THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court Of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-000041

Mary Wiggins, as Personal Representative of Kelvin Marquise Wiggins,.....Appellant,

v.

Enterprise Leasing Company-SouthEast, LLC,.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court properly grant summary judgment for claims arising out of the use of the vehicle where there was no evidence Respondent was an insured in accordance with South Carolina law?

II. Did the Circuit Court properly find the incident did not arise out of the ownership, maintenance, or use of the vehicle?

STATEMENT OF THE CASE

Appellant Mary Wiggins (hereinafter, "Appellant") asks this Court to repudiate a longstanding principle of South Carolina's common law. This matter arises from a declaratory judgment action in which Appellant claims Kelvin Marquis Wiggins (hereinafter, "Appellant's Decedent") was a permissive user of a rental vehicle owned by Respondent Enterprise Leasing Company-SouthEast, LLC (hereinafter, "Respondent"). Appellant challenges a decision by the trial court to grant summary judgment in favor of Respondent. The trial court based its decision on the common and statutory law Appellant now seeks to change.

STATEMENT OF THE FACTS

On September 27, 2011, Shala Kelly (hereinafater, "Ms. Kelly") entered into a rental agreement with Respondent, the owner, to rent the vehicle at issue. (R. p. 28) It is undisputed Respondent owned the vehicle and was self-insured. Ms. Kelly was permitted to use the vehicle subject to the terms of the rental agreement. When renting the vehicle, Ms. Kelly did not disclose any drivers beyond herself, nor did she request permission for additional drivers to operate the subject vehicle. Further, Ms. Kelly admitted she understood she was not permitted to allow anyone not disclosed in the rental agreement to use the subject vehicle. (R. p. 20, lines 11-22) There is no testimony Appellant's Decedent had permission to operate Respondent's vehicle.[1] Respondent had no relationship with Appellant's Decedent. Furthermore, Respondent did not give Appellant's Decedent permission to operate its vehicle.

On October 5, 2011, Appellant's Decedent operated the subject rental vehicle traveling southbound on Deerfield Road in Hardeeville, South Carolina. At that time, an unknown person fired a gun into the vehicle occupied by Appellant's Decedent. Unfortunately, Appellant's Decedent passed away as a result of a gunshot wound. There is no evidence the incident arose out of the ownership, maintenance, or use of a motor vehicle. Appellant now seeks to recover insurance coverage benefits from Respondent for Appellant's Decedent's unpermitted use of the subject vehicle. On October 7, 2015, the Circuit Court entered an order granting Respondent's motion for summary judgment and dismissing all claims for uninsured motor vehicle benefits. (R. pp. 1-4)

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[1] Appellant relies on Ms. Kelly's deposition testimony to establish she gave Appellant's Decedent permission to the use the vehicle. However, a careful review of the deposition testimony only indicates permission was given to Travis Wiggins, not Appellant's Decedent. (R. p. 18, lines 23-25; p. 19, lines 2-8; p. 23, lines 4-8). Regardless, Ms. Kelly did not have authority to permit any additional drivers.

STANDARD OF REVIEW

When an appellate court reviews a decision to grant summary judgment, it applies the same standards that governed the trial court under Rule 56, SCRCP. *Turner v. Milliman*, 392 S.C. 116, 121, 708 S.E.2d 766, 769 (2011). Under Rule 56, summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the conclusions and inferences to be drawn from the facts are undisputed.

When a court rules on a motion for summary judgment, it must view the evidence, and the inferences reasonably to be drawn from that evidence, in the light most favorable to the nonmoving party. *Turner,* 392 S.C. at 121, 708 S.E.2d at 769. However, a party bearing the burden of proof on a particular claim must factually support each element of that claim, and a "complete failure of proof concerning an essential element [of that claim] necessarily renders all other facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

On those issues where the nonmoving party will have the burden of proof, it is that party's obligation to confront the motion for summary judgment with specific facts demonstrating all elements of the claim. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Baughman v. AT&T*, 306 S.C. 101, 410 S.E. 2d 537 (1991). In such a situation, the moving party is entitled to judgment as a matter of law because the nonmoving party has failed to demonstrate a genuine issue of material fact as to a necessary part of that party's claim. *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THERE WAS NO EVIDENCE APPELLANT HAD PERMISSION TO USE THE SUBJECT VEHICLE AND THEREFORE HE WAS NOT AN INSURED.

South Carolina law requires the party seeking coverage to establish permission was given to the operator by the named insured. *Liberty Mutual Insurance Company and S & S Leasing d/b/a/ Holiday Rent A Car v. Lisa G. Edwards, et al.*, 294 S.C. 368, 364 S.E.2d 750 (1988) (*citing Allstate Insurance Co. v. Federated Mutual Implement and Hardware Insurance Co.*, 251 S.C. 203, 161 S.E.2d 240 (1968)). Respondent is a self-insured company. See S.C. Code Ann. § 56-9-60 (2015). A self-insurer holds a dual role as insurer and insured. *Collins Cadillac, Inc. v. Bigelow-Sanford, Inc.*, 276 S.C. 465, 467, 279 S.E.2d 611, 612 (1981). There is no evidence Respondent, the owner and insured, gave Appellant's Decedent permission to operate the vehicle.

It is incumbent Appellant establish Appellant's Decedent had permission to operate the subject vehicle, but the record is void of any such evidence. Appellant relies on the deposition testimony of Ms. Kelly to establish Appellant's Decedent had permission to operate the subject vehicle. This testimony is insufficient. First, Ms. Kelly's testimony only indicates she gave Travis Wiggins permission to use the vehicle. It is important to note Travis Wiggins and Appellant's Decedent are not the same person. It is more significant to note there is no evidence Respondent gave Appellant's Decedent permission to use the vehicle. There is simply no evidence Appellant's Decedent had any permission to operate the vehicle.

Respondent is the owner of the subject vehicle and took affirmative steps to limit use of the vehicle to only the identified renter. Ms. Kelly admitted understanding she was not to allow anyone to operate the vehicle. Respondent, as the owner and insurer

could limit the use of the vehicle. Regardless of to whom the renter gave the vehicle, the rights and privileges bestowed by the owner and insurer do not convey in perpetuity. Allowing such an application of the law would require an owner and insurer to provide unrestricted coverage for the entire population without limitation essentially eliminating the permission requirement recognized by law. Concomitantly, the Circuit Court did not find any evidence Appellant's Decedent had permission to use the vehicle and therefore properly held the Appellant's Decedent was not an insured and therefore, not covered by Respondent.

Respondent contracted with Ms. Kelly to provide the subject rental vehicle and permitted Ms. Kelly to use its vehicle subject to the terms of the contract. However, there was no insurer-insured relationship between Respondent and Ms. Kelly. Ms. Kelly, as a permissive user, had no authority to give permission to use Respondent's vehicle to any driver not disclosed on the rental agreement. Appellant's Decedent was not a permissive user at the time of the loss. Appellant's Decedent did not have express or implied permission from Respondent to drive the vehicle at the time of this incident, and consequently the self-insured uninsured motorist coverage normally provided by Respondent is not applicable here.

II. THE TRIAL COURT PROPERLY RULED PLAINTIFF FAILED TO ESTABLISH THE INCIDENT AROSE OUT OF THE OWNERSHIP, MAINTENANCE OR USE OF THE SUBJECT VEHICLE.

If the Court agrees with the Circuit Court's decision regarding Appellant's Decedent's unpermitted use of the vehicle, it is not necessary to address this issue. However, a response is necessary here. Respondent's motion for summary judgment

relied upon the pleadings and supporting memoranda.[2] The record reflects there is no causal connection between Appellant's Decedent's injury and either vehicle because the vehicles were not active accessories to the injury. South Carolina law mandates liability coverage, including uninsured motorist coverage, but only to insure against "damages arising out of the ownership, maintenance, or use" of a motor vehicle. S.C. Code Ann. § 38-77-140 (2015). The injury sustained by Appellant's Decedent was neither foreseeably identifiable with the normal use of an automobile, nor were the vehicles more than simply the site from which John Doe's wrongful actions emanated and where Appellant's Decedent was located when he was injured.

South Carolina employs a three-part test for whether an injury arises out of the ownership, maintenance, or use of an automobile. This test requires that:

1. There exists a causal connection between the vehicle and the injury;
2. No act of independent significance breaks the causal link; and
3. The vehicle is being used for transportation at the time of the assault.

State Farm v. Aytes, 332 S.C. 30, 502 S.E.2d 744 (1998). The South Carolina Supreme Court in *Aytes* further examined the "causal connection" requirement and adopted an additional three-part test for that element. To establish a causal connection between the vehicle and the injury, one must show: (a) that the vehicle was an active accessory to the assault; (b) something less than proximate cause but more than the mere site of the injury; and (c) that the injury was foreseeably identifiable with the normal use of the automobile. *Id.*

[2] Appellant was on notice of Respondent's defenses for over a year. Further, the Court provided additional time for the parties to supplement their submissions if they deemed necessary.

The South Carolina Supreme Court applied these factors in *State Farm v. Bookert* to determine that an injury did not arise out of the ownership, maintenance or use of a motor vehicle where an assailant, while inside a moving vehicle, shot and injured Bookert, a pedestrian. *Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999). In its opinion, the Supreme Court found that Bookert's injuries were not covered because the injuries were not "foreseeably identifiable with the normal use of an automobile" and thus failed the test for causal connection established in *Aytes*. There is no evidence a vehicle was an active accessory in the incident. Appellant's reliance on *Howser* is misplaced. *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992). The record lacks any evidence to establish analogous facts to *Howser.* Appellant relies on the police report, but there is no information in the report that describes how the incident occurred. The witnesses referenced in the report merely indicated they heard a sound as a vehicle approached. There is no evidence the incident arose out of the use, maintenance, or ownership of the John Doe vehicle.

Providing additional support to the argument that there should be no coverage in the present case is the South Carolina District Court's decision in *Holmes v. Allstate*, 786 F.Supp.2d 1022 (D.S.C. 2009). That court found that no coverage was available for injuries sustained by the plaintiff for a gunshot wound in a situation even more similar to the case before the court. In *Holmes* the assailant drove his vehicle to the victim's location and found her in her vehicle parked on the side of the road. The assailant pulled up beside the victim's car window and shot her before immediately fleeing the scene. *Id.* at 1024. Holmes sought coverage for her injuries pursuant to her auto liability insurance policy. The district court held there was no coverage because the injuries did not arise out of the ownership, maintenance, or use of either plaintiff's vehicle or the shooter's

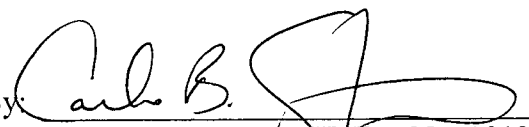
vehicle. *Id.* at 1025.

The court analyzed whether Holmes' injuries arose out of the use of any involved vehicle – either the one she was occupying at the time she was shot or the assailant's vehicle. The court found that the injury did not arise out of Holmes' ownership, maintenance, or use of her vehicle as it was merely the site of the shooting. This failed to meet the requirement of the second element of the three-part "causal connection" test. The court also found that the shooter's vehicle was not an active accessory and that the shooter's use of his car did not increase the severity of the harm inflicted. Going further, the court held that even if the shooter's vehicle could be considered an active accessory to the injury, there was still no coverage because there was no causal connection between the vehicle and the injury, per *Aytes*, as the shooter merely used the vehicle to "locate plaintiff, to position himself next to plaintiff's vehicle, and to leave the scene of the crime." *Id.*

The clear line of cases including *Aytes*, *Bookert*, and *Holmes* provides an additional and alternative basis for this Court to conclude, in harmony with judicial precedent, that Appellant is not entitled to coverage for Appellant's Decedent's injuries. The shooting of Appellant's Decedent by John Doe did not arise out of the ownership, maintenance or use of Respondent's vehicle or of the John Doe vehicle. There is no causal connection between Appellant's Decedent's injury and either vehicle because the vehicles were not active accessories to the injury, the injury sustained by Appellant's Decedent was not foreseeably identifiable with the normal use of an automobile, and the vehicles were nothing more than the sites from which John Doe's wrongful actions emanated and where Appellant's Decedent was located when he was injured.

CONCLUSION

This appeal is an attempt to apply South Carolina law in a manner in which has not previously been applied. Appellant did not provide any evidence Respondent permitted the use of the subject vehicle at the time of the incident. Further, Appellant has not produced evidence that the vehicles were active accessories to the incident. Therefore, the Circuit Court's granting of Respondent's Motion for Summary Judgment should be affirmed.

September 20, 2016 By: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF RESPONDENT complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

September 20, 2016 By: _____

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