

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals
Hon. William C. Whitbeck Presiding

RODNEY McCORMICK,
Plaintiff-Appellant,

v.

LARRY CARRIER,
Defendant, and

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

Docket No. 136738

Court of Appeals No. 275888

Lower Court No. 06-083549-NI
Genesee County Circuit Court

CRAIG E. HILBORN (P43661)
DAVID M. KRAMER (P63740)
HILBORN & HILBORN, P.C.
Attorneys for Plaintiff-Appellant
999 Haynes Street, Suite 205
Birmingham, MI 48009
(248) 642-8350

MARK R. BENDURE (P23490)
BENDURE & THOMAS
645 Griswold Street, Suite 4100
Detroit, MI 48226
(313) 961-1525

MICHAEL P. McDONALD (P37362)
JOHN W. LIPFORD (P69890)
GRZANKA GRIT McDONALD
Attorneys for Defendant-Appellee,
Allied Automotive Group, Inc.
2930 Lucerne Drive, S.E.
Grand Rapids, MI 49546
(616) 956-5559

**AMICUS CURIAE BRIEF OF THE NEGLIGENCE SECTION
OF THE STATE BAR OF MICHIGAN**

Prepared by:

JOSÉ T. BROWN (P33926)
CLINE, CLINE & GRIFFIN, PC
Co-Counsel for Amicus Negligence
Section of the State Bar of Michigan
503 South Saginaw Street, Suite 1000
Flint, MI 48502
(810) 232-3141

DAVID E. CHRISTENSEN (P45374)
Co-Counsel for Amicus Negligence
Section of the State Bar of Michigan
26555 Evergreen Rd., Ste. 1530
Southfield, MI 48076
(248) 353-7575

Dated: December 28, 2009

I. TABLE OF CONTENTS

<u>I. TABLE OF CONTENTS</u>	ii
<u>II. INDEX OF AUTHORITIES</u>	iv
<u>III. STATEMENT OF INTEREST OF AMICUS CURIAE NEGLIGENCE SECTION OF THE STATE BAR OF MICHIGAN</u>	1
<u>IV. CONCURRENCE WITH STATEMENT REGARDING JURISDICTION</u>	2
<u>V. CONCURRENCE WITH STATEMENT OF QUESTIONS PRESENTED</u>	2
<u>VI. CONCURRENCE WITH STATEMENT REGARDING STANDARD OF REVIEW</u>	2
<u>VII. CONCURRENCE WITH STATEMENT OF FACTS</u>	2
<u>VIII. ARGUMENT OF AMICUS CURIAE</u>	2
A. THE TRANSFER OF FACT-FINDING AUTHORITY UNDER MCL 500.3135(2)(A) IS UNCONSTITUTIONAL	7
1. Standard of Review	8
2. Historical Interplay of Right to a Jury Trial and Summary Disposition	9
<i>a. Federal Underpinnings</i>	9
<i>b. Michigan’s Historical Framework</i>	11
3. Summary Proceedings in the No-Fault Context	17
<i>a. Advisory Opinion re Constitutionality of 1972 PA 294</i>	17
<i>b. <u>Cassidy v McGovern</u></i>	18
<i>c. <u>DiFranco v Pickard</u></i>	21
<i>d. MCL 500.3135(2)(a) and <u>Kreiner v Fischer</u></i>	23
4. “Serious Impairment” is an Ultimate Fact Issue Reserved for Jury Determination under the Michigan Constitution	26

B. SECTION 3135(2) OF THE NO-FAULT ACT IS UNCONSTITUTIONAL BECAUSE IT CREATES A SUMMARY PROCEEDINGS PROCEDURE THAT DIRECTLY CONFLICTS WITH THE SUMMARY DISPOSITION PROCEDURES CONTAINED IN MCR 2.116(C)(10) AND THE MICHIGAN CONSTITUTION PROHIBITS THE LEGISLATURE FROM ENACTING PROCEDURAL LEGISLATION THAT CONFLICTS WITH RULES GOVERNING PRACTICE AND PROCEDURE PROMULGATED BY THIS COURT.....28

1. Separation of Powers is a Bedrock Principle in the Michigan Constitution.....29

2. Until the 1995 Amendment of the No Fault Act to Include the Current Version of MCL 500.3135(2), this Court Recognized that the Determination of Whether a Plaintiff has Suffered a “Serious Impairment of Body Function” is More Properly Within the Province of the Jury.....30

3. Under the Two-step Inquiry used to Determine Whether the Legislature has Unconstitutionally Interfered with this Court’s Authority over Matters of Practice and Procedure.....32

a. MCL 500.3135(2) conflicts with MCR 2.116(C)(10) because it reallocates the decision-making powers of the judge and jury, and lacks the evidentiary requirements of MCR 2.116(G).....33

b. MCL 500.3135(2) sets forth no substantive rights, and must yield to the requirements of MCR 2.116(C)(10).....37

C. THE *KREINER* DECISION SHOULD BE CORRECTED TO ELIMINATE ITS EXTRA-STATUTORY REQUIREMENTS THAT: (1) IMPOSE A TEMPORAL/DURATIONAL REQUIREMENT AND (2) REQUIRE THAT A PERSON’S ABILITY TO LEAD HER NORMAL LIFE BE COMPLETELY ELIMINATED INSTEAD OF “AFFECTED” AS STATED IN SECTION 3135(7)..... 41

IX. CONCLUSION AND REQUEST FOR RELIEF.....47

II. INDEX OF AUTHORITIES

Cases

<i>Abraham v Jackson</i> , 102 Mich App 567, 570; 302 NW2d 235, 237 (1980).....	19
<i>Advisory Opinion re Constitutionality of 1972 PA 294</i> , 389 Mich 441, 460-61 (1973)	17, 18, 30
<i>Blodgett v Holden</i> , 275 US 142, 147-48; 48 S Ct 105, 107 (1927) (Holmes, J., concurring)	8
<i>Bonin v Gralewicz</i> , 378 Mich 521, 526-527 (1966)	15
<i>Brooks v Reed</i> , 93 Mich App 166, 171 (1979).....	19
<i>Brown v Metropolitan Life Insurance Co.</i> , 65 Mich 306, 315 (1887)	18
<i>Buscaino v Rhodes</i> , 385 Mich 474, 479; 189 NW2d 202, 204 (1971).....	30
<i>Casco Twp v Secretary of State</i> , 472 Mich 566, 571, 701 NW2d 102 (2005).....	42
<i>Cassidy v McGovern</i> , 415 Mich 483, 501-502; 330 NW2d 22, 28-29 (1982).....	passim
<i>Celotex Corp v Catrett</i> , 477 US 317, 327; 106 S Ct 2548, 2555 (1986).....	10
<i>Clemons v City of Detroit</i> , 120 Mich App 363, 372; 327 NW2d 480, 484 (1982).....	33
<i>Conklin v Shack</i> , unpublished opinion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No. 268316).....	6

Cook v Hardy,
unpublished opinion per curiam of the Court of Appeals,
issued February 24, 2005 (Docket No. 250727) 5

DiFranco v Pickard,
427 Mich 32; 398 NW2d 896 (1986)..... passim

Dressel v Ameribank,
468 Mich 557, 561, 664 NW2d 151 (2003)..... 42

Durant v Stahlin,
375 Mich 628, 646-47; 135 NW2d 392, 397-98 (1965) 15

Earls v Herrick,
107 Mich App 657, 665; 309 NW2d 694, 698 (1981)..... 19

Edwards v. Symons,
65 Mich 348, 354 (1887) 12

Farm Bureau Mutual Insurance Company of Michigan v. Stark,
437 Mich 175, 184; 468 NW2d 498 (1991)..... 27

Feltner v Columbia Pictures Television,
523 US 340, 355; 118 SCt 1279, 1288 (1998)..... 11

Gagne v Schulte,
unpublished opinion per curiam of the Court of Appeals,
issued February 28, 2006 (Docket No. 264788) 5

Gauthier v Campbell, Wyant & Cannon Foundry Co,
360 Mich 510, 515; 104 NW2d 182, 184 (1960)..... 8

Ghrist v Chrysler Corp,
451 Mich 242, 249 n.13; 547 NW2d 272, 275 (1996)..... 15

Guardian Depositors Corp v. Darmstaetter 12

Guevara v. Martinez, Garcia & Sample,
unpublished opinion per curiam of the Court of Appeals,
issued May 24, 2005 (Docket No. 260387).....5

Harris v McVickers,
88 Mich App 508, 511 (1979)..... 19

Henderson v State Farm Fire & Casualty Co,
460 Mich 348, 353; 596 NW2d 190, 193 (1999)..... 14, 27

<i>Hill v Keller</i> , unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No. 269084)	6
<i>In re Contempt of Henry</i> , 282 Mich App 656, 667; 765 NW2d 44, 53 (2009).....	29, 40
<i>Jones v Olson</i> , 480 Mich 1169, 747 NW2d 250 (2008).....	44
<i>Jones v Wheelock</i> , unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 258974).....	6
<i>Kendricks v Rehfield</i> , 270 Mich App 679, 682; 716 NW2d 623, 625 (2006).....	36
<i>Kirby v Larson</i> , 400 Mich 585, 598; 256 NW2d 400, 406 (1977).....	32, 37
<i>Klapp v United Ins Group Agency, Inc</i> , 468 Mich 459, 469; 663 NW2d 447, 453-54 (2003)	15
<i>Krajewski v Krajewski</i> , 125 Mich App 407, 414; 335 NW2d 923, 927 (1983).....	32
<i>Kreiner v Fischer</i> , 471 Mich 109; 683 NW2d 611 (2004).....	passim
<i>Loving v United States</i> , 517 US 748, 756; 116 S Ct 1737, 1743 (1996).....	29
<i>Luther v Morris</i> , unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 244483)	4
<i>Lytle v. Malady</i> , 456 Mich 1, 12, n 10, n11; 566 NW2d 582 (1997).....	16
<i>Mable Cleary Trust v Edward-Marlah Muzyl Trust</i> , 262 Mich App 485, 510; 686 NW2d 770, 787 (2004).....	37
<i>McCart v J Walter Thompson, Inc</i> , 437 Mich 109, 115-16; 469 NW2d 284, 287 (1991)	16

<i>McDonald v Vaughn</i> , unpublished opinion per curiam of the Court of Appeals, issued May 18, 2004 (Docket No. 244687)	39
<i>McDougall v Schanz</i> , 461 Mich 15, 29; 597 NW2d 148, 155 (1999).....	30, 33, 38
<i>McDuffie v Root</i> , 300 Mich 286, 298; 1 NW2d 544, 548 (1942).....	14
<i>McMillan v State Highway Comm</i> , 426 Mich 46; 393 NW2d 332 (1986).....	22
<i>McQuillan v Eckerson</i> , 178 Mich 281, 287; 144 NW 510, 512 (1913).....	13, 27
<i>Metropolitan Ry. Co. v. Jackson</i> , 3 L. R. App. Cases 193).....	13
<i>Neal v Oakwood Hospital</i> , 226 Mich App 701, 722; 575 NW2d 68, 78 (1997).....	32
<i>Parklane Hosiery Co v Shore</i> , 439 US 322, 343-44; 99 S Ct 645, 657-58 (1979).....	10
<i>People ex rel Sutherland v Governor</i> , 29 Mich 320 (1874)	29
<i>Peoples Wayne County Bank v Wolverine Box Co</i> , 250 Mich 273, 277-81; 230 NW 170, 171-73 (1930).....	14
<i>Perin v Peuler</i> , 373 Mich 531, 541; 130 NW2d 4, 10 (1964).....	30
<i>Risser v Hoyt</i> , 53 Mich 185, 201; 18 NW2d 611, 619 (1884).....	26
<i>Rizzo v Kretschmer</i> , 389 Mich 363, 375; 207 NW2d 316, 321-22 (1973)	16, 27
<i>Rusinek v Schultz, Snyder & Steele Lumber Co</i> , 411 Mich 502; 309 NW2d 169 (1981).....	21
<i>Shinabarger v Phillips</i> , 370 Mich 135, 142 (1963)	14, 27

<i>Shropshire v Laidlaw Transit</i> , 550 F.3d 570 (CA 6, 2008)	38, 39
<i>Skinner v Square D Co</i> , 445 Mich 153, 162 n.2; 516 NW2d 475, 479 (1994).....	15
<i>Stanton v Battle Creek</i> , 237 Mich App 366, 375; 603 NW2d 285, 289 (1999).....	36
<i>State Conservation Dep't v Brown</i> , 335 Mich 343, 346-47; 55 NW2d 859, 861 (1952)	26
<i>Swart v. Kimball</i> , 43 Mich 443, 448 (1880)	11
<i>Swick v Okorn</i> , unpublished opinion per curiam of the Court of Appeals, issued November 1, 2005 (Docket No. 263478).....	5
<i>Tabor v Cook</i> , 15 Mich 322, 325 (1867)	8, 11
<i>Tolksdorf v Griffith</i> , 464 Mich 1, 5; 626 NW2d 163, 166 (2001).....	8
<i>Toman v Checker Cab Co</i> , 306 Mich 87, 88-92; 10 NW2d 318, 318-20 (1943).....	14
<i>Turk and Stoner v Dula</i> , unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 260387)	6
<i>Vitale v. Danylak</i> , 74 Mich App 615, 617 (1977).....	20
<i>Watkins v City Cab Corp</i> , 97 Mich App 723, 725; 296 NW2d 162, 163 (1980).....	19
<i>Welch v Yuhl</i> , unpublished opinion per curiam of the Court of Appeals, issued April 18, 2006 (Docket No. 266637)	5
<i>Williams v Payne</i> , 131 Mich App 403, 346 NW2d 564 (1984).....	42

<i>Woodin v Durfee</i> , 46 Mich 424, 427; 9 NW 457, 458 (1881).....	13
---	----

<i>Yonkus v McKay</i> , 186 Mich 203, 210-11; 152 NW 1031, 1034 (1915)	13
---	----

Statutes

MCL 500.3135(2)(a).....	24, 28
MCL 500.3135(7)	34, 42, 43, 44

Other Authorities

3 THE WRITINGS OF THOMAS JEFFERSON 71 (Washington ed. 1861)	9
---	---

Rules

FRCP 56(c)	38
MCR 1.103.....	29
MCR 2.116(C)(10).....	33, 34, 36, 37
MCR 2.116(G)(3)(b).....	36
MCR 2.116(G)(6)	37

Constitutional Provisions

Article III, §2 of the Michigan Constitution of 1963.....	29
Article VI, §5 of the Michigan Constitution.....	29
Const 1835, art 1, § 9.....	11
Const 1850, art 6, § 27	11
Const 1908, art 2, § 13	11
Const 1963, art 1, § 14.....	7, 11, 26, 28
Const 1963, art 3, § 8.....	17

III. STATEMENT OF INTEREST OF AMICUS CURIAE

The Negligence Section of the State Bar of Michigan is a practice section of the State Bar comprised of roughly equal numbers of both Plaintiff and Defense attorneys who practice negligence law. The Negligence Section strives to protect the public's right to jury trials, to enhance the practice of negligence law among its members and the greater Bar, and conducts educational functions for its members and the public.

As attorneys working in the field of law most directly implicated by this case, and as a Section of the Bar whose primary aim is the preservation of the right to a jury trial, the Negligence Section is very directly concerned with the outcome of this case on behalf of the Bar, the Negligence Section's members, and, most importantly, the public's right to jury trials under the Michigan Constitution.

The No-Fault Act contains provisions that, as interpreted by the *Kreiner* case, seriously threaten the right to jury trial and have resulted in a system of justice that is producing arbitrary results as judges are now charged with performing the functions traditionally reserved for the jury. We believe the 1995 No-Fault Act amendments charging the judge with finding facts and judging credibility concerning serious impairment of body function violate the Constitution and *Kreiner's* interpretation of the serious impairment threshold greatly exceeds what the Legislature intended when it passed the amendments. These factors combine to threaten the integrity of the jury system and judiciary. These issues have raised dire concerns for our system of civil justice among practitioners of automobile negligence and no-fault law, and the membership of the Negligence Section of the State Bar.

IV. CONCURRENCE WITH STATEMENT OF THE BASIS FOR JURISDICTION

Amicus Curiae Negligence Section of the State Bar of Michigan concurs with the Statement of the Basis for Jurisdiction by Plaintiff/Appellant, Rodney McCormick, in his Brief on Appeal.

V. CONCURRENCE WITH STATEMENT OF QUESTIONS PRESENTED

Amicus Curiae Negligence Section of the State Bar of Michigan concurs with the Statement of Questions Presented as stated by Plaintiff/Appellant, Rodney McCormick, in his Brief on Appeal.

VI. CONCURRENCE WITH STANDARD OF REVIEW

Amicus Curiae Negligence Section of the State Bar of Michigan concurs with the Standard of Review as stated by Plaintiff/Appellant, Rodney McCormick, in his Brief on Appeal.

VII. CONCURRENCE WITH COUNTER-STATEMENT OF FACTS

Amicus Curiae Negligence Section of the State Bar of Michigan concurs with the Counter-Statement of Facts as stated by Plaintiff/Appellant, Rodney McCormick, in his Brief on Appeal.

VIII. ARGUMENT OF AMICUS CURIAE

In 1995, the Michigan Legislature passed MCL 500.3135(2)(a) which transferred the primary fact-finding function of the jury to the judge in the case of determining serious impairment of body function. In the whole of Michigan jurisprudence we have been unable to find other instances of the abrogation of the primary jury function in favor of the judge, in non-governmental cases, where there are material questions of fact on an ultimate issue. This violates the Michigan Constitution's guarantee of a right to trial by jury.

Section 3135(2)(a) also violates the separation of powers doctrine which is the bedrock of our tri-partite government. This statute collides with, and fundamentally alters, the process for summary proceedings that has been in place for decades, and is contained in court rule at MCR 2.116(C)(10). The Legislature's process requires the judge to make findings of fact and credibility and then rule on the purely factual matter: whether a person's impairments have affected her general ability to lead her normal life. Once there is agreement on the nature and extent of the plaintiff's injuries, this decision on serious impairment is made by the judge no matter how many material facts are in dispute, no matter how many reasonable jurors could disagree on the outcome, and no matter how close the question may be. Because this statute presents a procedural rule that conflicts with this Court's existing procedural rule on summary disposition, the court rule must control and the statutory procedure must be invalidated.

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), this Court altered the rules for interpreting the statutory definition of serious impairment of body function found at MCL 500.3135(7). *Kreiner* injected a temporal/durational requirement that had never been seen before, and is not in the statute. It also added an extra-statutory requirement that a person's impairment "affects the person's general ability to lead his or her normal life" to require that the person's impairment completely prevent them from leading their normal life. "Affecting" and "preventing" are very different terms, and the statute says "affect." *Kreiner* should be reversed.

The violation of the right to trial by jury by delegating the ultimate fact finding function to the judge, the utilization of a legislatively created summary disposition procedure that conflicts with the court rules that allows for dismissal of cases where fact and credibility questions remain, and *Kreiner's* extra-statutory requirements for establishing a serious

impairment have created an unjust, inequitable, unequal and unpredictable system of justice for the victims of drunk drivers and other negligent and careless motorists.

An examination of the approximately 250 unpublished decisions issued by the Court of Appeals since *Kreiner* was published, reveals that there have been approximately 51 decisions in favor of the plaintiffs and 198 in favor of the defendants. The tragedy of *Kreiner* is not only that it has rendered such an imbalance in results or .792% favoring defendants, but that it has produced results that appear utterly arbitrary. The outcomes of cases containing nearly identical key fact patterns are routinely different. While there is definitely a strong temporal/durational component to the decisions, there is no consistent pattern developing for how long one must be disabled to be seriously impaired. While there is a trend of giving attention to the number of activities that a plaintiff can or cannot do, there is no consistency in what amount of disability is sufficient. To practitioners and the public, the reality is that it appears that the injured plaintiff's fate depends completely upon the random draw of the trial judge or Court of Appeals panel. The following review of a few of the more than 250 unpublished cases decided under Section 3135(2)(a) and *Kreiner* demonstrate this fact.

Luther v Morris, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 244483). Plaintiff missed 52 days from work following fractured dominant arm. She testified that her arm was in a sling and she required assistance with most activities for about two months. Her left arm was previously weakened. She recovered in two months. There was no evidence of ongoing restrictions. Plaintiff prevailed.

Guevara v Martinez, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 260387). Plaintiff, a dishwasher, suffered a torn rotator cuff and dislocated shoulder. Plaintiff required a shoulder immobilizer of the dominant arm and five

months physical therapy. He was off of work for five months with therapy. No serious impairment was found. Defendant prevailed.

Cook v Hardy, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2005 (Docket No. 250727). This student suffered a fractured fibula, which was casted six to eight weeks. She missed a vacation and was medically restricted from carrying items while recovering. She could not resume some activities, such as completing an independent study course, for six months. Plaintiff prevailed on serious impairment.

Swick v Okorn, unpublished opinion per curiam of the Court of Appeals, issued November 1, 2005 (Docket No. 263478), . Plaintiff injured his cervical spine and required neck surgery by a neurosurgeon. Plaintiff was off work from December 2003 to August 2004. The Plaintiff had ongoing restrictions from working on ladders or roofs, an integral part of his job as a masonry estimator. Plaintiff was also medically restricted from “strenuous” activities. Defendant prevailed, no serious impairment found.

Gagne v Schulte, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 264788). Plaintiff lost one year of work due to her torn anterior cruciate ligament and medial meniscus, which was surgically reconstructed. She had residual instability in the knee. Plaintiff was restricted from recreational activities such as gymnastics, roller blading, ice skating. She possibly could perform these activities with a knee brace eventually, according to a doctor. Defendant prevailed, no serious impairment found.

Welch v Yuhl, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2006 (Docket No. 266637). This 14-year-old boy had a hand laceration which damaged several tendons, a blood vessel and nerve. Reconstructive surgery was performed on his hand. Medical restrictions were in place for only two months and physical therapy was completed in four

months. There was testimony of residual pain and weakness in his hand, but there were no ongoing physician-imposed restrictions. Plaintiff prevailed on serious impairment.

Jones v Wheelock, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 258974). Plaintiff, a high school student, was stuck by a car resulting in torn knee ligaments. Reconstructive surgery was required. She was unable to walk without assistance for one month. Physical therapy was required for ten weeks. She was disabled from work for three months. She had residual pain when standing or walking, and occasional swelling. She dropped out of marching band and basketball due to the injury. Defendant prevailed, no serious impairment found.

Hill v Keller, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No. 269084). Plaintiff suffered a fractured fibula, fractured pinky finger, concussion, lacerations and deep vein thrombosis, a life-threatening condition. Plaintiff was off work for three months. There was residual pain and numbness in Plaintiff's right leg, which was objectively confirmed by an electromyogram (EMG). Consequently, the plaintiff could not water ski or play pool, per self-restrictions. Defendant prevailed, no serious impairment.

Conklin v Shack, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No. 268316). Plaintiff suffered a fractured back at T-12 and required a back brace for six months to restrict movement. He missed approximately nine and a half months from work. Plaintiff could not play football or hunt. Defendant prevailed, no serious impairment.

Turk and Stoner v Dula, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2007 (Docket No. 273424). Stoner, an 81-year-old plaintiff, underwent a knee replacement and shoulder surgery. Plaintiff quit her job due to the pain, but she did not obtain a doctor's note, so it was not considered by the Court. Defendant prevailed, no serious impairment.

These cases appear irreconcilable. They demonstrate the arbitrary nature of *Kreiner* and 3135(2)(a) procedure, and reaffirms the wisdom of the founding fathers' firm belief that juries should be the finders of fact and assessors of credibility.

A. THE TRANSFER OF FACT-FINDING AUTHORITY UNDER MCL § 500.3135(2)(A) IS UNCONSTITUTIONAL.

No matter how it is designated in the statute, the determination of serious impairment is essentially a question of fact committed to the jury in accordance with article 1, § 14 of the Michigan Constitution, and the dispositive procedure devised by the Legislature in MCL 500.3135(2)(a) is an unconstitutional usurpation of the people's right to a jury trial.

There is no way to avoid factual and credibility determinations when making serious impairment decisions. In this case, for example, Defendant-Appellee goes so far as to argue that the applicable standard of review is “clear error” specifically because this Court is being asked to review “a trial court’s factual findings.” (Appellee’s Brief, p. v). Defendant-Appellee’s argument is apparently based on the premise that this Court’s decision in *Kreiner* permits judges to decide the facts of a case in the course of ruling on a motion challenging the threshold. (Appellee’s Brief, pp. 2, and 44). The *Kreiner* decision itself characterizes the “serious impairment” inquiry as requiring “inherently fact-specific and circumstantial determinations.” *Kreiner*, 471 Mich at 134, n.19. The Michigan Constitution prevents the Legislature from transferring this fact-finding authority from the jury to the judge.

We do not take this position lightly. We are fully aware that the standard for finding a statute unconstitutional is necessarily high, and that there is a presumption in favor of constitutionality. We also are cognizant of the fact that this statute has been the subject of voluminous litigation for more than a decade, but this constitutional question nevertheless appears to present a matter of first impression for the Court. However, apart from a judicial

policy argument put forward in *Cassidy v McGovern*, 415 Mich 483, 501-502; 330 NW2d 22, 28-29 (1982), we have not found any authority in the history of Michigan jurisprudence supporting the legislative action of transferring fact-finding authority from the jury to the judge in a tort action. The authority to the contrary seems quite overwhelming, and at the end of the day, we do not see any way to decide the issue of serious impairment without evaluating and measuring the facts of the individual case. In this respect, the standard for rendering summary disposition under MCR 2.116(C)(10) presents the outer limits of a judge's ability to find facts, and to the extent that MCL 500.3135(2)(a) permits a judge to go further, the statute is unconstitutional.

1. Standard of Review

Review of the constitutionality of a statute presents a question of law that is reviewed *de novo*. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163, 166 (2001). The enormous power vested in the judiciary to declare a statute unconstitutional is one to be exercised only when the violation is clear, and it has been described as “the gravest and most delicate duty that this court is called on to perform.” *Gauthier v Campbell, Wyant & Cannon Foundry Co*, 360 Mich 510, 515; 104 NW2d 182, 184 (1960) (quoting *Blodgett v Holden*, 275 US 142, 147-48; 48 S Ct 105, 107 (1927) (Holmes, J., concurring)). Consequently, “courts will always construe a legislative act so as to give it effect as law, if it be practicable to do so. . .” An intent to violate the constitution is not to be presumed in any case, and a construction which would have that effect is not to be adopted unless forced upon us by the terms employed. *See e.g., Tabor v Cook*, 15 Mich 322, 325 (1867).

2. Historical Interplay of Right to a Jury Trial and Summary Disposition

In order to understand where MCL 500.3135(2)(a) falls short of passing constitutional muster, it is important to recognize the interplay of the right to a jury trial and the power of summary disposition in our system of jurisprudence. The limitations on the power of summary disposition have been established to protect the constitutional right to a jury trial, and consequently, these limitations are not subject to legislative revision. We require judges faced with motions for summary disposition to view the evidence in the light most favorable to the nonmoving party, and we forbid judges from weighing evidence or assessing the credibility of witnesses, because it would impinge on the realm of the jury if we allowed otherwise. These are not mere exercises of judicial prudence. Rather, they are structurally required to protect the constitutionality of summary disposition itself. The transfer of fact-finding authority in MCL 500.3135(2)(a) is unconstitutional precisely because it permits, indeed requires, judges to overrun the limits on summary disposition that are constitutionally mandated to protect the right to a jury trial.

a. Federal Underpinnings

Notwithstanding our respect for legislative prerogative, the right to a jury trial may be the most revered feature of our constitutional system. Thomas Jefferson regarded the right to a jury trial as “the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.” 3 THE WRITINGS OF THOMAS JEFFERSON 71 (Washington ed. 1861).

More recently, United States Supreme Court Justice William Rehnquist famously lamented:

The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be

left to the whim of the sovereign, or, it might be added, to that of the judiciary. Those who passionately advocated the right to a civil jury trial did not do so because they considered the jury a familiar procedural device that should be continued; the concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the "passional [sic] elements in our nature," and thus keep the administration of law in accord with the wishes and feelings of the community. O. Holmes, *Collected Legal Papers* 237 (1920). Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

Parklane Hosiery Co v Shore, 439 US 322, 343-44; 99 S Ct 645, 657-58 (1979) (Rehnquist, J, dissenting).

Justice Rehnquist's reverence for the jury trial is particularly significant here because Justice Rehnquist also was one of the principal architects of modern summary judgment practice in federal courts. As Justice Rehnquist later explained, "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp v Catrett*, 477 US 317, 327; 106 S Ct 2548, 2555 (1986) (quoting FR Civ P 1).

In short, the power of summary judgment in federal courts and the right to a jury trial go hand-in-hand. Summary judgment tests the presence of triable factual disputes, and the familiar constraints on the power of summary judgment are designed to preserve the constitutional role of the jury in resolving those factual disputes so that we remain safeguarded from "the whim of the sovereign, or ... that of the judiciary." *Parklane Hosiery*, *supra*, 439 US at 343-44. Moreover, this tension cannot be altered by a Congressional delegation of fact-finding authority to the court to decide issues as a matter of law, because the Seventh Amendment effectively prohibits

Congress from doing so. *Feltner v Columbia Pictures Television*, 523 US 340, 355; 118 SCt 1279, 1288 (1998).

b. Michigan's Historical Framework

The right to a jury trial in civil actions appeared prominently in Michigan even before statehood. The ordinance governing our territory declared: “No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.” Northwest Ordinance, art 2. As included in the first Michigan Constitution, the provision stated: “The right of trial by jury shall remain inviolate.” Const 1835, art 1, § 9. Subsequent revisions have provided that “[t]he right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law.” Const 1850, art 6, § 27; Const 1908, art 2, § 13; Const 1963, art 1, § 14 (omitting only the words “deemed to be”).

Our early cases elaborated on the meaning of this constitutional right to a jury trial in great detail. As Justice Cooley explained: “The intention here is plain, to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed; and suitors cannot constitutionally be deprived of this right except where, in civil cases, they voluntarily waive it by failing to demand it in some mode which the legislature shall prescribe.” *Tabor*, 15 Mich at 325. In the *Tabor* decision, Justice Cooley also explained that the legislature is powerless to alter this constitutional right:

Whatever proceeding the legislature authorizes for the determination of adverse claims, the right of the party in possession to a jury trial must be kept in view, and some mode pointed out by which he can demand it.

Id.

Similar holdings, prohibiting the legislature from converting a jury trial issue into a question of law for determination by a judge, were rendered in *Swart v. Kimball*, 43 Mich 443,

448 (1880); *Edwards v. Symons*, 65 Mich 348, 354 (1887); and *Guardian Depositors Corp v. Darmstaetter*, 290 Mich 445, 450-52 (1939) (collecting cases).

The scope of the jury's role also developed early in our history, most importantly with regard to the right to have a jury draw inferences, assess credibility, and thereupon determine the 'ultimate facts' of a case as well as the evidentiary facts. In a case involving claims of contributory negligence, where the trial court was asked to rule as a matter of law on the basis of the testimony of several witnesses, the Court clarified:

In determining this question, we must look at the case as it appears from the plaintiff's own testimony, unqualified by any which was offered on the part of the defendants, and must concede to him anything which he could fairly claim upon that evidence. He had a right to ask the jury to believe the case as he presented it; and, however improbable some portions of his testimony may appear to us, we cannot say that the jury might not have given it full credence. It is for them, and not for the court to compare and weigh the evidence.

Detroit & Milwaukee Railroad Co v Van Steinburg, 17 Mich 99, 118 (1868).

Yet, the Court explained that cases involving negligence are particularly difficult to decide as a matter of law because, "they present, from their very nature, a question, not of law, but of fact, depending on the peculiar circumstances of each case, which circumstances are only evidential of the principal fact." *Id.* at 122. Recognizing this distinction between the evidentiary facts and the ultimate or principal facts that determine the outcome, the Court further explained the role of the jury:

It is a mistake, therefore, to say, as is sometimes said, that when the facts are undisputed the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ.

Id. at 123.

Along this line of reasoning, our Court later held: “A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment.” *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457, 458 (1881); *see also*, *Yonkus v McKay*, 186 Mich 203, 210-11; 152 NW 1031, 1034 (1915). The Court discussed the relative roles of the judge and jury at length again in *Carver v Detroit & Saline Plank-Road Co*, 61 Mich 584, 591-94; 28 NW 721, 723-25 (1886). “The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred.” *Id.* at 592 (quoting Lord Cairns’ opinion in *Metropolitan Ry. Co. v. Jackson*, 3 L. R. App. Cases 193). While affirming the power of the Court to dispose of baseless claims summarily, the Court described the limitations on the role of the judge:

The difficulty is not in the rule, but in the application of it to the facts of the particular case. The testimony is often of such a nature that the trial judge is greatly embarrassed to determine whether any facts have been established by the evidence from which negligence may be reasonably inferred. In all cases of doubt, the proper method is to submit the evidence to the jury, under proper caution and instructions, to determine whether, from the facts as they shall find them established by the evidence, negligence ought to be inferred.

In determining the preliminary question of law, it is not the province of the court to pass upon the weight of the evidence, for the sufficiency and weight of evidence, and the effect to be given thereto, is a question exclusively for the jury; and it follows that it is only where there is no legal evidence which, if believed, will establish a fact material to the plaintiff’s case, that the trial judge can take the case from the jury.

Id. at 593-94.

Consequently, our courts have consistently maintained that it is “for the jury to exercise the processes of presumptive reasoning which the testimony authorized and decide the ultimate facts sought to be proven.” *See e.g.*, *McQuillan v Eckerson*, 178 Mich 281, 287; 144 NW 510,

512 (1913). Of course, this does not relieve the nonmoving party of the obligation to present evidence of triable facts in order to avoid summary disposition. *Peoples Wayne County Bank v Wolverine Box Co*, 250 Mich 273, 277-81; 230 NW 170, 171-73 (1930). But unless the inferences are truly incontrovertible, where the trial court decides inferences from the evidentiary facts as a matter of law, it invades the province of the jury. *McQuillan*, 178 Mich at 287.

The jury's role in making inferences of fact and evaluating the credibility of a party also extends to subjective matters where they are relevant. *Toman v Checker Cab Co*, 306 Mich 87, 88-92; 10 NW2d 318, 318-20 (1943). The issue in *Toman* was whether an award of future pain and suffering could be sustained solely on the basis of the plaintiff's testimony regarding his continuing pain and resulting limitations in activities. *Id.* The Court held that it was for the jury to decide "whether plaintiff, who was still suffering pain 18 months after the accident, would continue to suffer some pain for some time after the trial of the cause." *Id.* This principle is followed where the plaintiff's detailed testimony provides a factual basis for a jury to consider. *See McDuffie v Root*, 300 Mich 286, 298; 1 NW2d 544, 548 (1942); *Shinabarger v Phillips*, 370 Mich 135, 142; 121 NW2d 693 (1963).

As a general rule, "if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the fact finder exists." *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190, 193 (1999). In *Henderson*, the Court was confronted with a mixed question of law and fact, which it analyzed as follows:

While the meaning of the phrase "in the care of" is not ambiguous, this is not to say that application of the phrase to a given set of facts will always be easy. This is the case here. While the facts are not in dispute here, reasonable persons could disagree about the conclusions to which they lead. Said another way, individual factfinders could reasonably give different weight to the same facts, causing them to reach opposite conclusions regarding whether Mysierowicz was "in the care of" Mrs. Twitchell at the time of the stabbing. Thus, it was improper to grant summary disposition to either party in this case.

Id. at 357-58, 361.

As this Court has noted repeatedly, "there is a great difference between an inquiry to determine whether or not there is an issue of fact and a trial to decide a disputed issue of fact." *Skinner v Square D Co*, 445 Mich 153, 162 n.2; 516 NW2d 475, 479 (1994) (quoting *Durant v Stahlin*, 375 Mich 628, 646-47; 135 NW2d 392, 397-98 (1965)). Indeed, some cases involve mixed questions of law and fact. For example, the interpretation of a contract is ordinarily a matter of law for the court to decide, but the meaning of an ambiguous contract may create a question of fact for the jury. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447, 453-54 (2003). Even the issue of duty in a negligence case can present a mixed question of law and fact requiring some jury resolution:

[If] the jury found that as a matter of fact a reasonably prudent person should have foreseen the presence of the children in the zone of danger, then, as a matter of law the defendant owed to the injured child a duty of due care. If such duty arose, it then would become the jury's task to determine, as a matter of fact, whether the defendant's conduct measured up to the duty of care imposed upon him by the law. Usually, in negligence cases, whether a duty is owed by the defendant to the plaintiff does not require resolution of fact issues. However, in some cases, as in this one, fact issues arise. When they do, they must be submitted to the jury, our traditional finders of fact, for ultimate resolution and they must be accompanied by an appropriate conditional instruction regarding defendant's duty, conditioned upon the jury's resolution of the fact dispute.

Bonin v Gralewicz, 378 Mich 521, 526-527; 146 NW2d 647 (1966).

Finally, the premise that a factual determination requires technical understanding is not a sufficient basis for withdrawing the issue from jury consideration. For example, the question of whether a product suffers from a design defect may be highly technical, but this remains within the province of the jury. *Ghrist v Chrysler Corp*, 451 Mich 242, 249 n.13; 547 NW2d 272, 275 (1996) (citing *Van Steinberg*, 17 Mich at 120-21).

Some aspects of summary disposition practice changed with the adoption of the Michigan Court Rules in 1985, but the core substance of the distribution of power between judge and jury

has remained intact. For example, at one time a party could avoid summary disposition based solely on factual denials contained in pleadings. *See, e.g., Rizzo v Kretschmer*, 389 Mich 363, 375; 207 NW2d 316, 321-22 (1973). As mere promises to offer factual support at trial, such pleadings are no longer sufficient by themselves to create an issue of fact for jury resolution. *McCart v J Walter Thompson, Inc*, 437 Mich 109, 115-16; 469 NW2d 284, 287 (1991) (*construing* MCR 2.116(G)(4)). Apart from the requirement that supporting evidence must be admissible, however, the basic formulation has remained the same, and our current standard for summary disposition has been summarized as follows:

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim or defense. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 N.W.2d 715 (1992); *General Motors Corp v Detroit*, 372 Mich 234, 239-240; 126 N.W.2d 108 (1964). The affidavits, pleadings, depositions, admissions, and other material supporting and opposing the motion must be considered, so that it may be decided whether "it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome." *Stevens v McLouth Steel*, 433 Mich 365, 370; 446 N.W.2d 95 (1989), quoting *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 N.W.2d 316 (1973). If the court concludes that it is impossible for the record to be developed any further, summary disposition is appropriate. *Radtke v Everett*, 442 Mich 368, 374; 501 N.W.2d 155 (1993).

The Court may not make actual findings or weigh the credibility of the evidence presented. *Featherly v Teledyne Industries, Inc*, 194 Mich App. 352, 357; 486 N.W.2d 361 (1992).

In accordance with MCR 2.116(G)(4), the nonmoving party may not rest on mere allegations or denials in the pleadings. *Durant v Stahlin*, 375 Mich 628, 639; 135 N.W.2d 392 (1965). If the nonmoving party is able to produce some evidence, all inferences and the benefit of any reasonable doubt must be made in his favor. *Id.* at 638.

Lytle v. Malady, 456 Mich 1, 12, nn.10-11; 566 NW2d 582 (1997).

While this standard is recited frequently, its limitations are rarely expressed in terms of the constitutional right to a jury trial. As is evident from the historical development of the summary disposition proceeding, however, all of these limitations are specifically designed to protect the right to a jury trial established under the Michigan Constitution, and they must be enforced strictly to protect that essential right.

3. Summary Proceedings in the No-Fault Context

The tension between the right to a jury trial and the power of summary disposition has been a central feature in our jurisprudence under the Michigan No-Fault Act since its enactment.

a. Advisory Opinion re Constitutionality of 1972 PA 294

The Michigan No-Fault Act was established with the enactment of Public Act 294 in 1972, including the provision codified at MCL 500.3135(1), reading:

A person remains subject to tort liability for noneconomic loss caused by his 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.

The Michigan Constitution permits the governor or either house of the legislature to “request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before the effective date.” Const 1963, art 3, § 8. Both the governor and the senate requested such an advisory opinion regarding PA 294. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 460-61 (1973). One of the questions addressed by the Court was: “Are the phrases ‘serious impairment of body function’ and ‘permanent serious disfigurement’ as used in MCL 500.3135 of the Act ‘sufficient for legal interpretation?’” *Id.* at 462. The Court responded:

This Court holds that such phrases are capable of legal interpretation and, indeed, that juries or judges sitting without juries frequently have and do interpret comparable phrases bearing upon various facets of the law. Such findings result from denominated fact questions and thus are within the exclusive province of the

triers of fact. Only when interpretation approaches or breaches permissible limits does it become a question of law for the Court. Such questions must be approached on a case by case basis.

Id. at 477-78.

The Court looked to long-standing Michigan law regarding the meaning of “serious.” *Id.* at 478, n.9 (citing *Brown v Metropolitan Life Insurance Co*, 65 Mich 306, 315 (1887)) (“The word ‘serious’ is not generally used to signify a dangerous condition, but rather to define a grave, important, or weighty trouble.”). Although the phrase “serious impairment of body function” was new to Michigan, the Court also noted that other states readily construed similar phrases. *Advisory Opinion*, 389 Mich at 478 n.10. After surveying these statutes, and also reviewing a variety of terms defined in standard jury instructions, the Court concluded:

Clearly the subject phrases "serious impairment of body function" and "permanent serious disfigurement" as used in § 3135 of this act are comprised of no less commonly used or understood words of the English language, nor is the language presently before the Court less precise than that which has been adopted to express other standards for determining tort liability. The phrases are within the province of the trier of fact and are sufficient for legal interpretation.

Id. at 481.

b. Cassidy v McGovern

When this Court addressed two consolidated cases in its decision of *Cassidy v McGovern*, it focused substantial attention on the relative roles of the judge and the jury in deciding whether a plaintiff met the threshold of “serious impairment of body function.” *Cassidy*, 415 Mich at 488. In one of the cases (*Hermann*), the trial court had determined as a matter of law that the plaintiff did not meet the threshold, and the Court of Appeals affirmed. *Id.* at 490-91. In the other case (*Cassidy*), the plaintiff moved for summary disposition, asking the court to find as a matter of law that he had met the threshold. *Id.* at 493. The trial court denied the motion, concluding that “the question was one of fact for the jury.” *Id.* However, the Court of Appeals remanded the

case “with instructions that a directed verdict could be granted for plaintiffs if the injury was sufficient to meet the threshold of serious impairment of body function as a matter of law.” *Id.* On remand, the trial judge again denied the motion, “concluding on the basis of the evidence presented reasonable people could differ concerning whether Leo Cassidy had suffered serious impairment of body function.” *Id.* The Court of Appeals affirmed, concluding that “reasonable minds could differ.” *Id.* at 494.

After granting leave to appeal, this Court framed the two questions presented as follows:

The first question we must consider is the extent to which the determination of serious impairment of body function is a matter of law? The second question is what does serious impairment of body function mean?

Id.

The *Cassidy* Court noted that subsequent courts had applied the generally accepted standard for deciding motions for summary disposition. *Id.* at 495-97 (citing *Earls v Herrick*, 107 Mich App 657, 665; 309 NW2d 694, 698 (1981)) (“Unless it can be said that, viewing the evidence in the light most favorable to plaintiff, no reasonable jury could view the injuries as constituting a serious impairment or a serious permanent disfigurement the question is one of fact for the jury”); *Abraham v Jackson*, 102 Mich App 567, 570; 302 NW2d 235, 237 (1980) (“serious impairment of body function is a fact question and thus within the exclusive province of the triers of fact”); *Watkins v City Cab Corp*, 97 Mich App 723, 725; 296 NW2d 162, 163 (1980) (“It is no easier to say a body impairment is or is not ‘serious’ than to say conduct established by discovery is or is not ‘negligent’”); *Brooks v Reed*, 93 Mich App 166, 171; 286 NW2d 81 (1979). (“The question of serious impairment is one of law where it can be said with certainty that no reasonable jury could view a plaintiff’s impairment as serious”); *Harris v McVickers*, 88 Mich App 508, 511; 276 NW2d 629 (1979) (“While we recognize that generally the trier of fact must make the qualitative decision of whether a particular injury is serious or

permanent, it does not follow that the trial judge is in all cases precluded from consideration of those questions”); *Vitale v Danylak*, 74 Mich App 615, 617; 254 NW2d 593 (1977) (agreeing with defendant “that if the term ‘serious’ is capable of definition by a jury it is also possible for the trial judge to decide, after accepting as true all of the plaintiff’s factual allegations, that no reasonable jury would find the injury sustained to be serious”).

The *Cassidy* Court then formulated a basic policy argument for assigning the question of serious impairment to the court to decide as a matter of law:

We believe several considerations are instructive in determining whether the threshold requirement of "serious impairment of body function" is primarily a phrase presenting a fact question for the trier of fact, or a phrase requiring judicial definition as a matter of law. First, it is not a term commonly used, for which juries would have a clear sense of the intended meaning. Hence, the phrase differs from "intoxication", as used in the dramshop act, *see Rizzo v Kretschmer, supra*. It also differs from more specific requirements that could have been enumerated as threshold requirements for the no-fault act, e.g., broken bones, dismemberment, etc.

Second, and important especially in conjunction with the first factor, one of the important reasons behind the no-fault act was to reduce litigation in automobile accident cases. Considering that the phrase involved is unspecific and one concerning which reasonable minds can usually differ regarding specific applications, if the interpretation of the phrase is a matter to be left to the trier of fact, a trial would in most instances be required to determine whether the threshold requirements have been met. Such a consequence would certainly be contrary to the legislative intent in creating the threshold requirements.

Third, we cannot believe that the Legislature, when limiting the continued existence of traditional tort liability to certain specified exceptions, intended that the limits which they created would vary according to the specific jury impaneled or the specific part of the state in which a case was to be tried. Although the requirement of serious impairment of body function lacks specificity, uniformity in its application is to some extent attainable through statutory construction by the appellate courts. Unlike traditional tort litigation where differing views among differing juries are generally acceptable, the question whether tort immunity attaches is not a question which we believe the Legislature intended to leave as primarily a question for the trier of fact.

Cassidy, 415 Mich at 501-02.

The only authority the *Cassidy* Court relied upon for this construction of the statute was the general proposition that “The responsibility of effectuating the legislative will is primarily a matter of law for the court and not properly left to determination by a jury.” *Id.* at 502 (citing *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 169 (1981)). Ironically, *Rusinek* actually held that “statutes in derogation of the common law must be strictly construed ... and will not be extended by implication to abrogate established rules of common law.” *Rusinek*, 411 Mich at 508.

In effect, the *Cassidy* Court simply presupposed that the legislature had the power to transfer traditional fact-finding authority from the jury to the judge, and although the statute did not contain any language expressly permitting transfer, the *Cassidy* Court construed the statute broadly and concluded that the issue of serious impairment “is not a question which we believe the Legislature intended to leave as primarily a question for the trier of fact.” *Cassidy*, 415 Mich at 502. Based on this rationale, the *Cassidy* Court ruled in favor of Leo Cassidy, finding that his injuries satisfied the tort threshold of MCL 500.3135, overruling a jury verdict of no cause of action. *Id.* at 493, 504-06. Specifically, the *Cassidy* Court relied on the facts that “his two broken bones, 18 days of hospitalization, 7 months of wearing casts during which dizzy spells further affected his mobility, and at least a minor residual effect one and one-half years later are sufficiently serious to meet the threshold requirement of serious impairment of body function.” *Id.* at 505.

c. DiFranco v Pickard

This Court revisited the proper roles of the judge and jury in deciding the issue of serious impairment in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986). After recounting the history of the statute MCL 500.3135, the *DiFranco* Court went on to analyze the *Cassidy*

decision in detail. *Id.* at 48-53. Ultimately, the *DiFranco* Court viewed *Cassidy* as inconsistent with the proper method for deciding motions for summary disposition:

This language and logic is quite similar to that contained in GCR 1963, 117.2(3) (now MCR 2.116[C][10]), i.e., the trial court should grant a motion for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

After careful reconsideration, we find that *Cassidy* is somewhat inconsistent with general rules of civil procedure. Even where there is no material factual dispute, a motion for summary disposition (as well as directed verdict and judgment notwithstanding the verdict) should not be granted if the facts can support conflicting inferences. 73 AM JUR 2d, Summary Judgment, § 27, p 754.

Id. at 53-54.

The *DiFranco* Court relied on the same principles that have established the contours of summary disposition throughout the history of Michigan jurisprudence, recognizing that “if reasonable persons could differ, either because relevant facts are in dispute or because application of the legal concept ... to the case at hand is an evaluative determination as to which reasonable persons might differ, the issue ... is submitted to the jury with appropriate instructions on the law.” *Id.* at 54-55 (quoting *McMillan v State Highway Comm*, 426 Mich 46; 393 NW2d 332 (1986)). The *DiFranco* Court further noted that “the reasons given in *Cassidy* for requiring courts to determine threshold issues are not as compelling as they initially appeared.” *Id.* at 55. The Court explained that the legislature was “aware that threshold issues would generally be submitted to juries” and “did not attempt to rectify this situation” when it enacted the statute. *Id.* at 56. In the end, the *DiFranco* Court simply declared that juries are indeed competent to decide the issue of serious impairment:

The final reason given by the *Cassidy* Court was the belief that the Legislature did not intend to leave threshold issues to the vagaries of juries. No such legislative intent is evident from the statutory language or legislative history. Moreover, trial and appellate courts have proven to be no more consistent than juries would have been in determining whether a particular plaintiff suffered a serious impairment of body function. Conflicting results have been reached by different Court of

Appeals panels reviewing the same case. Conflicting results have also arisen among cases involving similarly injured plaintiffs. This is undoubtedly because no two plaintiffs are injured or recover in precisely the same manner. These conflicting results indicate that threshold issues are often questions upon which reasonable minds can differ.

Properly instructed jurors are capable of weighing evidence and using their collective experiences to determine whether a particular plaintiff has suffered an impairment of body function and whether that impairment was serious. Their verdict represents the collective judgment of six people, as opposed to the views of one trial judge, and perhaps a panel of appellate judges reviewing a cold record. Without further guidance from the Legislature, we believe that juries are better suited to resolving threshold questions where reasonable minds can differ on the answer.

Id. at 57.

Following this reasoning, the *DiFranco* Court reinstated the generally established summary disposition standard as the basis for allocating power between the judge and the jury: “If reasonable minds can differ as to whether the plaintiff suffered a serious impairment of body function, the issue must be submitted to the jury, even if the evidentiary facts are undisputed.” *Id.* at 58.

d. MCL 500.3135(2)(a) and Kreiner v Fischer

The Michigan Legislature amended 3135 in 1995 and inserted explicit language transferring the authority to decide serious impairment from the jury to the judge. As the relevant portion of the statute now reads:

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

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

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the

person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

MCL 500.3135(2)(a).

The Court construed this language of 3135 in *Kreiner v Fischer*. Like *Cassidy*, the *Kreiner* Court apparently presumed that this transfer of fact-finding authority was within the ambit of the legislature's power as the opinion contains no discussion of the constitutional implications on the people's right to trial by jury. As acknowledged by the *Kreiner* Court, the Court's decision in *Cassidy* "rejected its Advisory Opinion conclusion that juries should find facts," and *DiFranco* "readopted the old Advisory Opinion rule that the serious impairment issue was to be decided by a jury whenever reasonable minds could differ on the issue even if there were no material factual disputes about the nature or extent of the injuries." *Id.* at 117, 120. The *Kreiner* Court then explained that the legislative enactment of 3135(2)(a) was the product of "sufficient dissatisfaction" with the outcome in *DiFranco*. *Id.* at 120.¹ Concluding that the legislature "largely rejected *DiFranco* in favor of *Cassidy*," the *Kreiner* Court summarily stated:

This means then that pursuant to the Legislature's directives embodied in the 1995 amendment, "serious impairment of body function" contains the following components: an objectively manifested impairment, of an important body function, and that affects the person's general ability to lead his or her normal life. Furthermore, courts, not juries, should decide these issues.

Id. at 121.

Having placed the judge into the role of fact finder, the *Kreiner* Court then set out a multi-step process "meant to provide the lower courts with a basic framework for separating out

¹ This could be considered a surprising supposition in light of the fact that in the years between *DiFranco* and the enactment of 3135(2)(a) the electorate had overwhelmingly defeated two ballot proposals sponsored by the insurance industry that would have adopted a *Cassidy*-type threshold. It could be reasonably questioned: who was dissatisfied?

those plaintiffs who meet the statutory threshold from those who do not.” *Id.* at 131. This requires the judge to make a number of factual findings:

1. Determine whether there is a material factual dispute regarding the nature and extent of the injury, as opposed to the impairment. If the injury is in dispute, the court cannot decide the issue as a matter of law, but the facts of the impairment are for the court to decide.
2. Determine whether the impaired body function is “important.”
3. Determine whether the impairment is “objectively manifested,” and not based on “subjective complaints that are not medically documented.”
4. Determine whether the impairment affects the plaintiff’s general ability to lead his or her normal life, employing a multifaceted inquiry:
 - A. Comparing the plaintiff’s life before and after the accident
 - B. Evaluating “the significance of any affected aspects on the course of the plaintiff’s overall life.”
 - C. “Objectively” analyzing whether plaintiff’s “general ability” to conduct the course of his or her life has been affected, using a “nonexhaustive list of objective factors”:
 - i. The nature and extent of the impairment (as opposed to the injury);
 - ii. The type and length of treatment required;
 - iii. The duration of the impairment;
 - iv. The extent of any residual impairment; and
 - v. The prognosis for eventual recovery.

Id. at 132-34.

The *Kreiner* Court did not pretend that this determination of serious impairment involved anything other than an issue of fact, and the Court identified the factual aspects of serious impairment as “the ultimate question that must be answered.” *Id.* at 134. Indeed the Court held “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.” *Id.* at 134 n.19.

4. “Serious Impairment” is an Ultimate Fact Issue Reserved for Jury Determination under the Michigan Constitution

It is clear that the Court must address the constitutionality of 3135(2)(a) at this time. There can be no doubt that the determination of “serious impairment of body function” involves “inherently fact-specific and circumstantial determinations.” *Kreiner*, 471 Mich at 134 n.19. Whether a plaintiff in fact suffered a serious impairment of body function is “the ultimate question,” *Id.* at 134. The only authority cited in *Kreiner* for giving the judge the power to decide the ultimate facts of the case was “the Legislature's directives embodied in the 1995 amendment.” *Id.* at 121, 134. The Michigan Constitution clearly and plainly prevents the legislature from transferring the jury’s fact-finding authority to the judge. Const 1963, art 1, § 14.

As this Court explained more than a century ago, “[i]t was against the enactment of new laws which ignored the proceedings according to the course of the common law, and provided summary methods of determining legal rights, that the protecting shield of the Constitution was required.” *Risser v Hoyt*, 53 Mich 185, 201; 18 NW2d 611, 619 (1884). “Where there are questions of fact to be determined and the issues are such that at common law a right to jury trial existed, that right cannot be destroyed by statutory change of the form of action or creation of summary proceedings to dispose of such issues without jury.” *State Conservation Dep't v Brown*, 335 Mich 343, 346-47; 55 NW2d 859, 861 (1952).

Here, we do not challenge the power of the legislature to abolish or modify a common-law right or remedy. *Phillips*, 470 Mich at 430. The legislature had the power to impose a threshold for tort liability for noneconomic damages. However, even when common-law rights are modified, it remains for the jury to assimilate the facts, draw inferences, and determine what happened in the case. *Id.* at 429 (citing *Green*, 210 Mich at 129). As a constitutional matter, it

remains “for the jury to exercise the processes of presumptive reasoning which the testimony authorized and decide the ultimate facts sought to be proven.” *McQuillan*, 178 Mich at 287. “The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court.” *Van Steinburg*, 17 Mich at 123. This includes inferences drawn from credibility determinations. *Toman*, 306 Mich at 88-92; *Shinabarger*, 370 Mich at 142. If reasonable minds could disagree about “the conclusions to be drawn from the facts,” the question is reserved for the jury to decide. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190, 193 (1999).

The policy argument originally proffered in *Cassidy* is unpersuasive in two respects. First, there is no evidence that judges are better or more consistent than juries in correctly deciding the facts of serious impairment. Second, and more importantly, this policy argument was rejected conclusively when the Michigan Constitution was ratified.

Thus in the no-fault context, the jury should determine the 'ultimate fact' of whether the plaintiff has suffered a serious impairment of body function, thereby entitling the plaintiff to claim noneconomic damages in accordance with MCL 500.3135(1). The only instance in which the court should be empowered to decide the issue of serious impairment is when a party satisfies the standard for granting a motion for summary disposition under MCR 2.116(C)(10). This is not meant to pay lip service for only granting summary disposition under MCR 2.116(C)(10) when reasonable minds don't differ. The *Rizzo* standards previously cited indicate that at one time a party could avoid summary disposition based solely on factual denial as contained in pleadings. It is no longer sufficient that an issue of fact “might be developed” in future discovery. *Farm Bureau Mutual Insurance Company of Michigan v. Stark*, 437 Mich 175, 184; 468 NW2d 498 (1991).

There does not appear to be any way to interpret MCL 500.3135(2)(a) that avoids this unconstitutional transfer of fact-finding authority from the jury to the judge. Therefore, we request this Honorable Court to find this provision of the statute unconstitutional in that it violates the right to a jury trial preserved under the Michigan Constitution. Const 1963, art 1, § 14.

B. SECTION 3135(2) OF THE NO-FAULT ACT IS UNCONSTITUTIONAL BECAUSE IT CREATES A SUMMARY PROCEEDINGS PROCEDURE THAT DIRECTLY CONFLICTS WITH THE SUMMARY DISPOSITION PROCEDURES CONTAINED IN MCR 2.116(C)(10) AND THE MICHIGAN CONSTITUTION PROHIBITS THE LEGISLATURE FROM ENACTING PROCEDURAL LEGISLATION THAT CONFLICTS WITH RULES GOVERNING PRACTICE AND PROCEDURE PROMULGATED BY THIS COURT.

In 1995, the Michigan Legislature enacted MCL 500.3135(2), which provides, in relevant part:

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

There is no factual dispute concerning the nature and extent of the person's injuries.

There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

If read in a vacuum, without regard for the Michigan Constitution or Court rules, MCL 500.3135(2) may appear innocuous. However, MCL 500.3135(2) is nothing short of a legislative usurpation of this Court's exclusive constitutionally-mandated authority over practice and procedure in the Michigan courts. The Legislature is prohibited by the separation of powers doctrine from infringing upon it.

1. Separation of Powers is a Bedrock Principle in the Michigan Constitution.

Perhaps one of the oldest principles underlying our American government is the separation of powers between branches of the government. Under the separation of powers doctrine, one branch of government is prohibited from impairing another branch in the performance of its constitutional duties. *Loving v United States*, 517 US 748, 756; 116 S Ct 1737, 1743 (1996). Under Article III, §2 of the Michigan Constitution of 1963, “[t]he powers of government are divided into three branches: legislative, executive and judicial.” As recognized by the Michigan Supreme Court:

Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.

People ex rel Sutherland v Governor, 29 Mich 320 (1874).

The Michigan Constitution expressly sets forth the powers of the legislative, executive and judicial branches in Article IV, §1, Article V, §1, and Article VI, §5, respectively.

Article VI, §5 of the Michigan Constitution provides that, “[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.” The Michigan Supreme Court has fulfilled this constitutionally-mandated duty by promulgating the Michigan Court Rules, which, “[g]overn practice and procedure in all courts established by the constitution and laws of the State of Michigan.” MCR 1.103. The Supreme Court is thus recognized as the, “[f]inal arbiter of all matters of practice and procedure in the courts of this state.” *In re Contempt of Henry*, 282 Mich App 656, 667; 765 NW2d 44, 53 (2009). The Supreme Court’s authority over matters of practice and procedure “[m]ust be

liberally construed in order to aid in the efficient administration of our judicial system.” *Buscaino v Rhodes*, 385 Mich 474, 479; 189 NW2d 202, 204 (1971), *partially overruled on other grounds by McDougall v Schanz*, 461 Mich 15, 29; 597 NW2d 148, 155 (1999). The power to enact rules governing practice and procedure in the State of Michigan is, “[a] function with which the legislature may not meddle or interfere save as the [Supreme] Court may acquiesce and adopt for retention at judicial will.” *Perin v Peuler*, 373 Mich 531, 541; 130 NW2d 4, 10 (1964). The case law is thus clear that, when it comes to matters of practice and procedure, this Court has exclusive authority.

2. Until the 1995 amendment of the No Fault Act to Include the Current Version of MCL 500.3135(2), this Court Recognized that the Determination of Whether a Plaintiff has Suffered a “Serious Impairment of Body Function” is More Properly within the Province of the Jury.

Before the No Fault Act went into effect on October 1, 1973, this Court was requested by Governor William G. Milliken and the Senate to issue an advisory opinion on three topics, one of which was, “[a]re the phrases ‘serious impairment of body function’ and ‘permanent serious disfigurement’ as used in § 3135 of the Act ‘sufficient for legal interpretation?’” *In re Requests of the Governor and Senate on Constitutionality of Act No. 294*, 389 Mich 441, 462; 208 NW2d 469, 472 (1973). This Court ruled:

[S]uch phrases are capable of legal interpretation and, indeed...juries or judges sitting without juries frequently have and do interpret comparable phrases bearing upon various facets of the law. Such findings result from denominated fact questions and thus are within the exclusive province of the triers of fact. Only when interpretation approaches or breaches permissible limits does it become a question of law for the Court. Such questions must be approached on a case by case basis.

Id. at 477-78.

Thus, before MCL 500.3135 was even enacted, this Court determined that the question of whether a plaintiff has satisfied the serious impairment of body function threshold is a matter within the exclusive province of the jury, not the judge.

In *Cassidy*, this Court revisited the issue of whether the serious impairment of body function threshold was a matter for the judge or jury, and held:

[T]he meaning of “serious impairment of body function” is a matter to be determined by statutory construction. We hold that when there is no factual dispute regarding the nature and extent of a plaintiff’s injuries, the question of serious impairment of body function shall be decided as a matter of law by the court. Likewise, if there is a factual dispute as to the nature and extent of a plaintiff’s injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement of M.C.L. § 500.3135; M.S.A. § 24.13135 has been met.

Cassidy, 415 Mich at 502.

However, this Court overruled *Cassidy* in *DiFranco v Pickard*, and held that, “[C]assidy is somewhat inconsistent with general rules of civil procedure. Even where there is no material factual dispute, a motion for summary disposition...should not be granted if the facts can support conflicting inferences.” *DiFranco*, 427 Mich at 54. The *DiFranco* court further noted:

The final reason given by the *Cassidy* court was the belief that the Legislature did not intend to leave threshold issues to the vagaries of juries...[T]rial and appellate courts have proven to be no more consistent than juries would have been in determining whether a particular plaintiff suffered a serious impairment of body function. Conflicting results have been reached by different Court of Appeals panels reviewing the same case. Conflicting results have also arisen among cases involving similarly injured plaintiffs. This is undoubtedly because no two plaintiffs are injured or recover in precisely the same manner. These conflicting results indicate that threshold issues are often questions upon which reasonable minds can differ.

Id. at 56-57.

The Legislature, however, effectively overturned this Court’s ruling in *DiFranco* and reverted to a somewhat modified *Cassidy* standard by enacting an amended version of MCL

500.3135 in 1995, which, “[r]equired courts to decide the ‘serious impairment of body function’ issue if ‘[t]here is no factual dispute concerning the nature and extent of the person’s injuries,’ or if there is a factual dispute, but it is not material to the determination whether the person has suffered a serious impairment of body function. M.C.L. § 500.3135(2)(a)(i), (ii).” *Kreiner*, 471 Mich at 120. This amended version of MCL 500.3135 thus represents a legislative determination that, contrary to this Court’s ruling in *DiFranco*, the serious impairment of body function threshold is not an issue for the jury if there is no material factual dispute as to the nature and extent of the plaintiff’s injuries.

3. Under the Two-step Inquiry Used to Determine Whether the Legislature has Unconstitutionally Interfered with this Court’s Authority over Matters of Practice and Procedure, MCL 500.3135(2)(a) Represents an Unconstitutional Intrusion upon this Court’s Authority over Matters of Practice and Procedure.

To determine whether the Legislature has impermissibly interfered with the Supreme Court’s authority over matters of practice and procedure in the courts, a two-part analysis is used. The first determination to be made is whether there is a conflict between the statute and the applicable court rule. *Krajewski v Krajewski*, 125 Mich App 407, 414; 335 NW2d 923, 927 (1983) (overruled on other grounds). In order to determine whether a conflict exists between a statute and a court rule, “[b]oth are read according to their plain meaning.” *Neal v Oakwood Hospital*, 226 Mich App 701, 722; 575 NW2d 68, 78 (1997).

If there is a conflict between a court rule and a statute, the next determination to be made is whether the statute is procedural or substantive. In *McDougall*, the Supreme Court explained that a statute impermissibly infringes upon its duty to establish rules governing practice and procedure under Article VI, §5 when, “no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified...” *McDougall*, 461 Mich at 30 (quoting *Kirby v Larson*, 400 Mich 585, 598; 256 NW2d 400, 406 (1977)). Such an inquiry is made on a

case-by-case basis, and as the *McDougall* court itself recognized, there is a, “[d]ifficulty that attends the drawing of the line between ‘practice and procedure’ and substantive law.” *McDougall*, 461 Mich at 36. The Court of Appeals has recognized that one way of delineating the distinction between substance and procedure is that this Court determines *how* an action is to be brought, while the Legislature determines *what* actions are to be brought. *Clemons v City of Detroit*, 120 Mich App 363, 372; 327 NW2d 480, 484 (1982).

In its current form, MCL 500.3135(2) unconstitutionally interferes with this Court’s constitutionally-mandated authority over matters of practice and procedure in the Michigan courts because it does not specify what actions are to be brought, but instead attempts to control how such actions are to be brought. First, MCL 500.3135(2) conflicts with the summary disposition standard set forth in MCR 2.116(C)(10) by re-allocating, indeed, reversing, the decision-making powers of the judge and jury. Additionally, MCL 500.3135(2) conflicts with MCR 2.116(G) because it fails to include the requirements for admissible documentary evidence set forth in MCR 2.116(G). Second, MCL 500.3135(2) sets forth absolutely no substantive rights. Instead, this statute solely dictates procedure, because it sets forth the circumstances under which the judge, or the jury, should decide the issue of serious impairment of body function as a matter of law.

a. MCL 500.3135(2) conflicts with MCR 2.116(C)(10) because it reallocates the decision-making powers of the judge and jury, and lacks the evidentiary requirements of MCR 2.116(G).

Conspicuously absent from *Cassidy* and the current version of MCL 500.3135(2) is any attempt to reconcile its language with that of MCR 2.116(C)(10), which provides for summary disposition when there is no genuine issue as to any material fact, and judgment for the moving party is appropriate as a matter of law. The *DiFranco* court recognized the potential for conflict between the *Cassidy* standard and the predecessor of MCR 2.116(C)(10), but our Legislature

chose to ignore that potential, and instead enact a statute that completely ignores, and conflicts with, the Judicially established standard for summary disposition set forth in MCR 2.116(C)(10).

Under MCL 500.3135(7), a “serious impairment of body function” is defined as, “[a]n objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” Under MCR 2.116(C)(10), a genuine issue of material fact as to whether an impairment has affected the plaintiff’s general ability to lead his or her normal life would mandate denial of a motion for summary disposition, and submission of the issue to the jury. MCL 500.3135(2) conflicts with MCR 2.116(C)(10) because it allows a party moving for summary disposition to obtain judgment as a matter of law regardless of whether there are genuine issues of material fact as to the third element of the serious impairment analysis: whether the plaintiff’s impairments have affected his or her general ability to lead a normal life. MCL 500.3135(7).

Thus, while MCL 500.3135(2) provides that the issue of serious impairment is a matter of law for the court to decide if there is no material factual dispute as to the nature and extent of the plaintiff’s injuries, MCR 2.116(C)(10) specifically requires that the moving party is entitled to judgment as a matter of law only if there is, “[n]o genuine issue as to any material fact...” However, under MCL 500.3135, if there is no dispute as to the nature and extent of the plaintiff’s injuries, *the jury will never decide* whether the plaintiff’s general ability to lead his or her normal life has been affected, because it automatically becomes an issue of law for the court to decide under the language of the statute. Material questions of fact will not prevent the judge from deciding the issue.

Interestingly, the analysis of the nature and extent of the injuries is primarily medical while the analysis of the effects on the plaintiff’s ability to live his or her normal life is

comprised of facts derived about the person's lifestyle. These are two completely different topics of analysis, yet the resolution of the first medical issue absolutely controls the plaintiff's right to a jury trial about the second lifestyle issue.

In *Kreiner*, this Court made very clear that there is a clear distinction between a person's medical injuries and the affect those injuries have had on their ability to live their normal life. As is outlined at length in *Kreiner*, the serious impairment analysis consists of examining facts concerning the plaintiff's ability to perform functions and activities of their normal life while the analysis of the nature and extent of the injuries is based upon medical facts. There is no apparent logical connection between whether there is factual agreement about the nature and extent of the plaintiff's injuries and whether a plaintiff is entitled to a jury trial on serious impairment. These are two entirely different questions. Nevertheless, the statute does not allow for a judicial determination of whether there is a question of fact concerning the completely different subject of whether those injuries have: (a) caused qualifying impairments to an important body function that (b) has affected the plaintiff's ability to live his or her normal life. No question of fact on this issue, no matter how material or compelling, can send the serious impairment issue to a jury once everyone agrees on the nature and extent of the plaintiff's injuries.

The removal of any question of fact from the analysis of a serious impairment motion under Section 3135(2) directly conflicts with summary disposition practice outlined by the Supreme Court in MCR 2.116(C)(10). Decades of summary disposition law has required that a motion be denied if one reasonable juror could rule in favor of the non-moving party. Under Section 3135(2) the judge must decide this factual question without regard for whether reasonable minds could differ on the issue. Even if a court found that five out of ten minds

would differ on the issue, the judge must make the decision. This process is an inescapable conflict in procedure between the statute and the court rule, and the court rule must control.

The extent to which MCL 500.3135(2) interferes with the allocation of decision-making between the judge and jury as set forth by the Supreme Court in MCR 2.116 is further underscored by case law interpreting the (C)(10) standard.

The case law is clear that summary disposition pursuant to MCR 2.116(C)(10) is inappropriate where reasonable jurors could have reached different conclusions. *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285, 289 (1999); *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623, 625 (2006). Thus, it takes only one reasonable juror's differing conclusion as to the material facts of the case to preclude summary disposition under MCR 2.116(C)(10). However, under MCL 500.3135(2), even if reasonable jurors could reach different conclusions as to whether the plaintiff has suffered a serious impairment of body function, the trial judge must decide the issue of serious impairment as a matter of law so long as there is no material factual dispute as to the nature and extent of the plaintiff's injuries. Judges, not juries, are making factual determinations regarding whether the plaintiff's general ability to lead his or her normal life has been affected, regardless of whether reasonable jurors could have reached differing conclusions.

Another point of conflict between MCR 2.116(C)(10) and MCL 500.3135(2)(a)(ii) is that while, "[a]ffidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required..." in support of a MCR 2.116(C)(10) motion, MCL 500.3135(2)(a) contains no such requirement. MCR 2.116(G)(3)(b). Thus, under MCL 500.3135(2)(a), a court could determine that there is no dispute as to the nature and extent of the plaintiff's injuries that is material to the determination of whether that person suffered a serious

impairment of body function *without having received or reviewed a single shred of documentary evidence*. Under MCR 2.116(G)(3)(b), however, the court cannot grant a motion for summary disposition under MCR 2.116(C)(10) unless documentary evidence is provided in support of the grounds asserted in the motion.

Even if the moving party provides documentary evidence as required by MCR 2.116(G)(3)(b), MCL 500.3135 contains no requirement that such evidence be admissible. Under MCR 2.116(G)(6), however, “[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule...(10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion.” Thus, a court is permitted to consider evidence that will be inadmissible at trial in deciding a motion for summary disposition under MCL 500.3135(2), but prohibited from considering such evidence under MCR 2.116(G)(6).

b. MCL 500.3135(2) sets forth no substantive rights, but is instead solely procedural, and must yield to the requirements of MCR 2.116(C)(10).

Summary disposition has been recognized by Michigan courts as the procedural equivalent of a trial on the merits, and it would defy logic to argue otherwise. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770, 787 (2004). Furthermore, it is clear that MCL 500.3135(2) contains no substantive requirements. First of all, MCL 500.3135(2) does not specify “what” actions may be brought, but rather specifies “how” an action is to be brought by mandating that the court, not the jury, determine whether a person has suffered a “serious impairment of body function” when there is no dispute as to the nature and extent of the plaintiff’s injuries. Additionally, MCL 500.3135(2) represents no, “[c]lear legislative policy reflecting considerations other than judicial dispatch of litigation...” *McDougall*, 461 Mich at 30 (quoting *Kirby*, 400 Mich at 598). Indeed, MCL 500.3135(2)

represents nothing more than an attempt by the Legislature to re-allocate the clearly procedural determination of whether the judge or jury shall decide a case that may have huge credibility and factual questions.

The Federal Courts have determined this Section to be procedural in nature, and held that the Federal Court Rule concerning summary judgment overrules the Statute. In *Shropshire v Laidlaw Transit*, 550 F.3d 570 (CA 6, 2008) the Sixth Circuit Court of Appeals addressed whether MCL 500.3135(2)(a) is substantive or procedural. In *Shropshire*, the Court of Appeals was faced with the interplay between Federal Rule of Civil Procedure (“FRCP”) 56,² which governs motions for summary disposition in the federal courts and MCL 500.3135(2)(a)(ii). The *Shropshire* court first recognized that FRCP 56(c) and MCL 500.3135(2)(a)(ii) conflicted, noting that MCL 500.3135(2)(a)(ii), “[r]equires different things of a plaintiff at this stage of litigation than does [FRCP] 56(c).” *Id.* at 573. The court then embarked on an analysis of whether MCL 500.3135(2)(a)(ii) was procedural or substantive. The *Shropshire* court held that MCL 500.3135(2)(a)(ii) was in fact procedural, and not substantive. *Id.* at 573-74. In reaching this decision, the *Shropshire* court noted:

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

Id. (emphasis added).

² FRCP 56(c) provides, in relevant part, that, “[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The language of MCR 2.116(C)(10) is virtually identical, providing for summary disposition if, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.”

The *Shropshire* court also looked to the language of MCL 500.3135 in its entirety in reaching its decision.

The plaintiff in *Shropshire* argued that MCL 500.3135(2)(a)(ii) was substantive because it created a new avenue for plaintiffs to prevail on the merits. However, the court held:

[A] review of § 500.3135 in its entirety makes clear that there are *only* three circumstances in which a person can recover noneconomic tort damages arising from an automobile accident: "death," "permanent serious disfigurement," or "serious impairment of body function." Mich. Comp. Laws § 500.3135(1). And there is *only* one way to meet the "serious impairment" exception, as provided in subsection (7): "[a]s 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." Mich. Comp. Laws § 500.3135(7). Nothing in subsection (2)(a)(ii) suggests that these requirements need not be met in order for a plaintiff to recover at trial just because a plaintiff alleges a closed head injury. In fact, by its very terms, subsection (7)'s definition applies to the entire "section," including subsection (2)(a)(ii).

Id. at 574-75.

Thus, according to the *Shropshire* court, "[a]lthough subsection (2)(a)(ii) provides an alternate road by which a plaintiff may reach a jury, it does not create an altogether new means of recovery," and therefore cannot be considered substantive. *Id.* at 575.

The *Shropshire* court noted the dearth of Michigan case law on the issue before it. This writer did not locate a single published Michigan case addressing a conflict between MCR 2.116 and MCL 500.3135.³ However, the Court of Appeals has addressed the interaction between MCL 500.3135(2)(a)(ii)'s closed head injury exception and MCR 2.119(B), which sets forth various requirements for an affidavit submitted in support of, or in opposition to, a motion. In *McDonald v Vaughn*, unpublished opinion per curiam of the Court of Appeals, issued May 18,

³ The Court of Appeals did address the issue in the unpublished, non-binding, case of *Ballard v Drouse*, unpublished opinion per curiam of the Court of Appeals, issued March 21, 2006 (Docket No. 264758). However, the Court of Appeals' analysis of MCR 2.116 and MCL 500.3135 in *Ballard* is dicta, because it was not preserved in the lower court. *Id.*

2004 (Docket No. 244687), the Court of Appeals held that an affidavit submitted pursuant to the closed head injury exception set forth in MCL 500.3135(2)(a)(ii) which satisfies every word of the requirements of Section 3135(2)(a)(ii) is still subject to the additional requirements for affidavits set forth in MCR 2.119(B). The Court of Appeals further held that the trial court did not err in denying summary disposition under MCR 2.116(C)(10) because the affidavit, which did not comply with the requirements of MCR 2.119(B), did not create a genuine issue of material fact. *Id.* Thus, in the face of a procedural court rule, MCL 500.3135(2)(a)(ii) was required to yield. The Court of Appeals has similarly required the statute governing contempt of court proceedings to yield to the applicable court rule, and the statute governing nonparties at fault to yield to the applicable court rule. *In re Contempt of Henry*, 282 Mich App at 667, *Staff v Johnson*, 242 Mich App 521, 533; 619 NW2d 57, 64 (2000).

In *Cassidy*, Justice Kavanagh wrote a dissenting opinion which illustrates the distinction between summary disposition under the MCL 500.3135(2) standard and summary disposition under the MCR 2.116(C)(10) standard. *Cassidy*, 415 Mich at 511. In his dissent, Justice Kavanagh concluded that summary disposition was improperly granted against Barbara Jean Hermann, the plaintiff in the companion case. *Id.* Justice Kavanagh reasoned that, because reasonable jurors could differ as to whether Ms. Hermann's injuries amounted to a serious impairment of body function, which is the appropriate inquiry when deciding whether summary disposition is warranted under MCR 2.116(C)(10), the matter was one for the jury, not the court, to decide. *Id.* The majority opinion in *Cassidy*, however, affirmed the trial court and Court of Appeals' determination that summary disposition against Ms. Hermann was appropriate because there was no dispute as to the nature and extent of her injuries, and her injuries were not sufficient to satisfy the serious impairment threshold. *Cassidy*, 415 Mich at 503. Had the

majority in *Cassidy* used the standard for summary disposition set forth in MCR 2.116(C)(10), as Justice Kavanagh did, it would have been required to deny summary disposition and remand the matter for trial.

The *DiFranco* court also recognized the dangers of courts deciding the serious impairment threshold issue as a matter of law, noting the potential for conflicting results in cases involving plaintiffs with similar injuries, and different results reached by different appellate panels reviewing the same case. *DiFranco*, 427 Mich at 57. The *DiFranco* court also noted that, “[p]roperly instructed jurors are capable of weighing evidence and using their collective experiences to determine whether a particular plaintiff has suffered an impairment of body function and whether that impairment was serious.” *Id.* This Court, by enacting MCR 2.116(C)(10), has similarly entrusted the jury to determine matters when there are genuine issues of material fact. Yet the Legislature, by enacting the current version of MCL 500.3135(2), stripped the jury of its traditional role as fact finder in cases where there are genuine issues of material fact, and to instead grant trial judges the authority to decide factual issues regarding whether a plaintiff’s impairments have affected his or her general ability to lead a normal life. This procedural determination of the Legislature must yield to MCR 2.116(C)(10).

C. THE *KREINER* DECISION SHOULD BE CORRECTED TO ELIMINATE ITS EXTRA-STATUTORY REQUIREMENTS THAT: (1) IMPOSE A TEMPORAL/DURATIONAL REQUIREMENT AND (2) REQUIRE THAT A PERSON’S ABILITY TO LEAD HER NORMAL LIFE BE COMPLETELY ELIMINATED INSTEAD OF “AFFECTED” AS STATED IN SECTION 3135(7).

Kreiner dealt substantially with the interpretation of MCL 500.3135(7) which defines the term “serious impairment of body function”. MCL 500.3135(7) states:

As used in this section “serious impairment of body function” means an objectively manifested impairment of an important body function that affects the person’s general ability to

lead his or her normal life.” Thus, serious impairment is clearly defined by the Statute and that definition needs no further definition from this Court. It is clear and simply stated.

Statutory interpretation is a question of law which the Supreme Court reviews de novo. *Dressel v Ameribank*, 468 Mich 557, 561, 664 NW2d 151 (2003). When construing a statute, the court’s primary goal is to effectuate the legislature’s intent. *Casco Twp v Secretary of State*, 472 Mich 566, 571, 701 NW2d 102 (2005). When the language of the statute is unambiguous, the court should enforce the statute as written because the legislature is presumed to have intended what is expressed in the text. *Id.*

MCL 500.3135(7), in defining “serious impairment”, requires that an injured person satisfy three specific elements before their injury reaches the threshold of “serious impairment of body function”. These three elements include:

- (1) an objectively manifested;
- (2) impairment of an important body function;
- (3) that affects the person’s general ability to lead his or her normal life.

What constitutes an “objectively manifested” impairment is something that this Court should comment on and settle. This term found its genesis in *Cassidy v McGovern*. The majority in *Kreiner* indicated that the 1995 amendment incorporating MCL 500.3135(7) could be viewed as a codification of the *Cassidy* decision. *Id.* at 121 n.8.

The *Cassidy* court never defined the phrase “objectively manifested.” The Michigan Court of Appeals in *Williams v Payne*, 131 Mich App 403, 346 NW2d 564 (1984) defined “objectively manifested” as requiring some proof which was “subject to medical measurement.” The *DiFranco* Court rejected the *Williams* definition and defined “objectively manifested” as

requiring a medically identifiable injury which is established through demonstrating a physical basis for subjective complaints of pain and suffering. This definition of “objectively manifested” rejected the notion that the basis for the injury had to show up on some specific medical test. *DiFranco*, 427 Mich at 70-75.

When the legislature adopted MCL 500.3135(7) in 1995, it chose not to define “objectively manifested.” This leads to the conclusion that the *DiFranco* definition survives and should be applied by this Court. Thus, in demonstrating what an “objectively manifested” impairment is, a Plaintiff should provide medical testimony indicating what the physical basis for the pain and suffering is, rather than providing a specific test result which is “subject to medical measurement.” The focus is should be to require testimony that the impairment is patent (as opposed to latent) and susceptible of medical verification through standard diagnostic methodology. Moreover, for psychiatric injuries a psychiatrist applying DSM-IV criteria should be able to determine that a person's PTSD is a serious impairment.

It is important for this Court to clear up this particular issue. Many courts now require the *Williams* standard as opposed to the *DiFranco* standard. There is no statutory or judicial basis for this interpretation.

The second element of the 3135(7) “serious impairment” test requiring that the impairment be of “an important body function” is fairly straightforward. There is ample case law defining this particular term and it is not suggested that this Court make any pronouncement inconsistent with the prior case law.

The third element of the 3135(7) test is the primary focus of this appeal. It is the element of the test which is most profoundly affected by the *Kreiner* decision. The language used by our

legislature regarding this third element is that the impairment must “[a]ffect the person’s general ability to lead his or her normal life.” MCL 500.3135(7).

There is no disagreement regarding the legislature’s intent in adopting the phrase “his or her normal life.” The legislature clearly intended a subjective analysis on a case by case basis of each individual plaintiff’s normal life in determining whether or not his or her injury constitutes a serious impairment.

The remainder of the legislature’s language in this third element of the 3135(7) test is straightforward. If the impairment affects an individual’s ability to lead her normal life, then she has suffered a serious impairment of body function. At this point, the injury constitutes a serious impairment of body function.

The most onerous aspects of the *Kreiner* decision which have to be corrected by this Court pertain to two provisions which *Kreiner* creatively added to the 3135(7) statutory definition. This includes the temporal/durational requirement created by the *Kreiner* Court’s “course and trajectory” language, as well as the *Kreiner* Court’s expansion of the legislative term “normal life” to include the judicially created term “entire normal life.”

The strongest analyses and arguments criticizing the temporal/durational defect contained by *Kreiner*’s “course and trajectory” creation are set forth in two separate dissents issued by Justice Cavanagh and Justice Weaver. *See* Justice Cavanagh’s dissent in *Kreiner*, 471 Mich at 147-148. *See also* Justice Weaver’s dissent in *Jones v Olson*, 480 Mich 1169, 747 NW2d 250 (2008). This Court should follow these dissents and eliminate the “course and trajectory” language from the application of 3135(7).

As far as the concept of “entire normal life” is concerned, again, the legislature never included the word “entire” in its definition. The legislature simply chose to use the term “normal

life.” Thus, if a plaintiff can demonstrate that he now lives a life which is different from his prior life as a result of his injury, his injury should be considered a serious impairment.

Another onerous affect of *Kreiner* and its progeny pertains to how courts have come to view the pre- and post-accident lives of injured accident victims. The courts have disregarded the very personal and subjective qualitative concept of “ability.” The courts have essentially taken the position that if a person can do the things that he was doing before the accident, irrespective of the *quality* of the performance in doing those things, he has essentially returned to his normal life.

The “ability” level of any person is as unique to that person as is the concept of his “normal life.” Clearly, different people have different ability levels at which they perform different activities. When someone’s ability level in any type of vocation, activity or endeavor is affected by an injury sustained in an accident, it then clearly impacts how he leads that aspect of his normal life. The following examples demonstrate this point.

The first example involves a college student who suffers a mild traumatic brain injury which affects her short-term memory retention and information processing (classic symptoms of a mild traumatic brain injury). After the accident, she is able to return to school, but now it takes her two or three times as long to process and retain information while learning her subject matter and preparing for tests. This injury clearly would have affected her ability to return to her normal way of conducting her life as a student, although she can return to her life as a student in an abnormal (to her) fashion.

A second example involves an amateur golfer who plays in amateur tournaments as his primary hobby. In order to play in amateur tournaments, the golfer has to practice regularly and play golf four to five times per week. This results in his being able to shoot scores in the mid to

low 70's in order to compete in tournaments. This individual then suffers an orthopedic injury to his elbow which restricts his range of motion and prevents him from swinging normally, thereby diminishing his golfing ability and preventing him from shooting scores below the mid 80's. He could thus no longer play tournament golf which was a major part of his normal life. He can still play golf four to five times a week, but that in the way that was normal for him.

Eliminated Or Affected? Section 3135(7) does not require that a person's general ability to lead his or her normal life be *eliminated*, as *Kreiner* and its progeny have held. It only requires that the general ability to lead his or her normal life be *affected*. The point is that courts shouldn't limit their analysis of a person's pre- and post-accident life for determining whether an individual can simply engage in the same activities without regard to ability level. There has to be a qualitative analysis of that person's ability level and how it affects his normal life. This type of analysis of the qualitative aspects of an injury victim's normal life has been lacking in the post-*Kreiner* appellate decisions.

Finally, the *Kreiner* Court added the extra-statutory requirement that a plaintiff obtain a physician's restriction for every perceived limitation of activity, at a level of specificity well beyond what a doctor would normally provide. A casted hand cannot hold a pencil to write, but without a written note from the doctor stating that the plaintiff cannot write, the inability to write cannot be considered as a limitation in activity for *Kreiner* purposes. This law must be changed to reflect reality.

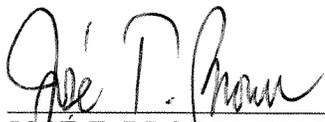
IX. CONCLUSION AND REQUEST FOR RELIEF

Section 3135(2)(a) of the No-Fault Act unconstitutionally delegates the fact-finding power to the judge and away from the jury, violating one of the most precious constitutional components of our democracy: trial by jury. This section also violates the Constitution's

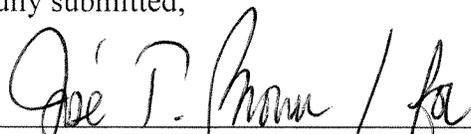
separation of powers clause by infringing on this Court's solemn powers to regulate the processes and procedures of the courts. Finally, *Kreiner's* extra-statutory requirements additions to Sections 3135's serious impairment threshold must be reversed and the easily understandable statutory definition of serious impairment in Section 3135(7) should be left for juries to apply.

For all of these reasons, we respectfully request this Honorable Court to declare MCL 500.3135(2)(a) to be unconstitutional and reverse the *Kreiner* decision's extra-statutory definitions of serious impairment of body function, and reserve the serious impairment question for jury determination unless MCR 2.116(C)(10) can be satisfied and reverse the Michigan Court of Appeals in this action, and to remand this action to the trial court for a jury trial.

Respectfully submitted,



JOSE T. BROWN (P33926)
CLINE, CLINE & GRIFFIN, PC
Co-Counsel for Amicus Negligence
Section of the State Bar of Michigan
503 South Saginaw Street, Suite 1000
Flint, MI 48502
(810) 232-3141 12/28/09



DAVID E. CHRISTENSEN (P45874)
Co-Counsel for Amicus Negligence
Section of the State Bar of Michigan
26555 Evergreen Rd., Ste. 1530
Southfield, MI 48076
(248) 353-7575 permission by phone
12/28/09