

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

DOUGLAS D. JONES,

Plaintiff-Appellee,

S. Ct. No. 132385

v.

C.A. No. 268929

KATHLEEN P. OLSON and TODD R.
OLSON,

L.C. No. 05-18785-NI

Defendants-Appellants.

DEFENDANTS-APPELLANTS' REPLY TO PLAINTIFF-APPELLEE'S
RESPONSE TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO
APPEAL

PROOF OF SERVICE

132385
reply

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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".

STATEMENT OF FACTS

Douglas D. Jones seeks to embellish the facts and circumstances surrounding his return to work following the August 1, 2003 accident involving him and Katherine Olson. To that end, he states on page 6 of his brief in opposition to defendants' application for leave to appeal that "physical therapy records show that he was eventually able to return to work". "Eventually" in the confines of this case means after physical therapy lasting approximately 30 days. That put Jones ready to return to work at some point in mid-February of 2004.

By way of the Callsen affidavit, defendants furnished the circuit court with undisputed facts explaining why Jones' return to work was postponed until March of 2004. Specifically, at the time of the accident, Jones worked for Northwest Foundations, which is in the business of setting foundation walls and pouring them (Jones dep, p 7). Jones' job was to construct the actual poured cement walls and to set them up (*id.*). Jones did not return to work until mid-March of 2004 due solely to the fact that Northwestern Foundations, Inc., laid off its employees in the winter months. Thus, despite Jones' ability to return to work in February, he was off work until March, 2004, on account of the annual business winter lay-off at Northwest Foundations (Callsen aff, ¶¶2-5).

The Court of Appeals failed to appreciate those facts and circumstances surrounding Jones' return to work. In the second paragraph of its opinion, the Court of Appeals stated that "[p]laintiff waited until March, 2004 to return to work, and then returned full-time without restrictions". In the following paragraph, the Court alluded to

the “approximately six months that he was off work”. These statements by the Court of Appeals evidence disregard for the Callsen affidavit. They prove emphasize the fatal shortcomings in the Court of Appeals’ decision.

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.

There are also numerous flaws in Douglas Jones' legal arguments. One of those stems from Mr. Jones' continued reliance upon and citation of the Court of Appeals' unpublished opinion in *Cook v Hardy*, Court of Appeals Docket No. 250727. In its decision in *Cook v Hardy*, 474 Mich 1010; 708 NW2d 115 (2006), this Court reversed the judgment of the Court of Appeals and concluded that the trial court properly found that the injury sustained by Cook did not affect the course or trajectory of her normal life. More particularly, this Court embraced the Court of Appeals' dissent and, upon considering the impact of the alleged injuries on the *Cook* plaintiff's normal life, held that the injuries did not rise to the level of a serious impairment of body function. In light of this Court's reversal of the Court of Appeals' *Cook* decision, it is unclear why Jones persists in citing the Court of Appeals' opinion.

Next, to the extent that he characterizes defendants' position to be that, in order to constitute a serious impairment of a bodily function, an impairment must be permanent, Mr. Jones is mistaken. Defendants have not and do not advocate that a threshold injury must last the lifetime of the plaintiff. *Kreiner* counsels as much. To make their point clear, defendants assert that their position is that minimal inconveniences and short interruptions in a person's course of life simply do not satisfy the serious impairment test.

Brief and minimal inconvenience and short interruptions in a person's course of life do not affect his or her general ability to lead his or her normal life.

One cannot help but note the nature of the case law relied upon by Jones in his brief in opposition to defendants' application for leave to appeal. Beside the *Kreiner* case, Jones rests his position mostly upon unpublished decisions by the Court of Appeals. Of course, these decisions have no precedential value, MCR 7.215(I). Further, they are offered in lieu of and in the place of *Kreiner, supra*, *Cook v Hardy, supra*, and published decisions by the Court of Appeals.

As one more published decision in support of their position, defendants cite the Court of Appeals' recent ruling in *Netter v Bowman*, ___ Mich App ___; ___ NW2d ___ (Docket No. 268571, 9/19/06). The *Netter* court reiterated the point that, although some aspects of a plaintiff's entire normal life may be interrupted by an impairment, 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 for purposes of establishing a serious impairment. The *Netter* court also instructed that, in determining whether the course of a plaintiff's normal life has been affected, a circuit 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 his or her life. As a consequence, a *de minimus* effect on a plaintiff's life is insufficient to meet the inquiry. Minor changes in how a person

performs a specific activity may not alter the fact that the person may still generally be able to perform that activity.

Finally, the *Netter* court disagreed with the trial court that the plaintiff's ability to lead her normal life was indeed impaired:

Although her July, 2005 deposition testimony indicates that she was still suffering residual effects from the accident, the evidence submitted to the trial court demonstrates that she reached her "maximum medical improvement and pre-injury status" as of November, 2004 and that she was discharged from physical therapy and, by implication, any physical-imposed restrictions, by December, 2004. We therefore conclude that *Netter* failed to show that the course or trajectory of her normal life was affected as a result of this relatively brief period (six months) of recuperation.

Published opinions, such as this Court's decisions in *Kreiner* and *Cook v Hardy*, as well as the Court of Appeals' *Netter* opinion, provide clear guidance as to the proper result. That case precedent clearly and unambiguously provides that brief and short-lived interruptions or impairments, like those sustained by Douglas Jones, do not affect a person's general ability to lead his or her normal life.

Finally, it is not defendants, alone, who consider recreational activities as being minor activities in a person's course or trajectory of life. In its opinion in *Cook v Hardy*, *supra*, the Court stated as follows:

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 her participation in impact recreation or activities was a significant part of her life. . . .

Nor can Jones assert that hunting, doing yard work, snowmobiling, playing softball, and taking walks with his girlfriend amount to a significant part of his life. Yet, these are the very activities upon which the Court of Appeals premised its decision that Jones sustained a serious impairment of body function. Being of the position that the Court of Appeals' September 21, 2006 decision contravenes *Kreiner, supra*; *Cook v Hardy, supra*, and published decisions by the Court of Appeals, Kathleen P. Olson and Todd R. Olson respectfully request that the Court peremptorily reverse the Court of Appeals' opinion and, failing that, grant their application for leave to appeal.

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DATED: December 6, 2006

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Defendants-Appellants.

PROOF OF SERVICE

Christine D. Oldani, hereby states that she is a shareholder with the firm of Plunkett & Cooney, P.C., and that on the 6th day of December, 2006, she caused to be served a copy of Defendants-Appellants' Reply to Plaintiff-Appellee's Response to Defendants-Appellants' Application for Leave to Appeal and Proof of Service upon the following:

JEFFREY S. JONES (P46340)
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by enclosing same in a pre-addressed, pre-stamped envelope and depositing same in the United States Mail.

Christine D Oldani
CHRISTINE D. OLDANI