

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

LINDA K. GOBLER,

SEP 08 1987

Plaintiff-Appellee,

v

NO. 100698

AUTO-OWNERS INSURANCE COMPANY,

ON REMAND

Defendant-Appellant.

Before: M.J. Kelly, P.J., J.H. Gillis and D.E. Holbrook, Jr. JJ.
M. J. Kelly, P.J.

This cause is remanded to us on order of the Supreme Court dated May 15, 1987, following reversal of this Court's opinion at 139 Mich App 768; 362 NW2d 881 (1984). In that opinion the majority held that the plaintiff, Steven Gobler's widow, was improperly awarded survivors' benefits because "the trial court's finding that Steven Gobler would have been employed by the U. S. Forestry Service is clearly erroneous." The Supreme Court reversed finding that "we are not convinced that the trial court made a mistake in its fact finding." The only issue on remand is whether the plaintiff is entitled to attorney fees under MCL 500.3148(1); MSA 24.13148(1):

"An attorney is entitled to reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be charged against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

The Supreme Court remanded the question of attorney fees to this Court because it found:

"It is unclear whether or not the Court of Appeals considered the defendant's good-faith arguments. We therefore remand this case to the Court of Appeals for a more thorough disposition of defendant's substantive arguments regarding its good faith." 428 Mich 67.

What more thorough disposition can be necessary to vindicate the defendant's position than the considered per curiam opinion of two judges of the Court of Appeals and two dissenting justices of the Supreme Court, Justice Boyle and Chief Justice Riley. I quote Justice Boyle:

"The Court of Appeals decision reversing the trial court's award of survivor's benefits based on future employment and denying survivor's benefits because Steven Gobler was unemployed is evidence that the defendant may have been initially justified in denying plaintiff's claim."

As the dissenter in the Court of Appeals decision, it is clear to me that the defendant's refusal to volunteer survivors' benefits was a good-faith refusal.¹ The majority opinion written by Judge Allen (but perversely and inappropriately labeled per curiam)² was well written and well reasoned. It should be abundantly clear to any reader of that opinion and the authorities discussed therein that the good faith of the insurance company was clearly established. Stated another way, the insurance company's refusal to voluntarily pay the claim was not unreasonable. The trial court's award of penalty interest and attorney fees is set aside.

/s/ Michael J. Kelly
/s/ John H. Gillis
/s/ Donald E. Holbrook, Jr.

FOOTNOTE

¹ I did not address the question of attorney fees in my dissent in Gobler v Auto-Owners Ins Co. #1, 139 Mich App 768; 362 NW2d 881 (1984), and to the extent that the editor assessed my opinion as affirming "the trial court's award of survivor's benefits, penalty, interest and attorney fees to plaintiff" at 139 Mich App 769, the editor was incorrect.

² As a court we have contended over this practice but never settled on a rule prohibiting the anomaly.