

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

LEVI THOMAS BROWN,

Plaintiff,

vs.


STATE FARM FIRE AND CASUALTY
INSURANCE COMPANY,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-00363

FINAL ORDER

BY 
JULIE J. ARMSTRONG
CLERK OF COURT

2017 FEB -7 PM 1:21

FILED

This matter came before the court on January 6, 2017 on cross motions for summary judgment. The parties announced at the hearing that a written stipulation of fact had been reached. The parties agreed there were no disputes of material fact and their cross-motions for summary judgments should be heard as a non-jury trial on the merits.

This is a declaratory judgment case relating to an automobile insurance policy issued by the defendant State Farm Fire and Casualty Insurance Company and a shooting involving Levi Brown, the plaintiff-victim. Plaintiff and three friends were riding in a Cadillac Deville sedan owned by the mother of one of the passengers. The vehicle was insured by State Farm. At approximately 4:25 a.m., while the Cadillac Deville sedan was in the right hand eastbound lane of I-526, a gray/silver older model Dodge Durango came alongside of the Cadillac in one of the other eastbound lanes of the interstate. A black male with dreadlocked hair and a baseball hat was hanging out of the rear passenger side window of the Durango. This unknown

assailant opened fire on the Cadillac. One of those shots struck Levi Thomas Brown causing serious injury.

The attack was entirely unprovoked. The assailant vehicle did not hit the Cadillac. The assailant vehicle did not attempt to ram, block, or otherwise strike the Cadillac. The assailant vehicle continued on I-526 East as Levi Brown exited at Montague Road after being shot. The assailants were never found.

State Farm's policy provides coverage "for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured. The bodily injury and property damage must be caused by an accident that involves the operation, maintenance, or use of an uninsured motor vehicle." Similarly under S.C. Code 38-77-140, an insured is legally entitled to recover damages arising out of the ownership, maintenance or use of an uninsured vehicle.

The South Carolina Supreme Court cases of *Aytes* and *Bookert* have established a three-part test for determining whether an individual's injuries, as a result of an assault or shooting, arise out of "ownership, maintenance, or use" of an automobile so as to trigger automobile insurance coverage. The test is as follows:

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

For there to be a "causal connection" in this context:

1. The [assailant's] vehicle must be an "active accessory" to the assault; and
2. Something less than proximate cause but more than mere site of the injury; and

3. That the "injury must be foreseeably identifiable with the normal use of the automobile."

State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998); *State Farm Mut. Auto. Ins. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999).

In *Bookert*, 523 S.E. 2d 181 (S.C. 2000), the victim (Bookert) and a group of his friends got into an altercation with two soldiers at Hardees. The victim and his friends left Hardees and went to McDonalds. The two soldiers used a vehicle to leave Hardees and picked up a third soldier. The three soldiers drove around McDonalds parking lot looking for the men from Hardees. Bookert was near the entrance when the soldiers yelled from the vehicle. The passenger had a handgun and another man was in the back with a shotgun. The vehicle jerked forward and the man with the shotgun fell and fired his shotgun. This blast did not strike Bookert, but the passenger then fired a handgun---while the vehicle was still moving forward--- and struck Bookert once in each leg. The assailants then escaped from the parking lot in the vehicle, except for the man with the shotgun who fled on foot. The Court of Appeals found the assailant vehicle acted as a "launching pad" for the assault, noting the use of the vehicle to circle the McDonalds to seek out their targets, to put the assailants into a position to shoot Bookert and for two assailants to quickly flee the scene. The Court of Appeals found there was coverage under Bookert's mother's uninsured motorist policy. The Supreme Court reversed---though it did not reverse the finding of the assailant vehicle an "active accessory", it found the gunshot injuries were not "foreseeably identifiable with the normal use of an automobile".

In *Wright v. North Area Taxi*, 523 S.E.2d 472 (S.C. Ct. App. 1999), the Court of Appeals of South Carolina gave further guidance with regards to the *Aytes* and *Bookert*

standard. The court held that a cab driver who was shot by a passenger inside the vehicle while the vehicle was moving was not entitled to uninsured motorist coverage. The court held that despite the fact the passenger's position in the vehicle gave him the opportunity to gain proximity shoot the driver from behind, the connection to the vehicle was lacking. The vehicle was not an active accessory. Furthermore, the Court concluded that even though taxi drivers face special dangers of robbery, a gunshot injury is not foreseeably identifiable within the normal use of a vehicle. (citing and quoting *Nationwide v. Brown*, 779 F.2d 984, 989 (4th Cir.1985)) ("An assault 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.")

In *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984, 989 (4th Cir.1985), a pre-*Aytes* and pre-*Bookert* case, an estranged husband rammed the car of his wife. He then exited his vehicle and shot her in her car. The Fourth Circuit Court of Appeals found that the damages from the car collision would be covered, but concluded the fatal gun assault was not foreseeably identifiable within the normal use of a motor vehicle.

South Carolina District Court cases also reach the same conclusion that a gunshot injury is not foreseeably identifiable with the normal use of a vehicle.

In *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009), an old boyfriend pursued a woman for years, making unusual threats and following her. One day, he saw her driving to pick up a child at a school bus stop. He turned around and pulled next to her stopped vehicle at the bus stop. He called to her and when she looked, he shot her several times with a handgun. Using the framework established by the South Carolina Supreme Court in *Aytes* and *Bookert*, the District Court found that

the vehicle of the assailant was not an active accessory and the gunshot injuries were not within the foreseeable normal use of a motor vehicle.

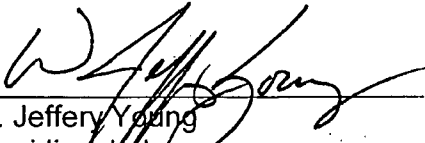
Although plaintiff argues the gunshots would have been harder to make as a stationary person standing on the side of the road, it is not clear that an assailant could more easily hit a target while leaning out the window of a moving vehicle. Further, even if true, that single fact would not seem enough to satisfy the "active accessory" prong. There is no evidence that there was any road rage, or chasing, or use of the assailant vehicle to block the victim's vehicle, nor any evidence of physical contact.

Using the framework provided by *Aytes* and *Bookert*, it is this Court's conclusion the "causal connection" prong is not met. The vehicle does not appear to be an "active accessory." Furthermore, the gunshot injury of this type is not foreseeably identifiable within the normal use of the vehicle per in *Bookert*, *Wright v. North Area Taxi*, *Nationwide v Brown*, and *Holmes v. Allstate*.

State Farm also submits this matter should be excluded because the policy contains an exclusion "for an insured whose bodily injury results from the discharge of a firearm." Plaintiff argues this provision is invalid. Defendant counters that there is no requirement to insure firearm injuries or any injuries that do not arise out of the use of vehicle. Based on the facts of this case, there is no requirement that State Farm insure this gunshot injury and the exclusion adds further reason for the court to conclude that no coverage exists.

Based on the stipulated facts, the policy language, and the law of South Carolina as established by *Aytes* and *Bookert* and their progeny, this Court finds that the gunshot

injuries sustained by Levi Brown are not covered by the State Farm uninsured motorist policy on the Cadillac he was occupying.


W. Jeffery Young
Presiding Judge

Smyter, South Carolina
Jan 20, 2017