

STATE OF MICHIGAN
SUPREME COURT

MICHAEL EUGENE DRAKE,

Plaintiff-Appellee,

vs.

Supreme Court
No. 130855

Court of Appeals No. 257800

Lower Court No. 03-318 NF

CITIZENS INSURANCE COMPANY
OF AMERICA,

Defendant-Appellant

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DEFENDANT-APPELLANT'S REPLY BRIEF
PROOF OF SERVICE

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DEFENDANT-APPELLANT’S REPLY BRIEF

In Plaintiff-Appellee’s Response to Defendant-Appellant, Citizens’ Application for Leave to Appeal, Plaintiff avoided references to the process which transformed the grain truck in question from merely a “delivery vehicle” to a grain pumping platform. Plaintiff, and the majority in the Court of Appeals, failed to recognize that the grain delivery truck had, like the cement truck in *Bialochowski vs. Cross Concrete Pumping Company*, 428 Mich 219; 407 NW2d 355 (1987), been transformed to a nontransportational function at the time of the Claimant’s injury. As stated by the Honorable Brian K. Zahra in the dissent below:

“The facts of this case cannot be distinguished from *Bialochowski vs. Cross Concrete [Id]*, which *McKenzie* squarely rejected. *Bialochowski* involved a cement truck with a:

‘[p]ermanently attached...concrete pump and a thirty- to thirty-five foot boom..., which was used to pump concrete up to the elevated levels. [The] [p]laintiff was injured in the course of his employment when the concrete pump exploded, causing the boom to collapse upon [the] plaintiff, crushing him. At the time of the accident, the truck was parked and stabilized...’

“The majority opinion concludes there is a ‘fundamental difference between *Bialochowski* and the case at bar’ solely because the vehicle in *Bialochowski* was stabilized. **This distinction is insignificant, particularly given that *McKenzie* found the holding in *Bialochowski* ‘utterly antithetical to the language of §3105.’** Further, the vehicle here first had to hydraulically extend its boom to the top of a silo, and **only then**, using three independently powered augers, did it move feed through the boom and into the silo. ‘Where the legislature explicitly limited coverage under §3105 to injuries arising out of a particular use of motor vehicles—use “as a motor vehicle” – a decision fining coverage for injuries arising out of any other use, e.g., **to pump cement, is contrary to the language of the**

statute.’ *Id.* Here, the majority has improperly found coverage for injuries that arose out of use of a vehicle to pump feed into a silo.”

Drake vs. Citizens Insurance Company, _____ Mich App _____; _____ NW2d _____; Slip Opinion, dissent, pages 1-2 (Michigan Court of Appeals, 22306).

Judge Zahra below recognized that the transportational function of the grain delivery truck had ended, or was only tangentially related to the function of pumping grain through a system of augers and motors, up and through an elevated, hydraulically-positioned boom, to an elevated point (the top of the silo). This function is indistinguishable from the facts in *Bialochowski*. Both *Bialochowski* and the present case alleged a right to no-fault benefits under MCL §500.3106(1)(b). There is no distinction between a malfunctioning pump motor in *Bialochowski* as the cause of the Claimant’s injuries, and a malfunctioning auger motor, as the cause of the Claimant’s injuries in the present case. Neither vehicle could be driven in its transportational function mode as set up for the pumping process.

The Court of Appeals’ majority below criticized the Michigan Supreme Court’s decision in *McKenzie vs. Auto Club Insurance Association*, 458 Mich 214; 580 NW2d 424 (1998) for its “eviscerating impact on MCL 500.3106....” *Drake, supra*, majority opinion, page 10. To the contrary, however, the majority below has not eviscerated, but erased, the statutory mandate set forth in MCL §500.3105 that a motor vehicle be used *as a motor vehicle*. In reversing the holding in *Bialochowski*, the *McKenzie* Court stated:

“Where the legislature explicitly limited coverage under Section 3105 to injuries arising out of a particular use of motor vehicles - use ‘as a motor vehicle’ - a decision finding coverage for any other use, e.g., to pump cement, is contrary to the language of the statute. Accordingly, we are convinced that *Bialochowski* was wrongly decided.” 458 Mich 215, 224.

RELIEF REQUESTED

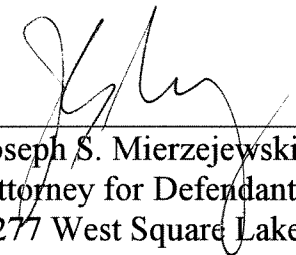
The facts of this case are unlike those cited by the Trial Court below, which compared the grain delivery process to a U.P.S. delivery. Defendant-Appellant respectfully requests that this Honorable Court grant its Application for Leave to Appeal or, alternatively, summarily reverse the Court of Appeals' majority in the Trial Court, and adopt the Opinion of the Court of Appeals' minority position.

Respectfully submitted,

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Date: May 9, 2006

By: _____


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