

**In the Circuit Court
Wabash County, Indiana
Cause No. 85C01-0710-PL-581**

SUSAN SHEPHERD and)
DEBORAH YOHE,)
)
Plaintiffs,)
)
vs.)
)
MARK C. GUENIN)
)
Defendant.)

**PLAINTIFFS' RESPONSE IN OPPOSITION TO GUENIN'S MOTION FOR
SUMMARY JUDGMENT, AND STATEMENTS OF MATERIAL FACTS IN DISPUTE**

Come now the plaintiffs, SUSAN SHEPHERD and DEBORAH YOHE, in person and by counsel, and respond to the defendant's motion for summary judgment.

INTRODUCTION

The decedent, Kenneth Sellers, had two daughters and two sisters. All five of the family members were represented by the defendant in this case, attorney Mark Guenin. When Kenneth needed a Last Will & Testament, Guenin drafted it. When Kenneth's sisters wanted to serve as his guardians, Guenin represented them. When Kenneth's daughters wanted to object to what his sisters did as guardians, Guenin sued them. Not a proud day for our profession.

Susan and Deborah are understandably upset at Guenin. He was their attorney as co-guardians. Guenin filed serious allegations against Amy in taking over the guardianship. Yet after Kenneth died, Guenin switched sides and filed serious allegations against Susan and Deborah concerning their actions as co-guardians. Guenin sought to

enforce a purported family agreement that tried to give Guenin himself a full release of any liability. He filed suit against his former clients for allegedly naming themselves as death beneficiaries of workers compensation settlement funds, which Guenin had the job of preventing in the first place.

Guenin's response to the malpractice case is to argue that Susan and Deborah becoming guardians was the end of their relationship, when in fact it was the beginning of his representation. In short, Guenin represented Susan and Deborah, abandoned them, and then sued them for damages he could have prevented.

To understand the dispute the Court should review what occurred in three cases: the guardianship case, Cause Number 85C01-9203-GU-20; the probate estate, Cause Number 85C01-0505-EU-59; the civil action, Cause Number 85C01-0512-PL-635; and the appeal (and appendices), Schlichter and Reid v. Shepherd and Yohe, Cause No. 85A02-0703-CV-283. Susan and Deborah move the Court in this malpractice case to take judicial notice of all of the filings in these various cases and designates them as evidence in support of this response. To the extent the Court denies this designation, or to the extent that Guenin moves to strike any of the evidence, pursuant to trial rule 56(F) Susan and Deborah move the Court to continue this matter until all of the assertions included in this brief can be copied, certified, authenticated, and designated as the Court deems proper.

FACTS FOR THE JURY

On February 21, 1984 Kenneth signed a Last Will & Testament drafted by Guenin that named as his heirs wife Sara and two minor children. *Ex.10*. On December 6, 1991 Kenneth fell from a scaffolding while employed by Atlas Systems, Inc., suffering massive injuries. *Ex.4,6, par.8*. He required extensive treatment and for nine years resided in a

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rehabilitation facility in the State of Texas. *Ex.4,6,par.9*. On May 8, 1992 the Wabash, Indiana Circuit Court appointed Kenneth's spouse, Sarah, as guardian over his person and estate. *Ex.3*. On September 15, 1998 the Court permitted Sarah to resign as guardian and appointed Kenneth's eldest daughter, Amy Sellers (now Amy Schlichter), as successor guardian. *Id*. On December 11, 1998 Kenneth and his wife divorced.

The divorce left Kenneth with virtually nothing. *Ex.8, p.21,par.17*. Kenneth was left to fend for himself with all of the medical bills. His only asset was social security and workers compensation. *Ex.4,6,par.16*. Amy in Indiana received all of these checks while he lived in Texas and when he returned to Indiana to live with his sisters. *Ex.4,6,par.16*.

On September 14, 2000, Guenin met with the plaintiffs in this case, Susan and Deborah, and agreed to represent them in the guardianship case. *Ex.4,6,par.17*. On October 4, 2000 they petitioned the Court to remove Amy as guardian, appoint Susan and Deborah as successor guardians, and require Sara and Amy to file a strict accounting. *Ex.4,6,par.18*. Therein Guenin made the following allegations against Amy:

"4. There is now a guardian for the person and the estate of said incompetent, but she is not performing the duties of a guardian. . . . 12. Amy Sellers has kept the Social Security Disability payments and Workman's Compensation benefits. The payments and benefits have not been applied for the benefit of Kenneth L. Sellers and Amy Sellers has refused to account for same."

Guenin also complained about the first guardian, Sara, who sold Kenneth's real estate and used the proceeds to purchase realty in her own name. *Ex.8,p.21,par.15*. During the divorce, Sara and Kenneth's new guardian were represented by the same attorney, Elden E. Stoops, Jr.. *Id*.

"22. An Order should be issued requiring a strict accounting by Sara Jane Sellers and Amy Sellers for all assets, including but not limited to Workman's Compensation benefits and Social Security Disability payments, coming into

their charge. Further all real estate, monies, accounts, and other assets should be strictly accounted for.

“23. It is believed and therefore alleged that the Guardians have mismanaged and misapplied the Ward’s assets to the point that the Ward is effectively reduced to a limited amount of Workman’s Compensation benefits and Social Security disability payments. The assets he originally held an interest in have been effectively transferred into the control and ownership of the previous Guardians.

“24. The guardians, Sara Jane Sellers and Amy Sellers, have violated their fiduciary duty owed to Kenneth Sellers.

“25. The Guardians have effectively impoverished the Ward to the own benefit.” *Ex.8,p.22.*

Sound familiar? Guenin used these same allegations against Sara and Amy while represented by Stoops, as he later did against Susan and Deborah while represented by Guenin.

On October 4, 2000 the Court ordered Sara and Amy to file an accounting, and temporarily changed guardians. *Ex.3.* On October 6, 2000 Guenin filed an appearance in the guardianship on behalf of Susan and Deborah. *Ex.8,p.17.*

On November 17, 2000 Amy resigned as guardian and the Court appointed Susan and Deborah as permanent co-guardians of Kenneth’s person and estate. *Ex.3.* Guenin then advised Susan and Deborah at some length of their fiduciary duties. *Ex.9, pp.46, 50-52, 56-59.* This included acting in the best interests of Kenneth; guardian responsibilities; accountings; higher standards involving investment decisions; complete disclosure; and having expenses approved by the Court. *Id.*

“Question: What do you think the guardianship code expects of an attorney who represents a guardian that’s handling things improperly?

“Answer: If they’re handling it improperly, I would expect that the attorney should advise the guardian as to what conduct or actions that they’re doing which

would appear improper and try to get it resolved so that there's no harm to the ward." *Ex.9, p.19, ll.1-16.*

"Question: Part of your job also is to review their acts as guardians and make sure they're acting properly?"

"Answer: I think to the extent that she asked me to do something on behalf of Ken or them acting on Ken's behalf, yeah. If they don't, if they don't follow my advice, or if they do something that I think is off of what the responsibility would require them to do, then it's my job to tell them that, look, this won't work, and this is why it won't work." *Ex.9, p.60, ll.6-14.*

Although the Court had ordered Sara Amy to file an accounting, Guenin did not follow up with the Court and allowed everyone to ignore the order. *Ex.3; Ex.4,6,par.29.* Guenin never discussed this with Susan and Deborah. *Ex.4,6,par.31.* Guenin never inquired of whether Amy acted properly as guardian during Kenneth's divorce proceedings. *Ex.9, p.35, ll.3-7.*

The Guardianship Code required Susan and Deborah to file an inventory within 30 days of being appointed temporary guardians and within 90 days of being appointed permanent guardians. *I.C. 29-3-9-5(a).* Yet Guenin did not advise Susan and Deborah of this and ignored the requirement. *Ex.9,p.60,ll.15-22.* Although Guenin prepared a complaint against Amy as prior guardian, it was never filed. *Ex.9,p.37,ll.5.* Guenin also did not follow up with Susan or Deborah about whether or not the matter was resolved. *Ex.4,6,par.33.*

Sometime after the Court appointed Susan and Deborah as guardians, they began negotiations with St. Paul Fire and Marine Insurance Company concerning Kenneth's workers compensation claim. *Ex.4,6,par.34.* Susan and Deborah sought advice about this matter from Guenin, who referred them to a list of other attorneys to contact about it.

Ex.9,p.91,ll.10-13. Before hiring another attorney to assist, Susan and Deborah met with representatives from St. Paul. *Ex.4,6,par.36.*

“Question: And they approached your office [Guenin] about what to say and do at a meeting with St. Paul?”

“Answer: I didn’t know it was St. Paul. I knew they had a meeting scheduled. I advised against the meeting and then told them, if they were going to do it, to listen to what they had to say don’t agree to anything; you’re better off to reschedule it and get their attorney involved. But if they were going to go ahead with the meeting, to ask if they could tape it. If they said, no, you can’t tape it, that was probably a warning sign that they shouldn’t go ahead with the meeting.” *Ex.9,p.91,ll.14-25.*

As co-guardians Susan and Deborah selected attorney Michael Valentine to represent Kenneth in resolving his workers compensation claim (now nearly ten years old). *Ex.4,6,par.38.* Guenin never had any conversations with Valentine prior to Kenneth’s death. *Ex.9,p.33,ll.14-15.* Guenin also never had any conversations with Susan and Deborah after he learned second hand that Valentine was involved. *Ex.4,6,par.39.* A fair reading of the record is that Guenin abandoned Susan and Deborah as clients.

“Question: And who was representing Ken’s interest to make sure, for example, they didn’t abuse whatever they were receiving from an insurance company along the lines of what you saw in the annuity schedule?”

“Answer: It would have been the girls, and then they would have been subject to court review. Ken didn’t have the money to keep paying me indefinitely just to check on his sisters. The sisters were already doing it at a financial loss, and I didn’t have any justification to just continue to charge him by the hour to check on what they were doing.” *Ex.9,pp.69-70, ll.24-9.*

“Question: Would it be fair to say that from the time period you a filed an appearance in the guardianship until you filed this motion to withdraw, that you received all of the CCS entries from the Court?”

“Answer: It would be fair to say, but I can’t guarantee that I did. I didn’t pay any attention to the filings.” *Ex.9,p.80, ll.17-22.*

“Question: Well let me ask it this way. After you appeared for them [Susan and Deborah] and worked for a month, how long was it before you gave them any notice that you were no longer their lawyer?”

“Answer: I think it kind of worked the other way around. They, I was worried that they had a statute of limitations problem for their workman’s compensation claim. I knew I wasn’t qualified to handle that. I knew they needed to seek other counsel. When it was confirmed, I think through a staff member, that they had in fact secured other counsel and were represented by them, then I considered myself discharged even though I didn’t do a withdrawal. And since that time ...”

“Question: Well, you not only didn’t do a withdrawal, you didn’t let Deborah or Susan know you weren’t representing them anymore did you?”

“Answer: They never asked me to represent them on anything ever again. Period.” *Ex.22, p.31, ll.9-19.*

There should be little doubt that Guenin represented Susan and Deborah beginning in October of 2000. Yet in this case Guenin has disputed the obvious, and goes so far as to move for summary judgment as if he had no duty to Susan and Deborah as clients. In his answer Guenin defends this case by stating as an additional defense “4. No attorney-client relationship existed between the Defendant and Plaintiffs and the Defendant performed no services for the Plaintiffs herein.” *Ex.27.* In response to discovery, Guenin stated that “Defendant performed no services for the Plaintiffs. For Ken Sellers, Defendant was able to secure the voluntary resignation of his current guardian and the appointment, by agreement, of Susan Shepherd and Deborah Yohe. ... Defendant did not represent the Plaintiffs.” *Ex.8.*

In deposition, however, Guenin finally admits the obvious: that he considered himself the attorney for Susan, Deborah, and Kenneth. *Ex.9,p.107, ll.14-15.* Susan and Deborah expected Guenin to “take care of our case, keep an eye on it”. *Ex.5,p.46,ll.5-8.* Including the time Guenin represented them when they received the paperwork involving

the workers compensation settlement. *Ex.23, p.90, ll.6-13.* The Wabash Circuit Court and the Clerk of the Court also believed Guenin represented Susan and Deborah by simply reviewing the CCS and the notices sent to him. *Ex.8,pp.81-109.*

The extensive requirements and complex legal issues are just a couple of the reasons why Indiana law requires guardians to be represented by an attorney. *I.C. 29-3-5-1(a)(11).* Guenin does not believe this, feeling free to withdraw from the case without notice. *Ex.9,p.17,ll.17-19.*

On March 22, 2002 Valentine appeared for the ward, Kenneth Sellers. *Ex.12.* That is when the co-guardians filed a petition that the court accept several settlement agreements, part of which involved the annuity. *Ex.3.* On April 17, 2002 the court held a hearing and approved the workers compensation settlement agreements. *Ex.3.* A *Civil Notice* from the Wabash Circuit Court in Guenin's file shows that he received notice of these. *Ex.8, p.96.*

The settlement agreement approved by the court did not name anyone as a beneficiary of an annuity. *Ex.4,6,par.51.* It simply gave Kenneth the right to select a beneficiary and to change his selection at any time. *Id.* Susan and Deborah never named themselves as beneficiaries of the annuity. *Ex.4,6,par.52.* St. Paul owned the annuity, and designated Susan and Deborah as beneficiaries after talking with Kenneth. *Id., Ex.13.* Guenin, representing Susan and Deborah, assisted them in preparation for this meeting and spoke by telephone when it began. *Ex.4,6,par.53.*

“Question: Did you have an attorney represent you during the course of that meeting?”

“Answer: Mr. Guenin was representing us by phone. We used his tape recorder. He told us what to tell them, what to ask. We had to make sure that we

asked if there was an attorney in the group. And he told us that before we taped them we had to let them know that they were being recorded. And then we had to return the tape to him after it was over with. And we had to make sure that each and every person stated their name and their title.” *Ex.23,pp.92-93,ll.24-5.*

Susan and Deborah believed that if anything they did in settling the workers compensation matter violated any law or rule or fiduciary duty, Guenin would have contacted them and informed them of any potential problem. *Ex.4,6,par.54.*

In filing the petition to approve the settlement agreement, Deborah was asked at deposition whether she believed Valentine was her attorney. Answer: “No. Question: Who did you understand him to be an attorney for? Answer: Ken. Question: Did you have an attorney yourself with regard to this petition? Answer: Well, we didn’t think we should hire another one since we had Mark [Guenin]. Question: And did you consult with Mark about this petition? Answer: No. If there was anything wrong, you know, we figured he would have consulted with us.” *Ex.5,pp.72-73,ll. 14-4.*

As late as February 5, 2003 Valentine sent a cover letter to the Wabash Circuit Court concerning an Order Regarding Monthly Allowance which he courtesy copied to Guenin, Deborah, and Susan. *Ex.8,p.83.* Receiving this continued to leave Deborah and Susan with the firm impression that Guenin was representing them and making sure everything was proper. *Ex.4,6,par.56.* Two weeks later, on February 19, 2003 Guenin filed a motion to withdraw his representation of Deborah (but not Susan) in the guardianship case. He did not inform Susan or Deborah or Valentine of this motion. *Ex.9,pp.77-78,ll.24-1.* Again, a fair reading of all this is that Guenin abandoned Susan and Deborah as clients.

On May 4, 2005 Kenneth Sellers passed away. *Ex.4,6,par.58.* Susan and Deborah were terminated as co-guardians by operation of law. *I.C. 29-3-12-1.* The Guardianship

Code required them to file an accounting within thirty days. *I.C. 29-3-9-6*. On May 25, 2005 the Probate Court appointed Amy and Emily as co-personal representatives. *Ex.2.* On June 22, 2005 as co-guardians Susan and Deborah filed a final accounting in the guardianship, which Guenin received on behalf of the probate estate. *Ex.8,pp.31-80*. Guenin on behalf of Amy and Emily as co-personal representatives did not file objections to the accounting. *Ex.2.*

In addition to the accounting, as co-guardians Susan and Deborah cooperated with Guenin who had apparently assumed control of the estate. *Ex.4,6,par.62*. Susan, Deborah, Guenin and Valentine met on September 16, 2005. *Ex.4,6,par.63*. In support of his motion for summary judgment, Guenin asserts that “During this meeting the proceeds of the WC Settlement were discussed and disputed. I contended that Amy and Emily were entitled to all the proceeds of the WC Settlement.” *Ex.J,par.14*. Not only do Susan and Deborah dispute this, prior testimony shows Guenin’s allegations to be false.

“Question: Alright. Now with respect to the meeting that you have two or three months before the settlement agreement, isn’t it a fair statement that the only things discussed were the paintings and the hospital bills?”

“Answer: No. We talked about the set aside account and how that, whether that existed and how much would be in it, and there were representations that they were going to provide additional information on the terms associated with the medicare/workman’s comp settlement.

“Question: When this meeting occurred, you had no idea what that annuity was worth or who was gonna get it did you?”

“Answer: At the time of that meeting, I had a, I had an understanding that it existed but I did not know the terms of it. I knew it was substantial. And substantial for me would’ve been anything over five hundred thousand dollars. But no, you’re correct, I didn’t, I didn’t have the particulars, I didn’t know the exact terms.

“Question: Alright. And when this meeting occurred, you have no reason to believe Deborah or Susan knew they were beneficiaries do you?”

“Answer: Yeah.

“Question: They knew they were beneficiaries of this annuity at the time of the meeting?”

“Answer: I understand they did, yeah.

“Question: Did they say that?”

“Answer: No.

“Question: From what do you base that?”

“Answer: The fact that they signed the papers that designating themselves as beneficiaries. I read those.

“Question: You’ve seen those?”

“Answer: Yes.

“Question: That was after the meeting wasn’t it?”

“Answer: Correct. After the meeting.

“Question: That’s what I’m saying. But at the meeting they didn’t know they were beneficiaries did they?”

“Answer: Well, I found out later that they’d signed it. But I’m assuming they knew what they signed so I would assume that they did know, yes. They did not tell me, but I assume at the time of the meeting they knew they were beneficiaries.” *Ex.23,pp.39-40, ll.5-25, 1-11 (Guenin’s testimony at October 4, 2006 hearing).*

Valentine testified about the September 16, 2005 meeting as follows:

“Question: Isn’t it a fair statement that the issues of paintings and hospital bills were discussed at that time?”

“Answer: Yes, they were.

“Question: Alright. Isn’t it a fair statement that the meeting left with we need to find out more information about the annuity?”

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“Answer: We knew what the annuity looked like. But it may’ve been Mr. Guenin who needed information.

“Question: Alright. Isn’t it a fair statement at the time of the meeting, Deborah and Susan, in the presence of Mr. Guenin, never conveyed any knowledge that they were the beneficiaries of it? That that was something that happened later wasn’t it? A few weeks later?

“Answer: I don’t believe there was any discussion about ultimate beneficiaries of that. ... I don’t think any settlement agreement was in the offing at that time.”
Ex.23, pp.70-71, ll.18-10.

Deborah testified about the September 16, 2005 meeting as follows:

“Question: What was discussed? What do you recall?

“Answer: In the meeting, we discussed hospital bills, the balance, and Ken’s paintings.

“Question: Was there any mention of the annuity?

“Answer: Oh no. No money, no annuity, no nothing like that was mentioned.”
Ex.23,p.91, ll.12-21.

The Court should consider that all of the above testimony occurred at a hearing on October 4, 2006, well before any limitations period in filing a malpractice case against Guenin could have expired. Had Guenin testified that he had made a demand on Susan and Deborah for the proceeds of any workers compensation settlement at the September 16, 2005 meeting, they could have filed the malpractice case before September 16, 2007. Only now does Guenin change his story and attempt to contradict his prior testimony and that of two others.

[On October 25, 2007 Susan and Deborah filed a malpractice complaint against Guenin. The parties agree that the limitations period requires a legal malpractice action to be brought within two years after the plaintiffs knew or should have known that

Guenin damaged them. Thus, what occurred after October 25, 2005 is important for the Court to consider.]

On November 14, 2005 Guenin sent a letter to Valentine demanding that Susan and Deborah assign anything they received from the workers compensation settlement over to Amy and Emily. *Ex.14*. In his motion for summary judgment Guenin asserts that the matters addressed in the November 14, 2005 letter were discussed at a September 16, 2005 meeting. The letter speaks volumes to the contrary. Susan and Deborah also dispute Guenin's recollection. A few days later Susan and Deborah received a copy of the November 14, 2005 letter. Only then did they have any reason to suspect Amy or Emily or Guenin wanted any proceeds of the workers compensation settlement or any other property in dispute. *Ex.4,6,par.67*.

On December 2, 2005 and December 8, 2005 Guenin and Valentine exchanged correspondence concerning a detailed family agreement. *Ex.17,18*. Susan and Deborah never saw the correspondence or any terms of the purported family agreement until after Amy and Emily filed a complaint to enforce it. *Ex.23,p.92,ll.4-7*. Neither Susan nor Deborah communicated with Guenin about any issue of settlement. *Ex.4,6,par.69*. Neither of them gave him cause to believe Valentine represented them. *Ex.4,6,par.70*.

Question to Guenin: "Did you ever have any discussions with [Susan or Deborah] that Mike Valentine represented them?" Mr. Guenin: "No." *Ex.23,p.23,ll.14-18*. Question to Deborah: "Did you ever at any time make any representation to Mr. Guenin, to Amy Schlichter, or Emily Sellers Reid that Mike Valentine had any authority to sign a settlement agreement on your behalf?" Answer by Deborah: "No.". *Id.,p.91, ll.22-25*. In denying enforcement of the settlement agreement, on November 2, 2006 the Court in PL-635 found

that “While Attorney Valentine testified as to his belief he represented the Defendants and that he believed he had authority to bind them, that belief was not shared by the Defendants.” *Ex.24*.

On December 7, 2005 Guenin represented Amy and Emily in filing a lawsuit against Susan and Deborah. *Ex.21*. Guenin alleged that at the time Susan and Deborah assumed their responsibilities as co-guardians, Kenneth had an estate plan for the benefit of his minor children. *Ex.21,par.7 of attached complaint*. Similarly, Count III begins with an allegation that Susan and Deborah “owed a fiduciary duty to act in concert with Kenneth L. Sellers declared Estate Plan and wishes.” *Id.* Guenin never informed Susan and Deborah about any of this. *Ex.4,6,par.73,74*. Guenin never advised about any fiduciary duty concerning this. *Id.,par.76*. And Guenin never disclosed Kenneth’s estate plan to Susan and Deborah to give them an opportunity to comply. *Id.,par.77*.

Guenin alleged that Susan and Deborah settled the workers compensation matter. *Ex.21,par.9 of attached complaint*. Yet Guenin knew this only because he served as their prior attorney. Guenin alleged that Susan and Deborah violated their fiduciary duties and Kenneth’s express direction. *Ex.21,par.11 of attached complaint*. Yet Guenin was the one who was supposed to inform and monitor whether they complied with their duties and acted properly.

In his motion for summary judgment Guenin has tried to argue that he was not involved in anything concerning the workers compensation matter. Yet in filing a complaint against his former clients Guenin purports to know that Kenneth gave “express direction” that the proceeds go to his daughters.

Guenin alleged that Susan and Deborah violated Indiana Code Section 29-3-8-5 concerning void transactions. *Ex.21,par.12 of attached complaint.* Guenin never mentioned this or any other Guardianship Code provision as he took upon himself the task of informing them of their duties as guardians. *Ex.4,6,par.76,77.* Guenin alleged that “The Estate Plan which remained unchanged until the time of his death, designated Amy Schlichter and Emily Sellers, Kenneth’s daughters, as his heirs and devisees.” *Ex.21,par.16 of attached complaint.* Guenin would not have known this unless he had an active role during the entire guardianship process. He had monitored the guardianship case sufficient to know that Susan and Deborah had not filed any petition for estate planning. It should come as no surprise that Guenin’s lack of advising them about it in the first place has led to this malpractice lawsuit.

It was not until the filing of the December 7, 2005 lawsuit that any limitations period in filing a malpractice case against Guenin should start. After receiving the complaint Susan and Deborah had to hire an attorney to defend them, and faced the possibility of personal liability and the return of benefits. *Ex.4,6,par.78.* Prior to receiving the complaint Susan and Deborah had simply communicated with Guenin as would any family member wanting to help after Kenneth passed away. *Id.par.79.*

In understanding the context of the malpractice case against Guenin, the Court should also review the estate planning provision of the Guardianship Code, which permits the Court to adopt or change an estate or gifting plan for the ward. Pursuant to Indiana Code Section 29-3-9-4, Susan and Deborah could have petitioned the Court to select who should have received any benefit or inheritance from Kenneth that remained after his passing.

(a) Upon petition of the guardian (other than a temporary guardian) or any other person as approved by the court, and after notice to such persons as the court may direct, . . . The court may accordingly authorize the guardian to make gifts, outright or in trust, on behalf of the protected person to or for the benefit of the prospective legatees, devisees, or heirs, including any person serving as the protected person's guardian, . . . In addition, the court may also authorize the guardian to:

(1) apply or dispose of the excess principal or income for any other purpose the court decides is in the best interests of the protected person or the protected person's property, spouse, or family; . . .

(b) In a hearing upon a petition filed under subsection (a), the court shall determine whether the planned disposition, renunciation, disclaimer, release, or exercise is consistent with the apparent intention of the protected person, which determination shall be made on the basis of evidence as to the declarations, practices, or conduct of the protected person or, in the absence of that type of evidence, upon the court's determination as to what a reasonable and prudent person would do under the same or similar circumstances as are shown by the evidence presented to the court. . . .

See Guardianship of E.N., 853 N.E.2d 960 (Ind.App. 2006), opinion after transfer granted, 877 N.E.2d 795 (Ind. 2007); Boone County v. Andrews, 446 N.E.2d 618 (Ind.App. 1983).

Susan and Deborah did not file such a petition because Guenin never advised them it was possible. *Ex.4,6,par.80*. Had the Court held a hearing with notice to Amy and Emily, all of the subsequent litigation would have been avoided. Although Guenin had drafted Kenneth's Will, he never informed Susan or Deborah that as guardians they could examine the Will. *Ex.4,6,par.81; see I.C. 29-3-9-4(c)*. They did not know who Kenneth had named. *Id.*

The annuity in this case was owned by St. Paul Fire & Marine, which designated Susan and Deborah as beneficiaries after talking with Kenneth. *Ex.23,pp.88-93*. Had Guenin or Amy or Emily raised any argument about Susan and Deborah's designation as

beneficiaries during Kenneth's lifetime, he could have testified about it. *Ex. 4,6,par.82*. By waiting until after Kenneth's death, Guenin's lack of advice prevented the court from holding a hearing where Kenneth could testify in support of his wishes. *Id.*

SUMMARY JUDGMENT STANDARD

To obtain summary judgment, the moving party must establish that "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *T.R. 56(C)*; *Time Warner v. Whiteman*, 802 N.E.2d 886, 895 (Ind. 2004). The party seeking summary judgment must demonstrate the absence of any genuinely disputed issue of material fact. *Id.* Only then the nonmoving party bears the burden of responding to the summary judgment motion. *Schmidt v. American Trailer*, 721 N.E.2d 1251, 1253-1254 (Ind.App. 1999). When the parties dispute material facts, or if undisputed facts give rise to conflicting reasonable inferences that affect the outcome, they must be resolved in favor of the nonmovant. *Warner Trucking v. Carolina Casualty*, 686 N.E.2d 102, 104 (Ind. 1997).

"In determining whether to grant a motion for summary judgment, the court considers the facts set forth in the nonmoving party's affidavits as true and construes the products of discovery liberally in his favor ... Pleadings, evidence, and inferences are to be viewed in a light most favorable to the party against whom the summary judgment is sought. ... Only if no issue as to a material fact is raised, may the court grant a summary judgment. To defeat such a motion, the opposing party only needs to show that a material fact is genuinely in issue."

Taylor v. Landsman, 422 N.E.2d 403, 406. (Ind. Ct. App. 1981). Courts "must carefully review decisions on summary judgment motions to ensure that parties are not improperly denied their day in court." *FOP v. Evansville*, 829 N.E.2d 494, 496 (Ind. 2005).

"Summary judgment is not to be used as an abbreviated trial", and "[a]ny doubt as to a fact, or an inference to be drawn, is resolved in favor of the nonmoving party." *Barsz v.*

Shapiro, 600 N.E.2d 151, 152 (Ind.App. 1992). As in the *Shapiro* case, negligence cases are rarely appropriate for disposal by summary judgment.

In his brief, page 7, Guenin asserts that “The factual allegations in the Complaint are insufficient to meet this burden”. Ordinarily this is the case; but not when the defendant includes the Complaint in his designation of material facts. Guenin attached the Complaint as Exhibit K to his motion for summary judgment. That means all of the allegations in the complaint are deemed admitted for purposes of this motion. Susan and Deborah do not need to designate evidence otherwise included in the Complaint because Guenin already admitted it into evidence.

Designating evidence is a waiver of any objections as to its admissibility. Indiana courts have addressed this very issue in a variety of contexts. If a party moves for summary judgment and designates an affidavit barred by the Deadman’s Statute, the opposing party must move to strike the affidavit or the otherwise inadmissible evidence comes in. *Crawford v. Wells*, 344 N.E.2d 869 (Ind.App. 1976). Designating otherwise incompetent evidence of the opponent also results in waiver. *Taylor v. Taylor*, 632 N.E.2d 808 (Ind.App. 1994); *Kalwitz v. Estates of Kalwitz*, 759 N.E.2d 228, fn.3 (Ind.App. 2001).

STATEMENT OF MATERIAL FACTS IN DISPUTE
CONCERNING STATUTE OF LIMITATIONS

In his brief, page 3, Guenin states that “On May 7, 2001, Guenin met with Plaintiffs. At this meeting he asked if there were any other tasks he could perform for Plaintiffs and Sellers and they indicated that there was nothing else and that they were hiring a workers compensation attorney.” Susan and Deborah dispute this. *Ex.4,6,par.83*.

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From October 2000 until December 2005 Susan and Deborah believed Guenin represented them. Guenin had appeared for them as co-guardians. *Ex.4,6,par.84.* Guenin filed a motion to withdraw as attorney for Deborah (but not for Susan) and did not send them a copy. *Id.* They also never discussed it. *Id.* At no time after they hired Guenin to represent them in the guardianship was there any discussion about his not being their attorney. *Id.* Susan and Deborah only assumed Guenin did not represent them after he filed a complaint against them in court. *Id.*

In his brief, page 4, Guenin asserts that “Plaintiffs hired attorney Michael L. Valentine to handle the workers compensation matter.” Important here is that Guenin now acknowledges that this was all that Mr. Valentine was hired to do.

In his brief, page 4, Guenin asserts that “Plaintiffs never provided Guenin with a copy of the Petition [to approve the workers compensation settlement agreement] and never requested Guenin review any documents related to the WC Settlement.” This does not properly characterize what the plaintiffs have asserted. Guenin was Susan and Deborah’s attorney. Valentine was the attorney for Kenneth who filed a petition to approve the settlement agreement. Guenin received notice from the Court that Valentine had filed the petition. *Ex.8,p.96.* Susan and Deborah believed that Guenin received a copy, and that Guenin as their attorney would have informed them had the petition involved anything improper. *Ex.4,6,par.85.* Susan and Deborah believed they had acted properly during the entire guardianship proceeding because their attorney, Guenin, had never contacted them with advice to do something different. *Id.,par.86.*

In his brief, page 5, Guenin asserts that he “met with the Plaintiffs and Valentine, acting as their counsel, in September of 2005 to discuss the assets of the Sellers Estate

including the WC Settlement for the workers compensation claim.” It is vehemently disputed who Valentine represented. In testimony before the Wabash County Circuit Court, and in separate depositions, Susan and Deborah have steadfastly maintained that Valentine was the attorney for Kenneth, and never them. Valentine filed an appearance for Kenneth in the guardianship case – not Susan and Deborah. They have verified that they did not believe Valentine was ever their attorney. Susan and Deborah also dispute that the September 2005 meeting included any reference to the workers compensation matter. *Ex.4,6,par.87,88.*

In his brief, page 8, Guenin states that “Plaintiffs claim they lost their entitlement to the benefits they had negotiated for themselves as co-guardians of Sellers estate ...”. This is not true. The settlement of the workers compensation claim provided a benefit to Kenneth. At his passing, Kenneth designated Susan and Deborah to receive any inheritance as to anything left over. Susan and Deborah did not negotiate this. *Ex.4,6,par.90.* Kenneth communicated directly with St. Paul as to who should be designated as beneficiaries. *Ex.23, pp.88-93.* Consistent with prior testimony in the guardianship case, and in depositions in this case, Susan and Deborah did not know they were beneficiaries of anything until after Kenneth passed away.

In his brief, page 10, Guenin mentions that on May 18, 2005 Valentine as counsel for Susan and Deborah sent Amy and Emily a letter that they would receive all of Kenneth’s estate. Again, Susan and Deborah dispute who Valentine represented. Valentine was never their attorney. *Ex.4,6,par.92.* The fact that Amy and Emily were beneficiaries of Kenneth’s estate did not address who Kenneth had named as beneficiaries of his life insurance

policies, the proceeds of the workers compensation settlement, or any other non-probate property. *Id.,par.93.*

Whatever information Guenin purports to have received from or conveyed to Valentine was never notice to Susan and Deborah. They did not receive copies of any of this correspondence, and did not know any of these communications. *Ex.4,6,par.94.* Susan and Deborah met with Valentine and Guenin on September 16, 2005. Susan and Deborah were appalled that Guenin would represent Amy and Emily. But Susan and Deborah still considered Guenin their attorney. *Ex.4,6,par.65.*

In his brief, page 10, “Guenin contended Amy and Emily were entitled to all of the proceeds from the WC Settlement.” Page 11 makes reference to a similar statement. Susan and Deborah deny the matter was ever discussed at the September 16, 2005 meeting. *Ex.4,6,par.95.* They had no idea that Amy, Emily, or Guenin wanted anything from the workers compensation settlement until the end of November of 2005. *Ex.4,6,par.96.* Even if Guenin discussed the workers compensation matter with Susan and Deborah in September of 2005 they would not have known Guenin had acted in a negligent manner until he caused them damage by filing a lawsuit against them on December 7, 2005. *Ex.4,6,par.97.* Having a conversation about the settlement did not damage Susan and Deborah. As co-guardians they had already accounted to the estate and had every reason to work toward a smooth transition.

In his brief, page 10, Guenin argues that an appearance of a conflict of interest in September 2005 caused the limitations period to accrue. Yet in his brief, page 11, Guenin argues that an appearance of a conflict of interest does not give rise to a civil action. If so, then the appearance of a conflict of interest in September of 2005 did not cause any action

to accrue. *State v. Robbins*, (1943) 221 Ind. 125, 46 N.E.2d 691; *Apple v. Hall* (Ind. App. 1980), 412 N.E. 2d 114, 116.

Conflicts are relevant to motive. There is nothing in the record of this case that the existence of a conflict, by itself, caused the plaintiffs damage. Had Guenin on behalf of Amy and Emily not filed the lawsuit against Susan and Deborah on December 7, 2005, they would not have had any reason to file a malpractice case against Guenin, no matter what conflicts of interest arose, much less when. After Guenin filed the December 7, 2005 complaint is when Susan and Deborah were first made aware of a damage that starts the running of the statute of limitations. *Madlem v. Arko* (Ind. 1992) 592 N.E. 2d 686; *Burks v. Rushmore* (Ind. 1989) 534 N.E. 2d 1101; *Barnes v. A.H. Robbins, Co. Inc.* (Ind. 1985) 476 N.E.2d 84.

STATEMENT OF MATERIAL FACTS IN DISPUTE
CONCERNING A LAWYER'S DUTY TO HIS CLIENTS

In his brief, page 13, Guenin argues he had no duty to Susan and Deborah to advise them about petitioning the Guardianship Court for estate planning because Valentine represented them in the workers compensation settlement. A review of the expert opinion of Martha T. Starkey attached to Exhibit 28 condemns any such argument. Guenin understood his responsibility was to make sure Susan and Deborah did not do anything wrong.

“Question: Part of your job also is to review their acts as guardians and make sure they’re acting properly?”

“Answer: I think to the extent that she asked me to do something on behalf of Ken or them acting on Ken’s behalf, yeah. If they don’t, if they don’t follow my advice, or if they do something that I think is off of what the responsibility would

require them to do, then it's my job to tell them that, look, this won't work, and this is why it won't work." *Ex.9,p.60,ll.6-14.*

Valentine was the attorney for Kenneth, not Susan and Deborah. Guenin admits recommending they contact "a workers compensation attorney". *Id.,p.63,ll.8-16.* Not an estate planning attorney. Not a guardianship attorney.

Guenin cannot argue that he has no duty to Susan and Deborah just because Valentine participated in the workers compensation matter. Finger pointing among several lawyers who represent the same people never wins the day. Valentine represented Kenneth. Susan and Deborah thought Guenin represented them. Guenin's confusion over this does not relieve him of any duty to the clients he appeared for in the case.

In his brief, page 14, "Guenin agreed to file the necessary paperwork to change the guardianship for a retainer fee." He did more than that. Susan and Deborah hired Guenin to be their attorney for all matters related to the guardianship case. *Ex.4,6,par.98.*

On page 14 and again referenced on page 15, "At the goodbye meeting between Guenin and Plaintiffs on May 7, 2001, Plaintiffs stated there was nothing else Guenin could do for them." Not true. Susan and Deborah dispute any such "goodbye" meeting occurred. *Ex.4,6,par.99,100.* Guenin's attorney never asked Susan and Deborah about any such meeting at their depositions. Susan and Deborah never stated anything that could have given Guenin the impression he was no longer their attorney. Guenin omitted any reference to such a meeting in his response to interrogatories. *Ex.8.*

In his brief, page 15, Guenin asserts as to the appointment of Susan and Deborah as guardians, "This was the only task Plaintiffs asked Guenin to perform and he successfully completed it." Not so. *Ex.4,6,par.102.* Guenin also got involved in advising Susan and

Deborah about their fiduciary duties as guardians, taught them how to do accountings, failed to advise them about filing an inventory, failed to advise them of the Court order requiring the prior guardian to account, and he gave them advice about the workers compensation meeting. Loaning clients a tape recorder may not count as legal advice; but telling the clients what to do with it should qualify. *Ex.4,6,par.103.*

In his brief, page 16 (and also referenced on page 17), “Guenin was never retained to perform the services of which the Plaintiffs now complain.” Susan and Deborah hired Guenin to be their attorney for all matters related to the guardianship case. *Ex.4,6,par.98.* The Guardianship Code requires the guardian to have an attorney. *I.C. 29-3-5-1(a)(11); Ex.28,p.22,l.12.* Guenin admits that he had a duty to monitor and, if necessary, correct their activities. *Ex.9,p.60,ll.6-14.* Any lack of communication from the clients cannot excuse the total lack of communication from Guenin as the attorney. Guenin did not need their advice. They needed his. Guenin has made no showing in his motion for summary judgment that as a matter of law clients in a guardianship case would even know what to ask.

In his brief, pages 18-19, Guenin asserts that he did not convey confidential information gained in his representation of Susan and Deborah to Amy and Emily. Just because the Guardianship Court ultimately approves a workers compensation settlement does not give Guenin license to create litigation against his former clients. Guenin admits he advised Susan and Deborah concerning a meeting with St. Paul. Guenin advised them to tape record it. *Ex.4,6,par.104.* Guenin advised them to consult with another attorney about it. To file the later lawsuit, Amy admits she learned of all this from Guenin. *Ex.22, p.4.*

STATEMENT OF MATERIAL FACTS IN DISPUTE
CONCERNING COLLATERAL ESTOPPEL ON CONFLICT OF INTEREST ISSUE

In his brief, page 6, Guenin asserts that on May 31, 2006 the Court denied Susan and Deborah's motion to disqualify Guenin based upon a conflict of interest. On pages 19-21 Guenin attempts to use this fact as *collateral estoppel*. He fails, however, to state that he withdrew as attorney in the estate case (EU-59) on June 5, 2006, *Ex.2*, and in the civil case (PL-635) case on July 3, 2006, *Ex.1*. The orders of the Court on May 31, 2006 in either the estate or civil cases were not appealable final orders. The Court did not include language pursuant to trial rule 54(B). By the time the Court entered final judgments in favor of Susan and Deborah, the issue was moot.

Susan and Deborah did not appeal the May 31, 2006 Court order because Guenin had given them complete relief by withdrawing from the case. *Ex.4,6,par.105*. In the summary judgment context, his action to withdraw speaks volumes more than a trial court's order denying disqualification. He gave up, rather than face appellate reversal. The inference being Guenin knew he had a conflict, knew he should have never represented Amy and Emily, and knew that he should never have filed a lawsuit against his former clients.

STATEMENT OF MATERIAL FACTS IN DISPUTE
CONCERNING MALICIOUS PROSUECTION

In paragraph 32 of the complaint, Susan and Deborah allege that "By filing the complaint in PL-635, the defendant filed a frivolous action, unreasonable on the merits, abused the legal process, and maliciously prosecuted a case against his former clients." In response on pages 22-24 of his brief, Guenin addresses only the malicious prosecution

claim. He does not ask the Court to dismiss the causes of action that permit the plaintiffs relief for filing frivolous or unreasonable actions, or abuse or process.

As to the malicious prosecution argument, Guenin states on page 24 that “There was no decision as to any of the merits of Amy and Emily’s claims against the Plaintiffs.” Not true. In the civil case Guenin filed a complaint to enforce a settlement agreement, which the Trial Court denied after a trial on the merits. *Ex.1,24.*

In the estate case, on March 7, 2006 Guenin filed a petition to recover assets. *Ex.2.* On February 16, 2007 the court held an evidentiary hearing on the petition. *Id.* Amy and Emily chose not to introduce any evidence; but they had the opportunity. On March 6, 2007 the court denied the motion to recover the annuity on the merits. *Ex.25.* On July 9, 2007 the court denied the petition to recover the medicare set aside account, again on the merits. *Ex.25.*

On April 9, 2007 Amy and Emily filed petitions to reopen the guardianship, set aside the order approving the final accounting, and modify the order approving the settlement agreements *Ex.3.* On June 12, 2007 the court held an evidentiary hearing on these motions. *Id.* On July 9, 2007 the court denied the motion to reopen the guardianship on the merits. *Ex.25.* On July 25, 2007 the court denied all other motions. *Id.*

EXPERT OPINION

Susan and Deborah asked attorney Martha T. Starkey to render her expert opinion concerning the matters raised in this case. Although her testimony at deposition involves much more, to follow is taken from her letter attached as an exhibit. *Ex.28.* To date Guenin has not disclosed any expert or offered opinion to refute any of the following:

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The legal counsel to a fiduciary has a fiduciary duty of competent and diligent representation. The American Law Institute's Restatement (Third) of the Law Governing Lawyers (2000) (hereafter Lawyers Restatement), sets forth the core duty of a lawyer to give competent and diligent representation:

[A] lawyer must, in matters within the scope of the representation: (1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation; [and] (2) act with reasonable competence and diligence

Id., §16. The Official Comment states “[a] lawyer is a fiduciary Assurances of the lawyer's competence, diligence, and loyalty are therefore vital.” *Id.*, *cmt. B*. The official Comment continues to discuss these fiduciary duties. It says:

In pursuing a client's objectives, a lawyer must use *reasonable care*. The lawyer *must be competent to handle the matter*, having the appropriate knowledge, skills, time, and professional qualifications. The lawyer must use those capacities *diligently, not letting the matter languish* but proceeding to perform the services called for by the client's objectives, including appropriate factual research, legal analysis, and *exercise of professional judgment*.

Id., §16, *cmt. D* (citations omitted) (emphasis added).

Deborah Lynn Yohe and Susan Yvonne Shepherd retained Mike Guenin to advise and represent them in the guardianship of their brother, Ken Sellers. [Guenin Transcript, pp. 24-25, 68, 154] The Indiana Guardianship Code requires that guardians be represented by attorneys. IC § 29-3-5-1(a)(11).

Ms. Yohe and Ms. Shepherd had no prior experience as a guardian of an estate or person and were unfamiliar with guardianship laws, procedures, and practices. [Guenin Transcript, pp. 45-47, 50, 90-92] As a result, Mr. Guenin had a heightened duty to oversee, direct and advise them regarding all aspects of the guardianship, including regarding their fiduciary duties and responsibilities.

As lay persons, Ms. Yohe and Ms. Shepherd relied on advice of their attorney, Mr. Guenin, to counsel them on their duties and obligations as co-guardians. [Guenin Transcript, pp. 45-47, 50, 60-61, 90-92] They prudently relied on Mr. Guenin to advise them of due dates and requirements for filing pleadings, inventories, and accountings in the guardianship. As lay persons, these duties, due dates, and obligations would be unfamiliar and unknown to Ms. Yohe and Ms. Shepherd without oversight and direction by counsel.

Despite entering into an attorney-client relationship with Ms. Yohe and Ms. Shepherd, Mr. Guenin did not have a written fee engagement letter with them. [Guenin Transcript, pp. 12-13] A written fee engagement letter would have prevented confusion and uncertainty regarding whom Mr. Guenin was representing, the scope of that representation, and the

fees and expense arrangement. It is good and prudent fiduciary practice for an attorney practicing in the areas of probate and estate matters to always have a written fee engagement letter with a client.

At their initial and subsequent meetings, Ms. Yohe and Ms. Shepherd informed Mr. Guenin of the fiduciary breaches committed by the guardian serving prior to them, Mr. Sellers' daughter Amy Schlichter. [Guenin Transcript, pp.30-32, 35-37, 101-06, 123-24] It is my experience that a lay person will not know what types of actions can be brought against a former fiduciary for breaches of duty. It is the lawyer's job to explain this to his client and to advise as to the appropriate course of action to protect the guardianship estate and interests of the ward.

Ms. Yohe and Ms. Shepherd informed Mr. Guenin that as guardian Amy had not provided an accounting. [Guenin Transcript, pp.30-32, 37, 102-06] Mr. Guenin prepared a petition for accounting on behalf of Ms. Yohe and Ms. Shepherd, but he did not file it. [Guenin Transcript, p. 37] After the court ordered the accounting, but Amy took no action, Mr. Guenin took no further actions against Amy. The Indiana Guardianship Code requires that a guardian file accountings and further requires that upon resignation or termination of a guardian, a final accounting be filed. Mr. Guenin breached his fiduciary duties to his clients by not advising them that they, as successor guardians, had a duty to the guardianship estate to ensure that assets due to the estate were returned.

It is my experience that a lay person will not be able to prepare and file an inventory or accountings without assistance of counsel. The Indiana Code and many local rules require that a guardian be represented by an attorney for this very reason, to advise and assist the fiduciary for the protection of the fiduciary and the ward. The lawyer's role in a guardianship matter includes advising the guardian of the fiduciary responsibilities and obligations, preparing all pleadings and filings with the court, assisting the guardian in preparing an initial inventory and all accountings and filing those items with the court on the client's behalf, and monitoring and overseeing the actions of the guardian to assure he is keeping with good fiduciary practice and standards. Mr. Guenin breached his duties to his clients by effectively abandoning his clients after their appointment as co-guardians, leaving them to navigate and comply with guardianship law and procedure on their own.

Based on my experience and practice, an attorney must always terminate his representation in writing. Mr. Guenin's failure to communicate in writing regarding his alleged termination of representation coupled with his subsequent communications with the clients regarding the guardianship matter, would lead any reasonable person to believe that the attorney continued to represent them in the matter.

Mr. Guenin's subsequent attempted withdrawal as counsel for Deborah Yohe, filed on February 19, 2003, was not served on Ms. Yohe, Ms. Shepherd, or Mr. Sellers. [Guenin Transcript, pp. 77-80] Without service to his clients, such withdrawal is ineffective.

Mr. Guenin did not maintain client meeting notes, scheduling notations, and written communications with his clients and non-parties. [Guenin Transcript, pp. 82-84, 157-158] When a conflict arises between an attorney and a client, custom and practice requires that where an attorney has failed to maintain notes, records, accurate time entries or other evidence of communications, the conflict should be resolved to the benefit of the client. Any damages arising from a lawyer's failure to communicate with a client in writing should be construed in favor of the client.

Attorney Mike Valentine filed his appearance as the attorney for Ken Sellers in the guardianship matter. [Guenin Transcript, pp. 119-20] This appearance would not give notice to Mr. Guenin or the co-guardians that their attorney-client relationship had terminated, nor would it provide a reason for Mr. Guenin or the co-guardians to believe the relationship had terminated.

The co-guardians and/or Mr. Sellers retained Mike Valentine as counsel for Mr. Sellers' workers compensation matter. [Guenin Transcript, pp. 107, 119-20] Mike Valentine was not retained as counsel for the guardianship matter. [*Id.*] The retention of Mike Valentine as counsel for the co-guardians and/or Mr. Sellers would not terminate the attorney-client relationship between Mr. Guenin and the co-guardians and would not provide a reason to believe such relationship is terminated.

Upon the workers compensation settlement, a reasonably prudent attorney representing the co-guardians would have prevented any misunderstanding regarding Ms. Yohe and Ms. Shepherd being named as beneficiaries of the annuity through use of the estate planning provision of the Indiana Guardianship Code. IC § 29-3-9-4. If Mr. Guenin had been on the ball regarding guardianship estate planning under IC § 29-3-9-4, with notice to Mr. Sellers' daughters, litigation and related costs and expenses could have been avoided.

It is contrary to Indiana law for any attorney to represent a client whose interests are adverse to a former client unless the former client provides informed, written consent. Indiana Rules of Professional Conduct 1.9. Mr. Guenin has violated these rules on several occasions.

His representation of Ms. Yohe and Ms. Shepherd as co-guardians may have conflicted with his earlier representation of Mr. Sellers in his estate planning matters. [Guenin Transcript, p. 71] No matter how well a guardian and ward may get along, their interests are not the identical. A ward may seek his own counsel to represent him, or a ward may waive his right to do so. There is no evidence that Mr. Guenin informed Mr. Sellers of this potential conflict of interest or sought his consent to the representation.

Further, Mr. Guenin actually alleges that he represented Mr. Sellers and Ms. Yohe and Ms. Shepherd at the same time. [Guenin Transcript, pp. 68, 107, 154] Yet, in Mr. Guenin's opinion, Mr. Sellers was not of sound mind and could not retain counsel. [Guenin Transcript, pp. 38, 40, 42-44, 107-110, 119] Mr. Sellers was an adjudicated incapacitated person. However, Mr. Guenin alleges he represented Ken Sellers. The Guardianship Code

provides a means for an attorney to represent an incapacitated person through the petitioning the court for appointment of a guardian ad litem. Although Mr. Guenin could have filed such a petition on Mr. Sellers' behalf, Mr. Guenin took no such action, and instead asserted that he could represent the co-guardians and the ward at the same time.

By far the most egregious conflict of interest, Mr. Guenin represented Mr. Sellers' daughters, Amy Schlichter and Emily Reid, in a direct conflict of interest with his allegedly former clients, Ms. Yohe and Ms. Shepherd. [Guenin Transcript, p. 133] Ms. Yohe and Ms. Shepherd were not informed of this representation and did not consent to it. Incredibly, as part of his representation of them as personal representatives, Mr. Guenin represented Amy Schlichter and Emily Reid in a complaint against Ms. Yohe and Ms. Shepherd. [Guenin Transcript, p. 136; Complaint for Attorney Malpractice, p. 4, ¶ 31] Mr. Guenin's representation of Mr. Sellers' daughters is an extreme violation of his fiduciary duties as lawyer (former or current) to Ms. Yohe and Ms. Shepherd. In my twenty-seven years of practice, I have never seen a more blatant conflict of interest and violation of the rules to protect client confidences than Mr. Guenin's actions in representing Mr. Sellers' daughters as personal representatives of his estate.

Mr. Guenin has attempted to distinguish his representation of Mr. Sellers' daughters, by arguing that he instead represented Mr. Sellers' estate. [Guenin Transcript, p. 112] While the same conflicts of interest and violation of client confidences would remain under this type of representation, Mr. Guenin would further be breaching Indiana practice and custom in estate administration. In Indiana, a lawyer does not represent the estate, but rather is counsel to the personal representatives and advises them in their fiduciary roles.

Ultimately, the greatest cost from Mr. Guenin's malpractice is the ruin of a family relationship. Mr. Guenin's malpractice resulted in litigation that would otherwise not have occurred but for his actions. This litigation ripped a family apart and resulted in permanent disharmony between family members. It would be difficult to place a price on the value of the familial relationship, but it would undoubtedly exceed any damages amount that has been put forth to date in this matter.

WHEREFORE the Court should DENY the defendant's motion for summary judgment, and permit the Jury to resolve this case on the merits.

CERTIFICATE OF SERVICE

I certify that I served the foregoing on the foregoing counsel by First Class United States mail, postage prepaid, this December 23, 2008:

Mr. Michael Brown
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Respectfully submitted,

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