

# ADJUSTING CLAIMS FOR MICHIGAN BODILY INJURY AUTO THRESHOLD CASES

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## **I. MCL 500.3135 - NO FAULT THRESHOLDS FOR TORT ACTIONS**

### **A. Introduction -Tort Reform**

Two comprehensive reform proposals with respect to the Michigan No-Fault Act were defeated at the polls in 1992 and 1994. Thereafter, the Michigan Legislature enacted 1995 PA 222 and 2002 PA 697 to amend the No-Fault Act. Specifically, the Act modifies MCL 500.3135, which generally concerns third-party tort liability and mini-tort.

The Act does not change the basic rule of law in Michigan that in order to collect on a third-party bodily injury noneconomic damages claim, the claimant must suffer and meet the threshold of:

1. Serious impairment of body function;
2. Serious permanent disfigurement; or
3. Death.

The three primary changes in Michigan's No-Fault Act arising out of this tort reform legislation are as follows:

1. The Act expressly defines “serious impairment of body function” [MCL 500.3135(7)];
2. The Act takes the issue of whether the plaintiff has sustained a threshold injury out of the hands of the jury generally and makes it a question of law for the court, subject to a few exceptions [MCL 500.3135(2)(a)];
3. The Act precludes noneconomic damages if the plaintiff is more than 50% at fault [MCL 500.3135(2)(b)] or if the plaintiff is an owner operating his or her own vehicle involved in the accident when injured without the required MCL 500.3101 insurance in effect for that motor vehicle. [MCL 500.3135(2)(c)]. See, MCL 500.3101(2)(g) for definition of owner.

### **B. The Current Statute as Amended.**

Sec. 3135. (1) A person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(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.
- (b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.
- (c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 at the time the injury occurred.
- (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:
  - (a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer that harm intentionally if he or she acts or refrains from acting for the purpose of averting injury

to any person, including himself or herself, or for the purpose of averting damage to tangible property.

- (b) Damages for non-economic loss as provided and limited in subsections (1) and (2).
  - (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.
  - (d) Damages for economic loss by a nonresident in excess of the personal protection insurance benefits provided under section 3163(4). Damages under this subdivision are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.
  - (e) Damages up to \$500.00 to motor vehicles, to the extent that the damages are not covered by insurance. An action for damages pursuant to this subdivision shall be conducted in compliance with subsection (4).
- (4) In an action for damages pursuant to subsection (3)(e):
- (a) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.
  - (b) Liability shall not be a component of residual liability, as prescribed in section 3131, for which maintenance of security is required by this act.
- (5) Actions under subsection (3)(e) shall be commenced, whenever legally possible, in the small claims division of the district court or the municipal court. If the defendant or

plaintiff removes the action to a higher court and does not prevail, the judge may assess costs.

(6) A decision of a court made pursuant to subsection (3)(e) is not res judicata in any proceeding to determine any other liability arising from the same circumstances as gave rise to the action brought pursuant to subsection (3)(e).

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

## **II. MCL 500.3135(2)(a)(i) and (ii) - ANALYSIS**

### **A. Introduction Subsection (2)(a) - Serious Impairment of Body Function/ Permanent Serious Disfigurement-Question Of Law Generally**

MCL 500.3135(2)(a) indicates that issues of serious impairment of body function or permanent serious disfigurement are questions of law for the court **if** the court finds **either**:

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

(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....

This is a significant change since a judge, not a jury, will now decide these two threshold issues if the requirements of the statute are met as set forth in Subsection (2).

However, the wording of Subsection (2) would still require the judge to allow the jury to make a determination as to whether the thresholds of serious impairment of body function and permanent serious disfigurement are met where there is a genuine issue of material fact.

This language was probably utilized in Subsection (2) in an attempt to preclude a constitutional challenge to the statute if the court was to decide all issues of serious impairment of body function and permanent serious disfigurement regardless of whether there is a genuine issue of material fact. If the court was permitted to decide a genuine issue of material fact, Article I, Section 14 of the 1963 Michigan Constitution, which preserves inviolate the right to a jury trial if properly demanded, could be violated as would the court rule and jury instruction requiring the court to allow the jury to decide an issue, if there is a

genuine issue of material fact in dispute. A due process and equal protection challenge occurred in *Stevenson v Reese*, 239 Mich App 513 (2000). The court upheld MCL 500.3135(2)(c) as being constitutional.

Tort reform did not alter the threshold of permanent serious disfigurement. Thus, pre-tort reform case law still has precedential value.

In order to meet this threshold, the disfigurement must be both permanent and serious. Thus, the physical characteristics of the injury are controlling, rather than the impact the injury has on the plaintiff's life.

## **B. Illustrative Cases Interpreting Serious Impairment Of Body Function**

**Caveat: Unpublished cases have no precedential effect and are not binding on a court, but may be persuasive. The unpublished cases are provided for information purposes only. Each case should be read in its entirety. Cases are listed chronologically oldest dated case to newest dated case.**

1. *Budnitskaya v Dreher* (Unpublished U.S. District Court, E.D. of MI, Judge Avern Cohn, 1/21/98), in which the court granted summary judgment in a closed head injury case. The defendant moved for summary judgment claiming that the plaintiff had not satisfied her burden of showing that an impairment of an important body function affected her general ability to lead her normal life. Budnitskaya's vehicle was struck by defendant's truck. She did not suffer any broken bones, cuts, or bruises from the accident, although she complained of **headaches, dizziness, neck and back pain, and nausea**. X-rays taken on the date of the accident were normal except for **slight degenerative changes of the vertebrae**. Dr. Mark Rosner, M.D. diagnosed plaintiff with a **mild closed head injury and an acute cervical strain/sprain**. Two weeks after the accident a CT scan was taken which was normal. The plaintiff also underwent an EMG which was normal. Subsequently, the plaintiff was examined by Dr. Puri, M.D. who noted neck pain and discomfort and pain down her right shoulder and right arm, difficulty turning her neck to the right and left, headaches, and dizziness. Dr. Puri diagnosed cervical strain/sprain and recommended physical therapy. The plaintiff undertook six weeks of physical therapy, whereupon her subjective complaints decreased but were not eliminated.

The plaintiff's residual injuries were claimed to be rib pain, difficulty reaching overhead, difficulty working in the home, difficulty dusting and cleaning and lifting her child, and overall pain approximately 25% of the day. She also complained of occasional shooting pain to her back. The plaintiff missed about one week of work following the accident, continued to drive after the accident, and claimed that for three to four months after the accident her husband was required to do household chores.

Judge Cohn relied upon the amended no-fault statute for the definition of serious impairment of body function as follows:

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

Judge Cohn held that the plaintiff had the burden of proving the following elements:

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

In granting the motion for summary judgment, Judge Cohn relied upon the fact that the only change in plaintiff’s lifestyle was that for the three or four months after the accident she was unable to do household chores and take care of her children. She missed only one week of work, continued to drive, and was able to feed her children. Judge Cohn finally concluded:

In sum, under any reasonable interpretation of the phrase ‘the impairment . . . affects the person’s general ability to lead . . . her normal life,’ Budnitskaya has not offered evidence sufficient to withstand summary judgment. The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Butnitskaya*, slip op at 12 (emphasis added).

2. *Crandall v Richmond* (Unpublished Michigan Court of Appeals, 5/7/99, Docket No. 202296), in which the Court of Appeals affirmed summary disposition finding no serious impairment as a matter of law. The plaintiff complained that he sustained **injuries to his neck, back, and knees** in an auto accident. X-rays taken at the hospital were negative. He had returned to his normal daily activities and unrestricted work about one month later, but four months after the accident he still complained of pain in the lower back and again sought treatment. No complicated or extensive treatment was required, and the treating physician opined that the injuries were resolved within one month of the accident.

3. *Blatt v Lynn* (Unpublished Michigan Court of Appeals, 6/22/99, Docket No. 209686), in which the plaintiff claimed **injuries to neck, back, shoulder, and “psyche.”** The Court of Appeals affirmed the trial court’s decision granting summary disposition in favor of the defendant, finding that the plaintiff did not meet any of the three required elements of the amended law. The Plaintiff did not seek immediate medical attention after the accident, had substantial gaps in treatment, continued frequent attendance at the gym, did not continue taking prescription medications, did not make a claim for replacement services, successfully completed physical therapy, and his career flourished.

4. *Sadik v Solberg* (Unpublished Michigan Court of Appeals, 9/3/99, Docket No. 209092), in which the plaintiff was involved in an auto accident and X-rays noted **degenerative disc disease**. An EMG revealed **bilateral carpal tunnel syndrome**. An MRI ten months later revealed **lumbar disc herniation**. The court determined that there was no evidence that these alleged injuries were related to the accident as opposed to pre-existing degenerative disc disease and thus found no serious impairment as a matter of law.

5. *Reynolds v McAdam* (Unpublished Michigan Court of Appeals, 9/10/99, Docket No. 210104), where the Court of Appeals affirmed summary disposition finding no serious impairment as a matter of law in a case where the plaintiff was diagnosed with a **fractured clavicle and three fractured ribs** as a result of an auto accident. He was released by his doctor to return to work after two weeks and was able to resume all other activities within one month of the accident. The plaintiff submitted reports from a doctor diagnosing **cranial nerve disorder, cervical radiculopathy, and thoracic outlet syndrome** as a result of the accident. The plaintiff complained of lingering pain and disparity of muscle strength, but the court held that these did not constitute a serious impairment as a matter of law. The court further found that although the alleged impairment need not be permanent, the length of time for which it existed as well as the extent of the medical treatment which is required are relevant to the determination of whether or not the injury constitutes a serious impairment.

6. *Starks v Stockdale* (Unpublished Michigan Court of Appeals, 10/01/99, Docket No. 212901), in which the Court of Appeals affirmed a summary disposition, finding no serious impairment as a matter of law despite the plaintiff’s complaints of **disc space narrowing at C5-6, a diagnosis of bilateral carpal tunnel syndrome, and complaints of cervical tightness and pain**, all of which were most likely present before the accident.

7. *Mathews v Tahash* (Unpublished Michigan Court of Appeals, 11/30/99, Docket No. 212350), dealing with **spinal subluxation**,

**headaches, back pain and stiffness.** The Court of Appeals affirmed the lower court's granting of defendant's motion for summary disposition on the serious impairment issue. The injuries involved a **spinal subluxation with chiropractic treatment.** Plaintiff claimed headaches, low back pain and stiffness, and she treated for approximately three months. Upon being released, she was not placed under any restrictions by her physician, but rather, placed herself under restrictions. In affirming the lower court, the Court of Appeals held: "The treatment plaintiff received after the accident concluded within two months." The plaintiff's headaches did not warrant specialized testing or treatment. The plaintiff continued to experience some head and neck pain following the accident; nevertheless, no evidence showed that either ailment required continuing treatment in the form of therapy or medication. The presence of lingering pain, in and of itself, does not create a jury question regarding whether an impairment is serious. Furthermore, no evidence showed that the plaintiff was prohibited from engaging in any work-related or recreational activities. Any restrictions on those activities were self-imposed.

8. *Ogden-Schuette v Irenc* (Unpublished U.S. District Court, E. D. of MI, Judge Lawrence Zatkoff, 12/2/99, Docket No. 98-749393), in which the plaintiff suffered an alleged **closed head injury**, causing a 19-point deficit in IQ testing, decreased intellectual processing speed, and exacerbation of a previously existing depressive disorder. **The plaintiff's doctor supported these conclusions with testimony regarding neuropsychological testing.** The Judge denied summary disposition, concluding that this testimony could support a finding that the plaintiff met the serious impairment threshold, thus leaving the matter as a question of fact for the jury.

9. *Kern v Blethen-Coluni*, 240 Mich App 333 (3/24/00), finding that the trial court had a duty to determine whether the plaintiff's injury satisfied the no-fault threshold of serious impairment of body function and of permanent serious disfigurement. The Court of Appeals further held that the minor plaintiff's **displaced and somewhat comminuted and oblique fracture of the right femur** constituted a serious impairment of body function as a matter of law and remanded for a new trial on the issue of the plaintiff's damages.

10. *May v Sommerfield*, 239 Mich App 197 (3/22/00), after remand 240 Mich App 504 (4/18/00), finding that pursuant to MCL 500.3135(2)(a), the issue of whether an injured person has suffered serious impairment of body function is a question of law for the court if the court finds that "[t]here was no factual dispute concerning the nature and extent of the person's injuries." Plaintiff had an arm injury with pain. The Court of Appeals initially remanded to the trial court to make appropriate findings concerning whether there was a factual dispute with respect to whether the plaintiff's impairment affected his "general ability to lead his...normal life." After remand, the

Court of Appeals upheld the trial court's decision that the plaintiff did not suffer an objective manifestation of injury aside from his subjective complaint of pain and that there was no genuine issue of material fact that the impairment did not affect his general ability to lead his normal life.

11. *French v Murphy* (Unpublished Michigan Court of Appeals, 5/12/00, Docket No. 214655), in which the Court of Appeals upheld the trial court's decision granting summary disposition in favor of the defendant, finding no serious impairment. The plaintiff complained of **pain in the neck, back, hip, elbow, and arm, as well as headaches**. Objective testing revealed only a **small disc herniation**. Physical therapy yielded a significant improvement, including full range of motion, less back pain, and less spasm. The plaintiff was able to continue running her daycare center and taking care of her house, although she required assistance.

12. *Miller v Purcell*, 246 Mich App 244 (6/1/00), in which the plaintiff alleged that she sustained injuries to her **neck, arms, and back as a result of an auto accident, including an acromioclavicular separation and mild tendonitis**. The defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the plaintiff's alleged injuries did not satisfy the no-fault threshold. The trial court denied the motion for summary disposition, but the Court of Appeals reversed, holding:

Our review of the record satisfies us that an outcome-determinative factual dispute does not exist with regard to the nature and extent of plaintiff's injury. Therefore, the trial court was required to rule whether plaintiff suffered a 'serious impairment of body function.' MCL 500.3135(2)(a)(i) & (ii); MSA 24.13135(2)(a)(i) & (ii).

It appears from the record that the trial court concluded that plaintiff's complaints of pain in her day-to-day activities may elevate her injury to a serious impairment of body function.

\* \* \*

In *Kern [v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000)], this Court set forth a 'non-exhaustive' list of factors to consider when determining whether the impairment of an important body function is *serious* within the meaning of MCL 500.3135(7); MSA 24.13135(7). These include the extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery. In *Kern, supra* at 342, the Court also observed that the Legislature's

amendment of MCL 500.3135; MSA 24.13135 reflected a return to the standard first articulated in *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982), in which our Supreme Court opined:

‘Another significant aspect of the phrase ‘serious impairment of body function’ is that it demonstrates the legislative intent to predicate recovery for noneconomic loss on objectively manifested injuries. Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.’

\* \* \*

[A]ssuming that plaintiff’s injury is objectively manifested, we are satisfied that plaintiff has not suffered a serious impairment of body function because her general ability to lead her normal life has not been altered by her injury. During her deposition, plaintiff admitted that she was able to perform all the same activities that she did before the accident. . . .

Plaintiff points to her inability to knit and having to type one-handed at times as evidence of a serious impairment of body function. **While we sympathize with plaintiff, the record is clear that her general ability to lead her normal life has not been significantly altered by her injury.** *Burk v Warren (After Remand)*, 137 Mich App 715; 359 NW2d 541 (1984), and cases cited therein. *Miller*, 246 Mich App at 248-250 (emphasis added).

13. *Churchman v Rickerson*, 240 Mich App 223 (6/2/00), finding that an affidavit of a doctor indicating that the plaintiff/pedestrian suffered a **“closed head injury” and “neurological injury”** was insufficient to satisfy the threshold requirement to recover non-economic losses. The plaintiff was required to demonstrate that she had suffered a “serious neurological injury” to satisfy the threshold and failed to do so. The Court of Appeals also ruled that the trial court had a duty to make factual findings concerning whether the pedestrian suffered a serious impairment of body function. In a footnote, the Court of Appeals referenced an article written by Dr. David Kushner

published in the Archives of Internal Medicine entitled, *Mild Traumatic Brain Injury: Toward Understanding Manifestation and Treatment*, Vol. 158, No. 15, 1998, as a helpful source for distinguishing between the different degrees of neurological injury.

14. *Haren v Brabbs* (Unpublished Mich. Court of Appeals, 6/6/00, Docket No. 217522), finding that a **laceration on the back of the plaintiff's head that required eight stitches, a concussion, contusions, and a sprained right knee** did not meet the serious impairment of body function threshold as a matter of law. The plaintiff was able to lead an active life, including playing baseball and running.

15. *Wilkinson v Lee*, 463 Mich 388 (9/26/00), in which the Michigan Supreme Court considered a rear-end accident for which the defendant admitted liability. The impact caused the plaintiff's seat to break and resulted in an original diagnosis of **neck strain**. The trial court entered a judgment on a jury verdict, and the Michigan Court of Appeals reversed, finding no causation. The Michigan Supreme Court reversed, thereby upholding the trial court, finding that the evidence supported the jury's verdict that the accident **proximately caused symptoms that the motorist suffered after the accident related to a pre-existing brain tumor**. Both the plaintiff's and the defendant's doctors concurred that the accident did not cause the tumor but that the accident could have precipitated or accelerated the symptoms which the plaintiff experienced. The Supreme Court held that the plaintiff presented ample testimony demonstrating that his physical and mental condition declined significantly after the accident.

16. *Herdus v Raffensberger* (Unpublished Michigan Court of Appeals, 11/17/00, Docket No. 219378), in which the 84-year-old plaintiff had an **injury to the eye which caused facial swelling, a drooping left eyelid, and some difficulty in vision**. The plaintiff underwent surgery that improved his condition somewhat, but he had some remaining paralysis above the left eye, was unable to raise his left eyebrow, and had periodic headaches for which he took Tylenol. The Court of Appeals found that the plaintiff's injuries were objectively manifested and constituted a serious impairment but found that they did not affect his general ability to lead a normal life. The plaintiff was retired, able to carry on his usual daily activities and personal needs, and continued driving, even for long distances. Any restrictions the plaintiff experienced were self-imposed.

17. *Hicks v Mumin* (Unpublished Michigan Court of Appeals, 1/12/01, Docket No. 214004), finding that the plaintiff's injuries did not constitute a serious impairment of body function that affected his general ability to lead a normal life where the plaintiff had **loss of strength in his non-dominant hand and neck pain**. The Court of Appeals affirmed the trial court's

subjective comparison of the plaintiff's pre- and post-accident lifestyle to determine if the injury had affected his general ability to lead a normal life.

18. *Howitt v Billings Feed & Lawn, Inc* (Unpublished Michigan Court of Appeals, 1/30/01, Docket No. 216738), in which the appellate court agreed with the trial court that the **softening of cartilage in the knee and the dislocation of two cervical vertebrae** were objective manifestations of injury and that the knee injury impaired the plaintiff's ability to walk, which is an important body function. However, the Court of Appeals ultimately concluded that the threshold was not satisfied, because there was no evidence that the plaintiff's injuries affected his general ability to lead a normal life:

The evidence showed that plaintiff had objective manifestations of injury, that being softening of the cartilage in his knee and dislocation of two cervical vertebrae, and that the injury to his knee at least impaired his ability to walk, which is an important body function. However, because plaintiff still could go to work and apparently do everything except walk for long periods of time, do some exercises, and participate in some sports, the evidence does not support a finding that plaintiff's injuries affected his general ability to lead a normal life. While plaintiff's doctor expressed an opinion to the contrary, the issue was one of law for the court, MCL 500.3135(2)(a); MSA 24.13135(2)(a), and a party's expert is not qualified to interpret and apply the law. *Howitt*, slip op at 2 (internal citations omitted).

19. *Hicks v Trammer* (Unpublished Michigan Court of Appeals, 1/30/01, Docket No. 217237), finding that the plaintiff's **muscle spasms and numbness in his extremities** were objectively manifested injuries that impaired important body functions, but that the impairments were not "serious" and did not subjectively impair his general ability to lead his normal life:

Giving the plaintiff the benefit of the doubt, his muscle spasms and numbness in his extremities were objectively manifested injuries that impaired important body functions, i.e., moving his neck and sleeping without interruption.... However, these impairments were not serious. The spasms noted during only one doctor's office visit, the resultant limited range of motion was minimal, and the range of motion problem was resolved within a month.

There is no evidence that the discomfort from the numbness, which occasionally occurred during day time, prevented him from using his hands or legs, or that these sleep interruptions prevented him from doing anything he desired. Overall, these injuries had no appreciable affect on plaintiff's life other than to cause him to miss one day of work and a hunting trip. While plaintiff himself restricted his activities, he admittedly could do everything he wanted to do, including working, driving, lifting, working around the house, shopping, sailing, and going out socially. Therefore, any injuries did not affect his ability to lead a normal life. *Hicks*, slip op at 2.

20. *Mirling v Carell* (Unpublished Michigan Court of Appeals, 1/30/01, Docket No. 216843), in which the Michigan Court of Appeals found that the plaintiff's injury did not significantly affect his ability to lead a normal life. The plaintiff **lost an upper incisor tooth** in the impact, had to wear a temporary replacement for two years, and then had a permanent replacement implanted. The court found that losing a tooth was an objectively manifested injury and that the injury interfered to an extent with an important body function, namely eating. The court concluded that the plaintiff's ability to eat was not, however, seriously impaired, as he merely had to eat more carefully. Although the plaintiff avoided some physical activities, he continued with his employment and finished school.

21. *Lullo v Heikkila* (Unpublished Michigan Court of Appeals, 7/10/01, Docket No. 226065), in which the plaintiff alleged a **back injury**. The trial court granted summary disposition in favor of the defendant and the Court of Appeals affirmed, holding:

Here, the trial court properly compared plaintiff's lifestyle before and after the accident to determine no factual dispute existed with respect to her injuries. *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000). Plaintiff continued to engage in similar activities after the accident. She experienced pain, but the only activities affected were her reduced ability to run, and the limitation on the type of exercises she could perform. There is no showing that the trial court erred in concluding that plaintiff's impairment did not affect her general ability to lead a normal life. *Lullo*, slip op at 1.

22. *Perales v Partin* (Unpublished Mich. Ct. of Appeals, 7/13/01, Docket No. 223343), in which the plaintiff alleged **tendonitis**. The trial

court granted summary disposition in favor of the defendant based upon a finding that the alleged injury did not satisfy the serious impairment threshold as a matter of law. The Court of Appeals affirmed, holding:

Because ‘the Legislature overturned the Supreme Court’s *DeFranco* decision by codifying the tort threshold injury standards of *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982),’ and the statutory definition of serious impairment of body function is the same as that adopted in *Cassidy*, it is appropriate to refer to *Cassidy* and cases decided thereunder in deciding this case. *Kern v Blethen-Coluni*, 240 Mich App 333, 338-342; 612 NW2d 838 (2000).

Plaintiff may have had an injury, that being tendonitis. However, there were no physical abnormalities which could account for plaintiff’s complaints of pain and tenderness, and it is the injuries, not the pain, that must be medically substantiated through objective manifestation. **Medical findings of tenderness and limited flexion do not rise to the level of objective manifestation.** Plaintiff testified at deposition that the pain hampered her ability to stand or drive for long periods of time, but ‘[a] limitation self-imposed because of real or perceived pain is not objective manifestation.’ Therefore, the trial court did not err in ruling that plaintiff did not meet the serious impairment threshold. *Perales*, slip op at 2 (emphasis added) (some internal citations omitted).

23. *Keller v Leja* (Unpublished Michigan Court of Appeals, 8/21/01, Docket No. 222589), in which the plaintiff alleged **back pain between her shoulders, tenderness, and muscle spasms** and was diagnosed with **acute thoracic strain**.

The trial court granted summary disposition in favor of the defendant and the Court of Appeals affirmed, holding:

The undisputed evidence showed that as a result of the accident plaintiff suffered a soft tissue injury to the area of her cervical spine. Plaintiff was not hospitalized, and did not require surgery. Tests, including x-rays and an MRI, showed no evidence of abnormality. Plaintiff correctly notes that the physicians with whom she consulted noted the

presence of tenderness; however, **tenderness is a subjective complaint....** The undisputed evidence showed that plaintiff required no treatment beyond physical therapy and pain medication, and that her prognosis for a full recovery was favorable. No evidence demonstrated that plaintiff suffered an objectively manifested injury as a result of the accident. Her general ability to lead her normal life was not significantly altered by the injury. *Keller*, slip op at 2 (emphasis added).

24. *Massey v Garbacz* (Unpublished Michigan Court of Appeals, 8/24/01, Docket No. 221577), in which there was a factual dispute as to whether the plaintiff's alleged injuries were age-related or were caused by the accident. The trial court held that regardless of that issue, summary disposition in favor of the defendants was appropriate. The trial court found that even though the plaintiff could no longer perform certain activities, his general ability to lead his normal life was not affected. **The Court of Appeals affirmed without providing additional information regarding the nature of the plaintiff's injuries or the effects thereof.**

25. *Spagnuolo v Dorn* (Unpublished Michigan Court of Appeals, 12/14/01, Docket No. 225535), in which the plaintiff alleged **TMJ disorder and headaches** associated with the accident. The TMJ was treated with a bite splint worn at night, and her complaints of soreness in the jaw stopped. The only residual problem was that she tended to eat softer foods and to avoid larger items. The headaches were resolved with over-the-counter medication. The trial court granted summary disposition in favor of the defendants, finding that plaintiff had not met the no-fault serious impairment threshold. The Court of Appeals affirmed, and in so doing relied upon *DiFranco* and its progeny, holding:

In those earlier cases, where the plaintiffs, like the plaintiff in this case, suffered pain and discomfort but were not incapacitated or subjected to significant changes in lifestyle, this Court determined that the trial courts correctly decided as a matter of law that the plaintiffs had not suffered a serious impairment.... Applying a similar approach in this case, we conclude that the trial court correctly found that, as a matter of law, plaintiff failed to establish the existence of a serious impairment of body function. *Spagnuolo*, slip op at 2.

26. *Moore v Clous* (Unpublished Michigan Court of Appeals, 12/21/01, Docket No. 226289), in which the plaintiff alleged **pain in her lower back**

**and extremities.** X-rays revealed **degenerative disc disease** that had not changed since three years pre-accident through one year post-accident. The trial court granted summary disposition in favor of the defendant, finding no proximate cause and no serious impairment. The Court of Appeals affirmed, holding:

The undisputed evidence showed that plaintiff had an extensive history of neck and back problems that preceded the accident by more than ten years. These problems included lumbar radiculopathy, of which plaintiff continued to complain after the accident. No objective medical tests demonstrated that plaintiff's condition worsened after the accident. The evidence showed that plaintiff's general ability to lead her normal life, i.e., her life as it was before the accident, was not significantly altered by the injury. *Moore*, slip op at 2.

27. *Abbott v State of Michigan* (Unpublished Michigan Court of Appeals, 12/28/01, Docket No. 225729), in which the plaintiff required **four stitches to the knee**. She was also diagnosed with a **discoid lateral meniscus** requiring arthroscopic surgery to the knee, but her treating physician concluded that the problem was related to a congenital malformation. She later fell when her knee buckled, necessitating another arthroscopic surgery. The trial court granted summary disposition finding no proximate cause between the accident and the knee problems, and the Court of Appeals affirmed without going on to address the serious impairment issue.

28. *Block v Pawluk* (unpublished Michigan Court of Appeals, 1/4/02, Docket No. 225124), in which the 15-year-old plaintiff was struck by the defendant's vehicle as she crossed the street. The only objective evidence of injury immediately following the accident was a **cut lip**. In the following months, the plaintiff's mother noticed that she was **distracted and was having difficulty with her memory, was tired, and was having emotional problems**. Sixteen months post-accident, the plaintiff was diagnosed with **depression**, and seventeen months post-accident she was diagnosed with an **inner-ear concussion and a mild closed head injury**. The plaintiff's depression was cured with a course of anti-depressants and counseling, and she continued with her education and employment with the assistance of a tutor and speech therapist. The trial court granted summary disposition in favor of the defendant, finding no serious impairment. The trial court concluded that a question of fact did not exist as to the plaintiff's alleged closed head injury, in part because her treating doctor who made the diagnosis devoted less than five percent of his practice to the diagnosis and

treatment of closed head injuries. The Court of Appeals affirmed on the same grounds.

29. *Jackson v. Nelson*, 252 Mich. App. 643 (2002), in which the court of appeals reversed in favor of the defendant following a jury verdict in favor of the plaintiff. The defendant appealed the trial judge's interpretation of serious impairment, arguing that the impairment must be a medically identifiable injury with a physical basis, and the court of appeals reversed on the basis of erroneous jury instructions. The court noted the Michigan Supreme Court's prior interpretation from *DiFranco v. Pickard*, 427 Mich. 32 (1986), that "his noneconomic losses arose out of a medically identifiable injury which seriously impaired a body function." The court also noted the decision from *Kern v. Blethen-Coluni*, 240 Mich. App. 333 (2000), that held that the amendments to MCL 500.3135 required a return to *Cassidy v. McGovern*, 415 Mich. 483 (1982). In defining the requirement that an injury be "objectively manifested," the court held that the injury or condition must be medically identifiable and with a physical basis, upholding the *DiFranco* and *Cassidy* interpretations.

30. *Kreiner v. Fischer*, 471 Mich. 109 (2004), in which the Michigan Supreme Court comprehensively addressed the definition of serious impairment of body function under the new statute. This case dealt with the third prong of MCL 500.3135(7) as to the effect on the person's general ability to lead his/her normal life. This case involved two plaintiffs. Plaintiff Straub suffered **a broken bone in his little finger and injured tendons in his ring and middle fingers** after a motorcycle accident on September 19, 1999. He had out-patient surgery to repair the tendons on September 23, 1999. He underwent minimal treatment, wearing a cast for a month. Straub returned to work part-time about late November, 1999 and full time on December 14, 1999 without restrictions. He continued to have pain and discomfort. At his deposition he testified that until late December, 1999, he had problems performing various activities of daily living, running his archery shop and playing his guitar in the band. By mid-January, 2000, he could play his guitar and perform all activities of daily living as he had prior to the accident, even though he wouldn't completely close his left hand or completely straighten his finger.

**Kreiner complained of pain in his lower back, right leg, and right hip. Cortisone injections, physical therapy, and pain medication was administered. Six weeks after the accident of November 28, 1997, an EMG revealed mild nerve irritation to the right fourth lumbar nerve root and degenerative disc disease with spondylolisthesis.** Kreiner continued to complain of radiating pain from the back into the right thigh and right calf which pain was aggravated by bending and sitting or standing for any length of time. A course of pain medication, anti-inflammatory medication, physical therapy, and home exercises occurred. Kreiner stopped

treating with any doctor and stopped medications after his last doctor's visit in August, 1999. After the accident, Kreiner, a self-employed carpenter and construction worker, was able to work only six hours a day instead of eight hours, could not stand on a ladder longer than twenty minutes, could not lift anything greater than eighty pounds, could only walk a half mile, and could hunt deer but not rabbits. The trial courts granted both defendants' motions for summary disposition, finding that the plaintiffs failed to establish that they suffered a serious impairment of body function, and the Michigan Supreme Court upheld the summary dispositions.

The plaintiffs argued that they only had to demonstrate an impairment of a body function that in some way affected the plaintiffs' lives, "*regardless of degree.*" The defendant argued that the plaintiffs must prove that in general they can no longer lead their normal lives. In interpreting a serious impairment, the Court noted that "[a]lthough a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life. . . . Determining whether the impairment affects a plaintiff's 'general ability' to lead his normal life requires considering whether the plaintiff is 'generally able' to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment." The Court stated that one must look at how the injuries affected the "course" of one's life, that is, whether the rest of his life was impeded by the injuries. After this, the Court devised a test to determine whether one's general ability to lead his/her life has been affected.

The following multi-step process is meant to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not.

First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. . . .

Second, if a court can decide the issue as a matter of law, it must next determine if an "important body function" of the plaintiff has been impaired. It is insufficient if the

impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired. If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. **Subjective complaints that are not medically documented are insufficient.** If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "*any* effect" on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life. The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." *Kreiner*, 471 Mich. at 131-136.

31. *Contreras v. U.S.*, 2004 WL 3457632 (Unpublished U.S. District Court W.D. MI, 1/26/04, Docket No. 1:03-CV-360), in which the plaintiff

sued the government following a vehicle collision with a postal delivery truck. The plaintiff stated that she **broke her tooth, cut her lip, and injured her neck and spine** because of the accident. A degenerative disc disorder was discovered, but tests could not reveal when exactly this disorder began. Using *Kreiner*, the court focused on whether the plaintiff suffered an objectively manifested impairment in order to recover non-economic losses. The court noted that “[a]n impairment is objectively manifested if there is a medically identifiable injury or condition that has a physical basis. . . . Subjective complaints of injury can support a claim of serious impairment of body function, but only if there is a physical basis and an expert diagnosis to support the subjective claim.” The plaintiff argued that her subjective complaints of pain were consistent with MRI findings. The government argued that the MRIs only showed a degenerative disease. The court found that a genuine issue of material fact existed as to whether there was an objective manifestation, for although her disease pre-existed the accident, it was asymptomatic before the accident, and thus the accident could have influenced it. The court drew a parallel between the facts of its case and that of *Wilkinson v. Lee*, 463 Mich. 388 (2000).

32. *Williams v. Medukas*, 266 Mich. App. 505 (2005), in which the court of appeals reversed summary disposition for the defendant, holding that the plaintiff suffered a serious impairment of body function after sustaining **a fractured right shoulder and fractured left hand** which prevented him from feeding himself and playing sports in the long term. In looking at whether the injuries have affected one’s ability to lead a normal life, the court determined that the focus should be on how the injuries have affected the course of the person’s life and how, to what extent, and for how long his life is affected. The court must look at the person’s life before and after the accident to determine how the injuries affected his life. The court also noted that even an injury that lasts a short time may meet the threshold for non-economic damages if the injury extensively affects that person’s life.

33. *Moore v. Cregeur*, 266 Mich. App. 515 (2005), in which the plaintiff sued for non-economic damages from a vehicle accident in which she suffered **multiple rib fractures, a collapsed right lung, and detached eye retinas**. Surgery complications resulted in permanent loss of vision in her right eye. The trial court granted summary disposition to the defendant, but the court of appeals partially reversed. The court applied the test from *Kreiner*, which looks at the plaintiff’s life before and after the accident to see if the general course of his life has been impacted. The court held that the plaintiff failed to demonstrate that the lung and rib injuries affected her ability to lead her normal life, but the **vision loss “will affect every aspect of her waking life to some extent”** and was not a minor event but rather a serious impairment.

34. *Chiarot v. Belcher*, 2005 WL 1529620 (Unpublished, U.S. District Court, E.D. of MI, 6/23/05, Docket No. 04-CV73424), in which the Federal Court denied the defendant's motion for summary judgment in an action where the plaintiff complained of **pain in the neck, lower back, and lower legs, headaches, memory loss, nausea and sleeping trouble**. The court followed the *Kreiner* test holding that due to a physician's testimony that the plaintiff may have a serious neurological injury, there was a factual dispute as to the nature and extent of the plaintiff's injuries and thus, a question of fact for the jury.

35. *Mansor v. Girnet*, 2005 WL 2757999 (Unpublished Michigan Court of Appeals, 10/25/05, Docket No. 262713), in which the court of appeals affirmed summary disposition for the defendant. The plaintiff complained of **headaches and pain from a small cut over her right eye, dizziness, blurred vision, and neck and back pain**. The court held that the plaintiff failed to produce evidence of an objectively manifested, medically identifiable injury with a physical basis. The court noted that in *Kreiner*, the plaintiff had medically documented injuries via an EMG test. The plaintiff here argued she had a MRI that demonstrated cervical injuries, but this test was performed months after the accident. She had no documented evidence of any serious injuries immediately following the accident. The court held that the MRI failed to demonstrate an objectively manifested injury causally related to the motor vehicle accident and that muscle spasms alone do not meet the threshold for non-economic damages.

36. *Paschal v. Maloney*, 2005 WL 2808576 (Unpublished Michigan Court of Appeals, 10/27/05, Docket No. 262607), in which the court affirmed summary disposition for the defendant. The plaintiff suffered a **disc bulge** following a motor vehicle accident and missed around 45 days of work. Physical therapy eventually improved the pain, and the plaintiff had no more work restrictions. The plaintiff complained that she could not sit through her children's sporting events and that her husband divorced her because she could not maintain a physical relationship. The court found that an important body function had been impaired and that it was objectively manifested, but the court held that the plaintiff could generally lead her normal life after comparing what she could do before and after the accident as well as the significance of the activities that were hindered.

37. *Swick v. Okorn*, 2005 WL 2862041 (Unpublished Michigan Court of Appeals, 11/1/05, Docket No. 263478), in which the court of appeals affirmed summary disposition for the defendant. The court held that the plaintiff failed to demonstrate that his injuries affected his general ability to lead a normal life under the *Kreiner* test. His injuries prevented him from climbing ladders and working on roofs as part of his job, but the court found that these activities were not important to the plaintiff's life before the

accident. Because he could lead his normal life, the plaintiff could not recover.

38. *McDaniel v Hemker*, 268 Mich App 269 (2005), in which the Court of Appeals reversed the Summary Disposition in favor of the defendant. The plaintiff alleged **head, neck, back, and shoulder injuries**. Dr. Kilgore initially diagnosed her as having “**traumatic cervical myositis and costrochondritis.**” Dr. Kilgore presented an affidavit that plaintiff complained of increased neck pain and tingling in her right trapezius muscle, increased neck pain plus numbness and tingling radiating into the right arm and hand, trapezius muscle was extremely tender and she had an olive sized area of muscle spasm. Electrodiagnostic testing was normal. Magnetic Resonance Imaging was also performed and revealed injuries to the cervical spine which Dr. Kilgore opined were sustained in the motor vehicle accident. Dr. Juneja also submitted an affidavit **diagnosing chronic neck pain, whiplash syndrome, neck and parascapular myofascial pain, and cervicogenic headaches**. Dr. Juneja also indicated that the **MRI of the neck showed foraminal stenosis exacerbated by bulged discs at two different levels. Trigger points in her neck and parascapular area along with reproducible headaches with compression of the nerve in the cervical area** were also noted. The accident occurred on 9/30/00. Plaintiff continued to treat with the doctors. In February, 2003, digital motion x-rays according to Dr. Juneja’s affidavit showed cervical ligament injury that the doctor testified occurred during the head and neck movement in the course of the accident. The doctor further opined that the ligaments holding the vertebrae in place were damaged and/or torn thereby allowing the vertebrae to move out of the normal alignment. The slippage of the vertebrae caused the discs to be pushed or bulged out. The vertebrae did not articulate properly with one another causing an abnormal wearing of the uncovertebral joints. The misalignment also caused the narrowing of the neural foramina. Ligaments that are stretched or torn do not heal or go back to their original shape. Injured ligaments allow for abnormal movement of the vertebrae which occurs every time the plaintiff moves her head and neck. This in turn causes inflammation of all the soft tissues in the cervical area. This information causes even more pressure on the soft tissues in turn causing an increase in symptoms, complaints of pain, and limitation on range of motion and activities. **Dr. Juneja indicated that the neck pain and headaches were going to be more of a permanent injury.** He also told her to continue her pain medication, home exercise program and adjust her activity levels based on her pain. Plaintiff had difficulty sleeping according to Dr. Juneja because of pain arising out of the position of her neck. **Dr. Juneja indicated there was no surgery to repair ligament damage or realign vertebrae and this was most likely a permanent condition.** Plaintiff would continue to experience headache and neck pain for a long period of time and had to adapt her lifestyle accordingly. There were certain activities she could not do or if she does she will probably have

pain and discomfort. She was given medication to control her headaches and neck pain. She was to continue with things such as cervical traction and stretching exercises at home, undergo repeat nerve blocks, and beyond that there is nothing more that would afford plaintiff any relief from her ongoing symptoms and complaints. McDaniels testified to her serious limitations at work and activities of daily living. **The court held that in light of the documentary evidence recited above, which is not disputed by defendants, that the plaintiff suffered a serious impairment of body function as a matter of law that affected her ability to lead her normal life.** The evidence established that she suffered an objectively manifested impairment of an important body function. Comparing her activities of her life before and after the accident is similar to comparing day to night. All aspects of her life had been significantly affected with no meaningful relief in sight. Based on the totality of the circumstances affecting plaintiff's general ability to lead her normal life, plaintiff suffered the necessary threshold injury constituting a serious impairment of an important body function. Based on the documentary evidence presented, there is a medically identifiable or physiological basis for plaintiff's pain and Dr. Juneja found that McDaniels was suffering from pain. **The doctor's expert's statements and opinions themselves regarding plaintiff's medical conditions and the likelihood of her condition being permanent could be utilized to show the extent of the residual impairment.**

39. *Pingel v Powers*, 2005 WL 3018251 (2005) (Unpublished Michigan Court of Appeals, 11/10/05, Docket No. 263714), in which plaintiff was involved in a rearend accident on 10/13/03. X-rays showed **degenerative changes in the spine**. The treating doctors **diagnosed thoracic strain, carpal tunnel syndrome and prescribed therapy**. One of the treating doctors attributed the condition to the accident while two independent medical examiners reached the opposite conclusion. **In early, 2005 plaintiff underwent decompressive surgery on both elbows. X-rays showed the presence of thoracic disc protrusions and the EMG showed the presence of carpal tunnel syndrome.** Plaintiff testified that he could not longer work as a painter because of physical activities required by his occupation such as holding brushes and moving his arms caused his upper extremities to become numb. **Although plaintiff had no physician imposed restrictions on his employment activities, the evidence presented that he had a physical incapacity that prevented him from working was sufficient under *McDaniels v Hemker*, 268 Mich App 269 (2005) to create an issue of fact regarding the existence of a serious impairment of body function.**

### C. Illustrative Cases Interpreting Permanent Serious Disfigurement

1. *Kosack v Moore*, 144 Mich App 485 (1985), in which the plaintiff sustained **scars on both of his hands and on his right leg** in a motor

vehicle accident. The Court of Appeals in a pre-tort reform case concluded that the evidence did **not** show serious impairments of body functions or permanent serious disfigurements as a matter of law.

**Whether an injury amounts to a permanent serious disfigurement depends on its physical characteristics rather than its effect on the plaintiff's ability to live a normal life.** *Williams v Payne, supra*, 131 Mich App 411. Here, plaintiff sustained scars on both his hands and on his right leg. Because evidence, including plaintiff's own testimony, suggests that medical treatment could reduce the extent of scarring, plaintiff's scars cannot be said to be permanent as a matter of law. Compare *Jakubiec v Kumbier, supra*, 134 Mich App 777. Moreover, the photographic evidence in the record demonstrates that plaintiff's scars cannot be characterized as serious disfigurements. *Id.* at 491 (emphasis added).

2. *Shortridge v Bailey*, 145 Mich App 547 (1985), in which the plaintiff had **four teeth loosened and two teeth fractured** in a motor vehicle accident. The trial court granted summary disposition in favor of the defendant, finding that the plaintiff had failed to establish either a permanent serious disfigurement or a serious impairment of a body function. The Court of Appeals in a pre-tort reform case affirmed holding:

Although plaintiff properly argues that the Supreme Court's holding in *Cassidy v McGovern* dealt only with the threshold issue of serious impairment of body function, we believe that the Supreme Court's reasoning and analysis apply equally to the threshold issue of permanent serious disfigurement. **The goals of limiting overcompensation for minor injuries and reducing excessive litigation in automobile accident cases apply with equal force to cases involving permanent serious disfigurement . . .** We do not believe that chipped teeth is the type of injury for which the Legislature intended to allow recovery when it established the threshold of permanent serious disfigurement. Therefore, we hold that the circuit court did not err in granting defendant's motion for summary judgment. *Id.* at 549-550. (emphasis added).

3. *Nelson v Myers*, 146 Mich App 444 (1985), in which the court of Appeals in a pre-tort reform case agreed with the trial court that the *Cassidy v McGovern*, 415 Mich 482 (1983) decision also applies to questions of permanent serious disfigurement. The plaintiff sustained a **three centimeter scar under her left eye** which was slightly depressed and slightly lighter than the surrounding skin. *Id.* at 446, n 1. Following *Cassidy v McGovern*, and its progeny, the trial court granted summary disposition in favor of the defendant finding that the scar did not constitute a permanent serious disfigurement. The Court of Appeals agreed with the trial court that the

*Cassidy* decision also applies to questions of permanent serious disfigurement holding:

The Court of Appeals further held that after looking at the physical characteristics of the scar, the plaintiff did **not** meet the threshold requirement. Although the scar was permanent, the Court of Appeals concluded that it was not “serious” holding:

Using the standard, and reviewing the record and the photographs, we are unable to say that the physical characteristics of the scar under plaintiff’s left eye either constitute a permanent serious disfigurement or create any fact issue on the question. There is no doubt that the scar is a permanent disfigurement, according to the proofs presented. **However, there is likewise no doubt that, in terms of its physical characteristics, it is not serious.** Plaintiff’s embarrassment and sensitivity about her appearance, including her reluctance to wear contact lenses and her choice of eyeglass frames, are all *subjective* reactions to a condition which may (and must) be *objectively* judged by the trial court, just as are complaints of pain and discomfort in a serious impairment case. There well may be cases involving scars where the call is not so clear, and where the trial court should leave a marginal question to the jury, but this is **not** one of them. *Id.* at 446 (partial emphasis added) (*italics in original*).

(**Note:** Even if a plaintiff has a permanent scar, the threshold is not satisfied unless the scar is also “serious.” The Michigan judiciary looks at the physical characteristics of the scar to make this determination.

4. ***Beutner v Kay*** (Unpublished Michigan Court of Appeals, 9/22/95, Docket No. 175097), in which the plaintiff alleged that he sustained a permanent serious disfigurement and an impairment of body function. The trial court granted summary disposition finding that the plaintiff’s alleged injuries did not satisfy either threshold. The Court of Appeals affirmed in a pre-tort reform case holding:

[A]s to plaintiff’s alleged scar, the medical records indicated the **laceration to the eyelid** was superficial and plaintiff had testified at deposition there was no stitching. The [circuit] court concluded reasonable minds could not differ as to the existence of serious impairment or permanent serious disfigurement. We agree with the circuit court that reasonable

minds could not conclude plaintiff suffered either serious impairment of a body function or permanent serious disfigurement under MCL 500.3135. *Beutner*, slip op at 2 (emphasis added).

(**Note:** It is well established in Michigan law that superficial scars do not constitute permanent serious disfigurements as required under the no-fault threshold for recovery of noneconomic damages.)

5. *Kanaziz v Runds*, 153 Mich App 180 (1986), in which the Court of Appeals in a pre-tort reform case held that whether an injury amounts to a **permanent serious disfigurement** depends on its physical characteristics. **It held that a one inch long jagged, starshaped scar on the right eyelid was not a serious disfigurement.**

6. *Kern v Blethem-Coluni*, 240 Mich App 333 (2000), in which the Court of Appeals noted in a post tort reform case that whether a disfigurement constitutes a **permanent serious disfigurement** is a question of law in the absence of a genuine outcome-determinative factual dispute. **Plaintiff showed four surgical scars to the jury and described them in detail.** However, no photographs or video of the disfigurement were contained in the lower court record. The case was remanded for ruling by the trial court as to whether there was a permanent serious disfigurement and if the trial court ruled against the plaintiff, further relief would be considered by the Court of Appeals only if plaintiff made an offer of proof in the lower court with photographic or other documentary evidence sufficient to support plaintiff's claim on appeal.

7. *Collins v Davis*, 2005 WL 2573354, (Unpublished Michigan Court of Appeals case, 10/13/05, Docket #256055) in which the Court of Appeals in a post tort reform case after reviewing photographs and testimony held that the scar was **not a serious disfigurement. The scar was small about 4 cm in length, near the top of plaintiff's forehead, slightly darker than the surrounding skin, and only caused a slight indentation in the skin.**

### III. MCL 500.3135(2)(a)(ii) - Analysis Closed Head Injury

#### A. Introduction Subsection (2)(a)(ii) - Closed Head Injury Exception

One significant **exception** to serious impairment of body function and permanent serious disfigurement issues being questions of law for the court pursuant to subsection (2)(a) is subsection (2)(a)(ii), which provides that 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.

The seminal case *Churchman v Rickerson*, 240 Mich App 223 (1999) is analyzed in Section III, B., *infra*.

## B. Illustrative Cases Interpreting Closed Head Injury Exception

**Caveat: Unpublished cases have no precedential effect and are not binding on a court, but may be persuasive. The unpublished cases are provided for information purposes only. Each case should be read in its entirety. Cases are listed chronologically oldest dated case to newest dated case.**

1. *Ogden-Schuette v Irencce*, 1999 WL 33581306 (Unpublished U.S. District Court, E.D. of MI, 12/2/99, Docket No. 98-749393), in which the plaintiff suffered an alleged **closed head injury**, causing a 19-point deficit in IQ testing, decreased intellectual processing speed, and exacerbation of a previously existing depressive disorder. The plaintiff's doctor supported these conclusions with testimony regarding neuropsychological testing. The Judge denied summary disposition, concluding that this testimony could support a finding that the plaintiff met the serious impairment of body function threshold; thus, leaving the matter as a question of fact.

2. *Churchman v Rickerson*, 240 Mich App 223 (2000), in which the Court of Appeals affirmed in part and remanded for further proceedings the trial courts grant of Summary Disposition to the defendant. The eleven year old minor suffered an alleged **closed head injury**. Serious impairment of body function is for the court to decide as a matter of law if there exists no factual dispute with regard to the nature and extent of plaintiff's injuries or where there is such a factor in dispute that dispute is not material to the determination of whether the plaintiff 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. Defendant argued that although there was evidence that the minor had suffered a closed head injury, plaintiff's own expert neuropsychologist found that the minor's injury had resolved itself with minimal, if any, lasting residual effects. Defendant argued that the affidavit of plaintiff's doctor, Laran Lerner, was deficient because it did not state that the minor had "sustained a serious neurological injury" as required by MCL 500.3135(2)(a)(ii), even though the affidavit stated that the minor had "sustained a post traumatic stress disorder with closed head injury and traumatic brain injury." **The trial court concluded that based on the plain language of the statute that the affidavit did not meet the MCL 500.3135 threshold because it provided a diagnosis but made no mention of the seriousness of the injury. The court noted that the statute requires some indication by the doctor providing testimony that the injury sustained by the plaintiff was serious. Here neither the**

**diagnosis of traumatic brain injury nor literal interpretation of those words necessarily indicated that the neurological injuries suffered by the minor may be serious.** The plaintiff was required to demonstrate that she had suffered a serious neurological injury to satisfy the threshold and failed to do so. The court noted that traumatic brain injuries may be classified as mild, moderate, or severe. The Court of Appeals referenced an article written by Dr. David Kushner, “Mild Traumatic Brain Injury: Toward Understanding Manifestation and Treatment.”, 158 Archives of Internal Medicine 1617 (Aug, 1998). Since the affidavit of Dr. Lerner contained nothing literally or substantively “to indicate the degree of injury, we find that it was not sufficient to satisfy the threshold requirement of” MCL 500.3135.

The plaintiff then argued that the court did not make any findings with regard to whether plaintiff sustained a serious impairment of body function based on evidence in the form of an affidavit from a neuropsychologist and medical records from the hospital where she was treated after the accident was alleged to be sufficient to raise a question of fact with regard to whether she sustained a serious impairment of body function. **The Court of Appeals noted that MCLA 500.3135 does not indicate that the closed head injury exception is the exclusive manner in which a plaintiff who has suffered a closed head injury may establish a factual dispute precluding Summary Disposition.** Absent an affidavit, a closed head injury exception may be established under the broader language of MCL 500.3135(2)(a)(i) and (ii). Since the trial court did not make the required findings under those two subsections, the Court of Appeals could not decide the merits of this issue and remanded the case for further proceedings under MCL 500.3135(2)(a)(i) and (ii).

3. *Peoples v Halton*, 2001 WL 1480818 (Unpublished Michigan Court of Appeals, 11/20/01, Docket #2208987), in which the Court of Appeals affirmed the denial of defendant’s Motion for Summary Disposition on the basis that a factual dispute existed as to whether plaintiff had suffered a serious impairment of body function as a result of the motor vehicle accident. The Court of Appeals noted that most importantly the trial court stated that the affidavit provided by plaintiff’s treating doctor, Dr. Gunabalan, opined that “there is a serious neurological injury, specifically that plaintiff is suffering from a **closed head injury, traumatic brain injury** sustained in the automobile accident” on 6/8/96. The Court of Appeals held that the affidavit of the doctor satisfied the requirements of the closed head injury exception in the statute and raised a question of fact for the jury regarding a threshold injury. The Court of Appeals noted that defendant argued that the affidavit was “completely worthless” because the doctor failed to take certain information into account and because other doctors have offered contradictory opinions.

The Court of Appeals noted that defendant's argument simply goes to the weight and credibility of Dr. Gunabalan's testimony and further illustrates that a question of fact exists for the jury.

4. *Block v Pawluk*, Docket 2002 WL 44238 (Unpublished Michigan Court of Appeals, 1/4/02, Docket No. 225124), in which the Court of Appeals affirmed the summary disposition in favor of the defendant.

The minor plaintiff in this case was crossing the street when a vehicle driven by defendant struck her. At the emergency room, she was found to have no objective evidence of injury aside from a cut lip. A neurological examination the following week was normal. Over the ensuing months, however, plaintiff's mother realized that her daughter was distracted, having difficulty with her memory, tired, and having emotional problems. **Four months after the accident, plaintiff consulted Dr. Hidalgo, who is board certified in neurology. Dr. Hidalgo performed neurological and mental status examinations, which were also normal. Dr. Hidalgo found evidence of depression, but did not diagnose cognitive impairment. However, another test conducted two weeks later revealed an inner-ear concussion, an area close to the brain, which Dr. Hidalgo opined was likely demonstrative of a mild closed head injury.** Michael Vredevoogd, Ph.D., diagnosed plaintiff with depression. This depression was successfully treated with a course of anti-depressants and counseling. Plaintiff was able to participate in various activities and hold summer jobs. She graduated from high school, entered college, and took full-time employment.

In affirming the lower court's grant of summary disposition for defendant, the Court found that plaintiff had failed to raise an issue of fact with regards to whether she had suffered a serious impairment. **The Court noted that plaintiff had presented evidence of an objectively manifested mild closed head injury that resulted in some cognitive difficulties and some depression.** However, the Court also found that plaintiff had recovered quickly from her injuries; that with tutoring, she was able to graduate high school, go to college and become gainfully employed; and that the only formal treatment she received for her injuries consisted of a course of anti-depressant drugs, counseling, and speech therapy. On this record, the Court found that plaintiff had not raised an issue of fact as to whether her general ability to lead her normal life had been affected by the accident. The court discussed testimony from plaintiff's treating neurologist and whether it raised an issue of fact under the newly amended language of MCL 500.3135(2)(a)(ii). **The Court found that Dr. Hidalgo, whose treatment of closed head injuries made up only 5% of his total practice, was not competent to render such an opinion under the statute's closed head injury exception.**

5. *Thalji v The Detroit Edison Co.*, 2002 WL 483515, (Unpublished Michigan Court of Appeals, 3/26/02, Docket No. 226426), in which plaintiff suffered objectively manifested injuries based on a **disc bulge in the lower back, central disc displacement in the neck**, positive **EMG** which revealed irritation of the nerve roots in the lower lumbosacral spine and that these injuries related to the disc bulge. Plaintiff also claimed a **closed** head injury. However, plaintiff did not present a closed head injury claim as a separate claim of serious impairment of body function. Rather he presented the evidence that he sustained an injury to his head in the accident which caused symptoms. Defendant's consulting physician, Dr. Furgison, testified that plaintiff likely sustained a Grade I closed head injury in other words a concussion. The Court of Appeals held that the trial court did not err in admitting evidence plaintiff suffered from headaches and other evidence relating to a closed head injury at the time of trial notwithstanding that the court granted a motion in limine striking "any reference to a closed head injury claim based on plaintiff's failure to comply with the requirements of MCL 500.3135(2)(a)(ii)." Notwithstanding the absence of an affidavit from an allopathic or osteopathic physician the court followed *Churchman v Rickerson*, 240 Mich App 223 (2000) that the closed head injury exception which allows a plaintiff to automatically create a jury question is not the exclusive manner to establish a factual dispute with respect to a closed head injury. Thus, regardless of whether plaintiff has met the requirement under the closed head injury exception, plaintiff could still prove he suffered from a closed head injury through other evidence.

6. *Randolph v Givan*, 2002 WL 31013702 (Unpublished Michigan Court of Appeals, 9/3/02, Docket No. 233104), in which the court affirmed the grant of summary disposition to the defendant on the other injuries not meeting the serious impairment of body function threshold and reversing and remanding the grant of summary disposition as to the **closed head injury** because there were material facts or disputes whether plaintiff suffered a serious neurological injury and whether the injury was caused by the automobile accident. Plaintiff, a pedestrian, was struck on 3/8/99 by a motor vehicle. The truck mirror hit the back of her head and neck and her left hand hit the front panel or bumper of the truck. Defendant conceded that his mirror hit something causing the mirror to fold back. The impact caused plaintiff to fall face down onto the ground. She experienced **dizziness, nausea, and facial swelling**. Two hours later she went to Henry Ford Hospital. The records indicate she was struck on the left side of the neck and that she was knocked to the ground. A chiropractor, Jeffrey Eisman, saw her on 3/12/99 for neck pain, upper back pain, and left arm weakness and numbness. He diagnosed her as having a sprain to the cervical/thoracic spine, headaches, and subluxations/partial dislocations of the spine at C7. On 5/20/99, plaintiff underwent an independent medical examination by Dr. Presad. Randolph complained that her neck hurt which limited her range of motion by 50%. She complained of pain upon palpation to the trapezius and

her back across the shoulders. Dr. Presad believed her limitations and symptoms were related to her chronic rheumatoid condition. Plaintiff saw another doctor on 10/19/99, Dr. Hysni, **who made a diagnosis of neck pain although plaintiff complained of neck, shoulder pain, headaches, occasional numbness, tingling and weakness in the arms.** On 1/7/00 plaintiff went to Bon Secours Hospital because she experienced left orbital numbness that was quickly followed by a twitching sensation radiating to her left face, left shoulder and eventually to her entire left arm. Dr. Boris Leheta performed an evaluation and concluded that plaintiff's "transient neurological event" was most consistent with that of a possible simple partial seizure, especially in light of the traumatic blunt head trauma episode" in 3/99. [Note: This discussion is limited to the closed head injury aspect of the case.] The trial court ruled that the plaintiff failed to present sufficient evidence that the closed head injury constituted a serious impairment of body function. **The Court of Appeals reversed finding material factual disputes in this regard because of Dr. Leheta's affidavit.** Dr. Leheta asserted in the affidavit that plaintiff's symptoms were signs of a transient neurological event consistent with a possible simple partial seizure. The doctor further stated that a simple partial seizure may indicate a serious neurological injury. The Court of Appeals noted that the affidavit contained the proposed testimony and met the requirements of MCL 500.3135(2)(a)(ii) with respect to closed head injuries. Moreover Dr. Leheta avered in his affidavit that the diagnosis of a possible simple partial seizure is consistent with the blunt head trauma plaintiff suffered in the 3/99 accident in conjunction with plaintiff's testimony that she was struck in the back of the head and neck with a side view mirror and the other medical history showing that plaintiff was struck in the left neck area and fell to the ground. This was sufficient to raise a material factual dispute regarding whether the automobile accident caused plaintiff's closed head injury.

7. *Hoffman v Despelder*, 2003 WL 197934 (Unpublished Michigan Court of Appeals, 1/24/03, Docket No. 238141), in which the Court of Appeals affirmed the grant of defendant's motion for summary disposition and the denial of plaintiff's motion for reconsideration. Dr. Policherla, a board certified neurologist, treated plaintiff for **headaches, neck and back pain and diagnosed her with bilateral S1 radiculopathy.** She was on physical therapy. The doctor did not place her on restrictions; however, she discontinued certain activities such as exercising and ballroom dancing. Dr. Glowacki, an orthopedic surgeon, **diagnosed spinal contusion and possible bulging disc.** Plaintiff alleged the new injuries including a **closed head injury** and the aggravation of pre-existing injuries. With respect to the closed head injury, the trial court observed that plaintiff did not present the required medical evidence to create a question of fact as to whether she suffered a serious neurological injury resulting from a closed head injury sustained in the accident. Medical records did not indicate that her back injury of 1996 was aggravated by the 2000 motor vehicle accident. With her

motion for reconsideration, plaintiff submitted the affidavit of Dr. Policherla, who stated that in his opinion plaintiff might have sustained a serious neurological injury as a result of a closed head injury suffered in the 2000 motor vehicle accident. The trial court denied the motion noting that no medical records placed into evidence made any reference to a closed head injury. The court also noted that Dr. Policherla's affidavit although it met the requirements of the statute was untimely and there was no evidence that plaintiff could not have presented in an affidavit in response to defendant's motion for summary disposition versus presenting it for the first time on the motion for reconsideration.

As to the remainder of the injuries discussed, although some of them were objectively manifested, the court dismissed them as they did not constitute a serious impairment of body function with respect to her general ability to lead a normal life.

8. *Lockwood v Wnuk*, 2003 WL 550007 (Unpublished Michigan Court of Appeals, 2/21/03, Docket No. 237088), in which the Court of Appeals reversed the grant of a Summary Disposition in favor of defendant on the basis that there is minimally a question of fact, which is outcome determinative, regarding whether plaintiff suffered an objectively manifested impairment of important body function and the effect of plaintiff's general ability to lead her normal life. Plaintiff alleged a host of injuries to include a **closed head injury, cervical strain, contusion to the left clavicle, contusion to the left hip, soft tissue trauma to the abdominal wall, and damage to her ileostomy**. Plaintiff asserted that the internal injuries were caused by the seatbelt during the accident. She had limitations in her activities of daily living and had to quit her job as a social worker due to cognitive problems caused by the accident. She began to suffer severe headaches and her ileostomy started leaking, bleeding, and causing her obstruction problems. Defendant established that plaintiff had extensive medical problems before the accident including Crohn's disease, hyperthyroidism, ovarian disease, hypertension as well as a craniotomy for a tumor. The Court of Appeals found that the abdominal and closed head injuries created a question of fact for the jury. [Note: Only the closed head injury is discussed in this analysis.] Dr. Bradley Klein, a D.O., performed a neuropsychiatric evaluation on several occasions. Lockwood reported headaches daily, jaw pain, neck and shoulder and back pain, increased anxiety, depression, significant forgetfulness, absentmindedness, difficulties articulating her thoughts and remembering what she read, etc. During the evaluation, Dr. Klein noted difficulties in areas of general processing of information, expressive language functioning, and areas of short term memory. The doctor made a diagnosis of traumatic brain injury. He suggested neuropsychological, cognitive, occupational, and speech language assessments to clarify the degree of cognitive deficits Lockwood experienced secondary to incurring a traumatic brain injury in the 8/25/99

motor vehicle accident. A subsequent cognitive evaluation by Dr. Klein's office showed some deficits. Cognitive rehabilitation was recommended. In another evaluation, plaintiff complained of her inability to complete daily activities in a safe and independent manner and described difficulty with tasks such as dishwashing, cooking, paying bills, grocery shopping, balancing a checkbook, taking medications, and housecleaning because of forgetfulness and the inability to focus and concentrate. The evaluation indicated that plaintiff was no longer functioning "as previous secondary to residual physical, cognitive, visual, perceptual, and emotional deficits as the result of the August, 1999 accident." The defendant submitted documentary evidence and reports that any cognitive impairments plaintiff had were consistent with the history of meningioma (tumor) and a craniotomy and not the result of the accident. MRI and CT scans indicated evidence of her prior surgery with a craniotomy defect seen in the left temporal frontal parietal region along with encephalomalacia of the left temporal lobe, probably post-traumatic in nature with no intracranial hemorrhage being seen. Plaintiff did not cite any MRI or CT scans in support of her position. Plaintiff could not recall if she hit her head during the accident or if she lost consciousness.

Defendant's own expert, Lisa Metler, Ph.D., opined that plaintiff suffered mild to moderate impairment of multiple cognitive tests although she also opined that the results were consistent with the history of a craniotomy. Dr. Metler also noted that plaintiff complained about the inability to plan meals, difficulty in bathing and dressing, driving only on a limited basis, and curbing her social activities following the accident.

Plaintiff presented **evidence in the form of medical diagnosis** by Dr. Klein that Lockwood suffered a traumatic brain injury and cognitive tests and evaluations conducted by Dr. Klein's office showed that plaintiff suffered deficits in mental processes thereby forming the bases of the diagnosis. As such, the court held that sufficient evidence was presented to leave the matter in the hands of the jury as to whether plaintiffs present condition arose out of the accident or previous medical problems and procedures. The court followed *Churchman v Rickerson*, 240 Mich App 223 (2000) in holding that the closed head injury exception does not provide the exclusive manner to establish plaintiff has suffered a closed head injury to create a factual dispute precluding Summary Disposition. In the absence of an affidavit that satisfies the closed head injury exception, the plaintiff may establish a factual question under the broader language set forth in subsections MCL 500.3135(2)(a)(i) and (ii).

9. *Domack v Spink*, 2004 WL 1628046 (Unpublished Michigan Court of Appeals, 7/20/04, Docket No. 245699), in which the Court of Appeals reversed the denial of defendants Motion for Summary Disposition as to serious impairment of body function. There were injuries alleged. A

radiology report reflected that at least **one white matter lesion was found in plaintiff's brain and the x-rays showing spinal subluxations** were objective findings, but there was no evidence that these conditions affected the functioning of plaintiff's body. The psychologist's report years after the accident indicating that plaintiff may have suffered impairments of cognitive functioning was not based on evidence of a medically identifiable physical injury attributable to the motor vehicle accident. Although plaintiff alleged she suffered a **closed head injury** from the accident, she presented no medical testimony or other medical evidence to the effect that she suffered a serious neurological injury. Thus, there was no basis to find a serious impairment of body function under either the straight forward application of the definition of serious impairment of body function and MCL 500.3135(7) or under the provision of MCL 500.3135(2)(a)(ii) that a question of fact is created for the jury 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. In footnote 2, the court distinguished the case of *Shaw v Martin*, 155 Mich App 89 (1986) because in that case, plaintiff suffered a large cut on the forehead requiring 42 stitches and about a week after the accident the doctor recommended that plaintiff see a neuropsychologist. In the *Shaw* case memory tests formed the basis of the opinion that plaintiff suffered memory loss. The court concluded that such evidence of memory loss was evidence of an objectively manifested injury because the psychologist of Shaw examined the plaintiff soon after the accident in which there was objective evidence of a substantial physical injury to plaintiff's head. **The close proximity between the psychologist's examination and the accident in the Shaw case provided a reasonable basis for concluding the memory loss was attributable to the physical injury from the accident.** At a minimum in *Shaw*, the psychological testing supported an inference that the memory loss was due to the accident without relying on further subjective reports of memory loss by the plaintiff. **In Domack, by contrast, the psychological testing years after the accident could not reasonably support such an inference, but rather plaintiff's claim of memory loss attributable to the accident relied on subjective claims of memory loss during the time between the accident and the belated psychological testing years later.**

10. *McKinnie v Ravel*, 2004 WL 2238621 (Unpublished Michigan Court of Appeals, 10/5/04, Docket No. 241842), in which the court affirmed the granting of defendant's Motion for Summary Disposition on the issue of serious impairment of body function. Plaintiff was in an accident of 6/00 and had complaints with respect to her **arm, hands, frequent headaches, neck pain, and jaw problems, clicking and jerking diagnosed as right capsulitis, TMJ, and cervicgia.** With respect to the **closed head injury**, the dissenter stated that a neurological examination under the impression section noted a closed head injury with possible whiplash neck injury with residual left parasthesia and mild left hyperreflexia raising suspicions of

possible intracranial focal pathology or upper cervical myelopathy, residual musculoskeletal pain with left wrist severe tendonitis, and chronic headaches in relation to the head injury. Other treating physicians described plaintiff's injuries as a permanent injury of vital body function and in the serious category of injuries of this type. DDS Richard Klein observed that plaintiff's injury affects much of what should be normal daily activities. In footnote 4, the majority addressed the dissent's utilization of the neurological examination as an example of medical evidence supporting the existence of an injury. **The majority noted that the letter from Dr. Amer Aboukam noted only a possible whiplash injury and pain.** The doctor provided no objectively identifiable basis for the statement that plaintiff had a 'closed head injury'. The court held that the letter did not meet the closed head injury exception of MCL 500.3135(2)(a)(ii) because there was no evidence that the doctor was a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed head injuries nor did the letter constitute testimony under oath. Therefore, the letter was insufficient to create a material issue of fact by itself. Furthermore, as the trial court noted, neurological tests of plaintiff's arm and leg failed to show any irregularities.

11. *Amos v Keller Transfer Line, Inc.*, WL 954986 (Unpublished Michigan Court of Appeals, 4/26/05, Docket No. 254232), in which the Court of Appeals affirmed the portion of the case dealing with the closed head injury in which the trial court allowed the issue of serious impairment of body function to be resolved by the jury. Plaintiff complained of **headaches, tendonitis, dizziness, and a closed head injury.** Dr. Gerald F. Robbins, D.O., plaintiff's treating neurologist, in his deposition stated under oath that Amos had sustained a serious neurological injury. As such, this was sufficient to satisfy the statutory exception that closed head injuries are to be resolved by the jury in light of such an affidavit or testimony. The doctor was asked in his trial deposition whether based on the history, his examination, the testing, the neuropsychological testing that he reviewed, the audiogram, and the total picture whether or not in his opinion Amos suffered a serious neurological injury. The doctor opined that based on plaintiff's complaints, the testing, and her ability to function, it seems that she sustained a serious neurological injury in her ability to function. **The neurologist also indicated an abnormality in the visual evoked response test and anomalies in an MRI performed on Amos indicating "findings in the paraventricular region with a suspicion of demyelinating process."** Upon follow up testing, Amos' neurologist opined that **the MRI findings and symptoms were not consistent with the diagnosis of demyelinating disorder, but more likely demonstrated a closed head injury and post-concussion syndrome.** The defendant also argued that neuropsychological testing cannot form the basis to establish the existence of an objectively manifested condition nor as an alternative to medical testimony to establish the existence of a serious neurological injury or as a means to objectify a plaintiff's subjective complaints. The *Amos* court noted

that MCL 500.3135(2)(a)(ii) in quoting *Churchman v Rickerson, supra* did not provide the exclusive manner by which the plaintiff may establish the existence of a closed head injury and the existence of a factual dispute. Instead it merely provides an exception that permits a plaintiff to automatically create a jury question by providing testimony of a medical physician that a serious neurological injury may exist. **The sworn testimony of the doctor satisfied this requirement. Neuropsychological testing performed was merely another mechanism available to Amos to establish the existence of medically verifiable serious neurological impairment that affected her ability to lead her life.** Issues that subsequently arose regarding the interpretation of test results or methodologies employed in testing and resulting diagnoses are evidentiary in nature and go to the weight of the evidence.

12. *Chairot v Belcher*, 2005 WL 1529620 (Unpublished U.S. District, E.D. of MI, 6/23/05, Docket No. 04-CV-73524), in which the court denied defendant's motion since the question of fact for the jury was created under MCL 500.3135(2)(a)(ii) by plaintiff's submission of a physician's affidavit. Plaintiff alleged his head hit the steering wheel upon impact. The police report showed no signs of injury. Plaintiff alleged **pain in his neck, lower back, lower legs, headaches, memory loss, nausea and trouble sleeping.** The defendant moved for Summary Disposition. In response, plaintiff filed an affidavit by Dr. Eilender indicating that he was a board certified neurologist who "regularly diagnoses and treats closed head injuries" and is "of the opinion that plaintiff may be suffering from serious neurological injury as the result of the automobile accident of September 11, 2001." The court noted that the affidavit appeared to be proffered solely to satisfy the requirements of MCL 500.3135(2)(a)(ii); however, the affidavit serves "to remove this case from those in which a determination on the nature and extent of the injuries is a matter of law." Although a doctor's affidavit giving only conclusory allegations and no scientific or factual support for those conclusions may be insufficient, the court held that "the distinguishing fact is Dr. Eilender's affidavit, which contains a paragraph stating '[s]pecifically, this opinion is derived from the fact that Mr. Chairot (sic) did suffer from a head impact as a result of the crash, that he also has been suffering from daily headaches since the crash and has been demonstrating short term memory deficits since the crash.'" Although noting that the opinion of Dr. Eilender was certainly generalized, the court did not feel it was in a position to substitute its judgment for that of a physician specializing in closed head injuries nor was the court in a position to conclude that there has been no factual support given for Dr. Eilender's opinion. Summary Judgment was denied as plaintiff minimally satisfied the requirements of the statute creating a question of fact for the jury.

13. *Collins v Davis*, 2005 WL 2573354 (Unpublished Michigan Court of Appeals, 10/13/05, Docket No. 256055), in which the Court of Appeals

affirmed the grant of a Summary Disposition for the defendant as to the **closed head injury**. [Note: This discussion only deals with the closed head injury aspect of the case.] Plaintiff argued that the trial court erred in not finding that plaintiff suffered from a serious neurological injury based on the affidavit from Dr. Turner. The Court of Appeals disagreed noting that plaintiff did not submit the affidavit until he filed a Motion for Reconsideration because it was apparent that there was no reason such an affidavit could not have been timely submitted to the trial court in response to defendant's Motion for Summary Disposition. The trial court did not err in declining to reconsider its grant of Summary Disposition based on the affidavit. There is no abuse of discretion in denying a Motion for Reconsideration that rests on testimony that could have been presented in a timely fashion in opposition to the Motion for Summary Disposition.

14. *Fodera v Van Lobbs*, 2006 WL 234871 (Unpublished Michigan Court of Appeals, 1/31/06, Docket No. 256555 and 259097, in which defendant's car struck plaintiff's vehicle and caused it to roll over. Plaintiff claimed a **closed head injury**. The matter went to trial where a jury found no cause of action. Plaintiffs appealed. In affirming the trial verdict of no cause of action, the court held, among other things that nothing in MCL 500.3135(2)(a)(ii) prevents a jury from ultimately disagreeing with the plaintiff's expert(s) on the existence or extent of any alleged closed head injury. This is true without regard to that person's qualifications under the statute. The court explained:

“The statute states, ‘for a closed-head injury, a question 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.’ The doctors’ testimony in this case merely allowed Sabrina’s claim to survive summary disposition but did not conclusively establish an injury. The jury was free to accept or reject any or all of the evidence presented pertaining to Sabrina’s alleged injuries. *Kelly v Builders Square, Inc.*, 465 Mich 29, 34; 632 NW2d 912 (2001).

Moreover, the jury actually did determine that Sabrina was injured in the car accident; however, they also determined that these injuries simply did not rise to the level of a serious impairment of a body function. Although Sabrina claimed that her ability to do math and deal with customers had been impaired, Sabrina’s former employer testified that Sabrina’s work abilities excelled after the accident. There

existed sufficient evidence from which the jury could determine that Sabrina did not suffer a serious impairment of a body function. . .”

15. *Parker v E. Conrad Trucking, Inc.*, 2006 WL 475420 (Unpublished Michigan Court of Appeals, 2/28/06, Docket No. 258037), in which the plaintiff alleged a **closed head injury** in relation to her automobile accident. The trial court found that the affidavit of Dr. William Gonte, M.D., a licensed medical doctor with an active practice who is board-certified in internal medicine, sports medicine, and geriatric medicine was insufficient to create an issue of fact under MCL 500.3135(2)(a)(ii). Specifically, the lower court questioned whether he was someone “who can certify precisely what a closed head injury is.” Dr. Gonte testified that plaintiff sustained a serious neurological injury diagnosed with cognitive disorders since the head trauma of October 15, 2002 and a closed head injury as a result of the accident. The case was decided on this issue alone. **In reversing the trial court’s grant of summary disposition for the defendant, the Court of Appeals found that the doctor’s status as a medical doctor along with his testimony that he diagnosed closed head injuries as a regular part of his practice was sufficient to satisfy MCL 500.3135(2)(a)(ii).** The court noted that “the statute does not require specialization in brain injuries.” Defendants argued the plaintiff failed to present objective findings to support her claim of a closed head injury and did not show a change in her general ability to lead her normal life. However, the court held that “because there was a factual dispute concerning the nature and extent of plaintiff’s injuries and she presented an affidavit satisfying the special rule for closed head injuries . . . the issue is a question of fact for the jury.” [Note: *The Parker Court* remanded the case on both the grounds that there was an issue of fact over the nature and extent of injuries and also on the affidavit satisfying MCL 500.3135(2)(a)(ii). It is not clear from the Court’s opinion whether it was the affidavit that created the issue of fact over the nature and extent of plaintiff’s injuries. The statute merely provides that such an affidavit creates “an issue of fact for the jury.” The statute does not say what the issue of fact is. There was nothing else from the record that indicated any factual dispute over the nature and extent of the plaintiff’s injuries. The point is little more than academic, however, because an issue of fact is all that was needed to defeat the motion.]

16. *Ballard v Drouse*, 2006 WL 709328 (Unpublished Michigan Court of Appeals, 3/21/06, Docket No. 264758), in which the Court of Appeals reversed the trial court’s holding that Ballard had suffered threshold injuries.

The plaintiffs in this case for uninsured motorists benefits were rearended as they were stopped at a stop sign. The defendant driver’s vehicle was estimated to be traveling in excess of 80 mph. The force from the impact

caused the plaintiffs' car to roll over onto its roof. **Ballard lost consciousness. She was taken to the hospital where she complained of being dizzy and was observed to have a hematoma on the left frontal region of her scalp. She was diagnosed with probable post concussive syndrome.** A neurological consult with Dr. Dardas, showed her exhibiting some features of both anterograde and retrograde amnesia. However, prior to her release, two days after the accident, Dr. Dardas indicated that she was feeling well in general, with a sore arm, tenderness around her neck, and a brief movement induced vertigo, but that neurologically she was asymptomatic. Two days after her discharge, plaintiff returned to the hospital with complaints of nausea and vomiting. **A second CT scan disclosed no new problems** Notes from a follow-up with Dr. Dardas also indicated that her neurological symptom had all resolved completely, except her movement-induced vertigo, which he said was becoming less severe and shorter. Plaintiff's neurological prognosis was said to be excellent.

A couple of months later, plaintiff again met with Dr. Dardas. His report from that visitation indicated that her vertigo had resolved, but that she had a constant headache, which could be tolerated with extra strength Tylenol. Dr. Dardas further noted an occasional, lancinating pain coming from a branch of her left trigeminal nerve. **Dr. Dardas indicated that this pain was not causing a significant functional or social impediment to plaintiff's daily life.** Plaintiff complained of difficulty sleeping. **Her neurological examination listed no abnormalities. At that time, Dr. Dardas opined that all of plaintiff's symptoms relating to her closed-head injury seem to be resolving except for the lancinating pain in her forehead.** During two more follow-up appointments, plaintiff indicated that she had begun experiencing dyesthesia (a tingling sensation) in her left forehead and scalp, which was triggered by touch. **At the first of these follow-up appointments, Dr. Dardas stated that plaintiff's closed-head injury and post concussive syndrome were resolved.**

**Plaintiff testified that her headaches did not stop her from doing anything, and that she could still function when she had them.** She testified that, although heavy lifting and vacuuming irritated her fractured sternum, she was able to work through the pain. She agreed that these problems did not prevent her from accomplishing her normal activities; that she could have returned to work one month after the accident; that she could dress, cook, care for her children; and that her injuries did not interfere with any of her hobbies.

The defendant insurer sought summary disposition as to plaintiff's uninsured motorist claim under MCR 2.116(C)(10) and argued her remedy was limited to personal protection insurance benefits because her injuries did not satisfy the tort threshold under MCL 500.3135. The trial court denied the insurer's motion and found that plaintiff had raised an issue of fact under MCL

500.3135(2)(a)(ii) and that her other non-closed head injuries had satisfied the threshold.

The Court of Appeals began its analysis by correcting the trial court in its application of MCL 500.5135(2)(a)(ii). The Court found that the closed head injury exception does **not**, as the trial court implied, require defendant to present evidence that plaintiff will be able to support a claim of serious neurological injury with proper expert testimony. Rather, the statute and the court rules controlling summary disposition motions require an affirmative showing on the part of the non-moving party to defeat a well pled motion. **More specifically, the court held that to come under the closed head injury exception and oppose a MCR 2.116(C)(10) motion plaintiff has to provide testimony from an appropriate expert opining that she may have suffered serious neurological injury. Moreover, the court held that this showing must, consistent with the “under oath” language of the statute, be presented in the form of sworn testimony, e.g. an affidavit or deposition testimony.** Plaintiff argued that such an “affidavit” requirement was contrary to MCR 2.116, which allows for other forms of documentary evidence to support or oppose a motion for summary disposition. The court disagreed. **The court found that the court rules and statute are not in conflict, but rather MCL 500.3135(2)(a)(ii) provides an additional means of establishing an issue of fact to the plaintiff with a closed head injury.** The court found that in this way the statute does not restrict plaintiff’s access to what other forms of evidence are generally allowed under the court rules. On the contrary, the court explained that those things are still very much available to plaintiff in regards to the general threshold language of MCL 500.3135, the same as they would be for any other plaintiff not alleging a closed head injury. The court also noted that, if the two were in conflict, that the far reaching public policy goals of the statute in limiting recovery for non-economic loss and maintaining the viability of the no-fault insurance system would win out over the court rule. **The court went on to examine the unsworn documentary evidence from the plaintiff and found that, even if considered, the evidence was not sufficient to satisfy MCL 500.3135(2)(a)(ii).** The court cited *Churchman* for the rule that the neurological injury testified to must be serious and severe, meaning that it should be “dangerous, [and] potentially resulting in death or other severe consequences.” The court noted that in this case Dr. Dardas diagnosed only a possible “**mild**” closed head injury. Finding plaintiff was not able to satisfy the closed head injury exception, the court reversed the trial court’s denial of defendant’s motion on this basis. **Plaintiff argued that her closed head injury, taken together with her other injuries, constituted a serious impairment of a body function that interfered with her general ability to lead her normal life under the statute generally.** Again, the court disagreed, finding that plaintiff’s life’s course had not been sufficiently affected by this accident.

#### IV. MCL 500.3135(2)(b) - Analysis

##### A. Introduction Subsection (2)(b) - Noneconomic Damages Barred If Plaintiff's Comparative Fault Is Greater Than 50%

Subsection (2)(b) makes a significant change in that damages will be assessed on the basis of comparative fault, **but** damages **shall not** be assessed in favor of a party who is more than 50% at fault.

Assessment of comparative fault appears to be a question of fact for the jury, because this issue is not specified as one involving a question of law for the court.

The comparative fault provision only applies to actions for noneconomic damages under MCL 500.3135(1). Thus, a party more than 50% comparatively at fault is barred only from recovering noneconomic loss damages and not damages for excess economic loss.

*Poch v Anderson*, 229 Mich App 40, (1998) held that comparative negligence is usually a question for the trier of fact. However, comparative negligence may be decided by a motion for summary disposition where “no reasonable juror could find that defendant was more at fault than the decedent in the accident as required by MCL 500.3135(2)(b).” When reasonable minds cannot differ whether one party was substantially more at fault than the other summary disposition is appropriate. *Huggins v Scriptor*, 469 Mich 898 (2003).

However, before comparative negligence can be even considered, the trier of fact must first find that the plaintiff was in fact negligent. *Schmitzer v Misener-Beneford, Inc.*, 135 Mich App 350 (1984). The fact that plaintiff was ticketed and adjudicated guilty of a civil infraction is not admissible as evidence of negligence in a civil case. *Kirby v Larson*, 400 Mich 585 (1977); *Wheelock v Eyl*, 393 Mich 74 (1974).

##### B. Illustrative Cases Interpreting Comparative Fault Greater Than 50%

**Caveat: Unpublished cases have no precedential effect and are not binding on a court, but may be persuasive. The unpublished cases are provided for information purposes only. Each case should be read in its entirety. Cases are listed chronologically oldest dated case to newest dated case.**

1. *Josephine Huggins, PR of the Estate of Steven Huggins, deceased v Scott Scriptor, et al*, 469 Mich 898 (2003), in which the Supreme Court reversed the judgment of the Court of Appeals and remanded to the trial court for entry of a summary disposition in favor of the plaintiff. The Supreme Court held as a matter of law:

“Assuming arguendo defendant’s conduct of taking his eyes off the road to look at his watch that while traveling under the posted speed limit was negligent, **no reasonable**

**juror could find that defendant was more at fault than the decedent in the accident as required by MCL 500.3101(2)(b).** [sic 500.3135(2)(b)]. The evidence presented shows that plaintiff was crouching or kneeling in the middle of an unlit rural road in the middle of the night just beyond the crest of a hill, wearing dark colored clothing at the time he was struck by defendant's automobile. Tests performed by a police accident reconstruction expert revealed that no driver would have enough time to avoid the collision, given the decedent's location just beyond the crest of the hill. There being no genuine issue as to any material fact, the defendant is entitled to judgment as a matter of law. MCR 2.116(C)(10)."

2. *Dennis v Ford*, 2004 WL 1778942 (Unpublished Michigan Court of Appeals, 8/10/04, Docket No. 246485), in which the Court of Appeals affirmed a summary disposition in favor of the defendant holding that the decedent moped driver was more than 50% responsible for the accident in question barring plaintiff's claim for non-economic damages under MCL 500.3135(2)(b). The plaintiff was driving his moped on the left side of the road through an S-curve where vegetation would have obstructed the view of the approaching driver in a motor vehicle. The evidence was undisputed that the decedent was driving in the wrong lane as he traveled through the S-curve where he could not be seen by oncoming traffic due in part to vegetation overgrowth on the edge of the road and was in fact not seen by the defendant in time to stop and avoid the collision. The police investigator and accident reconstructionist concluded that the decedent's actions were hazardous and the primary cause of the crash. The police investigator found that defendant was not primarily responsible for the collision notwithstanding he was driving with a suspended license and had marijuana in his system. Plaintiff produced no evidence indicating that these facts caused defendant to crash into the decedent moped driver. The defendant's speed may have been over the speed limit, but the defendant had no duty to anticipate that the decedent would drive in the wrong lane. The decedent was presumptively negligent for violating two statutes when he drove on the wrong side of the road through the S-curve and plaintiff failed to rebut the presumption of negligence of the decedent and only tried to establish the negligence of the defendant. The Court of Appeals concluded that the trial court did not err in granting defendant's motion for summary disposition.

3. *Sarafopoulos v Romp*, 2005 WL 1226528 (Unpublished Michigan Court of Appeals, 5/24/05, Docket No. 253214) in which the Court of

Appeals affirmed a summary disposition in favor of the defendant finding that the plaintiff negligently entered the left turn lane before the appropriate entry point and should have still been in the travel lane at the point of impact. MCL 257.647(1)(e) required plaintiff to follow the appropriate pavement markers when making her left turn. The trial court granted defendant's motion finding that the plaintiff was more than 50% at fault for the accident. The picture attached to defendants' motion depicted the location of the yellow line and entrance to the turn lane in relation to the driveway. Plaintiff's assertion that she entered the turn lane at the proper entrance point was impossible in light of the undisputed facts and plaintiff's own deposition testimony. She had admitted in her deposition that she knew she was not supposed to cross the yellow line and that she was required to wait until the appropriate entrance point to move into the left turn lane. Considering her testimony in conjunction with other documentary evidence to include photographs, it was apparent that plaintiff could not have entered the turn lane at the appropriate point as indicated by the yellow line on the pavement. The trial court properly determined as a matter of law that the plaintiff entered into the turn lane in violation of MCL 257.647. Because plaintiff was more than 50% at fault for the accident, summary disposition was properly granted.

4. *Mercado v Lahuis*, 2006 WL 120433 (Unpublished Michigan Court of Appeals, 1/17/06, Docket No. 256261) in which the Court of Appeals affirmed the summary disposition in favor of the defendant with respect to the claim of non-economic damages since those damages were barred by MCL 500.3135(2)(b). The plaintiff was out riding his bicycle and turned into the parking lot of a restaurant riding his bicycle in the wrong direction through the drive through lane against the flow of traffic. As he rounded a curve in the drive through lane, he collided with an automobile driven by defendant Lahuis. There was conflicting evidence whether the defendant applied her brakes immediately before or immediately after the collision. **The police officer testified that the shrubbery and dumpster in the parking lot prevented the defendant from seeing plaintiff's bicycle until the instant of the collision and he did not believe the defendant could have done anything to avoid it.** Defendant moved for summary disposition claiming that plaintiff was more than 50% comparatively negligent and thus, her action was barred for non-economic damages. The court noted that comparative negligence is usually a question of fact; however, comparative negligence may be decided in a motion for summary disposition where no reasonable juror could find that defendant was more at fault than the decedent in the accident. When reasonable minds could not differ whether one party was substantially more at fault than the other, summary disposition is appropriate. The Court of Appeals noted that no reasonable juror could find that the defendant was more at fault than the bicyclist since there was no dispute that the bicyclist rode the bicycle the wrong way through the drive through lane and the responding officer testified the defendant could not

have avoided the collision. Other than the bicyclist's testimony that her rear wheel was damaged suggesting a rear impact rather than a frontal impact, plaintiff offered no evidence to suggest that defendant had been negligent. The court concluded that "reasonable minds could not disagree that plaintiff was more than 50% at fault."

The Court of Appeals noted that the 50% at fault doctrine only applies for non-economic damages and not for economic damages under MCL 500.3135(3)(c) and as such, that portion of the case was reinstated.

## V. MCL 500.3135(2)(c) - Analysis

### A. Introduction Subsection (2)(c) - Uninsured Owner Operator Noneconomic Damages Claim Is Barred

Subsection (2)(c) makes another significant change in tort liability under the No-Fault Act. Subsection (2)(c) provides that damages shall not be assessed in favor of a party who was operating his/her own vehicle at the time the injury occurred and did not have in effect the no-fault security required by MCL 500.3101 at the time the injury occurred. **Once again, Subsection (2)(c) refers only to causes of action for damages under Subsection (1), which is limited to damages for non-economic loss.** Thus, at the time of the accident, if a party is operating his/her own vehicle without the no-fault security required by MCL 500.3101, Subsection (2)(c) precludes any recovery for non-economic damages.

Damages for excess economic loss may still be recoverable regardless of whether the MCL 500.3101 security was in effect at the time of the accident. However, an uninsured owner operating his/her own vehicle is barred from recovering noneconomic damages by virtue of amended Subsection (2)(c), and non-excess economic damages by virtue of MCL 500.3113(b) and MCL 500.3135(3) as amended, abolishing tort liability if the defendant had the no-fault security in effect pursuant to MCL 500.3101.

In *Stevenson v Reese*, 239 Mich App 513 (4/19/00), the Court of Appeals held that MCL 500.3135(2)(c) does **not** violate the Equal Protection and Due Process Clauses of the Michigan Constitution.

### B. Illustrative Cases Interpreting Uninsured Owner Operator

**Caveat: Unpublished cases have no precedential effect and are not binding on a court, but may be persuasive. The unpublished cases are provided for information purposes only. Each case should be read in its entirety. Cases are listed chronologically oldest dated case to newest dated case.**

1. *Kessel v Rahn*, 244 Mich App 353 (2001), in the Court of Appeals held that the definition of 'owner' from the Insurance Code, not from the Vehicle Code, should be applied when interpreting the meaning of 'own vehicle.' One is the 'owner' if he has a proprietary or possessory use of the

vehicle for more than 30 days, even if the vehicle was titled in another's name.

(Note: See MCL 500.3101(2)(h) for definition of owner.)

2. *Chop v Zielinski*, 244 Mich App 677 (2001), in which the Court of Appeals affirmed the summary disposition in favor of the defendant finding that the plaintiff was the owner of her former husband's uninsured motor vehicle and thus, her claim was barred with respect to non-economic damages. The court also held that the statute barring such recovery was constitutional. At the time of the accident, the car was registered to her ex-husband and there was no dispute that the car was uninsured. The defendant moved for summary disposition on the basis that plaintiff was uninsured and her damages were precluded by MCL 500.3135(2)(c). Plaintiff testified that she could not be the owner because the title was still in her ex-husband's name and that she had merely borrowed the car. The Court of Appeals noted that there was no dispute that plaintiff regularly used the car from at least the time of her divorce in late April, 1997 to mid-September, 1997 when the accident occurred. The fact that she was not awarded legal title in the divorce judgment is not dispositive of whether she may be considered an owner under the No Fault Act. **There may be multiple owners of a motor vehicle for purposes of the No Fault Act.** Plaintiff had testified in her deposition that she kept the car parked at her apartment complex which was a residence she kept separate from her ex-husband, drove the car to and from work on a daily basis, and used the car for other personal errands. **"The plaintiff's use of the car in such a manner was possessory use that comports with the concepts of ownership."** The court went on to state **"Indeed, plaintiff's own testimony regarding her regular use of the car reveals that she exercised ownership rights over the vehicle. Plaintiff's claim that she merely borrowed the car is not compelling in light of her testimony that she believed that she was awarded the car pursuant to the divorce from her husband.** Given the plaintiff's deposition testimony, there is no issue of fact regarding whether plaintiff had possessory use of the car for more than 30 days before the date of the accident. Thus, she was an owner of the car under the No Fault Act. The court noted that she had use of the vehicle as required by MCL 500.3101(2)(g)(i) even though there was no lease or rental agreement. **Plaintiff claimed she was innocently uninsured given the fact that her ex-husband told her the car at issue was in fact insured.** The Court of Appeals refused to read a scienter "requirement into the statute where it is not within the manifest intent of the Legislature as gathered from the act itself" that there had to be some willful intent to violate the statute. The court went on to note that plaintiff had the car in her sole possession for several months, which was such an extended period of time, that she reasonably should have been aware of the motor vehicle's uninsured status.

3. *McGhee v Helsel*, 262 Mich App 221 (2004), in which an uninsured non-resident owner/driver may seek non-economic damages stemming from an accident in Michigan with a Michigan driver. Since the non-resident was not required to register his vehicle in Michigan, the no-fault act did not apply to him..

4. *Twichel, Personal Representative of the Estate of Brady S. Sies v MIC General Insurance Corporation*, 469 Mich 524 (2004), in which the Supreme Court in a claim to recover personal protection benefits and uninsured motor benefits reversed the Court of Appeals and **held that the buyer was the owner of the uninsured motor vehicle, even if the person did not actually use the vehicle for a 30 day period of time before the accident. The focus must be on the nature of the person's right to use the vehicle citing MCL 500.3101(2)(g)(i).** At the time of the accident, the decedent had purchased the vehicle five days prior to the accident from a friend. He paid \$300 of the \$600 purchase price and was to pay the remainder at a later date. He took possession of the vehicle, but the title was not signed over because of incomplete payment. There was no insurance policy listing the vehicle driven by the decedent. Since the full price had not been paid, the title had not been delivered because the sale was not complete and the seller's plates were retained. The Supreme Court noted that like the Michigan Vehicle Code, MCL 500.3101(2)(g)(i) treats a person as an owner of the vehicle if the person rents or has use of the vehicle for a period greater than 30 days. **"It is the nature of the right to use the vehicle - whether it is contemplated that the right to use the vehicle will remain in effect for more than 30 days - that is controlling, not the actual length of time that has elapsed.** The court did not feel it was necessary that the person **actually** have used the vehicle for a 30 day period before a finding may be made that the person is the owner. **"Rather, the focus must be on the nature of the person's right to use the vehicle."** The purchase arrangement contemplated that the decedent **"would have the use of it for more than 30 days, thus bringing him within the statutory definition of owner"** under MCL 500.3101(2)(g)(i).

In Footnote 5, although not relied on by the Supreme Court, the Supreme Court noted that since the decedent had an immediate right of possession of a motor vehicle under an installment sale contract, the decedent qualified as an owner under MCL 500.3101(2)(g)(iii).

The decedent also sought coverage under the uninsured motorist provisions of his grandfather's policy with whom he lived at the time of the accident. However, benefits were excluded under the uninsured motorist contractual language because although the decedent was an insured under his grandfather's policy, the decedent was occupying the vehicle owned by the insured, but which was not insured for coverage under the grandfather's

policy. As such, the uninsured motorist claim was barred. The Supreme Court held:

“Brady Sies had possession and control of the vehicle, as well as dominion and authority over the vehicle, and thus, would commonly be understood to have ‘owned’ it at the time of the accident. The facts that the entire purchase price had not yet been paid and that the technical transfer of title had not yet occurred are not dispositive. Brady, who had paid part of the purchase price and taken control of the truck with the intention of permanently possessing it, ‘owned’ the vehicle as that term would be understood in ordinary usage. Because Brady ‘owned’ the uninsured vehicle, uninsured motorist benefits are not recoverable under the policy.”

## **VI. MCL 500.3135(7) - Analysis**

### **A. Introduction Subsection (7) - Serious Impairment Of Body Function Defined - Three Components**

Subsection (7) constitutes a significant change from the prior statute. Subsection (7) establishes three elements necessary for a serious impairment of body function:

1. An objective manifestation of injury
2. To an important body function
3. Which affects the person’s general ability to lead his/her normal life.

Liability in third party automobile negligence cases is governed by statute in Michigan. *See* MCL 500.3135. In order to recover in such cases, a plaintiff has the burden of demonstrating that he suffered an injury sufficient to meet the statutory threshold. *See Kern v. Blethen-Coluni*, 240 Mich App 333 (2000). This threshold requires proof that the plaintiff suffered from a “serious impairment of a body function.” *Id.*

MCL 500.3135(7) defines serious impairment of body function and requires that the person suffer “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” By enacting MCL 500.3135(7), the Michigan Legislature has returned for the most part, but not entirely, to the requirements for a serious impairment of body function formerly adopted by the Michigan Supreme Court in *Cassidy v McGovern*, 415 Mich 483, 504-505 (1982). *See Kern v. Blethen-Coluni*, 240 Mich App 333 (2000). Under that standard, a plaintiff must prove that the plaintiff suffered :

1. an objectively manifested impairment of
2. an important body function, and
3. that the impairment “seriously” affects the plaintiff’s life.

See *May v. Sommerfield*, 240 Mich. App. 504; 617 NW2d 920 (2000).

The “statutory threshold is designed to eliminate suits based on clearly minor injuries and those that do not seriously affect the ability of the body to function.” *May v. Sommerfield*, 239 Mich. App. 197, 200; 607 NW2d 422 (2000). Accordingly, “[t]he presence of an objectively manifested injury is not sufficient, in and of itself, to submit a case to a jury.” *Moore v. Clous*, 2001 WL 1654801 (2001). Rather, a “claimant must make a prima facie showing that as a result of defendant’s negligence, he or she sustained an objectively manifested injury that resulted in a serious impairment of a body function.” *Id.* Further, a plaintiff must show that the general ability to lead a normal life has been significantly altered by the injury. *Miller v. Purcell*, 246 Mich. App. 244, 250; 631 NW2d 760 (2001). In determining whether the impairment of the body function is serious, the court should consider factors such as the extent of the injury, the treatment required, the duration of the disability, and the extent of residual impairment and prognosis for eventual recovery. *Kern v. Blethen-Coluni*, 240 Mich. App. 333, 341; 612 NW2d 838 (2000).

*Kreiner v. Fischer*, 471 Mich. 109 (2004) clarified the framework to be used by trial courts in cases where there is a factual dispute to determine whether a plaintiff meets the statutory threshold, which incorporates the three elements of MCL 500.3135(7):

1. Whether there is a factual dispute concerning the person’s injuries, but the dispute is not material to the determination concerning the plaintiff suffering serious impairment;
  - i. If “yes,” move to step 2 and the issue may be decided as a matter of law;
  - ii. If “no,” the issue may not be decided as a matter of law.
2. Whether an “**important body function**” of the plaintiff has been impaired noting that:
  - It is insufficient that an unimportant body function has been impaired;
  - It is insufficient if an important body function has been injured but not impaired;

The next step:

- i. If “yes,” the court determines **whether the impairment is objectively manifested** (Subjective complaints not medically documented are insufficient);

3. Whether the **impairment affects the plaintiff's general ability to lead his or her normal life;**
  - Court to engage in a multifaceted inquiry looking at the plaintiff's pre- and post- life and significance of any affected aspects on the course of plaintiff's overall life;
  - Then an objective analysis regarding whether any difference between pre- and post- accident actually affecting plaintiff's "general ability" to conduct the course of his life (Court noted that "any effect" is insufficient)
  - Court set forth a non-exhaustive list to assist in evaluating whether there ha been an affect on the plaintiff's "general ability" to conduct the course of his normal life:
    - a. the nature and extent of the impairment;
    - b. the type and length of treatment required;
    - c. the duration of the impairment;
    - d. the extent of any residual impairment; and
    - e. the prognosis for eventual recovery.

1. **Introduction Objective Manifestation Component**

- a. **Historical Background**

The first of three components for the statutory threshold for serious impairment of body function requires that it be objectively manifested, but this is not defined in the statute. The cases of *Cassidy v McGovern*, 415 Mich 483, 505 (1982), *Williams v Payne*, 131 Mich App 403, 409 (1984), and *DiFranco v Pickard*, 427 Mich 32, 70-75 (1986) provide guidance on the question of what "objectively manifested" may mean under the new statute.

*DiFranco* discussed the objectively manifested injury language. *DiFranco* did not throw out the objective manifestation of injury test of *Cassidy* entirely. It did indicate that plaintiffs must introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering; however, the old MCL 500.3135 and *Cassidy*, according to *DiFranco*, did not limit recovery of noneconomic damages to plaintiffs whose injuries can be seen or felt. *DiFranco* indicates that the plaintiff must demonstrate a medically identifiable injury, pursuant to a doctor's diagnosis or otherwise, which seriously impairs a body function. Objective manifestation does not require a "direct demonstration of the injury through medical tests and procedures." *Washington v Reynolds*, 2003 WL 35 6653 (2003) (unpublished Michigan Court of Appeals, 2/18/03, Docket #: 237537) citing *DiFranco*. "The statute requires only that a plaintiff demonstrate an 'objectively manifested impairment' not objectively verifiable medical testing results." *Amos v Keller Transfer Line, Inc.*, 2005 WL 954986 (Unpublished Michigan Court of Appeals, 4/26/05, Docket #254232).

*Jackson v Nelson*, 252 Mich App 643 (2002) held that objective manifestation requires “a medically identifiable injury or condition that has a physical basis”. It is not “predicated on serious pain and suffering but on injuries that affect the functioning of the body”.

b. **Illustrative Cases Interpreting Objective Manifestation**

**Caveat: Unpublished cases have no precedential effect and are not binding on a court, but may be persuasive. The unpublished cases are provided for informational purposes only. Each case should be read in its entirety. Cases are listed chronologically oldest dated case to newest dated case.**

1.. *Blatt v Lynn*, 1999 WL 33441163 (Unpublished Michigan Court of Appeals, 6/22/99, Docket No. 209686), in which the plaintiff claimed **injuries to neck, back, shoulder, and “psyche.”** The Court of Appeals **affirmed the trial court’s decision granting Summary Disposition partly on the basis that plaintiff failed to satisfy the objective manifestation requirement because other than a shoulder separation diagnosed a year after the accident plaintiff failed to introduce evidence establishing a physical basis for the subjective complaints of pain and suffering.** The court also addressed the other two prongs of the partial requirement. He noted that the plaintiff failed to meet those requirements also.

2. *Sadik v Solberg*, 1999 WL 33435952 (Unpublished Michigan Court of Appeals, 9/03/99, Docket No. 209092), in which the plaintiff was involved in an auto accident and X-rays noted **degenerative disc disease.** **An EMG revealed bilateral carpal tunnel syndrome. An MRI ten months later revealed a lumbar disc herniation. The court determined that there was no evidence that these alleged injuries were related to the accident as opposed to pre-existing degenerative disc disease and thus, found no serious impairment as a matter of law.**

3. *Kern v Blethen-Coluni*, 240 Mich App 333 (3/24/00), finding that the trial court had a duty to determine whether the plaintiff’s injury satisfied the no-fault threshold of serious impairment of body function and of permanent serious disfigurement. The Court of Appeals further held that the minor plaintiff’s **objectively manifested displaced and somewhat comminuted and oblique fracture of the right femur** constituted a serious impairment of body function as a matter of law and remanded for a new trial on the issue of the plaintiff’s damages.

4. *May v Sommerfield*, 239 Mich App 197 (2000), after remand, 240 Mich App 504 (4/18/00), in which the court held that pursuant to MCL 500.3135(2)(a), the issue of whether an injured person has suffered serious impairment of body function is a question of law for the court if the court finds that “[t]here was no factual dispute concerning the nature and extent

of the person's injuries.'" Plaintiff had an arm injury and pain. The Court of Appeals initially remanded to the trial court to make appropriate findings concerning whether there was a factual dispute with respect to whether the plaintiff's impairment affected his "'general ability to lead his...normal life.'" After remand, the Court of Appeals upheld the trial court's decision that the plaintiff did not suffer an objective manifestation of injury aside from his subjective complaint of pain and that there was no genuine issue of material fact that the impairment did not affect his general ability to lead his normal life.

5. *French v Murphy*, 2001 WL 33420608 (Unpublished Michigan Court of Appeals, 5/12/00, Docket No. 214655), in which the Court of Appeals upheld the trial court's decision granting summary disposition in favor of the defendant, finding no serious impairment. **The plaintiff complained of pain in the neck, back, hip, elbow, and arm, as well as headaches. Objective testing revealed only a small disc herniation. Physical therapy yielded a significant improvement, including full range of motion, less back pain, and less spasm.** The plaintiff was able to continue running her daycare center and taking care of her house, although she required assistance.

6. *Herdus v Raffensberger*, 2001 WL 33401838 (Unpublished Michigan Court of Appeals, 11/17/00, Docket No. 219378), in which the 84-year-old plaintiff had an **injury to the eye which caused facial swelling, a drooping left eyelid, and some difficulty in vision.** The plaintiff underwent surgery that improved his condition somewhat, but he had some remaining paralysis above the left eye, was unable to raise his left eyebrow, and had periodic headaches for which he took Tylenol. The Court of Appeals found that the plaintiff's injuries were objectively manifested and constituted a serious impairment but found that they did not affect his general ability to lead a normal life. The plaintiff was retired, able to carry on his usual daily activities and personal needs, and continued driving, even for long distances. Any restrictions the plaintiff experienced were self-imposed. Summary disposition affirmed.

7. *Miller v Purcell*, 246 Mich App 244 (2001), involved alleged **injuries to plaintiff's neck, arms, and back including an acromial clavicular separation and mild tendonitis.** Apparently the **acromioclavicular separation** as well as mild **tendonitis** was medically documented. Although the case does not indicate how these two injuries were objectively manifested, the court assumed that "plaintiff's injury is objectively manifested."

8. *Mirling v Carell*, 2001 WL 760180 (Unpublished Michigan Court of Appeals, 1/30/01, Docket No. 216843), in which the Michigan Court of Appeals found that the plaintiff's injury did not significantly affect his ability

to lead a normal life. The plaintiff **lost an upper incisor tooth** in the impact, had to wear a temporary replacement for two years, and then had a permanent replacement implanted. **The court found that losing a tooth was an objectively manifested injury and that the injury interfered to an extent with an important body function, namely eating. The court concluded that the plaintiff's ability to eat was not, however, seriously impaired, as he merely had to eat more carefully.** Although the plaintiff avoided some physical activities, he continued with his employment and finished school.

9. *Hicks v Trammer*, 2001 WL 759976 (Unpublished Michigan Court of Appeals, 1/30/01, Docket No. 217237), affirmed summary disposition. **The plaintiff's muscle spasms and numbness in his extremities were objectively manifested injuries that impaired important body functions, but the impairments were not "serious" and did not subjectively impair his general ability to lead his normal life.**

Giving the plaintiff the benefit of the doubt, his muscle spasms and numbness in his extremities were objectively manifested injuries that impaired important body functions, i.e., moving his neck and sleeping without interruption.... However, these impairments were not serious. The spasms were noted during only one doctor's office visit, the resultant limited range of motion was minimal, and the range of motion problem was resolved within a month. There is no evidence that the discomfort from the numbness, which occasionally occurred during day time, prevented him from using his hands or legs, or that these sleep interruptions prevented him from doing anything he desired. Overall, these injuries had no appreciable affect on plaintiff's life other than to cause him to miss one day of work and a hunting trip. While plaintiff himself restricted his activities, he admittedly could do everything he wanted to do, including working, driving, lifting, working around the house, shopping, sailing, and going out socially. Therefore, any injuries did not affect his ability to lead a normal life.

10. *Howitt v Billings Feed & Lawn, Inc*, 2001 WL 759976 (Unpublished Michigan Court of Appeals, 1/30/01, Docket No. 216738), **in which the appellate court agreed with the trial court that the softening of cartilage in the knee and the dislocation of two cervical vertebrae were objective manifestations of injury and that the knee injury impaired the plaintiff's ability to walk, which is an important body function.** However, the Court of Appeals ultimately concluded that the threshold was not satisfied, because there was no evidence that the plaintiff's injuries affected his general ability to lead a normal life:

The evidence showed that plaintiff had objective manifestations of injury, that being softening of the cartilage in his knee and dislocation of two cervical vertebrae, and

that the injury to his knee at least impaired his ability to walk, which is an important body function. However, because plaintiff still could go to work and apparently do everything except walk for long periods of time, do some exercises, and participate in some sports, the evidence does not support a finding that plaintiff's injuries affected his general ability to lead a normal life. While plaintiff's doctor expressed an opinion to the contrary, the issue was one of law for the court, MCL 500.3135(2)(a); MSA 24.13135(2)(a), and a party's expert is not qualified to interpret and apply the law.

11. *Perales v Partin*, 2001 WL 793887 (Unpublished Michigan Court of Appeals, 7/13/01, Docket No. 223343), in which the plaintiff alleged **tendonitis**. The trial court granted summary disposition in favor of the defendant based upon a finding that the alleged injury did not satisfy the serious impairment threshold as a matter of law. The Court of Appeals affirmed, holding:

Because 'the Legislature overturned the Supreme Court's *DiFranco* decision by codifying the tort threshold injury standards of *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982),' and the statutory definition of serious impairment of body function is the same as that adopted in *Cassidy*, it is appropriate to refer to *Cassidy* and cases decided thereunder in deciding this case. *Kern v Blethen-Coluni*, 240 Mich App 333, 338-342; 612 NW2d 838 (2000).

Plaintiff may have had an injury, i.e., tendonitis. However, there were no physical abnormalities which could account for plaintiff's complaints of pain and tenderness, and it is the injuries, not the pain, that must be medically substantiated through objective manifestation. **Medical findings of tenderness and limited flexion do not rise to the level of objective manifestation.** Plaintiff testified at deposition that the pain hampered her ability to stand or drive for long periods of time, but '[a] limitation self-imposed because of real or perceived pain is not objective manifestation.' Therefore, the trial court did not err in ruling that plaintiff did not meet the serious impairment threshold.

12. *Keller v Leja*, 2001 WL 951745 (Unpublished Michigan Court of Appeals, 8/21/01, Docket No. 222589), in which the plaintiff alleged **back pain between her shoulders, tenderness, and muscle spasms** and was diagnosed with **acute thoracic strain**.

The trial court granted summary disposition in favor of the defendant and the Court of Appeals affirmed, holding:

The undisputed evidence showed that as a result of the accident plaintiff suffered a soft tissue injury to the area of her cervical spine. Plaintiff was not hospitalized, and did not require surgery. Tests, including x-rays and an MRI, showed no evidence of abnormality. Plaintiff correctly notes that the physicians with whom she consulted noted the presence of tenderness; however, **tenderness is a subjective complaint...** The undisputed evidence showed that plaintiff required no treatment beyond physical therapy and pain medication, and that her prognosis for a full recovery was favorable. No evidence demonstrated that plaintiff suffered an objectively manifested injury as a result of the accident. Her general ability to lead her normal life was not significantly altered by the injury.

13. *Davis v Kohl*, 2001 WL 1547881 (Unpublished Michigan Court of Appeals, 11/30/01, Docket No. 226215), **in which the Court of Appeals affirmed a no cause for action in favor of the defendant holding that the trial court directly allowed the jury to decide the case since there was a genuine outcome determinative factual dispute concerning whether plaintiff's injury was objectively manifested.**

Plaintiff had two pre-existing accidents that resulted in a **ruptured disc** with surgery and **neck and back pain**. Several years later, plaintiff was involved in a third automobile accident in 1/97 where she experienced persistent **shoulder and neck pain** that resulted in physical therapy and eventual surgery. Her orthopedic surgeon saw her for the first time in 10/97 and he diagnosed her as suffering from a **post-traumatic impingement syndrome**. After conservative therapy involving injections and anti-inflammatory medication, the doctor performed surgery and found that plaintiff's bursa, was extremely thick and scarred, she had a great deal of **spurring on her shoulder bone, torn cartilage in her shoulder, and a tear of the anterior labrum** consistent with the application of significant force to the shoulder. Plaintiff continued to experience pain and discomfort after the operation but the prognosis was favorable.

An IME orthopedic surgeon examined the plaintiff in 8/97 and noted that the reports and x-rays did not reveal any objective evidence of injury. On examination, the doctor found no objective indication of grating in plaintiff's neck or weakness in her upper extremities. The limited motion in her neck was consistent with the bone fusion operation that pre-existed the accident and limited motion in her shoulder was secondary to **pain in the**

**neck** and not “specifically to any injury in the shoulder itself.” His exam revealed no other objective signs of injury.

A neurologist who examined the plaintiff initially on 1/31/97 following the 1/6/97 motor vehicle accident after physically examining the plaintiff could not discern an objective neurological reason for complaints of pain. After reviewing x-rays, an MRI, and performing an electromyogram the results of which were normal, the neurologist concluded that he could not “find anything at that point that [he] could use to clearly explain her symptoms at least in terms of some type of ongoing neurologic process or problem. After the examination, the doctor concluded that he could not find any evidence of a new injury relating to the 1/97 motor vehicle accident and he referred her to physical therapy. Based on those facts, the Court of Appeals indicated that the trial court properly allowed the jury to resolve the issue of serious impairment of body function.

14. *Moore v Clous*, 2000 WL 1654801 (Unpublished Michigan Court of Appeals, 12/21/01, Docket No. 226289), in which the plaintiff alleged **pain in her lower back and extremities**. X-rays revealed **degenerative disc disease** that had not changed since three years pre-accident through one year post-accident. The trial court granted summary disposition in favor of the defendant, finding no proximate cause and no serious impairment. The Court of Appeals affirmed holding:

The undisputed evidence showed that plaintiff had an extensive history of neck and back problems that preceded the accident by more than ten years. These problems included lumbar radiculopathy, of which plaintiff continued to complain after the accident. No objective medical tests demonstrated that plaintiff’s condition worsened after the accident. The evidence showed that plaintiff’s general ability to lead her normal life, i.e., her life as it was before the accident, was not significantly altered by the injury.

15. *Thoreson v Kuntze*, 2001 WL 1667280 (Unpublished, U.S. Sixth Circuit Court of Appeals, 12/26/01, Docket No. 00-1820), in which the Sixth Circuit held that the plaintiff did not suffer a serious impairment after incurring **strained muscles of his neck and trapezius, a bruise or hematoma on his left thigh, and a cracked tooth, a scalp abrasion, and a bruise on his forehead**. Medical professionals found that the plaintiff was healing finally and would recover. The plaintiff alleged that he was in pain and could not work, but the Sixth Circuit found that his pain was not objectively manifested, precluding recovery for damages.

16. *Jackson v Nelson*, 252 Mich App 643 (2002), in which the Court of Appeals reversed the jury verdict in favor of the plaintiff. The defendant had appealed the trial judge’s interpretation of serious impairment arguing that

the impairment must be a medically identifiable injury with the physical basis.

The Court of Appeals noted that the jury instruction, SJI 2d 36.11 was accurate and required that for an impairment to be objectively manifested “there must be a medically identifiable injury for a condition that has a physical basis.” Although the statute talks about impairment and *Cassidy, supra* and *DiFranco, supra*, utilized the phrase objectively manifested in conjunction with injury, the Court of Appeals found that the “distinction does not affect our opinion that the standard instruction accurately states the law.” The Court of Appeals quoted the *DiFranco* case for the proposition that the plaintiff must prove that the “non-economic loss arose out of a medically identifiable injury” that would seriously impair a body function. Furthermore, *DiFranco* was quoted for the proposition that the plaintiff must introduce evidence “establishing that there is a physical basis for her subjective complaints of pain and suffering.” *Cassidy* was quoted for the proposition that serious impairment of body function requires for recovery for non-economic loss

“objectively manifested injuries. Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.”

The Court of Appeals held that the standard jury instruction accurately stated the law as follows:

“[I]n order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.”

17. *Washington v Reynolds*, 2003 WL 356653 (Unpublished Michigan Court of Appeals, 2/18/03, Docket No. 237537), in which plaintiff complained of **severe and permanent injuries to her ribs, back, shoulders, neck, spine as well as the muscles, cords, nerves, tendons and other fibers** contained therein. The complaint also alleged she needed assistance in doing things that she could no longer do for herself because of the accident related injuries. Plaintiff also alleged dizziness. **The Defendant’s Motion for Summary Disposition was granted and affirmed on appeal on the basis that plaintiff’s complaints of pain were not objectively manifested as required by statute.** The defendant attached to his motion numerous medical records, reports, progress notes, and independent medical evaluations. The bulk of the findings in the various reports were under the subjective headings from what plaintiff reported to the doctors. Under the objective headings there were some entries indicating palpatory findings of tenderness in some musculature and over the mid-thoracic spine in the T6-T7 region. X-rays of the low back showed no

evidence of any significant abnormality. An EMG examination was within normal limits. A PMR IME noted under objective findings only volitionally restricted range of motion of the lumbar spine. Otherwise, the examination was benign notwithstanding plaintiff's complaints of aching, burning, and throbbing pain in her mid to low back. A subsequent orthopedic independent medical examination did not "reveal objective abnormalities to correlate her ongoing complaints."

Plaintiff attached additional and different records than that attached by the defendant. Plaintiff argued that she met the objective manifestation because she suffered a **sprain of her entire spine**. These injuries impaired her ability to move her back, which movement of the back was an important body function. Furthermore, palpation of and tenderness were objective manifestations.

The trial court ruled in favor of the type of restricted movement described the plaintiff and her treaters were restrictions by pain. The pain is subjective and thus, plaintiff was restricting her own movement due to pain. **On appeal the plaintiff argued the trial court improperly dismissed the claim for non-economic damages because the injured back substantially impaired her lifestyle and because "the trial judge must consider as an objective manifestation of injury, a doctor's diagnosis of muscle strain and a doctor's basis for that diagnosis."** The Court of Appeals disagreed. The Court of Appeals noted that although objective manifestation does not require direct demonstration of the injuries by medical tests and procedures as *Williams v Payne*, 131 Mich App 403, 409-410 (1984) had held, there must be a medically identifiable injury or condition that has a physical basis in order for an impairment to be objectively manifested. Citing *Jackson, supra* at 653, the **Washington Court** concluded that none of the evidence presented by the plaintiff demonstrated a medically identifiable injury. "The doctors consistently reported an absence of injury and normal tests. \* \* \* Dr. Robertson \* \* \* consistently noted in the hospital progress reports that plaintiff complained of tenderness in her back but did not offer a medically - identifiable injury or condition with a physical basis. \* \* \* The evidence simply did not rise to the standard required by the case law. Indeed, plaintiff's complaints were more akin to 'general aches and pains', for which non-economic damages are not recoverable.

18. *Tolbert v Isham*, 2003 WL 21246634 (Unpublished Michigan Court of Appeals, 5/29/03, Docket No. 231424) involved allegations primarily of a **shoulder injury** and an aggravation of a pre-existing **back injury**. The Court of Appeals noted that the record revealed that the only objectively manifested proof of injury from the 1996 accident was a doctor's report that plaintiff suffered "a **small partial tear of the supraspinatus muscle tendon just proximal to its insertion on the greater tuberosity**."

Plaintiff's other evidence merely chronicled her complaints of pain and other subjective manifestations of her injuries. The court noted that non-economic tort recovery could not be predicated on pain but rather must be based on a serious impairment of body function. **The Court of Appeals held that "although plaintiff sustained an objectively manifested injury and plaintiff's shoulder injury affected 'an important body function', plaintiff did not suffer a serious impairment of body function in the 1996 accident because her general ability to lead her normal life was not affected.**

19. *Contreras v United States*, 2004 WL 3457632 (Unpublished U.S. District Court, W.D. of MI, 1/26/04, Docket No. 1:03-CV-360), in which plaintiff sued the government following a vehicle collision with postal delivery truck. The plaintiff stated that she **broke her tooth, cut her lip and injured her neck and spine** because of the accident. A degenerative disc disorder was discovered but tests could not reveal when exactly this disorder began. Using *Kreiner*, the court focused on whether the plaintiff suffered an objectively manifested impairment in order to recover non-economic losses. The court noted that

"[a]n impairment is objectively manifested if there is a medically identifiable injury or condition that has a physical basis . . . . Subjective complaints of injury can support a claim of serious impairment of body function, but only if there is a physical basis and an expert diagnosis to support the subjective claim."

The plaintiff argued that her subjective complaints of pain were consistent with MRI findings. The government argued that the MRIs only showed a degenerative disease. **The court found that a genuine issue of material fact existed as to whether there was an objective manifestation, for although her disease pre-existed the accident, it was asymptomatic before the accident, and thus, the accident could have influenced or exacerbated it.** The court drew a parallel between the facts of this case and that of *Wilconson v Lee*, 463 Mich 388 (2000).

20. *Crigler v Bryan*, 2004 WL 914425 (Unpublished Michigan Court of Appeals, 4/29/04, Docket No. 246174), in which plaintiff sustained injuries to the **neck, back, spine, muscles, cords, nerves, tendons, and other fibers contained therein, TMJ, and closed head injury along with cervicogenic headache.**

**The Court of Appeals held that sufficient documentary evidence was submitted to create an outcome determinative factual dispute concerning whether plaintiff suffered an objectively manifested impairment arising out of the accident. The Court of Appeals reversed**

**the trial court's Summary Disposition in favor of the defendant.** The documentation consisted of objectively identifiable muscle spasm that were "medically observable", other medical documentation, and plaintiff's accompanying testimony that she endured it for several months. Furthermore, x-rays revealed **C5-C6 disc space narrowing, kyphosis of the thoracic spine and an increased lumbosacral angle with some L4-5 and posterior L5-S1 disc space narrowing.** Objective manifestations of a back injury can be established through x-rays indicating an abnormal spine.

21. *Kreiner v Fischer*, 471 Mich 109 (2004), noted that subjective complaints not medically documented are insufficient. The impairment must be medically identifiable or have a physical basis.

22. *Mansor v Girnet*, 2005 WL 2757999 (Unpublished Michigan Court of Appeals, 10/25/05, Docket No. 262713), in which the Court of Appeals affirmed Summary Disposition for the defendant. Plaintiff complained of **headaches and pain from a small cut over her right eye, dizziness, blurred vision and neck and back pain.** The court held that the plaintiff failed to produce evidence of an objectively manifested, medically identifiable injury with a physical basis. The court noted that in *Kreiner*, the plaintiff had medically documented injuries based on a **EMG** test. Plaintiff argued that an MRI demonstrated **cervical** injuries, but this test was performed months after the accident. She had no documented evidence of any serious injuries immediately following the accident. The court held that the MRI failed to demonstrate an objectively manifested injury causally related to the motor vehicle accident and that muscle spasms alone do not meet the threshold for non-economic damages.

23. *Paschal v Meloni*, 2005 WL 2808576 (Unpublished Michigan Court of Appeals, 10/27/05, Docket No. 26260), in which the court affirmed Summary Disposition for the defendant. Plaintiff could generally lead her normal life after comparing what she could do before and after the accident as well as the significance of the activities that were hindered. Plaintiff suffered a **disc bulge** with consequent pain and missed 45 days of work. **The court found that a disc bulge was an objective manifestation in that an important body function had been impaired.**

24. *Pingel v Powers*, 2005 WL 3018251 (Unpublished Michigan Court of Appeals, 11/10/05, Docket No. 263714), in which the court found that **x-rays** showing the presence of **thoracic disc protrusions, and an EMG** showing the presence of **carpal tunnel syndrome** were sufficient to show objectively manifested injuries.

25. *Keeley v Jackson*, 2006 WL 53165 (Unpublished Michigan Court of Appeals, 1/10/06, Docket No. 263937), in which the plaintiff alleged an **aggravation of prior back injuries, including spurring, degenerative**

**changes, mild hypertrophy, facet arthrosis, mild central stenosis, and bulging.** Plaintiff also complained of an increase in and different pain from that which he experienced before the accident. **In affirming a Summary Disposition for the defendant, the Court of Appeals noted that plaintiff had not suffered an objectively manifested injury due to the automobile accident as none of the physicians who treated plaintiff stated either in the records or in deposition testimony that any of the alleged injuries were caused by the accident.** Plaintiff's subjective complaints of increased pain were not objective manifestations of any injury because none of the physicians stated that plaintiff suffered any physical injury as a result of the accident. Plaintiff only demonstrated that his pain increased and changed after the accident but did not demonstrate a medically identifiable physical injury that precipitated the symptoms of his pre-existing condition. **As such, there was no objective manifestation of injury as a result of the accident.**

26. *Register v Sledge*, 2006 WL 66664 (Unpublished Michigan Court of Appeals, 1/12/06, Docket No. 256470), in which plaintiff claimed that her June 9, 2000 automobile accident aggravated her pre-existing **head, neck and back injuries** as well as her **radiculopathy, hip pain, TMJ, cognitive deficits, dizziness, ringing in the ears constantly, light flashes, and blurred vision**, all of which were initially sustained due to a 1999 slip and fall accident. She claimed that due to the automobile accident she slept all day, did not want to do anything, took her all a long time to complete tasks, she was forgetful, lost and confused and did not have any feelings of care or concern for anyone. The plaintiff claimed an aggravation of her pre-existing conditions caused by the automobile accident. Defendant moved for Summary Disposition on the basis of failure to meet the threshold to include no objective manifestation of injury. **In affirming the trial court's grant of Summary Disposition that plaintiff did not suffer a serious impairment of body function, the Court of Appeals noted that plaintiff presented no reported or diagnostic evidence to support her claim that the automobile accident aggravated her pre-existing injuries.** The emergency room examination was normal and remarkable for the absence of complaints on testing and findings. Three affidavits submitted by the plaintiff from doctors contained mere conclusory statements without describing or indicating the asserted aggravation of pre-existing conditions, were based solely on plaintiff's subjective complaints as neurological, objective physical, and electrodiagnostic testing were normal, and revealed no objectively medically identifiable conditions. Furthermore, the record of Dr. Tolia that the automobile accident exacerbated her symptoms was insufficient because he did not explain how he reached that conclusion nor which symptoms were exacerbated, how, or to what extent they were exacerbated. In addition, the court noted that plaintiff failed to show that any such aggravation affected her general ability to lead her normal life as called for by the *Kreiner* case.

## 2. Introduction Important Body Function Component

### a. Historical Background

The second component for the serious impairment of body function threshold is that it must be an important body function. An important body function is not defined. The Michigan judiciary will have to define it. *Cassidy v McGovern*, 415 Mich 483, 504-505 (1982), briefly discusses the concept. The phrase does not mean an impairment of the *entire* body function or just *any* body function. Instead, *Cassidy* indicates that by “serious impairment of body function” the legislature meant important body functions. It then noted that walking is an important body function that is impaired by broken leg bones regardless of what the person's occupation is or how long a person is on his feet. There are cases noting that injuries to weight-bearing bones in the legs involve the important body function of walking. Similarly, problems with the neck and back can be important body functions.

b. **Illustrative Cases Interpreting the Important Body Function**

**Caveat: Unpublished cases have no precedential effect and are not binding on a court, but may be persuasive. The unpublished cases are provided for informational purposes only. Each case should be read in its entirety. Cases are listed, chronologically oldest dated case to newest dated case.**

1. *Shaw v Martin*, 155 Mich App 89 (1986) held that movement of the **back and head** is an important body function.
2. *Cassidy v McGovern*, 415 Mich 483 (1982) held that **walking** is an important body function. An important body function is a function of the body that affects the person's general ability to lead a normal life. Thus, a complete **break of both legs** that prevented walking was held to be an important body function.
3. *Mekkir v Bigham*, 147 Mich App 716, 720 (1985) noted that **movement of the neck and back** is an important body function.
4. *Paris v Lemicex*, 152 Mich App 149 (1986), in which the court held that the **movement of one's back** is an important body function.
5. *Chumley v Chrysler Corporation*, 156 Mich App 474 (1986), in which the court held that **back function** is an important body function.
6. *Kern v Blethen-Coluni*, 240 Mich App 333 (2000), in which the court found that **walking** is an important body function, which the plaintiff was unable to do due to a displaced and somewhat comminuted and oblique **fracture of the right femur** that required hospitalization for six days with traction, insertion of an external fixator attached to the outside of the femur by four pins drilled into the bone pursuant surgery, and the fixator was worn for eleven weeks in which time plaintiff was incapable of walking for a total of two months.
7. *Howitt v Billings Feed & Lawn, Inc.*, 2001 WL 759967 (Unpublished Michigan Court of Appeals, 1/30/01, Docket #216738) noted that an injury to the **knee which impaired walking** was an important body function.
8. *Washington v Reynolds*, 2003 WL 356653 (Unpublished Michigan Court of Appeals, 2/18/03, Docket #237537) stated that **movement of the back** is an important body function.
9. *Lockwood v Wnuk*, 2003 WL 550007 (Unpublished Michigan Court of Appeals, 2/21/03, Docket #237088), the court stated "It is beyond dispute that a **brain** function is an important body function."

10. *Tolbert v Isham*, 2003 WL 21246634 (Unpublished Michigan Court of Appeals, 5/29/03, Docket #231424) stated “Plaintiff’s **shoulder injury** affected an important body function.”

11. *Randolph v Givan*, 2002 WL 31013702 (Unpublished Michigan Court of Appeals, 9/23/03, Docket #233104), the court stated: “. . . Plaintiff’s ability to move her **neck and back** . . . are important body functions. *Mekler v Bigham*, 147 Mich App 716 (1985).

12. *Kreiner v Fischer*, 471 Mich 109, 136 (2004) noted that the use of a person’s **back and leg** were important body functions.

13. *Moore v Cregeur*, 266 Mich App 515 (2005) noted that **vision loss** due to a permanent loss of visual acuity, a deterioration in vision to 20/60, and a partial loss of peripheral vision was an important body function.

14. *Curbelo v Auto Owners Insurance Company*, 2006 WL 448728 (Unpublished Michigan Court of Appeals, 2/23/06, Docket #264928) noted that **injuries to the back and leg specifically the loss of response in the Achilles function, and disc protrusion in the lumbar region** are impairments to an important body function.

### 3. **Introduction The Person's General Ability to Lead a Normal Life Component**

#### a. **Historical Background**

The third component deals with the effect on the **person's** general ability to lead a normal life. Once the tort reform legislation took effect, the question was whether or not the objective standard of *Cassidy, supra* at 505, would be used, or whether the courts would look at the language of the new statute and apply a subjective standard. Thus far, the focus of the courts under the new statute appears to be how the injury impacts on the **person's** general ability to lead a normal life, which is a subjective standard. See, *May v Sommerfield*, 239 Mich App 197 (1999), on remand, 240 Mich App 504 (2000) comparing the particular plaintiff’s lifestyle before and after the accident.

An objective standard would involve looking at the impact of a similar injury on the theoretical objective, reasonable person, which has been disfavored by the courts in Michigan in post- tort reform cases.

Since the standard has been applied in a subjective manner as to each individual versus an objective manner in comparison to the theoretical reasonable or average person, substantial litigation can be expected. The subjective analysis is consistent with the legislature's attempt to overhaul MCL 500.3135 of the No-Fault Act. Although not binding

on the courts, the House Legislative Second Analysis dated December 18, 1995 provides in pertinent part:

Amendments to the No-Fault Statute that would return to a tort threshold resembling that provided by the *Cassidy* ruling were key elements to the two comprehensive reform proposals (which dealt with a great many other issues, as well) defeated at the polls in 1992 and 1994 and have been introduced again, this time standing alone. \* \* \* The expression ‘serious impairment of body function’ is not currently further defined in statute, but its meaning is governed by a state Supreme Court ruling. House Bill 4341 [the new amendment] would put a more restrictive definition in [the] statute by specifying that ‘serious impairment of body function’ means ‘an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.’

The “state Supreme Court ruling” is apparently a reference to the *DiFranco* decision, *supra*.

It was apparently the intent of the legislature to have a more restrictive threshold making it tougher for plaintiffs to file and win lawsuits. As a result, courts have applied a standard under the new statute closer to *Cassidy* and its progeny, such as *Williams v Payne*, 131 Mich App 403 (1984), wherein many causes of action were dismissed for failing to show an impact on a person’s lifestyle/ability to lead a normal life and/or failing to demonstrate an objective manifestation of injury, rather than a standard closer to *DiFranco* and its progeny.

However, on the issue of the proper standard to apply in an analysis of whether the person suffered an injury “which affects the person’s general ability to lead a normal life,” the Court of Appeals in *May v Sommerfield (After Remand)*, 240 Mich App 504 (2000), supported a subjective standard holding:

“The plain language of MCL 500.3135(7); MSA 24.13135(7) defines a serious impairment of body function in subjective terms, i.e., as an impairment that ‘affects the person’s general ability to lead his or her normal life.’ The trial court properly compared plaintiff’s lifestyle before and after the accident in determining whether a factual dispute existed with respect to the extent of plaintiff’s injuries.” *Id.*

***Kreiner v Fischer*, 471 Mich 109 (2004) is the current definitive case law on the person’s general ability to lead a normal life.**

There is nothing in the amended legislation that would change the holding of *ACIA v Hill*, 431 Mich 449 (1988). Thus, the statutory definition of serious impairment of **body function** arguably applies to uninsured motorist arbitration claims.

In addition, there is nothing in the new statute that changes the holding in *Incarinati v Savage*, 419 Mich 541 (1984), that once a person meets the serious impairment of body function threshold the person can recover all noneconomic losses, even when the impairment is no longer serious.

b. **Published Illustrative Cases Interpreting the Person's General Ability to Lead a Normal Life Component**

**This section only addresses *Kreiner v Fischer*, 471 Mich 109 (2004) and published cases after *Kreiner*.**

1. *Kreiner v. Fischer*, 471 Mich. 109 (2004), in which the Michigan Supreme Court comprehensively addressed the definition of serious impairment of body function under the new statute. This case dealt with the third prong of MCL 500.3135(7) as to the effect on the person's general ability to lead his/her normal life. This case involved two plaintiffs. Plaintiff Straub suffered **a broken bone in his little finger and injured tendons in his ring and middle fingers** after a motorcycle accident on September 19, 1999. He had out-patient surgery to repair the tendons on September 23, 1999. He underwent minimal treatment, wearing a cast for a month. Straub returned to work part-time about late November, 1999 and full time on December 14, 1999 without restrictions. He continued to have pain and discomfort. At his deposition he testified that until late December, 1999, he had problems performing various activities of daily living, running his archery shop and playing his guitar in the band. By mid-January, 2000, he could play his guitar and perform all activities of daily living as he had prior to the accident, even though he wouldn't completely close his left hand or completely straighten his finger.

**Kreiner complained of pain in his lower back, right leg, and right hip. Cortisone injections, physical therapy, and pain medication was administered. Six weeks after the accident of November 28, 1997, an EMG revealed mild nerve irritation to the right fourth lumbar nerve root and degenerative disc disease with spondylolisthesis.** Kreiner continued to complain of radiating pain from the back into the right thigh and right calf which pain was aggravated by bending and sitting or standing for any length of time. A course of pain medication, anti-inflammatory medication, physical therapy, and home exercises occurred. Kreiner stopped treating with any doctor and stopped medications after his last doctor's visit in August, 1999. After the accident, Kreiner, a self-employed carpenter and construction worker, was able to work only six hours a day instead of eight hours, could not stand on a ladder longer than twenty minutes, could not lift

anything greater than eighty pounds, could only walk a half mile, and could hunt deer but not rabbits. The trial courts granted both defendants' motions for summary disposition, finding that the plaintiffs failed to establish that they suffered a serious impairment of body function, and the Michigan Supreme Court upheld the summary dispositions.

The plaintiffs argued that they only had to demonstrate an impairment of a body function that in some way affected the plaintiffs' lives, "*regardless of degree.*" The defendant argued that the plaintiffs must prove that in general they can no longer lead their normal lives. In interpreting a serious impairment, the Court noted that "[a]lthough a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life. . . . Determining whether the impairment affects a plaintiff's 'general ability' to lead his normal life requires considering whether the plaintiff is 'generally able' to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment." The Court stated that one must look at how the injuries affected the "course" of one's life, that is, whether the rest of his life was impeded by the injuries. After this, the Court devised a test to determine whether one's general ability to lead his/her life has been affected.

The following multi-step process is meant to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not.

First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. . . .

Second, if a court can decide the issue as a matter of law, it must next determine if an "important body function" of the plaintiff has been impaired. It is insufficient if the impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired. If a court finds that an important body function has in fact been impaired, it

must then determine if the impairment is objectively manifested. **Subjective complaints that are not medically documented are insufficient.** If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "*any* effect" on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life. The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." *Kreiner*, 471 Mich. at 131-136.

2. *Williams v. Medukas*, 266 Mich. App. 505 (2005), in which the court of appeals reversed summary disposition for the defendant, holding that the plaintiff suffered a serious impairment of body function after sustaining a **fractured right shoulder and fractured left hand** which prevented him from feeding himself and playing sports in the long term. In looking at whether the injuries have affected one's ability to lead a normal

life, the court determined that the focus should be on how the injuries have affected the course of the person's life and how, to what extent, and for how long his life is affected. The court must look at the person's life before and after the accident to determine how the injuries affected his life. The court also noted that even an injury that lasts a short time may meet the threshold for non-economic damages if the injury extensively affects that person's life.

3. *Moore v. Cregeur*, 266 Mich. App. 515 (2005), in which the plaintiff sued for non-economic damages from a vehicle accident in which she suffered **multiple rib fractures, a collapsed right lung, and detached eye retinas**. Surgery complications resulted in permanent loss of vision in her right eye. The trial court granted summary disposition to the defendant, but the court of appeals partially reversed. The court applied the test from *Kreiner*, which looks at the plaintiff's life before and after the accident to see if the general course of his life has been impacted. The court held that the plaintiff failed to demonstrate that the lung and rib injuries affected her ability to lead her normal life, but the **vision loss "will affect every aspect of her waking life to some extent"** and was not a minor event but rather a serious impairment.

4. *McDaniel v Hemker*, 268 Mich App 269 (2005), in which the Court of Appeals reversed the Summary Disposition in favor of the defendant. The plaintiff alleged **head, neck, back, and shoulder injuries**. Dr. Kilgore initially diagnosed her as having "**traumatic cervical myositis and costochondritis**." Dr. Kilgore presented an affidavit that plaintiff complained of increased neck pain and tingling in her right trapezius muscle, increased neck pain plus numbness and tingling radiating into the right arm and hand, trapezius muscle was extremely tender and she had an olive sized area of muscle spasm. Electrodiagnostic testing was normal. Magnetic Resonance Imaging was also performed and revealed injuries to the cervical spine which Dr. Kilgore opined were sustained in the motor vehicle accident. Dr. Juneja also submitted an affidavit **diagnosing chronic neck pain, whiplash syndrome, neck and parascapular myofascial pain, and cervicogenic headaches**. Dr. Juneja also indicated that the **MRI of the neck showed foraminal stenosis exacerbated by bulged discs at two different levels. Trigger points in her neck and parascapular area along with reproducible headaches with compression of the nerve in the cervical area** were also noted. The accident occurred on 9/30/00. Plaintiff continued to treat with the doctors. In February, 2003, digital motion x-rays according to Dr. Juneja's affidavit showed cervical ligament injury that the doctor testified occurred during the head and neck movement in the course of the accident. The doctor further opined that the ligaments holding the vertebrae in place were damaged and/or torn thereby allowing the vertebrae to move out of the normal alignment. The slippage of the vertebrae caused the discs to be pushed or bulged out. The vertebrae did not articulate

properly with one another causing an abnormal wearing of the uncovertebral joints. The misalignment also caused the narrowing of the neural foramina. Ligaments that are stretched or torn do not heal or go back to their original shape. Injured ligaments allow for abnormal movement of the vertebrae which occurs every time the plaintiff moves her head and neck. This in turn causes inflammation of all the soft tissues in the cervical area. This information causes even more pressure on the soft tissues in turn causing an increase in symptoms, complaints of pain, and limitation on range of motion and activities. **Dr. Juneja indicated that the neck pain and headaches were going to be more of a permanent injury.** He also told her to continue her pain medication, home exercise program and adjust her activity levels based on her pain. Plaintiff had difficulty sleeping according to Dr. Juneja because of pain arising out of the position of her neck. **Dr. Juneja indicated there was no surgery to repair ligament damage or realign vertebrae and this was most likely a permanent condition.** Plaintiff would continue to experience headache and neck pain for a long period of time and had to adapt her lifestyle accordingly. There were certain activities she could not do or if she does she will probably have pain and discomfort. She was given medication to control her headaches and neck pain. She was to continue with things such as cervical traction and stretching exercises at home, undergo repeat nerve blocks, and beyond that there is nothing more that would afford plaintiff any relief from her ongoing symptoms and complaints. McDaniels testified to her serious limitations at work and activities of daily living. **The court held that in light of the documentary evidence recited above, which is not disputed by defendants, that the plaintiff suffered a serious impairment of body function as a matter of law that affected her ability to lead her normal life.** The evidence established that she suffered an objectively manifested impairment of an important body function. Comparing her activities of her life before and after the accident is similar to comparing day to night. All aspects of her life had been significantly affected with no meaningful relief in sight. Based on the totality of the circumstances affecting plaintiff's general ability to lead her normal life, plaintiff suffered the necessary threshold injury constituting a serious impairment of an important body function. Based on the documentary evidence presented, there is a medically identifiable or physiological basis for plaintiff's pain and Dr. Juneja found that McDaniels was suffering from pain. **The doctor's expert's statements and opinions themselves regarding plaintiff's medical conditions and the likelihood of her condition being permanent could be utilized to show the extent of the residual impairment.**

5. *McMullen v Duddles, II*, 405 F. Supp 2d 826 (2005), in which the Federal District Court held that plaintiff's injuries as a whole show that the impairments have affected plaintiff's ability to lead her normal life and as such, defendant's Motion for Summary Judgement was denied.

The plaintiff alleged **back pain with pain radiating down her groin and legs, a broad based right paracentral disc protrusion at L5-S1 per MRI scan, and assorted pain.** Plaintiff had been able to work full time prior to the accident, but now she is limited to working at a different job as little as five or six hours a week to at most 25 or 30 hours per week because of the pain. Following the accident, she had attempted to work two different jobs, but was let go because she could not fulfill the job requirements. She moved to Florida with her husband to help her parents run a liquor store and open up a restaurant. She intended to help run the restaurant after it opened. Plaintiff had received chiropractor treatment, conservative treatment in the form of physical therapy, spinal injections, and medication. She also received epidural steroid injections and a facet arthrogram at L5 but neither provided much relief. The accident was on December 4, 2001 and she continued to treat with various doctors. In October, 2004, Dr. Valentine performed a radiofrequency rhizotomy, which involved cutting the anterior or posterior spinal nerve roots to alleviate the pain. The procedure did not work. She continued to treat with medical doctors for pain as well as undergoing continued physical therapy.

In June, 2005, Dr. Hunt attempted further caudal epidurals and bilateral sacral nerve blocks. She continued to experience significant pain and was a candidate for disc replacement or spinal fusion surgeon. No doctor had placed any restrictions or limitations upon her employment or other activities because of her back condition. The plaintiff responded that she never requested restrictions because she worked for her parents and they would make necessary accommodations. She argued that the injury to her back also significantly affected various aspects of her life to include limited ability to work, inability to engage in various recreational activities such as biking, golfing and bowling, her ability to sit on the floor and play with her children, and her sex life and marriage.

She also testified that she could only stand for 10-15 minutes at a time and must sit down. She could only remain seated 20-30 minutes before she must stand up again. The defendant moved for summary disposition on the theory that plaintiff's general ability to lead her normal life had not been affected and her limitations were self-imposed versus a physician imposed restriction. Defendant also argued that her restrictions on her recreational, family, and sex life were self-imposed, and thus, were not sufficient to meet the *Kreiner v Fischer*, 471 Mich 109 (2004) threshold requirements.

The defendant also argued that only certain aspects of her life had been affected versus her general ability to lead a normal life as required by *Kreiner*.

The Federal District Court based on the evidence provided which consisted of testimony, medical records, and reports, held that the evidence as a whole

showed that the impairments have affected plaintiff's ability to lead her normal life.

The court noted that first, the impairment had significantly affected plaintiff's ability to work as she lost two jobs due to inability to perform the work due to her injuries.

Secondly, the court noted that as a result of the injuries McMullen was now unable to engage in many of the recreational activities that she formerly enjoyed in her marital relationship and her sex life had been negatively affected.

Third, plaintiff walked differently because she was stiff and she was unable to stand for more than 10 or 15 minutes at a time.

Fourth, plaintiff had received various forms of treatment that provided little or no relief. Also, Dr. Hunt stated that plaintiff had tried a TENS unit, epidural steroid injections, nerve blocks, facet joint injections, and medication, which in essence did not work. The court noted that the treatment that plaintiff received due to the accident on December 4, 2001 through the date of the hearing for Motion for Summary Judgment constituted extensive treatment over a rather lengthy period of time. The court did note that duration is one factor to consider, even though a significant injury of short duration could also meet the threshold.

Fifth, plaintiff was continuing to treat with doctors on a regular basis even through the date of her response to defendant's motion. The records indicated that major back surgery which was being considered was the only possibility of providing her relief and even then, the duration of her impairment has been and will be long term.

Finally, the court rejected defendant's arguments that the restrictions were self-imposed and thus, did not establish that the injuries have affected her ability to lead her normal life. The court in reviewing the various medical records noted that although no specific restrictions were provided by the doctors as contained in the medical records, the plaintiff had testified that the doctors have all stated that she should try to do what she can do and if her injuries bother her to discontinue that activity. Thus, as in *McDaniel v Hemker*, 268 Mich App 269 (2005), these constituted physician imposed restrictions in place based on the pain and were sufficient. The court concluded that in sum, the evidence as a whole, showed that the impairment has affected plaintiff's ability to lead her normal life.

6. *Behnke v Auto Owners*, 474 Mich 1004 (2006), in which the Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's bench trial rulings and findings of fact as not being clearly

erroneous that plaintiff had not suffered a serious impairment of an important body function. The following facts were set forth by the trial court. Plaintiff sustained **neck injuries and suffered intense headaches with tissue, muscle and vertebral damage. He went to the emergency room the morning following his accident and underwent x-rays that indicated a “straightening of the normal cervical lordosis” and revealed preexisting conditions in his vertebrae that were unrelated to the accident, but that may have been aggravated causing him pain.**

Plaintiff, a welder, stopped working on June 3, 1998, and returned to work with no restrictions on July 27, 1998. He reported continued headaches and neck pain on October 21, 1998, and it was recommended he perform only light-duty work. He was involved in a second car accident in June, 1999, causing neck soreness that went away after a week or two. He was laid off in June, 2000. He subsequently oversaw a snow removal crew and then went to work full-time as a sawyer for a truss-building company, where his job duties were limited to feeding lumber into a cutting machine.

He claimed that his injuries limited his career choices, that he was unable to pursue his usual recreational activities, that he was unable to help maintain his mother’s hotel, and that he was unable to engage in sexual intercourse without suffering painful headaches a significant amount of the time. He claimed he was unaware of his congenital spinal defects until after the accident and had not previously had any symptoms of such. After the accident, he claimed that his neck swelling subsided with the exception of a knot that swelled the more he used his neck. He further complained of headaches that increased in frequency and intensity the more active he became, and that lasted for 4-6 hours. He claimed he could not drive, weld, garden, or engage in normal activities when he had these headaches. He further complained of popping and grinding sounds in his neck, spasms that caused temporary paralysis and felt like an electric shock, and limited range of motion. He claimed that he was physically unable to work as a welder and that his doctor advised him to not return to work if he was recalled.

The trial, court entered a judgment of no cause of action and the Court of Appeals reversed. It found that muscle spasms or contractions, swelling in his neck, and aggravation of the objective congenital defects in plaintiff’s spine were objectively manifested; thus, plaintiff sustained his burden of showing an objectively manifested injury. The court further analyzed the effect the injuries had on plaintiff’s general ability to lead his normal life, and found that he was effectively foreclosed from doing many activities because they aggravated his injuries and caused intense pain. The court noted that the medical testimony indicated that surgery would not correct plaintiff’s injuries and that the only available remedy was chronic pain relief. The court further noted that plaintiff’s impairment had worsened and would likely continue indefinitely. The court held that the consequences of

plaintiff's injuries need not be objectively manifested; rather, only the underlying injury need be objectively manifested. The court further held that plaintiff's life had changed substantially.

The Michigan Supreme Court noted the following findings of fact by the trial judge acting as the trier of fact.

“As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such motion normally associated with headaches and occasional neck pain. Currently, plaintiff takes non-prescription medication for his headaches.

\* \* \*

The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff testified that when the headaches and neck pain occur, he is less active and limits his usual activities. At that point, he self-medicates with over the counter pain medications. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate relationship with his wife despite these recurring spasms. *Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff's ability to lead his normal life.* [Emphasis added by trial court]

**Based on the evidence presented, these findings of fact are not clearly erroneous. MCR 2.613(C). Further, after applying *Kreiner* to these facts, I would hold that the lower court did not err in concluding that plaintiff is generally able to lead his normal life.”** (Emphasis added).

**It is important to note that the Supreme Court was reviewing the case on appeal under a clearly erroneous standard after a bench trial by the court as the trier of fact and not after the granting of a motion for summary disposition, which is a de novo review.**

7. *Amber Netter v Sharon Rose Bowman*, 272 Mich App 289 (2006), in which the Court of Appeals affirmed the trial court’s dismissal of plaintiff’s action on a motion for summary disposition.

Netter was a passenger in a stopped car when the car ahead backed up causing a collision. There was minimal damage to both vehicles and the impact speed was less than 5 mph. Netter was several months pregnant at the time with twins. Her complaints consisted of **burning or cramping pains and hospitalization after the accident because she seemed susceptible to premature delivery**. She gave birth to twins several weeks prematurely. Netter filed suit claiming that the accident caused her to suffer various **soft tissue injuries and induced a premature delivery**.

The defendant moved for summary disposition arguing that Netter exhibited no objective signs of injury. The court noted that the pertinent question as to objective manifestation was whether a plaintiff’s injuries must be merely diagnosable by the plaintiff’s subjective symptoms, i.e., medically identifiable, or whether the injuries must be capable of being evidenced by objective testing, i.e., medically measurable.

The Netter Court of Appeals looked at the MCL 500.3135(7) definition of serious impairment of body function as requiring “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”

The *Netter* court held that it was bound to follow the earlier case of *Jackson v Nelson*, 252 Mich App 643 (2002) that for an impairment to be objectively manifested, there must merely be a medically identifiable injury or condition that has a physical basis versus a medically measurable interpretation of an objective manifestation. In other words, an impairment

is objectively manifested if that impairment can be verified in some way beside the person saying they have the impairment; therefore, it is the impairment that must be objectively manifested and not the injury itself. Thus, in light of *Jackson*, for an impairment to be objectively manifested it must merely be a medically identifiable injury or condition that has a physical basis. However, the *Netter's* Court of Appeals affirmed the trial court's ruling in light of *Kreiner*, 471 Mich 109 (2004) and held:

“In light of *Kreiner* and its progeny, we conclude that the current meaning of objectively manifested - whether described as ‘medically measurable,’ ‘medically identifiable,’ or ‘medically documented’ - requires that a plaintiff’s injury must be capable of objective verification by a qualified medical person either because the injury is visually apparent, or because it is capable of detection through the use of medical testing. This interpretation comports with the Legislature’s intent that the ‘serious impairment of bodily function’ requirement to be as significant an obstacle to recovery as that posed by the requirement of permanent serious disfigurement and death.”

The court noted that the EMS report revealed that Netter denied any back or neck pain. Post accident tests administered to Netter, an x-ray in August, 2004 and an MRI in September, 2004 failed to reveal any measurable abnormalities. The records did reflect a diagnosis of lumbar radiculopathy along with cervical, dorsal, and trapezius myositis. Physical therapy was being provided through Dr. Lerner’s office in August, 2004 for dorsal myositis. In November, 2004, Dr. Sessa diagnosed Netter with cervical myofascial pain syndrome secondary to a cervical strain injury. Dr. Sessa concluded Netter’s injuries were merely soft tissue in nature. Dr. Sessa found that by late November, 2004, Netter had reached her maximum medical improvement and pre-injury status.

Neither doctor submitted a disability certificate that declared plaintiff was disabled from house work, caring for her children, and caring for her own personal needs since the date of the accident. Netter was discharged from physical therapy by Dr. Lerner in December, 2004 for non-compliance with physical therapy.

The *Netter* court indicated that there is no doubt that the movement of one’s back and neck are important body functions. Thus, the court found that although there was some conflicting evidence as to whether plaintiff had

suffered an objective manifestation and would have remanded for further findings on this issue, the Court of Appeals held that Netter's general ability to lead her normal life was not impaired. Although in July, 2005, plaintiff testified she was still suffering residual affects from the accident, the evidence submitted to the trial court demonstrates that she reached maximum medical improvement and pre-injury status as of November, 2004 and was discharged from physical therapy and by implication any physician imposed restrictions by December, 2004. The *Netter* court concluded that the plaintiff "failed to show that the course or trajectory of her normal life was affected as the result of this relatively brief period (6 months) of recuperation. Hence summary disposition was appropriate.

8. *Deborah Sue Nicke v Kenneth Michael Miller, et al*, 477 Mich 954 (2006), in which the Michigan Supreme Court reversed the Court of Appeals' unpublished decision 2006 WL198090 (2006) and reinstated the trial court's grant of a Motion for Summary Disposition for the defendants.

Plaintiff suffered **back** and **neck** problems since childhood. She had surgery on her neck two years before the present accident. After the surgery, her condition improved, but she continued to experience **pain in her back, neck and shoulder**. She missed work for three weeks before returning full time. She accepted a buy out and then returned to full-time work for another company for more than a year. She claimed that her general ability to lead a normal life had been affected because she was unable to work. Her doctor never restricted her activity or employment except for the three weeks she was off after the accident.

Plaintiff's life before the accident was not substantially different from her life after the accident. She had additional pain, but was able to groom herself, perform house and yard work, collect antiques and hike. She did have pain associated with heavy lifting and other strenuous activity before and after the accident. She worked in a sedentary position that required no heavy lifting before and after the accident. Plaintiff failed to present evidence to establish that her general ability to lead her normal life had been affected. Self-imposed restrictions versus physician imposed restrictions based on real or perceived pain do not establish a serious impairment of body function.

**Plaintiff's treatment included discectomy surgery to her neck and acromioplasty surgery to her right shoulder.** Her surgeon opined that plaintiff had no quality of life and all her activities would limit her; thereby, requiring the performed surgeries. The Court of Appeals held that given the significant nature of the surgeries in treating plaintiff's injury that summary disposition could not be granted until the possibility of a temporary serious impairment of an important body function had been considered by the trial court.

The Michigan Supreme Court in a 4-3 decision reversed the Court of Appeals and reinstated the trial court summary disposition in favor of the defendants. Although a serious impairment of body function need not be permanent or of any particular duration, both temporary and permanent impairments must satisfy the same standard. Since plaintiff's life before the accident was not substantially different from her life after the accident and she failed to present evidence to establish that her general ability to lead her normal life had been affected, the decision of the Court of Appeals was reversed.

9. *Minter v City of Grand Rapids*, 480 Mich 1181 (2008), in which the Michigan Supreme Court reversed that part of the Court of Appeals' decision that reversed the trial court's decision granting summary disposition to the defendants.

The plaintiff a pedestrian sued to recover for no fault benefits when she was struck by a police car. The trial court entered a summary disposition in favor of the defendants holding that plaintiff's injuries consisting of a **broken toe**, a **cervical strain**, a **closed head injury** and a **laceration** above the **right eyebrow** did not constitute a serious impairment of body function.

The Court of Appeals affirmed the trial court in part with respect to the **broken toe and cervical strain**. However, the Court of Appeals reversed indicating that there was a question of fact whether or not plaintiff's **closed head injury** constituted a serious impairment of body function even absent expert testimony and whether the **scar above her eyebrow** was a permanent serious disfigurement.

Plaintiff was 67 years old at the time of the August 15, 2002 accident, had a bad back and could not lift things, but she was otherwise self-sufficient and leading a normal life without any physical injuries. She wore a special soft shoe for a week to a month and by the time of her deposition her toe had completely healed. Her cervical strain required her to wear a cervical collar for two weeks and refrain from heavy lifting, bending, squatting and housework for three months. She had stiffness six months later, but again by the time of her deposition, the strain was completely resolved. She had a scar above her right eyebrow. She felt the scar was embarrassing and itched, became numb, and hurt when she touched it. It could be revised by plastic surgery, but not completely. The scar was approximately one-half inch long. She was diagnosed with a **mild traumatic brain injury**. She reported **frequent headaches, occasional dizziness, memory problems and insomnia**. She had physical therapy, speech therapy, and language therapy. She was not restricted from any daily activities. As a result of her treatment, she had fewer headaches, but she had more dizziness as well as confusion and blurred vision. She also contended that she was not able to walk, dance or even cross the street comfortably.

The trial court ruled that plaintiff did not suffer for any prolonged period from her injuries and her injuries did not affect her ability to lead her normal pre-accident life. The court ruled that the scar was relatively small and not readily noticeable. A summary disposition was granted in favor of the defendants.

The Court of Appeals with respect to the **closed head injury** noted that even though no affidavit or testimony was presented by a licensed allopathic or osteopathic physician per MCL 500.3135(2)(a)(ii) that she had suffered a closed head injury that may be a serious neurological injury. The Court of Appeals reversed the trial court with respect to the **closed head injury** aspect of the case. The Court of Appeals also held that the scar could objectively be determined to have a great affect on her life and therefore it was a question for the jury as to whether the **scar** met the standard of serious permanent disfigurement.

The dissenting Court of Appeals judge held that evidence presented established the plaintiff's closed head injury did not affect her general ability to lead her normal pre-accident life and plaintiff's scar did not constitute a permanent serious disfigurement. From an objective view of the record, the plaintiff's temporary and minor injuries did not cause a serious impairment of body function and the scar above her eye although permanent was not serious as defined by law.

Prior to the accident, the dissenter noted that plaintiff was receiving Social Security disability after kidney surgery and that she suffered from chronic, long term back pain that prevented her from lifting or standing for long periods. As a consequence, plaintiff had her family some of whom lived with her help to clean the house, cook, and do the laundry. The effects of her injuries lasted no more than four months and none led to physician imposed restrictions. Her post-accident life was essentially as it was pre-accident.

The dissenting judge noted that looking at the totality of the circumstances, plaintiff had physician imposed restrictions relating to heavy lifting, bending, and prolonged standing for several months following the accident; however, these were similar restrictions to those she had prior to the accident. She required household assistance, but her daughters and grandsons were already providing much of that assistance before the accident. Although she argued her social activities had changed, this was not the result of any physician imposed restrictions. Her restrictions of not playing cards, dancing or walking were self-imposed restrictions. Also, the fact she had some lingering pain and forgetfulness was insufficient to overcome the high threshold of serious impairment of body function because they had not significantly altered her life.

Although the scar in the shape of a "T" 13 mm and 11 mm long and slightly lighter in skin tone color than the surrounding area was permanent and disfiguring, it was not serious as a matter of law. The scar was relatively small and upon review of the color photographs it was not readily noticeable. Plaintiff also testified that no restrictions were ever placed on her by a physician.

On appeal, the Michigan Supreme Court adopted the reasoning of the dissenting judge in the Court of Appeals and affirmed the trial court's grant of the motion for summary disposition to the defendants regarding plaintiff's broken toe, cervical strain, closed head injury and scar. The Michigan Supreme Court found as a matter of law that these injuries did not constitute a serious impairment of body function and the scar did not constitute a serious permanent disfigurement.

10. *Donald D. Jones v Kathleen P. Olson, et al*, 480 Mich 1169 (2008) in which the Michigan Supreme Court reversed the Court of Appeals' unpublished decision 2006 WL 2708685 (2006) and reinstated the trial court's grant of a Motion for Summary Disposition for the defendants.

Plaintiff suffered multiple injuries in the motor vehicle accident of August 1, 2003 with the most significant injury being a **stable fracture of the spine at C7**. She continued to experience **neck pain with radiation and numbness into her shoulders and arms** as of November 17, 2003.

On January 9, 2004, plaintiff reported discomfort in the **neck and decreased rotation**, but denied persistent radiation, numbness or weakness. After physical therapy, a February 12, 2004 progress note stated that he could return to heavy construction pouring foundation walls for three hours per day or two days per week, increasing to full-time work over the next two to four weeks. Plaintiff returned to work without restrictions in March, 2004. In his deposition of October 10, 2005, plaintiff testified that he did not need to take any time off from work since March, 2004. He was not on any medication. Although his neck sometimes hurt, it did not prevent him from doing anything. He was not able to hunt, snowmobile, play softball, do yard work or walk with his girlfriend during the approximately six months that he was off from work. He did not drive for three months. He did not have intimate relations with his girlfriend for two months and had difficulty dressing and feeding himself for two months. He had to get somebody to drive his son to school in the morning. Plaintiff challenged the trial court's ruling that the impairment did not affect his general ability to lead a normal life, asserting that it did, albeit for a short period of time.

The Court of Appeals noted that plaintiff's general ability to lead his normal life was put entirely on hold for the first two months after the accident and only gradually returned over the following four months. His life style before

the injury was dramatically different from his lifestyle for six months after the accident. The Court of Appeals noted that an injury need not be permanent to constitute a serious impairment of body function and held where the injuries entirely disrupted a person's ability to lead his normal life, the fact that the person eventually recovered did not preclude recovery for that injury. Based on the totality of the circumstances the plaintiff should recover damages for the period of time when his ability to lead his normal life was "entirely disrupted."

The Michigan Supreme Court in a 4-3 decision held in a single paragraph opinion that the trial court properly granted summary disposition to the defendant as the plaintiff was generally able to lead his normal life in spite of his injuries.

11. *Guerrero v Smith*, 280 Mich App 647 (2008), in which the Court of Appeals affirmed the jury verdict for the defendants on a verdict of no cause of action holding that serious impairment of body function was a question for the jury and in this case the verdict was not against the great weight of the evidence.

Plaintiff maintained that he suffered a **traumatic brain injury** and that his **neurological injury** impaired his **cognitive abilities** and **mental acuity**. He **claimed symptoms from his closed head injury of cognitive deficiencies, confusion, forgetfulness, difficulty in organizing his thoughts and affairs and a general inability to focus**. One of his doctors believed that the nature and extent of plaintiff's marijuana use was a relevant consideration in diagnosing plaintiff's condition. Defense counsel argued that plaintiff's past marijuana use affected his cognitive abilities and mental acuity independent of the motor vehicle accident.

The Court of Appeals noted that the question of whether plaintiff had suffered a serious impairment of body function turned largely on the testimony and reports of the physicians and psychologists as well as the testimony of the plaintiff himself.

There was conflicting evidence as to whether plaintiff's injuries were objectively manifested. **Physical exams and x-rays showed that plaintiff sustained muscle spasms and showed the loss of normal lordotic curve in his neck and back**. Two doctors opined that plaintiff had suffered a **traumatic brain injury**. Plaintiff testified at length regarding his neurological and cognitive symptoms as well as **back, neck and head pain**. Another doctor did not believe plaintiff sustained a brain injury and suggested plaintiff's pain was attributable to degenerative disc conditions that had been present in plaintiff's neck and back before the accident.

The Court of Appeals assumed for the sake of argument that plaintiff's injuries were objectively manifested; however, it found that reasonable jurors could have honestly concluded that plaintiff's injuries did not affect his general ability to lead his normal life.

Plaintiff testified that his life had changed since the accident and he was no longer able to perform any of the tasks before the accident. His doctor testified that the **neurological deficits, mood disorders, pain, headaches and depression** would likely be persistent in that plaintiff's **neck pain** would not go away, and suspected that plaintiff's **occipital neuralgia** would be permanent. There was conflicting testimony that plaintiff had began building a deck, had used heavy equipment since the July, 2002 accident, admitted that he continued to exercise, ride a bike, jog, play tennis, and even went on a hunting trip. Furthermore, surveillance tapes showed that plaintiff had plowed and shoveled snow without any apparent difficulties during early, 2007.

Due to the conflicting evidence and because reasonable jurors could have honestly differed on the issue, the Court of Appeals held that the trial court did not err in denying plaintiff's motion for judgment notwithstanding the verdict and allowing the jury verdict to stand.

12. *Premo v United States of America*, 580 F. Supp. 2d 562 (E.D. MI, 2008), in which the Federal District Court held that plaintiff's injuries did not constitute a serious impairment of an important body function that affected her general ability to lead her normal life and as such, defendants' Motion for Summary Judgment was granted.

A bicyclist was injured after being struck by a postal truck while riding through a crosswalk. Plaintiff suffered **multiple fractures to her leg, ankle and foot** which required **surgery**.

The plaintiff's injury impaired her ability to walk and stand at least initially after her surgery and during rehabilitation. Walking is an important body function. The court held that her fractures were objectively manifested. However, with respect to the third element of serious impairment of an important body function that affects the plaintiff's general ability to lead her normal life, the court held that plaintiff did not show that she suffered a serious impairment of body function for the following reasons. The court noted that she did have multiple fractures to her left leg and ankle. Two days later she underwent surgery. She then wore a cast, was given a walker, and instructed to elevate her foot. The next week she was given a removable cast and used crutches for about a month after the accident. By Thanksgiving of November, 2006, she was walking. Her doctor indicated the fracture was healed normally. She had no significant pain or problems. There were no

long term restrictions or medications prescribed by her doctor in the most recent progress note of March 6, 2007.

Plaintiff worked as a library aide and was off for about a month. She returned to work and was able to perform her duties, even though she had to elevate her leg and therefore, did sitting work only. She was able to attend classes, send in her work, and did not drop any classes.

While she was restricted from walking as her injury healed following the August 7, 2006 accident, she was able to hike, camp, ride her bike, swim, sew, play music, bake, and cook at about the same frequency as before the accident. However, on certain days her ankle was stiff or sore and she was hesitant to walk to work a couple times a month. She claimed to have a permanent limp that required the use of a cane.

Based on those facts, the court granted a summary judgment finding that plaintiff had not established that her injuries affected her general ability to lead her normal life. She was able to engage in the same activities. Although she testified that her ankle was stiff and sore and not the same, she did not take nor was she prescribed any pain medication and was not under any medical physical restrictions. There was no objective evidence to support the claim that she was likely to suffer from arthritis. At most, her restrictions were the result of her subjective beliefs about her injuries and as such, were not sufficient to show that her general ability to lead her normal life was affected by the accident.

13. *Benefiel v Auto Owners Insurance Co.*, \_\_\_ Mich \_\_\_, 759 NW2d 814 (2008), in which the Michigan Supreme Court held that there was a question of fact as to whether plaintiff suffered a serious impairment of an important body function.

The first accident occurred on February 13, 2002 and the second occurred on February 8, 2003. Plaintiff claimed that he suffered injuries to his **left shoulder** and **neck** in the second automobile accident.

The trial court granted defendant's Motion for Summary Disposition stating that nothing indicated that the course or trajectory of plaintiff's life had been affected by the second accident.

The Court of Appeals noted that the actual extent of the injuries caused by the second accident was difficult if not impossible to separate from plaintiff's earlier injuries from the first accident. The Court of Appeals noted that plaintiff had shown that his impairment associated with his **spinal injury** constituted an impairment of an important body function that was objectively manifested given the medical documentation that he suffered from a **disc**

**herniation** that ultimately required a **multi-level discectomy and fusion surgery**.

The primary dispute in this case was what time frame to consider for purposes of comparing plaintiff's normal lifestyles before and after the second accident. Plaintiff contends that the proper inquiry was not the time between the first and second accident, but rather the 55 years of living that he did before the second accident. Plaintiff argued that his **neck and shoulder pain** worsened after the second accident and that he underwent a **cervical discectomy and fusion** following the second accident. Plaintiff argued that this was evidence that the second accident significantly affected his general ability to lead his normal life.

Defendant's position was that plaintiff's lifestyle immediately before the second accident as compared to his lifestyle immediately after the second accident is the proper scope of the inquiry. Defendant argued that plaintiff's lifestyle after the second accident was not appreciably different from his lifestyle following the first accident.

The Court of Appeals held that for summary disposition purposes a review of plaintiff's whole life in order to determine plaintiff's normal life style before the second accident should not be limited to the time frame following the first accident. After doing the review, the Court of Appeals concluded that the plaintiff had met his burden of establishing that he suffered a serious impairment of body function.

The Court of Appeals noted that he had work limitations and recreational limitations on his activities. Plaintiff testified that before the first accident, he golfed once or twice a week, water skied 3-4 times a year, rode horseback a couple times a year, and rode a bicycle a couple times a year. Plaintiff stated that he was unable to play golf, water ski, ride a horse, or bicycle after the first accident and had not been able to return to those activities following the second accident. After engaging in an extensive review of plaintiff's whole life to determine what constituted plaintiff's normal lifestyle before the second accident, the court concluded that plaintiff had met his burden of establishing that he had suffered a serious impairment of body function. The Court of Appeals reversed the trial court.

On Appeal, the Michigan Supreme Court affirmed the Court of Appeals ruling that summary disposition should not have been granted to the plaintiff by the trial court because there remained disputed issues of fact when viewing the evidence in a light most favorable to the plaintiff. However, the Michigan Supreme Court indicated the entire Court of Appeals analysis was faulty because it was improperly premised on plaintiff's normal life as it existed prior to his first accident.

The Michigan Supreme Court held that the Court of Appeals wrongfully concluded, as a matter of law, that plaintiff established a serious impairment of body function. **Plaintiff who has suffered successive injuries bears the burden of proving that his current injury was caused by the subsequent accident and not by some independent occurrence.** Thus, plaintiff must prove that his pre-existing impairment is temporary in order to have his pre-impairment lifestyle considered as his normal life. **As such, in this situation, the plaintiff must show either that his pre-existing impairment was exacerbated or that his recovery was prolonged as a result of the subsequent accident for which he seeks to recover non-economic damages. The subsequent impairment must meet the statutory threshold in order for the plaintiff to recover non-economic damages.**

14. *Shropshire v Laidlaw Transit, Inc.*, 550 F. 3d 570 (6th Cir., 2008), in which the Sixth Circuit Court of Appeals affirmed the summary disposition in favor of the trucking company finding the child did not suffer an injury affecting her general ability to lead her normal life.

The plaintiff was five years old at the time of the accident. Plaintiff claims she suffered from a **closed head injury**. She presented an affidavit from a physician that stated that plaintiff "may have a serious neurological injury" in an effort to satisfy the statutory requirement. The court ruled that it was inadmissible. As such without the affidavit, Hannah had no evidence that she suffered a serious impairment of body function and a summary judgment was granted to the defendant. Hannah was a passenger in her mother's van, was seatbelted, and struck her head against the van's window when the truck impacted the van. Hannah received no medical treatment on the day of the accident and never showed any physical signs of any injury from the accident. After a few days she began to experience headaches and a week later developed a fever and began vomiting. Hannah had various treatment. Her neurologist as well as her pediatrician concluded that there was no physical evidence of a head injury.

Over the next five years, Hannah also saw three other doctors and a neuropsychologist with the net result that an electroencephalogram indicated some abnormality in her brain.

The doctor who performed the EEG in his affidavit indicated that the plaintiff suffered a **traumatic brain injury** from the motor vehicle accident, manifested **seizures** resulting from the **closed head injury**, and indicated that he was a licensed allopathic physician who regularly diagnoses and treats closed head injury patients. He was of the opinion that the accident caused the plaintiff to sustain a closed head injury resulting in a serious neurological injury.

She testified as to what her general life had been since the accident and it appeared normal for a girl her age. She goes swimming, has friends at school, plays computer games, plays basketball, watches television, rides her bike, and over the last summer got to do all the fun stuff. She was in the third grade, but was not eager to return to school. Her grades remained good throughout the years following the accident with the exception of her handwriting grade. The trial court held that the plaintiff must meet the serious impairment of body function threshold with respect to her allegations of a closed head injury.

The trial court noted that Hannah missed only two weeks of school for visits to the doctor and this did not affect her ability to attend school nor has the injury with the alleged seizures affected her ability to participate in activities or interact with other students or friends. She enjoyed doing many things typical for a girl her age such as playing basketball, riding her bike and playing with her best friend. Her mother claimed that the five year old's ability to perform academically had been impaired. The only evidence presented was that she had a low grade in handwriting, but she had a low grade in handwriting prior to the accident. Otherwise, Hannah's grades were good.

The Sixth Circuit Court of Appeals affirmed the summary judgment indicating that the evidence presented by the plaintiff as to whether or not she had suffered a serious impairment of body function was insufficient to create an issue of fact.

## **VII. Conclusion**

The legislative reforms to Michigan's No Fault Act, Section MCL 500.3135, are being tested rigorously in the trial and appellate courts. If any assistance is needed in obtaining any case of particular interest with respect to a case you may be handling or if you have any questions, please contact Harvey Kruse, P.C. at (248) 649-7800.

**SERIOUS IMPAIRMENT OF BODY FUNCTION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>CASE/ DOCKET NO.</b>	<b>DATE</b>	<b>CIRCUIT COURT/JUDGE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
6	<i>Budnitskaya v Dreher</i>	Unpublished	1/21/98	USDC/Cohn	Headaches, dizziness, neck and back pain and nausea. Slight degenerative changes of the vertebrae with mild closed head injury and an acute cervical strain/sprain.	Granted defendant's motion for summary judgment.
8	<i>Crandall v Richmond</i>	202296	5/7/99	Ingham/Glazer	Injuries to his neck, back, and knees.	Affirmed summary disposition.
8	<i>Blatt v Lynn</i>	209686	6/22/99	Lapeer/Holowka	Injuries to neck, back, shoulder and psyche.	Affirmed the trial court's decision granting summary disposition in favor of the defendant.
8	<i>Sadik v Solberg</i>	209092	9/3/99	Wayne/Talbot	Degenerative disc disease, bilateral carpal tunnel syndrome and lumbar disc herniation.	The court determined that there was no evidence that these alleged injuries were related to the accident as opposed to pre- existing degenerative disc disease and thus found no serious impairment as a matter of law.

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8	<i>Reynolds v McAdam</i>	210104	9/10/99	Allegan/Corsiglia	Fractured clavicle and three fractured ribs, cranial nerve disorder, cervical radiculopathy, and thoracic outlet syndrome.	Affirmed summary disposition.
9	<i>Starks v Stockdale</i>	212901	10/1/99	Vanburen/Buhl	Disc space narrowing at C5-6, a diagnosis of bilateral carpal tunnel syndrome, and complaints of cervical tightness and pain.	Affirmed summary disposition.
9	<i>Mathews v Tahash</i>	212350	11/30/99	Delta/Davis	Spinal subluxation, headaches, back pain and stiffness. Spinal subluxation with chiropractic treatment.	Affirmed the lower court's granting of defendant's motion for summary disposition.
9	<i>Ogden-Schuette v Irence</i>	98-749393	12/2/99	USDC/Zatkoff	Closed head injury. 19 point drop in IQ and decreased ability to process information.	Denied summary disposition. Question of fact.

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10	<i>Kern v Blethen-Coluni</i>	240 MA 333	3/24/00	Oakland/Morris	Displaced and somewhat comminuted and oblique fracture of the right femur.	Remanded for a new trial on the issue of the plaintiff's damages.
10	<i>May v Sommerfield</i>	239 MA 197 240 MA 504	Original 3/22/00  Remand 4/18/00	Charlevoix/Pajtas	Arm injury with pain.	Remanded to the trial court to make appropriate findings concerning whether there was a factual dispute with respect to whether the plaintiff's impairment affected his " 'general ability to lead his...normal life.' " After remand, the Court of Appeals upheld the trial court's decision that the plaintiff did <u>not</u> suffer an objective manifestation of injury aside from his subjective complaint of pain and that there was no genuine issue of material fact that the impairment did <u>not</u> affect his general ability to lead his normal life.
10	<i>French v Murphy</i>	214655	5/12/00	Ingham/Collette	Pain in the neck, back, hip, elbow, and arm, as well as headaches, small disc herniation.	Court of Appeals upheld the trial court's decision granting summary disposition in favor of the defendant.

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10	<i>Miller v Purcell</i>	246 MA 244	6/1/00	Saginaw/Heathscott	Injuries to neck, arms, and back as a result of an auto accident, including an acromioclavicular separation and mild tendonitis.	Trial court denied the motion for summary disposition, but the Court of Appeals reversed.
12	<i>Churchman v Rickerson</i>	240 MA 223	6/2/00	Wayne/Talbot	Closed head and neurological injury.	Trial court had a duty to make factual findings concerning whether the pedestrian suffered a serious impairment of body function.
12	<i>Haren v Brabbs</i>	217522	217522	Washtenaw/Swartz	Laceration on the back of the plaintiff's head that required eight stitches, a concussion, contusions, and a sprained right knee.	Court of Appeals upheld summary disposition for defendant finding injuries did not meet serious impairment of body function threshold as a matter of law.
12	<i>Wilkinson v Lee</i>	463 M 388	9/26/00	Oakland/Mester	Neck strain and aggravation of pre-existing brain tumor.	The Supreme Court held that the plaintiff presented ample testimony demonstrating that his physical and mental condition declined significantly after the accident.

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13	<i>Herdus v Raffensberger</i>	219378	11/17/00	Jackson/Perlos	Injury to the eye which caused facial swelling, a drooping left eyelid, and some difficulty in vision.	The Court of Appeals found that the plaintiff's injuries were objectively manifested and constituted a serious impairment but found that they did not affect his general ability to lead a normal life. Summary disposition affirmed.
13	<i>Hicks v Mumin</i>	214004	1/12/01	Oakland/Andrews	Loss of strength in his non-dominant hand and neck pain.	The Court of Appeals ultimately concluded that the threshold was not satisfied, because there was no evidence that the plaintiff's injuries affected his general ability to lead a normal life.
13	<i>Howitt v Billings Feed &amp; Lawn, Inc.</i>	216738	1/30/01	Oakland/Nichols	Softening of cartilage in knee and dislocation of two cervical vertebrae	Affirmed summary disposition for defendant.
14	<i>Hicks v Trammer</i>	217237	1/30/01	Macomb/Servitto	Muscle spasms and numbness in extremities.	Affirmed summary disposition for defendant.

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14	<i>Mirling v Carell</i>	216843	1/30/01	Oakland/Tyner	Lost an upper incisor tooth	The court of appeals found losing a tooth was an objectively manifested injury and that the injury interfered to an extent with an important body function, namely eating. Nonetheless, a directed verdict for defendant was affirmed.
15	<i>Lullo v Heikkila</i>	226065	7/10/01	Marquette/Solka	Back injury.	The trial court granted summary disposition in favor of the defendant and the Court of Appeals affirmed.
15	<i>Perales v Partin</i>	223343	7/13/01	Genesee/Neithercut	Tendonitis, medical findings of tenderness and limited flexion.	The trial court granted summary disposition in favor of the defendant based upon a finding that the alleged injury did not satisfy the serious impairment threshold as a matter of law. Affirmed on appeal.
16	<i>Keller v Leja</i>	222589	8/21/01	Emmet/Johnson	Back pain between shoulders, tenderness, and muscle spasms, acute thoracic strain.	The trial court granted summary disposition in favor of the defendant and the Court of Appeals affirmed.

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16	<i>Massey v Garbacz</i>	221577	8/24/01	Macomb/Bruff	Injuries not specified but were age related. Limitations on some activities.	Affirmed Summary Disposition for defendants.
17	<i>Spagnuolo v Dorn</i>	225535	12/14/01	Ingham/Houk	TMJ disorder and headaches.	The trial granted summary disposition in favor of the defendants. Affirmed on Appeal.
17	<i>Moore v Clous</i>	226289	12/21/01	Wexford/Corwin.	Pain in her lower back and extremities, degenerative disc disease.	The trial court granted summary disposition in favor of the defendant.
18	<i>Abbott v State of Michigan</i>	225729	12/28/01	Ingham/Stell	Four stitches to the knee and discol lateral meniscus requiring arthroscopic surgery.	The trial court granted summary disposition . Affirmed on Appeal.

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18	<i>Block v Pawluk</i>	225124	1/4/02	Oakland/Howard	Cut lip, distracted and was having difficulty with her memory, was tired, and was having emotional problems, inner-ear concussion and a mild closed head injury.	The trial court concluded that a question of fact did not exist as to the plaintiff's alleged closed head injury, in part because her treating doctor who made the diagnosis devoted less than five percent of his practice to the diagnosis and treatment of closed head injuries. Affirmed on Appeal.
18	<i>Jackson v Nelson</i>	252 MA 643	8/27/02	Kent/Kolenda	None specified. Good discussion on objective manifestation.	Court of Appeals reversed and remanded due to error in jury instructions.
19	<i>Kreiner v Fischer</i>	471 M 109	7/23/04	Lapeer/Holowka	Back, right left hip, mild nerve root irritation per EMG, L4 radiculopathy, sciatica, and degenerative disc disease with spondylolysis.	The trial courts granted both defendants' motions for summary disposition finding that the plaintiffs failed to establish that they suffered a serious impairment of body function and the Michigan Supreme Court upheld the summary dispositions.
19	<i>Straub v Collette</i>	471 M 109	7/23/04	Monroe/LaBeau	Broken bone in little finger, injured tendons in his ring and middle fingers with surgery and casted for a month.	

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21	<i>Contreras v U.S.</i>	2004 WL 3457632	1/26/04	USDC/Quist	Broke tooth, cut lip, injured her neck and spine and degenerative disease	The court found that a genuine issue of material fact existed as to whether there was an objective manifestation, for although her disease pre-existed the accident, it was asymptomatic before the accident, and thus the accident could have aggravated it.
22	<i>Williams v Medukas</i>	266 MA 505	5/24/05	Montcalm/Miel	A fractured right shoulder and fractured left hand.	The Court of Appeals reversed summary disposition for the defendant holding that the plaintiff suffered a serious impairment of body function.
22	<i>Moore v Cregeur</i>	266 MA 501	5/24/05	Montcalm/Hoort	Multiple rib fractures, a collapsed right lung, and detached eye retinas with vision problems.	The trial court granted summary disposition to the defendant, but the court of appeals reversed.
22	<i>Chiarot v Belcher</i>	2005 WL1529620	6/23/05	USDC/Steeh	Pain in the neck, lower back, lower legs, headaches, memory loss, nausea and sleeping trouble.	The Federal Court denied the defendant's motion for summary judgment.

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23	<i>Mansor v Girnet</i>	262713	10/25/05	Macomb/Servitto	Headaches and pain from a small cut over her right eye, dizziness, blurred vision, and neck and back pain.	Affirmed summary disposition for the defendant.
23	<i>Paschal v Maloney</i>	262607	10/27/05	Washtenaw/Morris	Disc bulge.	Affirmed summary disposition for the defendant.
23	<i>Swick v Okorn</i>	263478	11/1/05	Oakland/Grant	Surgery on cervical spine.,	Affirmed summary disposition for the defendant.

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23	<i>McDaniel v Hemker</i>	268 MA 269	9/27/05	Mecosta/Benson	Head, neck, back, and shoulder injuries, traumatic cervical myositis and costochondritis, chronic neck pain, whiplash syndrome, parascapular myofascial pain and cervicogenic headaches, and foraminal stenosis exacerbated by bulged discs.	Court of Appeals reversed the summary disposition in favor of the defendant.
25	<i>Pingel v Powers</i>	263714	11/10/05	Macomb/Biernat	Degenerative changes in the spine. Thoracic strain, carpal tunnel syndrome and prescribed therapy. Surgery on both elbows, thoracic disc protrusions.	Court of Appeals reversed the Summary Disposition in favor of the defendant.



**CLOSED HEAD INJURY CASES REFERENCE CHART**

<b>Page</b>	<b>Case</b>	<b>Docket No.</b>	<b>Date</b>	<b>Significance</b>	<b>Ruling</b>
29	<i>Ogden-Schuette v Irenc</i>	98-749393	12/2/99	Discusses that a 19 point decline in IQ, decreased intellectual process, speed, and exacerbation of prior depressive disorder was sufficient evidence to go to the jury. The medical doctor used neuropsychological testing to support his diagnoses.	Trial court held that it was a question of fact for the jury to decide if closed head injury met the threshold.
29	<i>Churchman v. Rickerson</i>	240 MA 223	3/17/2000	Defines “serious neurological injury” under the statute and makes clear that not just any neurological injury is sufficient; found no abuse of discretion in trial court’s rejection of supplemental affidavit offered on motion for reconsideration.	Affirmed the trial court’s determination that affidavit was insufficient under closed head injury exception, but remanded case for findings of fact under the general serious impairment language applicable to all injuries.
30	<i>Peoples v. Halton</i>	220987	11/20/2001	Discusses substantive requirements of an affidavit offered under the statute and rejects defense challenges that author failed to consider all information and was contradicted by opinions of other physicians.	Affirmed trial court’s denial of defendant’s motion for summary disposition after remand.

**CLOSED HEAD INJURY CASES REFERENCE CHART**

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31	<i>Block v. Pawluk</i>	225124	1/04/2002	Discusses who is qualified to author affidavit under statute (neurologist whose treatment of closed head injuries made up only 5% of his total practice was not competent); also discusses the proofs offered to establish closed head injury under general serious impairment language.	Affirmed the lower court's grant of summary disposition for defendant
32	<i>Thalji v. Detroit Edison Co</i>	226426	3/26/2002	Discusses use of motion in limine to preclude evidence of closed head injury where plaintiff fails to comply with the statute and holds that while the statute provides an "automatic" means of raising an issue of fact it does not provide the exclusive means of demonstrating a sufficiently serious closed head injury and does not limit what is admissible as evidence of a closed head injury.	Affirmed jury verdict for plaintiff.

**CLOSED HEAD INJURY CASES REFERENCE CHART**

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32	<i>Randolph v. Givan</i>	233104	9/03/2002	Discusses substantive requirements for an affidavit offered under the statute and also discusses testimony supporting causation.	Reversed trial court's grant of summary disposition for defendant.
34	<i>Hoffman v. Despelder</i>	238141	1/24/2003	Discusses use of affidavit filed with motion for reconsideration, holding that the trial court did not error in refusing to consider such an untimely affidavit	Affirmed trial court's grant of summary disposition for defendant.
34	<i>Lockwood v. Wnuk</i>	237088	2/21/2003	Discusses an attempt at establishing issues of fact on serious impairment and causation without the use of an affidavit under the statute.	Reversed trial court's grant of summary disposition for defendant
36	<i>Domack v. Spink</i>	245699	7/20/2004	Discusses the need for a "physical wound" to connect the conditions complained of to the accident and emphasizes the long gap in that case between the accident and the neurological testing.	Reversed the trial court's denial of the defendant's motion for summary disposition

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37	<i>McKinnie v. Ravel</i>	241842	10/05/2004	Discusses substantive and formalistic requirements of an affidavit offered under the statute, including the requirement that the statements be made under oath; also discusses who is competent to author such an affidavit; and the need for an objectively identifiable basis of injury if the plaintiff attempts to satisfy the threshold requirement without the use of such affidavit.	Affirmed the trial court's grant of summary disposition for defendant
37	<i>Amos v. Keller Transfer Line, Inc.</i>	254232	4/26/2005	Discusses substantive and formalistic requirements of affidavit offered under the statute (a medical report containing neuropsychological test results insufficient), but holds that an affidavit is not the exclusive means of establishing a closed head injury, or showing a factual dispute on a threshold injury; also discusses issues raised by defense of test reliability and defects in testimony (matters that go to the weight of the evidence and not its admissibility).	Upheld jury verdict for plaintiff, and trial court's denial of defendant's motion for directed verdict.

**CLOSED HEAD INJURY CASES REFERENCE CHART**

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38	<i>Chiarot v. Belcher</i>	04CV73524	6/23/2005	Discusses the substantive requirements of an affidavit offered under the statute and who may author such affidavit, and found “minimally” sufficient the affidavit from plaintiff’s neurologist; the court noted the affidavit appeared to be designed specifically to satisfy the statute and also recognized Michigan case law which rejects affidavits that give conclusory opinions without scientific or factual support; but also found that the statute does not specifically require a description of the source of the affiant’s opinions and that this requirement could be satisfied with generalized factual statements.	Denied defendant’s motion for summary disposition.
39	<i>Collins v. Davis</i>	256055	10/13/2005	Discusses untimely affidavit offered under the statute and holds that such affidavit should not be considered.	Affirmed the trial court’s grant of summary disposition for defendant.

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39	<i>Fodera v. Van Lobbs</i>	256555	1/31/2006	<p>The plaintiff had offered an affidavit from her neurological expert that was sufficient under the statute to survive summary disposition. However, the Court noted that nothing in the statute prevents a jury from ultimately disagreeing with the plaintiff's experts on the existence of a closed head injury or the degree of impairment from such injury.</p>	Upheld jury verdict of no cause of action.
40	<i>Parker v. E. Conrad Trucking</i>	258037	2/28/2006	<p>Discusses who may author an affidavit under the statute and held that medical doctor that diagnosed head injuries as regular part of practice was competent; the Court added that the person does not have to specialize in brain injuries to qualify under the statute.</p>	Reversed the trial court's grant of summary disposition for defendant.

**CLOSED HEAD INJURY CASES REFERENCE CHART**

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41	<i>Ballard v. Drouse</i>	264758	3/21/2006	Explains that the burden remains with plaintiff to make an affirmative showing sufficient to defeat a well pled motion; discusses the substantive and formalistic requirements of an affidavit offered under the statute, including the requirement that affidavit be made under oath; rejects argument that such a limited view of what satisfies the statute is inconsistent with the Court Rules; and repeated requirement that a closed head injury must be serious and severe and that a “mild” injury was insufficient.	Reversed the trial court’s denial of defendant’s motion for summary disposition.



**OBJECTIVE MANIFESTATION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NUMBER</b>	<b>DATE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
53	<i>Blatt v Lynn</i>	209686	6/22/99	Injuries to neck, back, shoulder, and psyche.	Affirmed the trial court's decision granting summary disposition to defendant.
53	<i>Sadik v Solberg</i>	209092	9/3/99	Degenerative disc disease, bilateral carpal tunnel syndrome. A ten month post accident lumbar disc herniation.	The court determined there was no evidence that these alleged injuries were related to the accident. Case dismissed.
53	<i>Kern v Blethen-Coluni</i>	240 MA 333	3/24/00	Fracture of the right femur.	Reversed trial court and remanded for new trial on damages as injury was a S.I.B.F.
54	<i>May v Sommerfield</i>	240 MA 504	4/18/00	Visible injury to arm with pain.	Affirmed the trial court's decision granting summary disposition to defendant.
54	<i>French v Murphy</i>	214655	5/12/00	Pain in the neck, back, hip, elbow, arm, headaches, and small disc herniation	Affirmed summary disposition in favor of defendant.

**OBJECTIVE MANIFESTATION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NUMBER</b>	<b>DATE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
54	<i>Herdus v Raffensberger</i>	219378	11/17/00	Injury to the eye, facial swelling, drooping left eyelid and vision difficulty.	Court of Appeals found that plaintiff's injuries were objectively manifested and constituted a serious impairment but found that they did not affect his general ability to lead a normal life. Summary disposition affirmed.
55	<i>Miller v Purcell</i>	246 MA 244	2001	Injuries to neck, arms, and back including an acromial clavicular separation and mild tendonitis.	The court assumed that "plaintiff's injury was objectively manifested." Summary disposition for defendant on other grounds.
55	<i>Mirling v Carell</i>	216843	1/30/01	Lost tooth.	Court of Appeals found that the plaintiff's injury did not significantly affect his ability to lead a normal life.
55	<i>Hicks v Trammer</i>	217237	1/30/01	Muscle spasms and numbness in extremities.	Injuries objectively manifested. Summary disposition to defendant affirmed on other grounds.
56	<i>Howitt v Billings Feed &amp; Lawn, Inc.</i>	216738	1/30/01	Softening of cartilage in the knee and dislocation of two cervical vertebrae.	Injuries objectively manifested. Tort threshold was not satisfied on other

**OBJECTIVE MANIFESTATION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NUMBER</b>	<b>DATE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
					grounds.
56	<i>Perales v Partin</i>	223343	7/13/01	Tendonitis.	Affirmed summary disposition in favor of the defendant.
57	<i>Keller v Leja</i>	222589	8/21/01	Back pain between shoulders, tenderness, and muscle spasms, and thoracic strain.	Affirmed summary disposition in favor of the defendant.
57	<i>Davis v Kohl</i>	226215	11/30/01	Ruptured disc, neck and back pain, shoulder and neck pain, post traumatic impingement syndrome, spurring on shoulder bone, torn cartilage in shoulder, and tear of the anterior labrum.	Affirmed a no cause for action in favor of defendant after plaintiff appealed the jury verdict.
58	<i>Moore v Clous</i>	226289	12/21/01	Back and extremities pain. Degenerative disc disease. Unchanged one year after accident.	Granted summary disposition in favor of defendant.

**OBJECTIVE MANIFESTATION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NUMBER</b>	<b>DATE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
59	<i>Thoreson v Kuntze</i>	00-1820	12/26/01	Strained muscles of neck and trapezius, bruise or hematoma on thigh, cracked tooth, scalp abrasion and bruise to forehead.	Federal Court of Appeals found pain was not objectively manifested. No recovery.
59	<i>Jackson v Nelson</i>	252 MA 643	2002	No injuries specified. Legal issue on proper jury instructions.	Reversed jury verdict for plaintiff due to improper jury instructions..
60	<i>Washington v Reynolds</i>	237537	2/18/03	Severe and permanent injuries to ribs, back, shoulders, neck, spine as well as muscles, cords, nerves, tendons and other fibers.	Affirmed motion for summary disposition as to defendant as pain was not objectively manifested.
61	<i>Tolbert v Isham</i>	231424	5/29/03	Shoulder, aggravation of back, and partial tear of supraspinatus tendon.	Injuries objectively manifested but plaintiff did not suffer a serious impairment of body function. Judgment for defendant.
61	<i>Contreras v United States</i>	1:03-CV-360	1/26/04	Broken tooth, cut lip, injured neck and spine with degenerative disease, PTSS and depression.	Denied motion for summary disposition as to defendant. Question for the jury.

**OBJECTIVE MANIFESTATION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NUMBER</b>	<b>DATE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
62	<i>Crigler v Bryan</i>	246174	4/29/04	Injuries to neck, back, spine, muscles, cords, nerves, tendons, and other fibers contained therein, TMJ, closed head injury along with cervicogenic headache.	Reversed summary disposition for defendant. Question for the jury on objective manifestation of injuries.
62	<i>Kreiner v Fischer</i>	471 M 109	2004	Back, right leg, right hip, nerve root irritation, degenerative disc disease.	Summary disposition for defendant on other grounds.
62	<i>Mansor v Girnet</i>	262713	10/25/05	Headaches, pain from small cut over eye, dizziness, blurred vision, neck and back pain, and spasms.	No objective manifestation. Affirmed summary disposition for defendant.
63	<i>Paschal v Meloni</i>	26260	10/27/05	Disc bulge with pain.,	Objectively manifested but affirmed summary disposition for defendant on other grounds.
63	<i>Pingel v Powers</i>	263714	11/10/05	Thoracic disc protrusions and carpal tunnel syndrome shown on testing.	Summary disposition for defendant reversed and remanded for trial.

**OBJECTIVE MANIFESTATION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NUMBER</b>	<b>DATE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
63	<i>Keeley v Jackson</i>	263937	1/10/06	Aggravation of prior back injuries, spurring, degenerative changes, mild hypertrophy, facet arthrosis, mild central stenosis and bulging.	Affirmed summary disposition for defendant.
63	<i>Register v Sledge</i>	256470	1/12/06	Aggravation of head, neck and back injuries. Radiculopathy, hip pain, TMJ, cognitive deficits, dizziness, ringing in ears, light flashes and blurred vision.	Affirmed summary disposition for defendant.

**IMPORTANT BODY FUNCTION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NO.</b>	<b>DATE</b>	<b>CIRCUIT COURT/JUDGE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
65	<i>Shaw v Martin</i>	155 MA 89	10/6/86	Kalamazoo/Lamb	Head and back.	Movement of head and back is an important body function.
65	<i>Cassidy v McGovern</i>	415 M 483 overruled	12/23/82	WayneWise	Broken legs.	Walking is an important body function.
65	<i>Meklrir v Bigham</i>	147 MA 716	6/26/85	Oakland/O'Brien	Neck and back.	Movement of neck and back is an important body function.
65	<i>Paris v Lemicex</i>	152 MA 149	4/23/86	Wayne/Stacey	Back.	Movement of back is an important body function.
65	<i>Chumley v. Chrysler</i>	156 MA 474	12/2/28	Macomb/Denewith	Back.	Movement of back is an important body function.
65	<i>Kern v Blethen-Coluni</i>	240 MA 333	3/24/00	Oakland/Morris	Fracture of the right femur.	Walking is an important body function.
65	<i>Howitt v Billings Feed &amp; Lawn, Inc.</i>	216738	1/30/01	Oakland/Nichols	Impairment of knee function.	Walking is an important body function.

**IMPORTANT BODY FUNCTION CASES REFERENCE CHART**

<b>PAGE</b>	<b>NAME</b>	<b>DOCKET NO.</b>	<b>DATE</b>	<b>CIRCUIT COURT/JUDGE</b>	<b>CLAIMED INJURY(IES)</b>	<b>RULING</b>
65	<i>Washington v Reynolds</i>	237537	2/18/03	Wayne/Neilson.	Back.	Movement of back is an important body function.
66	<i>Lockwood v Wnuk</i>	237088	2/21/03	Lapeer/Holowka.	Brain.	Proper functioning of the brain is an important body function.
66	<i>Tolbert v Isham</i>	231424	5/29/03	Genesee/Ransom	Shoulder.	Movement of shoulder is an important body function.
66	<i>Randolph v Givan</i>	233104	9/23/03	Wayne/Giovan	Neck and back.	Movement of neck and back is an important body function.
66	<i>Kreiner v Fischer</i>	471 M 109	7/23/04	Lapeer/Holowka	Back and leg.	Movement of back and leg is an important body function.
66	<i>Moore v Cregeur</i>	266 MA 501	5/24/05	Montcalm/Hoort	Vision loss.	Seeing is an important body function.
66	<i>Curbelo v Auto Owners Insurance Company</i>	264928	2/23/06	Oakland/Morris	Injuries to back, leg, and Achilles. Disc protrusion in lumbar region.	Loss of response in the Achilles tendon function is an important body function.

**THE PERSON'S GENERAL ABILITY TO LEAD A NORMAL LIFE PUBLISHED CASES REFERENCE CHART**

<b>Page</b>	<b>Name</b>	<b>Docket No.</b>	<b>Date</b>	<b>Circuit Court/Judge</b>	<b>Claimed Injury(ies)</b>	<b>Ruling</b>
68	<i>Kreiner v Fischer</i>	471 Mich 109	7/23/04	Lapeer/Holowka	Back, right leg/hip, mild nerve root irritation per EMG, L4 radiculopathy, sciatica, and degenerative disc disease with spondylolysis.	Affirmed trial court's grant of summary disposition for defendant.
68	<i>Straub v Collette</i>	471 Mich 109	7/23/04	Monroe/LaBeau	Broken bone little finger, injured tendons in ring and middle fingers with surgery and casted for a month.	Affirmed trial court's grant of summary disposition for defendant.
71	<i>Williams v Medukas</i>	266 MA 505	5/24/05	Montcalm/Miel	Fractures to right shoulder and left hand.	Reversed trial court's grant of defendant's motion for summary disposition
71	<i>Moore v Cregeur</i>	266 MA 501	5/24/05	Montcalm/Hoort	Rib fractures, collapsed lung, detached retinas leading to permanent vision problems.	Reversed trial court's grant of defendant's motion for summary disposition.

**THE PERSON'S GENERAL ABILITY TO LEAD A NORMAL LIFE PUBLISHED CASES REFERENCE CHART**

<b>Page</b>	<b>Name</b>	<b>Docket No.</b>	<b>Date</b>	<b>Circuit Court/Judge</b>	<b>Claimed Injury(ies)</b>	<b>Ruling</b>
71	<i>McDaniel v Hemker</i>	268 MA 269	9/27/05	Mecosta/Benson	Damage to neck and back ligaments, slipped and bulged discs, soft tissue damage.	Reversed trial court's grant of defendant's motion for summary disposition.
73	<i>McMullen v Duddles, II</i>	405 F.Supp 2d 826	12/15/05	Fed. Ct./Quist	Radiating back pain, into groin/legs, broad based paracentral disc protrusion at L5-S1 per MRI, pain, and herniated disc.	Federal Court denied defendant's motion for summary judgment.
75	<i>Behnke v Auto Owners Insurance Co</i>	474 Mich 1004	1/13/06	Chippewa/Lambros	Neck pain, intense headaches, aggravation of objective congenital defects in plaintiff's spine with tissue, muscle, and vertebral damage.	Court of Appeals reversed trial court's bench trial judgment of no cause for action. Michigan Supreme Court reversed the Court of Appeals and reinstated the judgment of no cause for action.

**THE PERSON'S GENERAL ABILITY TO LEAD A NORMAL LIFE PUBLISHED CASES REFERENCE CHART**

<b>Page</b>	<b>Name</b>	<b>Docket No.</b>	<b>Date</b>	<b>Circuit Court/Judge</b>	<b>Claimed Injury(ies)</b>	<b>Ruling</b>
77	<i>Netter v Bowman</i>	272 MA 289	9/19/06	Wayne/Giovan	Burning and cramping pains, soft tissue injuries, and premature delivery of twins.	Affirmed trial court's grant of summary disposition for defendant.
79	<i>Debra Sue Nicke v Kenneth Michael Miller, et al</i>	477 Mich 954	12/1/06	Wayne/Drain	Pain in her back, neck and shoulder.	Michigan Supreme Court reinstated trial court's grant of summary disposition for defendant.
80	<i>Minter v City of Grand Rapids</i>	480 Mich 1181	4/25/08	Kent/Sullivan	Broken toe, cervical strain, mild traumatic brain injury, frequent head-aches, occasional dizziness, memory problems, insomnia and scar above eyebrow.	Affirmed summary disposition in part as to the broken toe and cervical strain. Reversed Court of Appeals and reinstated trial court's summary disposition for defendant as to closed head injury and scar.
83	<i>Donald D. Jones v Kathleen P. Olson, et al</i>	480 Mich 1169	4/25/08	Wexford/Corwin	Neck pain with radiation and numbness into her shoulders and arms. Stable C7 fracture of the spine.	Michigan Supreme Court reversed the Court of Appeals and reinstated the trial court's grant of summary disposition for defendant.

**THE PERSON'S GENERAL ABILITY TO LEAD A NORMAL LIFE PUBLISHED CASES REFERENCE CHART**

<b>Page</b>	<b>Name</b>	<b>Docket No.</b>	<b>Date</b>	<b>Circuit Court/Judge</b>	<b>Claimed Injury(ies)</b>	<b>Ruling</b>
84	<i>Guerrero v Smith</i>	280 MA 647	9/16/08	Ingham/Nettles-Nickerson	TBI, neurological deficits, spasms, and loss of lordotic curve.	Jury verdict for defendant of no cause of action affirmed.
85	<i>Premo v United States of America</i>	580 F.Supp 2d 562	10/2/08	Fed. Ct/Cohn	Multiple fractures to leg, ankle and foot.	Federal court granted summary judgment for defendant.
86	<i>Benefiel v Auto Owners Insurance Co.</i>	759 NW 2d 814 (MI Sup. Ct.)	12/12/08	Livingston/Reader	Disc herniation, multi-level discectomy and fusion surgery, neck and shoulder pain.	Michigan Supreme Court reversed Court of Appeals. There was a question of fact as to threshold injury which could not be decided as a matter of law.
88	<i>Shropshire v Laidlaw Transit, Inc.</i>	550 F.3d 570	12/18/08	Fed. Ct./Taylor	Closed head injury.	Affirmed the summary judgment in favor of defendant.

**EXHIBIT F**

Michigan Compiled Laws Annotated [Currentness](#)

## Chapter 500. Insurance Code of 1956

[↗](#)  The Insurance Code of 1956 ([Refs & Annos](#))[↗](#)  [Chapter 31. Motor Vehicle Personal and Property Protection](#) ([Refs & Annos](#))[↗](#)  [→ 500.3101. Security for payment of benefits; definitions](#)

Sec. 3101. (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved upon a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect.

(2) As used in this chapter:

(a) “Automobile insurance” means that term as defined in section 2102. [\[FN1\]](#)

(b) “Highway” means that term as defined in section 20 of the Michigan vehicle code, 1949 PA 300, [MCL 257.20](#).

(c) “Motorcycle” means a vehicle having a saddle or seat for the use of the rider, designed to travel on not more than 3 wheels in contact with the ground, which is equipped with a motor that exceeds 50 cubic centimeters piston displacement. The wheels on any attachment to the vehicle shall not be considered as wheels in contact with the ground. Motorcycle does not include a moped, as defined in section 32b of the Michigan vehicle code, 1949 PA 300, [MCL 257.32b](#). Motorcycle does not include an ORV.

(d) “Motorcycle accident” means a loss involving the ownership, operation, maintenance, or use of a motorcycle as a motorcycle, but not involving the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle.

(e) “Motor vehicle” means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. Motor vehicle does not include a motorcycle or a moped, as defined in section 32b of the Michigan vehicle code, 1949 PA 300, [MCL 257.32b](#). Motor vehicle does not include a farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan vehicle code pursuant to section 216 of the Michigan vehicle code, 1949 PA 300, [MCL 257.216](#). Motor vehicle does not include an ORV.

(f) “Motor vehicle accident” means a loss involving the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle regardless of whether the accident also involves the ownership, operation, maintenance, or use of a motorcycle as a motorcycle.

(g) “ORV” means a motor-driven recreation vehicle designed for off-road use and capable of cross-country travel without benefit of road or trail, on or immediately over land, snow, ice, marsh, swampland, or other natural terrain. ORV includes, but is not limited to, a multitrack or multiwheel drive vehicle, a motorcycle or related 2-wheel, 3-wheel, or 4-wheel vehicle, an amphibious machine, a ground effect air cushion vehicle, an ATV as defined in section 81101 of the natural resources and environmental protection act, 1994 PA 451, [MCL 324.81101](#), or other means of transportation deriving motive power from a source other than muscle or wind. ORV does not include a vehicle described in this subdivision that is registered for use upon a public highway and has the security described in section 3101 or 3103 [\[FN2\]](#) in effect.

(h) “Owner” means any of the following:

(i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.

(ii) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.

(i) “Registrant” does not include a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(3) Security may be provided under a policy issued by an insurer duly authorized to transact business in this state which affords insurance for the payment of benefits described in subsection (1). A policy of insurance represented or sold as providing security is considered to provide insurance for the payment of the benefits.

(4) Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved upon a highway. The person filing the security has all the obligations and rights of an insurer under this chapter. When the context permits, “insurer” as used in this chapter, includes any person filing the security as provided in this section.

CREDIT(S)

Amended by P.A.1980, No. 445, § 1, Imd. Eff. Jan. 15, 1981; P.A.1984, No. 84, § 1, Imd. Eff. April 19, 1984; P.A.1987, No. 168, § 1, Imd. Eff. Nov. 9, 1987; [P.A.1988, No. 126, § 1, Imd. Eff. May 23, 1988](#); [P.A.2008, No. 241, Imd. Eff. July 17, 2008](#).

[\[FN1\] M.C.L.A. § 500.2102.](#)

[\[FN2\] M.C.L.A. §§ 500.3101 or 500.3103.](#)

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## Chapter 500. Insurance Code of 1956

[↗](#) [The Insurance Code of 1956 \(Refs & Annos\)](#)[↗](#) [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)[➔](#) **500.3101a. Certificates of insurance; proof of insurance, confidentiality; false information, penalty**

Sec. 3101a. (1) An insurer, in conjunction with the issuance of an automobile insurance policy, as defined in section 3303, [\[FN1\]](#) shall provide 2 certificates of insurance for each insured vehicle. The insurer shall mark 1 of the certificates as the secretary of state's copy, which copy, except as otherwise provided in subsection (2), shall be filed with the secretary of state by the policyholder upon application for a vehicle registration. The secretary of state shall not maintain the certificate of insurance received under this subsection on file.

(2) The secretary of state shall accept as proof of vehicle insurance a transmission, in the format required by the secretary of state, of the insured vehicle's vehicle identification number. Vehicle identification numbers received by the secretary of state under this subsection are confidential and shall not be disclosed to any person except pursuant to an order by a court of competent jurisdiction in connection with a claim or fraud investigation or prosecution. The transmission to the secretary of state of a vehicle identification number is proof of insurance to the secretary of state for motor vehicle registration purposes only and is not evidence that a policy of insurance actually exists between an insurer and an individual.

(3) A person who supplies false information to the secretary of state under this section or who issues or uses an altered, fraudulent, or counterfeit certificate of insurance is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than \$1,000.00, or both.

## CREDIT(S)

P.A.1956, No. 218, § 3101a, added by P.A.1980, No. 461, § 1, Eff. April 1, 1981. Amended by [P.A.1995, No. 288, § 1, Imd. Eff. Jan. 9, 1996](#); [P.A.1996, No. 456, § 1, Imd. Eff. Dec. 23, 1996](#).

[\[FN1\] M.C.L.A. § 500.3303.](#)

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## Chapter 500. Insurance Code of 1956

[↖](#)  The Insurance Code of 1956 ([Refs & Annos](#))[↖](#)  [Chapter 31. Motor Vehicle Personal and Property Protection](#) ([Refs & Annos](#))[→](#) **500.3101b. Proof of insurance through Insurance Verification Board, alternative**

Sec. 3101b. All insurers who choose to provide proof of vehicle insurance to the secretary of state pursuant to section 3101a(2) [\[FN1\]](#) shall do so through the insurance verification board created in section 227b of the Michigan Vehicle Code, Act No. 300 of the Public Acts of 1949, being [section 257.227b of the Michigan Compiled Laws](#), or the organization selected by the board. If that board or the organization selected by the board is not operational and able to transmit to the secretary of state by June 1, 1996 or if the board or organization stops transmitting proof of vehicle insurance by vehicle identification number to the secretary of state, an insurer who chooses to provide proof of vehicle insurance to the secretary of state pursuant to section 3101a(2) may do so directly and is not required to do so through the board or organization. Choosing to provide proof of vehicle insurance pursuant to section 227b of the Michigan Vehicle Code, Act No. 300 of the Public Acts of 1949, being [section 257.227b of the Michigan Compiled Laws](#) is not a state mandate and may not be identified on the automobile insurance declarations page as a state mandate or a state mandated assessment. Automobile insurers in this state shall not charge their policyholders more than a sufficient amount to cover the cost of any assessment for this program.

## CREDIT(S)

P.A.1956, No. 218, § 3101b, added by [P.A.1995, No. 288, § 1, Imd. Eff. Jan. 9, 1996](#).[\[FN1\]](#) [M.C.L.A. § 500.3101a\(2\)](#).

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Chapter 500. Insurance Code of 1956

▣ [The Insurance Code of 1956 \(Refs & Annos\)](#)

▣ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3101c. Standard certified statement**

Sec. 3101c. The commissioner shall prescribe a standard certified statement that automobile insurers shall use to show pursuant to section 227a(1)(a) of the Michigan Vehicle Code, Act No. 300 of the Public Acts of 1949, being [section 257.227a of the Michigan Compiled Laws](#), that a vehicle is insured under a 6-month prepaid, non-cancelable policy.

CREDIT(S)

P.A.1956, No. 218, § 3101c, added by [P.A.1995, No. 288, § 1, Imd. Eff. Jan. 9, 1996](#).

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## Chapter 500. Insurance Code of 1956

[↗](#)  The Insurance Code of 1956 ([Refs & Annos](#))[↗](#)  [Chapter 31. Motor Vehicle Personal and Property Protection](#) ([Refs & Annos](#))[↗](#)  [→ 500.3102. Security for payment of benefits; criminal sanctions; failure to produce evidence; rebuttable presumption](#)

Sec. 3102. (1) A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter.

(2) An owner or registrant of a motor vehicle or motorcycle with respect to which security is required, who operates the motor vehicle or motorcycle or permits it to be operated upon a public highway in this state, without having in full force and effect security complying with this section or section 3101 or 3103 [\[FN1\]](#) is guilty of a misdemeanor. A person who operates a motor vehicle or motorcycle upon a public highway in this state with the knowledge that the owner or registrant does not have security in full force and effect is guilty of a misdemeanor. A person convicted of a misdemeanor under this section shall be fined not less than \$200.00 nor more than \$500.00, imprisoned for not more than 1 year, or both.

(3) The failure of a person to produce evidence that a motor vehicle or motorcycle has in full force and effect security complying with this section or section 3101 or 3103 on the date of the issuance of the citation, creates a rebuttable presumption in a prosecution under subsection (2) that the motor vehicle or motorcycle did not have in full force and effect security complying with this section or section 3101 or 3103 on the date of the issuance of the citation.

## CREDIT(S)

Amended by P.A.1980, No. 446, § 1, Imd. Eff. Jan. 15, 1981; P.A.1987, No. 187, § 1, Eff. March 30, 1988; [P.A.1990, No. 79, § 1, Imd. Eff. May 24, 1990.](#)

[\[FN1\]](#) [M.C.L.A. §§ 500.3101 or 500.3103.](#)

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Chapter 500. Insurance Code of 1956

▢ [The Insurance Code of 1956 \(Refs & Annos\)](#)

▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3103. Motorcycles, security requirements; first-party medical benefits**

Sec. 3103. (1) An owner or registrant of a motorcycle shall provide security against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by a person arising out of the ownership, maintenance, or use of that motorcycle. The security shall conform with the requirements of section 3009(1).[\[FN1\]](#)

(2) Each insurer transacting insurance in this state which affords coverage for a motorcycle as described in subsection (1) also shall offer, to an owner or registrant of a motorcycle, security for the payment of first-party medical benefits only, in increments of \$5,000.00, payable in the event the owner or registrant is involved in a motorcycle accident. An insurer providing first-party medical benefits may offer, at appropriate premium rates, deductibles, provisions for the coordination of these benefits, and provisions for the subtraction of other benefits provided or required to be provided under the laws of any state or the federal government, subject to the prior approval of the commissioner. These deductibles and provisions shall apply only to benefits payable to the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household.

CREDIT(S)

Amended by P.A.1980, No. 445, § 1; P.A.1986, No. 173, § 1, Imd. Eff. July 7, 1986.

[\[FN1\] M.C.L.A. § 500.3009\(1\).](#)

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## Chapter 500. Insurance Code of 1956

▣ The Insurance Code of 1956 ([Refs & Annos](#))▣ [Chapter 31. Motor Vehicle Personal and Property Protection](#) ([Refs & Annos](#))➔ **500.3104. Catastrophic claims association; establishment, membership; indemnification; members' obligations; powers and duties; board of directors; plan of operation**

Sec. 3104. (1) An unincorporated, nonprofit association to be known as the catastrophic claims association, hereinafter referred to as the association, is created. Each insurer engaged in writing insurance coverages that provide the security required by section 3101(1) [FN1] within this state, as a condition of its authority to transact insurance in this state, shall be a member of the association and shall be bound by the plan of operation of the association. Each insurer engaged in writing insurance coverages that provide the security required by section 3103(1) [FN2] within this state, as a condition of its authority to transact insurance in this state, shall be considered a member of the association, but only for purposes of premiums under subsection (7)(d). Except as expressly provided in this section, the association is not subject to any laws of this state with respect to insurers, but in all other respects the association is subject to the laws of this state to the extent that the association would be if it were an insurer organized and subsisting under chapter 50.

(2) The association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence:

- (a) For a motor vehicle accident policy issued or renewed before July 1, 2002, \$250,000.00.
- (b) For a motor vehicle accident policy issued or renewed during the period July 1, 2002 to June 30, 2003, \$300,000.00.
- (c) For a motor vehicle accident policy issued or renewed during the period July 1, 2003 to June 30, 2004, \$325,000.00.
- (d) For a motor vehicle accident policy issued or renewed during the period July 1, 2004 to June 30, 2005, \$350,000.00.
- (e) For a motor vehicle accident policy issued or renewed during the period July 1, 2005 to June 30, 2006, \$375,000.00.
- (f) For a motor vehicle accident policy issued or renewed during the period July 1, 2006 to June 30, 2007, \$400,000.00.

(g) For a motor vehicle accident policy issued or renewed during the period July 1, 2007 to June 30, 2008, \$420,000.00.

(h) For a motor vehicle accident policy issued or renewed during the period July 1, 2008 to June 30, 2009, \$440,000.00.

(i) For a motor vehicle accident policy issued or renewed during the period July 1, 2009 to June 30, 2010, \$460,000.00.

(j) For a motor vehicle accident policy issued or renewed during the period July 1, 2010 to June 30, 2011, \$480,000.00.

(k) For a motor vehicle accident policy issued or renewed during the period July 1, 2011 to June 30, 2013, \$500,000.00. Beginning July 1, 2013, this \$500,000.00 amount shall be increased biennially on July 1 of each odd-numbered year, for policies issued or renewed before July 1 of the following odd-numbered year, by the lesser of 6% or the consumer price index, and rounded to the nearest \$5,000.00. This biennial adjustment shall be calculated by the association by January 1 of the year of its July 1 effective date.

(3) An insurer may withdraw from the association only upon ceasing to write insurance that provides the security required by section 3101(1) in this state.

(4) An insurer whose membership in the association has been terminated by withdrawal shall continue to be bound by the plan of operation, and upon withdrawal, all unpaid premiums that have been charged to the withdrawing member are payable as of the effective date of the withdrawal.

(5) An unsatisfied net liability to the association of an insolvent member shall be assumed by and apportioned among the remaining members of the association as provided in the plan of operation. The association has all rights allowed by law on behalf of the remaining members against the estate or funds of the insolvent member for sums due the association.

(6) If a member has been merged or consolidated into another insurer or another insurer has reinsured a member's entire business that provides the security required by section 3101(1) in this state, the member and successors in interest of the member remain liable for the member's obligations.

(7) The association shall do all of the following on behalf of the members of the association:

(a) Assume 100% of all liability as provided in subsection (2).

(b) Establish procedures by which members shall promptly report to the association each claim that, on the basis

of the injuries or damages sustained, may reasonably be anticipated to involve the association if the member is ultimately held legally liable for the injuries or damages. Solely for the purpose of reporting claims, the member shall in all instances consider itself legally liable for the injuries or damages. The member shall also advise the association of subsequent developments likely to materially affect the interest of the association in the claim.

(c) Maintain relevant loss and expense data relative to all liabilities of the association and require each member to furnish statistics, in connection with liabilities of the association, at the times and in the form and detail as may be required by the plan of operation.

(d) In a manner provided for in the plan of operation, calculate and charge to members of the association a total premium sufficient to cover the expected losses and expenses of the association that the association will likely incur during the period for which the premium is applicable. The premium shall include an amount to cover incurred but not reported losses for the period and may be adjusted for any excess or deficient premiums from previous periods. Excesses or deficiencies from previous periods may be fully adjusted in a single period or may be adjusted over several periods in a manner provided for in the plan of operation. Each member shall be charged an amount equal to that member's total written car years of insurance providing the security required by section 3101(1) or 3103(1), or both, written in this state during the period to which the premium applies, multiplied by the average premium per car. The average premium per car shall be the total premium calculated divided by the total written car years of insurance providing the security required by section 3101(1) or 3103(1) written in this state of all members during the period to which the premium applies. A member shall be charged a premium for a historic vehicle that is insured with the member of 20% of the premium charged for a car insured with the member. As used in this subdivision:

(i) "Car" includes a motorcycle but does not include a historic vehicle.

(ii) "Historic vehicle" means a vehicle that is a registered historic vehicle under section 803a or 803p of the Michigan vehicle code, 1949 PA 300, [MCL 257.803a](#) and [257.803p](#).

(e) Require and accept the payment of premiums from members of the association as provided for in the plan of operation. The association shall do either of the following:

(i) Require payment of the premium in full within 45 days after the premium charge.

(ii) Require payment of the premiums to be made periodically to cover the actual cash obligations of the association.

(f) Receive and distribute all sums required by the operation of the association.

(g) Establish procedures for reviewing claims procedures and practices of members of the association. If the claims procedures or practices of a member are considered inadequate to properly service the liabilities of the

association, the association may undertake or may contract with another person, including another member, to adjust or assist in the adjustment of claims for the member on claims that create a potential liability to the association and may charge the cost of the adjustment to the member.

(8) In addition to other powers granted to it by this section, the association may do all of the following:

(a) Sue and be sued in the name of the association. A judgment against the association shall not create any direct liability against the individual members of the association. The association may provide for the indemnification of its members, members of the board of directors of the association, and officers, employees, and other persons lawfully acting on behalf of the association.

(b) Reinsure all or any portion of its potential liability with reinsurers licensed to transact insurance in this state or approved by the commissioner.

(c) Provide for appropriate housing, equipment, and personnel as may be necessary to assure the efficient operation of the association.

(d) Pursuant to the plan of operation, adopt reasonable rules for the administration of the association, enforce those rules, and delegate authority, as the board considers necessary to assure the proper administration and operation of the association consistent with the plan of operation.

(e) Contract for goods and services, including independent claims management, actuarial, investment, and legal services, from others within or without this state to assure the efficient operation of the association.

(f) Hear and determine complaints of a company or other interested party concerning the operation of the association.

(g) Perform other acts not specifically enumerated in this section that are necessary or proper to accomplish the purposes of the association and that are not inconsistent with this section or the plan of operation.

(9) A board of directors is created, hereinafter referred to as the board, which shall be responsible for the operation of the association consistent with the plan of operation and this section.

(10) The plan of operation shall provide for all of the following:

(a) The establishment of necessary facilities.

(b) The management and operation of the association.

(c) Procedures to be utilized in charging premiums, including adjustments from excess or deficient premiums from prior periods.

(d) Procedures governing the actual payment of premiums to the association.

(e) Reimbursement of each member of the board by the association for actual and necessary expenses incurred on association business.

(f) The investment policy of the association.

(g) Any other matters required by or necessary to effectively implement this section.

(11) Each board shall include members that would contribute a total of not less than 40% of the total premium calculated pursuant to subsection (7)(d). Each director shall be entitled to 1 vote. The initial term of office of a director shall be 2 years.

(12) As part of the plan of operation, the board shall adopt rules providing for the composition and term of successor boards to the initial board, consistent with the membership composition requirements in subsections (11) and (13). Terms of the directors shall be staggered so that the terms of all the directors do not expire at the same time and so that a director does not serve a term of more than 4 years.

(13) The board shall consist of 5 directors, and the commissioner shall be an ex officio member of the board without vote.

(14) Each director shall be appointed by the commissioner and shall serve until that member's successor is selected and qualified. The chairperson of the board shall be elected by the board. A vacancy on the board shall be filled by the commissioner consistent with the plan of operation.

(15) After the board is appointed, the board shall meet as often as the chairperson, the commissioner, or the plan of operation shall require, or at the request of any 3 members of the board. The chairperson shall retain the right to vote on all issues. Four members of the board constitute a quorum.

(16) An annual report of the operations of the association in a form and detail as may be determined by the board shall be furnished to each member.

(17) Not more than 60 days after the initial organizational meeting of the board, the board shall submit to the commissioner for approval a proposed plan of operation consistent with the objectives and provisions of this section, which shall provide for the economical, fair, and nondiscriminatory administration of the association and for the prompt and efficient provision of indemnity. If a plan is not submitted within this 60-day period,

then the commissioner, after consultation with the board, shall formulate and place into effect a plan consistent with this section.

(18) The plan of operation, unless approved sooner in writing, shall be considered to meet the requirements of this section if it is not disapproved by written order of the commissioner within 30 days after the date of its submission. Before disapproval of all or any part of the proposed plan of operation, the commissioner shall notify the board in what respect the plan of operation fails to meet the requirements and objectives of this section. If the board fails to submit a revised plan of operation that meets the requirements and objectives of this section within the 30-day period, the commissioner shall enter an order accordingly and shall immediately formulate and place into effect a plan consistent with the requirements and objectives of this section.

(19) The proposed plan of operation or amendments to the plan of operation are subject to majority approval by the board, ratified by a majority of the membership having a vote, with voting rights being apportioned according to the premiums charged in subsection (7)(d) and are subject to approval by the commissioner.

(20) Upon approval by the commissioner and ratification by the members of the plan submitted, or upon the promulgation of a plan by the commissioner, each insurer authorized to write insurance providing the security required by section 3101(1) in this state, as provided in this section, is bound by and shall formally subscribe to and participate in the plan approved as a condition of maintaining its authority to transact insurance in this state.

(21) The association is subject to all the reporting, loss reserve, and investment requirements of the commissioner to the same extent as would a member of the association.

(22) Premiums charged members by the association shall be recognized in the rate-making procedures for insurance rates in the same manner that expenses and premium taxes are recognized.

(23) The commissioner or an authorized representative of the commissioner may visit the association at any time and examine any and all the association's affairs.

(24) The association does not have liability for losses occurring before July 1, 1978.

(25) As used in this section:

(a) "Consumer price index" means the percentage of change in the consumer price index for all urban consumers in the United States city average for all items for the 24 months prior to October 1 of the year prior to the July 1 effective date of the biennial adjustment under subsection (2)(k) as reported by the United States department of labor, bureau of labor statistics, and as certified by the commissioner.

(b) "Motor vehicle accident policy" means a policy providing the coverages required under section 3101(1).

(c) “Ultimate loss” means the actual loss amounts that a member is obligated to pay and that are paid or payable by the member, and do not include claim expenses. An ultimate loss is incurred by the association on the date that the loss occurs.

CREDIT(S)

Amended by P.A.1980, No. 445, § 1, Imd. Eff. Jan. 15, 1981; P.A.2001, No. 3, Eff. July 1, 2002; [P.A.2002, No. 662, Eff. July 1, 2003](#).

[\[FN1\] M.C.L.A. § 500.3101.](#)

[\[FN2\] M.C.L.A. § 500.3103.](#)

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→ **500.3104b. Inoperative**

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→ **500.3105. Personal protection benefits; accidental bodily injury**

Sec. 3105. (1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

(2) Personal protection insurance benefits are due under this chapter without regard to fault.

(3) Bodily injury includes death resulting therefrom and damage to or loss of a person's prosthetic devices in connection with the injury.

(4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

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▣ [The Insurance Code of 1956 \(Refs & Annos\)](#)▣ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)→ **500.3106. Parked motor vehicles, accidental bodily injury**

Sec. 3106. (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:

- (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
- (b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
- (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

(2) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being [sections 418.101 to 418.941 of the Michigan Compiled Laws](#), or under a similar law of another state or under a similar federal law, are available to an employee who sustains the injury in the course of his or her employment while doing either of the following:

- (a) Loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from, or secured to, as cargo or freight, a motor vehicle.
- (b) Entering into or alighting from the vehicle unless the injury was sustained while entering into or alighting from the vehicle immediately after the vehicle became disabled. This subdivision shall not apply if the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from or secured to, as cargo or freight, a motor vehicle.

## CREDIT(S)

Amended by P.A.1981, No. 209, § 1, Eff. Jan. 1, 1982; P.A.1986, No. 318, § 1, Eff. June 1, 1987.

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[↗](#) [The Insurance Code of 1956 \(Refs & Annos\)](#)[↗](#) [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)[➔](#) **500.3107. Personal protection insurance benefits; allowable expenses, work loss, personal services, waivers of coverage**

Sec. 3107. (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than \$1,750.00 or more than \$5,000.00.

(b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed \$1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.

(c) Expenses not exceeding \$20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

(2) A person who is 60 years of age or older and in the event of an accidental bodily injury would not be eligible to receive work loss benefits under subsection (1)(b) may waive coverage for work loss benefits by signing a waiver on a form provided by the insurer. An insurer shall offer a reduced premium rate to a person who waives coverage under this subsection for work loss benefits. Waiver of coverage for work loss benefits applies only to work loss benefits payable to the person or persons who have signed the waiver form.

CREDIT(S)

Amended by [P.A.1988, No. 312, § 1, Eff. March 30, 1989](#); [P.A.1991, No. 191, § 1, Eff. Jan. 1, 1992](#).

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→ **500.3107a. Work loss basis**

Sec. 3107a. Subject to the provisions of section 3107(1)(b), [\[FN1\]](#) work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident.

CREDIT(S)

Amended by [P.A.1991, No. 191, § 1, Eff. Jan. 1, 1992.](#)

[\[FN1\]](#) [M.C.L.A. § 500.3107\(1\)\(b\).](#)

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➔ **500.3107b. Personal protection insurance, expenses; required coverage**

Sec. 3107b. Reimbursement or coverage for expenses within personal protection insurance coverage under section 3107 [\[FN1\]](#) is not required for either of the following:

(a) A practice of optometric service, unless that service was included in the definition of practice of optometry under section 17401 of the public health code, Act No. 368 of the Public Acts of 1978, being [section 333.17401 of the Michigan Compiled Laws](#), as of May 20, 1992.

(b) The use of therapeutic sound or electricity, or both, for the reduction or correction of spinal subluxations in a chiropractic service. This subsection shall not take effect unless Senate Bill No. 493 of the 87th Legislature is enacted into law. [\[FN2\]](#)

CREDIT(S)

P.A.1956, No. 218, § 3107b, added by [P.A.1994, No. 438, § 1, Eff. March 30, 1995](#).

[\[FN1\]](#) M.C.L.A. § 500.3107.

[\[FN2\]](#) Senate Bill No. 493 was not enacted into law.

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➔ **500.3108. Survivors' loss, personal protection benefits, scope, maximum benefits**

Sec. 3108. (1) Except as provided in subsection (2), personal protection insurance benefits are payable for a survivor's loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death and expenses, not exceeding \$20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if the deceased had not suffered the injury causing death. Except as provided in section (2) the benefits payable for a survivors' loss in connection with the death of a person in a single 30-day period shall not exceed \$1,000.00 for accidents occurring before October 1, 1978, and shall not exceed \$1,475.00 for accidents occurring on or after October 1, 1978, and is not payable beyond the first three years after the date of the accident.

(2) The maximum payable shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner. A change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum. The maximum shall apply to the aggregate benefits for all survivors payable under this section on account of the death of any one person.

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→ **500.3109. Deductions from personal protection benefits, state or federal benefits; injured person, definition; deductible coverage provisions, personal protection benefits**

Sec. 3109. (1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury.

(2) An injured person is a natural person suffering accidental bodily injury.

(3) An insurer providing personal protection insurance benefits may offer, at appropriately reduced premium rates, a deductible of a specified dollar amount which does not exceed \$300.00 per accident. This deductible may be applicable to all or any specified types of personal protection insurance benefits but shall apply only to benefits payable to the person named in the policy, his spouse and any relative of either domiciled in the same household. Any other deductible provisions require the prior approval of the commissioner.

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3109a. Deductibles and exclusions relating to other health and accident coverage**

Sec. 3109a. An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

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➔ **500.3110. Dependents of deceased person, presumptions, fact questions; termination of dependence; accrual of personal protection benefits**

Sec. 3110. (1) The following persons are conclusively presumed to be dependents of a deceased person:

(a) A wife is dependent on a husband with whom she lives at the time of his death.

(b) A husband is dependent on a wife with whom he lives at the time of her death.

(c) A child while under the age of 18 years, or over that age but physically or mentally incapacitated from earning, is dependent on the parent with whom he lives or from whom he receives support regularly at the time of the death of the parent.

(2) In all other cases, questions of dependency and the extent of dependency shall be determined in accordance with the facts as they exist at the time of death.

(3) The dependency of a surviving spouse terminates upon death or remarriage. The dependency of any other person terminates upon the death of the person and continues only so long as the person is under the age of 18 years, physically or mentally incapacitated from earning, or engaged full time in a formal program of academic or vocational education or training.

(4) Personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred.

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➔ **500.3111. Accidents occurring out of state, personal protection benefits**

Sec. 3111. Personal protection insurance benefits are payable for accidental bodily injury suffered in an accident occurring out of this state, if the accident occurs within the United States, its territories and possessions or in Canada, and the person whose injury is the basis of the claim was at the time of the accident a named insured under a personal protection insurance policy, his spouse, a relative of either domiciled in the same household or an occupant of a vehicle involved in the accident whose owner or registrant was insured under a personal protection insurance policy or has provided security approved by the secretary of state under subsection (4) of section 3101. [\[FN1\]](#)

[\[FN1\]](#) M.C.L.A. § 500.3101(4).

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→ **500.3112. Payees of personal protection benefits; payments as discharge of liability**

Sec. 3112. Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to or for the benefit of a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment among the persons entitled thereto, the insurer, the claimant or any other interested person may apply to the circuit court for an appropriate order. The court may designate the payees and make an equitable apportionment, taking into account the relationship of the payees to the injured person and other factors as the court considers appropriate. In the absence of a court order directing otherwise the insurer may pay:

(a) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor.

(b) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

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➔ **500.3113. Persons not entitled to personal protection benefits**

Sec. 3113. A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

(a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

(b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 [\[FN1\]](#) was not in effect.

(c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and was not insured by an insurer which has filed a certification in compliance with section 3163. [\[FN2\]](#)

CREDIT(S)

Amended by P.A.1986, No. 93, § 1, Eff. July 8, 1986.

[\[FN1\]](#) M.C.L.A. §§ 500.3101 or 500.3103.

[\[FN2\]](#) M.C.L.A. § 500.3163.

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## Chapter 500. Insurance Code of 1956

[↗](#) [The Insurance Code of 1956 \(Refs & Annos\)](#)[↗](#) [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)[➔](#) **500.3114. Persons entitled to personal protection or personal injury benefits; insurer providing coverage**

Sec. 3114. (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) [\[FN1\]](#) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. A personal injury insurance policy described in section 3103(2) [\[FN2\]](#) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident. When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.

(2) A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. This subsection does not apply to a passenger in the following, unless that passenger is not entitled to personal protection insurance benefits under any other policy:

(a) A school bus, as defined by the department of education, providing transportation not prohibited by law.

(b) A bus operated by a common carrier of passengers certified by the department of transportation.

(c) A bus operating under a government sponsored transportation program.

(d) A bus operated by or providing service to a nonprofit organization.

(e) A taxicab insured as prescribed in section 3101 or 3102 [\[FN3\]](#).

(f) A bus operated by a canoe or other watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point.

(3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished

vehicle.

(4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the vehicle occupied.

(b) The insurer of the operator of the vehicle occupied.

(5) A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

(b) The insurer of the operator of the motor vehicle involved in the accident.

(c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.

(d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

(6) If 2 or more insurers are in the same order of priority to provide personal protection insurance benefits under subsection (5), an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among all of the insurers.

CREDIT(S)

Amended by P.A.1980, No. 445, § 1, Imd. Eff. Jan. 15, 1981; P.A.1984, No. 372, § 1, Imd. Eff. Dec. 27, 1984; P.A.2002, No. 38, Imd. Eff. March 7, 2002.

[FN1] M.C.L.A. § 500.3101(1).

[FN2] M.C.L.A. § 500.3103(2).

[FN3] M.C.L.A. §§ 500.3101 or 500.3102.

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

→ **500.3115. Distribution of loss among personal protection insurers; benefit limits, determination**

Sec. 3115. (1) Except as provided in subsection (1) of section 3114, [\[FN1\]](#) a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) Insurers of owners or registrants of motor vehicles involved in the accident.

(b) Insurers of operators of motor vehicles involved in the accident.

(2) When 2 or more insurers are in the same order of priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers.

(3) A limit upon the amount of personal protection insurance benefits available because of accidental bodily injury to 1 person arising from 1 motor vehicle accident shall be determined without regard to the number of policies applicable to the accident.

[\[FN1\] M.C.L.A. § 500.3114.](#)

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3116. Reimbursement and indemnification among personal protection insurers; tort claims**

Sec. 3116. (1) A subtraction from personal protection insurance benefits shall not be made because of the value of a claim in tort based on the same accidental bodily injury.

(2) A subtraction from or reimbursement for personal protection insurance benefits paid or payable under this chapter shall be made only if recovery is realized upon a tort claim arising from an accident occurring outside this state, a tort claim brought within this state against the owner or operator of a motor vehicle with respect to which the security required by section 3101(3) and (4) [\[FN1\]](#) was not in effect, or a tort claim brought within this state based on intentionally caused harm to persons or property, and shall be made only to the extent that the recovery realized by the claimant is for damages for which the claimant has received or would otherwise be entitled to receive personal protection insurance benefits. A subtraction shall be made only to the extent of the recovery, exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. If personal protection insurance benefits have already been received, the claimant shall repay to the insurers out of the recovery a sum equal to the benefits received, but not more than the recovery exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. The insurer shall have a lien on the recovery to this extent. A recovery by an injured person or his or her estate for loss suffered by the person shall not be subtracted in calculating benefits due a dependent after the death and a recovery by a dependent for loss suffered by the dependent after the death shall not be subtracted in calculating benefits due the injured person.

(3) A personal protection insurer with a right of reimbursement under subsection (1), if suffering loss from inability to collect reimbursement out of a payment received by a claimant upon a tort claim is entitled to indemnity from a person who, with notice of the insurer's interest, made the payment to the claimant without making the claimant and the insurer joint payees as their interests may appear or without obtaining the insurer's consent to a different method of payment.

(4) A subtraction or reimbursement shall not be due the claimant's insurer from that portion of any recovery to the extent that recovery is realized for noneconomic loss as provided in section 3135(1) and (2)(b) [\[FN2\]](#) or for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 [\[FN3\]](#) in excess of the amount recovered by the claimant from his or her insurer.

[\[FN1\]](#) M.C.L.A. § 500.3101(3) and (4).

[\[FN2\]](#) M.C.L.A. § 500.3135(1) and (2)(b).

[\[FN3\]](#) M.C.L.A. §§ 500.3107 to 500.3110.

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## Chapter 500. Insurance Code of 1956

[↗](#) [The Insurance Code of 1956 \(Refs & Annos\)](#)[↗](#) [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)[→](#) **500.3121. Property protection benefits; property damage, accidental damage; measure of benefits; maximum benefits**

Sec. 3121. (1) Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125, and 3127. [\[FN1\]](#) However, accidental damage to tangible property does not include accidental damage to tangible property, other than the insured motor vehicle, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles.

(2) Property protection insurance benefits are due under the conditions stated in this chapter without regard to fault.

(3) Damage to tangible property consists of physical injury to or destruction of the property and loss of use of the property so injured or destroyed.

(4) Damage to tangible property is accidental, as to a person claiming property protection insurance benefits, unless it is suffered or caused intentionally by the claimant. Even though a person knows that damage to tangible property is substantially certain to be caused by his or her act or omission, he or she does not cause or suffer such damage intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

(5) Property protection insurance benefits consist of the lesser of reasonable repair costs or replacement costs less depreciation and, if applicable, the value of loss of use. However, property protection insurance benefits paid under 1 policy for damage to all tangible property arising from 1 accident shall not exceed \$1,000,000.00.

## CREDIT(S)

Amended by [P.A.1993, No. 290, § 1, Imd. Eff. Dec. 28, 1993.](#)

[\[FN1\]](#) [M.C.L.A. §§ 500.3123, 500.3125, and 500.3127.](#)

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→ **500.3123. Property damage, exclusions from coverage**

Sec. 3123. (1) Damage to the following kinds of property is excluded from property protection insurance benefits:

(a) Vehicles and their contents, including trailers, operated or designed for operation upon a public highway by power other than muscular power, unless the vehicle is parked in a manner as not to cause unreasonable risk of the damage which occurred.

(b) Property owned by a person named in a property protection insurance policy, the person's spouse or a relative of either domiciled in the same household, if the person named, the person's spouse, or the relative was the owner, registrant, or operator of a vehicle involved in the motor vehicle accident out of which the property damage arose.

(2) Property protection insurance benefits are not payable for property damage arising from motor vehicle accidents occurring outside the state.

(3) Property protection insurance benefits are not payable for property damage to utility transmission lines, wires, or cables arising from the failure of a municipality, utility company, or cable television company to comply with the requirements of section 16 of Act No. 368 of the Public Acts of 1925, being [section 247.186 of the Michigan Compiled Laws](#).

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3125. Property protection benefit claims against several insurers, priority**

Sec. 3125. A person suffering accidental property damage shall claim property protection insurance benefits from insurers in the following order of priority: insurers of owners or registrants of vehicles involved in the accident; and insurers of operators of vehicles involved in the accident.

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→ **500.3127. Distribution of loss, reimbursement, and indemnification among property protection insurers**

Sec. 3127. The provisions for distribution of loss and for reimbursement and indemnification among personal protection insurers as set forth in subsection (2) of section 3115 [\[FN1\]](#) and in section 3116 [\[FN2\]](#) also applies to property protection insurers.

[\[FN1\]](#) M.C.L.A. § 500.3115(2).

[\[FN2\]](#) M.C.L.A. § 500.3116.

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[↗](#) [The Insurance Code of 1956 \(Refs & Annos\)](#)[↗](#) [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)[➔](#) **500.3131. Residual liability coverage, existence, scope**

Sec. 3131. (1) Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. This insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs. In this state this insurance shall afford coverage for automobile liability retained by section 3135. [\[FN1\]](#)

(2) This section shall not require coverage in this state other than that required by section 3009(1).[\[FN2\]](#) This section shall apply to all insurance contracts in force as of October 1, 1973, or entered into after that date.

[\[FN1\]](#) M.C.L.A. § 500.3135.

[\[FN2\]](#) M.C.L.A. § 500.3009(1).

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➔ **500.3135. Tort liability for noneconomic loss, cause of action for damages; tort liability from ownership, maintenance, or use of motor vehicle, abolition, exceptions, damages; serious impairment of body function, defined**

Sec. 3135. (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(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.

(b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

(c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 at the time the injury occurred.

(3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 [\[FN1\]](#) was in effect is abolished except as to:

(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or prop-

erty is substantially certain to be caused by his or her act or omission, the person does not cause or suffer that harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

(b) Damages for noneconomic loss as provided and limited in subsections (1) and (2).

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 [FN2] in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

(d) Damages for economic loss by a nonresident in excess of the personal protection insurance benefits provided under section 3163(4). [FN3] Damages under this subdivision are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

(e) Damages up to \$500.00 to motor vehicles, to the extent that the damages are not covered by insurance. An action for damages pursuant to this subdivision shall be conducted in compliance with subsection (4).

(4) In an action for damages pursuant to subsection (3)(e):

(a) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

(b) Liability shall not be a component of residual liability, as prescribed in section 3131, [FN4] for which maintenance of security is required by this act.

(5) Actions under subsection (3)(e) shall be commenced, whenever legally possible, in the small claims division of the district court or the municipal court. If the defendant or plaintiff removes the action to a higher court and does not prevail, the judge may assess costs.

(6) A decision of a court made pursuant to subsection (3)(e) is not res judicata in any proceeding to determine any other liability arising from the same circumstances as gave rise to the action brought pursuant to subsection (3)(e).

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

CREDIT(S)

Amended by P.A.1995, No. 222, § 1, Eff. March 28, 1996; P.A.2002, No. 697, Eff. March 31, 2003.

[FN1] M.C.L.A. § 500.3101.

[FN2] M.C.L.A. §§ 500.3107 to 500.3110.

[FN3] M.C.L.A. § 500.3163.

[FN4] M.C.L.A. § 500.3131.

OPERATIVE EFFECT

<P.A.2002, No. 697, applies to motor vehicle accidents that occur on or after January 1, 2003, pursuant to § 1 of that act.>

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➔ **500.3141. Notice of accident**

Sec. 3141. An insurer may require written notice to be given as soon as practicable after an accident involving a motor vehicle with respect to which the policy affords the security required by this chapter.

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➔ **500.3142. Personal protection benefits, time payable, overdue payments, interest**

Sec. 3142. (1) Personal protection insurance benefits are payable as loss accrues.

(2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

(3) An overdue payment bears simple interest at the rate of 12% per annum.

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➔ **500.3143. Agreements for assignments of future benefits void**

Sec. 3143. An agreement for assignment of a right to benefits payable in the future is void.

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→ **500.3145. Limitations as to actions for personal or property protection benefits; notice of injury**

Sec. 3145. (1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

(2) An action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident.

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➔ **500.3146. Limitations as to action by insurer for recovery or indemnity**

Sec. 3146. An action by an insurer to enforce its rights of recovery or indemnity under section 3116 [\[FN1\]](#) may not be commenced later than 1 year after payment has been received by a claimant upon a tort claim with respect to which the insurer has a right of reimbursement or recovery under section 3116.

[\[FN1\] M.C.L.A. § 500.3116.](#)

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→ **500.3148. Attorney fees**

Sec. 3148. (1) An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

(2) An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation. To the extent that personal or property protection insurance benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid.

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➔ **500.3151. Mental or physical conditions material to claim, examinations, policy provisions**

Sec. 3151. When the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, the person shall submit to mental or physical examination by physicians. A personal protection insurer may include reasonable provisions in a personal protection insurance policy for mental and physical examination of persons claiming personal protection insurance benefits.

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→ **500.3152. Reports as to mental or physical examinations, waiver of privilege**

Sec. 3152. If requested by a person examined, a party causing an examination to be made shall deliver to him a copy of every written report concerning the examination rendered by an examining physician, at least 1 of which reports shall set out his findings and conclusions in detail. After such request and delivery, the party causing the examination to be made is entitled upon request to receive from the person examined every written report available to him or his representative concerning any examination relevant to the claim, previously or thereafter made, of the same mental or physical condition, and the names and addresses of physicians and medical care facilities rendering diagnoses or treatment in regard to the injury or to a relevant past injury, and shall authorize the insurer to inspect and copy records of physicians, hospitals, clinics or other medical facilities relevant to the claim. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the person examined waives any privilege he may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

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➔ **500.3153. Refusal to submit to mental or physical examination or to make available reports of such examinations, court orders**

Sec. 3153. A court may make such orders in regard to the refusal to comply with sections 3151 and 3152 [\[FN1\]](#) as are just, except that an order shall not be entered directing the arrest of a person for disobeying an order to submit to a physical or mental examination. The orders that may be made in regard to such a refusal include, but are not limited to:

- (a) An order that the mental or physical condition of the disobedient person shall be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order.
- (b) An order refusing to allow the disobedient person to support or oppose designated claims or defenses, or prohibiting him from introducing evidence of mental or physical condition.
- (c) An order rendering judgment by default against the disobedient person as to his entire claim or a designated part of it.
- (d) An order requiring the disobedient person to reimburse the insurer for reasonable attorneys' fees and expenses incurred in defense against the claim.
- (e) An order requiring delivery of a report, in conformity with section 3152, on such terms as are just, and if a physician fails or refuses to make the report a court may exclude his testimony if offered at trial.

[\[FN1\]](#) [M.C.L.A. §§ 500.3151](#) and [500.3152](#).

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3157. Charges for products, services, and accommodations in treating injured persons**

Sec. 3157. A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

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→ **500.3158. Statement of earnings; reports and records of treatment of injured persons**

Sec. 3158. (1) An employer, when a request is made by a personal protection insurer against whom a claim has been made, shall furnish forthwith, in a form approved by the commissioner of insurance, a sworn statement of the earnings since the time of the accidental bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based.

(2) A physician, hospital, clinic or other medical institution providing, before or after an accidental bodily injury upon which a claim for personal protection insurance benefits is based, any product, service or accommodation in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, if requested to do so by the insurer against whom the claim has been made, (a) shall furnish forthwith a written report of the history, condition, treatment and dates and costs of treatment of the injured person and (b) shall produce forthwith and permit inspection and copying of its records regarding the history, condition, treatment and dates and costs of treatment.

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

→ **500.3159. Discovery**

Sec. 3159. In a dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment and dates and costs of treatment, a court may enter an order for the discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions and scope of the discovery. A court, in order to protect against annoyance, embarrassment or oppression, as justice requires, may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

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## Chapter 500. Insurance Code of 1956

[↗](#) [The Insurance Code of 1956 \(Refs & Annos\)](#)[↗](#) [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)[→](#) **500.3163. Certification regarding automobile liability policy protections for nonresidents; limitations on recovery for accidental bodily injury**

Sec. 3163. (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.

(2) A nonadmitted insurer may voluntarily file the certification described in subsection (1).

(3) Except as otherwise provided in subsection (4), if a certification filed under subsection (1) or (2) applies to accidental bodily injury or property damage, the insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage.

(4) If an insurer of an out-of-state resident is required to provide benefits under subsections (1) to (3) to that out-of-state resident for accidental bodily injury for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to \$500,000.00. Benefits under this subsection are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.

## CREDIT(S)

Amended by [P.A.2002, No. 697, Eff. March 31, 2003](#).

## OPERATIVE EFFECT

<P.A.2002, No. 697, applies to motor vehicle accidents that occur on or after January 1, 2003, pursuant to § 1 of that act.>

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3171. Assigned claims facility and plan**

Sec. 3171. The secretary of state shall organize and maintain an assigned claims facility and plan. A self-insurer and insurer writing insurance as provided by this chapter in this state shall participate in the assigned claims plan. Costs incurred in the operation of the facility and the plan shall be allocated fairly among insurers and self-insurers. The secretary of state shall promulgate rules to implement the facility and plan in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948.

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▢ [The Insurance Code of 1956 \(Refs & Annos\)](#)

▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3172. Personal protection insurance benefits through assigned claims plan**

Sec. 3172. (1) A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through an assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. In such case unpaid benefits due or coming due are subject to being collected under the assigned claims plan, and the insurer to which the claim is assigned, or the assigned claims facility if the claim is assigned to it, is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility.

(2) Except as otherwise provided in this subsection, personal protection insurance benefits, including benefits arising from accidents occurring before the effective date of this subsection, payable through an assigned claims plan shall be reduced to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits, to a person claiming personal protection insurance benefits through the assigned claims plan. This subsection shall only apply when the personal protection insurance benefits are payable through the assigned claims plan because no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. As used in this subsection “sources” and “benefit sources” do not include the program for medical assistance for the medically indigent under the social welfare act, Act No. 280 of the Public Acts of 1939, being [sections 400.1 to 400.121 of the Michigan Compiled Laws](#), or insurance under the health insurance for the aged act, title XVIII of the social security amendments of 1965.

(3) If the obligation to provide personal protection insurance benefits cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, and if a method of voluntary payment of benefits cannot be agreed upon among or between the disputing insurers, all of the following shall apply:

(a) The insurers who are parties to the dispute shall, or the claimant may, immediately notify the assigned claims facility of their inability to determine their statutory obligations.

- (b) The claim shall be assigned by the assigned claims facility to an insurer which shall immediately provide personal protection insurance benefits to the claimant or claimants entitled to benefits.
- (c) An action shall be immediately commenced on behalf of the assigned claims facility by the insurer to whom the claim is assigned in circuit court for the purpose of declaring the rights and duties of any interested party.
- (d) The insurer to whom the claim is assigned shall join as parties defendant each insurer disputing either the obligation to provide personal protection insurance benefits or the equitable distribution of the loss among the insurers.
- (e) The circuit court shall declare the rights and duties of any interested party whether or not other relief is sought or could be granted.
- (f) After hearing the action, the circuit court shall determine the insurer or insurers, if any, obligated to provide the applicable personal protection insurance benefits and the equitable distribution, if any, among the insurers obligated therefor, and shall order reimbursement to the assigned claims facility from the insurer or insurers to the extent of the responsibility as determined by the court. The reimbursement ordered under this subdivision shall include all benefits and costs paid or incurred by the assigned claims facility and all benefits and costs paid or incurred by insurers determined not to be obligated to provide applicable personal protection insurance benefits, including reasonable attorney fees and interest at the rate prescribed in section 3175 [FN1] as of December 31 of the year preceding the determination of the circuit court.

CREDIT(S)

Amended by P.A.1984, No. 426, § 1, Eff. March 29, 1985.

[FN1] M.C.L.A. § 500.3175.

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▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3173. Persons disqualified from receiving personal protection benefits under assigned claims plans**

Sec. 3173. A person who because of a limitation or exclusion in sections 3105 to 3116 [\[FN1\]](#) is disqualified from receiving personal protection insurance benefits under a policy otherwise applying to his accidental bodily injury is also disqualified from receiving benefits under the assigned claims plan.

[\[FN1\] M.C.L.A. §§ 500.3105 to 500.3116.](#)

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→ **500.3173a. Determination of eligibility for benefits under assigned claims plan**

Sec. 3173a. The assigned claims facility shall make an initial determination of the claimant's eligibility for benefits under the assigned claims plan and shall deny an obviously ineligible claim. The claimant shall be notified promptly in writing of the denial and the reasons for the denial.

CREDIT(S)

P.A.1956, No. 218, § 3173a, added by P.A.1984, No. 426, § 1, Eff. March 29, 1985.

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▣ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3174. Notice of claim through assigned claims plan; assignment of claim; notice to claimant; action by claimant**

Sec. 3174. A person claiming through an assigned claims plan shall notify the facility of his claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned, or of the facility if the claim is assigned to it. An action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later.

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## Chapter 500. Insurance Code of 1956

▣ The Insurance Code of 1956 ([Refs & Annos](#))▣ [Chapter 31. Motor Vehicle Personal and Property Protection](#) ([Refs & Annos](#))→ **500.3175. Rules for assignment of claims, fair allocation of burden among insurers; payment of loss, time, reimbursement; loss adjustment costs; indemnity or reimbursement rights against third parties**

Sec. 3175. (1) The assignment of claims shall be made according to rules that assure fair allocation of the burden of assigned claims among insurers doing business in this state on a basis reasonably related to the volume of automobile liability and personal protection insurance they write on motor vehicles or of the number of self-insured motor vehicles. An insurer to whom claims have been assigned shall make prompt payment of loss in accordance with this act and is thereupon entitled to reimbursement by the assigned claims facility for the payments and the established loss adjustment cost, together with an amount determined by use of the average annual 90-day United States treasury bill yield rate, as reported by the council of economic advisers as of December 31 of the year for which reimbursement is sought, as follows:

(a) For the calendar year in which claims are paid by the insurer, the amount shall be determined by applying the specified annual yield rate specified in this subsection to 1/2 of the total claims payments and loss adjustment costs.

(b) For the period from the end of the calendar year in which claims are paid by the insurer to the date payments for the operation of the assigned claims facility and the assigned claims plan are due, the amount will be determined by applying the annual yield rate specified in this subsection to the total claims payments and loss adjustment costs multiplied by a fraction the denominator of which is 365 and the numerator of which is equal to the number of days that have elapsed between the end of the calendar year and the date payments for the operation of the assigned claims facility and the assigned claims plan are due.

(2) The insurer to whom claims have been assigned shall preserve and enforce rights to indemnity or reimbursement against third parties and account to the assigned claims facility therefor and shall assign such rights to the assigned claims facility upon reimbursement by the assigned claims facility. This section shall not preclude an insurer from entering into reasonable compromises and settlements with third parties against whom rights to indemnity or reimbursement exist. The insurer shall account to the assigned claims facility for such compromises and settlements. The rules promulgated under section 3171 [\[FN1\]](#) shall include a rule establishing reasonable standards for enforcing rights to indemnity or reimbursement against third parties, including a standard establishing a value for such rights below which actions to preserve and enforce the rights need not be pursued.

(3) An action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of 2 years after the assignment of the claim to the insurer or 1 year after the date of the last payment to the claimant.

(4) Payments for the operation of the assigned claims facility and plan not paid by the due date shall bear interest at the rate of 20% per annum.

(5) The secretary of state through the facility may enter into a written agreement with the debtor permitting the payment of the judgment or acknowledgment of debt in installments payable to the facility.

CREDIT(S)

Amended by P.A.1984, No. 426, § 1, Eff. March 29, 1985.

[\[FN1\] M.C.L.A. § 500.3171.](#)

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▢ [The Insurance Code of 1956 \(Refs & Annos\)](#)

▢ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

➔ **500.3176. Assigned claims handling and disposition costs, rates**

Sec. 3176. Reasonable costs incurred in the handling and disposition of assigned claims, including amounts paid pursuant to assessments under section 3171, [\[FN1\]](#) shall be taken into account in making and regulating rates for automobile liability and personal protection insurance.

[\[FN1\] M.C.L.A. § 500.3171.](#)

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[↗](#)  The Insurance Code of 1956 ([Refs & Annos](#))[↗](#)  [Chapter 31](#). Motor Vehicle Personal and Property Protection ([Refs & Annos](#))[➔](#) **500.3177. Recovery of personal protection benefits paid from the owner or registrant of uninsured motor vehicle; suspension or revocation of motor vehicle registration and operator's license; uninsured motor vehicle, definition**

Sec. 3177. (1) An insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the owner or registrant of the uninsured motor vehicle or from his or her estate. Failure of such a person to make payment within 30 days after judgment is a ground for suspension or revocation of his or her motor vehicle registration and license as defined in section 25 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being [section 257.25 of the Michigan Compiled Laws](#). An uninsured motor vehicle for the purpose of this section is a motor vehicle with respect to which security as required by sections 3101 and 3102 [\[FN1\]](#) is not in effect at the time of the accident.

(2) The motor vehicle registration and license shall not be suspended or revoked and the motor vehicle registration and license shall be restored if the debtor enters into a written agreement with the secretary of state permitting the payment of the judgment in installments, if the payment of any installments is not in default.

(3) The secretary of state upon receipt of a certified abstract of court record of a judgment or notice from the insurer of an acknowledgment of debt shall notify the owner or registrant of an uninsured vehicle of the provisions of subsection (1) at that person's last recorded address with the secretary of state and inform that person of the right to enter into a written agreement with the secretary of state for the payment of the judgment or debt in installments.

## CREDIT(S)

Amended by P.A.1984, No. 426, § 1, Eff. March 29, 1985.

[\[FN1\]](#) [M.C.L.A. §§ 500.3101 and 500.3102.](#)

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▣ [The Insurance Code of 1956 \(Refs & Annos\)](#)

▣ [Chapter 31. Motor Vehicle Personal and Property Protection \(Refs & Annos\)](#)

→ **500.3179. Applicability**

Sec. 3179. This act applies to motor vehicle accidents occurring on or after October 1, 1973.

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