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SUPREME COURT FOR
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CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN

HEIDI KROEBER a/k/a/ HEIDI LAZENBY, Plaintiff

v.

GEICO INSURANCE COMPANY, Defendant

RESPONSE BRIEF OF GEICO INSURANCE COMPANY ON
CERTIFIED QUESTION

Alfred E. Donohue, WSBA# 32774
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
(206)623-4100
(206)623-9273 facsimile
Attorneys for GEICO Insurance Company

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MISCELLANEOUS

Automobile insurance coverage for drive-by shootings and other incidents involving the intentional discharge of firearms from moving motor vehicles, 41 A.L.R.5th 91..... 13

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I. INTRODUCTION

This matter is before the Court on the following question certified by the United States District Court for the Western District of Washington:

When a driver drives to a location, momentarily stops or slows his vehicle, intentionally fires a gun, his bullet hits a pedestrian, and the driver drives away immediately thereafter, does this driver's liability to this pedestrian for the injuries he causes "arise out of" the driver's use of his vehicle, for the purposes of underinsured motorist insurance coverage? Is it material whether or not he actually intended to harm anyone?

The Court may answer these questions by applying existing Washington law. The rule in Washington has long been that "arising out of" the use of a motor vehicle means "the vehicle itself or permanent attachments to the vehicle causally contributed in some way to produce the injury."¹ The causal relationship need not rise to the level of proximate cause, but there must be a causal connection. This Court has never stated that a "but for" test is sufficient to determine whether a tortfeasor's liability for an injury arises out of his use of a vehicle. The simple fact that the shooter was in the vehicle at the time of the shooting might satisfy a "but for" analysis, but under longstanding and consistent Washington decisions, merely being in a car is an insufficient connection

¹ *Mutual of Enumclaw Insurance Co. v. Jerome*, 122 Wn.2d 157, 162, 856 P.2d 1095 (1993) (citing *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 26, 593 P.2d 156 (1979)).

to support a finding that the shooter's liability arises out of his use of the vehicle.

Ms. Kroeber implies there is some consensus among other jurisdictions regarding UIM coverage for shooting victims, but that is not case. Some states find coverage in shootings where cars are involved, while other states do not. Attempting to assemble all the case law in the country on the question and then discern some logically cohesive rule is a pointless exercise. The better approach is for the Court to look to its own precedent and apply that reasoning here to conclude a shooter's liability to a victim struck by a bullet does not arise out of the shooter's use of the vehicle from which he fires the gun. This is true whether the shooter intended to harm the victim or whether the victim was struck by a stray bullet when the shooter negligently discharged the gun while attempt to act "like a cowboy."

Based upon existing Washington law, GEICO respectfully asks that the Court answer "no" to both certified questions.

II. STATEMENT OF THE CASE

This matter was presented to the Federal Court on the parties' cross-motions for summary judgment. For purposes of the certified question, the Federal Court summarized the relevant facts as follows:

In February 2012, plaintiff was shot outside of a bar in Kent, Washington by Matthew Atkinson, who was driving

an uninsured² truck belonging to a friend at the time that he opened fire. . . . Plaintiff filed a claim with defendant under the Underinsured Motorist (“UIM”) coverage provision of plaintiff’s GEICO auto insurance policy; defendant denied plaintiff’s claim on the grounds that her injuries did not arise out of the use of Atkinson’s truck. . . . Plaintiff has filed suit against defendant claiming that she is entitled to UIM coverage under her policy Geico has never contested the fact that this incident was an accident for purposes of UIM coverage.³

Before making her UIM claim under the GEICO policy, Ms. Kroeber sued Mr. Atkinson. In his deposition in that suit, Mr. Atkinson testified as follows regarding the shooting:

Q. All right. So now I want to go through the thought process you had before discharging your pistol. Tell me what went through your mind.

A. Yeah. I’ve thought about – given that a lot of thought, and the best way I can describe it is I felt kind of like a cowboy. You know when a cowboy shoots his gun off? I was just excited to shoot it off. I don’t know.

...
A. I mean it was the end of my night for sure. Yeah, that’s how I would describe it. It wasn’t a malicious like – it wasn’t like, man, I’m mad, I need to shoot my gun off. That’s never been a situation I’ve been in. But, yeah, I just remember being, like, genuinely excited to shoot it off. It was fun to shoot. And I shot it off once. Like I really just – one shot. The most unlucky shot of my life.

Q. Did you know there were people in the direction as to where you shot?

² Although the truck was uninsured, it falls within the definition of “underinsured motor vehicle” set forth in RCW 48.22.030(1), so GEICO will use the term underinsured to refer to the insured status of the truck Mr. Atkinson was using.

³ Because GEICO has never contested this was an accident, Ms. Kroeber’s repeated statements throughout her brief that the Federal Court made a finding on that issue appear to be an attempt to deflect attention from the real issue – i.e, whether Mr. Atkinson’s liability arose out of his use of the underinsured motor vehicle.

A. I didn't know anybody was still outside the bar. Had I given it much thought, probably not.⁴

In her response to GEICO's motion for summary judgment, Ms. Kroeber attempted to create an issue of fact regarding whether Mr. Atkinson intended to hit her when he shot the gun.⁵ Similarly, in her Opening Brief she refers to Mr. Atkinson's actions as intentionally directed toward injuring her.⁶ While GEICO disagrees that Mr. Atkinson intentionally aimed the gun at Ms. Kroeber, whether he did or not has no bearing on the outcome of the coverage issue. As explained below, the fact that Mr. Atkinson was sitting in a vehicle at the time he shot the gun is insufficient to support the conclusion that Ms. Kroeber's injuries arose out of the use of that vehicle.

In her Opening Brief, Ms. Kroeber incorrectly states that the Federal Court "found that drive-by shooting is vehicle use under the policy[.]"⁷ The judge found only "that Atkinson's vehicle was 'in use' at the time of the shooting[.]"⁸ He made no finding as to whether "drive-by shooting is vehicle use." Indeed, that is the question he has certified to this Court.

The question the Federal Court certified arises under the UIM coverage in the GEICO policy:

⁴ Docket #14, Ex. 5, Atkinson Dep. at 136:13 – 137:18.

⁵ Docket #22 at 3 – 8.

⁶ Plaintiff's Opening Brief at 6 and 20 – 21.

⁷ *Id.* at 14.

⁸ Docket #38 at 9.

LOSSES WE WILL PAY

We will pay damages an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle due to:

1. ***Bodily injury*** sustained by that ***insured*** and caused by an ***accident***; and

...

The liability of the owner or operator for these damages must arise out of the ownership, maintenance or use of the ***underinsured motor vehicle***.

...

Because GEICO has never contested the fact that this matter involves an accident from Ms. Kroeber's perspective, coverage turns on whether Mr. Atkinson's liability for Ms. Kroeber's injuries arises out of his use of the underinsured motor vehicle he was sitting in when he shot the gun.

III. ARGUMENT

- A. Under the test previously articulated by this Court, Mr. Atkinson's liability does not arise out of his use of the underinsured truck.

Ms. Kroeber does her best to make this a confusing question for the Court, but it need not be. Ms. Kroeber is entitled to UIM coverage only if Mr. Atkinson's liability for her injuries arises out of his use of the truck he was in at the time he discharged the gun. Existing Washington law provides the framework for answering the question and mandates the conclusion that UIM coverage does not apply under the facts as presented here.

⁹ Docket #14, Ex. 7 at 71.

1. *The underinsured vehicle or its attachments must causally contribute to the injury in order for UIM coverage to apply, which is something other than a “but for” test.*

This Court has addressed the “ownership, maintenance or use” requirement in an insurance policy on more than one occasion. The case of *Mutual of Enumclaw Insurance Co. v. Jerome*¹⁰ provides the framework for answering the issue as it is presented here. In that case, which involved coverage under a liability policy, Ederer was driving a car when passenger Jerome lit a few firecrackers and attempted to throw them out the window. One or two firecrackers fell back into the car and ignited a bag of additional firecrackers. Ederer was unable to immediately stop the car due to visual impairment from the smoke and he ultimately sustained burns to his legs, chest, back, arms, and hands. Ederer sued Jerome, alleging he was negligent in igniting and handling the fireworks. Jerome sought coverage under the Mutual of Enumclaw policy covering the car Ederer had been driving. The policy provided coverage only for damages “caused by an accident resulting from the ownership, maintenance or use of a covered vehicle.”¹¹

The Court held that “resulting from” was equivalent to “arising out of,” the phrase used in the GEICO UIM coverage, and further noted that:

In Washington, an accident “arises out of” the use of a vehicle if “the vehicle itself or permanent attachments to the vehicle **causally contributed in some way to produce the injury.**” *Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 26, 593 P.2d 156 (1979). See *McDonald*

¹⁰ 122 Wn.2d 157.

¹¹ 122 Wn.2d at 160.

Indus., Inc. v. Rollins Leasing Corp., 95 Wn.2d 909, 631 P.2d 947 (1981). See also *Fiscus Motor Freight, Inc. v. Universal Sec. Ins. Co.*, 53 Wn. App. 777, 770 P.2d 679, review denied, 113 Wash. 2d 1003 (1989). See generally 7 *Am. Jur. 2d Automobile Insurance* § 194, at 703 (1980 & Supp. 1993).¹²

The court concluded “the accident was not causally connected to either Ederer’s or Jerome’s use” of the insured vehicle.¹³ With regard to Jerome’s actions, the court held:

The accident also is not causally connected to Jerome’s use of the Acura. Jerome lit the firecrackers and threw them out the window. He testified the window was rolled down. There is no evidence any part of the Acura or permanent attachments thereto came in contact with Jerome’s hand, arm, or shoulder during the throwing motion which could have contributed to the dropping of the firecrackers.

In sum, there is no evidence in the record which links the Acura or any of its permanent attachments to the accident. Therefore, we hold the accident did not result from the use of the Acura as required under the MOE policy.¹⁴

The reasoning in *Jerome* was premised upon this Court’s decision in *Transamerica Insurance Group v. United Pacific Insurance Co.*¹⁵ In that matter, the insured stopped the truck he was driving so his passenger could retrieve his rifle from the gun rack affixed to the inner wall of the truck cab. While the vehicle was stationary, the insured leaned forward while the passenger removed the rifle, which discharged during the process, injuring the insured. The trial court concluded the trigger of the rifle brushed against the rear bracket of the gun rack, causing the rifle to

¹² *Id.* at 162 (emphasis added).

¹³ *Id.* at 163.

¹⁴ *Id.* at 164.

¹⁵ 92 Wn.2d 21, 593 P.2d 156 (1979).

discharge. At issue was whether the auto liability policy covering the truck provided coverage. One of the questions on appeal was whether the accident arose out of the use of the truck. The court noted there must be some causal connection between the vehicle and the injury:

Consequently, the question is whether the vehicle itself or permanent attachments to the vehicle causally contributed in some way to produce the injury. The cases concerning gunshot wounds received in and around automobiles place particular importance on some physical involvement of the vehicle itself or some permanently attached part thereof. Where such physical involvement was absent, the vehicle has been deemed the mere situs of the accident and thus the accident has been construed to fall outside the coverage of the policy. . . .¹⁶

Here, the vehicle was simply the location from which Mr. Atkinson discharged the gun. Thus, under the test previously articulated by this Court, the UIM coverage does not apply.

Throughout her brief, Ms. Kroeber argues that a simple “but for” test must be applied to the “arising out of” question. But as the holdings of *Jerome* and *Transamerica* make clear, she is wrong. While it may be true that use of the vehicle need not be the “proximate cause” of the injury, there at least must be some causal connection between the use of the vehicle and the injury. No Washington court has stated that a simple “but for” test is applied to determine whether a tortfeasor’s liability for insured’s injuries arises out of his use of the vehicle.

¹⁶ *Transamerica*, 92 Wn.2d at 26 (internal citations omitted).

*Butzberger v. Foster*¹⁷ is the only Washington case cited by Ms. Kroeber which uses the “but for” phrase upon which she places so much reliance. However, the issue analyzed in *Butzberger* is not the issue that is presented here. The question in that case was whether Butzberger qualified as a UIM insured under two policies of insurance. He had stopped to assist the driver of an overturned truck who was still inside. While Butzberger was speaking to the driver of the overturned truck, another car slammed into the truck and Butzberger was thrown by the force and killed. To qualify as a UIM insured under the UIM coverage of a particular vehicle, Butzberger had to have been “using” that vehicle at the time he was injured. Butzberger sought coverage as a UIM insured under the policy covering both his own vehicle, which was parked at the side of the road, as well as the policy covering the overturned truck. The test adopted by this Court to determine whether the person seeking UIM insured status was using a particular vehicle included the requirement that there be a causal relation or connection between the injury and the victim’s use of the insured vehicle.¹⁸ It was in that context that the Court concluded “but for” Butzberger attempting to rescue the driver, he would not have been injured.¹⁹

¹⁷ 151 Wn.2d 396, 404, 89 P.3d 689 (2004).

¹⁸ Ms. Kroeber’s use of a vehicle is not at issue here because as the named insured on the GEICO policy she is entitled to UIM coverage regardless of whether she was using the insured vehicle at the time she was injured. Similarly, Mr. Atkinson’s use is not at issue. Rather, the question is whether his liability for Ms. Kroeber’s injuries arise out of that use.

¹⁹ 151 Wn.2d at 410.

Butzberger did involve any issues regarding whether the liability of the tortfeasor “arose out of” *his* use of the vehicle he was driving — clearly it did. Thus, *Butzberger* did not address the “arising out of” issue and its simple “but for” test does not apply the issue presented here — i.e., whether Mr. Atkinson’s liability for Ms. Kroeber’s injuries arises out of his use of the truck he was sitting in when he fired the shots. Indeed, no Washington case has applied a simple “but for” test to answer that question.²⁰ Therefore, Ms. Kroeber’s extensive discussion throughout her brief regarding what other courts have or have not held regarding “but for” causation in UIM claims is irrelevant to the question before the Court.

Jerome and *Transamerica* answer the question presented here. Those cases do not state that a “but for” test is sufficient. Rather, the question is whether “the vehicle itself or permanent attachments to it causally contributed in some way to produce the injury.” The difference between the two tests is clear. For example, under a “but for” test, if a tortfeasor were to drive to a remote area and set a house on fire, killing someone inside, “but for” his use of the car, the tortfeasor would not have been able to access the area and Ms. Kroeber would assert that any UIM coverage that might be available to the victim of the fire would apply. Similarly, if a tortfeasor were to rob a bank and shoot someone—and then flee in a waiting getaway car—“but for” his use of the vehicle, he likely

²⁰ *Rau v. Liberty Mutual Ins. Co.*, 21 Wn. App. 326, 585 P.2d 157 (1978), also cited by Ms. Kroeber, similarly addressed only whether the person seeking status as a UIM insured was using a vehicle at the time of the accident. It did not address whether a tortfeasor’s liability arose out of his use of the underinsured vehicle. Following Ms. Kroeber down the rabbit hole of the various cases cited by *Butzberger* and *Rau* is, therefore, an unnecessary distraction with regard to the issue presented here.

would not have robbed the bank and Ms. Kroeber would argue UIM coverage applies. In contrast, under the test as articulated in *Jerome* and *Transamerica*, coverage would not apply because neither the vehicle nor any permanent attachments to it causally contributed in some way to produce the injury, meaning the tortfeasor's liability did not arise out of his use of the vehicle.

The validity of the *Jerome* and *Transamerica* test and its application to UIM coverage is confirmed by *McCauley v. Metropolitan Property & Casualty Insurance Company*.²¹ In that matter, a UIM insured was injured when a rifle that had been secured to the front of an ATV discharged while the bungee cord was being unhooked. In analyzing whether the injuries arose out of the use of the ATV, the Court of Appeals noted that *Jerome* required "the vehicle itself or permanent attachments to the vehicle" must have "causally contributed in some way to produce the injury."²² The court specifically discussed whether the vehicle was the mere situs of the injury and concluded it was not.²³ The court further noted:

Our courts have consistently recognized that direct physical contact with the vehicle is not the determinative factor in evaluating whether an accident arises from vehicle use. Of overriding importance is the presence of some sort of causal connection between a condition of the vehicle, a permanent attachment to it, or some aspect of the operation of the vehicle and the accident.²⁴

²¹ 109 Wn. App. 628, 36 P.3d 1110 (2001).

²² 109 Wn. App. at 633 (quoting *Jerome*, 122 Wn.2d at 162).

²³ *Id.* at 635.

²⁴ *Id.* at 636 – 37 (citing *Transamerica Ins. Group*, 92 Wn.2d at 27).

Under this test, there can be no coverage here.

Ms. Kroeber asserts several arguments against *Jerome's* application, all of which fail. She argues that *Jerome* does not apply to this case because the policy in *Jerome* required that the injury be caused by an accident and also had an intentional acts exclusion, whereas in the present matter the intentional nature of Mr. Atkinson's actions cannot preclude UIM coverage.²⁵ The analysis in *Jerome*, however, was not based upon either of those two policy provisions. In *Jerome*, the Court specifically noted the "relevant inquiry is whether Jerome's dropping of the fireworks resulted from the use of the Acura."²⁶ Moreover, in answering that question, the Court held that "resulted from" was equivalent to "arising out of."²⁷ Thus, *Jerome* is directly applicable here where Mr. Atkinson's liability "must arise out of the ownership, maintenance, or use" of the truck in order to trigger the UIM coverage.²⁸

Ms. Kroeber further argues that *Jerome* is inapplicable because the Court in that case noted a national trend of excluding coverage for throwing firecrackers from cars and according to Ms. Kroeber, the national trend regarding shooting cases is to find auto insurance coverage.²⁹ Ms. Kroeber cites *State Farm Mutual Automobile Insurance Co. v. Langan*³⁰ as support for what she asserts is a trend toward finding coverage for drive-by shooting. But in that case, the trend noted by the

²⁵ Plaintiff's Opening Brief at 16 – 17.

²⁶ 122 Wn.2d at 162.

²⁷ *Id.* at 162.

²⁸ Docket #14-7 at 17.

²⁹ Plaintiff's Opening Brief at 17.

³⁰ 947 N.E.2d 124 (N.Y. Ct. App. 2011).

court was toward treating intentional torts as accidents for purposes of UIM and PIP coverage. That question is not at issue here because GEICO has never disputed that the present matter involves an accident from Ms. Kroeber's perspective.

The national trend regarding the actual coverage issue presented here – whether UIM coverage applies when a shooter is sitting in a vehicle at the time he shoots – is *away* from finding coverage. For example, the South Dakota Supreme Court observed that a “majority of courts refuse to find that the insurer and insured contemplated that the conduct involved in a drive-by shooting would be covered under the policy.”³¹ Similarly, the Supreme Court of Delaware noted the “majority of courts . . . have viewed the operation of the vehicle and the shooting as essentially separate incidents and have denied insurance coverage.”³² To the extent national trends could be considered important, they support a finding of no coverage here. As noted in an American Law Reports annotation on the subject, though some courts have found coverage, “[t]he majority of courts, however, have viewed the operation of the vehicle and the shooting as essentially separate incidents and have denied coverage.”³³

Ms. Kroeber next tries to distinguish *Jerome* based upon the argument that “Atkinson was more patently using his truck as an accessory to the wrongdoing” than the tortfeasor in *Jerome*. Nonetheless, the question remains whether the truck causally contributed to Ms.

³¹ *Farm & City Ins. v. Estate of Davis*, 629 N.W.2d 586, 589 (S.D. 2001).

³² *Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130, 132 (Del. 1997).

³³ *Automobile insurance coverage for drive-by shootings and other incidents involving the intentional discharge of firearms from moving motor vehicles*, 41 A.L.R.5th 91.

Kroeber's injuries and it is clear it did not. It was merely the situs of the incident.

Ms. Kroeber's additional reasons for trying to escape the reasoning and holding of *Jerome* relate to the fact that some courts in other jurisdictions have found UIM coverage for drive-by shootings. As discussed in the following section, the cases cited by Ms. Kroeber are not useful to the Court in resolving the coverage here. Under the clear reasoning of prior Washington decisions, Mr. Atkinson's liability does not arise out of the ownership, maintenance or use of the truck. It is irrelevant what courts in other states have done in cases involving different facts.

State Farm Mutual Automobile Insurance Co. v. Centennial Insurance Co.,³⁴ discussed in *Jerome*, also supports the conclusion that coverage does not apply here. In that case, Rogers was driving his car when his passenger attempted to eject three shells from his hunting rifle. Two shells cleared the chamber, but the third misfired and hit Rogers. At issue on appeal was whether the policy covering the car in which the accident occurred provided coverage. The policy applied only to bodily injury "arising out of the ownership maintenance or use" of the insured vehicle. Based upon prior Washington decisions, the court observed:

before an injury arises out of the use of a vehicle, the vehicle must contribute in some fashion toward producing the injury; **the vehicle must be more than the coincidental place in which the injury occurred.** The crucial question is: **What motoring risks did the parties intend to cover by the automobile policy?** The parties' intentions control the extent of coverage. *Aetna Ins. Co. v.*

³⁴ 14 Wn. App. 541, 543 P.2d 645 (1975).

Kent, 85 Wn.2d 942, 540 P.2d 1383 (1975). Thus, under a slightly different fact pattern, one court declared:

The inquiry should be whether the negligent act which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract *a natural and reasonable incident or consequence of the use of the automobile*, and thus a risk against which they might reasonably expect those insured under the policy would be protected. (Italics ours.) *Westchester Fire Ins. Co. v. Continental Ins. Cos.*, 126 N.J. Super. 29, 38, 312 A.2d 664, 669 (1973).³⁵

The court also held that, although the vehicle was used for a hunting trip, that fact alone did not mean the action of unloading the gun automatically fell within the ambit of the policy's liability coverage:

The more pertinent inquiry is whether the parties to the contract intended to cover the risk which flows from the unloading of a weapon in a moving vehicle returning from a hunting trip, when the ordinary experiences of mankind dictate that guns are customarily unloaded when not intended for immediate use. *National Union Fire Ins. Co. v. Bruecks*, 179 Neb. 642, 139 N.W.2d 821 (1966). Wold's unloading of the weapon in the moving vehicle was both illegal and unsafe. It caused an injury that may or may not have been foreseen or expected from such use of the weapon, but can it be said that Wold's handling of the dangerous instrumentality in this manner was a natural and reasonable incident or consequence of the use of the vehicle on a hunting trip? We cannot so conclude.³⁶

Applying these principles here, neither the shooting nor the resulting bodily injury suffered by Ms. Kroeber arose out of Mr. Atkinson's ownership, maintenance or use of the vehicle he was in at the time he fired the shot. As a result, Mr. Atkinson's liability does not arise from the

³⁵ 14 Wn. App. at 543 - 44 (emphasis added).

³⁶ *Id.* at 544.

ownership, maintenance or use of that vehicle as required by the GEICO UIM coverage.

Ms. Kroeber argues that *Centennial* is no longer good law, but she is wrong. Ms. Kroeber asserts that, because the accident question is resolved from the insured's point of view pursuant to RCW 48.22.030(12), this somehow negates the *Centennial* court's conclusion that "arising out of the ownership, maintenance or use" of a motor vehicle contemplates a "motoring risk." Ms. Kroeber's argument is premised upon the incorrect assertion that an intentional tort is by definition not a motoring risk.³⁷ However, it is clear that some intentional torts – e.g., a driver who in a fit of rage intentionally rams another car – are certainly "motoring risks." RCW 48.22.030(12) does not negate the case law requiring that a motoring risk be involved in order for UIM coverage to be triggered. *Centennial*, therefore, remains good law in Washington and its reasoning supports the conclusion that Mr. Atkinson's liability does not arise out of his use of the motor vehicle.

Finally, *Seaway Properties, LLC v. Fireman's Fund Insurance Co.*,³⁸ also cited by Ms. Kroeber, has no application here. The court in that case was analyzing premises liability coverage. At issue was whether injuries suffered by a patron while in a common areas arose out of her use of the leased premises where the café she was going to was located. Ms. Kroeber claims the analogy between that case and the present one is

³⁷ Plaintiff's Opening Brief at 15.

³⁸ 16 F. Supp. 3d 1240 (W.D. Wash. 2014).

“straightforward.”³⁹ In actuality, the cases have nothing in common. *Seaway* provides no assistance in determining whether a tortfeasor’s liability for shooting a gun arises from his use of the truck he was sitting in when he took the shot.

2. *The UIM coverage is not ambiguous.*

In the final section of her Opening Brief, Ms. Kroeber urges the court to conclude that “arising out of” is ambiguous. But the District Court has already found that the phrase “arising out of” was not ambiguous:

Second, the Court concludes that plaintiff’s policy unambiguously requires that defendant’s liability to her “arise out of” Atkinson’s use of the truck.⁴⁰

Therefore, whether or not the phrase “arising out of” is ambiguous is not before the Supreme Court in the District Court’s certification. Moreover, even if this Court were to consider Ms. Kroeber’s argument, it is not supported by Washington decisions.

Ms. Kroeber cites *Equilon Enterprises, LLC v. Great American Alliance Insurance Co.*⁴¹ in support of her ambiguity argument. That case, however, confirms that “arising out of” is not ambiguous under Washington law. The court in that matter was addressing an additional insured endorsement to a commercial liability policy which made Shell an additional insured “only with respect to liability arising out of” the named

³⁹ Plaintiff’s Opening Brief at 3.

⁴⁰ Docket #48 at 9 (Order Granting Motion to Amend and Regarding Cross Motions for Summary Judgment).

⁴¹ 132 Wn. App. 430, 132 P.3d 758 (2006).

insured's operations.⁴² The court was not addressing the meaning of "arising out of" in the general sense. Rather, its discussion was expressly directed toward the distinction between whether the claimant's *injuries* must have arisen out of the named insured's operations or whether Shell's *liability* must have arising out of those operations. It is with regard to that distinction that the court noted different courts have analyzed the question differently.⁴³ Because the present matter does not involve that question, Ms. Kroeber's reference to *Equilon Enterprises* serves as yet another distraction from the true issue.

Jerome and *Transamerica* confirm that in the context of automobile insurance coverage, the question of whether a person's liability for injuries arises out of his use of a vehicle is determined by whether the vehicle itself or permanent attachments to the vehicle causally contributed in some way to produce the injury. The fact that other states might apply a different analysis to the issue does not mean the phrase "arising out of" is ambiguous under Washington law.⁴⁴

B. Out-of-state authorities simply confirm that other states have decided this issue in different ways.

Throughout her brief, Ms. Kroeber relies on numerous out-of-state cases, citing them for various propositions and implying that they directly answer the question presented to this Court. However, these non-Washington cases do nothing more than establish that different sometimes

⁴² 132 Wn. App. at 434.

⁴³ *Id.* at 437 (The court prefaced its discussion by noting the cases it was discussing had interpreted "of the phrase 'arising out of' in similar CGL policies.>").

⁴⁴ *Fed. Ins. Co. v. Pac. Sheet Metal*, 54 Wn. App. 514, 774 P.2d 538 (1989).

states resolve similar issues differently. Nonetheless, to debunk any notion that all the cases Ms. Kroeber cites are similar to this matter, the following discussion addresses how they differ factually from this case.

1. Victim and Assailant Both in Cars

In the following cases, both the insured and the other driver were driving down the highway when the shots were fired, which is a materially different situation than the one presented here: *State Farm Mut. Auto Ins. Co. v. Davis*, 937 F.2d 1415 (9th Cir. 1991); *State Farm Mut. Auto Ins. Co. v. McMillan*, 925 P.2d 785 (Col. 1996); *Cung La v. State Farm Auto. Ins. Co.*, 830 P.2d 1007 (Col. 1992); *Fortune Ins. Co. v. Ferreiro*, 458 So.2d 834 (Fla. Dist. Ct. App. 1984); *Ganiron v. Hawaii Ins. Guar. Assoc.*, 744 P.2d 1210, 1212 (Hawaii 1987); *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987); *Wausau Underwriters Ins. Co. v. Howser*, 422 S.E.2d 106 (S.C. 1992); *State Farm Mut. Auto. Ins. Co. v. Moorner*, 496 S.E.2d 8785 (S.C. Ct. App. 1998); *Hartfield v. Liberty Mut. Ins. Co.*, 31 Va. Cir. 240 (Va. Cir. Ct. 1993).

To the extent injuries sustained when shots are fired from one moving vehicle into another can be considered relevant to the matter at hand, as discussed in section 6 below, other jurisdictions have found no coverage under the same circumstances.

In the following cases cited by Ms. Kroeber, the insured and the assailant had both been driving immediately before the assault for which coverage was sought, which is also a different situation than the one presented here: *Shaw v. State Farm Mut. Auto Ins. Co.*, 19 P.3d 588

(Alaska 2001); *Mills v. Colonial Penn Ins.*, 768 A.2d 1 (Conn. Super. Ct. 2000); *State Farm Mut. Auto Ins. Co. v. Whitehead*, 711 S.W.2d 198 (Mo. App. 1986); *Barncastle v. American Nat'l Property Cas. Co.*, 11 P.3d 1234 (N.M. Ct. App. 2000); *Shouman v. Nationwide Ins. Co.*, 537 N.E.2d 696 (Ohio Ct. App. 1988); *Gen. Acc. Ins. Co. of America v. Olivier*, 574 A.2d 1240 (R.I. 1990). Again, as discussed below, other states have found no coverage under similar facts.

Cases addressing situations where both the victim and the assailant were in vehicles do not address whether UIM coverage should apply here, where the shooter was simply sitting in his vehicle at the time of the shooting and then drove away. Moreover, the cases cited by Ms. Kroeber do not present the final word in the cited jurisdictions regarding auto insurance coverage for a shooting or an assault. For example, Ms. Kroeber cites the Florida case of *Fortune Insurance Co. v. Ferreiro*, but in the subsequently decided *Race v. Nationwide Mut. Fire Ins. Co.*, the Florida Supreme Court held an insured who was assaulted following traffic accident was not entitled to UIM coverage, stating:

In analyzing liability coverage for an act arising out of the ownership, maintenance, and use of a motor vehicle, 6B J. APPLEMAN, INSURANCE LAW AND PRACTICE, section 4317 (Buckley ed. 1979), states:

It has been stated that the liability of an insurer under the "ownership, maintenance, or use" provision should be measured in accord with the terms of a policy as understood by a person of reasonable intelligence. The word "coverage" as used in automobile liability policy means the sum of

risks which the policy covers. Ownership, maintenance, or use of the automobile need not be the direct and efficient cause of the injury sustained.

Rather, the courts have only required that some form of causal relationship exist between the insured vehicle and the accident. However, liability does not extend to results distinctly remote, though within the line of causation.

.....
Accordingly, three rather interesting rules have been set up to determine the insurer's liability: 1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury. (Footnotes omitted.).⁴⁵

This analysis is consistent with the *Centennial* court's observation that a motoring risk must be involved and the analysis set forth in *Jerome* and *Transamerica* requirement that the vehicle causally contribute to the injury.

In *Taylor v. Phoenix*,⁴⁶ the Florida Court of Appeals also rejected the notion that a drive-by shooting triggered coverage. The insured in that matter was injured when an occupant of another vehicle shot into the vehicle in which the insured was riding. Both cars were traveling down the road at the time of the shooting. The court held:

⁴⁵ 542 So.2d 347, 349 (Fla. 1989).

⁴⁶ 622 So.2d 506 (Fla. Ct. App. 1993).

The fact that the location of the shooter is a motor vehicle does not mean the shooting arises out of the use of the vehicle. If the uninsured vehicle causes the injury, there is coverage; if the shooting causes the injury, there is no coverage. **There is no causal relationship between the ownership, maintenance and use of an uninsured motor vehicle and injuries sustained from the gunshots fired from a motor vehicle.** . . .

As pointed out by the dissent, the recent cases that have found coverage have all involved fact patterns where the vehicle was used to gain access to the victim. The victim was traveling in a moving car and a moving car was used to get into firing range, which these courts deem to be significant. Courts in Florida have never before held that using a vehicle to gain access to a victim of assault will give rise to automobile insurance coverage. [Citations omitted.] The fact that a motor vehicle provides transportation to the victim and gives the shooter access to shoot a victim does not make the shooting arise out of the use of the vehicle. It does not in substance matter whether the victim is in a moving car or in a neighboring town.⁴⁷

Ms. Kroeber also cites the 1992 South Carolina case of *Wausau Underwriters Insurance Co. v. Howser*,⁴⁸ where the court found coverage. However, in 1998, the South Carolina Supreme Court answered a question certified to it by the U.S. District Court in the case of *State Farm Fire & Casualty Co. v. Aytes*.⁴⁹ In that case, the assailant forced the insured into her vehicle and drove her to another location with the intent of killing her. The insured was in the passenger's seat and the assailant was standing outside the car when he fired a pistol toward her, striking her in the foot. The court applied a three-part test to determining whether the shooting arose out of the ownership, maintenance or use of the vehicle:

⁴⁷ *Id.* at 509 – 10 (emphasis added).

⁴⁸ 422 S.E.2d 106.

⁴⁹ 503 S.E.2d 744 (S.C. 1998).

The party seeking coverage must show (1) a causal connection exists between the vehicle and the injury, (2) no act of independent significance breaks the causal link between the vehicle and the injury, and (3) the vehicle was being used for transportation purposes at the time of the injury.⁵⁰

Although the Washington courts have not broken down the test in the same manner, the result is the same – there must be a causal connection between the use of the vehicle and the injury, which necessarily means there is no break in the causal link. In other words, Washington law also applies the first two elements of this test. The fact that Washington has not adopted the third element of whether the vehicle was being used for transportation purposes is irrelevant because the vehicle here was, in fact, being used for such purposes, as it was in *Aytes*. Thus, that element was not the deciding factor in *Aytes*, nor would it be here. As a result, the first two *Aytes* elements are the only ones that matter and those are the same in both Washington and South Carolina. Applying those elements, the *Aytes* court concluded the shooting did not satisfy this test and the insured was not entitled to UIM coverage.⁵¹ *Aytes* alone establishes that Ms. Kroeber is incorrect in her assertion that there are no known cases finding UIM coverage does not apply under the same test for “arising out of” vehicle use as is applied in Washington.

⁵⁰ *Peagler v. USAA Ins. Co.*, 628 S.E.2d 475, 478 (S.C. 2006) (citing *Aytes*, 503 S.E.2d at 745)).

⁵¹ *Aytes*, 503 S.E.2d at 746.

A Federal District Court in Florida recently applied the reasoning of *Aytes* to find auto insurance did not apply to an assault. In *Nationwide Mutual Fire Insurance Co. v. Jeter*, the assault occurred as follows:

The dispute continued inside the vehicle, as Jeter reversed her vehicle out of the Synergy building parking lot, and drove the short distance towards the intersection of Harmon and East Main Street. . . . As the vehicle approached the intersection, Jeter removed a can of pepper spray attached to her key chain and deployed it in Coulter's direction, making contact with Coulter's face. . . . When the vehicle reached the intersection, Coulter exited. . . . Jeter deployed pepper spray from the driver's side window of the vehicle as Coulter walked away, but none of the spray contacted her. . . .

After Coulter had distanced herself from the vehicle, Jeter made a right turn on to East Main Street, entered a parking lot to turn her vehicle back in the direction of Harmon Street, and returned to the parking lot of the Synergy building. . . . There, Jeter exited her vehicle to confront Coulter and, again, deployed pepper spray in Coulter's direction, this time making contact. . . . Thereafter, Jeter left the scene in her vehicle.⁵²

The court held that none of the assaults arose out of the ownership, maintenance or use of the vehicle. Regarding any argument that use of the vehicle as a means of escape created coverage, the court held:

For guidance post-*Aytes*, the court turns to *State Farm Mutual Automobile Insurance Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (S.C. 1999), upon which *Nationwide* relies. In *Bookert*, the South Carolina Supreme Court analyzed whether a pedestrian, shot and wounded by a gunman riding in a vehicle, sustained injuries covered by an automobile insurance policy. *Id.* at 181-82. The court of appeals' decision relied on *Howser* and *Towe* to find that the vehicle was an active accessory to the assault, causally

⁵² 2013 U.S. Dist. LEXIS 85029, 2-3 (D. S.C. 2013).

connected with the victim's injuries. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 330 S.C. 221, 499 S.E.2d 480, 486 (S.C. Ct. App. 1997). The court of appeals reasoned that the vehicle was the "launching pad" for the assault and the assailant's means of escape. *Id.* After granting certiorari to review that decision, the supreme court decided *Aytes*. The supreme court reversed the court of appeals, holding that the pedestrian's injuries were not foreseeably identifiable with the normal use of a vehicle. 523 S.E.2d at 182 (citing *Aytes*).⁵³

In short, even those jurisdictions which have previously found coverage under auto policies for shootings that occur while both cars are moving down the highway do not find coverage in every shooting or assault case that happens to also involve a vehicle.

2. Cases Involving Material Issues of Fact

In the following cases cited by Ms. Kroeber, the courts concluded issues of fact precluded a decision regarding coverage and the cases, therefore, do not support the conclusion that UIM coverage should apply in the situation presented here: *De Zafra v. Farmers Ins. Co.*, 346 P.3d 652 (Oregon Ct. App. March 25, 2015); *Shaw v. State Farm Mut. Auto Ins. Co.*, 19 P.3d 588 (Alaska 2001); *Wendell v. State Farm Mut. Auto Ins. Co.*, 974 P.2d 623 (Mont. 1999).

3. Cases Involving Only No-Fault PIP Coverage

The following cases cited by Ms. Kroeber involved no-fault Personal Injury Protection coverage, so their reasoning does not apply to UIM coverage, where the insured must establish the other driver's liability arose out of the ownership, maintenance or use of the underinsured

⁵³ *Id.* at 10.

vehicle: *Lindstrom v. Hanover Ins. Co.*, 636 A.2d 1097 (N.J. 1994);
Carrigan v. State Farm Mut. Auto Ins. Co., 949 P.2d 705 (Or. 1997).

4. Completely Different Facts Than Presented Here

Ms. Kroeber also cites *Foster v. Lafayette Ins. Co.*, 504 So.2d 82 (La. App. 1987), which involved a group of boys riding in the back of a truck when they threw a pumpkin out and it hit the insured's windshield. Under those facts, the court concluded there was a sufficient connection to the use of the vehicle and the subsequent injury, noting:

If the pumpkin or any other object had fallen from, or had been negligently dropped from, the truck to cause injury to another, the ease of associating the use of the truck with the injury would be more apparent. Where it is easily concluded that Craig Ferrier actively participated in the mission of the group as described above and had stopped the truck to obtain the pumpkin and knew that his group had been and were throwing objects from his truck, it does not strain reason or credulity to reach the same conclusion. The specific duty breached by Craig Ferrier, that is, his failure to take reasonable measures to prevent his passengers from throwing objects from his truck at others, "flowed" from the manner in which he was using or operating the truck. See *Fertitta v. Palmer*, 252 La. 336, 211 So.2d 282 (1968); *Carter v. City Parish Government*, 423 So.2d 1080 (La. 1982); *McKenzie, Automobile Liability Insurance - Use*, 44 La. L. Rev. 365, 368 (1983).⁵⁴

The *Foster* case clearly involved a materially different situation than the one presented here. The shooting did not "flow from" the use of the truck. Rather, it "flowed from" Mr. Atkinson's use of the gun.

State Farm Mut. Auto Ins. Co. v. Whitehead, 711 S.W.2d 198 (Mo. App. 1986), also cited by Ms. Kroeber, is not remotely similar to the

⁵⁴ 504 So.2d at 87.

present matter. In that case, a group of men had picked up a person who demanded they drive him to a certain location. The driver was a law enforcement officer. He suspected the man had committed an armed robbery and drove to the police station, which precipitated a shootout. The court concluded the “discharge of the pistol or pistols was a result of the use of Galemore’s car in transporting Lightning to the police station.”⁵⁵ “Galemore’s automobile was not just the situs where the injury occurred, a basis often used to deny recovery in some of those cases. The injury occurred because the vehicle was being used to transport a robbery suspect to the police station. That use caused the shooting.”⁵⁶

Although *Insurance Co. of North America v. Dorris*, 288 S.E.2d 856 (Ga. Ct. App. 1982) involved a shooting while two vehicles were driving down the road, the injuries for which coverage was sought were sustained when one of the vehicles ran off the road and overturned. It was not a case in which coverage for a gunshot wound was at issue.

In *Stamper v. Hayden*, 334 S.W.3d 120 (Ky. Ct. App. 2011), while the insured was stopped at an intersection, an oncoming automobile struck the passenger side of her vehicle and the driver of that vehicle broke the driver’s side window of the insured’s vehicle, pushed himself through, sat on the insured’s lap and began driving. The sole issue was whether the matter was “accident” for purposes of UIM coverage, a question not at issue here.

⁵⁵ 711 S.W.2d at 201.

⁵⁶ *Id.*

In *American Family Mutual Insurance Company v. Petersen*, 679 N.W.2d 571 (Iowa 2004), the court summarized the incident at issue as follows: “Petersen was a passenger in the uninsured vehicle being driven by Adcock, and she was injured while attempting to escape from the vehicle to avoid the assaultive actions of Adcock.”⁵⁷ The court concluded that “the use of the vehicle was causally related to the injuries she sustained when she jumped from the vehicle. Under these circumstances, the use of the vehicle became a causal factor of her injuries.”⁵⁸ Again, the case presents a different situation than the one at issue here. In the present matter, the vehicle did not causally contribute to Plaintiff’s injuries. Rather it was merely the situs from which the gun was fired. UIM coverage, therefore, does not apply.

5. *Cases Where Courts Found No UIM Coverage*

In many jurisdictions, including jurisdictions applying the same test as has been adopted in Washington, courts have concluded shootings are not covered by UIM or auto liability insurance. It should be noted that many of the cases cited by Ms. Kroeber in which coverage was found for assaults or drive-by shootings rely on the Minnesota case of *Continental Western Insurance Co. v. Klug*,⁵⁹ a case in which the shooting occurred while both cars were driving down the highway. The court in *Klug* concluded the vehicle was an “active accessory” to the assault under those

⁵⁷ 679 N.W.2d at 583.

⁵⁸ *Id.*

⁵⁹ 415 N.W.2d 876 (Minn. 1987).

facts. Other courts have completely rejected *Klug*. For example, in *Farm & City Ins. v. Estate of Davis*, the South Dakota Supreme Court stated:

The *Klug* case involved substantially similar facts to this present case. A co-worker chased another co-worker on a highway, pulled alongside, pointed a shotgun out his passenger side window and shot into the driver's side window of the victim's vehicle. *Id.* at 877. The victim sustained injury to his left arm. *Id.* He filed for benefits under his uninsured motorist coverage and the insurer denied coverage. *Id.* The trial court granted summary judgment to the insurer. *Id.*

Ultimately, the Minnesota Supreme Court reversed and under its three-part test reasoned: (1) the requisite causal nexus existed because the car was an "active accessory" in the shooting, which allowed the assailant to "keep up" with the victim; (2) that no act of independent significance broke the causal nexus because the driving and shooting were "inextricably linked"; and (3) the assailant used his vehicle for "motoring" purposes to place himself in a position to harm the victim. *Klug*, 415 N.W.2d at 878-79.

Like several other courts, we find this reasoning unconvincing. *Ruiz v. Farmers Ins. Co.*, 177 Ariz. 101, 865 P.2d 762, 765 (Ariz 1993) (finding that HN4 discharging a firearm from a vehicle is an "independent, voluntary, and deliberate act[] of a criminal using an uninsured vehicle not as a car, but as a gun platform"); *State Farm Mut. Auto. Ins. Co. v. Spotten*, 610 N.E.2d 299, 302 (Ind. App. 1993) (reasoning that a random act of violence is not a risk reasonably contemplated by the parties to the insurance contract); *Coleman v. Sanford*, 521 So. 2d 876, 877 (Miss 1988) (holding the shooting was voluntary and deliberate rendering use of the vehicle incidental); *Ward v. International Indem. Co.*, 897 S.W.2d 627, 628 (Mo. App. 1995) (finding that uninsured vehicle must be instrumentality of the injury not mere situs of the injury).⁶⁰

⁶⁰ 629 N.W.2d 586 (S.D. 2001) (emphasis added).

While this Court does not generally base its decisions on a tallying of cases from other jurisdictions, to the extent out-of-state authorities are relevant to the Court's inquiry, Ms. Kroeber is incorrect in her assessment that no other states have concluded UIM coverage does not apply to a shooting victim when analyzing the "arising out of" question under a test similar to the one applied in Washington. The following cases present some examples of out-of-state cases supporting the conclusion that Mr. Atkinson's liability does not arise out of his use of the truck he was in when he fired the gun:

Nationwide Gen. Ins. Co. v. Royal, 700 A.2d 130 (Del. 1997): The shots in this case were fired from a car as it drove by a trailer. In analyzing the question of UIM coverage, the court noted *Klug's* three-part test and concluded it provided a "flexible framework" for analyzing coverage.⁶¹ As in *Aytes*, because the car was being used for transportation purposes at the time of the shooting, the third prong of the *Klug* test was not a deciding factor. Rather, as is the case under Washington law, the primary question was whether there was a causal connection between the use and the injury. The court concluded there was not, noting that "[e]ven a liberal reading of the phrase 'arising out of the use of a motor vehicle' does not warrant a finding of coverage" for a drive-by shooting.⁶²

Farm & City Ins. v. Estate of Davis, 629 N.W.2d 586 (S.D. 2001): In this case, the victim was killed while two cars were being driven and shots were fired from one car into the other. As noted above, the court

⁶¹ 700 A.2d at 132.

⁶² *Id.* at 133.

discussed *Klug*, but did not adopt the *Klug* test. The court's primary reason for finding no coverage was its conclusion that there was no causal relationship between the use of the vehicle and the death of the victim.

The court held:

Although the facts of this case are tragic, we do not believe that driving a vehicle and the illegal discharge of a firearm are "inextricably linked." The better reasoned cases find that such conduct is an act of independent significance.⁶³

While the court concluded with a discussion of "normal use," it is clear from the earlier discussion that the court would have found no coverage independent of any "normal use" test. Thus, the case is consistent with Washington's requirement that there be a causal connection between the use and the injury.

Ms. Kroeber argues the reasoning of *Estate of Davis* conflicts with *Detweiler v. J.C. Penney Casualty Insurance Co.*,⁶⁴ but in fact the reasoning of the two cases is consistent. In *Detweiler*, the UIM insured fired his pistol at his pickup as a thief was driving it. Bullets ricocheted off the pickup and injured him. The Court concluded the liability of the thief to the insured arose out of the thief's use of the pickup because "the pickup causally contributed to the claimant's injuries when the bullets struck the pickup, which was being driven off, then fragmented and injured" the insured. In *Estate of Davis*, the vehicle did not contribute to the insured's injuries in such a manner, just as in the present case the truck Mr. Atkinson was sitting in did not contribute to Ms. Kroeber's injuries.

⁶³ 629 N.W.2d at 589.

⁶⁴ 110 Wn.2d 99, 751 P.2d 282 (1988).

Nationwide Mut. Ins. Co. v. Sifford, 38 Va. Cir. 341 (1996): In this case, the vehicles were both driving down the road when shots were fired from one vehicle into the other. The court held the use of the vehicle as a “mobile pillbox or as an outpost form which an assailant may inflict intentional injury with a firearm” was not the type of use contemplated by the insurance policy.⁶⁵ This is consistent with the *Centennial* court’s observation that to trigger coverage, the use must present a motoring risk.

Allstate Insurance Co. v. Hairson, 75 Va. Cir. 547 (2006): The victim was fatally injured by bullets from a gun fired from a moving vehicle. The court held there was “no causal relationship between the use of the vehicle and the death” of the victim, so UIM coverage did not apply.

Hamidian v. State Farm Fire & Casualty Co., 833 P.2d 1007 (1992): In this case, the UIM insureds were victims of a bump-and-run robbery. The tortfeasor bumped their car and when the two cars were stopped, he exited his vehicle to rob and shot the insureds before fleeing in his own vehicle. In concluding that the injuries did not arise out of the tortfeasor’s use of his vehicle, the court applied the same test as is applied in Washington – it analyzed whether the vehicle contributed to the injury. The court noted that an injury does not arise out of vehicle use “if it is caused by some intervening cause not identifiable with normal ownership, maintenance or use of the insured vehicle and the injury complained of,” citing several cases, including *Centennial*.⁶⁶ Ms. Kroeber argues that this

⁶⁵ 38 Va. Cir. at 341.

⁶⁶ 833 P.2d at 260.

reference to normal use is contrary to Washington law, but the *Hamidian* court's own citation to *Centennial* indicates otherwise. The court applied the same reasoning as would be applied in Washington.

Niglio v. Omaha Property & Cas. Ins. Co., 679 So.2d 323 (Fla. Ct. App. 1996): In this case, shots were fired from a moving car and a pedestrian was injured. The court applied the same rule as is applied in Washington – that the vehicle itself must have contributed to the injury in some manner. The court found coverage did not apply because the “car merely transported and contained the shooters.”⁶⁷ There was, therefore, an insufficient causal connection between the car and the injuries and UIM coverage did not apply.

State Farm Mut. Auto. Ins. Co. v. Fisher, 618 F.3d 1103 (10th Cir. 2010): The tortfeasor rammed his car several times into the car in which the victim was riding, before pulling next to the car and firing several shots. The court concluded that, under Colorado law, UIM coverage did not apply. Like Washington, the test applied by the court to determine whether the tortfeasor's liability arose out of his use of the vehicle required more than simple “but for” causation and less that proximate causation.⁶⁸

Simply put, some courts have found UIM coverage for injuries caused when a gun is shot from a vehicle, while other courts have not. Ms. Kroeber implies there is an effective way to reconcile all the case law to support the conclusion that existing Washington law mandates

⁶⁷ 679 So.2d at 325.

⁶⁸ 618 F.3d at 1108.

following the law of the jurisdictions finding coverage, but that is not the case. Like many of the jurisdictions finding no coverage, Washington requires that there be a causal connection between the vehicle use and the injury. When the driver of the vehicle is simply sitting in the vehicle when he shoots the gun and then drives away, the required causal connection does not exist. That is true even if he was slowly creeping forward when he fired the shot and it is also true whether or not he intended to harm anyone. No amount of “scorched earth” national research can or should alter that conclusion.

C. The number of drive-by shootings in Washington has no bearing on the questions certified to the Court.

Attached to Ms. Kroeber’s Opening Brief is a 2010 paper regarding drive-by shooting statistics prepared by the Violence Center, an entity identified on the first page of the paper as “a national non-profit educational organization that conducts research and public education in violence in America and provides information and analysis to policymakers, journalists, advocates, and the general public.” This paper was not contained in the record on review and should not be considered by the Court.⁶⁹ In addition, the information in the paper is not relevant to the issue presented to the Court. Whether a shooter’s liability arises out of his use of the vehicle he is in when he discharges the gun is not determined by the number of drive-by shootings that might occur in Washington in a given year. Rather, the question is whether, under the particular facts at

⁶⁹ RAP 10.3(a)(8).

issue, the vehicle had some causal connection to the injuries. The paper is nothing more than a further attempt by Ms. Kroeber to distract the Court's attention from the true issue in this matter, which may be resolved under existing Washington law. GEICO respectfully requests that the Court disregard the attachment.

Even if the Court were to consider the drive-by shooting statistics, they do not support the conclusion urged by Ms. Kroeber. Relying on the statistics, Ms. Kroeber asserts that "policy considerations cry out for providing relief" to victims of drive-by shootings.⁷⁰ But automobile insurance is not the proper source for the relief Ms. Kroeber seeks. This Court has noted that "[p]ublic policy is generally determined by the Legislature and established through statutory provisions."⁷¹

The UIM statute requires that, when UIM insurance is included in a policy, it must provide coverage "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles . . . because of bodily injury . . . resulting therefrom[.]"⁷² In other words, the bodily injury must result from the underinsured motor vehicle. The Washington Legislature has declared that the purpose of the UIM statute "is to protect innocent victims of motorists of underinsured motor vehicles."⁷³ As this Court has noted, "the statute embodies a strong public policy to ensure the availability of a

⁷⁰ Plaintiffs' Opening Brief at 28.

⁷¹ *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 339, 922 P.2d 1335 (1996) (citing *American Home Assur. Co. v. Cohen*, 124 Wn.2d 865, 875, 881 P.2d 1001 (1994)).

⁷² RCW 48.22.030(2).

⁷³ RCW 48.22.030(12).

source of recovery for an innocent automobile-accident victim when the responsible party does not possess adequate liability insurance.”⁷⁴ In addition, the Court “has rarely invoked public policy to limit or void express terms in an insurance contract[.]”⁷⁵

The GEICO policy provides UIM coverage to Ms. Kroeber when she suffers bodily injury and the tortfeasor’s liability for that injury arises out of his use of an underinsured motor vehicle. The GEICO UIM coverage is, therefore, consistent with the requirements and purpose of the UIM statute. The public policy underpinning UIM coverage does not support the extension of that coverage to provide a source of recovery for a shooting victim when the tortfeasor’s liability does not arise out of his use of the underinsured motor vehicle – i.e., where the vehicle did not causally contribute to the injuries. To hold that UIM coverage applies in the present case would re-write the UIM statute and alter the Legislature’s intent in providing UIM coverage.

This Court has previously recognized that it “must avoid stepping into the role of the Legislature by actively creating the public policy of Washington”⁷⁶ and “should resist the temptation to rewrite an unambiguous statute to suit” the Court’s “notions of what is good public policy[.]”⁷⁷ Here, the UIM statute requires that a tortfeasor’s liability must arise out of the use of an underinsured motor vehicle before UIM

⁷⁴ *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 245, 961 P.2d 350 (1998) (citing *Bohme v. PEMCO Mut. Ins. Co.*, 127 Wn.2d 409, 413, 899 P.2d 787 (1995)).

⁷⁵ *Cary*, 130 Wn.2d at 340 (citing *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984)).

⁷⁶ *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001)

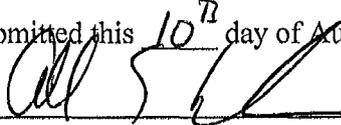
⁷⁷ *Id.* (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)).

coverage applies. The fact that the tortfeasor was in an underinsured motor vehicle at the time he discharged the gun does not satisfy that requirement. Therefore, UIM coverage does not apply and public policy does not dictate a different result.

IV. CONCLUSION

Ms. Kroeber's entire argument is based upon the incorrect premise that a simple "but for" test must be applied in Washington to determine whether a tortfeasor's liability arises out of his use of the vehicle he is using when he causes the UIM insured's injury. The actual test applied in Washington is between "but for" causation and proximate causation. Counting cases from other jurisdictions on either side of the equation serves no useful purposes. Rather, by applying its own precedent, this Court should conclude that Mr. Atkinson's liability for Ms. Kroeber's injuries does not arise out of his use of the underinsured motor vehicle he was in when he discharged the gun. GEICO respectfully asks that the Court answer "no" to the certified questions.

DATED and respectfully submitted this 10th day of August, 2015.



Alfred E. Donohue, WSBA #32774
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164
Tel. - 206.623.4100
Fax - 206.623.9273
Donohue@wscd.com
Counsel for Defendant
GEICO Insurance Company

DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached document as follows:

VIA LEGAL MESSENGER

Richard McKinney
Law Offices of Richard McKinney
2701 California Avenue SW, Suite 225
Seattle, WA 98116
Phone: 206-933-1605
Email: r_mckinney@qwestoffice.net

VIA EMAIL: supreme@courts.wa.gov
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

DATED at Seattle, Washington this 10th day of August, 2015.


Jennifer Hickman

OFFICE RECEPTIONIST, CLERK

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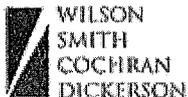
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Attached please find the *Response Brief of Geico Insurance Company on Certified Question* for filing today. Please confirm receipt of this email the attachment.

Thank you,

Jennifer



Jennifer Hickman
Legal Secretary
901 Fifth Ave, Suite 1700
Seattle, WA 98164
Main: 206 623 4100
Fax: 206 623 9273
Email: hickman@wscd.com
www.wscd.com

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