

STATE OF MICHIGAN  
COURT OF APPEALS

---

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,  
Cross-Appellant,

March 19, 1990

v

No. 116473

FARM BUREAU INSURANCE GROUP,

Defendant-Appellant,  
Cross-Appellee.

---

Before: Murphy, P.J., and Hood and Neff, JJ.

NEFF, J.

Defendant appeals as of right from a judgment entered by the circuit court in favor of plaintiff which ordered that defendant is liable for payment of all no-fault benefits which have become, or may in the future become, due as a result of a June 4, 1987, motor vehicle accident involving Charles W. Montgomery. Plaintiff cross-appeals from the judgment which denied its claim for attorney fees and costs. We affirm.

I

The central issue in this appeal is whether Montgomery was an "occupant" of the truck within the no-fault act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*, at the time he sustained injuries. The trial court found that Montgomery was an occupant within the meaning of the act.

Findings of fact by the trial court may not be set aside unless they are clearly erroneous. MCR 2.613(C). On the record before us, we cannot conclude that the trial court's finding that Montgomery was an occupant of a motor vehicle was clearly erroneous.

Montgomery was driving his employer's truck on the employer's farm. He got out of the truck to move some tools which were in the truck's path, leaving the motor running and the door open. As Montgomery was returning to the truck, the transmission slipped into reverse. He jumped on the runningboard and was reaching inside the truck when he slipped and fell under the truck and was injured.

Under these facts, we agree with the trial court's determination that Montgomery was an occupant of the truck when he was injured.

II

Plaintiff cross-appeals, arguing that the trial court erred in determining that it was not entitled to attorney fees and costs. We disagree.

For attorney fees to be charged against an insurer, the insurer must have acted unreasonably in withholding payment. *Wood v DAIIE*, 413 Mich 573, 587; 321 NW2d 653 (1982). A delay in payment is not unreasonable where it is the product of a bona fide factual uncertainty. *Joiner v Mich Mutual Ins Co*, 137 Mich App 464, 479; 357 NW2d 875 (1984). A legitimate question of the definition of "occupant" existed here. Therefore, the trial court did not err in denying plaintiff's request for attorney fees and costs.

Affirmed.

MICHIGAN TRIAL LAWYERS ASSOCIATION  
501 South Capitol, Suite 405  
Lansing, Michigan 48933  
Phone: (517) 482-7740

/s/ Janet T. Neff  
/s/ William B. Murphy  
/s/ Harold Hood