

STATE OF MICHIGAN
SUPREME COURT

MICHAEL EUGENE DRAKE,
Plaintiff-Appellee,

Supreme Court
No. 1030855

vs.

Court of Appeals No. 257800

Lower Court No. 03-318 NF

CITIZENS INSURANCE COMPANY
OF AMERICA,

Defendant-Appellant

MARK R. DAANE (P29345)
Attorney for Plaintiff-Appellee
Hooper, Hathaway, Price,
Beuche & Wallace
126 S. Main Street
Ann Arbor, MI 48104
(734) 662-4426

JOSEPH S. MIERZEJEWSKI (P32590)
Attorney for Defendant-Appellant
ANSELM & MIERZEJEWSKI, P.C.
1277 W. Square Lake Road
Bloomfield Hills, MI 48302
(248) 338-2290

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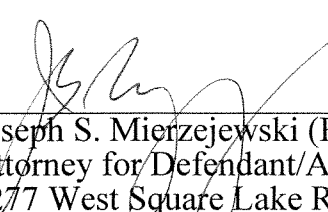
**DEFENDANT-APPELLANT CITIZENS INSURANCE COMPANY
OF AMERICA'S SUPPLEMENTAL BRIEF**

PROOF OF SERVICE

Respectfully submitted,

ANSELM & MIERZEJEWSKI, P.C.

Date: March 8, 2007

By: 
Joseph S. Mierzejewski (P32590)
Attorney for Defendant/Appellant
1277 West Square Lake Road
Bloomfield Hills, MI 48302
(248) 338-2290

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I. THE COURT OF APPEALS HAS IGNORED THE PLAIN LANGUAGE OF MCL §500.3106(1)(b) IN FINDING *DRAKE* ENTITLED TO NO-FAULT BENEFITS WHEN HE WAS INJURED MAINTAINING EQUIPMENT PERMANENTLY MOUNTED ON A VEHICLE, WHICH EQUIPMENT WAS NOT CLOSELY ASSOCIATED WITH THE VEHICLE'S TRANSPORTATIONAL FUNCTION.

MCL §500.3106(1)(b) was the basis of the majority of the Court of Appeals opinion granting *Drake* personal protection insurance benefits. That statute states:

“ . . .(1) accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless . . .

(b) . . . 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 property being lifted on to or lowered from the vehicle in the loading or unloading process . . .”

The statute, by its plain terms, requires that all of the following elements be satisfied before no-fault benefits can be afforded:

- (1) The vehicle must be parked;
- (2) The injury must result from physical contact with equipment permanently mounted on the vehicle;
- (3) The equipment must be in the process of operation; or
- (4) Property must be lifted on to or lowered from the vehicle; and
- (5) The Claimant must be in the loading or unloading process.

The Court of Appeals and the Plaintiff have failed to address the fact that the loading and unloading process was halted at the time Plaintiff was injured. The unloading of the grain through the use of a system of augers, chutes, and a boom raised in position to

discharge the grain into the silo had been stopped because the discharge system had become clogged. Plaintiff or Passmore, a deliveryman, removed an access door on the delivery system in order to unclog the system so that it could begin pumping grain up and through the discharge system again. By dismantling the system, the Plaintiff was engaged in a maintenance function when the auger was inadvertently turned on again by Passmore, causing Plaintiff's injuries.

MCL §500.3106 excludes no-fault benefits to an individual injured in connection with a parked vehicle, unless one of the specifically delineated exceptions apply. The exception at issue is MCL §500.3106(1)(b). **Plaintiff is not entitled to benefits when injured while maintaining the equipment permanently mounted on the vehicle, which is not closely associated with the vehicle's transportational function.** The vehicle was operational in its transportational function regardless whether the grain pumping mechanism was operational. This issue is uncontested. Under the plain language of the statute, no exception to the exclusion of benefits under MCL §500.3106 is applicable to Plaintiff's injury.

The maintenance of a delivery system which is not closely associated with a vehicle's transportational function has been the subject a recent case decided by the Court of Appeals. In *Kennedy v Farm Bureau Mutual Insurance Company*, unpublished opinion *per curiam* of Court of Appeals, August 3, 2006 (Docket No. 268021), the plaintiff was injured while repairing the hydraulic system on his dump truck. There, as here, the delivery system which was being repaired was not closely associated with the transportational function of the motor vehicle. The vehicle could be operated in its transportational mode regardless whether the delivery system (hydraulic dump bed) was operational. The Court of Appeals held unanimously that plaintiff was not entitled to benefits in *Kennedy* because he did not meet the "transportational function" test of MCL §500.3105.

Curiously, the Court in *Kennedy* distinguished *Drake* by reference to the location of the injury. Plaintiff in *Kennedy* had driven his truck from the work site to his home to perform the repairs. Nothing in the no-fault law suggests that the location of maintenance on permanently mounted equipment on a vehicle is relevant to a determination of a person's right to no-fault benefits. *Kennedy's* attempt to distinguish a right to benefits sought due to injuries sustained while maintaining permanently mounted equipment shows the confusion caused by the published *Drake* opinion. *Kennedy* was correctly decided, while *Drake* was not, on this essential issue.

The Court of Appeals has also failed to take into account the limited application of the exception set forth in MCL §500.3106 in its unsupported conclusion that property was being “lifted on to or lowered from the vehicle” while the Claimant was in the “loading or unloading process.” In *Perez v Farmers Insurance Exchange*, 225 Mich App 731, 571 NW2d 770 (1997), the Court of Appeals addressed the plain language of MCL §500.3106 (1)(b). The plaintiff there claimed that he was injured while engaged in the “loading or unloading process” and therefore was entitled to no-fault benefits. The Court affirmed summary disposition in favor of the defendant insurer, pointing out that:

“§3106(1)(b), however, does not state ‘injury was a direct result of the loading and unloading process’, it says ‘ . . . injury was a direct result of property being lifted on or lowered from the vehicle in the loading or unloading process’. This injury did not occur when the property was being lifted or lowered from the vehicle.”

Matters preparatory to loading or unloading, including maintenance of the non-transportational mechanism permanently attached to the vehicle, is not “loading or unloading.” Here, *Drake* does not satisfy the specific, limited exception set forth in the plain language of the statute because he was not lifting or lowering property from the vehicle in the loading or unloading process.

This error by the Court of Appeals majority has also led to confusion in subsequent cases decided since the *Drake* opinion was published. In *Fulton v State Farm Mutual Insurance Company*, unpublished opinion *per curiam* of Court of Appeals, January 16, 2007 (Docket No: 270644), Judge Kelly dissented in part and concurred in part in the majority opinion. He found that the plaintiff's injuries were outside the parked vehicle exception set forth in MCL §500.3106(1)(b) citing *Perez, supra* for the proposition that matters preparatory to the loading or unloading process are not covered under no-fault. However, he "reluctantly concurred" with the majority opinion based solely on the Court of Appeals opinion in *Drake*, stating:

“. . . however, I concur only because I am compelled to do so pursuant to MCR 7.215(J)(1). I believe that *Drake* was wrongly decided for the reasons stated in the dissent. Were it not for the precedential effect of *Drake*, I would reverse and remand for entry of an Order Granting Summary Disposition to State Farm.”

The foregoing cases show that, without strict adherence to the plain language of the statute, confusion and chaos results. Had the Court of Appeals relied on the strict language of MCL §500.3106(1)(b), *Drake* would have been deemed ineligible for benefits. This case is indistinguishable, a practical matter, from *Bialochowski vs. Cross Concrete*, 428 Mich 219, 407 NW2d 355 (1987), *Rice v Auto Club Insurance Association*, 252 Mich App 25 (2002), and *Kennedy v Farm Bureau, supra*. As pointed out by Judge Zahra in *Rice* at p. 193:

“There is no practical difference between pumping fuel and pumping ¹cement when it comes to examining the underlying activities of the motor vehicle . . . “

¹ *Bialochowski, supra* overruled by *McKenzie v Automobile Insurance Club Association*, 458 Mich 215, 580 NW2d 424 (1998).

Likewise, there is no practical difference between pumping cement, pumping fuel [*Rice*] or pumping grain through a mechanism that is unrelated to the vehicle's transportational function. The appellate majority's opinion in *Drake* failed to consider the steps necessary to transform a grain delivery truck to a grain pumping station. That transformation is indistinguishable from the transformation of the cement truck in *Bialochowski* to a cement pumping platform. The result here should be the same as *Rice* and *Kennedy*, with Plaintiff being found ineligible for no-fault benefits because he does not meet the unambiguous requirements of MCL §500.3105 or §500.3106.

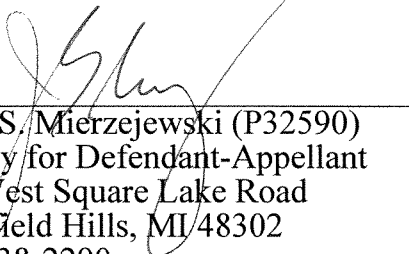
CONCLUSION

Appellant Citizens requests that this Honorable Court reverse the majority of the Court of Appeals in this action, adopt the dissenting opinion of Judge Zahra, and peremptorily reverse the Court of Appeals, granting summary disposition to Citizens Insurance Company of America.

Respectfully submitted,

ANSELM I & MIERZEJEWSKI, P.C.

Date: March 8, 2007

By: 
Joseph S. Mierzejewski (P32590)
Attorney for Defendant-Appellant
1277 West Square Lake Road
Bloomfield Hills, MI 48302
(248) 338-2290