S T A T E O F M I C H I G A N

COURT OF APPEALS

MICHAEL EUGENE DRAKE, Plaintiff-Appellee,	FOR PUBLICATION February 23, 2006 9:00 a.m.
v	No. 257800 Hillsdale Circuit Court
CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Appellant.	LC No. 03-000318-NF Official Reported Version

Before: Zahra, P.J., and Murphy and Neff, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. Contrary to the majority, I find no inconsistency between *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), and the express language of MCL 500.3105 and 500.3106. I conclude plaintiff's injuries did not arise out of the use of a motor vehicle as a motor vehicle. I would reverse and remand for entry of judgment in favor of defendant.

Sections 3105 and 3106 must be satisfied in order for plaintiff to prevail. Section 3105(1) precludes personal protection insurance unless the "accidental bodily injury aris[es] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . . " Section 3106 expressly precludes recovery for accidental bodily injury arising out of the "ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle" unless one of three statutorily defined exceptions exists. That § 3106 defines limited situations in which the Legislature permitted recovery for accidental injury that arose while interacting with a parked vehicle does not eviscerate the threshold question whether the injury arises out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. The majority would, in essence, ignore § 3105 whenever an injury relates to a parked vehicle. Such an interpretation flies in the face of the well-established rules of statutory construction cited by the majority and embraced by *McKenzie*.

I also disagree with the majority's conclusion that plaintiff's injury arose out of the use of a motor vehicle as a motor vehicle. The facts of this case cannot be distinguished from *Bialochowski v Cross Concrete Pumping Co*, 428 Mich 219; 407 NW2d 355 (1987), 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. [*Bialochowski, supra* at 222-223.]

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 . . . ." *McKenzie, supra* at 224. 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 finding 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.

I would reverse the judgment entered in favor of plaintiff and remand for entry of judgment in favor of defendant, because plaintiff 's injury clearly did not arise out of the use of a motor vehicle as a motor vehicle. MCL 500.3105; *McKenzie, supra*.

/s/ Brian K. Zahra