

no-fault newslines

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

Reining in *McCormick*: Plaintiffs Face Hurdles When a Prior Accident Impaired Lifestyle

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SECRET WARDLE NOTES

For the seventh time in just over one year, the Michigan Court of Appeals ruled in favor of the defense in an automobile negligence claim involving a *McCormick* analysis. Applying *McCormick*, the Court in an unpublished opinion, *Lopez v. Shamrock Cab Company and Addison* (Docket No. 323811), ruled that the Plaintiff failed to establish a serious impairment of a body function, as her largely inactive pre-accident lifestyle as a result of a prior motor vehicle accident remained unaltered by the subject accident. This ruling, among the six others listed below, is a broader win for the defense as it reveals the Court of Appeals' willingness to rule on the merits of a third-party threshold case as opposed to finding a question of fact for the jury to decide.

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In *Lopez*, Plaintiff sought damages for bodily injury following a November 2012 motor vehicle accident. Plaintiff was a passenger in Defendant Shamrock Cab Company's vehicle, which was driven by Defendant Addison. Plaintiff allegedly experienced pain in her neck and back after Defendant Addison struck the rear end of a vehicle while changing lanes.

The Plaintiff, however, was involved in a prior motor vehicle accident in 2011 sustaining injuries to her neck, back, and upper extremities. Following the 2011 accident, the Plaintiff was unable to perform her job as a certified nursing assistant. Further, she underwent treatment with numerous physicians and received assistance with daily living from her daughter throughout 2011.

The trial court granted the Defendants' motion for summary disposition, finding that the Plaintiff failed to present evidence that her post-accident lifestyle was any different than her pre-accident lifestyle as the Plaintiff had limitations with daily activities as a result of the prior accident. Plaintiff appealed, arguing that she "clearly suffered serious impairment of body function" and her alleged injuries affected her general ability to lead her normal life.

Under the Michigan No-Fault Act, an individual may pursue a tort claim "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL § 500.3135(1). To determine whether a person has suffered a "serious impairment of body function," the Michigan Supreme

Court has promulgated a three part test requiring: “(1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life.” *McCormick v Carrier*, 487 Mich 180, 195 (2010).

In *Lopez*, the Plaintiff lived a largely inactive lifestyle as a result of a prior motor vehicle accident that occurred in 2011. In fact, she testified that she did not return to work as a certified nursing assistant since her 2011 accident. Additionally, after the 2011 accident, the Plaintiff required assistance with basic household chores and errands. More specifically, the Plaintiff’s daughter cooked, cleaned, ran errands, washed clothes, and helped with childcare after the 2011 accident. After the November 8, 2012, accident, when asked how her daughter assisted with household chores and daily activities, the Plaintiff similarly responded, “[w]ash, clean, take me to get my hair done, my nails done, she helps me get dressed, she help[s] me in and out of the shower, [and] she help[s] me to the bathroom.”

Plaintiff argued that she had recovered from her 2011 accident injuries and was prepared to return to work. In support of this contention, she heavily relied upon one line in her deposition, “I was calling my agency to see if I could come back to work, and she said yes. Once I was done with all of that, then she would be glad to have me back when I spoke to her.” The Court of Appeals concluded that this statement, in and of itself, was insufficient to create a genuine issue of material fact that Plaintiff was able to return to work immediately prior to the 2012 accident. Testimony that the Plaintiff could return to work at an unspecified time in the future was not enough to substantiate her claim that she was able to return to work before the 2012 accident.

Ultimately, the Court of Appeals affirmed the trial court’s granting of the Defendants' motion for summary disposition. The Court reviewed the Plaintiff’s testimony and found no change in her lifestyle after the 2012 accident as Plaintiff already required assistance with activities of daily living following the 2011 accident.

The *Lopez* decision is one of many recent appellate court rulings in favor of the defense in automobile negligence actions. For years after the 2010 *McCormick* decision, the appellate courts heard few cases addressing what exactly constitutes a serious impairment – and what does not. However, in the last year and a half, the Court of Appeals has ruled six times in favor of the defendant in such cases:

- *Lenk v. Frankenmuth*, Docket No. 317014 (Decided November 25, 2014)
- *Mehdi v. Gardner*, Docket No. 319630 (Decided March 17, 2015)
- *Nbuhn v. Pitkin*, Docket No. 320426 (Decided May 21, 2015)
- *Sigan v. Deziel*, Docket No. 320570 (Decided June 2, 2015)
- *Fuller v. Howard*, Docket No. 322439 (Decided December 1, 2015)
- *Andzelick v. Auto Club*, Docket No.324281 (Decided February 11, 2016)

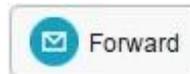
The recent rulings are a huge victory for the defense, giving hope for future success in dispositive motions and appeals in threshold cases. For an overview of significant cases, please see the following Secret Wardle *No-Fault Newslines*:

- Javon David, ["The Tide is Turning in the McCormick Era"](#)
- Alison Quinn, ["Hope Exists in the Post-McCormick Era"](#)

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