

STATE OF MICHIGAN
COURT OF APPEALS

HENRY KROLIKOWSKI,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

March 8, 1993

No. 133558

HENRY KROLIKOWSKI,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

No. 136457

Before: Weaver, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right the order of the Bay Circuit Court that awarded plaintiff first-party no-fault insurance benefits and attorney fees. Plaintiff appeals the trial court's subsequent order that denied plaintiff's request for additional fees under the mediation court rule, MCR 2.403(O). We reverse.

Plaintiff owned a motor home that was insured by defendant. The motor home was equipped with a propane stove. On May 26, 1988, plaintiff drove the motor home to a campground and connected it to water and electrical outlets. The motor home later exploded, causing plaintiff severe injuries. The explosion occurred after plaintiff opened the stove's valve and later attempted to light the stove's pilot light. Plaintiff filed a claim with defendant for personal injury protection benefits. Defendant denied the claim on the ground that the "motor home was being used as a residence at the time of [the] loss, and not as a motor vehicle."

Plaintiff brought an action against defendant for benefits. Both parties moved for partial summary disposition on the question of coverage. On August 14, 1989, the trial court granted summary disposition to plaintiff, holding that plaintiff's injuries arose out of the use of the motor home "as a motor vehicle" and that defendant was liable to pay personal injury protection benefits. This Court denied defendant's delayed application for leave to appeal. On April 12, 1990, plaintiff accepted and defendant rejected a mediation award totalling \$120,447 that included attorney fees. The trial court later entered a second opinion and order that granted plaintiff a total judgment of \$123,836. The judgment included an award of \$15,000 for attorney fees based on the trial court's finding that defendant had unreasonably refused to pay plaintiff benefits. MCL 500.3148; MSA 24.13148. Plaintiff thereafter moved for duplicate attorney fees pursuant to the mediation court rule, MCR 2.403(O). This motion was denied.

On appeal, defendant first claims that the trial court erred when it held that plaintiff was using the motor home as a motor vehicle when he was injured. We disagree. When a parked vehicle is equipped with a bed and stove and has a dual purpose of being a recreational vehicle, the injury of the person inside is not a result of the use of the vehicle as a motor vehicle. The injury of the person inside is a result of the use of the vehicle as a residence.

constitutes a normal use of the vehicle as a motor vehicle for its intended purpose. See Engwis v Michigan Mutual Ins Co, 181 Mich App 16; 448 NW2d 731 (1989); Koole v Michigan Mutual Ins Co, 126 Mich App 483; 337 NW2d 369 (1983). See also Bialochowski v Cross Concrete Pumping Co, 428 Mich 219; 407 NW2d 355 (1987). Plaintiff's injuries flowed from an activity that was inherent and a permanent part of the operation of plaintiff's particular type of vehicle. Defendant's reliance on Thornton v Allstate Ins Co, 425 Mich 643; 391 NW2d 320 (1986), and Miller v Auto-Owners Ins Co, 411 Mich 633; 309 NW2d 544 (1986), is misplaced. Thornton concerned a third-party's criminal attack on the driver of a vehicle, while Miller did not concern a dual purpose vehicle. Unlike this case, in Winter v Auto Club of Michigan, 433 Mich 446; 446 NW2d 132 (1989), the plaintiff was using the motor vehicle, a tow truck intended to tow automobiles, for an unintended purpose, pulling up concrete. Nor are defendant's attempts to distinguish Koole, supra, and Engwis, supra, persuasive.

Defendant next claims that the trial court erred when it awarded attorney fees pursuant to MCL 500.3148; MSA 24.13148 after finding that defendant had unreasonably refused to pay plaintiff benefits. Defendant argues that a legitimate question of statutory interpretation existed with regard to whether plaintiff's injuries occurred when his vehicle was being used as a motor vehicle within the meaning of MCL 500.3105(1); MSA 24.13105(1). We agree. Defendant was pursuing a legitimate legal issue concerning the dual purpose doctrine and should not be penalized for doing so. United Southern Assurance Co v Aetna Life & Casualty Ins Co, 189 Mich App 485, 493; 474 NW2d 131 (1991).

Given our disposition, we do not reach the issue raised by plaintiff concerning the permissibility of awarding duplicate attorney fees under the no fault act and the mediation sanction rule.

Because we reverse the order granting plaintiff attorney fees under the no fault act, we remand this to the trial court in order that it may determine the costs and reasonable attorney fees incurred by plaintiff as mediation sanctions.

Nos. 133558 and 136457 are reversed, and the case remanded. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ Elizabeth A. Weaver

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WAHLS, J. (concurring and dissenting.)

I concur with the majority's resolution of the issue of coverage, but respectfully dissent with regard to the issue of attorney fees.

The trial court found that defendant had unreasonably refused to pay plaintiff benefits and awarded plaintiff attorney fees pursuant to MCL 500.3148; MSA 24.13148. In view of the existence of this Court's opinion in Koole v Michigan Mutual Ins Co, 126 Mich App 483; 337 NW2d 369 (1983), which is nearly identical to the facts presented in this case and holds in favor of coverage, I believe that the trial court's decision is not clearly erroneous. United Southern Assurance Co v Aetna Life & Casualty Ins Co, 189 Mich App 485, 493; 474 NW2d 131 (1989). I would further hold that plaintiff may recover duplicate attorney fees under both MCL 500.3148; MSA 24.13148 and MCR 2.403(O). See Howard v Canteen Corp, 192 Mich App 427, 440-441; 481 NW2d 718 (1992); Dep't of Transportation v Dyl, 177 Mich App 33, 37-39; 441 NW2d 18 (1989); Kondratek v Auto Club Ins Ass'n, 163 Mich App 634, 639; 414 NW2d 903 (1987).

/s/ Myron H. Wahls