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MID CENTURY INSURANCE V. LINDSEY

HUGHES: The issue in this case is whether an unintentional gunshot injury is an accident arising out of the ownership, maintenance, or use of a motor vehicle within the meaning of the Texas personal automobile policy. This case arose from a situation where a gun was accidentally discharged from one vehicle into another vehicle causing the injuries to Mr. Lindsey. The CA from Texarkana found that there was coverage for this incident, and the court should reverse that decision for two general reasons. First, the nature of the hazards associated with a motor vehicle are the purpose for the purchase and writing of automobile insurance. The hazardous instrumentality causing this injury was a gun. The purpose of automobile insurance is not to insure against gunshot injuries. Secondly, this court has recently held in similar facts that this would not constitute an accident within the meaning of the policy and would not arise from the ownership, maintenance or use of the motor vehicle within the meaning of the policy.

Both the respondent and the CA below agree that both elements must be present for there to be coverage. There must both be an accident and the accident must arise from the ownership, maintenance or use.

In its opinion below, the CA focused upon the volitional nature of this or the absence of volition actually in this occurrence. The CA stated that there was no evidence that anyone either expected or intended the result in this case, and that is undisputed. The court, therefore, drew the conclusion that it was accident. The inference to be drawn from that is that any unexpected or unintended event is an accident.

Certainly this is not what was intended by use of the term "accident" in the Texas Personal Automobile Policy. This was frequently cited in the brief of respondent. Respondent on numerous occasions mentioned that this was an unintended, unexpected event, therefore, an accident. But we would show the court that the accident should be considered as an automobile accident rather than merely any unintended event.

ABBOTT: So then, you would rule out coverage for anything such as while you are sitting in a car and the car would explode?

HUGHES: Essentially if the car explodes because of something that is inherent to the car, I think coverage may exist. Because there are certain hazards that are naturally associated with the car - rolling into another vehicle, perhaps the gasoline tank explodes. And that's a possibility. However, if it exploded because of explosives stored in the car, I think that's a separate question, because the hazardous item is the explosives rather than the vehicle itself.

ABBOTT: Let's just say you get in your car and turn on the engine, and the car explodes

for whatever reason. That doesn't seem to be an accident as you are defining it because it doesn't involve the use of the car, and what may be a potential collision with another car or any other object?

HUGHES: Again, I think that that would depend upon the reason for the explosion. If the explosion was because of some defect in the vehicle this, I believe, would be something that was inherently related to the vehicle as such.

HANKINSON: But if someone had a can of gasoline in their trunk and it caused the car to explode, then that would not be an accident?

HUGHES: Again, I think that draws a closer distinction. But again, I don't believe that that would be an accident within the meaning of the policy.

HANKINSON: Aren't you asking us to engraft the word "automobile" in front of the word accident in the policy?

HUGHES: In this policy under the UM coverage, the word "automobile" is not there. The word "accident" is only present. However, if you look to the policy as a whole, the term "automobile accident" or "motor vehicle accident" are used throughout indicating the intent of the parties; and, furthermore, in the Limit of Liability section under the UM coverage, the language that we're talking about having to do with accident and ownership, maintenance and use is in the coverage agreement in the initial part of the UM coverage. Later on, there is a limit of liability section. Under that limit of liability section, which refers to the declarations page, all of the covered events and damages payable for either one person, or one occurrence, or property damage are described as "resulting from a motor vehicle accident."

HANKINSON: But the insuring language uses just the word "accident?"

HUGHES: The insuring language uses only the term "accident," but every dollar payable under that insurance coverage is described later in the policy. Every dollar payable as resulting from a motor vehicle accident. Because of that and because of looking at the entire policy, we think that an automobile accident, whatever the definition of that is, is what is intended by the term "accident."

ENOCH: Is this your strongest argument?

HUGHES: I believe that this is a strong argument. This is not an accident. And part of this is based upon *Farmers Texas County Mutual v. Griffin*, recently decided by this court. But I believe there's an equally strong argument that this does not arise from the use of a vehicle as such, and this court's decision in *National Union v. Merchants Transport*, I believe will be dispositive of that issue.

ENOCH: But for you to win on your argument that this was not an accident requires the

court to define "accident" to mean something other than its usual ordinary meaning?

HUGHES: This court has previously held that an automobile accident, and we believe that the term "automobile accident" is appended, or that the meaning "automobile accident" is appended to the term "accident" in each instance, because of the subsequent language in the limitation of liability section.

ENOCH: Limitation of liability is a different issue than coverage?

HUGHES: But it modifies the coverage. It modifies and describes the coverage.

ENOCH: Granted. But in terms of coverage, we would have to read "accident" to be something other than the common ordinary use?

HUGHES: And this court in *Farmers Texas County Mutual v. Griffin*, stated that the term "auto accident," and the court did use the term "automobile accident" refers to situations where one or more vehicles are involved with another vehicle, object or person. I believe that is what constitutes an automobile accident. And if you look at the insurance policy as a whole, as well as the limitation of liability section, it's clear that an automobile accident or a motor vehicle accident is what's contemplated by the term "accident." The omission of the word "automobile" in that insuring agreement, I don't think that that can be seen as being an intentional omission simply because of the surrounding language.

ENOCH: Did you make an argument in the CA under the limitation of liability, the use in the "automobile accident" those provisions?

HUGHES: We did.

ENOCH: But you think your main argument is that "accident" is a limitation on coverage?

HUGHES: Our main argument on the point "accident," is that the term "accident" was misdefined by the CA, that it states: that it's essentially any unintentional or unintended event. Another portion of the policy that would render this true, we think, is the intentional act...

ENOCH: To get where you are again on this point that you think is a strong point, we would have to look at the coverage provision that just simply says "accident," and we would have to say, but we look at the other provisions of the contract, particularly limitations of liability and say, well what they really meant in coverage was not "accident," but what they really meant was "auto accident?"

HUGHES: I think that's essentially correct. And in *Farmers Texas County Mutual v.*

Griffin, shots were fired from a passing car that hit Mr. Griffin. There was a known shooter. It was pled as a negligence case, although I believe this court looked at it as an intentional act case. That was a declaratory judgment action in which the question was, whether there was any duty to defend under that policy? And it was a Texas personal automobile policy. And again, the court used the language that I previously mentioned, but the term "automobile accident" refers to situations where one or more vehicles are involved with another vehicle, object or person. And I think that's the common sense understanding of the word "automobile accident."

With respect to the use argument, the CA stated, and we do not disagree, that this is a case in which the use requirement of ownership, maintenance or use is at issue. There are 3 acts alleged by respondent to constitute use: 1) the transportation of a firearm in a motor vehicle; 2) the storage of the firearm in a motor vehicle; and 3) is the action of the minor child. The minor child of the owner of the adjacent vehicle entered the vehicle contacting the gun causing it to accidentally discharge. So those are the three acts that are alleged to constitute use.

HANKINSON: Isn't the CA's interpretation of the word "use" in the policy in accord with the majority of jurisdictions who have interpreted that word in similar insurance policies?

LAWYER: I believe it's in the minority. I can't state an actual number. An amicus brief has been filed by the parties to *Whitehead v. State Farm*, in which that exact issue came up also before the Texarkana court. There is a list of cases from other jurisdictions in which the term "use" was held not to constitute a use relating to a gunshot accident. And I believe that that's in excess of those. I believe the majority holding is that "use" does not involve the use of a motor vehicle to carry a firearm.

HANKINSON: This is a point that you and your opponent disagree about then as to what the majority rule is?

LAWYER: It is a point on which we disagree. But the plain meaning of the term "use" is to use a vehicle as a motor vehicle. If I ask someone to use their car, I am wanting to use it to transport something. I am not wanting to use it to sit a gun in and let it stay there, to allow my child to climb in and out of it. So I think the plain understanding of the term "use" favors our position in this argument.

HANKINSON: If I'm using my car to transport a can of gasoline in the trunk and I'm driving along and something happens to cause the gasoline to ignite and my car bursts into flames, am I using my automobile and is that then covered by the insurance policy?

LAWYER: I think the focus must be on the nature, the hazardous propensity with which we are dealing.

HANKINSON: Is that a "use" or not?

LAWYER: I would say that that is probably a use, because you are transporting a commodity that ordinarily is safe to transport. Gasoline as such doesn't have the same hazardous propensity associated with it as a firearm. The transporting of a firearm involves a separate complete independent hazard, that is the danger associated with the firearm.

HANKINSON: But you've engrafted a second layer in the analysis. If I'm transporting the gasoline, I'm using the vehicle. Why am I not using the vehicle when I transport a shotgun?

LAWYER: You may be using the vehicle to transport something; however, again, I would refer back to the intent of the insurance contract to insure against hazards associated with vehicles rather than hazards associated with guns, explosives, dangerous chemicals or other things that might incidentally be transported. In other words, the danger is the gun fire. It's only incidentally related to the vehicle.

SPECTOR: Are you saying that having a gun rack installed in your vehicle is an unreasonable use of the vehicle?

LAWYER: I don't think so. I think that it's certainly common.

SPECTOR: So it would be a reasonable use?

LAWYER: It's an anticipated use. I don't think it's an unreasonable use. However, it can involve negligence if a loaded gun is carried in the gun rack. However, again, I would focus on the nature of the dangerous propensity being the gun rather than actually the transporting of a commodity. The danger is from the gun, not from the commodity. The two Houston CA's have applied the *Appleman* analysis that's cited in our brief on a couple of occasions: *Lee v. Farmer's Insurance* and *Collier v. Employers*. The *Collier* three-part test for whether use is involved, I think there are two prongs of that test involved here. One, is whether the use or the accident arises from the inherent nature of the automobile as such. And secondly, whether the automobile produces the injury. It's a restrictive analysis, but it does restrict to those hazards that are naturally associated with an automobile.

We also considered that *National Union*, recently decided by this court is dispositive of this issue. In that case, this court expressly held, and in that case the facts were similar in that it involved an accidental discharge of a firearm from one vehicle into another vehicle causing injury to the person in the second vehicle. And in that case, this court's expressly held that there was no duty to defend because the petition alleging negligent discharge given its most liberal interpretation, did not allege use of a covered automobile.

In that same case, this court held that there must be a causal nexus between the use of the vehicle that is involve and the accident or injury. And it stated that the mere fact that an automobile is the situs for an accident is not enough to satisfy the requirement of a causal nexus

between the accident and the use.

The Texarkana court in its opinion relied upon the permanent nature of the affixation of the gun rack in the vehicle. That was not in the evidence before the Texarkana court, and to that extent it relied on that, it was in error. Moreover, in respondent's argument they frequently cite the nature of the permanent fixation of the gun rack into the vehicle in essence saying that the gun rack becomes a fixture of the vehicle.

In the Texarkana CA case, *Whitehead,* they also construed "arising out of" language and they mentioned that "arising out of" is not tantamount to proximate cause. In other words, the use of the vehicle does not have to proximately cause the accident, but it fails to give any leading or any instruction as to what type of causation between the use of the vehicle and the accident is necessary to create coverage.

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RESPONDENT

LAWYER: This is not a case where we are trying to extend uninsured motorist coverage to every gunshot accident that occurs in an automobile. Contrary to what the petitioner says, the fact that the vehicle contained the shotgun is directly related to this accident. The facts of this case are very unique and lend themselves to an application of this uninsured motorist policy.

The court is well aware of the facts in this and I want to point out just one or two briefly. The particular facts that apply to this discussion are the facts that on January 19, 1992, Mr. Lindsey's automobile had an applicable policy. The accident was caused when a child attempted to enter a vehicle that contained the shotgun, properly mounted in a gun rack. The gun rack situated the shotgun in such a manner that it was pointed to the outside, it discharged when the child attempted to go into a sliding glass window, and struck Mr. Lindsey in the head.

And the other fact is, that there is no allegation in this case that this was an intentional act by anybody. The petitioner would tell the court that any accident involving a gunshot is going to be excluded. They try to say that this would open the floodgates to litigation, that it would be against public policy, and would require insurers to defend against hundreds or maybe even thousands of cases that weren't contemplated in an uninsured motorist policy. But the particular facts of this case don't lend themselves to that interpretation.

ENOCH: You're arguing the factual distinctions. But in *National Union*, it was conceded that there was just negligence in the discharge of the firearm that was obviously being transported in the truck. Here you have a pickup truck that's not even going down the highway. It's just sitting there. And there's an allegation of negligent discharge of a firearm that's being transported in the truck. What is the significant difference between these two that differentiates the negligence in the truck driving down the highway and the negligence in the truck parked in the

parking lot?

LAWYER: In the *National Union* case, that case was a pleadings case. And the court said in that case that there is no pleading or no allegation that the vehicle itself contributed to the accident or caused the accident in any way other than being the location of the firearm where the gentleman negligently discharged it.

As Justice Hankinson asked about the majority and minority rules, there's been a line of cases in approximately five different areas wherein the vehicle contributed, was held not to contribute, or was the site of the actual discharge of the vehicle. And it turned on who was playing with the vehicle, or who did what, or whether it was an intentional drive-by. In this case, we have an allegation that the gun rack played a part, the vehicle played a part because the shotgun was in there, it was situated in such a manner that it could shoot and injure a bystander or somebody beside it, and also that the method of use wherein the child attempted to enter into the vehicle to obtain some clothing all contributed to the accident itself.

PHILLIPS: So you wouldn't be here, but for the gun rack?

LAWYER: That's correct.

PHILLIPS: And petitioner says that your statements in the brief about the gun rack are beyond what's in the record in terms of the exact mounting and whether it was permanent or not, etc. Can you comment on that?

LAWYER: In the language of the opinion it says, permanently affixed or permanently mounted. And a couple of cases have said that. We agree that there is nothing that really says permanently affixed; however, the petitioner in its response and it's motion for summary judgment in its brief admits that this vehicle contained the gun rack that mounted in the vehicle itself, and the shotgun was in the gun rack. There is no allegation that it was leaning up against a seat, or that it was casually tossed in there. They say mounted. And opposed to permanently, I'm not sure exactly whether that would mean screwed in to the walls of the vehicle or whatever, but it was affixed in such a manner that it stayed in the vehicle, the shotgun was placed in it, and it wasn't intended to be removed with the gun itself. It wasn't like a cable lock or something like that. It was something where the rack was used to mount the shotgun. So it was an integral part of this vehicle at the time of this event.

HECHT: So I will be clear. If the gun had been lying on the seat, and the child crawled in through the back and set it off, you would say that's a different case?

LAWYER: That could be a different case. It depends on the manner and method of the storage. In that case certainly it could be applicable because of the method of use of the truck to transport it. The five different levels of cases that I mentioned earlier, and they were mentioned in

some of the cases, depend on who is playing with the gun, how it was mounted in there, what the intent of the parties were, that sort of thing. And in this case, because it was all an integral act, it combines use and accident. I realize that this court has granted writ of error on four different points, but these four points are intertwined in this case. When we talk about accident arising out of the use it's really one area.

HECHT: Clearly if the child had just been sitting there playing with it, that would be pretty close to *National Union* wouldn't it?

LAWYER: Yes it would. In fact, the petitioner attempts to point out that *National Union* contradicts this case. However, in *National Union*, this court pointed out in using its own language and quoting language from other cases states that: the CA stated in reviewing the underlying pleadings, that the court must focus on the factual allegations and also it's not the cause of action alleged that determines coverage, but the facts given rise to the alleged actionable conduct.

In our case, the facts place it squarely under the interpretation of coverage that an accident arose out of the use of this vehicle.

ENOCH: Based on the cases you've cited, would it be a fair comment that it appears the courts are trying to exclude reasonable doubt as to whether or not it was a drive-by shooting as opposed to clearly a negligent conduct that resulted in the shooting? Does it appear that the courts are attempting to differentiate between cases where there is some doubt that it might in fact have been a drive-by shooting. They just simply allege it's a negligent shooting as opposed to circumstances surrounding the shooting where it's more clearly negligent conduct as opposed to a drive-by?

LAWYER: Yes. The cases say, obviously, that drive-by shooting is excluded. And then, a couple of the cases have held, that while it appears that they are alleging negligence, the true facts show that it was a drive-by shooting and they are alleging negligence to get under the coverage. And our case is totally different. Our case involves no allegation of intentional act, no allegation of a drive-by shooting, but purely an accidental event.

ENOCH: Maybe I'm not being clear. What you're really arguing is that your case is in terms of degree and proximity on one of those cases to the far end of perhaps an intentional shooting as opposed to *National Union* that seemed to be closer in the middle toward - somebody was actually handling the gun when it went off, that could have been a drive-by shooting. But in this case it's just a child who walked through the back window of a pickup truck and discharged it, so that's far away from any sort of notion of negligent handling of a firearm, and so that ought to be covered?

LAWYER: From a factual spectrum, our's is completely different from the allegations where somebody was negligently playing with it or intentionally caused the event.

ENOCH: It's because the child was not playing with the gun, the child was just in proximity from the gun and the gun discharged?

LAWYER: In some manner. Again, we don't know what that manner is other than it discharged. But the fact that it discharged in such a way that it did is important, because it was situated in the vehicle. It was loaded, cocked, and situated in such a way that it could discharge upon, I want say a normal entry into the vehicle, but a foreseeable entry in to the vehicle.

ABBOTT: You're saying that provided those circumstances, a loaded cocked gun that was set into a gun rack, if the child didn't bump into it accidentally, but instead was sitting in the car and thinking, boy this is kind of fun to play with, I think I will play with the gun and it goes off. It's not an intentional discharge of the gun, but an accidental just by a young child playing with it, are you saying that would or would not be covered?

LAWYER: It would present a different fact situation.

ABBOTT: Here's what I am trying to figure out. Are you saying that absent intentional discharge of the gun any discharge of a gun if it's on a gun rack in a car would be covered?

LAWYER: Absent an intentional discharge, I am not saying that every event would be covered. I think it depends on the facts: where the vehicle is; where the gun is; who's doing what.

ABBOTT: In that regard, what I am searching for is instead of us trying to decide each of these cases on a case-by-case basis, what kind of bright line principle can we enunciate where you have a gun on a gun rack in a car that is discharged, what can we tell bench and bar and general public and insurance companies when they will be liable and when they won't be liable?

LAWYER: That's an extremely difficult question, and I'm not trying to be evasive. But it would be difficult to formulate a bright line test for this type of event. Clearly, a case where it was absolutely accidental and negligent rather than intentional should be covered. Because the express policy language says, coverage applies in an accident. If someone is playing with the gun itself, it would apply if the vehicle perhaps plays a part, such as, in the gun rack and part of the gun rack discharges the shotgun, that sort of thing. It's an extremely difficult area because of the unique fact situation presented with guns. Clearly, the intentional act of a drive-by shooting wouldn't be included. It's the gray area in the middle obviously that we are all struggling with here. But that's not applicable to our case because our case is on the other end of the spectrum. My answer is there is no bright line required to dispose of this case unless the court wanted to say that an absolutely negligent unintentional act should be covered.

The reason that I want to go that far is because of the question asked by Justice Hankinson regarding other events and other examples. If one is refueling a vehicle and lights a cigarette and causes an explosion injuring bystanders, that's clearly an example where there was not

a collision as the petitioners would seem to require but, the use, ownership and maintenance of the vehicle was incidental to what happened and caused the accident. Another example would be a truck negligently leaking a noxious or poisonous chemical.

SPECTOR: Is there anything in the record about whether Mr. Metzer's insurance company covered his liability?

LAWYER: Yes. The petitioner has agreed and stated as part of their motion for summary judgment in their brief, that the Metzer's insurance policy settled and thereafter that's how we got to the uninsured and underinsured motorist provision of this case. And it's interestingly to note that the liability policy in this case and the liability policy of Metzer uses the term "auto accident." Yet, Metzer's liability insurance had no trouble saying that this was an automobile accident. And it would be difficult - the same type of argument: well we don't think the liability insurer would find that there was no negligence from a liability standpoint under this fact scenario.

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REBUTTAL

LAWYER: In response there are still two requirements that arise from these facts that must be met for their B coverage. There must be a finding that there was an accident and that it arose from the use. Respondent would urge the adoption of a system of characterization where if a gun is located in a gun rack and accidentally discharges, then that arises from the use of the vehicle. However, a displacement of the gun by a few inches and perhaps a few seconds in the _____ by someone picking it up, would not constitute use of the vehicle. While there may not be a bright line test, there is a principal distinction, and that principal distinction can be found from the nature of the hazards associated with an automobile and the hazards associated with a gun. In this case, the hazards of a gun caused the injury, not the hazards that are naturally associated with the vehicle.

We would submit that the *National Union* case recently decided by this court is dispositive on the issue of "use," and that the *Griffin* case is dispositive on the issue of whether this involved an accident. For these reasons, and those reasons cited in our brief, petitioner would respectfully pray that the decision of the CA be reversed and judgment be rendered finding no uninsured motorist coverage in this case.