

STATE OF MICHIGAN
IN THE SUPREME COURT

RODNEY McCORMICK,

Plaintiff/Appellant,

v

LARRY CARRIER, an individual,

Defendant/Appellee.

136738
Supreme Court Case No. ~~136783~~
Court of Appeals Case No. 275888
Lower Court Docket No. 06-83549-NI

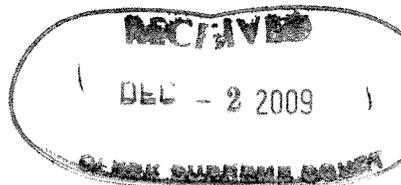
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AMICUS CURIAE BRIEF OF
COALITION PROTECTING AUTO NO-FAULT (CPAN)

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Dated: December 2, 2009

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STATEMENT OF INTEREST OF AMICUS CURIAE CPAN

The Coalition Protecting Auto No-Fault (CPAN) is a broad-based, bipartisan coalition of 16 medical provider associations and 11 consumer organizations who have united together for the sole purpose of preserving the unique, model status of the Michigan automobile no-fault insurance system – an injury reparations system that has consistently garnered national accolades since its inception in 1973. Central to the mission of CPAN is to oppose the legislative and judicial erosion of the No-Fault Law that has occurred over the last decade. CPAN’s membership associations are identified below:

CPAN: Coalition Protecting Auto No-Fault	
Medical Provider Groups	Consumer Organizations
1. <i>Michigan Academy of Physicians Assistants</i>	1. <i>Brain Injury Association of Michigan</i>
2. <i>Michigan Assisted Living Association</i>	2. <i>Disability Advocates of Kent County</i>
3. <i>Michigan Association of Chiropractors</i>	3. <i>Michigan Association for Justice</i>
4. <i>Michigan Association of Rehabilitation Organizations</i>	4. <i>Michigan Citizens Action</i>
5. <i>Michigan Brain Injury Providers Council</i>	5. <i>Michigan Consumer Federation</i>
6. <i>Michigan College of Emergency Physicians</i>	6. <i>Michigan Paralyzed Veterans of America</i>
7. <i>Michigan Dental Association</i>	7. <i>Michigan Partners for Patient Advocacy</i>
8. <i>Michigan Health & Hospital Association</i>	8. <i>Michigan Protection and Advocacy Service</i>
9. <i>Michigan Home Health Association</i>	9. <i>Michigan State AFL-CIO</i>
10. <i>Michigan Nurses Association</i>	10. <i>Michigan Tribal Advocates</i>
11. <i>Michigan Orthopedic Society</i>	11. <i>UAW Michigan CAP</i>
12. <i>Michigan Orthotics and Prosthetics Ass’n</i>	
13. <i>Michigan Osteopathic Association</i>	
14. <i>Michigan Rehabilitation Association</i>	
15. <i>Michigan State Medical Society</i>	
16. <i>Disability Network Michigan</i>	



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It is the fervent belief of CPAN that Michigan's auto no-fault insurance system cannot survive unless the Michigan Legislature and the Michigan Appellate Courts understand and protect the delicate balance of trade offs that created this system and that is essential to preserving it in the future. Specifically, the foundation for our no-fault law is the basic legislative quid pro quo that made its enactment politically possible—the creation of a remarkably balanced reparations system that assures payment of full lifetime economic loss damages to all accident victims regardless of whether they caused their own injury, in exchange for placing fair and reasonable limitations on the rights of innocent victims to recover damages for noneconomic losses caused by the party at fault. If this sensitive equilibrium is disturbed, the Michigan no-fault system cannot exist as it was originally conceived.

Unfortunately, this requisite delicate balance was destroyed when the Michigan Supreme Court released its opinion in *Kreiner v Fischer*, 471 Mich 109, 683 NW2d 611 (2004). This controversial and much criticized 4-3 decision has barred hundreds, if not thousands of innocent auto accident victims from recovering damages for serious personal injuries that clearly would have been compensable throughout the entire history of the Michigan no-fault system prior to *Kreiner*. *Kreiner* changed everything. It denied injured victims the right to noneconomic damages unless their injuries were so extensive and pervasive that the injuries caused a significant change in “*the course and trajectory*” of the injured person’s life and caused the injured person to be “*generally*” or “*for the most part*” unable to live the life he or she led prior to an accident. *Kreiner*, pp 130-31. Under such a Draconian standard, victims who have suffered injuries serious enough to require inpatient hospitalization and major surgery, and who have been left with significant residual



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disabilities have been denied access to the compensation that the Michigan no-fault statute has consistently guaranteed. In the process, the *Kreiner* decision has immunized drunk drivers and reckless drivers who seriously injure others by absolving them from any civil liability unless the injuries inflicted are crippling. For example, see *Gagne v Schulte*, Court of Appeals No. 264788 (February 28, 2006) and *Cottrill, et al v Senter and Fenton Lanes, Inc.*, Court of Appeals No. 285216 (June 23, 2009). This was never how the Michigan Legislature intended the no-fault law to work.

From the time the *Kreiner* decision was released on July 23, 2004 through September 1, 2009, there have been approximately 246 unpublished Court of Appeals decisions implementing its severe limitations. *Of those 246 decisions, the innocent victim lost approximately 196 times!* What is particularly disconcerting about this body count is that everyone of those victims represent scores of other victims who either abandoned their claim or lost it in a lower court ruling as a direct result of the *Kreiner* decision.

Clearly, the Michigan no-fault law in the wake of the *Kreiner* decision is woefully out of balance. This situation has caused significant political instability which threatens the continued viability of the Michigan no-fault system as we know it. That is exactly why CPAN has made "fixing *Kreiner*" one of its top priorities. CPAN respectfully submits that the only way to do this is to overrule *Kreiner v Fischer* and restore Michigan to the balanced tort threshold that existed prior to that decision. CPAN believes that the case at bar presents an excellent opportunity for this Court to revisit *Kreiner* and overturn that decision. The injuries suffered by Plaintiff Rodney McCormick, as presented in this litigation, clearly confirm that he sustained injuries that most assuredly constitute "serious impairment of body function" under Section 3135 of the Michigan No-Fault Act and that those



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injuries would have been so construed by any trial or appellate court prior to the *Kreiner* decision. The fact that Mr. McCormick's claim was dismissed by the Court of Appeals under the *Kreiner* standard shows how extreme the "*Kreiner* threshold" has become. Only this Court can stop the ongoing injustice of this decision and restore the essential balance that is so critical to protecting the integrity of the Michigan auto no-fault insurance system.

CONCURRENCE WITH STATEMENT OF THE BASIS FOR JURISDICTION

Amicus Curiae CPAN concurs with the Statement of the Basis for Jurisdiction by Plaintiff-Appellant, Rodney McCormick, in his Brief on Appeal.

CONCURRENCE WITH STATEMENT OF QUESTIONS PRESENTED

Amicus Curiae CPAN concurs with the Statement of Questions Presented as stated by Plaintiff-Appellant, Rodney McCormick, in his Brief on Appeal.

CONCURRENCE WITH STANDARD OF REVIEW

Amicus Curiae CPAN concurs with the Standard of Review as stated by Plaintiff-Appellant, Rodney McCormick, in his Brief on Appeal.

CONCURRENCE WITH COUNTER-STATEMENT OF FACTS

Amicus Curiae CPAN accepts and concurs with the Counter-Statement of Facts as stated by Plaintiff-Appellee, Rodney McCormick, in his Brief on Appeal.



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ARGUMENT

I. THE *KREINER* DECISION FAILED TO APPRECIATE THE FACT THAT, WHEN THE MICHIGAN LEGISLATURE ADOPTED THE CURRENT STATUTORY DEFINITION OF SERIOUS IMPAIRMENT OF BODY FUNCTION SET FORTH IN §3135(7) OF THE NO-FAULT ACT, IT INTENDED TO CREATE A THRESHOLD THAT WAS LESS RESTRICTIVE THAN THE THRESHOLD ADOPTED BY THE SUPREME COURT IN *CASSIDY V McGOVERN*, 415 MICH 483; 330 NW2D 22 (1982).

A. THE HISTORICAL PRELUDE TO THE 1995 THRESHOLD COMPROMISE: *THE ADVISORY OPINION; CASSIDY; DiFRANCO; AND P.A. 222*.

Since the Michigan No-Fault Law (MCL 500.3101, *et seq.*) first went into effect in 1973, the tort threshold provisions of the Act (Section 3135) have always defined a threshold injury as “*death, serious impairment of body function, or permanent serious disfigurement.*” The threshold category of “*serious impairment of body function*” is the threshold that is at issue in the vast majority of auto tort liability claims. The phrase “*serious impairment of body function*” had never been defined by the Legislature until it passed 1995 PA 222 which went into effect in 1996. Prior to the enactment of this new statutory definition, the meaning of “*serious impairment of body function*” was determined by the judicial rulings of the Michigan Supreme Court in three (3) major decisions: *The Advisory Opinion RE: Constitutionality of No-Fault*, 389 Mich 441 (1973); *Cassidy v McGovern*, 415 Mich 483 (1982); and *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986).

In the *Advisory Opinion*, the Supreme Court held that the threshold requirements of “*serious impairment of body function*” and “*permanent serious disfigurement*” are concepts that can be interpreted and implemented by juries and, therefore, do not render the statute



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unconstitutional for reason of ambiguity. The Court concluded, “the phrases are within the province of the trier of fact and are sufficient for legal interpretation.” (*Advisory Opinion*, p 481). The *Advisory Opinion* was the controlling precedent for approximately 10 years until it was superceded by the Supreme Court’s decision in *Cassidy*. During that 10 year period, the general rule was that the issue of serious impairment of body function should be submitted to the jury unless no reasonable mind could differ as to the conclusion. In those limited instances where no reasonable mind could differ, the trial court could rule, as a matter of law, whether the injury rose to the level of serious impairment of body function. See, *McKendrick v Petrucci*, 71 Mich App 200 (1976) and *Vitale v Danylak*, 74 Mich App 615 (1975). Moreover, cases during this initial 10 year period held that serious impairment of body function need not be permanent to be serious and that it was error for a trial court to instruct that serious impairment of body function required an injury “of more than ordinary severity.” See, *Stevens v Hogue*, 85 Mich App 185 (1978) and *Smith v Sutherland*, 93 Mich App 24 (1979). Similarly, an injury need not constitute an impairment of the total body function, such as through an injury to a life sustaining organ like the heart or the liver. On the contrary, impairment of a particular body function was held to be sufficient to meet the threshold. During this period, it was also considered to be error for a trial court to instruct a jury regarding the elements of death and permanent serious disfigurement when the plaintiff’s only claim was that his or her injury constituted serious impairment of body function. See, *McKendrick v Petrucci*, *supra*, and *Karas v White*, 101 Mich App 208 (1980).

The decisions in *Cassidy v McGovern*, *supra*, and *DiFranco v Pickard*, *supra*, set forth fundamentally different definitional views of the threshold requirement of “serious impairment of body function.” The holdings in these cases set the stage for the ultimate



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involvement of the Michigan Legislature when it enacted the current statutory definition of “*serious impairment of body function*.” Therefore, it is critically important to understand the holdings in *Cassidy v McGovern, supra*, and *DiFranco v Pickard, supra*, so that the current statutory definition can be properly interpreted and applied.

The Supreme Court’s decision in *Cassidy v McGovern, supra*, in late 1982 ushered in what is commonly referred to as the “*Cassidy era*,” a four-year period that began in January 1983 and lasted until the end of 1986. A close reading of *Cassidy v McGovern, supra*, reveals that the decision contains six (6) important holdings which are summarized below:

- (1) The *Cassidy* decision held that the question of whether an injury constitutes a *serious impairment of body function* is a question for trial judges unless there is a material factual dispute as to the nature and extent of the injury.
- (2) The *Cassidy* decision held that an injury must be “*objectively manifested*” in order to constitute *serious impairment of body function*. However, the *Cassidy* decision never defined that phrase. Approximately 18 months after the *Cassidy* decision was released, the Court of Appeals rendered its decision in *Williams v Payne, 131 Mich App 403 (1984)*, which defined “*objectively manifested*” as requiring proof of an injury that is “*subject to medical measurement*.” In articulating that standard, however, the *Williams* decision acknowledged that the Supreme Court had never defined the phrase “*objectively manifested*” in *Cassidy* and that it was subject to differing interpretations.
- (3) The *Cassidy* decision required that an injury impair “*an important body function*” in order for the injury to satisfy the threshold. Again, the *Cassidy* decision did not define the phrase “*important body function*.” However, the Court did clarify that it was not necessary to show an impairment of the entire body function, although something more than the impairment of any body function was required.
- (4) The *Cassidy* decision held that an injury must interfere with the plaintiff’s “*general ability to live a normal life*.” In articulating



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this requirement, the *Cassidy* decision did not provide any definitional guidance other than to say that this is an “objective standard” that focuses not on the plaintiff’s normal life, but rather on some objectively-determined, hypothetical “normal life.”

- (5) The *Cassidy* decision held that, in order for an injury to satisfy the serious impairment of body function threshold, it must be “sufficiently serious.” Therefore, “seriousness” was a separate definitional element. Moreover, in determining the seriousness of the injury, the serious impairment of body function threshold should be considered in conjunction with the other threshold requirements, namely death and permanent serious disfigurement. In this regard, the *Cassidy* court held that the Legislature “did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle.”
- (6) The *Cassidy* decision affirmed prior case law and held that the threshold does not require permanent injury.

During the four-year *Cassidy* era there were approximately 59 reported appellate court decisions dealing with various aspects of the *Cassidy* threshold. The majority of those cases were harsh on soft tissue injuries where there was no classic “objective manifestation” in the clinical medical sense. In addition, the “general ability to live a normal life” standard resulted in the disqualification of many plaintiffs for the reason that it was virtually impossible to define what was meant by “a normal life,” thus creating a moving target for most plaintiffs.

In December of 1986, the Michigan Supreme Court spoke again regarding the meaning of *serious impairment of body function* when it released its opinion in *DiFranco v Pickard, supra*. The *DiFranco* opinion was released in December of 1986 and ushered in the “*DiFranco* era,” which was in effect for almost ten years until it was superceded by the



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passage of 1995 PA 222. A close reading of the *DiFranco* decision reveals that it set forth five (5) major substantive rulings:

- (1) The *DiFranco* decision overruled the main holding in *Cassidy* regarding the right to jury trial and threshold issues and held that the question of whether a plaintiff suffered a *serious impairment of body function* is a question of fact for the jury to determine whenever reasonable minds could differ as to the answer.
- (2) The *DiFranco* decision modified the *Cassidy* decision regarding the meaning of the phrase "*objectively manifested injury*." Rather than specifically overruling this requirement, the *DiFranco* Court redefined it by stating that the concept of objective manifestation requires only proof of a "*medically-identifiable injury*" along with evidence "*establishing that there is a physical basis for subjective complaints of pain and suffering*."
- (3) The *DiFranco* decision specifically overruled the *Cassidy* requirement that serious impairment of body function requires an impairment of an important body function. In rejecting this holding, the *DiFranco* case held that the *Cassidy* decision had judicially engrafted this requirement onto the statutory threshold when no such requirement was contained in the statutory language.
- (4) The *DiFranco* decision specifically overruled that aspect of *Cassidy* requiring proof that an injury affected the plaintiff's "*general ability to live a normal life*." The *DiFranco* Court characterized this standard as having created "*an almost insurmountable obstacle*" to proving a threshold injury. The Court held that the test was unworkable because, "*very simply there is no such thing as a normal life*." Therefore, the *DiFranco* Court disregarded the entire concept of looking at "*life impact*" in favor of a more limited inquiry which simply asked two questions: (i) whether the injury impaired a body function and, if so, (ii) whether that impairment was serious. Therefore, as in *Cassidy*, *DiFranco* continued the separate, independent requirement that an injury be "*serious*" in order to satisfy the definition of serious impairment of body function.



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- (5) The *DiFranco* decision also affirmed the longstanding threshold principle that the Michigan threshold does not require a permanent injury.

During Governor John Engler's administration, Michigan voters twice voted on ballot questions that would have amended the Michigan No-Fault Law in a number of ways, including adopting a "*Cassidy*-type threshold." These ballot proposals were known as Proposals C and D, both of which were resoundingly defeated by the voters in the general elections of 1992 and 1994 by margins of approximately 60 to 40 each time.

Nevertheless, in 1995 the Michigan Legislature enacted 1995 PA 222, which set forth the first ever statutory definition of *serious impairment of body function*. This definition appears in Section 3135(7) and states:

"As used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

Although this statutory definition sounds very similar to the *Cassidy* definition of *serious impairment of body function*, it is not the same thing. Rather, it is clearly a statutory hybrid that takes from both the *Cassidy* era as well as the *DiFranco* era. This statutory definition differs from the *Cassidy* definition in three (3) material respects. First, the life impact test under the new statutory definition is *purely subjective*. That is to say, it focuses only on the plaintiff's life, not some hypothetical life as did the more restrictive objective life impact standard of *Cassidy*. Second, the new statutory definition does not define the phrase "*objectively manifested*," thereby leaving the less restrictive *DiFranco* definition of that term wholly intact. And, third, there is no longer any separate inquiry regarding the



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“seriousness” of an injury as there was under both *Cassidy* and *DiFranco*. In this regard, prior to the enactment of 1995 PA 222, the judicial determination of whether an injury constituted serious impairment of body function required a specific finding that the injury was *“serious.”* 1995 PA 222 obviates such an independent and separate inquiry of seriousness because, by its very terms, 1995 PA 222 defines serious impairment of body function with the prefatory phrase, *“as used in this section, serious impairment of body function means. . . .”* It then goes on to set forth three (3) substantive definitional elements that must be demonstrated to satisfy this definition: (1) objectively manifested injury; (2) important body function; and (3) an affect on the person’s general ability to lead his or her normal life. Once that three-part threshold definition of serious impairment of body function set forth in the statute has been satisfied, there is no separate, redundant, definitional requirement that the injury be *“serious.”* In other words, once a plaintiff proves an objectively manifested impairment of an important body function that affects the plaintiff’s general ability to lead his or her normal life, the plaintiff has conclusively proved the existence of a *“serious impairment of body function”* without any further qualitative or substantive requirements of proof.

Further support for the proposition that the Legislature, in enacting 1995 PA 222 did not intend to create a threshold that required nearly catastrophic injury, is the important legislative history that was written prior to the passage of 1995 PA 222. In this regard, the House Legislative Analysis Section, Second Analysis, December 18, 1995 (attached hereto as Exhibit 1), states at page 2 that the purpose of the new threshold language is to:



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“... work toward ensuring that the cases that go forward are deserving of a hearing before a jury. The undeserving and frivolous cases will be weeded out.”
(emphasis added)

Clearly, the Legislature was intending to weed out “*frivolous cases*” when it passed 1995 PA 222. It was not intending to eliminate the kind of cases that have been eliminated by *Kreiner* and its progeny.

The foregoing analysis clearly indicates that the Michigan Legislature reached a political compromise in 1995 when it enacted the new statutory definition of serious impairment of body function set forth in Section 3135(7). The Legislature was obviously aware that the *Cassidy* decision had been extensively criticized because of its harshness. Moreover, the Legislature was obviously mindful that a pure codification of *Cassidy v McGovern* would have been inconsistent with the will of the electorate who defeated two *Cassidy*-type thresholds in the early 1990s. Therefore, the Legislature adopted a threshold definition that was very similar to *Cassidy*, but was clearly less restrictive in the three ways described above. In other words, Section 3135(7) is a “*hybrid*” threshold similar to *Cassidy* but fundamentally different. This important point was widely appreciated by the legal community immediately upon passage of 1995 PA 222 and prior to the *Kreiner* decision.¹



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¹See, “*The 1995 No-Fault Tort Threshold: A Statutory Hybrid*,” 76 Mich BJ 76 (January 1997), The Honorable Robert M. Ransom and George T. Sinas.

B. THE WORST CASE SCENARIO PRINCIPLE: IF AN INJURY WOULD QUALIFY UNDER *CASSIDY*, IT MUST QUALIFY UNDER SECTION 3135(7).

The statutory definition of “*serious impairment of body function*” adopted by the Legislature in 1995 and set forth in Section 3135(7) did not receive judicial attention by the Michigan Supreme Court for approximately eight years. The silence was finally broken when the Supreme Court released its opinion in *Kreiner v Fischer*, 471 Mich 109 (2004). In this four-to-three decision written by Chief Justice Clifford Taylor, the Court focused on that element of the statutory definition that requires an impairment which affects “*the person’s general ability to lead his or her normal life.*” Even though the *Kreiner* decision contains much discussion regarding the meaning of this statutory phrase, one of the most important pronouncements by the Supreme Court regarding this element of the definition appeared in the Supreme Court’s April 9, 2003 Order reversing the Court of Appeals decision in the first *Kreiner* case [251 Mich App 513 (2002)] and remanding that case back to the Court of Appeals for redetermination [*Kreiner v Fischer*, 468 Mich 884 (2003)]. In this Order, the Supreme Court clearly stated that the statutory definition of serious impairment of body function does not require proof that an injury “*seriously*” or “*substantially*” affected the injured person’s normal life. Accordingly, the Supreme Court ruled that the trial court had committed error when it required Mr. Kreiner to prove that his injuries “*seriously*” affected his ability to lead his normal life. The Court went on to say that the real inquiry under the statutory definition is whether the plaintiff’s “*general ability to lead his or her normal life*” has been affected. In this regard, the Court stated in its Order reversing and remanding:



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“In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the matter is remanded to that court for further proceedings. . . . The circuit court granted defendant’s motion for summary disposition, concluding that plaintiff’s impairment is not ‘serious enough’ to meet the tort threshold. The Court of Appeals reversed, concluding that plaintiff is not required to show that his impairment ‘seriously’ affects his ability to lead his normal life in order to meet the tort threshold. The Court of Appeals then concluded that, if the facts as alleged by plaintiff are true, his impairment has affected his general ability to lead his normal life. In our judgment, both the circuit court and the Court of Appeals erred. Although a serious effect is not required, any effect does not suffice either. Instead, the effect must be on one’s general ability to lead his normal life. . . .”
Kreiner v Fischer, 468 Mich 884 (2003) (emphasis added)

When the Court released its decision in the *Kreiner* case, the Court reviewed the history of the “*serious impairment of body function*” threshold leading up to the enactment of 1995 PA 222 and, in footnote 8, stated that, for the most part, the 1995 statute marked a return to the threshold that was in existence under *Cassidy v McGovern, supra*. In this regard, the Court stated in footnote 8:

“As should be evident, and as previous panels of the Court of Appeals have noted, the most uncomplicated reading of the 1995 amendment is that the Legislature largely rejected DiFranco in favor of Cassidy. See e.g., Jackson v Nelson, 252 Mich App 643, 649-650 (2002); . . . and Miller v Purcell, 246 Mich App 244 (2001).”
Cassidy, supra, fn 8

Based upon the comments in the Court’s leave app order and the concepts set forth in footnote 8 of the *Kreiner* decision, it is clear that the *Kreiner* decision embraces the notion that the Legislature had codified the *Cassidy* threshold. Although that conclusion flies in the face of the clear substantive differences between the statutory definition set forth in Section 3135(7) and the specific language in *Cassidy v McGovern*, under no circumstances whatsoever could any defensible argument be made that when the Legislature enacted the



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new statutory definition of *serious impairment of body function*, it had actually created a threshold that was more restrictive than *Cassidy*. Any such theory would be highly disingenuous given the clear facts that the Legislature adopted a subjective rather than an objective life impact standard, did not disturb the *DiFranco* definition of objective manifestation, and did not require a separate determination of seriousness. In spite of that reality, the most restrictive interpretation of the 1995 threshold that would be possible in the wake of the *Kreiner* decision would be the interpretation adopted by the Supreme Court in *Cassidy v McGovern*. Thus, the need to satisfy the *Cassidy* threshold would be the “*worst case scenario*” for any plaintiff. On the other hand, if an injury would qualify under *Cassidy*, it must, by definition, qualify under Section 3135(7). All of this illustrates how critically important it is to fully appreciate the type of injury that the Supreme Court, in *Cassidy v McGovern*, found to be a “*serious impairment of body function*” as a matter of law.

In the *Cassidy* case, plaintiff Leo Cassidy suffered a fracture of both bones in his lower leg which required inpatient hospitalization, several leg casts and seven months of disability. There is no indication in the opinion that Leo Cassidy underwent any type of surgery. Moreover, the *Cassidy* opinion confirms that Mr. Cassidy went on to achieve a full recovery with no significant residual impairments approximately 15 months after he was injured. That is the type of “*garden variety*” orthopedic injury that the *Cassidy* decision found to cross the threshold as a matter of law. Put very simply, Leo Cassidy had a broken leg that healed without any significant problems - nothing more!

A quick review of the *Cassidy* era case law clearly confirms that it did not require injuries that were permanent or nearly catastrophic. On the contrary, cases involving



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typical fractures, relatively minor surgical procedures, and limited periods of work loss were often found to satisfy the more restrictive definition of serious impairment of body function during the four-year *Cassidy* era, or, at least, to raise an issue of fact for the jury.²

The foregoing clearly establishes that the “*worst case scenario*” for any injured plaintiff under the threshold defined in Section 3135(7) is to prove that the injuries sustained would survive a *Cassidy*-type threshold. For the reasons previously stated, even that statement is not legally accurate, given the fact that the statutory threshold under Section 3135(7) is clearly more lenient than the *Cassidy* threshold. However, there can be no reasonable dispute with the proposition that if a plaintiff suffers an injury that is similar in severity to the injuries suffered by Leo Cassidy, than those injuries should be considered a “*serious impairment of body function*” as a matter of law under Section 3135(7). *What is astonishing, however, is the fact that the definition of serious impairment of body function articulated by the Supreme Court in Kreiner v Fischer has actually resulted in a threshold that is far more restrictive than the Cassidy threshold!* This is especially troublesome,



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²*LaHousse v Hess*, 125 Mich App 14; 336 NW2d 219 (1983)–fractured femur requiring surgery; *Range v Gorosh*, 140 Mich App 712; 364 NW2d 686 (1985)–six fractured ribs, fractured right clavicle, and fractured toe requiring hospitalization; *Esparaza v Manning*, 148 Mich App 371; 384 NW2d 168 (1986)–six fractured ribs requiring hospitalization; *Freel v DeHaan*, 155 Mich App 517; 400 NW2d 316 (1986)–compression fractures of the first and second lumbar vertebra requiring hospitalization; *Argenta v Shahan*, 135 Mich App 477; 354 NW2d 796 (1984)–soft tissue injuries to the back with passive range-of-motion limitation; *Galli v Reutter*, 148 Mich App 313; 384 NW2d 43 (1985)–aggravation of a pre-existing arthritic condition involving disc degeneration and nerve root compression; *Wood v Dart*, 154 Mich App 586; 397 NW2d 843 (1986)–soft tissue injury to the cervical spine and lumbosacral nerve root irritation with hospitalization; *Washington v Van Buren County Road Commission*, 155 Mich App 527; 400 NW2d 668 (1986)–aggravation of a pre-existing low back degenerative disc condition.

given the fact that, in its original Order reversing and remanding the Court of Appeals in *Kreiner v Fischer #1*, the Supreme Court acknowledged that under the statutory language of Section 3135(7), a “*serious affect is not required.*” [468 Mich 884 (2003)] Moreover, in the *Kreiner* decision itself, the Supreme Court pronounced that “*the Legislature largely rejected DiFranco in favor of Cassidy*” (see, *Kreiner*, page 121, fn 8). Unfortunately, however, the *Kreiner* decision went on to render a definition of serious impairment of body function far more demanding than *Cassidy* ever espoused. As a result, the current threshold as interpreted by *Kreiner* and its progeny has evolved into a tort threshold that is the most oppressive in the 36 year history of the Michigan no-fault law. Something is dreadfully wrong here.



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II. THE SUBSTANTIVE LANGUAGE OF SECTION 3135(7), REVOLVES AROUND THREE CONCEPTS: (1) "NORMAL LIFE," NOT "WHOLE LIFE," OR "THE COURSE OR TRAJECTORY OF LIFE," (2) "QUALITY OF LIFE," NOT MERE ACTIVITIES OF LIFE; AND (3) "ABILITY" TO PERFORM, NOT MERE PERFORMANCE. THESE THREE CONCEPTS WERE EITHER NOT ADDRESSED IN *KREINER* OR NOT ADDRESSED PROPERLY.

A. THE LANGUAGE OF SECTION 3135(7) FOCUSES ON THE INJURED PERSON'S "NORMAL LIFE," NOT HIS OR HER "WHOLE LIFE" OR "ENTIRE NORMAL LIFE."

In 1995 PA 222, the Michigan Legislature enacted the first-ever statutory definition of the threshold phrase "serious impairment of body function." The definition is set forth in MCL 500.3135(7), which states:

"(7) As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

The "fundamental rule and primary goal" of statutory construction is to give effect to the Legislature's intent. *Apsey v Mem'l Hosp*, 477 Mich 120; 127; 730 NW2d 695 (2007). Furthermore, in order properly to construe the intent of the Legislature, it should be assumed that the Legislature meant to adopt the "plain meaning" of the words and phrases it enacted. *Parkwood Ltd Dividend Hous Ass'n v State House Dev Auth*, 486 Mich 763, 772; 664 NW2d 185 (2003).

Section 3135(7) provides that an injured person can recover noneconomic damages sustained from an auto accident when the injuries affect the injured person's "general ability to lead his or her normal life." The word "normal" is commonly defined as "usual or ordinary:



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typical." *Webster's II New Riverside Dictionary, Revised Edition*, p 468. Other definitions include "conforming to a norm or standard." *The American Heritage Dictionary*, 3rd Edition, p 568. In other words, normal life is made up of all those elements that comprise a person's everyday life, including things like state of mind, physical comfort, absence of pain, and social interaction. To the extent an accident injury changes or impacts a person's normal everyday life, then that person's general ability to lead his "normal life" has been affected by a motor vehicle accident.

In interpreting the Legislature's plain use of "normal life" in Section 3135, the Michigan Supreme Court held that "normal life" really means a person's "whole life" or "entire normal life." Moreover, the Court held that the "course or trajectory" of the plaintiff's life must be altered or changed. In addition, the Court held that the plaintiff must be "generally unable" or "for the most part unable" to live his or her normal life. All of these so-called interpretations of the Legislature's chosen term "normal life," contravenes the plain, unambiguous language of Section 3135(7). The *Kreiner* Court elaborated on its interpretation of the statutory phrase "normal life" in the following passage:

"The specific issue in these consolidated cases is whether plaintiffs' impairments affect their general ability to lead their normal lives.

In order to be able to maintain an action for noneconomic tort damages under the no-fault act, the 'objectively manifested impairment of an important body function' that the plaintiff has suffered must affect his 'general ability' to lead his normal life. Determining whether the impairment affects a plaintiff's 'general ability' to lead his normal life requires considering whether the plaintiff is 'generally able' to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.



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Random House Webster's College Dictionary (1991) defines 'general' as 'considering or dealing with broad, universal, or important aspects.' 'In general' is defined as 'with respect to the entirety; as a whole.' Id. 'Generally' is defined as 'with respect to the larger part; for the most part.' Id. Webster's New International Dictionary defines 'general' as 'the whole; the total; that which comprehends or relates to all, or the chief part; a general proposition, fact, principle, etc.;—opposed to particular; that is, opposed to special.' Accordingly, determining whether a plaintiff is 'generally able' to lead his normal life requires considering whether the plaintiff is, 'for the most part' able to lead his normal life.

*In addition, to 'lead' one's normal life contemplates more than a minor interruption in life. To 'lead' means, among other things, 'to conduct or bring in a particular course.' Given this meaning, the objectively manifested impairment of an important body function must affect the **course** of a person's life. Accordingly, the effect of the impairment on the course of a plaintiff's entire normal life must be considered. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the 'serious impairment of body function' threshold."*

Kreiner, supra, at 130-131 (footnotes omitted) (emphasis in original)

Not only did the *Kreiner* Court go beyond the statutory language by requiring the plaintiff to show that the injury affected his "entire normal life," the Court compounded the error by adding the requirement that the injury must affect the "course or trajectory" of the plaintiff's "entire normal life."

An example will illustrate the fallacy of the *Kreiner* Court's interpretation of Section 3135. Suppose that John Q. Plaintiff is injured in an automobile accident, in which he sustained an elbow injury, diagnosed as tendinitis. After the accident Plaintiff went to play golf with his brother. While on the golf course, Plaintiff discovers that every time he raises his club to swing at the ball, he experiences extreme discomfort and pain in his



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elbow. In fact, it is so painful for Plaintiff to play golf, that he leaves the golf course after two holes, and is never able to play again.

Does Plaintiff's inability to play golf affect his general ability to lead his normal life? It depends on whether golf is a part of Plaintiff's normal life. That is, did the Plaintiff typically play golf, or did he do so only rarely? If Plaintiff had only played golf two times in the past 10 years, and in fact, hated golf, but only went with his brother because he was invited to a special outing, then the fact the Plaintiff can no longer play golf is not a threshold-crossing injury because golf is not part of the Plaintiff's "*normal life*." While it is true that the injury affected his ability to play golf, and thus his life that one particular day, golf was not part of the Plaintiff's normal life, and hence, his difficulty playing golf is not sufficient to cross the threshold.

If in contrast, however, Plaintiff was an avid golfer who played nearly every weekend and sometimes during the week, and had planned family vacations around golfing destinations, then golf would be part of Plaintiff's "*normal life*." In that scenario, Plaintiff's inability to play golf would affect his general ability to lead his "*normal life*." This is the inquiry the Legislature intended when it enacted 1995 PA 222 – does the injury affect the "*normal life*." The *Kreiner* Court was mistaken because it established a test that went beyond the actual text of Section 3135(7) by requiring a plaintiff to show that the injury affected his or her "*entire normal life*," "*whole life*," and the "*course and trajectory of life*," rather than just "*normal life*" as the statutory text clearly states.



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B. SECTION 3135(7) FOCUSES ONLY THE "ABILITY" OF AN INJURED PERSON TO LEAD HIS OR HER NORMAL LIFE, NOT ON WHETHER THERE IS "ACTUAL PERFORMANCE" OF THE PERSON'S NORMAL LIFE.

The primary reason why the *Kreiner* decision seriously misinterpreted the statutory definition of serious impairment was because of the way the Court defined the phrase "general ability." Rather than viewing the words "general ability" as a single, unitary term, the Court focused on the word "general" and through that word, incorporated most of the restrictive concepts that have resulted in the onerous "Kreiner threshold" (that is, the injury must alter the "course and trajectory" of the plaintiff's life; that the plaintiff must be "for the most part" unable to lead his/her normal life; and that plaintiff's life must be a substantially different life after the injury).

This interpretation by the Supreme Court is fundamentally wrong because, as recognized by a leading American dictionary, *the words "general ability," when used together, create a single fixed phrase which is defined as meaning nothing more than "ability."* In this regard, *Webster's Third New International Dictionary of the English Language, Unabridged* (1964 Edition, subsequent addenda sections and reprints) defines "general ability" as follows:

"general ability N: ABILITY 2"
Webster's Third New International (p 944c)

It is significant to note that *this specific dictionary* has been cited by the Michigan Supreme Court in several cases as being an authoritative dictionary for the interpretation of statutory words and phrases. *See, eg, Rednour v Hastings Mut Ins Co*, 468 Mich 241, 248; 661



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NW2d 562 (2003) (defining the word “upon” as used in the no fault statute); *Hanson v Mecosta County Road Commissioners*, 465 Mich 492, 502; 638 NW2d 396 (2002) (defining the term “maintain” as used in statute governing exception from governmental immunity for highway defects). The Supreme Court has also relied on *Webster’s Third* to define contract terms. See, eg *Lytle v Malady*, 458 Mich 153, 165 n11; 579 NW2d 906 (1998) (defining term “policy” in employment contract); *Penzien v Dielectric Products Engineering Co*, 374 Mich 444, 446-447; 132 NW2d 130 (1965) (defining “question,” “negotiation,” “failure,” and “agreement” as used in collective bargaining agreements). *Thus, according to Webster’s Third, the phrase “general ability” simply means “ability.”*

The definition contained in *Webster’s Third* of the unitary phrase “general ability” is perfectly consistent with the concept well known in writing and rhetoric that it is not uncommon for two words to be joined together in a way that adds no additional meaning than would have been the case if only one of those words had been used. This principle is discussed in the widely used writing textbook entitled “*Style: 10 Lessons in Clarity and Grace, 6th Edition*” by John M. Williams, University of Chicago (Addison-Wesley Educational Publishers, Inc., 2000). In Part III, Lesson 7, entitled “*Concision*,” Professor Williams sets forth five (5) principles which, if used regularly, enhance the clarity of writing. His five principles are as follows: (1) delete words that mean little or nothing; (2) delete words that repeat the meaning of other words; (3) delete words whose meaning a reader can infer; (4) replace a phrase with a word; and (5) change negatives to affirmatives. With regard to the deletion of meaningless words, Professor Williams states at page 141:



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"Some words are verbal tics that we use as unconsciously as we clear our throats:

[EXAMPLES]

*kind of; actually; particularly; really; certain; various; virtually;
individual; basically; **generally**; given; practically."*
(emphasis added)

It is indeed noteworthy that this leading textbook on how to write the English language, confirms that the word "*generally*" is considered to be in that class of "*meaningless words*" whose use is nothing more than a "*verbal tic*." This is perfectly consistent with *Webster's Third* which confirms the notion that the phrase, "*general ability*," means nothing more than "*ability*."

Further support for this conclusion can be found by looking closely at the Supreme Court's decision in *Cassidy v McGovern, supra*, and the appellate case law which was rendered during the 48-month period following the *Cassidy* decision. In that regard, it is important to note that the phrase "*general ability*" had its specific origin in the *Cassidy* decision. Specifically, at page 505 of *Cassidy*, the Supreme Court stated, "*We believe that the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life.*" However, nowhere in the *Cassidy* decision did the Supreme Court define or even discuss the phrase "*general ability*." Moreover, during the *Cassidy* era, there were approximately 85 Court of Appeals decisions (published and unpublished) dealing with the *Cassidy* threshold and not a single one of those decisions focused on, or attempted to define, the phrase "*general ability*" or the individual word "*general*" that appears in that phrase. If the word "*general*" was so significant to the



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meaning of the phrase “*general ability*,” then why was this issue completely ignored by the Supreme Court in *Cassidy*—the decision which gave birth to the phrase “*general ability*?” Moreover, why was this issue ignored in the 85 threshold decisions the Court of Appeals rendered after *Cassidy*? The answer is simple: general ability means ability.

The Legislature’s decision to utilize the concept of “*ability*” as a substantive part of the threshold, is important for another reason. It draws a fundamental distinction between two separate concepts—the “ability to do something” as opposed to “actually doing something.” If the Legislature had not inserted the concept of “*general ability*” into Section 3135(7), then the statute would simply look at whether a person was in fact living their normal life regardless of whether their ability to do so had been impacted. This is not what the Legislature chose to do. On the contrary, the Legislature created a threshold that permits compensation if the injured person’s ability to live his or her normal life is affected even though the injured person struggles to keep living that normal life. Stated another way, it is the ability to perform rather than mere performance which is the operative focus. For example, consider a factory worker who sustains a shoulder injury in an automobile accident. The injury makes it painful and difficult for him to perform his job. Because of his injury, he is not able to rotate his shoulder without pain, has diminished strength, and cannot lift as much weight as he could before his injury and must work harder to get the job done. Nevertheless, this worker continues to work regularly, even though his work causes him to suffer severe pain during the work day and leaves him extremely fatigued and in considerable discomfort when his shift is over. In spite of the fact that this factory worker “*actually performed*” his job as an assembly line worker, his “*ability to perform*” was



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clearly affected by his injury. It is that compromised ability to do something that the Legislature focused on with the language it utilized, not whether the injured person actually performs in spite of significant burdens imposed by an injury.

C. PLAINTIFF'S DIMINISHED QUALITY OF LIFE IS ALSO A MEASURE OF WHETHER THE INJURY HAS AFFECTED THE PLAINTIFF'S "GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE."

As noted above, the Legislature's decision to define serious impairment of body function as affecting a person's "normal life" is significant because those words are very dependent and subjective based on a particular plaintiff's "normal life." The Court should examine the plaintiff's "normal life" - whatever that normal life is. For some, a normal life is one that involves constant physical activity. However, the Legislature did not intend to protect only physically active persons when it enacted Section 3135(7). The Legislature intended to include everybody whose general ability to lead his or her very subjective normal life has been affected by an auto accident – even those who are physically disabled, handicapped, elderly, and otherwise sedentary.

In defining "normal life" the *Kreiner* Court rewrote the Legislature's intent by excluding those person's who led sedentary lives before the accident because *Kreiner* weighed the value of the injured person's life by focusing exclusively on the extent to which the plaintiff's physical activities were limited by the injuries he sustained in the auto accident. The *Kreiner* Court then used the plaintiff's non-engagement in these physical



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activities as the touchstone for determining whether the plaintiff's general ability to lead his normal life was affected. The Court provided the following instruction:

"Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity."
Kreiner, supra, at 131 (emphasis added)

Similarly, when discussing the companion case to *Kreiner* (that is, *Straub v Collette*) and applying the above test regarding the effect on the plaintiff's general ability to lead his normal life to *Straub* specifically, the Court stated the following:

"In determining whether Straub's general, overall ability to lead his preaccident life was affected, we consider his functional abilities and activities. A necessary part of this analysis is determining how long and how pervasively his activities and abilities were affected. While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life."
Kreiner, supra, at 135 (emphasis added)

Such a narrow focus on physical activity, however, ignores the actual quality of the life that person is living. Normal life is not simply *doing* what you did before the accident. It also means being able to *qualitatively experience* the normal life one experienced before the accident. The statutory phrase "normal life" creates a standard broad enough to require assessment of the injured person's ability *to enjoy life*. Consequently, the term "normal life" also includes assessing whether the injured person has a *diminished quality of life* after the accident.



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Obviously, no one's life is made up completely of physical activities - life is more than that. Sleeping, for example, is obviously an essential component of normal everyday life. In fact, it is essential to one's well-being. For the injured person, sleep may be constantly interrupted. Watching television, spending time alone with one's thoughts, and simply enjoying life, may not be essential to one's survival in the same way as a necessary bodily function like sleeping or eating, but such sedentary moments are nonetheless essential parts of a person's normal everyday life. People also need quiet moments, with no activity. Without such moments, life may no longer be enjoyable for that person.

For those persons who are elderly or disabled, such quiet moments may be the centerpiece of normal everyday life as they are living it. While no physical activity is going on, life is being lived and enjoyed. Being injured, however, can interrupt people's lives in a number of ways. For the injured person, it may become difficult, if not impossible, to watch television, to think, to sleep, to meditate, because of pain, a loss of focus, and also, depression.

In no case is this point more significant than when an elderly person, who because of age already lives a mostly sedentary life, is then injured in an auto accident. Suddenly, Grandma's normal life, while outwardly unchanged in terms of her physical activity, is marked by constant pain, lost cognitive functioning, and depression. The change in Grandma's life from a sedentary pain free life to a sedentary life filled with unrelenting pain and discomfort is a classic example of when an auto accident has affected a person's general ability to lead her normal life, but there has been no significant change in physical activity level.



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Under *Kreiner, supra*, the change in Grandma's life is meaningless when it comes to deciding threshold. Her loss goes uncompensated because it has not limited her physical activity level. In fact, one of the most disturbing results of the *Kreiner* decision is how harshly it treats the elderly and the disabled. One need look no further than some of the unpublished appellate rulings dismissing cases brought by senior citizens and handicapped persons to find examples of the fundamental unfairness of such an approach to defining the threshold. [See, *Yovan v Bacarova*, C/A Docket No. 258976; 05/04/06; *Wohlscheid v Raymer*, C/A Docket No. 260033; 05/02/06; *Cates v Melhado*, C/A Docket No. 264557; 10/03/06].

D. KREINER GOT IT WRONG: HOW CAN THE COURTS GET IT RIGHT?

The concepts discussed above clearly illustrate that, with all due respect, the majority Opinion in *Kreiner v Fischer, supra*, got it wrong. This happened because the decision in *Kreiner* strayed from the specific statutory language used by the Legislature when it adopted the one sentence definition of serious impairment of body function set forth in MCL 500.3135(7). The language contained in that section is so important to the issues presented in this case that it bears repetition. This section defines the threshold phrase "*serious impairment of body function*" in the following way:

"As used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."
MCL 500.3135(7)



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Once an injured plaintiff has satisfied the specific elements of this one sentence definition, then the plaintiff has proven that the injury in question constitutes “*serious impairment of body function*,” thereby entitling plaintiff to noneconomic damages. Nothing further is required. Therefore, the focus is on the specific elements of this one sentence definition. A close reading of this sentence reveals that there are four (4) basic elements of the definition of “*serious impairment of body function*.” Those four elements are: (1) objective manifestation; (2) importancy of body function; (3) affected ability; and (4) impact on plaintiff’s normal life. Each one of these four specific elements performs a “*gatekeeper function*” that, working together, creates a threshold that precludes recovery for frivolous and trivial injuries. This legislative design is simple and clearly evident. The *objective manifestation* requirement precludes recovery for injuries that are purely subjective. The *importancy of body function* requirement precludes recovery for injuries that affect only trivial bodily functions. The *affected ability* requirement focuses on whether a person’s capacity or capability to live his or her life has been affected, thereby precluding recovery for those plaintiffs who simply choose to lead a limited life. The *normal life* requirement focuses on whether plaintiff’s normal life has been impacted, thereby precluding recovery simply because any aspect of life was affected. Its essence requires a determination of what, in fact, constituted the plaintiff’s typical, usual, regular, and routine life, which then becomes the “*normal life*” which must be demonstrated to have been affected by the injury.

Each of these four substantive elements of the one sentence definition of “serious impairment of body function” presents a simple “yes or no” question. The first question is whether the injury is “*objectively manifested*” – *yes or no?* The second question is whether



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the injury involves an “important body function” – yes or no? The third question is whether the injury has affected the plaintiff’s “life leading ability” – yes or no? The fourth question asks whether the plaintiff’s “normal life” has been affected in some way for some period of time – yes or no? If the answer is “yes” to all of these questions, the threshold definition is satisfied and the injured person is deemed to have sustained a “serious impairment of body function” as a matter of law. There are no additional requirements that the injury alter the course or trajectory of the injured person’s life, or that the injured person be generally unable or, for the most part, unable to lead his or her normal life. Furthermore, there are no additional requirements that the injury, or its effect, be serious, substantial, long-lasting, life-altering, severe, pervasive, extensive, or permanent. Moreover, there is nothing in the statute that requires an examination of the plaintiff’s entire life, or focuses solely on the plaintiff’s performance of physical activities. On the contrary, the statutory language is broad enough to consider such factors as the impact of an injury on the injured person’s “quality of life.” In fact, failing to consider quality of life issues creates a threshold that is virtually insurmountable by the elderly and the handicapped. That was obviously not the intent of the Michigan Legislature when it fashioned this *compromise threshold* in an effort to find some middle ground between the Supreme Court’s decisions in *Cassidy v McGovern*, *supra*, and *DiFranco v Pickard*, *supra*. The simple language selected by the Legislature is very capable of fulfilling the Legislature’s objectives, if the courts simply refrain from engrafting judicial qualifiers, standards, and factors that, in the end, constitute nothing more than judicial legislation. If there is any lack of detail, over simplicity, or lack



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of clarity in the way the Legislature has chosen to define “*serious impairment of body function*,” then the remedy is legislative, not judicial.

Although Justice Cavanagh’s dissenting Opinion in *Kreiner* incisively identified the major problem in the majority’s Opinion, even the dissent was flawed. *As Justice Cavanagh correctly pointed out, the primary defect in the Kreiner decision was that it had improperly engrafted onto the statute temporal/durational requirements that the Legislature did not adopt.* In this regard, Justice Cavanagh’s dissent states:

“ . . . The plain and unambiguous language of the statutory definition of ‘serious impairment of body function’ does not set forth any quantum of time the judge or jury must find dispositive when determining whether a serious impairment of body function has occurred. Therefore, the duration of the impairment is not an appropriate inquiry. . . . For example, the majority reasons that ‘the type and length of treatment required,’ ‘the duration of the impairment,’ ‘the extent of any residual impairment,’ and ‘the prognosis for eventual recovery’ are relevant factors to consider when making the threshold determination. Unlike the majority, however, I do not find any support for these considerations in the unambiguous language of MCL 500.3135(7). . . . As mentioned above, however, unlike death or permanent serious disfigurement, nothing in the plain text of MCL 500.3135(7) suggests that the Legislature intended temporal limitations or permanency be considered when making the ‘serious impairment of body function’ determination. Therefore, the majority errs when it reads additional language into the plain text of MCL 500.3135(7).”

(emphasis added)

However, where the dissent erred is in its characterization of the “*normal life*” element of the statutory definition of serious impairment of body function. With regard to that point, the dissent stated that “*the Legislature requires that the impairment have an influence on most, but not all, of the person’s capacity to lead his or her normal life.*” This “*most but not all*” standard is also at odds with the specific language of the statute. The Legislature did not



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require that a plaintiff prove that “*most but not all*” of the plaintiff’s ability to lead his or her normal life has been affected. On the contrary, the statute simply asks a series of “*yes or no questions*.” With regard to the elements of “*ability*” and “*normal life*,” the plaintiff need only show that an objectively manifested injury involving an important body function has, in some way and for some length of time, affected the plaintiff’s ability to lead the plaintiff’s normal life. There is no further statutory “*percentages test*.” In other words, just as there is no “*quantum of time*” requirement in Section 3135(7), there is no “*quantum of influence*” requirement either.

A powerful condemnation of the *Kreiner* opinion interpretation of the plain and unambiguous language of Section 3135’s “*general ability to lead his or her normal life*” was pointedly articulated by Justice Weaver in her dissent in *Jones v Olson*, 480 Mich 1169; 747 NW2d 250 (2008). In this 4-3 decision, the Supreme Court, in lieu of granting leave to appeal, reversed the unpublished unanimous decision of the Court of Appeals and reinstated the judgment of the trial court granting defendants’ motion for summary disposition.

The plaintiff in *Jones* sustained a fractured neck as well as bulging spinal discs at the 5th, 6th, and 7th cervical vertebral levels. These injuries required plaintiff to wear a neck collar and caused him to be disabled from work for six months. During his disability, the plaintiff was limited in his ability to engage in activities of daily living as well as a wide variety of recreational and domestic activities. In reversing the circuit court’s grant of summary disposition in favor of defendant, the Court of Appeals concluded that the plaintiff’s injuries presented more than a “*minor interruption*” in the plaintiff’s life because



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the plaintiff's life was entirely placed on hold for two months following the accident, and returned only gradually over the following four months.

In reversing the Court of Appeals, the Supreme Court stated, "*The circuit court properly found that the plaintiff was generally able to lead his normal life in spite of his injuries. . . . The plaintiff's injuries were substantially similar to those considered in Kreiner's companion case, Straub v Collette.*" Justices Cavanagh, Weaver, and Kelly dissented. In her dissenting Opinion, Justice Weaver properly criticizes the *Kreiner* decision for engrafting durational/temporal and permanency requirements onto a statutory definition that contains no time based factors. In this regard, Justice Weaver's dissent states:

"Every law-abiding car owner in Michigan who has obediently, as required by law, purchased no-fault automobile insurance with the expectation of being able to recover damages for serious impairment of bodily function in the unfortunate event of serious injury should know about this case.

By importing the concept of permanency of injury into MCL 500.3135 – a concept that is nowhere referenced in the text of the statute – the majority of four (Chief Justice Taylor, and Justices Corrigan, Young, and Markman), in Kreiner v Fischer, 471 Mich 109 (2004), actively and judicially legislated a permanency and temporal requirement to recover noneconomic damages in automobile accident cases. The Kreiner interpretation of MCL 500.3135 is an unrestrained misuse and abuse of the power of interpretation masquerading as an exercise in following the Legislature's intent. . . .

For all intents and purposes, the Kreiner majority held that unless a person 'for the most part' can no longer live his or her life, he or she cannot recover noneconomic damages under MCL 500.3135. The only way a person can no longer 'for the most part' live his or her life is if the 'overall or broad ability' to 'conduct the course of his life' is affected. While paying lip service to the contrary, the Kreiner majority faction in essence held that a plaintiff cannot recover noneconomic damages for serious impairment of bodily function unless the impairment affects his or her life ad infinitum. . . . By importing the concept of permanency of injury into MCL 500.3135 – a concept that is nowhere referenced in the statute – the Kreiner majority



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actively and judicially legislated an additional requirement for obtaining noneconomic damages in automobile accident cases.”
Jones, supra (emphasis in original)

Justice Weaver makes similar comments in her dissenting Opinion in *Minter v City of Grand Rapids*, 480 Mich 1182; 747 NW2d 229 (2008), in which the Supreme Court reversed the Court of Appeals and reinstated the trial court’s dismissal of a case involving an elderly woman who sustained a brain injury that affected her independence, quality of life, and ability to interact with her family. Justice Weaver’s observations in that dissent are clear, concise, and poignant statements of how fundamentally flawed and manifestly unjust the *Kreiner* threshold has become.



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III. IN DETERMINING WHETHER ISSUES OF “SERIOUS IMPAIRMENT OF BODY FUNCTION” OR “PERMANENT SERIOUS DISFIGUREMENT” CAN BE DECIDED AS A MATTER OF LAW, IT MUST BE MADE CLEAR THAT SUMMARY DISPOSITION CAN ONLY BE GRANTED UNDER MCL 500.3135(2) IF IT WOULD OTHERWISE BE APPROPRIATE UNDER MCR 2.116(C)(10).

The problem created by the *Kreiner* decision has been compounded many-fold by trial judges who use summary disposition to decide threshold cases in circumstances where summary disposition is not appropriate. Therefore, it has become critically important to remind trial judges of the controlling rules applicable to summary disposition of threshold issues and, in particular, to explain the important interplay between the summary disposition rules set forth in MCR 2.116(C)(10) and the “*questions of law*” procedures set forth in Section 3135(2)(a) of the No-Fault Act. Stated simply, no trial court can properly grant summary disposition under Section 3135(2), if summary disposition would otherwise be inappropriate under MCR 2.116(C)(10). This is an important procedural point that has been either overlooked or disregarded in the wake of the storm created by the *Kreiner* decision. Therefore, the case at bar affords the Supreme Court an opportunity to speak to this very important point.

MCR 2.116 sets forth the rules for granting motions for summary disposition. In particular, subrules (C) (10) permit summary disposition only if “*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.*” Section 3135(2)(a) of the No-Fault Act, however, also addresses the question of when summary disposition can be granted on a threshold issue. In this regard, Section 3135(2)(a) states:



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“(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

- (i) There is **no factual dispute** concerning the nature and extent of the person's injuries.
- (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the **dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.** However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.”

MCL 500.3135(2)(a) (emphasis added)

Given that both the court rules and the no-fault law address when the trial court may determine serious impairment threshold, the issue then becomes whether the summary disposition standard under MCR 2.116(C)(10) is actually any different from Section 3135(2) of the No-Fault Act.

Another notable difference between MCR 2.116 and Section 3135 is that subrule (G) of MCR 2.116 requires that affidavits, depositions, admissions, or other documentary evidence be used to support and to oppose a (C)(10) motion for summary disposition. The role of MCR 2.116 is also established in the case law interpreting that rule, which holds that summary relief is not appropriate where a question of material fact turns on a witness' credibility. These principles continue to be applicable. *Quinto v Cross & Peters Co*, 451 Mich 358, 378; 547 NW2d 314 (1996); *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005); *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998);



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Auto Club Ins Ass'n v State Auto Mutual Ins Co, 258 Mich App 328, 335-336; 671 NW2d 132 (2003).

As a matter of Michigan constitutional law, the summary disposition standard set forth in Section 3135(2)(a) cannot conflict with MCR 2.116(C)(10). Article 6, § 5 of the Michigan Constitution provides that the Michigan Supreme Court shall promulgate rules of court procedure that will simplify practice and procedure within the Michigan court system. Rules so promulgated take precedence over and supersede inconsistent legislation in areas of practice and procedure. This constitutional section states:

"The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited."

Mich Const, art 6 § 5; *see also* Const 1963, art 3, § 2 (governing separation of powers)

The Michigan Court Rules confirm this supremacy principle. In this regard, MCR 1.104 states, *"Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court."* These supremacy principles were also recognized by the Michigan Supreme Court in *McDougal v Shanz*, 461 Mich 15, 26; 597 NW2d 148 (1999), which confirmed that the Michigan Court Rules take precedence over conflicting legislation as long as the matter in dispute is truly procedural and not substantive: *"It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court. Indeed, this Court's primacy in such matters is established in our 1963 Constitution."* *McDougal, supra*, at 26.



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The Supreme Court in *McDougal* further emphasized this point by citing *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964), as follows:

"[T]he function of enacting and amending judicial rules or practice and procedure has been committed exclusively to this Court . . . ; a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will."
McDougal, supra, at 27 (quoting *Perin, supra*, at 541) (emphasis added)

Therefore, if the summary disposition provisions contained in Section 3135(2)(a) conflict with the summary disposition standard set forth in MCR 2.116(C)(10), the legislative rule would be invalid. Stated differently, Section 3135(2)(a) cannot constitutionally give trial judges greater power or different procedural tools to limit a litigant's right to a jury trial by altering the rules of summary disposition. Therefore, trial judges who are asked to render summary disposition on the threshold issue of "serious impairment of body function" can only do so if summary disposition would otherwise be appropriate under MCR 2.116(C)(10) and the case law that has been decided under that court rule since its inception.

Ever since the *Kreiner* decision was released by the Michigan Supreme Court, summary disposition on threshold issues has increased dramatically. This fact becomes apparent by analyzing the unpublished Court of Appeals decisions that have been rendered regarding the threshold since the release of the *Kreiner* decision on July 24, 2004. From the *Kreiner* decision until September 1, 2009, there have been approximately 246 unpublished Court of Appeals decisions dealing with the propriety of summary disposition in serious impairment threshold cases. Of these 246 cases, the appellate courts



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affirmed summary disposition for the defendant 196 times. This means that in this sampling of serious impairment cases, approximately 80% of the plaintiffs were found not to be entitled to a jury trial on the threshold issue!

It is respectfully submitted that this would not be the situation if trial courts were properly implementing the summary disposition provisions of MCR 2.116(C)(10). Instead, it appears that *the trial courts are implementing a summary disposition rule promulgated by the Legislature, not the Supreme Court* - a rule which the hard numbers demonstrate is something far different than what is permitted by MCR 2.116(C)(10).

It is also clear that the inappropriate and unrestrained use of summary disposition in the context of the jurisprudence of the Michigan no-fault law creates serious instability and deleterious volatility. The history of the Michigan no-fault law clearly confirms this point. During the 10-year period that the Supreme Court's *Advisory Opinion* was in effect (October 1973 to January 1983), the rule was that summary disposition on the threshold issue should only be granted if it was otherwise proper under MCR 2.116. Under such a standard, there was relative tranquility in Michigan appellate law regarding the no-fault tort threshold. During this 10-year period, there were approximately 25 appellate decisions that in some way dealt with threshold issues. In other words, there were only about 2.5 appellate threshold decisions each year. In contrast, during the four year period that the Supreme Court's decision in *Cassidy* was in effect (January 1983 to January 1987), there was a dramatic increase in the number of Court of Appeals decisions dealing with the threshold. During the four year *Cassidy* period, there were approximately 85 appellate decisions (published and unpublished) dealing with the threshold, which meant there were



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about 21.2 appellate threshold decisions every year. Essentially, the Court of Appeals was handing down a threshold case once every two weeks. We are now in the “*Kreiner period*,” which has lasted slightly more than four years. As previously stated herein, during this four year *Kreiner* period, there have been approximately 246 unpublished Court of Appeals decisions dealing with the no-fault threshold, plus approximately 10 published appellate decisions. This volume of appellate threshold litigation is more than three times what it was during the *Cassidy* era! In other words, threshold decisions are being handed down now almost once every week. This dramatic increase in the volume of appellate threshold decisions is destabilizing no-fault jurisprudence, wasting judicial resources, squandering taxpayer dollars, and creating a volatile state of chaos that is threatening the very survival of the Michigan auto no-fault system. None of this should be happening. Summary disposition is clearly a matter of procedure. That being the case, the Court Rules take precedence over any statutes that attempt to dictate when trial judges can grant motions for summary disposition. Therefore, summary disposition on threshold issues should only be rendered by trial judges if it would otherwise be appropriate under MCR 2.116.

In the recent case of *Shropshire v Laidlaw Transit, Inc*, 2008 US App. LEXIS 25809, 7-8 (6th Cir, Mich, 2008) (unpublished op), the Sixth Circuit Court of Appeals addressed the use of summary disposition under MCL 500.3135 and determined that this legislation could not trump the summary judgment rules under Federal Rules of Civil Procedure 56. In *Shropshire*, the Sixth Circuit noted that the summary disposition standard set forth in Section 3135 was clearly different from FRCP 56. The Court then proceeded to examine whether Section 3135 was substantive or procedural. If Section 3135 is substantive, then



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the Legislature's enactment would prevail over the court rule; but, if Section 3135 is procedural, then the court rules must govern the procedure for summary judgment. *Shropshire, supra*, at * 8. After studying Michigan's no-fault statute, the Court noted that the entire provision related to summary disposition in Section 3135(2)(a) had the purpose of allocating decision-making authority between the judge and jury, a quintessentially procedural determination. *See, Byrd v Blue Ridge Rural Elec Corp*, 356 US 525, 538; 78 S Ct 893; 2 L Ed 2d 953 (1958). The Court observed that Section 3135 did not set forth any substantive standards at all, but "*merely delineates which decision-making body, judge or jury, should make the substantive determinations laid out elsewhere.*" *Shropshire, supra*, at 10. The Sixth Circuit concluded that Section 3135 was a procedural mechanism and therefore, it was subordinate to the court rules on summary judgment. *Id* at * 8. In this regard, the Court in *Shropshire* held:

*"It appears from the language of the closed-head injury provision, and, for that matter, subsection (2)(a) [**10] as a whole, that its purpose is to allocate decision-making authority between the judge and jury, a quintessentially procedural determination. See, Byrd, 356 U.S. at 538. [*574] This subsection sets forth no substantive standards at all; it merely delineates which decision-making body, judge or jury, should make the substantive determinations laid out elsewhere. . . .*

*. . . [P]laintiff took the position at oral argument that the closed-head injury provision is substantive because it is found in a state statute that creates a cause of action. Put another way, plaintiff contends that Rule 56 may only supplant provisions of state law that are found in the state's summary judgment procedures, and in this she is simply mistaken. Whether a state law provision is substantive or procedural depends not on where that law is found, but rather, as stated above, on whether that particular provision either creates rights and obligations or is so 'bound up with [state-created] rights and obligations' that it must be considered substantive. Byrd, 356 U.S. at 535. It is true that [**16] in the usual case, the state law overridden by Rule 56 will be the state's summary judgment rule, but that is*



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happenstance, not a limit on the application of federal summary judgment procedures. . . .

*Having determined that defendant's motion for summary judgment is governed by Rule 56, we are left with the task of applying that rule to the case at bar. Summary judgment is proper when 'the pleadings, the [**18] discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law.' Fed. R. Civ. P. 56(c). . . . We must, therefore, determine whether plaintiff has created a genuine issue of material fact on the essential elements of her case. . . .*

When asked if Hannah had experienced any problems at school during first grade, the year after the accident, the only problem she brought up was with her handwriting. . . . This is the only evidence we have on this issue, and it is insufficient to create a genuine issue of material fact."
Shropshire, supra, at 5, 7, 8, and 10

The Sixth Circuit's decision in *Shropshire* reiterates the point stated in the Michigan Constitution and *McDougal* that the court rules are procedural devices promulgated by the courts. Those rules of procedures cannot be supplanted by the Legislature, as Michigan courts have been allowing since the passage of 1995 PA 222. *Therefore, trial courts cannot grant summary disposition on threshold issues unless summary disposition would otherwise be appropriate under MCR 2.116(C)(10).*



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IV. THE INJURIES SUSTAINED BY PLAINTIFF RODNEY McCORMICK SATISFY THE CURRENT THRESHOLD DEFINITION CONTAINED IN SECTION 3135(7).

It is at this point that *the proper factual frame of reference* must be emphasized regarding the injury severity requirements of the Michigan no-fault threshold. This task begins with recalling the injuries sustained by Plaintiff Leo Cassidy in *Cassidy v McGovern*. As previously stated, Leo Cassidy suffered a fractured lower leg which required inpatient hospitalization, several leg casts, and seven months of disability. *Id* at 492. *There is no indication in the opinion that Leo Cassidy underwent any type of surgery.* Moreover, the *Cassidy* opinion confirms that Mr. Cassidy went on to achieve a full recovery with no significant residual impairments approximately 15 months after he was injured. That is the type of “garden variety” orthopedic injury that the *Cassidy* decision held was sufficient to cross the serious impairment threshold *as a matter of law*. Put very simply, Leo Cassidy had a broken leg that healed without any significant problems—nothing more!

On the contrary, however, Plaintiff Rodney McCormick sustained an injury that is more severe than Leo Cassidy. Rodney McCormick suffered a severe fracture of his left ankle joint as a result of a truck backing over his leg. He underwent *two surgeries* and was off work for one year. Moreover, the majority opinion acknowledges the seriousness of this injury when it noted, *“The broken left ankle was a serious injury that impacted an important body function – namely, the ability to stand and walk. . . . We acknowledge that plaintiff’s injury was serious enough to require two operations and that plaintiff continues to suffer from some degree of ankle pain. We also acknowledge that painful injuries, such as that sustained by plaintiff in the*



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present case, do not generally disappear over time or necessarily improve with age. . . ." Similarly, the dissenting opinion confirms the functional significance of the injury by noting that although plaintiff eventually returned to work, *"He is at another duty because his employer evaluated plaintiff's physical condition and, on that basis, did not consider him capable of performing his prior duties."* Moreover, the dissenting opinion noted that the injury had produced significant residual consequences in the form of degenerative arthritis. In this regard, the dissent stated: *"Plaintiff's doctor and an independent doctor both found some indication of degenerative joint disease in his ankle."* Stated simply, Rodney McCormick was more severely injured than Leo Cassidy. *Yet he loses his case under a threshold that is more lenient than the Cassidy threshold.* This obvious, illogical result speaks for itself and further underscores the urgent need for this Court to overrule the *Kreiner* decision and reverse the decision in the case at bar.

CONCLUSION

For all the aforesaid reasons, it is respectfully submitted that the decision in *Kreiner v Fischer* was wrong and should be reversed by this Court. In doing so, this Court should interpret the statutory definition of "serious impairment of body function" contained in MCL 500.3135(7) consistent with the interpretation set forth in this brief. Finally, this Court should make clear that summary disposition of threshold issues is appropriate only if it would otherwise be appropriate under MCR 2.116(C)(10).

RELIEF REQUESTED

WHEREFORE, *Amicus Curiae* CPAN respectfully requests that this Honorable Court reverse the Court of Appeals' ruling dismissing Plaintiff-Appellant Rodney McCormick's



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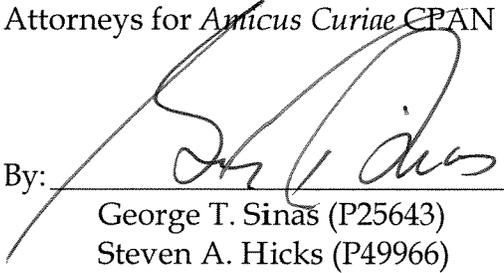
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lawsuit on threshold grounds, and in so doing, reverse this Court's prior, flawed interpretation of the amended no-fault tort threshold in *Kreiner, supra*, because the majority in *Kreiner, supra*, clearly misinterpreted the definition of "serious impairment of body function" under the no-fault law and adopted an unduly restrictive no-fault tort threshold.

Respectfully submitted,

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