

STATE OF MICHIGAN
IN THE SUPREME COURT

144781

CHARLES ANTHONY LEFEVERS,
Individually,

Plaintiff,

Supreme Court No. ~~144781~~
Court of Appeals No. 298216
Wayne County Circuit Court
No. 08-116325-NF

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant

and

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, TITAN INSURANCE
COMPANY, ZURICH AMERICAN INSURANCE
COMPANY, STEADFAST INSURANCE
COMPANY, CLARENDON NATIONAL
INSURANCE COMPANY,
REDLAND INSURANCE COMPANY,

Defendants.

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**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS PROPERLY DENY SUMMARY DISPOSITION WHEN IT DETERMINED THAT THE TAILGATE OF PLAINTIFF'S DUMP TRAILER IS EQUIPMENT PERMANENTLY MOUNTED ON A VEHICLE?

The Court of Appeals answered: yes

Plaintiff-Appellee answers: yes

Defendant-Appellant would answer: no

This Court should answer: yes

- II. DID THE COURT OF APPEALS PROPERLY DENY SUMMARY DISPOSITION WHERE PLAINTIFF WAS INJURED AS A DIRECT RESULT OF PHYSICAL CONTACT WITH THE TAILGATE OF HIS DUMP TRAILER?

The Court of Appeals answered: yes

Plaintiff-Appellee answers: yes

Defendant-Appellant would answer: no

This Court should answer: yes

STATEMENT OF ORDER BEING APPEALED:

This is an action for First Party No-Fault PIP benefits, arising out of an accident involving the unloading of Plaintiff's dump trailer. Plaintiff, Mr. Charles Lefevers, was injured as a direct result of physical contact with the tailgate of the truck trailer he was unloading.

Plaintiff made a claim for No-Fault (PIP) benefits on the basis that Plaintiff's injury arose out of the ownership, operation or maintenance of a motor vehicle as a motor vehicle.

Defendant State Farm filed a motion for summary disposition alleging that Plaintiff did not qualify for any exceptions to the parked vehicle exclusion to PIP coverage. At the conclusion of the hearing on November 10, 2009, the trial court issued an opinion that a question of fact exists as to the applicability of the exceptions set for in MCLA 500.3106(1)(a) and (b) relative to Plaintiff's claim for Michigan No-Fault benefits (see Transcript, Exhibit 1). On December 22, 2009 State Farm filed a motion for reconsideration but this was ultimately denied on in an order entered on January 26, 2010. The parties then agreed to a stipulated judgment subject to State Farm exhausting all appellate remedies.

Defendant appealed the decision and the Court of Appeals affirmed the trial courts order denying Defendant's Motion for Summary Disposition. Justices Peter D. O'Connell, Christopher M. Murray, and Pat M. Donofrio all held that Plaintiff's dump trailer constituted "equipment" within the meaning of MCL 500.3106(1)(b), and a question of fact existed regarding whether Plaintiff's injury occurred as a direct result of physical contact with the tailgate (see Exhibit 2). The Court relied on *Gunsell v. Ryan*, 236 Mich App 204, 210 n 5; 599 NW2d 767 (1999), and *Miller v. Auto-Owners Ins Co*, 411 Mich 633, 640-1; 309 NW2d 544 (1981) to determine that Plaintiff's tailgate was equipment within the meaning of the parked vehicle exception.

The Court rejected Defendant's argument that the tailgate was an integral part of the dump trailer. The Court went on to explain that the exceptions set forth in MCL 500.3106(1)(b) prevent the exception from swallowing the rule by requiring the equipment being in "use" or "operation."

Here, the Court determined that a trier of fact could find that Plaintiff's injury was a direct result of his physical contact with the tailgate, which caused an abrupt shift in Plaintiff's momentum when it suddenly broke free and struck the Plaintiff.

Defendant brought a Motion for Reconsideration based on the Supreme Court decision *Frazier v. Allstate Insurance Co.*, 490 Mich 381; 808 NW2d 450 (2011). The Court of Appeals denied Defendant's Motion for Reconsideration and distinguished the holding in *Frazier* from this case. The Court held that the tailgate was not an integral component of the vehicle itself, but was necessary for the dump truck to serve its load-carrying purpose and operated in conjunction with the hydraulic lift to contain and control the flow of matter being unloaded from the vehicle. Unlike the passenger door in *Frazier*, the tailgate was not a constituent part of the vehicle itself and was utilized only when the dump truck was functioning as a dump truck, i.e., transporting or hauling material for unloading at a dump site (see Exhibit 3).

Defendant now brings an application for leave to appeal arguing that a tailgate is not equipment for purposes of MCL 500.3106(1)(b) and that Plaintiff's injury was not a direct result of physical contact with equipment permanently mounted on the vehicle.

Plaintiff respectfully requests that this court deny Defendant's Leave to Appeal as the Court of Appeals has already addressed the applicability of *Frazier* and determined that a question of fact existed whether Plaintiff's injury was a direct result of physical contact with tailgate of his vehicle.

COUNTER STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiff's injury arises out of a serious accident that occurred on June 26, 2007 at the Wayne Disposal Incorporated Landfill. On this day, Mr. Lefevers was hauling hazardous material from Georgia to Michigan, with a 1991 Tibbrook end dump trailer. Mr. Lefevers arrived at the Wayne Disposal Incorporated Landfill where he was directed by Wayne County employees to dump his load over a concrete wall and into the landfill (Plaintiff's dep., pg. 65, Exhibit 4). As directed, he backed up to the very edge of the toxic waste pit, with his back wheels up to the lip of the pit and the back of the tailgate actually hanging over the pit (Plaintiff's dep., pg. 65, Exhibit 4). He then exited his vehicle and proceeded to the back of the trailer.

The trailer was equipped with a hydraulic bucket so that its contents emptied out of the back. The tailgate regulated the contents flow and had to be opened in order to dump the bucket's material. Mr. Lefevers had to go through multiple steps in order to open the tailgate. He first had to release the safety latch which was a screw top device located on the back of the trailer. Mr. Lefevers explained that he had to pull the safety latch out of place and screw the lock down onto the trailer (Plaintiff's dep., pg. 66-70, Exhibit 4). After the safety latch was in place, Mr. Lefevers then had to walk one to two steps to activate the tailgate release. The tailgate release is an air switch located on the front axle of the trailer (Plaintiff's dep., pg. 71-2, Exhibit 4).

Mr. Lefevers testified that he walked to the very rear of the trailer and placed his hands at the lip of the tailgate where the latch closes and applied pressure to the area. After several attempts to unlock the tailgate, Mr. Lefevers stepped onto the concrete "berm" that bordered the toxic waste pit in order to gain leverage, but the tailgate would still not unlatch. Mr. Lefevers continued to apply pressure and lean into the tailgate to try and push it open (Plaintiff's dep., pg. 78-9, Exhibit 4). He had both hands on the lip and he was pushing with his legs and arms to free the tailgate. Mr. Lefevers was in direct contact with the trailer tailgate when it suddenly broke

free from the trailer. The weight of the dirt pushing against the tailgate, combined with the swinging action of the tailgate, caused him to lose his balance and fall approximately twelve feet into the toxic waste pit. In this matter, Mr. Lefevers injury was a result of direct contact with the trailer tailgate.

STANDARD OF REVIEW:

The Michigan Supreme Court reviews a motion for summary disposition *de novo*.

On a Motion for Summary Disposition based on alleged absence of genuine issues of material fact (MCR 2.116(C)(10)), the Court must view the evidence in the light most favorable to the non-moving party. *DiFranco v. Pickard*, 427 Mich 32, 38, 398 NW2d 896 (1986). Courts are liberal in finding that a genuine issue exists, drawing all inferences in favor of the non-movant, and granting summary disposition only when the Court is satisfied that it is impossible for the claim to be supported at trial because of some deficiency that cannot be overcome.

Langeland v. Bronson Methodist Hospital, 178 Mich App 612, 615-616; 444 NW2d 146 (1989). The benefit of every reasonable doubt is to be given to the non-moving party. *State Farm Fire & Cas. Co. v. Moss*, 182 Mich App 449,562; 452 NW2d 816 (1989), *Meridian Mut. Ins. Co. v. Hunt*, 168 Mich App 672; 425 NW2d 111(1988). "If there is a possibility that a record might be developed that leaves open an issue of material fact upon which reasonable minds might differ, then the motion should be denied." *Ringewold v. Bos*, 200 Mich App 131; 136 (1993).

"The Court must carefully avoid substituting trial by affidavit and deposition for a trial by jury. Moreover, the Court is not allowed to make findings of fact or to weigh the credibility of affiants or deponents." *Soderberg v. Detroit Bank & Trust Co.* 126 Mich App 474, 479 (1983), and authority cited therein.

The overall principle of which this Honorable Court must be ever mindful is that when the evidence conflicts on a material point, the case may not be summarily decided. See *Johnson v Kroger*, 319 F3d 858 (6 Cir. 2003). There, the Court observed that "one judge's scintilla is another's genuine issue of material fact that requires consideration by a jury."

ARGUMENT:

THE TAILGATE OF PLAINTIFF'S DUMP TRAILER IS "EQUIPMENT PERMANENTLY MOUNTED" FOR PURPOSES OF MCL 500.3106(1)(b)

This Court should deny Defendant's Application for Leave to Appeal based on the fact that a tailgate is equipment permanently mounted for purposes of MCL 500.3106(1)(b). It is un rebutted that Plaintiff's injury arose when he was struck by the tailgate while attempting to open the tailgate of his dump trailer. MCL 500.3106(1)(b) contemplates circumstances where equipment is permanently mounted on a vehicle.

Under Michigan law, an individual injured while interacting with a parked vehicle is entitled to no-fault benefits if the "injury was a direct result of physical contact with equipment permanently mounted on the vehicle." MCL 500.3106(1)(b). This Court set forth the distinction between the vehicle and its equipment in *Frazier v. Allstate Insurance Co.*, 490 Mich 381; 808 NW2d 450 (2011):

"Equipment" is defined as "the articles, implements, etc., used or needed for a specific purpose or activity," while "vehicle" is defined as "any means in or by which someone is carried or conveyed: *a motor vehicle*" or "a conveyance moving on wheels, runners, or the like, as an automobile." *Random House Webster's College Dictionary* (1997). Because all functioning vehicles must be composed of constituent parts, no single article constitutes "the vehicle." This reality creates the potential for the definition of "equipment" to engulf that of "the vehicle." However, the language of MCL 500.3106(1)(b) forecloses the possibility by requiring that the "equipment" be "mounted on the *vehicle*," which indicates that the constituent parts of "the vehicle" itself are not "equipment."

Id. at 385 (italics in original). This Court went on to conclude that a passenger door of an automobile was "clearly" a constituent part of the vehicle and, therefore, not equipment.

Not surprisingly, despite all its protestations that *Frazier* exists as gospel on the issue, Defendant State Farm fails to even address this language in its present application. If it had, it would undermine its false tautology that the passenger side door in that case equals a tailgate door attached to the dumping mechanism mounted on a trailer. This Court's holding does not preclude all doors on any motor vehicle, as defined by the no-fault act, from being deemed equipment. It only establishes that "constituent parts" do not qualify as such. The Court then

went on to hold that *the passenger side door* was a constituent part of a *passenger vehicle*, and therefore, not equipment. It follows that the proper inquiry in the present case is whether or not the tailgate door at issue amounted to a “constituent” part of the vehicle on which it was mounted.

In the case at bar, the “vehicle” for purposes of analysis is the trailer. MCL 500.3101(2)(e). The trailer was equipped with a hydraulic bucket so that its contents emptied out of the back. The tailgate regulated the contents flow and had to be opened in order to dump the bucket’s material. Simply put, *the entire dumping mechanism, including the hydraulics, bucket and its tailgate constituted equipment permanently mounted on the vehicle*. The entire mechanism certainly existed as an “implement... used or needed for a specific purpose or activity.” *Frazier, supra*. In this case, the specific purpose was the hauling and disposal of hazardous waste. Because the tailgate is part of the dumping mechanism, and related to this specific purpose, rather than the trailer’s more general purpose, it qualifies as “equipment” and should not be considered a constituent part of the vehicle.

It must be stressed that the function of the entire dumping mechanism is distinguishable from the trailer itself. A trailer is a simple instrument defined as “a nonautomotive vehicle designed to be hauled by road as... a vehicle for transporting something.” <http://www.merriam-webster.com>. A basic one is nothing more than a flat bed without any enclosure or tailgate whatsoever. A large number are left this way while engaged in transportation. However some are mounted with equipment so that they may perform specialized functions. For instance, the trailer may be boxed in order shield its contents from the elements, it may be set up as a car hauler, or, as in the case at bar, it may be equipped with a dump end. In these circumstances, the specialized equipment is not integral to the trailer as the trailer is merely the equipment’s conveyance.

Defendant-Appellant’s argument also defies common sense and ignores the fundamental differences between automobiles and trailers. It is this distinction that undermines State Farm’s myopic “apples to apples” comparison of a door to a passenger compartment of an automobile

to the tailgate of a dumping mechanism attached to a trailer. *Because not much is necessary for a trailer to be a trailer, it follows that one has far less, and differing, constituent parts than an automobile.* For example, a car's engine would certainly be considered a constituent part as an engine is an inherent part of any automobile. However an engine mounted on a trailer (perhaps as a pump or generator) would not be a constituent part because, by definition, a trailer does not function under its own power. The same observation applies to doors. Automobile passenger compartments are always secured in some manner, in almost all cases by doors. Trailers do not always have doors and are often not enclosed at all. Whereas the door in *Frazier* was an integral part of the vehicle because it could not safely be used as a car without it, the tailgate at issue in the case at bar is not integral to the trailer as it can still safely function as a trailer without it, albeit not for the specialized purpose of hauling hazardous waste.

Accepting Defendant-Appellant's argument creates an environment where the definition of "vehicle" swallows the definition of "equipment." In order to reach its conclusion that the tailgate is not equipment, this Court will have to conclude that it is a constituent part of the trailer. The only way it can conclude that the tailgate is a constituent part of the trailer is if it believes the tailgate's relation to the transportation of hazardous waste makes it integral to the trailer. However, such a result would preclude all devices used in the aid in the transportation of goods and permanently mounted to trailers from being deemed equipment. For instance, a crane permanently mounted on a trailer in order to facilitate the trailer's loading and unloading would not be equipment because it was related to the transportation process. Likewise a winch used for bringing cars onto a hauler would not amount to equipment for the same reason. Such results defy common sense and render MCL 500.3106(1)(b) meaningless whenever an injury happens on a trailer.

Moreover, the Court in *Gunsell v. Ryan*, *supra*, held that the rear door of a semitrailer constituted "equipment" under subsection (b). *Gunsell* is still good law and should be binding on this case. Defendant attempts to minimize the precedential value of *Gunsell* by suggesting that the Courts determination that the rear door constituted equipment was not essential to its

holding. A review of the opinion suggests otherwise. The holding that the rear door of the semitrailer was equipment within the meaning of MCL 500.3106(1) was outcome determinative as to whether Plaintiff was subject to the No-Fault Act. If the Court had found that the rear door of the semitrailer was not equipment within MCL 500.3106(1), then the No-Fault Act would not have applied to Plaintiff's claim.

One of the justices who authored *Gunsell* is Peter D. O'Connell. Justice O'Connell is the same Justice who drafted the Court of Appeals decision now appealed. It is clear that the holding in *Gunsell* is binding on this case.

PLAINTIFF WAS INJURED AS A DIRECT RESULT OF PHYSICAL CONTACT WITH THE TAILGATE OF HIS DUMP TRAILER

Plaintiff's injury was a direct result of physical contact with the tailgate of his dump trailer. As the Court of Appeals correctly determined, Mr. Lefevers was in direct contact with the tailgate when it suddenly broke free and caused an abrupt shift in Plaintiff's momentum. The force of the tailgate caused Mr. Lefevers to lose his balance and fall off of the platform. If not for the trailer tailgate, Mr. Lefevers would not have been injured.

MCL 500.3106(1)(b) states in relevant part:

(b) Except as provided in subsection (2), the injury was a direct result of physical contact with the equipment permanently mounted on the vehicle, while the equipment was being operated or used or property being lifted onto or lowered from the vehicle in the loading or unloading process (emphasis added)

In *Richie v. Federal Insurance Company*, 132 Mich App 372, 374-375; NW2d 478 (1984), the Plaintiff was injured when a stairway he was descending collapsed as he held a 50-pound block of ice over his head in an effort to load it onto his parked truck. The Court held that a question of fact existed regarding whether the Plaintiff's injury "directly resulted" from the loading process because a trier of fact could find that the weight of the cargo, rather than Plaintiff's weight alone, caused the stairway to collapse. *Ritchie*, 132 Mich App at 375. In this case, the swinging action of the trailer tailgate caused Mr. Lefevers to lose his balance and was a cause of his injury.

Defendant argues that Plaintiff's injury was not a direct result of physical contact with the trailer tailgate. The qualifications that Defendant State Farm would impose on this aspect of 3106(1)(b) are not found in the text of this subsection. Defendant's argument is misguided in that it ignores the placement of "direct" in the statute and misreads the statute as requiring that an injury occur as a result of "direct physical contact" with the equipment on the vehicle.

Defendant cites *Winter v. AAA*, 433 Mich 446 (1989) for the proposition that Plaintiff's injury was not a direct result of physical contact with the trailer tailgate. In *Winter*, Plaintiff's injury occurred when a concrete slab disengaged from the hook of the tow truck and fell upon his hand. The Court held that Plaintiff could not recover benefits under the first prong of 3106(1)(b) because the Plaintiff did not come in contact with the hook or winch of the truck. *Winter* required that there be physical contact between the injured person and the equipment permanently mounted.

Here, there was physical contact between Plaintiff and trailer tailgate itself. There is no dispute that Plaintiff's injury arose when he was attempting to open the tailgate of his dump trailer. He was in direct contact with the tailgate when the tailgate swung open and caused him to lose his balance. Plaintiff's injury falls squarely within circumstances contemplated by MCL 500.3106(1)(b).

CONCLUSION AND RELIEF REQUESTED

¹ Wherefore, Plaintiff prays that this Court deny Defendant's Application for Leave to Appeal and determine that Plaintiff's injury was a direct result of physical contact with his trailer tailgate.

Respectfully submitted,


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