STATE OF MICHIGAN

COURT OF APPEALS

JODY MAY and DON EDDY, Conservators of JOSHUA EDDY, a minor,

Plaintiffs-Appellees,

v

TITAN INSURANCE COMPANY,

Defendant-Third-Party-Plaintiff-Appellant,

and

AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY,

Third-Party-Defendant.

UNPUBLISHED
January 28, 2010

No. 287250
Oakland Circuit Court
LC No. 2003-049855-NF

JODY MAY and DON EDDY, Conservators of JOSHUA EDDY, a minor,

Plaintiffs-Appellees,

v

TITAN INSURANCE COMPANY,

Defendant-Third-Party-Plaintiff-Appellee,

and

AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY,

Third-Party-Defendant-Appellant.

No. 287252
Oakland Circuit Court
LC No. 2003-049855-NF

Before: Murphy, C.J., and Jansen and Zahra, JJ.

MURPHY, C.J. (*dissenting*).

Because I would hold, as a matter of law, that the van was parked in such a way as to cause an unreasonable risk of bodily injury to Joshua Eddy, which did occur, I respectfully disagree with and dissent from the majority opinion. Accordingly, in Docket No. 287250, I would affirm the trial court's ruling that granted summary disposition in favor of plaintiffs, entitling Joshua to no-fault personal protection insurance (PIP) benefits. With respect to Docket No. 287252 and American Fellowship Mutual Insurance Company's argument that the trial court erred in granting summary disposition in favor of Titan Insurance Company (Titan) on Titan's third-party complaint, I find it unnecessary to proceed with an analysis and express a position, given the posture of the opinions issued by us today.

MCL 500.3105(1) provides, "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 215; 580 NW2d 424 (1998), our Supreme Court interpreted this provision, holding 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."

The *McKenzie* Court ruled that, with respect to parked motor vehicles, § 3105 is implicated along with MCL 500.3106, which specifically addresses parked motor vehicles. MCL 500.3106 provides in relevant part:

> (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.

The *McKenzie* Court, citing *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997), stated that there is a three-step analysis in determining coverage in regard to injuries relating to a parked motor vehicle. *McKenzie*, 458 Mich at 217 n 3. First, it must be shown that one of the exceptions under § 3106 is applicable, e.g., the car was parked in a manner causing an unreasonable risk of bodily injury. *Id.* Second, it must be shown that the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle as a motor vehicle. On this element or step, the *McKenzie* Court applied its interpretation of § 3105, which forces consideration of whether the injury is closely related to the transportational function of the vehicle. *Id.* Third, and finally, it must be shown that "'the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for.'" *Id.* (citation omitted).

Here, because of a stipulation by the parties that the only issue to be resolved concerned the applicability of the exceptions to the parked vehicle exclusion under § 3106, any issues regarding § 3105 and "transportational function" were rendered moot, and I do agree with that part of the majority's analysis addressing and rejecting Titan's attack on the stipulation. Therefore, the three-step analysis is whittled down to two steps – whether the van was parked in such a way as to cause an unreasonable risk of bodily injury, § 3106(1)(a), and whether Josh's injury had a causal relationship to the parked van that was more than "incidental, fortuitous, or but for," *McKenzie*, 458 Mich at 217 n 3.

In *Stewart v Michigan*, 471 Mich 692; 692 NW2d 376 (2004), our Supreme Court analyzed the parked vehicle exception in § 3106(1)(a). The Court first indicated that "[w]hen 'the facts are undisputed, the determination of whether an automobile is parked in such a way as to create an unreasonable risk of bodily injury within the meaning of § 3106(1)(a) is an issue of statutory construction for the court.'" *Id.* at 696, quoting *Wills v State Farm Ins Co*, 437 Mich 205, 208; 468 NW2d 511 (1991). The underlying facts are not in dispute in the case at bar, and the parties agreed to have the trial court decide the issue of § 3106's applicability as a matter of law. This Court reviews de novo a trial court's decision on a motion for summary disposition, *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004), as well as matters of statutory construction, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

Moving to the substance of the "unreasonable risk" exception found in § 3106(1)(a), the *Stewart* Court stated:

> Contrary to the reasoning of the Court of Appeals, the statutory language in MCL 500.3106(1)(a) that is at issue (i.e., a vehicle may be parked in such a way "as to cause unreasonable risk . . .") recognizes that there are degrees of risk posed by a parked vehicle. The statutory language does not create a rule that whenever a motor vehicle is parked entirely or in part on a traveled portion of a road, the parked vehicle poses an unreasonable risk. In each case cited by the Court of Appeals it was determined that the vehicle involved posed an unreasonable risk (because it was parked partly or entirely on the traveled portion of a road). But that does not mean that the same result must necessarily obtain in a situation such as this, in which the parked vehicle was a police cruiser performing emergency services. Indeed, we find that the police cruiser in this case was not parked in such a fashion as to pose an *unreasonable* risk. We have no doubt that the cruiser posed a risk to other northbound vehicles and their occupants, and we have no doubt that, as the Court of Appeals said, the operator of the motorcycle had to perceive, react to, and navigate around the police cruiser. But none of this answers the question whether the parked police cruiser constituted an *unreasonable* risk. [*Stewart*, 471 Mich at 697 (emphasis and omission in original).]

"[F]actors such as the manner, *location*, and fashion in which a vehicle is parked are material to determining whether the parked vehicle poses an unreasonable risk." *Id.* at 698-699 (emphasis added). The *Stewart* Court relied in part on *Miller v Auto-Owners Ins Co*, 411 Mich 633, 639-641; 309 NW2d 544 (1981). *Stewart*, 471 Mich at 698. In *Miller*, the Supreme Court expressed:

> Section 3106(a), which excepts a vehicle parked so as to create an unreasonable risk of injury, concerns the act of parking a car, which can only be done in the course of using the vehicle as a motor vehicle, and recognizes that the act of parking can be done in a fashion which causes an unreasonable risk of injury, as when the vehicle is left in gear or with one end protruding into traffic. [*Miller*, 411 Mich at 640.]

As is evident from *Stewart* and *Miller*, the location where a motor vehicle is parked can create or cause an unreasonable risk of injury. Here, the van was parked in the "pit area," just beyond the end of a 90-foot motocross straightaway where the track made a 90-degree turn. Other vehicles were parked in the pit area, but none were as close to the track as the van. Motorcycles coming down the straightaway and toward the direction where the van was located had to jump a large hill, flying 20 to 30 feet in the air, land and immediately brake hard, and then quickly navigate the sharp 90-degree curve in the track. The only barrier between the track and the van was a snow fence and some bales of straw. I find that, given these circumstances, the van was parked in such a way as to cause an unreasonable risk of bodily injury to Joshua, which did occur. I will elaborate and provide further reasoning below.

In regard to whether Joshua's injury had a causal relationship to the parked van that was more than "incidental, fortuitous, or but for," the motorcyclist fell off his motorcycle while coming down the straightaway, and the errant motorcycle struck a wheelchair ramp on the van, hit Joshua's friend who ultimately died, and it then struck the passenger-side door of the van, shattering the door's window. Finally, the motorcycle ricocheted off the van and hit Joshua who was standing next to the van. Therefore, the reason that Joshua was struck by the errant, unmanned motorcycle was that he was standing next to the van and the motorcycle bounced off the van. If the van had not been parked at that spot in the pit area, Joshua would not have been injured. Accordingly, I find that the necessary causal relationship existed.

The majority opinion provides:

> [T]he risk was present before the van was parked. If the risk was present before the van arrived, it cannot be maintained that the van caused the risk of harm. . . . [A]necdotally, the risk of being struck by an errant motorcycle increases the closer the van parks to the track. However, the van did not elevate the risk of being struck by an errant motorcycle by *parking* near the track. At best, the van elevated the risk of being struck by an errant motorcycle by *driving* closer to the track. The manner in which the van was parked did not cause the risk of being hit by an errant motorcycle. [*Ante* at __ (emphasis in original).]

At first glance, this reasoning appears persuasive, but I find that, on closer inspection, the reasoning falls short of supporting the majority's position that § 3106(1)(a) was not satisfied. The risk that was created by parking the van too close to the motocross track was to the occupants of and persons associated with the parked van itself. The risk of injury to them could not have arisen and been present before they even arrived in the van and parked the vehicle where it was ultimately parked, i.e., dangerously close to the motocross track. The "risk of the bodily injury [to Joshua] *which occurred*," § 3106(1)(a) (emphasis added), did not exist before the van was parked, as absent the van, Joshua would not have been present at the accident scene,

nor would the motorcycle have hit the van, ricocheted, and struck Joshua. The risk to be examined is not merely that of an errant motorcycle careening out of control. Instead, we need to contemplate the risk of bodily injury created or caused by parking the van in an area where it could be struck by an errant motorcycle careening out of control.

While possibly having a bearing on the extent or reasonableness of a risk, there is no difference, analytically or conceptually speaking, between the situation here and one in which, as a classic example, a person in or next to a parked vehicle is injured when the vehicle is struck after being parked entirely in a lane of travel or parked partially on the roadway and partially on the shoulder of the road.

In *Hackley v State Farm Mut Automobile Ins Co*, 147 Mich App 115; 383 NW2d 108 (1985), the plaintiff was driving a Volkswagen when the engine stalled, and he was able to maneuver the vehicle onto the right-hand shoulder of the roadway where he parked, but a portion of the car protruded into the right-hand lane of traffic. The plaintiff exited the vehicle and proceeded to the rear of the car in order to check the engine. While the plaintiff was bent over inspecting the engine, he was injured when struck by an oncoming truck. *Id.* at 117. The Court stated:

> Further, the Volkswagen's status as a parked vehicle does not stand as a bar to the recovery of benefits under the parked vehicle exclusion of section 3106(1) since an exception was provided where "[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). Plaintiff's Volkswagen was clearly parked in such a manner since the rear portion of the vehicle partially blocked the right-hand lane of the road. [*Hackley*, 147 Mich App at 118 (alteration in original).]

In *Lankford v Citizens Ins Co of America*, 171 Mich App 413; 431 NW2d 59 (1988), plaintiff Lankford was driving a rental car when he collided with another vehicle. Lankford exited his car and pushed the vehicle to the curb, but he was unable to push it off the roadway because of the curb. He then walked to the front of the car to assess the damage. While Lankford "was bending over the front of the car, with his right knee touching the front bumper and his right hand on top of the car's hood, another automobile, driven by an uninsured motorist, struck the rented vehicle from behind." *Id.* at 415. The rental car lurched forward and struck Lankford, causing injury. *Id.* This Court stated that Lankford's rental car was parked in such a way as to cause an unreasonable risk of the injury that Lankford incurred, where the car was not pushed off the roadway and remained in a traffic lane. *Id.* at 415-416.

In *Hackley* and *Lankford*, an unreasonable risk of bodily injury to parties standing next to their parked vehicles was caused by the parked vehicles being left in the path of traffic, in whole or in part. Here, the van, while not being parked on the motocross track itself, was nonetheless unsafely parked near a curve in the track, making it susceptible to being struck and endangering its occupants. And we are not dealing with ordinary vehicular traffic like in *Hackley* and *Lankford* but with speeding motorcycles that were jumping hills, which provides a good reason to look beyond the track itself and to consider a vehicle parked in the pit area next to the track for purposes of § 3106(1)(a). In my opinion, under the facts presented and recited above, a risk of bodily injury arose when the van was parked in the pit area, and I further find that the risk was

unreasonable. In both *Hackley* and *Lankford*, a second motor vehicle plowed into the area where a parked vehicle was located, causing injury to a party standing next to the party's parked vehicle. That is essentially what occurred here, except that a motorcycle was involved. The majority opinion indicates that the van did not elevate the risk of bodily injury as a result of being parked close to the track; rather, the risk was only elevated as a result of driving the van closer to the track. I have difficulty grasping the majority's reasoning, as certainly the same can be said for the parked vehicles in *Hackley* and *Lankford*, yet this Court found that § 3106(1)(a) was satisfied in those cases. The majority opinion suggests that the presence of the van in the pit area added nothing to the danger, where Joshua would have been in just as much danger had he simply been standing in the same spot in the pit area viewing the race with no van present. However, the injured parties in *Hackley* and *Lankford* would also have been at risk absent their vehicles had they merely been standing on the roadway where their vehicles had been present. The majority opinion posits that the manner in which the van was parked did not cause the risk of being hit by an errant motorcycle. The majority appears to be arguing that the way in which the van was turned or pointed made no difference to the issue of risk and therefore the "unreasonable risk" exception was inapplicable. But this argument ignores the cases such as *Stewart*, *Miller*, *Hackley*, and *Lankford*, which clearly indicate that it is the mere presence of a vehicle in a dangerous or hazardous spot or location that can give rise to invocation of § 3106(1)(a).

In sum, I would hold, as a matter of law, that the van was parked in such a way as to cause an unreasonable risk of bodily injury to Joshua Eddy, which did occur, and thus I respectfully disagree with and dissent from the majority opinion. Accordingly, I would affirm the trial court's ruling that granted summary disposition in favor of plaintiffs, entitling Joshua to no-fault PIP benefits.

/s/ William B. Murphy