

June 2011

**Special points of interest:**

- **Are conservator expenses payable as replacement service expenses?**
- **Can a person injured in an auto accident obtain wage loss benefits if they were being paid cash?**
- **How is an attorney fee award calculated?**

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# The Michigan No-Fault Newsletter

## AAA Ordered to Pay Conservator Fees For Injured Client

In *May v. ACIA*, \_\_\_ Mich App \_\_\_ decided April 26, 2011 (Docket No. 292649), the Plaintiff's ward, Mr. Carroll was involved in an automobile accident in 1982 that left him in a seriously debilitated condition. He suffered a closed head injury and was hospitalized for two and one-half years following the accident.

AAA was his no-fault insurer. For approximately 26 years, AAA paid \$7000 to \$8500 per month to Carroll's wife for the 24-hour care she gave to him. Carroll's wife died in November 2008.

Just prior to Mrs. Carroll's death, the Carrolls' daughter committed him to a psychiatric ward. Upon his release, she placed him in an adult foster care home.

Carroll's daughter sought a formal guardianship, but he had concerns with her handling of his finances. A lawyer filed a petition for the appointment of a conservator on Carroll's behalf and, in December 2008, the probate court appointed Alan A. May to be Carroll's conservator.

Mr. May requested that the Probate Court order AAA to pay for his services as conservator, pursuant to the No-Fault Act. The Probate Court ordered AAA to pay \$99.00 and Carroll's estate to pay the remaining \$6,816.70 of Mr. May's fee.

The probate court stated that the majority of May's claims involved "marshaling assets, paying bills, meetings, and administrative and legal services on Mr. Carroll's behalf."

The court further noted that under MCL 500.3107(1)(a), personal protection benefits were payable for "allowable expenses", which were expenses related to a person's care, recovery, or rehabilitation.

The court concluded that, although the majority of the fees were related to conservator duties, the services were for the most part not related to Carroll's care, recovery, or rehabilitation, as required under MCL 500.3107(1)(a).

On appeal, Mr. May argued that the trial court should have ordered AAA to pay the entire amount because all of his services were reasonably necessary services for Carroll's care and recovery under MCL 500.3107(1)(a).

In this regard, he maintained that because Mr. Carroll would not have needed a conservator but for the injuries he sustained in an automobile accident, AAA must pay the full amount of the conservator's fees as a reasonably necessary service for Carroll's care.

The Court of Appeals agreed with May and reversed the Probate Court's ruling.

In this regard, the Court of Appeals held that AAA was obligated to pay the entire fee for May's services as a reasonably necessary expense for Carroll's care.

The Court stated that, as the Court found in *Heinz v. Auto Club*, 214 Mich App 195, (1995) with respect to guardianship fees, that the term "care", as used in MCL 500.3107(1)(a), was not restricted to medical care alone. Rather, the type of care provided by a conservator could constitute "care" within the meaning of MCL 500.3107(1)(a).

In addition, the Court held that the conservator expenses were not payable as a replacement service expenses (which has a three year and \$20 per day limitation).

Instead, the Court found that they are indeed, allowable expenses under MCL 500.3107(a) which has no time limits and is only limited to whether the charges are reasonable.



## Michigan Attorney Daniel L. Buckfire

Michigan car accident attorney Daniel L. Buckfire has devoted his career to representing individuals who have suffered serious injuries in car, truck, and motorcycle accidents. He is recognized as a legal expert throughout the State of Michigan on motor vehicles accidents and cases involving Michigan No-Fault Insurance Benefits. Daniel has an undergraduate degree from the University of Michigan School of Business and a law degree from the University of Michigan Law School.

### Court of Appeals Applies New Attorney Fee Rules to No-Fault Case

In *Augustine v. Allstate Insurance Company*, \_\_\_ Mich App. \_\_\_ decided April 26, 2011, (Docket No. 296646) the Plaintiff Shirley Augustine was seriously injured in an auto accident and sought first-party, no-fault benefits from her insurer, defendant Allstate to pay for the permanent attendant care that she now requires.

Defendant paid the benefits for two years but ceased payments over a dispute regarding plaintiff's refusal to provide more detailed documentation of the nature of her care.

The plaintiff brought a lawsuit against Allstate and was victorious, recovering \$371,700 of the \$929,000 that she sought, plus interest in the amount of \$42,254.

The Plaintiff subsequently sought attorney fees pursuant to MCL 500.3148(1) of the No-Fault Act due to the defendant's "unreasonable delay" in making benefit payments.

The trial court awarded attorney fees in the amount of \$312,625 based upon a finding that plaintiff's attorneys had done 543.75 hours of work at \$500 per hour and 51.25 hours at \$300 per hour.

Defendant Allstate appealed the trial court's order awarding plaintiff \$327,090.60 for no-fault first party attorney fees and interest. The sole issue on appeal was the attorney fee award.

On Appeal the Court analyzed the award pursuant to the rule set forth by the Michigan Supreme Court in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

First, the Court held that the insurance company was

improperly denied access to the Plaintiff's counsel's litigation file. The Plaintiff argued that the file was protected by attorney client privilege and the work product doctrine.

The Court rejected Plaintiff's argument and held that the Plaintiff was required to produce the file for Defendant's review, but could redact those portions of the file protected by the privilege and work product doctrine. Otherwise, the Court reasoned, the Defendant would be denied a fair opportunity to properly scrutinize the number of hours claimed by the Plaintiff's attorneys.

Next, the Court held that the trial court erred in awarding Plaintiff's counsel \$500 per hour because the court did not follow the procedure set forth in *Smith, supra*.

In *Smith*, the Michigan Supreme Court held that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, (i.e., factor 3 under Michigan Rules of Professional Conduct (MRPC) 1.5(a)).

In determining this number the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case.

The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. Thereafter, the court should consider the remaining factors set

forth in *Wood v. DAIIE*, 413 Mich 573 (1982) and the MRPC to determine whether an up or down adjustment is appropriate.

These factors include: (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.

In addition, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. The Court also emphasized that the fee customarily charged in the locality for similar legal services should be the measure, not the fees paid to the top lawyers by the most well-to-do clients.

The Court of Appeals held that the trial court in *Augustine* failed to properly apply *Smith, supra*. The Court held that it was error to admit attorney letters in support of the fee calculation that were inadmissible hearsay under MRE 803(6) and MRE 803(24); and to award an amount of attorney fees unsupported by sufficient evidence of work performed and hours worked.

Accordingly, the Court of appeals vacated the attorney fee award and remanded for rehearing and redetermination consistent with *Smith, supra*.

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**Court Sets Forth Proof Required For College Student’s No-Fault Wage Claim**

In *Soriano v. Abbas*, unpublished opinion per curiam of the Court of Appeals decided May 19, 2011, (Docket No. 296517) the issue was whether an unemployed college student is eligible for work loss benefits if she does not provide specific evidence that she would have completed a four year degree and would have secured employment utilizing that degree but for the accident.

The case law requires an unemployed student to provide specific evidence of how much money she would have made in order to be eligible for work loss damages. That is, the evidence provided by a plaintiff must be specific enough to calculate loss based on actual earnings not future possibilities or expected earnings.

The No-Fault Act allows a seriously injured person to recover work loss damages in tort arising from the ownership, use or maintenance of a motor vehicle. See MCL 500.3135(3)(c); see also MCL 500.3107(1)(b). “Work loss” is defined as “income [which the injured party] would have

received *but for* the accident.”

A claim for loss of earning capacity is not recoverable under the no-fault act. Lost earning capacity is what an injured party *could* have earned but for the accident, whereas work loss is what an injured party *would* have earned but for the accident.

The Court discussed the prior cases of *Swartout* and *Gerardi*. The Court’s held in those cases that an unemployed college student seeking work loss benefits must provide specific evidence of wages that would, rather than could, have been earned but for the injuries.

Unlike the plaintiff in *Swartout*, the plaintiff in this case did not establish the source of her employment, the date of her employment, or her exact wage.

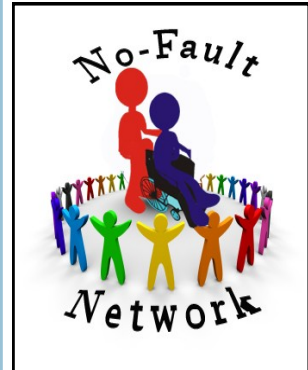
Plaintiff did present evidence from her expert that it is more likely than not that, but for the accident, she would have successfully completed college.

She also presented evidence that, statistically, it is more likely than not that, but for the accident, she would have earned income over her lifetime at least in the average range for a female college graduate with an average life expectancy.

However, such general proofs were rejected by the Court in *Gerardi* and found not to support a claim for work loss benefits.

Based on the Court’s analyses and rationales in both *Swartout* and *Gerardi*, the Court held that the plaintiff was required to present specific evidence that she would have completed her degree and evidence of the source of her employment post graduation, including date of employment and wage.

Plaintiff failed to provide such evidence, and thus, failed to establish a viable claim for work loss benefits.



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**ASK DAN - The No-Fault Insurance Expert**



**Q:** Can a person injured in an auto accident obtain wage loss benefits if they were being paid cash?

**Dan:** Yes. The Court’s have held that it does not matter if a person was being paid cash, as long as the person can provide proof of income. However, it may be necessary to file tax returns to show that the income was before the accident.

**Q:** If a person loses his or her job due to injuries from an accident, is the person still entitled to no-fault wage loss benefits?

**Dan:** Yes. The no-fault insurer is still required to pay wage loss benefits, even if when the person is cleared to work by his or her physician. However, once the person is no longer deemed disabled, he or she must make reasonable efforts to find employment.

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## Our No-Fault Service Provider Spotlight

*GENEX Services, Inc.*  
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*Ph: 800-838-4115*      *www.genexservices.com*

This month we spotlight GENEX Services, integrated care management services in the occupational, non-occupational, auto, and group healthcare markets. GENEX clients include self-insured employers, insurance carriers, managed care organizations and third party administrators. Founded in 1978, their team of medical and business professionals provide care solutions to more than 1,500 clients from locations throughout the United States, including Michigan, as well as Puerto Rico and Canada.

The services GENEX offers to their clients include case management, nationwide medical review, Medicare set-aside and life care planning, utilization review, early intervention Social Security disability representation, and information management. GENEX customizes and tailors the programs used by clients according to the business model and individual need of each client.

GENEX mission and vision is to provide exceptional healthcare and disability management solutions to their customers and to be a strategically important business partner. Acting as a visual guiding principle of GENEX's mission and vision, GENEX created the "Service Profit Chain," which can be viewed on their website. GENEX also created the network, GENEX Medical Diagnostic Network (MDN), which provides a single point of service to streamline the entire diagnostic process from referral to final report. Cost effective, time efficient scheduling of diagnostic services, including MRI's, CT scans, and bone scans are available through the nationwide GENEX MDN.



**GENEX Services, Inc.**  
**employees Michelle Rowland**  
**and Regina Bennett.**

**To nominate yourself or another no-fault provider for the No-Fault Service Provider Spotlight, please e-mail your nomination to [Kathryn@BuckfireLaw.com](mailto:Kathryn@BuckfireLaw.com). Our newsletter is read by 1,000 readers every month!**