STATE OF MICHIGAN

IN THE SUPREME COURT

DOUGLAS D. JONES,

Plaintiff-Appellee,

-vs-

KATHLEEN P. OLSON and
TODD R. OLSON,

Defendants-Appellants.

SCt No.:
COA No.: 268929
LC No.: 05-18785-NI

JEFFREY S. JONES (P46340)
JAY TRUCKS & ASSOCIATES, P.C.
Attorney for Plaintiff-Appellee
600 Pine Street
Clare, MI 48617
(989) 386-3456

CHRISTINE D. OLDANI (P25596)
PLUNKETT & COONEY, P.C.
Attorney for Defendants-Appellants
Buhl Building
535 Griswold Street, Suite 2400
Detroit, MI 48226
(313) 965-3900

132385

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

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

FILED

NOV 20 2006

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

TABLE OF CONTENTS

	Page
COUNTER QUESTION PRESENTED FOR REVIEW	iv
INDEX OF AUTHORITIES	v-vi
COUNTER STATEMENT OF FACTS	1-2
MEDICAL HISTORY	3-6
LEGAL STANDARD	6
LAW AND ARGUMENT:	
I. **THE MICHIGAN COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT PLAINTIFF-APPELLEE SUFFERED A SERIOUS IMPAIRMENT OF BODY FUNCTION, AND THIS RULING SHOULD BE UPHELD**	7-20
A. NATURE AND EXTENT OF THE PLAINTIFF'S INJURIES	8-9
B. IMPORTANT BODY FUNCTION	9
C. THE IMPAIRMENT MUST AFFECT THE PLAINTIFF'S GENERAL ABILITY TO LEAD HIS OR HER LIFE	9-20
CONCLUSION	20
APPENDIX:	
Wexford County Sheriff's Department's UD-10	1
Dep. Tr., Kathleen P. Olson	2
Medical records of North Flight, Inc.	3
Medical records of Mercy Hospital	4
Medical records of Dr. Lynn Hedeman	5
September 9, 2003 cervical spine x-ray report	6
Medical records of Dr. Paul Davis	7

Medical records of Dynamic Physical Therapy 8

Cook v Hardy, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2005 (Docket No. 250727) 9

Ream v Burke Asphalt Paving, unpublished opinion per curiam of the Court of Appeals, decided February 1, 2005 (Docket No. 238824) 10

Luther v Morris, unpublished opinion per curiam of the Court of Appeals, decided January 18, 2005 (Docket No. 244483) 11

McDanield v Hemker, unpublished opinion per curiam of the Court of Appeals, decided September 27, 2005 (Docket No. 263150). 12

Jones v Olson, unpublished opinion per curiam of the Court of Appeals, decided September 21, 2006 (Docket No. 268929) 13

Dep. Tr., Douglas Jones 14

COUNTER QUESTION PRESENTED FOR REVIEW

I. **WHETHER THE MICHIGAN COURT OF APPEALS WAS CORRECT IN THEIR RULING THAT PLAINTIFF-APPELLEE SUFFERED A SERIOUS IMPAIRMENT OF BODY FUNCTION?**

Plaintiff-Appellee answers: Yes.
Defendants-Appellants answer: No.
The Court of Appeals would answer: Yes.

INDEX OF AUTHORITIES

MICHIGAN STATUTES: Page

MCL 257.401 1

MCL 500.3135 . . . . . 1, 16

MCL 500.3135(1) 7

MCL 500.3135(7) 7

MICHIGAN COURT RULES:

MCR 2.116(C)(10) 6

MICHIGAN CASES:

Byer v Smith,
419 Mich 541; 357 NW2d 644 (1984) 11

Cook v Hardy,
unpublished opinion per curiam of the
Court of Appeals, decided February 24,
2005 (Docket No. 250727) 12, 13
15, 17

DiFranco v Pickard,
427 Mich App 32, 60; 398 NW2d 896 (1986) 7

Jones v Olson,
unpublished opinion per curiam of the
Court of Appeals, decided September 21,
2006 (Docket No. 268929) 16

Kern v Blethen-Coluni,
240 Mich App 333, 338; 612 NW2d 838 (2000) 12

Kreiner v Fischer,
471 Mich 109; 683 NW2d 611 (2004) 2, 7, 8
9, 10
11, 12
15, 17
19

Page

Luther v Morris,
unpublished opinion per curiam of the
Court of Appeals, decided January 18,
2005 (Docket No. 244483) 14, 15
17

May v Sommerfield,
239 Mich App 197, 200; 607 NW2d 422 (1999),
after remand, 240 Mich App 504; 617 NW2d 920 (2000) . . 6

McDanield v Hemker,
unpublished opinion per curiam of the
Court of Appeals, decided September 27,
2005 (Docket No. 263510) 15, 16
17

Ream v Burke Asphalt Paving,
unpublished opinion per curiam of the
Court of Appeals, decided February 1,
2005 (Docket No. 238824) 14, 15
17

Veenstra v Washtenaw Country Club,
466 Mich 155, 163-164; 645 NW2d 643 (2002) 6

COUNTER STATEMENT OF FACTS

This third-party automobile negligence case arises from a motor vehicle accident that occurred on August 1, 2003. On that date, Plaintiff, Douglas Jones, was traveling westbound on M-115 in Wexford County. As Plaintiff reached the intersection of State Road 35, Defendant[1], Kathleen Olson, pulled out from State Road 35 directly into the path of Plaintiff's vehicle. The impact between the vehicles was significant, and Defendant's vehicle was rendered inoperable. (Please see the Wexford County Sheriff's Department's UD-10, attached as EXHIBIT 1.) Defendant's testimony, among other things, shows that her actions were plainly negligent. (Please see a copy of Kathleen Olson's deposition transcript, attached as EXHIBIT 2.) The facts surrounding this case show that Defendant's negligence caused significant injuries to Plaintiff. Most notably, Plaintiff sustained a fractured cervical vertebra. Follow-up diagnostic testing revealed two bulging discs. Plaintiff submits, and the Court of Appeals agreed, that Defendant's negligent actions amount to the proximate cause of Plaintiff's injuries and that his injuries surmount the serious impairment of body function threshold.

Before trial, Defendants filed a Motion for Summary Disposition on the issue of serious impairment of body function as set out in MCL 500.3135, and as defined by Michigan's Supreme

[1] Defendant, Kathleen Olson's negligence arises out of her operation of a motor vehicle. Defendant, Todd Olson's negligence arises out of his ownership of that motor vehicle. MCL 257.401.

Court in *Kreiner v Fischer,* 471 Mich 109; 683 NW2d 611 (2004). Following a hearing before the trial court, Defendants' Motion for Summary Disposition was granted. The trial judge concluded that Plaintiff's fractured cervical spine did not affect his ability to lead his normal life even though he was off work for over six (6) months. The trial court denied Plaintiff's Motion for Summary Disposition with regard to the issue of serious impairment.

On September 21, 2006, the Court of Appeals reversed the trial court's ruling. The Court of Appeals held that Plaintiff did suffer a serious impairment of body function as a matter of law. More specifically, the Court of Appeals held:

> "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." *Jones v Olson,* unpublished opinion per curiam of the Court of Appeals, decided September 21, 2006 (Docket No. 268929).

MEDICAL HISTORY

The police report shows that Plaintiff complained of injury at the accident scene. Accordingly, an ambulance was dispatched to tend to Plaintiff's complaints. (EXHIBIT 1) Plaintiff complained of head pain, and he experienced tenderness to his scapula and knee pain. It was noted that he had numerous lacerations and abrasions on his body. Plaintiff was taken to Mercy Hospital in Cadillac. (Please see the records of North Flight, Inc., attached as EXHIBIT 3.)

Plaintiff's admitting diagnosis was "mult[iple] injuries," as he complained of a headache and pain in his left scapula. The assessment showed that Plaintiff struck his head on the "A" pillar of his car. He also complained of pain across his left shoulder; an examination revealed redness across his chest. He had a laceration over his right knee that warranted an immobilizer. X-rays showed that Plaintiff had a fracture of the pedicle and facet of his C-7 vertebra. The x-ray report read:

> "CT scan of the cervical spine reveals an usual [sic, unusual] fracture involving the pedicle and facet of C7 on the left. This is nondisplaced and nonangulated. This does not appear to extend significantly into the vertebral body and there is no evidence of jumping of the facet or locking of the facets at this level. This is an unusual fracture, but likely is a stable fracture. There is no subluxation demonstrated."

Plaintiff was advised to consult with Dr. Lynn Hedeman in Grand Rapids. (Please see the records of Mercy Hospital, attached as EXHIBIT 4.)

On August 13, 2003, Plaintiff was evaluated by Dr. Lynn Hedeman of Great Lakes Neurosurgical Associates, P.C. Dr. Hedeman's initial report stated:

> "Douglas Jones was seen in my office today. He is a 31-year-old white male who was involved in a motor vehicle accident approximately two weeks ago. He sustained multiple injuries that were fortunately quite minor, but he did have a noted cervical fracture on CT scanning which was felt to require further evaluation. He has been placed in a collar. He has no neurological symptoms. He has some bilateral arm pain occasionally; however, he basically denies any significant weakness, radicular symptoms or signs of trunkal paresthesias, etc.
>
> * * *
>
> Plain films were reviewed, as well as a cervical CT scan. The CT shows a lateral mass fracture at C7-T1 on the left. It is nondisplaced and appears fairly stable.
>
> At this point, I would like to re-evaluate him with cervical spine films in about a month. I would allow him to wear a soft collar. He should remain off work in the interim; however, he may be able to return to work in about a month."

Dr. Hedeman's assessment was that Plaintiff might be able to return to work at the end of October. (Please see Dr. Hedeman's records, attached as EXHIBIT 5.)

On August 15, 2003, Plaintiff returned to Mercy Hospital to have stitches taken out of his right knee. On September 9, 2003, Plaintiff returned to Mercy Hospital at the instruction of Dr. Hedeman. His admitting diagnosis was a C7-T1 lateral mass fracture. He underwent x-rays of his cervical spine relative to his diagnosis. (Please see the x-ray report, attached as EXHIBIT 6.)

On November 17, 2003, Plaintiff consulted with Dr. Paul Davis of Munson Medical Center in Traverse City. Dr. Davis' records showed that Dr. David M. Mutch, Plaintiff's primary care provider, referred Plaintiff to him. Dr. Davis' records detailed the following as Plaintiff's symptoms:

> "Since [the time of the accident] he has had persistent pain in his neck with radiation of numbness into his shoulders and arms greater on the left than the right hand side. He states that this happens to all the digits and not any one in particular. He does not report a specific muscle weakness but does have pain occasionally in his neck and arms with movement. He denies coordination, balance, or bowel/bladder changes. He provides that he has had no previous neck injury and no pain in his neck prior to his injury."

Dr. Davis felt that Plaintiff needed to undergo MRI testing to fully evaluate his condition.

On January 9, 2004, Plaintiff returned to Dr. Davis. Plaintiff's complaints mirrored his earlier complaints of continued discomfort in his neck. Plaintiff also experienced decreased range of motion in his neck. **Dr. Davis was able to review an MRI of Plaintiff's spine that showed disc bulges at the C6-7 and C5-6 levels.** There was no evidence of any foraminal stenosis at these levels. Dr. Davis recommended that Plaintiff treat conservatively for this, and he referred Plaintiff to physical therapy. (Please see Dr. Davis' records, attached as EXHIBIT 7.)

Based on Dr. Davis' recommendation, Plaintiff went through a course of physical therapy at Dynamic Physical Therapy. The

physical therapy records show that he was eventually able to return to work. (Please see the records of Dynamic Physical Therapy, attached as EXHIBIT 8.)

LEGAL STANDARD

Defendants brought a Motion for Summary Disposition pursuant to MCR 2.116(C)(10), which provides that summary disposition is appropriate if there are no genuine issues of material fact in a case. In ruling on such a motion, the trial court is required to engage in the following analysis:

> "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, a court considers the entire record in a light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." [*Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004), internal citations and footnotes omitted.]

In addition to the legal threshold, there exists an evidentiary burden shifting at play. The Michigan Supreme Court detailed the burden shifting in *Veenstra v Washtenaw Country Club,* 466 Mich 155, 163-164; 645 NW2d 643 (2002):

> "In opposition to the motion, the nonmoving party may not rest on mere allegations or denials, but must proffer evidence of specific facts showing that there is a genuine issue for trial. Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." [Internal citations omitted; emphasis added.]

LAW AND ARGUMENT

I. THE MICHIGAN COURT OF APPEALS WAS CORRECT IN HOLDING THAT PLAINTIFF-APPELLEE SUFFERED A SERIOUS IMPAIRMENT OF BODY FUNCTION, AND THIS RULING SHOULD BE UPHELD.

Although the no-fault scheme largely did away with tort liability in auto accident cases, MCL 500.3135(1) provides:

> "A person remains subject to tort liability for noneconomic 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."

"Serious impairment of body function" is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). "The statutory threshold is designed to eliminate suits based on clearly minor injuries and those that do not seriously affect the ability of the body to function." *May v Sommerfield*, 239 Mich App 197, 200; 607 NW2d 422 (1999), after remand, 240 Mich App 504; 617 NW2d 920 (2000), citing *DiFranco v Pickard,* 427 Mich App 32, 60; 398 NW2d 896 (1986).

Employing a textualist approach, the Supreme Court, in *Kreiner, supra*, 471 Mich 109, 129, 131, recently attempted to "provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not." The Court observed that the scope of the inquiry should be wide, including "a plaintiff's entire normal life." *Id.*

at 131. Moreover, an injury must be so serious as to impair a plaintiff's "general ability" to live that normal life:

> "Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impairments, 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." [*Id.*]

Because the inquiry requires a subjective look at the plaintiff's general life, the Court stated "specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life." *Id.* The Court stressed that the inquiry needed to be made "on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations." *Id.* at 134, n 19.

A. <u>NATURE AND EXTENT OF THE PLAINTIFF'S INJURIES</u>

The *Kreiner* Court stated that the first inquiry must be to determine whether a factual dispute exists as to the nature and extent of a plaintiff's injuries or, if there is a factual dispute, whether that factual dispute is material to the determination of the threshold injury. *Id.* at 131-132. Here, Defendants do not dispute that there is no factual dispute as to the extent of Plaintiff's injuries. Plaintiff had a fracture of the pedicle and facet of his C7 vertebra, which was confirmed by x-rays. (EXHIBIT 4) Dr. Hedeman's records show that he had a

lateral mass fracture at C7-T1. (EXHIBIT 5) An MRI of his cervical spine showed disc bulges at C6-7 and C5-6. (EXHIBIT 7)

B. IMPORTANT BODY FUNCTION

The Supreme Court held that the second step of the inquiry is to determine whether an "important body function" has been impaired. It is necessary to show both elements: (1) that the body function is important; and (2) that the body function is impaired, and not simply injured. As far as impairment, the Court stressed that the impairment must be objectively manifested; "Subjective complaints that are not medically documented are insufficient."

Here, the medical reports establish that important body functions were affected. Defendants presented no evidence that Plaintiff's use of his neck and back were not important body parts. Plaintiff is unaware of any legal authority showing that these are unimportant body parts.

C. THE IMPAIRMENT MUST AFFECT THE PLAINTIFF'S GENERAL ABILITY TO LEAD HIS OR HER LIFE

The third step in the *Kreiner* analysis requires that the serious impairment affect the plaintiff's general ability to lead his or her normal life. *Id.* at 132. The Court resisted the opportunity to make a bright line rule, saying only "although a *serious* effect is not required, *any* effect does not suffice." *Id.,* fn 14. However, the Court opined that, after weighing a

plaintiff's pre-accident life and post-accident life, a "de minimis" effect would not suffice.

The *Kreiner* Court set out several factors that would aid lower courts in determining whether the effect would be sufficient to surmount the "serious impairment of body function" threshold:

> "The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's 'general ability' to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery."

The decision in *Kreiner* was meant to "provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not." The Court recognized that the injury threshold was implemented as a compromise to allow lifelong medical benefits through no-fault insurers, and that **"in turn for this [a plaintiff] surrenders <u>the possibly minimal damages for pain and suffering</u> recoverable in cases not marked by serious economic loss or objective indicia of grave injury."** *Id.* at 116, fn 4, emphasis added. Accordingly, the no-fault threshold was intended to weed out negligence actions based on minor injuries. **In this regard, the *Kreiner* decision is best described as a "floor" to rule out the most minimal cases, as opposed to a "ceiling" to allow only the worst cases.**

The *Kreiner* Court observed that the scope of the inquiry should be wide, including "a plaintiff's entire normal life." *Id.*

at 131. However, the Supreme Court was clear that looking at the plaintiff's normal life was meant to look at the breadth of a party's life, as opposed to looking at the duration of the life. The Court noted:

> "Although **some aspects** of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impairments, 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." [Emphasis added.]

However, when the Court referred to the "entire normal life," it was referring to looking at all of the different aspects of the plaintiff's life, including a plaintiff's ability to work, to engage in recreational activities, and to interact with family members and friends. The Court was referring to a broad look at the plaintiff's pre-accident lifestyle when compared to the plaintiff's post-accident lifestyle.

When the Supreme Court refers to the "course or trajectory of the plaintiff's normal life," it is clear that the Court was not requiring a plaintiff to show that any impairment would have to exist for the remainder of the plaintiff's life. The Court stated that the inquiry must focus on "**how his life has been affected, by how much, and for how long.**" *Id.* at 131, emphasis added. By making this observation, the *Kreiner* Court expressly left open the possibility for a plaintiff who has not suffered permanent

injuries to surmount the serious impairment of body function threshold.

As further proof that the nature of the *Kreiner* inquiry is meant to highlight different **aspects** of a plaintiff's life, as opposed to the duration of any impairment, the *Kreiner* Court directed lower courts to conduct "a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Id.* at 132-133. To be sure, the inquiry is directed at all aspects of a plaintiff's life, and not solely on the duration of a plaintiff's life. The *Kreiner* decision makes clear that duration of impairment is only one of a non-exhaustive list of factors to consider. *Id.* at 133-134.

When reviewing the duration of an impairment, the Supreme Court has been unequivocal: **A plaintiff does not have to maintain a continuing level of the threshold injury.** *Byer v Smith*, 419 Mich 541; 357 NW2d 644 (1984). In other words, a good recovery does not preclude a finding of serious impairment of body function even after tort reform. *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000).

In *Cook v Hardy*, unpublished opinion per curiam of the Court of Appeals, decided February 24, 2005 (Docket No. 250727),[2] the Court observed that the plaintiff's impairment lasted only between **six to eight weeks!** She was forced to cancel an independent study

[2] A copy of this opinion is attached as EXHIBIT 9.

program, and she could not physically carry the lighting and film equipment associated with her schoolwork. Also, the plaintiff could not skateboard, which she did recreationally. In this case, the trial court granted summary disposition in favor of the defendant.

However, the Court of Appeals reversed, ruling:

> "**We hold that plaintiff suffered a serious impairment of body function as a matter of law. While the duration of her impairment was relatively short--six to eight weeks--in that time she could not work, attend school, or engage in any of her usual recreational activities because she was in a hard cast and could not move about without crutches.** Even after her cast was removed, her physical activities were limited. She was forced to cancel an independent study course which she was not able to complete until more than six months after the accident. She was forced to cancel a planned vacation. The activities the trial court focused on, to which plaintiff returned, did not resume until six months or more after her injuries. It is clear to us that plaintiff's impairment was significant and extensive.
>
> **We do not read *Kreiner* to require that plaintiffs must suffer serious impairment permanently in order to be entitled to meet the requirements of serious impairment of important body function. <u>Indeed, *Kreiner* held that impairments of a short duration can be sufficient to meet the serious impairment threshold</u>.** Under the totality of the circumstances in this case, including the seriousness and extent of the fractures, the nature and extent of treatment with casting and crutches, and the lifestyle alterations, all support a finding that plaintiff suffered a serious impairment of body function as a matter of law." [Id. at 2, internal citations omitted, emphasis added.]

It is noteworthy that the Court of Appeals did not simply rule that the *Cook* plaintiff created a genuine issue of material fact, but that **undisputed facts warranted a finding in her favor as a matter of law!**

In *Ream v Burke Asphalt Paving,* unpublished opinion per curiam of the Court of Appeals, decided February 1, 2005 (Docket No. 238824),[3] the Court reviewed a trial court's grant of summary disposition in favor of the defendant. In that case, the plaintiff sustained multiple abrasions and contusions of his shin, ankle, and wrist. He also had an unspecified injury to his lower spine and a torn biceps. **The plaintiff was off work for two months; the *Ream* plaintiff eventually returned to work with no restrictions.** However, the Court found it significant that the treating physician apparently considered the fact that the plaintiff was returning to a less vigorous position. In *Ream,* the Court of Appeals ruled that the grant of summary disposition amounted to legal error. **The Court reversed, ruling that a genuine issue of material fact existed on this point.**

In *Luther v Morris,* unpublished opinion per curiam of the Court of Appeals, decided January 18, 2005 (Docket No. 244483)[4], the Court reviewed another grant of summary disposition in favor of the defendant. The *Luther* plaintiff suffered a fractured and dislocated elbow. Surgery was necessary to repair the injury. **She was taken off work for 52 days.** She had to live with her sister, who performed household services for her. Moreover, the plaintiff was unable to drive for several weeks. The *Luther* plaintiff was not exceptionally athletic prior to the motor

[3] A copy of this opinion is attached as EXHIBIT 10.
[4] A copy of this opinion is attached as EXHIBIT 11.

vehicle accident at issue there; the Court realized that she suffered a stroke prior to the accident, and use of her non-dominant hand was compromised. In total, the plaintiff was able to return to her normal life, with exception to some physical ailments, difficulties, and limitations, within "a couple of months". Despite this, the Court of Appeals reversed the trial court's decision, stating:

> "**We hold that plaintiff suffered a serious impairment of body function as a matter of law.** It is true that the duration of plaintiff's impairment was relatively short; however, the undisputed evidence indicates that she could not work, could not drive, was unable to hold a coffee pot, dropped objects at home, could not bow hunt, had difficultly taking the garbage out, washing dishes, and bathing, suffered pain on lifting herself out of bed in the morning, and plaintiff's sister had to do 'everything' for her. **Thus, although the impairment was short-lived, the impairment left plaintiff virtually unable to do anything for herself, or to undertake tasks in the same manner as she had done before the injury; the impairment was extensive**." [Emphasis added.]

In *McDanield v Hemker,* unpublished opinion per curiam of the Court of Appeals, decided September 27, 2005 (Docket No. 263150)[5], the Court of Appeals yet again reviewed another grant of summary disposition in favor of the defendant. In *McDanield*, the Plaintiff was out of work approximately six to seven months, she had to forego recreational activities that she once enjoyed, she had to significantly curb her household chores, she had to limit her gardening activities, her sleep habits were interfered with, and her intimacy with her husband was decreased. Once again,

[5] A copy of this opinion is attached as EXHIBIT 12.

though, the plaintiff in *McDanield* was able, for the most part, to return to her normal life with the exception of some pain and discomfort. Despite this short impairment, the Court of Appeals denied the motion for summary disposition and held that the plaintiff in *McDanield* did suffer a serious impairment of body function.

The aforementioned appellate cases all make clear that permanent disability is not necessary to establish a serious impairment of body function under MCL 500.3135. Turning to the instant case, the Court of Appeals held that Plaintiff did suffer a serious impairment of body function. More specifically, the Court of Appeals pointed out that for a six-month period, Plaintiff was unable to work, hunt, snowmobile, play softball, do yard work, or take walks with his girlfriend. *Jones v Olson,* unpublished opinion per curiam of the Court of Appeals, decided September 21, 2006 (Docket No. 268929)[6].

Plaintiff's medical records make clear that as a result of his fractured vertebra, he was required to wear a cervical collar. This collar affected his ability to move his head. Moreover, the medical records reveal that Plaintiff's treaters ordered him to avoid work activities. (EXHIBIT 5) Dr. Hedeman believed that Plaintiff could likely return to work in October - several months after the accident. However, in actuality, Plaintiff was kept off work until January 2004. (EXHIBIT 8) Dr. Davis, who addressed

[6]A copy of this opinion is attached as EXHIBIT 13.

Plaintiff's bulging disc in his cervical spine, believed that Plaintiff should undergo physical therapy. (EXHIBIT 7)

Looking at this case, in light of *Kreiner* and its progeny, the Court of Appeals' opinion should be upheld. If the *Cook* plaintiff's six to eight weeks of impairment was sufficient, as a matter of law, to amount to a serious impairment of body function, and the *McDanield* plaintiff's six months of impairment amounted to a serious impairment, then surely Plaintiff's impairment is a serious impairment of a body function. Furthermore, Plaintiff's injuries are far more serious than the two months of disability in the *Ream* case. Moreover, Plaintiff's injuries and ensuing restrictions are far more serious than the *Luther* case, where the Court of Appeals found serious impairment as a matter of law. Accordingly, this Honorable Court should deny Defendants' Application for Leave to Appeal.

Moreover, Plaintiff's testimony reinforces the conclusion that his injuries affect his ability to lead his normal life. Plaintiff worked for Northwest Foundations, and he testified at his deposition that his work required setting forms and pouring concrete. (Please see Plaintiff's deposition transcript, attached as EXHIBIT 14, p 7.) Plaintiff characterized his work as "labor intensive," and the work would go throughout the winter. (EXHIBIT 14, p 8) However, because of his injuries, Plaintiff was restricted from working from the time of the accident in August 2003 until March 2004. (EXHIBIT 14, p 8) When Plaintiff's

restrictions were lifted, he did return to work. (EXHIBIT 14, p 9) Plaintiff explained his symptoms during his deposition, saying that he had neck pain roughly five out of seven days a week. When Plaintiff experiences pain, he tries to move around. (EXHIBIT 14, pp 32-33)

When Plaintiff was not working, he enjoyed hunting and playing softball. (EXHIBIT 14, p 13) Plaintiff testified that he played on three or four teams throughout the softball season. (EXHIBIT 14, p 13) Plaintiff's injuries prevented him from playing in some of the softball games. (EXHIBIT 14, p 35) Plaintiff also explained that he enjoyed snowmobiling. (EXHIBIT 14, pp 28-29) During the period of time that he was restricted by his physicians, Plaintiff was unable to ride his snowmobile. (EXHIBIT 14, p 38) **In fact, Plaintiff was unable to engage in any of these activities.** (EXHIBIT 14, p 38)

Plaintiff explained that his injuries affected him in other ways. He was unable to walk with his girlfriend, Marcy Webster, an activity he had enjoyed five or six nights each week. (EXHIBIT 14, p 39) Moreover, he needed her help in dressing and feeding himself after the accident. (EXHIBIT 14, p 40) Plaintiff was prevented from engaging in intimate relations with Webster for approximately two months due to his injuries. (EXHIBIT 14, p 40) Following the accident, for approximately three months, he was also prevented from driving. (EXHIBIT 14, pp 39-40) Plaintiff had to wear a cervical collar for "a period of months" following

the accident. (EXHIBIT 14, p 40) He was also unable to perform any yard work or snow shoveling at his home during this period and required someone else to do these activities. (EXHIBIT 14, p 38)

Defendants, in asking this Court to overrule the Court of Appeals, make a few arguments. They first argue that the Court of Appeals applied a test of its own making and did not follow *Kreiner's* logic. This is a misplaced assertion. In the Court of Appeals' opinion, the Court specifically refers to *Kreiner* several times. The Court of Appeals specifically took into consideration the factors laid out in *Kreiner*. The Court of Appeals considered things like the duration of the disability, the comparative lifestyle before and after the injury, and the length of treatment. After considering all of these factors, the Court of Appeals held that Plaintiff suffered a serious impairment of a body function.

Defendants also make the argument that Plaintiff only experienced minor inconveniences and that the Court of Appeals only looked at "activities of minor significance" in Plaintiff's life. This argument is also misplaced. It is easy for Defendants to claim that these recreational activities are only minor; Defendants did not have to go six months without doing recreational activities. The fact of the matter is that Plaintiff enjoyed hunting, doing yard work, snowmobiling, driving, playing softball, eating and dressing himself, and taking walks with his girlfriend, and the fact that he could not do these things for a

lengthy period after the accident should be considered when determining whether Plaintiff has suffered a serious impairment of a body function.

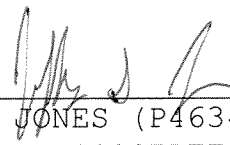
For the reasons set forth above, Plaintiff respectfully requests that this Honorable Court deny Defendants' Application for Leave to Appeal.

CONCLUSION

WHEREFORE, Plaintiff, Douglas D. Jones, respectfully requests that this Honorable Court deny Defendant's Application for Leave to Appeal. In the alternative, Plaintiff respectfully requests that this Honorable Court affirm the Court of Appeal's opinion.

Dated: November 17, 2006

Respectfully submitted,



JEFFREY S. JONES (P46340)
JAY TRUCKS & ASSOCIATES, P.C.
Attorney for Plaintiff-Appellee
600 Pine Street
Clare, MI 48617
(989) 386-3456