

## Keep Your Friends Close and Affiants Closer – Court of Appeals Affirms Dismissal Due to Insufficient Affidavit

By Matthew T. Nicols

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On November 20, 2024, the Court of Appeals issued a unanimous, unpublished decision in *Scott v EAN Holdings, LLS, et al.*, unpublished opinion of the Court of Appeals, issued November 20, 2024 (Docket No. 366706), which seemed like a standard third-party auto negligence case. The Plaintiff, while stopped at a red light, was struck by Defendant’s rental vehicle. *Id.*, unpub. op 1. The Plaintiff filed suit against the at-fault driver, the rental company (EAN Holdings, LLC), and Plaintiff’s insurer (represented by Secret Wardle) seeking to recover uninsured and underinsured benefits. *Id.*, unpub. op 2. Plaintiff complained of injuries to her “neck, back, shoulder, and knees” following the accident, and sought medical treatment for same. *Id.*, unpub. op 1–2.

The Defendants all moved for summary disposition under MCR 2.116(C)(10) arguing, in unison, that Plaintiff failed to establish that she sustained an objectively manifested injury and that the accident or alleged injuries did not negatively impact her general ability to lead a normal life, as required by MCL 500.3135(1) and *McCormick v Carrier*, 487 Mich 190, 189-90 (2010). *Id.*, unpub. op 2. While Plaintiff sought treatment from a variety of medical providers for her alleged injuries and telling them that “her pain and injuries were a result of the accident,” nearly all of the providers opined that Plaintiff’s injuries were pre-existing. *Id.* The trial court granted Defendants’ Motion for Summary Disposition and dismissed Plaintiff’s suit. Plaintiff appealed by right.

### SECRET WARDLE NOTES

In third-party auto negligence, tort recovery is limited to cases where the plaintiff suffers death, serious impairment of a bodily function, or permanent disfigurement. MCL 500.3135, see also, *McCormick v Carrier*, 487 Mich 18, 189-90 (2010). Serious impairment of an important bodily function is an objectively manifested impairment of an important body function that affects the person’s general ability to lead his normal life. *Id.* This inquiry is driven by specific facts and circumstances in each case, requiring plaintiffs to proffer evidence to satisfy each element.

Recently, the Michigan Court of Appeals issued a unanimous, unpublished opinion in *Scott v EAN Holdings, LLS, et al.*, unpublished opinion of the Court of Appeals, issued November 20, 2024 (Docket No. 366706), ruling that in the absence of evidence showing the injury affects the person’s ability to lead a normal life, summary disposition remains proper.

There, the Court of Appeals affirmed the grant of summary disposition in a third-party auto negligence lawsuit based on Plaintiff’s failure to produce sufficient evidence to establish a threshold injury. Here, where the only evidence to suggest the impact of the accident on the ability to lead her normal life was an unsigned and unsworn affidavit, summary disposition was proper.

On appeal, the Court of Appeals affirmed the trial court’s grant of summary disposition. *Id.*, unpub. op 2–3. The Court’s decision was largely based on Plaintiff’s failure to produce sufficient evidence to establish a threshold injury. The panel properly observed the elements necessary to prove a serious impairment of a bodily function as “(1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person’s general ability to lead his or her normal life (influences some of the Plaintiff’s capacity to live in his or her normal manner of living).” *Id.*, unpub, op 3 (citing *McCormick*, 487 Mich at 215.) The panel further noted that in order to meet this burden, a plaintiff must proffer evidence:

that some of the person’s *ability* to live in his or her normal manner of living has been affected, not that some of the person’s normal manner of living has itself been affected. Thus, while the extent to which a person’s general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person’s normal manner of living is, there is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected. *Id.*

Here, where the only evidence to suggest the impact of the accident on the ability to lead her normal life was an unsigned and unsworn affidavit, the Court of Appeals properly found that summary disposition was warranted. While the Plaintiff attempted to offer an affidavit alleging that prior to the accident she was in good health, but the accident resulted in her general inability to live the same life, defects in the affidavit rendered it defective. Here, Plaintiff’s affidavit, while “digitally signed,” was unnotarized and undated. *Id.*, unpub. op 3. Accordingly, the affidavit could not be considered to establish a genuine issue of material fact as to whether the injuries affected Plaintiff’s ability to lead a normal life. The Court of Appeals further observed that on appeal, the Plaintiff provided a new affidavit curing those deficiencies, but the panel correctly noted that as an improper attempt to expand the record on appeal. *Id* (citing *Wolfenbarger v Wright*, 336 Mich App 1, 27 (2021). However, even if the panel were to consider Plaintiff’s affidavit, it still could not demonstrate issues of fact because it was couched in “general and conclusory” statements. *Id.*, unpub. op 4, fn. 1.

This decision, while unpublished, shows that summary disposition is still available in third-party auto negligence cases where there is an absence of sufficient evidence to meet the serious impairment of an important bodily function standard. If anything, this case should serve as a reminder that when supporting motions for summary dispositions with affidavits, that they be signed, dated, notarized, and most importantly, contain *specific* allegations rather than general conclusions.

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### Motor Vehicle Litigation Practice Group Chairs

[Anthony A. Randazzo](#) | [arandazzo@secrestwardle.com](mailto:arandazzo@secrestwardle.com) or 248-539-2812

[Matthew J. Consolo](#) | [mconsolo@secrestwardle.com](mailto:mconsolo@secrestwardle.com) or 248-539-2822

### For questions pertaining to this article

[Matthew T. Nicols](#) | [mnicols@secrestwardle.com](mailto:mnicols@secrestwardle.com) or 248-539-2834



Website



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Troy | 248-851-9500

Grand Rapids | 616-285-0143

[www.secrestwardle.com](http://www.secrestwardle.com)

## Contributors

### Motor Vehicle Litigation Practice Group

#### Chairs

Anthony A. Randazzo

Matthew J. Consolo

#### Editors

Sandie Vertel

Sue Willcock

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