STATE OF MICHIGAN

COURT OF APPEALS

RICHARD O'HENLEY,

Plaintiff-Appellee,

v

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 3, 1999

No. 208468
Wayne Circuit Court
LC No. 95-509174 CK

Before: Gribbs, P.J., and O'Connell and R.B. Burns,* JJ.

PER CURIAM.

Defendant appeals as of right from a trial court order denying its motion for summary disposition and granting plaintiff's motion for summary disposition under MCR 2.116(C)(10). The trial court also awarded plaintiff attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1), in the amount of $18,000. We affirm.

First, defendant argues that the trial court erred in granting plaintiff's motion for summary disposition as to the issue of its liability for no-fault benefits. Defendant contends that, pursuant to MCL 500.3106(2)(a); MSA 24.13106(2)(a), plaintiff is not entitled to no-fault benefits because he was injured while doing mechanical work on a parked vehicle during the course of his employment and received worker's compensation benefits for his injury. We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* On appeal, a trial court's grant or denial of summary disposition is reviewed de novo. *Id.*

Under the no-fault act, an insurer that provides personal protection insurance may be liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to certain exceptions. MCL 500.3105(1); MSA

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

24.13105(1). Personal protection benefits may be recovered where "the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was

being operated or used" or where the injury was sustained "by a person while occupying, entering into, or alighting from the vehicle." MCL 500.3106(1)(b)-(c); MSA 24.13106(1)(b)-(c). The no-fault act precludes recovery, however, where the employee is injured while doing "mechanical work" on a parked vehicle. MCL 5.3106(2)(a); MSA 24.13106(2)(a).

In the instant case, the parties do not question that plaintiff's injury arose out of "the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle." Plaintiff shouldered the burden of showing that he was not doing "mechanical work" on the vehicle when he was injured. See *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 631-632; 552 NW2d 671 (1996). To this end, plaintiff submitted evidence that, as a truck driver for E&L Transport, he was required to conduct a "pre-trip check" of his truck, which involved checking the truck's water and oil levels and filling them if necessary. Plaintiff contended, and the trial court agreed, that this check was vital to the proper operation of his truck, or an activity routinely performed in the operation of his truck. As such, the trial court found that the pre-trip check did not constitute work normally done by a mechanic for the purpose of repairing or maintaining the vehicle, and therefore did not constitute "mechanical work" within the meaning of MCL 500.3106(2)(a); MSA 24.13106(2)(a).

We believe the trial court was correct in holding that plaintiff was not engaged in "mechanical work" when he was injured. This Court has defined the term "mechanical work," as used in § 3106(2)(a), as "work normally done by a mechanic which is for the purpose of maintaining or repairing the vehicle." *Thompson v TNT Overland Express*, 201 Mich App 336, 342; 505 NW2d 918 (1993), quoting *Marshall v Roadway Express, Inc*, 146 Mich App 753, 757; 381 NW2d 422 (1985). Thus, work that is generally recognized as maintenance does not qualify as "mechanical work" under § 3106(2)(a) *if* it is work not normally performed by a mechanic. Here, although adding oil to the truck's engine is normally considered an act of engine maintenance, it is not, in this situation, maintenance work normally performed by a mechanic. According to plaintiff's testimony and affidavit, a regular part of his job as a truck driver was checking the oil and water levels of his vehicle and refilling his engine as necessary. This portion of his job was never conducted by a mechanic. Any other necessary mechanical maintenance work was done by E&L Transport, the owner of the truck. Because of the amount of time that E&L's trucks spend on the road, it is necessary to regularly monitor the fluid levels in the trucks' engines. The claim that, in the hauling and trucking business, this kind of maintenance is work normally performed by mechanics, rather than the truck drivers themselves, simply strains credulity. Because plaintiff was not performing mechanical work within the meaning of § 3106(2)(a) when he was injured, the trial court did not err in granting plaintiff's motion for summary disposition.

Defendant also argues that the trial court clearly erred in granting plaintiff's motion for attorney fees pursuant to MCL 500.3148(1); MSA 24,13148(1), because there was a genuine, unresolved issue whether plaintiff's act of adding oil to the truck's engine constituted mechanical work. We disagree.

Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, or judicial exception. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). MCL 500.3148(1); MSA 24.13148(1) provides for the award of attorney fees if the court finds that the insurer unreasonably refused to pay the claim or unreasonably

delayed in making proper payment. A refusal or delay in payment by an insurer will not be found unreasonable under this statute where it is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). Where there is such a delay or refusal, a rebuttable presumption of unreasonableness arises such that the insurer has the burden to justify the refusal or delay. *Id.*

It is well established that the phrase "mechanical work " must be liberally construed. *Thomson, supra*, at 341-342; *Cobb v Liberty Mutual Ins Co,* 164 Mich App 66, 72; 416 NW2d 328 (1987). As noted previously, mechanical work does not include activity not designed to maintain or repair the truck and routinely performed in a truck's operation. *Id.* Common sense alone would dictate that checking and adding motor oil, especially in a situation involving a professional truck driver, is not "work normally done by a mechanic." The trial court did not clearly err in awarding attorney fees to plaintiff.

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert B. Burns