ADJUSTING CLAIMS FOR MICHIGAN CLOSED HEAD INJURY AUTO THRESHOLD CASES

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I. INTRODUCTION

Since the effective date of the no-fault law and outside of liability questions concerning the cause of the accident itself, adjusting the third party auto case has always involved an application of the specific allegations concerning the injury allegedly suffered in the context of the framework set forth by the legislature in MCL § 500.3135. That statute creates three categories of threshold injuries for which a person may recover under Michigan law: serious permanent disfigurement; serious impairment of body function; and death. The focus on such claims has primarily involved the determination of the second of the three threshold injuries, the serious impairment of a body function. Ordinarily, claims under this provision focus on physical injuries such as fractures and disc conditions. However, in light of ever increasing difficulties for injured claimants to meet this significant threshold, claimants are shifting focus under this provision to claims of "closed head injury." These claims are becoming more frequent in Michigan third-party cases because a jury question may be created by submitting an affidavit of a doctor who regularly diagnoses or treats closed head injuries opining that there "may be a serious neurological injury."

This primer is designed to enhance the adjuster's knowledge concerning claims of closed head injuries. It discusses the landscape of Michigan law, including published and unpublished cases of Michigan appellate courts, what experts might be used to investigate or substantiate such claims, and the common defenses to such claims. In practice, the information this primer provides can be used to determine if a threshold injury under the closed head injury exception exists.

Harvey Kruse, P.C. is available to answer further questions as they arise.

II. UNDERSTANDING CLOSED HEAD INJURY

A. CLOSED HEAD INJURIES AND THEIR CAUSES

Closed head injury is the occurrence of injury to the brain within a skull that has not been broken or penetrated. Most frequently, closed head injury is the direct result of a blow to the head, which may either occur while the head is stationary, such as in an assault, or moving, such as in an auto accident. Although most frequently associated with actual impact with the head, most plaintiffs' experts and many defense experts will opine that such injuries may occur in the absence of any outward trauma to the head. Such experts believe that the "inertia" of an automobile accident results in the rapid acceleration or deceleration of the brain, causing impact damage inside the skull between the brain and the skull, even in the absence of a physical blow to the head. These opinions are generally supported by the literature in the field, and it is increasingly difficult to find any expert who will opine that no closed head injury will occur in the absence of a blow to the head. See e.g., Gennarelli and Thibault, DIFFUSE AXONAL INJURY AND TRAUMATIC COMA IN THE PRIMATE, 1982; Ommaya AK, Hirsch AE, Martinez JL, THE ROLE OF WHIPLASH IN CEREBRAL CONCUSSION, Proc 10th Stapp Car Crash Con 1966.[1]

[1] This report is not without criticism. A careful review of the study indicates that the monkeys used in the study were equipped with large metal cages, which greatly increased the weight (and therefore the inertia) of their heads during the tests. It is believed that these cages may have induced the injury, rather than the forces. In addition, the

Experts will often discuss the injury mechanism of closed head injury claims in terms of either "impact" or "shear." "Impact" denotes those closed head injuries that result from a direct impact to the head, either while the head is moving or stationary. The damage may be caused by the head forcefully hitting an object such as the dashboard of a car (closed head injury) or by something passing through the skull and piercing the brain, as in a gunshot wound (penetrating head injury). This type of injury may also occur when a person is struck in the head with an object, such as in the case of a battery. Because the size and structure of the object involved in the impact may vary considerably, the seriousness of the resulting injury may likewise differ under the circumstances of each individual case.

Conversely, the term "shear" is used to describe an injury mechanism to the brain as a result of the brains movement within and against the skull in the absence of a blow to the head. Although the vast majority of closed head injuries involve a direct blow to the head, "shear" injuries have been reported without impact. In fact, animal studies on primates involving rapid acceleration of the head without impact in one of three directions produced comas. See e.g., Gennarelli and Thibault, DIFFUSE AXONAL INJURY AND TRAUMATIC COMA IN THE PRIMATE, 1982. Though the merits of such studies are questionable, the fact remains that published studies do exist that support such claims.

B. TRAUMATIC BRAIN INJURY

Regardless of cause, the term closed head injury involves a traumatic injury to the brain. Traumatic brain injury ("TBI") is sudden physical damage to the brain most frequently associated with closed head injury claims. These injuries may include trauma to a specific area of the brain, known as focal trauma, or may include non-specific damage, known as diffuse trauma. The physical, behavioral, or mental changes that may result from head trauma depend on the areas of the brain injured.

Focal injuries are the most frequent types of traumatic brain injury. These injuries are generally confined to a small area of the brain that was directly damaged. The focal damage is most often at the point where the head hits an object or where an object, such as a bullet, enters the brain. Many, but not all, of these types of injuries may be objectively verified on CT or MRI scans.

In addition to focal damage, closed head injuries may also involve diffuse brain injury. Experts typically opine that such diffuse damage occurs when the impact of the injury causes the brain to move back and forth against the inside of the bony skull. These experts believe that the frontal and temporal lobes of the brain, the major speech and language areas, often receive the most damage because they sit in pockets of the skull that allow more room for the brain to shift and sustain injury. The experts claim that because these major speech and language areas are

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G-forces present in these accidents are greater than what is ordinarily seen in most low speed collisions, rendering the results meaningless for most accidents. Finally, it should be noted that Ommaya himself reported on page 815 of his SAE paper No. 700401, 1970, that:

> "It is obvious therefore that our predicted tolerance of the onset of cerebral concussion in man is based on our scaling method in terms of rotational velocity and acceleration must be considered only as a useful hypothesis which requires further evaluation."

more susceptible to such damage, they therefore often are damaged. As a result, the experts claim that communication difficulties frequently occur following closed head injuries. Other problems resulting from such damage include voice, swallowing, walking, balance, and coordination difficulties, as well as changes in the ability to smell, memory and cognitive skills. Cognitive and communication problems that result from traumatic brain injury vary from person to person. The problems a given individual may experience depends on a number of factors, including his or her personality, pre-injury abilities, and the severity of their brain damage.

C. TYPICAL EFFECTS OF TRAUMATIC BRAIN INJURY

The effects of a traumatic brain injury are generally greatest immediately following the injury. Typically, most experts agree that head injuries progress, and that patients are at their worst immediately following their head trauma. What this means is that, absent malingering, any claimant's condition should generally improve with time. The rationale for this is straightforward. A newly injured brain often suffers temporary damage from swelling and a form of "bruising" or contusion. These types of damages are usually temporary and not permanent. Once this initial swelling or bruising subsides, the functions of those areas of the brain are likely to return.

In some litigation stages, a person may claim that effects of head trauma appeared days, weeks, or months later. Certain experts may opine that these individuals suffer from closed head or traumatic brain injury. These types of claims appear spurious, especially where a person's mental and neurological functioning is tested at or near the time of the accident. In many of these cases, the experts providing such opinions have not been given complete information.

Generally, patients with mild diffuse traumatic brain injuries should improve over a few months. Such damage typically is not serious, and may allow a patient to quickly return to normal activity. Focal damage, even if mild, is more likely to result in long-term, permanent difficulties. Improvements can occur as other areas of the brain learn to take over the function of the damaged areas. Children's brains are much more capable of this type of flexibility than are the brains of adults. For this reason, children who suffer brain trauma might progress better than adults with similar damage.

In moderate to severe diffuse or focal injuries, the swelling may cause pressure on a lower part of the brain called the brainstem, which controls consciousness or wakefulness. Some individuals who suffer these types of injuries become comatose. Although some people recover from a coma, becoming alert and able to communicate, others do not, and the actual prognosis of comatose patients cannot be guaranteed.

The most frequently associated problems that result from traumatic brain injury are cognitive in nature. Cognitive impairments may include problems in concentration, organization of thoughts, memory and confusion. Claimants typically will report difficulty learning new information, and an inability to interact or interpret the actions of others in social situations. Others will report difficulty in solving problems, making decisions, exercising good judgment, and planning.

In some cases, claimants will allege language deficits. Such problems often include word-finding difficulty, poor sentence formation, and lengthy and often faulty descriptions or explanations. Others will report difficulty understanding multiple meanings in jokes, sarcasm, and adages or figurative expressions. Individuals with traumatic brain injuries are often unaware of their errors and can become frustrated or angry and place the blame for communication difficulties on the person to whom they are speaking. Reading and writing abilities are often worse than those for speaking and understanding spoken words. Simple and complex mathematical abilities are often affected.

Similar to individuals who have suffered strokes, speech problems are sometimes reported by patients with closed head injuries. Typical problems include slow, slurred, or poorly expressed words (dysarthria). These individuals may also experience problems swallowing (dysphagia). Others may have difficulty with strength saying words correctly in a consistent way (apraxia of speech).

Some apparent effects from a traumatic brain injury may be misleading. Claimant experts frequently couple brain injury problems with psychological conditions, such as posttraumatic stress disorder. The injury sequelae of psychological injuries such as these may mirror or even enhance similar conditions suffered from an actual brain injury. Claimant experts typically lump such conditions together and treat the entirety of the claimant's injuries as resulting from the brain injury alone. The failure of these experts to separate psychological conditions from traumatic brain injury can make injury diagnosis and prognosis even more difficult. Therefore, it is difficult to predict accurately the extent of long-term problems in the first weeks following a traumatic brain injury.

D. ASSESSING CLOSED HEAD INJURY

The assessment of cognitive and communication problems is a difficult task. Immediately following the injury, a neurologist (a physician who specializes in nervous system disorders) or another physician may conduct an informal, bedside evaluation of attention, memory, and the ability to understand and speak. Typically conducted in the emergency room, or even by EMS technicians, these reports may be expressed in a Glasgow Coma Scale. The Glasgow Coma Scale is the most widely used scoring system used in quantifying level of consciousness following a traumatic brain injury. It is used primarily because it is simple, has a relatively high degree of reliability, and correlates well with outcome following severe brain injury.

The Glasgow Coma Scale involves three determinants, eye opening, verbal responses, and motor responses. Each is measured and provided a numerical value. These determinants are evaluated separately according to a numerical value that indicates the level of consciousness and the degree of dysfunction. Scores run from a high of 15 to a low of 3. Persons are considered to have experienced a "mild" brain injury when their score is 13 to 15. A score of 9 to 12 is considered to indicate a "moderate" brain injury and a score of 8 or less reflects a "severe" brain

injury.[2]

Once the person's physical condition has stabilized, a speech-language pathologist may evaluate cognitive and communication skills. Speech-language pathologists are master's degree level professionals who specialize in treatment of conditions of verbal, speech, memory and swallowing problems. Hospitals generally maintain a staff of acute-care speech language pathologists who may work with severely injured patients shortly after an accident. These professionals conduct speech assessments, and swallowing studies during initial stays at hospitals. In more severe cases, injured patients may also work with speech language professionals in after care, rehabilitation, or therapeutic settings.

A neuropsychologist may also evaluate other cognitive and behavioral abilities. These individuals usually assess cognitive function by administering a series of standardized tests designed to determine the mental and cognitive status of an individual. These experts ordinarily score these tests and compare the results to reported pre-accident (pre-morbid) conditions to reach a conclusion regarding any impairment. There are a wide variety of tests that may be administered, and each has known problems and indicators for reliability. The difficulty with these tests is that the same data may be scored differently by different experts. Mistakes in pre-morbid activities may make a person seem to be more impaired than they are. In order to insure best results, a comparison with educational records is recommended and may be necessary.

Occasionally, occupational therapists may also assess cognitive skills related to the individual's ability to perform "activities of daily living" (ADL) such as dressing or preparing meals. In addition, an audiologist may be used to assess hearing. All assessments continue at frequent intervals during the rehabilitative process so that progress can be documented and treatment plans updated. The rehabilitative process may last for several months to a year or more.

E. TREATMENT FOR CLOSED HEAD INJURY

The cognitive and communication problems of tr aumatic brain injury are best treated

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[2] The GCS is scored between 3 and 15, 3 being the worst, and 15 the best. See Teasdale G., Jennett B., LANCET (ii) 81-83, 1974. It is composed of three parameters: Best Eye Response, Best Verbal Response, Best Motor Response, as given below:

Best Eye Response. (4)	Best Verbal Response. (5)	Best Motor Response. (6)
1. No eye opening.	1. No verbal response	1. No motor response.
2. Eye opening to pain.	2. Incomprehensible sounds.	2. Extension to pain.
3. Eye opening to verbal command.	3. Inappropriate words.	3. Flexion to pain.
4. Eyes open spontaneously.	4. Confused	4. Withdrawal from pain.
	5. Orientated	5. Localizing pain.
		6. Obeys commands.

Id. Note that the phrase 'GCS of 11' is essentially meaningless, and it is important to break the figure down into its components, such as E3V3M5 = GCS 11. A Coma Score of 13 or higher correlates with a mild brain injury, 9 to 12 is a moderate injury and 8 or less a severe brain injury.

early, often beginning while the individual is still in the hospital. This early therapy will frequently center on increasing skills of alertness and attention. The focus is on improving orientation to person, place, time, and situation, and stimulating speech understanding. The therapist will also provide oral-motor exercises in cases where the individual has speech and swallowing problems.

Longer term rehabilitation may be performed individually, in groups, or both, depending upon the needs of the individual. This therapy often occurs in a rehabilitation facility designed specifically for the treatment of individuals with traumatic brain injury. This type of setting allows for intensive therapy by speech-language pathologists, physical therapists, occupational therapists, and neuropsychologists at a time when the individual can best benefit from such intensive therapy. Other individuals may receive therapy at home by visiting therapists or on an outpatient basis at a hospital, medical center, or rehabilitation facility.

The goal of rehabilitation is to help the individual progress to the most independent level of functioning possible. For some, ability to express needs verbally in simple terms may be a goal. For others, the goal may be to express needs by pointing to pictures. For still others, the goal of therapy may be to improve the ability to define words or describe consequences of actions or events.

Therapy will focus on regaining lost skills as well as learning ways to compensate for abilities that have been permanently changed because of the brain injury. Most individuals respond best to programs tailored to their backgrounds and interests. The most effective therapy programs involve family members who can best provide this information.

Therapy for closed head injury, however, should be carefully distinguished from that related to psychological trauma. Although psychological trauma may be a legitimate result of an accident, it is typically defined as a separate and distinct injury from traumatic brain injury. Notably, psychological trauma is not necessarily the result of closed head injury. Although traumatic brain injury symptoms may mimic psychological conditions or include psychological conditions, treatment for psychological trauma is typically distinct from that relating to closed head injuries. Unfortunately, many experts lump such conditions together and frequently discuss the two types of injury interchangeably.

III. THRESHOLD INJURY UNDER MICHIGAN LAW: THE CLOSED HEAD INJURY EXCEPTION

Given that understanding of traumatic brain injury, the question arises as to when a closed head injury constitutes a threshold injury under Michigan law. 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). Such a threshold is met only where a person suffers a "serious impairment of a body function." *Id.* The statute states:

> 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.
> >
> > * * * *
>
> (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.

M.C.L.A. 500.3135.

A "serious impairment of a body function" has been defined in many ways. In closed head injury cases, a serious impairment threshold is met where the claimant has suffered from a "serious neurological injury." Specifically, MCL 500.3135(2)(a)(ii) provides, in pertinent part, that for closed head injuries, "*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.*" Presumably, this language was put into the statute in recognition of the great difficulty that exists in producing objective evidence of closed head injuries through neurodiagnostic testing. But whatever the underlying rationale behind this

"closed head injury exception," the exception exists and it must be considered in adjusting the closed head injury case. In practice, this provision gives persons claiming closed head injuries an additional means by which they can establish an issue of fact, and thereby defeat a motion for summary disposition. See *Churchman v. Rickerson,* 240 Mich. App. 223; 611 N.W.2d 333 (2000). It is not the sole means by which a closed head injury can be shown to be sufficiently serious under the statute, or by which a plaintiff with other injuries aside from his or her closed head injury can satisfy the threshold requirement. *Id.* Importantly, testimony that is offered under MCL 500.3135(2)(a)(ii) that concerns just any neurological injury is insufficient. *Id.* Rather, to satisfy this "closed head injury exception", the proffered testimony must be of a serious neurological injury. *Id.*

These issues were defined by the Court of Appeals in *Churchman v. Rickerson*, 240 Mich. App. 223; 611 N.W.2d 333 (2000). In *Churchman*, a minor plaintiff allegedly suffered a "traumatic" closed head injury in a pedestrian-automobile accident. Her doctor provided evidence that she had suffered "traumatic" brain injury as a result of the accident. Finding that this failed to meet the threshold, the trial court granted summary judgment. The Court of Appeals affirmed. In doing so, the Court expressly rejected the plaintiff's argument that anyone suffering a closed head injury automatically recovered. Noting that "the legislature would not have required testimony that a plaintiff had sustained a *serious neurological injury…,"* if such were the case, the Court clarified that only "serious" closed head injuries sufficed to meet this threshold.

The Court noted that a finding of "traumatic brain injury" was insufficient, since "traumatic brain injury" could be classified as mild, moderate or severe. However, the statute required a serious injury, which it noted included an injury that is "dangerous, [and one] potentially resulting in death or other severe consequences." More importantly, although the Court conceded that the evidence established at least a neurological injury, it nevertheless affirmed summary judgment. This established that a mild closed head injury is not recoverable. In addition, the Court's repeated reference to "serious" provided a strong indication that "moderate" traumatic brain injuries also fail to meet the Michigan threshold.

IV. RULINGS OF THE MICHIGAN COURT OF APPEALS AFTER *CHURCHMAN*

1. *Churchman v. Rickerson,* 240 Mich. App. 223; 611 N.W.2d 333 (2000)

Since the holding in *Churchman*, the Court of Appeals has released numerous opinions regarding whether under the factual scenario presented a person suffered a serious impairment of body function in a closed head injury claim. Most of these decisions, however, are not published and have no precedential value in Michigan. They may be used as persuasive authority, but do not represent and cannot be construed as the law in Michigan.

2. *Askew v. Hernandez,* Docket No. 215734, rel'd July 6, 2001.

A. OVERVIEW

Plaintiffs were injured when the defendant driver drove through a red light at an

intersection striking their vehicle. Among other things, plaintiff Terrell Askew alleged a closed head injury from the accident. At the scene, both he and the other plaintiff, Yvonne Sanford, denied needing an ambulance and drove their vehicle home. The record is unclear as to who was actually driving the vehicle at this time, but Ms. Sanford had been driving before the accident and it may be presumed that she continued to do so. Two hours after the accident, both plaintiffs presented for treatment at Sinai Hospital. Askew was noted to have a bump on his head at that time which he attributed to hitting his head on the dashboard of the car. Askew did not begin showing signs of emotional and cognitive disability until almost 1-1/2 years after the accident. The case went to trial, where a jury returned a verdict of no cause of action. The jury found that there were significant injuries, but decided the case against the plaintiffs because the defendant's actions were not believed to be a proximate cause of those injuries. Plaintiffs appealed the trial court's denial of their motion for a new trial premised on a claim that the great weight of the evidence did not support the jury verdict.

B. THE *ASKEW* COURT'S ANALYSIS

In upholding the trial court's denial of the plaintiffs' motion for a new trial, the Court found that the jury had reasonably concluded that plaintiffs failed to show a causal connection between the accident and the injuries they asserted. Thus, the trial court had not abused its discretion in denying the plaintiffs' motion. Regarding Askew's alleged closed head injury, he argued that his experts had specifically testified that his mental problems were the result of a closed head injury he sustained in the accident. The Court, however, noted that defendant's experts had testified that plaintiff was feigning his injuries and that the bump on his head could not cause the ongoing disabling symptoms he displayed, especially because they appeared so long after the initial injury. On balance, the Court found that the matter reduced to a battle of the experts and deferred to the jury's findings in this regard, reasoning that the jury sits in a far "better position to judge the weight and credibility of witness testimony."

3. *Peoples v. Halton*, Docket No. 220987, rel'd November 20, 2001.

A. OVERVIEW

Plaintiff was involved in a "minor" auto accident from which she alleged a closed head injury. Plaintiff offered the affidavit of her treating physician, Dr. Gunabalan, to establish a serious neurological injury under MCL 500.3135(2)(a)(ii). Specifically, Dr. Gunabalan opined that "there is a serious neurological injury specifically that [plaintiff] is suffering from a closed head injury and traumatic brain injury sustained in the automobile accident…."

B. THE *PEOPLES* COURT ANALYSIS

In affirming the trial court's denial of defendant's motion for summary disposition, the Court found that Dr. Gunabalan's affidavit was sufficient under MCL 500.3135(2)(a)(ii). In his affidavit, Dr. Gunabalan opined that "there is a serious neurological injury" and that plaintiff "is suffering from a closed head injury and traumatic brain injury sustained in the accident" The Court found that this language mirrored that contained in the statute and was therefore sufficient. The Court also rejected the argument that the affidavit was "completely worthless" because Dr.

Gunabalan had not taken certain information into account and because other doctors had offered contradictory opinions. The Court found that such argument went to the weight and credibility of the testimony and not its admissibility. The Court noted that the very essence of this latter challenge conclusively demonstrates the point that a question of fact exists.

4. *Block v. Pawluk*, Docket no. 225124, rel'd January 4, 2002.

A. OVERVIEW

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.

B. THE *BLOCK* COURT'S ANALYSIS

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 of whether her general ability to lead her normal life had been affected by this accident. The Court also 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 opinion under the statute's closed head injury exception.

5. *Thalji v. Detroit Edison Company*, Docket No. 226426, rel'd March 26, 2002.

A. OVERVIEW

In this case, the plaintiff claimed to have suffered a closed head injury and neck and back

injuries as a result of an accident. After trial resulted in an award in favor of plaintiff, defendants appealed. Specifically, defendants claimed that the trial court should not have allowed any evidence on a closed head injury because the evidence was not sufficient to meet the threshold. Prior to trial, defendants successfully argued a pre trial motion in limine to exclude any evidence of a closed head injury for plaintiff's failure to comply with MCL 500.3135(2)(a)(ii) due primarily to the fact it was little more than a concussion. Despite its ruling on this motion, however, the trial court subsequently permitted plaintiff to testify that he suffered headaches and admitted other evidence of a closed head injury at trial. Defendants appealed the trial court's denial of their motion for directed verdict. Trial resulted in an award of $121,850 reduced by fifteen percent for plaintiff's comparative negligence in pulling out in front of defendant's oncoming vehicle. Plaintiff alleged a number of injuries, including a grade one closed head injury. On appeal, the Court affirmed the verdict.

B. THE *THALJI* COURT'S ANALYSIS

After noting that plaintiff's lower back and neck injuries were objectively manifested and met the threshold, the Court denied defendants' appeal by finding that the statute did not exclusively mandate that a plaintiff had to suffer a "serious neuropsychological injury" for a closed head injury to meet the threshold.

First the Court noted that because MCL 500.3135 had been satisfied through evidence of the existence and affect of plaintiff's other back and neck injuries, the evidence of closed head injury could be presented to the jury. Citing *Churchman*, the Court noted that MCL 500.3135(2)(a)(ii) does not provide the exclusive manner for demonstrating a closed head injury, and does not limit what is admissible as evidence of a closed head injury. The Court noted that the statute merely "automatically" created a question of fact for a jury when such evidence was presented. The Court concluded that, because plaintiff was permitted to demonstrate a closed head injury through evidence other than an affidavit under MCL 500.3135(2)(a)(ii), any failure to do so under the statue was not grounds for excluding such evidence. The trial court did not err in allowing testimony on this issue.

6. *Randolph v. Givan*, Docket No. 233104, rel'd September 3, 2002.

A. OVERVIEW

Plaintiff was struck by defendant's truck on March 8, 1999 while she was walking away from her vehicle toward the sidewalk. Plaintiff testified that the truck's side view mirror hit the back of her head and neck and that her left hand hit either the right front panel or bumper of defendant's truck. The impact caused plaintiff to fall face down onto the ground. She experienced dizziness, nausea, and facial swelling. Approximately two hours after the accident, she presented to Henry Ford Hospital. Plaintiff complained of and treated for numerous neck and back conditions. In addition, she claimed a closed head injury and seizure disorder.

On January 7, 2000, plaintiff went to Bon Secours Hospital because she had experienced left orbital numbness followed by a twitching sensation radiating to her left face, left shoulder, and eventually to her entire left arm. Dr. Boris Leheta, who performed the evaluation, 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 March 1999." Dr. Leheta further concluded that this simple partial seizure may indicate a serious neurological injury. The trial court dismissed the case as failing to meet the threshold. On appeal, the Court of Appeals reversed.

B. THE *RANDOLPH* COURT'S ANALYSIS

The Court reversed the trial court's grant of summary disposition for defendant on the issue of a closed head injury. The Court found that Dr. Leheta's affidavit contained testimony that plaintiff "may have sustained a serious neurological injury" and thus raised a question of fact for the jury under MCL 500.3135(2)(a)(ii). The Court went a step further, however, noting the factual basis for the testimony. The Court found that Dr. Leheta's belief that the diagnosis of possible simple partial seizure is consistent with the blunt head trauma suffered in March of 1999, in conjunction with plaintiff's testimony that she was struck in the back of the head and neck with the side view mirror and the other medical history giving similar accounts, was sufficient to raise a material factual dispute regarding whether the automobile accident had caused this closed head injury. The Court concluded that material factual disputes exist as to whether plaintiff has a serious neurological injury and whether that injury was caused by the automobile accident. Hence, the trial court erred in granting summary disposition for defendant on the claim of a closed head injury.

7. *Hoffman v. Despelder*, Docket No. 238141, rel'd January 24, 2003.

A. OVERVIEW

Plaintiff's vehicle was struck from behind by a vehicle driven by the defendant. Plaintiff sought recovery for neck and back injuries and a closed head injury. At the conclusion of discovery, defendant moved for summary disposition, claiming that plaintiff did not meet the Michigan threshold. At the time of the hearing on defendant's motion, plaintiff failed to present an affidavit from any licensed allopathic or osteopathic physician to create a question of fact as to whether she suffered a serious neurological injury resulting from a closed-head injury under MCL 500.3135(2)(a)(ii). The trial court granted defendant's motion for summary disposition. Plaintiff subsequently filed a motion for reconsideration, where she attached an affidavit from Dr. Policherla, stating that she may have sustained a serious neurological injury resulting from a closed head injury sustained in the accident. The trial court denied the motion the basis that the affidavit was untimely.

B. THE *HOFFMAN* COURT'S ANALYSIS

In affirming the trial court's grant of summary disposition, the trial court noted that untimely affidavits need not be considered by the trial court. However, in doing so, the Court observed that Dr Policherla's affidavit satisfied the requirements of MCL 500.3135(2)(a)(ii), apparently conceding that the mere inclusion of the phrase "may have suffered a serious neurological injury" was sufficient to create a jury question.

8. *Reed v. Yackell,* Docket No. 236588, rel'd February 14, 2003 (vacated on other grounds by *Reed v. Yackell,* 469 Mich. 960 (2003).

A. OVERVIEW

The plaintiff in this case was a passenger in a delivery van. At the time of the accident, the driver of that van was preoccupied with billing sheets and was unable to stop when the driver of the other vehicle involved lost control of her vehicle and entered an intersection against a red light. Upon impact, Plaintiff's head struck the van's windshield, which caused him to temporarily lose consciousness. Plaintiff was taken to the hospital. He was released with only bandages on his head and knee. However, through subsequent visits to several doctors and a rehabilitation clinic, plaintiff was shown to have suffered a closed head injury as a result of this accident. A jury awarded plaintiff over $1.2 million. Defendants appealed. This case was on appeal several times, and was ultimately decided on plaintiff's employment status at the time of the accident (workers compensation providing the sole remedy). In this early appeal record, however, the Court provided a lengthy discussion as to what is required under MCL 500.3135(2)(a)(ii).

B. THE *REED* COURT'S ANALYSIS

In upholding the jury verdict, the Court found that plaintiff had presented qualified evidence under MCL 500.3135(2)(a)(ii). Defendants argued that plaintiff had not presented competent testimony because two of his experts were not allopathic or osteopathic physicians and the third expert, who was an allopathic physician, did not testify to regularly diagnosing or treating closed head injuries. The Court rejected this argument. The Court agreed that the first two experts, Dr. Sewick and Dr. Blasé, were not allopathic or osteopathic physicians, but found that the third expert, Dr. Gunabalan, had sufficient credentials to qualify him to testify under the plain language of the statute. Specifically, the Court observed that Dr. Gunabalan was an allopathic physician, board certified in nuclear medicine, and board-eligible in internal medicine. The Court noted that nuclear medicine involves the use of radioactive materials and specialized instruments to diagnose a variety of disorders, including those of the brain. When Dr. Gunabalan examined plaintiff, he was the director of a clinic called "Preferred Medicine" and supervisor of all the operations in that clinic. Dr. Gunabalan testified that he had treated "several" closed head injuries since graduating from medical school. He stated that he specialized in patients such as plaintiff, where there is injury to the body as well as the head, and has been doing so for twenty-some years. In diagnosing plaintiff's brain injury, Dr. Gunabalan relied upon the SPECT scan, and concurring neuropsychological evaluations provided by Dr. Sewick and Dr. Blase. He further testified that in the regular course of his practice, he would rely on the results of a neuropsychological evaluation. On this record, the Court found that Dr. Gunabalan was qualified under M.C.L. § 500.3135(2)(a)(ii) for demonstrating "traumatic brain injury" because his specialty involved diagnosing a variety of disorders, including those of the brain, he has treated closed head injuries during his practice over twenty-some years, and in the regular course of his practice, he relies on neuropsychological evaluations in diagnosing closed head injuries.

Later in the opinion, addressing the defendants' claim that the jury award was excessive and that the trial court erred in denying their motion for remittitur, the Court discussed the extent

of plaintiff's injuries and the effects of his traumatic brain injury as presented to the jury. Defendants argued that the trial court should have considered the emergency room records that indicated only a bump to the forehead, that plaintiff hit his left arm, and that his complaints were limited to mild left arm pain and a small abrasion to his right knee. Defendants argued that the trial court should have further considered that the records indicated that plaintiff was oriented to time, place and person, had recent and remote memory intact, and had normal judgment, insight, mood and affect. Likewise, defendants argued that it was error to not consider the final diagnoses in those records, which indicated only a "left arm contusion." The Court disagreed. The Court found that the extensive medical evidence offered at trial, as well as the effects of the injury on plaintiff, supported the verdict. Specifically, the Court found that Dr. Gunabalan, Dr. Klein, Dr. Silverman, Dr. Sewick, and Dr. Blase all concurred that plaintiff suffered from traumatic brain injury. In fact, the only doctor that testified plaintiff did not suffer a brain injury was Dr. Liethen, who was also the only non-board-certified neuropsychologist to testify. Both the SPECT scan and the Halstead-Reitan test battery were consistent with traumatic brain injury. Dr. Gunabalan stated that the SPECT scan is a very definitive diagnostic test in imaging, and that he relied on the Halstead-Reitan test battery in the regular course of his practice. After reviewing plaintiff's SPECT scan results, Dr. Gunabalan explained that as a result of the TBI, plaintiff was unable to maintain concentration, unable to remember things that happened only an hour earlier, and could not be given a job or task with any real expectation that he would complete it. Furthermore, he testified that the dizziness, loss of memory capacity and confusion suffered by plaintiff are directly related to the collision, and these areas of brain dysfunction are highly significant and permanent in nature, leaving plaintiff unable to perform tasks or resume activities that he could perform before the accident occurred. After reviewing the results of plaintiff's Halstead-Reitan neuropsychological test, Dr. Sewick reported that plaintiff had cerebral impairment in areas of smell, attention capacity, complex information processing, novel problem solving, and emotional functions. He also found plaintiff was depressed, defensive, and suffering from personality changes and chronic fatigue. He testified that traumatic brain injury patients are unable to direct and guide their behavior, they are less spontaneous, less driven, and less able to follow through on plans. Furthermore, he opined that they have difficulty maintaining employment, in solving simple but new problems during work, and maintaining attention. He asserted that they suffer from changes in personality, a reduced efficiency in living, and a diminished capacity to be productive in life. On this basis, the evidence of plaintiff's traumatic brain injury and the effects thereof supports the verdict in this case.

9. *Lockwood v. Wnuk*, Docket No. 237088 rel'd February 21, 2003.

A. OVERVIEW

Plaintiff was involved in a car accident that occurred on August 25, 1999. She claimed that as a result of the accident, she suffered a closed-head injury, cervical strain, a contusion to the left clavicle, a contusion to the left hip, and soft tissue trauma to the abdominal wall, including damages to her ileostomy. She could not recall if she hit her head during the accident or if she lost consciousness. She indicated that she had to leave her job as a social worker and had difficulties doing daily tasks at home due to cognitive problems caused by the accident. She also began to suffer severe headaches, and her ileostomy started leaking, bleeding, and having obstruction problems. Plaintiff had extensive medical problems prior to the accident, including Crohn's disease, hypothyroidism, polycystic ovarian disease, and hypertension, as well as

undergoing a craniotomy for a meningioma. Plaintiff did not support her claim of a closed head injury with an affidavit under MCL 500.3135(2)(a)(ii). Rather, she presented evidence in the form of a medical diagnosis by Dr. Klein that she suffered a "traumatic brain injury;" cognitive tests and evaluations conducted by Dr. Klein's office showed deficits in mental processes, forming the basis of the diagnosis; the testimony of defendant's own expert, Lisa E. Metler, Ph.D., who opined that plaintiff had suffered mild to moderate impairment on multiple cognitive tests, but attributed the results to her history of a craniotomy; and her own statements, as noted in the numerous medical reports, indicating great difficulty in performing her normal daily activities and the occurrence of daily headaches, along with the need to leave her employment. The trial court granted summary disposition for defendant. The Court of Appeals reversed.

B. THE *LOCKWOOD* COURT'S ANALYSIS

In reversing the trial court's grant of summary disposition for defendant, the Court began its analysis by noting that only two alleged injuries could conceivably give rise to a finding of serious impairment, those to the plaintiff's head and abdomen. The other various strains and contusions were not shown to affect plaintiff's general ability to lead her normal life, nor was evidence presented establishing impairment of an important body function based on those injuries. Thus, the Court limited its review to plaintiff's alleged closed head and abdominal injuries. On the issue of a closed head injury, the Court held that a failure to present affidavit testimony of an allopathic or osteopathic physician under MCL 500.3135(2)(a)(ii) does not preclude consideration of a closed head injury. Rather, that provision merely mandates jury consideration of the serious impairment question, as opposed to the trial judge, where such an affidavit had been submitted. An outcome-determinative factual dispute may well exist in the absence of such testimony. The Court found that the evidence submitted by the plaintiff supported her claim of closed head injury and raised an issue of fact that she suffered an objectively manifested impairment of an important body function that affected her general ability to lead her normal life. The Court also found that Plaintiff's various statements to medical personnel after her accident were sufficient to send to the jury the issue of whether her cognitive defects were connected to the accident and not any preexisting injury.

10. *Pettie v. Brock,* Docket No. 238713 rel'd February 28, 2003.

A. OVERVIEW

Plaintiff claimed certain injuries in relation to her automobile accident including a closed head injury. During treatment, an EEG was positive for abnormal brain function. However, when defendant moved for summary disposition, plaintiff failed to submit an affidavit to satisfy M.C.L. § 500.3135(2)(a)(ii). After the trial court granted defendant's summary disposition motion, plaintiff consulted a neurologist and procured an affidavit in compliance with M.C.L. § 500.3135(2)(a)(ii).

B. THE *PETTIE* COURT'S ANALYSIS

The Court upheld the trial court's grant of summary disposition for defendant. Because the neurologist' affidavit, although arguably sufficient in substance, was not timely filed it was

properly rejected by the trial court. Moreover, while the other evidence of injury presented, i.e. an MRI showing bulging discs, created issues of fact over objectively manifested injuries, it did not establish plaintiff's injuries as sufficiently serious, or more to the point that they had a significant impact on her general ability to live a normal life. Plaintiff was still able to work, drive, socialize, travel, care for herself, her children and her home, and she otherwise continued to engage in normal activities of life. There was testimony that she slept more, required some assistance with housework and had difficulty balancing her checkbook, but these things were not, standing alone, sufficient to show the requisite life's change.

11. *Crigler v. Bryan*, Docket No. 246174, rel'd April 29, 2004.

A. OVERVIEW

Plaintiff sustained injuries in a motor-vehicle accident on November 4, 2000, when her car was rear-ended by the defendant's vehicle. Plaintiff's vehicle was totaled as a result of the accident. Plaintiff alleged a laundry list of injuries from the accident, including a closed head injury.

B. THE *CRIGLER* COURT'S ANALYSIS

In reversing the trial court's grant of summary disposition for defendant, the Court found that, as to plaintiff's injuries generally, she had presented sufficient proof to raise a factual dispute over whether she suffered an objectively manifested injury arising from the accident. As to her alleged closed head injury, however, Plaintiff had failed to submit a supporting affidavit of any licensed allopathic or osteopathic physician and thus had not raised an issue of fact under MCL 500.3135(2)(a)(ii). Because an issue of fact is all that is required to defeat a motion for summary disposition, the trial court's grant of summary disposition was reversed and the case remanded

12. *McDonald v. Vaughn*, Docket No. 244687, rel'd May 18, 2004.

A. OVERVIEW

Plaintiff claimed injuries to her head, back and neck as well as a closed head injury. The only documentary evidence she provided to oppose defendant's motion was an affidavit from Dr. Bharat Tolia, M.D. The affidavit stated that Dr. Tolia (1) was a licensed medical physician, (2) that he was trained and qualified and regularly diagnosed and/or treated closed head injuries, and (3) that plaintiff was diagnosed with a closed head injury which may be a serious neurological injury as a result of her automobile accident. Aside from this, plaintiff offered only an excerpt of her own deposition testimony in which she stated that she hurt her head, back and neck in the accident and that her chest was also affected. The trial court found that plaintiff had not raised a genuine issue of fact regarding whether she suffered a serious impairment under MCL 500.3135 and the Court of Appeals affirmed.

B. THE *MCDONALD* COURT'S ANALYSIS

The Court began its analysis by refusing to consider Dr. Tolia's affidavit, finding that it did not contain any facts or details showing that plaintiff suffered an objectively manifested impairment of any important body function that affected her general ability to lead a normal life. The Court cited Michigan precedent holding that mere conclusory allegations that are devoid of detail do not satisfy the burden of a party opposing a motion for summary disposition. The Court also found that the affidavit was deficient under MCR 2.119(B) because it did not state that it was made with personal knowledge and did not contain specific facts or details about plaintiff's closed head injury or neurological impairments and did not state that Dr. Tolia could testify competently to the facts if called to trial. Like the court below, the Court of Appeals found plaintiff's own nonspecific deposition testimony alone insufficient to defeat the motion. Moreover, the Court rejected plaintiff's argument that any defects in the affidavit were harmless error under the court rule that could be corrected. The Court did so by again pointing to the factual deficiencies of the affidavit. In addition, the Court found no error in the lower court's refusing to consider a second affidavit from Dr. Tolia offered in connection with a motion for reconsideration. Specifically, the Court held that the trial judge had not abused its discretion by refusing to consider testimony that could have been presented when the issue was first argued.

13. *Domack v. Spink,* Docket No. 245699, rel'd July 20, 2004.

A. OVERVIEW

Plaintiff alleged injuries to her spine and closed head injury resulting in cognitive loss from her automobile accident. She testified to missing occasional days from work because of headaches, cutting back on her horseback riding, and not being able to water ski or tube. The case was decided on both the broader serious impairment language of MCL 500.3135 and the closed head injury specific language of MCL 500.3135(2)(a)(ii).

B. THE *DOMACK* COURT'S ANALYSIS

The Court began its analysis by identifying the only objective evidence in the case, a radiology report reflecting at least one white matter lesion in plaintiff's brain and an x-ray showing spinal subluxations. The Court noted that there was no evidence that these conditions had affected the functioning of plaintiff's body. The Court then found that the psychologist's report from an evaluation done years after the accident indicating that plaintiff may have suffered impairments of cognitive functioning was not based on evidence of any medically identifiable physical injury, e.g. a head wound, attributable to this accident. The Court distinguished this case from those other cases that have found that test results showing memory loss can serve as evidence of an objectively manifested injury. The Court did so by again pointing to the absence of a physical wound and emphasizing the long gap between the accident and the testing that was done in this case. The Court held that, unlike that other case law, the circumstances here did not reasonably support an inference that any memory loss was due to the accident. Thus, the court found that there was no evidence to support serious impairment under either the general language of MCL 500.3135 or under the special closed head injury proviso of MCL 500.3135(2)(a)(ii). In addition, the Court assessed plaintiff's general ability to lead her normal life after this accident

and concluded that she had not raised an issue of fact as to the seriousness of her injuries. The Court noted that plaintiff had a continued ability to work, go to school, and take care of herself as she did before the accident, and found her relatively minimal decrease in certain social functions alone insufficient to show the requisite life's change.

14. *McKinnie v. Ravel,* Docket No. 241842, rel'd October 5, 2004.

A. OVERVIEW

Plaintiff was in a June, 2000 automobile accident. Following the accident, she went to the hospital where a CT scan was performed on her head and x-rays taken of her arms and hands. At an October examination, she reported frequent headaches, neck pain and jaw problems. She was diagnosed with temporomandibular joint disease ("TMJ"). Plaintiff alleged that because of the accident she suffered depression, her every day tasks were made more difficult, she required some assistance with her housework, and she stopped participating in anything that involved a lot of lifting. Plaintiff did not return to work, but this was done by her own choice. No medical professional had disabled her. The case was decided primarily under the general serious impairment language of MCL 500.3135. However, in a footnote, the Court addressed an argument under the closed head injury specific language of subsection (2)(a)(ii) raised by dissenting Judge Neff.

B. THE *MCKINNIE* COURT'S ANALYSIS

In affirming the trial court's grant of summary disposition for defendant, the Court found no serious impairment. In dicta, the court noted that the mere reference to a possible closed head injury is insufficient to meet the threshold under Michigan law. The Court noted that a report submitted by plaintiff did not point to any objectively identifiable basis for the statement that plaintiff suffered a closed head injury, and found that the letter from Dr. Aboukam did not satisfy MCL 500.3135(2)(a)(ii) because it was not made under oath and there was no evidence that the doctor was a licensed allopathic or osteopathic physician who regularly diagnosed or treated closed head injuries.

15. *VanOrder v. Gross,* Docket No. 251202, rel'd April 7, 2005.

A. OVERVIEW

Plaintiff alleged a serious impairment of body function, as manifested by several conditions, including a closed head injury, depression, insomnia, and neck and back injuries. Claiming he suffered from a closed head injury, plaintiff treated with a psychiatrist, who diagnosed him with a closed head injury. Plaintiff argued for a threshold injury under both the general serious impairment language of MCL 500.3135 and the closed head injury specific language of subsection (2)(a)(ii).

B. THE *VANORDER* COURT'S ANALYSIS

In upholding the trial court's grant of summary disposition to defendant, the Court held

that plaintiff had failed to establish a serious impairment of body function under *Kreiner*. Plaintiff had submitted an affidavit of his psychiatrist, who diagnosed his closed head injury. The affidavit tracked the language of the statute in its averments that plaintiff "may have suffered a serious neurological injury." However, at the psychiatrist's deposition, taken after the hearing for summary disposition, the psychiatrist testified that he did not regularly diagnose closed-head injuries. Based on this admission, the Court found that the psychiatrist was not competent to render such an opinion under MCL 500.3135(2)(a)(ii).

16. *Amos v. Keller Transfer Line, Inc*, Docket No. 254232, rel'd April 26, 2005.

A. OVERVIEW

Defendants appealed the jury verdict for plaintiff and the trial court's denial of their motion for directed verdict based on an alleged failure to establish a serious impairment of body function or an objective manifestation. At trial, plaintiff had presented evidence of a closed head injury in the form of video deposition testimony of her treating neurologist, Gerald F. Robbins, D.O., and records of certain neuropsychological testing. Dr. Robbins testified that plaintiff's history and his findings were indicative of a closed head injury as a result of a motor vehicle accident, and further that, considering plaintiff's inability to function in the real world, her subjective complaints, and what was observed of her through testing, that plaintiff had sustained a serious neurologic injury in her ability to function. The Court of Appeals affirmed the verdict and the lower court's rulings in all regards meaningful to this discussion.

B. THE *AMOS* COURT'S ANALYSIS

The Court of Appeals affirmed the jury's verdict. The Court began its analysis by disagreeing with the defendants' interpretation of MCL 500.3135 that the law requires the court and not the jury to decide the issue of serious impairment. The Court found that under the statute serious impairment is determined by the Court only when there is no factual dispute concerning the nature and extent of injuries, and that in this case defendants had disputed the nature and extent of plaintiff's injuries by asserting that she had not sustained a closed head injury and that even if she had it did not sufficiently impact her ability to lead her normal life. Further, the court found that under MCL 500.3135(2)(a)(ii) an issue of fact for the jury's determination is automatically created when a physician who regularly diagnoses or treats closed head injuries provides sworn testimony that there may be a serious neurological injury, and such testimony had been provided by Dr. Robbins.

Having determined that the matter was properly submitted to the jury, the Court examined the jury's findings on the issue of a serious impairment. The Court noted that the statute requires an objectively manifested impairment and not "objectively verifiable medical testing results." The Court found this standard satisfied by plaintiff's inability to return to her job; her decreased socialization; and her inability to participate in activities that comprised her

normal life.[3] The Court added, however, that abnormalities were identified in a visual evoked response test and anomalies seen in an MRI, which plaintiff's neurologist testified were not consistent with a diagnosis of demyelinating disorder, as originally noted, but likely demonstrated a closed head injury and post concussion syndrome. The Court also found that MCL 500.3135(2)(a)(ii) does not provide the exclusive manner by which a plaintiff may establish the existence of closed head injury, or raise a factual dispute on the threshold issue. It does not limit the evidence that can be used to establish these points, but merely provides an exception that permits a plaintiff with a sufficiently serious closed head injury to automatically create a jury question. Thus, the neuropsychological testing results offered here, while defective under MCL 500.3135(2)(a)(ii), were properly submitted to the jury as "merely another mechanism available to plaintiff to establish the existence of a medically verifiable serious neurological impairment that affected her ability to lead her life." Moreover, the Court noted that any issues regarding interpretation of test results or with the methodologies employed in testing were evidentiary in nature and matters that went to the weight of the evidence.

Next, the Court discussed the evidence of plaintiff's post accident life changes and found that her absence from work, as supported by the testimony of Dr. Robbins, and her loss of most of her prior recreational pursuits showed the requisite life's change.

Finally, the Court specifically addressed the defendants' attack of the methodology employed by plaintiff's neuropsychology expert. Defendants argued that the methodology employed was unreliable and that the trial court should have disqualified the expert on this point. Specifically, defendants argued that plaintiff's expert had wrongly compared plaintiff's test results with an improper population, or normative sample, and that the study did not account for plaintiff's pre-accident functioning levels. The Court disagreed. First, the Court noted that counsel had not objected to the testimony during the witness examination and thus had not preserved the issue for appeal. As a result, the records from the hearings below were reviewed for plain error. Next, the Court found that experts from both sides had used many of the same tests and that little to no opportunity existed to obtain detailed information on plaintiff's pre-accident functioning levels. Moreover, the high school transcripts relied on by defendants' expert were not significantly contradictory of Dr. Robbins' findings. Finally, the Court noted that any defect in Dr. Robbins' testimony went to its weight and not its admissibility, which the Court found not significantly diminished given that defendants had an opportunity to attack the witness' testimony during cross examination.

17. *Collins v. Davis*, Docket No. 256055, rel'd October 13, 2005.

A. OVERVIEW

Plaintiff alleged that he suffered neck and back pain, a closed head injury, and depression as a result of his automobile accident. Plaintiff missed three weeks of work, and claimed he was unable to perform household activities and some recreational activities, such as bow hunting, fishing, and camping, for about a year after the accident. Plaintiff also complained of a decline in

[3]Case law does not support the *Amos* Court's use of loss of activity to establish the "objectively manifested" element of the *Kreiner* analysis. Rather, these things are more properly considered in relation to the requirement that the plaintiff be shown no longer able to generally lead her normal life.

intimate relations with his wife. The trial court dismissed the claim due to a failure of evidence supporting a serious neurological injury. The court also denied a motion for reconsideration on the basis that a newly submitted affidavit was untimely.

B. THE *COLLINS* COURT'S ANALYSIS

In upholding the trial court's grant of defendant's motion for summary disposition, the Court held that plaintiff had not suffered a serious impairment of body function. With regard to the closed head injury claim, the court affirmed summary judgment holding that affidavits not timely submitted should not be considered.

18. *Register v. Sledge*, Docket No. 256360 rel'd January 12, 2006.

A. OVERVIEW

Plaintiff was in an automobile accident on June 9, 2000. She alleged aggravation to her preexisting head, neck, and back injuries, radiculopathy, hip pain, TMJ, cognitive deficits, dizziness, ringing ears, and blurred vision, all of which date back to a 1999 slip-and-fall accident. Following her automobile accident, plaintiff alleged sleeping all day, not wanting to do anything, taking a long time to complete tasks, being forgetful, lost, and confused, and not having any feelings of care or concern for anyone.[4] Plaintiff did not attempt to raise an issue of fact by submitting an affidavit under MCL 500.3135(2)(a)(ii) in this case, and thus the case was decided on the broader serious impairment language of MCL § 500.3135.

B. THE *REGISTER* COURT'S ANALYSIS

In finding no serious impairment, the Court first noted that plaintiff had not presented any objective evidence in support of her claim that the auto accident aggravated her pre-existing injuries. The emergency room examination performed on the day of the accident was normal. Imaging tests were unremarkable. The three doctors' affidavits plaintiff submitted in support of her claim contained mere conclusory statements. In addition, the report of plaintiff's treating neurologist neither identified an aggravation of pre-existing conditions, nor identified automobile accident conditions. Further electrodiagnostic testing was normal. The reports from all of plaintiff's treating physicians were based on plaintiff's own subjective complaints of physical pain. Plaintiff thus presented no evidence of any objectively manifested injury related to her 2000 auto accident and could not, therefore, satisfy the broader serious impairment language of MCL 500.3135. Further, the Court held that even if some aggravation of preexisting injuries were objectively manifested, plaintiff's claim would still fail under MCL 500.3135 because plaintiff had not demonstrated any differences between her normal life before and after her accident. Her complaints of not being able to sleep or "exist without pain" could be traced back to her 1999 slip-and-fall. Moreover, her complaints of her ears ringing more loudly and her vision worsening after this accident were not accompanied with any explanation of what, if anything, these changes were said to prevent her from doing.

[4]This case is included here because of the plaintiff's claim of cognitive defects. Cognitive defects are, of course, commonly associated with closed-head injuries. In this particular case, there is no specific mention of any such injury and only vague conclusions from plaintiff's neurologist about "post-traumatic cognitive deficits."

19. *Fodera v. Van Lobbs*, Docket Nos. 256555, 259097 rel'd January 31, 2006.

A. OVERVIEW

Defendant's car struck plaintiff's vehicle and caused it to roll over. Plaintiff alleged that during the accident, she suffered a closed head injury. Defendant's motion seeking a neurological examination of plaintiff was denied. Consequently, only plaintiff's neurological expert testified at trial. The matter went to trial, where a jury found no cause of action. Plaintiff appealed.

B. THE *FODERA* COURT'S ANALYSIS

In upholding the jury verdict of no cause of action, the Court held, among other things, that nothing in MCL 500.3135(2)(a)(ii) prevented 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 that the statute merely creates a question of fact for the jury. In this case, the doctors' testimony allowed plaintiff's claim to survive summary disposition but did not, consistent with the statute, conclusively establish a serious neurological injury. At trial, the jury was free to accept or reject any or all of the evidence presented pertaining to plaintiff's alleged injuries, which it did. The jury determined that plaintiff was injured in the car accident, but that these injuries did not rise to the level of a serious impairment of a body function. Although plaintiff testified that her ability to do math and deal with customers had been impaired, her former employer testified that her work abilities excelled after the accident. The Court found that on this record, the jury could well determine that plaintiff did not suffer a serious impairment of a body function

20. *Parker v. E. Conrad Trucking, Inc.*, Docket No. 258037 rel'd February 28, 2006.

A. OVERVIEW

Plaintiff alleged a closed head injury from 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 Dr. Gonte was someone "who can certify precisely what a closed head injury is." Dr. Gonte testified that plaintiff had sustained a serious neurological injury diagnosed with cognitive disorders since her head trauma on October 15, 2002 and also had a closed head injury as a result of the accident. The case proceeded on the issue of Dr. Gonte's qualifications alone.

B. THE *PARKER* COURT'S ANALYSIS

In reversing the trial court's grant of summary disposition for the defendant, the Court found that the doctor's status as a medical doctor along with his testimony that he diagnoses 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."[5]

21. *Ballard v. Drouse,* Docket no. 264758, rel'd March 21, 2006.

A. OVERVIEW

The plaintiffs in this case for uninsured motorists benefits were rear-ended 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. Mrs. 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 Gregory J. Dardas, M.D., 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 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 indicate that her symptoms, neurologically, 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 indicates 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 her lancinating pain in her forehead. During two more follow-up appointments, plaintiff indicated that she had begun experiencing dysesthesia (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

[5]The *Parker* Court clearly 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." It 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. This point is little more than academic, however, because an issue of fact is all that is needed to defeat the motion.

that these problems did not prevent her from accomplishing her normal activities; that she could have returned to work one month after the accident; and 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 of plaintiff's uninsured motorist claim under MCR 2.116(C)(10), arguing 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, finding that she had raised an issue of fact under MCL 500.3135(2)(a)(ii) and also that her other non closed-head injuries had satisfied the threshold.

B. THE *BALLARD* COURT'S ANALYSIS

The Court 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 unable 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 nonmoving 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 a 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 that MCL 500.3135(2)(a)(ii) provides an additional means of establishing an issue of fact as to a 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 her 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 noneconomic 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.

22. *Guerrero v. Smith*, Docket no. 268477, rel'd August 22, 2006.

A. OVERVIEW

The plaintiff allegedly sustained injuries when his vehicle was rear ended in a chain reaction accident. The plaintiff claimed to have suffered a closed head injury, back and neck injuries, and an aggravation of preexisting back and neck injuries. The defendants moved for summary disposition arguing that the plaintiff had not met the threshold injury as required by MCL 500.3135. The trial court granted the defendants summary disposition finding that the plaintiff was required to show that his alleged closed head injury was an objectively manifest impairment of a bodily function and that it affected his ability to lead his normal life. That is, the trial court concluded that MCL 500.3135(2)(a)(ii) was not a separate means of creating a question of fact, but was still subject to the requirements of any other injury under *Kreiner v. Fischer*, 471 Mich 109 (2004).

B. THE *GUERRERO* COURT'S ANALYSIS

The Court of Appeals reversed the decision of the trial court. The Court found the language of MCL 500.3135(2)(a)(ii) plain and clear. With regard to the plaintiff's alleged closed head injury, all that he was required to establish to avoid summary disposition was that a licensed allopathic or osteopathic physician, who regularly diagnoses or treats closed head injuries, testified under oath that there may be a serious neurological injury. Contrary to the trial court's analysis, there is no requirement that the plaintiff also establish that the injury was objectively manifest in order to avoid summary disposition. The Court noted that the trial court's decision was specifically mistaken given that the *Kreiner* Court noted that the statute creates a special rule for closed head injuries.

23. *Nelson v. Vasich*, Docket no. 269082, rel'd September 21, 2006.

A. OVERVIEW

The plaintiff was injured in an auto accident. The plaintiff claimed a closed head injury, but the trial court granted summary disposition to the defendant finding that the plaintiff had failed to show that she had been unable to participate in any activities due to the accident, which it determined to mean that the plaintiff's ability to lead her normal life had not been affected. Regarding the closed head injury, the Court concluded that the record was devoid of any evidence to suggest that the alleged impairments rise to the level of a serious neurological injury. The physician's affidavit stated, "I diagnosed [plaintiff] as having a closed head injury as a result of the 11/6/01 vehicle collision which is a serious neurological injury." The trial court concluded that the expert's affidavit automatically equated a closed head injury with a serious neurological injury. The trial court found this insufficient.

B. THE *NELSON* COURT'S ANALYSIS

The Court of Appeals reversed the decision of the trial court. It found that plaintiff's expert statement suggested that plaintiff might have a serious neurological injury. The Court

stated that the trial court overly parsed the language of the expert's affidavit. The phrasing is sufficiently ambiguous to admit two possible readings: That the closed head injury is by default a serious neurological injury; or that the closed head injury that plaintiff suffered presented a serious neurological injury. Because MCL 500.3135(2)(a)(ii) uses the phrase "may be" rather than "is", the Court found the expert's statement sufficient.

24. *Cockle v. Thomas,* Docket no. 261884, rel'd October 24, 2006.

A. OVERVIEW

The plaintiff was a restrained back seat passenger in a vehicle that collided with another vehicle pulling out of a parking spot. Plaintiff claimed that she was thrown backwards and forward during the impact causing her to hit her head. She also claimed injury to her shoulder. Plaintiff claimed neck, back, and closed head injuries. Before the initiation of trial, defendants filed a motion seeking to preclude plaintiff from offering expert testimony from a psychologist regarding her closed head injury. The trial court excluded the testimony concluding that, pursuant to MCL 500.3135(2)(a)(ii), the plaintiff had to provide testimony from an allopathic or osteopathic physician to meet the threshold requirement.

B. THE *COCKLE* COURT'S ANALYSIS

The Court of Appeals reversed the decision of the trial court. The Court concluded that the statutory provision does not provide the exclusive manner or means for a plaintiff to establish a closed head injury. MCL 500.3135(2)(a)(ii) does not delimit the admissibility of evidence pertaining to the existence of a closed head injury. Instead, it is simply an exception that permits a party to automatically create a question for a jury through provision of testimony by a physician that a serious neurologically based injury might exist. That is, the statute provides two different ways to reach the same conclusion. In remanding, the Court of Appeals noted that the evidence regarding the closed head injury may affect the determination of the nature and extent of plaintiff's injuries as a whole. Therefore, it vacated the trial court's directed verdict with respect to plaintiff's neck claims as well.

25. *Benedict v. State Farm Mut Auto Ins Co,* Docket no. 265595, rel'd November 28, 2006.

A. OVERVIEW

The plaintiff allegedly sustained serious injuries, including aggravation of existing neck and back injuries and a closed head injury. The plaintiff was under a fifty pound weight restriction, no longer ran or jogged, could not fully perform household chores, could not go to the gym to exercise and lift weights, could not walk the plaintiff's three dogs, and had cognitive problems. The cognitive problems included memory problems, distraction, problems with focusing and with attention to detail. The plaintiff continued his college courses, but testified that his concentration and focus problems made it necessary to compensate by spending more time on completing projects and studying in order to maintain results similar to those obtained before the accident. The trial court denied the defendant's motion for summary disposition.

B. THE *BENEDICT* COURT'S ANALYSIS

The defendant argued that the plaintiff's closed head injury claim could not succeed because there was no testimony under oath that he may have a serious neurological injury. The Court of Appeals disagreed and affirmed the trial court's decision. The Court noted that the case could not automatically proceed to trial under MCL 500.3135(2)(a)(ii) because the plaintiff's expert did not expressly testify under oath. But the Court concluded that this did not preclude the plaintiff from asserting that the closed head injury constitutes as serious impairment of bodily function under the general principles in MCL 500.3135. Taking the documentary evidence into consideration, the Court found that the issue could not be decided as a matter of law. The Court found a factual issue with respect to whether the injuries, including the alleged closed head injuries, affected the plaintiff's general ability to lead his normal life.

26. *Hamad v. Farm Bureau Gen Ins Co of Michigan*, Docket no. 265971, rel'd November 28, 2006.

A. OVERVIEW

The plaintiff claimed a serious impairment through injuries to his neck, back and a closed head injury. Neurological assessments performed by two doctors indicated significant deficiency in the plaintiff's memories and his cognitive abilities. The doctor opined that the closed head injury existed and noted deficits in memory, attention, concentration, higher cognitive functions and sensory and motor functions. Another doctor believed that the plaintiff was feigning at least some of his problems. The trial court granted the defendant summary disposition to finding no serious impairment.

B. THE *HAMAD* COURT'S ANALYSIS

The Court of Appeals reversed regarding the closed head injury. The Court of Appeals noted that, while it is arguable that MCL 500.3135(2)(a)(ii) created a special rule for closed head injuries, it was bound by the published opinion in *Churchman* finding that the language of MCL 500.3135 does not indicate that the closed head injury exception provides the exclusive manner in which the plaintiff who suffers a closed head injury may establish a factual dispute. The Court further noted that any ambiguity would be interpreted in favor of the plaintiff. Given this, the Court turned to whether the memory and cognitive difficulties affected the plaintiff's ability to lead his normal life. The Court noted that the inability to remember interferes with a persons ability to lead his normal life. In light of the severity of the deficits claimed by the plaintiff and substantiated by his doctor, the Court concluded that, due to the nature and extent of the plaintiff's closed head injury, it was inappropriate to grant summary disposition to the defendant. With regard to the plaintiff's neck and back injuries, the Court concluded without detailed analysis that the plaintiff had failed to demonstrate the effect on his life from the neck and back injuries was extensive enough to meet the serious impairment threshold.

27. *McCall v. Dorch*, Docket no. 269817, rel'd January 23, 2007.

A. OVERVIEW

The plaintiff claimed numerous injuries from an automobile accident. This included a closed head injury. Plaintiff submitted the affidavit of a neurologist that stated that she evaluated plaintiff and that he suffered from post concussive syndrome that represented a serious neurological injury, which would prevent him from performing his job as an ironworker and would have significantly interfered with his normal activities of daily living. The doctor was a licensed physician and a neurologist. Despite this affidavit, the trial court concluded that the plaintiff had not established a serious impairment because the plaintiff still had to meet the requirements of *Kreiner* to show that any serious impairment affected his ability to lead a normal life. The trial court noted that the plaintiff had several previous accidents and medical conditions predating the accident in question. The plaintiff was in fact disabled before the previous accident. The plaintiff previously experienced chronic pain, back spasms, and had restrictions on his abilities. In fact, after his stroke predating the accident in question, the plaintiff had little to no activity.

B. THE *MCCALL* COURT'S ANALYSIS

The Court of Appeals concluded that the trial court erred in determining that the plaintiff still had to meet the *Kreiner* requirements if he supplied an affidavit satisfying MCL 500.3135(2)(a)(ii). But the Court of Appeals noted that the affidavit relied on by the plaintiff was from out of state. The Court of Appeals relied on *Apsey v. Memorial Hosp* (on reconsideration), 266 Mich App 666 (2005) to conclude that the plaintiff's affidavit was inadmissible because it did not meet special certification requirements required by MCL 600.2102. Subsequent to this opinion, the Michigan Supreme Court reversed the Court of Appeals decision in *Apsey*. *Apsey v. Memorial Hosp*, 477 Mich 120 (2007). The Supreme Court stated hat there is a separate way to authenticate affidavits under the uniform recognition of acknowledgement act. MCL 565.528. Given the Supreme Court's decision in *Apsey*, the Court of Appeal's reasoning in *McCall* is misplaced.

28. *Modrzejewski v. Beddingfield*, Docket no. 271247, rel'd February 22, 2007.

A. OVERVIEW

The plaintiff's vehicle was struck by a vehicle driven by the defendant. The plaintiff was diagnosed with a head injury, a hand abrasion, a chest wall contusion, and a scalp laceration. A CT scan of the plaintiff's brain taken at the emergency room was unremarkable. After an EEG and an MRI, a doctor diagnosed a closed head injury, traumatic brain injury, chronic posttraumatic headaches, and chronic neck, back, and shoulder pain. A neurosurgeon diagnosed cervical degenerative disc disease, foraminal stenosis, in left temporal arachnoid cyst. And a neuropsychologist noted that plaintiff had deficits including difficulty with attention, concentration, memory, motor function, and emotional and behavioral adaptation. The neuropsychologist diagnosed a traumatic brain injury. But another doctor noted that it was possible that the plaintiff was exaggerating his symptoms. Apparently, the plaintiff failed to

provide an affidavit from a physician who regularly diagnosed or treated closed head injuries. The trial court found no question of fact regarding plaintiff's ability to meet the threshold. The trial court noted that no objective evidence such as x-rays or MRIs demonstrated that plaintiff sustained any injury to his neck, back or knee in the accident. It also noted that the plaintiff had made frequent complaints of neck and back pain before the accident. There was also evidence that the defendant was disabled before the accident.

B. THE *MODRZEJEWSKI* COURT'S ANALYSIS

The Court of Appeals affirmed. Unfortunately, the Court did not offer significant analysis on the closed head injury. The Court merely states, "plaintiff claims that he suffered a closed-head injury as a result of the accident; however, he did not provide testimony, in the form of an affidavit or otherwise, from a physician who regularly diagnosed closed-head injuries to the effect that plaintiff might have sustained a serious neurological injury. Plaintiff's evidence was insufficient to create a question of fact for the jury." The Court did note, however, that the plaintiff had failed to sustain his burden of showing that his general ability to lead his normal life had been affected by the accident. The Court noted that plaintiff was disabled from his employment before the accident. He offered no specifics regarding how his daily life changed after the accident occurred. No physicians placed any restriction on the plaintiff's activities and the Court noted that plaintiff's self imposed restrictions were insufficient to establish the existence of a residual impairment.

29. *Minter v. Grand Rapids,* 275 Mich App 220 (2007), reversed by 480 Mich 1182 (2008).

A. OVERVIEW

The plaintiff was a sixty-seven year old woman legally crossing the street when she was struck by a police officer. The police officer admitted that the accident was his fault. As a result of the accident, the plaintiff sustained a broken toe, a cervical strain, a closed head injury, and a laceration above her right elbow. Plaintiff took Vicodin and wore a special soft shoe for a week to a month. By the time of her deposition her toe had completely healed. Her cervical strain required her to wear a soft collar for two weeks and refrain from heavy lifting, bending, squatting, and housework for three months. She stills experienced stiffness six months later, but by the time of her deposition the strain was completely resolved. The plaintiff's scar on her eyebrow was approximately half an inch long, she claimed that it was embarrassing, itched, hurt when touched, and became numb. The plaintiff also contended that the scar prevented her from moving her right eyebrow in a normal manner. The plaintiff reported frequent headaches, occasional dizziness, memory problems, and insomnia. She also noted dizziness, confusion, and blurred vision. She contended that she could no longer walk, dance, or cross the street comfortably. *Minter,* 275 Mich App at 223-224. The trial court determined that the plaintiff did not suffer for any "prolonged" period from her injuries. The court determined that the plaintiff's scar was relatively small and not readily noticeable. Therefore, the trial court concluded that the plaintiff had not suffered a serious impairment of bodily function or a permanent serious disfigurement. The trial court granted summary disposition to the defendants. The Court of Appeals reversed in part. The Court of Appeals agreed that plaintiff's broken toe and cervical strain did not meet the threshold standard. The Court noted that, at most, the plaintiff had to

wear a soft shoe for a month and a soft collar for two weeks. The Court stated that all that the plaintiff had to refrain from doing were activities that she was mostly or completely unable to do anyways. The Court of Appeals also noted that plaintiff did not experience any ongoing effect from these injuries. The Court of Appeals reached a different conclusion regarding the closed head injury. The Court of Appeals noted that, contrary to the trial court's decision, the plaintiff was not required by MCL 500.3135(2)(a)(ii) to present an affidavit from a physician who regularly diagnosed or treated closed head injuries regarding the serious neurological injury. Instead, a plaintiff who has suffered a closed head injury may establish a factual dispute under the traditional *Kreiner* process. *Id.* at 227. The Court found the headaches that plaintiff complained of irrelevant under *Kreiner*. But it noted that she also asserted that she suffered from dizziness, confusion, and blurred vision, which resulted in a reduced ability to locomote independently, perform routine tasks necessary to life, and engage in the social activities she previously enjoyed. The Court stated that the trajectory of plaintiff's normal life pass the age of seventy seemed to have been at least potentially effected. The Court concluded that in a factual dispute concerning the nature and extent of the injuries was a matter to be determined by a jury. Therefore, it found that the trial court erred in granting summary disposition on this matter. *Id.* at 228. Regarding the scar, the Court of Appeals noted that the plaintiff claimed that is was not only visible, but also caused a functional problem with her ability to express emotion or otherwise communicate nonverbally. The Court noted the importance of nonverbal communication. Therefore, it found a factual dispute regarding the scar sufficient to give rise to a jury question. *Id.* at 229-230. The Michigan Supreme Court subsequently reversed the decision of the Court of Appeals. *Minter v. Grand Rapids,* 480 Mich 1182 (2008). The Supreme Court adopted the reasoning stated in the Court of Appeals dissenting opinion. The Supreme Court noted that the Court of Appeals majority erred in reversing the Circuit Court order granting the defendant's motion for summary disposition regarding the plaintiff's closed head injury and scar period. *Id.*

B. THE *MINTER* DISSENT COURT OF APPEALS' REASONING.

The Supreme Court adopted the reasoning of Judge Murray in his dissenting opinion. Judge Murray noted that the plaintiff had previously been on Social Security Disability due to disability from kidney surgery. He noted that while plaintiff had physician imposed restrictions relating to heavy lifting, bending, and prolonged standing for several months following the accident, these were similar restrictions as those she had prior to the accident from her kidney surgery. He noted that the plaintiff's daughter and grandsons were already providing much of the assistance required for household chores prior to the accident. He stated that any restrictions on walking, dancing, or listening to the radio appeared to be self-imposed restrictions. *Minter,* 275 Mich App at 234-235 (Murray, J., concurring in part and dissenting in part). Judge Murray noted that there was no actual dispute regarding the nature and extent of the plaintiff's closed head injury. Instead, he stated that the only dispute was regarding the impact the closed head injury had on her ability to lead her normal life. Therefore, the trial court properly decided the issue as a matter of law. *Id.* at 238-239. Judge Murray emphasized that the plaintiff was disabled before the accident and required physical assistance before the accident. He characterized the head injury as mild and noted that it subsided without physician-imposed restrictions. Because of the previously imposed restrictions, Judge Murray concluded that the plaintiff essentially carried on with her life as she had in the past. He stated that any limitations

on her social life were by the plaintiff's own choice. Regarding the scar, Judge Murray concluded that the seriousness of a scar depends on its physical characteristics rather than its effect on the plaintiff's ability to live her normal life. He noted that the scar was relatively small and light in color. He also noted that the plaintiff had not undergone cosmetic surgery on the scar. Therefore he concluded that the scar did not constitute a permanent serious disfigurement. *Id.* 242-243.

30. *Pellegrino v. AMP Co Systems Parking,* Docket no. 274743, rel'd May 27, 2008.

A. OVERVIEW

The plaintiff and the decedent flew into Detroit Metro Airport and were riding in a shuttle bus owned by the defendant when the shuttle bus struck a concrete barrier of a retaining wall. The plaintiff sustained serious injuries, and the decedent died as a result of the accident. The plaintiff filed a negligence claim on his own behalf and a wrongful death action on behalf of his decedent wife. The jury awarded the plaintiff total damages of $14,900,000.

B. THE *PELLEGRINO* COURT'S ANALYSIS.

The defendant argued that the trial court errantly permitted Bradley Sewick, Ph.D. and Dr. Gerald Shiener to testify regarding their interpretation of MRI and CT scans of the plaintiff's brain. The defendant claimed that the testimony was improper under MCL 500.3135(2)(a)(ii). The defendant claimed that a question of fact for the jury regarding the existence of a closed head or traumatic brain injury is only created if a licensed allopathic or osteopathic physician who regularly diagnosed or treated closed head injuries testifies under oath that there may be a serious neurological injury. The defendant noted that Dr. Shiener and Ph.D. Sewick were unable to testify that they focused their practices as allopathic or osteopathic physicians who regularly diagnose or treat closed head injuries. The Court of Appeals noted that it had previously ruled that Ph.D. Sewick is not qualified under MCL 500.3135(2)(a)(ii) because he is not an allopathic or osteopathic physician. See *Reed v. Yackell* (on remand), unpublished opinion per curiam of the Court of Appeals, issued June 8, 2004 (Docket no. 236588), reversed on other grounds 473 Mich 520 (2005). But the Court of Appeals noted that Dr. Shiener was qualified to testify. Dr. Shiener is a medical doctor who is board certified by the American Board of Psychiatry and Neurology. He therefore qualifies as an allopathic physician. Dr. Shiener testified that he had seen thousands of patients with head trauma since he began his practice. He had also noted his training with CT and MRIs. The Court of Appeals found this sufficient. The Court of Appeals also noted that while Dr. Shiener did not explicitly testify that the plaintiff suffered a severe or serious neurological injury, he did imply that the neurological injury to the plaintiff may have been serious. Therefore, the trial court did not abuse its discretion in admitting Dr. Shiener's testimony. The Court then concluded that any error in the trial court failing to exercise its gate keeping responsibilities regarding expert testimony under MCL 600.2955(1) regarding Dr. Shiener was harmless error because Dr. Shiener was qualified to testify regarding the closed head injury pursuant to MCL 500.3135(2)(a)(ii). The defendant then argued that the trial court erred in allowing Ph.D. Sewick to testify regarding the plaintiff's MRIs. The Court of Appeals agreed that the trial court failed to exercise its gate keeping responsibilities in determining whether Dr. Sewick was qualified to testify regarding the interpretation of the MRIs. But it

found any error harmless given the overwhelming testimony regarding the closed head injury. This evidence included the testimony of Dr. Shiener and numerous other treating doctors. In light of the abundance of unattained testimony, the Court concluded that any error was harmless.

31. *Guerrero v. Smith,* 280 Mich App 647 (2008).

A. OVERVIEW

The plaintiff claimed throughout the case that he had sustained a traumatic brain injury as a result of an automobile accident. He claimed that the neurological injury had impaired his cognitive abilities and mental acuity. He alleged symptoms including cognitive deficiencies, confusion, forgetfulness, difficulty in organizing his thoughts, and a general inability to focus. The defendant attacked the plaintiff's claim by raising questions of the plaintiff's marijuana use. The jury ultimately returned a verdict concluding that the plaintiff had not suffered a serious impairment.

B. THE *GUERRERO* COURT'S ANALYSIS

The plaintiff challenged the defendant's questioning of him regarding past marijuana use. The Court of Appeals noted that counsel was not permitted to prove the plaintiff's general lack of morality with evidence of past instances of specific conduct such as marijuana use. But it noted that the questions regarding the plaintiff's marijuana use were not used to attack the plaintiff's general character or morality. Instead the defense counsel's questions were designed to determine whether the plaintiff's past marijuana use had in any way affected his cognitive abilities and mental acuity independent of the automobile accident. The court concluded that many of the mental and cognitive symptoms attributed by the plaintiff to the automobile accident could equally have been attributed, at least in part, to other causal factors such as drug use. The Court noted that at least one of the plaintiff's physicians apparently believed that the nature and extent of the plaintiff's marijuana use was a relevant consideration in diagnosing the plaintiff's condition. Therefore, the Court found the testimony relevant and non-prejudicial. On the other hand, the Court of Appeals found it improper to question a separate witness regarding specific instances of the plaintiff's marijuana use. The Court stated that it would have been admissible testimony had it been admitted to test the credibility of the plaintiff. But the witness was not called as a character witness and did not testify concerning the plaintiff's character for truthfulness or untruthfulness. Nevertheless, the Court of Appeals found any error harmless. Taking into account the other admissible evidence concerning the plaintiff's past marijuana use, the Court could not conclude that the improperly elicited testimony was so prejudicial that declining to set aside the verdict or grant a new trial would be inconsistent with substantial justice.

V. FEDERAL COURT RULINGS SUBSEQUENT TO *CHURCHMAN*

1. *Chiarot v. Belcher,* Docket no. 04-CV-73524, rel'd June 23, 2005.

A. OVERVIEW

This auto negligence action was before the Eastern District Court based on the diversity of the parties. Plaintiff, a Canadian citizen, alleged to have been rear-ended while driving his vehicle in Clinton Township, Michigan. Plaintiff alleged that his vehicle was pushed into the vehicle situated in front of him and that his head hit the steering wheel upon impact. After the accident, plaintiff spoke to defendant, got back in his car and continued on his way to play golf with co-workers. Plaintiff stopped his golf game short because of pain. The police report indicated no signs of injury. Plaintiff presented to a Windsor hospital later that same day. No x-rays were taken. Plaintiff was given pain medication and released. Plaintiff only missed 4-5 days of work immediately after the accident. He treated with a chiropractor for six months, and elected to have acupuncture. Plaintiff alleged pain in the neck, lower back and lower legs, headaches, memory loss, nausea, and trouble sleeping. Much of this, i.e. the nausea, back pain and trouble sleeping, however, could be related to plaintiff's other health conditions and past injuries. Plaintiff alleged that his ability to play golf and work out at the health club had been limited, but he admitted to still being able to mow the lawn, use a treadmill and lift weights. Plaintiff submitted an affidavit from his neurologist, which was clearly created to satisfy the language of MCL 500.3135(2)(a)(ii). The affidavit was not dated or signed when submitted, but was later sworn to on May 19, 2005. The Court's analysis proceeded on the issue of whether this affidavit was sufficient under MCL 500.3135(2)(a)(ii).

B. THE *CHIAROT* COURT'S ANALYSIS

In denying the defendant's motion for summary disposition, the district court found plaintiff's neurologist's affidavit sufficient under MCL 500.3135(2)(a)(ii). Specifically, the court found that an affidavit from a board-certified neurologist, which attests that he or she is someone that "regularly diagnoses and treats closed injuries" and that offers opinions that the plaintiff "may be suffering from serious neurological injury as a result of the automobile accident" is sufficient under the statute. The court found that the plaintiff's neurologist was an "allopathic physician", who had testified in a manner consistent with the statute. Accordingly, the court found the affidavit sufficient under the "closed head injury exception."

In so holding, the court specifically distinguished this affidavit from the one found insufficient in *Churchman*. The court acknowledged that the affidavit here seemed to have been specifically designed to satisfy the statute and also considered those Michigan cases that have refused to consider doctor affidavits that give "only conclusory allegations, and provid[e] no scientific or factual support for th[eir] conclusions." However, the court distinguished these cases by focusing on paragraph two of the affidavit, which stated that the doctor's opinions were "derived from the fact that [plaintiff] did suffer from a head impact as a result of the crash, that he has also been suffering from daily headaches since the crash, and has been demonstrating short term memory deficits since the crash." The court added that the statutory language of MCL 500.3135(2)(a)(ii) does not require a description of the source of the doctor's opinion, and

although the factual support for plaintiff's doctor's opinions is generalized, the court is not in a position to substitute its judgment for that of a physician specializing in closed head injuries to conclude there has been no factual support given for his opinion. The court ended its discussion by noting that this plaintiff had "minimally satisfied" the requirements of MCL 500.3135(2)(a)(ii). Because plaintiff satisfied the statute, he had raised an issue of fact sufficient to defeat the defendant's motion for summary disposition.

2. *Pietrykowski v. Trimac Transport Services,* Docket no. 05-CV-72545, rel'd July 13, 2006.

A. OVERVIEW

The plaintiff was driving on I94 when she decelerated to allow a truck onto to the highway. The defendant's semi truck rear-ended the plaintiff's vehicle. The plaintiff complained of headaches and pain in her neck, head, back, hips and knees. Neuropsychologist Dr. Sewick diagnosed cognitive, mood and pain disorder secondary to the plaintiff's injuries. A different doctor diagnosed a closed head injury, cognitive impairment and recommended cognitive rehabilitation and a neurocognitive assessment. A neurosurgeon diagnosed herniation of eight discs and a compression fracture. The doctor indicated that he spinal injuries were permanent.

B. THE *PIETRYKOWSKI* COURT'S ANALYSIS

The Court concluded that summary disposition was inappropriate. It noted that is was unnecessary for the Court to decide the dispute regarding the nature and extent of the plaintiff's injuries regarding her claim of a serious impairment of bodily function. The plaintiff presented sworn affidavits from two medical doctors who regularly diagnosed and treated neurological injuries stating that the plaintiff may have suffered a serious neurological injury as a result of the accident. The Court noted that these affidavits provided a sufficient basis for allowing the finder fact to consider the plaintiff's closed head injury. Viewing the evidence in the light most favorable to the plaintiff, the Court also found a question of fact regarding the plaintiff's claimed other physical injuries. Therefore, it completely denied summary judgment for the defendants.

3. *Maloczewski v. Babic,* Docket no. 07-CV-10966, rel'd July 16, 2008.

A. OVERVIEW

The plaintiff was a semi truck driver. While driving his truck, he apparently rear-ended another semi. The plaintiff had to be extracted from the vehicle with the Jaws of Life. Within four months of the accident, the plaintiff was cleared by his doctor to return to work. The plaintiff was scheduled to work his usual seventy hours per week, but the plaintiff indicated that because of his back pain he has been averaging forty hours per week. The plaintiff indicated that he no longer engaged in playing with his grandchildren, bicycle riding, long drives without a break, and that the distance he can walk is restricted. No doctor imposed these restrictions. A doctor diagnosed plaintiff with traumatic brain injury, cervical disc pathology, cervical strain, rib fractures, T9 compression, thoracic myelopathy, lumbosacral disc pathology, sciatica, carpal tunnel syndrome, left ulnar neuropathy, and hyperlipidemia.

B. THE *MALOCZEWSKI* COURT'S ANALYSIS

The defendant moved for summary disposition, which the trial court granted. The trial court noted that the plaintiff merely submitted records from his doctor regarding the closed head injury. Although the doctor was a licensed allopathic physician, there is no evidence that he regularly diagnosed or treated closed head injuries. The Court also noted that the doctor's report was unsworn and not under oath. Finally, the Court noted that the doctor did not specifically diagnose a serious neurological injury. Therefore, the plaintiff had to satisfy the *Kreiner* requirements. The District Court for the Eastern District of Michigan noted that he could not meet this requirement. The Court noted that all of the restrictions were self-imposed. The Court also noted that, although the plaintiff was working less hours, he was still working full time. The plaintiff's job activities had not significantly changed. Therefore, the plaintiff's life after the accident was not significantly different than his life before the accident.

4. *Belknap v. J.B. Hunt Transport, Inc*, 273 Fed Appx 415 (2008)(unpublished).

A. OVERVIEW

The defendant driver allegedly rear-ended the plaintiff's vehicle. As a result of the accident, theplaintiff allegedly suffered from injuries to his left shoulder, lower back, right hand, and potential closed head injuries. The plaintiff was unable to work for almost a year. The defendants moved for summary disposition arguing that the plaintiff did not meet the serious impairment threshold. The plaintiff responded by relying on MCL 500.3135(2)(a)(ii). The plaintiff submitted an affidavit from his doctor indicating that the plaintiff may have sustained a serious neurological injury and that the plaintiff had suffered a traumatic brain injury in the automobile accident. The District Court granted the defendant's motion for summary disposition, finding that plaintiff did not qualify for the serious neurological injury exception under MCL 500.3135(2)(a)(ii).

B. THE *BELKNAP* COURT'S ANALYSIS

The Sixth Circuit reversed the decision of the Federal District Court. The Court concluded that the District Court erred in finding the affidavit and subsequent deposition testimony of the diagnosing doctor insufficient under MCL 500.3135(2)(a)(ii). At the deposition, the doctor testified that he is a board certified physician trained in neurophysiology who regularly diagnoses and treats closed head injuries. The doctor stated that it was probably more likely than not that the plaintiff sustained a serious neurological injury. The Sixth Circuit concluded that the doctor offered sufficient testimony that the plaintiff "may be" suffering from a serious neurological injury. This sworn testimony automatically created a question of fact for the jury.

5. *Shropshire v. Laidlaw Transit, Inc*, 550 F 3^{d} 570 (CA6, 2008).

A. OVERVIEW

The plaintiff filed this suit as next friend of her daughter. The plaintiff picked her

children up from school and was exiting the parking lot when her van was struck by a bus. The plaintiff's daughter, Hannah, hit her head against the van's window. Hannah did not immediately show physical signs of injury and did not seek immediate medical treatment. But within a few days Hannah began to experience headaches, developed a fever, and began vomiting. Over the years, Hannah visited several doctors, but there was only one EEG indicating abnormality in Hannah's brain. Hannah testified that since the accident she would go swimming, plays computer, has friends, plays basketball, watches television, rides her bike, and generally got to do all the fun stuff that she wanted to do. Hannah's grades remained good although there was some indication that her handwriting grade was low before and after the accident. The plaintiff filed suit and relied on an affidavit from the doctor performing the abnormal EEG. The doctor indicated that Hannah suffered from a traumatic brain injury that the doctor was a licensed allopathic physician who regularly diagnosed and treated closed head injuries, and that it was his opinion that the motor vehicle accident caused Hannah to sustain a closed head injury resulting in a serious neurological injury. The District Court excluded the affidavit for unstated procedural reasons. The District Court ruled that without the affidavit, plaintiff had no evidence that Hannah suffered a serious impairment. Therefore, it granted summary judgment to the defendant.

B. THE *SHROPSHIRE* COURT'S ANALYSIS

The Sixth Circuit noted that, in a diversity action, the Federal Courts apply the state substantive law but federal procedural law. Therefore, it considered an essential question whether MCL 500.3135(2)(a)(ii) was a procedural or substantive law. The Court concluded that the language of the statute indicated that its purpose is to allocate the decision-making authority between the judge and jury. This is a quintessential procedural determination. The Court stated that the subsection sets forth no substantive standard. It merely delineates which decision-making body, judge or jury, should make the substantive determination laid out elsewhere. The Court concluded that there is only one way to meet the serious impairment threshold required under MCL 500.3135, and that is by showing a serious impairment of bodily function. The Court stated that this means that every plaintiff must satisfy the requirements of MCL 500.3135(7), which defines a serious impairment of bodily function as an objectively manifest impairment of an important bodily function that effects the person's general ability to lead his or her normal life. The Court stated that there is no exception for cases involving closed head injuries. Therefore, cases involving closed head injuries would also have to demonstrate that the plaintiff suffered a serious impairment of a bodily function that affected his or her general ability to live his or her normal life. The Court noted that Michigan Court of Appeals cases have determined that a plaintiff need not satisfy the requirements of subsection (7) to survive summary disposition. But the Court noted that this merely dealt with summary disposition and not what the plaintiff must ultimately prove to the jury in order to prevail on the merits. Therefore, the Sixth Circuit concluded that, although subsection (2)(a)(ii) provides an alternate road by which a plaintiff may reach a jury, it does not create an altogether new means of recovery. Because of this, the Court concluded that the statute was merely procedural and not controlling on the federal court. Reaching this conclusion, the Court simply ignored MCL 500.3135(2)(a)(ii) and determined whether the plaintiff has presented sufficient evidence of an objectively manifested injury to Hannah that affected Hannah's ability to lead her normal life. The Court found no evidence that Hannah could not lead her normal life. The Court noted that

the only possible evidence of a change in her normal life was Hannah's academic performance. But Hannah had never been held back a grade in school and had never received the assistance of a tutor. The only negative academic performance involved Hannah's handwriting. But the evidence showed that Hannah's handwriting scores in Kindergarten were also low. Therefore, the Sixth Circuit concluded that summary judgment was appropriate for the defendant.

Shropshire presents an interesting case. Arguably, the Sixth Circuit's analysis regarding MCL 500.3135(2)(a)(ii) is dicta because the Court never needed to reach the issue. Because the plaintiff failed to provide an admissible affidavit, she did not offer testimony sufficient to meet the statutory requirement. Therefore, like the Court of Appeals cases discussed supra, she would have to meet the traditional *Kreiner* standards. And this is exactly what the Sixth Circuit applied in its reasoning in the case. Regardless, *Shropshire's* analysis has not been rejected on this dicta ground. Therefore, it is binding precedent in the Sixth Circuit. Arguably, the elimination of MCL 500.3135(2)(a)(ii) from consideration in federal court cases makes the federal courts an inviting venue for defending closed head injury cases. It eliminates an avenue for a plaintiff to go directly to a jury. Of course, the ability to invoke the federal court's jurisdiction is limited. Typically, cases such as these would only be able to reach the federal court in matters of diversity of citizenship.

VI. THEORIES AND DEFENSES TO CLOSED HEAD INJURY CASES

A. INTRODUCTION

Adjusting the closed head injury case is not complete upon a review of the claimed injuries. Threshold injury is but one defense to such claims. Defenses based upon causation and malingering, as well as challenging the very diagnosis, remain. These defenses must be reviewed during the adjustment process. Some of the more prevalent defenses are summarized below.

B. BLAMING THE PLAINTIFF

1. Demonstrating The Cause Of The Accident

As in every other motor vehicle case, the simplest defense is that the insured was not at fault for the accident. Such claims may be defended by asserting that the Plaintiff was at fault for the incident, or by asserting that a non-party was at fault for the accident. Non-party fault may be assessed even in the absence of a specific identification of the non-party (such as the hit and run or phantom vehicle cases). If a plaintiff's negligence is greater than 50%, there is no recovery for non-economic damages.

2. The Seatbelt Defense

Many closed head injuries involve blows to the head resulting from the fact that a claimant did not wear a seatbelt. In many of those cases, a biomechanical expert can testify that there would have been no blow to the head and no head injury had the claimant simply been wearing a seatbelt. This defense is simple, straightforward and easy to prepare. However, under

current Michigan law, a person is assigned only five percent negligence for a failure to wear a seatbelt as required by law. Thus, in many cases, even though the injury could not have occurred but for the plaintiff's failure to follow the mandated seatbelt law, the jury may only apportion five percent negligence to the plaintiff for doing so. See MCL § 257.710e. The Statute provides, in pertinent part:

> (3) Each operator and front seat passenger of a motor vehicle operated on a street or highway in this state shall wear a properly adjusted and fastened safety belt, except as follows:
>
> > (a) a child who is less than 4 years of age shall be protected as required in subsection 710d. [MCL 257.710d]
> >
> > (b) a child who is 4 years of age or older, but less than 8 years of age and who is less than four feet nine inches in height shall be properly secured in a child restraint system in accordance with the child restraint manufacturer's and vehicle manufacturer's instruction and the standards prescribed in 49 CFR 571.213.
>
> * * * *
>
> (7) Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However the negligence shall not reduce the recovery for damages by more than 5%. [MCL 257.710e(3) and (7)]

The Michigan Supreme Court concluded that MCL 257.710e does not apply to products liability actions. *Klinke v Mitsubishi Motor Corp,* 458 Mich 582, 589 (1998). "[W]e hold that statutes in the motor vehicle code do not apply in product liability cases involving the civil liability of manufacturers." *Id.* at 591 n7. The Court concluded that the failure to wear the seat belt could be used under a common law comparative negligence standard. Therefore, it concluded that the 5% cap did not apply to such cases. *Id.* The Court reached the same conclusion in *Mann v St Clair Co Rd Comm,* 470 Mich 347 (2004), when discussing a suit against a county road commission brought under the highway exception to governmental immunity. In *Mann,* the Court stated that the cap on the reduction of damages for failure to wear a safety belt can only apply in those limited tort suits allowed under the No Fault Act. *Id.* at 353-354. Because the plaintiffs' suit in *Mann* was not brought under the No Fault Act, the Court concluded that the safety belt statute's cap on the reduction of damages did not apply. *Id.* at 354. The Court also concluded that MCL 257.710e was inapplicable because the plaintiffs did not allege that their damages arose out of the "ownership, maintenance, or operation of a motor vehicle." *Id.* at 355. Instead, the plaintiffs alleged that the accident and their damages were caused by a roadway edge drop and that the defendants were liable under the highway exception to governmental immunity. *Id.* The Court concluded that the language meant that the liability must actually be caused by the ownership, maintenance, or use of a motor vehicle. Therefore, the statute would not apply to injuries that were allegedly caused by product manufacturing or improper maintenance of a highway. *Id.* at 356-357.

It should also be noted that the statute does not require an adult back seat passenger to wear a safety belt. There has been no definitive case that has reached the issue of whether MCL 257.710e's failure to discuss back seat passengers would prevent the imposition of any

comparative negligence or whether it would allow for the imposition of greater than a 5% comparative negligence. Arguments could be made in either direction. For instance, a party could argue that, because back seat seatbelts are not required for adults at all, it would be absurd to impose greater liability for the lack of their use than the seatbelts that are required by law. On the other hand, it could be argued that the legislature has simply remained silent on the issue and that the traditional common law comparative fault would apply, which would allow the imposition of greater than 5% comparative fault. The Court of Appeals briefly discussed the issue in *Thompson v Fitzpatrick*, 199 Mich App 5 (1991). *Thompson* did not specifically address a back seat passenger. Therefore, anything that it said regarding the application of MCL 257.710e to back seat passengers would be dictum. But in addressing the defendants' argument that *Lowe* would allow a back seat passenger to be 100% comparatively negligent for not wearing a seatbelt, the Court of Appeals noted that *Lowe* applied only to products liability cases, and it concluded that the issue of limiting the reduction of damages for non-use of a seatbelt was a legislative concern. *Id.* at 8-9

Despite the plain language of this statute, our firm has been successful on at least two occasions in convincing the court to allow the jury to apportion a greater "fault" to the plaintiff than 5%. This argument, however, is difficult and technical, arising from a combination of statistical evidence regarding seatbelt use and seatbelt efficacy, and an interplay between the non-party at fault statute and the negligence statute. The defense requires the testimony of a qualified biomechanical expert who can testify that if the person was wearing the belt, there would have been no blow to the head and, without a blow to the head, there would have been no injury. Although a difficult argument, at least two circuit courts have accepted it.

C. DEFENSES ON CAUSATION

1. Simple Challenge That The Injury Occurred In The Accident

a. The Lack Of Blow to the Head

As explained above, there is some support in the literature that suggests that a closed head injury may occur even in the absence of a blow to the head. This does not mean, however, that this is not a defense in these cases. Challenges may be made to this literature. Moreover, especially where there is a low speed collision, the absence of a blow to the head may make it very difficult for a jury to believe an injury actually occurred. In low speed accidents, the forces acting upon the head are frequently minimal, and well below the threshold to induce injury. Most jurors are skeptical of whether low impact collisions could cause such injuries.

Careful examination of experts on the requirements for such injuries may reveal a lack of knowledge on the physical criteria necessary to cause such incidents, (such as a change in velocity or insufficient g-forces) and whether such criteria existed in a particular case. Most neuropsychologists and medical physicians lack any real specifics about the accident, and any real knowledge of what types of forces are necessary to cause injury without a blow to the head. The absence of such knowledge provides a strong basis for challenging the opinion, while at the same time providing some logical basis to jurors that closed head injuries cannot occur without a blow to the head to decide in favor of the defendant.

b. Effect of Low Speed Collisions

The forces involved in a collision are always relevant to injury causation criteria. Applying common sense, it is far more likely (absent special circumstances) that a high-speed high impact will cause an injury whereas a low speed low impact collision may not. The forces in high-speed collisions are simply higher, and there is a direct correlation between impact forces and injury. Despite this, an expert may opine that a closed head injury may be more likely to occur in low speed collisions than in high-speed collisions. This, however, belies notions of common sense. In fact, absent unforeseen circumstances not present in most cases, low speed collisions are unlikely to result in closed head injuries. This fact is well received by juries since many have been in low speed accidents without ever having been injured.

c. The Manufacturer Defendant: The Research And Development Spent To Avoid Head Injuries By Manufacturers Of Motor Vehicles

In certain cases a claimant may allege that they suffered a closed head injury by coming into contact with a headrest or an airbag. Manufacturers, however, spend millions of dollars every year insuring that headrests and airbags meet certain federally mandated criteria to prevent such events from occurring. In order to certify a vehicle to meet certain Federal Motor Vehicle Safety Standards (FMVSS), these manufacturers test and certify that the airbags and headrest perform well within the head injury criteria established by the federal government (i.e., they do not and cannot induce head injury). Although often difficult to get into evidence, this fact should not be forgotten when faced with a claimant alleging that their head injury resulted from interaction with the headrest or airbag. A well-qualified biomechanical expert should provide the basis for such an argument.

2. The Pre-Existing Psychological Dilemma

One of the defenses to claims of closed head injury is where a claimant was psychologically ill long before the allegedly precipitating event. In ascertaining whether a person has a developmental history of psychological conditions, it is often important to determine whether he or she had a history of meeting developmental milestones normally. In addition, it is important to determine whether the plaintiff had any significant physical disease, trauma, or illness as a child, or whether there were any psychological disorders present in childhood such as a separation anxiety disorder or learning disability. Other factors that might be taken into account are whether the plaintiff was raised in a home with divorced parents, experienced a custody battle, or had dysfunctional relationships with parents. Finally, it is important to determine if the plaintiff experienced any sexual or physical abuse as a child.

Another good indicator for pre-existing psychological trauma is to determine whether the plaintiff came into contact with governmental agencies such as social services or youth services as a child. Was the plaintiff either the victim or perpetrator of any crimes? Was the plaintiff involved in multiple marriages or a succession of chaotic, stormy relationships? These facts may make a jury less likely to believe that certain alleged effects of closed head injury originate from

the automobile accident.

Educational history is also extremely important, especially where there is an alleged change of cognitive functioning. For instance, where neuropsychological testing demonstrated a lower than average scoring on mathematical skills, it is a good idea to check the educational performances in those areas. Those areas set benchmarks for comparison that might not otherwise be available. In addition, investigation should be made into whether the plaintiff had any learning disabilities or behavioral disorders; whether they graduated and, if so, whether it was with their class. Finally, the plaintiff's experiences in social programs, extracurricular activities, academic honors, academic discipline or discipline for misconduct should be explored, as well as whether the plaintiff started but failed to finish college.

A plaintiff's employment history may be indicative of pre-existing psychological trauma. Did the plaintiff have a work history of terminations or chronic "job-hopping"? Did the plaintiff make job applications with various employers? If so, locate inconsistencies in work history. Did the plaintiff have reprimands, counseling reports, or discipline for misconduct or poor work performance? Did the plaintiff's income history indicate a consistent upward trajectory, or rather a flat or downward trajectory that may indicate career reversals? Once again, this information may help to show below normal pre-morbid functioning and psychological sequelae.

A plaintiff's medical history should always be reviewed carefully. Identify all treatment providers, physical disorders diagnosed, treatment, medications used, indications of addictive habits, and number of treatment providers. Depositions of treaters are usually necessary and recommended as appropriate. Short-term doctor/patient relationships may be indicative of a Somatoform Disorder, symptom exaggeration, or treatment noncompliance. Obtain medical records as far back as possible. Generally it is advisable to request pediatric, family practice, obstetrician/gynecologist, and internists' records in addition to any other specialties involved. When reviewing medical records always look for reports, intake forms, progress notes, test results, other treating or examining doctors' names, correspondence, insurance forms and billing information, and diagnoses. Always compare the diagnoses found in the chart to those located in correspondence, insurance forms, and billing information for any inconsistencies. Determine whether the course of treatment provided was appropriate to diagnosis and was effective. Evaluate possible side effects of treatment. On some occasions, repeated complaints of problems without objective evidence of injury, or challenges to medical doctors' opinions, may be an indication of an underlying psychological disorder.

Substance abuse history may also be beneficial. At least one count has noted the relevance of marijuana's effect on memory. Note any reference to concern for drug abuse, alcohol usage, abnormal blood or liver screens, or medical notations expressing concern over prescribed medication abuse or alcohol abuse. Any physician notation indicating the refusal to prescribe additional medications can be a red flag for substance abuse. Does the plaintiff have a history of DUIs or DWIs? Multiple marriages and divorces may also be indicative of substance dependence.

A person's marital history may also include keys to a successful defense. Look for the ages of first marriage, number of marriages, or grounds for divorce. Look for any history of

being involved in custody disputes, failure to pay child support, visitation or custody disputes, or hints of abuse. A person's criminal history must also be reviewed. Criminal records should be evaluated for any issues related to substance abuse, fraud, or domestic violence inflicted or received. A person's financial record may provide strong motives. Changes in income, failure to honor financial obligations, foreclosures, repossessions, mortgages, or heavy debt ratios may indicate significant psychosocial stressors. Each of these elements may provide important pieces to the puzzle and demonstrate the existence of a pre-existing psychological disorder.

D. THE MALINGERER ARGUMENT

Another potential defense is whether the claimant is a malingerer. Under such circumstances, exploration of whether the plaintiff is intentionally producing or grossly exaggerating his or her symptoms. In an attempt to discredit the plaintiff as a malingerer, the defense usually considers the following: Did the plaintiff have an overriding concern with cash rather than cure? Did the plaintiff often refuse treatment, especially if it was inconvenient? Did the plaintiff agree to treatment but then miss appointments? Did the plaintiff, despite complaints of misery, manifest none of the classical signs or symptoms of depressive illness? Did a marked discrepancy exist between the claimed stress and the objective findings? Did the plaintiff's physical complaints come and go, varying with the nature of his or her activities and the strength of the legal issues? Did the plaintiff manifest symptoms that are vague and difficult to pin down? Did the plaintiff have a long history of drifting about accompanied by spotty employment? And, did the plaintiff have chronic financial problems, which suggest a predisposition for malingering? All of these questions are important for determining whether a person's claims relate to a real injury or are part of an underlying malingering psychosis.

E. PRIMARY OR SECONDARY GAIN

Another defense to explore is whether the plaintiff's symptoms are actually a manifestation of "primary" or "secondary gain" rather than the result of a true mental or emotional injury. Primary gain is the compensation for a psychological problem by means of a physical disability. It is the subconscious creation of a substantial disability out of even a minor physical injury. Secondary gain can be the care and solitude, or freedom from responsibility, or the financial compensation often obtained as a consequence of disability. Frequently, secondary gain prolongs or exacerbates existing illness. Secondary gain differs from primary gain in that it is more a consequence than a cause of disability. It serves as a "fringe benefit" to the disabled, which can arguably make the prospect of continued illness quite attractive. Secondary gain may be difficult to see or to show, but may be suggested by an expert. If fully explained, a jury may see the claims as <u>not</u> being as serious as described, or not being related to the accident. The defense may argue that both primary and secondary gains create substantial subconscious obstacles to full recovery and resolution of symptoms despite a sincere desire to get better.

VII. EXPERTS THAT MAY BE HELPFUL IN DETERMINING THE EXTENT OF THE CLAIM

A. BIOMECHANICAL ENGINEER

As explained above, biomechanical experts may be very important in defending closed

head injury claims. Biomechanical engineers are scientists who have studied the relationship between force, acceleration, and deceleration and their impact on the human body (i.e., injury causation), including the brain. They can explain how the brain can be damaged simply due to the change in acceleration forces and that there can be brain injury without an actual blow to the head. Biomechanical engineers should be able to provide analogies and examples so that a jury is able to understand the movement of the brain inside the skull and the damage that can or cannot occur from the lack of impact to the head and impact with the bony structures of the skull. This testimony helps the jury to understand and accept the medical testimony that will follow. It is also helpful in demonstrating the forces involved in a given accident, the impact of the body with any structure within the vehicle, the forces that act upon the body, and whether those forces can cause injury.

B. ACCIDENT RECONSTRUCTIONIST

In some cases, the forces involved in an accident may not be strong enough to induce injury. Although this may be explained by a biomechanical expert, typically the biomechanical expert is not qualified to testify as to the forces involved in a given accident, but must rely upon an accident reconstructionist. Working together, the pain may provide strong evidence that the accident did not cause the injury.

C. NEUROLOGIST

Michigan law requires that a licensed osteopathic or allopathic physician that regularly treats people with a closed head injury diagnose the existence of a serious neurological injury. Typically, a neurologist is used in this role. The neurologist substantiates the legitimacy and credibility of the treating neuropsychologist and explains the mechanism of the traumatic brain injury, the results of the clinical examination, and the significance of negative diagnostic test results.

D. NEUROPSYCHOLOGIST

The most commonly used experts in closed head injury cases are neuropsychologists. Often used in conjunction with the biomechanical engineer and neurologist who will explain the biomechanics of the body in the subject accident, the neuropsychologist typically discusses testing and cognitive or other difficulties. The neuropsychologist is typically the expert who explains the effects of such an accident.

E. PSYCHIATRIST

Used with far less frequency, and often difficult to find, psychiatrists are also used as experts in litigation. Increasingly, however, those individuals with mild head injuries are complaining of other psychiatric conditions, including emotional instability, depression, and anxiety that may require the intervention of a neuropsychiatrist to prescribe and administer medicine. Literature describing the allegedly negative psychological effect of patients suffering from “mild” traumatic brain injury exists.

Frequently, plaintiff attorneys attempt to use psychiatrists to explain the alleged detrimental effect of the injury on the client's ability to perform in the workplace. Defense psychiatrists can be used to counter such testimony. They might also be used to reveal the claimant as a malingerer, if such a portrayal applies.

F. LIFE CARE PLANNER

In more serious cases, some individuals may claim permanent symptoms from their injury. See e.g. RANDOLPH W. EVANS, NEUROLOGY AND TRAUMA 91, 92-93 (1996). These individuals may claim to suffer from debilitating but persistent post-concussion syndrome or other lingering conditions. In a city in which a favorite hockey player lost his career in a vehicular accident, and remains incapacitated to this day requiring full time nursing care[6], lingering effects of a closed head injury are more readily understood and believed by a jury.

In such cases, a plaintiff may use a life care planner to quantify the cost of future medical and psychological care. The life care planner is asked to quantify the replacement cost of hiring individuals to provide services the patient is unable to do for himself or herself. In such cases, life care planners on the defense side might be necessary to make certain that a claimants chosen planner remains intellectually honest.

G. VOCATIONAL ECONOMIST

In some cases, claimants will argue that they suffer from a permanent disability. They may argue that people with disabilities have a shortened work and life expectancy and earn less income per year, and that this loss results in a significant economic loss for the person with a traumatic brain injury. A vocational economist may offer assistance exploring jobs available to such a claimant, regardless of the claimed injury. A vocational economist may also be helpful in quantifying future lost income, and help keep any such experts for the claimants honest in their calculations.

[6] Vladimir Konstantinov of the Detroit Red Wings was injured in a limo accident shortly after the 1997 Stanley Cup victory.