STATE OF MICHIGAN

COURT OF APPEALS

LAKELAND NEUROCARE CENTERS,

Plaintiff-Appellee/Cross-Appellant,

v

TITAN INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
February 6, 2001

No. 213167
Oakland Circuit Court
LC No. 97-539904-NF

Before: Smolenski, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Plaintiff brought this action seeking payment of no-fault insurance benefits for medical services rendered to plaintiff's patient, Larry J. Murff. Murff was seriously injured when his motorcycle collided with a parked car belonging to Shawn McPeters and insured by defendant. McPeters had parked his car along a highway in order to aid another motorist, Ben Johnson, in changing a flat tire. Both parties filed motions for summary disposition. The trial court granted summary disposition to plaintiff and denied summary disposition to defendant. The trial court also denied plaintiff's request for attorney fees. Defendant appeals as of right the trial court's grant of summary disposition, and plaintiff cross-appeals the trial court's denial of attorney fees. We affirm.

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Spencer v Citizens Ins Co*, 239 Mich App 291, 298-299; 608 NW2d 113 (2000). This Court considers "affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 299. "When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

The no-fault act generally excludes coverage for parked vehicles. See MCL 500.3106; MSA 24.13106. However, coverage for a parked vehicle *does* exist if, among other things, "[t]he vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred." MCL 500.3106(1)(a); MSA 24.13106(1)(a). Here, defendant claims that the trial court erred in determining that McPeters' car was parked in such a way that it caused an unreasonable risk of the bodily injury that occurred. "[W]here the facts are not disputed, the determination whether an automobile is parked in such a way so as to create an unreasonable risk

of bodily injury under the no-fault act is an issue of statutory construction for a court to decide." *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631 n 3; 563 NW2d 683 (1997).

Courts have recognized an unreasonable risk of bodily injury under the no-fault act in cases where a vehicle only slightly protruded into a traffic lane. See *Hackley v State Farm Mutual Automobile Ins Co*, 147 Mich App 115, 118; 383 NW2d 108 (1985), *Williams v Allstate Ins Co*, 144 Mich App 178, 180-181; 375 NW2d 8 (1985), and *Braun v Citizens Ins Co*, 124 Mich App 822, 823, 828; 335 NW2d 456 (1983). Here, it was undisputed that McPeters' car was parked in the left lane of traffic. There was some evidence that McPeters' car was also in the partial left shoulder, but it is clear that at least the rear of the car was within the traffic lane. Inasmuch as McPeters' car occupied the high-speed lane of I-94 at 10:30 p.m., it posed an unreasonable risk of bodily injury. *Id.* Cf. *Autry v Allstate Ins Co*, 130 Mich App 585, 594-595; 344 NW2d 588 (1983) (no unreasonable risk of bodily injury where a vehicle is parked "in a safe and prudent fashion"). Accordingly, the trial court did not err in finding, as a matter of law, that McPeters' parked vehicle posed an unreasonable risk of the bodily injury which occurred.[1]

Defendant next argues that McPeters' vehicle was not being used as a motor vehicle, as required for coverage under the no-fault act, and that the causal relationship between McPeters' vehicle and the incident was merely incidental, fortuitous, or but for. *Putkamer*, *supra* at 635-636. We disagree. "[W]here there is no dispute about the facts, the issue whether an injury arose out of the use of a vehicle is a legal issue for a court to decide and not a factual one for a jury." *Putkamer*, *supra* at 630. The Michigan Supreme Court has held that "[w]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' turns on whether the injury is closely related to the transportational function of automobiles." *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998).

Defendant claims that the car was being used as a barricade and a spotlight for Johnson's disabled vehicle. It is true that McPeters parked his car behind Johnson's car and illuminated his headlights. However, we conclude that such action did not take McPeters' vehicle out of the realm of its use "as a motor vehicle." The Supreme Court has observed that merely because a car was not moving does not mean that it was not engaged in its transportational function.

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[1] We also reject defendant's argument focusing on the reasonableness of McPeters' actions. The trial court properly observed that this was not a negligence case, and the no-fault act operates without regard to fault. *Travelers Ins v U-Haul of Michigan, Inc (On Remand)*, 235 Mich App 273, 283; 597 NW2d 235 (1999). Defendant cites *Wills v State Farm Ins Cos*, 437 Mich 205; 468 NW2d 511 (1991), in arguing that McPeters' alleged intoxication should be taken into account in this case. *Wills* held, *inter alia*, that a plaintiff who illegally travels along the shoulder of a road cannot obtain no-fault benefits after colliding with an unlighted vehicle parked on the shoulder in violation of an ordinance requiring that vehicles parked along highways display their lights. *Id*. at 212-215. The Supreme Court upheld the denial of benefits because the person traveling along the shoulder "was not in the class of plaintiffs sought to be protected by the lighted-vehicle statute." *Id.* at 213. Contrary to defendant's contention, *Wills* is inapposite to the instant case, because (1) a statutory violation is not at issue here, and (2) regardless of any intoxication, McPeters was traveling on the roadway proper and therefore was entitled to be free from the unreasonable risk of harm presented by a parked vehicle protruding into the roadway.

McKenzie, *supra* at 219 n 6. Here, McPeters' car was in use in the context of its transportational function. See *Putkamer, supra* at 636, and *McKenzie*, *supra* at 221. McPeters stopped *while traveling along the highway* to aid Johnson in changing a flat tire. The facts that he illuminated his headlights and that his car functioned as a barrier to Johnson's car were insufficient, in our opinion, to alter the car's use as a motor vehicle. Cf. *McKenzie*, *supra* at 226 (no coverage because vehicle being used as sleeping accommodations), and *Gooden v Transamerica Ins Corp of America*, 166 Mich App 793; 420 NW2d 877 (1988) (no coverage because vehicle being used as a scaffold).

We further conclude that the causal connection between Murff's injury and McPeters' parked car was more than merely incidental. Murff's injury was sufficiently tied to McPeters' use of his motor vehicle as a motor vehicle. It was McPeters' use of his vehicle as a motor vehicle, by parking on the expressway in order to aid another motorist, that directly caused the accident. Cf. *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986), *Mueller v ACIA*, 203 Mich App 86; 512 NW2d 46 (1993), *Kraeger v State Farm*, 197 Mich App 577; 496 NW2d 346 (1992), and *Auto Owners v Rucker*, 188 Mich App 125; 469 NW2d 1 (1991) (no coverage because causal connection merely incidental). The trial court properly concluded that McPeters' vehicle caused the accident in a way that was more than merely "incidental, fortuitous, or but for." *Putkamer*, *supra* at 635.

Because the trial court correctly granted defendant summary disposition based on the parked vehicle exception contained in MCL 500.3106(1)(a); MSA 24.13106(1)(a), we need not address whether summary disposition was also appropriate because the injury occurred during the "maintenance" of a motor vehicle. See MCL 500.3105(1); MSA 500.13105(1).

On cross-appeal, plaintiff claims that the trial court erred in denying plaintiff's request for attorney fees. We disagree. Michigan's no-fault statute provides for an insured's recovery of attorney fees where the no-fault insurer unreasonably delayed or denied benefits. MCL 500.3148(1); MSA 24.13148(1). "[T]he inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable." *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). A delay or denial is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Id*.

"A trial court's finding of an unreasonable refusal to pay or delay in paying benefits will not be reversed on appeal unless the finding is clearly erroneous." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999). However, a trial court's ultimate decision to deny an insured's attorney fees, based upon the no-fault insurer's reasonable basis for denying or delaying coverage, is reviewed for an abuse of discretion. *Shanafelt*, *supra* at 634-635.

Here, defendant argued that coverage for the parked vehicle involved in this case did not exist because McPeters' car was being used as a barricade and a spotlight and was not engaged in its transportational function. This was a legitimate argument. Although defendant did not prevail in the trial court, we cannot say that the trial court's finding of a legitimate question of statutory interpretation was clearly erroneous, and the trial court did not abuse its discretion in ultimately denying plaintiff's request for attorney fees.

Plaintiff additionally contends that the denial of attorney fees was inappropriate because coverage was clearly triggered under MCL 500.3105(1); MSA 500.13105(1), inasmuch as the injury arose from the "maintenance" of a motor vehicle. Although, as stated earlier, we do not reach the issue of whether the "maintenance" of Johnson's vehicle triggered coverage, we *do* conclude that a legitimate question of statutory construction existed with regard to this argument. Indeed, no case law has addressed whether coverage extends to injuries resulting from a collision with a vehicle that was not undergoing maintenance but was merely parked while aiding in the maintenance of another vehicle. A grant of attorney fees based on the "maintenance" argument would not have been appropriate.

Affirmed.

/s/ Michael R. Smolenski
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder