

IN THE SUPREME COURT OF TEXAS

=====
No. 97-0449
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MID-CENTURY INSURANCE COMPANY OF TEXAS, A DIVISION OF THE FARMERS
INSURANCE GROUP OF COMPANIES, PETITIONER

v.

RICHARD LINDSEY, RESPONDENT

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS
=====

Argued on October 20, 1998

JUSTICE ENOCH, joined by JUSTICE BAKER and JUSTICE GONZALES, dissenting.

Before today, our pronouncement in *National Union Fire Insurance Company v. Merchants Fast Motor Lines* was clear. We said that because negligent discharge of a firearm does not produce an injury “caused by . . . use of a covered auto,” it *is not* a covered event under an automobile liability policy.¹ The Court’s decision today, that, under a similarly worded policy, negligent discharge of a firearm *is* a covered event should come as quite a surprise. Because these two decisions irreconcilably conflict, I respectfully dissent.

The Court must have forgotten that the issue in *National Union* was not the more narrow question of whether there was coverage, but the broader question of whether the insurer owed a duty

¹ 939 S.W.2d 139, 141 (Tex. 1997).

to defend.² This circumstance is significant because in a duty to defend case we resolve any doubt in favor of the insured:

[I]n case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in insured's favor.³

Also, we considered and concluded in *National Union* that under the policy language, "a causal relation between the injury and the use of the auto is essential to recovery."⁴ We further considered and concluded that "the mere fact that an automobile is the situs of the accident is not enough to establish the necessary nexus between the use and the accident to warrant the conclusion that the accident resulted from such use."⁵ We then concluded that the plaintiffs' broad allegations that injuries resulting from the negligent discharge of a firearm in a moving truck, given their most liberal interpretation, did not suggest that the injury resulted from use of the vehicle and did not state a claim within the scope of liability coverage.⁶ Consequently, our holding that the insurer had no duty to defend necessarily meant that there was no coverage.

But the Court claims the facts are different here. Let me compare. In *National Union*, the plaintiff asserted that a truck driver, while operating a truck, negligently discharged a firearm.⁷ Here,

² See *id.* at 140-41.

³ *Id.* (quoting *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 26 (Tex. 1965), in turn quoting C.T. Drechsler, Annotation, *Allegations in third person's action against insured as determining liability insurer's duty to defend*, 50 A.L.R.2d 458, 504 (1956)).

⁴ *Id.* at 142.

⁵ *Id.*

⁶ See *id.* at 141-42.

⁷ See *id.* at 141.

the plaintiff complains that the defendant's child, while entering a truck, negligently discharged a firearm. If there's a difference, it escapes me.

Curiously, the Court seems content to rely on the supposedly important distinction that in this case Metzger's gun was in a gun rack. But negligent discharge of a gun in a gun rack in a truck that's not moving is no more, and arguably less, a "use" of a vehicle than negligent discharge of a gun in a moving truck. Nor is the child's entering the pickup any more a causal nexus between "use" of the vehicle and the injury than a trucker driving his truck down the highway when the injury occurs. Both injuries were incidental to the use of the vehicle. Neither established the necessary causal nexus between the vehicle's use and the accident to implicate coverage under the automobile liability policy.⁸

Further, the Court obfuscates the issue by claiming that this case is different because the gun was not "purposefully" handled.⁹ In *National Union*, we decided simply whether a broad pleading alleging only negligent discharge of a firearm in a moving vehicle triggered the duty to defend under the automobile liability policy.¹⁰ And we said no.¹¹

Oddly, the Court recognizes as fundamental the question of what the insurer intended to provide and the insured intended to buy,¹² but then ignores the issue. If the Court finds intent of the parties fundamental, it should then explain its implicit conclusion that (1) the agreement between

⁸ See *State Farm Mut. Ins. Co. v. Whitehead*, ___ S.W.2d ___, ___ (Tex. 1999) ("[W]hen the injury complained of is purely incidental to the use of the vehicle, this nexus is not shown and the policy does not provide coverage.").

⁹ ___ S.W.2d at ___.

¹⁰ See 939 S.W.2d at 141-42.

¹¹ *Id.*

¹² See ___ S.W.2d at ___.

the parties in this case contemplated that the negligent discharge of a firearm would be covered, but that (2) the similarly worded agreement between the parties in *National Union* didn't. Surely the Court does not believe that the contracting parties here had in mind the sort of infinitesimal distinctions the Court is making between this case and *National Union*. I can't split hairs so finely. And I don't think the practicing bar will be able to either.

The Court unnecessarily embarks on an exhaustive search through other states' jurisprudence to glean support for its conclusion that there is coverage here¹³ when we have already decided the issue. There is no principled distinction between this case and *National Union*. The court of appeals' judgment should be reversed. Accordingly, I dissent.

Craig T. Enoch
Justice

Opinion delivered: April 8, 1999

¹³ See *id.* at ____.