

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 REPLY TO PETITIONERS' RETURN TO RESPONDENT'S
PETITION FOR REHEARING**

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Respondent respectfully submits this Reply to Petitioners' Return to Respondent's Petition for Rehearing pursuant to Rule 221 of the Appellate Court Rules. Nowhere in the Return do Petitioners attempt to explain how Lynn Harrison's injuries could have conceivably occurred without Redman's use of his uninsured vehicle. Instead, Petitioners continue to push the argument that if a gun is involved, the injuries must arise solely out the use of the gun. As explained in the Petition for Rehearing, the vehicle in this case was the instrumentality of the assault; an essential part of the resulting damages. Further, in this case, where both cars were being used in a normal fashion at the time of the injuries, the vehicle was every bit as important as the gun. The injuries arise out of the use of the automobile because the automobile is the instrumentality of the assault. In reaching its decision that the injuries did not arise out of the use of the automobile in this case, the Court overlooked or misapprehended the importance of the use of the vehicle.

Petitioner's first argument in the Return is that Respondent did not discuss the State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998) and State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) in the Petition for Rehearing. The Petition for Rehearing explains the points believed to be overlooked by the Court in its interpretation of those cases in creating a bright-line rule that gunshot injuries caused by the intentional firing of a gun *never* arise out of the use of an automobile. There was no need to dwell on Aytes or Bookert, which did not explicitly adopt a bright-line rule. In fact, because the Opinion recognized that Howser and Towe had not yet been overruled (until the Opinion), the proper focus in the Petition for Rehearing was the new rule adopted in the Opinion that "gunshot injuries do not arise out of the use of an automobile." (**Opinion, 8**).

For their second point, Petitioners assert that because Aytes, Booker, and Peagler were decided before the issuance of the policies at issue in this case, no one could have reasonably

anticipated that uninsured automobile insurance would cover the injuries Mrs. Harrison suffered at the hands of another driver. The Court's statement in the Opinion that "in retrospect" Aytes changed the law, belies Petitioners' assertion that everyone should have known that these injuries would not be covered. The Court of Appeals' well-reasoned decision applying the Aytes test and finding coverage in this case further belies Petitioners' suggestion that the new rule created by the Opinion is a long-standing rule that would have been obvious to the parties to the insurance policies. Therefore, 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 facts of this case center around the use of two vehicles, one of which was uninsured. At the time she was killed, Mrs. Harrison was "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, nor turned off their vehicle. See (App. 98, #6, #7 and #8); (App. 84, #8); (App. 89, #8); (App. 97-98, #3). It's hard to image that if Mrs. Harrison had asked her insurance agent whether injuries she suffered as a result of an uninsured driver's actions would be covered under the policies that the answer would not have been "Of course, that's why you have this coverage." In fact, this Court has said the focus of the analysis should be on the use of the vehicle. See Peagler v. USAA Ins. Co., 628 S.E.2d 475, 479, 368 S.C. 153, 160 (2006) ("The three-part test in Aytes applies regardless of whether the injury occurred as a result of an intentional assault or an accident. The focus is on the extent of the role, if any, the vehicle played in causing the injuries or damage, or whether a particular activity is a covered use as required by statute or a policy provision." (citations

omitted)). It should not matter whether a gun is involved or whether the other driver rammed her car. The critical point is that the injuries arose from the use of the uninsured vehicle and could not have occurred absent the use of that vehicle by Redman.

Respondent submits that in issuing the Opinion the Court overlooked or misapprehended that when the use of the uninsured vehicle is a critical part of the causation of the injuries, the injuries arise out of the use of the uninsured vehicle.

In their third and fourth arguments, Petitioners continue to argue that gunshot injuries are not the foreseeably identifiable with the normal use of a vehicle and that intentional acts are acts of independent significance. Petitioners assert that because cars are incapable of firing bullets, gunshot injuries are not foreseeably identifiable with the normal use of an automobile. Other than self-driving cars, cars aren't capable of causing collisions without human action, so the fact that a car cannot fire a bullet on its own is a moot point. As discussed above, the analysis must focus on the use of the vehicle,¹ which here was admittedly a normal use.

Petitioner seems to assert that drive-by shootings are not foreseeably identifiable with the normal use of a vehicle, because something bad happened (a shooting). (**Return, 6**). All claims involve something unexpected, to some extent. The reason for insurance is to protect the insured against the unexpected. As explained in the Petition for Rehearing, while the Opinion states that no distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act, the effect of the Opinion is to draw the line based on intent. The framing of the issue interjects intent into the analysis: "Whether injuries arising from the intentional firing of a gun are

¹ Importantly, Peagler was decided on the basis that the vehicle was not being used at all, not because it involved a gunshot. Peagler, 628 S.E.2d at 481, 368 S.C. at 164 ("The truck was not actively used or involved in causing the injury; it was merely the site of the injury.").

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, 4**). Therefore, the Court overlooked or misapprehended Respondent's argument that no distinction should be made between intentional or negligent acts.

The Court's Opinion opens the door for these insurance companies to erode the coverage afforded through uninsured motorist coverage, while charging the same premiums. In a future case, insurance companies will surely argue that the intentional ramming of another vehicle is no longer covered, because an intentional act is not the normal use of an automobile. Further, they will argue, an intentional ramming breaks the cause chain between the normal use of a vehicle and the damages caused must be an intervening act.

As has been stated, the reason coverage should be afforded in this case is that the vehicle's movement (and normal use) was critical to causing the injuries.

CONCLUSION

For all these reasons, as well as those reasons stated in Respondent's Petition for Rehearing, other briefs and oral argument, 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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