STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Hon. Helene N. White, Presiding Judge

RICHARD ADAM KREINER,

Plaintiff-Appellee,

v. **Supreme Court No. 124120**

ROBERT OAKLAND FISCHER,

Defendant-Appellant.

Court of Appeals No. 225640
Lapeer County Circuit Court No. 98-026072-NI

REPLY BRIEF OF DEFENDANT-APPELLANT, ROBERT OAKLAND FISCHER

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INTRODUCTION

In its remand order to the Court of Appeals, this Court expressly rejected the notion that a serious impairment of body function could be established merely by a showing of just "*any*" effect on the person's ability to lead his or her normal life. To be sure, the Court also was clear in rejecting a construction that would require a "serious" effect.[1] The challenge here, then, is to articulate the extent to which the person's normal life (that is, the person's ability to lead his normal life) must be affected by the impairment before it can be said that his "*general* ability to lead his normal life" has been affected.

In spite of these parameters laid down by the Court, Plaintiff-Appellee clearly has made it his goal in this appeal to persuade the Court to adopt an "*any* effect" standard. Accepting the unavoidable proposition that the "general ability" test ultimately must focus not on particular skills and abilities of the claimant but on a single, overall *general* ability of the claimant to live his normal life, Plaintiff nevertheless urges the Court to accept the proposition that "an impairment that affects *any* of the plaintiff's specific abilities necessarily affects the plaintiff's general ability." (Plaintiff-Appellee's Brief, p. 36) (emphasis added).

As will be addressed below, Plaintiff's conclusion directly conflicts even with his own construction of "general ability" as a "singular, indivisible 'ability,'" or "one all-

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[1] This Court said, "Although a *serious* effect is not required, *any* effect does not suffice either." (**76a** - Supreme Court Order, 4/9/03) (emphasis in original). As is detailed in Defendant's principal brief, Defendant has not advocated a "serious effect" construction and the circuit court did not apply or even refer to a "serious effect" standard (the assertions of amicus curiae CPAN notwithstanding -- *see*, CPAN Amicus Curiae Brief, p. 15). Rather, the lower court's inquiry was whether the "*impairment*" was serious enough to support a conclusion that Plaintiff's general ability to lead his normal life had been affected; and given Plaintiff's overall, general ability to maintain his normal life, the court answered in the negative: "Plaintiff is hard-pressed to show how his alleged impairment is serious enough to affect his normal life" (**66a**). (*See*, Defendant-Appellant's Brief, pp. 12-13, nn. 3-4.)

encompassing, unitary 'ability.'" (Plaintiff-Appellee's Brief, pp. 17, 29). To this extent, Plaintiff's argument actually supports Defendant's position that, in essence, the Court of Appeals erred in its failure to see the forest for the trees: "[T]he Court's inquiry actually focused on Plaintiff's altered *particular* abilities; had the Court stepped back and examined Plaintiff's *general ability* to lead his normal life, it would have observed that, in fact, it had not been affected." (Defendant-Appellant's Brief, p. 30) (emphasis in original).

The sleight of hand Plaintiff attempts in this appeal is to concede the obvious legislative preference for the single "general ability" standard, and yet, at the same time, advocate reliance on the altered *particular* abilities of the Plaintiff as the operative test. Plaintiff, in other words, feigns agreement with the notion that the focus must be on the forest instead of the trees, and yet argues that any impact on a particular tree necessarily qualifies as an effect on the entire forest. The Court should call Plaintiff's bluff and reject this proposed "any effect" standard as fatally inconsistent with the terms of the statute.

In an equally untenable argument, both Plaintiff and his amicus curiae contend that the statutory definition that was added to the serious impairment of body function statute in 1995 was actually a *rejection* of the *Cassidy* era of cases and should operate to lower rather than raise the serious impairment tort threshold. Defendant provides a response to this argument, as well.

Amicus curiae CPAN goes even further in this regard to warn that, "[i]f this Court raises the verbal threshold, making it virtually impossible to recover for noneconomic losses, drivers will have no incentive for driving safely." (CPAN Amicus Curiae Brief, p. 27). The Court should reject this untenable policy argument.

Finally, in response to CPAN's argument that the tort threshold portion of the no-fault act should be construed in a manner similar to other "no-fault" systems (CPAN Brief, pp. 22-24), Defendant points out that the issue now before the Court concerns *not* Michigan's no-fault scheme but the *fault-based* tort action that was retained when the common law remedy was partially abolished by the no-fault act. MCL 500.3135(3). While a liberal construction of the first-party provisions in the no-fault act is appropriate to effectuate coverage, the provisions of MCL 500.3135 should *not* be so construed; rather, the Court should broadly effectuate the partial abolishment of tort remedies in order to preserve the legislative trade-off on which the no-fault act was founded. *Churchman v Rickerson*, 240 Mich App 223, 228-229; 611 NW2d 333 (2000) (*see*, Defendant-Appellant's Brief, pp. 19-21).

ARGUMENT

A. Where the statute requires inquiry into whether the impairment has affected the person's "*general* ability" to lead his normal life, the Court should reject Plaintiff's plea for a standard by which *any effect* on the person's life would meet the threshold.

Plaintiff-Appellee Kreiner, together with his amicus curiae, CPAN, both acknowledge -- indeed, they advocate -- that MCL 500.3135(7) must be construed as requiring the Court to focus on the big picture of the injured person's life. Plaintiff observes that the singular "ability" that appears in §3135(7) refers not to any one particular skill among the myriad "abilities" within the person's life, but rather, to "one all-encompassing, unitary 'ability.'" (Plaintiff-Appellee's Brief, p. 29). Thus, according to Plaintiff, the word "general" appearing

as an adjective in the statute "operates simply to make clear that the word 'ability' is used in its maximum, unrestricted sense." (*Id.*).

Likewise, CPAN affirmatively argues that the Legislature phrased §3135(7) as an "instruction to view the effects of an injury on a person's ability to lead his or her normal life in the *overall context* of that person's life." (CPAN Amicus Curiae Brief, p. 17; *accord, id.*, p. 19 -- it is appropriate "to look at the plaintiff's injuries and determine whether they affected his normal life as a whole").

Plaintiff and CPAN take this position only because they must. Where the statute refers *not* to an impairment's effect on "the person's normal life," but on "the person's *general ability* to lead his or her normal life," the inquiry necessarily must focus on the singular, overall picture of the Plaintiff's normal life. The question is whether there has been an effect on the forest, not on the trees.

Plaintiff, nevertheless, is intent on advocating an "any effect" standard. (Plaintiff-Appellee's Brief, Argument I point-heading, p. 19 -- an impairment satisfies the threshold if it has "AN EFFECT ON [THE PLAINTIFF'S] NORMAL LIFE"; *Id.*, p. 16 -- inquiry is whether the plaintiff's normal life "was, in some way, affected by the injury"; p. 29 -- threshold is met if "plaintiff's ability is *limited* or *qualified* in any way"). In an attempt to reconcile the irreconcilable, Plaintiff thus seeks to turn the focus back on the "particulars" by advocating that *any* impact on a plaintiff's life necessarily affects "the person's general ability" because the term "general ability" is so all-inclusive. (Plaintiff-Appellee's Brief, pp. 27, 31-33, 36). But the opposite is true.

Since a "general ability" to lead one's normal life refers not to numerous particular abilities but to an overall, net-result, singular "ability," the "particulars" of the person's life necessarily must be impacted substantially[2] before one should conclude that the "*general* ability" -- the overall, net-result, conglomerate "ability," has been affected. By putting the focus on the person's overall "*general* ability" to lead his or her normal life, the Legislature left ample room for particular aspects of the person's life to have been affected by the impairment of body function without requiring the conclusion that, in an overall, "unitary" sense, his *general* ability to lead his normal life has been affected. In other words, to complete the metaphor, the fact that particular trees might have been affected does not inevitably lead to the conclusion that there has been any substantial effect on the forest as a whole. The Court should reject Plaintiff's strained argument for an "any" effect standard.

It has been Defendant's position that the "serious impairment of body function" threshold requires more than an objectively manifested impairment of an important body function that has affected the person's normal life; rather, it must be shown to have affected his *general* ability to lead his normal life. By basing the standard on a single, overall, conglomerate "general ability" rather than on the numerous particular facets or "abilities" that make up a person's normal life, the statute logically forbids an "any effect" standard. Unavoidably, some of the particular "abilities" in the person's life will be "affected" to one degree or another by any impairment suffered in an automobile accident. If the net result,

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[2] In this regard, Defendant posits the three-dimensional inquiry into the gravity, duration and pervasiveness of the impairment. For instance, there is substantial impact if a small number of particulars are affected very gravely, or if a great majority are significantly affected for a duration that is permanent or long-term, or if there is some combination of these impacts. (*See*, Defendant-Appellant's Brief, pp. 32-35.)

however, is that, by and large, the overall, singular "ability" has not been materially altered, then it cannot be said to have affected his "general ability to lead his normal life."

Thus, to use Plaintiff's terminology, the Court must indeed make a determination of whether the impairment's impact on the person's functional abilities -- across the broad spectrum of his or her life -- has reached a "critical mass" so as to support the conclusion that there has been an effect on the person's "general ability to lead his or her normal life." (*See*, Plaintiff-Appellee's Brief, pp. 35-36.) Such was the Legislature's directive when it declared the issue of "serious impairment of body function" to be "a question of law for the court." MCL 500.3135(2)(a).

In this regard, Defendant does not entirely disagree with amicus curiae CPAN when it says that §3135(7) requires a fact-specific inquiry into "whether the injuries *viewed in context* have affected the plaintiff's ability to lead his or her normal life." (CPAN Brief, p. 18) (emphasis in original). Indeed, the three-dimensional approach Defendant has proffered (examining the impact on the person's functional abilities in terms of the gravity, duration and pervasiveness of the impairment's effect) provides the logical framework for this very inquiry (*see*, Defendant-Appellant's Brief, pp. 32-33). CPAN thus is wrong in its characterization of Defendant's position as prohibiting inquiry into "the particular ways in which an injury affects a plaintiff's life" (CPAN Brief, p. 17). CPAN and Plaintiff miss the point. While the fact-specific inquiry is necessary, nevertheless when deciding a serious impairment motion the court ultimately must rely on the big picture -- the forest -- which, in this case is essentially unchanged -- and *not* on the altered particulars.

Plaintiff, then, comes dangerously close to agreeing with Defendant when he phrases the "operative inquiry" as requiring an assessment of "the qualitative and quantitative implications of the injury" in terms of its effect "on his normal life as a professional carpenter and avid hunter" in order to determine "the extent to which those and other aspects of his normal life have been sharply curtailed." (Plaintiff-Appellee's Brief, pp. 11-12) (emphasis added).

Here, the record demonstrates that, while there have been effects on Plaintiff's activities as a construction worker and as a hunter, the plain truth is that no aspect of his normal life has been "sharply curtailed." Plaintiff has not been disabled from his regular work, even for a day, and has not been forced to alter substantially the nature of construction work in which he engages. Further, he was and remains an avid hunter as his primary avocation. And Plaintiff concedes that his life around the house with his wife, family and friends has not been impacted by the his condition in any way (**31a-33a** -- Plaintiff's deposition, pp. 29-30, 34).

The degree to which Plaintiff's accident-related injuries have affected the various areas of his life, in other words, simply does not reach the "critical mass" of affecting his "general ability to lead his ... normal life." Plaintiff has not shown that he suffered death, permanent, serious disfigurement, or serious impairment of body function. The circuit court, therefore, was correct in granting summary disposition in favor of Defendant.

B. Contrary to Plaintiff's (and amicus curiae CPAN's) contention that §3135(7) is a repudiation of *Cassidy*, the statutory definition is an endorsement and virtual reinstatement of the *Cassidy* standard.

As the centerpiece of his principal (or preliminary) argument (Argument I of Plaintiff-Appellee's Brief, pp. 19-26), Plaintiff asserts that the 1995 amendment to the No-Fault Act must be understood as an indictment of the standards announced by the Court in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982) (Plaintiff-Appellee's Brief, p. 23), and that the amendment represents "a very significant relaxation of the threshold applied during the *Cassidy* era." (*Id.*, p. 22). Plaintiff's amicus curiae, CPAN, likewise opposes any suggestion that 1995 PA 222 was an endorsement of *Cassidy* (CPAN Brief, pp. 24-25), and warns this Court not to disrupt the "delicate balance" between the first-party and third-party sides of the no-fault system by construing §3135(7) as raising the serious impairment tort threshold (*id.*, pp. 21-22).

The Court should find Plaintiff's and CPAN's contentions unpersuasive. To be sure, §3135(7) did modify the seemingly objective phrase "a normal life" to link it subjectively with the actual plaintiff ("his or her normal life"), but as the *DiFranco* Court pointed out, this is how the Court of Appeals was applying the *Cassidy* test anyway. *DiFranco v Pickard*, 427 Mich 32, 62-63; 398 NW2d 896 (1986) ("it [the Court of Appeals] usually concludes that the injuries sustained did not significantly affect the *plaintiff's* life style or daily activities") (emphasis in original); *id.*, p. 64 ("[i]f the plaintiff returned to work, even after an absence of several months, the Court of Appeals has usually concluded that there has been no significant interference with *the plaintiff's* normal life") (emphasis added).

DiFranco also criticized the theoretical, abstract notion of an objective "normal life," noting that "there is no such thing" (427 Mich at 66), yet it is clear that what the *DiFranco* Court ultimately rejected was the entire "'general ability' test." *DiFranco*, 427 Mich at 65. It construed §3135 *not* as being "a threshold which looks at how the injury affected the plaintiff's ability to work or perform his normal activities" but, rather, one which narrowly examines "whether the injury impaired a body function and, if so, whether that impairment was serious." *Id.* Quite obviously, the 1995 amendments constitute a total reversal of *DiFranco*'s conclusions in this regard.

The Legislature's enactment of §3135(7) in 1995 thus adjusted the hypothetical "normal life" phrase, but the statute is otherwise an unqualified endorsement of *Cassidy*'s requirement that, for an impairment of body function to be "serious," it must affect the person's *general* ability to lead a normal life. This fundamental concept -- the idea that there must be an overall life-altering impact for an impairment to be "serious," was rejected by *DiFranco*, but was re-adopted by the 1995 amendment.

Plaintiff, therefore, is clearly wrong in his rather untenable contention that "the phrase 'general ability' can only operate to *lower* the threshold plaintiffs must satisfy." (Plaintiff-Appellant's Brief, p. 18) (emphasis in original). *See*, *Churchman v Rickerson*, 240 Mich App 223, 231; 611 NW2d 333 (2000) (legislative history of §3135 reveals that the amended statute "was intended to raise or strengthen the no-fault threshold"); *Paisley v Waterford Roof Truss, Ltd*, 968 F Supp 1189, 1194 n. 8 (ED Mich, 1997) ("[t]his amendment [§3135(7)] overrules *DiFranco* and would present a much more formidable hurdle for plaintiff").

As the Legislative Analysis reveals, the serious impairment of body function threshold "must be understood in connection with the other tort thresholds, death and permanent, serious disfigurement. These are high thresholds." (**54a-55a**). Unquestionably, the purpose of the Legislature's actions in 1995 was to raise, not lower, the "serious impairment" threshold in order to effectuate its function of reducing motor vehicle tort litigation. The case at bar was properly dismissed by the circuit court on summary disposition. This Court should affirm.

RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellant, ROBERT OAKLAND FISCHER, respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and reinstate the Lapeer County Circuit Court's grant of summary disposition in favor of Defendant.

Respectfully submitted,

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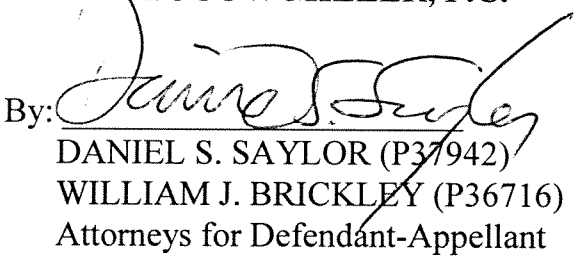
By: 

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PROOF OF SERVICE

STATE OF MICHIGAN)

COUNTY OF WAYNE)

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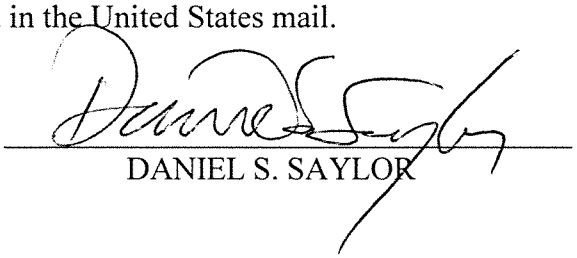

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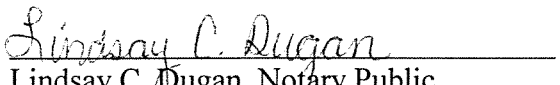

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