# STATE OF MICHIGAN

# COURT OF APPEALS

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| DANIEL P. MARCOUX,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>November 8, 2011 |
| v | No. 299559<br>Ingham Circuit Court |
| HOME OWNERS INSURANCE COMPANY,<br><br>Defendant-Appellee. | LC No. 09-001707-NF |

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Daniel Marcoux, appeals as of right from the trial court's order granting defendant, Home Owners Insurance Company, summary disposition under MCR 2.116(C)(10). We affirm.

## I. BASIC FACTS

In the early morning hours of February 2, 2009, Marcoux gave a friend a ride home on a borrowed snowmobile. While travelling across a frozen lake, Marcoux hit a bump, and the snowmobile's headlight assembly fell out of its housing. Marcoux and his friend looked for the headlight but could not locate it because it was very dark. Marcoux and his friend then continued on without it.

Marcoux dropped his friend off at home and then continued on to his own home. While travelling southbound on a residential street, Marcoux collided with the rear of a white van partially parked in the southbound lane of the two-lane street. Sergeant Eric Tiepel and Deputy Michael Max of the Roscommon Sheriff's Department arrived at the scene at about 2:10 a.m.

Sergeant Tiepel and Deputy Max turned south onto the street enroute to the scene and immediately saw the parked van from a distance of 310 feet. Sergeant Tiepel smelled alcohol on Marcoux's breath. Paramedics transported Marcoux to the hospital. As a result of the accident, Marcoux suffered numerous facial fractures, a shattered right femur, and a fractured clavicle. Marcoux's blood alcohol level was 0.12 grams per 100 milliliters.

Home Owners insured the owner of the van. The owner of the van moved the van onto the street after getting stuck in his driveway and, after having mechanical difficulties, left the van parked along the street for fear of becoming stuck in the driveway again. The van blocked

approximately one-half of the southbound lane. Sergeant Tiepel testified that from the degree of damage, the severity of Marcoux's injuries, and the degree to which the impact had moved the van, he estimated that Marcoux travelled in excess of 25 miles per hour when the collision occurred. Marcoux agreed with Sergeant Tiepel's estimate.

Marcoux filed suit seeking recovery of personal injury protection (PIP) insurance benefits under the no-fault act. Marcoux alleged that the owner of the van parked it in a manner that posed an unreasonable risk of bodily harm under MCL 500.3106. Home Owners moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the van was not unreasonably parked in the road. The trial court granted the motion, stating:

> THE COURT: So I think it appears that had [Marcoux] been acting as a reasonably prudent person, he would have had ample opportunity to observe, react to, and avoid the hazard posed by the van.
>
> So, therefore, the Court finds that the van did not pose an unreasonable risk within the meaning of MCL 500.3106(1)(a).

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

Marcoux argues that the trial court erred in granting Home Owners summary disposition because the owner of the van parked it in such a way as to pose an unreasonable risk of bodily harm. Marcoux also argues that the trial court erred by considering his fault with regard to the collision when grating Home Owners summary disposition.

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law.[1] When reviewing a motion for summary disposition under MCR 2.116(C)(10), the Court must "consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party."[2] We review de novo a trial court's decision on a motion for summary disposition.[3] We also review de novo a question of statutory interpretation.[4]

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[1] *Bourne v Farmers Ins Exch*, 449 Mich 193, 197; 534 NW2d 491 (1995).

[2] *Id*.

[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] *Cardinal Mooney High School v Mich High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

## B. UNREASONABLE RISK OF BODILY HARM

Marcoux argues that the trial court erred in granting Home Owners summary disposition because the owner of the van parked it in such a way as to pose an unreasonable risk of bodily harm. Marcoux also argues that the trial court erred by considering his fault with regard to the collision when granting Home Owners summary disposition.

MCL 500.3106 provides in pertinent 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:
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> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

When the facts are undisputed, the question whether a vehicle was parked in such a way as to create an unreasonable risk of bodily injury is a question of statutory interpretation for the court.[5]

The Michigan Supreme Court has held that the language of MCL 600.3106(1)(a) "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."[6] Rather, "factors 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."[7]

In *Stewart v Michigan*, a motorcyclist struck the rear of a police cruiser parked in a lane of traffic on a five-lane highway to assist a stalled vehicle in that lane. Both the police cruiser and the disabled vehicle had emergency lights activated. The speed limit on the highway was 45 miles per hour.[8] The Court in *Stewart* held:

> In this case, a police cruiser was parked in a travel lane, but it was parked in an area that was well lit, with its emergency lights flashing, with its spotlight on, and it was parked there for the purpose of providing necessary emergency services to a stalled vehicle that itself posed a risk of bodily injury. The stalled vehicle ahead of it also had its flashing lights on. The speed limit was forty-five miles an hour. Moreover, there was another northbound lane available, and the middle turn lane was potentially available for other vehicles to use. There is nothing in the record to suggest that an oncoming northbound driver would not have ample opportunity

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[5] *Stewart v Michigan*, 471 Mich 692, 696; 692 NW2d 376 (2004).

[6] *Id*. at 697.

[7] *Id*. at 698-699.

[8] *Id*. at 693-694, 699.

> to observe, react to, and avoid the hazard posed by the police cruiser. In short, we find that the parked police cruiser in this case did not pose an unreasonable risk within the meaning of MCL 500.3106(1)(a).[9]

Marcoux notes that under the Michigan Vehicle Code, a vehicle must not be parked "on a limited access highway" except in cases of emergency or mechanical failure.[10] Marcoux further notes that the Code cites *Hackley v State Farm Mut Auto Ins Co*,[11] for the proposition that a parked vehicle protruding into the traveled portion of a roadway presents an unreasonable risk of injury. However, the street on which the accident occurred was not a limited access highway.[12] Rather, it was a residential street. Moreover, *Hackley* was decided prior to November 1, 1990, and does not constitute binding precedent.[13] *Hackley* also does not engage in the analysis required by *Stewart*. Therefore, we do not find *Hackley* determinative and instead rely on the analysis provided by *Stewart*.

Here, the parked van was more than 300 feet from the nearest cross street and impeded only one-half of one lane on a lightly travelled residential road with a speed limit of 25 miles per hour. The accident occurred in the early hours of the morning, unlike the accident in *Stewart*, but traffic was not as heavy as in *Stewart*. Similar to *Stewart*, approaching drivers had ample opportunity to observe the van. This supports a conclusion that drivers could react to and avoid the hazard it posed either by moving partially into the oncoming lane, if it was clear to do so, or by stopping behind the van until oncoming traffic cleared. Thus, we conclude that the trial court did not err in concluding that the van in this case did not pose an unreasonable risk of the bodily injury. Accordingly, the trial court did not err in granting summary disposition.

C. USING MARCOUX'S ACTIONS TO ASSESS FAULT

At the hearing on Home Owner's motion, the trial court stated:

> THE COURT: So I think it appears that had [Marcoux] been acting as a reasonably prudent person, he would have had ample opportunity to observe, react to, and avoid the hazard posed by the van.

The trial court held that a reasonable driver would have had ample opportunity to observe, react to, and avoid the hazard presented by the van. The trial court based its holding on

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[9] *Id*. at 699 (emphasis in original).

[10] MCL 257.671(1).

[11] *Hackley v State Farm Mut Auto Ins Co*, 147 Mich App 115, 118; 383 NW2d 108 (1985).

[12] A "limited access highway" is defined as "every highway, street, or roadway in respect to which owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only, and in such manner as may be determined by the public authority having jurisdiction over such highway, street or roadway." MCL 257.26.

[13] MCR 7.215(J)(1).

the manner, location, and fashion in which the van was parked. Any statement by the trial court regarding Marcoux's actions served merely to summarize evidence or to explain why the accident took place despite the reasonable manner in which the owner parked the van. Thus, we conclude that the trial court did not erroneously consider evidence of Marcoux's fault in this case.

## III. ADOPTION OF WITNESS TESTIMONY

Marcoux's argument that the trial court erred by adopting the opinion testimony of Sergeant Tiepel and Deputy Max regarding the ultimate issue in this case, that is, whether the van was reasonably parked, is unpreserved, not properly presented, and without merit. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[14]

We affirm.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

[14] *Jenkins v Raleigh Trucking Servs, Inc*, 187 Mich App 424, 430; 468 NW2d 64 (1991).