

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

DOUGLAS D. JONES,

Plaintiff-Appellee,

v.

KATHLEEN P. OLSON and TODD R.
OLSON,

Defendants-Appellants.

S. Ct. No. _____

C.A. No. 268929

L.C. No. 05-18785-NI

Opn 9/21/06

*Wexford
C. Corwin*

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MICHIGAN SUPREME COURT

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	i
STATEMENT IDENTIFYING COMPLAINED-OF OPINION AND SETTING FORTH REQUESTED RELIEF	iii
STATEMENT OF THE QUESTION PRESENTED	iv
INTRODUCTION.....	v
STATEMENT OF FACTS	1
A. Nature of the Case.....	1
B. Background Facts.....	2
C. The Instant Litigation.....	5
1. Plaintiff’s Allegations	5
2. The Summary Disposition Motions	5
3. The Circuit Court’s Ruling	8
4. The Court of Appeals’ Decision.....	9
STATEMENT REGARDING STANDARD OF REVIEW	11
ARGUMENT	13
PLAINTIFF DID NOT SUFFER A SERIOUS IMPAIRMENT OF BODY FUNCTION AND THUS HE MAY NOT MAINTAIN THIS NEGLIGENCE ACTION FOR NONECONOMIC LOSS SUSTAINED IN THE MOTOR VEHICLE ACCIDENT WITH DEFENDANTS.....	13
RELIEF	30

INDEX OF AUTHORITIES

Page

MICHIGAN CASES:

Adkins v Thomas Solvent Co,
440 Mich 293; 487 NW2d 715 (1992) 11

Behnke v Auto Owners' Ins Co,
____ Mich ____; 708 NW2d 102 (2006) xii, 22, 23, 27

Brown v Michigan Health Care Corp,
463 Mich 368; 617 NW2d 301 (2000) 11

Cook v Hardy,
474 Mich 1010; 708 NW2d 370 (2006) xii, 22, 23, 27

Durant v Stahlin,
375 Mich 640; 135 NW2d 392 (1965) 12

Groncki v Detroit Edison,
453 Mich 644; 567 NW2d 289 (1996) 11

Kreiner v Fischer,
471 MICH 109; 683 NW2d 611 (2004)iv, v, vi, vii, viii, ix,
..... 1, 5, 7, 8, 10, 14, 15, 16, 17, 18, 19, 22, 27, 28, 29

Maiden v Rozwood,
461 Mich 109; 597 NW2d 817 (1999) 11

McCart v J Walter Thompson,
437 Mich 109, 115; 469 NW2d 284 (1991) 12

Nicke v Miller,
475 Mich 880; 715 NW2d 775 (2006) 13

Quinto v Cross & Peters Co,
451 Mich 358; 547 NW2d 314 (1996) 11, 12

Skinner v Square D Co,
445 Mich 153; 516 NW2d 475 (1994) 12

Smith v Globe Life Ins Co,
460 Mich 446; 597 NW2d 28 (1999) 11

Williams v Medukas,
266 Mich App 505; 702 NW2d 667 (2005) 27

COURT RULES:

MCR 2.116 5, 11

MCR 7.302 iii, x

STATUTE:

MCL 500.3135 (No Fault Act) v, vi, vii, x, 8, 14, 27, 28

**STATEMENT IDENTIFYING COMPLAINED-OF OPINION AND SETTING
FORTH REQUESTED RELIEF**

Pursuant to MCR 7.302(A)(1)(a), defendants-appellants Kathleen P. Olson and Todd R. Olson state that the within application for leave to appeal seeks the Court's review of the Court of Appeals' September 21, 2006 opinion reversing the Wexford County Circuit Court's February 22, 2006 order on defendants' motion for summary disposition. Kathleen P. Olson and Todd Olson seek a peremptory reversal of the Court of Appeals' opinion and, failing that, a grant of this application for leave to appeal.

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS D. JONES,

Plaintiff-Appellant,

v

KATHLEEN P. OLSON and TODD R. OLSON,

Defendants-Appellees.

UNPUBLISHED
September 21, 2006

No. 268929
Wexford Circuit Court
LC No. 05-018785-NI

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), and implicitly denying his countermotion for partial summary disposition. The trial court determined as a matter of law that plaintiff had not suffered a serious impairment of body function. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We reverse and remand for proceedings consistent with this opinion.

Plaintiff suffered multiple injuries in an automobile accident on August 1, 2003. The most significant injury was an unusual but likely stable fracture of the spine at C-7. Plaintiff was initially treated with a cervical collar and medication. As of November 17, 2003, plaintiff had persistent pain in his neck with radiation of numbness into his shoulders and arms. On January 9, 2004, plaintiff reported continued discomfort in his neck and decreased rotation, but denied persistent radiation, numbness, or weakness. He underwent physical therapy with good results. The February 12, 2004, progress report indicates that he could return to heavy construction work, pouring foundation walls, for three hours per day or two days per week, increasing to full-time over the next two to four weeks. Plaintiff waited until March 2004 to return to work, and then returned full-time without restrictions. Plaintiff stated in his deposition on October 10, 2005 that he had not needed to take any time off since March 2004, that he was not on any medication and, that although his neck sometimes hurt, it did not prevent him from doing anything.

However, more relevant to the claim at hand, plaintiff also testified that during the approximate six months that he was off work, he was not able to hunt, snowmobile, play softball, do yard work, or walk with his girlfriend, which he had typically done four or five evenings each week. Further, he did not drive for three months, did not have intimate relations with his

girlfriend for two months, and had difficulty dressing and feeding himself for two months. Plaintiff has custody of his eleven-year-old son, and during the months after the accident, plaintiff needed help from his mother, grandmother, and girlfriend to get his son to school in the morning.

To prevail on his claim, plaintiff must establish a serious impairment of bodily function, which is an objectively manifested impairment of an important body function that affects the person's general ability to lead his normal life. MCL 500.3135(7); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Plaintiff does not take issue with the trial court's determination that this case presents a question of law, since there is no material factual dispute concerning the nature and extent of his injuries. See MCL 500.3135(2)(a); *Kreiner, supra* at 120; *Moore v Cregeur*, 266 Mich App 515, 518; 702 NW2d 648 (2005). Plaintiff agrees with the trial court's determination that the impairment was objectively manifested. Plaintiff challenges only the trial court's determination that the impairment did not affect his general ability to lead his normal life, asserting that it did, albeit for a short duration. Our review is de novo. *Kreiner, supra* at 129.

In determining whether a plaintiff's "general ability" to conduct the course of his normal life has been affected, a court should consider the totality of the circumstances, including but not limited to, the nature and extent of the injury, the type and length of treatment required, the duration of the disability, the extent of residual impairment and the prognosis for eventual recovery. *Id.* at 133-134. In assessing the extent of the injury, a court should compare the plaintiff's lifestyle before and after the injury. *Id.* at 132. An injury need not be permanent to be an impairment of an important body function, *id.* at 135, but if the person's general ability to lead his normal life has not been affected, he has not suffered a serious impairment. *Id.* at 130. The *Kreiner* Court noted that "to 'lead' one's normal life contemplates more than a minor interruption in life," and that "the effect of the impairment on the course of a plaintiff's entire normal life must be considered." *Id.* at 131.

We find that the facts of this case present more than a "minor interruption" in plaintiff's life. Plaintiff's general ability to lead his normal life was put entirely on hold for the first two months after the accident, and returned only gradually over the following four months. Plaintiff's lifestyle before the injury was dramatically different from his lifestyle for the six months after the accident. Following the *Kreiner* Court's dictate that an injury need not be permanent to constitute a serious impairment, we hold that where, as here, an injury entirely disrupts a person's ability to lead his normal life, the fact that the person eventually recovers does not preclude recovery for that injury. To hold otherwise would disregard the Court's direction to consider such factors as the duration of the disability, comparative lifestyle before and after the injury, length of treatment, and other factors that suggest permanence is not dispositive. The totality of the circumstances of this case support plaintiff's contention that he should recover damages for the time period when his ability to lead his normal life was entirely disrupted.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper

STATEMENT OF THE QUESTION PRESENTED

THE COURT IN *KREINER V FISCHER*, 471 MICH 109; 683 NW2d 611 (2004), HELD THAT, IN ORDER TO MAINTAIN A TORT ACTION FOR NONECONOMIC LOSS, A PLAINTIFF MUST HAVE SUSTAINED AN OBJECTIVELY MANIFESTED IMPAIRMENT OF AN IMPORTANT BODY FUNCTION THAT AFFECTS THE COURSE OF THE PLAINTIFF'S LIFE. DOES THE BRIEF AND TEMPORARY LIMITATION ON DOUGLAS JONES' LIFE FOR A PERIOD OF ONLY MONTHS FALL OUTSIDE THIS RULE SUCH THAT THE COURT PROPERLY GRANTS DEFENDANTS' REQUESTED RELIEF?

Defendants-Appellants Kathleen P. Olson and Todd R. Olson say "YES".

Plaintiff-Appellee says "NO".

INTRODUCTION

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Court examined various provisions of Michigan's No Fault Act. It explained that, through the Act, the Legislature generally abolished tort liability in motor vehicle accident cases replacing it with a regime whereby a person injured in a motor vehicle accident is entitled to certain economic compensation from his own insurer regardless of fault. 471 Mich 114. In exchange for providing for the receipt of no fault economic loss benefits from one's own insurer, the legislature limits an injured person's ability to sue a negligent operator or owner of a motor vehicle for bodily injuries. Specifically, no tort suit against a third party for non-economic damages is permitted unless the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement", MCL 500.3135.

As part of this same discussion, the *Kreiner* court articulated two reasons prompting the Legislature's limitation of recovery for non-economic loss. 417 Mich at 117. One is to avoid the overcompensation of minor injuries. The second is to eliminate some of the excessive litigation involving motor vehicle accident cases. As explained by the Court, the combination of the cost of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability of providing so many benefits without regard to fault, 471 Mich at 117.

The *Kreiner* court, cognizant of those goals, re-examined and refined the governing framework for pursuing a tort action for non-economic damages in motor

vehicle accident cases. The Court announced that, in order to pursue an action for non-economic tort damages under Michigan's No Fault Act, a plaintiff must show that he/she has suffered a serious impairment of an important body function. That is defined at MCL 500.3135(7) as an objectively manifested impairment of an important body function that affects a person's general ability to lead his or her normal life. The Court also said that the determination whether an impairment affects a plaintiff's general ability to lead his or her normal life requires a consideration of whether the plaintiff is "generally able" to lead his/her normal life. If he/she is generally able to do so, then his/her general ability to lead his/her normal life has not been affected by the impairment. 471 Mich at 130.

The *Kreiner* court further explained that to lead one's normal life contemplates more than a minor interruption in life. Specifically, under the Act, the objectively manifested impairment of an important body function must affect the "course" of a person's life. Accordingly, the effect of the impairment on the plaintiff's normal life must be considered. If the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's general ability to lead his normal life has not been affected and he/she cannot meet the serious impairment of body function threshold.

Guided by those principles, the *Kreiner* court articulated a multi-step process to provide lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not. Concerning the step which calls upon a court to engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's general

ability to conduct the course of his/her life, the Court provided a non-exhaustive list of objective factors to assist in evaluating whether a plaintiff's general ability to conduct the course of his normal life has been affected. Those factors include the length of treatment required and the duration of the impairment. Not surprisingly, upon enumerating those factors, the *Kreiner* court mentioned that an impairment lasting only a few moments does not have the same effect on a person's general ability to lead his or her normal life as an impairment of several years' duration. In situations that are not so simple, a necessary part of the analysis calls for a study of how long and how pervasively a plaintiff's activities and abilities are affected. While observing that an injury need not be permanent, the *Kreiner* court emphasized that the impairment must be of sufficient duration to affect the course of a plaintiff's life. 471 Mich 135.

The Court of Appeals' September 21, 2006 unpublished per curiam opinion directly contravenes the principles enunciated by this Court in its *Kreiner* decision. The Court of Appeals never utilized the step-by-step process for determining whether a plaintiff would be allowed to maintain an action for non-economic tort damages under the No Fault Act. Yet, the *Kreiner* Court's articulation of this methodology takes into account the history and goals of the No Fault Act, the purposes to be served by the No Fault Act, and the clear and plain language of the No Fault Act. Utilization of a different test does not achieve these same ends.

The duration of the alleged impairment is a crucial component of a court's analysis. In determining whether an impairment affects a plaintiff's general ability to

lead his/her normal life and whether the course or trajectory of the plaintiff's normal life has been affected, a minor temporary interruption in life will not suffice. Neither will brief or short-lived impairments. An impairment lasting only a few minutes will not qualify. Rather, the limitation must be of sufficient duration to affect the course of the plaintiff's life. To reinforce that point, the *Kreiner* Court found that the alleged impairments suffered by the plaintiffs in the cases before it were not of sufficient duration as to constitute serious impairments of body function. More specifically, the *Kreiner* Court ruled that the temporary limitations that Straub experienced did not satisfy the statutory prerequisites. As for Mr. Kreiner, the Court held that his impairment did not affect his overall or broad ability to conduct the course of his normal life. As a result, his life after the accident was not significantly different than it was before the accident.

Despite *Kreiner* providing a virtual road map to the proper resolution of the issue of whether Douglas D. Jones suffered a serious impairment of a body function so as to allow him to maintain his negligence action against defendants, the Court of Appeals inexplicably declined to follow the route laid out by the *Kreiner* court. Instead the Court of Appeals embarked on a journey leading it to a wrong destination. The Court mistakenly concluded that Mr. Jones could proceed with his negligence suit because his ability to lead his normal life was put "entirely on hold for the first two months after the accident and returned gradually over the following four months". This conclusion follows from the Court of Appeals' application of a test of its own making. The *Kreiner* analysis would not support such a result. Unlike the situation in *Kreiner*, the Court of

Appeals' ruling allows temporary and abbreviated interruptions to factor into a consideration of one's general ability to lead his normal life.

The fourth step in the *Kreiner* Court's multi-level analysis calls for a determination of whether the course of the plaintiff's normal life has been affected. This "multifaceted inquiry" entails comparing the plaintiff's life before and after the accident and weighing the significance of any affected aspects of the course of the plaintiff's overall life. Once that is identified, a court is called upon to engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his/her life. In that context, the *Kreiner* court warned that just "any" effect on a plaintiff's life is insufficient because a *de minimus* effect would not, as objectively viewed, affect the plaintiff's general ability to lead his life.

In disregard of those principles, the Court of Appeals examined Douglas Jones' life in segments. By focusing upon monthly segments of time following plaintiffs' accident. By focusing upon monthly sections of time following plaintiff's accident, the Court of Appeals abandoned the governing *Kreiner* analysis and improperly and impermissibly altered and modified the proper approval by considering segments of Douglas Jones' life rather than his "general ability to lead his normal life".

The *Kreiner* test entails a determination of whether a plaintiff is "generally able" to lead his normal life so as to be able to maintain an action for non-economic tort damages. By allowing only brief and small interruptions in Douglas Jones' life to

qualify, the Court of Appeals effectively nullified the clear wording of the No Fault Act which requires the presence of an objectively manifested impairment of an important body function that affects the course of a person's life. It has likewise jeopardized the goals which the Act is intended to achieve. If the Court of Appeals' decision is allowed to stand, the results will be disastrous. Suits by persons suffering only temporary and brief life interruptions will flood the courts. Minutes, hours, or days of alleged impairments will be the stuff of which lawsuits are made. There will be no end to litigation. That being said, it is obvious that the issue presented here is of significance to the jurisprudence of the State, MCR 7.302(B)(3).

The Court of Appeals looked to temporary and abbreviated periods of Douglas Jones' entire normal life:

Plaintiff's general ability to lead his normal life was put entirely on hold for the first two months after the accident, and returned only gradually over the following four months. Plaintiff's lifestyle before the injury was dramatically different from his lifestyle the six months after the accident. Following the *Kreiner* court's dictate that an injury need not be permanent to constitute a serious impairment, we hold that, where, as here, an injury entirely disrupts a person's ability to lead his normal life, the fact that the person eventually recovers does not preclude recovery for that injury.

The Court of Appeals' buttressed its holding by examining activities of minor significance in Douglas Jones' overall life. For example, the Court of Appeals cited Douglas Jones' ability to hunt, to snowmobile, to play softball, and to walk in the evenings with his girlfriend. It also considered the fact that, in the months after the accident, Douglas Jones needed help from his mother, his grandmother, and his girlfriend

in getting his son to school in the morning. Minor changes in how a person performs a specific activity do not change the fact that the person is still generally able to perform the activity for purposes of determining whether an impairment affects a plaintiff's general ability to lead his normal life.

The error in the Court of Appeals' consideration of this appeal is especially evident in the Court's handling of the issue of Mr. Jones' absence from work. Mentioning the fact that his job involving heavy construction work pouring foundation walls, the Court of Appeals stated that plaintiff waited until March of 2004, to return to work (Opinion, p 1). The Court of Appeals then reviewed the activities which it found were curtailed "during the approximate six months that he was off work". *Id.* Significantly, the Court of Appeals' opinion never recognizes or takes into account the affidavit of Steve Callsen, Jones' employer. The affidavit accompanied defendants' motion filings. The gist of the Callsen affidavit is that, due to the lack of work during the winter months, Northwestern Foundations, Inc., Jones' employer, closes down and lays off its employees. Thus, regardless of his physical condition, Jones would have been laid off work from January 23, 2004, through February, 2004, up until the time he was rehired in March of 2004. Had Northwestern Foundations, Inc., had been open for business, Jones would have been back to work pursuant to the February 12, 2004 progress report.

Based on the above, the Court of Appeals clearly erred in concluding that Douglas Jones could proceed with his negligence suit because his general ability to lead his normal life "was put entirely on hold for the first two months after the accident"; that

Douglas Jones' lifestyle before the injury "was dramatically different from his lifestyle for the six months after the accident", and that Douglas Jones' injury disrupted his ability to lead a normal life. More specifically, the Court of Appeals' opinion conflicts with the Court's decision in *Cook v Hardy*, 474 Mich 1010; 708 NW2d 370 (2006). There, the Court embraced the Court of Appeals' dissent in finding that interruption to the plaintiff's normal life activities was only minimal and temporary. Therefore, the Court concluded that the injuries did not rise to the level of a serious impairment of body function. Additionally, the Court of Appeals' decision also improperly disregards the Court's opinion in *Behnke v Auto Owners' Ins Co*, ____ Mich ____; 708 NW2d 102 (2006).

Defendants are not before the Court urging that only total permanence will satisfy the serious impairment test. However, by the same token, minimal inconveniences and short interruptions in a person's course of life simply do not make it either. Douglas D. Jones has not and cannot demonstrate the existence of a genuine issue of material fact concerning a serious impairment of bodily function which affected his general ability to lead his normal life. The admittedly short duration of Jones' impairment did not affect his general ability to lead his normal life. Therefore, Jones should not be permitted to proceed with this automobile negligence suit.

STATEMENT OF FACTS

A. Nature of the Case

Douglas D. Jones brings this action seeking to recover non-economic damages for injuries allegedly sustained by him in an August 1, 2003 automobile accident involving Jones and Kathleen P. Olson. With the entry of its February 22, 2006 Order granting defendants' motion for summary disposition, the circuit court ruled that Jones failed to make the showing required by *Kreiner v Fischer, supra*. Specifically, the circuit court opined that the alleged impairments complained of did not affect Jones' general ability to lead his normal life and thus, Jones' action was properly summarily dismissed.

In an opinion dated September 21, 2006, the Court of Appeals reversed the trial court's summary disposition order. Finding that Jones' general ability to lead a his normal life "was put on hold for the first two months after the accident" and that Jones' pre-accident lifestyle was dramatically different "from his lifestyle for the six months after the accident," the Court of Appeals ruled that Douglas Jones could recover damages for the time period when his ability to lead his normal life was entirely disrupted. Urging that the issue presented is of major significant to the jurisprudence of the State and that the Court of Appeals' decision is clearly erroneous and will cause material justice as well as the fact that the Court of Appeals' decision conflicts with rulings by this Court.

Defendants now seek relief by way of this application for leave to appeal.

B. Background Facts

On August 1, 2003, Douglas D. Jones was traveling Highway M-115 returning home from the Cadillac-West EZ Mart (Jones dep, p 15). The roads were decent and there were no weather problems *id.* Jones was driving between 50 and 60 m.p.h. (Jones dep, p 16). He had pretty much followed two trucks for the 3.5 to 4 miles from the Store. The drivers of both trucks moved over to make a right hand turn off Highway M-115 (Jones dep, pp 15-17). With the two trucks in the right hand lane to turn, Jones did not accelerate but continued driving at the same speed (Jones dep, p 21). There was no traffic light controlling the intersection. All of a sudden, a PT Cruiser appeared in front of Jones (Jones dep, p 19). He did not have time to take evasive action (Jones dep, pp 19-20). He remembers hitting the brakes (Jones dep, p 20). The PT Cruiser being driven by Kathleen Olson impacted the right corner panel or front of Jones' vehicle (Jones dep, p 22).

After the accident, Jones went to the emergency room at Mercy Hospital in Cadillac (Jones dep, p 24). He was at the hospital for 9 to 10 hours before being released *id.* X-rays were taken. Jones had complaints of neck and back pain and his lower back hurt *id.* Jones' head was cut from his impact with the windshield *id.* Jones' basic complaint was his neck (Jones dep, p 25).

The doctors diagnosed a fractured vertebra in Jones' neck (Jones dep, p 25). Jones was fitted with a C-collar (Jones dep, p 26). He wore the soft C-collar for a couple of months *id.* Jones did not receive any stitches in his head (Jones dep, p 31). He did

sustain a large cut on his knee (Jones dep, p 31). That was stitched *id.* It healed well *id.* Jones has a scar from the 17 to 19 stitches *id.* Jones eventually went to physical therapy *id.* He attended therapy two or three times a week and he would have been forthright with his physical therapist *id.* His physical therapy lasted for approximately 30 days.

Following the accident, Jones had no surgery or other procedure on his neck (Jones dep, p 27). The emergency room doctor provided Jones with Vicodin. At the time of his deposition, years after the accident, Jones still had some Vicodin left over from his treatment (Jones dep, p 27).

Jones was off work from August, 2003, to sometime in March, 2004 (Jones dep, p 9). At the time of the accident, Jones worked for Northwestern Foundations (Jones dep, p 7).¹ The business of Northwestern Foundations was to set foundation walls and to pour them *id.* Jones' job was to construct the actual poured cement walls and to set them up *id.* The sizes of the foundation walls varied; some walls were 4 feet, some 8 feet, and some 9 feet, depending upon the foundation that was being installed *id.* Jones put in 40 hours a week doing that, and he described it as "labor intensive work" (Jones dep, p 8).

When he returned to work, Jones did not have any restrictions (Jones dep, p 9). He went right back and took up the same tasks he had been doing before the accident.

¹ Defendants supplied the circuit court with the affidavit of Steve Callsen, Jones' employer. In his affidavit, Callsen explained that, due to the lack of work, it was the general practice of Northwestern Foundations, Inc., to lay off employees in the winter months. Accordingly, despite his ability to return to work, Jones would have been off work from January 23, 2004, through February of 2004, and into March, 2004 due to the business winter lay-off (Callsen aff, ¶¶2-5).

Those included setting up forms, pouring cement, and ripping forms down *id.* Since going back to work, Jones had not had to take any time off (Jones dep, p 28).

Jones is not currently under any medical restrictions or activity restrictions (Jones dep, p 32). He is not on any medication *id.* His neck hurts him on occasion. However, it does not prevent him from doing anything (Jones dep, p 33). When his neck hurts, Jones tries to move it around *id.*

Jones last saw Dr. Heneman of Great Lakes Neurology in September, 2003 (Jones dep, p 11). Heneman had treated Jones for his neck (Jones dep, p 12). Starting September 2003, Jones met with Dr. Davis. The last Jones saw of Dr. Davis was in December, 2003 or January, 2004 (Jones dep, p 12).

During the months Jones was off work, he was unable to hunt, snowmobile, or play softball (Jones dep, p 38). He could not do yard work and he was unable to take walks with his girlfriend (Jones dep, pp 38-39). He did not drive after the accident for three months and he did not have intimate relationships with his girlfriend for two months (Jones dep, p 40). As for his present activities, Jones went hunting in 2004 (Jones dep, p 13). He plays softball on three or four teams. He is the pitcher *id.*² Jones enjoys snowmobiling (Jones dep, p 28). He does yard work and shoveling for his grandmother (Jones dep, p 43).

² While Jones may have missed three or four softball games because of pain, he played in 20 to 25 games (Jones dep, p 35).

C. **The Instant Litigation**

1. **Plaintiff's Allegations**

Douglas D. Jones commenced this action with the filing of a complaint on February 18, 2005. There, he generally charged that, in an attempt to make a left hand turn on to M-115, Kathleen P. Olson failed to yield the right of way at the intersection of South 35 Road and M-115 and turned directly into his path, causing a collision with his vehicle (Complaint, ¶4). In seeking damages from the Olsons, Jones complained of the following alleged acts of negligence: failing to maintain a proper lookout and observation; driving in a careless manner; failing to keep the motor vehicle under control; failing to obey traffic signals; driving the motor vehicle left of the center line; and impeding or otherwise interfering with the free flow of traffic.

2. **The Summary Disposition Motions**

Following discovery, Kathleen P. Olson and Todd R. Olson brought a motion for summary disposition pursuant to MCR 2.116(C)(10) based on the decision in *Kreiner v Fischer, supra*. In particular, the Olsons contended that Douglas D. Jones had not suffered a serious impairment of body function because his general ability to lead his normal life had not been affected. In making that argument, the Olsons emphasized that, after Jones was taken from the accident site to the hospital, a fracture of the C-7 was identified. It was noted as being nondisplaced and non-angulated. After a brief hospital stay of only hours, Jones was discharged from the Hospital and instructed to follow up with Dr. Hedeman within the following week.

Jones saw Dr. Hedeman of Great Lakes Neurological Associates on August 13, 2003. Hedeman observed that Jones sustained multiple injuries that were fortunately “quite minor” and that Jones had no neurological symptoms; that he ambulated without difficulty; and that he had excellent strength and reflexes such that Dr. Hedeman concluded that Jones’ exam was “quite unremarkable”.

Approximately one month later, Jones saw his family physician, Dr. Mutch. On that occasion, Dr. Mutch indicated that Jones’ neck was supple without rigidity and that the range of motion in the extremities appeared normal. Dr. Mutch saw Jones again on October 14, 2003 at which time Jones had some subjective complaints of neck stiffness and tenderness. Dr. Mutch directed Jones to check with a neurological surgeon.

Jones saw Dr. Paul Davis, a neurological surgeon, on November 17, 2003. Dr. Davis noted that the old CT films on Jones’ neck showed good alignment without subluxation or facet locking. Dr. Davis ordered another MRI. This latter MRI noted a normal appearance to the C-7 and vertebral body and a very small focal central disc bulge or disc protrusion at the C-6-7 level. Dr. Davis interpreted the MRI for Jones on January 9, 2004. He said that the MRI showed no evidence of instability and that good alignment was noted. There was a very slight disc bulge scene at the C-6-7 level and, to a lesser degree, at the C-5-6 level. Accordingly, Davis referred Jones to physical therapy.

Jones attended approximately 20 physical therapy sessions over a one-month period. He was discharged from physical therapy on February 16, 2004. When Jones returned to work, he did so without restriction. Based on these facts and circumstances,

the Olsons urged that Jones' claims did not meet the provisions of MCL 500.3135 and the governing *Kreiner* analysis.

The Olsons accompanied their summary disposition motion with the affidavit of Steve Callsen. Mr. Callsen is the president of Northwestern Foundations, Inc., which employed Jones in the fall of 2003 and the winter of 2004 (Callsen aff, ¶2). Callsen explained that, due to the lack of work, it was the general practice of Northwestern Foundations, Inc, to lay off employees during the winter months (Callsen aff, ¶4). As such, Mr. Callsen affirmed that, regardless of his involvement in the automobile accident, Jones would have been laid off from work at Northwest from January 23, 2004, through February 2004, until such time as he was rehired in March, 2004, subsequent to the winter lay-off (Callsen aff, ¶5).

Jones opposed the motion for summary disposition and brought his own countermotion for partial summary disposition as to negligence, proximate cause, and serious impairment of body function. Doing so, Jones insisted that defendants' negligence caused him significant injuries because he sustained a fractured cervical vertebra and subsequent testing revealed two bulging discs. Jones further asserted that the medical reports established that important body functions were affected and that permanent disability was not necessary to establish a serious impairment of body function. Jones was adamant that the medical records made it clear that it was as a result of the fractured vertebra that he was required to wear a cervical collar and that the collar affected his ability to move his head. Jones argued that his fractured vertebra and two

bulging discs affected his ability to live his normal life and that he continued to have residual problems.

By way of their reply brief, the Olsons reiterated their reliance upon the medical records, upon Jones' unequivocal testimony, the Callsen affidavit, and pertinent case law. In addition, they emphasized that Jones returned to work in March, 2004, without any restrictions and was currently back to work performing exactly as he did before the accident.

On February 13, 2006, the circuit court entertained oral arguments on defendants' motion for summary disposition. During those arguments, both parties reiterated their respective positions concerning Jones' ability to meet his burden under MCL 500.3135. On their part, the Olsons repeated the argument that Jones was unable to demonstrate that the August 1, 2003 automobile accident resulted in a serious impairment of a body function that affected Jones' general ability to lead his normal life. Defense counsel touched upon Jones' course of medical treatment and further stressed that Jones was back to work with no restrictions; that he had not seen any physician for medical treatment since January, 2004, more than two years prior to his deposition; that he was presently playing softball, deer hunting; and that he was not prevented from doing anything (Tr, 2/13/06, pp 5-6).

3. The Circuit Court's Ruling

In a lengthy oral opinion, the circuit court granted defendants' motion. Doing so, the court employed the *Kreiner* analysis and found that the neck and back are important

body functions and that Jones' impairment was objectively manifested (Tr, 2/13/06, p 20). The court also opined that the case boiled down to the question of whether the alleged impairment affected Jones' ability to lead a normal life *id*). It employed the *Kreiner* analysis whereupon it decided that the Olsons were entitled to their requested relief:

Kreiner says that the Court has to look at all these factors and determine whether or not the course or trajectory of the plaintiff's life has been affected to such an excellent [extent] that the plaintiff was not able to lead a normal life.

The injuries in this case are not extensive. There was little treatment required; basically, physical therapy. He's back to normal except for some subjective complaints of pain, but he's able to do everything he used to do. There was no pervasive injury to any body function here. Um, I'm thinking of Judge Griffin's dissent in that one case you cited; certainly from August to the time of his physical therapy, there were frustrations and aggravations in his life which have thankfully now been overcome, but they don't amount in my opinion to a serious impairment of important body function; those restrictions that he claims he had from August through January, I just don't think it meets the *Kreiner* test. I don't think his impairments have affected his general ability to lead a normal life, and so applying *Kreiner*, I think the motion has to be granted.

(Tr, 2/13/06, pp 26-27). Consistent with its oral ruling, the circuit court entered an order on February 22, 2006 granting defendants' motion for summary disposition.

4. The Court of Appeals' Decision

On September 21, 2006, the Court of Appeals issued its opinion and reversed and remanded the matter for proceedings. At the outset, the Court of Appeals noted that Jones challenged only the circuit court's determination that the impairment did not affect Jones' general ability to lead his normal life. Jones took the position that the impairment

did affect his general ability to lead a normal life, albeit for a short duration. The Court of Appeals purported to follow the *Kreiner* analysis but, in reality, embraced a methodology allowing for brief or temporary interruption of a plaintiff's life to constitute a serious impairment of a body function:

We find that the facts of this case present more than a "minor interruption" in plaintiff's life. Plaintiff's general ability to lead his normal life was put entirely on hold for the first two months after the accident and returned only gradually over the following four months. Plaintiff's lifestyle before the injury was dramatically different from his lifestyle for the six months after the accident. Following the *Kreiner* court's dictate that an injury need not be permanent to constitute a serious impairment, we hold that where, as here, an injury entirely disrupts a person's ability to lead his normal life, the fact that the person eventually recovers does not preclude recovery for that injury. To hold otherwise would disregard the Court's direction to consider such factors as the duration of the disability, comparative lifestyle before and after the injury, length of treatment and other factors that suggest that permanence is not dispositive. The totality of the circumstances of this case support plaintiff's contention that he should recover damages for the time period when his ability to lead his normal life was entirely disrupted.

(Slip Op, p 2). Claiming that they have made the showing required by MCR 7.302(B)(2), to wit: that this matter involves legal issues of major significance to the jurisprudence of this State and that the Court of Appeals' decision is clearly erroneous and conflicts with other decisions by this Court and by the Court of Appeals, the Olsons respectfully request that the Court peremptorily reverse the Court of Appeals' September 21, 2006 opinion and, failing that, grant this application for leave to appeal.

STATEMENT REGARDING STANDARD OF REVIEW

An appellate court reviews a trial court's grant of summary disposition *de novo*, *Groncki v Detroit Edison*, 453 Mich 644, 649; 567 NW2d 289 (1996); *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999); and *Brown v Michigan Health Care Corp*, 463 Mich 368, 374; 617 NW2d 301 (2000). In engaging in such review, an appellate court must review the record to determine if the movant was entitled to judgment as a matter of law, *Groncki, supra*, at *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). An appellate court reviews a trial court's decision regarding the motion *de novo* by accepting as true all factual allegations in the complaint and all reasonable inferences which may be fairly drawn therefrom to determine whether a claim was so clearly unenforceable as a matter of law that no factual development could have established the claim and justified recovery.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint, *Maiden v Rozwood, supra*, and *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In evaluating a motion for summary disposition filed pursuant to (C)(10), the court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the non-movant, *Maiden, supra*, at p 120. In presenting such a motion, the moving party has the initial burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence, *Quinto v Cross & Peters Co*, 451 Mich 358-362; 547 NW2d 314 (1996).

Once a party is challenged as to the existence of facts upon which he/she grounds his/her case, the sum and substance of a summary disposition procedure is that general allegations are not enough, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The challenged party must come forward with at least some evidentiary proof, some statement of specific fact, on which to base his/her case, *Durant v Stahlin*, 375 Mich 640; 135 NW2d 392 (1965) and *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the non-movant is unable to sustain the burden of producing documentary evidence establishing the existence of a material factual dispute, summary disposition is properly granted, *Quinto, supra*, at p 363.

ARGUMENT

**PLAINTIFF DID NOT SUFFER A SERIOUS
IMPAIRMENT OF BODY FUNCTION AND THUS HE
MAY NOT MAINTAIN THIS NEGLIGENCE ACTION
FOR NONECONOMIC LOSS SUSTAINED IN THE
MOTOR VEHICLE ACCIDENT WITH DEFENDANTS.**

On June 9, 2006, the Court issued an order in the matter of *Nicke v Miller*, 475 Mich 880; 715 NW2d 775 (2006). There, upon considering the application for leave to appeal filed by the defendants, the Court directed the Clerk of the Court to schedule oral arguments on whether to grant the application for leave to appeal or to take other peremptory action. The order further recited that the parties were to include among the issues to be addressed at oral argument the question of whether the Court of Appeals erred by remanding the case to the trial court for consideration of whether plaintiffs suffered a temporary serious impairment of body function. That is the same question presented in this application for leave to appeal.

While the verbiage used by the Court of Appeals in this case may differ slightly from that presented in *Nicke, supra*, the end result is the same. As in *Nicke*, instead of considering whether Jones' alleged impairment altered the trajectory or changed the course of the trajectory of Douglas Jones' normal life, the Court of Appeals opted to view only segments of Douglas Jones' life and ruled that, during those brief time periods, Douglas Jones' was temporarily unable to lead his normal life, thereby allowing him to proceed with his claim for non-economic damages. The Court of Appeals' approach clearly contravenes decisions by this Court and by the Court of Appeals.

To maintain an automobile negligence action for non-economic tort damages, a plaintiff must satisfy the “serious impairment of body function” threshold set by Michigan’s No Fault Act. In particular, MCL 500.3135(1) provides that:

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

In turn, MCL 500.3135(7) defines a “serious impairment of body function”:

An objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.

In its *Kreiner* decision, the Court explained the meaning and operation of these statutes. As here, the specific issue presented in *Kreiner* was whether the respective plaintiffs’ impairments affected their general ability to lead their normal lives. The *Kreiner* court explained that, in order to maintain an action for non-economic tort damages under the No Fault Act, an objectively manifested impairment of an important body function that the plaintiff has suffered must affect his or her “general ability” to lead his or her normal life. The determination as to whether an impairment affects a plaintiff’s general ability to lead a normal life requires a consideration of whether the plaintiff is generally able to lead his or her normal life. If the plaintiff is generally able to do so, then his or her general ability to lead his or her normal life has not been affected by the impairment. Citing various dictionary definitions, the *Kreiner* court concluded that whether a plaintiff is “generally able” to lead his or her normal life requires a

determination as to whether the plaintiff is “for the most part” able to lead his or her normal life.

The *Kreiner* court also instructed that the notion of leading one’s normal life contemplates more than a minor interruption in life. In particular, the *Kreiner* approach contemplates that the objectively manifested impairment of an important body function must affect the “course” of a person’s life, 471 Mich at 130-131. That calls for a consideration of the effect of the impairment on the course of a plaintiff’s normal life:

In addition, to “lead” one’s normal life contemplates more than a minor interruption in life. To “lead” means, among other things, “to conduct or bring in a particular course”. Given this meaning, the objectively manifested impairment of an important body function must affect the course of a person’s life. Accordingly, the effect of the impairment on the course of plaintiff’s entire normal life must be considered. Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s “general ability” to lead his normal life has not been affected and does not meet the “serious impairment of body function” threshold. (emphasis in original)

471 Mich at pp 130-131.

The *Kreiner* court then set forth the appropriate framework for analyzing whether an impairment affects a person’s general ability to lead a normal life. The starting point for any such analysis entails identifying how the plaintiff’s life has been affected, by how much, and for how long. A court is to examine a plaintiff’s specific activities and to do so with an understanding that not all activities have the same significance in a person’s overall life. Also, minor changes in how a person may perform a specific activity may not alter the fact that the person may still generally be able to perform an activity. The

Kreiner court formulated the following multi-step process for separating out those plaintiffs who meet the statutory threshold from those who do not:

First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injury; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines that there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. MCL 500.3135(2)(a)(i)(n)(ii).

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

If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multi-faceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any effects on the course of plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "any effect" on the plaintiff's life is insufficient because a *de minimus* effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.

471 Mich 109, 131-133.

The *Kreiner* court then furnished a list of non-exhaustive objective factors that are of assistance in evaluating whether a plaintiff's "general ability" to conduct the course of his or her normal life has been affected. Included amongst those factors are the following: the nature and extent of the impairment; the type and length of treatment required; the duration of the impairment; the extent of any residual impairment; and the prognosis for eventual recovery. The *Kreiner* court also cautioned that the list of factors provided was not meant to be exclusive nor are any of the individual factors intended to be dispositive. Rather, in order to determine whether one has suffered a "serious impairment of body function", a court must consider the totality of the circumstances and the ultimate question to be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life". As for the factor concerning the extent of any residual impairment, the *Kreiner* court clearly directed that self-imposed restrictions, as opposed to physician-imposed restrictions based on real or perceived pain, do not satisfy such a showing.

The *Kreiner* court applied the principles announced there to the two pending cases before it. Daniel Straub injured three fingers when his motorcycle collided with an automobile on September 19, 1999. He broke a bone in his little finger and injured tendons in his ring and middle fingers. He underwent outpatient surgery four days after the accident to repair the tendons. No medical treatment was required for the broken bone. He took prescription pain medication for about two weeks following the surgery and completed a physical therapy program.

Two months after the surgery, Straub returned to work as a cable lineman for a cable television company. He maintained that, until late December of 1999, he encountered difficulty in performing household chores such as washing dishes, doing yard work, and making property repairs. He was also unable to operate his archery shop during the hunting season in the Fall of 1999. By the middle of January, 2000, he resumed playing bass guitar in a band that performed on weekends. By the time of his deposition, he could perform all of the activities in which he had engaged before the accident.

The circuit court granted the defendants' motion for summary disposition concluding that Straub's injuries did not meet the threshold of serious impairment of body function. The Court of Appeals reversed holding that, between the date of the accident and mid-January of 2000, Straub's injuries affected his general ability to lead his normal life and thus, that Straub satisfied the serious impairment threshold. The Court of Appeals further reasoned that Straub was unable to engage in full time employment for about three months. Therefore, the Court concluded that, for a limited amount of time, Straub's injuries affected his general ability to lead his normal life, particularly his ability to perform musically and to work.

The defendants filed an application for leave to appeal to this Court. The Court entered an order vacating the judgment of the Court of Appeals and remanding the matter to the Court of Appeals for consideration in light of *Kreiner*. The Court of Appeals again

concluded that Straub's injuries affected his ability to play the guitar and to work. The Court granted the *Straub* defendants leave to appeal.

In determining whether Straub's general ability to lead his pre-accident life was affected, this Court considered Straub's functional abilities and activities. It said that a necessary part of the analysis called for determining how long and how pervasively Straub's activities and abilities were affected. The Court cautioned that, while an injury need not be permanent, it must be of sufficient duration to effect the course of the plaintiff's life. The Court eventually concluded that Straub's impairment did not affect his ability to conduct the course of his normal life:

Given that Straub's injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, we conclude that Straub's general ability to live his normal life was not affected. There is no medical evidence that Straub has any residual impairment or that the course of Straub's life has been affected. The temporary limitations Straub experienced do not satisfy the statutory prerequisites. Considered against the backdrop of his pre-impairment life and the limited nature and extent of his injuries, we conclude that Straub's post-impairment life is not so different that his "general ability to lead his normal life has been affected". Because the course of Straub's normal life has not been affected, he failed to satisfy the "serious impairment of body function threshold for recovery of non-economic damages. Accordingly, the trial court properly granted summary disposition for defendants in Straub's lawsuit.

In the *Kreiner* factual scenario, Mr. Kreiner was injured in a motor vehicle accident, and after the accident, he complained of pain in his lower back, right hip, and right leg. The doctor ordered X-rays and cortisone injections for pain. The doctor prescribed physical therapy and pain medication. Kreiner's pain continued for six weeks

after the accident, and he was referred to a neurologist who conducted an electromyography (EMG) that revealed a mild nerve irritation in Kreiner's back along with degenerative disc disease. The doctor prescribed Motrin for pain along with a muscle relaxant and instructed Kreiner to perform back and muscle strengthening exercises. In May of 1998, some six months after the accident, Kreiner returned to the doctor complaining of pain radiating from the back of his right thigh and right calf. The doctor prescribed pain medication and a continued program of muscle strengthening exercises. Months later, the doctor prescribed physical therapy and an anti-inflammatory medication along with home exercises. Nine months after the accident, Kreiner was still complaining of continuous pain in his lower back and his right leg radiating to the lower extremities on the right side. The doctor prescribed continuing home exercises and a mild muscle relaxant. Kreiner subsequently stopped treating with any physician and ceased taking medications.

Kreiner was self-employed as a carpenter and construction worker performing home remodeling. He was forced to limit his work day to only six hours. He was unable to stand on a ladder longer than 20 minutes at a time. He could no longer perform roofing work and he was unable to lift anything over 80 pounds.

Kreiner filed a complaint against Fischer seeking non-economic damages and the trial court granted Fischer's motion for summary disposition ruling that Kreiner failed to satisfy the serious impairment of body function threshold. The Court of Appeals reversed. This Court peremptorily vacated the Court of Appeals' decision and remanded

for consideration regarding whether Kreiner's impairment affected his general ability to lead his normal life. Further appellate activity followed. The Court ultimately granted leave to appeal. It found that Kreiner's impairment did not affect his overall or broad ability to conduct the course of his normal life. In fact, the Court opined that Kreiner's life after the accident was not significantly different than it was before the accident. Kreiner continued working as a self-employed carpenter and construction worker and was still able to perform all the work that he did before with the possible exception of roofing work.

Looking at Kreiner's life as a whole, both before and after the accident, the Court concluded that his impairment did not affect his overall ability to conduct the course of his normal life. While Kreiner could not work to full capacity, he was generally able to lead a normal life. Considered against the backdrop of his pre-impairment life, Kreiner's post-impairment life was not so different that his general ability to conduct the course of his normal life had been affected. With Kreiner unable to establish that his impairment affected his ability to conduct the course of his normal life, he did not and could not satisfy the serious impairment of body function threshold for recovery of non-economic damages.

The factual scenario presented in the instant case is similar than that presented in *Straub*. As in *Straub*, the temporary limitations experienced by Douglas Jones do not satisfy the statutory prerequisites. Considered against the backdrop of Jones' pre-impairment life and the limited nature and extent of his injuries, the Court of Appeals was

bound to conclude that Jones' post-impairment life was not so different that his general ability to lead his normal life had been affected.

In light of the above discussion, it is apparent that the Court of Appeals' opinion conflicts with the decision in *Cook v Hardy*, 474 Mich 1010; 708 NW2d 115 (2006). The *Cook* court reversed the judgment of the Court of Appeals and concluded that the trial court properly found that the injuries sustained by Cook did not affect the course or trajectory of her normal life. This Court embraced the Court of Appeals' dissent and, upon considering the impact of the alleged injuries on that plaintiff's normal life, held that the injuries did not rise to the level of a serious impairment of body function:

Plaintiff identified three aspects of her life that were affected by her injury: (1) her education; (2) her employment; and (3) her recreation activities. The interruption to her normal life activities in these three areas was minimal and temporary. Plaintiff's education was only minimally interrupted as her classload was reduced for only one semester and she received her associate's degree the following semester. Plaintiff did not return to her part-time job after her accident. However, less than one month after the accident plaintiff commenced an internship in which she worked 10 to 15 hours a week. Further, no physician placed any restrictions on plaintiff's ability to work. Self-imposed restrictions do not establish an injury that affects one's ability to lead a normal life. . . . Plaintiff maintains that she can no longer engage in "impact" sports. However, plaintiff resumed skateboarding shortly after the accident and, significantly, plaintiff never asserted that participation in impact recreational activities was a significant part of her life.

Citing *Kreiner*, the Court in *Behnke v Auto Owners Ins Co*, ____ Mich ____; 708 NW2d 102 (2006) reiterated that the determination as to whether an impairment affects a plaintiff's "general ability" to lead his normal life requires a consideration of the question whether the plaintiff is "generally able" to lead his normal life. If he is generally able to

do so, then his general ability to lead his normal life has not been affected by the impairment. While suffering intermittent neck pain and headaches, the *Behnke* plaintiff was able to work and was not medically restricted. No physician-imposed restrictions had been placed on his daily activities. Acknowledging that the plaintiff's minor lifestyle changes were undoubtedly frustrating, the court nonetheless found that they did not affect the plaintiff's ability to lead his normal life.

Like the plaintiffs in *Cook* and *Behnke*, Douglas Jones is unable to meet the threshold burden of proving the existence of a serious impairment of body function. In particular, Jones cannot establish that his impairment affected his general ability to lead his normal life. The subject accident occurred on August 1, 2003. At that time, the PT Cruiser being driven by Kathleen P. Olson impacted the right corner panel or front of Jones' vehicle (Jones dep, p 22). Jones went directly to the emergency room at Mercy Hospital in Cadillac, Michigan. Jones was alert and oriented. He did not lose consciousness upon admission. He denied neck pain, back pain, but complained of right knee pain (Mtn for Sum Disp, Ex 1, 8/1/03, E R Consultation). An MRI was ordered. It indicated a very "subtle lucency" within the facet of C-7 on the left. The MRI records specifically noted that the findings at C-7 were barely discernible. Regardless, the fracture at C-7 was noted as being nondisplaced and non-angulated *id.* Mr. Jones was discharged from the hospital that same day *id.* He was advised to seek follow-up care with Dr. Hedeman within the next week.

Mr. Jones did in fact see Dr. Hedeman of Great Lakes Neurological Associates on August 13, 2003 (Mtn for Sum Disp, Ex 2). In his report, Dr. Hedeman noted as follows about Jones' status:

He sustained multiple injuries that were fortunately quite minor, but he did have noted cervical fracture in CT scanning which was felt to require further evaluation. He has been placed in a collar. He has no neurologic symptoms. He has some bilateral arm pain occasionally; however, he basically denies any significant weakness, radicular symptoms or truncal paresthesias, etc.

Dr. Hedeman completed a neurological exam and noted as follows:

On neurological exam, he is right handed, 230 lbs. and 6 feet tall. He ambulates without difficulty. Exam was conducted with him in a cervical collar. He has excellent strength and reflexes. No pathologic reflexes were noted. Basically, his exam was quite unremarkable.

* * *

Plain films were reviewed, as well as the cervical CT scan. The CT shows a lateral mass fracture at C-7-T-1 on the left. It is nondisplaced and appears very stable.

Id. Dr. Hedeman indicated that he wanted to reevaluate Mr. Jones within about one month and that Mr. Jones should remain off work in the interim. Dr. Hedeman ordered further radiological reports on September 9, 2003. Those noted the following:

On the current examination, the C-7 vertebral body and the rest of the cervical spine appears within normal limits. The nondisplaced fracture seen on the CT scan is not identified. This could be due to some healing of the fracture but a repeat CT scan would be the only way to fully further evaluate that area in the patient is having persistent pain.

Id.

On September 12, 2003, Douglas D. Jones saw Dr. David Mutch. For his part, Dr. Mutch indicated that “Mr. Jones’ neck is supple without rigidity” and that “range of motion in the extremities appears normal” (Mtn for Sum Disp, Ex 3). Jones saw Dr. Mutch again on October 14, 2003. At that time, Jones voiced some subjective complaints of neck stiffness and tenderness radiating down into the thoracic spine. Mr. Jones was instructed to check with Dr. Paul Davis, a neurological surgeon (Mtn for Sum Disp, Ex 4). Final follow-up records with Dr. Mutch dated February 12, 2004, noted that Jones was “doing quite well.”

Jones saw Dr. Davis on November 17, 2003. The doctor noted that the old CT and plain films of the neck showed good alignment without subluxation or facet locking. Dr. Davis ordered another MRI of Jones’ cervical spine. That was completed on December 1, 2003. It indicated that:

Normal MRI appearance to the C-7 vertebral body. A very small focal central disc bulge or disc protrusion at the C-6-7 level without central canal, lateral recess or foraminal stenosis.

(Mtn for Sum Disp, Ex 5). Jones followed up with Dr. Davis again on January 9, 2004.

At that time, Dr. Davis interpreted the December 1, 2003 MRI as follows:

Magnetic resonance imaging of cervical spine is available for review. This shows no evidence of instability. Good alignment is noted of a slight loss of the normal lordotic curve. A very slight disc bulge is seen at the C-6-7 level and to a lesser degree C-5-6. This results in no central, lateral recess or foraminal stenosis at any level.

(Mtn for Sum Disp, Ex 6).

Dr. Davis referred Mr. Jones to physical therapy. Mr. Jones attended approximately 20 physical therapy sessions over a one-month period (Mtn for Sum Disp, Ex 7). The physical therapy records also noted an indication of symptom magnification behavior. Mr. Jones was discharged from physical therapy on February 16, 2004 *id.*

Jones was off work from August, 2003 to March, 2004 (Jones dep, p 9).³ When he returned to work, Jones did not have any restrictions *id.* He went right back and resumed what he had been doing before, including setting up forms, pouring cement, and ripping forms down *id.* In addition to returning to work, Jones resumed hunting (Jones dep, p 13). He also played softball on three or four different teams *id.* He even snowmobiled (Jones dep, p 28). He has had no surgeries or procedures on his neck (Jones dep, p 27). He was not required to take any time off since going back to work in March, 2004 (Jones dep, p 28).

Jones currently makes \$15 an hour in his job (Jones dep, p 34). This represents an increase from his pay at the time of the accident when he was making \$12 or \$13 an hour *id.* His work hours are about the same now as they were before the accident *id.*

Lest there be any doubt, it is not defendants' position that only permanent impairments constitute an impairment of an important body function. On the other hand,

³ Mr. Callsen's affidavit accounts for a significant part of Jones' absence from work. Jones' employer, Northwestern Foundations, Inc. annually lays off employees during the winter months due to a lack of work (Callsen aff, ¶4). Thus, in any event, Jones would have been laid off from work from January 23, 2004, through February, 2004, until he was rehired in March, 2004, subsequent to Northwest's annual winter lay off (Callsen aff, ¶5). For unexplained reasons, the Court of Appeals completely ignored Callsen's affidavit.

an impairment cannot be *de minimus*. Rather, an impairment must be of sufficient duration to affect the course of a plaintiff's life. Temporary impairments which do not substantially alter a plaintiff's pre-accident lifestyle are not threshold injuries under MCL 500.3135(1). An injury of only a few months duration simply does not affect the "course" of one's life. Its effect on a plaintiff's life is not extensive. However, an impairment of short duration may constitute a serious impairment of body function only if its effect on the plaintiff's life is extensive, *Williams v Medukas*, 266 Mich App 505, 508; 702 NW2d 667 (2005). The nature and extent of Douglas Jones' impairments do not approach those suffered by the plaintiffs in *Kreiner*. Jones' limitations are not extensive. He continues to work full time and can perform his pre-accident activities.

At best, Douglas Jones has shown that the accident had some effect on his activities. However, he has fallen far short of demonstrating that the course or trajectory of his normal life has been affected so as to meet the threshold requirement. Accordingly, the Court of Appeals erred when it reversed the summary disposition granted to defendants.

The Court of Appeals' mistaken construction and application of the provisions of MCL 500.3135 in a manner contrary to *Kreiner*, *Cook*, and *Behnke*, is deserving of the Court's attention, either by way of a peremptory reversal of the Court of Appeals' opinion or by grant of the Olsons' application for leave to appeal. Douglas Jones' impairments do not even come close to approaching the conditions burdening the plaintiffs in *Kreiner* where the Court readily concluded that the plaintiffs had not met

their burden of proving the existence of a serious impairment of body function.

Consistency and fairness demands that the Court take up this appeal and fix the Court of Appeals' mistake.

The *Kreiner* court looked to dictionary definitions of the words "general" and "generally" before concluding that the determination whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is "for the most part" able to lead his normal life, 471 Mich 130. So, too, the *Kreiner* court looked to define the term "lead". In doing so, it found that "to lead" one's normal life contemplates more than a minor interruption in a life. Consistent with that meaning, the *Kreiner* court held that the objectively manifested impairment of an important body function must affect the course of a person's life. The Court of Appeals' analysis of the present factual situation is not consistent with this discussion by the *Kreiner* court.

Mr. Jones experienced a temporary and minimal interruption of his lifestyle which, however unfortunate, simply does not meet the requirements of MCL 500.3135. His alleged impairments fall far short of meeting the threshold of showing that the course or trajectory of Jones' life had been affected to such an extent that he was not able to lead his normal life. Viewing the totality of the circumstances and all five factors listed in *Kreiner*, the circuit court properly concluded that Jones' injury failed to meet the threshold requirement under *Kreiner*. Jones continued to engage in activities that he enjoyed before the accident. He resumed work. His treatment was conservative. He had no surgery. He was not under any restrictions. In short, under the analytical framework

as set forth by the Court in *Kreiner*, Jones' injuries do not meet the threshold requirements because they do not affect his general ability to live his normal life.⁴ The Court of Appeals should have affirmed the order granting summary disposition to defendants.

⁴ In footnote 18 of its opinion, the *Kreiner* court posed the question of whether the dissent really believed that an impairment lasting only a few moments has the same effect on a person's "general ability to lead his or her normal life" as an impairment lasting several years. With slight modification, defendants pose the same question here. Does the Court of Appeals really believe an impairment lasting only a few months for a plaintiff who has returned to work full time without restrictions and who essentially assumed his pre-accident lifestyle with sufficient duration to affect the course of that plaintiff's life? In believing that it does, the Court of Appeals committed reversible error.

RELIEF

WHEREFORE, defendants-appellants Kathleen P. Olson and Todd R. Olson respectfully request that the Court peremptorily reverse the Court of Appeals' September 21, 2006 Opinion reversing the circuit court's February 22, 2006 Order on defendants' motion for summary disposition and, failing that, grant this Application for Leave to Appeal.

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