

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.

**SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS KATHLEEN P.
OLSON AND TODD R. OLSON**

PROOF OF SERVICE

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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

On June 8, 2007, the Court issued an order directing the Clerk to schedule oral arguments on whether to grant the application for leave to appeal filed by Kathleen P. Olson and Todd R. Olson or to take other peremptory action. The Court also directed the parties to address the question of whether the Court of Appeals erred in reversing the circuit court's grant of defendants' motion for summary disposition in light of *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). With this filing, Kathleen P. Olson and Todd R. Olson avail themselves of the opportunity to supplement their application for leave to appeal to speak directly to the issue presented.

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.

Under Michigan's No Fault Act, MCL 500.3101, *et seq.*, tort liability for non-economic loss is limited to instances in which the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement, MCL 500.3135(1) and *Hardy v Oakland County*, 461 Mich 561, 565; 607 NW2d 718 (2000). MCL 500.3135(1) reads as follows:

A person 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.

If there is no factual dispute concerning the nature and extent of the person's injuries or, if there is a factual dispute, but the dispute is not material to the determination whether the person suffered a serious impairment of body function, the issue of whether an injured person has suffered a serious impairment of body function is a question of law for a court to decide, MCL 500.3135(2)(a)(i) and (ii).

Here, there is no material dispute regarding the nature and extent of Douglas D. Jones' primary injury: fracture of the spine at C-7. Further, there is no question that the injury was objectively manifested, *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006). That leaves as the single remaining question whether Jones' injuries affected

his general ability to lead his normal life, *Kreiner v Fischer*, 471 Mich 109, 131;683

NW2d 611 (2004):

The effect of the impairment on the course of the 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 he does not meet the "serious impairment of body function" threshold.

The *Kreiner* court articulated a multi-faceted inquiry to be employed in determining whether the course of a plaintiff's normal life has been affected by an impairment. That inquiry involves a comparison of the plaintiff's life before and after the accident including a consideration of the significance of any affected aspects on the course of the plaintiff's overall life. The starting point for deciding whether an impairment affects a person's general, overall ability to lead his normal life is the identification of the effect of the impairment on one's life, by how much, and for how long. Each specific activity should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a particular activity do not alter the fact that the person may still generally be able to perform the activity. Accordingly, in determining whether an injury affects a person's general ability to lead his or her normal life, courts must examine the person's life before and after the accident and determine whether any difference between the person's pre- and post-accident lifestyle has affected that person'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. That the duration of an impairment is long does not necessarily mandate a finding of a serious impairment of body function. Instead, *Kreiner* instructs that, in order to determine whether one has suffered a serious impairment of body function, the totality of the circumstances must be considered and the ultimate question that must be answered is whether the impairment affects the person’s general ability to conduct the course of his or her normal life, *Kreiner, supra*, at pp 132-134.

In *Nicke v Miller*, 977 Mich 954; 723 NW2d 908 (2006), the Court heard oral arguments on the application for leave to appeal the judgment of the Court of Appeals. In lieu of granting leave to appeal, the Court reversed the Court of Appeals and reinstated the May 4, 2005 order of the circuit court granting the defendants’ motion for summary disposition. Doing so, the court stated that, although an impairment that satisfies the *Kreiner* test need not be permanent or of any particular duration, both “temporary” and “permanent” impairments must satisfy the same standard.

The *Nicke* defendants emphasized, however, that in its *Kreiner* decision, the Court did not interpret the Michigan legislature’s intent to include a week-to-week or month-to-month snapshot of a plaintiff’s life when deciding whether a plaintiff’s ability to lead a normal life was affected by a motor vehicle accident. Instead, *Kreiner* contemplates that a trial court will look at the course of the person’s overall life or the trajectory of the

person's normal life. *Kreiner* calls for is a broad and expansive inquiry, i.e., a review of a person's entire life, as opposed to short and isolated periods of time.

The nature and extent of Douglas Jones' alleged impairment does not approach and is not comparable to those suffered by the plaintiffs in *Kreiner, supra*, where the plaintiffs were unable to make the threshold showing. Mr. Straub required surgery, a cast, pain medication, and physical therapy as a result of his injuries. He returned to full time work three months after the accident and eventually rejoined the band for which he played bass guitar. He continued to complain of reduced gripping strength in his left hand along with an inability to straighten one finger or close the hand completely. For his part, Mr. Kreiner continued to suffer mild nerve irritation and a degenerative disc condition several weeks after the accident, underwent three weeks of physical therapy nine months after the accident, and continued seeing a doctor while complaining of back and leg pain almost two years after the accident. Kreiner was forced to shorten his workday, could not stand on a ladder longer than 20 minutes, could not lift over 80 pounds, could no longer perform roofing jobs, and had difficulty walking one-half mile. Notwithstanding, the Court found that neither Straub nor Kreiner met the threshold requirement for recovery under MCL 500.3135(1).

In comparison to Messrs. Straub and Kreiner, Douglas Jones suffered only minor effects from the accident. For a short period of time after the accident, i.e., two months, he needed assistance performing household chores and related activities. However, he returned to his employment without any physician-imposed restrictions.

In addition to the short-lived nature of Jones' injury, the specific activities that were curtailed are not significant under the *Kreiner* analysis. *Kreiner* instructs that the specific activities alleged to have been impacted must be examined with an understanding that not all activities have the same significance in a person's overall life, *Kreiner*, at p 131. For example, limitations on one's sporting activities might not rise to the level of a serious impairment of a body function for some people, *Williams v Medeukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005). In and of itself, a mere negative effect on a particular aspect of a person's life is not sufficient to meet the tort threshold as long as the injured person is still generally able to lead his normal life, *Kreiner, supra*, at 137.

Jones argues that, during the six months he was off work, his impairment left him unable to hunt, snowmobile, play softball, do yard work, or walk with his girlfriend. Cognizant of the fact that specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life, the Court properly finds that any difficulty which Jones experienced with hunting, snowmobiling, playing softball, doing yard work, or walking with his girlfriend did not constitute an impairment that affected Jones' general ability to lead his normal life.

Jones has not and cannot prove that the course or trajectory of his life was generally affected by the injuries to his neck. He did not present evidence indicating that the accident thwarted any plans or attempts to return to work. His alleged injuries did not, except for a brief period of time, affect his ability to bathe, groom, and dress himself without assistance, to perform household chores, or even to do yard work. He has

returned to hunting, snowmobiling, playing softball, doing yard work, and walking with his girlfriend.

No evidence showed that these activities were particularly significant to Jones' overall life. Physical sports constitute only one aspect of Jones' life. None of his treatment records support a finding that the activities were necessarily limited. Even affording Jones the benefit of the doubt by stating that the accident had some effect on his activities, Jones has not shown that the course or trajectory of his normal life has been affected so as to meet the threshold requirement, *Kreiner, supra*, at p 131.

Jones relies largely on the nature of his injury and his inability to work for six-months as proof that his general ability to lead his normal life was affected. At best, his claim is based upon a six-month time period. The Court of Appeals found that “[p]laintiff’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”. Thus, Jones seeks to convince the Court to apply the *Kreiner* guidelines to a minor interruption in his life. That is contrary to the *Kreiner* test that focuses not upon any particular period of time, but rather on the limitations, if any, upon the plaintiff’s overall life. What the Court of Appeals has improperly done here is to expand the *Kreiner* court’s holding that an injury need not be permanent to constitute a serious impairment of a body function into a license to find a serious impairment of a body function wherever a person’s ability to conduct non-significant activities lasts for only brief periods of time. Looking at Jones’ life both before and after the accident, as well as

the nature and extent of his injuries, there is only one proper conclusion. That is that Jones did not sustain a serious impairment of body function sufficient to allow him to pursue this action. Therefore, the Court of Appeals erred in reversing the current court's grant of defendants' motion for summary disposition.

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 their application for leave to appeal.

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