Court, and could submit it accordingly, because
9 according to Findling, all duties may be delegated with
10 no approval, no notice to the Court whatsoever. So if
11 we adopted that interpretation, technically speaking
12 Mr. Findling could have Jim-Bob submit the annual report
13 with Jim-Bob's name, and that would be legitimate under
14 their interpretation.

15 We argue that that flies in the face of what
16 EPIC intends. That in fact, if a Guardian is going to
17 delegate a duty, it must -- he or she must comply with
18 5103 and must have a Power of Attorney, must provide
19 notice to the Court, and it must only last for a hundred
20 and eighty days. And the reason that EPIC should be
21 interpreted as such is because of the public policy
22 explanation that I just provided. That it is very
23 important that those who are performing the duties for a
24 ward that the Court is aware that there's a proper Power
25 of Attorney in place, and that it is not just -- again,

1 if we adopt Plaintiffs' Counsel's interpretation of
2 EPIC, then -- then technically speaking, every duty that
3 is being performed for every Guardian in the State of
4 Michigan could be occurring without any notice to the
5 Court and without any Power of Attorney involved.
6 That's -- that is technically the argument that's being
7 put forth.

8 And we're saying, Your Honor, there is no
9 distinction between power and duty. Both -- regardless
10 of the definition, both require compliance with 5103,
11 which is Power of Attorney properly executed between
12 Darren Findling and whoever he is going to delegate his
13 duties to as well as notice to the Court, Your Honor.

14 THE COURT: Okay. Is that it?

15 MR. BLACK: Your Honor, if I briefly could
16 respond.

17 THE COURT: Hang on a second. I'm just
18 asking, are you done?

19 MR. BLACK: Oh.

20 THE COURT: Is that the end of your argument,
21 Counsel?

22 MS. DYSARZ: Your Honor, are you speaking to
23 me?

24 THE COURT: Yes. You -- you -- he --

25 MS. DYSARZ: Oh, I -- I would allow -- if you

1 have any questions, Your Honor, I (indecipherable words)
2 that.

3 THE COURT: Oh, I do have questions. Okay?
4 The way I read it, the No-Fault Law provides in MCL
5 500.3105, "Under personal protection insurance," and
6 this is subsection (1), "Under personal protection
7 insurance, an insurer is liable to pay benefits for
8 accidental bodily injury arising out of the ownership,
9 operation, maintenance, or use of a motor vehicle as a
10 motor vehicle."

11 In 3107, sub -- subsection (1)(a) it states,
12 "Personal protection insurance benefits are payable for
13 the following: (a) Allowable expenses consisting of
14 reasonable charges incurred for reasonably necessary
15 products, services, and accommodations for an injured
16 person's care, recovery, or rehabilitation."

17 And 3112 provides, "Personal protection
18 insurance benefits are payable to or for the benefit of
19 an injured person."

20 So, my question to you is, if a person
21 sustains accidental bodily injury in a motor vehicle
22 accident and another person provides reasonably
23 necessary products, services, or accommodations for the
24 injured person's care, recovery, or rehabilitation, is
25 the personal protection insurance insurer liable to pay

1 benefits to the injured person for the expenses incurred
2 for the products, services, or accommodations? What's
3 the answer?

4 MS. DYSARZ: Your Honor, my answer to that
5 question is yes.

6 THE COURT: Is yes.

7 MS. DYSARZ: You've stated this --

8 THE COURT: Yes.

9 MS. DYSARZ: -- is yes, you've stated the
10 statutes are correct.

11 THE COURT: Thank you.

12 MS. DYSARZ: However, provides in different
13 circumstances differ.

14 THE COURT: Okay.

15 MS. DYSARZ: But it is not an issue --

16 THE COURT: Can you --

17 MS. DYSARZ: -- in these motions.

18 THE COURT: -- oh -- okay. Can you tell me --
19 oh, it is an issue. It is. Can you tell me --

20 MS. DYSARZ: Well, we got --

21 THE COURT: -- can you tell me where in the
22 No-Fault Code it's -- it says -- except for, I
23 understand, like Darren Findling's secretary cannot
24 provide medical care to the ward or psychiatric services
25 to the ward. But where appropriate, okay, for other

1 persons, does the statute anywhere distinguish who
2 performs the reasonably necessary products, services,
3 and accommodations. Who provides those things? Does
4 the statute say that only certain persons can provide
5 those products, services, and accommodations?

6 MS. DYSARZ: Your Honor, the No-Fault Law
7 does, in fact, direct us to define guardianship services
8 according to the Guardianship Law, EPIC.

9 THE COURT: Okay. Where does --

10 MS. DYSARZ: For instance --

11 THE COURT: -- but where does it say that in
12 the No-Fault Act because you never cited it.

13 MS. DYSARZ: Your Honor, for example, there is
14 distinction in the case law that --

15 THE COURT: No, no, no.

16 MS. DYSARZ: -- guardianship services --

17 THE COURT: No, no, no, no. You said the No-
18 Fault Law describes guardianship -- what are
19 guardianship services. So, I want you to tell me where
20 the No-Fault Law says that.

21 MS. DYSARZ: Your Honor, it describes the
22 word, in fact, guardianship services, in the words --

23 THE COURT: Where?

24 MS. DYSARZ: -- guardianship services --

25 THE COURT: Where? Where?

1 MS. DYSARZ: -- we take from EPIC.

2 THE COURT: Where in the No-Fault Law?

3 MS. DYSARZ: Does it use the word
4 guardianship?

5 THE COURT: Yes. You said -- you just said it
6 describes guardianship services. Where does it say that
7 in the No-Fault Law? That's all I want to know. I'm
8 not trying to be harsh or anything.

9 MS. DYSARZ: I -- I see what Your Honor's --
10 what you're saying, Your Honor. I think you're asking
11 me does it then go on to --

12 THE COURT: No.

13 MS. DYSARZ: -- define guardianship in the No-
14 Fault? Is that what you're asking?

15 THE COURT: I'm asking where in the No-Fault
16 Law does it say -- does -- does it make a limitation on
17 who provides the product, services, and accommodations
18 that you are liable for. Where does it describe or
19 limit the person who may perform those -- who provides
20 those things? Where does it do that?

21 MS. DYSARZ: By use of the word guardianship
22 services --

23 THE COURT: Who --

24 MS. DYSARZ: -- it is --

25 THE COURT: -- who uses --

1 MS. DYSARZ: -- directing us to utilize EPIC.

2 THE COURT: -- but who uses the word
3 guardianship services? The No-Fault Law?

4 MS. DYSARZ: The No-Fault Law describes
5 guardianship --

6 THE COURT: And --

7 MS. DYSARZ: -- and we then --

8 THE COURT: -- Ms. --

9 MS. DYSARZ: -- turn to EPIC.

10 THE COURT: -- okay. Tell me -- I'm asking
11 you. You say -- you said it several times. I'm not
12 trying to give you a hard time, Counsel. You've said
13 three times at least the guardian -- the No-Fault Law
14 describes guardianship services. Where in the No-Fault
15 Act, 500 point, I guess, 3101 et seq, s-e-q for the
16 court reporter, where in that act does it provide --
17 describe guardianship services. Where does it do that?

18 MS. DYSARZ: Your Honor, it -- it uses the
19 words guardianship services --

20 THE COURT: Where?

21 MS. DYSARZ: -- which we then turn to EPIC
22 law.

23 THE COURT: Where -- Ms. -- but where? Can
24 you show me where it uses the words guardianship
25 services? That's all I'm asking.

1 MS. DYSARZ: Yes, Your Honor. If you'd give
2 me just a moment --

3 THE COURT: I'll give you all the time you
4 want.

5 MS. DYSARZ: -- I will give you the specific
6 cite.

7 THE COURT: I have today till four-thirty, and
8 then, we -- you can come back tomorrow if you need more
9 time.

10 MS. DYSARZ: I appreciate it, Your Honor. I
11 just want to make sure I answer your question directly.

12 THE COURT: Well, I hope you do. 'Cause I'm
13 really -- I would really be interested to see where in
14 the No-Fault Act it uses the word guardian or
15 guardianship service.

16 (Long pause)

17 THE COURT: Hum. Well, I can tell you right
18 now the word guardian is not in it. I just did a
19 search. So, let's try guardianship. Hum. Guardianship
20 is also not in what is known as Chapter 31 of the
21 Insurance Code of 1966. The Motor Vehicle Personal and
22 Property Protection Act, I guess.

23 (Long pause)

24 THE COURT: If you'd like, we can take a
25 break. Do you want to do that?

1 MS. DYSARZ: Yes, Your Honor. That would be
2 great. I just want to make sure I --

3 THE COURT: All right.

4 MS. DYSARZ: -- I articulate exactly to solve
5 your question.

6 THE COURT: Sure. I -- what I'm trying to
7 find is where -- my question was, "Where is there a
8 limitation on who provides the products, services, and
9 accommodations?" You said that the No-Fault Act
10 describes guardianship services. I am asking you where
11 in the Act it either, A, places a limitation on who
12 provides the products, services, and accommodations.
13 And I'm talking about other than what is a bona fide
14 medical or psychiatric treatment that requires a doctor
15 or licensed psychologist to perform. Other than that --
16 or -- or a hospital -- where -- where in the Act does
17 it place a limitation on who can provide products,
18 services, or accommodations, and where in the Act does
19 it, as you say, describe guardianship services.

20 So, we can take a fifteen-minute break. Is
21 that going to be good enough? If you want a half an
22 hour? What do you want?

23 MS. DYSARZ: No, Your Honor, just a few
24 minutes. I'm -- I'm just looking for -- for an
25 illustration to respond to your question.

1 THE COURT: From the Act.

2 MS. DYSARZ: Correct, Your Honor, yes.

3 THE COURT: Okay. All right.

4 Why don't you just go off the record until
5 she's ready.

6 (At 2:01:57 p.m., court recessed.)

7 (At 2:13:11 p.m., court reconvened.)

8 THE COURT: All right. We're back on the
9 record in Malloy and Jenkins versus Auto Owners cases.
10 Okay.

11 MS. DYSARZ: Thank you, Your Honor. I -- I
12 did find the cite that I wanted to address.

13 So, Your Honor, the -- the Code specifically
14 that addresses the guardianship service, 500.3107, which
15 this Court already addressed, and the reason we know
16 that --

17 THE COURT: You say it does specifically
18 address guardianships.

19 MS. DYSARZ: Your Honor, those words -- that
20 -- those words are not in there; however, the Court has
21 found that -- that that category of allowable expenses
22 does include that. The reason we then know that what
23 type of guardianship services are compensable and
24 whether or not -- you know, what are the requirements
25 for that. We know that we have to turn to EPIC for all

1 of that interpretation, which includes delegation --

2 THE COURT: Hang on.

3 MS. DYSARZ: -- from the --

4 THE COURT: Hang on. There are a number of
5 cases that have concluded that guardianship services do
6 come under the definition of allowable expenses in 3107,
7 okay? They have said that.

8 MS. DYSARZ: Right.

9 THE COURT: But they didn't say that --
10 anywhere in those cases that only guardianship services
11 are compensable, and that's why I asked you the real
12 question, which is, is there any -- any limitation in
13 the No-Fault Law, 500.3101 et seq, okay? Is there any
14 limitation on -- in there on who may provide the
15 necessary product services and accommodations for an
16 injured person's care? Is there any limitation in the
17 Act?

18 MS. DYSARZ: Your Honor, I would argue yes,
19 but I --

20 THE COURT: Whoa, whoa.

21 MS. DYSARZ: -- would say in response to your
22 question --

23 THE COURT: Based on what?

24 MS. DYSARZ: -- the -- the words --

25 THE COURT: Based on what?

1 MS. DYSARZ: Based upon all of the law. For
2 example -- but let me answer. I think what you're
3 asking is are those exact words in there.

4 THE COURT: No. My --

5 MS. DYSARZ: No, I would agree with you, Your
6 Honor. The words are not --

7 THE COURT: -- specific question, and it's
8 easy to understand, is there any limitation on who may
9 provide the products, services, and accommodations? Is
10 there any limitation in the No-Fault Law?

11 MS. DYSARZ: Your Honor, I'm --

12 THE COURT: You don't want to answer --

13 MS. DYSARZ: -- sure it's the best way to
14 answer it, but --

15 THE COURT: -- I know you don't want to
16 answer.

17 MS. DYSARZ: -- I'm just trying to answer it
18 directly.

19 THE COURT: The answer is no. The answer is
20 no. Nowhere in here. It simply says it defines what an
21 accidental bodily injury is. Okay? It says -- and it
22 says, "Personal protection insurance -- under personal
23 protection insurance an insurer is liable to pay
24 benefits for accidental bodily injury arising out of the
25 ownership, operation, maintenance, or use of a motor

1 vehicle as a motor vehicle." And then it says,
2 "Personal protection insurance benefits," okay, meaning
3 what insurance companies are liable for, "consist of
4 reasonable charges incurred for reasonably necessary
5 products, services, and accommodations for an injured
6 person's care, recovery, or rehabilitation," and it
7 says, "personal protection insurance benefits are
8 payable," meaning the personal protection insurer is
9 liable to pay the benefits to or for the benefit of an
10 injured person. And there is no limitation in the No-
11 Fault Act. None, none.

12 MS. DYSARZ: Your Honor, and that's where we
13 have to look at the law because we have to have a
14 definition for what is included within that. For
15 example, the 2012 Douglas versus All State case that
16 draws a distinction between guardianship services and
17 replacement care services.

18 THE COURT: Sure.

19 MS. DYSARZ: The only way the --

20 THE COURT: But to add --

21 MS. DYSARZ: -- Court of Appeals can do
22 that --

23 THE COURT: -- but -- but Ms. -- Ms -- I'm
24 sorry. How do you pronounce your last name, ma'am?

25 MS. DYSARZ: Dysarz.

1 THE COURT: Dysarz. Ms. Dysarz, those are
2 issues that are reserved, whether it's replacement
3 services, whether it's -- what were the other things
4 that you said? And I have a letter here.

5 MS. DYSARZ: I just said that it was --

6 THE COURT: Okay. And one of the things you
7 say in the letter, your company, August 13, 2019 to
8 Darren Findling regarding your claimant -- your insured,
9 Roger Lydon, and Claimant, Mary Ann Malloy, one of the
10 reasons you give for rejecting payment for certain
11 things are any activities con -- and this I'm quoting,
12 "any activities considered to be replacement services,"
13 okay? That's there. But later here you said, "Lastly,
14 at this time, the documentation that we have on file
15 indicates that Darren M. Findling, Esquire, is the co-
16 guardian for Ms. Mary Ann Malloy. Charges that have
17 been labeled on the enclosed invoice by, quote '(i),'
18 unquote, are not being considered. It does not appear
19 Ms. Malloy's guardian performed the guardianship
20 services being claimed. Should letters of authority
21 exist for the individuals providing these services,
22 please forward them for consideration."

23 So, we're not talking about replacement
24 services, Ms. Dysarz. We're talking about this

25 Web 3-2-21 2:19:35

1 objection here. This one objection, that Mr. Findling
2 did not perform the service, the Guardian did not
3 perform the service, but somebody performed them on his
4 behalf. That's what we're talking about here, and
5 that's all Mr. Black is seeking summary dis --
6 disposition of. So, the argument about replacement
7 services, not before me today. But I agree with you.
8 Replacement services are not compensable.

9 MS. DYSARZ: Your Honor, my illustration of
10 replacement versus guardian is not to suggest those are
11 at issue but only to suggest that we must look for the
12 definition of what is compensable guardianship work, and
13 we do that by turning to EPIC. And we -- in order for
14 them to claim guardianship services, it must be in line
15 with EPIC, and EPIC mandates --

16 THE COURT: Okay.

17 MS. DYSARZ: -- that delegation of those --

18 THE COURT: All right.

19 MS. DYSARZ: -- must, in fact, comply --

20 THE COURT: All right.

21 MS. DYSARZ: -- with 5103. So that's what I'm
22 explaining. That if they're going to claim compensation
23 for guardianship services, then, all of the requirements
24 of EPIC must be met.

25 THE COURT: Okay. Where does it say that in

1 the No-Fault Law? It just simply refers to --

2 MS. DYSARZ: I --

3 THE COURT: -- when a person has sustained an
4 accidental bodily -- bodily injury for which they
5 require products, services, and accommodations for their
6 care, recovery, and rehabilitation, when they incur ex
7 -- expenses for those things, it simply says the
8 insurance com -- company is liable to pay to or for the
9 benefit of that person those allowable expenses. That's
10 all it says.

11 MS. DYSARZ: Your Honor, I -- I -- we then
12 turn to the Michigan Court of Appeals and Michigan
13 Supreme Court and all of the law that then interprets
14 what are allowable expenses. That's where we find, in
15 fact, where a court has indicated guardianship services
16 are compensable. But we have to then turn to --

17 THE COURT: Okay.

18 MS. DYSARZ: -- where guardianship --

19 THE COURT: Ms. Dysarz --

20 MS. DYSARZ: -- and that is EPIC.

21 THE COURT: -- Ms. Dysarz, I know we don't
22 have these facts before us in this case today. But I
23 can just about guarantee that in one or more of those
24 cases, whether it's Hines (ph) or Gurrora (ph) or what's
25 the other one you cited, Douglas, whatever --

1 MS. DYSARZ: Yes, Your Honor.

2 THE COURT: -- that in one more of those
3 cases, it wasn't just compensation for the guardian. It
4 was for the guardian and people who assisted the
5 guardian. I -- I would --

6 MS. DYSARZ: I --

7 THE COURT: -- I would bet every penny I had,
8 which is not much, but it's all I have.

9 MS. DYSARZ: Your Honor, with all due respect,
10 I would say that Findling has not -- Plaintiffs'
11 Counsel's office has not offered any cases where that is
12 the factual scenario --

13 THE COURT: I -- I know. I know.

14 MS. DYSARZ: -- and that's what we addressed
15 in our response brief.

16 THE COURT: I know. Because nobody raised
17 this argument before. I mean, it's -- I'll -- I'll --
18 I'll say it's novel.

19 Okay. So anyway, you've tried to answer my
20 question. Whether I'm satisfied with your answer or not
21 is another issue. Is it your contention that there is
22 no legal distinction between the word "power" and the
23 word "duty"? There's no distinction in the law between
24 those two words. And further, is it your contention
25 that when the Legislature in the No-Fault Act uses power

1 and -- the word power in some places and duty in another
2 that they do not recognize any distinction, any legal
3 distinction between those terms? Is that what you're
4 saying?

5 MS. DYSARZ: As it pertains to 5103 and
6 obtaining delegation of power and duties, I would say
7 correct, Your Honor.

8 THE COURT: Hang on. Hang on.

9 MS. DYSARZ: There is no distinction.

10 THE COURT: You're reading -- you are reading
11 a word into 5103 that is not there. 5103 does not talk
12 about delegation of duties. 5103 talks only about
13 delegation of power. We can read the statute if you'd
14 like. I have it right here.

15 It says, "By a properly" -- and this is
16 5103(1). "By a properly executed power of attorney, a
17 parent or guardian of a minor or a guardian of a legally
18 incapacitated individual may delegate to another person,
19 for a period not exceeding one hundred and eighty days,
20 any of the parent's or guardian's powers regarding care,
21 custody, or property." The word duty is nowhere in
22 there. Why do you insert the word duty in there when
23 you talk about 5103 governs the delegation of powers and
24 duties is what you said? Where in 5103 does it say the
25 word duty? And going back to my question --

1 MS. DYSARZ: Your Honor --

2 THE COURT: -- is it your contention --

3 MS. DYSARZ: -- to answer your question,
4 duty --

5 THE COURT: -- is it your contention that when
6 the -- when the Legislature uses the power in one --
7 word power in one place and the word duty in another
8 place that they recognize no distinction between those
9 two words?

10 MS. DYSARZ: As it pertains to delegation of
11 power and duties, yes.

12 THE COURT: Wait! Why do you say --

13 MS. DYSARZ: And the reason I --

14 THE COURT: -- okay. Please explain to me why
15 you say delegation of powers and duties? What is your
16 basis for saying that?

17 MS. DYSARZ: My basis for saying that, Your
18 Honor, is that we believe that Plaintiffs' Counsel is
19 reading in the statute something that does not exist,
20 and here is why -- here's -- here's an example of that.
21 We also believe it flies in the face of the legislative
22 -- legislative intent and public policy. And here's why
23 I say that. This is the statute that outlines the
24 powers and duties of guardians. One of the descriptions
25 is the duty to file a report. So according to

1 Findling's -- according to Plaintiffs' Counsel's
2 definition, that means that filing the annual report is
3 a duty not a power, meaning if we adopt Plaintiffs'
4 Counsel's explanation of 5103, that means that
5 Plaintiffs' Counsel is -- Plaintiffs' Counsel's office
6 is -- Mr. Findling himself is able to delegate the,
7 quote, "duty," to author every annual report. And like
8 I said before, therefore, every case in which he's a
9 guardian they could submit annual reports to this
10 Honorable Court, and on that signature block it could
11 say Jim-Bob. They would have no requirement to have
12 Jim-Bob sign a Power of Attorney, no requirement to give
13 the Court advance notice. It could be indefinite for
14 thirty years Jim-Bob. And the re -- and -- and that
15 doesn't make sense. That's illogical.

16 The reason I say that is, filing an annual
17 report is both a duty and a power because in that annual
18 report that -- that -- that individual who signs that is
19 making a recommendation to the Court, who in fact --
20 whether or not, in fact, the guardianship should remain
21 or not, and there are other recommendations.

22 So if we look at the word "duty," yes, filing
23 the annual report is described as a quote, "duty." But
24 it -- the Legislature must have intended it to be a
25 power and a duty.

1 THE COURT: No.

2 MS. DYSARZ: Because otherwise, it -- it's
3 illogical because clearly the annual report --

4 THE COURT: Okay.

5 MS. DYSARZ: -- provides for this Court a
6 recommendation as to whether or not to continue the --

7 THE COURT: Is that what we're talking about
8 here? Is that what we're talking about is filing an
9 annual report? Let me ask you another question. You
10 haven't addressed 700.5106, subsection (6). It says, "A
11 professional guardian appointed under this section shall
12 ensure that there are a sufficient number of employees
13 assigned to the care of wards for the purpose of
14 performing the necessary duties of -- with -- associated
15 with ensuring that proper and appropriate care is
16 provided." Isn't that saying right there that the
17 Legislature envisions the guardian, a professional
18 guardian, retaining employees to perform some of the
19 necessary duties associated with ensuring that proper
20 and appropriate care is provided? Isn't that what the
21 Legislature is saying? And if it's not what they're
22 saying, then what is the point of the employees if
23 they're doing nothing for the guardian?

24 MS. DYSARZ: Good question, Your Honor.

25 THE COURT: Thank you.

1 MS. DYSARZ: One, I would -- Your Honor, I
2 would say that -- that while that may be the case,
3 employees may be doing some of those duties, that does
4 not make them exempt from the requirements of 5103.
5 They still must do a Power of Attorney, and I would say
6 that this was a different situation because Darren
7 Findling does not actually employ the individuals that
8 he has delegated in Malloy and Jenkins. It's not the
9 Darren Findling Law Firm or Probate Pro that is, in
10 fact, appointed guardian in this case. It's Darren
11 Findling in his personal capacity. And it is not -- it
12 is not the case that Darren Findling personally employs
13 say the paralegal that he has doing the work.

14 So, therefore, that 5106, it -- you know, it
15 kind of goes both ways, Your Honor. And it -- it
16 wouldn't apply to his situation potentially because he
17 does not, in fact, employ his paralegal. His law firm
18 employs his paralegal but not him in his personal
19 capacity. So, Your Honor, I would argue that, you know,
20 under that language of -- and even if we accepted
21 Plaintiffs' Counsel's argument, it wouldn't apply in
22 this situation.

23 THE COURT: Okay.

24 MS. DYSARZ: You know, Your Honor, that still
25 doesn't explain why Plaintiffs' Counsel argues that

1 they're exempt from 5103.

2 THE COURT: I -- I -- actually, I don't think
3 he's -- says he's exempt from 5103. I think he says
4 5103 doesn't apply because I haven't delegated any
5 power. In fact, he said I think in his reply that
6 Darren Findling remains the only person with authority
7 to consent to medical procedures, psychiatric
8 procedures, placement, and so on. I think he just said
9 in his reply. So, he's saying --

10 MS. DYSARZ: He --

11 THE COURT: -- I'm not delegating any power.
12 I'm having --

13 MS. DYSARZ: Your Honor, so even --

14 THE COURT: -- employees assist me with
15 performing my duties.

16 MS. DYSARZ: So even if we put aside the
17 argument that -- that in this -- in these specific
18 cases, the individuals performing them are not actually
19 employees of Darren Findling in his personal capacity.
20 If we -- if we set that aside for a moment, Your Honor,
21 it still goes back to what -- to -- to the -- to the
22 main argument, which is 5106 does not say that a
23 delegation of duty is exempt, and you may delegate
24 duties without any restrictions, without any
25 requirements. It does not say that, Your Honor, with --

1 THE COURT: It -- it says --

2 MS. DYSARZ: -- within the statute.

3 THE COURT: -- it specifically says "employees
4 assigned to the care of wards for the purpose of
5 performing the necessary duties." It says specifically,
6 "assign employees to the care of wards to perform
7 necessary duties." It's -- that's what it's saying to
8 do with the employees. It's not --

9 MS. DYSARZ: So, Your Honor -- and again, I --
10 I --

11 THE COURT: Okay.

12 MS. DYSARZ: -- I go back to my twofold --

13 THE COURT: I'm not going to -- Counsel, I
14 don't want to go back and forth. I -- I figure you've
15 answered as best you can. Do you -- my questions. Do
16 you have anything else you want to say?

17 MS. DYSARZ: Your Honor, I do -- I do not
18 believe so at this time.

19 THE COURT: Okay. Thank you.

20 Mr. Black, do you have a reply or response or
21 whatever?

22 MR. BLACK: It's -- it's pretty clear to me
23 that the Court understands the issues. Unless you've
24 got any questions for me, Your Honor, I'll -- I'll --
25 I'll leave it at that.

1 THE COURT: I don't. Um, I don't.

2 So, I'm going to go ahead and make my decision
3 on this. All right. So both of these -- and there's
4 motions in both cases, and we've argued them all as one
5 case, one issue really.

6 I've taken an example, a letter, from the Mary
7 Malloy case. I think it's attached as Exhibit A to the
8 motion for summary disposition. The letter is dated
9 August 13, 2019 addressed to the Probate Pro, Darren
10 Findling, Esquire.

11 It says, "Regarding our ensured Roger F.
12 Lydon, L-y-d-o-n, and Claimant, Mary Ann Malloy," and it
13 states -- and I'm just pulling out, you know, as I go
14 along. "The itemized activities have been reviewed for
15 relatedness, reasonable necessities, and compensability
16 as outlined by the Michigan No-Fault Statute. For your
17 records, enclosed is a copy of the submitted invoice
18 with an itemization of any reductions taken. There are
19 several activities that may have been invoiced -- that
20 may have been invoices for which we will not consider
21 for reimbursement. These activities include" -- and it
22 states -- "any activities considered to be replacement
23 services. These activities include but are not limited
24 to Social Security administration activities and
25 corresponding mileage." Another bullet point under this

1 heading is "letters/documentation to litigation
2 counsel."

3 The next paragraph states, "There are also
4 several activities that may have been invoiced for which
5 we will not consider reimbursement without additional
6 information and/or documentation." And they list a few
7 of them there.

8 Then the next paragraph is, "Lastly" -- and
9 this is the paragraph that it's -- that's at issue in
10 this motion. "At this time, the documentation that we
11 have on file indicates that Darren M. Findling, Esquire,
12 is the Co-Guardian for Ms. Mary Ann Malloy. Charges
13 that have been labeled on the enclosed invoice by,
14 quote, '(i)' close quote, are not being considered. It
15 does not appear Ms. Malloy's Guardian performed the
16 guardianship services being claimed. Should letters of
17 authority exist for the individuals providing these
18 services, please forward them for further
19 consideration."

20 Okay. So, a similar letter was received in
21 the -- letters were received in the Mary Malloy case and
22 also the Dana Jenkins case, and a lawsuit was filed by
23 Mr. Findling on behalf of the Estate of Mary Malloy and
24 the Estate of Dana Jenkins. By the way as an aside, you
25 know, as to who should be the guardianship in this case,

1 we just had that issue in the Dana Jenkins case. We
2 worked through that issue with Mr. Jenkins. And at the
3 last hearing on February 19th -- I'd love to show it to
4 you, but it'll just cause a bunch of feedback here.
5 Mr. Jenkins himself participated in the hearing by Zoom,
6 and we had a very nice conversation, Mr. Jenkins and I
7 and several others who showed up, all of whom
8 Mr. Jenkins knew, all of whom Mr. Jenkins had good
9 things to say about them, and those were care providers,
10 support coordinators, a lawyer from Mr. Findling's law
11 firm, and so on. And we had been working through
12 problems that Mr. Jenkins had brought to my attention by
13 a letter that he sent to me that my staff received and
14 forwarded to me.

15 So, we set a number of hearings to try and
16 work with him through those issues. And he's extremely
17 happy with Mr. Findling, the services he provided.
18 That's, as I said, an aside. I brought that up because
19 of some issue that was raised by counsel in their
20 pleading and also began to bring it up on the record
21 priority, who should be Guardian, family, and all that
22 stuff. Mr. Jenkins is very happy with Mr. Findling and
23 -- and the services being provided at this point. He
24 apparently was not happy with the past guardian. He
25 sought a change, and he obtained one.

1 Okay. So, we move back into the -- into these
2 civil actions here. And the first thing I note, um, you
3 know, they said, as I read, the first sentence that I
4 read, it's the second sentence here, that "the itemized
5 activities have been reviewed for relatedness,
6 reasonable necessity, and compensability as outlined by
7 the Michigan No-Fault Statute." And presumably they
8 believe that under the No-Fault Statute, which they
9 reviewed these -- the invoices under, they believe that
10 any services provided by any employee and not by Darren
11 M. Findling, Esquire, himself are not compensable
12 pursuant to the Michigan No-Fault Statute.

13 So, I had a little conversation with Counsel,
14 and I read through the three relevant statutes, and I'll
15 read through them briefly again. MCL 500.3105,
16 subsection (1), provides: "Under personal protection
17 insurance, an insurer is liable to pay benefits for
18 accidental bodily injury arising out of the ownership,
19 operation, maintenance, or use of a motor vehicle as a
20 motor vehicle."

21 The next relevant section is 500.3107,
22 subsection (1), "Personal protection insurance benefits
23 are payable for the following:" Paragraph (a),
24 "Allowable expenses consisting of reasonable charges
25 incurred for reasonably necessary products, services,

1 and accommodations for an injured person's care,
2 recovery, or rehabilitation."

3 And the next relevant section is 500.3112,
4 (coughing) excuse me, "Personal protection insurance
5 benefits are payable to or for the benefit of an injured
6 person."

7 I've asked if there is any limitation in the
8 statute on who -- who -- who is a lawful provider of
9 reasonably necessary products, services, and
10 accommodations for an injured person's care, recovery,
11 or rehabilitation the incurred expenses for which the
12 personal protection insurance insurer is liable to pay.
13 I've asked if there is any limitation on who may provide
14 the products, services, or accommodations, and the
15 answer is there is none. There is an argument -- ment
16 made that in case law that case law has discussed
17 guardianship services being a compensable.

18 But I don't -- I don't find anywhere in there
19 that the courts have read a limitation into the No-Fault
20 Act that is simply not there. And I don't think -- the
21 courts would not do that. What they're being asked to
22 decide was whether certain guardianship services were
23 compensable, and they said, yes, if they meet the
24 requirements of the statute. So, we don't find any
25 limitation under the Michigan No-Fault Statute as to who

1 may provide the services, nonetheless, the products,
2 services, or accommodations.

3 Nonetheless, the argument is made that only
4 the guardian -- that we have to look to EPIC to see
5 whether the services are compensable, and I -- I don't
6 -- I don't see it. Okay. I simply do not see it.
7 There is no question that if services, products, or
8 accommodations were made within the dep -- within the
9 No-Fault Act, that it does not matter who provided them.
10 It simply matters whether the injured person incurred an
11 expense, and if the injured person incurred an expense,
12 the personal protection insurance insurer is liable to
13 pay to or for the benefit of that injured person the
14 allowable expenses. Nonetheless, even assuming that
15 EPIC might have something to say about that -- well,
16 assuming the EPIC has something to say about it, let's
17 look at what EPIC has to say.

18 First of all, EPIC provides for the
19 appointment of a guardian in MCL 700.5306, subsection
20 (1). It states, "The Court may appoint a guardian if
21 the Court finds by clear and convincing evidence both
22 that the individual for whom a guardian is sought is an
23 incapacitated individual, and that the appointment is
24 necessary as a means of providing continuing care and
25 supervision of the in -- incapacitated individual, which

1 -- with each finding supported separately on the
2 record."

3 So, we look to the statute for the definition
4 of an incapacitated individual. MCL 700.1105 (a)
5 provides: "Incapacitated individual means an individual
6 who is impaired by reason of mental illness, mental
7 deficiency, physical illness or disability, chronic use
8 of drugs, chronic intoxication, or other cause, not
9 including minority, to the extent of lacking sufficient
10 understanding or capacity to make or communicate
11 informed decisions." So, that's what a Court has to
12 find by clear and convincing evidence.

13 It is a given in this case that a guardian was
14 appointed. Thus, it's a given that those findings were
15 made. And again, like I said, we -- we've had more
16 hearings with Mr. Jenkins to confirm this as recently as
17 February 19th.

18 The definitional section goes on to say in
19 paragraph (i), "Legally incapacitated individual" -- and
20 the reason I bring this up is because through the rest
21 of EPIC the reference is to legally incapacitated
22 individual, and I contend that legally incapacitated is
23 a -- a loaded phrase. Each word in there means
24 something. "Legally incapacitated individual means an
25 individual other than a minor for whom a guardian is

1 appointed under this Act.”

2 Okay. And the reason I bring up legally is
3 this: A ward by virtue of having a guardian appointed
4 for them is legally incapacitated, in other words,
5 legally unable to enter into any binding contract.
6 Okay? Any kind of contractual relation. That would be
7 for legal services. He cannot legally contract for
8 that. That would be for medical services. He cannot
9 legally contract for that. That would be for
10 residential services. He cannot legally enter into a
11 lease for a premises where he would stay. He cannot
12 legally contract with service providers, such as
13 rehabilitation service providers. He cannot legally
14 consent to medical care. He can't legally consent to
15 psychiatric care. He can't legally consent to any of
16 those things. He cannot be bound by his consent because
17 he has been found to be incapacitated from doing that.
18 He is -- in fact, he -- it -- there is a finding, in
19 fact, that he lacks, as I read, sufficient understanding
20 or capacity to make or communicate informed decisions,
21 particularly legal decisions.

22 There's a discussion here about 5103(1) and
23 5106(6). In those two statutes, the sections of the --
24 of EPIC, it states in Protected Individuals Code the
25 Legislature uses two different words. In 5103, it uses

1 the word power, and in 5106(6), it uses the word duties.
2 In 5103(1), it states, "By properly executed power of
3 attorney a guardian of a legally incapacitate -- a
4 legally incapacitated individual may delegate to another
5 person the guardian's powers regarding care, custody, or
6 property."

7 In (4), it says, "The guardian must give
8 notice to the Court of doing that." There's a reason
9 for doing that. 'Cause the Court in making a decision
10 as to who to appoint a guardian and as to who to empower
11 with the authority conferred by the -- by EPIC, the
12 Court has to make a finding as to suitability of the
13 person. So if a guardian were to delegate a power, in
14 other words to consent to medical care, to consent to
15 psychiatric care, to enter into a binding lease, the
16 Court gave that power to the guardian that the Court
17 found suitable. If the guardian attempts to give that
18 power to another person, the Court should certainly have
19 the right and the opportunity to pass on whether that
20 person selected is suitable. It certainly wouldn't do
21 for the Court to make a finding of suitability in the
22 guardian and for the guardian to confer those powers on
23 somebody who was unsuitable. That's the purpose of that
24 statute, but it refers to power.

25 In 5106(6), it states, "A professional

1 guardian," which Mr. Findling is, "a professional
2 guardian appointed under this section shall ensure that
3 there are a sufficient number of employees assigned to
4 the care of wards for the purpose of performing the
5 necessary duties associated with ensuring that proper
6 and appropriate care is provided." The Legislature used
7 the word duties here. I think another important
8 phrasing here is "employees assigned to the care of the
9 wards." In other words, employees who are given a task
10 of caring for the ward.

11 The -- it is clear that in the law -- it --
12 it's presumed, okay, when interpreting a statute, that
13 the Legislature chose its words for a purpose. That if
14 it's not accidental, then it's not flippant, and that
15 the Court should -- should enforce legislative statutes,
16 sections, subsections as written, period. Therefore,
17 when the Court -- when the Legislature uses different
18 words, the Court is compelled to apply their appropriate
19 meaning. If it happens to be a legal term, it is the
20 legal meaning that applies this Court finds.

21 A power, according to Black's Law Dictionary,
22 Tenth Edition, I don't know what year, it's quite a
23 lengthy definition, but the one that really applies here
24 -- it has one, "the ability to act and not act." That
25 doesn't seem to help us much. Two, "dominance, control,

1 or influence over another, control over one's
2 subordinates." That's not one that applies in this
3 case. The specific one that I find that applies in the
4 case of a guardian and the power granted to them is "the
5 legal right or authorization to act or not act. A
6 person's or organization's ability to alter by an act of
7 will the rights, duties, liabilities, or other legal
8 relations either of that person or of another." And
9 then, it goes on and says, "A power is the capacity to
10 change a legal relationship." And that's from a
11 treatise that's quoted here by um.....by Black's Law
12 Dictionary.

13 And it defines duty as a "legal obligation
14 that is owed or due to another and that needs to be
15 satisfied. That which one is bound to do and for which
16 somebody else has a corresponding right." So, we see in
17 law they have different meanings.

18 A duty is -- a power is an authority to change
19 the legal relation -- legal relations or -- or to fix
20 legal relations between a ward and another person or
21 entity. Like I said, to consent to medical treatment,
22 content -- consent to psychiatric treatment, to be
23 placed in a -- in a particular residential setting and
24 sign a lease for that. Those are changes in legal
25 relations between a ward and another person or entity

1 that a guardian has authority to do.

2 And the guardian has duties as well. So,
3 let's go into what the statute actually says. And we
4 see in MCL 700.5314, "Powers and Duties of Guardian."
5 And the statute describes specific powers and specific
6 duties, and right off the bat it starts off with a duty.
7 "If meaningful communication is possible, a legally
8 incapacitated individual's guardian shall consult with
9 the legally incapacitated individual before making a
10 major decision affecting the legally incapacitated
11 individual." That phrasing "shall consult" imposes a
12 duty.

13 It states further, "The guardian is
14 responsible for the ward's care, custody -- well, to the
15 extent a guardian of a legally incapacitated individual
16 is granted powers by the Court under section 5306, the
17 guardian is responsible for the ward's care, custody,
18 and control. In particular, without qualifying the
19 previous sentences, a guardian has all of the following
20 powers and duties to the extent granted by Court order.

21 (A), The custody of the person or the ward and
22 the power to establish the ward's place of residence in
23 or outside the state." That describes a power. Again,
24 a legal relation. It goes on, "The guardian shall visit
25 the ward quarterly," is what it states, but then -- what

1 it means. "The guardian shall visit the ward." That's
2 a duty. "The guardian shall notify the Court of any
3 change in residence," another duty. "If entitled to the
4 custody of the ward, the duty to make provisions for the
5 ward's care, comfort, and maintenance," a duty, not a
6 power, a responsibility, an obligation to act.

7 And I want to talk about something here. The
8 Auto Owners' attorney talked about a duty to report
9 annually to the Court. That the guardian couldn't have
10 Jim-Bob sign it. Well, maybe not. But the guardian can
11 certainly have Jim-Bob or Jill or whatever name you want
12 to come up with, gather all the information and prepare
13 the report, and the guardian review it for accuracy and
14 sign it, and have Jim-Bob or Jill file it with the
15 Court. So, we can see that most of that duty of the
16 guardian is fulfilled by someone else, and it matters
17 not one wit to the Court.

18 The issue ultimately is who is responsible for
19 the performance of that duty, and that's where we get
20 back into Black's Law Dictionary. "A duty for which the
21 principal retains primary as opposed to vicarious
22 responsibility for due performance even if the principal
23 has delegated performance to an independent contractor.
24 For example, a landlord's duty to maintain common areas
25 though delegated to a servant contractor remains the

1 landlord's responsibility if someone was injured by
2 improper maintenance."

3 So any duty, even the preparation of reports,
4 gathering of the information that Mr. Findling might
5 have someone else do, he remains responsible for. He
6 hasn't really delegated anything. He's merely -- merely
7 assigned a task to them, to use the language of 5106,
8 "employee assigned to perform, to assist with duties,"
9 wherewith, "The power to give the consent or approval
10 that is necessary to enable the ward to receive medical,
11 mental health, or other professional care, counsel,
12 treatment or service." I specifically spoke about that.
13 Giving consent is changing a legal relation between the
14 ward and the person providing the service whether it's
15 medical, mental health, or other professional care. The
16 ward can't consent. The ward is legally unable to give
17 informed consent to medical care, psychiatric care, or
18 any other type of care.

19 (D), "The power to execute, reaffirm, and
20 revoke a Do Not Resuscitate Order." Then it describes
21 some duties with regard to that. The -- the guardian
22 has the power to do that, but it says, "If a guardian
23 executes a Do Not Resuscitate Order -- or executes a Do
24 Not Resuscitate Order, the guardian has the duty to do
25 all of the following: One is visit the ward and consult

1 with the ward. Consult directly with the ward's
2 attending physician," and so on. So, there's a power,
3 an ability to affect a legal relation between the ward
4 and the care provider by executing a Do Not Resuscitate
5 Order, and two, "A duty to perform these acts to make
6 sure that the ward is involved and that the guardian has
7 a full understanding of the ward's desire and the needs
8 to the ward's true -- both the ward and the medical
9 provider."

10 (F), "The power to execute, reaffirm, and
11 revoke the nonopioid direct form on behalf of a ward."

12 (G), "The power to execute, reaffirm, and
13 revoke a physician orders for scope of treatment form on
14 behalf of a ward," again, a power, to affect a legal
15 relationship between the ward and treatment provider.
16 But then, it imposed a duty on the guardian. "However,
17 a guardian shall not execute a physician order for scope
18 of treatment unless the guardian does all of the
19 following: Visit the ward, and if meaningful
20 communication is possible, consult with the ward about
21 executing it." Two, "Consulting directly with the
22 attending physician about the specific indications," and
23 so on.

24 And then it goes on. It has other powers, and

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1 it lists other duties. This Court finds it's crystal
2 clear in the statute that the Legislature knew that
3 there was a difference between the word "power" and the
4 word "duty" and the law, and it intended their
5 correlative meanings when using each word.

6 Therefore, I find that -- now mind you, they
7 haven't put a specific line item in front of me, an
8 itemized billing entry, for me to judge whether a
9 particular billing entry is an attempt by the Guardian
10 to delegate a power or simply an assignment by the
11 Guardian to an employee of a -- of a function or
12 performance of an act to assist the Guardian in
13 performing, in this case, Darren Findling's duties.
14 Okay? So, they haven't put that in front of me. All
15 right? But to the extent for -- that it is simply the
16 assignment to an employee of a duty, this Court finds
17 that it is not in violation of the -- of EPIC,
18 specifically section 700.5103, because it is not a
19 delegation of a power. The ability to change the words
20 legal relations with another person or another entity.
21 It is simply an assignment of an employee to the care of
22 the wards of certain duties. Okay.

23 So the -- to the extent it is that, okay, then
24 even if there was, which I find there is not, but even
25 if there was a limitation under the No-Fault Act that

1 the -- the a guardian not be found for delegate -- un --
2 im -- improperly delegated a power, I would find that it
3 was not a delegation of power.

4 And secondly, I find that even if it was a
5 delegation of a power, okay, the No-Fault Act does not
6 place any limitation whatsoever on who may provide
7 services, and it doesn't give authority to a personal
8 protection insurance insurer, a provider, it doesn't
9 give authority to them to enforce the provisions of
10 EPIC. Again, the -- the No-Fault Law clearly provides
11 that where a person has sustained an accidental bodily
12 injury out of the ownership, operation, maintenance, or
13 use of a motor vehicle injury that they -- that the
14 insurance company is liable to reimburse them for any
15 allowable expenses incurred for reasonably necessary
16 products, services, and accommodations for the injured
17 person's care, recovery, or -- or rehabilitation
18 regardless of who provides them.

19 Lastly, this -- this argument that was brought
20 up, I think belatedly, that these are not employees of
21 Mr. Findling there's -- I don't think there's any
22 argument or evidence that they're not employees, or that
23 even that is a requirement. So, I -- it wasn't argued.
24 So, I -- I'll find the argument as waived for purposes
25 of this motion. It's clear as -- to me as -- that Auto

1 Owners' position is fatally flawed because they ignore
2 the difference between a duty and a power as stated by
3 Findling in his reply that was filed February -- I can't
4 tell what it is. Um, ignores the difference between a
5 duty and a power in the statute, and again, there is no
6 limitation in the No-Fault Act.

7 Just the -- the expenses, the benefits are
8 payable to the ward or for the ward's benefits
9 regardless of who provides them. So, I am granting the
10 motion for partial summary disposition. And that's my
11 ruling, and denying the --

12 MR. BLACK: Do I need to prepare an order,
13 Your Honor?

14 THE COURT: -- denying the countermotion for
15 summary disposition.

16 MS. DYSARZ: Your Honor, may I ask a quick
17 question on your ruling?

18 THE COURT: Yep.

19 MS. DYSARZ: Does your ruling imply that there
20 would be -- there would then need to be a separate
21 hearing on the specific line-item bills themselves to
22 determine whether or not they were a delegation of power
23 or delegation of a duty?

24 THE COURT: No.

25 MS. DYSARZ: Would -- would that --

1 THE COURT: No, because --

2 MS. DYSARZ: Oh.

3 THE COURT: -- I'm just saying. I just tried
4 to cover all the bases, but in the end, I said I don't
5 find that there is any such limitation in the No-Fault
6 Law that gives the personal protection insurer authority
7 to deny benefits to the injured person, which is what
8 you're doing. You're denying benefits -- -- you're
9 denying benefits to the injured person by your
10 interpretation of EPIC, and there is no limitation in
11 there on your duty to pay personal protection insurance
12 benefits to an injured person for allowable expenses
13 that meet the definitions in -- in 3107. There is no
14 limitation. It is the injured person who's the object
15 of the statute. It's reimbursement of that person, and
16 the payment of benefits to that person for expenses
17 incurred. That's what the statute is about.

18 So, no, I'm not going to go back over it. I
19 was just pointing out that nobody's shown me exactly
20 what -- whether there was a delegation of power, and if
21 there was, if I do see one, perhaps what I'll do is I'll
22 set the other case for a hearing and decide something
23 there, which I think would be the only proper place to
24 decide it. Again, there is --

25 MS. DYSARZ: Your Honor, which other case?

1 THE COURT: -- there is -- again, there is no
2 limitation on the insurer's duty to pay the injured
3 person for expenses incurred obtaining reasonably
4 necessary products, services, and accommodations,
5 reasonable charges for reasonably necessary products,
6 service, and accommodations. That's my answer.

7 MS. DYSARZ: Okay, Your Honor. Just - I
8 thought -- you had called both cases. You said you
9 would make a ruling on the other case. Which case are
10 you not ruling on currently?

11 THE COURT: Huh?

12 DEPUTY CLERK: I think you (indecipherable
13 words).

14 MS. DYSARZ: You just said it -- you said
15 potentially in another case you would actually review
16 the bills, but you said you wouldn't make --

17 THE COURT: No, I never said --

18 MS. DYSARZ: -- a ruling on that, which --

19 THE COURT: -- I never said I would review --
20 review the bills. I said if it is shown to me that the
21 guardian is delegating powers, okay. Okay, I said I --
22 that would be for me to look at in another case, which
23 -- in other words, is the guardianship case, which is
24 the only place, I think, to look at it.

25 MS. DYSARZ: Okay, Your Honor. You're not

1 mentioning Malloy or Jenkins. You're talking about
2 outside of that. Thank you, Your Honor. I appreciate
3 it.

4 THE COURT: I'm not mentioning what?

5 MS. DYSARZ: When you say that would be
6 addressed in another case, you're referring to some
7 other case outside of Malloy and Jenkins. I was just
8 trying to make --

9 THE COURT: I'm not -- Miss --

10 MS. DYSARZ: -- sure I understood that.

11 THE COURT: -- Miss? Malloy and Jenkins each
12 have a guardianship case. What I'm saying is that the
13 proper place to address misconduct of the guardian is in
14 -- if it's in reference to Mr. Jenkins, it's in the Dana
15 Jenkins guardianship case. We have a case number for
16 that. It 15-362728-GA. It is not this case. And if
17 it's in Malloy --

18 MS. DYSARZ: Thank you.

19 THE COURT: -- then it is in the Mary Ann
20 Malloy guardianship case 08-316364-GA. It is not in
21 this case. Okay?

22 MS. DYSARZ: Thank you, Your Honor. Yes, I
23 understand. Thank you.

24 THE COURT: I hope you do. I'm -- I'm not
25 getting the impression you do.

1 MS. DYSARZ: Thank you for the clarification
2 on your ruling, Your Honor. I do appreciate it.

3 THE COURT: Okay. Do you want to do that
4 other motion now or not?

5 MS. DYSARZ: Yes, Your Honor. The motions are
6 motions for relief. Specifically, we are asking for a
7 stay on these proceedings so that the issues in
8 declaratory action can be ruled upon. We can get
9 rulings as to a whole, and I would rely upon the briefs
10 for the reasons that we've articulated.

11 THE COURT: Mr. Black?

12 MR. BLACK: Your Honor, one thing I would
13 point out to the Court that I don't think was in those
14 briefs is that the Kent County case, which is also
15 pending, there was a ruling on a summary disposition
16 motion specifically dismissing the matter as it applies
17 to these two cases.

18 I think a -- I think at this point, it seems
19 like the only request is for a stay. I think these
20 matters should move forward. There's -- there's nothing
21 tied to that other case that -- that can't be decided in
22 this case. This case is about payment of fees. At this
23 point, it is really a pretty simple issue, I think, of
24 the reasonableness of the fee, and um, whether it's a
25 replacement service or -- or the care, recovery, and

1 rehabilitation. Those are issues unique to this case,
2 and I don't see any reason to stay it.

3 THE COURT: Do you have any rebuttal?

4 MS. DYSARZ: We would just rely on our
5 briefing, Your Honor. Thank you.

6 THE COURT: Okay.

7 (Long pause)

8 THE COURT: Okay. In light of the -- the new
9 position I guess it would be, I want to point out there
10 was a motion -- a revised motion. Defendant Auto
11 Owners' Insurance Company revised motion for relief in
12 light of declaratory action. Um.....and at -- and in
13 it, legal law and analysis, they had option one, formed
14 on convenience. Option two, transfer venue.
15 Apparently, those two arguments have been abandoned.
16 The third option, stay pending the declaratory action.

17 It says, "If this Court declines to either
18 dismiss the case under doctrine of formed on convenience
19 or transfer venue, under the relevant Court Rule, Auto
20 Owners seeks to stay this case pending a decision in the
21 declaratory action to avoid duplicative litigation and
22 the potential for inconsistent judgments."

23 You know, um.....you know, it -- it states,
24 "This Court has in -- inherent authority to stay this
25 case as part of its vested power to maintain its docket

1 in an orderly manner and preserve judicial economy.
2 Doing this would promote the cause of justice, preserve
3 judicial economy, and prevent the increased chances of
4 the threat of COVID-19 by permitting Auto Owners to
5 litigate the issue" -- hum. I can't really read that
6 word.

7 Okay. So, it's interesting. I mean, the idea
8 that there would be duplicative litigation. It seems to
9 me in every single one of those cases there's going to
10 have to be evidence presented unique -- you know,
11 particular to those specific cases regarding the
12 injuries sustained by the -- the injured person in each
13 case. The need of -- of those persons in light of their
14 injuries, the need in each of those cases for a specific
15 product, service, or accommodation, and the
16 determination as to whether those products, services, or
17 accommodations were reasonably necessary in that case in
18 light of that person's particular injury and the state
19 of their recovery and rehabilitation, where they are in
20 the process, and what the prospects are for improvement.
21 You know, for continued rehabilitation, for continued
22 recovery, and so on. And those are all going to be
23 unique or particular to each case. So, it seems to me
24 that that testimony would be provided regardless. So,
25 it's not clear to me what would be du -- duplicative

1 beyond the attorneys making arguments.

2 Another thing that comes to mind is apparently
3 there's -- what, there's seventeen, nineteen cases,
4 whatever they said it was. And as Auto Owners put it,
5 what'd they say, "throughout the State." So, they're
6 not all in this jurisdiction. And the determination of
7 the reasonableness of certain fees is a -- is in part
8 determined by the venue in which the injured person
9 happens to be located. Whether it's attorney fees or
10 assisted care that's provided, there's going to be a
11 rate for services in any given area that's appropriate
12 for a particular service and a particular provider of
13 that service.

14 Um, so it seems to me the best court to make a
15 decision on what's appropriate in a given area of the
16 State, the best court to do that is one that sits in the
17 same area where the injured person finds himself and is
18 receiving the care. So, I find that it is appropriate
19 and proper and not duplicative for this Court to deny
20 the request to stay this action and await a decision by
21 another court in these other cases. I -- I don't know
22 if that other court is even going to get to the issues
23 that I'm going to get to. And I've already made a
24 decision.

25 So, what happens there? I stay this while

1 that court decides what it wants to do on, for example,
2 the arguments that have already been made here today. I
3 don't know if that's an issue in those other cases, but
4 assuming it is, what happens to this case if that court
5 says no. Mr. Fi -- I'm going to deny your motion,
6 Mr. Findling, and the case proceeds without it. I've
7 already made my decision on the motion for summary
8 disposition. I don't think it's worthwhile to wait.

9 As far as spreading COVID-19, you know, as far
10 as I know, this is going to be done by Zoom. All the
11 attorneys in this case are local. All the witnesses are
12 local. Probably a lot of this testimony will be done by
13 Zoom. I don't know exactly when it's set for trial, but
14 I don't see how it would be any less chance of spreading
15 COVID-19 by litigating it in Kent County. Maybe they're
16 better at preventing COVID-19 than we are. I don't
17 know. But I certainly don't have any evidence for that.
18 So, I'm denying the request for a stay at this time.

19 So, Mr. Black, if you would prepare the orders
20 granting the motion for summary -- your motion for
21 summary disposition, denying the countermotion for
22 summary disposition for the reasons stated on the
23 record. And too, denying their request for relief.

24 MR. BLACK: Do you want that as one order or
25 two, Your Honor?

1 THE COURT: I don't care how you do it.

2 MR. BLACK: Okay. Very well.

3 THE COURT: All right. And let the other
4 counsel say it, but if you just limit it to for the
5 reasons stated on the record, there could hardly be any
6 objection.

7 MR. BLACK: Sounds good. I will do that.

8 THE COURT: Good. So long everyone. Have a
9 good day.

10 (At 3:23:33 p.m., proceedings concluded.)

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CERTIFICATE OF REPORTER

(STATE OF MICHIGAN)
(SS)
(COUNTY OF INGHAM)

I hereby certify that this transcript represents the complete, true and correct rendition of the video of the proceedings as recorded.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the video of the proceedings.

Dated: 4-6-2021

/s/ Roana F. Smith
Roana F. Smith, CER 8160

Appendix Attachment 10

State of Michigan

PROBATE JUDGES
JENNIFER CALLAGHAN
LINDA S. HALLMARK
DANIEL A. O'BRIEN
KATHLEEN A. RYAN



Edward Hutton III
Probate Administrator

Barbara Andruccioli
Probate Register

Probate Court County of Oakland

1200 N. TELEGRAPH ROAD, DEPT. 457
PONTIAC, MICHIGAN 48341-0457
PHONE: (248) 858-0260
FAX: (248) 452-2016

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REGARDING: MARY ANN MALLOY V AUTO OWNERS	

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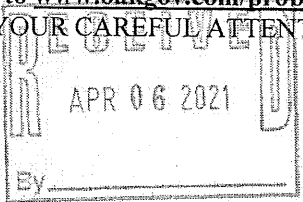
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- Your pleading must be legibly written in ink or typewritten.
- Your pleading must state who the "interested persons" are.
- Your pleading must either be notarized or contain the following statement:
"I declare, under the penalties of perjury, that this petition has been examined by me and that its contents are true to the best of my information, knowledge and belief."
- A complete legal description is needed for the real estate listed in your inventory.
- An improper caption appears on your *Proof of Restricted Account and Verification of Funds on Deposit* form. Enclosed is an example sheet with the acceptable examples highlighted that can be used.
- This document cannot be filed until _____.
- A *Statement of Services* must be attached to the account to explain the fees.
- A financial institution statement must be attached to presented with _____ your account.
- The accounting period should be From: _____ To: _____

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STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF OAKLAND

THE ESTATE OF MARY ANN MALLOY,
A Legally Incapacitated Individual, by
Darren Findling and Kathern Malloy, as Co-Guardians,
and THE DARREN FINDLING LAW FIRM, PLC,

Plaintiffs,

Case No.: 2020-393904-CZ
Hon. Daniel A. O'Brien

v.

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

THE DARREN FINDLING LAW FIRM PLC
ANDREW J. BLACK (P64606)
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AUTO-OWNERS' MOTION FOR RECONSIDERATION

Auto-Owners requests that this Court reconsider its denial of Auto-Owners' counter-motion for summary disposition, as heard on March 2, 2021. In support, it relies on the attached brief.

THEREFORE, Auto-Owners requests that this Court reconsider its decision against Auto-Owners and grant summary disposition in Auto-Owners' favor.

Respectfully submitted,

COLLINS EINHORN FARRELL PC

/s/ Lauren A. Frederick

LAUREN A. FREDERICK (P75167)

MARYRACHEL DYSARZ (P77780)

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Dated March 29, 2021

BRIEF IN SUPPORT

Introduction

Auto-Owners believes that this Court committed five palpable errors when it denied Auto-Owners' counter-motion for partial summary disposition on March 2, 2021. Auto-Owners respectfully requests that this Court reconsider its decision and reverse its ruling based on the arguments in this brief.

Relevant Background

On March 2, 2021, this Court heard arguments on counter-motions for partial summary disposition. The issue in those motions was whether Darren Findling could lawfully delegate his guardianship duties under EPIC without a power of attorney and notice to the court to other people in his law firm. The underlying assertion by Auto-Owners is that if Darren Findling cannot lawfully delegate his duties under EPIC, then guardianship expenses incurred by other people at his firm for his wards are not lawful expenses payable under the no-fault act.

During the hearing, this Court made several findings. First, it found that nothing in the no-fault statute says that a guardian cannot delegate its duties and there was no

reason to analyze whether EPIC permits the delegation of guardianship duties. The Court seemed to indicate that the analysis for whether Darren Findling's delegates could receive reimbursement under the no-fault act ended with the no-fault act – irrespective of whether the delegation was lawful under EPIC.

Second, the Court found that it could not rule on whether Darren Findling improperly delegated his guardianship duties because that issue was not before the Court.

Third, the Court found that the Legislature clearly distinguished between a power and duty in EPIC, and that the requirements in MCL 700.5103 (a power of attorney and notice to the court) only pertained to the delegation of powers, not duties – irrespective of the SCAO Form PC 633 used in conjunction with MCL 700.5103 states in bold: **DELEGATION OF DUTIES: You are required by law to notify the court when you delegate duties under a durable power of attorney:**

PC 633 (9/12) LETTERS OF GUARDIANSHIP

MCL 330.1631, MCL 700.5103, MCL 700.5214, MCL 700.5215(f), (g), MCL 700.5314(a), (e),
MCL 700.5417, MCR 5.202, MCR 5.402(D), MCR 5.405(C), MCR 5.406(A), MCR 5.409

DELEGATION OF DUTIES: You are required by law to notify the court when you delegate duties under a durable power of attorney.

Fourth, the Court found that MCL 700.5106(5)-(6) permitted Darren Findling to delegate his duties to his employees without any restrictions, including the requirements in MCL 500.5103.

Fifth, the Court found that at least one of the cases cited by Findling Law pertained to the delegation of guardianship duties even though it had not reviewed all of the cases. The Court noted that it would “guess” and “bet all [its] money” that at least one of the cases Findling Law cited addressed whether a guardian can delegate its

duties without a power of attorney or notice to the court and receive reimbursement under the no-fault act.

Legal Standard

Under MCR 2.119(F)(3), a court may reconsider and reverse its ruling if the moving party demonstrates palpable error by which the court and the parties have been misled and, in light of the revelation, a different disposition of the motion must result. The rule “allows the court considerable discretion in granting reconsideration to correct mistakes . . . and to minimize costs to the parties.” *Koky v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). Indeed, a showing of “palpable error” is not mandatory. *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005). The Court of Appeals has explained that, “If a trial court wants to give a second chance to a motion it has previously denied, it has every right to do so, and [MCR 2.119(F)] does nothing to prevent this exercise of discretion.” *Id.* at 350-351 (citations omitted).

Argument

Auto-Owners respectfully requests that the Court reconsider its findings from the March 2, 2021 hearing and grant Auto-Owners’ motion for partial summary disposition.

I. Unlawfully rendered services are not reimbursable under the no-fault act.

This Court palpably erred when it found that whether a service was rendered lawfully had no bearing on whether a service was reimbursable under the no-fault act. The Michigan Court of Appeals has made it clear that only lawfully rendered services are subject to payment under the no-fault act. *Hofman v Auto Club Ass’n*, 211 Mich App 55, 64; 535 NW2d 529 (1995), citing *Cherry v State Farm Mut Auto Ins Co*, 195 Mich App

316, 320; 489 NW2d 788 (1992), which held that unlicensed doctors could not receive payment under the no-fault act. The Court of Appeals has stated this rule unequivocally: "Only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit." *Cherry*, 195 Mich App at 320, quoted in *Psychosocial Service Associates, PC v State Farm Mut Auto Ins Co*, 279 Mich App 334; 761 NW2d 716 (2008).

Here, if Darren Findling unlawfully delegated his duties under EPIC, his delegates, acting unlawfully, may not receive reimbursement under the no-fault act. So the analysis requires reviewing EPIC to determine whether Darren Findling lawfully delegated his duties, not simply analyzing the no-fault act. The Court's ruling was erroneous, so reconsideration is appropriate.

II. The issue of whether Darren Findling unlawfully delegated his duties was properly before the Court because unlawful delegation would prohibit reimbursement – which is what Findling seeks.

The issue of whether Darren Findling unlawfully delegated his duties under EPIC was properly before the Court. The underlying question is whether Findling's firm's employees were entitled to payment under the no-fault act. If the delegation was improper, then they're not entitled to payment under the no-fault act.

In reviewing whether the insurer owed no-fault benefits for chiropractor services, *Hofman* specifically conferred on the trial court the authority to determine whether the chiropractor lawfully rendered in relationship to no-fault reimbursement:

Because the lawfulness of a given activity . . . was not considered by the trial court below . . . we remand to the trial court to afford the parties the opportunity to address whether the exercise of that activity might be considered

unlawful as, for example, constituting the practice of medicine without a license. [*Hofman*, 211 Mich App at 64].

So the question of whether Darren Findling lawfully delegated his guardianship duties was properly before the Court as the underlying question to whether his delegates could receive reimbursement for their duties. The Court palpably erred in finding otherwise.

III. The requirements in MCL 700.5103 apply to the delegation of guardianship powers and duties.

This Court committed palpable error when it found that the requirements in MCL 700.5103 only applied to the delegation of powers, not duties, or that section 5103 distinguished powers from duties.

First, the Court's finding overlooked SCAO form PC 633, which links MCL 700.5103 (and its requirements) to the delegation of duties.

PC 633 (9/12) LETTERS OF GUARDIANSHIP

MCL 330.1631, MCL 700.5103, MCL 700.5214, MCL 700.5215(f), (g), MCL 700.5314(a), (e), MCL 700.5417, MCR 5.202, MCR 5.402(D), MCR 5.405(C), MCR 5.406(A), MCR 5.409

DELEGATION OF DUTIES: You are required by law to notify the court when you delegate duties under a durable power of attorney.

Second, the Court misapplied the rules of statutory construction. The goal of statutory construction is to give effect to the Legislature's intent. *City of Grand Rapids v Brookstone Capital, LLC*, ___ Mich App ___, ___ NW2d ___ (2020) (Docket No. 350746); slip op at 2, citing *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 136; 892 NW2d 33 (2016). To correctly arrive at the legislative intent behind the statute, a court cannot speculate about legislative intent. *Id.* Rather, a court must take a series of steps to accurately ascertain the legislative intent behind a statute. *Id.*

The first step is to look at the specific language of the statute and give the words their ordinary meaning. *City of Grand Rapids*, ___ Mich App at slip op 2, citing *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003). If the language is unambiguous, the analysis stops because the plain language of the statute reveals the legislative intent. *Id.* No judicial construction is permitted. *Id.*

Ambiguity exists only if (1) the statute creates an irreconcilable conflict with another provision or (2) it is equally susceptible to more than one meaning. *Noll v Ritzer (On Remand)*, 317 Mich App 506, 511; 895 NW2d 192 (2016). If the statute satisfies either of these two exceptions, the analysis continues and a court may use various doctrines of statutory interpretation such as the doctrine of *in pari materia* or *nocitur a sociis*. *City of Grand Rapids*, ___ Mich App at slip op 3; *G.C. Timmis & Co v Guardian Alarm Co*, 463 Mich 416, 422-423; 622 NW2d 416 (2003) (holding that words in a statute should not be construed in isolation, but should be read together to harmonize the meaning, giving effect to the act as a whole). Above all, statutes should be construed to prevent injustice or prejudice to the public interest. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

Here, the Court did not follow step one, which is to review the plain language of the statute and determine if the statute was ambiguous. It concluded that the legislative intent was “crystal clear” and the statute clearly distinguished powers from duties. But the Court never addressed the statute’s language on the record and did not explain how this intent is “crystal clear” from the statute’s plain language. And if the Court based its conclusion on something other than the plain text, it never made a finding on whether the statute was ambiguous and if so, which exception showing ambiguity applied.

Failing to apply the plain language is palpable error. *City of Grand Rapids*, ___ Mich App at slip op 2.

The Court also arrived at an unjust result. In concluding that the statute only applied to the delegation of powers, it overlooked SCAO Form PC 633, which ties the statute to the delegation of duties. It also posed a substantial risk to the public interest. It arrived at the result that EPIC permits a guardian to delegate legal duties owed to the ward without any judicial oversight. Under the Court's conclusion, a legal guardian could delegate duties to anyone, including people who have no intent to act with the ward's best interest in mind. This unrestrained delegation lacking any judicial oversight is ripe for abuse and fraud of our community's most vulnerable individuals. This is palpable error.

IV. MCL 700.5106 does not address whether guardians may delegate legal duties, and the Court misconstrued the statute.

The Court palpably erred when it found that MCL 700.5106 supports its holding that guardians may delegate their legal duties without abiding by the restrictions in section 5103. In finding that the statute supported the Court's conclusion, the Court construed the word "care" to include rendering legal guardianship duties in lieu of the legal guardian. This is palpable error.

Courts are not permitted to construe a statute to say something that it doesn't. *Malone v Lambrect*, 305 Mich 58, 62; 8 NW2d 910 (1943) (holding that construing the words of a statute away from their ordinary meaning does violence to the statute); see also *Nelson v Assoc Financial Services Co. of Indiana, Inc*, 253 Mich App 580, 590; 659 NW2d 635 (2002) (holding same).

As an initial matter, Auto-Owners addressed in its briefing why the statutory language in MCL 700.5106 does not support Findling Law's (and this Court's) conclusion.¹ Auto-Owners pointed out that the statute does not speak to the delegation of guardianship duties. Rather, it imposes the duty on the guardian, *in performing guardianship duties*, to establish a schedule of visitation for care-providers and to ensure that the protected individual has enough care-providers.

Moreover, construing the word "care" to include rendering legal guardianship duties in lieu of the legal guardian is wrong for two reasons. First, it disposes of the role of the guardian that forms the subject of the sentence in subpart (6): "A professional guardian appointed under this section shall ensure that there are a sufficient number of employees assigned to the care of wards."

Second, construing the word "care" to include rendering guardianship duties departs from the plain meaning of the word that refers to providing attention to health, well-being, and safety of someone. See MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/care> (last visited March 25, 2021) (using the example "under a doctor's care). The ordinary meaning of the word "care" doesn't refer to providing legal services. The ordinary meaning refers to attending to someone's or something's physical well-being. So the Court's reading of the statute departed from the ordinary meaning of care and also disposed of the subject of the sentence in subpart (6). This constitutes palpable error.

¹ Attachment A, Auto-Owners' Brief in Support of Counter-Motion for Partial Summary Disposition, 7-9.

V. Findling Law did not cite any applicable case law.

This Court committed palpable error when it found that at least one case cited by Findling Law related to the delegation of guardianship duties. The Court was incorrect. Findling Law didn't cite one case in any of its briefing that addressed whether a guardian may delegate duties. Auto-Owners' briefing demonstrates this in its review of every single case cited by Findling Law.² So the Court erred.

Request for Relief

For these reasons, Auto-Owners requests that this Court reverse its decision from March 2, 2021, and grant Auto-Owners' counter-motion for partial summary disposition.

Respectfully submitted,

COLLINS EINHORN FARRELL PC

/s/ Lauren A. Frederick

LAUREN A. FREDERICK (P75167)

MARYRACHEL DYSARZ (P77780)

Attorneys for Defendant

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maryrachel.dysarz@ceflawyers.com

Dated March 29, 2021

Index of Attachments

Attachment A	Auto-Owners' Brief in Support of Counter-Motion for Partial Summary Disposition
Attachment B	Auto-Owners' Reply Brief

²² *Attachment A*, Auto-Owners' Brief in Support of Counter-Motion for Partial Summary Disposition, 5-7; *Attachment B*, Auto-Owners' Reply Brief, 3-4.

Proof of Service

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein via E-mail on *March 29, 2021*.

By: /s/ Barbara Roldan
Barbara Roldan

Appendix Attachment 11

STATE OF MICHIGAN PROBATE COURT COUNTY OF OAKLAND	LETTERS OF GUARDIANSHIP	FILE NO. 2008-316364-GA
---	-------------------------	--------------------------------

In the matter of MARY ANN MALLOY Legally Incapacitated Individual

To: <i>Name and address</i> DARREN FINDLING 414 W. FIFTH ST. ROYAL OAK, MI 48067	PATRICK MALLOY 4793 SHARP SHOOTER WAY PRESCOTT, AZ 86301
---	--

<i>Guardian's telephone no.</i> 248-399-3300	909-292-3284
---	--------------

1 You have been appointed by will or other witnessed writing by the court as Successor guardian of the individual named above Type of guardian (full, limited, temporary, etc.)

2. Having filed an acceptance of appointment, you have the care, custody, and control of that individual:

a. together with all authority and responsibilities granted and imposed by law including all powers and duties under MCL 700.5314 and 5315. **CO-GUARDIANS HAVE INDEPENDENT AUTHORITY TO ACT.**

b. except as follows. *You may not change individual's residence from the State of Michigan without prior approval of the probate court.*

c. as to the following powers and responsibilities only:

3 These letters of guardianship expire on SEPTEMBER 12, 2021
Date

MAY 21, 2021
Date

Daniel A. O'Brien
Judge Daniel A O'Brien P42120 Bar no

Attorney name (type or print) Bar no

Address

City, state, zip Telephone no

SEE NOTICE OF DUTIES ON SECOND PAGE

I certify that I have compared this copy with the original on file and that it is a correct copy of the whole of such original, and on this date, these letters are in full force and effect.

Date Deputy probate register/clerk

USE NOTE: If this form is being filed in the circuit court family division, please enter the court name and county in the upper left-hand corner of the form
Do not write below this line - For court use only

FILED MAY 21 20 21
April Gallen
Deputy Register of Probate

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NOTICE OF DUTY TO VISIT

You are required by law to visit the individual for whom you are guardian at least once every three months

NOTICE OF REPORTING DUTIES

You are required by law to file with this court a written report on the indicated form(s) and at the indicated times. Forms are available at the court

CHANGE IN PLACE OF RESIDENCE: You are required to promptly inform the court of any change in the ward's residence within 14 days of the change. You are also required to keep the court and interested persons informed in writing within 7 days of any change in your address

ANNUAL REPORT:

Your annual report on condition of ward is due on SEPTEMBER 12 of each year (Use form PC 634 or PC 654)
Date

Your annual report period should cover events from JULY 18 to JULY 18

In addition, you must serve the report on the ward and interested persons as specified in the Michigan Court Rules and file proof of service with the court

ACCOUNTS: You must file with this court once a year, either on the anniversary date of your letters of authority or on another date you choose (you must notify the court of this date) or more often if the court directs, a complete itemized accounting of your administration of the estate. On termination of the individual's disability, you shall account to the court or to the individual or that individual's successors. **The accounts must be served on the required persons at the time they are filed with the court, along with proof of service.** (Use form PC 583 or PC 584 "Account")

ONGOING DUTY TO REPORT: Pursuant to MCL 700.5319(2), if a conservator has not been appointed for the ward's estate and you determine that there is more cash or property that is readily convertible into cash in the ward's estate than was estimated by the guardian ad litem and reported to the court, you must report the amount of the additional cash or property to the court

DEATH OF WARD: If the ward dies during the guardianship, you must give written notification to the court within 14 days of the individual's date of death. If accounts are required to be filed with the court, a final account must be filed within 56 days of the date of death

DELEGATION OF DUTIES: You are required by law to notify the court when you delegate duties under a durable power of attorney

ATTENTION: **The above provisions are reporting duties only and are not the only duties required of you.** These mandatory provisions are specified in court rules adopted by the Michigan Supreme Court. Your failure to comply may require the court to appoint a special fiduciary in your place and to suspend your powers. This may result in your removal as fiduciary. The court is prohibited by statute from giving you legal advice

KEEP THIS NOTICE FOR FUTURE REFERENCE

Appendix Attachment 12

STATE OF MICHIGAN PROBATE COURT COUNTY OF OAKLAND	ORDER REGARDING TERMINATION/MODIFICATION OF <input type="checkbox"/> GUARDIAN FOR MINOR <input checked="" type="checkbox"/> GUARDIAN FOR LII <input type="checkbox"/> CONSERVATOR	FILE NO. 2008-316364-GA
---	--	--------------------------------

In the matter of Mary Ann Malloy
First, middle, and last name

1. Date of hearing: _____ Judge Daniel A. O'Brien P42120
Bar #

THE COURT FINDS:

- 2. Notice of hearing was given to or waived by all interested persons.
- 3. a. A petition to terminate modify a guardianship conservatorship was filed with this court and should be granted. denied.
- b. On the court's own motion, the guardianship conservatorship should be terminated. modified.
- 4. The fiduciary should be removed and a successor appointed.
 should be permitted to resign and a successor appointed.
 has died or become disabled and a successor must be appointed.
 is not effectively performing the duties of a guardian and the welfare of the incapacitated individual requires immediate action and the appointment of a temporary guardian.
- 5. The individual continues to be an incapacitated individual and in need of a guardian as a means of providing continuing care and supervision of the person.
 continues to be a person in need of a conservator.
 is a minor who continues to need a guardian.
 is no longer in need of a guardian. conservator.
- 6. There is no qualified, suitable individual willing to act as conservator/guardian and the appointment of a professional guardian/conservator as fiduciary is in the best interest of the individual. A bond must be filed.
- 7. A coguardian is necessary.

IT IS ORDERED:

- 8. The petition is granted. denied on the merits. dismissed/withdrawn.
- 9. The appointment of a special conservator is necessary to preserve the estate or secure its proper administration.
- 10. Siporin & Associates, Inc. is removed permitted to resign as Co-Guardian
Name of fiduciary Type of fiduciary
 S/he shall file with this court and serve on the interested persons a final account no later than _____
Date

(SEE SECOND PAGE)

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11. Darren M. Findling, Esq. 414 W. 5th St.
Name Address
Royal Oak, Michigan 48067 (248) 399-3300 is appointed
City State Zip Telephone no.

Kathern Malloy 25696 W. 9 Mile Rd.
Name Address
Southfield, Michigan 48033 (248) 262-7844 is appointed
City State Zip Telephone no.

a. successor full limited temporary guardian of the individual and qualifies by filing an acceptance of appointment. Bond is fixed at \$ _____.

The guardian is not permitted to act until letters of guardianship are issued. After qualification, the guardian shall comply with all relevant requirements under the law.

The temporary guardian shall serve until _____ with the following powers: _____
Date

b. successor special conservator and shall have the following powers: _____

An acceptance of appointment is to be filed. Bond is fixed at \$ _____.

The conservator is not permitted to act until letters of conservatorship are issued. After qualification, the conservator shall comply with all relevant requirements under the law.

12. The guardianship conservatorship is terminated modified as follows: Siporin & Associates, Inc., is allowed to resign as co-guardian and Darren M. Findling, Esq., and Kathern Malloy are appointed successor co-guardians.

13. The attorney guardian ad litem for the individual is discharged.

14. Other:

15. The matter is closed. not closed.

Date 4-29-19

Judge 

Steven Siporin P39391
Attorney name (type or print) Bar no.
29488 Woodward Ave., #330, Royal Oak, Michigan 48073
Address City State Zip Telephone n

(248) 398-5582
Telephone n

Appendix Attachment 13

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF GRAND TRAVERSE

THE ESTATE OF PATRICK OBESHAW,
A Legally Incapacitated Individual, by
Darren Findling, as Guardian, and THE
DARREN FINDLING LAW FIRM, PLC,

Plaintiffs,

Case No: 2020-32793 CZ

Hon. Melanie D. Stanton

v.

GRAND TRAVERSE COUNTY
PROBATE COURT

JUN - 1 2021

AUTO-OWNERS INSURANCE COMPANY,

Defendant.

THE DARREN FINDLING LAW FIRM PLC
ANDREW J. BLACK (P64606)
Attorney for Plaintiffs
414 W. Fifth Street
Royal Oak, MI 48067
(248) 399-3300 / (248) 556-9767 - Fax
andrew@findlinglaw.com

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MARYRACHEL DYSARZ (P77780)
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Southfield, MI 48075
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lauren.frederick@ceflawyers.com
maryrachel.dysarz@ceflawyers.com

**ORDER GRANTING DEFENDANT, AUTO-OWNERS INSURANCE COMPANY'S
MOTION FOR PARTIAL SUMMARY DISPOSITION**

At a session of said Court held in
the City of Traverse, County of Grand Traverse,
State of Michigan

on _____

PRESENT: HON. _____

Melanie D. Stanton, Probate Court Judge

This matter having come before the Court on Defendant, Auto-Owners Insurance
Company's Motion for Partial Summary Disposition on May 25, 2021, and the Court

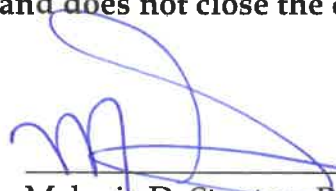
being fully advised in the premises,

IT IS HEREBY ORDERED that Defendant Auto-Owners Insurance Company's Motion for Partial Summary Disposition is hereby granted for the reasons stated on the record.

IT IS SO ORDERED.

This is not a final Order and does not close the case.

6
/ 11
/ 2021



Melanie D. Stanton, Probate Court Judge

P/2969

Appendix Attachment 14

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF GRAND TRAVERSE

THE ESTATE OF PATRICK OBESHAW,
a Legally Incapacitated Individual, by
Darren Findling as Guardian, and
THE DARREN FINDLING LAW FIRM PLC,

Case No. 2020-32793-CZ
Hon. Melanie D. Stanton

Plaintiff,

vs.

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant.

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2023 JUN 29 PM 3:48
GRAND TRAVERSE COUNTY
PROBATE COURT

THE DARREN FINDLING LAW FIRM, P.L.C.
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Southfield, MI 48075
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lauren.frederick@ceflawyers.com
maryrachel.dysarz@ceflawyers.com

STIPULATED ORDER FOR STAY OF TRIAL COURT PROCEEDINGS

At a session of said Court held in
the City of Traverse, County of Grand Traverse,
State of Michigan

on _____

PRESENT: HON. _____
PROBATE COURT JUDGE

The parties, through their counsel, stipulate and agree to the following as follows:

IT IS HEREBY STIPULATED that a principle and contested issue in this lawsuit is whether the guardian can delegate his duties. This issue is not unique to this lawsuit and

is currently being litigated in multiple courts throughout the State of Michigan. Recently, the parties have received inconsistent rulings on this issue from different courts, and more rulings are expected on this issue in the near future on pending motions. The Kent County Circuit Court (where Auto-Owners and Home-Owners Insurance Companies filed a declaratory action) is scheduled to conduct oral arguments on this delegation issue on Wednesday, July 21, 2021, in Case No. 20-06393-CB.

IT IS FURTHER STIPULATED the parties wish to resolve this issue before proceeding with any further discovery in this lawsuit, as this issue significantly impacts the scope and extent of discovery in this lawsuit, and will drastically change the landscape of any future trial. The current discovery deadline is July 30, 2021.

IT IS FURTHER STIPULATED the Genesee County Probate Court has recognized that staying the lawsuit currently pending before it was the best course of action until this issue can be resolved across the state.

IT IS FURTHER STIPULATED that a stay of trial court proceedings is necessary in this lawsuit to preserve judicial economy, allow cost-effective litigation, and prevent unnecessary discovery and trials pending resolution of inconsistent decisions on this issue across the State of Michigan.

IT IS HEREBY ORDERED that the trial court proceedings in this matter are stayed, until further order of the Court.

6/30/2021
[Signature]

~~IT IS HEREBY ORDERED that the only exception to this stay of proceedings order will be to allow this Honorable Court to rule on any Motion for Reconsideration regarding Defendant's Partial Motion for Summary Disposition, which may be filed by Plaintiff in the future.~~

6/30/2021
[Signature]

~~IT IS HEREBY ORDERED that this matter will be scheduled for a status conference on _____ (a date and time to be determined by the Court) to review the stay of this lawsuit.~~

IT IS SO ORDERED.

This is not a final Order and does not close the case.

6/30/2021

[Signature]

PROBATE COURT JUDGE

I hereby stipulate to the entry
of the above Order:

/s/ Andrew J. Black (w/permission)
THE DARREN FINDLING LAW FIRM, P.L.C.
ANDREW J. BLACK (P64606)
Attorneys for Plaintiff

/s/ MaryRachel Dysarz
COLLINS EINHORN FARRELL PC
LAUREN A. FREDERICK (P75167)
MARYRACHEL DYSARZ (P77780)
Attorneys for Defendant

Dated: June 29, 2021

Dated: June 29, 2021

Appendix Attachment 15

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF GENESEE

THE ESTATE OF COLLEEN O’CULL,
A Legally Incapacitated Individual, by
Darren Findling, as Guardian, and
THE DARREN FINDLING LAW FIRM, PLC,

Case No: 2020-215122 CZ
Hon. Jennie E. Barkey

Plaintiffs,

v.

AUTO-OWNERS INSURANCE COMPANY,

Defendant.

_____ /

THE DARREN FINDLING LAW FIRM PLC
ANDREW J. BLACK (P64606)
Attorney for Plaintiffs
414 W. Fifth Street
Royal Oak, MI 48067
(248) 399-3300 / (248) 556-9767 - Fax
andrew@findlinglaw.com

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LAUREN A. FREDERICK (P75167)
MELISSA E. GRAVES (P64646)
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(248) 355-4141 / (248) 355-2277 - Fax
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melissa.graves@ceflawyers.com

_____ /

ORDER FOR STAY OF PROCEEDINGS

At a session of said Court held in
the City of Flint, County of Genesee,
State of Michigan

on _____

PRESENT: HON. _____
PROBATE COURT JUDGE

This court, having conducted a hearing on plaintiff’s motion for partial summary disposition on June 2, 2021, reviewed written briefs related to the motion, and being

otherwise duly advised in the premises, including that the issues raised by plaintiff's motion have previously been addressed by probate courts in Oakland County and Grand Traverse County with at least two motions for reconsideration pending,

IT IS HEREBY ORDERED that, for the reasons set forth on the record, all proceedings in this case are stayed until further order of this court.

PROBATE COURT JUDGE

Approved as to form:

THE DARREN FINDLING
LAW FIRM, P.L.C.

COLLINS EINHORN FARRELL PC

*Andrew J. Black / with consent
6/15/21*

ANDREW J. BLACK (P64606)
Attorney for Plaintiff

Melissa E. Graves

MELISSA E. GRAVES (P64646)
Attorney for Defendant

Appendix Attachment 16

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

AUTO-OWNERS INSURANCE COMPANY and
HOME-OWNERS INSURANCE COMPANY,

Case No: 20-06393-CB

Plaintiffs,

Hon. T.J. Ackert

v.

THE DARREN FINDLING LAW FIRM PLC
D/B/A THE PROBATE PRO,

Defendant.

_____ /

COLLINS EINHORN FARRELL PC
PATRICK D. CRANDELL (P76249)
LAUREN A. FREDERICK (P75167)
MARYRACHEL DYSARZ (P77780)
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(248) 351-5471
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maryrachel.dysarz@ceflawyers.com

LISS, SEDER & ANDREWS, PC
NICHOLAS S. ANDREWS (P42693)
Attorneys for Defendant
39400 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304
(248) 647-9700
nandrews@lissfirm.com

_____ /

**RE-NOTICE OF HEARING REGARDING
PLAINTIFF AUTO-OWNERS INSURANCE COMPANY'S
MOTION FOR PARTIAL SUMMARY DISPOSITION**

PLEASE TAKE NOTICE that Plaintiff Auto-Owners Insurance Company's Motion for Partial Summary Disposition in the above-entitled cause will be brought on for hearing and disposition before the Hon. T.J. Ackert of the Kent County Circuit Court on **Wednesday, August 11, 2021 at 10:00 a.m.**, or as soon thereafter as counsel may be heard. See Zoom instructions below.

KENT COUNTY CIRCUIT COURT

Remote Participation in Hearing using Zoom Instructions

Please use **one** of the following **four** options for connecting to a court hearing using Zoom:

- **Option 1 – Polycom Systems (hospitals and facilities with IVT equipment)**

1. From the Polycom system, dial the numbers below:

Judge	Meeting ID
JUDGE T.J. ACKERT	162.255.37.11##3519423253

Alternatively, from the Polycom system you can dial the meeting ID followed by an “@” symbol and the IP address (e.g. [XXXXXXXX@162.255.37.11](tel:XXXXXXXX@162.255.37.11))

- **Option 2 – Zoom App for Smartphones and Tablets**

1. This option requires an Apple or Android device, and an internet connection
2. Install the Zoom App from the App Store or Play Store prior to the call
3. Launch the Zoom app
4. Tap “Join a Meeting”
5. In the Meeting ID field, enter the appropriate Meeting ID, as listed below

Judge	Meeting ID
JUDGE T.J. ACKERT	3519423253

6. **Enter your name and case number in the “Personal Link name” field**

7. In *join options*

- Don’t connect to audio – turn off
- Turn off my video – turn on if audio only, turn off if participating by video

8. Ensure your device has the microphone (audio) and camera (video) on

9. Tap “Join”

10. In the prompt, “to hear others please join audio”

- Select “call using Internet audio”

11. Once your participation is no longer needed, leave Zoom by tapping “Leave”

- **Option 3 – PCs and Laptops**

1. This option requires an internet connection
2. Go to www.zoom.us
3. Click “Join a Meeting”
Enter the appropriate Meeting ID listed below

Judge	Meeting ID
-------	------------

JUDGE T.J. ACKERT	3519423253
-------------------	------------

4. Follow the download instructions
5. Select Computer Audio or Phone Call
 - If joining with Computer Audio – click “Join with Computer Audio” (there must be a microphone and speakers on the device)
 - If joining via phone call – click “Phone Call” and follow the instructions given
6. **Enter your name and case number in the “Personal Link name” field**

• **Option 4 – Telephone (audio only)**

1. Call (646) 876-9923 or (669) 900-6833
Enter the appropriate Meeting ID listed below

Judge	Meeting ID
JUDGE T.J. ACKERT	3519423253

1. Press #
2. **Enter your name and case number in the “Personal Link name” field**

It is your obligation and responsibility to ensure you have the equipment and networking needed for a successful call. If you are unable to appear you must contact your attorney and reply to this email to alert the court.

Technical Responsibilities: The court does not provide technical assistance for testing or troubleshooting. In addition, the court does not provide time during court proceedings to troubleshoot issues. It is your responsibility to insure that your connection works, before your court date.

Testing Windows, Apple, or Android devices: Directions for testing your device and networking prior to the proceeding can be found at [https://support.zoom.us/hc/en-us/articles/201362313-How-Do-I-Test-My-Video-](https://support.zoom.us/hc/en-us/articles/201362313-How-Do-I-Test-My-Video)

Technical Support: The court uses Zoom meeting services for the Virtual Court Room experience. If you are having TECHNICAL issues with your equipment you should review Zoom training and support materials at Zoom.us. Please understand Zoom is an independent service provider and will have NO knowledge of your court case or legal issues.

Local Court Policy:

- The call is a court proceeding and therefore an extension of the court room and appropriate conduct and attire is expected and required.
- Remote participants should use a good WiFi connection or a substantial LTE mobile data plan to ensure a quality connection. (Note: Mobile data use may incur substantial cellular carrier charges which are the responsibility of the remote participant.)

- Remote Participants must use a private and quiet room that will be free of interruptions. (Outdoor, car, or public places are not permitted.) Also, video meetings also need good, consistent lighting so avoid rooms with bright windows and / or back-lighting.
- Remote Participants must place their mobile devices on a solid surface with the camera at eye level. Do not hand-hold mobile devices and do not lay phones or tablets flat on a desk or tabletop!
- Remote Participants should take time prior to the call to become familiar with the controls and test the mic and speaker controls.
- If the court determines the quality of the video experience is not acceptable it has the right to terminate the call.
- The judge has full power over remote participants as if they were present in the physical court room.

Respectfully submitted,

COLLINS EINHORN FARREL PC

/s/ Patrick D. Crandell
PATRICK D. CRANDELL (P76249)
LAUREN A. FREDERICK (P75167)
Attorneys for Plaintiffs
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 351-5471
patrick.crandell@ceflawyers.com
lauren.frederick@ceflawyers.com

Dated: July 15, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of July 2021, Re-Notice of Hearing Regarding Auto-Owners Insurance Company's Motion for Partial Summary Disposition was served upon counsel of record listed on the above-referenced caption, *via e-service*.

/s/ Patrick D. Crandell
PATRICK D. CRANDELL (P76249)
LAUREN A. FREDERICK (P75167)
Attorneys for Plaintiffs
4000 Town Center, 9th Floor
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Appendix Attachment 17

Approved, SCAO

STATE OF MICHIGAN
PROBATE COURT
COUNTY OF OAKLAND

ANNUAL REPORT OF GUARDIAN ON
CONDITION OF
LEGALLY INCAPACITATED INDIVIDUAL
[] FINAL REPORT

FILE NO.
2008-316364-GA

NOTE: This report must be completed yearly by the guardian, or more often if directed by the court. The guardian must serve the completed report on the ward and all interested persons as required by Michigan Court Rules 5.105 and 5.125. Then the guardian must complete a proof of service (form PC 564) and file it and this report with the court.

In the matter of Mary Ann Malloy, a legally incapacitated individual
First, middle, and last name

1. I, Kathern Malloy and Darren Findling, am the guardian of the adult named above and my annual
Name (type or print)

report for the period of July 18, 2018 to July 18, 2019 is as follows:
Date Date

2. Present age of the adult: 65 Date of birth: January 17, 1954

3. Living Arrangement

a. The current address and telephone number of the adult are: 25696 W. 9 Mile Rd. Southfield, MI 48033 (248) 880-2537

b. The name of the facility where the adult resides, if any: Lives with Mom/Co-Guardian

c. The adult's residence is: [] Check here if this is a new address
[] own home/apartment [x] guardian's home/apartment [] other: _____
[] nursing home [] hospital or medical facility (boarding home, assisted living, etc.)
[] foster home [] relative's home: _____
Relationship

d. The adult has been in the present residence since April 1, 1980. If moved within the past year, state
the changes and the reasons for change. Date

e. I rate the adult's living arrangement as [x] excellent. [] average. [] below average. _____
Explain

f. I believe the adult is [x] content with the living situation. [] unhappy with the living situation.

[x] g. I recommend a more suitable living arrangement for the adult as follows: N/A

(SEE SECOND PAGE)

USE NOTE: If this form is being filed in the circuit court family division, please enter the court name and county in the upper left-hand corner of the form.

Do not write below this line - For court use only

2019 OCT 18 PM 2:51
Amy

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4. Physical Health

- a. The adult's current physical condition is excellent. good. fair. poor.
- b. During the past year the adult's physical condition has remained about the same. improved. Explain _____ worsened. Explain _____

c. During the past year the adult received the following medical treatment (include check-ups and dental work):

Date	Ailment	Type of Treatment	Doctor's Name
09/18/18	follow up	Vision	Dr. Jennifer Place
11/12/18	follow up	PM&R	Dr. Perlman
01/09/19	dental-broken crown	broken crown repair	Laurich Dental
01/23/19	routine	cleaning - dental	Laurich Dental
02/20/19	follow up	crown repair	Laurich Dental
07/09/19	routine	cleaning - dental	Laurich Dental
03/05/19	fall	eval and treat for hip contusion	Beaumont Hospital - Farmington
05/20/19	follow up	PM&R	Dr. Perlman
02/27/19	follow up	eye exam - ophthalmologist	Dr. Papp
07/17/19	routine	podiatry	Dr. Burk

5. Do-Not-Resuscitate Order

- a. I did not execute, reaffirm, or revoke a do-not-resuscitate order.
- b. I executed reaffirmed revoked a do-not-resuscitate order for the adult under MCL 700.5314(d). In doing so, I did did not consult with the adult and his/her attending physician.

6. Physician Orders for Scope of Treatment (POST) Form

- a. I did not execute, reaffirm, or revoke a POST form.
- b. I executed reaffirmed revoked a POST form for the adult under MCL 700.5314(f). In doing so, I did did not consult with the adult and his/her attending physician.

7. Mental Health

- a. The adult's current mental condition is excellent. good. fair. poor.
- b. During the past year, the adult's mental condition has remained about the same. improved. Explain _____ worsened. Explain _____
- c. During the past year, treatment or evaluation by a psychiatrist, psychologist, or social worker was was not provided.

8. Social Activities/Services

- a. The adult's current social condition is excellent. good. fair. poor.
- b. During the past year, the adult's social condition has remained about the same. improved. Explain _____ worsened. Explain _____

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8. (continued)

c. During the past year, the adult has participated in the following activities:

- recreational fitness and yoga twice a week
- educational _____
- social out to dinner, shopping, movies, visiting with friends and family
- occupational Cassel and Associates - vocational job 4 days a week, 5 hours a day
- No activities were available.
- The adult refused to participate in any activities.
- The adult was unable to participate in any activities.

9. List of Visits

a. During the past year, I visited the adult as follows:

N/A - we live together. Darren Findling visited on 5/21/2019 List dates

b. The average amount of time I spent on each visit was n/a

c. The last time I visited with the adult was on _____
Date

10. Activities

During the past year, I performed the following activities on behalf of the adult: Supervising all ADL's (grooming and dressing, etc). Supervises medication dispensing. Facilitates work attendance. Assists with money management.

11. Consultation

During the past year, I consulted with the adult before making the following decisions: We discuss all medical and financial decisions as well as basic decisions (meal planning, clothing purchase, etc).

12. I believe the adult has the following unmet needs: NONE

[x] 13. The guardianship should should not be continued because:

disability continues

Note: If you no longer wish to serve as guardian, you must file a petition to remove yourself.

[x] 14. There is is not more cash or property than what was previously reported to the court.

If there is, specify the additional amount: \$ _____

[] 15. As guardian, I have been ordered by the court to file an annual account, which is attached.

Date


Signature of guardian

414 W. Fifth Street
Address

Royal Oak, MI 48067
City, state, zip

(248) 399-3300
Telephone no.

[] Check here if this is a new address

Date

Signature of co-guardian (if applicable)

Address

City, state, zip

Telephone no.

[] Check here if this is a new address

8. List of Visits

a. During the past year, I visited the adult as follows:

List dates
Co-Guardian, Kathern Malloy lives with Mary Ann and sees her every day.
Co-Guardian, Darren Findling also visited the Ward on May 21, 2019

b. The average amount of time I spent on each visit was 24 hours.

c. The last time I visited with the adult was on July 18, 2019.
Date

6/02/2019

9. Activities

During the past year, I performed the following activities on behalf of the adult: Supervises grooming & dressin
supervises day to day medication, facilitates attendance to work, helps
with money management

10. Consultation

During the past year, I consulted with the adult before making the following decisions: _____

11. I believe the adult has the following unmet needs: None

[x] 12. The guardianship [x] should [] should not be continued because:

Mary Ann still requires assistance with her daily needs due to a traumatic brain injury, which was a result of a motor
vehicle accident which occurred on August 10, 1979.

Note: If you no longer wish to serve as guardian, you must file a petition to remove yourself.

[x] 13. There [] is [x] is not more cash or property than what was previously reported to the court.

If there is, specify the additional amount. \$ _____.

[] 14. As guardian, I have been ordered by the court to file an annual account, which is attached.

10-15-19
Date

10/17/19
Date

414 W. Fifth Street
Address

25696 W. 9 Mile Rd.
Address

[] Check here if this is a new address

Kathern Malloy
Signature

[Signature]
Signature

Darren Findling
Royal Oak, MI 48067 (248) 399-3300
City, state, zip Telephone no.

Southfield, MI 48033
City, state, zip Telephone no.

Appendix Attachment 18

STATE OF MICHIGAN PROBATE COURT COUNTY OF OAKLAND	ANNUAL REPORT OF GUARDIAN ON CONDITION OF LEGALLY INCAPACITATED INDIVIDUAL [] FINAL REPORT	FILE NO. 2008-316364-GA
---	--	----------------------------

NOTE This report must be completed yearly by the guardian, or more often if directed by the court. The guardian must serve the completed report on the ward and all interested persons as required by Michigan Court Rules 5.105 and 5.125. Then the guardian must complete a proof of service (form PC 564) and file it and this report with the court.

In the matter of Mary Ann Malloy, a legally incapacitated individual
First, middle, and last name

1 I, Kathern Malloy and Darren Findling, am the guardian of the adult named above and my annual
Name (type or print)

report for the period of July 18, 2019 to July 18, 2020 is as follows
Date Date

2 Present age of the adult 66 Date of birth January 17, 1954

3 Living Arrangement

a The current address and telephone number of the adult are 25696 W 9 Mile Rd, Southfield, MI 48033 (248) 880-2537

b The name of the facility where the adult resides, if any: Lives with Mom/Co-Guardian

c The adult's residence is [] Check here if this is a new address
[] own home/apartment [x] guardian's home/apartment [] other
[] nursing home [] hospital or medical facility (boarding home, assisted living, etc.)
[] foster home [] relative's home
Relationship

d The adult has been in the present residence since April 1, 1980 If moved within the past year, state the changes and the reasons for change Date

e I rate the adult's living arrangement as [x] excellent [] average. [] below average Explain

f I believe the adult is [x] content with the living situation [] unhappy with the living situation

[x] g I recommend a more suitable living arrangement for the adult as follows N/A

(SEE SECOND PAGE)

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Firm
T. Smithey
Deputy Probate Register

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4 Physical Health

- a The adult's current physical condition is excellent good fair poor
- b During the past year the adult's physical condition has
 remained about the same
 improved Explain _____
 worsened Explain _____

000076 1/1

c During the past year the adult received the following medical treatment (include check-ups and dental work)

Date	Ailment	Type of Treatment	Doctor's Name
11/12/2019	TBI	PM&R	Dr Perlman
06-01-2020	TBI	PM&R	Dr Perlman

5 Do-Not-Resuscitate Order

- a I did not execute, reaffirm, or revoke a do-not-resuscitate order
- b I executed reaffirmed revoked a do-not-resuscitate order for the adult under MCL 700 5314(d)
 In doing so, I did did not consult with the adult and his/her attending physician

6 Physician Orders for Scope of Treatment (POST) Form

- a I did not execute, reaffirm, or revoke a POST form
- b I executed reaffirmed revoked a POST form for the adult under MCL 700 5314(g)
 In doing so, I did did not consult with the adult and his/her attending physician

7 Nonopioid Directive

- a I did not execute, reaffirm, or revoke a nonopioid directive
- b I executed reaffirmed revoked a nonopioid directive for the adult under MCL 700 5314(f)

8 Mental Health

- a The adult's current mental condition is excellent good fair poor
- b During the past year, the adult's mental condition has
 remained about the same
 improved. Explain _____
 worsened Explain _____

c During the past year the adult received the following mental health treatment.

Date	Ailment	Type of Treatment	Doctor's Name

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9 Social Activities/Services

- a The adult's current social condition is excellent good. fair poor
- b During the past year, the adult's social condition has remained about the same improved Explain _____ worsened Explain _____
- c During the past year, the adult has participated in the following activities.
 - recreational _____
 - educational _____
 - social Mary Ann and her mother go on outings together (stores, out to dinner)
 - occupational Mary Ann works at Medical Alternatives
 - No activities were available
 - The adult refused to participate in any activities.
 - The adult was unable to participate in any activities

10 List of Visits

- a During the past year, I visited the adult as follows _____

	List dates		lives		with		ward
<u>Co-Guardian</u>		<u>Kathern</u>					
<u>Co-Guardian representative of Darren Findling visited 11/13/19, 6/1/2020</u>							
- b The average amount of time I spent on each visit was N/a
- c The last time I visited with the adult was on July 18, 2020
Date

11 Activities

During the past year, I performed the following activities on behalf of the adult _____
Attend all doctor appointments, keep open communication with Mary Ann's team on a regular basis, manage Mary Ann's finances Kathern is her Rep Payee for her Social Security benefits

12 Consultation

During the past year, I consulted with the adult before making the following decisions _____
We discuss all medical and financial decisions as well as basic decisions (meal planning, clothing purchase, etc)

13. I believe the adult has the following unmet needs _____
NONE

14 The guardianship should should not be continued because _____
Disability continues due to TBI
 Note: If you no longer wish to serve as guardian, you must file a petition to remove yourself

Annual Report of Guardian on Condition of Legally Incapacitated Individual (12/19)

File No. 2008-316364-GA

15. There is is not more cash or property than what was previously reported to the court

If there is, specify the additional amount: \$ _____

EXHIBIT 1

16. As guardian, I have been ordered by the court to file an annual account, which is attached.

9/21/2020

Date _____
DocuSigned by
Daven Jindley
C43BR754894C41A

Signature of guardian

414 W. Fifth Street

Address

Royal Oak, MI 48067 (248) 399-3300
City, state, zip Telephone no

Check here if this is a new address

8-26-20
Date

Kathern Malloy
Signature of co-guardian (if applicable)

25696 W. 9 Mile Road

Address

Southfield, MI 48033 248-398-5582
City, state, zip Telephone no

Check here if this is a new address

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Appendix Attachment 19

Court of Appeals, State of Michigan

ORDER

In re Guardianship of Mary Ann Malloy

Docket No. 358006

LC No. 2020-393904-CZ

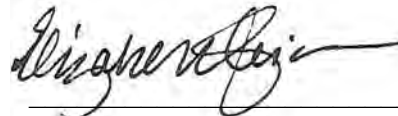
Elizabeth L. Gleicher
Presiding Judge

Mark J. Cavanagh

Kathleen Jansen
Judges

The motion for immediate consideration is GRANTED.

The application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.



Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

September 13, 2021

Date



Chief Clerk

*Appendix
Attachment 20*

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STATE OF MICHIGAN
THE PROBATE COURT FOR THE COUNTY OF GRAND TRAVERSE

PATRICK B. OBESHAW ESTATE,
Plaintiff,

vs. File 20-32,793-CZ

AUTO-OWNERS INSURANCE COMPANY,
Defendant.

_____ /

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION
BEFORE THE HONORABLE MELANIE D. STANTON, PROBATE JUDGE
Traverse City, Michigan - Tuesday, May 25, 2021

ZOOM APPEARANCES:

ANDREW J. BLACK (P64606)
414 West 5th Street
Royal Oak, Michigan 480676
(248)399-3300
Appearing on behalf of Plaintiff

MARYRACHEL DYSARZ (P77780)
Collins Einhorn Farrell PC
4000 Town Center, Suite 909
Southfield, Michigan 48075
(248)351-6026
Appearing on behalf of Defendant

Janet McGee, CSR 3361

TABLE OF CONTENTS

WITNESSES:

None

EXHIBITS:

None

- - -

Traverse City, Michigan

Tuesday, May 25, 2021 at 1:07 p.m.

THE COURT: I will call the file of Patrick Obeshaw versus Auto-Owners Insurance Company. We are here today on Defendant Auto-Owners Insurance Company motion for summary disposition. I do have MaryRachel is it Dysarz?

MS. DYSARZ: Yes, Your Honor.

THE COURT: Dysarz, who is representing the Auto-Owners Insurance Company. And I do have Andrew Black who is the attorney for the Plaintiff in this matter, the Plaintiff.

And I received a motion for summary disposition from Auto-Owners on April 15th, 2021 indicating that it was an unlawful delegation of

1 the guardianship duties to other members of the
2 firm, and therefore they were not going to pay for
3 those.

4 I did not receive any kind of responsive
5 pleading from the Plaintiff in this matter
6 pursuant to MCR 2.116(C)(10), that must be filed
7 within seven days before the hearing. And I
8 received nothing, so essentially I have an
9 uncontested motion for summary disposition, which
10 leaves me in a position that I must grant that
11 motion for summary disposition.

12 MR. BLACK: Your Honor, if I can make a
13 record?

14 THE COURT: A record of what?

15 MR. BLACK: Your Honor, we did file a
16 response.

17 THE COURT: Sir, did you file it in time
18 with this Court?

19 MR. BLACK: Your Honor, we did not. And
20 to that end --

21 THE COURT: No. You didn't file it in
22 time, it was not read. I am not going to be
23 proceeding forward with that. I have made a
24 record here that it wasn't filed in time, and it
25 wasn't read.

1 And I also do know -- I haven't even seen
2 it to be honest with you, because I wouldn't see
3 them after the time frame is up. There was also a
4 reply brief from the Defendant, I did not read
5 that either because that's not appropriate under
6 the Court Rules. Okay?

7 So based on the fact that the only record
8 that I have appropriately before me is the motion
9 for summary disposition that has been filed by
10 Auto-Owners, none of the facts in there have been
11 disputed by any evidence, at this time I am going
12 to grant the motion.

13 Ms. Dysarz, I will anticipate that you
14 will file an order with respect to that.

15 MS. DYSARZ: Yes, Your Honor, we will.

16 THE COURT: And this matter is done for
17 here today.

18 MS. DYSARZ: Thank you, Your Honor.

19 THE COURT: Thank you. We are all set.

20

21 (AT 1:10 p.m. hearing concluded.)

22

23

--ooOoo--

24

25

*Appendix
Attachment 21*

Order

March 23, 2022

163553 & (23)

In re GUARDIANSHIP OF MARY ANN
MALLOY.

DARREN FINDLING, as Co-Guardian of MARY
ANN MALLOY, LIP,
Plaintiff-Appellee,
and

PATRICK MALLOY, as Co-Guardian of MARY
ANN MALLOY, LIP, and KATHREN MALLOY,
Plaintiffs,

v

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Appellant.

SC: 163553
COA: 358006
Oakland PC: 2020-393904-CZ

On order of the Court, the motion for leave to provide supplemental authority is GRANTED. The application for leave to appeal the September 13, 2021 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration as on leave granted.



m0316

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 23, 2022


Clerk

Appellant Appendix 240

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

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Appendix
Attachment 22

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

In re Guardianship OF MARY ANN MALLOY.

DARREN FINDLING, Coguardian of MARY ANN MALLOY, a legally protected person, and DARREN FINDLING LAW FIRM, PLC,

FOR PUBLICATION
October 13, 2022
9:05 a.m.

Plaintiffs-Appellees,

and

PATRICK MALLOY, Coguardian of MARY ANN MALLOY, a legally protected person, and KATHREN MALLOY,¹

Plaintiffs,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

No. 358006
Oakland Probate Court
LC No. 2020-393904-CZ

In re Guardianship of DANA JENKINS.

¹ The probate court’s April 2019 Order Regarding Modification of Guardianship identified Kathren Malloy and Darren Findling as coguardians. A May 21, 2021 Letters of Guardianship filed with the probate court identified Patrick Malloy as a coguardian with Darren Findling. The Letters of Guardianship were filed after entry of the order appealed in this matter. Accordingly, both Kathren Malloy and Patrick Malloy are listed as plaintiffs, though it does not appear that Kathren Malloy is currently a coguardian of Mary Ann Malloy.

DARREN FINDLING, Guardian of DANA
JENKINS, a legally incapacitated person, and
DARREN FINDLING LAW FIRM, PLC,

Plaintiffs-Appellees,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

No. 358021
Oakland Probate Court
LC No. 2020-393903-CZ

Before: SWARTZLE, P.J., and CAVANAGH and REDFORD, JJ.

REDFORD, J.

In the cases before the Court, in the context of two persons who are the subject of guardianships necessitated by two different motor vehicle accidents, we address the powers and duties of a guardian under MCL 700.5314, and the distinction between the delegation of a duty and a power of a guardian under MCL 700.5103 and MCL 700.5106.

The matters arise out of separate motor vehicle accidents after which guardianships were established for the two wards. This Court ordered the consolidation of these two appeals. *In re Guardianship of Mary Ann Malloy*, unpublished order of the Court of Appeals, entered July 5, 2022 (Docket Nos. 358006 and 358021). In Docket No. 358006, defendant appeals by leave granted² the probate court's order granting the Malloy plaintiffs'³ motion for partial summary disposition, and denying defendant's countermotion for summary disposition. In Docket No. 358021, defendant appeals by leave granted⁴ the probate court's order granting the Jenkins

² On March 23, 2022, our Supreme Court, in lieu of granting leave to appeal, remanded this case to this Court for consideration as on leave granted. *In re Guardianship of Malloy*, ___ Mich ___; 970 NW2d 886 (2022).

³ Regarding Docket No. 358006, because multiple individuals in this matter share the last name of Malloy, for clarity, we will refer to plaintiff, Darren Findling, as "plaintiff"; plaintiff, Darren Findling Law Firm, PLC, as "plaintiff firm"; plaintiff, Patrick Malloy, as "Patrick"; plaintiff, Kathren Malloy, as "Kathren"; and the ward, Mary Ann Malloy, as "Malloy." Further, we collectively refer to plaintiffs, Darren Findling, Darren Findling Law Firm, PLC, Patrick Malloy, and Kathren Malloy, as the "Malloy plaintiffs."

⁴ On March 23, 2022, our Supreme Court, in lieu of granting leave to appeal, remanded this case to this Court for consideration as on leave granted. *In re Guardianship of Jenkins*, 970 NW2d 889 (Mich, 2022).

plaintiffs'⁵ motion for partial summary disposition and denying defendant's counter-motion for summary disposition.

Because we conclude that the trial court correctly determined that many of the duties performed on behalf of the wards were able to be delegated by the court-appointed guardian, we affirm in part. Because there is a factual question as to whether or not actions taken on April 23, 2019 and April 24, 2019, on behalf of both wards were delegable by the court-appointed guardian, we reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. DOCKET NO. 358006

On August 10, 1979, Malloy suffered serious injuries including a traumatic brain injury from a motor vehicle accident. She is a legally incapacitated individual. She lived with her mother, who served as her coguardian and caregiver for approximately 40 years after the 1979 accident, though Malloy moved to a group home for 24-hour care and supervision after her mother sustained a fall. Plaintiff, Patrick, and Kathren, were later named Malloy's coguardians. The court appointed plaintiff, an attorney and professional fiduciary, as Malloy's legal guardian. Defendant is Malloy's no-fault insurer. Plaintiff provided legal and guardianship services for Malloy through plaintiff firm. Malloy's estate incurred fees and costs totaling \$8,040.45 for services provided by her coguardians and plaintiff firm. Defendant refused to pay for the legal and guardianship services for Malloy provided by plaintiff and plaintiff firm. In six letters sent to plaintiff between August 13, 2019 and July 23, 2020, defendant indicated that it would "not consider reimbursement without additional information" because it did "not appear Ms. Malloy's guardian performed the guardianship services being claimed."

The Malloy plaintiffs filed a complaint against defendant in Oakland Probate Court, requesting that defendant pay Malloy's coguardians or plaintiff firm fees and costs associated with the care, recovery, and rehabilitation of Malloy in the amount of \$8,040.45 plus interest, attorney fees, and costs. The Malloy plaintiffs alleged that defendant was "responsible for payment of fiduciary and attorney fees and costs incurred which are allowable expenses and that are reasonably necessary" for Malloy's care, recovery, or rehabilitation pursuant to MCL 500.3107. Further, the Malloy plaintiffs asserted that defendant refused to pay the proper no-fault benefits to the estate of Malloy, Malloy's coguardians, and plaintiff firm. Defendant filed an answer and asserted in its affirmative defenses that the "services allegedly provided by [the Malloy] Plaintiffs were not lawfully rendered."

The Malloy plaintiffs moved for partial summary disposition under MCR 2.116(C)(9) and (C)(10), arguing that fees and costs for a ward's guardianship "are allowable expenses compensable by the No-Fault Insurance Carrier under the no[-]fault act no matter who provides

⁵ Regarding Docket No. 358021, we refer to plaintiff, Darren Findling, as "plaintiff"; plaintiff, Darren Findling Law Firm, PLC, as "plaintiff firm"; and the ward, Dana Jenkins, as "Jenkins." Further, we collectively refer to plaintiffs, Darren Findling and Darren Findling Law Firm, PLC, as the "Jenkins plaintiffs."

them.” Further, the Malloy plaintiffs asserted that a guardian “may employ an attorney, perform work themselves, and/or employee [sic] others, and all of those services are compensable under the no-fault act, MCL 500.3101 *et seq.*, if they are for the care, recovery and rehabilitation of the ward.” Defendant responded to the Malloy plaintiffs’ motion for partial summary disposition and filed a countermotion for partial summary disposition pursuant to MCR 2.116(I)(2). Defendant argued that no authority—including MCL 700.5103 or MCL 700.5106—supported the Malloy plaintiffs’ claim that plaintiff could delegate his guardianship duties to employees at his firm. The probate court granted the Malloy plaintiffs’ motion for partial summary disposition, reasoning that plaintiff did not violate MCL 700.5103 because he delegated only duties and not his guardianship powers, and he remained responsible for the delegated duties.⁶

B. DOCKET NO. 358021

On November 20, 2013, Jenkins suffered a traumatic brain injury as a pedestrian in a motor vehicle accident. The court appointed plaintiff, an attorney and professional fiduciary, as Jenkins’s legal guardian because Jenkins is a legally incapacitated individual. Defendant is the no-fault insurer for Jenkins. Plaintiff and plaintiff firm provided legal and guardianship services to Jenkins, and Jenkins’s estate incurred fees and costs in the amount of \$28,853.59 between March 27, 2019 and February 1, 2020. Defendant refused to pay for services provided by plaintiff and plaintiff firm on behalf of Jenkins. In six letters sent to plaintiff between August 16, 2019 and June 17, 2020, defendant indicated that it would “not consider reimbursement” for “[g]uardian services completed by someone other than” plaintiff.

The Jenkins plaintiffs filed a complaint against defendant in Oakland Probate Court, requesting that defendant pay plaintiff or plaintiff firm fees and costs associated with the care, recovery, and rehabilitation of Jenkins. The Jenkins plaintiffs alleged that defendant was “responsible for payment of fiduciary and attorney fees and costs incurred which are allowable expenses and that are reasonably necessary” for Jenkins’s care, recovery, or rehabilitation pursuant to MCL 500.3107. Further, the Jenkins plaintiffs asserted that defendant had refused to pay the proper no-fault benefits to Jenkins’s estate, plaintiff, and plaintiff firm. Defendant answered the Jenkins plaintiffs’ complaint. Defendant asserted that the “services allegedly provided by [the Jenkins] Plaintiffs were not lawfully rendered.” The Jenkins plaintiffs moved for partial summary disposition pursuant to MCR 2.116(C)(9) and (C)(10), making virtually identical arguments as those made by the Malloy plaintiffs in their motion for partial summary disposition. Defendant responded to the Jenkins plaintiffs’ motion for partial summary disposition and filed a countermotion for partial summary disposition pursuant to MCR 2.116(I)(2) similar to the response and countermotion filed by defendant in Docket No. 358006. The probate court heard the Jenkins plaintiffs’ motion along with the Malloy plaintiffs’ motion, and the court granted both motions in favor of the Malloy plaintiffs and Jenkins plaintiffs, and denied defendant’s countermotions for summary disposition.

⁶ The Oakland Probate Court heard the Malloy plaintiffs’ motion for partial summary disposition at the same time as the Jenkins plaintiffs’ motion for partial summary disposition. The court granted both motions.

II. STANDARDS OF REVIEW

“This Court reviews de novo a trial court’s decision on a motion for summary disposition.” *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 242; 964 NW2d 50 (2020) (citation omitted). A party may move for summary disposition when the “opposing party has failed to state a valid defense to the claim asserted against him or her.” MCR 2.116(C)(9). “When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant’s pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim.” *Slater v Ann Arbor Public Schs Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). “Pleadings include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of these, and replies to answers.” *Id.* “Summary disposition under MCR 2.116(C)(9) is proper when the defendant’s pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff’s right to recovery.” *Id.* at 425-426. When the trial court considers documentation beyond the pleadings, a motion for summary disposition is properly reviewed under MCR 2.116(C)(10). *McJimpson v Auto Club Group Ins Co*, 315 Mich App 353, 357; 889 NW2d 724 (2016).

A trial court may properly grant a motion for summary disposition pursuant to MCR 2.116(C)(10) “when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law.” *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). “If the moving party properly supports his or her motion, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists.” *Redmond v Heller*, 332 Mich App 415, 438; 957 NW2d 357 (2020). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.* (quotation marks and citation omitted). “Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Lowrey*, 500 Mich at 7, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (quotation marks omitted). “If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.” *Lowrey*, 500 Mich at 7, quoting *Quinto*, 451 Mich at 363 (quotation marks omitted). Our “review is limited to the evidence that had been presented to the circuit court at the time the motion was decided.” *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). We review questions of statutory interpretation de novo. *Sterling Hts Pain Mgt, PLC v Farm Bureau Gen Ins Co of Mich*, 335 Mich App 245, 249 n 1; 966 NW2d 456 (2020).

III. ANALYSIS

Because the arguments of defendants, the Malloy plaintiffs, and the Jenkins plaintiffs, and the applicable statutes and legal reasoning in both consolidated cases in this matter are virtually identical, we address both appeals together.

Defendant essentially argues that it could refuse to pay and has no liability to pay no-fault benefits to the Malloy plaintiffs and the Jenkins plaintiffs because guardianship services were

provided to Malloy and Jenkins by individuals other than plaintiff. Specifically, defendant contends that plaintiff alone could provide guardianship services and because he had his law firm staff perform his duties he cannot obtain no-fault benefits for such services because MCL 700.5103 only allows a guardian to delegate his role to another person for 180 days if the guardian executed a power of attorney to the person and notified the court. Defendant contends that because of plaintiff's failure to comply with MCL 700.5103, the guardianship services were not lawfully rendered. We disagree.

These appeals require us to interpret the no-fault act and the way it intersects with the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, and determine whether the probate court properly applied the law. “The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the statutory language.” *Dep’t of Talent & Economic Dev/Unemployment Ins Agency v Great Oaks Country Club, Inc*, 507 Mich 212, 226; 968 NW2d 336 (2021) (quotation marks and citation omitted). “Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning” *Id.* at 226 (quotation marks and citation omitted). “[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.” *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). “Provisions must be read in the context of the entire statute so as to produce a harmonious result.” *Mericka v Dep’t of Community Health*, 283 Mich App 29, 38; 770 NW2d 24 (2009). “When the Legislature uses different words, the words are generally intended to connote different meanings.” *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass’n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). “If a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word.” *Epps v 4 Quarters Restoration, LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015).

The no-fault act provides that “an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.” MCL 500.3105(1). MCL 500.3107(1)(a) provides that “personal protection insurance benefits are payable for . . . (a) [a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” “[I]f a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian . . . for that person, the services performed by the guardian . . . are reasonably necessary to provide for the person’s care” and are allowable expenses under MCL 500.3107. *Heinz v Auto Club Ins Ass’n*, 214 Mich App 195, 198; 543 NW2d 4 (1995).

EPIC governs the appointment of a guardian for an incapacitated person and sets forth in MCL 700.5314 a guardian’s powers and duties. MCL 700.5314 plainly distinguishes between a guardian’s powers and duties. The two terms are not interchangeable. A guardian’s powers to the extent granted by the court under MCL 700.5306 include the power to establish the ward’s residence, MCL 700.5314(a); give consent or approval to enable the ward to receive medical care, mental health care, professional care, counseling, treatment, or service, MCL 700.5314(c); execute, reaffirm, revoke a ward’s do-not-resuscitate order with some requirements, MCL 700.5314(d); execute, reaffirm, revoke a ward’s nonopiod directive, MCL 700.5314(f); execute, reaffirm, revoke a physician’s orders for scope of treatment for the ward with some requirements, MCL 700.5314(g); take action to compel persons responsible to support the ward, to pay money

for the ward's welfare, and apply money and property for the ward's support, care, and education, MCL 700.5314(i).

A guardian's duties include being responsible for the ward's care, custody, and control and communicating and consulting with the ward if possible before making decisions, MCL 700.5314. A guardian also has the duty to make provisions for the ward's care, comfort, maintenance, and when appropriate education, secure services for the ward's mental and physical well-being, care for and protect the ward's personal and real property or dispose of it if in the ward's best interest, MCL 700.5314(b). Further, if a guardian executes a do-not-resuscitate order, the guardian has the duty to visit, communicate, and consult with the ward and consult directly with the ward's attending physician, MCL 700.5314(d). Similarly, respecting physician orders for scope of treatment, a guardian has the duty to visit, communicate, and consult with the ward about such orders, MCL 700.5314(h). A guardian has the duty to report at least annually the ward's condition and the ward's estate to the court, MCL 700.5314(j). Under MCL 700.5106, among other duties, a professional guardian appointed by the court has the duty to "ensure that there are a sufficient number of employees assigned to the care of wards for the purpose of performing the necessary duties associated with ensuring that proper and appropriate care is provided."

MCL 700.5103 governs a guardian's delegation of powers and in relevant part provides:

(1) By a properly executed power of attorney, . . . a guardian of a . . . legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the . . . guardian's powers regarding care, custody, or property of the . . . ward

* * *

(4) If a guardian for a . . . legally incapacitated individual delegates any power under this section, the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact.

Defendant contends that plaintiff had the obligation but failed to satisfy any of the requirements set forth in MCL 700.5103 by not executing and granting powers of attorney to his law firm staff members to act as guardian, by not providing the probate court with names or contact information of his staff members, and by delegating his entire role as guardian to his law firm staff. To support its argument that plaintiff violated MCL 700.5103, defendant asserts that, under EPIC, MCL 700.1101 *et seq.*, a guardian's duties and power to act are indivisible. According to defendant, MCL 700.5314⁷ delineates a guardian's powers and duties, and this statute establishes

⁷ MCL 700.5314 provides, in part:

If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court

that duties flow from powers because it directs the guardian to perform certain tasks and melds these duties with the power to do so. We disagree.

Defendant’s interpretation of EPIC overlooks the statutory language in which the Legislature makes distinctions between “duties” and “powers.” The probate court highlighted that EPIC uses the word “power” in MCL 700.5103(1) and the word “duties” in MCL 700.5106(6). As noted above, “[w]hen the Legislature uses different words, the words are generally intended to connote different meanings.” *US Fidelity & Guaranty Co*, 484 Mich at 14.

Defendant seeks to rely on Michigan’s State Court Administrative Office (SCAO) form PC 633 which cites MCL 700.5103, which states that a guardian delegating his or her powers to “notify the court when you delegate duties under a durable power of attorney.” SCAO recommendations, memorandums, interpretations, and forms, however, are not binding authority. See *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 260; 792 NW2d 781 (2010) (stating that “an agency’s interpretation is not binding on this Court and it cannot overcome the statute’s plain meaning.”).

EPIC does not define “power” or “duties.” According to *Black’s Law Dictionary*, “power” is defined as

1. The ability to act or not act; esp., a person’s capacity for acting in such a manner as to control someone else’s responses.
2. Dominance, control, or influence over another; control over one’s subordinates.
3. The legal right or authorization to act or not act; a person’s or organization’s ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another. [*Black’s Law Dictionary* (11th ed)].

Black’s Law Dictionary defines “duty” as

1. A legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right. [*Black’s Law Dictionary* (11th ed)].

Accordingly, when granted a power pursuant to EPIC by a court, a guardian is authorized and holds the legal right to alter the “rights, duties, liabilities, or other legal relations” of the ward.

Regarding Docket No. 358006, plaintiff largely delegated the performance of duties to other individuals to assist in his care of his wards. He did not delegate powers. Therefore, he did not violate MCL 700.5103 as defendant contends. Specifically, billing records of plaintiff and plaintiff firm indicate that services performed by others—that is, other individuals at plaintiff firm

under section 5306, the guardian is responsible for the ward’s care, custody, and control, but is not liable to third persons because of that responsibility for the ward’s acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order

who were delegated tasks by plaintiff to perform on behalf of Malloy—including attending meetings with Malloy’s doctors, attending guardianship visits, attending team meetings with Malloy’s family, telephone conferences with Patrick and Kathren, and meeting at a Social Security Administration office. Defendant points out in its brief on appeal that other tasks that plaintiff delegated included preparing Malloy’s annual guardian report, overseeing Malloy’s work program, and attending a hearing to modify Malloy’s guardianship. Virtually every task delegated to staff members by plaintiff did not alter the “rights, duties, liabilities, or other legal relations” of Malloy. *Black’s Law Dictionary* (11th ed). Rather, these delegated tasks, such as telephone conferences with Patrick and Kathren, were merely “legal obligation[s] that [were] owed or due to [Malloy] and that [needed] to be satisfied.” *Black’s Law Dictionary* (11th ed).

However, we agree with defendant that there is a genuine issue of material fact regarding whether plaintiff violated MCL 700.5103 when he delegated tasks that altered the “rights, duties, liabilities, or other legal relations” of Malloy without complying with the requirements of MCL 700.5103. Specifically, there is a genuine issue of material fact that preparing for a hearing to modify Malloy’s guardianship on April 23, 2019, and attending an April 24, 2019 hearing regarding the petition to modify Malloy’s guardianship altered Malloy’s rights and legal relations. Plaintiff appears to have assigned these two tasks to employees at his law firm but it is unclear whether and to what extent plaintiff engaged the services of the law firm or individuals and if he did so on behalf of the ward. Because these hearings involved adding and removing Malloy’s coguardians, these tasks altered Malloy’s rights and legal relations—an act fitting the definition of a power. *Black’s Law Dictionary* (11th ed). Therefore—because plaintiff did not prepare for or attend the April 24, 2019 hearing himself—there is a genuine issue of material fact regarding whether plaintiff delegated his guardianship powers as to these two tasks and, in doing so, violated MCL 700.5103. Because there is a genuine issue of material fact as to whether plaintiff delegated his guardianship powers as to the preparation for and attendance at a hearing to modify Malloy’s guardianship, there is also a genuine issue of material fact as to whether these services were “lawfully rendered” within the meaning of the no-fault act and whether these services are compensable under the no-fault act. Therefore, the probate court erred in granting partial summary disposition in favor of the Malloy plaintiffs with regard to these two tasks.

Similarly, regarding Docket No. 358021, plaintiff largely delegated duties—and not powers—to other individuals as it relates to Jenkins’s guardianship. Therefore, he did not violate MCL 700.5103 as to nearly all delegated tasks. Specifically, the Jenkins plaintiffs’ billing records indicate that services performed by individuals other than plaintiff on behalf of Jenkins included attending guardianship visits and communicating with Jenkins. Defendant also notes in its brief on appeal that services provided on behalf of Jenkins by individuals other than plaintiff included coordinating Jenkins’s care needs, reviewing medical reports, meeting with Jenkins’s doctors, meeting with individuals from Jenkins’s banks, and meeting with officials from the Social Security Administration. Similar to Docket No. 358006, virtually every task delegated to these staff members by plaintiff did not alter the “rights, duties, liabilities, or other legal relations” of Jenkins. *Black’s Law Dictionary* (11th ed). Nearly all of these delegated tasks were merely “legal obligation[s] that [were] owed or due to [Jenkins] and that [needed] to be satisfied.” *Black’s Law Dictionary* (11th ed).

However, we again agree with defendant that a genuine issue of material fact exists regarding whether plaintiff violated MCL 700.5103 by delegating tasks that altered the “rights,

duties, liabilities, or other legal relations” of Jenkins without complying with the requirements of MCL 700.5103. Specifically, viewing the evidence in a light most favorable to defendant, there is a genuine issue of material fact regarding whether preparing for a hearing to modify Jenkins’s guardianship on April 23, 2019, and attending an April 24, 2019 hearing regarding the petition to modify Jenkins’s guardianship altered Jenkins’s rights and legal relations. Plaintiff appears to have assigned these two tasks to employees at his law firm but it is unclear whether and to what extent plaintiff engaged the services of the law firm or the individuals and if he did so on behalf of the ward. Because these hearings involved modifying Jenkins’s guardianship and adding or removing a guardian, these tasks altered Jenkins’s rights and legal relations—an act fitting the definition of a power. *Black’s Law Dictionary* (11th ed). Therefore, because plaintiff did not prepare for or attend the April 24, 2019 hearing himself, there is a genuine issue of material fact regarding whether plaintiff delegated his guardianship powers as to these two tasks and, in doing so, violated MCL 700.5103. Because a genuine issue of material fact exists as to whether plaintiff improperly delegated his guardianship powers to modify Jenkins’s guardianship, there is also a genuine issue of material fact as to whether these services were “lawfully rendered” and whether these services are compensable under the no-fault act. Therefore, the probate court erred in granting summary disposition in favor of the Jenkins plaintiffs with regard to these two tasks.

Defendant also argues that the probate court erred in determining that a guardian’s duties and power to act were divisible. Defendant asserts that the probate court’s determination “threw discord between MCL 700.5103 and [MCL 700.5314.]” Defendant notes that MCL 700.5103’s “reference to a guardian’s ‘powers’ naturally includes the guardian’s duties in light of the indivisible nature of the two under EPIC.” We disagree.

As previously discussed MCL 700.5314 distinguishes between the powers and duties of a guardian. Although both duties and powers are discussed in MCL 700.5314, duties and powers of a guardian bear separate qualities that comport with the definitions described above. For example, while MCL 700.5314(a) lists the establishment of “the ward’s place of residence” as a power of the guardian, this establishment is referring to a guardian’s “ability to alter . . . the rights, duties, liabilities, or other legal relations” of the ward. *Black’s Law Dictionary* (11th ed). Conversely, the portion of the statute instructing the guardian to “visit the ward within [three] months after the guardian’s appointment” establishes a duty—that is, a “legal obligation that is owed” to the ward. *Black’s Law Dictionary* (11th ed). Accordingly, defendant’s contention that “powers” and “duties” are inseparable lacks merit. Further, there is no discord between MCL 700.5103 and MCL 700.5314. The references to both powers and duties in MCL 700.5314 also demonstrates that the Legislature intended that these two terms have different meanings under EPIC, and do not constitute the same things.

Further, as both the Malloy and Jenkins plaintiffs’ briefs point out, MCL 700.5106 demonstrates that the Legislature anticipated that a guardian would employ or task other individuals with caring for a ward. MCL 700.5106(5) and (6) provide:

(5) A professional guardian appointed under this section shall establish and maintain a schedule of visitation so that an individual associated with the professional guardian who is responsible for the ward’s care visits the ward within 3 months after the professional guardian’s appointment and not less than once within 3 months after each previous visit.

(6) A professional guardian appointed under this section shall ensure that there are a sufficient number of employees assigned to the care of wards for the purpose of performing the necessary duties associated with ensuring that proper and appropriate care is provided.

MCL 700.5106 expressly permits that “an individual associated with the professional guardian” may be “responsible for the ward’s care” and that a professional guardian “shall ensure that there are a sufficient number of employees assigned to the care of wards” in order to carry out the necessary duties. The plain language of the statute demonstrates that the Legislature contemplated that individuals other than the guardian would perform duties on behalf of a ward.

Accordingly, the probate court was correct in part and erred in part.

Specifically, a genuine issue of material fact exists regarding whether plaintiff delegated tasks that altered the “rights, duties, liabilities, or other legal relations” of Malloy and Jenkins when he allowed other individuals to prepare for and attend hearings regarding the modification of Malloy’s and Jenkins’s guardianships. Because “an insurer is required to pay benefits only for treatment lawfully rendered,” there also remains a genuine issue of material fact regarding whether defendant is responsible for the payments for these two tasks in each case. *Sterling Hts Pain Mgt, PLC*, 335 Mich App at 249.

Respecting all other contested matters, the probate court properly granted plaintiffs’ motions and denied defendant’s motions.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ James Robert Redford

/s/ Brock A. Swartzle

/s/ Mark J. Cavanagh

Appendix Attachment 23

Order

April 27, 2023

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In re Guardianship of MARY ANN MALLOY.

DARREN FINDLING, Coguardian of MARY ANN MALLOY, a legally protected person, and DARREN FINDLING LAW FIRM, PLC,
Plaintiffs-Appellees,
and

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AUTO-OWNERS INSURANCE COMPANY,
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DARREN FINDLING, Guardian of DANA JENKINS, a legally protected person, and DARREN FINDLING LAW FIRM, PLC,
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v

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Appellant.

Michigan Supreme Court
Lansing, Michigan

Elizabeth T. Clement
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolder
Justices

SC: 165018
COA: 358006
Oakland PC: 2020-393904-CZ

SC: 165020
COA: 358021
Oakland PC: 2020-393903-CZ

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On order of the Court, the applications for leave to appeal the October 13, 2022 judgment of the Court of Appeals are considered. We direct the Clerk to schedule oral argument on the applications. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing whether the Court of Appeals properly construed and applied the relevant provisions of the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, in determining that there is a genuine issue of material fact whether the guardianship services provided by the appellee and the appellee firm were “lawfully rendered” so as to be payable under MCL 500.3107 of the no fault act, MCL 500.3101 *et seq.*

The Probate and Estate Planning Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in these cases may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *In re Guardianship of Mary Ann Malloy*, Docket No. 165018, only.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 27, 2023

Handwritten signature of Larry S. Royster in blue ink.

Clerk [Appellant Appendix 255](#)