STATE OF MICHIGAN

COURT OF APPEALS

JOHN ALLAN KENNEDY,

Plaintiff-Appellant,

and

DEPARTMENT OF COMMUNITY HEALTH,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 27, 2004

No. 251004
Marquette Circuit Court
LC No. 02-039460-NO

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Plaintiff John Allan Kennedy appeals as of right summary disposition entered in favor of defendant State Farm Mutual Auto Insurance Company, pursuant to MCR 2.116(C)(10). We affirm.

In this action, plaintiff seeks to recover first-party no-fault benefits (personal protection insurance benefits (PIP)) from defendant arising out of an automobile-parked car accident. Plaintiff's claim for first-party no-fault benefits is based upon the unreasonably parked vehicle exception. MCL 500.3106(1)(A).

Between 1:00 a.m. and 2:00 a.m. on January 17, 2001, plaintiff left Ed's Iron Inn on his snowmobile in an attempt to travel to his home in the city of Negaunee. While riding on his snowmobile on Ann Street in the city of Negaunee, plaintiff collided with the rear of an automobile that had been parked near a snow bank on Ann Street by Jeri Barabe. Because a snowmobile is not a vehicle for purposes of the no-fault statute (see *Wills v State Farm Ins Co*, 437 Mich 205, 209, n 4; 433 NW2d 396 (1991)), plaintiff's claim for first-party no-fault benefits is based upon the unreasonably parked vehicle exception. Specifically, under MCL 500.3106(1)(A), accidental bodily injury does not arise out of ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle "unless the vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred."

On appeal, both sides argue the precedential effect of *Wills*, *supra*. *Wills* was a similar snowmobile-parked car collision case in which the plaintiff sought no-fault first-party benefits under the unreasonably parked vehicle exception. The only factual difference between *Wills* and the present case is that, in *Wills*, the plaintiff was illegally operating his snowmobile on the *shoulder* of the road, not in the road itself. In the present case, the plaintiff was illegally operating his snowmobile on a city street in violation of a Negaunee city ordinance that prohibits snowmobiles on city streets between the hours of midnight and 8 a.m.:

> Sec. 10.39 Operation on roadway prohibited; exceptions.
>
> (1) A person shall not operate a snowmobile on any roadway within the corporate limits of the City, except as follows:
>
> * * *
>
> (d) *A snowmobile may be operated at speeds not to exceed 10 miles per hour . . . between the hours of 8:00am and 11:59pm, on the extreme right-hand shoulder of the road if no one [sic] is available or upon the extreme right-hand edge of the road if no shoulder is available, . . .* (Emphasis added.)

In *Wills*, the Supreme Court held that the statutory purpose of parking statutes and lighted-vehicle statutes was to protect the safety of other vehicles traveling on the roadway. Because, in *Wills*, snowmobiles were statutorily prohibited from traveling on the shoulder, the Supreme Court held: "A passenger on a snowmobile, traveling unlawfully on the shoulder of a highway, is not in the class of persons intended to be protected by the lighted-vehicle statute." *Wills*, *supra* at 214. In regard to plaintiff's claim that the vehicle was unreasonably parked, the Supreme Court further held, "We conclude that it is not unreasonable to park a vehicle without regard to the protection of persons who may not legally be on the shoulder where the vehicle is parked." *Id.* at 214-215.

In the present case, the trial court relied on *Wills* in ruling that plaintiff was operating his snowmobile illegally and was thus precluded from recovery of no-fault first-party benefits:

> [B]ased on those undisputed facts, I reach the conclusion that the plaintiff, John Kennedy, at the time of the collision on Ann Street was unlawfully operating this snowmobile inasmuch as he was exceeding what would be the statutory speed limit for an unposted area, number one.
>
> Number two, he was in violation of a City of Negaunee Ordinance that I interpret and read as barring operation of snowmobiles on City streets after midnight. . . .
>
> And, finally, I also conclude that the plaintiff was unlawfully operating his snowmobile because he was operating while impaired by alcohol.

On appeal, plaintiff argues that he is not excluded from coverage for first-party benefits merely because he was operating his snowmobile in an unlawful manner and that there is a genuine issue of material fact whether the Barabe vehicle was parked in such a way as to cause

unreasonable risk of the bodily injury which occurred. Because we conclude that plaintiff is not within the class of persons protected by the unreasonably parked vehicle exception, MCL 500.3106(1)(A), we need not decide whether the vehicle was parked unreasonably in a manner to cause the bodily injury which occurred.

The grant or denial of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Id.* The moving party is entitled to judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id*. MCR 2.116(C)(10), (G)(4). In presenting a (C)(10) motion, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* The nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Id*. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363.

Plaintiff is correct that his actions of speeding and impaired snowmobile driving are evidence of negligence, and negligence does not bar a claim for first-party no-fault benefits because benefits are normally paid regardless of fault. *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). See also MCL 500.3113 (persons not entitled to PIP benefits).

However, pursuant to the city of Negaunee ordinance, plaintiff was barred from operating his snowmobile on the city road after midnight. Because plaintiff was prohibited from the road, he was not within the class of persons to be protected by the Negaunee parking ordinance, and he was not within the class of persons to which Jeri Barabe owed a duty in regard to parking her vehicle. *Wills, supra*. Applying *Wills*, we conclude that it was not unreasonable for the automobile owner to park her vehicle without regard to the protection of plaintiff, who was not legally on the roadway where the vehicle was parked.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello