STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SUSAN K. PHIPPS-CARPENTER, individually and as Next Friend of BRITTANY and TYLER PHIPPS, minors,

Plaintiff,

v

File No. 02-22381-NI
HON. PHILIP E. RODGERS, JR.

JONATHAN MICHAEL MINER, JOYCE RENA MINER, and ALLSTATE INSURANCE COMPANY,

Defendants.
/

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ORDER DENYING DEFENDANT ALLSTATE'S
MOTION FOR PARTIAL SUMMARY DISPOSITION

This case arises out of an incident which occurred on May 2, 2002. By Count III of her Complaint, Plaintiff has alleged an entitlement to first-party personal injury protection benefits under a policy of automobile insurance between Defendant Allstate Insurance Company ("Allstate") and Plaintiff Susan K. Phipps-Carpenter. More specifically, Plaintiff is claiming payment of "allowable expenses" for psychological counseling and dental/orthodontic and other medical treatment received by her minor children as a result of the incident.

Briefly, the minor children were playing in a field near their home. Defendant Jonathon Miner was allegedly driving on a two-track that passes through that field. There is a dispute over whether Miner left the two-track and "chased" the children or merely drove to the end of the two-track attempting to reach his destination, but was forced to turn around and drive back because the end of the two-track was blocked. In any event, he encountered the children. It is undisputed that

his vehicle had a defective muffler which made it excessively loud. It is also undisputed that no contact occurred between Miner's vehicle and the minor children.

Plaintiff Susan Phipps-Carpenter alleges that the children required psychological counseling due to emotional trauma and that her daughter has required orthodontic treatment. In addition, her daughter became so emotionally upset while discussing the event that she slipped while exiting a hot tub and broke her arm.

Defendant Allstate filed a motion for partial summary disposition seeking judgment as a matter of law as to Count III of the Plaintiffs' Complaint, pursuant to MCR 2.116(C)(10).[1] Allstate claims that there is not a sufficient causal nexus between the injuries sustained by the minor children and the motor vehicle to create an entitlement to personal injury protection benefits under the Michigan No-Fault Act.

On May 19, 2003, the Court heard the arguments of counsel. Plaintiff untimely filed her response to the motion on the morning of the hearing. The Court granted the Defendant Allstate an additional seven days from the date of the hearing to file a reply. The Defendant Allstate filed a supplemental brief in support of its motion. The Court now issues this written decision and order and, for the reasons stated herein, denies the motion.

STANDARD OF REVIEW
MCR 2.116(C)(10)

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

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[1]Although the Defendant states that its motion is brought pursuant to MCR 2.116(C)(8) *and* (C)(10), the Defendant does not make any argument or cite any authority in support of a (C)(8) motion. Defendant has abandoned this issue by failing to brief it in accord with the court rules and by failing to set out any argument or authority supporting its claim that it is entitled to judgment pursuant to MCR 2.116(C)(8). *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 405; 651 NW2d 756 (2002). Therefore, the Court has treated the motion as one for summary disposition pursuant to (C)(10) only.

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

ANALYSIS

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.

In *McKenney v Crum & Forster*, 218 Mich App 619, 623; 554 NW2d 600 (1996), the Court said:

> The no-fault act is remedial in nature. No-fault benefits are payable for certain accidental bodily injuries arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. MCL 500.3105; MSA 24.13105. The act must be liberally construed in favor of those for whom benefit was intended, i.e., persons injured in motor vehicle accidents. *Lee v Nat'l Union Fire Ins Co*, 207 Mich App 323, 327; 523 NW2d 900 (1994). Whether an injury arises out of the use of a motor vehicle must be determined case by case. *Gordon v Allstate Ins Co*, 197 Mich App 609, 614; 496 NW2d 357 (1992). In making this determination, the causal connection between the injury and the use of the motor vehicle must be more than incidental, fortuitous, or but for. *Thornton v Allstate Ins Co*, 425 Mich 643, 660; 391 NW2d 320 (1986).

The Defendant Allstate relies upon the case of *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 17; 235 NW2d 42 (1975) in which the Court of Appeals set forth the following test for determining whether there is a sufficient causal connection between the plaintiff's injuries and the motor vehicle to create an entitlement to benefits:

> We conclude that while the automobile need not be the proximate cause of the injury, there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle.

The Defendant also cites two police chase cases in which the courts followed *Kangas* and held that "the Legislature did not intend the phrase 'normal use' of a vehicle to cover the unusual circumstances of an individual fleeing from the police . . . The accident arose not from the police use of a vehicle but from plaintiff's act of fleeing from the police." See also, *Peck v Auto Owners Ins Co*, 112 Mich App 329; 315 NW2d 586 (1982); *Sanford v Ins Co of North America*, 151 Mich App 747; 391 NW2d 473 (1986).

The question presented, therefore, is whether the minor children's injuries arise out of Miner's use of his vehicle as a motor vehicle.

In *Thornton v Allstate Ins Co*, 425 Mich 643, 660; 391 NW2d 320 (1986), our Supreme Court considered a suit brought by a Flint taxidriver who was assaulted by a person pretending to be a fare and suffered debilitating injuries. The Court explained that the Legislature did not extend

coverage to this situation, because the connection between the injuries suffered by the taxidriver and the use of the taxicab as a motor vehicle was no more than incidental, fortuitous, or but for. In other words, the cab "was not the instrumentality of the injuries," but "was merely the situs of the armed robbery--the injury could have occurred whether or not Mr. Thornton used a motor vehicle as a motor vehicle." *Id* at 660.

Likewise, in *Marzonie v ACIA*, 441 Mich 522; 495 NW2d 788 (1992), a dispute erupted between the occupants of two vehicles. One driver drove home, followed by the other. In the moments after the second car arrived, the first driver emerged from his house with a shotgun. Later claiming that he had intended to shoot the second car, not its driver, the first driver discharged his shotgun. Again, the result was permanent and serious injury. The no-fault act did not cover this situation, either, since "[t]he involvement of the automobiles was incidental and fortuitous"--"the shooting arose out of a dispute between two individuals, one of whom happened to be occupying a vehicle at the moment of the shooting." *Id* at 534.

Bourne v Farmers Ins Exchange, 449 Mich 193; 534 NW2d 491, 42 ALR5th 953 (1995), involved a claim brought by a man who entered his parked car, only to find two men in the back seat. They forced him at gunpoint to drive to a parking lot a mile away, where he was struck in the face and thrown to the ground. His injuries included several facial fractures and a broken ankle. Building on *Thornton* and *Marzonie*, our Supreme Court found that "there was not a sufficient causal connection between plaintiff's injuries and the use of his motor vehicle as a motor vehicle to find liability on the part of defendant." *Id* at 203.

In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), two men were hospitalized after inhaling carbon monoxide fumes from a propane heater in a camper/trailer that was attached to the back of a pickup truck. Examining closely the syntax selected by the Legislature, this Court observed that "the phrase 'use of a motor vehicle as a motor vehicle' would appear to invite contrasts with situations in which a motor vehicle is not used as a motor vehicle." *Id*. Noting that a motor vehicle can be used for other purposes, the Court explained that "when we are applying the statute, the phrase 'as a motor vehicle' invites us to determine if the vehicle is being used for transportational purposes." *Id* at 219. Discussing *Thornton* and *Bourne*, and overruling an earlier decision involving a cement truck that was being unloaded [*Bialochowski v Cross Concrete Pumping*

Co, 428 Mich 219; 407 NW2d 355 (1987)], the Court held that "whether 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 motor vehicles." *Id* at 225-226. Applying that test to the *McKenzie* facts, the Court again concluded that the Legislature excluded coverage.

In *Bradley v DAIIE*, 130 Mich App 34, 42-43; 343 NW2d 506 (1983) an accident victim was injured when the motorcycle he was operating struck the rear of a parked vehicle. The motorcyclist brought an action against the insurer to recover personal protection benefits under a no-fault policy issued to his wife on her car. The Court of Appeals held that operation of a motor vehicle in the adjoining lane was a normal and foreseeable use of that vehicle as a motor vehicle and was a contributing cause of the accident because that vehicle precluded the plaintiff from changing lanes. Such operation contributed in part to accident which caused plaintiff's injuries even though there was no contact between that vehicle and the plaintiff's motorcycle. The Court held that plaintiff's injuries arose out of operation of a motor vehicle and he was entitled to personal protection benefits under the no-fault policy issued to his wife.

In *Jones v Tronex Chemical Corp, et al,* 129 Mich App 188; 341 NW2d 469 (1983), a pedestrian and his wife brought an action to recover damages for injuries sustained to pedestrian's eye when a city bus drove through a puddle of water containing lye. The Court of Appeals held that the pedestrian's eye injury was a foreseeable injury which arose out of the city's use of a bus as a motor vehicle, so that the city was liable for no-fault personal protection benefits. In reaching this result, the Court said:

> We find it eminently foreseeable that a bus, upon encountering a pool of water, may propel that water and whatever may be mixed with it in the direction of nearby pedestrians. The likelihood that the puddle of water would contain a caustic chemical is simply not relevant to this inquiry. It is the manner in which injury occurs that must be "foreseeably identifiable with the normal use of the vehicle," not the quality of the injury.
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> In this regard, *Gajewski v Auto-Owners Ins Co*, 112 Mich App 59; 314 NW2d 799 (1981), rev'd 414 Mich 968 (1982), is analytically helpful. Gajewski was injured when a dynamite bomb connected to the ignition of his car exploded as he turned the key. The Court of Appeals ruled that the injury was not covered by the no-fault act, holding that the fact that Gajewski was injured in his car was a "mere fortuity." It was not Gajewski's act of trying to start the car that injured him, but the connection

of the explosive device. The Court held that injury by explosive device is not "foreseeably identifiable with the normal use, maintenance, and ownership of the vehicle." *Gajewski, supra* at 62, 314 NW2d 799.

The Supreme Court reversed *Gajewski* in an order adopting the dissent of Judge Cynar. That opinion reads in full as follows:

> CYNAR, J. (dissenting). I agree with the trial court that there was a sufficient causal relationship between plaintiff's use of the vehicle and his injuries. This case is distinguishable from the cases in which benefits were denied because the plaintiff's presence in the vehicle at the time of the injury was a mere fortuity. See, e.g., *Detroit Automobile Inter-Ins Exchange v Higginbotham*, 95 Mich App 213; 290 NW2d 414 (1980) (the insured's husband forced her to the curb, trapped her in her car, and shot her several times with a revolver), *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1; 235 NW2d 42 (1975) (passengers of the insured's vehicle assaulted a pedestrian), *O'Key v State Farm Mutual Automobile Ins Co*, 89 Mich App 526; 280 NW2d 583 (1979) (the insured was shot by an assailant while she was sitting in her vehicle). In these cases, the injury could have resulted whether the plaintiff was using the vehicle or not. The vehicle was more than merely the site of the injury. Under the facts in this case, turning the ignition key must be identified with the normal manner of starting a vehicle. There was a direct causal relationship between the use of the motor vehicle and plaintiff's injuries. *Gajewski, supra*, 112 Mich App 62-63; 314 NW2d 799. See also, *Smith v Community Service Ins Co*, 114 Mich App 431; 319 NW2d 358 (1982).
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> Just as an ample causal nexus between the use of a vehicle and an injury was supplied in *Gajewski* by the turning of an ignition key, it is extant here in the splashing of water by Detroit's bus. That the actual character of the resulting injury was bizarre or unexpected is not dispositive. Pledge Jones's injury resulted directly from the force of the bus as it was being operated in a normal fashion as a motor vehicle. The fact that the bus itself did not strike him does not bar his claim. *Bromley v Citizens Ins Co of America*, 113 Mich App 131, 135; 317 NW2d 318 (1982). Summary judgment in favor of plaintiffs and against Detroit is therefore affirmed.

From these decisions, we can conclude that incidental involvement of a motor vehicle does not give rise to coverage under the language enacted by the Legislature. *Thornton.* The focus is on the relationship between the injury and the use of a motor vehicle as a motor vehicle. *Bourne.*

Actual contact with the motor vehicle is not required. *Bradley.* The No-Fault Act authorizes coverage if the injuries are closely related to the transportational function of the motor vehicle. *McKenzie.*

In the instant case, there are genuine issues of material fact regarding (1) whether Defendant Miner was using his motor vehicle as a motor vehicle for transportational purposes when he encountered the minor children; and (2) whether the children's injuries were foreseeably identifiable with the normal use, maintenance and ownership of the vehicle. If the Plaintiff can show that Defendant Miner was using his vehicle as a motor vehicle for transportational purposes and that the children's trauma was identifiably foreseeable from the normal use, maintenance and ownership of the vehicle, even though the vehicle made no contact with either of the children, then the Plaintiff is entitled to personal injury protection benefits. If, on the other hand, the Defendant can show that the children's injuries arise out of the Defendant's use of the motor vehicle to chase the children around in the field or that the children's injuries were caused by the "excessively loud muffler" that was not a part of the "normal use, maintenance and ownership" of the vehicle, then the Plaintiff will have no cause of action. This factual dispute precludes a grant of summary disposition.

For the reasons stated herein, the Defendant Allstate's motion for partial summary disposition should be and hereby is denied.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/13/03