STATE OF MICHIGAN

COURT OF APPEALS

LEONE MARIE HICKS,

Plaintiff,

May 20, 1991
10:05 a.m.

v

No. 123988

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Cross-
Plaintiff-Appellee,

and

WOLVERINE MUTUAL INSURANCE COMPANY,

Defendant-Cross-
Defendant-Appellant.

Before: Michael J. Kelly, P.J., and Doctoroff and Neff, JJ.

MICHAEL J. KELLY, P.J.

This case involves the application of the priority provision of the No-Fault Insurance Act, MCL 500.3101 et seq.; MSA 24.13101 et seq. Section 3114 of the act, in relevant part, requires an injured person to first seek benefits from the insurer of a relative domiciled in the same household before seeking benefits from the owner of the vehicle occupied at the time of the injury.

In this case, plaintiff was injured while alighting from a vehicle owned by Cecil McMillan. Plaintiff, who was uninsured, filed suit against defendant Automobile Club Insurance Association, plaintiff's son's insurer, and defendant Wolverine Mutual Insurance Company, McMillan's insurer. Auto Club then filed a cross-complaint against Wolverine Mutual, seeking reimbursement for any benefits Auto Club might eventually pay to plaintiff. The parties later entered into an agreement whereby Auto Club was to compensate plaintiff and thereafter seek reimbursement from Wolverine Mutual. Plaintiff's complaint was dismissed and the case proceeded between Auto Club and Wolverine Mutual, with the only issue being which insurance company had priority to pay plaintiff's claim.

Following a bench trial, the trial court ruled that plaintiff and her son, Donald Hicks, were not domiciled in the same household at the time of the injury. Judgment was entered in Auto Club's favor for $18,497.90, as follows: $13,492.88 for benefits paid to plaintiff; $1,040 for fees paid to plaintiff's attorneys; $3,861.02 for Auto Club's attorney fees; and $104 for costs. Wolverine Mutual appeals as of right, raising two issues.

The first issue presented is whether the trial court erred in finding that plaintiff and her son were not domiciled in the same household. We find no error.

The determination of domicile is a question of fact for the trial court and will not be reversed unless the evidence clearly preponderates in the opposite direction. Dobson v Maki, 184 Mich App 244, 253; 457 NW2d 132 (1990).

The evidence adduced at trial established that plaintiff and McMillan purchased a house which was divided into two separate units, one upstairs and one downstairs. Plaintiff and McMillan lived in the lower unit, and Donald Hicks and his family occupied the upper unit. Each unit had its own living area, sleeping

quarters, kitchen, and bathroom. The units had separate entrances, post office addresses, telephone lines, and electric bills. A "formal" agreement existed between plaintiff and her son whereby Donald paid plaintiff $200 per month in rent. Applying these facts to the factors enumerated by this Court in Dobson, supra, p 252 (citing Workman v DAIIE, 404 Mich 477; 274 NW2d 373 (1979) and Dairyland Insurance Co v Auto-Owners Insurance Co, 123 Mich App 675; 333 NW2d 322 (1983)), we cannot say that the evidence clearly preponderates opposite to the trial court's determination.

The next issue raised is whether the trial court erred in awarding Auto Club attorney fees. We agree with Wolverine Mutual and find that Auto Club was not entitled to recover its own attorney fees under the no-fault act.

Pursuant to the no-fault act, an attorney is entitled to a reasonable fee for advising and representing the claimant in an action for personal injury protection benefits which are overdue, if the insurer unreasonably refuses to pay the claim or unreasonably delays in making payment. MCL 3148(1); MSA 24.13148(1). However, in this case, Auto Club did not advise or represent the claimant. Cf. Darnell v Auto-Owners Insurance Co, 142 Mich App 1, 14-15; 369 NW2d 243 (1985). In any event, we do not find unreasonable Wolverine Mutual's refusal to pay, as a bona-fide factual uncertainty existed. See Bloemsma v Auto Club Insurance Assn, 174 Mich App 692, 697; 436 NW2d 442 (1989). Auto Club is not entitled to attorney fees under the no-fault act.

Auto Club alternatively argues that it is entitled to mediation sanctions. Because this issue was not addressed by the trial court due to its finding that Auto Club was entitled to attorney fees under the no-fault act, we remand in order that the trial court may address the issue.

Affirmed in part, reversed in part, remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Martin M. Doctoroff
/s/ Janet T. Neff