STATE OF MICHIGAN

IN THE SUPREME COURT

BRUCE BEHNKE ~~and ANGELA BEHNKE~~,

Plaintiff~~s~~/Appellee~~s~~,

Docket No._____
Michigan Court of Appeals Docket No. 248107
Chippewa Circuit Court LC No. 01-005523-NI

Gpn 9/16/04
Rec 10/27/04

v

N. Lambros

and ESTATE OF KAREN McLEAN, ~~deceased,~~

Defendant,

and AUTO-OWNERS INSURANCE CO.

Defendant/Appellant.

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**DEFENDANT/APPELLANT**
**AUTO-OWNERS INSURANCE COMPANY'S**
**APPLICATION FOR LEAVE TO APPEAL**

**ORAL ARGUMENT REQUESTED**


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## EXHIBITS

Exhibit A: Court of Appeals Unpublished Decision, No. 248107, dated September 16, 2004 and Court of Appeals Order Denying Motion for Reconsideration dated October 27, 2004

Exhibit B: Deposition of Plaintiff/Appellee Bruce Behnke

Exhibit C: War Memorial Hospital Emergency Room Records

Exhibit D: Robert Graham, D.O. Records

Exhibit E: J. Eric Zimmerman, M.D. Letter of July 8, 1998

Exhibit F: Richard Ganzhorn, M.D. Records

Exhibit G: J. Eric Zimmerman, M.D. Letter of November 21, 2001

Exhibit H: Deposition of Roland Behnke

Exhibit I: Michigan Court of Appeals Unpublished Opinion of *Lindsay v Grinage, et al*, No. 248579, dated October 28, 2004

Exhibit J: Michigan Court of Appeals Unpublished Opinion of *Rivera v Rivera, et al*, No. 248914, dated October 28, 2004

Exhibit K: Michigan Court of Appeals Unpublished Opinion of *Dahlvig v Gordy's Mobile Home Transport, et al*, No. 248969, dated November 4, 2004

Exhibit L: Michigan Court of Appeals Unpublished Opinion of *Hewelt v Hetherington*, No. 249044, dated November 9, 2004

## JURISDICTIONAL STATEMENT

Defendant/Appellant states that jurisdiction is proper under MCR 7.301(A)(1)(2), as the Defendant/Appellant seeks leave to appeal the Court of Appeals Decision of September 16, 2004 reversing the Trial Court's findings of fact and entry of a judgment in favor of Defendant/Appellant. The Court of Appeals denied Defendant/Appellant's Motion for Reconsideration on October 27, 2004.

## STATEMENT OF ISSUES

1. WHETHER THE TRIAL COURT'S FINDINGS OF FACT AND JUDGMENT OF NO CAUSE OF ACTION WAS SUPPORTED BY SUBSTANTIAL AND PLAUSIBLE EVIDENCE AND WAS NOT CLEARLY ERRONEOUS AND WHETHER THE COURT OF APPEALS REVERSED THE TRIAL COURT BY APPLYING AN IMPROPER "DE NOVO" STANDARD OF REVIEW SUBSTITUTING ITS OWN FINDINGS OF FACT AND MUST BE REVERSED AND THE TRIAL COURT'S FINDINGS OF FACT AND JUDGMENT AFFIRMED?

| | |
|---|---|
| Court of Appeals Answer: | NO |
| Plaintiff/Appellee's Answer: | NO |
| Defendant/Appellant's Answer: | YES |
| Trial Court's Answer: | YES |

2. WHETHER THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD AND PROPERLY FOUND THAT PLAINTIFF/APPELLEE HAD NOT DEMONSTRATED AN OBJECTIVELY MANIFESTED IMPAIRMENT AND HAD NOT SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION AS A MATTER OF LAW?

| | |
|---|---|
| Court of Appeals Answer: | NO |
| Plaintiff/Appellee's Answer: | NO |
| Defendant/Appellant's Answer: | YES |
| Trial Court's Answer: | YES |

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 29, 1998 Plaintiff/Appellee was stopped at a stoplight when he was bumped from behind by a vehicle driven by Karen McLean, now deceased. Ms. McLean did not have any insurance. The impact of the collision was very slight, causing only $400.00 worth of damage to Plaintiff/Appellee's bumper. In this regard Plaintiff/Appellee testified:

> Q All right. You were hit in the rear.
> A She - -
> Q Did you get that damage fixed?
> A Yes, I did.
> Q Okay. And Auto-Owners paid for that?
> A Yes.
> Q All right. Where did you get it fixed? What was the damage, out of curiosity?
> A It - - total bumper was about $400, approximately.
> (Deposition of Plaintiff/Appellee Bruce Behnke, p. 42) (Exhibit B)

At trial, Plaintiff/Appellee testified:

> Q Do you agree that you gave no indication of being injured at the accident?
> A Yes.
> Q Do you agree that you had the rear bumper replaced, your damage to the Dodge Ram pickup was $389.79? ...
> Q Do you agree that the rear bumper was replaced on your truck?
> A Yes. Q There was no other damage to your truck as a result of this accident, was there?
> A No. (Trial Transcript, pp. 78-80)

Plaintiff/Appellee did not immediately seek medical help. The next day, on May 30, 1998 Plaintiff/Appellee did go to the emergency room at War Memorial Hospital complaining of neck pain. He did not complain of any other injuries or problems. He was diagnosed as having an acute cervical strain, and it was recommended that he see his family doctor. (Exhibit C)

June 2, 1998 Plaintiff/Appellee did follow-up with his family doctor, Dr. Robert Graham, D.O. (Exhibit D). At that time Plaintiff/Appellee complained of pain in the neck and some

subjective limitation of motion. Dr. Graham was told by Plaintiff/Appellee that he had been diagnosed in the emergency room with severe cervical myositis. Dr. Graham ordered an MRI of the cervical spine.

On June 9, 1998 Plaintiff/Appellee returned to Dr. Graham complaining that his neck was hurting more. Dr. Graham suggested he get a soft cervical collar and gave him pain medication. On June 9, 1998 Dr. Graham, as a precaution, placed the Plaintiff/Appellee on off-work status pending the results of his MRI.

A review of Dr. Graham's deposition testimony and records will exhibit that the only objective symptom of any injury Plaintiff/Appellee demonstrated on June 2, 1998 was that the right side of his neck was somewhat swollen. That is never mentioned in any of Dr. Graham's subsequent medical records. Dr. Graham did not identify in his records or his testimony that he had ever noted any form of permanent knot in Plaintiff/Appellee's neck.

On June 12, 1998 the MRI was done and showed that the Plaintiff/Appellee had a **congenital developmental anomaly** at C4-5 and that the vertebrae there were fused. This was not caused by the accident. It was also noted that there were some degenerative changes at C5-6 and C6-7. Dr. Graham recommended to the Plaintiff/Appellee that he see Dr. Zimmerman, a neurosurgeon and continued him on medication for relaxation and pain.

On July 8, 1998 the Plaintiff/Appellee saw Dr. Zimmerman. Dr. Zimmerman noted that the MRI did not show any spinal cord or root compression. It showed degenerative changes only at C5-7. Dr. Zimmerman recommended that the Plaintiff/Appellee stay off work for two more weeks and recommended that he go to physical therapy (Exhibit E). The Plaintiff/Appellee had no radicular symptoms or complaints. Dr. Zimmerman has testified that the Plaintiff/Appellee gave him a history of suffering from pre-existing headaches. Dr. Zimmerman went on to testify

that he found no objective evidence of injury and diagnosed muscle related pain based solely on Plaintiff/Appellee's subjective complaints. Dr. Zimmerman also testified that in July of 1998 he could not relate Plaintiff/Appellee's complaints to the accident and that the Plaintiff/Appellee was not complaining of any headache pain in July of 1998. In these regards, Dr. Zimmerman testified:

> Q Very good. And do you have that form or a similar history form –
> A Let me look – let me see. Sometimes they keep them; sometimes – oh, here is the one from the first visit. And he indicates migraine headaches on that. And that was in '98 as well. (p. 7)
>
> * * *
>
> Q All right. 'On examination today,' which is your next paragraph heading, on examination, was he complaining of any headaches when you examined him or when you actually saw him on – was it that same day, July 8, '98?
> A He wasn't complaining of a migraine headache. He had neck pain on examination.
> Q All right. And you investigated or attempted to investigate the cause or source of his neck pain?
> A Right.
> Q All right. And so we understand, what did you do with reference to a neurological exam. What did you look at study-wise and what did you do for your exam?
> A Neurologically ranged the neck through its normal motion, looked for abnormal phenomena other than the pain with ranging, didn't find any abnormalities with the exception of some popping of the posterior joints, noise they would make. Neurologically – that was sort of a musculoskeletal exam. Neurologically his strength was normal in all the major muscle groups. Sensation, reflex were normal. No signs of spinal cord involvement with hyper reflex or abnormal reflexes in the lower extremities and then looked at the MR scan, found degenerative changes at the C5-6 and 6-7 level but no root or cord compression, then a congenital blocked vertebra higher up, I believe. That was – I'm not sure just what level that was.
> Q All right. You noted in your report that you saw some spondylitic ridge and facet degenerative change?
> A Right.
> Q All right. Can you tell whether that would be preexisting for any period of time?

A That didn't happen just within a month or two of the MR.
Q All right. And congenital, I think we all know, means –
A Right.
Q -- what? – probably from birth?
A Right.
Q All right.
A That was at 4-5 level.
Q All right. So you noted in your report based on the MR that he had a normal craniocervical junction.
A Correct.
Q Can you just point to that for me so that I'm sure I understand where you're referring to?
A Where the skull and the neck attach.
Q All right. And so neurologically he had a normal craniocervical junction. But that was still the location of what? What you determined to be some muscle-related pain?
A Pain, right.
**Q Okay. Again did you palpate anything objective to determine that or was that basically his area of complaint of pain?**
**A Area of complaint.** (pp. 7-10)

* * *

Q Okay. Based on you seeing him on November 21, 2001, and not having seen him for the past three-and-a-half years, would you be able to relate more probably than not his muscle discomfort to the rear-end accident that he's complaining about in this case that occurred on May 29, or '98…
Q … Can you for whatever reasons – you can then tell me – are able to relate that?
A Not with the information that I have at my disposal. What I would do is defer to any physician that saw him in the interim period of time.
Q All right…And would it be true that you're not in a position to give a medical opinion about whether his myospasms that he experiences or says he experiences at the time of ejaculation were related to this rear-end accident that occurred in May of '98 either?
A Correct, for the same reason as the last answer. (pp. 12-13) (Deposition of J. Eric Zimmerman, M.D. , pp. 7, 7-10, 12-13.)

It should be noted that the Plaintiff/Appellee testified in his deposition that he never went to any physical therapy. He also acknowledged that he understood from Dr. Zimmerman that his neck had only degenerative changes and no nerve or nerve related injuries. In this regard he testified:

Q All right. Do you remember seeing Dr. Zimmerman, apparently when he came to the Soo, in July '98? Do you remember seeing him?
A Yes.
Q Okay. He said that you were complaining of pain in the neck. Do you recall that?
A Yes.
Q He said that you had had some shoulder pain and arm pain but that had gone by that time. Do you remember that and do you agree with that?
A I don't recall that part of the conversation.
Q Do you agree with that?
Mr. Petruska: Following the accident?
Q That your shoulder pain and arm pain had gone by the time he saw you in July?
A Yes.
Q All right. He commented you hadn't had any treatment by way of therapy - - meaning what? You didn't go to physical therapy between the time of the accident and the time you saw him? Is that right? You didn't go to physical therapy or rehab?
A There was some physical therapy that Dr. Graham had me do. It was a traction type thing for seven days.
Q Okay. But you didn't go in to a physical therapist or a rehabilitation center, did you?
A No.
Q All right. Have you at all since the accident?
A No.
Q Okay. Do you understand that Dr. Zimmerman determined, in his opinion, that you didn't have any fractures or dislocations - -
A Yes.
Q - - of the vertebrae in your neck?
A Yes.
Q All right. Did he tell you you had degenerative changes in your neck, meaning at C5-6 and C6-7?
A Yes.
Q All right. Do you remember him telling you that you didn't have any nerve root compression, meaning you didn't appear to have any nerve injury - -
A Yes, I do.
Q - - or nerve related injuries?
A Yes, I do. (Deposition of Plaintiff/Appellee Bruce Behnke, pp. 25-27)

On July 27, 1998 Plaintiff/Appellee was seen by Dr. Graham for a recheck of his neck pain. **Dr. Graham found that he was able to return to work without any restrictions.**

(Deposition of Dr. Graham, p. 40.) Plaintiff/Appellee informed Dr. Graham that his pain was greatly reduced.

On July 27, 1998, Plaintiff/Appellee also reported to the physical therapy department at War Memorial Hospital -- despite his testimony that he had no physical therapy -- **that he did not have his headaches anymore, that he had returned to work, and that he was canceling any additional physical therapy**.

Plaintiff/Appellee had no additional medical treatment until October 21, 1998. At that time he complained of some pain in his neck and that he had headaches **for the first time**. Dr. Graham found that these were "tension" headaches associated with occipital muscular tension. **Dr. Graham also noted that he was not sure if this was related to his lifestyle or to his type of work. He did not relate it to the accident**. Dr. Graham testified:

> Q ...I think the next time you're noted as seeing him...was October 21st of 1998. And in your typed note of that date, Exhibit 10, you state, "He has tension headache associated with occipital muscular tension. We suggest that he return only to light work, because his headaches was of a tension headache type. We are not sure whether this is related to his lifestyle or to his type of work." What did you mean by that statement, "his lifestyle or his type of work?"
> A Well, his posture, his daily posture in driving, sitting.
> Q Okay. So those occipital tension headaches may have had nothing to do with the accident. Fair statement?
> A I guess that's possible, yes. (Deposition of Robert J. Graham, D.O., p. 42.)

Dr. Graham admitted in his testimony that Plaintiff/Appellee's complaints of headaches were purely subjective in nature and that there was no objective evidence of any injury stating:

> A My the nature of the – the whole history of the headache pain, the onset, the aura, the exact headache finding at the time a person has a headache.
> Q So that's basically subjective. Fair statement?
> A Yes. Unless they're in a laboratory, yeah. (Deposition of Robert J. Graham, D.O. p. 43,)

Dr. Graham went on to admit that Plaintiff/Appellee had given a medical history that established he had suffered from severe migraine-type headaches before this accident, stating:

> Q Doctor, do you recall him giving you a history of having migraine headaches prior to June 2nd?
> A I wrote it down. (p. 31)
>
> * * *
>
> Q Okay. He notes that his past medical history shows his review of systems to be positive for smoking, blood transfusions and migraine headaches. That's the same history he gave to you, wasn't it?
> A Yes. (p. 47)
>
> * * *
>
> Q And in your records it indicates he had past migraine headaches, correct?
> A That's what it said.
> Q And that's what it indicates in Dr. Zimmerman's record or his letter to you of June 8th – July 8th – excuse me – '98, correct?
> A Right. (p. 49) (Deposition of Robert J. Graham, D.O., pp. 31, 47, 49)

Plaintiff/Appellee saw Dr. Graham later on January 20, 1999, because he was suffering from chronic weight loss. At that time, he made absolutely no complaints regarding any headaches or neck pain. It was noted that he continues to smoke a lot of pot. On June 13, 1999 Plaintiff/Appellee was involved in another motor vehicle accident. This was a head-on collision. He sustained a head injury, a knee injury and another neck injury. He was treated by Dr. Ganzhorn at War Memorial Hospital for this condition. (Exhibit F). Dr. Ganzhorn took x-rays on June 15, 1999 and again noted the congenital fusion at C4-5 and some degenerative changes. Dr. Ganzhorn took the Plaintiff/Appellee off work for 2-3 weeks because of this second motor vehicle accident.

Plaintiff/Appellee also saw Dr. Graham in February of 1999 and in September of 1999. Neither of those visits was related to the auto accident. No headache complaints were made.

On November 4, 1999, the Plaintiff/Appellee complained of neck pain, indicating that the use of Darvocet at work while welding would make him sleepy. No headache complaints were made.

On May 15, 2000, additional x-rays of Plaintiff/Appellee's lumbar spine revealed only mild degenerative changes, this time in the lower back region, not related to this automobile accident.

For the first time--and almost 2 1/2 years after this May 1998 incident--on September 11, 2000 Plaintiff/Appellee complained to Dr. Graham that he had a severe cervical spasm and pain while having sexual relations with his wife. He claimed to have an instant headache. Dr. Graham suggested that he again see Dr. Zimmerman. Plaintiff/Appellee did not do so until over a year later, on November 21, 2001.

On September 19, 2000, Dr. Graham met with the Plaintiff/Appellee and explained that he felt the Plaintiff/Appellee's symptoms were due to arthritis of his spine, otherwise known as ankylosing spondylitis. This condition is not related to the automobile accident, but is simply the same degenerative process that had been noted on the June 12, 1998 MRI.

Plaintiff/Appellee last saw Dr. Graham to Defendant/Appellant's knowledge on October 8, 2001 again asking for a referral for Dr. Zimmerman. The Court should keep in mind that Plaintiff/Appellee had not seen Dr. Zimmerman when Dr. Graham had earlier recommended it.

Dr. Zimmerman saw the Plaintiff/Appellee on November 21, 2001 (Exhibit G). Dr. Zimmerman again noted Plaintiff/Appellee had a normal neurological examination and no evidence of spinal cord impingement. **He had degenerative changes to his cervical spine**

**which have nothing to do with this accident. All testing was negative and his strength was normal.** Plaintiff/Appellee complained he had a severe myospasm while having sexual relations with his wife, but has previously testified that he continues to have sexual relations with his wife on a daily basis. Dr. Zimmerman indicated he was unable to offer any treatment to the Plaintiff/Appellee, but did recommend a referral to a neurologist in Petoskey for medication to prevent this type of myospasm. Dr. Zimmerman went on to testify that he could not relate the Plaintiff/Appellee's headaches to the accident and that there was no objective evidence of injury, just Plaintiff/Appellee's subjective complaints. He also testified that in 2001, the Plaintiff/Appellee neglected to tell him that he had been involved in a second, head-on, automobile collision in June of 1999. In this regard, Dr. Zimmerman testified:

> Q So, Doctor, if he over the years prior to this accident and for two years after this accident was a welder most of the time and wore this welding helmet and was often in a flexed position, that in itself could cause muscle spasm or tension, could it not, irrespective of whatever he may have done or had happen; true?
> A It could.
> Q All right. And it certainly could cause in itself headaches, whether we call them tension headaches; true?
> A True. (pp. 24-25)
>
> * * *
>
> Q And he never told you about a head-on collision he had in June of '99 in any of your history, did he –
> A No.
> Q -- where he injured his neck?
> A Right. (pp. 25-26)
>
> * * *
>
> Q So would it be a fair statement that his complaints of headache were subjective? That's not something that you can touch, feel or objectively diagnose; true?
> A That's true. I can say yes to that.

Q **So basically any relationship that this accident had to either a myofascial strain or to headaches is based on his history, not on something that you saw or did or felt; true?**

A **Correct.** (p. 26) (Deposition of J. Eric Zimmerman, M.D., pp. 24-25, 25-26, 26 ) (Emphasis added.)

In April, 2002, Plaintiff/Appellee was seen by Dr. Susan Anderson, a neurologist, for his complaints of headaches. Dr. Anderson noted that Plaintiff/Appellee was drinking at least two pots of coffee per day and smoking one pack of cigarettes per day. Dr. Anderson's impression was "occipital neuralgia on the right**, chronic daily rebound headaches from overuse of caffeine, nicotine, and Aleve**, migraine with orgasm headaches, and cervical spine whiplash injury—rule out vascular abnormality." Dr. Anderson treated Plaintiff/Appellee with an occipital nerve block and ordered carotid and Doppler studies as well as an updated MRI of Plaintiff/Appellee's cervical spine. Plaintiff/Appellee was asked to discontinue the Aleve and decrease his caffeine. She also prescribed Indomethacin.

Plaintiff/Appellee returned to Dr. Anderson on June 5, 2002. The doctor noted that Plaintiff/Appellee's carotid doppler was essentially normal. She also noted that the medication prescribed resolved all of Plaintiff/Appellee's pain, although he continued to complain of a "pressure pulsating sensation" in the back of his neck. The occipital nerve block offered some relief.

Dr. Anderson testified that she could not relate any of his symptoms to the accident to a reasonable degree of medical certainty or probability. Any relation was based solely on his subjective history and based on that subjective history, Dr. Anderson testified only that the symptoms "may have been" or "could have been" related to the accident. In this regard, she testified:

A The one – only one thing out of his complaints that I thought – from the history that he gave and the type of pain on examination that he demonstrated was the occipital neuralgia.

Q All right. And in –

A That **may have been** related to any type or trauma that would involve rapid deceleration, extension/ flexion of the head and neck. That's something that we frequently see occipital neuralgia resulting from.

Q Rear-end impacts?

A That **could** cause it, yes. (pp. 10-11) (Emphasis added)

* * *

A … It's difficult for me to specifically relate what I'm seeing four years after the fact. All I can tell you is that an injury such as that **could** cause this type of complaint. But I can't specifically state in his case because I didn't see him for the four years -- (p. 11)

* * *

A Well, not only that, but it also was four years following what he described. I don't know what had been going on in between times, or, you know, I don't know how much of this is related specifically – or even started immediately after said accident, so –

Q Fair enough, doctor. But, in any event, the tests that you took were – the results of those tests were consistent with the type of complaints that he presented to you with; is that a fair statement?…

Q Not really... (p. 13) (Deposition of Susan L. Anderson, M.D. , pp. 10-11, 13.) (Emphasis added)

Dr. Anderson went on to testify that Plaintiff/Appellee's complaints were purely subjective and that, in her opinion, the majority of his pain was due to his pre-existing stenosis, congenital anomaly, and degenerative disc disease, stating:

Q Okay. So after ruling those things out, if he has – and to the extent he has headaches, would you agree in general terms that's a pretty subjective complaint?

A All pain is subjective.

Q Okay. All right. So it's not something you can put your finger on or see or feel; is that a fair statement?

A As to degree and that, no… (p. 15)

* * *

Q All right. And I'm looking at that report date of yours, July 19, 2002. It looks like about the last statement that you made was your belief his significant stenosis and degenerative disc disease are probably causing the majority of headaches. Is that what you're saying?
A That's what I stated.
Q Is the stenosis like the degenerative disc disease –
A Correct. (pp. 16-17) (Deposition of Susan L. Anderson, M.D., pp. 15, 16-17)

Dr. Anderson went on to opine that Plaintiff/Appellee's welding problems were not caused by any injury from the accident, but, again, were instead caused by his pre-existing degenerative disc disease and stenosis, stating:

Q With Mr. Behnke can certain activities trigger these headaches? He described his profession of welding to you.
A Uh-huh. Uh-huh.
Q Would that be something you would recommend that he continue with with his underlying situation?
A No.
Q And why is that?
A I think that between the – it's a combination of the constant flexion position of the head, as well as the head gear that they need to wear. And he had stated himself that it caused extreme exacerbation of his head pain while working, so he was unable to work. And that was something he stated on his first visit to me, and that is consistent with the degenerative disc disease and stenosis that he has; that that type of activity would most assuredly exacerbate the problem. (Deposition of Susan L. Anderson, M.D., p. 19)

Finally, Dr. Anderson testified that the Plaintiff/Appellee's overuse of caffeine was the primary cause of what she referred to as his "rebound" headaches, stating:

Q All right. And apparently – I couldn't tell whether he's still drinking two pots of coffee a day and smoking a pack of cigarettes per day.
A Yeah.
Q But that was part of the history that he gave you; was it not?
A Correct.
Q All right. I see a little cartoon behind you on your desk. It says, "I've got to cut back on the caffeine."

A Yeah.
Q What's the significance of the caffeine consumption?
A Large amounts of caffeine in a patient who suffers from headaches can often cause rebound type headaches. (Deposition of Susan L. Anderson, M.D., p. 17)

MRI's of Plaintiff/Appellee's brain and cervical spine were performed on July 18, 2002. The MRI of his brain revealed an old lacunar infarction in the deep white matter of the left frontal lobe with no acute changes. The MRI of Plaintiff/Appellee's cervical spine revealed significant degenerative disc disease at C5-6 and C6-7 and significant central canal stenosis but no cord compression. An MRI of Plaintiff/Appellee's head revealed no significant abnormalities. It was Dr. Anderson's belief that the majority of Plaintiff/Appellee's headaches were being caused by his significant stenosis and degenerative disc disease and his overuse of caffeine.

Plaintiff/Appellee claimed at trial that he had complained of headaches ever since the accident, but admitted he could not point to any medical record showing that prior to October 28, 1998, or after that time, until September of 2000. In this regard, he testified:

Q And you would have no explanation of why there would be no mention of nay complaint of headache when you went to the emergency room, do you?
A No. (p. 80)

* * *

Q So you told Dr. Graham about your severe headache getting worse over the past four days?
A Yes.
Q So you have no reason or explanation why there was no mention of headache in his report of June 2, 1998?
A No, I don't.
Q And you probably told him about your bad headaches over the next times you saw him in June and July of '98, didn't you?
A I complained about it constantly.
Q You still have no explanation of why there is no mention of the headache in Dr. Graham's records in June or July, do you?

A No, I don't.

* * *

Q I am asking, you mentioned to Dr. Graham on October 21, 1998, a tension headache, if it's in the record, and do you recall it, the tension headache, he didn't know whether it was related to lifestyle or work, correct? Do you agree with that?
A Yes.
Q And you probably continued to complain to Dr. Graham about your severe, excruciating headaches in 1999, didn't you, when you saw him?
A Yes.
Q Again, you have no explanation why there is no mention or use of the word headache in the records of 1999, do you?
A No.
Q You didn't see any other doctor for the headaches, did you?
A Dr. Zimmerman.
Q When you went to see Dr. Zimmerman, you agree you didn't complaint of a headache when you saw Dr. Zimmerman?
A Yes. (p. 82)

* * *

Q And you never mentioned to any doctor, did you, that you had any problems with sexual relations with your wife until you made complaint of that to Dr. Graham on 9-11 2000, two and a half years after the May, 1998 accident; do you agree with that?
A Yes. (p. 83) (Trial Transcript, pp. 80, 81, 82, 83)

Plaintiff/Appellee testified at his deposition that he was off work for approximately eight weeks following the accident, waiting for an appointment with neurosurgeon Dr. Zimmerman and an MRI, **but that he has worked full time ever since**. At the time of the accident Plaintiff/Appellee was working for Olofsson Company as a welder. Following the accident he was off work for approximately eight weeks. He was returned to work on July 27, 1998 after seeing Dr. Zimmerman.

On June 13, 1999, Plaintiff/Appellee was involved in a **head-on** collision. Plaintiff/Appellee admitted at his deposition that this subsequent automobile accident caused a

second injury to his neck. The accident occurred outside of Grayling on Highway 71. He sustained a bruise to his left knee, a scrape to his face from the air bag, and a muscular strain to the right side of his neck. Plaintiff/Appellee was seen by Dr. Ganzhorn following this accident and was taken off work until July 12, 1999. Plaintiff/Appellee admitted, at trial, that his neck was also injured in the second, and far more severe, accident, stating:

> Q Did you see Dr. Ganzhorn?
> A Yes, I did.
> Q How many times did you see him for that?
> A That once I saw him. I had a scrape somehow I got on my neck. I wanted him to just give me a general check.
> Q I believe his records will reflect that you complained of neck pain?
> A My neck was sore. (Trial Transcript, p. 63)

Dr. Graham testified that on September 11, 2000, he felt a muscle spasm in the Plaintiff/Appellee's neck. This was the only other "objective" symptom he could point to, other than the swelling he had noted on June 2, 1998. However, Dr. Graham was not informed by the Plaintiff/Appellee of the second, more serious, accident in June of 1999. Moreover, the recording of a muscle spasm was isolated and not repeated anywhere else in Dr. Graham's records. (Dr. Graham deposition, p. 17.)

Plaintiff/Appellee continued to work at Olofsson until **he was laid off in June, 2000 due to lack of work**. He admitted he has no physical condition that prevents him from working as a welder, stating at trial:

> Q How long had you been a professional welder?
> A 25 years.
> Q Do you have a physical disability that prevents you from welding?
> A No, I don't. (Trial Transcript, pp. 26-27)

Plaintiff/Appellee did not work the rest of 2000 due to lack of work. In January, 2001 Plaintiff/Appellee became employed full-time by Burton's Excavating doing snow removal, and in May, 2001 he began working for Wendrick's Truss Company, where he continues to work as

a sawyer cutting and stacking lumber up to twenty feet in length used to build trusses. The lumber the Plaintiff/Appellee is cutting and stacking includes 2 x 4's, 2 x 8's, 2 x 6's and 2 x 10's. He works a 40-hour week, and Plaintiff/Appellee has testified that he is making no claim for excess wage loss. **Other than approximately eight weeks, most of which he was just waiting for an MRI and to see Dr. Zimmerman, he has worked full time without any impairment as a result of the accident in May of 1998.**

At trial, Plaintiff/Appellee testified:

Q I think we got your work history but you worked at Olofsson's for a number of years before May of '98, correct?
A Yes.
Q After your accident you continued to work there until June of 2000 or until about two years after the May of 1998 accident, correct?
A Correct.
Q **And you were laid off for lack of work, right?**
A **Yes.**
Q **You have never been recalled, true?**
A **True.**
Q And then you got a job with Burton Excavating, basically in January of 2001 through the spring of 2001, correct?
A Yes.
Q And apparently it included a snowplow, one you pushed with your hands?
A A snowblower.
Q Snowblower, I am sorry. It's the kind we see people push with their hands?
A The one we had was self-propelled.
Q You still have to move it around?
A Yes, but I was the boss. I didn't physically use it myself.
Q You didn't use the snowblower, you watched them clean the roof at K-Mart?
A I helped. I used a snow scoop a little.
Q That's one of those things you push?
A Right.
Q So you helped with the snow scoop?
A Right.
Q You shoveled off the roof at K-Mart that winter?
A Yes.
Q Was that the only job you had or did you have other jobs for Burton?

A A little heavy equipment repair, a couple of private home roofs in between.
Q Did you use a scoop or snowblower?
A A scoop or what we call a snow rake.
Q One of those things you put up on the roof and pull down the snow?
A Right. (pp. 84-85) (emphasis added)

* * *

Q Approximately when did you go to work for Wendricks?
A That was in May, 2001, I believe.
Q And what is your job there?
A I'm what they call a sawyer. I saw all the wood for the truss builders.
Q What is your rate of pay?
A Nine seventy five.
Q Is that lighter duty work than welding?
A Oh, much.
Q Basically what do you do there?
A Feed lumber into a saw, a large machine. (p. 74) (Trial Transcript, pp. 84-85, 74)

Plaintiff/Appellee also admitted, in both his discovery deposition and his trial testimony, that the remainder of his life has not really changed as a result of this accident. As an example, he testified that he is a good gardener and enjoys mowing lawn, **and has continued to do so**. (Bruce Behnke Deposition, pg. 43, Exhibit B) He initially claimed that he did the yard maintenance and landscaping work at a motel owned by his mother, **but later admitted that his brother had been doing this work** since 1994, stating:

Q If Roland said he has done the maintenance, yard work, plowing since he moved back for your mother at the motel, is that incorrect?
A That's correct.
Q So he has done it?
A He has done it since he came back, yes.
Q Which was '93 or '94, right, or '92 or '93?
A I think it was '94.

Trial Transcript, pp. 89-90.

Plaintiff/Appellee's brother, Roland Behnke, was also deposed in this matter. The original of his discovery deposition was filed with the trial court and is a part of the court record (Exhibit H). Roland Behnke testified that since moving to Michigan in 1992, he had done all of the lawn maintenance at his mother's motel, not the Plaintiff/Appellee. (Roland Behnke Deposition, p. 18.)

Plaintiff/Appellee's wife, Angela Behnke, has also testified that the Plaintiff/Appellee has continued to mow lawns and garden, although he may do it every other week, more recently, rather than every week.

Plaintiff/Appellee testified in his deposition that he had not purchased a hunting license since 1996, two years before this accident. (Bruce Behnke Deposition, pp. 44-45, Exhibit B) His brother, Roland Behnke, testified that the Plaintiff/Appellee had not hunted since 1993 or 1994. (Roland Behnke Deposition, p. 9, Exhibit H.)

Plaintiff/Appellee testified that he used to go fishing quite a bit but, in his discovery deposition, he testified that **the only reason he has not continued fishing is because he has not had the time due to his work schedule**. (Bruce Behnke Deposition, p. 50, Exhibit B.) It has nothing to do with his alleged injury. Interestingly enough, despite his own claim he has not been fishing, the Plaintiff/Appellee's brother, Roland Behnke, testified that he and his brother continued to try and "drown some worms." (Roland Behnke Deposition, p. 12, Exhibit H)

Plaintiff/Appellee went on to testify that despite his alleged neck problems and headaches he has had sexual relations with his wife approximately once a day. In this regard he testified:

> Q When is the last time you had sexual intercourse with your wife?
> A Three days ago.
> Q So what is the frequency of your sexual intercourse with your wife?
> A We have a very good relationship. If it's not – it's usually once a day. (Deposition of Plaintiff/ Appellant, Bruce Behnke, p 58)

Plaintiff/Appellee testified at trial that he has headaches while having intercourse only about one-third of the time, stating:

> Q Does that happen all the time when you have sexual relations?
> A I would say two out of six times it happens. (Trial Transcript, p. 69)

In November, 2001, Plaintiff/Appellee reported to Dr. Zimmerman that he had severe spasms when having sexual relations with his wife. However, these spasms occur only occasionally when reaching orgasm. Dr. Graham acknowledged that Dr. Zimmerman could find no relation between the accident and Plaintiff/Appellee's alleged sexual problems in reaching orgasm. Dr. Zimmerman informed Dr. Graham that this simply happens with some people. In this regard, Dr. Graham testified:

> Q Okay. What does Dr. Zimmerman indicate in terms of the cause of that?
> A He just talks about the ice pick headaches associated with that and that coital trigger mechanism.
> Q And he indicates that's something that some people just have, correct?
> A That's what he's saying, yes.
> Q Does he relate that in any way to the auto accident in the report he sent to you?
> A Not that I can see. Deposition of Robert Graham, D.O., p. 58)

Dr. Graham went on to admit that the straightening of the lordotic curve in Plaintiff/Appellee's neck was not caused by this accident, but instead is the simple result of the congenital anatomic anomaly at C4-5, stating:

> Q All right. And that indicates, at the beginning, that he was being seen for results of the MRI. The MRI was done on 6-12-98, correct?
> A Uh-huh. "Compared with the radiographs of 5-30 demonstrates developmental anomalies, blocked vertebra at C4 and 5, hypertrophic spurring C5 and C6, normal cervical cord signal."
> Q And then what does it say?

A "Blocked—" let's see here. "Signal to block, spondylitic spurring, facet degenerative changes and small disc protrusion or bulge."
Q Wait a minute. Wait a minute. Doesn't it indicate, "The blocked vertebra of C4 and 5 results in a straightening of the normal cervical lordosis"?
A Yes.
Q And what does that mean, Doctor?
A What do you mean now? You're asking me how it got straightened or why it's straightened because of that?
Q Well, that's been described as a developmental anomaly, a blocked vertebra at C4 and 5. What does that mean to you?
A Oh, blocked is the anatomical configuration.
Q Meaning what?
A The shape of the vertebra itself.
Q Okay. And then it goes on to say that, "The blocked vertebra at C4 and 5 results in a straightening of the normal cervical lordosis."
A Right.
Q What does that mean to you?
A Well, that it's a straighter—that the loss of the lordosis or that there's less of a lordosis there than would be because of the anomaly.
Q Okay. And that's a developmental anomaly, correct?
A As far as I know, yes. (Deposition of Robert J. Graham, D.O., pp. 36–37)

Dr. Graham went on to state that he could not testify that there was any objective evidence of injury to Plaintiff/Appellee's cervical spine. He had never reviewed the x-rays or MRI's himself. He had never reviewed any prior x-rays or MRI's. He could not testify that the pre-existing, degenerative and congenital conditions noted in the x-rays and MRI's had been aggravated in any way, stating:

Q Okay. Did you ever review the x-rays of May 30th, 1998, or just the report?
A Just the report.
Q Okay. And I think you said most of the things you saw in that were from a prior condition with the exception of the straightening of the lordosis?
A Right.
Q Or the curve?
A Curve.
Q Okay. But you don't have any prior x-rays to know what it was like before?

A No. (p. 33)

* * *

Q If you look up above –I'm not trying to take advantage – of September 11, about the middle of the paragraph it says, 'There are spondylitic changes posteriorly most marked at C5 and 6, C6 and 7.'
A Right.
Q Is that what you're talking about?
A Sure.
Q How is that different from what you were seeing back in 1998?
A I guess I'd have to take the x-rays and compare them. I couldn't say.
Q You haven't done that to date, have you?
A No, I haven't. (p. 54)

* * *

Q All right. Doctor, it's true that you never have seen any of the x-rays or MRI's. You've just related to reports, correct?
A As far as I know – I can remember, yeah.
Q Okay. And you never saw any x-rays or reports of x-rays or MRI's from prior to June 2nd, '98, correct?
A No.
Q So you don't have any idea what the curvature of his spine was like prior to the accident as opposed to following the accident?...
A I have no x-rays.
Q Your answer is no, correct?
A Correct. (p. 71) (Deposition of Robert J. Graham, D.O., pp. 33, 54, 71)

Dr. Graham went on to admit that the Plaintiff/Appellee's pain complaints were essentially subjective, stating:

Q Now, you talked about how you felt there was an objective component when you did some of your exams because there was some guarding. Isn't that really a subjective symptom?
A No. If you have a sore, and I push on it, what are you going to do? You're going to pull away from it, right? That's pretty objective when you're standing there holding onto somebody, you push them, and they move away from your hand. Now, why they move away of your hand depends on the degree. Some people tolerate more than others.
Q Okay.

A Okay. So that observation is in proper response to the stimulus given. So you figure that's pretty much objective. I would.
Q But it's based on what the patient does when you push, correct?
A Right.
Q There's no independent objective response other than what the patient does, pulling away or not pulling away, correct?
A Well, yeah. That's apples and oranges, and you know it.
Q Okay. You were asked earlier if there was objective evidence of injury to this man outside of his subjective statements of neck pain. And so I guess I would ask outside of the guarding we just talked about, what objective evidence was there?
A Palpatory findings in terms of swelling, I stated. That's with my hands and touch.
Q That was on June 2nd, correct?
A Heat generated. Yeah.
Q Was there any swelling or anything like that after that time?
A I can't really say.
Q I haven't seen anything in your records.
A No.
Q Are you aware of any? Are you aware of any activities, outside of when you took him off work between June 2nd and July 27, that he was unable to do? ...
A No. (Deposition of Robert J. Graham, D.O., pp. 60-61)

Finally, Plaintiff/Appellee testified that he could do anything if he was willing to go through some pain in the form of a headache. (Bruce Behnke Deposition, p. 50, Exhibit B) Dr. Graham testified that the Plaintiff/Appellee had never complained that there were any activities he could not engage in, stating:

Q Other than the time you had him off work between June 2nd and July 27th --- and I know we talked about October of '98, I think, when you recommended light work – but are you aware of any other time that you took him off work or that this man was off work allegedly because of the injuries in this auto accident?
A Not that I'm aware of.
Q Are you aware of any activity other than work, which we talked about, that he was unable to engage in after this accident that he would have normally engaged in? ...
A No, I'm not aware of anything.
Q Okay. Thank you. Other than the two-month – roughly two-month period initially following this incident when he was off work, are you aware of him being unable to pursue his normal

pursuits? Has he ever told you that he's unable to do his normal activities?

A He's never told me that. (Deposition of Robert J. Graham, D.O., pp. 71-72)

It should be noted that in his report of July 8, 1998, Dr. Zimmerman noted that the Plaintiff/Appellee had given him a history of suffering from migraine headaches before the accident in May of 1998. Plaintiff/Appellee now denies that, claiming he only had normal headaches. However, that history would be significant to Dr. Zimmerman and as a result was duly noted by him.

Plaintiff/Appellee claims that he suffers depression as a result of this accident, but has admitted -- as has his wife, Angela – that he has never sought any treatment for depression, nor has he sought any treatment for his alleged sexual dysfunction.

In summation, Plaintiff/Appellee may have sustained a minor soft tissue neck strain as a result of a very low impact rear-end accident. While he was off work for eight weeks so that medical testing could be done and he could see Dr. Zimmerman, he has since **worked full time and without any restrictions**. He has continued to engage in his normal, every-day activities. He has never been hospitalized. He has never had any surgery. Other than some degenerative and congenital conditions in his cervical spine, not identified as traumatic in origin by any medical care provider, there is no objective evidence of any injury to the Plaintiff/Appellee. Given these facts, Defendant/Appellant contended that Plaintiff/Appellee failed to sustain a serious impairment of body function, as defined by the Michigan No-Fault Act.

Plaintiff/Appellee sought damages under the uninsured motorist provisions of his own policy. Defendant/Appellant, Auto Owners Insurance Company, denied liability on the basis that Plaintiff/Appellee did not sustain a threshold injury under the Michigan No-Fault Act. The parties stipulated to a bench trial, which took place on January 21, 2003. The trial court issued a

written opinion finding that Plaintiff/Appellee had not sustained a threshold injury on March 19, 2003 and a judgment of no cause of action was entered on April 4, 2003. Plaintiff/Appellee filed a Claim of Appeal on April 21, 2004.

On September 16, 2004, the Court of Appeals issued a non-unanimous opinion reversing the Trial Court's decision (Exhibit A). As Justice Griffin, writing the dissent, pointed out, the Majority **improperly reviewed the Trial Court's Decision "de novo."** The correct standard of review is: "... Findings of fact by the Trial Court may not be set aside (on appeal) **unless clearly erroneous**." MCR 2.613(C). Justice Griffin went on to state that, in his view, the Trial Court's findings of fact were not clearly erroneous; that the Trial Court had applied the proper legal standard to the facts (the Majority Opinion agreed with this); and he would have affirmed the Trial Court's Opinion and Order.

Defendant/Appellant subsequently filed a Motion for Reconsideration on October 4, 2004, requesting that the Court of Appeals reconsider its decision, as the two Majority judges had committed palpable error by reviewing the Trial Court's decision "de novo" rather than applying the proper "clearly erroneous" standard of review. MCR 2.613(C). Had the Court of Appeals applied the proper standard of review, a different result must occur, as substantial and plausible evidence absolutely supported the Trial Court's findings of fact. MCR 2.119 (F) (3).

## ARGUMENT

**I. THE TRIAL COURT'S FINDINGS OF FACT AND JUDGMENT OF NO CAUSE OF ACTION WAS SUPPORTED BY SUBSTANTIAL AND PLAUSIBLE EVIDENCE AND WAS NOT CLEARLY ERRONEOUS AND THE COURT OF APPEALS REVERSED THE TRIAL COURT BY APPLYING AN IMPROPER "DE NOVO" STANDARD OF REVIEW SUBSTITUTING ITS OWN FINDINGS OF FACT AND MUST BE REVERSED AND THE TRIAL COURT'S FINDINGS OF FACT AND JUDGMENT AFFIRMED.**

### A. STANDARD OF REVIEW

The "clearly erroneous" standard is to be applied by the reviewing court to the Trial Court's findings of fact and judgment following a bench trial. *Precopio v Detroit*, 415 Mich 457; 330 NW2d 802 (1982); MCR 2.613(C).

### B. DISCUSSION

MCR 2. 613(C) states:

> **"(C) Review of Findings by Trial Court.**
> Findings of fact by the trial court **may not be set aside unless clearly erroneous.** In the application of this principle, **regard shall be given** to the **special opportunity** of the trial court to judge the credibility of the witnesses who appeared before it." (Emphasis added.)

Federal civil court rule FRCP 52(A) also states, in pertinent part:

> "Findings of fact, where based on oral or documentary evidence, **shall not** be set aside unless clearly erroneous and **due regard shall be given** to the opportunity of the trial court to judge the credibility of the witnesses." (Emphasis added.)

In this case, the Trial Court issued its findings of fact and conclusions of law on March 19, 2003. The majority of the Court of Appeals did not review the Trial Court's findings of fact under the "clearly erroneous" standard. Instead, the majority improperly jumped to a de novo standard relating to reviews of summary dispositions. While the majority noted the Trial Court's findings of fact, it then overstepped its bounds by engaging in its own fact finding and issuing its own findings of fact. At no time did the majority ever find that the Trial Court's findings of fact

were clearly erroneous – they merely substituted their own fact finding opinions. They obviously did not observe the Plaintiffs/Appellants while testifying so as to first-hand evaluate their credibility on these subjective complaints, which was blatantly suspect, to be candid. The Court of Appeals majority's use of the wrong standard of review led then to the wrong result. As stated by the United States Supreme Court, in this situation of a bench trial on the merits:

> "In applying this clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is **not** to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge, as well as those of a jury, is circumscribed by **the deference it must give to the decisions of the trier of fact**, who is usually in a superior position to appraise and weigh the evidence. *Zenith Radio Corp. v Hazeltine Research*, 395 US 100, 123; 89 S.Ct. 1562, 1576; 23 L.Ed.2d 129 (1969); *U.S. v Yellow Cab Co.,* 338 US 338, 341-342; 70 S.Ct. 177, 179; 94 L.Ed. 150 (1949)." (Emphasis added.)

The United States Supreme Court has also stated:

> "**This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(A) if it undertakes to duplicate the role of the lower court**... If the district court's account of the evidence is **plausible**, in light of the record reviewed in its entirety, the Court of Appeals **may not** reverse it even though convinced that it had been sitting as the trier of fact it would have weighed the evidence differently. **Where there two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.** *Anderson v Bessemer City*, 470 US 564, 573-574; 105 S.Ct. 1504, 1511; 84 L. Ed.2d 518 (1985)." (Emphasis added.)

In *Beason v Beason*, 435 Mich 791; 460 NW2d 207 (1990), the Michigan Supreme Court specifically stated that an appellate court's review of a trial court's findings of fact is **not** a de novo review. An appellate court **must** affirm the trial court's decision unless the trial court's ruling is "clearly erroneous" under MCR 2.613(C). "... If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals **may not**

**reverse**." *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990). The Court of Appeals again attempted to avoid the application of the clearly erroneous standard. The Michigan Supreme Court again reversed the Court of Appeals, in *Beason v Beason*, 447 Mich 1023; 527 NW2d 425 (1994); Recon. Denied, 533 NW2d 311 (1995), stating that there was no clear error in the trial court's findings of fact and conclusions of law and, as a result, the trial court's decision **must** be affirmed. See also *Morris v Clawson Tank Co.*, 221 Mich App 280, 284; 571 NW2d 469 (1997).

In reviewing the entire record, the Trial Court's findings of fact are supported by clear and plausible evidence. The trial court was in a position to view the Plaintiffs/Appellants and appraise credibility and the Court of Appeals and this Court must give deference to its findings. The majority of the Court of Appeals, incredibly, simply adopts Mr. Behnke's testimony as truth without any question of credibility, yet Mr. Behnke certainly had a clear and obvious motive to exaggerate his problems and had, indeed, attempted to do so. The majority of the Court of Appeals improperly engaged in its own fact finding and ignored the facts in the record which support the Trial Court's findings, including, but not limited to, the following:

**A. Headaches**

1. Mr. Behnke gave Dr. Zimmerman and Dr. Graham a history of having pre-existing migraine headaches when he first saw him on July 8, 1998. (Dr. Zimmerman deposition, p. 7; Dr Graham deposition, pp. 31, 47, 49)

2. Dr. Graham admitted that the headaches Mr. Behnke first complained of on October 28, 1998 (five months after the accident) were related to his lifestyle or his type of work and were not related to the automobile accident. (Dr. Graham deposition, p. 42)

3. All treating doctors testified that Mr. Behnke's complaints about headaches were purely subjective and that there was no objective evidence of headaches. (Dr. Graham deposition, p. 43; Dr. Anderson deposition, p. 15; Dr. Zimmerman deposition, pp. 10, 25-26)

4. Mr. Behnke's claim that he had constant headaches was not supported by any of his treating doctors or their medical records, as the first time he complained of headaches was October 28, 1998, and he did not complain about headaches again until September 11, 2000, almost two years later and two and a half years after the accident. Mr. Behnke admitted he could not explain this. (Trial transcript, pp. 80-82)

5. Mr. Behnke testified in his deposition, which was a part of the court record and must be reviewed with the entirety of the record, that his headaches did not prevent him from engaging in any activities he chose to. (Bruce Behnke deposition, p. 50)

6. Dr. Susan Anderson testified that Mr. Behnke had "rebound headaches" caused by Mr. Behnke's overuse of caffeine and cigarettes. Otherwise, headaches were caused by his congenital stenosis and degenerative disc disease. (Dr. Anderson deposition, pp. 16-17)

**B. Lack of Objective Evidence of Injury**

1. Neurosurgeon Dr. Zimmerman never found any objective evidence of injury on either July 8, 1998 or November 21, 2000. (Dr. Zimmerman deposition, pp. 10, 25-26)

2. Dr. Graham admitted that other than a small swelling that resolved after being noted on the first visit of June 2, 1998, there was no other objective evidence of injury at any time he was treating Mr. Behnke. (Dr. Graham deposition, pp. 36-37, 60-61)

**C. Proximate Cause**

1. Dr. Anderson testified that Mr. Behnke's symptoms, at best, **could** have been, **possibly**, aggravated by the accident. (Dr. Anderson deposition, p. 10)

2. Dr. Zimmerman testified that he could not relate any of Mr. Behnke's problems or symptoms to the accident. (Dr. Zimmerman deposition, pp. 12-13)

3. Dr. Graham opined that the accident **could** have caused an aggravation of some underlying, pre-existing problem. (Dr. Graham deposition, pp. 9-10)

**D. No Serious Impairment**

1. Mr. Behnke was never hospitalized, never underwent surgery and never required physical therapy.

2. Mr. Behnke returned to full time employment on July 27, 1998 **working as a welder** (his same job he did prior to this accident) until being **laid off** in June of 2000, due to lack of work, and he admitted that he was not physically disabled as a welder (Trial transcript, pp. 26-27). Mr. Behnke had no work restrictions placed on him by his doctors and admitted that he continuously worked full time, since that unrelated lay-off, as a snow removal contractor, and more recently as a sawyer. (Trial transcript. pp. 74, 84-85)

3. Mr. Behnke never complained to Dr. Graham that he was unable to pursue his normal activities and, as far as Dr. Graham knew, his normal activities were not restricted. (Dr. Graham deposition, pp. 71-72)

4. Mr. Behnke never complained of any problems with spasm or headaches during sex until September 11, 2000, almost two and one-half years after the accident. Despite Dr. Graham's recommendation that Mr. Behnke see Dr. Zimmerman again, he did not until more than a year later, November 21, 2001. (Trial transcript, p. 83).

5. Mr. Behnke only occasionally had headaches or other problems during sex and continued to have an active sexual relationship with his wife at all times following the accident. (Trial transcript, p. 69)

## E. Credibility Issues

1. Mr. Behnke admitted, at trial, that his brother Roland had been doing the maintenance work at his mother's motel since 1994, four years before the accident. (Trial transcript, pp. 89-90)

2. After the accident, Mr. Behnke continued to garden and mow his lawn. (Bruce Behnke deposition, p. 43)

3. Mr. Behnke had not purchased a hunting license since 1996, two years before the accident (Bruce Behnke deposition, pp. 44-45). Mr. Behnke's brother, Roland Behnke, testified that Mr. Behnke had not hunted since 1993 or 1994. (Roland Behnke deposition, p. 9)

4. Mr. Behnke testified that the only reason he did not go fishing was because of his work schedule (Bruce Behnke deposition, p. 50). Roland Behnke testified that the two had tried to "drown some worms" since the accident. (Roland Behnke deposition, p. 12).

The Trial Court's finding that there was no conclusive evidence that Mr. Behnke's injury was objectively manifested was supported by substantial and plausible evidence. The Trial Court's finding that Mr. Behnke had not sustained a serious impairment of a body function is amply supported by substantial and plausible evidence. Since July 27, 21998, Mr. Behnke has worked full time; he has never been placed on any work or activity restrictions by any physician; he admitted he is able to do anything he wants to do; he continues to mow and garden; and he continues to have an active sexual relationship with his wife, only occasionally experiencing headaches or spasm, which is medically unrelated to the accident. As the Trial Court properly pointed out, these minor lifestyle changes are undoubtedly frustrating, but did not affect Mr. Behnke's ability to lead his normal life.

Mr. Behnke's credibility was also a factor in how the Trial Court made its findings of fact. Mr. Behnke tried to claim that he couldn't take care of his mother's motel anymore, but had to admit that he hadn't done so since 1994. He tried to claim he could no longer hunt or fish, but admitted that he quit hunting some years before the accident, and has not fished because of his work schedule.

The entire Court of Appeals found that the Trial Court applied the correct legal standard, as recently clarified by the Supreme Court's decision in *Kreiner v Fisher*, 471 Mich 109; 683 NW2d 611 (2004).

Where the Trial Court's findings of fact were not clearly erroneous and the Trial Court properly applied *Kreiner, supra*, and found that the Plaintiff had not sustained a serious impairment of a bodily function and was not entitled to non-economic damages, the COurt of Appeals reversal was improper. It was the majority's fact decision (which includes their ignoring of the above referenced evidence just as an example!) which is against the great weight of the evidence! Their decision is an incredible aberration, applying the wrong standard of review and further being inconsistent with the continuing line of serious impairment decisions of their fellow appellate judges.

## II. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD AND PROPERLY FOUND THAT PLAINTIFF/APPELLEE HAD NOT DEMONSTRATED AN OBJECTIVELY MANIFESTED IMPAIRMENT AND HAD NOT SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION AS A MATTER OF LAW.

### A. STANDARD OF REVIEW

The "clearly erroneous" standard is to be applied by the reviewing court to the Trial Court's findings of fact and judgment following a bench trial. *Precopio v Detroit*, 415 Mich 457; 330 NW2d 802 (1982); MCR 2.613(C).

## B. DISCUSSION

Following a Bench Trial in this matter, the Trial Court took this case under advisement so it could review the three medical depositions that had been introduced into evidence. The Trial Court also had an opportunity to review Bruce Behnke's discovery deposition, as well as the deposition of his brother, Roland Behnke. On March 19, 2003, the Trial Court issued its findings of fact and its Opinion, finding that Bruce Behnke was not entitled to recover non-economic damages stating:

> "In this case, although plaintiff suffers from headaches and neck pain, the medical evidence is inconclusive as to the cause. However, no further treatment is necessary from a neurological standpoint.
>
> As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such normally associated with headaches and occasional neck pain. Currently, plaintiff takes non-prescription medication for his headaches.
>
> Under these circumstances, the court concludes that plaintiff's myofacial strain does not constitute a serious impairment of an important body function.
>
> But even assuming that plaintiff has suffered an objectively manifested injury that impaired an important body function, the injury does [not] affect plaintiff's ability to lead his normal life.
>
> The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff testified that when the headaches and neck pain occur, he is less active and limits his usual activities. At that point, he self-medicates with over the counter pain medications. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate

> relationship with his wife despite these recurring spasms. Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff's ability to lead his normal life.
>
> No evidence has demonstrated that plaintiff suffered an objectively manifested injury of an important body function as a result of the accident. His general ability to lead his normal life was not significantly altered by this injury.
>
> Accordingly, this court concludes that plaintiff's injury was not a 'serious impairment of a body function' as defined by statute and applied by controlling case law. As such, plaintiff is not entitled to recover non-economic damages." (Trial Court Opinion, pp. 6-8)

Determining whether a person is able to live his or her normal life, requires considering whether an objectively manifested impairment has affected the course of the person's life. Assuming, for the sake of argument only, that plaintiff's brief swelling and one muscle spasm two and a half years later constitute an objectively identifiable injury, the Court must then examine how, to what extent and for how long the plaintiff's life has been affected by the impairment. The Court must examine the plaintiff's life before and after the accident, and consider the significance of the affected aspects on the course of the plaintiff's life. In order to determine whether the plaintiff's general ability to live his normal life has been affected by the general impairment, the Court should consider factors such as 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. *Kreiner v Fisher,* 471 Mich 109, 133; 683 NW2d 611 (2004).

In this case, the Trial Court engaged in exactly the type of examination called for by *Kreiner, supra.* Mr. Behnke's assertion that he experienced pain following the accident and that he has restricted his recreational activities and does not do household chores, gardening or mowing to the extent he did prior to the accident did not establish that his injuries affected his

general ability to lead a normal life, under *Kreiner, supra.* Mr. Behnke continued to hold steady employment and to engage in various recreational activities. He operated under no physician-imposed restrictions. Pain, in and of itself, cannot be relied upon to establish the existence of a serious impairment of body function, and self-imposed restrictions are insufficient to create the existence of a serious impairment of body function. *Kreiner, supra*, at 133, n 17. No evidence established that any injury Mr. Behnke suffered as a result of the accident affected his general ability to lead his normal life. The Trial Court's findings of fact in that regard were supported by substantial and plausible evidence and the Trial Court properly applied its findings of fact to the standard and test set out in *Kreiner, supra.* This Supreme Court stated, in *Kreiner, supra*:

> "In order to be able to maintain an action for non-economic tort damages under the no-fault act, the 'objectively manifested impairment of an important body function' that the plaintiff has suffered must affect his 'general ability' to lead his normal life. Determining whether the impairment affects a plaintiff's 'general ability' to lead his normal life requires considering 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... 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 a 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 plaintiffs 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." *Kreiner, supra*, at pp. 130-131. (Emphasis added.)

This Court, in *Kreiner*, went on to state:

> "In determining whether the course of plaintiff's normal life has been affected, the Court should engage in 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 plaintiff's overall life. Once this is identified, the Court must engage in an objective analysis regarding 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 affect' on the plaintiff's life is insufficient because a de

> minimis effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life.
>
> ... 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*, pp. 133-134.

In Footnote 17 of *Kreiner, supra*, the Supreme Court stated:

> "Self imposed restrictions, as opposed to physician imposed restrictions, based on real or perceived pain, **do not establish this point.**' (Emphasis added.)

One of the plaintiffs being considered by this Court in its analysis in *Kreiner, supra*, was Mr. Straub, who had sustained injuries to his non-dominant hand. The plaintiff had missed work for eight weeks. He then worked a reduced schedule for three weeks. Mr. Straub did undergo surgery, unlike Mr. Behnke. However, Mr. Straub stopped physical therapy after two visits, just as Mr. Behnke stopped after one visit. This Court concluded that Mr. Straub's general ability to live his normal life had not been affected.

As to the second plaintiff, Mr. Kreiner, this Court found that his medically documented injuries to his lower back, right hip and right leg did not constitute an impairment of an important body function, as his impairment did not affect his overall or broad ability to conduct the course of his normal life. *Kreiner, supra*, at 137. This Court pointed out that Mr. Kreiner's life after the accident was not significantly different than it was before the accident. He continued to work and was able to work with the possible exception of roofing. While Mr. Kreiner claimed certain self-imposed restrictions, he admitted those limitations did not prevent him from performing his job. He also had difficulty walking more than half a mile and could no longer hunt rabbits, but continued to hunt deer. This Court stated:

> "Looking at Kreiner's life as a whole, before and after the accident, and the nature and extent of his injuries, we conclude that his impairment did not affect his overall ability to conduct the course of his normal life. While he cannot work to full capacity, he is generally able to lead his normal life. A negative affect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life. Considered against the backdrop of his pre-impairment life, Kreiner's post-impairment life is not so different that his 'general ability to conduct the course of his normal life has been affected.'"

Applying this Court's decision in *Kreiner, supra,* to the established facts in this case, as found by the Trial Court following the Bench Trial, it is clear that the Trial Court correctly concluded that Mr. Behnke did not sustain a serious impairment of a body function because his general ability to lead a normal life had not been affected. Mr. Behnke, after missing eight weeks work due to medical testing, has worked full time. His injuries did not prevent him from working as a welder. He was laid off due to lack of work. He subsequently worked full time in snow removal and as a sawyer. He has continued to engage in gardening, household chores, and mowing the grass. He stopped hunting long before the accident involved in this case. He admitted the only reason he has not been fishing is because of lack of time due to his work schedule, although his brother Roland Behnke testified that the two of them had been fishing. Mr. Behnke admitted in his testimony that he and his wife have continued to have a social life and go dancing, and that he and his wife continue to have intimate relations on a daily basis, although he occasionally has headaches during intercourse. Simply stated, no facet of Mr. Behnke's life was actually changed in any significant manner. The "course or trajectory of plaintiff's normal life has not been affected" and "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." *Kreiner, supra*, p. 131.

The Court of Appeals Decision in this case is clearly an aberration and must be reversed. Not only did the Court of Appeals use an improper standard of review, substituting its own findings of fact for those of the Trial Court, its Opinion also stands directly in opposition to this Court's ruling in *Kreiner, supra*, and virtually all of the appellate decisions rendered since. As an example, on October 28, 2004, the Michigan Court of Appeals rendered an unpublished decision, in *Lindsay v Grinage, et al*, No. 248579, attached as Exhibit I. The Court of Appeals therein affirmed the trial court's order granting the defendant's motion for summary disposition. In *Lindsay, supra*, unlike in this case, the plaintiff did have a clearly manifested objective injury in the form of a depressed lateral tibial plateau fracture of his right knee. However, four months after the accident, the fracture was fully healed and the plaintiff was advised by his physician that he could put full weight on his leg and engage in activities as tolerated. After citing to *Kreiner, supra*, the Court of Appeals stated:

> "Plaintiff exhibited an objectively manifested impairment of his knee as a result of the accident. *Jackson, supra* [v. Nelson, 252 Mich App 643; 654 NW2d 604 (2002)]. The ability to walk is an important body function. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). Nevertheless, no evidence created a question of fact as to whether plaintiff's injury affected his general ability to lead his normal life. Plaintiff was able to resume placing full weight on his leg approximately four months after the accident. He stated that after the accident he was required to take more frequent rests breaks during activities and to adjust the manner in which he performed certain activities, but acknowledged that he was able to engage in the activities in which he participated prior to the accident. No physician restricted plaintiff from engaging in recreational activities. Self-imposed restrictions do not establish that an injury has affected a person's ability to lead his normal life. *Kreiner, supra*, at 134 n 17. No evidence showed that plaintiff's general ability t lead his normal life was adversely affected by any injury caused by the accident. Absent such evidence, plaintiff was unable to make out a prima facie case that he suffered a serious impairment of body function."

Needless to say, *Lindsey, supra*, is almost factually indistinguishable from this case. The only difference is that the plaintiff was off work for four months rather than Mr. Behnke's two

months, while he was simply waiting for his appointment with a neurosurgeon. Mr. Behnke has never had any physician-imposed restrictions. His claimed restrictions are self-imposed. He admitted he has been able to engage in all of his regular activities.

On October 28, 2004, the Court of Appeals also issued its unpublished Opinion in *Rivera v Rivera, et al*, No. 248914, attached as Exhibit J. In affirming the trial court's dismissal of the plaintiff's claim, the Court of Appeals stated:

> "An objectively manifested impairment consists of a medically identifiable injury or a condition that has a physical basis. *Jackson, supra* at 653. Plaintiff experienced back pain both before and after the accident. Pain, in and of itself, is not an objectively manifested condition, and cannot be relied upon to establish the existence of a serious impairment of body function. *Kreiner v Fisher*, 471 Mich 109, 133 n 17; 683 NW2d 611 (2004); *Kallio v Fisher,* 180 Mich App 516, 518-519; 448 NW2d 46 (1989). X-rays taken before and after the accident demonstrated no change in the condition of plaintiff's spine... No evidence presented in opposition to defendants' motion for summary disposition created an issue of fact as to whether plaintiff suffered an objectively manifested injury as a result of the accident. Absent such evidence, plaintiff was unable to make out a prima facie case that she suffered a serious impairment of body function."

This case is factually indistinguishable. Mr. Behnke suffered from headaches and pain before the accident as well as after. There are no restrictions on his activities by his physicians. The fact that he subjectively complains of pain does not constitute an objectively manifested condition. The only evidence Mr. Behnke can claim to be objective was the swelling seen on June 2, 1998, which disappeared immediately thereafter, and a single muscle spasm two and a half years later. Defendant/Appellant contends that these do not constitute objective evidence of injury and, as a result, the Trial Court properly found that Mr. Behnke had not sustained a serious impairment following the Bench Trial in this matter.

In *Dahlvig v Gordy's Mobile Home Transport, et al*, an unpublished Opinion of the Court of Appeals dated November 4, 2004, No. 248969 (attached hereto as Exhibit K), the Court of

Appeals again affirmed the trial court's grant of summary disposition. The plaintiff's chiropractor diagnosed him as suffering from muscle spasms following the accident and opined that the spasms were attributable to the accident. In this case, Mr. Behnke had one muscle spasm two and a half years after the accident. The Court stated:

> "Dahlvig's assertion that he experience constant pain following the accident and that he was unable to engage in recreational activities or do household chores to the extent he had prior to the accident did not create a question of fact as to whether his injuries affected his general ability to lead his normal life. Dahlvig continued to hold steady employment and to engage in various recreational activities. He operated under no physicians-imposed restrictions. Pain, in and of itself, cannot be relied upon to establish the existence of a serious impairment of body function, and self-imposed restrictions are insufficient to create the existence of a serious impairment of body function. *Kreiner, supra* at 133 n17. No evidence created an issue of fact as to whether any injury Dahlvig suffered as a result of the accident affected his general ability to lead his normal life. Absent such evidence, plaintiffs were unable to make out a prima facie case that Dahlvig suffered a serious impairment of body function."

In *Hewelt v Hetherington*, an unpublished Opinion of the Court of Appeals, No. 249044, dated November 9, 2004 (attached hereto as Exhibit L), the Court of Appeals affirmed a trial court's grant of summary disposition. The Court found that while the plaintiff did have an objective injury, her soft tissue cervical strain and mild TMJ symptoms did not constitute a serious impairment. In analyzing the case under *Kreiner, supra*, the court noted that the plaintiff had slight swelling two weeks after the accident and that two years later she was found to have tinnitus, TMJ dysfunction, mild disc protrusion at C6-7, and mild to moderate spasms of her neck, back and right shoulder. The plaintiff had undergone extensive physical therapy and missed one day and four months of work. Applying *Kreiner, supra*, the Court of Appeals stated:

> "Finally, we must determine whether Hewelt's impairment affects her general ability to lead her normal life. In examining whether Hewelt's overall ability to lead her pre-accident life has been affected, this Court must consider her functional abilities and activities, including how long and how pervasively these activities and abilities were affected. *Kreiner,*

> *supra*, 471 Mich 135. Although an injury need not be permanent, 'it must be of sufficient duration to affect the course of a plaintiff's life.' *Id.*
>
> Hewelt missed one day of work after the accident, and then approximately four months of work almost three years after the accident. She is able to perform all the tasks of her job as a dispatcher, although with some discomfort, including talking on the phone and using the computer. Hewelt uses a headphone to reduce tension on her neck. She continues to garden, exercise, clean the house, and take care of her family, although with discomfort and assistance. Hewelt has described her pain as 'intermittent' and rated it as a two on a scale of ten, with ten being the worst pain possible. Her treatment has consisted of bite splint therapy beginning shortly after the accident, and chiropractic manipulation and physical therapy commencing over two years after the accident. Several of Hewelt's physicians noticed her injuries improving over the course of their examinations. No surgeries were performed. As of January 2003, no doctor considered Hewelt disabled and, with the exception of the bite splint which she may continue to wear at night, Hewelt was not receiving any medical treatment for her injuries. One of defendant's doctors opined that Hewelt's condition could not be improved with further chiropractic treatment. The evidence indicates that Hewelt's ability to move her neck and jaw, to use her back to lift objects, to garden, and to sit in a chair for lengths of time has been functionally diminished since the accident.
>
> We conclude under these circumstances that Hewelt's general ability to lead her normal life has not been affected by her impairment.

*Hewelt, supra*, is almost factually indistinguishable from the instant case.

In *Miller v Purcell*, 246 Mich App 244; 631 NW2d 760 (2001), the Court of Appeals reversed the trial court's denial of summary disposition. The plaintiff had sustained injuries to her neck, arms and back, including acromioclavicular separation, as well as mild tendonitis. She initially underwent physical therapy after the accident to alleviate her pain. At the time of her deposition, the plaintiff was taking prescription pain medication daily. The Court stated:

> "However, assuming that plaintiff's injury is objectively manifested, we are satisfied that plaintiff has not suffered a serious impairment of body function because her general ability to lead her normal life has not been altered by her injury. During her deposition, plaintiff admitted that she was able to perform all the same activities that she did before the accident... Plaintiff has not demonstrated that any aspect of her day-to-day activities have been curtailed as a result of her injury. Furthermore, it

> appears from the record that plaintiff's injury was minor, she did not have to undergo a significant amount of treatment, nor is there any indication that her prognosis for recovery is anything but favorable. Plaintiff points to her inability to knit and having to type one-handed as evidence of a serious impairment of body function. While we sympathize with plaintiff, the record is clear that her general ability to lead her normal life has not been significantly altered by her injury. *Burk v Warren* (after remand), 137 Mich App 715; 359 NW2d 541 (1984), and cases cited therein."

In this case, Mr. Behnke did not sustain an objectively manifested injury, other than some short-lived swelling and a single muscle spasm two and a half years later. In *Miller, supra,* the plaintiff had sustained an acromioclavicular separation and had undergone physical therapy. Mr. Behnke stopped physical therapy after one visit. Mr. Behnke testified, at trial and in his deposition, that he was able to perform the same activities he did before the accident, although perhaps not as extensively. He did not have to undergo a significant amount of treatment. Applying the statutory standard and case law to this matter, it is clear that Mr. Behnke did not sustain a serious impairment of body function affecting his general ability to lead his normal life. Mr. Behnke could not meet his burden of proof in that regard. Following the accident, he was off work for only eight weeks. He was returned to work on July 27, 1998 and has worked full time ever since, except for a brief layoff due to lack of work. The work he has done in all of his jobs is strenuous, as he has worked as a welder, engaged in snow removal, and more recently worked as a sawyer. He has been able to do this strenuous work on a fulltime basis. Based on Mr. Behnke's own testimony, he has been able to continue participating in all of his activities of daily life, including gardening and mowing grass. He may not have been hunting, but he stopped at least two years, if not more, before the accident in May of 1998, and while he may be fishing less, he admitted that was because of his work schedule and not because of the accident. He admitted he was still able to go dancing with his wife and to enjoy regular and frequent intimate relations. In fact, Mr. Behnke could not identify any aspect of his life that had actually changed

as a result of this accident. Despite his objective complaints of pain and headaches, Mr. Behnke admitted he was able to engage in his regular activities, his normal lifestyle and, as the case law presented amply demonstrates, such evidence does not establish a serious impairment of body function.

The importance of all of this lies in the simple fact that even under the improper "de novo" standard of review used by the Court of Appeals, the Majority's opinion is directly contrary to this Court's ruling in *Kreiner, supra*, and all of the other decisions interpreting this Court's ruling in *Kreiner, supra.* Not only did the Majority of the Court of Appeals take upon itself to substitute its findings of fact for those of the Trial Court, it also failed to properly apply the tests set out in *Kreiner, supra.* As a result, this Court must reverse the Court of Appeals' decision and reinstate the Trial Court's findings of fact and affirm the Trial Court's judgment that Mr. Behnke did not sustain a serious impairment of body function.

## CONCLUSION AND RELIEF REQUESTED

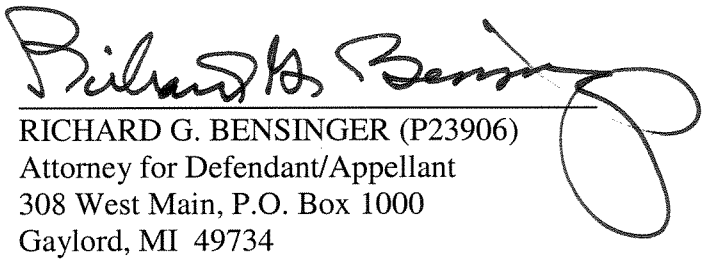
In conclusion, the Majority of the Court of Appeals, in reversing the Trial Court, committed palpable error by using an incorrect and improper standard of review, that being "de novo." Since the Trial Court had made its findings of fact following a Bench Trial in this matter, the proper standard of review was whether or not the Trial Court's findings of fact were clearly erroneous. In fact, the Trial Court's findings of fact were supported by substantial and plausible evidence and, as a result, could not be set aside by the Court of Appeals. However, the Majority Opinion improperly engaged in its own findings of fact and substituted those for the Trial Court's. For that reason alone, the Majority Opinion must be reversed and the Trial Court's findings of fact and judgment affirmed.

Interestingly, even under the standard the majority of the Court of Appeals utilized in reversing the Trial Court, the majority opinion of the Court of Appeals is incorrect as a matter of law. In fact, it is an aberration and stands directly contrary to this Court's Opinion in *Kreiner, supra*, and the vast number of decisions by other panels of the Court of Appeals. Since the Trial Court's Decision was proper and not clearly erroneous, even under a "de novo" standard of review, the Court of Appeals' Decision must be reversed and the Trial Court's findings of act and judgment of no cause of action be affirmed.

Dated: 11-18-04

Respectfully Submitted By:

BENSINGER, COTANT & MENKES, P.C.



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