THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No.: 2016-CP-10-00363

LEVI THOMAS BROWN.....Appellant

v.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY .....Respondent

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RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

Did the trial court err in applying the multi-part test for determining whether injuries arise out of the use of a motor vehicle established by State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998) and State Farm Mut. Auto. Ins. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) and their progeny?

Should the case be affirmed on the independent basis of the policy exclusion for firearms injuries which was not addressed by the Appellant in his brief?

STATEMENT OF THE CASE

The Respondent, State Farm Fire and Casualty, (hereinafter State Farm), does not dispute the Appellant's statement of the case.

FACTS

The facts are stipulated. State Farm does not dispute the Appellant has accurately set forth the stipulation of fact.

LEGAL ARGUMENTS

I. The Trial Court Did Not Err In Applying The Multi-Part Test Established By Aytes And Bookert To Determine The Injuries Of Brown Did Not Arise Out Of The Use Of The Motor Vehicle.

The bodily injury to Levi Brown resulting from this shooting is not covered by the State Farm uninsured motorist coverage. His injuries are not covered by the policy because the damages do not arise out of the ownership, operation or use of an uninsured vehicle. The lower court did not ignore precedent. It applied the correct precedent which is the multi-part test established by State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998) and more expressly stated in State Farm Mut. Auto. Ins. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999). Whether Wausau

Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1991) remains good law is questionable. Although the case has not been expressly overruled, it is undisputable Aytes and Bookert added the requirement the injuries be "foreseeably identifiable with the normal use of the automobile." (emphasis added). And that requirement has served as an obstacle to coverage in shooting cases since Aytes and Bookert. There is not a single appellate firearm injury case since Aytes which has resulted in a finding of coverage. Even if Howser remains good law, the facts of the present case differ from Howser in several material respects.

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." (State Farm policy, R. p. 40) 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."

Aytes, 332 S.C. at 221; Bookert, 337 S.C. at 291.

The South Carolina Supreme Court decision in Bookert, 337 S.C. at 291. is most instructive. In Bookert, the victim (Bookert) and a group of his friends got into an altercation with two soldiers at Hardee's. Bookert and his friends left Hardee's and went to McDonald's. The two soldiers used a vehicle to leave Hardee's and picked up a third soldier. The three soldiers circled the McDonald's parking lot looking for the men from Hardee's. 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 by the assailants to circle the McDonald's 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 as an "active accessory."

Instead, the South Carolina Supreme Court found the gunshot injuries were not "foreseeably identifiable with the normal use of an automobile".

In Wright v. North Area Taxi, 337S.C419, 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 standard. The court held that a cab driver shot from behind by a passenger inside the vehicle while the cab was moving was not entitled to uninsured motorist coverage. There was no dispute the passenger was "using" the vehicle in the sense that he was a passenger. However, the passenger's act of firing a gun into the cab driver was not covered as part of the "use" of the vehicle. The court held so despite noting the passenger's position in the vehicle gave him the opportunity to gain proximity and opportunity to shoot the driver from behind. Still, the connection to the vehicle was lacking. The vehicle itself did not produce the gunshot injury. The vehicle was not an active accessory. Furthermore, the Court concluded that even though taxi drivers face special dangers of firearm-related robberies, a gunshot injury is not foreseeably identifiable within the normal use of a vehicle. It is interesting to note the North Area Taxi court found insurance coverage did exist for the damage to a parked vehicle hit after the shooting of the cab driver. The court explained these damages arose out of the use of an auto as an auto.

The North Area Taxi court cited with approval Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984, 989 (4th Cir.1985), a decision since cited by the South Carolina Supreme Court three times----in Howser, in Aytes, and in Peagler v. USAA Ins. Co., 368 S.C. 153, 628 S.E. 2d 475 (2000). In Nationwide Mutual Ins. Co. v. Brown, an estranged husband riding as a passenger grabbed the wheel and rammed the car of his

wife. He then exited his vehicle and shot her in her car. The Fourth Circuit Court of Appeals found the fatal gun assault was not foreseeably identifiable with the normal use of a motor vehicle. "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." 779 F.2d at 989. However, the court found it could not grant a declaratory judgment of no coverage on collision-related injury from where the husband rammed his wife's vehicle.

South Carolina District Court cases following Aytes and Bookert 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. 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 United States District Court found that the vehicle of the assailant was not an active accessory AND that the injuries were not within the foreseeable normal use of a motor vehicle.

The appellant attempts to claim this case is identical Howser, 309 S.C. at 269. As an initial matter, it is important to understand prongs have been added to the test since Howser. Since the Howser decision, the Court added the requirement the injury be

"foreseeably identifiable with the normal use of a vehicle." [1] To be clear, this prong does not ask whether the driver and passengers were using the vehicle normally at the time of the assault but instead focuses on whether the injury is foreseeably identifiable with the normal use of a vehicle. There is no question the assailants in Bookert were normally using the vehicle in the sense they were occupying it as it circled the McDonald's moving under the power of the engine while the assailants located and repeatedly shot at their victims.. There is no question the passenger in North Area Taxi was normally occupying the back seat of the cab before firing into the cab driver from behind There is no question that the assailant in Holmes was normally driving his vehicle to the bus stop and was normally seated in the vehicle when he pulled the trigger of a handgun pointed at his victim However, none of the gunshot injuries were foreseeable from the normal use of the motor vehicle as a vehicle.

In the present case, the gunshot injury to Mr. Brown in no way is foreseeable with the normal use of a vehicle. Using the vehicle as a shooting platform is not consistent with its normal use. Plaintiff's only injuries are from a gunshot wound. It is reasonably clear in light of Aytes, Bookert, Brown and Holmes, that gunshot injuries are not "foreseeably identifiable with the normal use of an automobile."

Even if Howser is good law, there are some significant differences with the present case. In Howser, the assailant vehicle bumped the victim's vehicle. The victim vehicle did not stop, presumably because they sensed something was unusual. The

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[1] Aytes, 332 S.C. at 33, 503 S.E. 2d at 745 also expressly acknowledged the addition of the transportation prong to Howser. ("A third requirement was added in Canal Ins. Co. v. Ins. Co. of N. Am., 315 S.C. 1, 431 S.E.2d 577 (1993): it must be shown the vehicle was being used for transportation at the time of the assault.")

assailant vehicle bumped the victim's vehicle two more times. So, there was physical contact. More importantly, this series of bumps set off a chase as the Howser vehicle accelerated and the assailant vehicle pursued. That chase could have only succeeded with a motor vehicle. In the present case, there was no physical contact. There was no chase. There was no precipitating road-related event that generated the dispute. There was simply a vehicle that came out of nowhere and opened fire on the Brown vehicle.

The Appellant attempts to construct an argument that it is easier to shoot a moving vehicle from a moving vehicle than it is to shoot a moving vehicle from a stationary position. First, this is not part of the factual stipulation between the parties. Second, it is not necessarily true. While a moving vehicle might allow a car to overtake another and create proximity; a stationary shooting position, and an appropriate angle would probably create at least as good of a chance of hitting a moving target.

Also, the proximity argument is a slippery slope. If the question revolves only around keeping proximity, then there are many cases where the vehicle contributes proximity in different ways. The drive-by shooting creates proximity to the victim to allow a quick discharge of weapons before the victim has a chance to run or take cover. In a physical assault, the vehicle can create proximity to the victim to drive to a remote location---as was in alleged in Aytes or Nationwide Prop. & Cas. Co. v. Lain, 402 F. Supp. 2d 644, (D.S.C. 2005)(strangulation, in backseat after victim driven to a remote location, not covered). Or the nature of the vehicle can create proximity where the victim cannot escape an assault because of locked doors or because the vehicle is

moving. Or because of the position of the cab driver to a passenger as in North Area Taxi.

The Appellant also cites in support of its position the decision in Home Insurance Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1993). The Towe case actually supports State Farm's position. In Towe, the passenger threw a glass bottle out of a moving vehicle. The bottle hit the steering wheel of a tractor driving in the opposite direction. The broken glass sprayed into the face of the tractor driver. The Towe court found coverage for the tractor driver's injuries by expressly noting that the speed of the vehicle contributed to the velocity of the bottle which increased the seriousness of the injuries. With gunshot injuries, vehicles do not contribute velocity to the bullets to cause greater injury. There is no difference in degree of injury between a bullet fired from a moving car versus a bullet fired from a stationary location.

Of course, it is State Farm's position that even if a casual connection exists, the gunshot injury here is not foreseeably identifiable with the normal use of the vehicle. As noted above, in is indisputable the Howser decision did not include this prong. It was not added until Aytes and Bookert.[2] And the Bookert case shows the difference

[2] This point has been made by others, including the Honorable Margaret S. Seymour, United States District Court Judge in Nationwide Mut. Fire, Ins. Co., v. Jeter, 3:112-cv-01759-MBS,2013 U.S. Dist. Lexis 85029 (D.S.C. 2013) ("Although Howser and Towe are pertinent to the analysis of whether Jeter's vehicle was . . . an active accessory . . ., those cases' relevance is limited due to the fact that both were decided before Aytes. Significantly. Aytes added to the causal connection analysis the requirement that the "injury must be foreseeably identifiable with the normal use of the automobile." Although prior to Aytes a few courts had acknowledged that such a requirement might be relevant to the causation analysis, see, e.g., Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir. 1985); Hite v. Hartford Accident and Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (S.C. Ct. App. 1986), the South Carolina Supreme Court did not consider the foreseeability of the victims' injuries in Howser or Towe.

that prong makes in a gunshot injury case. Even though the Bookert vehicle was moving and even though it was a "launching pad," there was no coverage because the gunshot injury was not foreseeable indentifiable with the normal use of a vehicle. The Court of Appeals is bound to follow the most recent governing precedent of the South Carolina Supreme Court. Bookert and its progeny are the most recent applicable governing precedent, not Howser. The Supreme Court in Bookert did not reverse the Court of Appeals' conclusion that the assailant vehicle was an active accessory---a launching pad. The Bookert court did not reverse on the basis of a lack of causal connection. The South Carolina Supreme Court reversed the Court of Appeals because the gunshot injuries were not foreseeably identifiable with the normal use of an automobile. It is impossible to distinguish Bookert's gunshot injuries from Mr. Brown's gunshot injuries. Therefore, the Court should affirm the lower court.

While this decision should be based on precedent, there are obviously underlying policy questions of what risks should be underwritten by our automobile insurance system and the reasonable expectations of the motoring public. This Court can also attempt to discern those policy considerations as an additional guide to its decision in the present case. Bookert appears partially rooted in a decision not to underwrite all risks through automobile insurance coverage. Because each of the prongs must be met, the Bookert court understood there would be cases which have a strong causal connection, but where the injuries are not foreseeable with the normal use of a vehicle. By its nature and design, the foreseeably identifiable with the normal use prong operates as a restriction on the types of injuries covered by an automobile insurance policy. Shootings, stabbings, sexual assaults, strangulations and the like are not the

type of injuries that the motoring public reasonably expects covered by a motor vehicle policy. Nor are those injuries the type contemplated by insurance companies when setting premiums. The injuries foreseeable with the normal use of a vehicle are those that the vehicle will collide with someone or something. That is what the motoring public expects when they purchase insurance. That is the risk contemplated by underwriters and actuaries in setting premiums.

II. State Farm's Policy Contains A Specific Exclusion For Firearm Injuries.

Plaintiff should be denied coverage because State Farm's automobile insurance policy contains a provision which excludes firearm injuries. The trial court ruled in favor of State Farm on this issue and there was no argument made in the Appellant's Initial Brief to the contrary.

Here, the uninsured motorist policy excludes coverage "for an insured whose bodily injury results from the discharge of a firearm." The exclusion is applicable on these facts. State Farm is entitled to limit its liability for firearm injuries.

CONCLUSION

This Court should affirm the decision of the lower court in finding that no coverage applies through the State Farm policy for the injuries sustained by Mr. Brown.

(Signature on next page)

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CERTIFICATE OF COUNSEL

I certify that Respondents' Final Brief complies with Rule 211(b) of the South Carolina Appellate Court of Appeals.

Respectfully submitted,

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