

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2017-001946
Trial Court Case No. 2015-CP-18-01571

Progressive Direct Insurance Co., and
USAA General Indemnity Company, Respondents,

v.

Shanna Groves as the Personal Representative of the
Estate of Lynn Harrison.....Appellant.

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	1
Statement of Facts	3
A. The shooting	3
B. The policies	5
Standard of Review	6
Argument	6
I. The Circuit Court correctly found Redman’s use of the Ford Escape was not causally connected to Harrison’s injuries because gunshot injuries are not foreseeably identifiable with the normal use of an auto, the vehicle was not an “active accessory” to the shooting, and the vehicle was merely the site from which Redman fired the gun.	7
A. Pursuant to the Supreme Court’s holding in <i>Bookert</i> , injuries resulting from gunshots fired out of a vehicle window as part of an assault are not foreseeably identifiable with the normal use of an auto.	8
B. When a shooter fires a shot from one stationary vehicle into another stationary vehicle, the fact that the shooter fires from within a vehicle does not make the vehicle an “active accessory” to the shooting but merely the site of the assault.	11
II. The Circuit Court correctly held Redman’s act of firing a shot at Harrison’s vehicle was an intervening act of independent significance that broke any causal connection with the use his vehicle.	16
Conclusion	19

TABLE OF AUTHORITIES

Page Number

CASES

Carraway v. Smith, 321 S.C. 23, 467 S.E.2d 120 (Ct. App. 1996) 8, 16

Detroit Automobile Inter-Insurance Exchange v. Higginbotham, 95 Mich. App. 213,
290 N.W.2d 414 (1980)..... 10

Doe v. S.C. State Budget and Control Bd., 337 S.C. 294, 523 S.E.2d 457 (1999)..... 19

Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986)..... 17

Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022 (D.S.C. 2009) 11-15

Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994) 12-15, 19

Nationwide Mutual Insurance Company v. Brown, 779 F.2d 984 (4th Cir. 1985) 9-11, 18-19

Norris v. Allstate Ins. Co., 2005-UP-124, 2005 WL 7083469 (Ct. App. Feb. 17, 2005)..... 9

Ray v. Austin, 388 S.C. 605, 698 S.E.2d 208 (2010)..... 6

State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998)..... 2, 6-7, 9-11, 16

State Farm Mutual Automobile Insurance Company v. Bookert, 330 S.C. 221,
499 S.E.2d 480 (Ct. App. 1997), *rev'd* 337 S.C. 291..... 8-9

State Farm Mutual Automobile Insurance Company v. Bookert, 337 S.C. 291,
523 S.E.2d 181 (2000)..... 1-2, 6, 8-12

Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (Ct. App. 2008)..... 6

Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992)..... 12-19

Wright v. North Area Taxi, Inc., 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999) 15, 17

STATUTES

South Carolina Code Ann. § 38-77-140..... 7

Rule 268, SCACR 9

STATEMENT OF ISSUES ON APPEAL

- (I) Whether the Circuit Court correctly applied the South Carolina Supreme Court's holding in *State Farm Mutual Automobile Insurance Company v. Bookert* by deciding that gunshot injuries fired by an assailant from a stationary vehicle are not foreseeably identifiable with the normal use of an automobile.
- (II) Whether the Circuit Court correctly held that when a shooter fires a shot from one stationary vehicle into another stationary vehicle, the vehicle is the mere site from which the assault occurs and the fact that the shooter fires from within a vehicle does not make the vehicle an "active accessory" to the shooting.
- (III) Whether the Circuit Court correctly ruled a shooter's act of firing at a victim after both vehicles are stopped is an intervening act of independent significance that breaks any causal connection with the shooter's use of the vehicle.

STATEMENT OF THE CASE

This appeal arises out of a tragic shooting incident that occurred when Jimi Carl Redman stopped his vehicle at a red light beside Decedent Lynn Harrison's vehicle, pointed a rifle at her, shot her, and drove away. Harrison died as a result of the shooting. Respondents Progressive Direct Insurance Company ("Progressive") and USAA General Indemnity Company ("USAA") issued insurance policies to Harrison's husband providing uninsured motorist coverage for injuries arising out of an uninsured motorists' ownership, maintenance or use of an automobile.

After receiving a claim for uninsured motorist benefits from Harrison's Estate, Progressive filed this declaratory judgment action seeking a declaration that Harrison's injuries and resulting death did not arise out of Redman's ownership, maintenance, or use of an automobile. Progressive and USAA then filed an Amended Complaint adding USAA as a Plaintiff on September 17, 2015.

After receiving responses to Requests to Admit, Respondents USAA and Progressive filed a Motion for Summary Judgment and supporting memorandum on May 9, 2016. (Pl.s' Mot. for Summ. J.) (Pl.s' Mem. in Supp. of Mot. for Summ. J.). On January 27, 2017, shortly before the hearing on Respondents' motion, the Estate filed its own Motion for Summary Judgment and supporting memorandum.

On February 7, 2017, the Honorable Alison Renee Lee heard arguments on the motion. On August 17, 2017, the Circuit Court issued a thorough Order granting Respondents Progressive and USAA's Motion for Summary Judgment and denying the Estate's motion. Applying the three-factor test established in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998), the Circuit Court found Harrison's injuries did not arise out of Redman's ownership, maintenance or use of an auto because there was no causal connection between Redman's use of the auto and Harrison's injuries. First, the Circuit Court held Redman's auto was not an "active accessory" to the assault because "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." (Order, Aug. 17, 2017, p. 4).

Second, the Circuit Court found Redman's vehicle was merely the site from which he fired the gun. (Order, Aug. 17, 2017, p. 4). Third, relying upon the Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (2000), the Circuit Court held Harrison's gunshot injuries were not foreseeably identifiable with the normal use of an auto. (Order, Aug. 17, 2017, p. 5). Even if the vehicle had been an active accessory to the shooting, the Circuit Court alternatively found Redman's act of shooting a rifle out of a stationary vehicle broke any causal connection with his use of the vehicle. (Order, Aug. 17, 2017, p. 6). For all of these reasons, the Circuit Court granted Progressive and USAA's Motion for Summary Judgment. This appeal followed.

STATEMENT OF THE FACTS

A. The shooting.

On April 2, 2015, Lynn Harrison operated a 2010 GMC Terrain in Summerville eastbound on East Carolina avenue, which became Old Trolley Road just before the intersection of Old Trolley Road and Bacons Bridge Road. (Req. to Admit No. 6); (Def.'s Resp. to Req. to Admit, ¶ 6). Harrison stopped for a red light in the middle eastbound lane of Old Trolley Road at the intersection of Bacons Bridge Road and Old Trolley Road near the Sawmill Shopping Center. (Req. to Admit No. 7); (Def.'s Resp. to Req. to Admit, ¶ 7).

At the same time, Jimi Carl Redman was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Harrison's right. (Request to Admit No. 8); (Def.'s Resp. to Req. to Admit, ¶ 8). Redman stopped at the red light at the same intersection in the eastbound lane immediately to the right of the vehicle operated by Harrison. (Request to Admit No. 9); (Def.'s Resp. to Req. to Admit, ¶ 9). As they approached the stop light, one witness indicated she saw Redman blowing kisses and making hand gestures to Harrison. (Pl.s' Am. Resp. to Def.'s Req. to Admit, ¶ 1). As the Circuit Court held, there is no evidence Harrison was aware of Redman. (Order, Aug. 17, 2017, p. 2). In fact, it is undisputed that Lynn Harrison was operating her vehicle in a normal fashion up until stopping at the red light. (Pl.s' Am. Resp. to Def.'s Req. to Admit, ¶ 7). There is no evidence in this case of a pursuit. Moreover, Appellant concedes that Redman and Harrison were complete strangers.¹ (Pl.s' Req. to Admit to Def., ¶ 17).

¹ Appellant initially describes this fact accurately in her Statement of Facts. (Br. of Appellant, p. 2) ("While driving **toward the stop light** at the intersection of Old Trolley Road and Bacons Bridge Road, Redman was blowing kisses and making hand gestures toward Harrison while driving.") (emphasis added). After accurately describing the interaction in the Statement of Facts, Appellant thereafter repeatedly misstates this fact and claims Redman "stalked" Harrison. (Br. of Appellant, p. 6, 10). Appellant also states Redman "followed Harrison from the first red light, while gesturing towards her" (Br. of Appellant, p. 14). Once again, the evidence presented to the Circuit

While both vehicles were stopped at the red light, Redman pointed a rifle at Harrison and fired in her direction. (Req. to Admit No. 10); (Def.'s Resp. to Req. to Admit, ¶ 10). The bullet went through the passenger window of Harrison's GMC Terrain and struck her in the neck, causing her death. (Req. to Admit No. 11); (Def.'s Resp. to Req. to Admit, ¶ 11). Neither the GMC Terrain nor the Ford Escape were in motion at the time of the shooting. (Req. to Admit No. 12); (Def.'s Resp. to Req. to Admit, ¶ 12).

Redman then disregarded the red light, proceeded through the intersection, and was apprehended a few blocks away. (Req. to Admit No. 13); (Def.'s Resp. to Req. to Admit, ¶ 13). Because her vehicle was still in drive at the time of the shooting, Harrison's GMC Terrain proceeded slowly through the intersection until it came to rest on the median. (Req. to Admit No. 14) (Def.'s Resp. to Req. to Admit, ¶ 14).

The vehicles operated by Redman and Harrison never made contact. (Req. to Admit No. 15) (Def.'s Resp. to Req. to Admit, ¶ 15). There is no evidence that Harrison and Redman knew each other prior to the shooting. (Req. to Admit No. 17) (Def.'s Resp. to Req. to Admit, ¶ 17). Harrison's injuries resulted solely from the use of the rifle.

Redman was charged with murder and possession of a weapon during a violent crime. According to the South Carolina online public index, those charges are still pending. The Ford Escape operated by Redman was not insured or was underinsured at the time of the shooting.² (Req. to Admit No. 19); (Def.'s Resp. to Req. to Admit, ¶ 19).

Court does not show Redman "followed Harrison" from one light to the next or that he "stalked" her. The only evidence is that Redman made gestures towards Harrison "while driving toward the stop light" where the shooting occurred.

² For purposes of this case, whether the vehicle was uninsured or underinsured is irrelevant because the same analysis applies regardless.

B. The policies.

Progressive issued a South Carolina Motorcycle insurance policy to Lynn Harrison's husband, James M. Harrison. (Progressive Policy Excerpts, Declarations Page). USAA issued a South Carolina Auto Policy to James M. Harrison. (USAA Policy Excerpts, Declarations Page). Both policies were in force at the time of the shooting, and both policies included uninsured motorist coverage. Lynn Harrison lived with her husband at the time of the shooting. (Req. to Admit No. 5); (Def.'s Resp. to Req. to Admit, ¶ 5).

Both policies limited uninsured motorist coverage to injuries arising out of the ownership, maintenance or use of an uninsured vehicle by an uninsured motorist. The Progressive policy provided in relevant part:

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of:

1. an uninsured motor vehicle because of bodily injury:
 - a. sustained by an insured person;
 - b. caused by an accident; and
 - c. *arising out of the ownership, maintenance, or use of an uninsured motor vehicle; . . .*

(Progressive Policy Excerpts, p. 4) (emphasis added). Likewise, the USAA policy states:

A. UNINSURED MOTORISTS COVERAGE

We will pay the following damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of an auto accident:

1. BI [Bodily Injury] sustained by a covered person; and
2. injury to or destruction of the property of a covered person.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

(USAA Policy Excerpts, p. 13) (emphasis added). Therefore, the policies do not provide coverage for Harrison's injuries unless they arose out of Redman's ownership, maintenance, or use of an auto.

STANDARD OF REVIEW

"When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the trial court." *Ray v. Austin*, 388 S.C. 605, 610-11, 698 S.E.2d 208, 211 (2010) (citation omitted). Pursuant to Rule 56(c), summary judgment is appropriate if "there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law." *Id.* Although the court must view any material disputes of fact in the light most favorable to the nonmoving party, a non-moving party "must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 308, 657 S.E.2d 67, 70 (Ct. App. 2008) (citation omitted).

ARGUMENT

The Circuit Court correctly held that a shooting from one stationary vehicle into another stationary vehicle does not arise out of the use of an auto. Applying the three-factor test from *Aytes*, Redman's use of the vehicle was not causally connected to Harrison's injury. Our Supreme Court in *Aytes* adopted three sub-factors to determine whether a vehicle is causally connected to a claimant's injury. Appellant fails to establish any of those three sub-factors. First, the Supreme Court in *Bookert* held that gunshot injuries such as the one here are not foreseeably identifiable with the normal use of an auto. Second, Redman did not use the vehicle as an active accessory to the assault, and his use of the vehicle did not increase the severity of Harrison's injuries. Third, the vehicle was merely the site from which Redman fired the gun.

Even if Appellant could show a causal connection, Appellants fail to satisfy the second *Aytes* factor. Redman's action of firing the gun after both vehicles were stopped and stationary constitutes an intervening action that breaks any causal connection that may exist between Redman's use of the auto and Harrison's injuries. Therefore, the Circuit Court's Order should be affirmed.

I. The Circuit Court correctly found Redman's use of the Ford Escape was not causally connected to Harrison's injuries because gunshot injuries are not foreseeably identifiable with the normal use of an auto, the vehicle was not an "active accessory" to the shooting, and the vehicle was merely the site from which Redman fired the gun.

"An insured is legally entitled to recover damages arising out of the 'ownership, maintenance, or use' of an uninsured vehicle." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745 (citing S.C. Code Ann. § 38-77-140). The above-quoted Progressive and USAA policies incorporate this statutory language. (Progressive Policy Excerpts, p. 4); (USAA Policy Excerpts, p. 13). In *Aytes*, our Supreme Court established the standard for determining whether an injury arises out of the ownership, maintenance, or use of an auto. First, the party seeking coverage – here, the Estate – must prove a causal connection between the vehicle and the injury. Second, there must be no act of independent significance that breaks the causal link. Third, the vehicle must be used for transportation at the time of the incident.³ *Id.*

In order to prove the causal connection, the Estate must establish three sub-factors: (1) the vehicle was an "active accessory" to the assault; (2) the vehicle was something more than the mere site of the injury; and (3) "[t]he injury must be foreseeably identifiable with the normal use of the vehicle." *Id.* (citations omitted). Appellant failed to present evidence showing Redman's vehicle was causally connected with Harrison's injuries. Instead, his use of the vehicle was merely

³ Progressive and USAA do not dispute that Redman was using his vehicle for transportation at the time of the shooting, although his vehicle was stationary.

incidental to the shooting, and Harrison's injuries were not foreseeably identifiable with the normal use of an auto.

A. Pursuant to the Supreme Court's holding in *Bookert*, injuries resulting from gunshots fired out of a vehicle window as part of an assault are not foreseeably identifiable with the normal use of an auto.

As the party seeking coverage, Appellant bears the burden of proving a causal connection between Harrison's injuries and Redman's ownership, maintenance or use of an auto. See *Carraway v. Smith*, 321 S.C. 23, 25, 467 S.E.2d 120, 121 (Ct. App. 1996). Therefore, Appellant must prove Harrison's injuries were "foreseeably identifiable with the *normal* use of the automobile." *Id.* (emphasis added). However, our Supreme Court held in *Bookert* that similar injuries are not foreseeably identifiable with the normal use of an auto. Therefore, Appellant failed to meet this burden.

Our Supreme Court in *Bookert* held gunshots fired in connection with an assault are not foreseeably identifiable with the normal use of an auto. According to stipulated facts in that case, two soldiers from Fort Jackson got into an altercation with a group of young men at a Hardee's parking lot. *Bookert*, 330 S.C. 221, 224-26, 499 S.E.2d 480, 481-82 (Ct. App. 1997), *rev'd* 337 S.C. 291. After the fight was broken up, the two soldiers took a jeep to pick up a third assailant and followed the group of young men to a nearby McDonald's parking lot. *Id.* The assailants used the jeep to circle the parking lot in search of their intended victims. *Id.* One soldier stood in the back of the jeep with a shotgun while another soldier sat in the passenger seat with a handgun. While yelling at and taunting the group of young men, the jeep lurched forward. The soldier in the back fell out and fired his shotgun into the crowd. While the jeep was still moving, the passenger fired multiple shots into the crowd and struck the plaintiff in each leg. *Id.* The two soldiers in the jeep then used the jeep to flee from the scene, and the third soldier ran off on foot. The claimant

was injured from shots fired by the soldier in the passenger seat, not the soldier that fell out of the jeep. *Id.*

The claimant sought underinsured motorist coverage claiming that the injury arose out of the use of an automobile. The Circuit Court and this Court found in favor of the claimant. Specifically, this Court found the vehicle was the “launching pad” for the assault. Moreover, “[t]he vehicle also put the assailants in the position to shoot and then escape quickly and easily. . . . Furthermore, the automobile was in motion when the shots which injured Michael Bookert were fired.” *Id.* at 232-33, 499 S.E.2d at 486.

The Supreme Court granted certiorari and reversed, finding there was no causal connection between the vehicle and the injury. *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182. Despite the fact that the assailants used the vehicle to track down the group of young men and fired the gun from a moving vehicle, the Supreme Court held the injuries did not satisfy the third *Aytes* sub-factor: the gunshot wounds were “not ‘foreseeably identifiable with the normal use of an automobile.’” *Id.* (quoting *Aytes, supra*). Therefore, no causal connection between the vehicle and the injury existed.⁴

The Supreme Court adopted this “normal use” factor from the United States Court of Appeals for the Fourth Circuit’s decision in *Nationwide Mutual Insurance Company v. Brown*,

⁴ Despite Rule 268(d)(2), SCACR, Appellant cites a concurrence in this Court’s unpublished decision in *Norris v. Allstate Ins. Co.*, 2005-UP-124, 2005 WL 7083469 (Ct. App. Feb. 17, 2005). However, to the extent that case is considered, its holding actually supports the Circuit Court’s decision in this case. In *Norris*, this Court held shooting injuries were not foreseeably identifiable with the normal use of an auto despite the fact that the shooter fired from a moving vehicle that was pursuing the victim at the time of the shooting. *Id.* at *3 (“Because we can discern no material distinction from the facts at hand and the facts in the *Bookert* case, we find no error in the trial judge’s determination there was no coverage because the incident was not ‘foreseeably identifiable with the normal use of an automobile.’”).

779 F.2d 984 (4th Cir. 1985). In that case, a vehicle operator drove around with his passenger looking for the passenger's wife. When the passenger saw the wife's car, he pushed the operator and caused a collision between the two vehicles. He then got out of his vehicle and shot and killed his wife. *Id.* at 986. The Fourth Circuit held the wife's injuries did not arise out of the ownership, maintenance or use of an automobile, stating:

Courts confronted with the general question of whether personal injuries resulting from physical assaults by insured vehicle passengers or operators "arose out of" the ownership, maintenance or use of the vehicle, have almost unanimously found no causal relation between the "use" of the vehicle and such assault-caused injuries.

Id. at 988. Moreover, "[i]n cases dealing with the specific situation here in issue—shooting by a passenger in or operator of an insured vehicle—the decisions have uniformly applied and found unmet a comparable causal requirement." *Id.* Applying the "normal use" test, the Fourth Circuit quoted favorably from the Michigan Court of Appeals: "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." *Id.* at 989 (quoting *Detroit Automobile Inter-Insurance Exchange v. Higginbotham*, 95 Mich. App. 213, 290 N.W.2d 414 (1980) (emphasis in original)).

Like the claimants in *Bookert*⁵ and *Brown*, Harrison's injuries are not foreseeably identifiable with the *normal use* of an automobile. Redman's "use" of the auto here is actually less extensive than the purported "use" at issue in *Bookert*. The assailants in *Bookert* used the vehicle to track down the group of young men, the jeep's "lurch" forward caused the soldier to fall

⁵ In explaining its basis for reversing this Court, the Supreme Court in *Bookert* acknowledged that it rendered its decision in *Aytes* after this Court's ruling in *Bookert*. See *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182. Because the decision in *Aytes* was the first time South Carolina's Supreme Court had applied the "normal use" factor under the causal connection analysis, the normal use standard was not considered by this Court in its decision in *Bookert*. Likewise, the Supreme Court's decision of *Howser* does not address the "normal use" factor because it predates *Aytes* and *Bookert*.

out and fire into the crowd, and the jeep was in motion at the time of the shooting. In contrast, Redman merely drove the vehicle to the red light where the assault took place, fired a shot from his stationary vehicle at Harrison – who was also stationary – and then used his vehicle to escape. Our Supreme Court found the purported use in *Bookert* insufficient to prove any causal connection to the injuries. Even more so, Redman’s use here does not create any causal connection.

Moreover, Harrison’s injuries are exactly the same as those in *Bookert* and *Brown* – gunshot wounds due to an assault. As the Courts held in *Bookert* and *Brown*, gunshot injuries are not the type of injuries that are foreseeably identifiable with the *normal* use of an automobile. Therefore, Harrison’s death did not arise out of Redman’s use of the vehicle.

B. When a shooter fires a shot from one stationary vehicle into another stationary vehicle, the fact that the shooter fires from within a vehicle does not make the vehicle an “active accessory” to the shooting but merely the site of the assault.

The first and second sub-factors under the *Aytes* causal-connection test interrelate. The vehicle must be an “active accessory” to the assault, and the vehicle must be more than the mere site of the injury or the mere site from which the actor fired a weapon. *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (citing *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745-46). Here, Redman’s vehicle was merely the site from which he fired the gun. The vehicle has no causal connection to Harrison’s injuries, and Redman’s use of the vehicle did not increase the severity of her injuries. Therefore, the causal connection does not exist.

The District Court for the District of South Carolina in *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009), held that use of a vehicle in a drive-by shooting does not make the vehicle an “active accessory” to the assault. In that case, an estranged lover had a history of using his truck to stalk the claimant. On the date of the assault, he saw the claimant’s vehicle parked in front of her friend’s house and drove back and forth, harassing the claimant for some time. Later that day, he saw the claimant driving down the road in the opposite direction. Unbeknownst to

her, he turned around to follow. When she stopped her vehicle to wait to pick up a child at a bus stop, the assailant drove up beside her vehicle, stopped briefly, and fired multiple shots into her vehicle seriously injuring the claimant before the assailant drove away. *Id.* at 1024. The District Court held the vehicle was not an active accessory to the assault.⁶ *Id.* at 1027.

In its brief, the Appellant in this case attempts to rely on the *Howser* and *Towe* cases to suggest that uninsured motorist coverage is triggered in this case.⁷ Its reliance on these cases is misplaced for several reasons. The District Court in *Holmes* aptly distinguishes both *Howser* and *Towe* and shows why they do not support Appellant's argument in this case.

In *Howser*, an unidentified assailant used his vehicle to ram the claimant's vehicle multiple times while chasing her down a public roadway. As the claimant made a "quick" turn in an attempt to flee from the assailant, he shot at her car and the fragmented bullet struck the claimant, injuring her. 309 S.C. at 271, 422 S.E.2d at 106. The Supreme Court held the injuries arose out of the assailant's use of the vehicle because "[o]nly through the use of his vehicle was the assailant able to closely pursue [claimant], 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." *Howser*, 309 S.C. at 273, 422 S.E.2d at 108 (emphasis added). The Supreme Court also held, "the unknown driver's use of his vehicle and the shooting were **inextricably linked as one continuing assault**." *Id.* at 274, 422 S.E.2d at 109 (emphasis added). Of particular note, the Supreme Court

⁶ The District Court also held that although "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." *Id.*

⁷ See *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992); *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994).

contrasted the facts in *Howser* with those where the “assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack.” *Id.* at 273, 422 S.E.2d at 108.

In *Towe*, a group of kids were riding in an insured auto when a passenger threw a glass bottle at a street sign. He missed and struck a tractor operated by the claimant. The bottle shattered and injured the claimant who argued that the injuries arose out of the passenger’s use of the auto. The Supreme Court agreed, holding: “[t]he use of the automobile placed [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 [claimant’s] injuries.**” *Towe*, 314 S.C. at 107, 441 S.E.2d at 827 (emphasis added).

After analyzing both *Howser* and *Towe*, the District Court in *Holmes* recognized that the vehicle in *Howser* was an active accessory because it was used to ram and chase the plaintiff’s vehicle and to keep up with the fleeing plaintiff to shoot her. The vehicle in *Towe* was an active accessory because its speed actually caused the claimant’s injuries to be more severe. In contrast, the victim in *Holmes* – and Harrison here – was stationary and the severity of her injuries was not affected by the speed of the shooter’s vehicle. Therefore, the District Court held the drive-by shooting in *Holmes* was not comparable:

Unlike *Howser*, [assailant] did not use his vehicle to assault Plaintiff, as nothing in the record indicates that Plaintiff knew [assailant] was approaching her as she waited at the school bus stop or that [assailant’s] vehicle ever made contact with Plaintiff’s. Nor was Plaintiff traveling in her vehicle at the time [assailant] fired the gun, thus making [assailant’s] position in relation to Plaintiff dependent on the use of his vehicle. Moreover, unlike *Towe*, [assailant’s] use of his car did not increase the severity of potential harm inflicted by his gunshots. He merely used his car to approach Plaintiff, stopped his car next to her parked car, fired several gunshots at Plaintiff, and drove off. Thus, unlike the incidents giving rise to the South Carolina Supreme Court’s decisions in *Howser* and *Towe*, the court does not find that [assailant’s] car acted as an active accessory to his assault on the Plaintiff.

Id. at 1026-27.

The District Court's well-reasoned opinion in *Holmes* applies with equal force in this case. The drive-by shooting in this case is wholly different from the vehicular chase and assault in *Howser* that culminated in a shooting. Like the drive-by shooting in *Holmes*, Redman did not use his vehicle to keep up with a fleeing Harrison, but merely used the vehicle to transport himself to the site of the assault and then to flee. Like the victim in *Holmes*, Harrison's car was stationary at the time of the shooting, no contact was ever made between the vehicles, and nothing in the record indicates Harrison knew Redman was beside her as she waited for the red light. Like the shooter in *Holmes*, Redman pulled up beside Harrison while her vehicle was stationary, fired into her vehicle, and drove away. Neither vehicle was in motion, so Redman's use of the vehicle did not increase the severity of Harrison's injuries or make his use of the vehicle necessary to carry out the assault. Therefore, the relevant facts here are indistinguishable from those in *Holmes*.⁸

Furthermore, the basis for the Supreme Court's holding in *Towe* was the fact that the velocity of the vehicle contributed to the severity of the plaintiff's injuries. *Id.* at 1027. However, in a shooting case, the speed of the assailant's vehicle (here, stationary and perpendicular to the victim) does not increase the severity of the victim's injuries. *Id.* The use of the vehicle had no connection to the nature or severity of Harrison's injuries. Thus, *Towe* has no bearing on the facts of this case.

⁸ The facts here are even more remote than those in *Holmes*. In *Holmes*, the evidence showed the shooter saw the victim drive past him, and he turned around to follow her. There is no evidence in this case that Redman knew Harrison or that he followed Harrison for any duration prior to the accident. However, even with Appellant's contention that Redman "stalked" Harrison for the duration between two stop lights, *Holmes* shows that this allegation would not suffice to create a causal connection. Moreover, as discussed below, Redman's act of firing *after* both vehicles were stopped constitutes an act of independent significance that breaks any purported causal connection.

Appellant mistakenly cites *Howser* and *Towe* as if they stand for a unified rule. They do not. The two cases stand separately on their facts. In *Howser*, the assailant used the vehicle as part of an ongoing assault, both using the vehicle to ram the victim's vehicle and to pursue the fleeing victim, and he was still pursuing the fleeing victim when he fired the bullet that ultimately caused her injuries. Thus, the use of the vehicle as an "active accessory" to the assault triggered coverage. In *Towe*, the bottle was thrown from a moving vehicle, and the speed of the vehicle contributed to the overall speed of the bottle, thus having a direct causal connection to the extent of the plaintiff's injuries. Therefore, the use of the vehicle in *Towe* had a direct causal connection and was an "active accessory" to causing the physical injuries.

The Circuit Court – relying on the District Court's decision in *Holmes* – properly evaluated the rule from each case and found the facts here do not fall under either rule. As to *Howser*, the evidence shows there was no chase, there was no contact between Harrison and Redman's vehicles, Harrison was not aware of Redman's conduct, and the vehicles were stationary at the time of the shooting. As to *Towe*, the speed of Redman's vehicle – stationary – was not causally connected with the severity of Harrison's injuries. Thus, the *Howser* and *Towe* cases have no bearing in this case.

At best, the evidence shows Redman's vehicle was the mere site from which he fired the shot at Harrison. However, when the only connection between a vehicle and an injury is that the assailant or victim is occupying the vehicle at the time of the assault, the causal connection requirement is not satisfied. For example, in *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999), two assailants entered the victim cabdriver's vehicle under pretext as fare-paying customers. Once the cab was in motion, they attempted to rob the victim and ultimately shot and killed her. This Court held the injuries to the cabdriver were not causally

related to the use of the vehicle because the cab merely served as the site of the robbery. Like the attempted robbery in *Wright*, Redman's Ford Escape merely served as the site from which he fired the shot at Harrison's vehicle. Therefore, the causal connection between his use of the Ford Escape and Harrison's injuries is insufficient to trigger coverage under Plaintiff's auto liability policies.

In sum, the Circuit Court correctly found that the Appellant failed to establish the first prong of the *Aytes* causal connection test because Harrison's injuries did not arise out Redman's use of the vehicle.⁹ Gunshot injuries are not foreseeably identifiable with the normal use of an automobile. Moreover, Redman's vehicle was not an "active accessory" to the shooting. Neither vehicle was in motion at the time of the shooting, there was no vehicular chase, and Redman's use of his vehicle did not increase the severity of Harrison's injuries. Therefore, Appellants failed to prove the causal connection requirement.

II. The Circuit Court correctly held Redman's act of firing a shot at Harrison's vehicle was an intervening act of independent significance that broke any causal connection with the use of his vehicle.

The second prong of the *Aytes* test to determine whether an injury arises out of the ownership, maintenance, or use of a vehicle requires that no act of independent significance breaks the causal link between the use of 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.'" *Howser*,

⁹ Appellant also appears to argue that coverage should apply because Harrison was using her vehicle at the time of the shooting. (Appellant's Br. p. 6) ("Additionally, it is worth noting that Redman shot Harrison while she was operating her vehicle in a normal and reasonably foreseeable fashion."). However, whether the claimant was using a vehicle is immaterial to whether coverage is triggered. Instead, the proper inquiry focuses on whether the injuries arise out of the uninsured motorist's ownership, use, or maintenance of his vehicle, not the claimant's use of a vehicle. See *Carraway, supra* (focusing on actions of shooter in case where victim was shot while sitting in the driver's seat of a running vehicle waiting for the vehicle in front of him to clear a stop sign).

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)).

This Court in *Wright* also addressed the question of whether a shooting constitutes an act of independent significance to break any causal connection between the use of a vehicle and a shooting injury. This Court held the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or the gunmen were standing outside of the vehicle." *Wright*, 337 S.C. at 427, 523 S.E.2d at 476. Therefore, "the assault of the gunmen broke any causal connection between the vehicle and [the cabdriver's] injury because it arose from an act of independent significance." *Id.*

Even if there were a causal connection between Redman's use of the Ford Escape and the assault, the shooting was an act of independent significance breaking any causal link that may have existed. Redman fired his gun after both vehicles were stopped and stationary. Like the shooters in *Wright*, Redman could have committed the same assault by walking up to Harrison's vehicle and firing his gun. Redman could have accomplished the shooting by stopping the Ford Escape and getting out, shooting Harrison, then leaving in his vehicle. Therefore, Redman's act of firing a shot into Harrison's vehicle after both vehicles were stopped broke any causal connection that may have existed.

Appellant fails to raise any compelling argument that Redman's act of shooting Harrison was not an act of independent significance. Relying on *Howser*, Appellant argues that a shooting does not categorically constitute an independent act. However, the question is not whether a shooting categorically breaks the chain of causal connection. The question is whether *this* shooting between two *stationary* vehicles breaks the causal connection. In *Howser*, the shooter shot ***while the vehicles were in motion, in a car chase, with collisions between the vehicles, and while the***

victim was trying to flee. Thus, the Supreme Court in *Howser* held the shooting and the shooter's use of the vehicle were "inextricably linked as one continuing assault." 309 S.C. at 274, 422 S.E.2d at 190. Because the victim was still fleeing, the shooter in that case could not have exited his vehicle to complete the shooting.

Unlike the assault in *Howser*, the shooting here occurred *after* both Redman and Harrison had stopped their vehicles for the red light. Thus, to the extent Appellant argues Redman used his vehicle to keep up with Harrison, that "use" stopped when both vehicles stopped at the red light. His act of shooting Harrison while both vehicles were stationary was a separate, independent act, and the two actions cannot logically be considered "inextricably linked as one continuing assault." Rather, the two acts are independent. Redman did not use his vehicle as part of the assault like the assailant did in *Howser*. Stopping the vehicles in this case broke any possible causal connection.

Moreover, based on the Appellant's flawed contentions, the shooting at issue in *Brown* would have been covered. In *Brown*, the shooter used the vehicle to crash into and *stop* his victim, yet the Court found that shooting did not trigger coverage. Had he not used the vehicle to stop his victim and then stopped his vehicle, he would not have been in a position to step out of the vehicle and shoot the victim. The *Brown* Court found that, although the truck may have been used to track down and physically stop the victim, that use of the truck was "not the causative factor in producing [the victim's] death." 779 F.2d at 989. "Rather, [the assailant's] assault, an act wholly independent

of the use of the truck, caused the death.” *Id.* It follows in this case that the connection between the use of the vehicle and the shooting was broken when the vehicles were no longer in motion.¹⁰

Put simply, the act of shooting Harrison was independent of Redman’s use of the Ford Escape. Her vehicle was stationary, and so was the Ford Escape. Unlike the continuous acts in *Towe* and *Howser*, the shooting here was independent of Redman’s use of the vehicle. Because both vehicles were stopped, Redman could have carried out the shooting by exiting his vehicle or while standing on the corner of the intersection. Therefore, the Circuit Court properly held the shooting was an act of independent significance breaking any potential causal connection.

CONCLUSION

The Circuit Court correctly held Harrison’s injuries do not arise out of Redman’s use of the Ford Escape. Appellant has not established a causal connection because gunshot injuries resulting from an assault are not foreseeably identifiable with the normal use of an auto. In addition, the Ford Escape was not an “active accessory” to the shooting. The use of the vehicle was not inextricably linked to the shooting as one continuing assault, and Redman’s use of the vehicle did not increase the severity of Harrison’s injuries. Instead, the Ford Escape merely served as the site from which Redman committed the shooting. Moreover, even if there were a causal connection between Redman’s use of the vehicle and Harrison’s injuries, Redman’s act of firing at Harrison after both vehicles stopped for the red light was an independent act breaking any

¹⁰ Likewise, the act of exiting the vehicle cannot be the dividing line between what constitutes an independent act and what does not. In *Doe v. S.C. State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999), the Supreme Court found sexual assault by an officer in a police cruiser was an act of independent significance despite allegations that the officer transported one of the victims to a golf course where the sex act took place in the police cruiser. The facts in that case did not indicate the victim or assailant exited the vehicle before the assault. Thus, the question is not whether the assailant exited the vehicle, but rather whether the assailant’s conduct in carrying out the assault is still dependent on his or her use of the vehicle.

connection that may have existed. In order for Appellant to prevail, she must show all of these factors, but here she has failed to establish any. Therefore, the Circuit Court's order should be affirmed.

Respectfully submitted,

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April 13, 2018

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

RECEIVED

APR 13 2018

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2017-001946
Trial Court Case No. 2015-CP-18-01571

Progressive Direct Insurance Co., and
USAA General Indemnity Company, Respondents,

v.

Shanna Groves as the Personal Representative of the
Estate of Lynn Harrison..... Appellant.

CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Respondent, certify that the Respondents' Brief and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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IN THE STATE OF SOUTH CAROLINA

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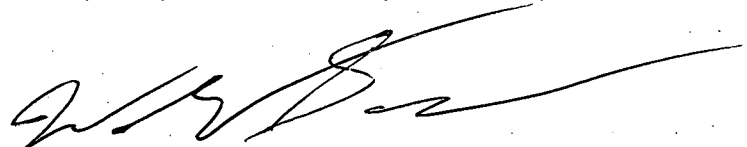
Progressive Direct Insurance Co., and
USAA General Indemnity Company,Plaintiff,

v.

Shanna Groves as the Personal Representative of the
Estate of Lynn HarrisonDefendants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents on Shanna Groves, Individually and as Personal Representative of the Estate of Lynn Harrison by depositing a copy of it in the United States Mail, postage prepaid, on April 13, 2018, Ryan H. Sigal, Esquire, Miller, Dawson, Sigal & Ward, LLC, 8310 Rivers Avenue, Suite D, North Charleston, SC 29406 and John P. Linton, Jr., Esquire, Walker, Gressette, Freeman & Linton, LLC, P.O. Box 22167, Charleston, SC 29413.



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April 13, 2018

HAND DELIVERED

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Re: Progressive Direct Insurance Co., and USAA General Indemnity Company vs. James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison
Civil Action No.: 2015-CP-18-1571
Claim No.: 155621943 (Progressive) 31913153-5 (USAA)
Date of Loss: 4-2-15
Our File No.: 1115-2637/3250-0892

Dear Ms. Kitchings:

Enclosed please find herewith for filing with the Court the original and five (5) copies of the Initial Brief of Respondents and Respondents' Designation of Matter to Be Included in the Record on Appeal in the above-referenced matter. I would appreciate your filing the original and returning the clocked copies to me by individual delivering same. By copy of this letter I am serving same on opposing counsel.

With warm personal regards, I am

Sincerely yours,

Wesley B. Sawyer

WSB/rlb
Enclosures

cc: Ryan H. Sigal, Esquire
John P. Linton, Jr., Esquire

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APR 13 2018

SC Court of Appeals