THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION
UNITED STATES DISTRICT COURT OF SOUTH CAROLINA
The Honorable Richard M. Gergel

Appellate Case No. 2017-002110

Patti Silva, as personal representative for the
Estate of Adrian Silva,.....Plaintiff,

v.

Allstate Property and Casualty Insurance Company,.....Defendant.

FINAL BRIEF OF DEFENDANT

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II. Do injuries caused by a drive-by shooting "arise" from the operation of a motor vehicle under South Carolina Code § 38-77-140, where the shooting victim was operating a motor vehicle followed by the assailant vehicle and blocked from escape by the assailant vehicle during the shooting?

STATEMENT OF THE CASE

Patti Silva, as Personal Representative for the Estate of Adrian Silva ("Plaintiff") filed a Complaint against Allstate Property and Casualty Insurance Company ("Allstate") in the United States District Court for the District of South Carolina, Columbia Division, on January 19, 2017. Plaintiff's Complaint alleged causes of action for declaratory judgment, common law bad faith, and statutory bad faith. Allstate timely filed an Answer and Counterclaims for Declaratory Judgment on February 13, 2017, seeking declarations from the court that the affidavit submitted by Plaintiff did not satisfy section 38-77-170 of the South Carolina Code and that Plaintiff was not entitled to recover under South Carolina law or the insurance policies at issue. Allstate filed an Amended Answer and Counterclaims for Declaratory Judgment on February 16, 2017. On February 27, 2017, Plaintiff filed her Reply to Defendant's Amended Answer and Counterclaims for Declaratory Judgment.

On July 13, 2017, Allstate filed its Motion for Summary Judgment. On August 3, 2017, Plaintiff filed her Response in Opposition to Defendant's Motion for Summary Judgment and Cross Motion for Partial Summary Judgment, or, in the Alternative, for Certification. Allstate filed its response to that motion on August 9, 2017. On August 16, 2017, Plaintiff filed her Reply to Defendant's Memorandum in Opposition to Plaintiff's Cross Motion for Partial Summary Judgment, or, in the Alternative, for Certification.

On September 5, 2017, the Honorable Richard M. Gergel filed two separate Orders and Opinions, in which he denied without prejudice Allstate's motion for

summary judgment and Plaintiff's motion for partial summary judgment, certified questions to this Court, and stayed the matter pending this Court's answer to those certified questions. On November 16, 2017, this Court issued an order informing the parties of its decision to answer the certified questions.

STATEMENT OF THE FACTS

On or about August 1, 2016, Plaintiff filed a Complaint bearing docket number 2016-CP-40-4622, titled *Patti Silva, as Personal Representative for the Estate of Adrian Silva v. John Doe*, in the Court of Common Pleas for Richland County, South Carolina (the "underlying lawsuit"). Plaintiff filed the underlying lawsuit against John Doe under section 38-77-170 of the South Carolina Code, and she contends she is owed uninsured motorist ("UM") benefits under an Allstate motorcycle insurance policy and an Allstate automobile insurance policy (collectively "the Policies").

(A) The Underlying Lawsuit

The underlying lawsuit alleges the following: (1) Adrian Silva was operating a 2014 Harley Davidson motorcycle on January 3, 2016; (2) as Silva was approaching the intersection of Longreen Parkway and Churchland Drive in Richland County, South Carolina, Doe, the driver of an unknown vehicle, positioned his vehicle in a manner that prevented Silva from escaping; (3) Doe then aimed a gun at Silva through the window of the unknown vehicle and shot Silva five times on the left side of his body. [State Court Complaint, ¶ 7-8.] The underlying lawsuit asserts that Silva suffered fatal injuries as a result of the shooting, and that these injuries and damages were due to and proximately

caused by the negligence, carelessness, recklessness, willfulness, wantonness and grossly negligent conduct of Doe in the following particulars:

a. In pointing a firearm at Silva;

b. In discharging a firearm at Silva;

c. In using a vehicle to obstruct Silva's path, thereby preventing him from evading Defendant's use of deadly force;

d. In causing the death of Adrian Silva;

e. In utilizing a motor vehicle as a means of avoiding apprehension by law enforcement following the shooting of Silva;

f. Failing to render aid to Silva after shooting Silva who then crashed his motorcycle in the ditch parallel to the road; and

g. In other such particulars as may be determined through discovery or trial.

[State Court Complaint, ¶ 10-11.]

(B) Investigation of the Accident

Plaintiff submitted an affidavit of Investigator Joe Clarke of the Richland County Sheriff's Department, which Clarke dated June 7, 2016 ("the June 2016 Affidavit."). The June 2016 Affidavit states that Clarke "respond[ed] to the scene of a traffic accident near the intersection of Longreen Parkway at Churchland Drive in Columbia, South Carolina . . . to perform further investigations of the Accident as the Accident involved a murder." His "investigation revealed that the driver of a Harley-Davidson motorcycle, Mr. Adrian Silva . . . , sustained multiple gunshot wounds causing the motorcycle to crash into the adjacent woods. Mr. Silva was pronounced dead on the scene." The June 2016 Affidavit further states, "Surveillance footage from a camera pointed at Longreen Parkway affixed to Journey Church, currently in evidence, captured Mr. Silva on the motorcycle

immediately prior to his estimated time of death and shows that Mr. Silva was followed closely by a second vehicle. It is the theory of this investigation that the gunshots were fired by the occupant(s) of the second vehicle in the Journey Church footage and that the occupant(s) fled the scene in the same car."

Clarke later signed another affidavit, which he dated October 10, 2016 ("the October 2016 Affidavit"), which is after the commencement of the underlying lawsuit. The October 2016 Affidavit states that "[o]n January 3, 2016, at approximately 3:30 A.M., a woman called 911 to report a traffic accident near the intersection of Longreen Parkway at Churchland Drive in Columbia, South Carolina . . . . Deputy Kevin Beck asked that [Clarke] respond to the scene to perform further investigation as the first responders determined that the Accident involved a fatality and a Harley-Davidson motorcycle . . . ." The October 2016 Affidavit further states that "[d]uring the course of the Silva Investigation, it has been determined that the driver of the Motorcycle was Mr. Adrian Silva . . . . Mr. Silva was discovered dead in the ditch beside the roadway still partially on his Motorcycle."

Clarke's "review of the surveillance footage from a camera pointed at Longreen Parkway affixed to Journey Church, currently in evidence, captured Mr. Silva driving the Motorcycle followed by a second vehicle . . . immediately prior to the accident. Based on the time stamp of the surveillance footage taken from Journey Church, in conjunction with the time the call was received by the woman who reported the Accident, Mr. Silva's time of death occurred within one minute thirty seconds after he exited the frame of the

surveillance camera. At this time, the Silva Investigation has revealed no additional witnesses to the Accident."

Based on Clarke's "investigation into the Accident, including all available evidence, [his] knowledge, training, and experience as a law enforcement investigator, it is the theory of the Silva Investigation that Mr. Silva's death and the damage to the motorcycle were proximately caused by the occupant(s) of the Phantom Vehicle who, after overtaking Mr. Silva, fired five gunshots at Mr. Silva from within the Phantom Vehicle and then fled the scene of the Accident in the Phantom Vehicle." The October 2016 Affidavit also contained language stating: "A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW." The June 2016 Affidavit did not contain this language.

(C) The Allstate Policies

Allstate issued a policy numbered 968 911 299 ("the Motorcycle Policy") to Adrian Silva, for the period December 21, 2015 through December 21, 2016. The Policy provided Motorcycle Liability Insurance and Uninsured Motorists Insurance for a 2014 Harley Davidson motorcycle, subject to terms, conditions and certain exclusions, on an occurrence basis. The Uninsured Motorists Insurance policy limits were $25,000.00 per person for bodily injury and $25,000.00 per person for property damage.

Allstate also issued a policy numbered 955 621 670 to Patti and Adrian Silva, for the period September 9, 2015 through March 9, 2016 ("the Auto Policy"). The Policy provided Automobile Liability Insurance and Uninsured Motorists Insurance for a 2014

Honda Accord and a 2012 Toyota Tundra, subject to terms, conditions and certain exclusions, on an occurrence basis. The Uninsured Motorists Insurance policy limits for the 2014 Honda Accord and the 2012 Toyota Tundra were each $50,000.00 per person for bodily injury and $50,000.000 per person for property damage.

STANDARD OF REVIEW

"The Supreme Court in its discretion may answer questions of law certified to it by any federal court of the United States or the highest appellate court or an intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." Rule 244(a), SCACR.

ARGUMENT

I. PLAINTIFF CANNOT SATISFY THE WITNESS REQUIREMENTS OF S.C. CODE ANN. § 38-77-170

In her Final Brief, Plaintiff contends Investigator Clarke satisfied the "witness" requirement of section 38-77-170(2) and the Policies, and asserts there is no requirement that Clarke have observed the accident. Well-established South Carolina law directly contradicts that argument.

South Carolina Code section 38-77-170 sets forth the statutory requirements for recovery against an unknown driver of a motor vehicle. In pertinent part, that section states:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> * * *
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit . . . .

Allstate issued the Motorcycle Policy to Adrian Silva, which provided in pertinent part:

> **Part 3**
> **Uninsured Motorists Insurance**
>
> * * *
>
> **Insuring Agreements**
> If a premium is shown on the Policy Declarations for Uninsured Motorists Insurance, **we** will pay those damages than an **insured person** is legally entitled to recover from the owner or operator of an uninsured **motor vehicle** because of:
>
> 1. **Bodily injury** sustained by an **insured person**; and
>
> 2. **Property damage.**
> The **bodily injury** or **property damage** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured **motor vehicle**.
>
> * * *
>
> **An Uninsured Motor Vehicle Is:**
>
> 1. A **motor vehicle** which has
> a. No bodily injury liability bond or insurance in effect; and
> b. No cash or securities deposited with the State Treasurer;
> at the time of the accident.

2. A **motor vehicle** covered by insurance which doesn't provide at least the minimum limits specified by the South Carolina financial responsibility requirements and for which there is no cash deposit or bond in lieu of such minimum insurance limits.

3. A **motor vehicle** for which the bonding or insuring company:
a. Successfully denies coverage;
b. Is or becomes insolvent;
c. Is in delinquency proceedings, suspension or receivership; or
d. Is proven unable to respond to a judgment.

4. A hit-and-run **motor vehicle** which causes **bodily injury** to an **insured person** by physical contact with the **insured person** or with a vehicle occupied by that person or which causes **property damage** arising out of the physical contact with the damaged property. The identity of the operator or the owner of the vehicle must be unknown and the insured must not have been negligent in failing to determine the identification of the other vehicle and driver of the other vehicle at the time of the accident. The accident must be reported within 24 hours to some appropriate police authority. **We** must be notified within 30 days or as soon thereafter as practicable. If **the insured person** was occupying a vehicle at the time of the accident, **we** have a right to inspect it.

5. A phantom **motor vehicle** which causes;
a. **Bodily injury** to an **insured person** without physical contact with the **insured person** or with a **motor vehicle** occupied by that person.
b. **Property damage** to the **insured cycle** without physical contact between the vehicles.
The facts of the accident must have been witnessed by someone other than the owner or operator of the insured vehicle, provided, however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit.

Allstate also issued the Auto Policy to Patti and Adrian Silva, which provided in pertinent part:

Part 3
Uninsured Motorists Insurance

* * *

Insuring Agreements

If a premium is shown on the Policy Declarations for Uninsured Motorists Insurance, **we** will pay those damages than an insured person is legally entitled to recover from the owner or operator of an uninsured auto because of:

1. **Bodily injury** sustained by an insured person; and

2. **Property damage**.

The bodily injury or **property damage** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto. This coverage does not apply to the first $200 of the total amount of all **property damage** as the result of any one accident.

* * *

An Uninsured Auto Is:

1. A **motor vehicle** which has
c. No bodily injury liability bond or insurance in effect; and
d. No cash or securities deposited with the State Treasurer;
At the time of the accident

2. A **motor vehicle** covered by insurance which doesn't provide at least the minimum limits specified by the South Carolina Financial Responsibility Act and for which there is no cash deposit or bond in lieu of such minimum insurance limits.

3. A **motor vehicle** for which the bonding or insurance company:
a. Successfully denies coverage;
b. Is or becomes insolvent;
c. Is in delinquency proceedings, suspension or receivership; or
d. Is proven unable to respond to a judgment.

4. A hit-and-run **motor vehicle** which causes **bodily injury** to an insured person by physical contact with the insured person or with a vehicle occupied by that person or which causes **property damage** arising out of the physical contact with the damaged property. The identity of the operator or the owner of the vehicle must be unknown and the insured must not have been negligent in failing to determine the identification of the other vehicle and driver of the other vehicle at the time of the accident. The accident

must be reported within 24 hours to some appropriate police authority. **We** must be notified within 30 days or as soon thereafter as practicable. If the insured person was occupying a vehicle at the time of the accident, **we** have a right to inspect it.

5. A phantom **motor vehicle** which causes
a. **Bodily injury** to an insured person without physical contact with the insured person or with a **motor vehicle** occupied by that person.
b. **Property damage** to the insured auto without physical contact between the vehicles.
The facts of the accident must have been witnessed by someone other than the owner or operator of the insured vehicle, provided, however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit.

The Polices' language is consistent with South Carolina law, and Plaintiff is not legally entitled to recover under either. Plaintiff has not alleged that the unknown vehicle made physical contact with the insured or the insured's motor vehicle. Officer Clarke's June 2016 Affidavit states Silva "sustained multiple gunshot wounds causing the motorcycle to crash into the adjacent woods," and the October 2016 Affidavit states "it is the theory of the Silva Investigation that . . . occupant(s) of the Phantom Vehicle . . . fired five gunshots at Mr. Silva from within the Phantom Vehicle . . . ." Given that there are no allegations or evidence that an unknown vehicle physically contacted Silva's motorcycle, Plaintiff cannot satisfy section 38-77-170(2) by way of "physical contact" that caused the injury or damage. *See Enos v. Doe*, 380 S.C. 295, 313, 669 S.E.2d 619, 628 (Ct. App. 2008) ("Our courts have historically required strict compliance with section 38-77-170."); *Meyers v. Ford Motor Co.*, No. 2:09-CV-2525-DCN, 2010 WL 2079881, at *2 (D.S.C. May 24, 2010) ("In the case *sub judice*, no one disputes that the

there was no physical contact between plaintiff Green's vehicle and the unknown vehicle. Thus, the affidavit requirement applies.").

Neither the June 2016 Affidavit nor the October 2016 Affidavit satisfies the requirements of South Carolina law that, in the absence of physical contact, "the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit . . . ." Neither affidavit states that Clarke saw the accident; instead, both affidavits state that Clarke responded to a call about the accident and subsequently investigated the accident scene.

Plaintiff contends in her Final Brief that "[n]either Section 38-77-170(2) nor the Allstate Policies required an 'eyewitness' for purposes of satisfying the affidavit requirement." [Plaintiff's Final Brief, p. 13]. However, courts examining this requirement have consistently and unanimously held that a witness must actually observe the accident. *See, e.g., Bradley v. Doe*, 374 S.C. 622, 633-35, 649 S.E.2d 153, 159-60 (Ct. App. 2007) (holding the requirement that the accident be "witnessed by someone other than the owner or operator of the insured vehicle" was not satisfied because none of the affiants actually saw the accident); *id.* at 633, 649 S.E.2d at 159 (noting that "none of the affiants actually saw Bradley swerve to avoid a trash bag in the road and collide with the tree"); *Tucker v. Doe*, 413 S.C. 389, 403, 776 S.E.2d 121, 129 (Ct. App. 2015), reh'g denied (Oct. 19, 2015), reh'g denied (Nov. 19, 2015) (finding *Bradley* distinguishable from *Tucker* because the witness in *Tucker*, unlike any of the affiants in *Bradley*, actually witnessed the accident); *Shealy v. Doe*, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (Ct. App.

2006) (determining plaintiff failed to satisfy the affidavit requirement of section 38-77-170(2) because the affiants did not attest to facts they perceived); *id.* at 201, 634 S.E.2d at 49 ("According to [Appellant], requiring the affiant to have witnessed the accident creates an unreasonably harsh result because a sleeping passenger or blind passenger injured by a John Doe driver might be precluded from recovery. Yet the statute indubitably bars an operator and lone occupant of a vehicle from recovery where no contact is made with the unknown driver and where no one else witnesses the accident. In both instances, the result is lamentable to the injured party, but *mandated by the statute*." (emphasis added)); *id.* at 201, 634 S.E.2d at 49 ("Section 38-77-170 demonstrates a policy decision by the legislature which balances the interest of parties injured in accidents with unknown drivers, with the interest of insurance companies in preventing fraudulent claims. Where the legislature determines policy and promulgates a clear rule of law, there is no room for the courts to alter that decision."); *Enos v. Doe*, 380 S.C. 295, 310-11, 669 S.E.2d 619, 626-27 (Ct. App. 2008) (quoting the holding from *Shealy* that a sleeping or blind passenger injured by a John Doe driver is precluded from recovery).[1]

The holding of *Bradley* is dispositive of the case at hand. Bradley swerved to avoid an object in the road, lost control of his vehicle, veered off the road, and struck a

[1] *See also Brown v. Allstate Prop. & Cas. Ins. Co.*, 184 F. Supp. 3d 1326, 1335–36 (M.D. Ala. 2016), judgment entered, No. 2:15CV488-WHA, 2016 WL 1737745 (M.D. Ala. May 2, 2016) ("Unlike the affidavit in *Tucker*, there is no statement that the affiants actually observed the accident, or that they observed Brown's car at the time that the car swerved away from the parked truck which led Brown's car [to] overcorrect and to leave the roadway near the parked truck. The affiants in this case have only attested to events before and after the uninsured vehicle allegedly caused the accident, which is insufficient under South Carolina law . . . .").

tree. *Bradley*, 374 S.C. at 624, 649 S.E.2d at 154. Roughly fifteen minutes later, a witness drove past Bradley, turned his vehicle around, and headed toward the accident scene. *Id.* That witness observed a "large white garbage can bag" in the lane in which Bradley had previously been traveling. *Id.* While helping Bradley, the witness observed another passing vehicle strike and drag the garbage bag down the road. *Id.* at 624, 649 S.E.2d at 155. Bradley's son and daughter arrived soon after and noted the trash bag and trash scattered on the roadway. *Id.* Another witness who passed the scene minutes before Bradley claimed he saw a large trash bag in the middle of the road. *Id.* That witness stated he narrowly avoided the bag and continued driving roughly another quarter-mile when he witnessed a "white street sweeper's truck," which "drop[ped] another similar trash bag onto the public roadway." *Id.*

Faced with those facts, the South Carolina Court of Appeals held that none of the witnesses could satisfy the affidavit requirement of section 38-77-170(2) because "none of the affiants actually saw Bradley swerve to avoid a trash bag in the road and collide with the tree." *Id.* at 633, 649 S.E.2d at 159; *see also Tucker*, 413 S.C. at 403, 776 S.E.2d at 129 (finding *Bradley* distinguishable because the witness in *Tucker*, unlike any of the affiants in *Bradley*, actually observed the accident).

In the present case, Clarke, like the witnesses in *Bradley*, did not observe the accident. Instead he arrived after the accident had already occurred and merely observed the accident scene. Clarke's subsequent investigation of the scene led him to make certain conclusions about what had transpired, but again, that is no different than what the

witnesses did in *Bradley*. Therefore, just as the witnesses in that case were insufficient, Clarke's affidavit cannot satisfy the witness requirements of section 38-77-170(2).

Significantly, Plaintiff admits that *Bradley*, *Tucker*, *Shealy*, and South Carolina jurisprudence regarding section 38-77-170 render Clarke's affidavit insufficient. Nevertheless, Plaintiff now asks this Court to ignore the binding precedent and change the law. [Plaintiff's Final Brief, p. 15]. Despite making that plea, Plaintiff cites no authority indicating that the General Assembly or this Court has ever even contemplated such a radical change. To the contrary, the legal authorities on this issue have consistently held to the standard set forth in the statute. *See, e.g.*, *Bradley*, 374 S.C. at 634, 649 S.E.2d at 160 ("A plaintiff's strict compliance with the affidavit requirement is mandatory."); *Collins v. Doe*, 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002) ("The statute makes no provision for the functional equivalent of an affidavit."). In addition, every appellate decision which has deemed a witness sufficient under section 38-77-170(2) featured a witness who actually observed the accident. *See Tucker*, 413 S.C. at 393-94, 776 S.E.2d at 124; *Gilliland v. Doe*, 357 S.C. 197, 198, 592 S.E.2d 626, 627 (2004); *Miller v. Doe*, 312 S.C. 444, 445, 441 S.E.2d 319, 320 (1994).

Given this weight and consistency of authority, this Court should continue to follow the long-standing rule requiring an affidavit from an eyewitness. This is the only reasonable application of the plainly worded statute, and Allstate respectfully submits that any change in the law should come, if at all, from the General Assembly. If the General Assembly wishes to amend the statute to prevent purportedly harsh results such as the "sleeping or blind passenger" scenario discussed in *Shealy*, it can certainly do so.

Unless and until that legislative change occurs, however, this Court should adhere to precedent, and Plaintiff has not presented any compelling reason to do otherwise.

For the same reasons, Plaintiff is not "legally entitled to recover from the owner or operator of an uninsured motor vehicle" under the Policies. Pursuant to the Policies, in order for an insured to recover for bodily injury caused by a phantom motor vehicle without physical contact with the insured person or with a motor vehicle occupied by that person, "[t]he facts of the accident must have been witnessed by someone other than the owner or operator of the insured vehicle, provided, however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit." Neither the June 2016 Affidavit nor the October 2016 Affidavit satisfies this condition, as neither affidavit states that Clarke saw the accident. Instead, both affidavits state that Clarke responded to a call about the accident and subsequently investigated the accident scene. Accordingly, as a matter of law, Plaintiff cannot recover under section 38-77-170 of the South Carolina Code or the Policies, as Officer Clarke did not observe the accident in this case. *See Enos v. Doe*, 380 S.C. 295, 313, 669 S.E.2d 619, 628 (Ct. App. 2008) (finding plaintiff's action was "barred for her failure to comply with section 38-77-170(2)"). Therefore, this Court should answer "no" to the first certified question.

II. THE POLICIES DO NOT PROVIDE INSURANCE COVERAGE FOR SILVA'S ALLEGED INJURIES

In asking this Court to find Silva's injuries are covered by the Policies, Plaintiff again urges the Court to ignore well-established South Carolina jurisprudence. Under South Carolina law, automobile insurance policies "insur[e] the persons defined as insured against loss from the liability imposed by law *for damages arising out of the*

ownership, maintenance, or use of" a motor vehicle. S.C. Code Ann. § 38-77-140 (emphasis added). Pursuant to the Motorcycle Policy, for an insured person to receive payments for UM coverage, "[t]he bodily injury or property damage must be caused by accident and arise out of the ownership, maintenance or use of an uninsured motor vehicle." The same condition applies to the Auto Policy, as "[t]he bodily injury or property damage must be caused by accident and arise out of the ownership, maintenance or use of an uninsured auto." As the discussion below demonstrates, Adrian Silva's injuries do not arise out of the "ownership, maintenance, or use" of an uninsured automobile under South Carolina law. Therefore, the Court should also answer "no" to the second certified question.

Plaintiff relies on *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992), in contending Silva's injuries arose out of the use, maintenance, and operation of a motor vehicle. At the time *Howser* was decided, courts utilized a two-pronged test for determining when an injury arises out of the ownership, maintenance, or use of an uninsured vehicle. *See State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998) ("The two-pronged test for determining when an injury arises out of the ownership, maintenance, or use of an uninsured vehicle is set out in *Howser*. First, the party seeking coverage must establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link." (internal citation omitted)). However, this Court added a third prong in *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993),

requiring a showing that the vehicle was being used for transportation at the time of the assault.

In *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745-46 (1998), this Court explained the "causal connection" requirement, stating "[t]he injury must be foreseeably identifiable with the normal use of the vehicle." (citing *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985)). The Court further explained the causal connection requirement in *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999), noting: "In this context, causal connection means: a. the vehicle was an 'active accessory' to the assault; and b. something less than proximate case but more than mere site of the injury; and c. that the 'injury must be foreseeably identifiable with the normal use of the automobile.'"

Because *Howser* was decided before *Aytes* and *Bookert*, the *Howser* Court did not consider whether the injury was "foreseeably identifiable with the normal use" of a motor vehicle. *See Nationwide Mut. Fire Ins. Co. v. Jeter*, No. CA 3:12-1759-MBS, 2013 WL 3109214, at *3 (D.S.C. June 18, 2013) ("*Aytes* added to the causal connection analysis the requirement that the 'injury must be foreseeably identifiable with the normal use of the automobile.'").

The following chronology from United States District Judge Seymour's opinion in *Jeter* demonstrates why *Aytes* and *Bookert* are controlling and why *Howser*, as a result, has limited relevance:

> For support, Coulter relies on [*Howser*] and *Home Insurance Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (S.C. 1994). In *Howser*, the South Carolina Supreme Court found that a causal connection existed between the injuries

sustained by the victim and the assailant's use of his vehicle. 422 S.E.2d at 107. In the course of a high-speed pursuit, the assailant bumped the victim's vehicle, pulled alongside it, and fired a gun in its direction, wounding the victim. *Id.* The court distinguished the case from those in which the vehicle was only used to provide transportation to the site of the assault, or in which the assailant happened to be sitting in a stationary vehicle at the time of the assault. *Id.* at 108 (citing *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir.1985)). The court held that the vehicle was an "active accessory to [the] assault," reasoning that "[o]nly through use of his vehicle was the assailant able to closely pursue [the victim], thereby enabling him to carry out the pistol assault. The gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part." *Id.*

In *Towe*, the South Carolina Supreme Court held that injuries sustained by a tractor driver were causally connected to the use of a passing vehicle. 441 S.E.2d at 826. In *Towe*, a passenger in a moving vehicle threw a glass bottle out the window, attempting to hit a road sign but, instead, seriously injuring a tractor driver who was traveling down the road in the opposite direction. *Id.* The court explained, "[t]he use of the automobile placed [the passenger] 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 ... injuries[,]" thus determining that the vehicle served as an active accessory that gave rise to the injuries. *Id.* at 827.

Although *Howser* and *Towe* are pertinent to the analysis of whether Jeter's vehicle was merely the site of, or an active accessary to the assault, 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*.
>
> For guidance post-*Aytes*, the court turns to *State Farm Mutual Automobile Insurance Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (S.C. 1999), upon which Nationwide relies. In *Bookert*, the South Carolina Supreme Court analyzed whether a pedestrian, shot and wounded by a gunman riding in a vehicle, sustained injuries covered by an automobile insurance policy. *Id.* at 181-82. The court of appeals' decision relied on *Howser* and *Towe* to find that the vehicle was an active accessory to the assault, causally connected with the victim's injuries. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 330 S.C. 221, 499 S.E.2d 480, 486 (S.C. Ct. App. 1997). The court of appeals reasoned that the vehicle was the "launching pad" for the assault and the assailant's means of escape. *Id.* After granting certiorari to review that decision, the supreme court decided *Aytes*. The supreme court reversed the court of appeals, holding that the pedestrian's injuries were not foreseeably identifiable with the normal use of a vehicle. 526 S.E.2d at 182 (citing *Aytes*).

Jeter, 2013 WL 3109214, at *3-4.

In her Final Brief, Plaintiff contends that "as was the case in [*Howser*], the injury suffered by Silva was foreseeably identifiable with the normal use of the automobile." [Plaintiff's Final Brief, p. 29 (internal quotation makes omitted).] However, as Judge Seymour noted in *Jeter*, the *Howser* Court did not even consider the issue of whether the injuries in that case were foreseeably identifiable with the normal use of the automobile. *See Jeter*, 2013 WL 3109214, at *3-4.

In *Bookert*, a bullet fired from a passenger in a motor vehicle struck the respondent. 337 S.C. at 292-93, 523 S.E.2d at 181-82. This Court concluded that the automobile insurance policy at issue did not cover respondent's injuries because such gunshot injuries "[were] not foreseeably identifiable with the normal use of an

automobile." *Id.* at 293, 523 S.E.2d at 182 (citing *Aytes*, 332 S.C. at 35, 503 S.E.2d at 746). While Plaintiff contends the *Bookert* holding was rendered "without further explanation," multiple courts have cited *Bookert* for this very proposition when analyzing whether gunshot injuries are foreseeably identifiable with the normal use of an automobile. *See, e.g., Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022, 1027 (D.S.C. 2009) ("While Plaintiff likens the assault on her with that of a drive-by shooting, *Bookert* establishes that such use of a vehicle will not satisfy the causal connection requirement necessary to invoke insurance coverage, since such conduct is not foreseeably identifiable with the normal use of an automobile."); *Krenn v. State Farm Mut. Auto. Ins. Co.*, No. 2004-UP-200, 2004 WL 6250799, at *2 (S.C. Ct. App. Mar. 24, 2004) (citing *Bookert* in holding that the shooting of the plaintiff, who was riding in a vehicle at the time, was not "foreseeably identifiable" with the normal use of the uninsured vehicle."); *Norris v. Allstate Ins. Co.*, No. 2005-UP-124, 2005 WL 7083469, at *1 (S.C. Ct. App. Feb. 17, 2005) (finding *Bookert* controlling in determining that gunshot injuries from a moving motor vehicle were not "foreseeably identifiable with the normal use of an automobile"); *id.* at *3 (S.C. Ct. App. Feb. 17, 2005) (Beatty, J., concurring) ("The *Bookert* court found that the gun shot injuries were not foreseeably identifiable with the normal use of the vehicle.").

Ever since *Aytes* and *Bookert*, South Carolina's appellate courts have held that purposefully-inflicted gunshot injuries were not "foreseeably identifiable with the normal use of a vehicle." *See Wright v. N. Area Taxi, Inc.*, 337 S.C. 419, 426, 523 S.E.2d 472, 475 (Ct. App. 1999) ("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." (quoting *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984, 989 (4th Cir. 1985))). This Court did hold in *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 164, 628 S.E.2d 475, 481 (2006), that the respondent's injuries caused by the accidental discharge of a shotgun as it was being unloaded from a pickup truck were "foreseeably identifiable with the normal use of a pickup truck."[2] However, *Peagler* is distinguishable from the present case, which involves an alleged purposeful assault from a vehicle, rather than the accidental discharge of a hunting firearm while unloading it from a pickup truck utilized for hunting purposes. *See Jeter*, 2013 WL 3109214, at *5 (D.S.C. June 18, 2013) ("Injuries sustained during a pepper spray attack are no more foreseeable than the injuries sustained by the shooting victims in *Bookert* and *Wright*.").

South Carolina's appellate courts have clearly held that gunshot injuries like those at issue in this case are not foreseeably identifiable with the normal use of a vehicle, and the Policies therefore do not cover the injuries at hand. While Plaintiff urges this Court to ignore the holding of *Bookert*, South Carolina's appellate courts have found *Bookert* to be controlling on this issue, as it is consistent with *Aytes*.

As with the first certified question, Plaintiff essentially asks this Court to abandon well-established South Carolina law, which holds that injuries such as those in the case at hand do not arise out of the ownership, maintenance, or use of a motor vehicle. Once again, however, Plaintiff has not presented any compelling reason to depart from the precedent as it now exists. The jurisprudence on this issue has evolved from *Howser* to

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[2] The Court ultimately held the automobile insurance policy did not cover the injuries because the vehicle was not an active accessory.

Aytes and *Bookert*, and the Court should not reverse that process now. Therefore, the Court should answer "no" to the second certified question. Indeed, the Court need only look to its own precedent to see that this answer is warranted.

CONCLUSION

Plaintiff cannot recover UM benefits for a claim against John Doe under section 38-77-170 of the South Carolina Code because Plaintiff has failed to satisfy the witness affidavit requirements of South Carolina law and the Policies. Furthermore, neither South Carolina law nor the Policies provide insurance coverage for the alleged injuries and damages of Adrian Silva. Therefore, this Court should answer the two certified questions in the negative.

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RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Respondent/Appellant Allstate Property and Casualty Insurance Company, certifies that this Final Defendant's Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION
UNITED STATES DISTRICT COURT OF SOUTH CAROLINA
The Honorable Richard M. Gergel

Appellate Case No. 2017-002110

Patti Silva, as personal representative for the
Estate of Adrian Silva,.....Plaintiff,

v.

Allstate Property and Casualty Insurance Company,.....Defendant.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Defendant, certifies that I have this **19th day of March, 2018**, served a copy of the **Final Brief of Defendant** upon counsel for the Plaintiff by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: Edward K. Pritchard, III; Pritchard Law Group, LLC; P.O. Box 620; Charleston, SC 29402.

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