

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SARA TSCHIRHART and JERRY  
TSCHIRHART,

UNPUBLISHED  
March 21, 2006

Plaintiffs-Appellants,

and

THEEDYS HAGGERTY,

Plaintiff,

v

No. 266164  
Wayne Circuit Court  
LC No. 03-338832-NO

PATRICK MICHAEL PILION and DORIS  
WALSTON,

Defendants-Appellees.

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Before: Murphy, P.J, and White and Meter, JJ.

PER CURIAM.

In this automobile negligence action, plaintiffs-appellants appeal as of right from an order granting summary disposition to defendants under MCR 2.116(C)(10).

On November 24, 2003, plaintiffs filed a complaint alleging that, on September 14, 2003, defendant Patrick Michael Pilion was operating a motor vehicle owned by Doris Walston when he negligently caused the vehicle to collide with a vehicle driven by plaintiff Sara Tschirhart (hereinafter “plaintiff”).<sup>1</sup> The complaint alleged that plaintiff suffered “[s]evere and traumatic injuries to the left side of her body” and “[s]evere and traumatic injuries to her lower extremities.”

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<sup>1</sup> The claims of plaintiff-appellant Jerry Tschirhart were derivative in nature. Theedys Haggerty was a passenger in the vehicle driven by Sara Tschirhart at the time of the accident, but Haggerty is not a party to this appeal.

On August 17, 2004, defendants moved for summary disposition under MCR 2.116(C)(10), stating that plaintiff “claims injuries including a heel spur, neck pain, knee pain and leg pain. These injuries are minor at best.” Defendants alleged that plaintiff’s “general ability to lead her normal life” had not been affected by the automobile accident. Defendants attached to their motion excerpts from plaintiff’s deposition, which was given approximately eight months after the accident. In her deposition, plaintiff testified as follows: She has resumed doing all her household chores after being unable to do them for three months following the accident. Her neck is painful, but she has a full range of motion in it. She still exercises at Curves, doing the same exercise routine she did before the accident, although she had to give up her Curves routine for approximately seven months. She still works in her yard and mows the lawn with a push-style lawnmower. She has plans for a jet-skiing trip but is unable to say whether she “will . . . be able to go.” She participates in scrapbooking and “buy[s] stuff” at a store for this hobby.

Plaintiff filed a response brief in which she alleged that the injuries resulting from the accident had indeed affected her general ability to lead her normal life. She claimed that she suffered “a high-grade PCL (posterior cruciate ligament) tear” of her left knee, which caused her to limp and therefore to develop a heel spur. Plaintiff also alleged that she had cervicalgia emanating from C6-C7 disc in her neck; she claimed this caused tenderness and a decrease in flexion and extension.

Plaintiff attached to her response brief an affidavit, dated October 25, 2004, in which she stated that she “still ha[s] excruciating pain” in her heel as well as pain in her knee and in her neck. She additionally stated:

F) I cannot do daily chores as I used to. I cannot bend down and put pressure on my knee to clean floors, the bathtub, or do yard work. I am unable to start the lawnmower.

G) I watch my granddaughter, and I am unable to pick her up because of pain in my back and neck.

H) I have not been able to participate in any recreational activities since my accident due to pain. Because it is difficult to drive due to pain, I am severely restricted in daily activities like shopping, visiting, or running errands.

I) After the accident I tried to go back to Curves to resume my exercise regiment [sic], but I was unable to do it because of pain.

The trial court, after hearing brief arguments from the parties on November 5, 2004, granted the motion, stating the following in a short opinion from the bench: “[A]lthough the plaintiff may have subjective complains of pain, she’s able to do virtually all of the things she was able to do pre-accident, [and] for that reason I have to grant defendant’s motion.”

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant because a genuine issue of material fact existed with regard the nature and extent of plaintiff’s injuries and with regard to whether plaintiff suffered a serious impairment of a body function. We disagree that the trial court erred in granting summary disposition.

We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. [*Spiek, supra* at 337.]

MCL 500.3135(1) indicates that “[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.” MCL 500.3135(7) states, “As used in this section, ‘serious impairment of body function’ means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.”

In *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004), the Supreme Court stated that

determining whether a plaintiff is “generally able” to lead his normal life requires considering whether the plaintiff is, “for the most part” able to lead his normal life.

In addition, to “lead” one's normal life contemplates more than a minor interruption in life. To “lead” means, among other things, “to conduct or bring in a particular course.” Given this meaning, the objectively manifested impairment of an important body function must affect the *course* of a person's life. Accordingly, the effect of the impairment on the course of 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 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 in *Kreiner*.]

Moreover,

[i]n determining whether the course of the plaintiff's normal life has been affected, a 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 the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's “general ability” to conduct the course of his life. Merely “any effect” 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. [*Id.* at 132-133 (emphasis in *Kreiner*).]

The *Kreiner* Court stated that a court should use the following list of factors as a guide in determining whether a plaintiff's general ability to lead his or her 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." *Id.* at 133.

In light of *Kreiner*, the trial court did not err in granting summary disposition to defendants. The excerpts from plaintiff's deposition that were included in the lower court record demonstrate that "the course or trajectory of . . . plaintiff's normal life has not been affected." *Id.* at 131. Plaintiff admitted that she has a full range of motion in her neck, that she still exercises at Curves, and that she does all her household chores and works in her yard. Apparently, she had to suspend her exercise program for some months after the accident and also needed help with housework after the accident. These temporary infringements on plaintiff's lifestyle did not, in our opinion, affect the "course or trajectory of . . . plaintiff's normal life." *Id.* We note that plaintiff filed an affidavit in which she alleged numerous ways in which the accident has affected her life. However, much of the affidavit is contradicted by her earlier deposition testimony. As stated in *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001), "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition" (internal citations and quotation marks omitted). The remaining allegations in the affidavit are insufficient to demonstrate that the course of plaintiff's life has been affected by the accident. Again, *Kreiner, supra* at 131, states:

Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold.

The trial court did not err in granting summary disposition to defendants because there was no genuine issue of material fact regarding whether plaintiff suffered a serious impairment of a body function as a result of the accident.

We need not address plaintiff's allegation that a genuine issue of material fact existed with regard the nature and extent of plaintiff's injuries because, even if such an issue existed, it was not material in determining whether plaintiff suffered a serious impairment of a body function. See MCL 500.3135(2)(a)(ii). Indeed, the record clearly indicates that no such impairment was present in this case.

Affirmed.

/s/ William B. Murphy  
/s/ Helene N. White  
/s/ Patrick M. Meter