

STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )  
Progressive Direct Insurance Co., and )  
USAA General Indemnity Company, )  
Plaintiffs, )  
v. )  
James Mark Harrison as the Personal )  
Representative of the Estate of Lynn )  
Harrison, )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

Docket No. 2015-CP-18-1571

ORDER

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SC Court of Appeals

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Clerk of Court  
DORCHESTER COUNTY

This matter came before the Court on Cross Motions for Summary Judgment by Plaintiffs Progressive Direct Insurance Company ("Progressive") and USAA General Indemnity Company ("USAA") (collectively "Plaintiffs"), and James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison ("Defendant"). A hearing on the motions was conducted on February 7, 2017. Present at the hearing were Wesley B. Sawyer, Esquire, attorney for Plaintiffs, and Ryan H. Sigal, Esquire, attorney for Defendant.

Plaintiffs filed an Amended Summons and Complaint against Defendant seeking a declaratory judgment on the basis that neither the Progressive policy nor the USAA policy provides coverage for this incident because Lynn Harrison's ("Harrison") injuries did not arise out of the ownership, maintenance, or use of an automobile by Jimi Carl Redman, Jr. ("Redman"). Defendant filed an Answer on November 5, 2015, requesting the court to deny Plaintiff's request for a declaratory judgment. Defendant alleges the Progressive and USAA policies provide coverage for this incident because Harrison's injuries did arise out of the ownership, maintenance or use of an automobile by Redman. Plaintiffs filed a Motion for Summary Judgment on May 9, 2016. Defendant filed a Cross Motion for Summary Judgment on January 27, 2017.

**FACTUAL BACKGROUND**

This case arises from a shooting incident that occurred when Redman pulled up at a red light beside an automobile operated by Lynn Harrison, pointed a rifle at her, shot her, and drove away. At some point prior to the shooting, Redman pulled next to Harrison and began making hand gestures and blowing kisses towards Harrison as they approached the red light where the

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shooting occurred. There is no evidence that Harrison was aware of Redman's conduct. While stopped at the red light, Redman pointed a rifle at Harrison and fired in her direction, striking her in the neck. Harrison died as a result of the shooting. Plaintiffs each issued insurance policies with uninsured motorist coverage for injuries arising out of an uninsured owner or operator's ownership, maintenance, or use of a motor vehicle. Harrison's estate submitted claims to the Plaintiffs under the policies.

### DISCUSSION

The question on summary judgment is whether Harrison's injuries "arise out of the use" of Redman's automobile, so as to trigger uninsured motorist coverage under the policies issued by Plaintiffs. South Carolina applies a three-pronged test to determine whether injuries arise out of the ownership, maintenance, or use of an automobile. An injury arises out of the ownership, maintenance, or use of a vehicle for purposes of automobile insurance, if (1) a causal connection exists between the vehicle and the injury; (2) no act of independent significance breaks the causal link between the vehicle and the injury; and (3) the vehicle was being used for transportation purposes at the time of the injury. *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 159-60, 628 S.E.2d 475, 478 (2006) (citing *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998)). The three-part test in *Aytes* applies regardless of whether the injury occurred as a result of an intentional assault or an accident. *Id.* at 160; 628 S.E.2d at 479. The focus is 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 a statute or policy provision. *Id.*

#### **I. Causal connection between the automobile and the injury.**

Plaintiffs contend that there is no causal connection between Redman's automobile and Harrison's injuries. The causal connection requirement is satisfied if (a) the vehicle was an active accessory to the assault; (b) the vehicle was something less than a proximate cause, but more than the mere site of the injury; and (c) the injury was foreseeably identifiable with the normal use of the automobile. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (2000).

##### **A. Automobile as an active accessory to the assault.**

Several cases have addressed this element. Plaintiffs contend Redman's automobile was not an active accessory because it did nothing more than transport Redman to and from the crime scene. The South Carolina Supreme Court in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C.

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269, 422 S.E.2d 106 (1992), held that a vehicle used in the commission of a shooting is an "active accessory" to the assault when the assailant's ability to carry out the attack is dependent on the use of his vehicle. The victim was driving down a public road way and an unidentified assailant used his vehicle to bump the victim's vehicle from behind. The assailant continued to follow the victim, eventually pulling aside her and yelling for her to pull the car over. As the victim attempted to flee, the assailant fired a gun into the vehicle injuring the victim. The Supreme Court found "the vehicle was an active accessory in the assault because only through the use of his vehicle was the assailant able to closely pursue the victim, enabling him to carry out the assault. The gunshot was the culmination of an ongoing assault, in which the vehicle played an integral part. Additionally, only a motor vehicle could have provided the assailant a quick and successful escape." *Id.* at 273, 422 S.E.2d at 108. The Court concluded a sufficient causal connection existed between the assailant's vehicle and the victim's injuries based upon all three prongs of *Aytes*. The use of the assailant's vehicle and the shooting were inextricably linked as one continuing assault, and the victim's injuries arose out of the use of the assailant's vehicle. *Id.*

Subsequently, the South Carolina Supreme Court held a causal connection existed between an assailant's use of his vehicle and the injuries sustained by the driver of the tractor in *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994). While riding in an automobile driven by Towe, a passenger threw a bottle from the moving vehicle at a road sign, but instead of striking the sign, the bottle shattered on the steering wheel of a tractor being driven in the opposite direction. *Id.* at 106, 441 S.E.2d at 826. The bottle seriously injured the driver of the tractor and caused minor damage to the tractor itself. *Id.* The Court found the automobile was an active accessory that gave rise to the injuries stating, "the use of the automobile placed the [assailant] in the position to throw the bottle at the sign and the vehicle's speed contributed to the velocity of the bottle, increasing the seriousness of the [victim's] injuries." *Id.* at 107, 441 S.E.2d at 827.

However, the Federal District Court in South Carolina distinguished the drive-by shooting in *Holmes v. Allstate Ins. Co.*, 786 F.Supp.2d 1022 (D.S.C. 2009), from the assaults in *Wausau* and *Towe*. In *Holmes*, the District Court held that the use of a vehicle in a drive-by shooting does not make the vehicle an "active accessory" to the assault. The assailant, an estranged lover, followed claimant to a bus stop where claimant was parked waiting to pick up a neighbor's child. The assailant stopped his vehicle next to the claimant's parked car, fired multiple shots into her vehicle, and drove away. *Id.* at 1024. The District Court found that a causal connection did not

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exist between the assailant's use of his vehicle and the claimant's injuries. The vehicle was not used to assault the claimant, the claimant was not traveling in her vehicle at the time the assailant fired his gun, and the use of his vehicle did not increase the severity of potential harm inflicted by the gunshots. *Id.* at 1026-1027. Accordingly, the District Court determined the assailant's car did not act as an active accessory to his assault on Plaintiff. *Id.* at 1027.

The facts of this case are also distinguishable from *Wausau* and *Towe*. Redman did not use his automobile to keep up with Harrison and did not make contact with her vehicle. There also is no evidence Harrison saw Redman driving beside her or that she was aware of Redman's gestures towards her. There was no attempt by Harrison to evade Redman. Further, Redman's automobile was not an active accessory because the manner in which the automobile was operated did not contribute to the seriousness of the injuries as determined in *Towe*. The facts of this case are more like the drive-by shooting in *Holmes*, Redman pulled next to Harrison's vehicle, committed the assault and drove off. Redman's vehicle was not, therefore, an active accessory to the assault.

**B. Automobile as the mere site of the injury.**

When the vehicle is merely the site of the injury, there is no causal connection with the use of the vehicle. *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999). According to Defendant, Harrison's injuries were directly related to Redman's "functional use of his motor vehicle" and the injuries were more than just incidental. Plaintiffs argue Redman's automobile merely served as the site from which the shots were fired comparable to *Wright*. In *Wright*, two assailants entered a cabdriver's vehicle under pretext as fare-paying customers. Once the cab was in motion, they attempted to rob the driver and ultimately shot and killed her. The Court of Appeals held the injuries to the cab driver were not causally related to the use of the vehicle because the cab merely served as the site of the robbery. *Id.* at 425, 523 S.E.2d at 475. Additionally, the Court determined "the required causal connection does not exist when the *only* connection between an injury and the insureds vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." *Id.* (emphasis added). Such is the case here. The relationship between Redman's use of his automobile and Harrison's injuries were incidental. Redman's automobile was merely the site from which he fired the gun.

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**C. Use of automobile as being foreseeably identifiable with the normal use of an automobile.**

The third element for causal connection requires the injury to be foreseeably identifiable with the normal use of the automobile. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (2000). The South Carolina Supreme Court held the insured was not entitled to underinsured benefits for injuries from gunshots fired from a vehicle. In *Bookert*, a dispute started in a Hardee's parking lot between a group of soldiers and another group of young men. The group of soldiers, in their vehicle, followed the group of men from Hardees to McDonald's. *Id.* at 292, 523 S.E.2d at 182. While riding in the passenger's seat of the soldiers' vehicle, the assailant fired multiple shots into the crowd and struck the victim in both legs. *Id.* The Court restated from *Aytes* the three part test for determining whether an individual's personal injuries arise out of the "ownership, maintenance, or use" of an automobile such that they are covered by an automobile insurance policy. *Id.* at 293, 523 S.E.2d at 182. The Court also restated the causal connection requirement. *Id.* The Court held the "policy [did] not cover the [victim's] injuries because they [were] not foreseeably identifiable with the normal use of an automobile." *Id.* Like *Bookert*, Harrison's injuries from the shot fired by Redman from his automobile were not foreseeably identifiable with the use of an automobile. The assault committed by Redman in firing the gun at Harrison did not result from normal ownership, maintenance or use of a vehicle.

The facts of this case fail to satisfy the first prong of *Aytes*. There is no causal connection between Redman's automobile and the injuries sustained by Harrison.

**II. An intervening act of independent significant breaking any causal connection with the use of his automobile.**

The second prong of *Aytes* to determine whether an injury arises out of the ownership, maintenance, or use of a vehicle requires that no act of independent significance break the causal link between the vehicle and the injury. "If the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of an automobile, the injury is not the result of the 'use' of the automobile." *Wausau*, 309 S.C. at 274, 422 S.E.2d at 109 (citing *Hite v. Hartford Accident & Indem. Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986)).

Plaintiffs argue Redman's act of firing a shot into Harrison's automobile is an act of independent significance that breaks any possible causal connection to the use of his automobile.

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Plaintiffs argue Redman could have committed the same assault by walking up to Harrison's automobile and firing his gun. The Court in *Towe* stated, "[t]he use of the automobile and [assailant's] throwing of the bottle were, as in *Wausau*, 'inextricably linked' as one continuing act. Accordingly, there was no act of independent significance that broke the causal connection between the use of the automobile and [victim's] injuries." 314 S.C. at 827, 441 S.E.2d at 108. The question of whether a shooting constitutes an act of independent significance was addressed in *Wright v. North Area Taxi, Inc.*, *supra*. The Court of Appeals held:

the assault of the gunmen broke any causal connection between the vehicle and the victim's injury because it arose from an act of independent significance. The fatal injuries that Rogers sustained were unrelated to any use of the vehicle. The same injuries could have occurred when the vehicle was parked, not moving, or when Rogers or gunmen were standing outside the vehicle.

337 S.C. at 427, 523 S.E.2d at 476.

Likewise, in this case, the shooting by Redman was an act of independent significance breaking any causal link that may have existed. The same injuries could have occurred without an automobile involved. The same injuries could have occurred if the vehicle was parked, not moving, as in this case, or if Redman was standing outside of the vehicle. The fatal injuries Harrison sustained were unrelated to the use of the automobile. Thus, even if there was a causal connection under the first prong of the *Aytes* test, the evidence shows an independent significant act that breaks the causal connection.

### **III. Redman and Harrison's automobile being used for transportation at the time of the shooting.**

The final prong of the *Aytes* test asks whether the vehicle was being used for transportation at the time of the assault. 332 S.C. at 33, 503 S.E.2d at 745. There is no factual dispute Redman used his vehicle for transportation before and after the shooting.

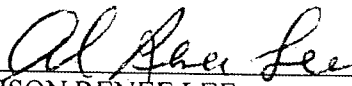
### **CONCLUSION**

The three-prong test to determine whether the injuries sustained arose out of the ownership, maintenance or use of an automobile set forth in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998), has not been met. There was no causal connection between Redman's automobile and the gunshot injuries suffered by Harrison. Additionally, the shot fired by Redman was an act of independent significance breaking any causal connection to the use of his automobile. For the foregoing reasons,

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**IT IS HEREBY ORDERED**, Plaintiffs Progressive Direct Insurance Co., and USAA General Indemnity Company's Motion for Summary Judgment is **GRANTED**. Defendant James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison's Motion for Summary Judgment, is **DENIED**.

**AND IT IS SO ORDERED.**

  
ALISON RENEE LEE  
Presiding Judge

August 2, 2017  
Columbia, South Carolina

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