STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF THE MIDWEST, Plaintiff-Appellant,	UNPUBLISHED June 20, 2019
v	No. 344221 Wayne Circuit Court
EUGENE D. WRIGHT, Defendant-Appellee.	LC No. 18-001816-CZ

Before: BECKERING, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Citizens Insurance Company of the Midwest, appeals as of right the order denying plaintiff's motion for summary disposition, dismissing plaintiff's cause of action, and ordering that defendant is entitled to no-fault personal injury protection (PIP) benefits under MCL 500.3106(1)(a). We affirm.

I. BACKGROUND

This case arises out of an accident that occurred while defendant was driving his motorcycle down Evergreen Road in Detroit, Michigan around 9:30 p.m., on August 5, 2017. Defendant and two of his friends were each driving their own motorcycles in a "two and one" formation northbound on Evergreen Road. Defendant and one friend were driving in the front, and the other drove behind them. Defendant drove on the right side of the lane, closest to the side of the road. As defendant drove down the road, Matthew Patterson, who was both intoxicated and inside a pick-up truck illegally parked in a "no standing" area at the side of the road, opened the driver's side door of his truck. Defendant was unable to avoid the door and crashed into it, causing him to sustain a broken right hand and a fractured right knee. Although Patterson's truck was undisputedly parked illegally, numerous other vehicles were identically, and legally, parked along the same road.

Because defendant did not have a no-fault policy on his motorcycle, defendant completed an Application for Personal Injury Protection (PIP) Benefits with the Michigan Assigned Claims Plan (MACP). The MACP assigned plaintiff's claim for PIP benefits to plaintiff. Plaintiff

denied defendant's application on the grounds that defendant's collision was a "motorcycle accident" under MCL 500.3101(2)(g) rather than a motor vehicle accident under MCL 500.3105, and the collision did not meet any of the parked vehicle exceptions under MCL 500.3106. Plaintiff also filed a complaint for declaratory relief, asserting the same grounds cited in its denial of defendant's application for benefits. The trial court disagreed with plaintiff, finding that Patterson's truck had been parked in such a manner as to cause unreasonable risk of injury, so the parked vehicle exception in MCL 500.3106(1)(a) applied. The trial court therefore dismissed plaintiff's cause of action and held that defendant was entitled to no-fault PIP benefits. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision to deny a motion for summary disposition." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). A motion for summary disposition under MCR 2.116(C)(10) challenges the "factual adequacy of a complaint on the basis of the entire record, including affidavits, depositions, admissions, or other documentary evidence." *Gorman v American Honda Motor Co*, *Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). "In deciding a motion for summary disposition pursuant to MCR 2.116(C)(10) and reviewing that decision on appeal, courts must consider any evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists." *Yoches v City of Dearborn*, 320 Mich App 461, 478-479; 904 NW2d 887 (2017). This Court reviews a trial court's decision to dismiss a case for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014). This Court reviews statutory construction de novo. *Stewart v Michigan*, 471 Mich 692, 696; 692 NW2d 376 (2004).

III. APPLICABLE LEGAL PRINCIPLES

Under the no-fault act, an "insurer is responsible for paying first-party PIP benefits 'for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.' " *Stewart*, 471 Mich at 696, quoting MCL 500.3105(1). In order to be entitled to no-fault benefits for an injury that resulted from an accident with a parked vehicle, the person claiming entitlement must demonstrate the following:

> (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation maintenance, or use of the parked motor vehicle *as a motor vehicle*, and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental fortuitous, or but for. [*Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 635-636; 563 NW2d 683 (1997) (emphasis in original)].

The second and third prongs are clearly established. The parties do not dispute that defendant's injury arose out of Patterson's use of the truck as a motor vehicle. See *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 219; 580 NW2d 424 (1998).[1] Moreover, there is no indication that Patterson used his truck for any reason other than for transportation purposes. There is also no dispute that defendant's injury had a causal relationship to Patterson's truck. Defendant's injury was the direct result of contact with the driver's door of the truck. Therefore, because motorcycles are not considered "motor vehicles" for purposes of the no-fault statute, MCL 500.3101(2)(i)(*i*), the case turns on whether any of the "parked vehicle exceptions" enumerated in MCL 500.3106(1) are present.

IV. VEHICLE DOOR AS EQUIPMENT UNDER MCL 500.3106(1)(B)

Defendant contends for the first time on appeal that he is also entitled to recover no-fault benefits under MCL 500.3106(1)(b) because the door of Patterson's truck is considered "equipment" within the meaning of the statute. Defendant arguably waived this argument by conceding in the trial court that MCL 500.3106(1)(b) was inapplicable. "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Braverman v Granger*, 303 Mich App 587, 608; 844 NW2d 485 (2014) (quotation omitted). Nevertheless, the nature of the door is a question of law for which all relevant facts have been established, and the question is important to a complete resolution of the issues properly before us on appeal. We will therefore address this argument. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). We disagree with defendant's argument that the door is "equipment" because, as we will discuss further below, it is instead a "constituent part of the vehicle."

Pursuant to MCL 500.3106(1)(b), an exception to the parked vehicle preclusion exists if, in relevant part, "the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process." Our Supreme Court has explained that:

> MCL 500.3106(1)(b) centers on the distinction between "equipment" and "the vehicle." "Equipment" is defined as "the articles, implements, etc., used or needed for a specific purpose or activity," while "vehicle" is defined as "any means in or by which someone or something is carried or conveyed: *a motor vehicle*" or "a conveyance moving on wheels, runners, or the like, as an automobile." *Random House Webster's College Dictionary* (1997). Because all functioning vehicles must be composed of constituent parts, no single article constitutes "the vehicle." This reality creates the potential for the definition of

[1] In *McKenzie* the Court noted that, although a vehicle is "most often used 'as a motor vehicle,' i.e., to get from one place to another," the Legislature clearly intended to exclude situations where a vehicle is used for other purposes such as "a housing facility, advertising display, construction equipment base, public library, or museum display[.]" *McKenzie*, 458 Mich at 219.

> "equipment" to engulf that of "the vehicle." However, the language of MCL 500.3106(1)(b) forecloses this possibility by requiring that the "equipment" be "mounted on the *vehicle*," which indicates that the constituent parts of "the vehicle" itself are not "equipment." [*Frazier v Allstate Ins Co*, 490 Mich 381, 384-385; 808 NW2d 450 (2011) (emphases in original).]

Our Supreme Court concluded that because the plaintiff in that case "was in contact with the *door* of the vehicle at the time of her injury, she was clearly in contact with the vehicle itself, not with 'equipment' mounted thereon." *Id*. at 386 (emphasis in original). Furthermore, *Frazier* repudiated earlier precedent to the extent it held that a car door that caused an accident when opened into traffic might satisfy the "equipment" exception. See *Woodring v Phoenix*, 325 Mich App 108, 116; 923 NW2d 607 (2018).[2] Irrespective of any waiver, we are therefore obligated to substantively reject defendant's argument that the door to Patterson's vehicle was "equipment" for purposes of satisfying MCL 500.3106(1)(b).

V. ILLEGAL PARKING AS "UNREASONABLE RISK" UNDER MCL 500.3106(1)(A)

Pursuant to MCL 500.3106(1)(a), an exception to the parked vehicle preclusion exists if "[t]he vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred." Our Supreme Court has emphasized that the statute "recognizes that there are degrees of risk posed by a parked vehicle." *Stewart*, 471 Mich at 697. 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." *Id.* To determine whether a vehicle is parked in such a manner as to cause an unreasonable risk of bodily injury, "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." *Id*. at 698-699.

"[W]here the facts are undisputed and the [plaintiff] is relying on a violation of a statute to establish [the requisite] unreasonableness, it is a question of law for the court." *Wills v State Farm Ins Co*, 437 Mich 205, 213; 468 NW2d 511 (1991). Significantly, the fact that a vehicle is parked illegally is not alone sufficient to render the vehicle unreasonably parked within the meaning of MCL 500.3106(1)(a). See *id*. at 214; see also *United Southern Assur Co v Aetna Life & Cas Ins Co*, 189 Mich App 485, 491-492; 474 NW2d 131 (1991). Therefore, the fact that Patterson's truck was parked in a no standing zone does not alone mean that the truck was parked in such a manner as to cause an unreasonable risk of bodily injury. Thus, the issue is whether the truck was parked in such a manner, location, and fashion as to cause unreasonable risk of injury.

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[2] In *Woodring*, this Court observed that in *Lefevers v State Farm Mut Auto Ins Co*, 493 Mich 960, 960; 828 NW2d 678 (2013), our Supreme Court carefully identified a specific and limited single paragraph from *Miller v Auto-Owners Ins Co*, 411 Mich 633, 640; 309 NW2d 544 (1981), that had been disavowed by *Frazier*. That paragraph discussed the "equipment" parked vehicle exception, which at the time was located in substantially identical language at MCL 500.3106(b).

Although it is undisputed that Patterson was parked illegally, the evidence indicates that Patterson was not parked unreasonably dangerously merely because he was parked in a "no standing" zone intended for busses to stop. The evidence is that there was nothing physically exceptional about that portion of the road or the curb. Indeed, numerous other vehicles were parked identically further along the road. Defendant conceded that, other than the opening of Patterson's door, Patterson was not parked improperly in the lane of travel. We cannot accept that all of the vehicles on the road were parked unreasonably dangerously. We also cannot accept that Patterson was parked unreasonably dangerously merely because of a nearby sign stating that parking was not allowed. Defendant's argument that a bus would not discharge passengers into the road misses the point. Because, other than his open door, there was nothing remarkable about Patterson's parking compared to any of the other legal and reasonable parking elsewhere on the street, finding Patterson's parking to be unreasonably dangerous would be an elevation of a technicality over substance. See *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958).

VI. OPEN DOOR AS "UNREASONABLE RISK" UNDER MCL 500.3106(1)(A)

Nevertheless, as we have alluded to, Patterson did not merely park illegally in a "no standing" zone. Again, the door of a vehicle is not "equipment," but rather it is a constituent part of the vehicle itself. *Frazier*, 490 Mich at 384-386. As a consequence, when Patterson opened the door, *the vehicle itself* was now protruding into the lane of travel. Thus, Patterson might have been parked in an unreasonably dangerous manner irrespective of whether he was parked illegally. Under the circumstances of this case, we conclude that he was indeed parked in an unreasonably dangerous manner.

In *Braun v Citizens Ins Co,* 124 Mich App 822, 823-824; 335 NW2d 701 (1983), the plaintiff's vehicle went off the road and into a snowdrift. A tow truck arrived and pulled the plaintiff's vehicle out of the snow drift; however, once the vehicle was pulled out of the snowdrift, the vehicle was left "partially in the traffic lane, but mostly on the shoulder of the road[.]" *Id*. at 823. While the plaintiff was standing behind the tow truck, a third vehicle hit the plaintiff's vehicle and then struck the plaintiff and the tow truck. *Id*. at 823-824. This Court concluded that, pursuant to MCL 500.3106(1)(a), the plaintiff's vehicle was parked in such a way as to cause an unreasonable risk of bodily injury which occurred. *Id*. at 828. In contrast, in *Stewart*, a police cruiser was parked in a well-lit travel lane in order to provide emergency services to a stalled vehicle. *Stewart*, 471 Mich at 699. Although the police cruiser was in a travel lane, the cruiser's emergency lights were flashing, the cruiser's spotlight was on, and there was a northbound lane available for vehicles to use, as well as a middle turn lane that could potentially be used. *Id*. The *Stewart* Court concluded that there was "nothing in the record to suggest that an oncoming northbound driver would not have ample opportunity to observe, react to, and avoid the hazard posed by the police cruiser." *Id*.

Clearly, the mere fact that part of a vehicle protrudes into the lane of travel is not, by itself, enough to constitute an unreasonable risk of bodily injury. The fact that people routinely and safely enter and exit vehicles parked alongside the road by opening driver's-side doors is a well-established phenomenon. Critical to the analysis, however, is whether that protrusion would be realistically avoidable by approaching traffic. Thus, the inquiry turns on situational factors such as the ambient illumination in the area, the posted speed limit, any limitations on

sight distance, and, especially importantly to this case, the immediate proximity of any moving vehicles. We accept plaintiff's argument that at 9:30 p.m. in August, it likely would not have been completely dark. However, it is a matter of public record that it was approximately half an hour after sunset; and, in an urban area with unknown cloud cover, the illumination likely also was not ideal. Most importantly, however, Patterson clearly did not check for nearby vehicles before opening his door. Opening a car door directly into immediately oncoming traffic unambiguously creates an unreasonable risk of bodily injury. The evidence clearly shows that defendant did not have adequate time to avoid the unreasonable risk of bodily injury caused by Patterson's manner of parking his vehicle. Consequently, the trial court correctly determined that defendant is entitled to no-fault benefits pursuant to MCL 500.3106(1)(a).

Affirmed. Defendant, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Amy Ronayne Krause