IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

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.

PETITIONERS' RETURN TO RESPONDENT'S PETITION FOR REHEARING

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SUMMARY

Automobile insurance policies insure against injuries caused by the ownership, maintenance or use of an automobile. Lynn Harrison was killed by a gunshot wound – i.e., the use of a gun, not the use of an automobile. In its September 21, 2022 Opinion, this Court faithfully applied its past precedent in *Aytes*,[1] *Bookert*,[2] and *Peagler*.[3] It also made clear that South Carolina follows the rule of a majority of jurisdictions that hold gunshot injuries do not arise out of the ownership, maintenance or use of a motor vehicle.

Respondent Groves raises three arguments in her Petition for Rehearing: (1) there is no evidence the parties would not have contemplated coverage for gunshot injuries; (2) drive-by shootings are common enough to be foreseeably identifiable with the normal use of an automobile; and (3) a finding that the shooting constitutes an act of independent significance is inconsistent with the Court's past holdings that there is no distinction between accidental and intentional conduct. These arguments fail.

As an initial matter, Respondent does not challenge this Court's application of *Bookert* and *Aytes*. In fact, Respondent's Petition never even references *Bookert* or *Aytes*. The Opinion finds that *Aytes* was a "gamechanger." Injuries from a shooting are not foreseeably identifiable with the normal use of an automobile. On this ground alone, the Petition should be denied.

As to Respondent's first argument, numerous courts have held that parties to an automobile policy do not anticipate coverage for gunshot injuries. That is certainly the case in South Carolina where this Court had previously ruled in *Bookert* (1999) and *Peagler* (2006) that gunshot wounds

[1] *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998).
[2] *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999).
[3] *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 628 S.E.2d 475 (2006).

were not covered. The Court's September 21, 2022 Opinion merely confirms the rule of law that was in existence before the insurance contracts in this case were issued (2014 and 2015).

As to Respondent's second argument, the descriptive term "drive-by" does not make the shooting in this case foreseeably identifiable with the normal use of an automobile. Respondent conflates foreseeability with normal use, but the two terms are distinct. Although gunshot injuries may be the foreseeable result of a drive-by shooting, a drive-by shooting is not a normal use of an automobile.

As to the third argument, the Court's Opinion makes no distinction between accidental and intentional shootings. In fact, the Opinion cites to *Bookert* (an intentional shooting case) and *Peagler* (an accidental shooting case). Therefore, Respondent's arguments fail, and the Petition for Rehearing should be denied.

I. Respondent fails to address the two controlling cases – *Bookert* and *Aytes* – in her Petition.

The Court's Opinion succeeds in its stated goal: to clarify whether gunshot injuries arise out of the ownership, maintenance or use of an automobile. (Opinion, p. 2). In clear terms, the Court holds: "gunshot injuries do not arise out of the use of an automobile." (Opinion, p. 2). To the extent there was any confusion left in the wake of *Aytes, Bookert*, and their progeny, the Court's Opinion puts that confusion to rest.[4]

In her Petition, Respondent does not appear to challenge this Court's interpretation of *Aytes* or *Bookert*. In fact, the Petition fails to cite either case. Thus, the Court's application of *Aytes* and *Bookert* is binding, and the Petition can be denied on this ground alone.

[4] To be clear, Progressive and USAA contend the law on this issue was made clear in *Bookert*.

In its Opinion, the Court spends a significant amount of time summarizing the development of South Carolina's shooting jurisprudence, starting with a discussion of *Howser*[5] and *Towe*[6] and then proceeding to the present. As to *Howser* and *Towe*, the Court accurately describes these two cases as "an aberration in our jurisprudence." (Opinion, p. 5). The Opinion then navigates the development of the modern case law from *Aytes* and through *Bookert* and *Peagler*. (Opinion pp. 5-6). *Aytes* served as a turning point for the shooting jurisprudence, or, as this Court puts it: "While the Court in *Aytes* did not specifically overrule *Howser* and *Towe*, in retrospect we believe it was a game-changer." (Opinion. P. 6). Since *Aytes*, this Court has consistently held gunshot injuries do not arise out of the ownership maintenance or use of an auto – both those injuries from the intentional firing of a gun (*Bookert*) and those from the accidental discharge of a gun (*Peagler*).

After trekking through the development of this Court's jurisprudence on this issue, this Court concludes by stating:

> Thus, whether coverage exists in a shooting involving a vehicle has evolved in our jurisprudence. Supporting our view that *Aytes* changed the legal landscape is the fact that there has been no appellate decision allowing coverage where injuries arose from a gunshot wound since *Towe* in 1994; that is, until the court of appeals' decision in this case. In reversing the circuit court and finding coverage here, the court of appeals relied on cases nearly thirty years old which, though not explicitly overruled, were sharply limited by *Aytes* and the new framework it established.

(Opinion, p. 7).

The Opinion finally makes express that which has been implicit by this Court's jurisprudence in *Aytes*, *Bookert*, and *Peagler*: "Accordingly, we hold gunshot injuries do not arise out of the use of an automobile." (Opinion, p. 8).

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[5] *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992).
[6] *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994).

Petitioners do not identify any point that this Court overlooked or misapprehended in its analysis of its past jurisprudence or the impact of *Aytes* and *Bookert*. They cannot, because this Court accurately described the history and evolution of this legal issue in South Carolina. Therefore, the Petition should be denied.

II. Respondent's focus on a lack of information about the specific intentions of the parties to this contract is misplaced because courts have recognized generally that reasonable persons to automobile insurance contracts do not anticipate coverage for shootings.

Respondent is correct that, with the exception of the terms of the contract limiting coverage to liability "arising out of the ownership, maintenance or use" of an uninsured motor vehicle, there is no evidence in the record in this case of what either party intended when it entered the contract. To the extent that the specific intent of the parties is important in this case, Respondent's point is a wash. There is also no evidence that the parties intended coverage for shooting injuries. However, because *Aytes*, *Bookert*, and *Peagler* were the law in South Carolina at the time of the subject contracts and incident, the parties would be presumed to know the law of South Carolina and to have known that shooting injuries would not be covered.

Although there is no evidence in this case of the specific intent of the parties to the contract, courts in other jurisdictions have held that parties to an automobile insurance contract do not reasonably anticipate that such a contract would cover gunshot injuries. *Farm & City Ins. v. Est. of Davis*, 629 N.W.2d 586, 589 (S.D. 2001) ("A majority of courts refuse to find that the insurer and insured contemplated that the conduct involved in a drive-by shooting would be covered under the policy.").[7] This point is even more poignant in South Carolina where this Court

[7] *See also State Farm Mut. Auto. Ins. Co. v. Spotten*, 610 N.E.2d 299, 302 (Ind. Ct. App. 3rd Dist. 1993) ("A random act of violence by a vehicle passenger . . . is not a risk reasonably contemplated by the parties and expressed in the [automobile[contract."); *Ramirez v. State Farm Mut. Auto. Ins. Co.*, 331 Ill. App. 3d 77, 85-86, 771 N.E.2d 619, 626 (App. Ct. 2nd Dist. 2002) (holding injuries

ruled that gunshot injuries from intentional shootings (*Bookert*) and accidental discharges (*Peagler*) did not arise out of the ownership, maintenance or use of an automobile. Those decisions were issued years before the formation of the insurance contracts at issue in this case. Thus, when the parties entered into these contracts stating that uninsured motorist coverage only applies to liability arising out of the uninsured motorist's "ownership, maintenance or use of" the uninsured motor vehicle, they reasonably contemplated that coverage would not extend to gunshot injuries. The policy language – read in light of the existing case law – is the best evidence of the parties' intent.

III. Respondent conflates foreseeable injuries with normal use, but the two terms are plainly distinct.

Respondent argues that drive-by shootings are foreseeably identifiable with the normal use of an automobile because it is "impossible to have a drive-by shooting without the use of the vehicle." (Pet. for Reh'g, p. 4). However, Respondent is conflating foreseeability with normal use. Gunshot injuries are the foreseeable result of a gunshot – whether in a "drive-by" or otherwise. If someone fires a gun, gunshot injuries are a foreseeable result of that act.

However, the test established in *Aytes* is not whether the injuries are foreseeably identifiable with the specific action of the defendant at the time the injuries were sustained. Instead, the test is whether the injuries are foreseeably identifiable with the normal use of an automobile. As the Michigan Court of Appeals recognized: "One shudders to contemplate whether drive-by shootings have become foreseeable. It is, however, uncontestable that they are not identified with the normal use of a motor vehicle." *Auto Owners Ins. Co. v. Rucker*, 188 Mich. App. 125, 127,

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resulting from shots fired from pursuing vehicle were "not within the reasonable contemplation of the parties to plaintiff's automobile insurance policy").

469 N.W.2d 1, 2 (Ct. App. 1991). Simply put, a drive-by shooting is not a normal use of a vehicle, and no normal use would have caused the injuries sustained by Harrison in this case.

In its normal use, an automobile cannot cause gunshot injuries. Cars are incapable of firing bullets. Thus, gunshot wounds are not foreseeably identifiable with the normal use of an automobile. *See, e.g., Rucker, supra*; *State Farm Mut. Auto. Ins. Co. v. DeHaan*, 393 Md. 163, 192-93, 900 A.2d 208, 225 (2006) ("Shooting people is likewise not the manner in which vehicles are normally used, or for which they are designed, i.e., vehicles are not normally necessary for shooting people."); *Victoria Ins. Co. v. Hawkins*, 31 S.W.3d 578, 582-83 (Tenn. Ct. App. 2000) (holding vehicle-to-vehicle shooting did not arise out of the ownership, maintenance or use because shooting was not a "proper use in order for the liability to arise out of the use of the vehicle as required by the policy"); *Scales v. State Farm Mut. Auto. Ins. Co.*, 119 N.C. App. 787, 790, 460 S.E.2d 201, 203 (1995) ("Clearly, an automobile chase with guns blazing is not a regular and normal use of a vehicle."); *Ward v. International Indem. Co.*, 897 S.W.2d 627, 629 (Mo. Ct. App. 1995) (holding the "discharge of a gun is unconnected to the inherent use of the motor vehicle"); *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985) ("An attack by an armed assailant upon the driver of a car is not the type of conduct that is foreseeably identifiable with the *normal* use of a motor vehicle.") (emphasis in original); *Detroit Auto. Inter-Insurance Exchange v. Higginbotham*, 95 Mich. App. 213, 222, 290 N.W.2d 414, 419 (Ct. App. 1980) (same).

Respondent's focus on whether gunshot injuries are foreseeable in a drive-by shooting is misplaced. Simply put, a drive-by is not a normal use of an automobile.

IV. The Court's Opinion does not distinguish between accidental and intentional shootings.

Respondent's final argument on rehearing misstates the Court's well-reasoned and carefully drafted Opinion. Specifically, Respondent claims that the Court erred in finding that the

shooting was an act of independent significance because the Court purportedly focused on the intentional firing of the gun by Redman. Respondent argues that an unintentional vs. intentional distinction is inconsistent with South Carolina law. However, the Court's discussion of the act of independent significance issue does not distinguish between accidental and intentional conduct. Thus, this argument does not reflect the holding in the Court's Opinion.

Respondent focuses on page 4 of the Court's Opinion, which states the issues before the Court: "Whether injuries arising from the intentional firing of a gun are foreseeably identifiable with the normal use of an automobile and whether the act of firing a gun constitutes an act of independent significance breaking the causal chain?" (Opinion, p. 4). Notably, the reference to an intentional shooting is in the description of the first question – whether the injuries are foreseeably identifiable with the normal use of an automobile – and not the second question – whether the shooting is an act of independent significance.

The Court appears to be very careful in the Opinion not to distinguish between intentional and unintentional shootings. To the contrary, in the first portion of the Opinion, the Court notes that both intentional and unintentional shootings are not covered, per *Bookert* and *Peagler*, respectively. (Opinion, p. 6). The question is not whether the shooting was intentional, but whether the shooting was an act independent from the operation of a vehicle. Following the majority of other courts on this issue, the Court made the unsurprising conclusion that the shooting was independent from the use of the automobile. The fact that the shooting in this case happened to be intentional does not change the fact that it was an act independent from the use of the vehicle. This ruling is consistent with numerous decisions from courts applying South Carolina law. *See, e.g.*, *Aytes*, 332 S.C. at 35, 503 S.E.2d at 746 (finding shooting was an act of independent significance); *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999) (finding shooting

was an act of independent significance); *Doe v. South Carolina State Budget and Control Bd.*, 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997) (finding sexual assault in vehicle was an act of independent significance: "The injuries to Appellants resulted from Roberson's assaults of them, not from his use of the vehicle."); *Nationwide Mut. Fire Ins. Co. v. Jeter*, 2013 WL 3109214, *5 (D.S.C. June 18, 2013) (holding physical assault and assault with pepper spray inside and outside of vehicle were acts of independent significance); *Nationwide Property & Cas. Co. v. Lain*, 402 F. Supp. 2d 644, 649-50 (D.S.C. 2005) (holding act of strangulation in car was an act of independent significance); *Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 150, 511 S.E.2d 692, 699 (Ct. App. 1999) (holding shooting by assailant standing outside of car was an act of independent significance); *Carraway v. Smith by South Carolina Ins. Co.*, 321 S.C. 23, 26, 467 S.E.2d 120, 122 (Ct. App. 1995) (same).

The Court's Opinion stays true to its past statements that there is no distinction between accidental and intentional conduct. Under either scenario, the Court will look to the act that gave rise to the injury and determine if that act was one of independent significance that broke any causal connection with the use of the vehicle. Here, Redman's acts certainly do so.

CONCLUSION

For the above-stated reasons, the Respondent's Petition for Rehearing should be denied. For her Petition to be successful, Respondent would have to demonstrate an error as to each part of the *Aytes* test on which the Court found against her. However, Respondent fails to identify any point which the Court either misapprehended or overlooked. To the contrary, the Court's Opinion does exactly what it sets out to do – making clear that gunshot injuries do not arise out of the use of an automobile.

Respectfully submitted,

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