

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT E. BENEFIEL,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,
a Michigan corporation,

Defendant-Appellant.

Supreme Court Case No. 135778

Court of Appeals Case No. 273664

Livingston County Circuit Court
Case No. 05-021742-NI

Hon. David J. Reader

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BRIEF OF *AMICUS CURIAE*
MICHIGAN DEFENSE TRIAL COUNSEL, INC.,
IN SUPPORT OF AUTO-OWNERS INSURANCE CO.

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STATEMENT OF QUESTIONS PRESENTED

1. The No-Fault Act, MCL 500.3101 *et seq.*, limits suits for noneconomic losses resulting from a motor vehicle accident to instances of grave injury or death, including serious impairment of a body function. The act defines a serious impairment as one that “affects the person’s general ability to lead his or her normal life.” If Plaintiff Benefiel had proven his pre-existing impairments were temporary, would the time period before the onset of those impairments have been relevant to determining the trajectory of his normal life at the time of the accident?

Defendant/Appellant answers: Yes

Plaintiff/Appellee answers: Yes

Amicus curiae Michigan Defense Trial Counsel answers: Yes

2. The No-Fault Act requires a plaintiff to show the automobile accident affected the course of his normal life. One year after the plaintiff in this case suffered impairments from an initial automobile accident, he was in a second accident which he claims rendered his pre-existing impairments permanent. Does the plaintiff bear the burden of proving that his pre-existing impairments were not already permanent?

Defendant/Appellant answers: Yes

Plaintiff/Appellee answers: No

Amicus curiae Michigan Defense Trial Counsel answers: Yes

3. Plaintiff concedes that his impairments following the second accident were identical to his pre-existing impairments, but contends the second accident made those impairments permanent. But the plaintiff produced absolutely no medical prognosis or other evidence to show that his pre-existing impairments were not already permanent. Did the Court of Appeals err in reversing the trial court’s decision to grant the defendant summary disposition and in holding that the plaintiff established a serious impairment as a matter of law?

Defendant/Appellant answers: Yes

Plaintiff/Appellee answers: No

Amicus curiae Michigan Defense Trial Counsel answers: Yes

4. Did the Court of Appeals err when it modified the ordinary burden of proof and instructed the trial court that if the jury finds it impossible to differentiate between the damages caused by the first and second accidents, the defendant must be deemed responsible for all the injuries and damages sustained by the plaintiff?

Defendant/Appellant answers: Yes

Plaintiff/Appellee answers: No

Amicus curiae Michigan Defense Trial Counsel answers: Yes

STATEMENT OF INTEREST

The Michigan Defense Trial Counsel (“MDTC”) is a business association organized and existing to advance the knowledge and improve the skills of defense lawyers, to support improvements in the adversary system of jurisprudence in the operation of the Michigan courts, and to address the interests of the legal community in Michigan. The MDTC appears before the Court as a representative of defense lawyers and their clients in Michigan, a significant portion of whom are potentially affected by the issues currently before this Court.

An important aspect of the MDTC’s activities is representing the interests of its members in matters of importance before state and federal courts. Accordingly, the MDTC regularly submits *amicus curiae* briefs to the Michigan Court of Appeals and the Michigan Supreme Court advocating the interests of its members. On May 30, 2008, the Court invited the MDTC to submit an *amicus curiae* brief in this matter. The MDTC appreciates the opportunity to assist the Court in settling this important area of Michigan jurisprudence.

INTRODUCTION

The defining issue in this case is whether a plaintiff pursuing a claim under Michigan's No-Fault Act, MCL 500.3135, bears the ordinary burden of proving causation and injury to sustain his negligence claim and establish a "serious impairment of body function," or whether that burden is instead shifted to the responsible insurance company to **disprove** the plaintiff's unsupported allegations.

Under the No-Fault Act, a tort suit against another driver for noneconomic damages is prohibited unless the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). In this case, the Court of Appeals has abandoned the well-settled rule that plaintiffs bear the burden of proof on all elements of their claims, apparently for no other reason than the fact that the defendant is an insurance company. The Court of Appeals' decision flies in the face of Michigan's traditional system of justice, and it undermines the No-Fault Act's goal of reducing litigation over non-economic damages in automobile accidents. The MDTC respectfully requests that this Court reverse the Court of Appeals' decision because the plaintiff, Robert Benefiel, failed to come forward with evidence sufficient to survive Auto-Owners' motion for summary disposition.

STATEMENT OF PROCEEDINGS AND FACTS

The facts relevant to the legal issues presented in this *amicus curiae* brief are as follows:

1. On February 13, 2002, Robert Benefiel was involved in an unrelated car accident that caused him neck, back, and shoulder injuries. *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 420; 745 NW2d 174 (2008).

2. Benefiel first sought treatment in May 2002 after his neck locked up and he experienced tremendous pain. *Id.* He underwent spinal manipulation from a chiropractor and then a physician until November 2002. At that point, Dr. John Rosella prescribed physical therapy and placed Benefiel on ultralight duty, *id.* at 421, which meant that he could not pick up anything heavier than a paper folder, *id.* at 429. Benefiel sued for noneconomic damages under the No-Fault Act for his injuries in this first accident, and he ultimately settled that claim.

3. In February 2003, while in the midst of physical therapy, Benefiel was involved in a second automobile accident. *Id.* at 421. This February 2003 accident is the subject of this litigation. Mr. Benefiel continued his physical therapy until April 14, 2003. *Id.* at 424.

4. Several months after the second accident, Benefiel's pain allegedly worsened. *Id.* In September 2003, he had his first magnetic resonance imaging ("MRI") and was referred to Dr. Stephen Boodin, a neurosurgeon. *Id.* at 424-425. Dr. Boodin recommended a discectomy and fusion of discs, which he performed on October 24, 2003. *Id.* at 425.

5. Benefiel continued to experience pain and receive treatment following the surgery. *Id.* at 426-428. On September 15, 2004, his physical therapists reported his condition had improved, that his functional limitations were "moderate" and his rehabilitation potential was "fair." *Id.* at 428.

6. Of critical importance to the issues presented, Benefiel testified in his deposition that "the 2003 accident did not cause any additional limitations on his activities" (Appellant's Br 33), and he further concedes that fact in this appeal.

7. Auto-Owners filed a motion for summary disposition in the trial court, asking the trial court to decide as a matter of law that Benefiel suffered no "serious impairment of body function" from the second accident and to dismiss the case. The trial court granted Auto-

Owners' motion on the basis that "nothing indicate[d] that th[e] course or trajectory of his life ha[d] been affected by the second accident." *Id.* at 414. Benefiel failed to present a single piece of evidence demonstrating that his general ability to lead his normal life after the first accident was any different after the second accident.

8. The Court of Appeals reversed the trial court. At each step in its analysis, the Court of Appeals reviewed the evidence in the "light most favorable to plaintiff." *Id.* at 416, 422, 434. After concluding (without pointing to any supporting evidence) that Benefiel's impairments were now permanent, *id.* at 422-423, the court casually presumed his impairments from the first accident were only temporary and shifted the burden to Auto-Owners to prove otherwise. *Id.* at 422. Finding no evidence that Benefiel's pre-existing impairments were either temporary or permanent, the court simply pretended the first accident never occurred and concluded that the second accident affected Benefiel's general ability to lead the life he had lived **before** the first accident.

STANDARD OF REVIEW

Benefiel appeals from the trial court's grant of summary disposition to Auto-Owners Insurance Company under the No-Fault Act. Typically, "[t]his Court reviews the grant or denial of summary disposition de novo." See, e.g., *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). But determining whether plaintiff suffered a "serious impairment" as a matter of law under MCL 500.3135(2)(a) requires the trial court first to make certain findings of fact. Accordingly, in reviewing the grant or denial of summary disposition pursuant to MCL 500.3135(2)(a), "the trial court's finding of fact is reviewed for clear error, MCR 2.613(C), while its ultimate legal conclusion is reviewed de novo." *Behnke v Auto Owners Ins Co*, 474 Mich 1004, 1005 n 2; 708 NW2d 102 (2006).

To explain, under the No-Fault Act, “[t]he issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court,” unless there is a factual dispute concerning the nature and extent of the person’s injuries that is material to this determination. MCL 500.3135(2)(a). The trial court was permitted to decide the issue as a matter of law in this case because Auto-Owners stipulated for the purposes of summary disposition that Benefiel suffered an objectively manifested injury as a result of the second accident. But because the plaintiff’s injuries must affect his “general ability to lead his or her normal life” to constitute a “serious impairment,” MCL 500.3135(7), the trial court must first decide certain issues of fact before deciding whether a “serious impairment” exists as a matter of law. For instance, determining the quality of a plaintiff’s normal life requires weighing of the evidence of plaintiff’s lifestyle and any impairments he may have already suffered at the time of the accident.

The Court of Appeals, in error, viewed such evidence in “the light most favorable to the party opposing the motion,” Benefiel. *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 416, 422, 434; 745 NW2d 174 (2008) (quoting *Maiden*, 461 Mich at 120; 597 NW2d 817). That standard of review is designed for testing the factual sufficiency of a complaint, see *Maiden*, 461 Mich at 120; 597 NW2d 817, not for definitively deciding factual issues precedent to a “serious impairment” determination. The 1995 amendment to the No-Fault Act permits courts to decide the “serious impairment” issue as a matter of law in order to bar tort suits for lesser injuries. See *Kreiner v Fischer*, 471 Mich 109, 114-121; 683 NW2d 611 (2004). The trial court should therefore decide factual issues (except the nature and extent of injuries) that arise in its *Kreiner* analysis under the same standard it would apply at trial, the “preponderance of the evidence”

standard. Otherwise, the amendment accomplishes nothing because it merely duplicates the screening process already provided under MCR 2.116(C)(10).

ARGUMENT

I. **The Time Period Before the Onset of a Pre-existing, Temporary Impairment May Be Relevant to Determining Benefiel’s “Normal Life.”**

MDTC agrees with the Court of Appeals that the time period before the onset of pre-existing impairments **may** be relevant to determining the trajectory of the plaintiff’s “normal life.” To effectuate the goal of reducing tort cases related to automobile accidents, the No-Fault Act requires the plaintiff to show “death, serious impairment of body function, or permanent serious disfigurement” to maintain his negligence suit. MCL 500.3135(1). To qualify as a “serious impairment of body function” under MCL 500.3135(1), the impairment must affect the plaintiff’s “general ability to lead his or her normal life,” *i.e.*, the “course” or “trajectory” of the plaintiff’s “entire normal life.” MCL 500.3135(7) (“As used in this section ‘serious impairment of body function’ means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”); *Kreiner*, 471 Mich at 130-131; 683 NW2d 611 (defining to “lead” as “to conduct or bring in a particular course”). If the plaintiff’s lifestyle before the accident was hindered by a **temporary** impairment, the plaintiff’s earlier lifestyle may be relevant to determine the life he would have led once those impairments healed. *Amicus*, Auto-Owners, and the Court of Appeals all appear to agree on this point. (See Appellant’s Br 26.)

Benefiel contends his impaired life at the time of the accident should not be considered because “it was not his ‘usual’ or ‘natural’ life”—his life “had been [recently] changed by the consequences of that [first] accident.” (Appellee’s Br 13.) But that is exactly why the impairments from the first accident must be considered. Regardless of what Benefiel considers

his “normal life” to be, Benefiel admits that he was not living that life at the time of the second accident, and—critically—there is no evidence that he ever would again.

The existence of this life-changing event shortly before the second accident illustrates an important point: the pivotal moment for purposes of the *Kreiner* analysis must always be the moment of the accident in question. That point in time is the crux of the before-and-after analysis outlined in *Kreiner*, 471 Mich at 133; 683 NW2d 611 (“[T]he court must engage in an objective analysis regarding whether any difference between the plaintiff’s pre- and post-accident lifestyle has actually affected the plaintiff’s ‘general ability’ to conduct the course of this life.”). To be sure, how Benefiel lived his life before the first accident may be relevant to the extent it indicates the course of his life at the time of the second accident. But nothing that impacted the course of his life before the second accident can logically be considered a result of the second accident.

Rather than “comparing the plaintiff’s life before and after the [second] accident” as *Kreiner* requires, Benefiel asks this court to compare his life **before the first** accident with his life **after the second accident** and simply to ignore impairments he suffered in between. Conveniently for him, this obfuscates any distinction between the effects of the first accident and the effects of the second accident. The only logical reason for analyzing Benefiel’s life this way is to improve Benefiel’s claim against Auto-Owners by imposing liability on Auto-Owners not only for damage caused by the second accident, but for damage caused by the first accident as well. This Court should reject Benefiel’s theory.

II. The Plaintiff, Benefiel, Bears the Burden of Proving His Pre-existing Impairments Were Not Permanent.

The ordinary default rule in the United States is that **plaintiffs** bear the risk of failing to prove the elements of their claims. See *Schaffer v Weast*, 546 US 49, 56 (2005). There

is no reason to shift that burden of proof here simply because Benefiel's damages will be paid by an insurance company. The plaintiff should retain the burden of proving that his ability to lead his normal life has been affected, which includes showing that his pre-existing impairments were not permanent. Allocating this burden to the plaintiff is fair, because it is the plaintiff who holds the evidence of the nature and extent of his pre-existing impairments. And placing the burden on Auto-Owners would not only be unfair, it would undermine the No-Fault Act's goal of reducing motor vehicle accident litigation.

To determine whether a serious impairment has occurred, *Kreiner* instructs trial courts to first determine what the course of the plaintiff's normal life would have been, and then compare that "normal life" with the course of the plaintiff's post-accident life. 471 Mich at 130-131; 683 NW2d 611. In many cases where the plaintiff has pre-existing impairments, the course of his normal life naturally depends on the nature of those impairments and their duration. (Duration is, after all, one of the factors this court enunciated in *Kreiner* for determining the seriousness of post-accident impairments. 471 Mich at 133; 683 NW2d 611.) In this case, even Benefiel concedes that **there is no qualitative difference between Benefiel's pre- and post-accident impairments**. The only possible difference would be duration. In other words, a determination regarding the permanence or duration of Benefiel's pre-existing impairments will conclusively resolve whether Benefiel has been "further injured" by the second accident.

It is axiomatic that the plaintiff bears the burden of proving that the defendant's negligence resulted in injury. See, e.g., *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001) ("Plaintiff had the burden to prove each element of her [negligence] case, including every item of claimed damages."); *Beattie v JL Hudson Co*, 180 Mich 111, 115; 146 NW 650, 651 (1914) ("And so it is that the burden of proving by a preponderance of proof rests

upon the plaintiff, both of the wrongful act of the defendant, the injury which resulted therefrom to the plaintiff, and the damages she suffered because of that injury.”); *Mull v Equitable Life Assur Soc of US*, 196 Mich App 411, 423; 493 NW2d 447 (1992) (affirming the trial court’s instruction that “[t]he Plaintiff has the burden of proof on each of the following propositions: (A), that the Plaintiff was injured . . .”). “Perhaps the broadest and most accepted idea [for allocating evidentiary burdens] is that the person who seeks court action should justify the request, which means plaintiffs bear the burdens on the elements in their claims.” C Meuller & L Kirkpatrick, *Evidence* § 3.1 (3d ed, 2003). Accordingly, Michigan’s Model Civil Jury Instructions assign to the plaintiff the burden of proving at trial “serious impairment of a body function” under the No-Fault Act. Mich Civ JI 36.15.

Nothing in the language of the No-Fault Act or the common law suggests that this burden of proof should be allocated any differently simply because the trial court is deciding the issue as a matter of law, or because the defendant happens to be an insurance company. To the contrary, there are several cogent reasons for allocating that burden to the plaintiff, wholly aside from the fact that litigants should always be required to justify their affirmative requests for relief.

For one, the purpose of the No-Fault Act in reducing tort suits is undermined if the plaintiff is relieved of the burden to prove the facts necessary to show a threshold injury. As this Court explained in *Kreiner*, the No-Fault Act created “a regime that established that a person injured in . . . an accident is entitled to certain economic compensation from his own insurance company regardless of fault.” 471 Mich at 114; 683 NW2d 611. In exchange, “the Legislature limited an injured person’s ability to sue a negligent operator or owner of a motor vehicle [and,

consequently, his insurer] for bodily injuries.” *Id.* at 115. The Act was passed with the “goal of reducing motor vehicle accident litigation.” *Id.* at 117.

The Court of Appeals in this case upset the balance of the compromise by creating a rebuttable presumption in favor of a plaintiff with pre-existing impairments. See *Benefiel*, 277 Mich App at 422; 745 NW2d 174 (“While it is impossible to know whether plaintiff would have suffered any residual impairment from . . . the first accident . . . we have found no evidence in the record [to the contrary].”). In other words, rather than requiring Plaintiff Benefiel to satisfy his burdens of persuasion and production, the Court of Appeals simply **presumed** that Benefiel’s pre-existing impairments would have healed, even though he presented no evidence that would have allowed a fact finder to conclude that the second accident exacerbated the persistent injury he suffered in the first accident. In so doing, the Court of Appeals relieved Benefiel from the burden of establishing what the course of his normal life would actually have been. Even worse, the Court of Appeals made no finding as to how long Benefiel’s presumably temporary impairments would have endured. It simply pretended those impairments never existed. So the Court of Appeals not only relieved the plaintiff of his burden of proof, it disregarded reality entirely and imagined a normal life trajectory for Benefiel that lacked any evidentiary support.

Benefiel is nothing like the impairment-free plaintiff analyzed in *Kreiner*. It was reasonable for this court in *Kreiner* to infer that a plaintiff who was free of impairments before an accident would have otherwise continued free of impairments but for the accident. Such an inference is justified by common life experience. Accordingly, the simple analysis of “comparing the plaintiff’s life before and after the accident” makes sense, without any need for expert testimony to show that the plaintiff’s lifestyle would remain the same.

By contrast, common sense has very little to say about how the normal life trajectory of a plaintiff such as Benefiel who suffers from a persistent (having lasted a year) medical condition in the middle of treatment at the time of an accident. A court is not justified in concluding that this persistent condition will heal without some medical prognosis or other competent evidence showing that it will.¹ Without such evidence, the court at most should presume that a persistent condition will simply continue to persist. With or without such a presumption, the plaintiff's burden remains the same, and it would rarely be an impossible burden for the plaintiff to bear if he has indeed suffered a serious impairment.²

This leads to the second reason for allocating the burden to the plaintiff: It is natural that the plaintiff should carry this burden, rather than the defendant, because the plaintiff knows and controls all of the information regarding the course of what his normal life actually would have been, but for the accident. The plaintiff holds the physical evidence of his injury, chooses whether or not to consult a physician or undergo treatment and laboratory testing, and has direct knowledge of his pain and his limitations.

To be sure, it is conceivable that in very rare instances even the plaintiff may experience difficulty showing his pre-existing impairments would have come to an end. But it would be the truly rare instance where no medical opinion could be drawn as to whether the prior injuries would have healed. And if no medical expert can conclude that his prior impairments

¹ Here, where the impairments before and after the accident are identical, and the only issue is duration, there would have to be some prognosis not only regarding the persistence of the impairments prior to accident, but also afterward, to determine to what degree the duration has been altered as a result of the second accident. Under the totality of the circumstances, the difference may be insufficient to conclude that the plaintiff suffered a serious impairment from the second accident. See *Kreiner*, 471 Mich at 134; 683 NW2d 611.

² In fact, in most cases, the duration of the plaintiff's pre-existing impairments may have little influence on the *Kreiner* analysis, because they may be qualitatively different from impairments at issue and may consequently affect different aspects of the plaintiff's life.

would have healed, there is no basis for believing Benefiel was robbed of that opportunity by the subsequent accident.

In sum, evidence that the accident affected the course of the plaintiff's normal life is necessary to establish the threshold injury of "serious impairment" under the No-Fault Act.

Where a pre-existing impairment is involved and duration is at issue, that includes showing how those impairments would have persisted or disappeared were it not for the intervening accident.

As explained below, the evidence was completely lacking in this case.

III. The Court of Appeals Erred in Reversing the Trial Court and Holding That Benefiel Established a Serious Impairment as a Matter of Law.

The Court of Appeals erred in reversing the trial court because Benefiel failed to present a single piece of evidence demonstrating that his general ability to lead his normal life was any different after the subject accident. As explained in detail above, Benefiel bears the burden of proving that his general ability to lead his normal life has been affected before he may bring a tort suit against Auto-Owners. It is undisputed that Benefiel was equally if not more impaired after the first accident than he was following the second accident. Consequently, Benefiel's case hinges on proving not only that his pre-existing impairments were temporary but also that his post-accident impairments were permanent. The Court of Appeals should have affirmed the trial court because Benefiel failed to meet his burden of proof.

Neither Benefiel nor the Court of Appeals has pointed to any competent evidence in the record that indicates that his pre-existing impairments were temporary. Indeed, Benefiel's showing was so inadequate that the Court of Appeals was forced to concede that "**it is impossible to know** whether plaintiff would have suffered any residual impairment from his neck, back, and shoulder injuries sustained in the first accident had he had the opportunity to complete a full treatment program." *Benefiel*, 277 Mich App at 422; 745 NW2d 174. In the ordinary case, when

it is “impossible to know” whether a defendant’s acts caused a plaintiff harm, judgment in favor of the defendant is appropriate as a matter of law.

But apparently because this case involves an insurance company, the Court of Appeals felt it appropriate to relieve Benefiel of that burden and to shift it to Auto-Owners. Having “found no evidence in the record suggesting that the injuries he sustained in the first accident resulted in a catastrophic, permanent, residual impairment physically incapable of healing,” the Court of Appeals concluded that the injuries from the first accident were only temporary.³ *Id.* The Court of Appeals’ burden-shifting presumption has no basis in the plain language of the No-Fault Act, and it turns the entire litigation exercise on its head by requiring the defendant to **disprove** that the plaintiff’s pre-existing injuries were only temporary. That is an incredible result in a situation where there was no prognosis for recovery by a medical expert or any other competent evidence to support it. The Court of Appeals should have instead concluded that Benefiel failed to meet his burden to show that the course of his normal life was affected.

³ The Court of Appeals earlier concluded, without identifying any supporting evidence and based on an incorrect standard of review, that “the second accident imposed a medical regime on plaintiff that made completing the course of treatment from the first accident, as well as recovery from the injuries sustained in the first accident, physically impossible.” *Benefiel*, 277 Mich App at 421-422; 745 NW2d 174. “In other words, as a direct result of the second accident, plaintiff lost all opportunity to completely heal and become pain-free after the first accident without being burdened by further complications or any additional conditions he sustained due to the first accident.” *Id.* at 422. The Court of Appeals here inappropriately decided an issue of causation that it later acknowledged should have remained an issue on remand. *Id.* at 434 (“On remand, the trial court may conclude that causation is a question of fact for the jury.”). Moreover, the record provides no basis for concluding that the course of treatment following the second accident was not merely the continuing result of his injuries from the first accident. Consequently, and as explained in further detail in the following section, the trial court could have granted summary disposition on the issue of causation as well.

IV. The Defendant Cannot Be Deemed Liable if the Plaintiff Has Failed to Prove Causation.

The lower court's instruction to the trial court on remand is problematic on several levels. Most significantly, it erroneously suggests that Auto-Owners should be deemed responsible for all injuries if the jury cannot distinguish the first-accident injuries from the second-accident injuries. Specifically, the Court of Appeals stated:

On remand, the trial court may conclude that causation is a question of fact for the jury. If so, the jury will be charged with determining which injuries were caused by each accident. However, given the likely difficulty in differentiating, it is conceivable that a jury may be incapable of doing so. If that were to occur—that is, *if plaintiff showed that the underinsured motorist negligently caused an accident resulting in injury but the jury could not separate accident-related and non-accident-related injuries and damages*—the trial court could conclude that the injury would be indivisible and defendant would therefore be deemed responsible for all the injuries and damages that plaintiff sustained.

Benefiel, 277 Mich App at 434; 745 NW2d 174.

This instruction is both internally inconsistent and incorrect as a matter of law. On the one hand, the instruction correctly states that the plaintiff must show that the accident resulted in, or caused, an injury. On the other hand, it suggests that Benefiel could make this showing without the jury being able to distinguish between the injury from the first accident and the injury from the second accident. Logically speaking, if the jury cannot discern any change in Benefiel's injuries from the second accident, then it must find that he has suffered no injury from the second accident. Otherwise, an arbitrary presumption is created that the second accident caused an injury, and once again, Benefiel is improperly relieved of his burden to prove an essential element of his claim. See *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001) (“Plaintiff had the burden to prove each element of her [negligence] case.”).

The Court of Appeals relied on *Richman v City of Berkley*, 84 Mich App 258; 269 NW2d 555 (1978), and *Belue v Uniroyal, Inc*, 114 Mich App 589; 319 NW2d 369 (1982), as authority for this instruction, but such an instruction cannot be found in either of those cases. In fact, both cases guard against such an instruction.

In *Richman*, the court addressed whether the trial court should have instructed the jury that “if you can’t apportion the amount of damages resulting from each individual cause, the defendant whose act of negligence caused the trauma and the very problem of the risk of uncertainty, is held responsible for the entire damage.” 84 Mich App at 260; 269 NW2d 555. The court explained that “[t]his policy **does not . . . remove from a plaintiff the burden of showing that the negligence of the defendant was the proximate cause of the injury.**” *Id.* at 263 (emphasis added). It merely gives the benefit of the doubt in determining [the amount] of damages to the party whom the jury has found to have been wronged.” *Id.* The Court accordingly held the instruction was proper based on evidence in the trial testimony that the “accident caused aggravation of pre-existing diseases and weaknesses of plaintiff.” *Id.* at 263.

In *Belue*, the court addressed the propriety of instructing the jury that “if from the nature of the case damages cannot be estimated with certainty . . . it is better to run a slight risk of giving somewhat more than actual compensation” 114 Mich App at 593; 319 NW2d 369. The court concluded that this policy allowed “juries to consider elements of damages, the amount of which was not ascertainable as an exact sum **but the existence of which was supported by competent evidence**” and that it applied “where a defendant’s tort causes an aggravation of a plaintiff’s previous injury.” *Id.* at 594 (emphasis added). The court noted that “such an instruction must be used carefully so as to be limited to the question of the **amount** of damages.” *Id.* at 595 (emphasis added).

Richman and *Belue* both involved a finding that the defendant's conduct caused further aggravation of the plaintiff's pre-existing injuries. This is consistent with Michigan's Model Civil Jury Instruction 50.11, which is titled "Inability to Determine Extent of Aggravation of Injuries." Neither case supports the ill-conceived notion that Auto-Owners should be held liable by default if no sign of further injury is found from the second accident. To the contrary, both cases explicitly caution that the plaintiff bears the burden to prove the defendant proximately caused an injury before the defendant can be held responsible for any damages. Unless and until a plaintiff comes forward with admissible evidence from which a fact finder could rule in favor of the plaintiff on causation, the only appropriate result is judgment in favor of the defendant as a matter of law.

CONCLUSION

There are two key facts that drive the resolution of all legal issues in this matter. First, Benefiel has conceded that the 2003 accident did not cause any additional limitations on his activities. (Appellant's Br 33.) Second, Benefiel has failed to proffer any evidence, admissible or otherwise, that would allow a reasonable fact finder to conclude that the damage Benefiel suffered from his first accident was only temporary. As a result, the trial court was left with no basis for concluding that Benefiel's normal life would have been any different if the second accident had never occurred. Having failed to show a serious impairment resulted from the second accident, Benefiel's claim fails as a matter of law. The Court of Appeals' error was in relieving Benefiel's burden to prove his normal life was affected by the second accident and presuming instead that it was affected unless Auto-Owners could **disprove** it. Such burden shifting is not contemplated by the No-Fault Act and is an anathema to the system of proof followed in all manners of litigation since this State's inception. Accordingly, MDTC respectfully requests that this Court clarify that it is the plaintiff that always bears the burden of

proving his case, and hold that Auto-Owners is entitled to summary disposition because Benefiel failed to satisfy that burden here.

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