STATE OF MICHIGAN

COURT OF APPEALS

DONALD BESCHORNER,

Plaintiff-Appellant,

v No. 93462

AUTO CLUB INSURANCE ASSOCIATION
and ALLSTATE INSURANCE COMPANY,
Jointly and Severally,

Defendants-Appellees.

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BEFORE: M.H. Wahls, P.J., R.M. Maher and J.T. Kallman*, JJ.

PER CURIAM

Plaintiff, Donald Beschorner, appeals by right the dismissal with prejudice of his claim and the grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants Auto Club Insurance Association (Auto Club) and Allstate Insurance Company (Allstate) by Oakland County Circuit Judge Hilda R. Gage. We affirm.

Plaintiff's suit for no-fault benefits under insurance policies with defendants arose out of a fireworks accident which occurred inside a van owned by Paul Richmond. According to plaintiff, on July 4, 1984, he was seated in the van's passenger seat and Richmond was in the driver's seat when the latter ignited a bottle rocket, intending it to go through the van's sunroof. A spark from the rocket ignited a bag of gun powder which had been placed beneath the front seat between plaintiff and Richmond, causing a flash fire which engulfed plaintiff in flames. Plaintiff jumped out of the van and rolled on the ground to extinguish the flames. As a result of the fire, Richmond either released his foot from the brake or put the van into gear, causing the vehicle to roll down the street and into a parked car. Plaintiff suffered first- and second-degree burns on his face, and severe third- and fourth-degree burns on his chest, arms, and left leg, requiring hospitalization for several days.

*Circuit Court Judge, sitting on the Court of Appeals by assignment.

Defendants moved for a grant of summary disposition pursuant to MCR 2.116(C)(10)--no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law--arguing that the accident and subsequent injuries did not arise out of the ownership, maintenance, or use of a motor vehicle as a motor vehicle, as required by statute, MCL 500.3105(1); MSA 24.13105(1), for the purposes of no-fault personal injury protection benefits. On June 4, 1986, Judge Gage granted the motion, stating:

"THE COURT: The court in ruling on these matters, and we get them all the time still under the no fault act turns to the old tort law and what is foreseeable and what isn't. That's what the Appellate Courts have done as well fortunately.

"The injury must be foreseeably identifiable with the normal use, maintenance, or ownership of the vehicle. Common sense would just dictate that there is no way that it would be foreseeable that somebody would use a vehicle to launch a rocket. A motor vehicle, a car. That's the bottom line.

"The fact that they were in the car would fall within the Denning case. The fact that it was just fortuitous that they were sitting there, but it certainly does not arise out of the inherent nature of the automobile. It is not foreseeable, it was not contemplated by the legislature and it is not contemplated by the Court. The motion for summary disposition on behalf of the Defense is granted."

The pertinent statute 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 500.3105(1); MSA 24.13105(1).

In deciding whether plaintiff's case falls within this provision, we are guided by the recent Supreme Court case of Thornton v Allstate Ins Co, 425 Mich 643, 391 NW2d 320 (1986). Thornton involved the 1978 armed robbery and shooting of a taxicab driver, Eddie Thornton, Jr. As a result of a gunshot wound, Mr. Thornton was completely paralyzed from the neck down and will require medical care for the rest of his life. Both the trial court and this Court found that he was entitled to no-fault personal injury benefits under the taxicab owner's insurance policy because his injuries were directly related to his use of the vehicle as a taxicab. In reversing, the Supreme Court stressed that the motor vehicle involved was not the instrumentality of, but merely the

situs of, Mr. Thornton's injuries. The Court observed that the injuries could have occurred whether or not Mr. Thornton had used the motor vehicle as a motor vehicle.

In Thornton, the Supreme Court specified that the first consideration under MCL 500.3105(1); MSA 24.13105(1), must be the relationship between the injury and the vehicular use of the motor vehicle, and that without a relation that is more than "but for," incidental, or fortuitous, there can be no recovery of no-fault personal injury protection benefits. 425 Mich at 660. The Court reaffirmed, citing Miller v Auto-Owners, 411 Mich 633, 640-641; 309 NW2d 544 (1981), that the involvement of the motor vehicle in the injury should be directly related to its character as a motor vehicle.

Accordingly, in this case, the dispositive question is whether the facts established that plaintiff's injuries were causally connected to the use of the van as a van, thus entitling plaintiff to no-fault insurance benefits. We believe that the facts in this case as presented by the parties on appeal support the legal conclusion drawn by the circuit judge. Plaintiff argued below and argues on appeal that his injuries were sustained in part due to the existence of the sunroof in the van. From this, plaintiff concludes that there was a direct causal connection between his injury and the motor vehicle. As succinctly stated by plaintiff's counsel at the summary disposition hearing, "It is our contention that but for the existence of this sunroof which is something inherent to this vehicle, there would never have been an injury in this case and therefore, coverage does exist."

In the present case, however, as in Thornton, plaintiff's injuries could have occurred whether or not the motor vehicle was being used as a motor vehicle. Moreover, our perception is that the van was not being used as a motor vehicle, but rather as a lauching pad for fireworks. After the bottle rocket was lit, a spark ignited the bag of gunpowder located beneath the seat and between plaintiff and the driver, Richmond. The resulting flash

fire which unfortunately seriously burned plaintiff could have occurred whether or not plaintiff was seated in the motor vehicle; if the bottle rocket had been lit outside the vehicle and plaintiff was present with a bag of gunpowder nearby, he would have sustained the same injuries. As in Thornton, the motor vehicle in the instant case was not the instrumentality of plaintiff's injuries, but merely the situs of their infliction. Krause v Citizens Ins Co, 156 Mich App 438; ___NW2d___ (1986).

Since the circuit court, however, based its grant of summary disposition not on the relationship, or lack of a relationship, between plaintiff's injuries and the vehicular use of the van, but on lack of foreseeability "that somebody would use a vehicle to launch a rocket," we comment on the concept of foreseeability and its relevance to the issue we face today. In his brief, which suprisingly fails to discuss the Supreme Court's decision in Thornton, plaintiff places great stress on foreseeability. Prior to Thornton, in Kangas v Aetna Casualty & Surety Co, 64 Mich App 1; 235 NW2d 42 (1975), this Court interpreted the phrase "arising out of the ownership, maintenance or use of the owned automobile" in the context of a pre-no-fault insurance contract. In Kangas, the following two-prong test was adopted for determining whether a given injury arose out of the use of a motor vehicle:

> "In summary, 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." 64 Mich App at 17.

Thus, Kangas directed parties to look at the causal connection between the injury and the use of the motor vehicle as well as at the foreseeability of the injury in determining whether a claimant was entitled to no-fault personal injury benefits.

The viability of the foreseeability element of the Kangas test seems questionable in light of language in Thornton. The Thornton Court cited Kangas for the proposition that the "requirement that there be more than a 'but for' connection

between an injury and 'the use of a motor vehicle' was well-represented in the case law at the time the Michigan no-fault act was enacted." 425 Mich at 651. However, without specifically overruling the foreseeability element of the Kangas test, the Thornton Court cast great doubt on its applicability in determinations regarding no-fault personal injury benefits. The Court noted that the concept of foreseeability is essentially a fault concept and "might, indeed, run counter to one of the basic purposes of Michigan's no-fault legislation: to provide assured compensation for the broad range of accidental injuries which arise out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle, without regard to fault." 425 Mich at 661, fn 11. Mr. Thornton argued that his injuries were foreseeably identifiable with the normal use of a taxicab as a motor vehicle. The Court, conceding that perhaps the injuries were foreseeably identifiable with the commercial use of the motor vehicle as a taxicab, stressed that nevertheless the relation of the gunshot wound to the use of the motor vehicle as a motor vehicle was at most merely "but for," incidental, and fortuitous. The Court, continuing, stated:

> "The mere foreseeability of an injury as an incident to a given use of a motor vehicle is not enough to provide no-fault coverage where the injury itself does not result from the use of the motor vehicle as a motor vehicle. Likewise, the mere absence of foreseeability would not necessarily preclude coverage." (Footnote omitted.) 425 Mich at 661.

We note that one post-Thornton panel of this court has mentioned, without extensive discussion, foreseeability in determining whether a plaintiff was entitled to benefits as a consequence of having been injured by using a motor vehicle as a motor vehicle. Perryman v Citizens Ins Co, 156 Mich App 359, 365; ____NW2d ____ (1986). The focus in Perryman, however, was not foreseeability, but rather the necessary causal connection as enunciated in Thornton and in the first element in the Kangas two-prong test.

Determinative in the present case is our conclusion that the motor vehicle in which plaintiff was injured was not the

instrumentality of plaintiff's injuries, but merely the situs of their infliction. Even if the foreseeability element of Kangas survives Thornton, which is highly unlikely, and even if it was foreseeable that a person would shoot a bottle rocket out of the sunroof of the relevant vehicle in this case, which again is highly unlikely, we would nevertheless be constrained to affirm the circuit court's grant of summary disposition in favor of defendants based on the rule enunciated in Thornton.

Affirmed.

/s/ Myron H. Wahls
/s/ Richard M. Maher
/s/ James T. Kallman