STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 227257

MARGARET PHILLIPS, Personal Representative
of the Estate of REGEANA DIANE HERVEY,
Deceased,

Supreme Court No. 121831

Plaintiff-Appellant,

vs.

MIRAC, INC., a Michigan Corporation,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

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DECISION APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellant, by and through its attorneys, TROGAN & TROGAN, P.C., by NICHOLAS R. TROGAN, III, requests that the Court reverse the majority decision of the Court of Appeals dated June 7, 2003, and reinstate the judgment of the Circuit Court.

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER MCLA 257.401(3); MSA 9.2101(3) WHICH LIMITS MOTOR VEHICLE OWNER'S LIABILITY SOLELY FOR THOSE OWNER'S ENGAGED IN THE BUSINESS OF LEASING MOTOR VEHICLES FOR A PERIOD OF 30 DAYS OR LESS TO $20,000 PER PERSON/$40,000 PER ACCIDENT IS AN UNCONSTITUTIONAL INFRINGEMENT UPON THE RIGHT TO JURY TRIAL GUARANTEED BY ARTICLE I § 14 OF THE MICHIGAN CONSTITUTION.

Plaintiff-Appellant answers	"Yes"
The Trial Court answered	"Yes"
Defendant-Appellee answered	"No"
Court of Appeals answered	"No"

II.

WHETHER MCLA 257.401(3); MSA 9.2101(3) WHICH LIMITS MOTOR VEHICLE OWNER'S LIABILITY SOLELY FOR THOSE OWNER'S ENGAGED IN THE BUSINESS OF LEASING MOTOR VEHICLES FOR A PERIOD OF 30 DAYS OR LESS TO $20,000 PER PERSON/$40,000 PER ACCIDENT IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION OF THE LAWS GUARANTEED BY ARTICLE I § 2 OF THE MICHIGAN CONSTITUTION.

Plaintiff-Appellant answers	"Yes"
The Trial Court answered	"Yes"
Defendant-Appellee answered	"No"
Court of Appeals answered	"No"

III.

WHETHER MCLA 257.401(3); MSA 9.2101(3) WHICH LIMITS MOTOR VEHICLE OWNER'S LIABILITY SOLELY FOR THOSE OWNER'S ENGAGED IN THE BUSINESS OF LEASING MOTOR VEHICLES FOR A PERIOD OF 30 DAYS OR LESS TO $20,000 PER PERSON/$40,000 PER ACCIDENT IS AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS OF LAW GUARANTEED BY ARTICLE I § 17 OF THE MICHIGAN CONSTITUTION.

Plaintiff-Appellant answers	"Yes"
The Trial Court answered	"Yes"
Defendant-Appellee answered	"No"
Court of Appeals answered	"No"

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On October 25, 1997, Defendant, Da-Fel Reed, rented a 1997 Dodge automobile from the Defendant, Mirac, Inc., a/k/a Enterprise Rent-A-Car. On October 27, 1997, Plaintiff's Decedent, Regeana Diane Hervey, was a passenger in the right front seat of the automobile. At this time, Da-Fel Reed was driving the automobile in an easterly direction on East Holland Avenue, a/k/a M-46, about 1/16th of a mile west of Reimer Road in Saginaw County. Da-Fel Reed negligently operated the 1997 Dodge automobile too fast for the pavement conditions, lost control of the vehicle, crossed the centerline of East Holland Avenue and collided with a 1994 Oldsmobile automobile being driven in a westerly direction by one Dolores K. Force. As a result of the collision, Regeana Hervey was killed. At the time of her death, Regeana Hervey was 32 years old. Her immediate next-of-kin was her daughter, Koya Hervey, age 10, and her mother, Margaret Phillips, age 55.

Margaret Phillips, as Personal Representative of the Estate of Regeana Hervey, has sued the Defendants, Da-Fel Reed and Mirac, Inc., for the death of Regeana Hervey. Under Michigan law, Mirac, Inc., as owner of the automobile, is responsible for Da-Fel Reed's operation of the 1997 Dodge automobile. Da-Fel Reed was an **uninsured driver**.

The case was tried to a jury on November 23, 24, and 30, 1999. On November 30, 1999, the jury returned a verdict for Plaintiff in the amount of $250,000.00. Plaintiff moved to enter Judgment against the Defendant, Mirac, Inc., in the amount of $250,000.00 plus statutory interest, fees, and costs. Defendant objected to the proposed Judgment based upon the provisions of MCL 257.401(3); MSA 9.2101(3) and requested that the Court enter Judgment against it for the sum of $20,000.00 plus interest, costs, and fees.

Oral arguments were heard by the trial court (Judge Leopold P. Borrello) on March 3, 2000. On April 26, 2000, Judge Borrello issued an Opinion and Order.

Specifically, Judge Borrello first found that MCLA 257.401(3); MSA 9.2101(3) was unconstitutional as an impermissible violation of Plaintiff's right to have a jury assess its damages. The trial court found that

> ". . . in 1963 owner's liability existed and plaintiffs were entitled to have a jury assess damages under the constitution. Consequently, any subsequent attempt by the Legislature to limit the jury's ability to perform this constitutionally required task is an impermissible interference on the Plaintiff's right. Therefore, the limit provided for in MCLA 257.401(3); MSA 9.2101 is an unconstitutional infringement on Plaintiff's right to have a jury determine damages in this case." Opinion, p 4.

Second, the trial court found that the statute in question violated the equal protection clause of the Michigan Constitution. Having already found that the statute violated Plaintiff's right to trial by jury, the court employed the "strict scrutiny" test in its determination. On page 9 of its Opinion the court summarized as follows:

> "Initially, the Court must determine whether a compelling governmental interest exists. The Court finds that there is no compelling governmental interest in the regulation of the car rental industry in Michigan. Furthermore, the Court finds that the Defendants have failed to assert any compelling governmental interest whatsoever. Therefore, in absence of a compelling governmental interest, MCL 257.401(3); MSA 9.2101(3) fails strict scrutiny and necessarily violates the Equal Protection Clause of the Michigan Constitution."

Finally, the trial court also found that the statute in question violated the due process clause of the Michigan Constitution "based upon the reasons articulated for the Equal Protection violation." Opinion, p 10.

On May 16, 2000, Defendant filed its claim of appeal. On May 26, 2000, Plaintiff filed her Appearance. On December 21, 2002, Defendant filed its Brief on Appeal. On February 26, 2001, Plaintiff filed her Brief on Appeal. On March 16, 2001, Defendant filed its Reply Brief on Appeal. The Court of Appeals heard oral argument from Defendant and Plaintiff on January 16, 2002. The Court of Appeals issued its written Opinion and Order on June 7, 2002. In a **TWO TO ONE SPLIT DECISION** the Court of Appeals reversed the Opinion and Order of the trial court and found that the statute in question was not unconstitutional as an impermissible violation of Plaintiff's right to have a jury assess its damages, did not violate the equal protection clause of the Michigan Constitution and did not violate the due process clause of the Michigan Constitution. From that decision the Plaintiff filed for Leave to Appeal to the Michigan Supreme Court on June 21, 2002. On July 3, 2003, the Michigan Supreme Court granted Plaintiff's Petition for Leave to Appeal limited to the issues of whether MCL 257.401(3) constitutes an unconstitutional denial of Plaintiff's right to a jury trial, equal protection, or due process.

ARGUMENT

I.

THE PORTION OF MICHIGAN'S OWNER'S LIABILITY STATUTE THAT LIMITS LIABILITY TO $20,000 PER PERSON/$40,000 PER ACCIDENT SOLELY TO THOSE OWNERS WHO LEASE MOTOR VEHICLES FOR 30 DAYS OR LESS VIOLATES PLAINTIFF'S RIGHT TO JURY TRIAL GUARANTEED BY CONSTITUTION 1963, ARTICLE I, § 14.

Although the Court of Appeals majority in this case disagreed with the above-statement, there are several propositions upon which there is unanimous accord. Both the majority and dissent agreed that the Civil Liability Act, the statute in question herein, confers a right to jury trial because the Act provides for actual damages, and therefore is an action at law, not equity, at the time that the 1963 Constitution was adopted. [1] Both the majority and the dissent in this case agreed that in Michigan the right to a jury trial includes the right to have the jury assess damages.[2]

The majority in this case has irrationally decided that the Owner's Liability Statute (Civil Liability Act) does not infringe on the plaintiff's right to a jury trial for two reasons. First, the majority states that the Legislature has the power to abolish or modify common law and statutory rights and remedies. Therefore, the majority adopted the defendant's oft used catch phrase "what the Legislature gives, it may take away". [3] In other words, the majority opined that because the Legislature has the power to completely eliminate actions, it follows that the Legislature may therefore limit a plaintiff's remedy.

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[1] See Majority Opinion Page 3 and Dissent Page 1, both citing Anzaldua v Band, 457 Mich 530, 538, 539, 548; 578 NW2d 306 (1998).

[2] See Majority Opinion Page 3 and Dissent Page 1, both citing Leary v Fisher, 248 Mich App 574, 578; 227 NW 767 (1929).

[3] See Majority Opinion Page 4.

Justice Meter, at Page 2 of his opinion, succinctly explained the problem with the majority's reasoning as follows:

> "The fatal flaw with this argument is that the existence of a particular cause of action, at least in many instances, is not mandated by the constitution. Many causes of action are creatures of the Legislature, and therefore the Legislature is free to abolish these causes of action. The right to a jury trial on the other hand, is indeed mandated by the constitution, as discussed supra. Accordingly, the Legislature is not free to abrogate this right. In other words, while the Legislature may take away what it has given, it may not take away what *the constitution* has given".
>
> Support for this rationale can be found in *Sofie v Fibreboard Corp.*, 112 Wash 2d 636; 771 P2d 711, amended 780 P2d 260 (Wash, 1989). In *Sofie*, the Supreme Court of Washington, responding to a similar argument, stated:
>
> The Legislature has power to shape litigation. Such power, however, has limits: it must not encroach upon constitutional protections. In this case, by denying litigants an essential function of the jury [by way of damages caps], the Legislature has extended those limits.
>
> * * *
>
> Because of the constitutional nature of the right to jury trial, litigants have a continued interest in it – it simply cannot be removed by legislative action. *As long as the cause of action continues to exist and the litigants have access to a jury, that right of access remains as long as the cause of action does.* [Emphasis added.]

Second, the majority herein claims that subsection 401 (3) [of the Owner's Liability Statute] does not violate the right to jury trial because it does not infringe on the jury's right to

decide the amount of damages. It simply limits the amount of those damages that can be recovered from a particular class of vehicle owners. [4]

Again, Judge Meter pointed out the illogical reasoning and absurd results of the majority rationale stating at Pages 2 and 3 of his opinion as follows:

> Once again, this logic is fatally flawed. Indeed, in a case such as the instant one, having the jury "determin[e] . . . [the] facts and . . . the amount of damages that the injured plaintiff incurred" but then arbitrarily reducing this amount to a prescribed statutory number renders the jury's function purely illusory. [1] As noted in *Sofie*, supra at 721:
>
> > Respondents also contend that the damages limit affects only the judgment as entered by the court, not the jury's finding of fact. This argument ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents are essentially saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. *Such an argument pays lip service to the form of the jury but robs the institution of its function.* This court will not construe constitutional rights in such a manner. [Emphasis added.]
>
> A similar rationale was adopted by our neighbor state, Ohio, in *State ex rel Ohio Academy of Trial Lawyers v Sheward*, 86 Ohio St 3d 451, 715 N.E.2d 1062 (1999), in which the court stated, " . . . a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance."

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[4] See Majority Opinion Pages 4 and 5.

[1] I note that in the instant case, plaintiff does not have the option, as the majority suggests, of recovering damages from "other tortfeasors," because the negligent driver of the automobile in which plaintiff's decedent was a passenger is not collectible and was uninsured.

It is interesting that the majority attempted to analogize the case of Heinz v Chicago Road Investment Co., 216 Mich App 289, 299-300; 549 NW2d 47 (1996), to the case herein. In Heinz, supra, the court held that the statute which required that a jury damage award be reduced by the amount a plaintiff receives from a collateral source did not violate the right to a jury trial. The majority opined that the same was true in the present case because like Heinz, supra, the recovery is limited to a certain amount although the jury may assess a higher amount of damages. The obvious flaw in this line of reasoning is that under the situation in Heinz, supra, the plaintiff is simply prevented from recovering more in damages to which he is entitled. Under Heinz, supra, the plaintiff is **made whole**. For example, under Heinz, supra, if the plaintiff is compensated for ten thousand ($10,000.00) dollars of medical expenses, which were in fact paid by a collateral source, then his verdict is reduced by that amount in order to avoid a windfall. Furthermore, the plaintiff can recover his cost of the collateral source that paid the expenses if such were the case. In other words, the plaintiff is truly made whole. Contrast this with the present case. The jury verdict for the loss of a mother and daughter was $250,000.00. How can the plaintiff be said to be made whole if the statute in question limits the entry of judgment to $20,000.00? This is but an example of the fallacious reasoning process engaged in by the majority in reaching their clearly erroneous decision.

It would be of benefit to examine the historical precedent that culminated in Justice Meter's opinion. Michigan has long regarded the right to a jury trial "as the great bulwark of the liberty of the citizens." McRae v Grand Rapids, L & D R Co, 93 Mich 399, 401; 53 NW 561 (1892). The right is guaranteed by article 1, § 14 of the Michigan Constitution, which provides:

> The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in a matter proscribed by law. [Const 1963, art 1, § 14.]

Similarly, MCR 2.508 states:

> **(A) Right Preserved.** The right of trial by jury as declared by the constitution must be preserved to the parties **inviolate**.

"The right to a jury trial is a fundamental right protected by the State Constitution." Estate of Council v. Dr. Howard Gaba, 119 Mich App 300, 303; 326 NW2d 489 (1982) [emphasis added]. "The right to trial by jury is a substantive right guaranteed by the constitution of the State of Michigan." Jinkner v Widmer, 3 Mich App 155, 158; 141 NW2d 692 (1966) [emphasis added]. "[N]othing is better settled on the authorities that the legislature cannot take away a single one of its substantial and beneficial incidents" such as the right to a jury trial. Swart v. Kimball, 43 Mich 443, 448; 5 NW 635 (1880). It has been considered "a basic constitutional right" of all Michigan citizens. People v. Smith, 383 Mich 576, 578; 177 NW2d 164 (1970). **The right to trial by jury in a civil case extends to the determination of damages.** Mink v. Masters, 204 Mich App 242; 514 NW2d 235 (1994); Equico Lessors, Inc. v. Original Buscemi's, Inc., 140 Mich App 532; 364 NW2d 373 (1985); Waisanen v. Gaspardo, 30 Mich App 292; 186 NW2d 75 (1971); and Leary v. Fisher, supra, [holding that "plaintiff is entitled to a right of trial by jury, and one of the necessary incidents of the trial of cases of this character by jury is that the jury **shall fix the amount of damages**" (emphasis added)]. In the most recent case on point, Mink, supra, the Michigan Court of Appeals held that the court is "obligated to honor [a party's] right to a jury trial on the issue of damages." Mink, supra.

By allowing the jury to award the full amount of compensatory damages, only to have that award circumvented by the Legislature, hollows and eviscerates the right to trial by jury, thus rendering its existence one of mere form, and not substance. This is strictly prohibited by Michigan precedent. In Hughes v. John Hancock Mut. Life Ins. Co., 351 Mich 302, 309; 88 NW2d 557 (1958), the Michigan Supreme Court held that:

> the "purpose and aim [of the right to trial by jury] is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative."

Id., at 309.

The Defendant claims that the statute does not violate Plaintiff's right to jury trial because the Statute does not operate until the Judgment phase of the case. Such claim is spurious. In Rouse v. Gross, 357 Mich 475, 481; 98 NW2d 562 (1959), the Michigan Supreme Court held that the right to trial by jury under the Michigan Constitution "**refers to a right to present or defend an actionable claim to one jury to the point of jury verdict and judgment.**" Id., at 481 [emphasis added]. Thus, this "inviolate" right extends all of the way through judgment, and is not limited to the mere reading of a verdict in court.

The American Heritage Dictionary, which was used by Justices Corrigan and Weaver in Lewis v. Detroit Osteopathic Hospital, 460 Mich 851, 598 NW2d 632 (1999), defines something that is "inviolable" as "impregnable to assault or trespass; invincible" as well as "secure from violation or profanation." This means that the "inviolate" right to trial by jury, including the determination of damages, cannot be reduced or in any way compromised. The Michigan Supreme Court recognized this 58 years ago in People v. Bigge, 297 Mich 58, 72; 297 NW 70 (1941) where it held that "[t]he right of trial by jury is too firmly established in American jurisprudence to allow it to be whittled away by the legislature or by a too liberal construction of statute law by the courts." Id., at 72.

Subsequent proceedings contemplated by the statute following the verdict, are likewise prohibited.

> Where there are questions of fact to be determined and the issues are such that at common law a right to jury trial existed, **that right**

> **cannot be destroyed** by statutory change of the form of action **or creation of summary proceedings to dispose of such issues without jury**, in the absence of conduct amounting to waiver.

State Conservation Dept. v. Brown, 335 Mich 343, 346; 55 NW2d 859 (1952) [emphasis added].

As stated above, the jury renders a verdict for the full amount of compensatory damages. The jury then leaves the courthouse thinking that it has fulfilled its duty in honoring and protecting the constitutional right to trial by jury, only to have the verdict eviscerated by the court in a subsequent summary proceeding. This is akin to a hunter gutting the kill and then proclaiming that the trophy is still a full live deer. It is pure fiction. Form over substance. If upheld, the Statute would render the right to trial by jury a mere "paper tiger." As mentioned above, this fundamental right is one of substance. Jinkner, supra at 158. Its "purpose and aim is not to preserve mere matters of form and procedure, but substance of right." Hughes, supra, at 309. Thus, allowing the jury to render its verdict, only to have the verdict eviscerated by the court pursuant to MCL 257.401(3); MSA 9.2101(3), renders the right to jury trial a severely compromised right, which is supposed to be "inviolate." What is left is a complete right that exists only in form. The actual right is only partial in substance. This is the exact type of "whittling" away of the right to jury trial that the Michigan Supreme Court has already prohibited. Bigge, supra, at 72.

> The constitution deals with substance, not shadows . . . a constitutional protection cannot be bypassed by allowing it to exist in form but letting it have no effect in function . . . because the jury's province includes determining damages, this determination must affect the remedy.

Sofie v. Fibreboard Corp., supra. Furthermore, when the Michigan Constitution was adopted in 1963, juries had a specific duty under the Owners' Liability Statute to return a verdict that would fully compensate victims of automobile negligence for all injuries caused by the use of the

automobile. In fact, from the time the statute was enacted in 1909 until 1995, the jury had a specific duty to compensate the victim for pain and suffering damages, Belleville v Ingram, 230 Mich 462, 465-467; 202 NW 945 (1925); Crenshaw v Goza, 43 Mich App 437, 444; 204 NW2d 302 (1972), citing Yates v Wenk, 363 Mich 311, 318; 109 NW2d 828 (1961), and future damages. Zelinski v Harris, 289 Mich 381, 383; 286 NW 654 (1939). The question of the size of the verdict under the Owner Liability Act was "left largely to the discretion of the jury." Sweeney v Hartman, 296 Mich 343, 348; 296 NW 282 (1941); Hoffman v Rengo Oil Company, Inc, 20 Mich App 575, 577; 174 NW2d 155 (1969). So long as the verdict was within the range of proof and prejudice did not enter into the jury's consideration, the courts could not "substitute [their] judgment for that of the jury" on the question of damages. Sweeney, supra, 347-348.

Since litigants had a right to have the jury determine damages to fully compensate the victim of automobile negligence in 1963, the Michigan Constitution precludes the legislature from simply removing that right. Sofie, supra, 720. The legislature may not in any way encroach upon or "whittle away" the traditional right of the jury in Michigan to assess damages according to the evidence before it. Bigge, supra, 72; Zelinski, supra, 383. By artificially capping damages at $20,000/$40,000 in cases where the jury would award more than that amount, the legislature had "rendered nugatory the jury's function of assessing damages, thereby destroying the essence of the right" to a jury trial. Henderson v. Alabama Power Company, 627 So2d 878 (Ala 1993) at 885.

The imposition of the Statute at the judgment stage violates the Michigan Supreme Court's holding in Rouse, supra, in which the court held that **the right to trial by jury in civil cases "refers to a right to present or defend an actionable claim to one jury to the point of jury verdict and judgment."** Rouse, 357 Mich at 481 [emphasis added]. If the scope of this

right extends through judgment, the Statute which is applied prior to entry of judgment, violates the right to trial by jury.

The Court of Appeals majority Opinion postulated that the Legislature can limit the available damages in light of its power to altogether abrogate a cause of action. This position is dead wrong. As stated above, the right to trial by jury is a substantive fundamental right. Jinkner, supra, at 158. Again, the Michigan Supreme Court held, in Swart, supra, that "the legislature cannot take away a single one of its substantial and beneficial incidents." Swart, supra, at 448. Thus, it is all or nothing – a zero-sum equation. If the cause of action exists, the right to jury trial, including the determination of damages, cannot be "whittled" away. Bigge, supra, at 72. If the Legislature giveth, the Legislature cannot taketh away partially.

> As long as the cause of action continues to exist and the litigants have access to a jury (through the medium of a civil trial) . . . the right of access remains as long as the cause of action does.

Sofie v. Fibreboard Corp., supra.

Furthermore, the Legislature cannot taketh away what the Constitution hath given. Since the Constitution of 1963 declared the right of jury trial in civil cases if demanded, this right must be preserved inviolate. A recent case which addressed this very point is Anzaldua v Band, 216 Mich App 561; 550 NW2d 544 (1996). In that case, the question was whether the plaintiff had a **constitutionally guaranteed** right of jury trial in an action brought under the Whistleblowers Protection Act (WPA). At page 565, the court noted that there are two approaches to the issue. First is the "historical analogue" approach. Under this approach, the test is whether a similar cause of action in which a jury trial was accorded, existed at the time the **1963 Constitution** was adopted. The second approach is the nature-of-action approach. Under this approach, the test is whether the cause of action would have been denominated as one of law, as opposed to one of

equity, at the time the **1963 Constitution** was adopted. If denominated one of law, then the party bringing the action, would be accorded a right of jury trial. After a thorough discussion of each approach, the court felt that case law and sound reasoning mandated acceptance of the nature-of-action approach. At page 584, the court stated:

> "Specifically, we hold that if the WPA had been in existence at the time of the adoption of the 1963 Constitution, plaintiffs' actions here would properly have been denominated as legal actions, which retain the right to a jury trial."

It is **significant** that under **either** approach, the right of jury trial exists for actions brought under the Owners Liability Statute. Under the historical analogue approach, the Owners Liability Statute was adopted in 1908. Therefore it was in existence and was accorded a jury trial at the time the 1963 Constitution was adopted. Under the nature-of-action approach, the cause of action is certainly denominated as legal, not equitable, and therefore the right to jury trial is accorded plaintiff. It is quite obvious that a reading of the Anzaldua case, supra, construes the language of MCR 2.508, "the right of jury trial **as declared by the Constitution**. . . . ." to mean the most recent Constitution of 1963.

Other State Supreme Courts have struck down damage caps as violative of litigants' right to a jury trial under their respective State Constitutions because the caps encroached upon the traditional and essential function of a jury to assess damages.

The Washington Supreme Court struck down a law capping noneconomic damages in all personal injury and wrongful death cases as violative of the state guarantee of trial by jury. Sofie v Fibreboard, supra.[5] In Washington, similar to Michigan and Alabama, the right to a jury trial is

[5] Under the Washington law, an injured person was precluded from recovering noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy.

dependent on whether there existed such a right at the time the state constitution was ratified in 1889. Id., 716.

The Washington Supreme Court recognized that in 1989 the measure of damages was a question of fact within the jury's province. Id., 716-718. Based on this fact, the court concluded that damage caps unconstitutionally usurp the traditional role of the jury in setting damages, and therefore violated litigants' right to a trial by jury under the state constitution.

> [The Legislature] must not encroach upon constitutional protections. In this case, by denying litigants an essential function of the jury [to find damages], the Legislature has exceeded those limits. . . . [T]he Legislature cannot intrude into the jury's fact-finding function in civil actions, including the determination of the amount of damages. [771 P2d at 711.]
>
> * * *
>
> Constitutional protections are not directly subject to common law changes. Because of the constitutional nature of the right to jury trial, litigants have a continued interest in it -- it simply cannot be removed by legislative actions. [Id., 720.]
>
> * * *

At issue in the Sofie case is a statute that directly changes the outcome of a jury determination. The statute operates by taking a jury's finding of fact and altering it to conform to a predetermined formula. [Id., 720.]

* * *

> Finally, the plain language of article 1, section 21 provides the most fundamental guidance: "The right of trial by jury shall remain inviolate." The term "inviolate" connotes deserving of the highest protection. *Webster's Third New International Dictionary* 1190 (1976), defines "inviolate" as "free from change or blemish: pure, unbroken . . . free from assault or trespass: untouched, intact . . ." Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees. In Washington, those

> guarantees include allowing the jury to determine the amount of damages in a civil case. [Id., 721-722.]

The Supreme Court in other states, including, Florida and Kansas, have also struck down damage caps under their respective state constitutional provisions guaranteeing trial by jury. See Smith v Department of Ins, 507 So2d 1080, 1088-1089; 55 USLW 2608 (Fla 1987) (a plaintiff whose personal injury recovery is arbitrarily capped is not "receiving the constitutional benefit of a trial by jury."); Kansas Malpractice Victims v Bell, 243 Kan. 333; 757 P.2d 251 (Kan 1988) ($1,000,000 cap on total recovery and $250,000 cap on noneconomic damages "is an infringement on the jury's determination of the facts, and, thus, is an infringement on the right to a jury trial").

Furthermore, the Ohio Supreme Court recently held that a statute which requires an award of future damages in excess of $200,000 to be paid in periodic installments, rather than in a lump sum, violates the Ohio constitutional right to a jury trial. Galayda v Lake Hospital Systems, Inc., 71 Ohio St 3d 421; 644 NE2d 298 (Ohio 1994). The Ohio Supreme Court reasoned that application of the statute effectively reduced the jury award without the consent of the plaintiff and therefore "invades the jury's province to determine damages." Id., 426. See also, Best v Taylor Machine Works, 179 Ill 2d 367, 689 N.E. 2d 1057 (1997).

In the summer of 1999, the Supreme Courts of Oregon and Ohio reached momentous decisions that affect the case at bar. On July 15, 1999, the Supreme Court of Oregon issued its decision in Lakin v Senco Products, Inc., 329 ORE 62; 987 P2d 463 (1999). The Oregon State legislature passed a bill limiting non-economic damages in a products liability lawsuit to the sum of $500,000. Plaintiff, who was severely injured by one of Senco's products, filed suit and the jury returned a verdict in his favor for over 3 million dollars. The sole issue for the Court was

whether the cap on non-economic damages was unconstitutional as a violation of a person's right to trial by jury. The Court first traced the history of the guarantee of trial by jury from pre-Magna Carta to the present. The Court took great pains to point out that the right to trial by jury is as important to a civil case as to a criminal case. The Court correctly makes the observation that the focus of inquiry is not upon the power of the legislature but upon the rights of the litigants and the proper role of the jury in a civil case. In paragraph 60 of Lakin, supra, the Court totally disposes of defendant's arguments in this case by stating:

> "We conclude that Article I, section 17, prohibits the legislature from interfering with the full effect of a jury's assessment of non-economic damages, at least as to civil cases in which the right to jury trial was customary in 1857, or in cases of like nature. Senco also argues that, because under Article XVIII, section 7, of the Oregon Constitution,*fn9 the legislature has the power to alter or repeal 'all laws,' it must have the power to define the legal boundaries of those laws, including the extent to which a civil defendant may be liable for non-economic damages. Again, we disagree. . .the legislature's power to alter 'laws' in force in 1857 may be exercised only to the extent that it does not infringe on constitutionally-protected rights. If Article I, section 17, guarantees the right to have a jury assess non-economic damages in cases to which it applies, the legislature may not interfere with that right by capping those damages."

On August 16, 1999, the Supreme Court of Ohio, our neighboring State, decided the case of State ex rel. OATL v Sheward, supra. In that case, organizations and individuals filed suit challenging the constitutionality of certain legislative enactments including caps on punitive damages and on non-economic damages. At pages 1090 through 1095 the Court held that such damage caps are unconstitutional as (1) violating the right to trial by jury under Ohio's state constitution and, (2) as a denial of due process. This case will be revisited during the discussion later herein in regard to the "rational relation" test as applied herein.

It is quite apparent that the majority of State Supreme Court decisions have been focused upon preserving and protecting our right to trial by jury. Such was the conclusion of the trial court when it stated in its Opinion, page 8, as follows:

> "In conclusion, the Court finds that there is a constitutional right to have the jury make a determination of damages in Michigan. Furthermore, the Court finds that this right was crystallized in 1963 when the Michigan Constitution was adopted and cannot be subsequently limited by the Legislature's imposition of a damage cap on the liability of the rental car industry. Therefore, MCL 257.401(3); MSA 9.2101(3) is unconstitutional."

Justice Meter very neatly summed up the proper rationale and determination of this issue by stating at pages 1 and 2 of his Opinion as follows:

> **"In light of these cases and in light of our constitution's language, the necessary outcome for the instant case appears to me rather clear: Because our constitution confers a right to trial by jury, and because the right to trial by jury in Michigan extends to a determination of damages, the damages cap in the instant case is unconstitutional. Indeed, if the trial court must automatically reduce the amount of damages assessed by the jury to conform to the statutory cap, then the jury is not "fix[ing] the amount of damages" as required by *Leary*. See id.**

II.

THE PORTION OF MICHIGAN'S OWNER'S LIABILITY STATUTE THAT LIMITS LIABILITY TO $20,000 PER PERSON/$40,000 PER ACCIDENT SOLELY FOR THOSE OWNERS WHO LEASE MOTOR VEHICLES FOR 30 DAYS OR LESS IS A DENIAL TO PLAINTIFF OF EQUAL PROTECTION OF THE LAWS GUARANTEED BY ARTICLE I § 2 OF THE MICHIGAN CONSTITUTION.

A. Overview of the Equal Protection Analysis Under the Michigan Constitution.

It is under the equal protection analysis that the restriction on damages herein **is totally distinguishable from all other damage caps in this state**. This will be more fully discussed under section D infra.

The Michigan Constitution declares that "[n]o person shall be denied the equal protection of the laws. . . . " Const 1963, art 1, § 2. The equal protection clause of the Michigan Constitution protects citizens against the enforcement of laws which treat similarly situated classes of people in a discriminatory or unequal manner. See, e.g., Doe v Dep't of Social Services, 439 Mich 650, 661-662; 487 NW2d 166 (1992); Manistee Bank v McGowan, 394 Mich 655, 668-690; 232 NW2d 636 (1975).

Although it is within the province of the Legislature to decide on the wisdom of legislation, the courts have a responsibility to strike down a law that violates the Constitution. As stated in Manistee, supra:

> **All agree that the power of the Legislature is not without limits. "[T]"hat those limits may not be mistaken or forgotten, the Constitution is written" Marbury v Madison, 5 US (1 Cranch) 137; 2L Ed 60 (1803). And that those limits not be exceeded, the courts are entrusted with the responsibility to**

review and the power to nullify legislative acts which are repugnant to the constitution. [Id., 666.]

When determining whether a statute is repugnant to the Equal Protection Clause of the Michigan Constitution, Michigan Courts have developed a three-tiered approach. Depending on the type of legislation at issue, the courts will subject the legislation to review under a strict scrutiny analysis, a rational basis analysis or an intermediate scrutiny analysis. Manistee, 668-670; Doe, 661-662.

If legislation creates a classification scheme which is either based upon "suspect factors" (such as race, national origin, or ethnicity), or impinges upon the exercise of a "fundamental right," courts must subject the legislation to a strict scrutiny standard of review. Doe, 662, citing Plyer v Doe, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982), reh den 458 US 1131 (1982). A law reviewed "under this strict standard will be upheld only if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling governmental interest." Doe, 662. There is a presumption that legislation that creates suspect classes or impinging upon fundamental rights is unconstitutional and the burden is on the state to prove otherwise. Kropf v Sterling Heights, 391 Mich 139, 158; 215 NW2d 179 (1974).

Legislation which does not impinge upon any fundamental or important interests and which does not create suspect classifications, is generally reviewed under the rational basis standard. Such legislation is presumed to be constitutional, and it "will not be struck down if the classification scheme is rationally related to a legitimate governmental interest." Doe, 662. A classification must be shown to be "essentially arbitrary" to fail the rational basis test. Manistee, 668; Reich v State Highway Department, 386 Mich 617, 623; 194 NW2d 700 (1972).

In between the strict scrutiny and rational basis tests there is an intermediate level of scrutiny, sometimes referred to as the "middle tier of heightened scrutiny," Doe, 662 n 19, or

"substantial relation to the object" test Manistee Bank, 669. Under this test, it is the court's responsibility to "examine carefully the proffered purposes [of the legislation] and determine whether they are reasonable and, if so, whether the . . . classification bears a substantial relation to them." Manistee, 680. Courts have employed intermediate scrutiny in a variety of circumstances. It has been applied when classifications are based upon gender or mental capacity. Doe, 662-663 n 19, citing Craig v Boren, 429 US 190; 97 S Ct 451; 50 L Ed 2d 397, reh den 429 US 1124 (1977). It has also been applied in Michigan to economic and social legislation. Manistee Bank, 671, 680-681 (striking down guest passenger statute as violative of equal protection). Finally, courts have applied intermediate scrutiny to statutes that implicate interests which, while not fundamental, nonetheless constitute important substantive interests such as the right to recover for personal injuries. See, e.g., Carson v Maurer, 120 N.H. 925; 424 A2d 825, 830 (NH 1980); Richardson v Carnegie Library, 107 N.M. 688; 763 P2d 1153, 1163 (NM 1988); Arneson v Olson, 270 NW2d 125, 133 (ND 1978).

B. The Damage Cap Must Be Struck Down Under as Violative of Equal Protection Under the Strict Scrutiny Standard of Review.

1. This Court Must Review the Damages Cap in 1995 PA 98 Under the Strict Scrutiny Test Since the Law Impinges Upon Plaintiff's Fundamental Interest in Trial by Jury.

Plaintiff will concede that if this Court does not find in her favor on Question I, then in such event, the strict scrutiny standard does not apply herein. Obviously, the converse would apply.

As noted above Michigan Courts will employ the strict scrutiny equal protection analysis if a statutory classification impinges upon a fundamental interest. For example, the Michigan courts have subjected employment residency requirements to the strict scrutiny test because they

infringe upon the fundamental right under the Michigan Constitution to travel between locations in Michigan. Musto v Redford Twp, 137 Mich App 30, 34; 357 NW2d 791 (1984). Although there is no mention of the "right to travel" between locations in the Michigan constitution, the courts have noted that it is implicit in the equal protection clause and it is a sufficiently important interest to be deemed fundamental. Id., 34 n 1. See also Grano v Ortisi, 86 Mich App 482, 491-495; 272 NW2d 693 (1978).

The right to a jury trial, like the right to travel, is a fundamental right under the Michigan Constitution. Not only is the right explicitly guaranteed by the Michigan Constitution, but our Supreme Court has deemed it to be "inviolate." MCR 2.508(A); Const 1963, art 1, § 14. See also, Estate of Council, supra, Jinkner, supra. Moreover, there is no doubt of the right's importance. As stated in McRae, supra, the right to a jury trial has long been "regarded as the great bulwark of the liberty of the citizen." Although a person may waive his or her right to a jury trial, there is little doubt that "a jury trial is among the most fundamental rights of a litigant." Malek v Jayakar, 116 Mich App 111, 113-114; 321 NW2d 858 (1982).

2. Defendant Cannot Prove that the Damages Cap Serves a Compelling Interest.

To survive strict scrutiny, defendants must first establish that the damage cap advances a compelling state interest. Doe, supra, 662. According to the House Legislative Analysis of 1995 PA 98 the Legislature amended the Owner's Liability Statute because the lobby from the rental car and truck industry claimed that their insurance costs were rising, that the cause of this increase was liability suits, and that their increased costs threatened the viability of some rental vehicle companies in the state. The Legislative Analysis describes the "Apparent Problem" as follows:

> Representatives of the car and truck rental industry are seeking limitations on their exposure to lawsuits under Section 401 of the Michigan Vehicle Code, which deals with "owner's liability." The industry says its members have become a "deep pockets" under that section, which they say exposes them to unlimited vicarious liability. A rental company can be held liable for harm done by a negligent operator of one of its vehicles, even though the operator was not the person who rented the vehicle and even though the company had no way to control who was driving the vehicle. According to testimony from the industry, there have been cases in which a company has been held liable for millions of dollars without any attribution of negligence to the company. . . .
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> * * *
>
> While the so-called owner's liability statute applies to all vehicle owners, it is said to have a peculiarly acute impact on the rental vehicle industry. They have complained that, as a result of case law, just giving up the keys to a vehicle makes them practically responsible for whatever happens while the vehicle is in operation. The result, say industry representatives, is that some companies face costs they cannot afford and their viability in the state is threatened. . . . One company has testified that its liability insurance costs have more than tripled since 1991. And catastrophic damage awards have the potential to destroy a company. [House Legislative Analysis of 1995 PA 98, attached as Appendix E.]

The legislation proposed by the rental car and truck industry, and enacted by the Legislature, sought to lower the industry's rising insurance costs by: (1) precluding lawsuits against the rental companies unless the vehicle in question was operated by an authorized driver or a member of his or her immediate family; and (2) imposing damage caps. See MCL 257.401(3); MSA 9.2101(3). Plaintiff challenges only the damage cap portion of the statute and not the portion that limits liability to accidents involving just authorized drivers or members of their immediate family.

It is questionable whether providing preferable treatment for a particular industry by reducing its liability insurance rates for a particular industry is a legitimate governmental

purpose when the reduction is done at the expense of those with catastrophic injuries. See Argument II(D), infra. However, there is no question that such a goal is not of sufficient importance to constitute a compelling purpose for the purposes of strict scrutiny.

Governmental interests specifically declared "compelling" in nature include (1) the "overwhelming need to protect citizens from incurable sexually transmitted disease," People v. Jansen, 231 Mich App 439, 459; 586 NW2d 748 (1998); (2) ensuring the payment of child support, People v. Ghosh, 188 Mich App 545, 547; 470 NW2d 497 (1991); (3) ending employment discrimination, McLeod v. Providence Christian School, 160 Mich App 333, 344; 408 NW2d 146 (1987); (4) protection of children from harms sustained by involuntary membership in a religious cult, People v. Yarbough, 148 Mich App 139; 384 NW2d 107 (1986); (5) the welfare of children, Fisher v. Fisher, 118 Mich App 227; 324 NW2d 582 (1982); (6) the proper administration of justice, Falk v. State Bar of Michigan, 411 Mich 63; 305 NW2d 201 (1981); and (7) the safety of children, State Fire Marshall v. Lee, 101 Mich App 829; 300 NW2d 748 (1980).

The governmental interest in lowering insurance premiums is not "compelling" in nature. In fact, it is not even a "legitimate" interest sufficient to survive the minimum scrutiny test. In Manistee Bank, the plaintiff challenged the constitutionality of the Michigan guest passenger statute on equal protection grounds. One of the stated bases for enacting the guest passenger statute was the desire to decrease automobile insurance premiums. The Michigan Supreme Court held that "[c]onceding, arguendo, that insurance rates are lower because there is a guest statute, *lower insurance premiums do not, without more, justify an essentially arbitrary classification*." Manistee Bank, 394 Mich at 677 [emphasis added]. If lower insurance premiums are insufficient to satisfy the minimum scrutiny test, there is no possible way such a proposed interest could satisfy the strict scrutiny test, which requires the interest to be

"compelling." In other words, if such an interest is not "legitimate," then it certainly cannot be "compelling."

Moreover, even if the goal of lowering the insurance rates for rental vehicle companies did constitute a compelling governmental interest, defendant bears the burden of proving that there actually exists some sort of insurance crises in the rental car industry. Kropf, supra, 158. Defendant cannot be permitted to rely on bald self-serving assertions when fundamental rights such as the right to jury trial are burdened. See, e.g., White v State, 203 Mont. 363; 661 P2d 1272, 1275 (Mont 1983) (state's "bare assertion" of a compelling interest in protecting the state treasury "falls far short of justifying a discrimination which infringes upon fundamental rights").

There has been no empirical evidence presented in this case that there was any financial crises in the rental car industry in 1995 or that, absent governmental intervention, consumers in Michigan would no longer be able to rent a motor vehicle in the state. Additionally, there has been no evidence presented in this case that rising insurance rates actually threatened the viability of rental companies. To the contrary, statistics collected by the rental car industry showed that car rental revenue grew from 9.2 billion dollars in 1990 to over 18.3 billion dollars in 1999 (See Appendix H). One must conclude that the industry was flourishing in 1995 and that it continues to flourish today.

C. Intermediate Scrutiny or "Substantial Relation-To-The-Object Test."

The Court of Appeals majority Opinion failed to give a reason as to why the heightened scrutiny of the substantial relation to the object test would not apply to this case. The Court simply stated at page 6 that "various tort reform legislation are social or economic legislation subject to the rational basis test". First, there is no indication that the questioned statute herein is

"tort reform legislation". Second, in Manistee Bank v McGowan, supra, the "guest passenger" statute that was struck down under the substantial relationship to the object test was certainly "social legislation". The appropriate standard of review is not to be selected based upon whether the legislation is deemed "social" or "economic" alone. If the legislation on its face creates arbitrary or irrational classifications, then it is deemed "suspect" to which this test should apply. This is the correct holding of Manistee Bank v McGowan, supra, wherein at page 669 it cited Reed v Reed, 404 US 71; 92 S Ct. 251; 30 L Ed 2d 225 (1971) as stating "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ".

Furthermore, the question does arise as to whether the legislature has created a "suspect classification" by singling out rental car companies for specialized favorable treatment. If the legislature has created a "suspect classification", then the substantial relation-to-the-object test should apply. For the reasons stated in both the preceding and following sections, the statute in question does not survive this test at all.

D. The Damage Cap Flunks the Rational Basis Test.

If this Court decides that the proper standard of review in this case is rational basis, the damage cap at issue in this case must fail. Under rational basis, a law must be struck down as violating a plaintiff's right to equal protection unless it "is rationally related to a legitimate governmental interest." Doe, 662. Therefore, each statute must be examined in that light. This is why the damage restriction in issue is **distinguishable** from the damage caps in medical malpractice and in products liability actions. There may be a rational relationship to a legitimate government interest in regard to medical malpractice and product liability actions. However, as

will be seen hereafter by the statistics accumulated by the car rental industry itself, no such relationship exists in the case herein. If this Court decides that the damage restriction herein fails either the rational basis test or the intermediate scrutiny test, it is of **no precedential value** to the other damage caps of this state.

The Court of Appeals majority Opinion at page 6 cited the case of Crego v Coleman, 463 Mich 248, 259; 615 NW2d 218 (2000), for the following explanation of the rational basis test:

> "Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable."

The majority then concluded as follows at page 6:

> "We find that this legislation passes that test because it can reasonably be assumed that Michigan has a legitimate interest in the continued operation of automobile rental businesses, and protecting those businesses from large damage awards in jury trials bears a rational relationship to that end."

The fallacy of the Court's conclusion is that such logic would apply to **any business or profession** in the State. For example, it can reasonably be assumed that Michigan has a legitimate interest in the continuation of garbage pickup. If garbage were allowed to pile up across the State, a substantial health hazard or even epidemic would result. What if the garbage removal industry decided its insurance premiums on its trucks were too high and it came to the legislature for relief? If the Legislature should impose arbitrary limits of responsibility of $20,000.00 for the owners of garbage trucks, does that pass constitutional muster? The analogies could go on ad infinitum.

Moreover, it is questionable whether the goal of reducing insurance rates for the rental car and truck industry alone is a legitimate state interest when it is being done at the grave expense of severely injured persons. As the Wyoming Supreme Court stated in Hoem v State, 756 P.2d 780 (Wyo 1988), in striking down a law intended to reduce medical malpractice insurance rates under the rational basis test:

> We cannot condone the legislature's use of the law to protect one class of people from financial difficulties while it dilutes the rights under the constitution of another class of people. Every profession confronts financial distress at some time, and that does not justify depriving others of the equal protection guaranteed by the constitution. [Hoem, 756 P2d at 784.]

Even if reducing insurance rates could possibly be construed as a legitimate state interest, the classifications established by the damage cap, as discussed hereinafter in detail, are irrational. The Court of Appeals Opinion **failed to address the arbitrariness of the classifications involved herein**. This was discussed at length during oral argument of this case. The arbitrariness of the classifications are similar to the classifications discussed in Reich , supra. In Reich, our Supreme Court reviewed a statute that prevented those who suffered injuries as a result of a highway defect from recovering unless they gave the appropriate governmental agency notice of the defect within 60 days of the injury. MCL 691.1404; MSA 3.996(104). The 60-day notice requirement only applied to public roads, not private roads.

The Reich court struck down the notice provision under the rational basis test. First, it noted that the act created arbitrary classifications. It "arbitrarily split the natural class, i.e., all tortfeasors into two differently treated subclasses: private tortfeasors to whom no notice of claim is owed and governmental tortfeasors to whom notice is owed." Id., 623. Similarly, the act arbitrarily split the natural class of victims of negligent conduct into two subclasses: "victims of

governmental negligence who must meet the 60-day requirement, and victims of private negligence who are subject to no such requirement." Id.

The Court then held that both classifications bore "no reasonable relationship to the purpose of the act," which was to place victims of the negligent conduct on equal footing. Id.

> The notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence after only 60 days. The victims of private negligence are granted three years in which to bring their actions. [ ] Such arbitrary treatment clearly violates the equal protection guarantees of our state. [Id., 623 (citation omitted).]

Like the 60-day notice requirement addressed in Reich, the damage cap at issue here, **arbitrarily splits natural classes of victims and natural classes of tortfeasors into arbitrary subclasses and treats the subclasses in a grossly unequal manner**. For example, two innocent passengers could be broadsided and rendered paraplegics on the same evening in two separate crashes caused by two different drunk drivers – the first driver in a company car and the second driver in a rental car. Under the damage cap at issue, the first victim is able to fully recover damages for, among other things, the pain and suffering she will endure for the rest of her life, lost wages, and her reduced quality of life. The second victim, however, is limited to a recovery of a mere $20,000 for identical injuries.

As another example, two brothers could be injured in the same accident caused by the same drunk driver operating a rental car. The first brother may have suffered relatively minor injuries barely over the threshold for third-party actions; yet, the second brother suffered severe injuries and will never be able to walk, speak or work again. Under the damage cap, the first brother will be fully compensated for his relatively minor injuries. However, the second brother,

who would have been awarded hundreds of thousands of dollars prior to the 1995 amendment to fully compensate him for his injuries, would now receive a mere $20,000.

Similarly, this act creates **separate** and **unequal classes of tortfeasors**. For example, a motor vehicle owner-operator could fail to stop at a stop sign, collide with another vehicle in the intersection who had the right of way, and seriously injure or kill the occupants of the other vehicle. In such event, the at-fault owner could be liable for hundreds of thousands of dollars in damages. However, under the same set of circumstances, the at-fault vehicle could have been a rental car operated by an uninsured driver. In such a case, the owner is only liable for $20,000.00 in damages under the questioned statute.

One of the most striking examples of the disparate treatment of similarly situated individuals created by the damage restriction herein, is its relationship to other damage caps in the state. The damage cap for medical negligence cases, MCL 600.1483; MSA 27A.1483, provides **no damage cap for economic damages**. The damage cap applicable to product liability action, MCL 600.2946(a); MSA 27A.2946(a), provides **no damage cap for economic damages**. Furthermore, the cap on non-economic damages in each statute are upwards of $640,000. To illustrate the grossly unequal treatment of similarly situated individuals, let us assume that a 35 year old married and employed male were to be subjected to neurosurgical negligence and left a quadriplegic. Such a person would be able to be fully compensated for all of his economic damages, including loss of earnings. He would be compensated for his pain and suffering up to $641,000. Now, assume that this same individual was the victim of an uninsured operator of a rental car. Such a person would not be compensated for economic damages other than medical expense, which last beyond three years. His total compensation, economic and non-economic, would be limited to $20,000. In fact, this is what happened in the case herein. Plaintiff's decedent, Regeana Hervey, was a young employed female with a 10 year old daughter. At trial,

Plaintiff presented the expert testimony of a professor of economics, one Calvin Hoerneman. Charts prepared by Professor Hoerneman were received into evidence which indicated a present value economic loss to decedent's daughter of $197,128.52 (See Appendix C).

As these scenarios and the actual case herein illustrate, the disparate treatment of similarly situated individuals is not only unjust, but it is arbitrary and has no reasonable relationship to any legitimate goal. Reich, supra; Hoem, supra; Wright v Central Du Page Hosp Ass'n, 63 Ill. 2d 313; 347 NE2d 736, 743 (Ill 1976); McGuire v C & L Restaurant, Inc, 346 NW2d 605 (Minn 1984).

Defendant argues that the legitimate purpose of MCL 257.401(3); MSA 9.2101(3) was to ease a liability crisis involving the car rental business in Michigan. The Court of Appeals majority neatly sidestepped this issue by stating at page 6 of its Opinion, "Whether we agree with this assertion or not is not the issue before us". This statement is not correct. The appellate courts cannot simply stick their collective heads in the sand and ignore the realities of commercial everyday life. It **is** important to understand whether the rental car industry was in fact undergoing **any** type of hardship at the time the questioned legislation was passed. **If indeed there was no legitimate reason for governmental intervention in the first place, then it is fallacious to maintain that the legislation is "rationally related to a legitimate government purpose".**

Defendant argues that without the protection afforded the car rental industry by MCL 257.401(3); MSA 9.2101(3), car rental companies would pull out of the State, or in the alternative, car rentals would involve exorbitantly high costs. NOTHING COULD BE FURTHER FROM THE TRUTH!

First, an insurance premium is made up of many components. In Michigan, separate coverages are charged separate premiums. These coverages usually entail collision coverage,

comprehensive coverage, liability coverage, and personal injury protection. Other optional coverages are available. **The only coverage affected by the provisions of MCL 257.401(3); MSA 9.2101(3) is that of LIABILITY COVERAGE.**

As can be seen by Appendix F, the cost for 1 million dollars ($1,000,000) of liability insurance ranges from 66¢ to $1.50 per day per car. This is a cost which can easily be added to the cost of the car rental without in any way jeopardizing a reasonable rental price structure. In other words, would a potential car renter balk at paying $30.66 per day as opposed to $30.00 per day? Would he balk at paying $31.50 per day instead of $30.00 per day? Of course not! There is not, nor was there ever, a liability crisis in Michigan for the car rental industry related to the vicarious liability provisions of MCL 257.401(3); MSA 9.2101(3).

Both Plaintiff and Defendant have cited the House Legislative Analysis in their respective Briefs. The car rental industry first told the legislature that "the industry faces costs it cannot afford and its viability in this state is threatened. . . ." The rental car industry implied that the costs were for liability coverage. Appendix F would drastically contradict that implication. In addition, statistics provided by the industry to its members also contradicts its representations to our legislature. The trade publication of the car rental industry is the **Auto Rental News**. This is a bi-monthly publication. At the end of each calendar year, the **Auto Rental News** publishes a "Fact Book" which recaps important data for the industry. (See Appendix G). Appendix H is a graph contained in the Fact Book for the year 2000. Contrary to the representations made to our legislature, the graph indicates that the car rental industry grew from **9.2 billion dollars** in 1990 rental revenue to **18.3 billion dollars** in 1999 rental revenue. Rental revenue doubled within this 10 year period and total car rental revenue was almost 132 BILLION DOLLARS (131.93)! In addition, the car rental fleet grew from 760,000 cars in 1985 to 1,733,000 cars in 1999. Car rental revenue has increased by at least a half billion dollars per

year since 1990. Furthermore, according to the Editorial from the ARN 2000 Fact Book, by the year 2005, the car rental industry should be a $28.9 billion dollar per year industry (See Appendix I). Where, pray tell, is the crisis?

Our legislature also stated that one company testified that its liability insurance costs have more than tripled since 1991. Obviously, this raises the question of "what" liability costs? Did this include collision? Personal injury protection? Although the category of coverage is suspect, let us assume that liability coverage alone tripled from 1991 to 1995. THIS WAS A MISLEADING REPRESENTATION TO THE LEGISLATURE. Appendix J is an article that appeared in the February/March 1992 issue of **Auto Rental News**. The article points out that 1991 was an extremely soft market for insurance for rental cars. In fact, insurance premiums had been decreasing since the mid 1980's to a decided low in 1991. The article goes on to predict price rises in coverages over the next few years for the obvious reason that "the insurance industry is historically cyclical." This is a fact of free economics and has nothing to do with vicarious liability of car rental agencies. In fact, the car rental insurance market did harden in 1992 and in 1993. Appendix K is an article from **Auto Rental News** from February/March 1993 which attributed the raise in rates to several sources. First was the fact that because of the soft market in 1991, companies were charging very low premiums that resulted in low profits. Therefore, the companies were forced to raise their rates. Contributing to the problem was the extreme losses incurred by the insurance industry in 1992 due to Hurricane Iniki in Hawaii and Hurricane Andrew in Florida (See Appendix K). These two hurricanes alone cost the industry $18 billion. Another $775 million was shelled out due to riots in Los Angeles. Again, these are economic facts of life and have nothing to do with vicarious liability of car rental companies. In addition, Appendix G points out that the car rental agency can charge an extra $5.95 per day on a

car rental and secure another $1 million worth of coverage on the car renter. This is known as Supplementary Liability Insurance (SLI).

The House Legislature Analysis also states that "catastrophic damage awards have the potential to destroy a company." This is obvious. However, a catastrophic award would have the potential of destroying any car owner in the State. Suppose a nurse is involved in a catastrophic auto collision and is at fault. Should we carve a special exception in the owners liability statute that says nurse owners of autos are only liable for $20,000 per person or $40,000 per collision? This would go on ad absurdum. It is more important to look at what has actually occurred for guidance instead of what might occur. In 1996 the revenue to the car rental industry was $14.6 billion (See Appendix H). The Wall Street Journal revealed that the entire car rental industry had only $100 million in accident costs in 1996 (Lisa Miller, "Car rental Companies Are Jacking Up Prices," Wall St. J., Feb. 4, 1997, at B6). In other words, the car rental industry's accident cost only represents .07 cents (**LESS THAN A PENNY**) of every dollar of its revenue. Thus it may well be asked, where are these catastrophic awards? Which companies have been destroyed by a damage claim? The answer is **NONE!** Now, to add insult to injury (no pun intended), while the car rental industry was proselytizing and misleading our legislature as to an "insurance crisis," it had just completed its most spectacular year in history. The editorial contained in the ARN 1995 Fact Book lauded 1994 as one of the most productive in history for the car rental industry (See Appendix L). Revenues alone increased by $1.3 billion.

Finally, the car rental industry had other avenues of recourse available to it in order to lower any perceived increase in insurance rates. First, is to contract for a high deductible. An article in the May/June 1995 **Auto Rental News** (See Appendix M) indicates that taking a deductible in the amount of $15,000 will result in such a low premium that "you would have to be a fool not to purchase it."

Another avenue is the advent of supplemental liability insurance. The rental car company can obtain $1 million worth of liability coverage for the renter for a cost of $3.00 to $6.00 (See Appendix F, paragraph 4f3 and Appendix J). This then becomes primary insurance thus lowering even further the liability premium for the rental company (Appendix J).

The next avenue to save on liability costs is especially applicable to this case. Companies in eleven states and Washington D.C. are on-line checking potential renters' driver's licenses in order to identify high risk drivers and therefore deny rentals to them. **In the case herein such action would have revealed that Da-Fel Reed had her driver's license suspended and only recently to the rental had it restored**. The potential savings involved if companies instituted regular motor vehicle record checks are contained in an article from **Auto Rental News**, January/February 1995 (See Appendix N).

Finally, the rental car industry can reduce liability costs simply by making the renter's insurance primary by the terms of the rental contract. Appendix O contains an article from **Auto Rental News**, October/November 1994, which explains the cost saving measure (See also Appendix M). The article points out that if the renter does not have insurance, the primary responsibility shifts back to the rental company. Now, in a responsible environment this leaves the rental company with several choices. It can refuse to rent the vehicle or it can require the renter to purchase $1 million SLI for $3 to $6 extra. What has happened in Michigan is that MCL 257.401(3); MSA 9.2101(3) has resulted in a **totally irresponsible environment**. Instead of the above two choices, the company can rent a car to an UNINSURED motorist secure in its knowledge that the worst case scenario is that the company becomes liable for $20,000. For the years 1989 through 1995, on any given day, drivers in Michigan had a 14% chance of being struck by an uninsured driver (See Appendix P). A study performed by the National Association of Independent Insurers found that between 1996 and 1998, the most recent years for which

figures are available, the number of uninsured motor vehicles was 15.2% statewide (See **The Detroit News**, August 3, 2003, pp. 1 and 6).This percentage translates to 1.1 million of Michigan's 7 million drivers that are operating a motor vehicle without insurance coverage, Id. That is the background to the set of circumstances that occurred herein. Da-Fel Reed was one of the 1.1 million drivers in Michigan who had no insurance. Enterprise intentionally put an uninsured driver on the highway because it believed its risk to be minimal.

In the State Ex Rel. OATL, supra, the Court applied the rational relation test defining it as the less stringent test under which a legislature enactment not involving a fundamental right or suspect class will be deemed valid "(1) if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and, (2) if it is not unreasonable or arbitrary." Id at page 1092. The Court went on to state that it was unable to find any rational connection between awards that exceeded the proposed cap on malpractice cases and malpractice insurance rates. It is abundantly obvious that no such relationship is evidenced in the case at bar. In fact, the opposite is true as is shown by Appendix F through Q.

Further, in State Ex Rel. OATL, supra, at 1092, the Court quoted from Morris v Savoy, 61 Ohio St 3d 684; 576 NE2d 765 (1991), as follows:

> "'[I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice. * * *' *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8.
>
> We hold, therefore, that R.C. 2307.43 is unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary.' Id., 61 Ohio St.3d at 690-691, 576 N.E.2d at 770-771."

So it is in the case at bar. According to Appendix M, most claims are under $15,000. Therefore, it does not make any sense that the most severely injured claimants are left without recourse. According to Defendant, low cost car rentals are the intended benefit to the public as a result of MCL 257.401(3); MSA 9.2101(3). Although Plaintiff has effectively brought forth evidence to discredit this claim, let us assume the putative intended benefit. Who bears the cost of this illusory benefit? It is the most severely injured (in this case fatally so) that must bear the cost. Is this rational? What about the car rental companies? What kind of position are they in to bear the cost of serious injury? We already know the industry itself is a $19 billion a year industry. In regard to the Defendant in this case, Appendix Q indicates that it is a $4.7 billion company as of 1999. It has over 427,000 cars in service and has become the largest car rental company in North America. Contrast Appendix Q with Margaret Phillips and Koya Hervey. To paraphrase the Ohio Supreme Court:

> "It is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by rental automobiles."

In summation, there is absolutely no evidence that vicarious liability of short-term car rental companies would result in either the availability of rental cars or their availability at exorbitant costs. In fact, the opposite is true. Therefore, Defendant's argument falls of its own weight. The special classification given car rental companies by the provisions of MCL 257.401(3); MSA 9.2101(3) are totally arbitrary and irrational. There is simply no rational basis for the existence of MCL 257.401(3); MSA 9.2101(3).

III.

THE PORTION OF MICHIGAN'S OWNER'S LIABILITY STATUTE THAT LIMITS LIABILITY TO $20,000 PER PERSON/$40,000 PER ACCIDENT IS AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS OF LAW GUARANTEED BY ARTICLE I § 17 OF THE MICHIGAN CONSTITUTION.

Article 1, section 17 of the Michigan Constitution declares that "[n]o person shall . . . be deprived of life, liberty or property without due process of law." 1963 Const, art 1, § 17. Michigan courts review substantive due process claims "using substantially the same standard as [they] use to review equal protection claims." Doe v Dep't of Social Services, 439 Mich 650, 682 n 36; 487 NW2d 166 (1992), citing Shavers v Attorney General, 402 Mich 554, 612-613; 267 NW2d 72 (1978); also see Haberkorn v Chrysler Corp, 210 Mich App 354, 381; 533 NW2d 373 (1995).

Some states supreme courts have struck down damage caps based upon the due process clauses of their respective constitutions. For example, the Ohio Supreme Court held that a $200,000 cap on medical malpractice claims violated due process "because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary." Morris v Savoy, 61 Ohio St 3d 684; 576 NE2d 765, 771 (Ohio 1991). The court noted that it "is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." Id.

Similarly, the South Dakota Supreme Court recently struck down a $1 million dollar cap in medical malpractice cases under a middle tier due process test. In the Matter of the Certification of Questions of Law From the United States Court of Appeals for the Eighth Circuit, 544 NW2d 183, 189-191 (SD 1996). The Court found that the defendants did not bear the burden of proving that a medical malpractice insurance crises really existed. In the case

herein, Plaintiff has affirmatively shown that no insurance crisis ever existed for the rental car industry. Id., 189-190. It further held that the damage cap:

> Does not treat each medical malpractice claimant uniformly. It divides claimants into two classes: those whose damages are less than $1 million and those whose damages exceed $1 million. Those who have awards below the statutory cap shall be fully compensated for their injury while those exceeding the cap are not.
>
> Therefore, [the cap] does not bear a "real and substantial relation to the objects sought to be obtained" and we hold that the damages cap violates due process guaranteed by the South Dakota Constitution. [Id., 191.]

Furthermore, in the case herein, the statute **creates two disparate classes of tortfeasors as well as claimants**. For all the reasons set forth in Argument II under the equal protection analysis, this Court, like the Supreme Courts of Ohio and South Dakota and the trial court herein, should strike down the statute for rental vehicle corporations as violative of substantive due process.

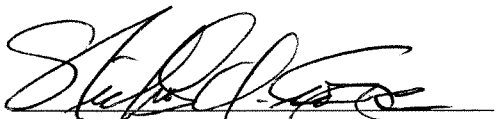
RELIEF REQUESTED

Plaintiff-Appellant respectfully requests that this Court reverse the majority decision of the Court of Appeals and reinstate the Circuit Court Judgment.

Respectfully submitted,

DATED: August 18, 2003

TROGAN & TROGAN, P.C.



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