



*Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.*

## **PROBATE LAW CASE SUMMARY**

**BY:** Alan A. May



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He was selected for inclusion in the 2007 through 2011 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 and 2012 compilations of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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**DT:** November 3, 2011

**RE:** Conservatorship of Deanna Theresa Cisneros  
STATE OF MICHIGAN COURT OF APPEALS

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### **BASEBALL STATS AND LORE:**

In the analysis of the attached probate case you will see that I have reiterated the “but for” argument used by the Court of Appeals.

Lets apply the “but for” argument to baseball.

I have made up a team of good players who would have been great “but for” something, and a great team that could have been greater “but for” something.

### GOOD TEAM

#### Third base:

Buck Weaver – Had eight good years in the majors when he was thrown out because of the Black Sox’s scandal.

#### Second base:

Ken Hubbs – On his way to breaking Lou Gehrig’s longevity record when he died in a plane crash. Also an excellent fielder.

#### Shortstop:

Ray Chapman – Killed by a Carl Mays’ fast ball in 1920.

#### First base:

Eddie Waitkus – Shot in the heart by a woman who said “if I can’t have you I don’t want anyone to have you.” Waitkus was the basis of the hero in the novel “The Natural.” Unlike Roy Hobbs, in “The Natural,” Eddie Waitkus did make a comeback. At the time he was shot he had a lifetime batting average of .300. He never reached that again.

#### Catcher:

Thurman Munson – Plane crash

#### Outfield:

Pete Reiser – Ran into left field wall and was never the same.

#### Outfield:

Tony Conigliaro – Beaned by a Jack Hamilton fast ball.

#### Outfield:

Bo Jackson – Football injury to the hip while running for the Oakland Raiders.

#### Pitcher:

Monty Stratton – Shot himself in the right leg while hunting rabbits with a pistol which was holstered. He had to have his leg amputated and never came back, although he attempted to do so.

#### Pitcher:

Herb Score – Hit by a Gil McDougal line drive in the eye and was never the same.

The following are great players that I think would have been greater “but for” something:

#### Third base:

George Kell – Had polio as a youngster.

#### Shortstop:

Cecil Travis – The greatest player not in the Hall of Fame. Lost two toes from frostbite at the Battle of the Bulge.

#### Second base:

Jackie Robinson – Segregation. I don’t want to repeat the whole Jackie Robinson Story or the effect of segregation, but let’s just go into a few things that segregation brought with it. In this case the “but for” happened before the career and not during the career, but to some extent it transcended. Think about this. He didn’t get to sleep and eat with his team. He would not have had to

hold back on his aggressiveness. He wouldn't have had to endure taunts. He wouldn't have been looked at under a microscope as the first. He wouldn't have had the weight of a black nation on his shoulders. In essence he just would have had to cope with the exigencies of baseball rather than the exigencies of baseball and life. He would have experienced major and minor league baseball earlier.

**First base:**

Lou Gehrig – Lou Gehrig's Disease

**Catcher:**

Roy Campanella – Car accident

**Outfield:**

Roberto Clemente – Plane crash

**Outfield:**

Joe Dimaggio – Multiple injuries and World War II

**Outfield:**

Ted Williams – World War II and Korea

And, as an extra one who could have been the greatest of all but for the Black Sox scandal, when there was no proof to tie him to it – Shoeless Joe Jackson.

**REVIEW OF CASE:**

Reference Files: Heinz  
First Party Benefits

This case is now the second in a series following *May v Auto Club Insurance Association*, allowing benefits that the insurance industry has been rejecting and, to some extent, broadening *May*.

The Court of Appeals is dealing with a conservatorship and asks the question whether the purely economic affairs qualify as allowable expenses?

The court goes into *Griffith v State Farm*, 472 Mich 521, which is a case of limitation and cites with italics the words “*for an injured person's care, recovery or rehabilitation.*” The context suggests that care must be related to the insured's injury.

The court then goes on to reiterate *Heinz* to say that the damages that are reimbursable are not limited to medical.

The court distinguishes *Shields*, 254 Mich App 367, by saying that the estate and conservator were only necessary there because of minority not injury.

The court then looks at some language in *Griffith* relative to food and said that food would be necessary in any event.

The court then defined *May* “rather it concluded that the type of care provided by the guardian could constitute ‘care’ within the meaning of MCL 500.3107(1)(A) and said that there was very little difference between the care given by a guardian and a conservator.”

Then in its own language the Court of Appeals said “a conservatorship may necessarily be part of the protected person’s ‘care’ because he could no longer manage his own affairs as a result of the closed head injury.”

The court then correctly states that the legal affairs which were billed would not have been necessary “but for” the accident, and those expenses were “allowable expenses.”

You can imagine that I agree with the opinion.

AAM:jv:700200v2  
Attachment

STATE OF MICHIGAN  
COURT OF APPEALS

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In re Conservatorship of DEANNA THERESA  
CISNEROS.

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MARK A. FULLMER, Successor Conservator of  
DEANNA THERESA CISNEROS, a Protected  
Person,

Petitioner-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Respondent-Appellant.

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UNPUBLISHED  
September 27, 2011

No. 298922  
St. Clair Probate Court  
LC No. 07-110072-CA

Before: SERVITTO, P.J., and MARKEY and K.F. KELLY, JJ.

PER CURIAM.

On November 8, 2000, Deanna Theresa Cisneros suffered significant injuries in an automobile accident and a conservatorship was opened on her behalf. The initial conservator was removed by the probate court and petitioner, Mark A. Fullmer, was appointed as successor conservator. Respondent, Auto Club Insurance Association, appeals as of right from an order of the probate court which granted petitioner reimbursement in the amount of \$11,274 for his efforts in the defense of Cisneros in real estate and indebtedness disputes, as well as fees for legal work provided on behalf of Cisneros to recover no-fault insurance benefits. The probate court found that the fees were qualified allowable expenses under § 500.3107(1)(a) of Michigan's No-Fault Insurance Act, MCL 500.3101 *et seq.* We affirm.

I. STANDARD OF REVIEW

At issue in this case is whether or not expenses incurred by a conservator in the handling of a protected person's purely economic affairs qualify as "allowable expenses" under MCL 500.3107(1)(a). "Whether a cost constitutes an allowable expense under MCL 500.3107(1)(a) is a question of statutory construction, subject to review de novo." *Hoover v Michigan Mut Ins Co*, 281 Mich App 617, 622; 761 NW2d 801 (2008).

## II. ANALYSIS

MCL 500.3107(1)(a) provides the following with respect to payment of personal protection insurance benefits for “allowable expenses”:

(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 reasonable necessary products, services and accommodations for an injured persons care, recovery, or rehabilitation. . . .

In *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005), the Michigan Supreme Court provided further explanation as to the meanings of “care,” “recovery,” and “rehabilitation.” Under *Griffith*, “expenses for ‘recovery’ or ‘rehabilitation’ are costs expended in order to bring an insured to a condition of health or ability sufficient to resume his preinjury life.” *Griffith*, 472 Mich at 535. “Care” is defined as “expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident.” *Id.* As mentioned in *Griffith*,

it is important to note that the statute does not require compensation for any item that is reasonably necessary to a person’s care in general. Instead, the statute specifically limits compensation to charges for products or services that are reasonably necessary “for an *injured person’s* care, recovery, or rehabilitation.” (Emphasis added.) This context suggests that “care” must be related to the insured’s injuries. [*Id.* at 534.]

Petitioner relies heavily on *Heinz v Auto Club Ins Ass’n*, 214 Mich App 195; 543 NW2d 4 (1995). In *Heinz*, we rejected the argument that allowable expenses under MCL 500.3107(1)(a) were limited to medical expenses only and held that “if a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian or conservator for that person, the services performed by the guardian and conservator are reasonably necessary to provide for the person’s care.” *Heinz*, 214 Mich App at 198.

*Heinz* was distinguished in *re Estate of Shields*, 254 Mich App 367; 656 NW2d 853 (2002). In that case, the petitioner was appointed conservator of an estate established for his infant daughter following an automobile accident. *Shields*, 254 Mich App at 368. The estate was funded from a payment received following settlement of a claim against the driver of the vehicle that struck the minor. *Id.* We concluded that the conservatorship was only necessary because the beneficiary of the estate was “a minor, unable to oversee her own financial affairs.” *Id.* at 370. Thus, unlike the situation in *Heinz*, “the conservatorship . . . , and its related costs, did not ‘arise out of’ the accident for which respondent was obligated to pay [personal injury protection] benefits.” *Id.*

Respondent argues that the holding in *Griffith* greatly restrains the rule of *Heinz* and leaves respondent free from liability with regard to fees charged for legal services provided by a conservator that the protected party would have required had they been injured or not. Here, there is no question that the provision of conservatorship was “necessitated by the injury sustained in the motor vehicle accident,” and there is no question that Cisneros’s incapacitation was solely the result of injuries sustained due to an automobile accident. In other words, but for the accident, a conservator would not have been needed. Moreover, there is no dispute as to whether the expenses charged by petitioner were reasonable. Rather, the question is whether petitioner’s expenses were necessary for Cisneros’s care, recovery or rehabilitation, given that they were not incurred “in order to bring an insured to a condition of health or ability sufficient to resume his preinjury life.” *Griffith*, 472 Mich at 535.

*Griffith* explains 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.” *Griffith*, 472 Mich at 535. Nonetheless, *Griffith* concluded that the food costs in issue were not “necessary for [Griffith’s] care because of the injuries sustained in the accident.” *Id.* at 536. “In fact,” the Court observed, “if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now.” *Id.*

We looked to both *Griffiths* and *Heinz* in our recent decision *May v Auto Club Ins Ass’n*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 292649, issued April 26, 2011). In that case, the probate court determined that because the majority of the fees sought by the conservator “involved ‘marshalling assets, paying bills, meetings, and administrative and legal services’” for the protected person in issue, they were not allowable expenses under MCL 500.3107(1)(a). *May*, slip op p 2. We disagreed, noting:

*Heinz* clearly concluded that the term “care,” as used in MCL 500.3107(1)(a), was not restricted to medical care alone. Rather, it concluded that the 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.* at slip op pp 3-4.]

A conservatorship was necessary as a part of the protected person’s “care” because “he could no longer manage his own affairs as a result of a closed head injury.” *Id.* at slip op p 5. Citing MCL 700.5401(4), which provides for appointment of a conservator for “an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively,” *May* concluded that the services provided by the petitioner “are extraordinary professional services related to [the protected person’s] care.” *Id.* at slip op pp 4-5.

We then addressed the respondent’s argument that a conservatorship did not constitute an allowable expense under MCL 500.3107(1)(a):

Here, [the protected person] had a closed head injury that prevented him from being able to manage his own affairs—that is, [his] need for a conservator was causally related to the injuries [he] sustained in an accident. Admittedly,

even if [he] had not been in the accident, he would have needed to pay his bills and manage his accounts and assets. The question therefore becomes whether the conservator's actions were needed for [his] care, recovery, or rehabilitation *from the injury*. Unlike the case in *Griffith*, petitioner here was not seeking payment of the actual expenses that he would have incurred—such as the cost of food—nor was he seeking to recover the cost of engaging a real estate agent to sell his home or the cost of advertisements. These expenses would likely have been incurred regardless of the accident. Instead, the claim here is for the *service* of having a conservator *manage* these matters; and this would not have been necessary but for the accident-related injury. . . . [B]ecause the need for the conservator was causally connected to [the protected person's] injury and the expense is reasonably necessary for his "care," it too is compensable under MCL 500.3107(1)(a). Accordingly, *Griffith* does not bar recovery of the conservator's fee. [*May*, slip op pp 6-7 (emphasis in original).]

Pursuant to *May*, we conclude that because the conservatorship was necessary to care for Cisneros as a result of bodily injuries she suffered in an automobile accident and because the reasonable expenses incurred by petitioner in managing Cisneros's business and legal affairs would not have been necessary but for the accident, those expenses were "allowable expenses" under MCL 500.3107(1)(a).

In reaching this conclusion, we specifically reject respondent's argument that petitioner's claim was one for "replacement costs" under MCL 500.3107(1)(c), which provides for payment of "[e]xpenses 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." In its order, the trial court noted:

As is apparent from the statutory citations, MCLA 500.3107(1)(a) and (c) are part of the same section of the No Fault Act, which identifies the different types of personal protection insurance benefit payments required. Adopting Auto Club's argument would give subsection (c) supremacy over subsection (a) and, in effect, would make the latter section without practical effect. Under Auto Club's reading, any services provided by a guardian or conservator would have been performed by the ward and, given the limitations of subsection (c), would be limited to \$20 per day for the first three (3) years after the date of the accident. Any charges after that date would not be an allowable expense, and accordingly not recoverable. The Court believes such an interpretation is contrary to the explicit language of the statute.

We agree with the trial court's rationale. In interpreting a statute, we must give effect to every word, phrase, and clause in the statute and avoid an interpretation that would render any part of the statute surplusage or nugatory. *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

**Affirmed. As the prevailing party, petitioner may tax costs pursuant to MCR 7.219.**

**/s/ Deborah A. Servitto  
/s/ Jane E. Markey  
/s/ Kirsten Frank Kelly**