

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL EUGENE DRAKE,

Plaintiff-Appellee,

-vs-

CITIZENS INSURANCE COMPANY
OF AMERICA,

Defendant-Appellant.

Supreme Court Docket
No. 130855

Court of Appeals Docket
No. 257800

Lower Court Docket
No. 03 318 NF

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF
IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT BEING APPEALED AND RELIEF SOUGHT

The Defendant correctly identifies in its original Application for Leave to Appeal 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

No supplemental questions will be presented or reviewed and Plaintiff-Appellee Michael Drake relies on his original Counter-Statement of Questions Involved.

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SUPPLEMENTAL ARGUMENT

In order for Citizens Insurance Company to be entitled to review by this Court on its Application for Leave to Appeal, it must show that it has satisfied one of the grounds listed in MCR 7.302(B). The only enumerated ground under which Citizens could make application in this case is MCR 7.302(B)(5). However, as shown below, Citizens has not established that the decision of the Court of Appeals is “clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.”

Citizens works diligently in its application to muddy the waters by ignoring the obvious and critical factual distinctions between the instant case and the cases of *McKenzie v. Auto Club Insurance* 458 Mich 214; 580 NW2d 424 (1998); *Rice v. Auto Club Insurance* 252 Mich App 25; 651 NW2d 188 (2002); and *Bialochowski v. Cross Concrete Pumping Co* 428 Mich 219; 407 NW2d 355 (1987). A thorough review of those cases makes clear that the instant case fits squarely within settled precedent and is not in conflict with any other Court of Appeals decision. Citizens Application for Leave to Appeal should be denied.

It is undisputed that *McKenzie v. Auto Club Insurance* 458 Mich 214; 580 NW2d 424 (1998) is the leading case interpreting MCL 500.3105 and MCL 500.3106. The *McKenzie* court held that claimants who were asphyxiated in a parked camper/trailer while using the camper/trailer as “sleeping accommodations” were not entitled to PIP benefits because using the vehicle as “sleeping accommodations” was too far removed from the transportation function of the vehicle for coverage to apply. *Id* at 226.

In this case, it is also undisputed that the injury occurred while the claimant was unloading grain from a grain delivery truck by equipment that was permanently affixed to the truck. Unlike *McKenzie*, *Rice* and *Bialochowski*, the vehicle in this case had a *single* purpose – to deliver grain.

There is no other function. It is a delivery truck. In this case there is no closer nexus to be found under the *McKenzie* approach than an injury occurring while delivering grain from a grain delivery truck.

The Court of Appeals found that “*McKenzie* controls the analysis of no-fault coverage in this case” (Opinion pg. 4) and rendered its opinion within the confines of the *McKenzie* decision. The applicant in this case makes no argument that the Court of Appeals failed to *follow McKenzie*. The Court of Appeals *dicta* that the *McKenzie* analysis is at odds with the no-fault statutory scheme (Opinion pg. 4) would not change the outcome of the Court of Appeals’ decision in this case. With no argument that the Court of Appeals decision was clearly erroneous in this case, or that there is a conflict with another opinion, there is simply no basis for granting Citizens application in this case. Whether the *McKenzie* decision must be revisited is neither here nor there as it applies to this case.

Citizens attempts to use the fact that *McKenzie* overruled the *Bialochowski* case to argue that the instant case was wrongly decided under *McKenzie* and should be reversed. Citizens seems confused by the application of *McKenzie* to these two cases because the vehicles at issue were both “delivering” something and therefore must be “indistinguishable” (Citizens Reply Brief p. 2) Citizens ignores the fact that the cement truck in *Bialochowski* had been stabilized with stabilizers and was not merely unloading the concrete, but was pumping it to remote areas of a building under construction as part of the construction process. It was, at that point, construction equipment. Citizens goes on to argue (as did Judge Zahra in the dissent in the instant case) that since the grain delivery truck could not be driven while it was delivering grain, then the grain delivery process must be far removed from its transportational function. First, there is nothing in the record to suggest that this grain delivery truck could not be driven *at* the time Mr. Drake was

injured. More importantly, however, is the fact that if this Court were to adopt Citizens analysis, it would require overruling cases like *Putkamer v. Transamerica Ins. Corp. of America*, 454 Mich 626; 563 NW2d 683 (1997), where the Plaintiff was injured entering the vehicle. Obviously, a vehicle that has no driver cannot be driven at the time of injury. That analysis is not well thought out and would wreak havoc on already settled law.

Relief Requested

This is not a case where a dual purpose vehicle was engaged in activity far removed from the transportational purpose of the vehicle at the time of the injury. It is a case where Michael Drake was injured by equipment permanently mounted on a grain delivery truck which was delivering grain. The Court of Appeals' decision affirming the Trial Court's decision fits squarely within existing precedent. It will not create a conflict with settled authority. The Application for Leave should be denied.

Respectfully submitted,

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