STATE OF MICHIGAN

COURT OF APPEALS

ROBYNE CRANE, Individually and as
Next Friend of JACOB CRANE, a minor,

Plaintiff-Appellee,

v

WOLVERINE MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

March 12, 1991

No. 117690

Before: Gillis, P.J., and MacKenzie and Weaver, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order granting plaintiff's motion for summary disposition. We affirm.

On September 22, 1987, at approximately 9 p.m., plaintiff's decedent stopped to help a motorist whose automobile was stuck in a ditch. Part of the automobile which was stuck appears to have been protruding slightly onto the roadway. That vehicle had its headlights and parking lights on. Plaintiff's decedent parked his Torino in the southbound lane facing north with its low-beam headlights on so that he could see to hook chains onto the disabled vehicle. Plaintiff's decedent parked the Torino close to the edge of the road and several feet south of the vehicle in the ditch. Mr. VanDusen, a southbound driver, struck plaintiff's decedent, who was near the portion of the stalled vehicle which was slightly protruding onto the roadway, and then ran into plaintiff's decedent's Torino.

Plaintiff's decedent's Torino was uninsured while the VanDusen's vehicle was insured by defendant. Plaintiff sought survivors' benefits pursuant to MCL 500.3108; MSA 24.13108 from defendant. Defendant denied benefits, claiming that plaintiff was precluded under MCL 500.3113; MSA 24.13113 which provides in part:

> 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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> * * *
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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.

Plaintiff then filed suit.

Defendant filed a motion for summary disposition, claiming that there was no genuine issue of material fact on the issues of whether plaintiff's decedent was the owner of the Torino and whether the Torino was involved in the accident. As to the first issue, defendant argued that decedent was the owner of the Torino. As to the second issue, defendant argued that the Torino was involved in the accident if it fell within the parked vehicle exception, MCL 500.3106; MSA 24.13106. Heard v State Farm Mutual Automobile Ins Co, 414 Mich 139; 324 NW2d 1 (1982), reh den 414 Mich 1111 (1982). Defendant then argued that plaintiff's decedent's Torino fell within the following parked vehicle exception:

(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.

MCL 500.3106(1)(a); MSA 24.13106(1)(a). Defendant argued that the Torino was parked in such a way as to cause unreasonable risk of the accident and resulting injury, noting that the Torino was parked in the wrong lane with its headlights facing oncoming traffic. Defendant further noted that plaintiff's decedent violated several laws by so parking.

Plaintiff then filed a motion for summary disposition, claiming that there was no genuine issue of material fact on the issues of whether decedent was the owner of the Torino or whether the Torino was involved in the accident. As to the first issue, plaintiff claimed that decedent was not the owner of the Torino. As to the second issue, plaintiff argued that the Torino was not involved in the accident. Plaintiff argued that even if the Torino was unreasonably parked, the risk that decedent would be injured was created by the vehicle decedent was attempting to remove from the ditch. Plaintiff noted that the Torino might have been involved in the accident if its headlights had blinded approaching drivers. Nonetheless, plaintiff noted that there was no evidence that this was the case and, in any event, plaintiff submitted an affidavit by another driver, who had earlier safely passed by decedent's vehicle, indicating that the headlights had not blinded her. Plaintiff also submitted an affidavit from the person who was helping decedent, indicating that "two or three" cars approached and safely passed the Torino. Plaintiff argued that decedent's actions were reasonable as he was assisting a disabled driver and gave notice of his position by leaving his lights on, citing Bowmaster v William H. De Pree Co, 258 Mich 538; 242 NW 744 (1932). Plaintiff further argued that defendant had failed to articulate any unreasonable risk created by the Torino which occurred.

The circuit court granted plaintiff's motion for summary disposition. The circuit court did not rule on the issue of whether plaintiff's decedent was the owner of the vehicle, but, instead, ruled that the Torino was not involved in the accident. The court held:

> The parked vehicle exception to the exclusion does not apply. The deceased's car was parked, to be sure, but it was on a roadway with its lights on. It was not, therefore, an item that had the characteristics of a stationary object, like a tree, or lamp post, which is what the parked vehicle exception means to cover. Therefore, I must conclude that its characteristics were that of a car.
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> I base my decision that the parked vehicle exception, per se, does not apply on Heard v State Farm, 414 Mich 139. To be involved, as the statute requires, there must be some activity which somehow contributes to the happening of the accident. . . .
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> I can find on the record in front of me no such contribution by the deceased's car to the happening of the accident in this particular case. Unlike the reported cases on this subject, the car that the deceased had been operating and which he had parked on the roadway was not, itself, involved in any collision. It did not strike him, nor did it, in any fashion, precipitate the other driver swerving to avoid it and hitting the deceased. The defendant says that the car was involved because it was stopped in the traffic lane with its headlights on and those headlights were glaring in the insured's eyes, thereby contributing to the accident which occurred. If that claim was potentially provable, the motion would have to be denied, but it is not provable on the record in this particular case. The driver of the vehicle does not claim to have been blinded or distracted by the headlights. As a matter of fact, he says he "does not believe" he was blinded by the headlights, and he further says that the cause of the accident most likely was being distracted by activity across the street around the car which was in the ditch. Mr. VanDusen is the only person who knows what caused that accident. Since he does not claim to have been blinded or distracted by the headlights, but claims that what caused the accident was most likely his distraction by something else, I find that on this record the insurance company simply cannot prove the applicability of the

exception. I suppose that there are ways to deduce how an accident happened, other than from the driver, but there is absolutely no evidence on this record that would allow the Court to make such a deduction. The Court is confronted exclusively with the testimony of the driver, and he offers no solace to the insurance company because he does not even arguably claim that the headlights were the cause of the driving by him which caused the fatality.

Defendant first argues that the circuit court improperly ruled that the vehicle was not parked. Reviewing the circuit court's opinion, we believe that the circuit court did not rule that the Torino was not a parked vehicle, but concluded that the parked vehicle exception did not apply because the parked vehicle was not involved in the accident.

Defendant then argues that the parked vehicle exception applies. Defendant contends that decedent's vehicle was unreasonably parked. Defendant argues that if a risk of bodily injury resulted from the manner in which the vehicle was parked, it is not necessary that the actual injury which resulted be caused by the manner in which the vehicle was parked. Defendant phrases this distinction in terms of objective (injury which could occur) versus subjective injury (the injury which actually occurred). MCL 500.3106(1)(a); MSA 24.13106(1)(a) requires that the "vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred." We hold that this language requires the injury which occurred to be caused by the manner in which the vehicle was parked.

Defendant next contends that the circuit court erred in relying on VanDusen's deposition testimony as VanDusen claimed that he did not remember anything from the time he turned the corner, 250 to 300 yards before the accident, until after the accident. VanDusen testified in his deposition that he had such a memory loss. However, VanDusen did testify that he saw northbound headlights when he made a right turn onto the street upon which decedent's vehicle was parked. VanDusen further testified that he did not believe that he was blinded by the Torino's headlights. VanDusen admitted that it would be guesswork on his part to state what effect, if any, the Torino's headlights had on him. VanDusen testified that if he had to guess what happened he would assume that he was looking at the car in the ditch and the people around it.

Defendant, therefore, argues that VanDusen's credibility was a jury question and the circuit court improperly granted summary disposition thereon. We hold that the circuit court reached the correct result and, therefore, we affirm. VanDusen testified that he could not recall the accident or events immediately preceding it. Plaintiff presented the affidavit of a driver who safely passed around the disabled vehicle and the Torino which stated that she was not blinded by the Torino's headlights. Plaintiff also presented the affidavit of the person who was helping decedent which stated that two or three cars safely passed the disabled vehicle and the Torino. Defendant did not present any contrary evidence. MCR 2.116(G)(4). We, like the circuit court, cannot infer that VanDusen was blinded by the Torino's headlights merely because they were on. Therefore, defendant's offered no evidence that the "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).

Affirmed.

/s/ John H. Gillis
/s/ Barbara B. MacKenzie
/s/ Elizabeth A. Weaver