

STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL EUGENE DRAKE,

Supreme Court Docket
No. _____

Plaintiff-Appellee,

Court of Appeals Docket
No. 257800

-vs-

CITIZENS INSURANCE COMPANY
OF AMERICA,

Lower Court Docket
No. 03 318 NF

Defendant-Appellant.

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**PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE
TO APPLICATION FOR LEAVE TO APPEAL**

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JUDGMENT BEING APPEALED AND RELIEF SOUGHT

The Defendant correctly identifies the published Opinion of the Court of Appeals and the Order of the Hillsdale County Circuit Court. Plaintiff asks that this Court deny the Defendant's Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHERE THE COURT OF APPEALS HELD THAT DELIVERY OF GRAIN TO A SILO WAS “CLOSELY ASSOCIATED WITH THE TRANSPORTATIONAL FUNCTION” OF A GRAIN DELIVERY TRUCK, WAS THE DECISION CLEARLY ERRONEOUS?

Plaintiff-Appellee Drake answers this question “No.”

The Trial Court answered this question “No.”

The Court of Appeals’ Majority answered this question “No.”

The Court of Appeals’ Minority answered this question “Yes.”

Defendant-Appellant Citizens answers this question “Yes.”

II. WHERE THE NO FAULT CLAIMANT WAS INJURED BY PHYSICAL CONTACT WITH EQUIPMENT PERMANENTLY MOUNTED ON A GRAIN DELIVERY TRUCK WHILE THE EQUIPMENT WAS BEING OPERATED OR USED, WAS IT CLEARLY ERRONEOUS FOR THE COURT OF APPEALS’ MAJORITY TO FIND NO FAULT COVERAGE IN FAVOR OF THE CLAIMANT?

Plaintiff-Appellee Drake answers this question “No.”

The Trial Court answered this question “No.”

The Court of Appeals’ Majority answered this question “No.”

The Court of Appeals’ Minority answered this question “Yes.”

Defendant-Appellant Citizens answers this question “Yes.”

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COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Procedural History

The procedural history set forth in Defendant-Appellant's Brief is essentially correct.

Counter-Statement of Facts

Michael Drake's hand was seriously injured when his hand physically contacted equipment on a grain delivery truck when the equipment was being operated to unload the truck. Because *Bialochowski v Cross Concrete Pumping Co.*, 428 Mich 219; 407 NW2d 355 (1987) involved a piece of construction equipment pumping concrete, the Defendant-Appellant repeatedly refers to "pumping the grain" or "an independent pumping system," which appears nowhere in the factual record before this Court. Evidence that the grain was not being pumped comes from one of the eyewitnesses. The grain truck delivering grain to Mr. Drake's silo was driven by Thomas Passmore. In Mr. Passmore's deposition word index "unload" or derivations appear 35 times; "delivery" or derivations appear 58 times; "pumping" or "pumping station" or "independent pumping systems" appear not at all. The truck involved in this case was not a tractor-trailer rig but was a single unit more like a dump truck, without the dumping hydraulics, or a step van. The truck had five compartments, referred to as "bins," which were loaded from the top at the seller's place of business and unloaded, one at a time, at silos owned by the customers of the seller. Dep. Tr., Thomas Lee Passmore, pp. 17-20. There were three separate augers permanently attached to the grain truck to assist in unloading the truck and delivering the grain to the silo. The first auger ran along the bottom of the vehicle on the passenger side.

It was enclosed and integral to the truck, visible only through an inspection door on the passenger rear of the vehicle. Dep. Tr., Thomas Lee Passmore, p. 64. The grain was gravity fed into this auger. Dep. Tr., Thomas Lee Passmore, p. 65. On May 31, 2002, Thomas Lee Passmore opened one of the bin hatches and the grain ran into the bottom auger. Grain clogged the bottom auger and the truck would not continue to unload. According to Michael Drake, Thomas Lee Passmore then asked for assistance. Dep. Tr., Michael Drake, p. 75. Mr. Drake approached the truck, bent by the inspection door, and looked in. The truck engine was running and the hydraulics were not. Dep. Tr., Michael Drake, p. 77. When Michael Drake looked in the inspection door, he saw grain. Dep. Tr., Michael Drake, p. 85. He began to unload that grain with his right hand and had unloaded five or six handfuls of grain when Thomas Lee Passmore activated the bottom auger, which came into contact with Michael Drake's right hand and caused serious injury. Dep. Tr., Michael Drake, pp. 91, 106 – 110. The truck was being unloaded at the time of the injury, which was simply the last step in transporting the grain from the seller's place of business to the buyer's storage facility.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

COUNTER-ARGUMENT I

I. THE COURT OF APPEALS' HOLDING THAT WHEN A PARKED GRAIN DELIVERY TRUCK IS DOING NOTHING BEYOND COMPLETING ITS DELIVERY, IT IS ENGAGED IN ACTIVITY "CLOSELY ASSOCIATED WITH THE TRANSPORTATIONAL FUNCTION" OF A MOTOR VEHICLE WAS NOT CLEARLY ERRONEOUS.

A. The Court of Appeals' Majority Opinion is decided within the parameters of Supreme Court precedent.

The Court of Appeals in this case, following McKenzie v Auto Club Ins. Ass'n, 458 Mich 214; 580 NW2d 424 (1998), correctly held that under the facts of this case, the starting point for its analysis under the No Fault Act is MCL 500.3105(1). The Court stated:

The starting point for our analysis under the no-fault act is MCL 500.3105(1). Rice v Auto Club Ins. Ass'n, 252 Mich App 25, 33; 651 NW2d 188 (2002). Section 3105(1) provides:

Under personal protection insurance an insurer is 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 the provisions of this chapter. [MCL 500.3105(1) (emphasis added).]

Under § 3105(1), the analysis for determining whether no-fault benefits are available involves two broad steps. Rice, supra at 33. First, it is necessary to determine "whether the injury at issue is covered," i.e., whether it is "accidental," "bodily," and "aris[es] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle." *Id.* Second, it is necessary to determine whether the injury is excluded under other provisions in the no-fault act and whether an exception to an exclusion would save the claim. *Id.*

In the present case it is undisputed that the injury sustained by the plaintiff was both accidental and bodily, consisting of the accidental severance of the right index finger and a substantial portion of the right middle finger. Thus, it is necessary to determine whether plaintiff's injuries arose out of "the ownership, operation, maintenance or use of a motor vehicle *as a motor vehicle*." Rice, supra, at 33 (emphasis added). If so, we must then determine whether plaintiff's injury is excluded under other applicable provisions of the no-fault act.

“[W]hether an injury arises out of the use of a motor vehicle “as a motor vehicle” under § 3105 turns on whether the injury is closely related to the transportational function of motor vehicles.” McKenzie v Auto Club Ins Ass’n, 458 Mich 214, 225-226; 580 NW2d 424 (1998). While a vehicle need not be in motion at the time of an injury in order for the injury to “arise out of the use of a motor vehicle as a motor vehicle,” McKenzie, supra at 219 n 6, the phrase “as a motor vehicle” does require a general determination of whether the vehicle in question was being used, maintained, or operated for transportational purposes, *id.* at 219.

Contrary to defendants’ argument, we disagree that plaintiff’s injury did not arise out of the ownership, operation, maintenance or use of a motor vehicle *as a motor vehicle* under the analysis set forth in McKenzie. This case is unlike those circumstances identified in McKenzie as rare instances “when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum.” *Id.* at 219. The vehicle involved is a delivery truck, and it was being used as such when the injury occurred. Accordingly, plaintiff’s injury is closely related to the motor vehicle’s *transportational function*, and therefore arose out of the operation, ownership, maintenance, or use of a motor vehicle “as a motor vehicle” pursuant to McKenzie, id. at 220.

Drake v Citizens Ins. Co. of America, Slip Op., pp. 2-3.

Having found that the grain delivery truck was simply delivering grain when the injury occurred and that injuries occurring during the delivery/unloading process were closely related to the motor vehicle’s transportational function, the Court, referring to Rice, supra at 33, went on to analyze the case under 500.3106(1)(b). The Court found, as the undisputed facts in this case support, that the injury was “a direct result of physical contact with equipment permanently mounted on the vehicle while the equipment was being operated or used.” MCL 500.3106(1)(b).

Contrary to the Defendant-Appellant’s assertions, this case is factually distinguishable from Bialochowski, supra. Bialochowski, as well as Johnston v Hartford Ins. Co., 131 Mich App 349 (1983) and McFadden v Allstate Ins. Co., 164 Mich App 20 (1987) (on remand after

Bailochowski) were cases in which, factually, the vehicles were stabilized and being used as a platform for construction equipment at the time that the injury occurred. Unlike Bialochowski, McFadden or Johnston, the grain truck in this case was not stabilized and was not being used for any purpose other than the delivery of grain. It was not being used to feed pigs. It was not being used to plant fields. It was being used to transport grain and was unloading that grain into a silo when the injury occurred. The vehicle was parked, its engine was running, and the equipment permanently mounted on the vehicle was being operated when Mr. Drake's hand came into physical contact with that equipment during its operation. As the Court correctly held, this is not a situation where the vehicle was a "dual purpose vehicle." The vehicle was a grain delivery truck, nothing more and nothing less. It was not being used as a sleeping quarters or the functional equivalent of a tent as in McKenzie and Engwis v Michigan Mutual Ins. Co., 181 Mich App 16 (1989) (cited with disfavor by McKenzie). Nor was it being used as a housing facility, an advertising display, a mobile public library, a museum display or, as stated previously, a foundation for construction equipment. It was simply delivering grain. The vehicle could not fulfill its function as a delivery truck without the operation of the equipment permanently mounted on the vehicle. Operation of the auger is integral to and necessary for the delivery of grain to customers.

The Court correctly found that the vehicle was parked. The Court correctly applied McKenzie and found that Plaintiff's injury was closely related to the motor vehicle's transportational function and therefore arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. The Court correctly found that the injuries were accidental and bodily. The Court correctly held that the circumstances of the injury caused it to fall within one of the parked vehicle exceptions contained in MCL 500.3106(1)(b) in that

Plaintiff's injuries were a direct result of physical contact with equipment permanently mounted on the vehicle while the equipment was being operated or used. Having correctly analyzed the case under Michigan Supreme Court precedent and the Michigan No Fault law, the Court correctly affirmed the Trial Court's ruling in Plaintiff's favor.

B. The Court of Appeals Opinion will not create confusion or conflict.

The Court of Appeals' Majority Opinion will not create confusion and conflict in subsequent cases. As stated above, the Court used the McKenzie analysis in affirming the Trial Court. The Court in subsection 4 of its Opinion Drake v Citizens Ins. Co. of America, (Slip Op. p. 4) then went on to discuss what the Court believes to be problems with the McKenzie analysis. Since the Court used the McKenzie analysis in deciding the case in Plaintiff-Appellee's favor, the thoughtful and considered criticisms of McKenzie contained in subpart 4 are dicta and merely, as stated in the concluding paragraph of the Opinion, a request for reconsideration of that Opinion by the Supreme Court or the Legislature. Should this Court choose not to reconsider McKenzie, McKenzie will, of course, remain the law and subsequent panels of the Court of Appeals will be bound, as this panel was, to follow its dictates.

COUNTER-ARGUMENT II

II. WHERE THE NO FAULT CLAIMANT WAS INJURED AS A RESULT OF PHYSICAL CONTACT WITH EQUIPMENT PERMANENTLY MOUNTED ON THE VEHICLE, IT WAS NOT CLEARLY ERRONEOUS FOR THE COURT OF APPEALS MAJORITY TO FIND NO FAULT COVERAGE IN FAVOR OF THE CLAIMANT.

The Defendant-Appellant's tortured description of the grain auger that was permanently mounted on the grain truck is irrelevant. What is relevant is that it was equipment that was permanently mounted on the vehicle and that it was being operated or used.

It is un rebutted that all that was occurring at the time of the injury was the unloading of grain from the truck into the silo. MCL 500.3106(1)(b) contemplates that there are circumstances where equipment is permanently mounted on a vehicle which has an operation or use independent of the vehicle. The statute specifically references equipment permanently mounted on the vehicle. If the Legislature meant to exclude systems like grain augers or hydraulic tailgates, they would have simply referred to "the vehicle." The Legislature also contemplated that the equipment would operate independent of the vehicle while the vehicle was parked. The statute does not read "while the vehicle was being operated or used;" it reads while the "equipment was being operated or used." If the operation of the equipment permanently mounted on a vehicle means the vehicle is not being used "as a motor vehicle," the Legislature would not have provided an exception to the "parked vehicle" exclusion for such a scenario. The Legislature contemplated that it would be the equipment that was being operated, not the vehicle. The question, under the "dual purpose vehicle" analysis is whether the equipment is being used for a purpose other than transportational. Here, the equipment was being used to unload the vehicle, nothing more, nothing less. Goods cannot be "transported" unless they are unloaded. The statute itself in subpart (b) refers to loading and unloading of vehicles as indicative of the use of a motor vehicle as a motor vehicle. Nothing could be more closely associated with the transportational function of a vehicle than unloading the goods which have been transported.

RELIEF REQUESTED

Plaintiff-Appellee Michael Drake prays that this Honorable Court deny Defendant-Appellant's Application for Leave to Appeal.

Respectfully submitted,

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