

STATE OF MICHIGAN
IN THE SUPREME COURT

RODNEY McCORMICK,
Plaintiff-Appellant,

v.

Supreme Court No. 136738

LARRY CARRIER,
Defendant,

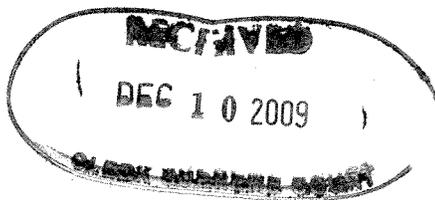
and

ALLIED AUTOMOTIVE GROUP, INC.,
Indemnitor of GENERAL MOTORS CORPORATION,
Defendant-Appellee.

Court of Appeals No. 275888
Genesee County Circuit Court No. 06-083549-NI

BRIEF OF AMICUS CURIAE,
INSURANCE INSTITUTE OF MICHIGAN

PROOF OF SERVICE



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TABLE OF CONTENTS

	Page
Index of Authorities	ii
Statement of the Questions Presented	1
Interest of Amicus Curiae	2
Statement of Facts	3
Argument	
IN ITS RECONSIDERATION OF §3135(7) AND THE STANDARDS ENUNCIATED IN <i>KREINER</i> , THE COURT SHOULD MAINTAIN A SUBSTANTIALLY HIGH “SERIOUS IMPAIRMENT” THRESHOLD CONSISTENT WITH THE INTENT OF THE STATUTE AND A DECISIONAL FRAMEWORK THAT UTILIZES OBJECTIVE FACTORS FOR CONSISTENT JUDICIAL APPLICATION.	3
<u>Introduction</u>	3
A. <u>The requirement of an effect on the person’s “general ability” to lead his or her normal life establishes a substantially high “serious impairment” threshold commensurate with the other two exceptions to the abolishment of tort liability.</u>	8
B. <u>The Court should maintain a workable decisional framework for judicial determination of whether a given injury meets the “serious impairment” threshold, including consideration of the three logical dimensions of an impairment’s impact on function -- gravity of the impairment, pervasiveness of the impairment, and duration of the impairment.</u>	16
Conclusion	22

INDEX OF AUTHORITIES

Cases	Page(s)
<i>Adams Outdoor Advertising, Inc v City of Holland</i> , 463 Mich 675; 625 NW2d 377 (2001)	7
<i>Adrian School Dist v Michigan Pub School Employees' Retirement System</i> , 458 Mich 326; 582 NW2d 767 (1998)	8
<i>Beach v State Farm Mutual Auto Ins Co</i> , 216 Mich App 612; 550 NW2d 580 (1996)	10
<i>Cassidy v McGovern</i> , 415 Mich 483; 330 NW2d 22 (1982)	5, 6, 7, 12, 13, 21
<i>Churchman v Rickerson</i> , 240 Mich App 223; 611 NW2d 333 (2000)	6, 7, 10, 11
<i>DiFranco v Pickard</i> , 427 Mich 32; 398 NW2d 896 (1996)	7, 13
<i>Dressel v Ameribank</i> , 468 Mich 557; 664 NW2d 151 (2003)	8, 13
<i>Great American Ins Co v Queen</i> , 410 Mich 73; 300 NW2d 895 (1980)	13
<i>Incarinati v Savage</i> , 419 Mich 541; 357 NW2d 644 (1984)	13, 20
<i>Kern v Blethen-Coluni</i> , 240 Mich App 333; 612 NW2d 838 (2000)	7, 14, 16, 17
<i>Koontz v Ameritech Services, Inc</i> , 466 Mich 304; 645 NW2d 34 (2002)	10
<i>Kreiner v Fischer</i> , 471 Mich 109; 683 NW2d 611 (2004)	3, 4, 6, 7, 11, 12, 16, 17, 18, 19, 21
<i>Marquis v Hartford Accident & Indemnity (After Remand)</i> , 444 Mich 638; 513 NW2d 799 (1994)	8, 13

INDEX OF AUTHORITIES (cont.)

	Page(s)
<i>May v Sommerfield</i> , 239 Mich App 197; 607 NW2d 422 (1999)	18
<i>May v Sommerfield (After Remand)</i> , 240 Mich App 504; 617 NW2d 920 (2000)	18
<i>Miller v Purcell</i> , 246 Mich App 244; 631 NW2d 760 (2001)	16, 17, 18
<i>O'Donnell v State Farm Mut Ins Co</i> , 404 Mich 524; 273 NW2d 829 (1979)	15
<i>Paisley v Waterford Roof Truss, Ltd</i> , 968 F Supp 1189 (ED Mich, 1997)	7
<i>Popma v Auto Club Ins Assoc</i> , 446 Mich 460; 521 NW2d 831 (1994)	11
<i>Rednour v Hastings Mutual Ins Co</i> , 468 Mich 241; 661 NW2d 562 (2003)	9
<i>Sanchick v State Board</i> , 342 Mich 555; 70 NW2d 757 (1955)	9
<i>Shavers v Attorney General</i> , 402 Mich 554; 267 NW2d 72 (1978)	5, 6, 13, 15
<i>State Farm Fire & Cas Co v Old Republic Ins Co</i> , 466 Mich 142; 644 NW2d 715 (2002)	9
<i>State Treasurer v Wilson</i> , 432 Mich 138; 377 NW2d 703 (1985)	10
<i>Stephens v Dixon</i> , 449 Mich 451; 536 NW2d 755 (1995)	5
<i>Sun Valley Foods Co v Ward</i> , 460 Mich 230; 596 NW2d 119 (1999)	8

INDEX OF AUTHORITIES (cont.)

Statutes/Court Rules	Page(s)
MCL 500.3135	2, 3, 9, 22
MCL 500.3135(1)	6
MCL 500.3135(2)(a)	2, 6, 7, 16, 18
MCL 500.3135(2)(a)(ii)	10
MCL 500.3135(3)	5
MCL 500.3135(3)(c)	5
MCL 500.3135(7)	3, 4, 7, 8, 9, 10, 12, 17
1995 PA 222	6

Other Authorities

The American Heritage College Dictionary, 3rd Ed. (Houghton Mifflin Company, Boston MA, 1997)	11
House Legislative Analysis, HB 4341, 12/18/95	7, 14
Webster's Dictionary of the English Language, 1988 Edition (Lexicon Publications, Inc., NY)	11

STATEMENT OF THE QUESTIONS PRESENTED

1. Should the Court maintain the requirement of an effect on the person's "general ability" to lead his or her normal life as establishing a substantially high "serious impairment" threshold commensurate with the other two exceptions to the abolishment of tort liability?

Amicus Curiae Insurance Institute of Michigan answers, "Yes."

2. Should the Court maintain a workable decisional framework for judicial determination of whether a given injury meets the "serious impairment" threshold, including consideration of the three logical dimensions of an impairment's impact on function -- gravity of the impairment, pervasiveness of the impairment, and duration of the impairment?

Amicus Curiae Insurance Institute of Michigan answers, "Yes."

INTEREST OF AMICUS CURIAE

On behalf of its member companies, the Insurance Institute of Michigan (“IIM”) is interested in the very significant issues raised in the case at bar. IIM would seek to impress upon the Court the importance of maintaining stability and predictability in the judicial application of the serious impairment tort threshold established by the No-Fault Act, MCL 500.3135. Since the legislature made the serious impairment determination a question of law, MCL 500.3135(2)(a), a decisional framework with identifiable factors must be maintained, IIM submits, in order for a consistent standard to emerge from case law. Moreover, due to the mandatory nature of motor vehicle insurance, which includes both first party personal protection insurance and third party tort liability coverage, the preservation of a meaningfully high serious impairment threshold, consistent with the intent of the legislature, is vital to the state’s auto reparations system.

IIM represents over 90 property/casualty insurance companies and related organizations operating in Michigan. Its member companies provide insurance to approximately 75% of the automobile market in Michigan and are interested in the ongoing development of automobile no-fault and liability insurance in Michigan. The issues raised in the instant case are of great importance to both the insurance industry and Michigan’s purchasers of mandatory automobile insurance, and accordingly, to the Amicus Curiae, Insurance Institute of Michigan.

STATEMENT OF FACTS

Amicus Curiae, the INSURANCE INSTITUTE OF MICHIGAN, accepts and relies upon the Counter-Statement of Facts provided in Defendants-Appellees' Brief on Appeal, 11/16/09, pp 4-10.

ARGUMENT

IN ITS RECONSIDERATION OF §3135(7) AND THE STANDARDS ENUNCIATED IN *KREINER*, THE COURT SHOULD MAINTAIN A SUBSTANTIALLY HIGH "SERIOUS IMPAIRMENT" THRESHOLD CONSISTENT WITH THE INTENT OF THE STATUTE AND A DECISIONAL FRAMEWORK THAT UTILIZES OBJECTIVE FACTORS FOR CONSISTENT JUDICIAL APPLICATION.

Introduction

This automobile negligence action again brings before the Court a central question within the no-fault act's tort threshold of "serious impairment of body function" under MCL 500.3135. The question concerns the scope of §3135's partial abolishment of tort liability for motor vehicle accident-related bodily injury, and focuses particularly on the text of §3135(7) -- the amended statute's definition of "serious impairment of body function." At what point does an impairment of a body function go from merely affecting the person's ability to lead his or her normal life to affecting the person's *general* ability to lead his or her normal life?

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Court analyzed this issue and established a workable framework for courts to decide whether a person's general

ability to lead his or her normal life has been affected by an objectively manifested impairment to an important body function. It said the analysis involves an examination of the plaintiff's life before and after the accident to objectively determine whether any change in lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Kreiner*, 471 Mich at 132-133. The Court discerned a legislative intent that a big picture perspective on the plaintiff's life was necessary. "Merely 'any effect' on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life." *Id.* at 133. The Court proceeded to endorse consideration of several factors by courts analyzing whether a given case meets the serious impairment threshold. *Id.* at 133-134.

The case at bar appears destined to be a referendum on the Court's *Kreiner* decision and its construction of §3135(7). The Court, therefore, is asked to reexamine the statutory text within and surrounding the clause at issue, as well as the manifest legislative purpose of the amendatory provisions that in 1996 added the statutory definition to the act. In doing so, the Court is urged to maintain the decisional framework that *Kreiner* established for lower courts to utilize in cases alleging serious impairment of body function, and retain a substantially high threshold consistent with the purposes of the no-fault act's partial abolishment of tort liability.

Under Michigan's No-Fault Automobile Insurance Act, persons injured in automobile accidents generally are intended to obtain recovery of benefits for their losses from the no-fault insurance system, without regard to fault. Correspondingly, the availability of tort

remedies was abolished in part by the Legislature, with claims for noneconomic damages preserved only where “the injuries are severe enough.” *Cassidy v McGovern*, 415 Mich 483, 506; 330 NW2d 22 (1982) (Kavanagh, J., concurring and dissenting); *Stephens v Dixon*, 449 Mich 451, 541; 536 NW2d 755 (1995).

In upholding the constitutionality of the no-fault act -- “an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or ‘fault’) liability system” -- this Court in *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978), concluded that the assurance of adequate and prompt reparations for economic losses, without regard to fault, was a fair and equitable trade-off for relinquishment of the traditional tort remedy. “Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries *as a substitute* for their common-law remedy in tort.” 402 Mich at 579 (emphasis added).

Since the act’s inception, tort liability for noneconomic losses arising out of automobile accidents has been abolished, under what is now MCL 500.3135(3), except for those that meet the statutory “threshold” of death, serious impairment of body function, or permanent, serious disfigurement. In abolishing pain and suffering claims based upon lesser injuries, the Legislature clearly recognized that actual loss would go uncompensated,¹ but simply reached the *policy* decision that it was more beneficial and, ultimately, more

¹ See, *Cassidy v McGovern*, 415 Mich 483, 499; 330 NW2d 22 (1982), where this Court observed that “it is apparent that an injured person may suffer significant losses other than those for which the act guarantees recovery without regard to fault. For economic losses beyond those for which payment was assured, the traditional tort remedy was left intact. [MCL 500.3135(3)(c)] However, the tort remedy for noneconomic losses for which no payment was assured under the act was not left wholly intact.”

important, to provide for the recovery of *economic* losses (e.g., loss of earnings, medical bills, and replacement services) -- promptly and without regard to fault -- than to allow for the pursuit of pain and suffering damages in all but the most seriously injured claimants. *Cassidy v McGovern*, 415 Mich at 499.

Thus, a plaintiff claiming noneconomic damages for injuries sustained in an automobile accident can recover “only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). As the Court of Appeals observed even prior to *Kreiner* in its application of these tort threshold provisions, a liberal construction of these provisions in favor of recovery “is *not* warranted,” given the remedial nature of the first-party benefits side of the no-fault system and the inherent trade-off underlying the system. *Churchman v Rickerson*, 240 Mich App 223, 229; 611 NW2d 333 (2000). *See, Shavers v Attorney General*, 402 Mich at 620-623.

As of 1996, when amendments to §3135 went into effect, 1995 PA 222, the question of whether a person’s injuries meet the statutory no-fault tort threshold is one of law:

The issues of whether an injured person has suffered a serious impairment of body function or permanent serious disfigurement are questions of law for the court to decide 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. . . .

MCL 500.3135(2)(a).

The amendment thus legislatively overruled *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1996), in taking the inquiry of whether a plaintiff sustained a threshold injury from the jury and returning it to the court, where this Court had placed it in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982). See, *Kreiner*, 471 Mich at 121 n 8, and cases cited therein; and *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000), quoting, House Legislative Analysis, HB 4341, 12/18/95 (Defendants-Appellees' Appendix, **4b** - final House legislative analysis).

The amendment also largely incorporated the additional elements the *Cassidy* Court had articulated for determining whether the impairment at issue was sufficiently “serious” to meet the tort threshold. These amendments have been described as “overrid[ing] *DeFranco* [*v Pickard*, 427 Mich 32; 398 NW2d 896 (1986)] and present[ing] a much more formidable hurdle for plaintiff[s].” *Paisley v Waterford Roof Truss, Ltd*, 968 F Supp 1189, 1194, n 8 (ED Mich, 1997); accord, *Churchman*, 240 Mich App at 231 (the amended statute “was intended to raise or strengthen the no-fault threshold”). At issue here is the statutory definition for “serious impairment of body function”:

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).

An issue of statutory construction is reviewed de novo by the Court as a question of law. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 681; 625 NW2d 377

(2001). The “cardinal principle” of statutory construction is that courts must give effect to legislative intent. *Dressel v Ameribank*, 468 Mich 557, 562; 664 NW2d 151 (2003). Where the plain and ordinary meaning of the statutory language is clear, judicial construction is normally neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Where reasonable minds can differ about the meaning of a statute, however, judicial construction is appropriate. *Adrian School Dist v Michigan Pub School Employees’ Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998). In that event, the Court should consider the object of the statute, the harm it was designed to remedy, and apply a reasonable construction that best accomplishes the statute’s purpose. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). Here, Amicus Curiae respectfully submits that, both under the text of the statute itself and the overriding purpose behind the creation of §3135’s threshold provisions, the Court should construe the “serious impairment of body function” as imposing a substantially high threshold to entitlement to noneconomic tort damages.

- A. The requirement of an effect on the person’s “general ability” to lead his or her normal life establishes a substantially high “serious impairment” threshold commensurate with the other two exceptions to the abolishment of tort liability.

The Court in *Kreiner* construed §3135(7) as calling for a big picture perspective when examining whether the injuries sustained by the victim of an automobile accident so

impacted the person's life as to constitute a "serious impairment of body function." Indeed, as the following will show, the text of the statute and the purpose of the statute both call for such an analytical approach.

First, the Court must accord meaning to the fact that the life impact element of §3135(7) speaks of an effect not on the person's "ability to lead his or her normal life," but on the person's "*general* ability to lead his or her normal life." *Id* (emphasis added). In its construction of this critical phrase in the statute, the Court thus should seek to "give effect to every word ... 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). Indeed, construction of an undefined word (such as "general" -- used here as an adjective) within a definitional phrase should be interpreted in the context of the words or phrase it is defining. *Cf.*, *Rednour v Hastings Mutual Ins Co*, 468 Mich 241, 250, n. 2; 661 NW2d 562 (2003). Here, the phrase being defined is "*serious* impairment of body function." The repeated use of the term "serious" throughout §3135 permits and, indeed, requires, the Court to give effect to the word consistently throughout §3135. *Accord*, *Sanchick v State Board of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955) (in seeking meaning, the words and clauses of a statutory provision are not divorced from those which precede and those which follow).

In §3135, as amended, the adjective "serious" appears in the context of three different phrases: the "*serious* impairment of body function" threshold, the "permanent, *serious* disfigurement" threshold, and the provision stating that in closed head injury cases a question

of fact for the jury is established by a showing of “*serious* neurological injury.” §3135(2)(a)(ii) (emphasis added). Notably, while the *phrase* “serious impairment of body function” is statutorily defined, §3135(7), the word “serious” itself is not. In *Churchman, supra*, the Court of Appeals thus resorted to the common usage of the term in the context of describing an injury, illness or accident, as derived from Black’s Law Dictionary, to hold that it means “‘dangerous; potentially resulting in death or other severe consequences...’ Black’s Law Dictionary (7th ed), p. 1371.” Accordingly, the plain language of the statute [§3135(2)(a)(ii)] requires some indication that the injury sustained by the plaintiff was severe.” 240 Mich App at 230. Where a term appears throughout a same or similar statutory scheme, the court should construe the term consistently. *State Treasurer v Wilson*, 432 Mich 138, 145; 377 NW2d 703 (1985); *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 629; 550 NW2d 580 (1996).

In this context, then, the Court should construe §3135(7)’s requirement that the claimed impairment affect one’s “*general* ability to lead his or her normal life” in such a way as to render the resulting “serious impairment of body function” a truly “*serious*” impairment; an impairment that affects a person’s “*general ability* to lead his or her normal life” must be materially different than one that merely affects the person’s “*ability* to lead his or her normal life.” The plain meaning of the word “general,” in context of the clear legislative purpose of §3135(7)’s enactment, provides the basis for this distinction.

It is appropriate to examine the dictionary definition of the word “general” to derive and apply its plain and ordinary meaning. *Koontz v Ameritech Services, Inc*, 466 Mich 304,

312; 645 NW2d 34 (2002); *Popma v Auto Club Ins Assoc*, 446 Mich 460, 469-470; 521 NW2d 831 (1994); *Churchman*, 240 Mich App at 228. “General” is defined as “pertaining to a whole or to most of its parts, not particular, not local ... prevalent, widespread ... concerned with main features and not with details[.]” Webster’s Dictionary of the English Language, 1988 Edition (Lexicon Publications, Inc., NY), p. 396. Another dictionary defines the word “general,” when used as an adjective, as follows:

general *adj.* **1.** Concerned with, applicable to, or affecting the whole or every member of a class or category. **2.** Affecting or characteristic of the majority of those involved; prevalent. **3.** Being usually the case; true or applicable in most instances. **4.a.** Not limited in scope, area or application. **b.** Not limited to or dealing with one class of things; diversified. **5.** Involving only the main features rather than precise details.

The American Heritage College Dictionary, 3rd Ed. (Houghton Mifflin Company, Boston MA, 1997), p. 566 (emphasis added). *Accord, Kreiner*, 471 Mich at 143 (Cavanagh, J., dissenting).

Plaintiff complains that the majority in *Kreiner* wrongly adopted and imposed a “‘course and trajectory’ limitation” on those seeking to meet the “serious impairment” threshold (Plaintiff-Appellant’s Brief, p 29). Yet the Court imposed no such “limitation” -- it is an appropriate context for determining whether an impairment has affected the person’s “*general* ability to lead his or her normal *life*.” The position advocated by Plaintiff would focus on altered particular abilities rather than on whether the plaintiff’s general ability to lead his normal life has been affected. The text of the statute, however, calls for consideration of the big picture -- a focus on the forest, if you will, and not on particular

trees. An impact on a relatively small number of particular trees in the forest should not qualify as an effect on the entire forest generally.

The Court in *Kreiner* recognized and honored this legislatively mandated big-picture perspective -- “A negative effect on a particular aspect of an injured person’s life is not sufficient in itself to meet the threshold, as long as the injured person is still generally able to lead his normal life” (471 Mich at 137), even while emphasizing that the duration of the impairment need not extend over an entire life -- “[T]hat the duration of the impairment is short does not necessarily preclude a finding of a ‘serious impairment of body function’” (*id.*, at 134). The plain and ordinary meaning of the term “general,” in the context of examining what type of ability is affected by an impairment, simply requires that consideration of the person’s overall life, in all its dimensions, be the context for determining whether the tort threshold has been met. Amicus Curiae IIM thus submits that, in its task of articulating a standard that identifies when an impairment will be deemed to have “affect[ed] [a] person’s general ability to lead his or her normal life,” §3135(7), the Court must construe the phrase so as to give meaning to the fact that it is a “*serious* impairment of body function” that is being defined.

The definitional phrase for “serious impairment of body function” should also be construed, IIM submits, in the context of the other two no-fault tort thresholds with which it appears. This point was obvious to the Court in *Cassidy*:

In determining the seriousness of the injury required for a “serious impairment of body function”, this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely

death and permanent serious disfigurement. MCL 500.3135 []. The Legislature clearly did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle.

Cassidy, 415 Mich at 503 (emphasis added). Even prior to *Cassidy*, in making reference to the three prongs of the no-fault tort threshold, this Court twice unanimously characterized the injury required for meeting the threshold as “severe.” In *Incarinati v Savage*, 419 Mich 541, 543-544; 357 NW2d 644 (1984), the Court said that tort liability for noneconomic loss is abolished under the statute “unless the physical injury is as *severe* as death, permanent serious disfigurement, or serious impairment of body function” (emphasis added). And in *Great American Ins Co v Queen*, 410 Mich 73, 93; 300 NW2d 895 (1980), the Court said that claimants proceeding in a tort case “may sue the third-party tortfeasor for work loss exceeding that compensated by the no-fault carrier [and] for non-economic loss where injury is severe” (emphasis added).

Finally, the statutory definition of “serious impairment of body function” should be construed in the context of the Legislature’s purpose in enacting the provision. *Dressel*, 468 Mich at 562; *Marquis*, 444 Mich at 644. It is an established fact that, while Michigan’s first-party no-fault insurance system is extremely generous, it likewise is very costly. There also can be no denying the legislative concern for the escalating costs of the tort side of the no-fault automobile system in the wake of the Supreme Court’s *DiFranco* decision in 1986. The trade-off that was so fundamental to the original concept of the no-fault insurance scheme (*Shavers, supra*) was becoming increasingly meaningless, to which the Legislature responded with the 1995 amendments:

Michigan's no-fault law needs to be in balance. The system was designed so that drivers would be compensated from their own policies for economic losses stemming from damage done to person and property due to accidents, regardless of fault, in exchange for a strict limitation on lawsuits. The limitation on lawsuits was weakened by a 1986 state supreme court decision, and the no-fault statute needs to be restored to its condition prior to that decision.

* * *

To the extent that these provisions would reduce the number of lawsuits and the amount paid out in pain and suffering awards, they will reduce the costs of the insurance system and help reduce or restrain insurance premium costs in the competitive auto insurance marketplace. The system now is too expensive; this is one way, and a fair way, to make insurance more affordable for more people. ... The combination of high no-fault benefits and easy access to tort litigation, with high jury awards and defensive out-of-court settlements, threatens the system; it will become unaffordable to ever more insurance customers.

* * *

-- The expression "serious impairment of body function" must be understood in connection with the other tort thresholds, death and permanent serious disfigurement. These are high standards.

Final House Legislative Analysis, House Bill 4341; 1995 PA 22, pp. 2-3 (**4b**) (emphasis added); *see, Kern*, 240 Mich App at 338 n. 1.

Amicus Curiae IIM is concerned, as indeed all Michigan motorists should be concerned, about the economic effect of losing the legislative trade-off that was so fundamental in the passage of our no-fault system. The ever increasing cost of the system's generous no-fault personal injury coverage, when coupled with the impact of a substantially lowered tort threshold, could largely obliterate cost containment for this mandatory coverage. The Court has always been cognizant of this potential problem when interpreting the no-fault

act, and it should be no less so in this case. *See, Shavers v Attorney General*, 402 Mich at 607-611 (“In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether the no-fault insurance is available at fair and equitable rates.”); *O’Donnell v State Farm Mut Ins Co*, 404 Mich 524, 547; 273 NW2d 829 (1979) (since the insurance is compulsory, “it [is] important that the premiums to be charged by the insurance companies be maintained as low as possible. Otherwise, the poor and the disadvantaged people of the state might not be able to obtain the necessary insurance.”)

In accord with the clear legislative purpose of the 1995 amendments, of restoring the integrity of the “serious impairment of body function” threshold, the Court thus should effectuate the vital role this threshold plays in the economic viability of the no-fault system. The Court should recognize that the *only* function served by this threshold is that of a sieve -- sorting the serious injuries from the non-serious or minor ones, the cases that should proceed to trial in the traditional tort system from those susceptible of summary disposition. Any interpretation of the statutory threshold language that fails to eliminate *most* bodily injury claims from the tort system and that instead permits most cases to proceed to trial would completely subvert the one, and, indeed, *only*, purpose of the threshold provision.

- B. The Court should maintain a workable decisional framework for judicial determination of whether a given injury meets the “serious impairment” threshold, including consideration of the three logical dimensions of an impairment’s impact on function -- gravity of the impairment, pervasiveness of the impairment, and duration of the impairment.

Despite the unavoidably factual, case-by-case nature of the “serious impairment” inquiry, §3135(2)(a) makes the question one of law for courts to decide. This is so unless there is a material dispute of fact -- yet since it is still the court who must determine whether a factual dispute is “material” or not, the determination of whether an alleged impairment is “serious” ultimately is always a legal inquiry. Thus, in order to foster consistent application of the act’s serious impairment threshold, the Court in *Kreiner* provided a “basic framework” for the lower courts to utilize in “separating out those plaintiffs who meet the statutory threshold from those who do not.” 471 Mich at 131-133. The Court should reaffirm this decisional framework.

This framework, IIM submits, must include the “nonexhaustive list of factors” identified by the Court as necessary for the courts (and others) to consistently and predictably assess each unique set of injury and life-impact facts against the “serious impairment” threshold. Even before the Court endorsed their use in *Kreiner*, 471 Mich at 133, the Court of Appeals in *Kern, supra*, and *Miller v Purcell*, 246 Mich App 244; 631 NW2d 760 (2001), had relied on *Cassidy*-era case law to discern factors to be considered by trial courts when deciding if an injury met the “serious impairment” threshold:

In determining whether the impairment of the important body function is “serious,” the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery.

Kern, 240 Mich App at 341; *accord*, *Miller*, 246 Mich App at 248-249.

Absent a decisional framework as provided in *Kreiner*, there would be no workable basis for the lower courts to build a body of precedent necessary for fostering consistent and predictable results in claims of serious impairment of body function. The dissenting opinion in *Kreiner* stated that §3135(7) “does not lend itself to any bright line rule or imposition of [a] nonexhaustive list of factors.” *Id.*, 471 Mich at 145 (Cavanagh, J., dissenting). IIM agrees that the statute does not allow for a “bright line rule,” but the courts unavoidably must be directed to use the same criteria and terminology when assessing a claim of “serious impairment” or else the development of a consistent legal standard would be impossible.

As indicated, the Court articulated several factors as part of the “nonexhaustive list” to be considered in each case. 471 Mich at 133; 240 Mich App at 341. Underlying these factors, and ultimately indispensable in the determination of whether an impairment has affected the person’s “general ability to lead his or her normal life,” §3135(7), are three related criteria: **gravity** of the impairment, **duration** of the impairment, and **pervasiveness** of the impairment.

Preliminarily, the assessment of an accident-related impairment’s effect on a person’s ability to lead their life should be made by comparing that person’s lifestyle before and after the accident. On this point the majority and dissenting opinions in *Kreiner* agreed. 471 Mich

at 132; 471 Mich at 143 (Cavanagh, J., dissenting); *accord*, *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000). From a causation standpoint, it cannot be an impairment that “affects” one’s general ability to lead their normal life if there is no significant difference between the before and after pictures of the person’s life.

The three related criteria IIM posits as being central to the inquiry of whether there has been an effect on the person’s “general ability to lead his or her normal life,” gravity, duration and pervasiveness, are the three logical dimensions of “the extent” of an impairment’s potential effect on a person’s ability to lead their normal life. Under §3135(2)(a)(i) and (ii), trial courts are to determine whether there is a factual dispute “concerning the nature and extent” of the person’s injuries. This inquiry has two distinct aspects:

In determining the “nature” of plaintiff’s injuries, the trial court should make appropriate findings concerning whether ... plaintiff has an “objectively manifested” impairment and, if so, whether “an important body function” is impaired. In determining the “extent” of plaintiff’s injuries, the trial court should make appropriate findings concerning whether ... the impairment affects plaintiff’s “general ability to lead his ... normal life.

May v Sommerfield, 239 Mich App 197, 203; 607 NW2d 422 (1999); *Miller v Purcell*, 246 Mich App at 247 (emphasis added). Examination of the gravity, duration and pervasiveness of an impairment’s effect on a person’s functional abilities will reveal the “extent” to which it “affects the person’s general ability to lead his or her normal life.”

The **duration** of the impairment addresses the dimension of time -- for how long (what portion of the person's life) has the impairment affected, or will it affect, the person's ability to live their normal life? In line with the high tort threshold mandated by the language and purpose of the amended statute, IIM submits that, all other factors being equal, the duration must be considerable.

Rather incredibly, Plaintiff-Appellant advocates that, while an impairment must have an effect on the person's life to be serious, "the [e]ffect need not have any particular duration." (Plaintiff-Appellant's Brief, p 20). Indeed, the dissenting opinion in *Kreiner* posits likewise that "the duration of the impairment is not an appropriate inquiry." 471 Mich at 147 (Cavanagh, J., dissenting). Yet the statute necessarily envisions that an impairment last a substantial length of time in order for there to be any effect on a person's "general" ability to lead his or her normal "life," particularly in context with the other two tort thresholds. Death is inherently permanent, and a serious disfigurement is expressly required to be permanent to meet the threshold. To be sure, there is no such "permanence" requirement in the serious impairment threshold, yet this hardly supports an inference that duration of the impairment is irrelevant to the inquiry. Since the statute does speak in terms of one's ability to lead his or her normal "life," a long-term duration of an impairment, even if not life-long, clearly is envisioned.²

² When stating, "I have spent my life here," a person clearly means he has spent either his whole life, or at least much of it, in one location. If he said, "I have spent my entire life here," the person makes it clear that the *entire* life is referenced. The former (like the statute in question) allows for less than the whole life to be referenced, yet a substantial part of it clearly is.

Importantly, the element of duration works both ways; indeed, the seriousness of an impairment cannot truly be assessed without it. If a person is rendered unconscious at the scene of the accident, but recovers fully five minutes later, with no residual effects whatsoever, the “duration” of this otherwise all-pervasive impact on the person’s ability to function forecloses the conclusion that the impairment is “serious” under the statute.³ On the other hand, however, the “duration” factor can render many otherwise minor impairments “serious.” An injury causing only a moderate impact on the person’s day to day functioning, such that it would not be a “serious impairment” if the condition lasted only a month to two, might very well meet the threshold if the condition were permanent or otherwise long-term in duration.

Thus, while it is true that “an injury need not be permanent to be serious,” it must be equally true that an impairment that materially impacts a person’s lifestyle only for a short time should seldom be of sufficient duration to conclude that the person’s *general* ability to lead his or her normal life has been affected.

The **gravity** of the impairment addresses the dimension of intensity, or magnitude -- at any given point in time, to what extent is the particular impairment at issue impacting the person’s functional abilities? The Court in *Cassidy* utilized the nonexhaustive list of factors to determine whether, as applied, they revealed an impairment of “sufficient gravity” to meet

³ Notably, since the tort thresholds operate as a one-time “hurdle” that allows all damages to be recovered (as opposed to an ongoing requirement that bars further damages once the “impairment” has ceased to be “serious”), *Incarinati v Savage*, 419 Mich at 545-546, accepting Plaintiff’s “no duration” argument would thus effectively eliminate *any* tort threshold in many, if not most, cases.

the threshold. *Cassidy*, 415 Mich at 502-503. Again, before the person's ability to lead his or her normal life should be said to have been affected, *generally*, the impact must be considerable; in other words, all other factors being equal, the difference between the person's functional abilities pre-accident and post-accident must be striking.

The **pervasiveness** of the impairment addresses the dimension of breadth -- at any given point in time, how pervasive is the impact of the impairment on the person's overall life functioning? The dissenting opinion in *Kreiner* essentially endorses this inquiry as vital to the overall serious impairment determination. 471 Mich at 144-145 (asking whether "the impairment has an influence on most, but not all, of the plaintiff's capacities to lead his pre-accident lifestyle") (Cavanagh, J., dissenting). While total disability usually would not be required, a person who remains able, generally, to lead the life he or she led prior to the accident should not meet the "serious impairment" threshold. A person's abilities may be affected in various particular ways -- i.e., adaptations or accommodations are made in how the person works or in the manner in which they perform chores or engage in recreational activities, but where the person is able, after recovery from their acute injuries, to return to employment that is the same or similar to the person's pre-accident employment, and is able, likewise, to resume the same or similar recreational activities as before the accident, then it should not be said that the person's *general* ability to lead his normal life has been affected.

These three dimensions are consistent with, and conceptually inform, the factors identified as the nonexhaustive list for use analyzing a serious impairment claim: "extent of the injury, treatment required, duration of disability, and extent of residual impairment and

prognosis for eventual recovery.” The Court is urged to retain the use of these factors as critical for providing the courts with a workable decisional framework to foster consistency in the ongoing development of this area of law.

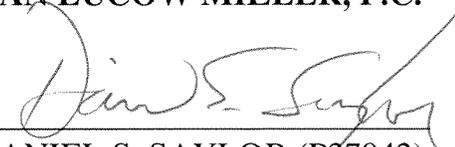
CONCLUSION

In its opinion rendered in this case, the Court should honor the clear legislative intent of §3135, as amended in 1995, of establishing a substantially high “serious impairment” threshold, commensurate with the other two exceptions to §3135’s abolishment of motor vehicle tort liability, death and permanent, serious disfigurement.

Further, the Court should preserve the decisional framework established in *Kreiner*, and thus provide the courts with a workable decisional framework necessary for maintaining consistency in the ongoing development of this area of law.

Respectfully submitted,

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