

STATE OF MICHIGAN
IN THE SUPREME COURT

CHARLES ANTHONY LEFEVERS,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellant,

and

TITAN INSURANCE COMPANY, ZURICH
AMERICAN INSURANCE COMPANY,
STEADFAST INSURANCE COMPANY,
CLARENDON NATIONAL INSURANCE
COMPANY and REDLAND INSURANCE
COMPANY,

Defendants.

Supreme Court No. *Open 12-13-11*
Rec 1-31-12

Court of Appeals No.: 298216

Wayne County Circuit Court
Case No: 08-116325-NF
(Hon. Gershwin Drain)

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APPLICATION FOR LEAVE TO APPEAL

**FILED ON BEHALF OF DEFENDANT-APPELLANT,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
ORAL ARGUMENT REQUESTED**

RizzoBryan, P.C.
Devin R. Day (P60298)
220 Lyon Street, N.W.,
Suite 200 Grand Plaza Place
Grand Rapids, Michigan 49503
(616) 451-8111
dday@rizzobryan.com

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CORBIN R. DAVIS
CLERK
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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. **DID THE COURT OF APPEALS ERR BY REFUSING TO FOLLOW THIS COURT'S HOLDING IN *FRAZIER*, BASED ON A HOLLOW SEMANTIC DISTINCTION BETWEEN "TAILGATES" AND A "DOORS," FOR PURPOSES OF APPLYING THE "EQUIPMENT PERMANENTLY MOUNTED ON THE VEHICLE" EXCEPTION TO THE PARKED VEHICLE EXCLUSION?**

The Plaintiff-Appellee would respond:	No.
The Defendant-Appellant answers:	Yes.
The Court of Appeals would respond:	No.
This Court should answer:	Yes.

- II. **DID THE COURT OF APPEALS ERR IN DECIDING THAT *DICTA* FROM THIS COURT'S DECISION IN *MILLER*, COMBINED WITH FOOTNOTE 5 FROM THE COURT OF APPEALS' DECISION IN *GUNSELL*, SUPERSEDES THIS COURT'S HOLDING IN *FRAZIER* FOR PURPOSES OF APPLYING MCL 500.3106(1)(b) TO THE FACTS OF THIS CASE?**

The Plaintiff-Appellee would respond:	No.
The Defendant-Appellant answers:	Yes.
The Court of Appeals would respond:	No.
This Court should answer:	Yes.

- III. **IN THE ALTERNATIVE, DID THE COURT OF APPEALS ERR IN FINDING A GENUINE ISSUE OF FACT REGARDING CAUSATION BASED ON APPLICATION OF THE WRONG CAUSAL STANDARD - APPLYING THE "ARISING OUT OF" CAUSAL STANDARD FROM MCL 500.3105(1), TO SUPPLANT THE "DIRECTLY RESULTED" CAUSAL STANDARD FROM MCL 500.3106(1)(b)?**

The Plaintiff-Appellee would respond:	No.
The Defendant-Appellant answers:	Yes.
The Court of Appeals would respond:	No.
This Court should answer:	Yes.

INTRODUCTION

This Court recently held that doors are not “equipment permanently mounted” on a motor vehicle; instead, they are constituent parts of the vehicle itself. *Frazier v Allstate*, 490 Mich 381; ___ NW2d ___ (2011). Based on that ruling, this Court determined that a person who slipped and fell while attempting to close the passenger door on her truck was precluded from recovering first-party no-fault “PIP” benefits, by application of the parked vehicle exclusion, MCL 500.3106(1)(b).

This case tests the veracity of this Court’s decision in *Frazier*. In this case, Mr. Lefevers lost his balance and fell some twelve (12) feet into a toxic waste pit, after manually prying open the rear door of his dump trailer. He stopped falling when his body violently collided with a concrete slab on the floor of the pit, which resulted in severe injuries to his back. State Farm determined that these facts did not give rise to a valid claim for no-fault PIP benefits, because they did not satisfy any of the exceptions to the parked vehicle exclusion. Mr. Lefevers disagreed, arguing among other things, that his injuries were a direct result of physical contact with equipment permanently mounted on the vehicle. The trial court and the Court of Appeals agreed that the rear door of the trailer was “equipment,” and thus denied State Farm’s request for summary disposition. Shortly thereafter, this Court decided *Frazier* and State Farm asked the Court of Appeals to reconsider its decision.

In effort to distinguish *Frazier’s* clear and unequivocal holding that doors are not equipment permanently mounted on a motor vehicle, the Court of Appeals drew several hollow semantic distinctions, and conflated the “equipment permanently mounted” exception with the “loading/unloading” exception to effectively develop a broader hybrid. In essence, the Court of Appeals appears to have decided that because the facts of this case are *close* to satisfying *both*

the equipment exception and the unloading exception (albeit, in State Farm's view, technically satisfying neither), the term "equipment" should be more broadly construed than normal, in order to trigger coverage.

State Farm submits that there is no meaningful distinction between a passenger door on a pickup truck and the rear door of a dump trailer. Both serve the same exact purpose. Both are equally a constituent part of the vehicle itself, rather than "equipment" permanently mounted "on" the vehicle. For that reason, State Farm asks this Court to either peremptorily reverse the Court of Appeals' holding, or otherwise grant leave to appeal so that the matter can be fully briefed and heard.

Moreover, in the alternative only, even if this Court is inclined to agree with the lower courts, and find that the rear door in this case was "equipment" (which it should not), summary disposition should still have been granted to State Farm because Plaintiff's own testimony defeats any claim that his injury had the required causal connection to the door. This Court, in *Winter*, decided that MCL 500.3106(1)(b) has its own causal standard, and that in order to satisfy that standard, the claimant's injury must result from direct contact with the equipment in question. In this case, Mr. Lefevers admitted that his injury resulted from contact with the cement slab, some twelve feet down in the pit – not any physical contact with the door, which had clearly ceased before he was injured. As a result, even if this Court agrees with the Court of Appeals on the equipment issue, summary disposition still should have been granted in favor of State Farm on causation.

**THE JUDGMENTS BEING APPEALED, ALLEGATIONS OF ERROR, IMPACT OF
THE ERRORS, AND THE RELIEF SOUGHT**

I. Judgment/Orders Being Appealed

This application seeks review and reversal of an unpublished opinion of the Michigan Court of Appeals issued December 13, 2011 (**Exhibit A**), and an associated order denying rehearing/reconsideration issued January 31, 2012 (**Exhibit B**).

In its Opinion, issued eight (8) days before this Court's decision in *Frazier*, the Court of Appeals held that the rear-door/tailgate of a motor vehicle was "equipment permanently mounted on the vehicle," rather than a constituent part of the vehicle itself, and further found that a fact question existed regarding whether the momentum precipitated by opening that door played a sufficient role in causing Mr. Lefevers to lose his balance, slip, and fall twelve feet into a toxic waste pit where he landed on a slab of concrete that injured his back.

On Rehearing, the Court of Appeals distinguished *Frazier* on the grounds that the rear-door of a motor vehicle is so closely tied to the loading/unloading process that it must be deemed "equipment." In a concurring statement, Judge Murray observed that this Court did not address statements in the Court of Appeals decision in *Gunsell*, or dicta from this Court's prior opinion in *Miller*, which formed the basis for both this case and the now overruled Court of Appeals' decision in *Frazier*. Thus, according to Judge Murray, the Court of Appeals was somehow bound to follow *Gunsell* rather than this Court's ruling in *Frazier*.

II. Allegations of Error

The Court of Appeals committed several errors that require reversal to correct. First, the Court of Appeals improperly distinguished *Frazier* by drawing several hollow semantic distinctions. Contrary to what the Court of Appeals held on reconsideration, the rear door of the

vehicle involved in this case is no different than the passenger door involved in *Frazier*. As a result, *Frazier* should control and the same result should obtain.

Second, the Court of Appeals incorrectly reasoned that a footnote from a prior Court of Appeals case, *Gunsell*, along with dicta from this Court's decision in *Miller* - both suggesting that doors are equipment rather than constituent components of the vehicle itself - survive as a proper basis for avoiding *Frazier*. Those non-binding statements (which were also the underlying rationale of the Court of Appeals' decision in *Frazier*, which this Court overruled) should not be relied upon to find *Frazier* inapposite. Apparently, this needs to be made explicit.

Third, in the alternative only, even if the rear door of the vehicle involved in this case was "equipment permanently mounted on the vehicle" rather than a constituent part of the trailer itself, the Court of Appeals also erred by applying the wrong causal standard. The Court of Appeals incorrectly applied the broader "arising out of" standard embodied in Section 3105, rather than the "directly resulted" standard from Section 3106(1)(b), to determine that there was a genuine issue of material fact with regard to causation. The correct causal standard, as this Court held in *Winter*, requires the injury to directly result from actual physical contact with the door - not merely that the door plays a role in setting into motion the events that would ultimately give rise to the injury.

III. Impact of Error

The Court of Appeals' erroneous decision will have two important consequences. First, it will have the effect of diluting this Court's Opinion in *Frazier*, by elevating a contrary decision of the Court of Appeals, *Gunsell*. Second, the decision will create uncertainty in an area of the law that *Frazier* sought to clarify. Third, the decision is based on application of the wrong causal standard, meaning that the wrong analysis would be employed on remand; when the

proper causal standard is applied, there is no factual dispute – the undisputed evidence mandates entry of summary disposition in favor of State Farm.

Whether it is immediately apparent to this Court or not, the no-fault insurance industry in this state handles a massive number of claims involving parked motor vehicles, a vast proportion of which involve issues exactly like *Frazier* and, in turn, just like this case. The general lack of cogent legal analysis on these issues, which is squarely illustrated by the Court of Appeals' handling of this case – even in the wake of *Frazier* – illustrates the extent of the problem. This Court ought to buttress *Frazier's* holding regarding the equipment exception, and dispel the undisciplined analysis employed by the Court of Appeals in this case.

IV. Relief Sought

State Farm seeks reversal of the Court of Appeals' decision, insofar as it held that the rear-door/tailgate of the vehicle was “equipment permanently mounted on the vehicle” under MCL 500.3106(1). Moreover, in reversing, this Court should declare that statements regarding the rear-door in *Gunsell*, and car doors in general in dicta from this Court's decision in *Miller* are not controlling of these issues.

In the alternative, if the rear-door/tailgate is “equipment,” which State Farm maintains it is not, then this Court should recognize and determine that Mr. Lefevers was not injured by contact with the door; rather, he was injured because he lost his balance and fell some twelve (12) feet into a pit, where he landed on a slab of concrete.

Either way, this Court is asked to reverse, peremptorily or otherwise, the decision of the Court of Appeals, by recognizing that Plaintiff's claims should have been summarily dismissed because he cannot satisfy any of the exceptions to the No-Fault Act's parked vehicle exclusion as a matter of law.

STATEMENT OF FACTS

While standing on the edge of a hazardous waste pit, Mr. Lefevers lost his balance and fell in. His body dropped approximately twelve feet before landing on the concrete floor of the pit. The force of his body slamming down onto the concrete caused serious injury to his low back.

Before he fell, Mr. Lefevers had been standing near the rear driver-side corner of a dump trailer, which he had backed to the edge of the pit and parked in accordance with instructions from the landfill personnel. In preparation to dump his load, Lefevers activated a switch that was supposed to release the rear door of the trailer. The door stuck, however, because the hinges were not adequately maintained. So, Mr. Lefevers walked to the rear corner of his trailer, and while remaining completely outside it with both feet on the ground, pushed the rear door of the trailer open manually, using both hands. When the door opened suddenly, the momentum from opening the door caused Mr. Lefevers to lose his balance and fall into the pit where he was injured.

Lefevers made a claim to State Farm, his personal auto insurer, for Michigan No-Fault PIP benefits. After being denied benefits, he filed suit against State Farm and others. State Farm moved for summary disposition arguing that the No-Fault Act did not apply because the trailer was parked, and none of the exceptions to the parked vehicle exclusion were satisfied. Plaintiff responded by claiming that several of the exceptions applied; specifically, he argued that: (1) the vehicle was unreasonably parked; (2) he was injured as a direct result of physical contact with equipment permanently mounted on the vehicle, and (3) he was injured as a direct result of contact with property being lowered from the vehicle. MCL 500.3106(1)(a) and (b). The trial

court agreed with Mr. Lefevers on all three propositions and, therefore, denied State Farm's motion for summary disposition. A final order was entered and State Farm appealed.

The Court of Appeals agreed with State Farm on two of the three exceptions under Section 3106(1), finding that the vehicle was not "unreasonably parked," and further, that Mr. Lefevers was not injured as a direct result of contact with property being lowered from the vehicle. See, MCL 500.3106(1)(a) and (b). It disagreed with State Farm, however, on the "equipment permanently mounted on the vehicle" exception. MCL 500.3106(1)(b).

Citing two prior cases, *Gunsell* and *Miller*, the Court of Appeals decided that the rear door of the dump trailer was "equipment permanently mounted on the vehicle" as a matter of law:

We hold that the tailgate on the trailer in this case constitutes "equipment" within the meaning of section (b). Similar to the rear door of the semitrailer in *Gunsell*, plaintiff here was injured while attempting to open the rear tailgate of his dump trailer. *Miller*, 411 Mich at 640. Because the facts of this case fall squarely within the circumstances contemplated in *Gunsell* and *Miller*, the tailgate of the dump trailer constitutes "equipment permanently mounted on the vehicle," as stated in subsection (b).

(Exhibit A, p. 4). Based on that holding, the Court of Appeals affirmed the trial court's denial of summary disposition to State Farm and remanded the case to resolve a remaining factual dispute regarding causation:

In sum, we hold that the tailgate on the dump trailer constituted equipment permanently attached to the vehicle and that plaintiff's evidence was sufficient to establish a genuine issue of material fact regarding whether his injury occurred as a direct result of his physical contact with the tailgate. We further conclude that the trial court erred by finding that questions of fact exist regarding whether the trailer was parked in such a fashion as to cause an unreasonable risk of harm and whether plaintiff was injured as a direct result of physical contact with the dirt being dumped from the vehicle. Because plaintiff needed to establish only one of the exceptions under MCL 500.3106(1) to qualify for no-fault coverage, we affirm the trial court's order denying defendant's motion for summary disposition.

(Exhibit A, p. 6).

Eight days after the Court of Appeals issued its opinion, this Court decided *Frazier*. With hopes of avoiding an Application for Leave to Appeal, State Farm timely asked the Court of Appeals to reconsider its decision in light of *Frazier*. The Court of Appeals denied this request, finding that *Frazier* was not controlling. (Exhibit B, p. 1). In so doing, the Court of Appeals decided that the rear door on the dump trailer was a “tailgate,” rather than a “door” as in *Frazier*, and further reasoned that because a tailgate plays an important role in the unloading of the trailer, this bolstered its being characterized as “equipment.” (Exhibit B, p. 1). As a result, the Court of Appeals denied reconsideration.

This Application seeks reversal of both the original Opinion and the Order denying Rehearing/Reconsideration.

STANDARD OF REVIEW

The issues presented for review in the Court of Appeals, and now on application to the Supreme Court, were decided below on State Farm’s motion for summary disposition under MCR 2.116(C)(10) on materially undisputed facts. The standard of review is *de novo*. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 43; 742 NW2d 264 (2007).

Moreover, disposition of this dispute involved the appropriate interpretation of a statute, MCL 500.3106(1)(b). Issues of statutory interpretation are, likewise, reviewed by this Court *de novo*. *Moore v Secura Ins.*, 482 Mich 507, 516; 759 NW2d 833 (2008); *Saffian v Simons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

LAW AND ARGUMENT

I. FRAZIER CONTROLS DISPOSITION OF THIS CASE, AND THE SAME RESULT SHOULD OBTAIN.

A. There is no meaningful distinction between a “tailgate” and a “door” for purposes of the “equipment permanently mounted on the vehicle” exception.

The first thing to recognize is that the dump trailer in this case is a “motor vehicle” in its own right, under the No-Fault Act. By statutory definition, trailers are “motor vehicles” if they have more than two wheels. MCL 500.3101(2)(c); *Parks v DAIIE*, 426 Mich. 191, 198; 393 NW2d 833 (1986); *Kelly v Inter-City Truck Lines, Inc.*, 121 Mich. App. 208, 209-210; 328 NW2d 406 (1982). The dump trailer involved in this case was a “tandem axle” meaning that it had at least four wheels. (Deposition of the Plaintiff, Charles Lefevers, taken March 12, 2009, pp. 63-64). Thus, there is no meaningful distinction between the dump trailer involved in this case and the pickup truck involved in *Frazier*; both are “motor vehicles” under the Act. This was made clear to the Court of Appeals, and there was no apparent effort to draw any distinction based on the fact that this case involved a trailer rather than a passenger vehicle.

Instead, the Court of Appeals attempted craft a different semantic distinction: the court concluded that the rear door of the dump trailer was a “tailgate” rather than a “door,” and thus purported to find *Frazier* inapposite. The common meaning of the two terms, as well as the record evidence, however, renders this distinction hollow.

Doors and tailgates are not materially different, for purposes of determining whether one is “equipment” or a constituent part of the motor vehicle, because tailgates are merely a type of door – identical in function, just with a specific location. Indeed, the more technically one reads the definitions of these terms, the more it appears that rear part of the trailer in this case fits the

definition of a "door" more than a "tailgate." Webster's Dictionary defines the word "door" as follows:

door (dôr) n. [ME. *dure*, *dor* < OE. *duru* fem. (orig., pair of doors), *dor* neut., akin to G. *tür*, door, *tor*, gate < OE/ base **dhwer-*, **dhwor-*, door, whence L. *fores* (pl. of *foris*), two-leaved door, Gr. *Thyra*, door (in pl., double door)] 1. a) a moveable structure for opening or closing an entrance, as to a building or room, or giving access to a closet, cupboard, etc.: most doors turn on hinges, slide in grooves, or revolve on an axis b) same as AIR CURTAIN 2. the room or building to which a particular door belongs [*two doors down the hall*] 3. Any opening with a door in it; doorway 4. Any way to go in or out; passage; access[.]

Websters New World Dictionary, second ed (1976) (underline added). Other dictionaries have virtually identical definitions. For example, *The American College Dictionary* defines the word door as follows:

door (dor), n. 1. A moveable barrier of wood or other material, commonly turning on hinges or sliding in a groove, for closing and opening a passage or opening into a building, room, cupboard, etc. 2. A doorway. 3. The building, etc., to which a door belongs: *two doors down the street*. 4. Any means of approach or access, or of exit.

Random House American College Dictionary (1962) (underline added).

The word "tailgate" appears to merely denote the *location* of the thing (the back of the vehicle), as well as perhaps the *direction* in which it swings (downward):

Tailgate (-gät') n. a board or gate at the back of a wagon, truck, station wagon, etc., designed to be removed or swung down on hinges for loading or unloading; also **tail'board'** [.]

Websters New World Dictionary, second ed (1976) (underline added).

tail·board (tāl'börd'), n. 1. The board at the back of a wagon, etc., which can be removed or let down for convenience in loading and unloading. Also, **tail'gate'**.

Random House American College Dictionary (1962) (underline added). In other words, tailgates appear to simply be a door located at the back of a vehicle, whether that vehicle is a car, a trailer, or a wagon. Indeed, technically speaking, it appears that "tailgates" are generally distinct in that

they either hinge and swing downward, or are otherwise removable entirely – whereas doors, including passenger doors, generally have hinges along one side and swing horizontally rather than vertically.

The record evidence in this case suggests that “thing” at issue arguably met both definitions – indeed, if anything, it more closely fits the general definition of a “door” than a “tailgate” because of the way it was hinged. According to Mr. Lefevers, the rear door of the trailer was a “barn door” type, hinged on one side rather than on the bottom. (Deposition of Charles Lefevers, attached as **Exhibit C**, pp. 64-65). He went on to explain the make-up of the thing in elementary terms:

- Q- Okay. You have to pardon my unfamiliarity with trailers. I just want to clarify some of the terminology. When you use the term “barn gate door,” are you referring to a one-piece door?
- A- Yes, sir.
- Q- Okay. That is hinged on the passenger side of the trailer?
- A- On that one, yes, sir.
- Q- Okay. So it’s not a two-piece door, it’s a one piece?
- A- No, sir, it’s one solid piece.

(Exhibit C, p. 134). In other words, the rear end of the dump trailer in this case was at least as much a “door” as it was a “tailgate” – but either way, these things are truly indistinguishable in terms of their definitions and their function.

According to the Court of Appeals, “Unlike the passenger door in *Frazier*, the tailgate was not a constituent part of the vehicle itself and was utilized only when the dump trailer was functioning as a dump truck, i.e., transporting or hauling material for unloading at a dump site.” (Exhibit B, p. 1). This ignores, however, that passenger doors serve the same exact function – holding passengers and cargo in the vehicle during transport, and providing a means for loading and unloading while parked.

Perhaps the best illustration of this fact comes from the Plaintiff's own testimony. He testified, fairly unequivocally, that the function of the two "things" is identical:

- Q- When you're dealing with an enclosed trailer, I'm not talking a flatbed.
A- Right.
Q- I'm talking about an enclosed trailer. A door is an important part of the trailer?
A- Yes, sir.
Q- Okay. It's very difficult to haul a load without the door?
A- That's true.
Q- Otherwise, it falls out the back and the person you're hauling for doesn't like that when they lose cargo.
A- That's true.
Q- Okay. Similarly, a tailgate is an important part of the trailer?
A- Yes, sir.
Q- It's an integral part of the trailer's function to haul stuff?
A- Yes, sir.
Q- And without a tailgate, you can't haul loads?
A- That's true.

(Exhibit C, pp. 138-139). Thus, in common sense terms, passenger doors and tailgates (or hoods or hatch-backs, or any number of other components designed for a particular area of the motor vehicle) are exactly the same, and serve the same function. Both keep the contents (whether passengers or other types of cargo) from falling out during transport, and both allow access either into or out of the vehicle when appropriate.

The Court of Appeals' response to this fact appears to be that the tailgate has a unique relationship to the loading or unloading of the vehicle. Indeed, the Court of Appeals focused so much on this idea - that tailgates have a special role in the loading or unloading of the vehicle - that the Court appears to have conflated the two separate exceptions into one hybrid. In essence, the Court of Appeals appeared to suggest that the term "equipment" in Section 3106(1)(b) should be more broadly construed when the "thing" at issue plays a role in the subject of another separate exception, in this case the loading or unloading of the vehicle. (*See*, Exhibit B, third full paragraph, particularly Footnote 1).

The problem with the Court of Appeals' analysis, however, is that – even assuming the component involved in this case was a “tailgate,” – a tailgate's role in the loading or unloading of a vehicle is not at all a distinguishing characteristic. Moreover, even if could categorically be said that tailgates have a *closer* connection with the loading and unloading of the vehicle, that should be insufficient to render the “thing” any more “equipment” than a constituent component of the vehicle. Loading and unloading has its own exception, with its own distinct requirements – and, as the Court of Appeals properly recognized, those requirements were unsatisfied on the facts of this case. The fact that it was *close*, should not be sufficient justification to treat tailgates differently, merely because they *almost* satisfy a different exception.

A passenger door functions no less proximally to other parked vehicle exceptions. Passenger doors are, in general, the only means for “entering” or “alighting” from motor vehicles. Yet, they are not rendered “equipment” merely because of their close proximal relationship to the “entering” or “alighting” exceptions. The reason, of course, is that the exceptions operate independently.

The parked vehicle exceptions should not be construed more or less broadly depending on how *close* a particular set of facts seems to fit more than one. The exceptions operate independently, with each having its own requirements. Those requirements should not be expanded nor constricted, depending on how “close” the facts come to satisfying more than one.

The rear door of the dump trailer in this case was just as much a constituent component of the motor vehicle itself as the passenger door was in *Frazier*. Just as in *Frazier*, this fact defeats any claim that the “equipment” exception to the parked vehicle exclusion was triggered. The Court of Appeals finding to the contrary flies in the face of *Frazier's* rationale and holding, and the error should be corrected, either peremptorily or on leave granted.

A. **Contrary to the conclusion of the Concurring Judge, non-binding dicta from Miller, and footnote 5 from Gunsell, do not supersede this Court's decision in Frazier for purposes of applying Section 3106(1)(b) to the facts of this case.**

According to Judge Murray, the fact that this Court did not address some 30-year-old dicta from *Miller*, or reasoning from Footnote 5 from the Court of Appeals decision in *Gunsell*, when it issued *Frazier*, those prior pronouncements remain intact – and, indeed, supersede *Frazier* to control the issue in this case. (*See*, Exhibit B, p. 4, Judge Murray's Concurrence).

As will be discussed below, it was patently unnecessary for this Court, in *Frazier*, to address these non-binding pronouncements; this Court's rationale implicitly obviated any reliance on the statements. Indeed, recall: the Court of Appeals decided *Frazier* based on these same two cases, *Miller* and *Gunsell*, and the same rationale. Regardless, to the extent that this Court's holding in *Frazier* even arguably left intact this emerging "trend" toward treating components of the vehicle as "equipment," based on *Miller* and *Gunsell*, it should be firmly suppressed in this case.

The trend toward treating doors as equipment had its genesis in a conclusory footnote in Court of Appeals case called *Gunsell*. *Gunsell* gives meaning to the old adage "bad facts make bad law." It was not an insurance case and no insurer was a party to the lawsuit. Yet, the Court of Appeals purported to declare that the Plaintiff was entitled to recover first-party no-fault PIP benefits from his no-fault insurer, in spite of the fact he had disclaimed that entitlement and no insurance dispute existed. In reality, as will be discussed below, the decision represented an effort on the part of the Court of Appeals to prevent the Plaintiff from working an "end run" around the strictures of the No-Fault Act, rather than a disciplined approach to interpreting the exceptions to the parked vehicle exclusion.

Gunsell was a straight negligence case that did not actually involve single insurance company. Mr. Gunsell, an employee of the US Postal Service, sued a trucking company and its truck driver in tort, for their alleged failure to maintain the rear door of a small semi-trailer. *Gunsell v Ryan*, 236 Mich App 204, 206-207; 599 NW2d 767 (1999). Apparently, Mr. Gunsell injured his back while lifting the rear door of the trucking company's semitrailer. *Gunsell*, 236 Mich App at 206.

Mr. Gunsell's lawsuit was initially filed as a third-party auto negligence case under MCL 500.3135(1). *Gunsell, supra* at 207, n. 2. Later, however, he moved to amend his complaint to remove reference to the No-Fault Act, and instead plead a straight negligence action. *Id* at 207-208. He apparently did so for two reasons: (1) so that he would not have to prove a "threshold injury" under MCL 500.3135(1); and (2) in order to avoid having to repay a federal workers compensation lien out of a portion of his recovery. *Id*. The trial court sympathized with Mr. Gunsell and allowed him to amend his complaint to remove any reference to the No-Fault Act. *Id*. The jury ultimately found in favor of Mr. Gunsell, awarding both economic and non-economic damages. *Id*.

The trucking company appealed, arguing that the trial court should not have permitted Mr. Gunsell to plead in avoidance of the requirements of the No-Fault Act. *Gunsell, supra* at 208. The Court of Appeals agreed and reversed, holding that the matter should have been tried as a third-party auto no-fault case. *Id*. In so doing, the Court of Appeals concluded - *in a footnote, without any detailed discussion of the facts or citation to any case law* - that the facts of the case would have triggered both the "equipment permanently mounted on the vehicle" exception and the "loading/unloading" exception to the parked vehicle exclusion under MCL 500.3106(1)(b). *Gunsell, supra* at 210, n. 5.

In response, Mr. Gunsell argued that Section 3106(1)(b) was not controlling because his no-fault insurer had properly denied him coverage based on Section 3106(2), which precludes recovery of PIP benefits for loading/unloading injuries where workers compensation benefits were available. *Gunsell, supra* at 212-213. The Court of Appeals disagreed, analogizing *Shibley v DAIIE*, 431 Mich 164, 169-170; 427 NW2d 528 (1988), to conclude that under federal preemption, because Mr. Gunsell was required to repay his federal workers compensation benefits, they were not “benefits available” under Section 3106(2). *Id.* at 213-215 (construing the language “benefits available” in Section 3106(2) to mean “benefits [*permanently*] available” in accord with the reasoning from *Shibley, infra*). As a result, according to the *Gunsell* Court, the first-party no-fault insurer would have been liable for payment of his federal lien. *Id.*

It is difficult to discern the extent to which the pronouncements from footnote 5 of *Gunsell* constitute precedential authority. First and foremost, the statements were made in a footnote – suggesting that they were not essential elements of the holding. Secondly, again, no insurer was a party to the lawsuit; thus, its holding was presumably not binding on any actual coverage dispute.

Gunsell has never been cited by the Michigan Supreme Court. It has been cited by the Michigan Court of Appeals a total of seven (7) times, but only once in a published decision.¹

¹ According to Shepards®, *Gunsell* has been cited a total of seven times. In reverse chronological order, the cases citing *Gunsell* are as follows: *Lefevers v State Farm*, unpublished per curiam decision of the Michigan Court of Appeals, decided December 13, 2011 (Docket No. 298216) (holding, based on *Gunsell*, that the rear door of a dump trailer is equipment permanently mounted); *Frazier v Allstate*, unpublished per curiam decision of the Michigan Court of Appeals, decided December 21, 2010 (Docket Nos. 292149, 293904) (holding, based on *Gunsell*, that the passenger door on a truck is equipment permanently mounted) *rev'd* 490 Mich 381; *King v Econotravel One*, unpublished per curiam decision of the Michigan Court of Appeals, decided April 25, 2006 (Docket No 265520) (citing *Gunsell* for the proposition that the no fault act is the exclusive means of recovery for an injured occupant of a bus); *Dyer v Trachtman, D.O.*, 255 Mich App 659; 662 NW2d 60 (2003) (citing *Gunsell* for the standard of

The one published decision, *Dyer v Trachtman, D.O.*, was a medical malpractice case that cited *Gunsell* only for the applicable standard of review in deciding appeals from the denial of a motion to amend pleadings. 255 Mich App 659, 663; 662 NW2d 60 (2003). Of the remaining six (6) times the case has been cited by the Court of Appeals in unpublished cases, only two (2) cited it in reference to the parked vehicle exceptions: *Frazier v Allstate*, which this Court recently overturned, and this case, *Lefevers v State Farm*. In other words, *Gunsell* has hardly given rise to a precedential tide of binding authority on the subject.

Similarly, this Court's statements in *Miller*, made almost in passing, are equally insufficient to supersede *Frazier* in terms of analyzing this case. In *Miller*, this Court recognized that maintenance can be an exception to the parked vehicle exclusion in and of itself, in spite of the fact that it was not referenced in Section 3106. *Miller v Auto-Owners Ins. Co.*, 411 Mich 633; 309 NW2d 544 (1981). The rationale was grounded in fact that almost all maintenance on motor vehicles is done while the vehicle is parked. *Miller*, 411 Mich. at 638. Thus, a person who is injured while doing maintenance on his or her vehicle need not also show that the situation fits squarely within one of the Section 3106 exceptions. *Id.*

The rationale underlying *Miller* was simple, but the means to employ it was less so. The focus of the reasoning was, of necessity, on the statutory phrase "ownership, operation, maintenance, or use of a parked vehicle *as a motor vehicle*...." MCL 500.3106(1); *Miller*, at

review regarding motions on the amendment of pleadings); *Salim v Buchanan, Jr.*, unpublished per curiam decision of the Michigan Court of Appeals, decided January 22, 2002 (Docket No 224338) (citing *Gunsell* for the proposition that a person injured in a motor vehicle accident must prove a threshold injury to recover in tort under the No Fault Act); *Heller v Citizens*, unpublished per curiam decision of the Michigan Court of Appeals, decided September 4, 2001 (Docket No 222219) (citing *Gunsell* regarding federal preemption and a no-fault insurer's liability for benefits up to the amount of a federal lien, even where the policy is coordinated); and *Lewis v McCurdy*, unpublished per curiam decision of the Michigan Court of Appeals, decided March 7, 2000 (Docket No 210605) (citing *Gunsell* for the proposition that a tort claimant must prove a threshold injury under the No Fault Act).

639. According to the *Miller* Court, each the exceptions embodied in Section 3106 generally referenced situations where a parked motor vehicle was being utilized *as a motor vehicle*, as opposed to any other inanimate object; “[e]ach of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle.” *Miller*, 411 Mich. at 640. Then, based on this declaration of universal purpose, the Court decided that “maintenance,” served a complimentary purpose – and thus, embodied its own exception to the exclusion.

In the meantime, without any citation to any case law or other specific authorities, the *Miller* Court outlined a series of generalized examples, designed to illustrate the point that each of the Section 3106 exceptions were tailored to situations where parked vehicles could produce an injury while still maintaining their character *as motor vehicles*:

Each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle - - characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents.

Section 3106(a), which excepts a vehicle parked so as to create an unreasonable risk of injury, concerns the act of parking a car, which can only be done in the course of using the vehicle as a motor vehicle, and recognizes that the act of parking can be done in a fashion which causes an unreasonable risk of injury, as when the vehicle is left in gear or with one end protruding into traffic.

Section 3106(b) recognizes that some parked vehicles may still be operated as motor vehicles, creating risk of injury from such use as a motor vehicle. Thus a parked delivery truck may cause injury in the course of raising or lowering its lift or the door of a parked car, when opened into traffic, may cause an accident. Accidents of this type involve the vehicle as a motor vehicle.

Section 3106(c) provides an exception for injuries sustained while occupying, entering or alighting from a vehicle, and represents a judgment that the nexus between the activity resulting in injury and the use of the vehicle as a motor vehicle is sufficiently close to justify including the cost of coverage in the no-fault system of compensating motor vehicle accidents.

Miller, supra at 640 (emphasis added). Again, as is obvious from the quotation, each of these examples was included without any real discussion, citation to any particular authority, or any

real intent that they be relied upon as an authoritative guide to interpreting the individual exceptions. Rather, they were merely included to illustrate that parked vehicles can, under a number of circumstances, produce injuries by virtue of their nature *as a motor vehicle*, in contrast to instances where the vehicle is no different from a stationary object. Indeed, interestingly, the portion of this discussion that the Court of Appeals relied upon in both *Frazier* and in this case (the underlined phrase), appears to be addressing a situation more akin to the “unreasonably parked” exception, than the “equipment” exception in any event.

Regardless, the fact is that *Miller’s* entire discussion was non-binding dicta.² The examples were there to prove a cumulative point, not as a binding recitation. Thus, this Court was in no way required to address the errand phrase when it decided *Frazier* – and in so doing, rejected the same rationale from the Court of Appeals that was employed in this case.

Again, when the Court of Appeals decided *Frazier*, it relied on the same Footnote 5 from *Gunsell*, and the same dicta statement from *Miller*, to conclude that doors were equipment, rather than constituent parts of the motor vehicle itself. This Court rejected that proposition, without explicitly referencing either *Miller* or *Gunsell*, but obviated the underlying rationale all the same. *Frazier*, 490 Mich. 381. Thus, there should be little question that the statements from *Miller* and *Gunsell* were implicitly rendered ineffective, in terms of illustrating the boundaries of the equipment exception. In light of Judge Murray’s Concurrence, however, it appears that perhaps there would be a benefit to making the situation more explicit.

² Judge Murray appears to have acknowledged this fact in his Concurring Opinion to the Denial of State Farm’s Motion for Reconsideration.

I. EVEN IF THE REAR DOOR OF MR. LEFEVER'S TRAILER WAS "EQUIPMENT PERMANENTLY MOUNTED ON THE VEHICLE," HIS CLAIM STILL FAILS TO SATISFY SECTION 3106(1)(b)'S "DIRECT RESULT" CAUSAL REQUIREMENT. THE COURT OF APPEALS, HOWEVER, APPLIED THE WRONG CAUSAL STANDARD TO DETERMINE THAT A GENUINE ISSUE OF FACT EXISTED REGARDING CAUSATION.

A. MCL 500.3106(1)(b) has its own distinct "direct result" causal requirement that is materially different than the "arising out of" standard from MCL 500.3105(1).

After concluding that the tailgate of the dump trailer was "equipment" the Court of Appeals went to find that there was a genuine issue of material fact with regard to whether Mr. Lefevers' injury resulted from direct contact with the tailgate. As a result, the Court remanded the matter for trial. This finding ignored the fact that Mr. Lefevers *admitted*, during his deposition, that he was not injured by contact with the door; instead, his injury was caused by his body striking the concrete floor of the pit, after he had lost his balance and fell some twelve feet. Based on this testimony, there can be no genuine issue of material fact, and summary disposition was proper on this basis alone, pursuant to MCR 2.116(C)(10).

The Court of Appeals rejected State Farm's argument that the language required that the injury result from direct contact with the equipment before the exception would be triggered. (*See*, Exhibit A, p. 4, particularly footnote 4). Instead, the Court of Appeals applied this Court's formulation of the "arising out of" standard to Section 3106(1)(b), as if they were one in the same:

To show that an injury directly resulted from physical contact with equipment, a plaintiff must show that "the injury [had] a causal relationship to the motor vehicle that is more than incidental, fortuitous, or but for." *Putkamer v Transamerica Ins Corp of Am*, 454 Mich 626, 635-636; 563 NW2d 683 (1997).

(Exhibit A, p. 4). In other words, according to the Court of Appeals, the “directly resulted” standard in the statute was to be evaluated under the broader “arising out of” standard developed under Section 3105.

As the plain language of the statute indicates, however, the causal standard under Section 3106(1)(b) has its own “direct result” causal standard, which differs from the “arising out of” standard embodied in MCL 500.3105:

(1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle, unless one of the following three exceptions is met:

(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 or lowered from the vehicle in the loading or unloading process.

MCL 500.3106(1)(b) (emphasis added). State Farm submits that use to the word “direct” connotes an immediate or “first” result, meaning that the physical contact itself must produce the injury. Historically, this Court has agreed.

In *Winter*, this Court rejected the analysis employed by the Court of Appeals in this case. *Winter v Auto Club of Michigan*, 433 Mich 446; 446 NW2d 132 (1989). In *Winter*, the plaintiff was injured when a concrete slab fell on his hand/wrist. *Winter*, 433 Mich at 449. He had been using the hook of a tow truck to lift a portion of his sidewalk, while using his hands to try to level the soil underneath. *Id.* At some point, the hook slipped and the slab fell on his hand/wrist, causing him injury. *Id.* Plaintiff, seeking PIP benefits, argued that the hook was “equipment permanently mounted” on the tow truck, and that he therefore met the equipment exception to the parked vehicle exclusion. *Id.* at 449-450. The Court of Appeals agreed, reasoning that direct contact with the hook itself was not required. *Id.* This Court rejected that interpretation, agreeing

with the insurer that under plain language of Section 3106(1)(b), the injury must be caused by actual contact with the equipment:

Plaintiff argues, and the Court of Appeals agreed, that direct physical contact between plaintiff and the equipment itself is not necessary. The panel considered it sufficient that the injury was a direct result of contact made with the slab of concrete being lifted or lowered. This interpretation of the statute separates the requirements of "physical contact" and "direct result," and emphasizes the latter. Such an interpretation of the statutory language would not require actual physical contact.

The alternative interpretation, obviously supported by defendant, is that the injury must directly result from actual physical contact between the injured person and the equipment.

We believe that this latter interpretation accords the term "direct" the meaning that the Legislature intended in enacting § 3106(1)(b). If the Legislature had intended broader coverage, it could easily have used the phrase "arising out of" rather than "was a direct result of." The former phrase would connote coverage in the absence of physical contact between the injured person and the injury-producing instrument. Moreover, insertion of the word "physical" in the subsection fortifies a legislative intent that the injured person's body must come into contact with the equipment. Once again, had the Legislature not intended this requirement, it could have stated simply that benefits were recoverable if the equipment "caused" the injury. The Legislature's choice of terminology was deliberate, and this Court must give it the effect dictated by the language and the purpose of the provision.

Winter v Auto Club of Michigan, 433 Mich 446, 458-459; 446 NW2d 132 (1989) (internal citations and footnotes omitted). In other words, contrary to what the Court of Appeals concluded in *Winter*, as in this case, the statute requires that contact with the equipment result in the injury. *Id.*

In addition, further support for this interpretation is found in the temporal requirement of the provision. Again, Section 3106(1)(b) requires not only that the injury directly result from *physical contact* with the equipment, *Id.* it goes on to require that the injury occur "while the equipment was being operated or used..." MCL 500.3106(1)(b). Thus, not only does the

statute require contact, the plain language also dictates that the injury occur while the equipment is being used.

B. Mr. Lefevers admitted that his injury was not “directly caused” by contact with the rear door of his trailer; instead, his injury was directly caused by contact with the concrete floor of the toxic waste pit, some twelve feet below, after his contact with the door had ceased.

Again, according to this Court in *Winter*, satisfaction of the “direct cause” standard required by Section 3106(1)(b), dictates that the injury must directly result from actual physical contact between the injured person and the equipment. *Winter*, 433 Mich at 458-459.

In this case, Mr. Lefevers tried to focus on the fact that contact with the rear door of his trailer caused him to lose his balance. The Court of Appeals appears to have agreed. (Exhibit A, p. 4). But the loss of his balance was not the “injury” that gave rise to his claims. That injury, as Mr. Lefevers ultimately admitted, resulted from direct physical contact with a cement slab at the bottom of the pit.

Q- Okay. Your injury, though, occurred as a result of direct physical contact with the cement floor of that pit?

A- Yes.

(Exhibit C, p. 141). Again, he fell some twelve feet to the bottom of the pit, before his body came into violent contact with the cement slab that resulted in his injury. Thus, it is beyond dispute that the injury occurred *after* his contact with the door ceased.

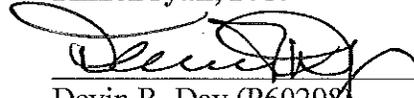
Thus, almost ironically, here as in *Winter*, it was contact with a concrete slab that produced Plaintiff’s injury, not contact with the alleged equipment. Here, as in *Winter* - at best - the door merely played a role in *giving rise* to the events that produced the injury. The Court of Appeals erred when it decided that Mr. Lefevers’ claim survived, based on a genuine issue of material fact under the “arising out of standard,” because that is the wrong causal standard under Section 3106(1)(b).

CONCLUSION / RELIEF REQUESTED

For all of the foregoing reasons, Defendant-Appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, respectfully requests that this Honorable Court GRANT leave to appeal and, after plenary review, REVERSE the Court of Appeals Judgment insofar as it failed to grant summary disposition in favor of State Farm. In the alternative, STATE FARM asks this Court to do the same on a peremptory basis in lieu of granting leave to appeal.

Respectfully submitted,

RizzoBryan, P.C.



Devin R. Day (P60298)
Attorney for Defendant-Appellant
220 Lyon Street, N.W.,
Suite 200 Grand Plaza Place
Grand Rapids, Michigan 49503
(616) 451-8111

Dated: _____

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