

STATE OF MICHIGAN  
COURT OF APPEALS

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RICHARD O'HENLEY,

Plaintiff-Appellee,

v

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

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UNPUBLISHED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.

O'CONNELL, J. (concurring in part and dissenting in part).

Although I concur with the majority that the trial court correctly granted summary disposition to plaintiff, I would reverse the trial court's grant of attorney fees.

MCL 500.3148(1); MSA 24.13148(1) allows for an award of attorney fees against an insurer where "the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." This Court reviews the trial court's finding of unreasonable refusal or delay for clear error. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). Although the insurer has the burden of justifying the refusal or delay, the refusal or delay will not be found to be unreasonable "where it is the product of a legitimate question of statutory construction . . . ." *Id.*

I believe that whether "mechanical work" includes adding fluids to an engine is a legitimate question of statutory construction. The cases cited by the majority defining "mechanical work" involved different activities: detaching a trailer from a motor vehicle, *Marshall v Roadway Express, Inc*, 146 Mich App 753, 757; 381 NW2d 422 (1985), and checking an air hose to see whether it was leaking, *Thompson v TNT Overland Express*, 201 Mich App 336, 342; 505 NW2d 918 (1993). An insurer has the right to litigate to protect its interests, and I find that it was not unreasonable for defendant to refuse payment and litigate this issue. Whether certain engine-maintenance tasks are or are not "mechanical work" does not involve a clear-cut, "mechanical" analysis, but requires the thoughtful application of court-made definitions of statutory terms to factual situations.

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

I would therefore hold that the trial court clearly erred in awarding plaintiff \$18,000 in attorney fees.

/s/ Peter D. O'Connell