STATE OF MICHIGAN

COURT OF APPEALS

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

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

NEFF, J.

In this first-party no-fault insurance action, defendant appeals as of right the trial court's order granting plaintiff 's motion for summary disposition regarding liability. We affirm.

I. Facts

Plaintiff filed this action for no-fault benefits under his automobile insurance coverage with defendant insurer after he was injured in an accident involving a grain delivery truck. On May 31, 2002, Thomas Lee Passmore, a delivery truck driver for Litchfield Grain Company arrived to deliver animal feed at a farm where plaintiff was employed. Passmore backed the truck up to a silo and activated the truck's auger system to unload the feed. Passmore realized that the feed was not dropping onto the auger system, which had apparently become clogged. Plaintiff was assisting Passmore in unclogging the truck's auger system when he was injured. As plaintiff reached through an inspection door on the truck to clean the animal feed from the augers, Passmore activated the augers without warning, apparently unintentionally. Plaintiff lost his right index finger and a portion of his right middle finger.

The trial court granted plaintiff 's motion for summary disposition on the issue of liability. The court found that plaintiff 's injuries were covered under the no-fault act, MCL 500.3101 *et seq.*, pursuant to the parked-vehicle exceptions, MCL 500.3106(1). Defendant contends that the trial court erred in granting summary disposition to plaintiff.

II. Standard of Review

We review de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 163. The court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the party opposing the motion. *Id*. at 164. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*.

III. Analysis

Defendant argues that plaintiff's injury is not covered by the no-fault act because it did not arise out of the use of a motor vehicle "as a motor vehicle." MCL 500.3105(1). We disagree. 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. [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 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* . . . ." *Id.* (emphasis added). If so, we must then determine whether plaintiff's injury is excluded under other applicable provisions of the no-fault act. *Id*.

"[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 defendant's 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, supra* at 220.

With regard to the second step in the analysis under § 3105(1), *Rice, supra* at 33, injuries arising out of contact with parked vehicles are generally not covered by the no-fault act. MCL 500.3106(1). However, an injury related to a parked vehicle is compensable if one of the following exceptions applies:

> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) Except as provided in subsection (2), 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 onto or lowered from the vehicle in the loading or unloading process.
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> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [MCL 500.3106(1).]

Plaintiff contends that § 3106(1)(b) applies because his injuries were "a direct result of physical contact with equipment permanently mounted on the [grain delivery] vehicle, while the equipment was being operated or used . . . ." MCL 500.3106(1)(b). We agree.

It is uncontested that the grain delivery truck's auger system, used for unloading, was "permanently mounted" on the grain delivery truck. It is further uncontested, as shown by the documentary evidence submitted to the trial court, that Passmore activated the vertical auger momentarily while plaintiff's right hand was reaching through the inspection door on the rear of the delivery vehicle. Finally, neither party disputes the fact that plaintiff's injuries were caused by physical contact with the grain truck's augers when they were activated. Because the material facts were not in dispute regarding whether plaintiff's injuries were "a direct result of physical contact with equipment permanently mounted on the [grain delivery] vehicle, while the equipment was being operated or used," the trial court properly found that plaintiff's claim for no-fault benefits fell within the second parked-vehicle exception of § 3106(1)(b).

Defendant argues that this case is factually analogous to *Bialochowski v Cross Concrete Pumping Co*, 428 Mich 219; 407 NW2d 355 (1987), which was expressly overruled in

McKenzie, *supra* at 223-224. In *Bialochowski*, our Supreme Court found that an injury sustained while a cement truck was pumping concrete had arisen "out of the use of a motor vehicle as a motor vehicle."[1] *Bialochowski*, *supra* at 228-229. However, the *McKenzie* Court criticized the analysis in *Bialochowski*, noting that the cement truck was not being used for a transportational function at the time of the injury. *McKenzie*, *supra* at 224-226.

Defendant suggests that because the grain delivery truck in the case at bar was similarly unloading cargo, plaintiff's injury must not have arisen out of the use of the grain truck "as a motor vehicle" under the reasoning of *McKenzie*. However, as discussed above, this case is not akin to those rare instances identified in *McKenzie* in which a motor vehicle is not being used as a motor vehicle. Further, defendant's argument disregards a fundamental difference between *Bialochowski* and the case at bar. Before the *Bialochowski* cement truck could begin unloading concrete, the vehicle had to be stabilized, effectively transforming the cement truck from a motor vehicle into a platform for construction equipment. Therefore, at the time of the injury in *Bialochowski*, the cement truck was no longer functioning "as a motor vehicle," but rather as a foundation for construction equipment. In contrast, the grain truck in the case at bar never lost its essential character as a motor vehicle. At all times it remained drivable, and no transformation or mechanical alteration was necessary before it could begin unloading grain. The facts of this case are therefore distinguishable from those present in *Bialochowski*.

IV. *McKenzie* Interpretation of the Parked-Vehicle Exceptions

While we recognize that *McKenzie* controls the analysis of no-fault coverage in this case, we conclude that the *McKenzie* analysis is at odds with the no-fault statutory scheme.

MCL 500.3105(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 500.3106, which addresses parked motor vehicles and the recovery of personal injury protection (PIP) *benefits*, provides in part:

> (1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:

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[1] *Bialochowski* involved a motorized, four-wheel, cement truck, with a permanently attached thirty- to thirty-five-foot boom used to pump concrete up to elevated levels. *Id*. at 222-223. The plaintiff was injured when the concrete pump exploded, causing the boom to collapse on the plaintiff. *Id*. at 223. At the time of the accident, the truck was parked and stabilized. *Id*.

(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

(b) Except as provided in subsection (2),[2] 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 onto or lowered from the vehicle in the loading or unloading process.

(c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

Plaintiff's injuries fall squarely into § 3106(1)(b). The unintentional injuries were caused by physical contact with the grain truck's augers when they were activated. As such, 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[.]" MCL 500.3106(1)(b).

In determining the parameters of no-fault benefits, we must examine the express provisions of the no-fault act. Reading the plain language of MCL 500.3106, a cogent argument can be made that if any of the three parked-vehicle exceptions[3] applies in a given case, the injury, by statutory mandate, *does arise* out of the ownership, operation, maintenance, or use of the parked vehicle as a motor vehicle; therefore, PIP benefits would be recoverable.[4] If this were the approach intended by the Legislature, there could be no legitimate dispute that plaintiff is entitled to PIP benefits.

The primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id.* This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v Brandon Twp*, 264 Mich App 156, 162; 691 NW2d 459 (2004). "'The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.'" *Shinholster, supra* at 549 (citation omitted). If the wording or language of a statute

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[2] Section 3106(2) is not applicable here.

[3] Subsections a, b, and c of § 3106(1).

[4] Stating that "[a]ccidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur[,]" is arguably comparable to stating that "accidental bodily injury does . . . arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle [when] any of the following occur[.]"

is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. *Id.* "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

In keeping with these rules of statutory interpretation, the historical view of the no-fault provisions under § 3105 and § 3106, is that § 3106 establishes an analytical framework for the parked-vehicle exceptions that is independent of § 3105. Only recently has the Court embraced a conceptual scheme that treats § 3105 as a threshold requirement for consideration of the parked-vehicle exceptions, which now has come to full fruition in the *McKenzie* "transportational function" test. *McKenzie*, *supra* at 225-226.

In *Winter v Automobile Club of Michigan*, 433 Mich 446, 448; 446 NW2d 132 (1989), the Michigan Supreme Court, in providing an overview of the case and its holding, stated:

> In this insurance case, the carrier appeals from a determination that the no-fault act covers an accidental injury to plaintiff which occurred when a slab of sidewalk, raised by a tow truck, slipped off its hook and fell on plaintiff's hand. Because the vehicle was "parked" within the meaning of § 3106(1) at the time of the accident, and none of the § 3106(1) exceptions is applicable, plaintiff is not entitled to no-fault benefits, and we therefore reverse.

In *Winter*, as in this case, the defendant argued that the tow truck was not being used "as a motor vehicle" within the meaning of MCL 500.3105(1), but rather it was being used as a stationary crane. *Id*. at 451. Our Supreme Court, sharpening the focus on the proper analysis, stated:

> In limiting no-fault benefits to injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle," the Legislature realized that it would be inherently difficult to determine when a *parked* vehicle is in use "as a motor vehicle." *Accordingly, the Legislature specifically described in subsections (a)-(c) of § 3106(1) the limited circumstances when a parked vehicle is being used "as a motor vehicle."* Thus it is apparent that if a vehicle is "parked" coverage otherwise available under § 3105(1) is qualified by the provisions of § 3106(1). In the instant case, because the tow truck was parked, coverage is excluded by § 3106(1) unless one of its exceptions is applicable. [*Winter, supra* at 457-458 (emphasis added in the second sentence).]

The Court concluded that none of the exceptions set forth in MCL 500.3106(1) applied to the facts of the case; therefore, the tow truck was not being "used as a motor vehicle" within the

meaning of § 3105(1), and the plaintiff was not entitled to PIP benefits. *Winter, supra* at 460-461.[5] *Winter* suggests that if any parked-vehicle exceptions applies to a given set of facts, the motor vehicle was by statutory mandate being "used as a motor vehicle." This ruling is consistent with the statutory language.[6]

The Supreme Court subsequently addressed no-fault coverage of a parked vehicle, somewhat altering the analysis applied in *Winter*. In *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997), the plaintiff was injured when she slipped and fell on ice as she was getting into a parked motor vehicle, and the issue presented was whether she was entitled to PIP benefits under the no-fault act. Reversing the decisions of the circuit court and this Court, the Supreme Court held, "On the undisputed facts of this case, plaintiff established as a matter of law that her injury arose from the use of her parked motor vehicle as a motor vehicle under the no-fault act." *Id.* at 627. The Court acknowledged MCL 500.3105, but then proceeded directly to MCL 500.3106 because a parked vehicle was at issue. *Id*. at 631-632. The Court, citing *Winter,* noted that "[w]here the motor vehicle is parked, the determination whether the injury is covered by the no-fault insurer generally is governed by the provisions of subsection 3106(1) alone. There is no need for an additional determination whether the injury is covered under subsection 3105(1)." *Putkamer, supra* at 632-633 (citations omitted). Although *Putkamer* found it unnecessary to engage in any analysis under MCL 500.3105, the following three-step analysis was required under MCL 500.3106:

> In summary, where a claimant suffers an injury in an event related to a parked motor vehicle, he must establish that the injury arose out of the ownership, operation, maintenance, or use of the parked vehicle by establishing that he falls into one of the three exceptions to the parking exclusion in subsection 3106(1). In doing so under § 3106, he must demonstrate that (1) his conduct fits one of the three exceptions of subsection 3106(1); (2) the injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle *as a motor vehicle*; and (3) the injury had a causal relationship to the parked motor vehicle that is more than incidental, fortuitous, or but for. [*Putkamer, supra* at 635-636 (emphasis in original).]

Because there was no dispute that the plaintiff was getting into the vehicle with the intention of traveling to her brother's home, the Court found, as a matter of law, that she was using the parked motor vehicle as a motor vehicle when she was getting into the car. *Id.* at 636.

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[5] In examining § 3106(1)(b), and rejecting its applicability, the Court found that the plaintiff did not come into contact with the hook or winch of the truck, but rather, he was injured when the cement slab fell from the hook onto his hand. *Winter, supra* at 460.

[6] *Winter* was addressed in *McKenzie*, as we discuss later in this opinion in considering the specifics of *McKenzie.*

A distinguishing feature between *Winter* and *Putkamer* is that the *Winter* Court indicated that if one of the parked-vehicle exceptions of § 3106(1) applied, it would automatically equate to a finding that the parked motor vehicle was indeed being used as a motor vehicle, which in turn meant that the plaintiff was entitled to PIP benefits; however, *Putkamer* required an independent determination whether the parked vehicle was being used as a motor vehicle, even if one of the parked-vehicle exceptions applied. *McKenzie* subsequently extended *Putkamer* by holding that the question "[w]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' turns on whether the injury is closely related to the transportational function of automobiles." *McKenzie, supra* at 215.

McKenzie, decided a year after *Putkamer*, involved a claim for PIP benefits for injuries sustained when the plaintiff was nonfatally asphyxiated while sleeping in a camper/trailer attached to his pickup truck. The Court noted:

> This case turns on whether plaintiff's injury, incurred while sleeping in a parked camper/trailer, arose out of the use of a motor vehicle "as a motor vehicle" as contemplated by § 3105. We are able to arrive at this ultimate question because all agree that this injury was occasioned while a person was occupying the vehicle as required by MCL 500.3106(1)(c). [*McKenzie, supra* at 216-217.]

Curiously, *McKenzie* cited *Putkamer* in a footnote in support of the above language, despite the fact that *Putkamer* never utilized § 3105 in its analysis concerning the parked motor vehicle.[7] To the contrary, *Putkamer* expressly stated that the analysis was controlled by MCL 500.3106.[8] Nonetheless, both *McKenzie* and *Putkamer* held that even if one of the parked-vehicle exceptions applies, it is necessary to determine whether the injury arose out of the use of a motor vehicle as a motor vehicle.

With respect to the determination whether a motor vehicle was being used as a motor vehicle, the *McKenzie* Court ruled that "the clear meaning of this part of the no-fault act is that the Legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *McKenzie, supra* at 220. Because the parked camper/trailer was being used as sleeping accommodations, the use was too far removed from the transportational function to constitute use of the vehicle "as a motor vehicle" at the time the injury occurred. *Id.* at 226.

In assessing *McKenzie's* extended analysis in the context of previous decisions, the *McKenzie* Court noted that *Putkamer* had been correctly decided because "entering a vehicle in

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[7] The *McKenzie* Court incorporated the three-step analysis for parked motor vehicles that was enunciated in *Putkamer*. *McKenzie, supra* at 217 n 3.

[8] This Court in *Rice, supra* at 33-34, recognized this discrepancy and simply concluded that *McKenzie* retreated from *Putkamer*'s alternative analytical approach.

order to travel in it is closely related to the [vehicle's] transportational function[.]" *McKenzie, supra* at 221. With regard to *Winter*, the Court stated:

> The *Winter* Court's holding turned on the fact that the truck was parked and none of the exceptions set forth in § 3106 applied. Accordingly, it was unnecessary to explicitly consider whether the injury arose out of the use of a motor vehicle "as a motor vehicle," as opposed to some other use. However, this holding is nonetheless consistent with the approach posited here because the injury arose out of the use of a motor vehicle as a foundation for construction equipment and was not closely associated with the transportational function. [*McKenzie, supra* at 221.]

However, a straightforward reading of *Winter* shows that the Court would not have independently determined whether the tow truck was being used as a motor vehicle when the injury occurred even if the Court had found applicable one of the parked-vehicle exceptions of MCL 500.3106. The *Winter* Court indicated that if a parked-vehicle exception applied, it necessarily meant that the parked vehicle was being used as a motor vehicle given the statutory scheme. *Winter, supra* at 457-458. *McKenzie* essentially concurred in the result reached in *Winter*, but based on reasoning not encompassed in the *Winter* Court's analysis. *McKenzie* clearly does not permit a conclusion that PIP benefits are recoverable simply on the basis that one of the parked-vehicle exceptions applies to the facts of the case.

The *McKenzie* Court also addressed, and overruled, the Supreme Court's decision in *Bialochowski*. With respect to *Bialochowski*, the *McKenzie* Court stated:

> In *Bialochowski*, this Court concluded that an injury incurred while a cement truck was unloading its product arose out of the use of a motor vehicle as a motor vehicle. The Court stated at 228:
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> "Motor vehicles are designed and used for many different purposes. The truck involved in this case is a cement truck capable of pouring cement at elevated levels. Certainly one of the intended uses of this motor vehicle . . . is to pump cement. The accident occurred while this vehicle was being used for its intended purpose. We hold that the phrase 'use of a motor vehicle as a motor vehicle' includes this use."
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> We find this holding utterly antithetical to the language of § 3105. As discussed above, § 3105's requirement that injuries arise out of the use of a motor vehicle "as a motor vehicle" clearly distinguishes use "as a motor vehicle" from other possible uses. *Bialochowski* eviscerates this distinction by holding that the use of the vehicle at issue to pump cement constitutes use "as a motor vehicle." Obviously, motor vehicles are designed and used for various purposes as the *Bialochowski* Court noted. In fact, only in the context of various possible uses would a limitation to use "as a motor vehicle" be necessary. 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. Accordingly, we are convinced that *Bialochowski* was wrongly decided.
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> Entirely apart from this direct criticism of *Bialochowski*, we do not think it constitutes adequate support for the dissent's proposed rule that any intended use of a multipurpose vehicle constitutes use "as a motor vehicle." [*McKenzie, supra* at 223-224.]

McKenzie's analysis of MCL 500.3105 is contrary to the ruling in *Putkamer*, and to some degree the ruling in *Winter*, relative to their focus on the language of MCL 500.3106, which specifically addresses parked motor vehicles. Interestingly, the *Bialochowski* Court, like the *McKenzie* Court, also analyzed the case under § 3105 to determine whether the cement truck was being used as a motor vehicle at the time of injury *and* under § 3106, pursuant to which the Court found applicable § 3106(1)(b),[9] which is the provision at issue here. However, the *Winter* Court overruled *Bialochowski* to the extent that the latter could be read to mean that a determination whether § 3105(1) is fulfilled is to be made separately from a determination whether § 3106 is fulfilled. *Winter, supra* at 458 n 10. The *Putkamer* Court pointed out this fact when remarking that the analysis is confined to § 3106 when parked vehicles are at issue. *Putkamer, supra* at 633 n 6.

Despite the confusion created by the case law, because *McKenzie* dealt with injuries that were sustained while occupying a parked motor vehicle, which implicated § 3106(1)(c), and because *McKenzie* overruled *Bialochowski*, which specifically dealt with the subsection at issue here, § 3106(1)(b), it appears that the *McKenzie* "transportational function" test controls our analysis.

McKenzie, when addressing and overruling *Bialochowski*, did not acknowledge or reference the fact that *Bialochowski* applied § 3106(1)(b), and thus *McKenzie* did not confront, at least expressly, the inherent problem in reconciling the "transportational function" test with the plain language of § 3106(1)(b). Indeed, the general concept of applying a test that focuses on the *transportational function* of a vehicle when considering *parked* vehicles seems illogical and, consequently, is, for all practical purposes, unworkable. This is especially true in relation to § 3106(1)(b), which speaks of injuries resulting from physical contact with permanently mounted equipment, while the equipment is being operated, or injuries incurred during the loading or unloading process. This language necessarily entails situations where injuries arise from uses of the vehicle other than those uses related to the transportational function of the vehicle.

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[9] The Court found that the plaintiff's injury occurred as a result of his contact with the boom, which was permanently mounted on the truck, while the pump and boom were being operated or used to pump concrete. *Bialochowski, supra* at 229.

Because of the inherent inconsistency with the statutory language, the *McKenzie* analysis is suspect as a test for applying the parked-vehicle exceptions under § 3106. Given the practical difficulties in applying *McKenzie* and its eviscerating effect on MCL 500.3106, we urge that it be reconsidered by the Supreme Court or that the Legislature clarify the parked-vehicle exception.

V. Disposition

Summary disposition for plaintiff on the issue of no-fault liability was proper. In light of our disposition of this issue, we decline to reach any alternative arguments raised by plaintiff.

Affirmed.

Murphy, J., concurred.

/s/ Janet T. Neff
/s/ William B. Murphy