When the Motor Vehicle Exclusion Doesn't Apply in Motor Vehicle Accidents

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Almost every Commercial General Liability and Homeowners Insurance Policy issued in the State of Missouri contains a Motor Vehicle Exclusion. Although they can be worded in various ways, most boil down to excluding coverage that "arises out of the ownership, maintenance or use of a motor vehicle." The purpose of these exclusions is very straightforward. The risks associated with operating a motor vehicle are separate and distinct from other risks of liability. Missouri, like most states, has mandatory automobile insurance. Individuals who drive cars or companies that operate fleets of vehicles can and must obtain insurance specifically designed to cover the operation of motor vehicles.

Even though the phrase "arises out of" appears very broad and would exclude any accident that happens due to the operation or use of a motor vehicle that has not always been the case in Missouri. Certain courts have used some novel approaches to find coverage under non-auto policies for accidents that clearly involved the use of motor vehicles.

One such case is *Bowan v. General Security Indemnity Company of Arizona*, 174 S.W.3d 1 (Mo. App. E.D. 2005). In that case the plaintiff, Ms. Bowan, a physically and mentally disabled person, was routinely transported to and from her place of work by General Security's insured, Express Medical Transporters. She was riding in the insured's 15-person van when it was involved in a collision with another vehicle. Bowan was not wearing a seat belt. She sustained serious injuries in the accident, rendering her a paraplegic. General Security contended that there was no coverage for the accident under the commercial general liability policy issued to the insured because of the motor vehicle exclusion. That exclusion provided that the policy did not apply to:

> Bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and loading and unloading. Further, 'loading and unloading' is defined as 'the handling of property.'

The court applied the concurrent proximate cause doctrine to find that there was coverage under the policy regardless of the motor vehicle exclusion. Bowan had alleged in the personal injury action against Express Medical Transporters that they were negligent both in the operation of the

vehicle and in failing to determine that Bowan was not wearing a seat belt prior to the collision. Judgment was obtained against Express Medical Transporters, and an equitable garnishment was later brought against the insurance carrier by Bowan to collect the judgment. The Eastern District Appellate Court agreed with the Trial Court that the loading and unloading part of the motor vehicle exclusion did not apply because Bowan was not "property." The *Bowan* opinion found that the entire exclusion did not apply because under the concurrent proximate cause doctrine, the failure to secure Bowan in the vehicle was a concurrent proximate cause of her injuries. The concurrent proximate cause doctrine requires coverage in the face of an applicable exclusion if there is a separate and independent cause of the injury from the accident which is not excluded by the policy. The court then had to determine whether or not the failure to secure Bowan was a negligent act distinct from the operation of the vehicle and whether that failure to secure was a concurrent proximate cause of her injuries.

The court noted two categories of cases interpreting the doctrine. The first category involved cases where the negligence of the defendant is independent of or divisible from the use of a motor vehicle. In *Centermark Properties, Inc. v. Home Indemnity*, 897 S.W.2d 98 (Mo. App. E.D. 1995), a stolen automobile collided with a police officer's patrol car, injuring the police officer. The court found coverage, even though the commercial general liability policy contained an automobile liability exclusion, based on a separate and distinct cause of action for negligence in which it was claimed that the Centermark employees "failed to comply with procedures for apprehending, subduing and controlling third parties and persons suspected of criminal activity, and it failed to have proper and adequate hiring practices…." *Id.* at 101. The court found these allegations to be independent of the ownership, maintenance or operation of the automobile. The court also refers to *Columbia Mutual v. Neal*, 992 S.W.2d 204 (Mo. App. E.D. 1999), where a child was run over by a vehicle. Suit was brought against the child's grandparents for negligent supervision of the child. The court pointed out that negligent supervision of a child was separate and distinct from the operation of the motor vehicle, as opposed to such claims as negligent entrustment and negligent supervision of employees.

The court did cite other categories of cases, finding that the concurrent proximate cause doctrine did not apply. One such case was *American States Insurance Company v. Porterfield*, 844 S.W.2d 13 (Mo. App. W.D. 1992). This was a Western District of Missouri case in which a trailer became detached from a truck and struck and injured plaintiffs. It was claimed that the employer was negligent in failing to properly supervise employees as to the proper method of hitching the trailer to the truck. The Western District found that the injuries arose out of the use of the truck and not from negligent supervision. Coverage did not apply due to the motor vehicle exclusion. The court also noted the case of *Shelter Mutual Insurance Company v. Politte*, 663 S.W.2d 777 (Mo. App. E.D. 1983), in which it was found that coverage did not apply due to the motor vehicle exclusion. In *Politte* there was a claim for negligent entrustment of a vehicle by a father to his son. The Eastern District Court of Appeals found that in a case of negligent entrustment, the liability of the person entrusting the vehicle necessarily arises out of the operation of the motor vehicle, and the exclusion applies. The *Bowan* court, nevertheless, attempted to distinguish cases such as *Politte* by the following reasoning:

> This case is distinguishable from *Politte* in that even if Driver had not operated the van negligently by violating the traffic signal and it was involved in an

> accident when the vehicle was not in operation, he still could have been liable for negligence for the failure 'to make certain' Bowan was wearing her seat belt. Thus, the failure to properly secure Bowan was an independent and distinct act of negligence that did not necessarily involve operation of the vehicle.

The *Bowan* case, just as the *Centermark* case, both Eastern District cases, seem to go out of the way to find a concurrent proximate cause for an accident that would allow coverage under the policy. Later opinions, as will be discussed, seem to be moving back from such an extreme position. Nevertheless, language in *Bowan* such as the following is troubling:

> Further, this case is distinguishable on the facts from *Porterfield* because in that case, the court specifically held that the injuries did not arise out of the negligent supervision of employees but from the use of the truck. In this case, we found in the underlying case that both the failure to properly secure Bowan and the negligent operation of the vehicle were distinct causes of Bowan's injuries. Therefore, there existed an independent and distinct act of negligence (the failure to properly secure Bowan) that was a cause of Bowan's injuries and was not excluded under the policy. Where an insured risk and an excluded risk constitute concurrent proximate causes of an accident, a liability insurer is liable as long as one of the causes is covered by the policy. *Braxton*, 651 S.W.2d at 619.
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> On a more positive note, the *Bowan* Court did state:
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> The finding in this case, that EMT was liable for failing to properly secure Bowan is similar to the finding in *Neal* with respect to negligent supervision of a child who was run over by a vehicle. Both claims involved individuals who to some extent, needed supervision, and were injured in part because of a lack of supervision.

Judge Gary M. Gaertner, Sr., who authored the opinion in *Bowan*, refers only to the "operation" of the vehicle in reasoning that the concurrent proximate cause doctrine applies. That is, he states that the accident in *Bowan* could have resulted in injury due to negligence that did not necessarily "involve operation of the vehicle." The exclusion excludes coverage for the "ownership, maintenance or use…of an auto…owned or operated by or rented to or loaned to any insured." The court seems to have ignored vehicles that were "owned" or "used" by an insured and concentrated only on the term "operated" by an insured.

Cases in the Western District of Missouri have tended to find that the exclusion does apply to injuries caused in the course of the operation of a vehicle. For instance, in *Kinnaman-Carson v. Westport Insurance Corporation*, 2008 WL 4128057 (Mo. App. W.D. 2008), a Honda automobile was stored at ABC's towing lot. Wallace Hopkins unlawfully took the Honda from the lot and allowed Ms. Norton to drive the vehicle in an intoxicated condition. Hopkins was a passenger in the car at the time of the accident. Norton crossed the center line and struck plaintiff's head-on, causing serious injury. Carolyn Carson sued the towing company which had stored the car along with Ms. Norton. Theories against the towing company included negligent hiring, training and supervision of employees and negligent implementation of security measure

to prevent unauthorized use of stored vehicles (these are allegations similar to those in *Centermark, supra*, wherein the Eastern District Court of Appeals found coverage). Kinnaman-Carson and her husband obtained a judgment in excess of $1 million and filed an equitable garnishment against Defendant Westport Insurance Corporation. Westport defended under its automobile liability exclusion, which excluded bodily injury arising out of the "ownership" or use of any automobile "owned or operated by or rented or loaned to any insured." The full exclusion in the Westport policy relating to motor vehicles is set out below.

> This insurance does not apply to:
> …
> "Bodily injury" or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any inured. Use includes operation and 'loading or unloading.'
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> This **exclusion** applies even if the claims against any insured alleged negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the 'bodily injury' or 'property damage' involved the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft that is owned or operated by or rented or loaned to any insured.

The Western District found that the exclusion applied to prevent coverage for ABC Auto.

> Our review of a series of prior Missouri cases leads us to conclude that ABC Tow's alleged negligence was not a concurrent proximate cause of the Carsons' injuries, since the assuredly negligent acts were only directed at preventing unauthorized use of ABC Tow's automobiles and did not independently pose a threat of harm to the Carsons; ABC Tow's claimed negligence only contributed to the harm the Carsons suffered when its vehicle was used in a manner resulting in the accident.

The court held that to determine whether negligence constitutes an independent concurrent cause of action, the court must "examine whether each alleged cause could have independently brought about the injury" (citing *Co Fat Le*, 439 F.3d 436 at 449 (8th Cir. 2006), interpreting Missouri law). The court also cited another Missouri Western District case, *Hartford Casualty Insurance Company v. Budget Rent-A-Car of Missouri*, 864 S.W.2d 5 (Mo. App. W.D. 1993), in which the court ruled on a similar issue involving the unauthorized use of an insured's automobile. A third party stole a shuttle bus from insured Budget Rent-A-Car, drove the automobile while intoxicated, and caused a fatal accident. A petition was filed for wrongful death alleging that Budget was negligent in supervising its employees in allowing an intruder to be on the premises while intoxicated and failing to remove him. In the *Budget* case, the court stated:

> Any negligence on the part of Budget in failing to have the intruder removed from the premises would not result in liability on Budge were it not for the use of the

> shuttle by the intruder…when liability depends on the negligence (of the intruder) in operating the shuttle bus, coverage of the shuttle bus at the time of the accident is specifically excluded by the exclusionary clause. In short, liability on the part of Budget can only be founded on the ownership and use of the shuttle bus. It is these elements, ownership and use of the shuttle bus, which are specifically excluded by the exclusionary clause. Therefore the exclusionary clause clearly excludes coverage for the alleged accident in the "underlying petition."

The court relied in part on *In Re Estate of Murley*, 250 S.W.3d 3d 393, (Mo. App. S.D. 2008), which will be discussed later.

The court noted that although the Plaintiff claimed that there was independent negligence on the part of ABC to prevent unauthorized third persons from gaining access to ABC's vehicles, it was only when ABC Tow's alleged negligence was combined with the unauthorized use of a stored vehicle that any risk of injury to the Carsons was presented. No danger was presented until the Honda was operated on the highway in which the plaintiffs were traveling. The claimed act of negligence in failing to secure the vehicle was not independent of the use of the vehicle.

The court cited and discussed the Missouri Eastern District cases, which included *Bowan*, *supra*, where the court found that the exclusion did not apply due to an independent concurrent cause of action for failing to secure a mentally and physically disabled person in a van seat. The Western District Appellate Court noted that these cases were based on acts of negligence that were not necessarily involved in the operation of a vehicle. Those cases, according to the court, are not controlling in the case before it because the only way injury could have been produced under the allegations against ABC was when combined with automobile usage.[1]

The a more recent Missouri Eastern District case dealing with the concurrent proximate cause doctrine is *Gateway Hotel Holdings, Inc. v. Lexington Insurance Company*, 275 S.W.3d 268 (Mo. App. E.D. 2008). Gateway Holdings contended that Lexington's policy provided coverage for a judgment obtained by a boxer who sustained brain damage in a match at Gateway's hotel. The boxer was knocked out during the boxing match, but was revived. He left the ring and went into a dressing room where he later became unconscious. There was no ambulance on site, and one had to be called to take him to the hospital. It was contended that the delay resulted or contributed in the severe brain damage. A jury instruction allowed the jury to find for the plaintiff if they believed that there was a failure to provide an ambulance on standby or to provide medical personnel in the locker room to monitor the boxer's condition.

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[1] The Court shows some discomfort with the holding in Bowan and other Eastern District cases by noting that Westport Insurance Company raised "colorable challenges" to the Eastern District interpretation of the automobile exclusion "and their consistency with decisions of this Court which we are bound to follow." Id. FN 6. The Court further commented in citing Centermark, *supra,* Bowan, *supra*, and Neal, *supra*, that the injuries, in fact, occurred only because the insured's allegedly negligent acts were combined with automobile use. In short, the Western District clearly is not in agreement with the reasoning in the Eastern District cases concluding that the injuries could have occurred but for the operation of the automobile.

The insurance policy contained an exclusion for bodily injury from athletic contests. The plaintiffs, however, contended that the hotel's failure to make adequate medical care available had been established as a proximate cause of the boxer's injuries in the underlying court action. That, plaintiff argued, constituted a separate and concurrent proximate cause for the injuries and the exclusion did not apply to that theory of recovery. The court discussed *Hunt v. Capitol Indemnity Corporation*, 26 S.W.3d 341 (Mo. App. E.D. 2000), where the court held that the concurrent proximate cause rule was not applicable, and that the exclusion in the policy for assault and battery applied. In *Hunt*, negligent supervision was charged against a bar owner. An employee stabbed a person with a knife. The court refused to apply the concurrent proximate cause rule in the supervision claim against the bar owner, noting that the injury could not have occurred without the underlying assault. "The *Hunt* court seemed to have adopted a 'but for causation analysis' with its decision that the bar owner's negligence was not a separate and nonexcluded cause under the insurance policy." Id. at 280. In discussing *Bowan*, *supra*, the *Gateway* court noted that *Bowan* concluded that a critical distinction between claims finding insurance coverage under the concurrent proximate cause rule and those denying coverage under the rule was whether the alleged negligence was "independent of or divisible from the use of a motor vehicle as contemplated by the policy." *Id*. at 281. Nevertheless, the court did not disavow *Bowan*.

The *Gateway* court also discussed the more recent case of *In Re Estate of Murley*, 250 S.W.3d 393 (Mo. App. S.D. 2008), involving negligence in properly securing a shower unit loaded into a pickup truck. It came out of the truck while it was being driven and struck a bystander who was injured. The Southern District rejected the concurrent proximate cause argument and held that the automobile exclusion prevented coverage under the policy. It reasoned that the accident could not have happened but for the operation of the truck. The act of negligently failing to secure the load in the truck was not independent of the use of the truck.

The tone of the court in *Gateway* in addressing the concurrent proximate cause doctrine appears to be more restrictive than in prior Eastern District cases, but Judge Oldenwald further commented in *Gateway*:

> We find that the judicial analysis first offered in *Centermark* and later in *Neal* and *Bowan* provides the best guidance in applying the concurrent proximate cause rule first announced in *Braxton.*