STATE OF MICHIGAN

COURT OF APPEALS

CHARLES HIGHTOWER, Plaintiff-Appellee,	UNPUBLISHED June 23, 2000
v	No. 207189 Calhoun Circuit Court
AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellant.	LC No. 96-002261-NF

Before: O'Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of the trial court granting summary disposition to plaintiff as to liability only. By granting the motion, the court ruled that plaintiff is entitled to recover no-fault personal protection insurance (PPI) benefits. We reverse and remand for further proceedings consistent with this opinion.

FACTS

Plaintiff was driving southbound on Washington Avenue in Battle Creek when he noticed a stalled van with its emergency flashers activated. The van was in the left southbound lane of Washington, just north of the intersection of Jackson and Washington. Two women, Annette Williams and Regina Powell, were standing outside of the vehicle, which was owned by Williams. Plaintiff pulled over to offer assistance to the women and was told that they needed a "jump." Plaintiff maneuvered his car so that it was parked directly in front of and facing the disabled van with a three-foot space between the vehicles. Plaintiff's car extended into the intersection, partially blocking the right westbound lane of Jackson Street. Plaintiff turned off the ignition, turned on the emergency flashers and got out of his car. He raised the hood of his car and the hood of the van and attached the jumper cables to the battery of the van. Before plaintiff could attach the jumper cables to his car, Williams' van was struck from behind by a car owned and operated by Michael Woodford,[1] defendant's insured, which caused Williams' van

[1] Woodford claimed that he was following another car and did not see the van until the other car swerved out of the lane in front of him. Woodford attempted to swerve into the right lane as well, but could not avoid hitting Williams' van.

to move forward, pinning plaintiff between his car and Williams' van. Plaintiff sustained injuries to both legs as a result of this accident.

At the time of the accident, plaintiff and Williams were both uninsured. Woodford was the only person who carried insurance, which was provided by defendant. Plaintiff sought PPI benefits from defendant, which defendant refused to pay. Plaintiff brought the instant action seeking PPI benefits from defendant. Defendant maintained that plaintiff was disqualified from PPI benefits pursuant to MCL 500.3113(b); MSA 24.13113(b), because plaintiff's uninsured motor vehicle was involved in the accident.

The parties filed cross-motions for summary disposition. The trial court granted summary disposition to plaintiff as to liability only, finding as a matter of law that plaintiff is entitled to collect PPI benefits from defendant. This Court granted leave to appeal.

ANALYSIS

MCL 500.3113(b); MSA 24.13113(b) provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
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> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect. [Footnote omitted.]

The security referenced above is automobile insurance. It is undisputed that plaintiff's vehicle was uninsured at the time of the accident. However, the parties disagree regarding whether plaintiff's vehicle was "involved" in the accident. Defendant argues that this case is factually indistinguishable from *Troutman v Detroit Auto Inter-Insurance Exchange*, 117 Mich App 376; 323 NW2d 711 (1982), where this Court held that the plaintiff's uninsured vehicle was involved in the accident that caused the plaintiff to be pinned between his vehicle and the vehicle he was attempting to jump start. The *Troutman* Court, using the "but for" analysis adopted in *Heard v State Farm Mut Auto Ins Co*, 93 Mich App 50; 286 NW2d 46 (1979) ("*Heard I*"), found that "but for [the presence of] plaintiff's uninsured vehicle, plaintiff might have avoided any injury, or suffered a much less serious one." *Troutman, supra* at 381.

However, the Supreme Court in *Heard v State Farm Mut Auto Ins Co*, 414 Mich 139, 147-148; 324 NW2d 1 (1982) ("*Heard II*"), later reversed this Court's decision in *Heard I*, rejecting the "but for" analysis relied upon in *Troutman*. In *Heard II*, the Supreme Court held that "a parked

vehicle is not 'involved in the accident' unless one of the exceptions to the parked vehicle provision [MCL 500.3106; MSA 24.13106] is applicable." *Heard II, supra* at 144 (footnote omitted).[2]

Although we reject defendant's contention that it is entitled to judgment as a matter of law pursuant to *Troutman, supra,* we nonetheless vacate the judgment in favor of plaintiff entered by the trial court. The trial court failed to consider whether plaintiff's car was reasonably parked pursuant to MCL 500.3106; MSA 24.13106, as directed by *Heard II*. Instead, the trial court relied upon *Hackley v State Farm Mut Auto Ins Co*, 147 Mich App 115; 383 NW2d 108 (1985), and *Gentry v Allstate Ins Co*, 208 Mich App 109; 527 NW2d 39 (1994). The trial court's reliance upon these cases was misplaced. Neither *Hackley* nor *Gentry* involved claims of automobile owners injured while using their uninsured vehicle. In *Hackley*, the uninsured motor vehicle owner was the plaintiff's spouse, not the plaintiff. *Hackley, supra* at 117. In *Gentry*, the vehicle the plaintiff operated at the time of his injury was insured. *Gentry, supra* at 112. Thus, neither case addressed the statutory bar to no-fault benefits upon which defendant relies in this case. Simply put, neither case supports the claim of plaintiff in the present case. Accordingly, the judgment in favor of plaintiff entered by the trial court is vacated.

We remand this matter to the trial court for further consideration of the cross motions for summary disposition. Pursuant to *Heard II,* whether plaintiff's car was involved in the accident turns upon whether it was reasonably parked at the time plaintiff sustained injury. MCL 500.3106; MSA 24.13106 provides in pertinent part:

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[2] Defendant argues that the Supreme Court's holding in *Heard II* was overruled by *Turner v Auto Club*, 448 Mich 22; 528 NW2d 681 (1995). Defendant has misinterpreted *Turner*, which, instead of overruling *Heard II,* merely limited its application to determining whether a parked vehicle is involved in the accident. The Supreme Court stated:

> To the extent that our holding in *Heard II* can be read to equate the "involved in the accident" standard with the "arising out of" standard, we now clarify that such comparisons are appropriate only when assessing whether a parked vehicle is "involved in the accident." [*Turner, supra* at 40.]

We question the logic supporting *Turner's* limitation of *Heard II*. *Turner* found that

> the concept of being "involved in the accident" under § 3125 encompasses a broader casual nexus between the use of the vehicle and the damage than what is required under § 3121(1) to show that the damage arose out of the ownership operation, maintenance, or use of the motor vehicle as a motor vehicle. [*Turner, supra* at 39.]

By distinguishing, as opposed to overruling *Heard* II, *Turner* in effect holds that the term "involved in" is broader than the term "arising out of" in all instances except when determining whether a parked vehicle is involved in an accident. *Turner* offers no logical reason for its distinction. Notwithstanding our concern, this case involves the issue of whether a parked vehicle was involved in an accident. Accordingly, we are duty bound to follow *Heard II* and, thus, we decline to apply the broader definition of "involved in" set forth in *Turner*.

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

When the material facts are undisputed the issue of whether a car is unreasonably parked pursuant to MCL 500.3106; MSA 24.13106 is not a fact question. Rather, this case presents a question of law for the trial court to determine. *Wills v State Farm Ins Cos*, 437 Mich 205, 212-213; 468 NW2d 511 (1991); *Mack v Travelers Ins Co*, 192 Mich App 691, 696; 481 NW2d 825 (1992).[3] If the trial court finds that plaintiff's car was reasonably parked at the time of this accident, then plaintiff's car was not involved in the accident as a matter of law and plaintiff is entitled to PPI benefits. Conversely, if the trial court finds that plaintiff's car was not reasonably parked at the time of the accident, plaintiff would be barred from recovering PPI benefits because his car was involved in the accident as a matter of law.

CONCLUSION

The judgment of the trial court is reversed. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[3] Since this case presents a pure legal issue on de novo review, we acknowledge that this Court could, in the exercise of its discretion, resolve the legal issue and order entry of a judgment rather than remand for resolution by the trial court. Nonetheless, we are unable to reach a majority disposition on the question of whether plaintiff's vehicle was reasonably parked. One panel member would find the vehicle unreasonably parked as a matter of law. Another panel member would find the vehicle reasonably parked as a matter of law. The third panel member declines to decide the issue, reasoning that since we are a court of error our review should be limited only to matters presented, considered and addressed by the trial court.