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**WASHINGTON STATE SUPREME COURT**

**HEIDI KROEBER a/k/a HEIDI LAZENBY**

**v.**

**GEICO INSURANCE COMPANY**

---

**Kroeber's Reply on Certified Question**

---

LAW OFFICES OF RICHARD MCKINNEY

By: Richard McKinney, WSBA No. 4895  
2701 California Avenue SW, #225  
Seattle, WA 98116  
206/933-1605; Fax: 206-937-5276



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### 1. But-For Causation Is Washington's Test.

Contrary to GEICO's contention on pp. 1, 8-9 of its brief, the "but-for" test of causation is the bedrock principle in Washington in analyzing UIM causation cases.

As noted by GEICO on pp. 8-9 of its brief, *Butzberger v. Foster*, employs a "but for" analysis in determining whether vehicle use caused the victim's injuries. Specifically, *Butzberger* states, ". . . the causal relation or connection factor requires only that the use of the insured vehicle be a 'but-for' cause of the injury."

GEICO tries to slough aside this language by stating on p. 9 of its brief that the above-quoted language is intended to determine whether a person was using the vehicle (text at n.18 of GEICO brief). This feint simply misstates *Butzberger* which employed the above-quoted language to determine whether the vehicle used caused the injuries – the precise issue certified in this case.

GEICO is also wrong (text at n.17 of its brief) when it says that, among Kroeber's cited cases, only *Butzberger* uses "but-for" phraseology. *Beckman v. Connolly* (p. 1 of Kroeber's opening brief) at 274 also applies a but-for analysis. In *Beckman* a teenage driver placed a full gas can in the cab of his truck and then began smoking, leading to an explosion within the truck.

The insurer argued that a vehicle use did not cause the injuries of one of the passengers who was injured by the explosion. However, the Court of Appeals found that the gas can was being transported by the truck, and the fumes and flames were confined by the cab of the truck. *Beckman* then states, “the accident would not have happened as it did but-for the use of the truck . . . the truck causally contributed in some fashion toward producing the injuries.” (emphasis added.) Not only does *Beckman* employ a “but-for” causation test, but it analyzes whether vehicle used caused the accident to happen as it did – not as an insurer might hypothesize under an “alternative history” analysis.

Next *Transamerica Ins. Group v. United Pacific Ins. Co.*, 92 Wn.2d 21, 593 P.2d 15 (1979) relies on out-of-state authority which utilizes a “but-for” analysis. *Transamerica* relies upon *Travelers Ins. Co. v. Aetna Cas. & Sur. Co.*, 491 S.W.2d 363 (Tenn. 1973) which explicitly utilizes a but-for analysis to determine causation under an insurance policy.

*McDonald Industries, Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 631 P.2d 947 (1981) has not been previously cited by either party. In *McDonald*, during the loading process, a trailer was negligently attached to a tractor, and the trailer later disconnected from the tractor while passing through “S” curve. There was a policy exclusion for damages

resulting from loading and unloading the rig, and the Court found that the injury resulted in part from negligent loading.

The question was whether driving the tractor was also a cause of the accident. The Supreme Court ruled that the driving of the tractor “contributed in some way” to produce the injury. This conclusion was based on the finding that, “Without the motive power of the insured tractor the trailer would not have been able to negotiate the “S” curve . . .”

*McDonald* finds coverage because driving the tractor was a cause of the accident. This case does not use the phrase “but-for”, but “contributed in some way” is equivalent. This is especially so because driving of the tractor was not performed improperly nor was driving by any means the predominant reason for the accident.

*McDonald* is directly analogous to the present case. Atkinson drove to the scene of the shooting by using a circuitous route. As Atkinson was driving to the scene of the crime, the imminent prospect of shooting his gun assuaged his pent-up anger toward Kroeber. According to Kroeber’s ballistics expert, Atkinson took direct aim towards Kroeber with the bullet striking her after ricocheting from a place that was close to where she was standing. This testimony belies Atkinson’s testimony that he merely fired his gun at the ground beneath his open car door. Of

course, Atkinson was able to escape quickly by using his vehicle after the shooting, and he did so by accelerating rapidly away from the crime scene.

The involvement of Atkinson's truck in the present case was at least as much of a cause of Kroeber's injury as the involvement of the tractor in *McDonald* which was traveling in an ordinary manner and fulfilling an ordinary purpose.

Kroeber insists that the applicable causation standard in this case is even more lax than "but-for" causation. Because of the policy language requiring only that the injuries "arise out" of Atkinson's' vehicle use, the test for causation is even broader than it otherwise would be. *Munn v. Mutual of Enumclaw* (p. 2 of Kroeber's opening brief); *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 404, 773 P.2d 906 (1989).

Kroeber previously cited *Seaway Properties LLC v. Firemen's Fund Ins. Co.*, 16 F.3d 1240 (W.D. Wash. 2014) as shedding light on Washington's interpretation of the phrase "arising out of" in relation to "ownership, maintenance or use." In *Seaway* the issue is ownership, maintenance or use of premises. In the UIM line of cases the issue is ownership, maintenance or use of an uninsured vehicle. In the present case the sole question is whether the accident "arises out of" "the ownership, maintenance or use" of the underinsured vehicle.

Even though *Seaway* interprets the relationship between the two phrases in the context of insurance coverage for a premises liability policy, *Seaway* nonetheless relies on *Transamerica* and other cases involving ownership, maintenance or use of a vehicle. There is no logical reason to pigeonhole *Seaway's* reasoning as having a different analytical basis than the UIM cases upon which *Seaway* relies.

*Seaway* finds that the patron's accident was caused by the restaurant owner's ownership, maintenance or use of the restaurant. This was because the patron was traveling through a common area in anticipation of arriving at the restaurant and becoming a patron there.

Analogously, in the present case there would be a relationship between Atkinson's vehicle use and Kroeber's injuries even if the truck was stopped at the time of the shooting.<sup>1</sup> This is because Atkinson intended to use his truck to facilitate his escape.

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<sup>1</sup> Judge Lasnik has already ruled that there was vehicle use at the time of the shooting. There is a variation in testimony as to whether the truck was moving forward or stopped at the time of the shooting. (Compare Document 11-2 p. 8 with Document 14-2 p. 4.) Yet even if the truck were stopped, there would still be vehicle use under *Seaway* because (among other reasons) Atkinson intended to accelerate quickly away from the scene in order to conceal his identity and to escape apprehension.

## **2. GEICO Misstates Issue In Referring To Liability In A Coverage Case.**

GEICO states on n.20 of its brief that the issue is whether the tortfeasor's liability arose out of the use of the uninsured vehicle.

In making this statement GEICO repeats the error identified in *Fiscus* at 785 (p. 1 of opening brief) wherein the Court of Appeals noted that a party was confusing liability and coverage. Liability requires a finding of proximate cause between the wrongdoing and the damages. WPI 15.01. Yet even GEICO admits that the test for causation in this case is less than proximate cause. Page 8 of GEICO brief. The question is not whether Atkinson's liability led to Kroeber's damages.

GEICO's footnote 20 goes on to state that the citation of *Rau v Liberty Mut. Ins. Co.*, 21 Wn. App. 326, 585 P.2d 157 (1978) is a "rabbit hole." Kroeber cited *Rau* in substantial part because Judge Lasnik cited *Rau* for the proposition that vehicle "use" may include actions which occurred when the vehicle was not engaged at the time of the accident. If this is a rabbit hole, Kroeber was not the only one who dug it.

## **3. GEICO's Main Washington Precedents Are Inapplicable.**

Neither *State Farm Mut. Auto Ins. Co. v. Centennial Ins. Co.* (p. 14 of GEICO's brief) nor *Mutual of Enumclaw Ins. Co. v. Jerome* (p. 1 of GEICO's brief) is applicable to the present case.

These cases constitute the bulwark of GEICO's argument. *Centennial*, a 1975 decision, requires that a covered risk be a "motoring risk." GEICO asserts on p. 16 of its brief that intentional torts may be motoring risks. GEICO illustrates this by stating that ramming one's car into another car is a motoring risk. Yet, prior to passage of RCW 48.22.03 (12) in the 2005 time period, intentional ramming of one's car was not a covered motoring risk. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 674, 801 P.2d 207 (1990) holds that ramming one's car against another car is not a covered risk. Therefore in 1975, at the time of *Centennial*, intentional torts were not covered under UIM. "Motoring risks" are reminiscent of those cases found on pp. 27-30 of GEICO's brief. Those out-of-state cases held that criminal acts committed with an automobile are independent causes of harm and cannot be the basis of UIM coverage.

After *Roller*, Washington began permitting UIM coverage for criminal acts committed with a vehicle. *Greene v. Young*, 113 Wn. App. 746, 54 P.3d 734 (2002). Despite Kroeber frequently citing *Greene* in the Federal Court and in her opening brief to this Court, GEICO has steadfastly ignored *Greene* altogether. This case holds that deployment of a vehicle to kidnap and run over a victim constitutes vehicle use sufficient to trigger UIM coverage.

*Jerome* also is not precedent for the present case. *Jerome* holds that as a matter of law the vehicle use (riding as a passenger) was not the cause of the victim's injury. Unless the driver is under a passenger's control, it is hard to imagine how a passenger could have sufficient control over a vehicle to cause injuries by means of the vehicle. For an example of a passenger controlling a driver see *State Farm Mut. Auto Ins. Co. v. Davis*, 937 F.2d 1415 (9<sup>th</sup> Cir. 1991). Obviously the tortfeasor-passenger in *Jerome* was not under the control of the driver because the driver was the ultimate victim of the tortfeasor's actions in trying to throw firecrackers out of a closed window.

There can be no comparison between the present case and *Jerome* which found as a matter of law that the vehicle use (sitting in the car as a passenger) did not cause the harm. In the present case there are numerous aspects of Atkinson's vehicle use which caused Kroeber's harm. The nexus between the vehicle use and the harm is at least as strong in the present case as the nexus was in *McDonald, supra*.

The facts which show a causal link between the vehicle use and Kroeber's injuries are: the hostility which Atkinson felt toward Kroeber (Document 11-1 pp. 12-14 and Document 21-2 p. 4-5); Atkinson "standing down" from physical confrontation with Kroeber and her coterie when he was on foot at the bar (Document 14-2 p. 3 and Document 11-1

pp. 10-15); Atkinson's circuitous driving route taken to get his truck close to Kroeber (Document 21-1 p. 8 and Document 21-2 p. 9 through end of document); his admitted assuagement of anger toward Kroeber when he contemplated shooting his gun as he was driving toward Kroeber (Document 21-2 p. 7); his taking direct aim toward Kroeber when he shot (Document 32-2); his sudden acceleration away from the scene immediately after the shooting (Document 11-4 p. 15 and Document 11-5 p. 6).

Clearly Atkinson was relying far more heavily on his truck when he shot Kroeber than he would have been if he were merely "sitting in his vehicle" at the time of the shooting. GEICO on p. 34 of its brief inaccurately characterizes Atkinson's connection to the truck as merely "sitting in his vehicle."

#### **4. GEICO's Hypotheticals Are Non-Instructive.**

In a "parade of horrors" on pp. 10-11 of its brief GEICO essentially asks, "Where will it all end?" It suggests that if Kroeber receives UIM benefits, then victims of bank robbers and arsonists will also be covered under UIM.

The short answer is that there is a plethora of American case law extending UIM benefits to drive-by shooting victims, but there are no

known decisions extending such benefits to victims of arsonists or bank robbers.

A bank robbery would remove the robber from his vehicle. *Butzberger, supra*, and *Rau v. Liberty Mut. Ins. Co.*, 21 Wn. App. 326, 585 P.2d 157 (1978), *supra*, cite with approval the case of *U.S. Fire Ins. Co. v. Parker*, 250 Va. 374, 463 S.E.2d 464 (1995). In *Parker* a landscaper had arrived at his destination and was no longer using his vehicle except as a barrier. The landscapers were planting cabbages when an uninsured motorist broke beyond the landscaper's parked truck and struck Peterson, the landscaper.

*Parker* holds that Peterson was no longer using his vehicle as a vehicle at the time of being injured.

*Butzberger* and *Rau* also cite *Insurance Company of North America v. Perry*, 204 Va. 833, 134 S.E.2d 418 (1964). In *Perry* a police officer was injured by an uninsured vehicle while the officer was on foot, attempting to serve a warrant. The officer was 164 feet away from his squad car which he used to drive to the neighborhood. *Perry* rules that the officer needed to be using the police vehicle in order to get UIM benefits. The lack of active use of the vehicle and the officer's great distance from the vehicle caused *Perry* to rule that there was no vehicle use.

Similarly, if a bank robber is on foot and runs to a car, the shooting in the bank would be too temporally and spatially removed from the car to justify UIM coverage. Moreover, the bank robber would not be using his car when shooting his victim within the bank.

The present case does not fit within the bank robber paradigm because Judge Lasnik has ruled as a matter of law that Atkinson was using his truck at the time of the injury.

The analysis for a motorist-turned-arsonist involves at least as remote causation as the hypothetical of the bank robber. Both of these hypotheticals are far removed from the present case where the shooter was actively operating his vehicle at the time of the shooting.

#### **5. GEICO's Statement of Foreign Law Is Often Inaccurate.**

GEICO correctly notes that many states have applied different tests than Washington and have therefore not permitted UIM recovery for a drive-by shooting.

GEICO is also correct that some states once permitted UIM recovery by a drive-by shooting victim, but those states no longer do so. Kroeber noted this on p. 11 of her opening brief. On the other hand, some states, such as Oregon in 2015, have recently begun permitting UIM benefits to drive-by shooting victims. *See De Zafra v. Farmers Ins. Co.*, cited on p. 9 of opening brief.

However, the salient determinative point remains. No state denies recovery of UIM benefits to a drive-by shooting victim if that state has Washington's minimal test of causation. This test is variously state as "contributed in some way" (*McDonald*) or "any cause" *Fiscus Motor Freight v. Universal Ins.*, 53 Wn. App. 777, 770 P.2d 679 (1989) or "but-for connection" (*Butzberger* and *Beckman*).

On p. 30 of its brief GEICO tries to answer this point by providing citations which supposedly contradict this conclusion. To illustrate other jurisdictions which supposedly have Washington's causation tests GEICO cites *Nationwide Gen. Ins. Co. v. Royal*, 700 A.2d 130 (Del. 1997) and *Farm & City Ins. v. Estate of Davis*, 629 N.W.2d 586 (S.D. 2001). However, neither of these cases have tests that are at all similar to Washington.

*Royal* requires that the vehicle must have been an "active accessory" to the harm before there can be UIM coverage. The active accessory requirement is not part of Washington law. Moreover, *Royal* applies its test by imagining whether the shooting would still have occurred had the shooter been on foot.

This “counter-factual” alternative history differs from the *McDonald, supra*, which analyzes the accident “as it occurred,” not as it imaginably might have occurred.<sup>2</sup>

Most importantly “active accessory” is a test which requires that the vehicle use be some sort of predominant factor. Yet *Fiscus, supra*, rejected tests from other jurisdictions which require that the vehicle use constitute some sort of super-causation. *McDonald* also establishes that Washington has a very minimal causation requirement.

*Estate of Davis* announces its test that an “act of independent significant” must not have caused the harm. Because *Davis* holds that the shotgun usage is an act of independent significance, it concludes that drive-by shooting victims are not protected under UIM.

*Davis* varies sharply from *Greene, supra*, and RCW 48.22.030 (12) which permit recovery of UIM benefit even if the use of the vehicle contributed to intentional criminal conduct. The “super-causation” approach taken in *Royal* and *Estate of Davis* is also found in the test set forth in the Appleman Treatise cited on pp. 20-21 of GEICO’s brief. Appleman requires that the accident result from the “inherent use” of a vehicle. This is identical or very close to the “motoring risk” test found in

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<sup>2</sup> It is noteworthy that in the present case Atkinson refused to physically confront Kroeber and her boyfriend while he was facing her on foot within the confines of the bar and its outer patio (Document 11-1 pp. 10-15 and Document 14-2 pp. 3-4).

*Centennial*. Once again, Kroeber insists that the statutory change contained in RCW 48.22.030 (12) eviscerated the motoring risk test.

Appleman also requires that the accident must have occurred within the natural territorial limits of the vehicle. However, *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 751 P.2d 282 (1988) demonstrates that this requirement is not part of Washington law. In *Detweiler* the accident happened no closer than 10 to 12 feet from the vehicle, and the vehicle was racing away from the victim.

Most importantly the Appleman test requires that the vehicle must itself produce the injury. This sounds like a requirement of sole proximate cause or least predominant proximate cause. Based upon Washington cases which merely require “but-for” causation (or even less according *Munn*) and based upon *McDonald*, one can be certain that Washington’s test does not include the requirement that the automobile itself must produce the injury.

Kroeber maintains that no state with a minimal causation test such as Washington has denied UIM benefit to a drive-by shooting victim.

## **6. Miscellaneous Rejoinders to GEICO.**

6.1 GEICO makes distinction which do not affect the legal analysis in this case. For example GEICO parses the cases into categories of fact patterns where both the shooter and the victim are in the same

vehicle or separate vehicles, etc. This exercise is pointless. GEICO concedes at n.18 of its brief that Kroeber is an insured under her UIM policy. Her ability to recover UIM benefits does not depend on whether she was standing on the street or riding in a particular vehicle.

6.2 GEICO does not fully or accurately summarize every case which it cites. For example, *State Farm Mut. Auto Ins. Co. v. Fisher*, 618 F.3d 1103 (10<sup>th</sup> Cir. 2010) (p. 33 of GEICO brief) involves a denial of UIM benefit to a drive-by shooting victim because both the shooter and the victim had gotten out of their cars. *Fisher* holds that the shooter was no longer using the uninsured vehicle at the time of the shooting. At the same time *Fisher* reaffirms Colorado's longstanding case law (pp. 9-10 of Kroeber's opening brief) that a drive-by shooting victim receives UIM benefit if the shooter is still operating his vehicle.

There are other instances of GEICO "shaving" in characterizing its cited cases, but one example should suffice for purposes of this Reply.

### CONCLUSION

In *Seaway* Judge Jones suggests that Washington has a distinctive minority view on the question of whether an action "arises out of" the "ownership, maintenance or use" of insured premises. *Seaway's* test is based upon UIM case law.

While it is not clear to Kroeber that Washington is in a distinctive minority, it is safe to conclude that many states do not embrace Washington's relatively loose and permissive standard of causation within an insurance policy.

Washington once had strictures on causation which it no longer has. The passage of RCW 48.22.030 (12) has swept away the prohibition against coverage for intentional acts within a UIM endorsement. That same statute has certainly obliterated the "normal use" requirement in *Centennial*. Because of the but-for test and the statutory enactment referenced herein, Washington now has one of the most liberal insurance policy causation standards in the country.

Even so at least twenty states in the Union have, at least at one point in time, ruled that UIM coverage is available to drive-by shooting victims. They have done so without fear that they were legislating in the manner consuming the final pages of GEICO's brief.

Because there is evidence that Atkinson was maneuvering his truck to accomplish his craven deed, this Court should rule that there is at least an issue of fact as to whether there is a causal relationship between Atkinson's use of his truck and the "accident" associated with his shooting of Kroeber.

DATED this 14<sup>th</sup> day of August, 2015.

Respectfully submitted,

*Richard McKinney*

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RICHARD MCKINNEY, WSBA NO. 4895  
Attorney for Heidi Kroeber

**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2015, one (1) copy of the **Plaintiff Heidi Kroeber's Reply Brief on Certified Question** was mailed via Regular Mail to the following individual:

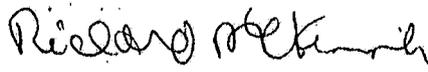
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Bremerton, Washington this 14<sup>th</sup> day of August, 2015.



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RICHARD MCKINNEY, WSBA NO. 4895  
Attorney for Heidi Kroeber

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