

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Alison Renee Lee, Circuit Court Judge

Opinion No. 28115 (S.C. Sup. Ct. filed September 21, 2022)
Appellate Case No. 2020-001337

Progressive Direct Insurance Co., and
USAA General Indemnity Company Petitioners,

v.

Shanna Groves as the Personal Representative
of the Estate of Lynn Harrison Respondent.

RESPONDENT'S PETITION FOR REHEARING

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Respondent hereby petitions the Court for Rehearing pursuant to Rule 221 of the Appellate Court Rules. The Respondent respectfully submits that in issuing Opinion #28115 on September 21, 2022 (the “Opinion”), the Court overlooked or misapprehended numerous important points as set forth herein.

The Opinion creates a bright-line rule that gunshot injuries caused by the intentional firing of a gun *never* arise out of the use of an automobile. As explained herein, this new rule fails to consider the specific facts of this case, including that the vehicle was a necessary instrumentality to the assault. Additionally, this rule is inconsistent with the practical reality that drive-by shootings occur with enough frequency that insurance companies and insureds would reasonably contemplate that they will occur and be covered by a policy of insurance that the legislature has mandated must cover injuries arising from the use of an automobile. Further, the Opinion’s ruling that the intentional firing of a gun is an act of independent significance breaking the causal chain between the use of the vehicle and the injuries is inconsistent with the long-held rule that the intent of the uninsured motorist is irrelevant to coverage. Finally, the Opinion’s ruling that the intentional firing of a gun is an act of independent significance breaking the causal chain between the use of the vehicle and the injuries is inconsistent with fact that the vehicle in this case was an instrumentality of the assault and the getaway—the use of the vehicle continued after the shooting.

- (1) There is no evidence in the record that the parties to the insurance policies at issue would have contemplated that Mrs. Harrison’s injuries, which were caused by an uninsured motorist while both she and the uninsured motorist were driving their vehicles, would not be covered under the policies at issue.

The Opinion fails to consider several reasons it is reasonable for the parties to the uninsured motorist policy at issue in this case to conclude that gunshot injuries that are the result of the use of a vehicle would be covered under the policy of insurance. In fact, no evidence in the record

suggests that either Mrs. Harrison or the insurance companies contemplated that her bodily injuries caused by an uninsured motorist would not be covered, particularly when both she and that uninsured motorist were driving at the time of the shooting.

Lynn Harrison, the decedent in this case, contracted for coverage for bodily injuries arising out of the use of the uninsured motor vehicle. On April 2, 2015, she suffered serious bodily injuries, resulting in her death, while “operating her vehicle in a normal and reasonably foreseeable fashion.” (App. 98, #7). The injuries she suffered were caused by another driver on the roadway, who was also driving his vehicle. See (App. 98, #8). Neither left the roadway, neither turned off their vehicle; both vehicles were being used in a foreseeable manner. See (App. 98, #6, #7 and #8); (App. 84, #8); (App. 89, #8); (App. 97-98, #3). Nothing in the record suggests that either Mrs. Harrison, or the insurance companies, did not contemplate that any bodily injuries she suffered while she was driving her vehicle would not be covered. In fact, quite the opposite. The language of the policy, and the statute governing uninsured motorist coverage, would lead a reasonable person to conclude the injuries would be covered because the injuries could not have occurred without the use of the uninsured vehicle before, during, and after the shooting. See (App. 38-49) and see S.C. Code § 38–77–140. Ms. Harrison could not have envisioned that the policies, which purport to cover bodily injuries arising out of the use of the uninsured motor vehicle, would not cover injuries she sustained at the hands of an uninsured driver while both she and that driver were driving their vehicles.

Additionally, the Court’s Opinion that the parties to the insurance contract could not have reasonably anticipated Mrs. Harrison’s injuries would be covered also misapprehends and overlooks that at the time the policies were issued Howser had not been overruled and that that other states have found gunshot injuries covered by policies insuring bodily injuries arising out of

the use and operation of an automobile.¹ It is hard to imagine that two sophisticated insurance companies could not (and did not) anticipate Mrs. Harrison's death would be covered when at least one case in South Carolina had found coverage for gunshot injuries at the time the policies were written. Likewise, cases from other states have found coverage in similar situation and the insurance carriers issued policies providing coverage for injuries arising out of the use of a vehicle.

(2) Even if all gunshot injuries are treated the same, drive-by shootings are foreseeably identifiable with the normal use of an automobile.

It's impossible to have a drive-by shooting without the use of the vehicle. The vehicle is the instrumentality of the crime. In fact, the vehicle is such an important component of the act that it is the first part of the colloquial name, "drive-by shooting." The driving is every bit as essential as the shooting. In a drive-by shooting, the vehicle is used exactly as a vehicle is expected to be

¹ See, e.g., Barncastle v. Am. Nat. Prop. & Cas. Companies, 2000-NMCA-095, 129 N.M. 672, 11 P.3d 1234 (N.M. 2000) (claimant was entitled to uninsured motorist (UM) benefits for injuries he suffered when unidentified passenger of unidentified vehicle shot him as he sat in driver's seat of insured vehicle at intersection; assailant's vehicle was "active accessory" in attack because assailant's driver used it to get into position where assailant could shoot and then to escape scene at high rate of speed, no act of independent significance broke the causal chain, and vehicle in which assailant was riding was put to its normal use in driving alongside claimant.); Cung La v. State Farm Auto. Ins. Co., 830 P.2d 1007, 1011 (Colo. 1992) ("Here, the fact that the firearm contributed to the injuries does not preclude the requisite causal connection. Evidence was presented that it was more than incidental that the assailant was inside a vehicle when he shot the petitioner. At the time the shooting occurred, both the assailant's vehicle and the petitioner's vehicle were proceeding on I-70. Without a vehicle and the assistance of two other vehicles, the assailant would not have been able to restrict the movement of the Mustang and shoot the petitioner."); State Farm Mut. Auto. Ins. Co. v. McMillan, 925 P.2d 785, 795 (Colo. 1996); Abercrombie v. Georgia Farm Bureau Mut. Ins. Co., 216 Ga. App. 602, 604, 454 S.E.2d 813, 815 (1995) ("The movement of the vehicle was integral to, and enabled, the assault. It was not merely incidental; it was inextricably linked. The vehicle was being used for transportation at the time of the shooting and the driving of it facilitated the attack."); Cont'l W. Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987) (The assailant's car was an active accessory to the assault; the assailant used his car to keep up with the victim for over 2 miles in order to shoot the victim. The court also found that no act of independent significance occurred to break the causal link. The assailant's driving and shooting were inextricably linked, and there were no intervening acts by the assailant, for example, driving ahead of the victim, stopping, leaving his vehicle and shooting the victim, which would break the causal chain); De Zafra v. Farmers Ins. Co., 270 Or. App. 77, 85, 346 P.3d 652, 657 (2015) ("We conclude that ORS 742.504(1)(a) requires UM coverage when the injury arises out of the use of an uninsured vehicle and that coverage cannot be denied based on an interpretation that the gunshots were the 'direct cause' of injury."); Stevens v. MAPFRE Ins./Com. Ins. Co., No. BRCV2018309, 2019 WL 2565235, at *5 (Mass. Super. Apr. 5, 2019) ("Here, there was a causal relationship between Holloman's use of his uninsured vehicle and Stevens's injuries. Holloman shot in Stevens's direction while operating his uninsured vehicle. It is reasonable to infer that without the use of his uninsured automobile, Holloman would not have been able to keep up with Stevens, who was driving thirty-five to forty miles per hour, in order to inflict his injuries.")

used. The vehicle is used for transportation and for purposefully positioning the vehicle and its passengers in relation to others on the roadway.

Here, it was undisputed that Mrs. Harrison was driving her vehicle at the time of the shooting. The assailant's position in relation to Mrs. Harrison was completely dependent upon his use of his vehicle. Without the use of his vehicle it would not have been possible for him to keep up with her until the next intersection so that he would be in a position to shoot her at the stop light.

One of the first points made at oral argument by the insurance carriers was that drive-by shootings are, according to the insurance companies, rare. Citing statistics maintained by South Carolina Law Enforcement Diversion ("SLED") on the number of murders statewide, the number of licensed drivers in South Carolina and their own assumptions about the frequency of a normal driver's use of their vehicle, the insurance companies argued that drive by shooting are "abnormal." The argument—that the number of drive-by shootings is large enough to be estimated through the assumptions and statistics proves that drive-by shootings occur with sufficient frequency that they are not so abnormal that insurance companies could not contemplate their occurrence and coverage for the injuries caused thereby. If insurance companies understand and can calculate the frequency of these occurrences, then they should be able to calculate appropriate premiums to cover the risk of loss. Further supporting coverage in this case is that vehicles are so commonly used in this manner that society has a colloquial name for the use of a vehicle in a shooting, a "drive-by."

Therefore, for these reasons the Court should grant rehearing and issue an opinion affirming the result of the Court of Appeals

- (3) The Opinion’s ruling that the use of any firearm is an act of independent significance is contrary to South Carolina precedent that an no distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act.

The Opinion frames the issue as “Whether injuries arising from the *intentional* firing of a gun . . .” are covered. (**Opinion, p. 4**) (italics added). In the final paragraph of the Opinion, the Court finds that firing a gun from a vehicle breaks any causal connection between the vehicle and the injury because the firing of the gun is an act of independent significance. The Opinion misapprehends and overlooks that “[n]o distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act.” Peagler v. USAA Ins. Co., 628 S.E.2d 475, 479, 368 S.C. 153, 160 (2006) (quoting Wright v. North Area Taxi, Inc., 337 S.C. 419, 424, 523 S.E.2d 472, 474 (Ct. App.1999); Home Ins. Co. v. Towe, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994)); see also, (**Opinion, p. 4**) (stating that no distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act) (quotation marks and citation omitted)).

The reason for the finding that the causal connection was broken by an act of independent significance is the conclusion that the intentional firing of a gun is an act of independent significance. The primary case cited by the Court was decided based on South Dakota’s rule that the *deliberate act* of firing a weapon is an act of independent significance. See Olson v. Slattery, 942 N.W.2d 263, 269, 2020 S.D. 21, ¶ 22 (S.D. 2020) (citing Farm & City Ins. v. Estate of Davis, 629 N.W.2d 586, 589, 2001 S.D. 71, ¶ 14 (S.D. 2001) for the proposition that “[t]he shooter's use of a vehicle to position himself to harm another ‘ignores his deliberate act of pointing a loaded shotgun out his window and firing it into the passenger window[.]’”). The Davis case from South Dakota makes clear that *intentional* actions break any causal connection under South Dakota law:

While we could accept Minnesota's three-part test for interpreting whether liability arises out of the use of a vehicle, its reasoning in the context of a drive-by shooting does not persuade us. We do not agree with the conclusion in *Klug* that shotgun injuries and the use of an uninsured vehicle are causally connected. Granted,

Andrews used the vehicle to position himself to harm Davis, but this ignores his deliberate act of pointing a loaded shotgun out his window and firing it into the passenger window where Davis sat. He was convicted of voluntary manslaughter for his actions, which is comparable to “willful and wanton” misconduct. *State v. Seidschlaw*, 304 N.W.2d 102, 106 (S.D.1981). Andrews' use of his vehicle for transportation purposes did not cause Davis' death. His illegal discharge of a firearm did. We find no causal connection.

Davis, 629 N.W.2d 586, 589, 2001 S.D. 71, ¶ 14 (S.D. 2001).² As noted above, intentional acts are not automatically excluded from coverage in South Carolina when the injuries arise out of the use of an uninsured vehicle.

Once Redman’s intent is disregarded, which is required under South Carolina law, there is no break in the causal link because the assault could not have been accomplished without the use of the vehicle and it is inextricably linked to the assault in that way. Redman never exited his vehicle prior to the shooting and his vehicle was on and running at the time of the shooting. **(App. 97-98, #3); (App. 98, #8)**. Redman could not have completed his attack without using his vehicle. Redman could not have kept up with Mrs. Harrison from stop light to stop light without a car. See (App. 97, #2). Redman could not have positioned himself next to Mrs. Harrison at the stop light without a car. See (App. 98, #4). Simply put, without the use of Redman’s vehicle this assault could not have occurred. Redman’s use of his vehicle and the shooting are inextricably linked as one continuing action.

² The other case cited in the opinion is *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App.1999). That case involved very different facts. Importantly, in that case, the vehicle was not essential to the shooting. In *Wright*, the assailants hailed a taxi, entered the taxi once the driver parked his car on the side of the road, and then shot the driver as he began driving. See id. at 422, 472. The vehicle’s movement did not enable the gunman to carry out the attack, as the cabdriver’s injuries “could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or gunmen were standing outside of the vehicle.” Id. at 427, 472. As such, the injuries sustained by the cabdriver resulted from the assault by the gunmen and were unrelated to any functional use of the vehicle because the use of the vehicle was not essential to accomplishing the crime. Id. at 426-27, 523 S.E.2d at 472.

The Opinion's ruling that the firing of a gun from one vehicle to another is an act of independent significance ignores that the vehicle was used in a normal and foreseeable fashion both *before and after* the shooting. See (App. 98, #8).

CONCLUSION

For all these reasons, Respondent requests this Court grant the Petition for Rehearing and issue an amended opinion affirming the result of the Court of Appeals' decision.

Respectfully submitted,

s/ John P. Linton, Jr.

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