

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Michigan Court of Appeals  
Whitbeck, P.J., Jansen and Davis, J.J.

RODNEY McCORMICK,

Plaintiff-Appellant,

v

LARRY CARRIER,

Defendant,

and

ALLIED AUTOMOTIVE GROUP, INC.,  
Indemnitor of GENERAL MOTORS  
CORPORATION,

Defendant-Appellee.

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Supreme Court No. 136738

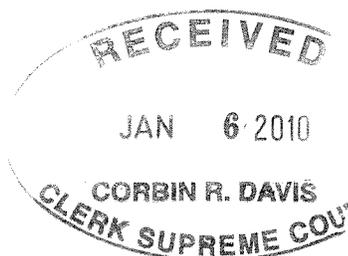
Court of Appeals No. 275888

Genesee Circuit Court No. 06-083549-NI

**AMICUS CURIAE BRIEF OF THE COMMISSIONER OF THE  
OFFICE OF FINANCIAL AND INSURANCE REGULATION**

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## STATEMENT OF QUESTIONS PRESENTED

- I. The Legislature defined "serious impairment of body function" in MCL 500.3135(7) to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Recognized rules of statutory construction dictate that when a statute specifically defines a given term, that definition alone controls, while judicial construction of an unambiguous statute is not permitted. Should the Court overrule *Kreiner v Fischer*, which re-defined "serious impairment of body function" by imposing durational and other requirements that: (a) are not found in the statutory definition; (b) rely on strained interpretations—rather than the plain and ordinary meaning—of the unambiguous words used in MCL 500.3135(7); (c) conflict with the Legislature's express imposition of a durational requirement only in cases involving a "permanent serious disfigurement"; and (d) are inconsistent with the history pre-dating the statute's enactment?

Appellant's answer: "Yes."

Appellee's answer: "No."

Amicus Curiae OFIR Commissioner's answer: "Yes."

- II. Stare decisis is a principle of policy that allows the Court to overrule a prior decision if it was wrongly decided, is practically unworkable, and involves no reliance interests that would work an undue hardship. *Kreiner v Fischer* was wrongly decided, creates unworkable standards for the lower courts, and involves no legitimate reliance interests that would work an undue hardship. Should the Court overrule *Kreiner v Fischer*?

Appellant's answer: "Yes."

Appellee's answer: "No."

Amicus Curiae OFIR Commissioner's answer: "Yes."

## SUMMARY OF ARGUMENT

This Court should overrule *Kreiner v Fischer*,<sup>1</sup> which imposed judicially-created, heightened standards not found in the MCL 500.3135(7) definition of "serious impairment of body function." Several reasons compel this result. First, the Legislature has provided the specific, controlling definition of the term "serious impairment of body function" that cannot be altered by judicial fiat. Similarly, the statutory definition found in MCL 500.3135(7) utilizes unambiguous, commonplace words, precluding any further judicial construction by resort to dictionaries or otherwise. Courts must apply the plain language that the Legislature selected to define "serious impairment of body function," as they did for over eight years prior to *Kreiner*.

Even assuming that judicial construction of MCL 500.3135(7) is permitted, *Kreiner* misinterpreted the statute. It selected an inapposite definition of the word "lead" to create the "course or trajectory test." It created an "entire normal life" standard by defining the word "general" to mean "entire" and by rearranging MCL 500.3135(7) so that this definition modifies the term "normal life" rather than the word "ability." It created an extra-statutory, "nonexhaustive list of objective factors" for courts to use when deciding whether the statutory threshold has been met. As a result of these interpretative errors, *Kreiner* imposes a durational requirement for establishing a threshold impairment although the statutory definition does not.

That *Kreiner* erred by imposing a durational requirement is further evidenced by MCL 500.3135(1). In that statute, the Legislature expressly rejected imposing a "permanent" or similar durational requirement for the "serious impairment of body function" threshold while imposing such a requirement for the "permanent serious disfigurement" threshold. The maxim of *expressio unius est exclusio alterius* precludes the judicial imposition of any durational requirement under these circumstances.

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<sup>1</sup> *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

*Kreiner* is also flawed because the Legislature intended the statutory definition of "serious impairment of body function" to be less stringent than the standards imposed by *Cassidy v McGovern*,<sup>2</sup> which the statutory definition replaced. In application, however, *Kreiner* imposes standards that are more rigorous than those employed in *Cassidy*. This has resulted in the routine dismissal of lawsuits filed by injured persons whose impairments are as or more severe than the impairment suffered by the plaintiff in *Cassidy*, which this Court held met the statutory threshold as a matter of law.

Practical and policy considerations additionally justify this Court overruling *Kreiner*. The statutory definition of "serious impairment of body function," standing alone, provides effective limits and adequate court guidance. Conversely, the judicially-imposed *Kreiner* standards lead to illogical, adverse consequences that the Legislature did not intend. For example, *Kreiner's* durational requirement improperly discounts resolved and latent impairments and treats people suffering similar impairments differently based solely on when the threshold determination is made. *Kreiner's* "activities test" is unduly harsh on the elderly, disabled, and children. As a whole, *Kreiner* skews the delicate Legislative balance underlying the No-Fault Act in favor of negligent drivers at the expense of the seriously impaired accident victims that they injure.

Contrary to the statutory definition, *Kreiner* and its progeny have made it exceedingly difficult for people injured in motor vehicle accidents to establish that they have suffered "a serious impairment of body function." The doctrine of stare decisis permits this Court to overrule wrongly decided prior decisions. *Kreiner v Fischer* is such a decision.

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<sup>2</sup> *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982).

## **STATEMENT OF PROCEEDINGS AND FACTS**

Amicus Curiae Commissioner of the Office of Financial and Insurance Regulation adopts Plaintiff-Appellant Rodney McCormick's Statement of Facts contained in pages 2 – 10 of his Brief on Appeal, together with the procedural background recited in that section.

**STATEMENT OF INTEREST OF  
AMICUS CURIAE COMMISSIONER OF THE  
OFFICE OF FINANCIAL AND INSURANCE REGULATION**

The Commissioner of the Office of Financial and Insurance Regulation (Commissioner) exercises comprehensive regulatory authority over the insurance industry in this State, including Michigan's no-fault automobile insurance system provided for in Chapter 31 of the Insurance Code. Pursuant to MCL 500.200, the Commissioner is "specially charged with the execution of the laws in relation to insurance and surety business" and with performing "such other duties as may be required by law." To effectuate the purposes of the Insurance Code and to execute and enforce the provisions of Michigan's insurance laws, MCL 500.210 authorizes the Commissioner to "promulgate rules and regulations in addition to those now specifically provided for by statute as he may deem necessary."

Under the Insurance Code, the Commissioner is repeatedly called upon to make determinations and to take actions on behalf of policyholders and the public.<sup>3</sup> Chapters 21, 24, and 26 of the Insurance Code grant the Commissioner regulatory authority over the rates of no-fault automobile insurers writing both individual and group policies.<sup>4</sup> By statute, the Commissioner and his staff may examine the books and records of any no-fault or other insurer doing business in this state to ensure their compliance with the Insurance Code's provisions.<sup>5</sup> Specifically under Chapter 31, the Commissioner sits as a non-voting, ex officio member on the Board of Directors of the Michigan Catastrophic Claims Association (MCCA),<sup>6</sup> which

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<sup>3</sup> For example, under MCL 500.2236(5) the Commissioner may disapprove language in no-fault automobile and other insurance policies that violate the Insurance Code, that are inconsistent, ambiguous or misleading, or that contain exceptions or conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.

<sup>4</sup> See MCL 500.2114(2), MCL 500.2418, and MCL 500.2618.

<sup>5</sup> MCL 500.222(1).

<sup>6</sup> MCL 500.3104(13).

indemnifies no-fault automobile insurers for personal protection insurance (PIP) losses exceeding the statutory threshold—currently at \$460,000 for newly-issued policies. The Commissioner also appoints the members of and fills vacancies on the MCCA Board.<sup>7</sup> Also under Chapter 31, the Commissioner must approve any PIP deductibles offered by no-fault insurers in excess of the \$300 statutory limit,<sup>8</sup> and must approve the premium rate discounts, deductibles, and exclusions that no-fault insurers offer their policyholders based upon the existence of other health and accident insurance coverage.<sup>9</sup>

As the regulator of the business of insurance in this State, the Commissioner is uniquely positioned to assist the Court in evaluating the parties' arguments and can aid the Court in deciding this matter of great public interest. Specifically, the Court may consider the Commissioner's views on the proper interpretation of Section 3135 of the Insurance Code, MCL 500.3135, along with his critique of how the decision in *Kreiner v Fischer* improperly raised the bar for people injured in motor vehicle accidents to establish a "serious impairment of body function." Unlike the parties, the Commissioner has no financial interest in the outcome of this case.

As explained further below, restoring the "serious impairment of body function" threshold to a level that is consistent with the Legislature's intent—as evidenced by its statutory definition of this term—is of paramount importance to Michigan residents and, ultimately, to the survival of Michigan's no-fault automobile insurance system that has existed for over thirty-five years.

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<sup>7</sup> MCL 500.3104(14).

<sup>8</sup> MCL 500.3109(3). In *Underhill v Safeco Ins Co*, 407 Mich. 175; 284 NW2d 463 (1979), this Court held that MCL 500.3109(3) authorized the Commissioner to approve deductibles and was not an unconstitutional delegation of authority.

<sup>9</sup> MCL 500.3109a.

## ARGUMENT

I. The Legislature defined "serious impairment of body function" in MCL 500.3135(7) to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Recognized rules of statutory construction dictate that when a statute specifically defines a given term, that definition alone controls, while judicial construction of an unambiguous statute is not permitted. The Court should overrule *Kreiner v Fischer*, which re-defined "serious impairment of body function" by imposing durational and other requirements that: (a) are not found in the statutory definition; (b) rely on strained interpretations—rather than the plain and ordinary meaning—of the unambiguous words used in MCL 500.3135(7); (c) conflict with the Legislature's express imposition of a durational requirement only in cases involving a "permanent serious disfigurement"; and (d) are inconsistent with the history pre-dating the statute's enactment.

### A. Standard of Review

The Court reviews de novo the grant or denial of summary disposition.<sup>10</sup> Questions of statutory interpretation are similarly reviewed de novo.<sup>11</sup> Because the business of insurance is affected with a public interest, courts should liberally construe the provisions of the Insurance Code—including Section 3135(7) defining "serious impairment of body function"—in favor of the interests of the public, policyholders, and creditors.<sup>12</sup>

The interpretation of a statute by the administrative agency charged with its execution is entitled to "respectful consideration."<sup>13</sup> While "[c]ourts must respect legislative decisions and interpret statutes according to their plain language[, a]n agency's interpretation, to the extent it is persuasive, can aid in that endeavor."<sup>14</sup>

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<sup>10</sup> *Kreiner*, 471 Mich at 129.

<sup>11</sup> *DaimlerChrysler Corp v State Tax Comm'n*, 482 Mich 220, 247; 753 NW2d 605 (2008); *Kreiner*, 471 Mich at 129.

<sup>12</sup> *Attorney General, ex rel Comm'r of Ins v Michigan Surety Co*, 364 Mich 299, 325; 110 NW2d 677 (1961); see also *Szabo v Insurance Comm'r*, 99 Mich App 596, 599; 299 NW2d 364 (1980)("Our courts have often recognized that the insurance industry is of great public interest and that insurance laws are to be liberally construed in the interests of the public, policy holders and creditors").

<sup>13</sup> *In re Complaint of Rovas*, 482 Mich 90, 93; 754 NW2d 259 (2008).

<sup>14</sup> *In re Complaint of Rovas*, 482 Mich at 93.

## **B. Analysis**

Section 3135(1) of the Insurance Code, MCL 500.3135(1), provides that "a person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." This provision has existed in its current form since the 1972 enactment of the Michigan No-Fault Automobile Insurance Act (No-Fault Act). The plain language of Section 3135(1) evidences that although the no-fault system largely replaced common law tort liability governing motor vehicle negligence cases, common law tort liability for noneconomic losses (e.g., pain and suffering) was preserved in certain instances. Specifically, a person injured as a result of another person's negligent operation of a motor vehicle can still seek noneconomic damages against the at-fault driver if his or her injuries result in: (a) death; (b) serious impairment of body function; or (c) permanent serious disfigurement. Thus, despite the No-Fault Act's historic trade-off that entitles a person injured in an automobile accident to recover all reasonably necessary medical expenses and certain other economic losses from his or her own insurance company regardless of fault, the exchange for this prompt and comprehensive payment system was a limitation—but not a complete bar—on the injured person's ability to sue the at-fault driver for noneconomic tort damages.

At issue in this case is the definition of "serious impairment of body function," or the statutory threshold that a party injured in an automobile accident (who does not die or suffer permanent serious disfigurement) must meet to *maintain* a common law tort action against an at-

fault driver for noneconomic losses.<sup>15</sup> Public Act 222 of 1995, which became effective March 28, 1996, codified the definition of "serious impairment of body function" in MCL 500.3135(7):

"[S]erious 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.<sup>16</sup>

The Legislature has therefore succinctly stated the three elements that an injured person must satisfy to establish a "serious impairment of body function," which then allows the injured person to maintain a noneconomic loss tort action against the at-fault driver:

- 1) An objectively manifested impairment;
- 2) Of an important body function;
- 3) That affects the person's general ability to lead his or her normal life.<sup>17</sup>

Importantly, these are the only three elements that the Legislature decided an injured person must satisfy to maintain a common law tort action for noneconomic losses against an at-fault driver.

In *Kreiner v Fischer* and the cases that have followed—including the present case—whether an injured person has met the "serious impairment" threshold generally turns on the third element. With respect to the first element, as long as the impairment caused by the injury is medically identifiable, the parties and the courts typically find the existence an "objectively manifested impairment." Similarly, regardless of whether the impairment results from a broken finger, leg, or various other types of injuries, the courts generally conclude that the functions carried out by these body parts are "important" (element two). What remains at issue—and what

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<sup>15</sup> Even if the statutory threshold has been met, the injured person bears the burden of proving all the elements of a common law negligence action at a bench or jury trial. The "serious impairment" test therefore presents a preliminary hurdle that the injured party must clear before proceeding on the merits of his or her underlying tort claim.

<sup>16</sup> MCL 500.3135(7).

<sup>17</sup> MCL 500.3135(7); *see also Kreiner*, 471 Mich at 121.

has operated as a near-complete bar to any tort action for noneconomic losses since the *Kreiner* decision—is whether the impairment "affects the [injured] person's general ability to lead his or her normal life." The decision in *Kreiner* set the bar for satisfying this third element exceedingly high, in a manner inconsistent with the plain language of the statutory definition of "serious impairment of body function" found in MCL 500.3135(7).

- 1. The Court should overrule *Kreiner* because the Legislature has provided a specific, statutory definition of "serious impairment of body function" and the language used in that definition is unambiguous; thus, judicial construction of MCL 500.3135(7) is neither required nor permitted.**

Several rules of statutory construction apply to this Court's consideration of the unambiguous statutory definition of "serious impairment of body function" contained in MCL 500.3135(7). Particularly applicable to MCL 500.3135(7) is the rule that "[w]hen a statute specifically defines a given term, that definition alone controls."<sup>18</sup> Thus, courts may not re-define a statutory term—such as "serious impairment of body function"—when the Legislature has already defined that term by statute.

The court's primary goal when interpreting the provisions of a statute is to discern and give effect to the intent of the Legislature as reflected in the statute's plain language.<sup>19</sup> In *Kreiner*, this Court recognized that courts must examine the language that the Legislature has used in a statute because "[t]hat language is the best indicator of the Legislature's intent."<sup>20</sup> However, judicial construction of unambiguous statutes is not permitted. As this Court explained in *Koontz v Ameritech Services, Inc*:

When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the

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<sup>18</sup> *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008)(citing *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007)).

<sup>19</sup> *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008).

<sup>20</sup> *Kreiner*, 471 Mich at 129.

statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute.<sup>21</sup>

Other Supreme Court decisions have similarly explained that "[a] bedrock principle of statutory construction is that a 'clear and unambiguous statute leaves no room for judicial construction or interpretation'"<sup>22</sup> and that the "primary rule of statutory construction is to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, it is generally applied as written."<sup>23</sup>

The decision in *Kreiner* strayed from these recognized rules of statutory construction in several respects. The pivotal flaw in *Kreiner* was its creation of a durational or temporal requirement for establishing a "serious impairment of body function" that appears nowhere in the statutory definition of that term.<sup>24</sup> This was accomplished through judicial interpretation of the unambiguous statutory phrase "that affects the person's general ability to lead his or her normal life" by applying selected dictionary definitions to these common, non-technical words.<sup>25</sup> The exercise yielded requirements—including the "course or trajectory test,"<sup>26</sup> a mandate to consider

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<sup>21</sup> *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002)(citations omitted).

<sup>22</sup> *Rakestraw v General Dynamics Land Sys, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003)

<sup>23</sup> *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 482; 673 NW2d 739 (2003).

<sup>24</sup> Examples are abundant of the *Kreiner* decision imposing a durational requirement, in application if not expressly. See, e.g., *Kreiner*, 471 Mich at 131 ("Accordingly, the effect of the impairment on the *course of a plaintiff's entire normal life* must be considered.")(emphasis added); *id.* at 133 ("The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's 'general ability' to conduct the course of his normal life has been affected . . . (c) *the duration of the impairment* . . . .")(emphasis added); *id.* at 135 ("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.")(emphasis added); *id.* at 136 ("The *temporary limitations* Straub experienced do not satisfy the statutory prerequisites.")(emphasis added).

<sup>25</sup> Three different dictionaries were utilized to define these common words. *Kreiner*, 471 Mich at 130.

<sup>26</sup> *Kreiner*, 471 Mich at 131.

a plaintiff's "entire normal life"<sup>27</sup> or "whole life,"<sup>28</sup> and a "nonexhaustive list of [five] objective factors"<sup>29</sup>—that significantly raise the bar for meeting the statutory threshold and effectively require that an injured person's impairment be permanent. The Court should reject these extra-statutory requirements, restoring the definition of "serious impairment of body function" provided in the plain language of MCL 500.3135(7).

Where the Legislature's statutory definition of "serious impairment of body function" uses clear and unambiguous language, the statute speaks for itself and further judicial construction is neither required nor permitted.<sup>30</sup> The plain language of MCL 500.3135(7) does not require a qualifying impairment to continue for a minimum length of time before the "serious impairment of body function" threshold may be satisfied.<sup>31</sup> In the absence of the Legislature imposing such a requirement, *Kreiner's* creation of a durational requirement under the third element of MCL 500.3135(7) conflicts with the statute's unambiguous provisions and constitutes improper judicial lawmaking. "Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute."<sup>32</sup> For these reasons alone, this Court should overrule *Kreiner* and the "serious impairment of body function" threshold should derive solely from the statutory definition provided in MCL 500.3135(7).

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<sup>27</sup> *Kreiner*, 471 Mich at 131.

<sup>28</sup> *Kreiner*, 471 Mich at 133 n 16.

<sup>29</sup> *Kreiner*, 471 Mich at 133-134.

<sup>30</sup> *Koontz*, 466 Mich at 312.

<sup>31</sup> *Kreiner*, 471 Mich at 147 (Cavanaugh, J., dissenting)("[T]he 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.").

<sup>32</sup> *Koontz*, 466 Mich at 312.

2. **Even assuming that the unambiguous statutory definition provided in MCL 500.3135(7) requires or permits judicial interpretation, the Court should overrule *Kreiner* based on the interpretive errors that it committed.**

As explained above, the unambiguous statutory definition of "serious impairment of body function" neither requires nor permits any further judicial interpretation and must be applied by the courts as written. Even assuming, however, that dictionary definitions or other interpretive aids are necessary to understand the basic words used in the third element of MCL 500.3135(7), the Commissioner respectfully submits that *Kreiner* employed an inappropriate, out-of context definition for one key word ("lead") and misapplied the modifying word "general" to the wrong term ("normal life" rather than "ability"). In addition, *Kreiner* created a "nonexhaustive list of [five] objective factors" for use in determining whether the third element of MCL 500.3135(7) has been met that lacks any statutory basis. Again, the net effect of these interpretative errors has been to impose a durational or temporal requirement for establishing a threshold impairment that the statutory definition does not require.

- a. ***Kreiner's* "course or trajectory" test resulted from the use of an out-of-context definition of the word "lead."**

The first interpretative error in *Kreiner* relates to its "course or trajectory test," which was derived from a definition of the word "lead" provided in the *Random House Webster's Unabridged Dictionary* (2001). Selecting one definition from the fifty-six (56) different definitions of "lead" that this particular dictionary provides, the Court found that "[t]o 'lead' means, among other things, 'to conduct or bring in a particular course.'"<sup>33</sup> However, the entire definition of "lead" relied on by the Court (definition #5) actually reads: "to conduct or bring (*water, wire, etc.*) in a particular course."<sup>34</sup> In the context of MCL 500.3135(7) and the phrase

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<sup>33</sup> *Kreiner*, 471 Mich at 130 and n 13.

<sup>34</sup> *Random House Webster's Unabridged Dictionary*, at 1092 (2<sup>nd</sup> ed 2001)(emphasis added).

"to lead his or her normal life," this definition of "lead"—meaning to channel water, wire, or some other inanimate object in a particular course or direction (e.g., "a pipe *leads* water to the house")—clearly does not apply. "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*," which "stands for the principle that a word or phrase is given meaning by its context or setting."<sup>35</sup> The Court should reject *Kreiner's* out-of-context definition of "lead" to mean "course," which ultimately led to the "course or trajectory" requirement, because it conflicts with the doctrine of *noscitur a sociis*.

Instead of meaning "course" or "conduct the course," the proper definition of "lead" in the context of the phrase "to lead his or her normal life" would simply be "live."<sup>36</sup> Thus, to the extent that the word "lead" as used in MCL 500.3135(7) needs any further definition, it means nothing more than that the impairment must affect the injured person's general ability to live his or her normal life. This Court should therefore overrule *Kreiner* because it relied on an inapposite definition of "lead" that (a) infused the word "course" into the statutory definition, and (b) extrapolated the word "course" (or "conduct the course") into a requirement that an impairment must affect "the *course or trajectory* of the plaintiff's normal life."<sup>37</sup> Rejection of the "course or trajectory test" is further compelled because the word "trajectory" appears nowhere in the Legislature's statutory definition, nowhere in the definition of "lead" relied upon in *Kreiner*, and for that matter, nowhere in the 55 other definitions of "lead" found in *Random House Webster's Unabridged Dictionary* (2001). Because the "course or trajectory test" inherently

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<sup>35</sup> *Koontz*, 466 Mich at 318.

<sup>36</sup> *Merriam Webster's Collegiate Dictionary*, at 661 (10<sup>th</sup> ed 1996). The *Kreiner* decision acknowledges that "lead" means nothing more than "live." When considering whether the plaintiff in the consolidated case of *Straub v Collette* met the statutory threshold, the Court framed the issue as "whether the impairment affected [Straub's] general ability to *live* his life." *Kreiner*, 471 Mich at 134 (emphasis added).

<sup>37</sup> *Kreiner*, 471 Mich at 130-131 (emphasis added).

imposes a durational or temporal requirement not found in MCL 500.3135(7), and because the test derives from a strained, inapplicable definition of the word "lead," the Court should reject this test in favor of the plain language contained in MCL 500.3135(7).

- b. *Kreiner's* requirement that courts consider the effect of an impairment on an injured person's "entire" or "whole" life resulted from rearranging MCL 500.3135(7) to apply selected dictionary definitions of the modifier "general" to the wrong statutory term.**

The second interpretive error in *Kreiner* relates to the Court's re-arrangement of MCL 500.3135(7) so that the word "general" modifies the term "normal life" rather than the word "ability." This process began with the Court relying on selected definitions of "general," "in general," and "generally" to mean "for the most part" or "with respect to the entirety; as a whole."<sup>38</sup> Next, although in MCL 500.3135(7) the word "general" modifies the word "ability," the Court instead applied these definitions of "general" to the term "normal life." This change,

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<sup>38</sup> *Kreiner*, 471 Mich at 130. The Commissioner does not agree that these definitions are the most suitable or only definitions of "general" that could be applied in the phrase "general ability." By incorporating the word "general," and consistent with one of the No-Fault Act's purposes of limiting but not abolishing noneconomic loss tort actions, the Legislature intended that a threshold impairment must affect the injured person's "ability to lead his or her normal life" to some degree. However, dictionary definitions of "general" are "generally" unhelpful, providing various gradations of degree and little instruction to the courts beyond the word "general" itself. See *Jones v Olson*, 480 Mich at 1176 (Weaver, J., dissenting)(discussing a definition of "general" from the *American Heritage Dictionary* that would find the requisite degree of effect "if any part of the life is affected"—a standard that stands "diametrically opposed" to *Kreiner's* definition of "general" meaning "for the most part" or "entire"). The Commissioner would therefore urge this Court to utilize the "general ability" language provided by the Legislature itself, without any judicial gloss. This is particularly appropriate where both the *Kreiner* majority and dissent recognized that the statutory definition "does not lend itself to any bright-line rule" [*Kreiner*, 471 Mich at 145 (Cavanaugh, J., dissenting)] and that the threshold inquiry "must 'proceed[] on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations" [*Kreiner*, 471 Mich at 134 n 19]. Thus, whether a specific plaintiff's "general ability" to live his or her normal life has been affected by an impairment will turn on the facts of each case, including the specific areas of a person's normal life that have been affected and for each identified area, the degree of the effect. Courts are well equipped to make these fact-specific determinations, and did so based on the statutory definition alone for over eight years pre-*Kreiner*.

combined with the improper definition of "lead" to mean "course," converted the statutory requirement that an impairment "affect the [injured] person's *general ability* to lead his or her normal life" to the heightened, judicially-crafted requirement that the impairment affect "the course of a plaintiff's entire normal life" or "whole life."<sup>39</sup> The dissent in *Kreiner* expressly identified this second interpretive error.<sup>40</sup> Combining the "course or trajectory test" with these ambiguous terms "whole life" and "entire life"—which could mean the "complete scope" of a person's normal life behaviors at a given point in time or temporally to mean the remainder of a person's natural life—has for practical purposes engrafted a durational requirement on the statutory definition that bars recovery unless the injured person will remain impaired for the remainder of his or her "whole" or "entire" natural life. Thus, the Court's misapplication of its selected definitions of the modifier "general" to the wrong term ("normal life" versus "ability") again resulted in a durational requirement that contradicts the plain language of the Legislature's statutory definition of "serious impairment of body function." Only the Legislature, not the courts, may change the specific, unambiguous statutory definition. This misinterpretation of MCL 500.3135(7) further warrants the Court overruling *Kreiner*.

**c. *Kreiner's* "nonexhaustive list of objective factors" has no statutory basis and perpetuates a durational or temporal requirement not imposed by the Legislature.**

Finally, each of the five factors provided in *Kreiner's* "nonexhaustive list of objective factors"<sup>41</sup> serves only to perpetuate the foregoing interpretive errors and to fortify the judicially-created imposition of a durational or temporal requirement not found in MCL 500.3135(7)'s statutory definition. When "extent" is applied in the temporal sense, the "nature and extent of the

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<sup>39</sup> *Kreiner*, 471 Mich at 131 and 133 n 16.

<sup>40</sup> *Kreiner*, 471 Mich at 154 (Cavanaugh, J., dissenting)("The term 'general' as used in MCL 500.3135(7) does not, as the majority asserts, modify the phrase 'to lead his or her normal life.' Rather, 'general' modifies the term 'ability.'").

<sup>41</sup> *Kreiner*, 471 Mich at 133-134.

impairment" factor imposes a durational requirement not contained in Section 3135(7), requiring consideration of how long the impairment continued. Even if this ambiguous, extra-statutory factor is applied only as a measure of the impairment's severity, consideration of the "nature and extent" of the impairment improperly adds to the statutory requirement that the impairment be to an "important body function." This is the only standard that the Legislature imposed regarding the severity, or "the nature and extent," of the impairment—if it impairs "an important body function," it is sufficient under MCL 500.3135(7). Properly applied, the third element only focuses on the effect or result of the impairment, i.e., the degree to which the objectively manifested impairment of an important body function impacted the injured person's ability to lead his or her normal life. Considerations or "factors" that extend beyond this effect or result question are not appropriate under the third element of MCL 500.3135(7), and should be rejected by the Court.

Similarly, the factor involving "the type and length of treatment required" re-measures the severity of the impairment and/or considers its duration, where the appropriate inquiry under element three is the effect of the impairment on the injured person's ability to lead his or her normal life. "The duration of the impairment" directly imposes a durational requirement where none exists in the statute, contradicting *Kreiner's* own acknowledgment that MCL 500.3135(7) contains no minimum durational requirement.<sup>42</sup> "The extent of any residual impairment" and "the prognosis for eventual recovery" factors again improperly focus on the duration of the impairment, contrary to the statute's plain language.

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<sup>42</sup> *Kreiner*, 471 Mich at 134 ("[T]hat the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function.'").

The dissent in *Kreiner* aptly recognized the lack of support for any of these "five factors" in the unambiguous language of MCL 500.3135(7).<sup>43</sup> In addition, the "five factors," "course or trajectory test," and other requirements found in *Kreiner* infuse ambiguity into an otherwise unambiguous statute and impose heightened requirements for meeting the statutory threshold. The result has been an overwhelming majority of appellate decisions concluding that the statutory threshold has not been met,<sup>44</sup> which is not surprising given the rigorousness and temporal breadth of the new, judicially-created requirements found in *Kreiner*. Essentially, under these *Kreiner* requirements, any plaintiff who has recovered or may eventually recover from his or her accident-caused impairment fails to satisfy the statutory threshold.<sup>45</sup> Because *Kreiner's* "course or trajectory test," "entire or whole life" requirement, and "nonexhaustive list of [five] objective factors" all resulted from interpretive errors, the Court should overrule these extra-statutory requirements and return the lower courts' focus to the plain language of Section 3135(7).

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<sup>43</sup> *Kreiner*, 471 Mich at 148 (Cavanaugh, J., dissenting).

<sup>44</sup> See Coalition Protecting Auto No-Fault (CPAN) Amicus Curiae Brief, at p 3 (explaining that out of the 246 unpublished Court of Appeals decisions following *Kreiner*, the injured person / plaintiff has been the losing party approximately 196 times).

<sup>45</sup> By adding this durational overlay, which in application requires a permanent or near-permanent impairment, *Kreiner* has elevated Michigan's "verbal" threshold (compared to a threshold stated as a dollar amount, as some no-fault states have enacted) to a level that is insurmountable for most people suffering serious but non-permanent injuries. This is not what the Legislature intended when it enacted the verbal threshold—i.e., the statutory definition of "serious impairment of body function"—found in MCL 500.3135(7). In effect, *Kreiner* has precluded any recovery for thousands of seriously injured Michigan citizens who otherwise would have been statutorily entitled to seek compensation for their pain and suffering caused by another's negligent operation of a motor vehicle. Moreover, even absent *Kreiner's* durational overlay, Michigan's verbal threshold remains among one of the most rigorous in the nation. Consequently, overruling *Kreiner* and restoring the statutory definition to its original intent will not "pull down the no-fault temple and produce an auto insurance catastrophe for the state's drivers." *Kreiner*, 471 Mich at 138. Instead, it will vindicate the statutory right of seriously injured Michigan citizens to pursue compensation for their noneconomic losses from the negligent drivers who injure them.

3. **The Legislature's decision to use the modifier "permanent" only for the "serious disfigurement" exception in MCL 500.3135(1), together with application of the maxim *expressio unius est exclusio alterius*, additionally preclude the judicial imposition of a durational requirement on the "serious impairment of body function" threshold.**

As the *Kreiner* dissent recognized, the plain language used in MCL 500.3135(1) further evidences the Legislature's intent not to impose a temporal or durational requirement on the "serious impairment of body function" threshold found in MCL 500.3135(7).<sup>46</sup> Section 3135(1) limits common law tort actions based on the negligent operation of a motor vehicle except in cases where the injured person suffers death, serious impairment of body function, or permanent serious disfigurement. The Legislature's use of the modifier "permanent" for the "serious disfigurement" exception evidences its awareness of this durational modifier and its conscious decision to impose this durational modifier only on the "serious disfigurement" exception. In fact, the discussion of the enactment of the No-Fault Act in *DiFranco v Pickard* confirms that the Legislature expressly rejected proposals that would have made it more difficult to sue for noneconomic damages, including "a requirement that the impairment of body function be permanent, major, or extensive."<sup>47</sup> Thus, the Legislature could have imposed a "permanent" or similar durational modifier on the "serious impairment of body function" exception. It did not. The judicial imposition of a such a durational requirement when the Legislature expressly rejected one flies in the face of the Legislature's intent and further justifies this Court overruling *Kreiner*.

Michigan courts recognize the well-settled rule of statutory construction "*expressio unius est exclusio alterius* -- express mention in a statute of one thing implies the exclusion of other

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<sup>46</sup> *Kreiner*, 471 Mich at 147 (Cavanaugh, J., dissenting)("Unlike death or permanent serious disfigurement, the serious impairment of body function threshold does not suggest any sort of temporal limitation.").

<sup>47</sup> *DiFranco v Pickard*, 427 Mich 32, 45; 398 NW2d 896 (1986).

similar things."<sup>48</sup> This rule of construction "expresses the learning of common experience that when people say one thing they do not mean something else."<sup>49</sup> Moreover, this time-honored legal maxim provides "'a safe guide in the construction of statutes marking powers not in accordance with the common law."<sup>50</sup> Thus, "'[w]hen what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted."<sup>51</sup>

In *Feld v Robert & Charles Beauty Salon*, this Court applied the maxim of *expressio unius est exclusion alterius* to deny an employee the right to have legal counsel present during a physical examination requested by an employer or its insurance carrier under Section 385 of the Workers' Disability Compensation Act (WDCA).<sup>52</sup> Section 385 of the WDCA provides that "[t]he employee shall have the right to have a *physician* provided and paid for by himself or herself present at the [physical] examination,"<sup>53</sup> but does not express a similar right with respect to the presence of legal counsel. In applying the maxim of *expressio unius est exclusion alterius*, the Court recognized that the WDCA "is a legislative creation which is in derogation of the common law" and, as such, is the Legislature's sole prerogative to alter or modify.<sup>54</sup> Consequently, the right of an employee to have a physician—but not legal counsel—present at

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<sup>48</sup> *Stowers v Wolodzko*, 386 Mich 119, 133; 191 NW2d 355 (1971); see also *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990) ("[T]he principle of *expressio unius exclusio alterius* is well recognized throughout Michigan jurisprudence.").

<sup>49</sup> *Feld*, 435 Mich at 362.

<sup>50</sup> *Feld*, 435 Mich at 362 (quoting *Taylor v Michigan Public Utilities Comm'n*, 217 Mich 400, 402-403; 186 NW 485 (1922)).

<sup>51</sup> *Feld*, 435 Mich at 362-363 (quoting *Taylor*, 217 Mich at 403).

<sup>52</sup> *Feld*, 435 Mich 352.

<sup>53</sup> MCL 418.385 (emphasis added).

<sup>54</sup> *Feld*, 435 Mich at 363-364.

the examination "is plainly granted within the statute and exists *only* to the extent plainly granted."<sup>55</sup>

Here, the maxim of *expressio unius est exclusion alterius* applies with equal force and precludes the judicial imposition of a temporal or durational requirement on the "serious impairment of body function" threshold. The No-Fault Act is a legislative creation which is in derogation of the common law, with Section 3135 limiting common law tort liability in cases of motor vehicle negligence. Section 3135(1) expressly provides that a "serious disfigurement" must be "permanent" in duration, while the "serious impairment of body function" exception contains no such durational modifier. Under the maxim of *expressio unius est exclusion alterius*, the Legislature's express mention of a "permanent" requirement for one exception ("serious disfigurement") implies the exclusion of a "permanent" or other durational requirement for the other exception ("serious impairment of body function"). Moreover, because Section 3135(1) is creative and not in accordance with the common law, the expressed durational requirement for the "serious disfigurement" exception alone "is exclusive, and the power exists only to the extent plainly granted."<sup>56</sup> For this same reason, "[i]t is the sole prerogative of the Legislature to alter or modify"<sup>57</sup> the "serious impairment of body function" exception or any other provision of the No-Fault Act.

Unlike the exception for "permanent serious disfigurement," the MCL 500.3135(1) exception for "serious impairment of body function" contains no "permanent" or other durational modifier. In fact, the Legislature expressly considered and rejected adding a "permanent" or other durational modifier to the "serious impairment of body function" exception found in

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<sup>55</sup> *Feld*, 435 Mich at 365.

<sup>56</sup> *Feld*, 435 Mich at 363 (quoting *Taylor*, 217 Mich at 403).

<sup>57</sup> *Feld*, 435 Mich at 364.

Section 3135(1).<sup>58</sup> Based on the statute's plain language, the Legislature's intent, and the maxim of *expressio unius est exclusio alterius*, the Legislature's express use of "permanent" to modify only the "serious disfigurement" exception precludes any judicial construction of MCL 500.3135(1) or (7) that imposes a similar "permanent" or other durational requirement on the "serious impairment of body function" exception. The Court should overrule *Kreiner* because it imposes these extra-statutory durational requirements.

**4. The history pre-dating the Legislature's 1995 enactment of the statutory definition of "serious impairment of body function" further exposes the *Kreiner* standards as overly stringent and beyond the Legislature's intent.**

Both the Plaintiff-Appellant's Brief on Appeal and the CPAN Amicus Brief discuss in detail the history preceding the Legislature's 1995 enactment of a statutory definition of "serious impairment of body function." The Commissioner will not repeat that history except to focus on one significant point: *Kreiner* improperly elevated the statutory threshold beyond the standards found in *Cassidy v McGovern*,<sup>59</sup> even though the Legislature intended MCL 500.3135(7) to replace *Cassidy* with less stringent standards.

The *Kreiner* decision recognized that MCL 500.3135(7)'s statutory definition was largely an adoption of the "serious impairment of body function" standards found in *Cassidy*.<sup>60</sup> However, *Kreiner* conceded that the MCL 500.3135(7) definition is more lenient than *Cassidy* because it utilizes a subjective test that considers the effect of an impairment on the injured person's ability to lead "his or her normal life," rather than employing *Cassidy's* entirely objective test that focused on the injured person's ability to lead "a normal life."<sup>61</sup> In addition, with the passage of a Legislative definition of "serious impairment of body function,"

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<sup>58</sup> *DiFranco v Pickard*, 427 Mich at 45.

<sup>59</sup> *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982).

<sup>60</sup> *Kreiner*, 471 Mich at 121 n 8.

<sup>61</sup> *Kreiner*, 471 Mich at 121 n 7.

independent judicial consideration of whether an impairment is sufficiently severe or "serious" is no longer necessary, as it was in *Cassidy* and other decisions pre-dating the enactment of MCL 500.3135(7). Instead, if the statutory definition has been met, by definition there is a "serious impairment of body function."<sup>62</sup>

As the CPAN Amicus Brief explains, at worst the statutory definition of "serious impairment of body function" should be interpreted as incorporating the *Cassidy* standards—not creating a threshold more stringent than *Cassidy*.<sup>63</sup> Even this would be incorrect, as the identified statutory revisions to *Cassidy* must be made, first by using the subjective "his or her normal life" effect test and second by discarding any independent "seriousness" test rendered extraneous by the statutory definition. Again, *Kreiner* expressly acknowledged that the statutory threshold was essentially *Cassidy* with these two noted revisions, both of which make the statutory threshold easier to meet.<sup>64</sup>

The problem with *Kreiner* becomes readily apparent when comparing the qualifying impairment in *Cassidy* with the non-qualifying impairments in the present and other similar cases to which *Kreiner* has been applied. In *Cassidy*, the plaintiff Leo Cassidy was in an automobile accident and suffered two broken bones in his lower right leg.<sup>65</sup> Mr. Cassidy's treating physician "testified that the fractures in both bones were complete, but did not break the

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<sup>62</sup> *Kreiner*, 471 Mich at 128 ("Although a *serious* effect is not required, *any* effect does not suffice either.")(emphasis in original)(quoting *Kreiner v Fischer*, 468 Mich 885; 661 NW2d 885 (2003)).

<sup>63</sup> CPAN Amicus Curiae Brief, at pp 13-17.

<sup>64</sup> That these revisions make the threshold easier to satisfy cannot be reasonably disputed. The subjective life effect test considers each injured person's own lifestyle pre- and post-accident and is therefore easier to satisfy—particularly for those leading limited or otherwise "atypical" lives—than the amorphous, objective "a normal life" standard. Similarly, "seriousness" is shown by satisfying the three statutory elements, rather than by courts independently and subjectively weighing the "seriousness" of a given impairment without any statutory guidance.

<sup>65</sup> *Cassidy*, 415 Mich at 491-492.

skin."<sup>66</sup> Mr. Cassidy was hospitalized for 18 days following the injury.<sup>67</sup> He wore four different casts during the seven months following the accident.<sup>68</sup> Mr. Cassidy's treating physician further testified that by nine months after the accident, x-rays revealed that the fractures had "healed well" and that there was no question that the fractures had completely healed by the last time he saw Mr. Cassidy, which was approximately twenty months post-accident.<sup>69</sup> According to the treating physician, while Mr. Cassidy seemed to have "a little trouble" with his leg as of the last visit (soreness possibly caused by scar tissue), "basically Mr. Cassidy had returned to normal and there was no significant residual damage from the injury."<sup>70</sup> The defendant's independent physician who saw Mr. Cassidy sixteen months after the accident noticed that Mr. Cassidy walked with a limp, took x-rays that showed the fractures were well-healed, and believed the leg appeared capable of normal activity.<sup>71</sup> With respect to effects on Mr. Cassidy's normal life, the opinion discloses only that Mr. Cassidy testified he had to cut back on some activities relating to his work as a potato farmer following the accident, and that the leg "continued to give him trouble" and had "returned only to about 50% of normal" as of the date of trial approximately twenty-one months post-accident.<sup>72</sup> Importantly, the Supreme Court concluded that Mr. Cassidy's injury—a broken leg that was well-healed after nine months, showed no residual damage, and affected only some of his ability to work as a potato farmer—constituted a "serious impairment of body function" as a matter of law.<sup>73</sup>

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<sup>66</sup> *Cassidy*, 415 Mich at 492.

<sup>67</sup> *Cassidy*, 415 Mich at 492.

<sup>68</sup> *Cassidy*, 415 Mich at 492.

<sup>69</sup> *Cassidy*, 415 Mich at 492.

<sup>70</sup> *Cassidy*, 415 Mich at 492.

<sup>71</sup> *Cassidy*, 415 Mich at 492-493.

<sup>72</sup> *Cassidy*, 415 Mich at 492.

<sup>73</sup> *Cassidy*, 415 Mich at 505-506.

The conclusion in *Cassidy* is clearly at odds with *Kreiner* and its subsequent application, further exposing *Kreiner's* durational requirements as being overly stringent and inconsistent with the Legislature's intent in enacting MCL 500.3135(7). Undisputedly, the threshold under the statutory definition of "serious impairment of body function" should be as or more lenient than the standards employed in *Cassidy*. Consideration of Plaintiff-Appellant McCormick's case alone shows that post-*Kreiner*, this is not the case.

Plaintiff-Appellant McCormick suffered a broken ankle requiring hospitalization and two surgeries. Mr. Cassidy suffered a broken leg requiring hospitalization, but the opinion discusses no surgeries. Plaintiff-Appellant McCormick was completely unable to work at his job moving and loading trucks for nineteen months following his accident. In contrast, Mr. Cassidy testified only that the accident required him to cut back on some activities relating to his work as a potato farmer, and his treating physician testified that Mr. Cassidy's broken leg was well-healed within nine months after his accident. Plaintiff-Appellant McCormick's ability to fish and golf were also affected by his injury. Mr. Cassidy, according to the opinion, discussed no affects on his ability to live his normal life other than the limitations on his ability to work. Twenty-one months post-accident, Plaintiff-Appellant McCormick continued to experience ankle pain for which he took prescription painkillers as needed, and a radiology exam revealed signs of degenerative arthritis in his ankle joint. Although Mr. Cassidy testified that he still experienced pain about twenty-one months after his accident, two physicians testified that there was no significant residual damage from the injury and that his leg appeared capable of normal activity. Most notably, Plaintiff-Appellant McCormick's case was dismissed on summary disposition because he did not suffer a "serious impairment of body function" under MCL 500.3135(7), as that statutory definition has been interpreted by *Kreiner*. Conversely, Mr. Cassidy was found to

have suffered a "serious impairment of body function" as a matter of law, utilizing the *Cassidy* standards that are more stringent than those contained in MCL 500.3135(7).

Comparing the injury (broken leg) and result (serious impairment as a matter of law) in *Cassidy* to Plaintiff McCormick's case, or to the Court's decision in *Jones v Olson*<sup>74</sup> and countless other post-*Kreiner* appellate decisions concluding that the statutory definition was not met as a matter of law due to the "limited duration" of the plaintiff's impairment, illustrates *Kreiner's* gross misinterpretation of the statute in a manner inconsistent with the Legislature's intent. The Legislature intended the statutory definition of "serious impairment of body function" to be less stringent than the standards espoused in *Cassidy*, which the statutory definition replaced. Following *Kreiner*, the statutory threshold has been elevated far beyond *Cassidy*, requiring impairments that last an undefined, even permanent, length of time following a motor vehicle accident. This was not the standard in *Cassidy*, which found a broken leg that healed after nine months and a partial impact on the plaintiff's ability to work to be a "serious impairment of body function" as a matter of law. This is not the statutory standard contained in the plain language of MCL 500.3135(7), which the Legislature enacted to supplant *Cassidy* using less stringent standards. The Court should overrule *Kreiner* because it improperly raised the bar for establishing a "serious impairment of body function" in a manner inconsistent with the history pre-dating the enactment of MCL 500.3135(7) and the Legislative intent evidenced by the statute's plain language. In addition, the Court should rule that Plaintiff-Appellant McCormick's impairment satisfies the statutory threshold as a matter of law or remand to the trial court with instructions to apply the correct, pre-*Kreiner* statutory threshold.

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<sup>74</sup> *Jones v Olson*, 480 Mich 1169; 747 NW2d 250 (2008).

**5. The statutory definition of "serious impairment of body function" provides effective limits and adequate court guidance, while the statutorily-unwarranted *Kreiner* standards lead to illogical, adverse consequences that the Legislature did not intend.**

The clear Legislative intent underlying MCL 500.3135(7), as well as several well-settled rules of statutory construction, dictate that *Kreiner* be overruled. In this section, the Commissioner identifies several additional practical / policy considerations that support the Court overruling *Kreiner* because: (a) the statutory definition of "serious impairment of body function" provides effective limits and ample court guidance; and (b) the *Kreiner* standards lead to illogical, adverse consequences that the Legislature did not intend.

**a. The duration of an injured person's impairment that qualifies under the statutory threshold presents a question of damages to be decided by the factfinder in the underlying tort action.**

As previously explained, the absence of a durational modifier in the statutory definition of "serious impairment of body function" was intended by the Legislature and cannot be modified by judicial intervention. Rather than precluding a tort action from proceeding under MCL 500.3135(7), the duration of the impairment caused by an at-fault driver's negligence presents a factual question of damages to be decided by the factfinder in the injured person's underlying tort action. Where the statute contains no durational minimum, it is the role of the factfinder to consider the duration of the injured person's impairment and to assess damages to the at-fault driver accordingly. Assuming that the other elements of a negligence action have been met, the factfinder may assess a lesser damage award to an injured person that suffers a qualifying impairment that is relatively short in duration. Impairments that are exceedingly short in duration may be awarded only nominal damages, or as a practical matter, may not be legally viable in light of the expenses of litigation and the typical contingency fee structure utilized by no-fault plaintiffs' attorneys. In any event, this damage assessment and the relative monetary

value that should be awarded for a successful action based on tort, breach of contract, or any other cause of action is commonplace and falls squarely within the role of the trial court factfinder. Where MCL 500.3135(7) contains no durational requirement, however, impairments that meet the statutory threshold should proceed in the trial court regardless of their duration, allowing the factfinder to fulfill this recognized, historical role.

- b. The statutory requirement of an impairment "that affects the [injured] person's general ability to lead his or her normal life" requires no further explanation, can be applied by the courts, and contains two important limitations that preclude frivolous lawsuits.**

Applied correctly, the statutory threshold asks three and only three questions:

- (1) Is there an objectively manifested impairment?
- (2) If so, is the impairment to an important body function?
- (3) If so, does the impairment affect the injured person's general ability to lead his or her normal life?

Assuming that an important body function has been impaired and that the impairment is objectively manifested, the "affect" analysis required by the third element of MCL 500.3135(7) properly presents the following question: Has there been an affect or impact—for any period of time—on the injured person's general ability to live his or her normal, pre-accident life? If the answer to this question is "yes," then the third element has been satisfied, a "serious impairment of body function" has been established, and the injured party's tort action should be allowed to proceed.

By interpreting and applying the phrase "affects the person's general ability to lead his or her normal life" using only the unambiguous words chosen by the Legislature, the Court avoids selecting from countless dictionary definitions that inherently leads to judicial shading. In addition, this Legislatively-created standard contains two important limitations that restore the

original balance between the No-Fault Act's generous first-party economic loss guarantees and its general limitation on—but not complete abolition of—tort actions against at-fault drivers for noneconomic losses.

First, this standard requires an affect on the injured person's "general" ability to lead his or her normal life. Consistent with the decision in *Kreiner*, the word "general" precludes noneconomic loss tort actions for an impairment that has *any* or a *de minimis* effect on this ability.<sup>75</sup> However, the word "general" is not capable of mathematical or other precision. The Legislature, not the courts, could have further defined or replaced "general" with the words "entire," "most," "some," "a majority," or even stated a specific percentage of the "ability to lead one's normal life" that must be affected to qualify under the third element. None of these requirements appear in MCL 500.3135(7)'s statutory definition, and they may not be added by the courts. If the word "general" is not "specific" enough for courts to apply, it is within the specific province of the Legislature to amend the statute. Moreover, the Legislature's chosen use of "general" evidences its preference for this particular word that, given its flexibility, is entirely consistent with the case-by-case, fact-specific determinations that must be made by courts considering whether each injured person's ability to lead his or her unique, pre-accident lifestyle has been sufficiently affected.<sup>76</sup> Under the statute, an impairment must affect the injured person's "general ability" to lead his or her normal life. "General" implies a question of some degree that courts can apply in each case. Moreover, if a genuine issue of material fact exists

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<sup>75</sup> *Kreiner*, 471 Mich at 133.

<sup>76</sup> *Kreiner*, 471 Mich at 134 n 19 ("We agree with the dissent that the 'serious impairment of body function' inquiry must 'proceed on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations.'").

regarding the extent of an impairment on the injured person's "general ability" to lead his or her normal life, this issue should be decided by the factfinder consistent with MCR 2.116(C)(10).<sup>77</sup>

Second, giving due weight and effect to the word "ability" preserves the Legislature's intent to bar noneconomic loss tort actions for impairments having only a minor effect on the injured person's life. The word "ability" allows the courts to weed out "malingerers" by requiring injured parties to establish that their impairments rendered them unable to engage in their pre-accident lifestyle. Thus, if a defendant or their insurer can establish that an injured person is able to accomplish most of the things that he or she did before the accident, but the injured person has chosen not to engage in some or all of these pre-accident behaviors for reasons unrelated to the accident, then the person's general ability to live his or her normal, pre-accident life has not been affected and the threshold has not been met.<sup>78</sup> Again, if the issue of one's ability is in dispute, the factfinder is well-equipped to weigh the credibility of witnesses and the evidence presented to determine whether the plaintiff's discontinuation of his or her normal lifestyle is attributable to the impairment or to other, non-accident related reasons.

- c. ***Kreiner's* imposition of a durational requirement expressly rejected by the Legislature: (1) treats similarly-impaired injured persons differently based on when the threshold question is asked; and (2) improperly discounts both resolved and latent impairments.**

In addition to lacking any statutory support, the judicial layering of a durational or temporal requirement on the "serious impairment" exception can have the unfair practical effect of treating similarly-impaired injured persons differently depending upon when the *Kreiner* "serious impairment" standards are applied. For example, consider two injured persons with

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<sup>77</sup> See CPAN Amicus Curiae Brief, pp 36-43.

<sup>78</sup> See, e.g., *Waltz v Story*, unpublished opinion per curiam of the Court of Appeals, decided January 24, 2006 (Docket No 265145), 2006 Mich App LEXIS 215, at \*6 (discussing plaintiff's continued ability to fish four times and deer hunt once following his accident, although he testified at deposition that he had since discontinued these activities).

similar compound leg fractures that require surgery, preclude them from any work for six months, and significantly limit them from engaging in their normal, pre-accident lifestyle for a one-year period. After this one-year period, their impairments substantially resolve. Both parties file tort actions against the at-fault drivers.

For injured person "A," her tort action moves quickly and the MCL 500.3135(7) determination is made *while* her impairment is ongoing. Because "A" is currently impaired and it remains unclear whether or when her impairment will resolve, the court determines that the *Kreiner* standards have been met and allows her tort action to proceed. "A" proves her negligence case and recovers noneconomic damages against the at-fault driver, even though her impairment substantially resolves after one year.

For the less fortunate injured person "B," his tort action proceeds more slowly due to crowded dockets, attorney schedules, and other considerations beyond his control. The MCL 500.3135(7) determination is made after the one-year period when his impairment has substantially resolved. Based on *Kreiner's* focus on the duration and "temporary v. permanent" nature of his impairment, the trial court determines that his impairment has resolved and that "the course or trajectory" of his life has not been significantly affected, dismissing his tort action.<sup>79</sup> In this way, *Kreiner's* extra-statutory durational requirement encourages at-fault drivers to delay the threshold determination for as long as possible, where maximizing the time during which the injured person can recover helps ensure that the threshold cannot be met and that the at-fault driver can escape liability.

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<sup>79</sup> Under *Kreiner*, an injured person who heals quickly, medical advances that speed recovery, and unequal access to medical treatment could also have this disparate effect. Thus, although two injured persons may suffer similar impairments, one person's tendency to recover quickly and access to superior medical treatment may shorten the comparative duration of his impairment, precluding only him from meeting the *Kreiner* threshold.

In a related example, the durational requirements imposed by *Kreiner* can preclude tort actions where the injured person suffers latent or lingering impairments that although severe, may not be deemed "significant" enough at the time of the threshold inquiry to allow the plaintiff's tort case to proceed. This is true of Plaintiff-Appellant McCormick in the present case, who has the onset of degenerative arthritis that may worsen over time. Essentially, *Kreiner* imposes a "snapshot in time" test that considers only "what is the plaintiff's condition today"? If the plaintiff suffered a qualifying impairment but has mostly recovered, the past impairment is ignored and deemed to be of insufficient duration to affect the "course or trajectory" of the plaintiff's entire life. Future impairments are similarly ignored, or at least greatly discounted. However, if an injured person can establish that a past or latent impairment affected or will affect his general ability to lead his normal life, the statutory threshold has been met and the case should proceed to trial. At trial, the factfinder can determine whether these resolved or latent impairments have been proven and if so, assess their damage value. Through its use of extra-statutory durational standards, *Kreiner* improperly discounts both past impairments and latent or future impairments beneath the statutory threshold, precluding any court determination as to their merit or value.

Clearly, the unequal treatment of injured persons suffering similar impairments, based solely on the vagaries of when the "serious impairment of body function" determination is made, was not intended by the Legislature. MCL 500.3135(7) considers only whether an objectively manifested impairment of an important body function affects the injured person's general ability to lead his or her normal life. It does not consider or require any showing that this effect continue for a minimum length of time. Any effect that is pervasive enough to satisfy this third statutory element is sufficient regardless of how long it persisted, continues to persist, or is

expected to persist in the future. Where the threshold is met, the factfinder should decide whether the liability elements of a negligence action have been proven. If they have, the factfinder can then consider factors such as the duration of the impairment and/or its latent, continuing, or worsening potential and assess noneconomic loss damages accordingly—just as they did pre-*Kreiner* and as they continue to do in non-vehicular negligence actions today.

**d. *Kreiner's* focus on "activities" is particularly harsh on those leading relatively sedentary pre-accident lives, including the elderly, children, and the disabled, and should be corrected in favor of the statutory phrase "his or her normal life."**

As explained in CPAN's Amicus Brief,<sup>80</sup> the *Kreiner* decision's focus on pre- and post-accident "activities" in defining "normal life" conflicts with the unambiguous language used by the Legislature and makes satisfying the statutory threshold more difficult for the disabled, children, the elderly, and other injured people who lead relatively sedentary lives. This adverse consequence of *Kreiner's* "activity test" was both illustrated and criticized by Justice Kelly in *Minter v City of Grand Rapids*.<sup>81</sup> In that case, the plaintiff Dorothy Minter was 67 years old when she was hit by a police cruiser and suffered, *inter alia*, a broken toe, a cervical strain, and a closed head injury.<sup>82</sup> Focusing on the plaintiff's relative inactivity and physical limitations both before and after the accident, the Court reversed the Court of Appeals in lieu of granting leave to appeal and reinstated the judgment of the trial court granting the defendant summary disposition on statutory threshold grounds. In her dissent, Justice Kelly identified that the statutory threshold requires an examination of the effect of an impairment on the injured person's "general ability to lead *his or her* normal life."<sup>83</sup> She then criticized the Court of Appeals dissent, which this Court adopted in reaching its decision, for its focus on what the plaintiff did not do before

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<sup>80</sup> CPAN Amicus Curiae Brief, at pp 26-29.

<sup>81</sup> *Minter v Grand Rapids*, 480 Mich 1182; 747 NW2d 229 (2008).

<sup>82</sup> *Minter v Grand Rapids*, 275 Mich App 220, 223; 739 NW2d 108 (2007).

<sup>83</sup> *Minter*, 480 Mich at 1182 (Kelly, J., dissenting)(emphasis in original).

her accident because the resulting "before-and-after-accident comparison compares negatives and tells us nothing about how the accident affected plaintiff's life."<sup>84</sup> Justice Kelly then reminded the Court to "be careful not to punish this or any injured person for not being young, healthy, self-sufficient, employed, and a driver before suffering injury in an accident" because the "[t]he statute does not speak in terms of 'a' model normal life."<sup>85</sup> In this way, the *Kreiner* "activity test," whether intentionally or not, can be utilized to the disadvantage of the elderly and others who engage in few "activities," even though they may have suffered an impairment affecting their general ability to lead their unique, relatively sedentary "normal lives."

*Minter* demonstrates that *Kreiner's* "activity test" can lead to subjective court determinations about which activities (or lack of activities) are most important to the injured person's life. Misapplied to the extreme, the "activity test" requires courts to make judgments about the societal value of the injured person's pre- and post-accident activities, transforming the statutory standard into the legislatively-rejected "a normal life" standard found in *Cassidy*. For example, an 80-year-old injured person may have enjoyed and spent a majority of her pre-accident life sitting in a chair while knitting and watching television. Under MCL 500.3135(7), an impairment that affects this person's ability to sit comfortably in a chair and engage in knitting would satisfy the third element of the statutory threshold. Under the *Kreiner* standards as interpreted by *Minter*, however, the "course or trajectory" of this person's "entire normal life" may not be affected because: (1) she still cannot engage in a variety of "activities" (walking, household chores, driving, working, etc.) that she could not engage in pre-accident; or (2) the court does not deem sitting in a chair and knitting to be "significant activities." Accordingly, the *Kreiner* "activity test" allows trial courts to discriminate against the less physically active

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<sup>84</sup> *Minter*, 480 Mich at 1183 (Kelly, J., dissenting).

<sup>85</sup> *Minter*, 480 Mich at 1183 (Kelly, J., dissenting)(emphasis in original).

members of society, or even to discriminate against those whose pre-accident lifestyles are deemed to be outside the "norm." This is not the statutory standard, which expressly provides that an impairment that "affects the [injured] person's general ability to lead his or her normal life" is sufficient to meet the threshold.

As the *Kreiner* dissent recognized, a standard that favors certain activities while discounting others and that generalizes activities into broad, "close enough" categories (e.g., the ability to walk v. the ability to walk a certain distance, the ability to work v. the ability to work full time) essentially reinstates the "ability to live *a normal life*" standard established in *Cassidy v McGovern*.<sup>86</sup> The Legislature expressly rejected that *Cassidy* standard in favor of the "ability to lead *his or her normal life*" standard found in MCL 500.3135(7). The Court should therefore overrule *Kreiner* and clarify that its "activity test" should not be utilized by the lower courts, which should instead focus on and apply the statutory standard of "the injured person's normal life." Whether the injured person's "normal life" includes many or few activities, and regardless of whether those activities include running marathons or sitting on the couch, the statutory inquiry is whether the injured person's impairment affects his or her general ability to engage in that unique, pre-accident conduct.

- e. ***Kreiner* skews the delicate Legislative balance underlying the No-Fault Act in favor of negligent drivers at the expense of the seriously impaired accident victims that they injure.**

Finally, the *Kreiner* standard effectively insulates at-fault drivers (including drunk and reckless drivers) from the consequences of their actions while barring any remedy to the innocent accident victims harmed by these drivers' negligent conduct. This was not the balance stricken when the No-Fault Act was enacted, nor was it the balance intended by the 1995 codification of the definition of "serious impairment of body function." The generous economic loss benefits

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<sup>86</sup> See *Kreiner*, 471 Mich at 153, 156 (Cavanaugh, J., dissenting).

under the No-Fault Act were not provided in exchange for a complete ban on noneconomic loss tort actions against at-fault drivers. Instead, the balance stricken imposed a reasonable limitation on noneconomic damage tort actions by restricting their availability to persons who suffer a certain severity of injury. The level of severity for an injury to constitute a "serious impairment of body function" is defined by statute. Post-*Kreiner*, however, that severity bar has been raised significantly beyond the statutory threshold, skewing the delicate balance underlying the No-Fault Act. The consequences, including public outrage and political upheaval, endanger the no-fault system itself. More importantly, a new, non-statutory policy has been judicially created that protects negligent drivers who were never intended to be protected and punishes innocent, severely injured persons who were never intended to be punished. For this and the other practical / policy reasons explained in this Section, the Court should overrule *Kreiner*, impose the statutory threshold required by the plain language of MCL 500.3135(7), and restore the political compromise that the Legislature codified in Section 3135(7).

**II. Stare decisis is a principle of policy that allows the Court to overrule a prior decision if it was wrongly decided, is practically unworkable, and involves no reliance interests that would work an undue hardship. *Kreiner v Fischer* was wrongly decided, creates unworkable standards for the lower courts, and involves no legitimate reliance interests that would work an undue hardship. The Court should overrule *Kreiner v Fischer*.**

**A. Standard of Review**

The Commissioner incorporates the Standard of Review contained in Argument I, Subsection A, *supra*.

**B. Analysis**

Although this Court should not take lightly its decision to overrule *Kreiner*, it has expressly recognized that the doctrine of stare decisis "is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning

of statutes."<sup>87</sup> The Court has further recognized "that stare decisis is a 'principle of policy' rather than 'an inexorable command'"<sup>88</sup> and that it is not bound to follow precedent "when governing decisions are unworkable or are badly reasoned."<sup>89</sup> As discussed below, each of the factors that the Court must consider when deciding whether to overrule a prior decision weighs in favor of overruling *Kreiner*.

**1. The Court should overrule *Kreiner* because it was wrongly decided.**

When evaluating the factors that the Court uses when deciding whether to overrule a prior decision, "the first question we ask is whether the earlier decision was wrongly decided."<sup>90</sup> For each of the reasons discussed in Argument I above, the Commissioner respectfully submits that *Kreiner* was wrongly decided, imposing durational and other impediments to satisfying the "serious impairment of body function" threshold that are found nowhere in the unambiguous statutory definition of this term. Based on this factor, the Court should overrule *Kreiner*.

**2. The Court should overrule *Kreiner* because it creates unworkable, confusing standards for the lower courts.**

In addition to considering whether the prior decision was wrongly decided, the Court considers "whether the decision at issue defies 'practical workability' [and] whether reliance interests would work an undue hardship."<sup>91</sup> As explained above and in the brief of Amicus Curiae CPAN, the *Kreiner* decision has created unworkable, confusing standards for the lower courts to apply, resulting in an explosion of appellate litigation.<sup>92</sup> Specifically, the ambiguous,

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<sup>87</sup> *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000).

<sup>88</sup> *Robinson*, 462 Mich at 464 (quoting *Hohn v United States*, 524 US 236, 251 n 21; 118 S Ct 1969; 141 L Ed 2d 242 (1998)).

<sup>89</sup> *Robinson*, 462 Mich at 464 (citing *Holder v Hall*, 512 US 874, 937 n 22; 114 S Ct 2581; 129 L Ed 2d 687 (1994)).

<sup>90</sup> *Haynes v Neshewat*, 477 Mich 29, 39; 729 NW2d 488 (2007).

<sup>91</sup> *Robinson*, 462 Mich at 464.

<sup>92</sup> CPAN Amicus Curiae Brief, at pp 40-41 (describing the over 250 published and unpublished appellate decisions dealing with the no-fault threshold since *Kreiner* was decided); *see also*

extra-statutory standards created in *Kreiner*, including its imposition of the "course or trajectory test" and references to effects on the injured person's "whole life" or "entire life," have led to a de facto permanency requirement and the corresponding spate of appeals challenging the summary disposition of cases that would otherwise meet the statutory definition. Because the *Kreiner* decision is practically unworkable and has skewed the original balance under the No-Fault Act that was intended to limit—not absolutely bar—actions against at-fault drivers for noneconomic losses, the Court should also overrule *Kreiner*.

**3. The reliance factor compels the Court to overrule *Kreiner* because negligent drivers cannot and do not legitimately rely upon *Kreiner's* overstated tort immunity; rather, Michigan citizens who suffer a "serious impairment of body function" are entitled to rely upon the plain language of MCL 500.3135(7).**

Finally, the Court must consider whether overruling *Kreiner* would work an undue hardship on those relying on it, or in other words, whether *Kreiner* "has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations."<sup>93</sup> This is not the case. As this Court concluded in *Haynes v Neshewat*, "[t]he fact that some parties may rely on a decision to protect them from civil liability for discriminatory behavior is not a reason to uphold an erroneous decision."<sup>94</sup> Similarly, the fact that some at-fault drivers may rely on *Kreiner* to protect them from civil liability for their negligent or reckless operation of a motor vehicle is not a reason to uphold *Kreiner's* erroneous decision. Moreover, as this Court recognized in *Robinson v City of Detroit*,<sup>95</sup> it is more likely that these at-fault drivers—like the drivers fleeing the police in *Robinson*—are completely unaware of *Kreiner* and do not drive negligently or recklessly in

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*Jones*, 480 Mich at 1170 n 1 (Cavanaugh, J., dissenting)(suggesting that "if *Kreiner* is so easily misunderstood" by the lower courts, "its precepts must deserve revision or clearer articulation").

<sup>93</sup> *Robinson*, 462 Mich at 466.

<sup>94</sup> *Haynes*, 477 Mich at 39.

<sup>95</sup> *Robinson*, 462 Mich at 466.

reliance on the theory that their conduct may be excused from tort liability based on the heightened *Kreiner* standards. Rather, this awareness would come, if at all, after the injury-causing accident, and "[s]uch after-the-fact awareness does not rise to the level of a reliance interest."<sup>96</sup> Thus, no legitimate reliance interest weighs against overruling *Kreiner*.

The following discussion in *Robinson* is particularly fitting to the urgent need to overrule *Kreiner* and to re-implement the unambiguous statutory definition of "serious impairment of body function" contained in MCL 500.3135(7). In discussing the reliance interest to be considered when deciding whether to overrule a prior decision, the Court explained:

Further, it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error.<sup>97</sup>

In this case, Michigan citizens injured in motor vehicle accidents are entitled to rely upon the plain language of MCL 500.3135(7) to determine whether they have suffered a "serious impairment of body function," absent which they cannot even pursue a tort claim for

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<sup>96</sup> *Robinson*, 462 Mich at 466-467.

<sup>97</sup> *Robinson*, 462 Mich at 467-468.

noneconomic damages against an at-fault driver.<sup>98</sup> The statute itself contains no durational, temporal, or permanency requirement. Yet the decision in *Kreiner*, together with its subsequent application by the lower courts and even by this Court in cases like *Jones v. Olson*,<sup>99</sup> imposes just such a requirement. As Justice Weaver recognized in her dissent in *Jones v Olson*, these decisions disrupt rather than protect the legitimate reliance interests of Michigan citizens<sup>100</sup> and constitute—in the words of *Robinson*—"a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature."<sup>101</sup> Rather than holding to *Kreiner's* distorted reading of MCL 500.3135(7) because of the doctrine of stare decisis, this reliance interest in fact compels the Court to overrule *Kreiner*.

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<sup>98</sup> Assuming that they have not suffered death or a permanent serious disfigurement.

<sup>99</sup> *Jones v Olson*, 480 Mich 1169; 747 NW2d 250 (2008).

<sup>100</sup> *Jones*, 480 Mich at 1173 (Weaver, J., dissenting)("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.").

<sup>101</sup> *Robinson*, 462 Mich at 467.

## RELIEF SOUGHT

For each of the reasons stated above, Amicus Curiae the Commissioner of the Office of Financial and Regulation respectfully requests this Court to overrule *Kreiner v Fischer*, thereby restoring the unambiguous statutory definition of "serious impairment of body function" contained in MCL 500.3135(7). To ensure the uniform application of MCL 500.3135(7) by the lower courts, the Commissioner further requests this Court to hold that MCL 500.3135(7) contains no durational or temporal requirement. In the event that the Court decides not to overrule *Kreiner*, the Commissioner request that at a minimum, the Court specifically reject *Kreiner's*: (a) "course or trajectory test"; (b) consideration of effects on the injured party's "entire life" or "whole life"; (c) "list of objective factors" that predominantly focus on the duration of the impairment and the likelihood of eventual recovery<sup>102</sup>; and (d) other language that could be construed to impose a durational requirement.

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<sup>102</sup> Rejecting these five factors necessarily results in rejection of the statement in footnote 17 that "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish" the factor relating to "the extent of any residual impairment." *Kreiner*, 471 Mich at 133-134 and n 17. Neither the "residual impairment" factor nor the "physician-imposed restrictions" requirement has any basis in the statutory definition of "serious impairment of body function." The statute requires an "objectively manifested impairment" that "affects the person's general ability to lead his or her normal life." Whether a physician has specifically listed all of the things that the injured person cannot do because of the impairment is not dispositive as to whether this standard has been met. For example, even absent such physician-imposed restrictions, the standard could be met if extreme pain renders the person unable to engage in his or her normal life functions—particularly if the pain is consistent with the type of injury that the person suffered.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher L. Kerr". The signature is fluid and cursive, with the first name being the most prominent.

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