THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2017-001946
Case No. 2015-CP-18-1571

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

v.

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

INITIAL REPLY BRIEF OF APPELLANT

April 23, 2018

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REPLY ARGUMENT

I. The Bookert case does not stand for the proposition that any injuries resulting from gunshots fired out of a vehicle window are not foreseeably identifiable with the normal use of an automobile, regardless of the circumstances.

Respondents Progressive Direct Insurance Co. and USAA General Indemnity Company's (collectively, "Respondents" or "the Insurers") brief relies heavily on an embellished interpretation of State Farm Mut. Auto Insurance Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999). Respondents assert the Court in Bookert held that, regardless of the factual circumstances, gunshots fired out of a vehicle window are not foreseeably identifiable with the normal use of an automobile. Respondents' argument is unsupported by South Carolina case law. For example, our Supreme Court has held an insurer liable under uninsured motorist provision for gunshot injuries sustained by person traveling on public highway in insured vehicle and inflicted during vehicular chase by unknown owner or operator of unidentified vehicle. See Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). Howser has not been overruled and is still binding law in South Carolina. No South Carolina appellate court has found that Bookert precludes coverage anytime a gun is involved. See Norris v. Allstate Ins. Co., 2005-UP-124, 2005 WL 7083469, at *3 (Ct. App. Feb. 17, 2005) (Beatty, J. concurring in result but explaining "[u]ntil our Supreme Court overrules Howser, we must assume that the fact that an assailant fired a gun from an automobile does not automatically defeat coverage . . . it is arguable that drive-by shootings are foreseeably identifiable with the normal use of a vehicle."); Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022, 1027, 2009 WL 8138328 (D.S.C. 2009) (district court distinguishing the facts of Howser and Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994) in a case nine (9) years after the Bookert ruling); Peagler v. USAA Ins. Co., 628 S.E.2d 475, 368 S.C. 153 (2006) (post-Bookert discussion regarding Howser and Towe).

Furthermore, as explained fully in Appellant's opening brief, the facts in Bookert are distinguishable from the facts of this case and the facts of this case are more analogous to those in Howser and Towe. In Bookert, an insured under his mother's policy, was *standing in a McDonald's parking lot* when he was shot by a passenger in a moving vehicle. Bookert, at 292-93, 523 S.E.2d at 181-82. The Bookert opinion simply established that when the victim(s) of drive by shooting(s) are not in a car at the time of the incident, their injuries are not foreseeably identifiable with the normal use of an automobile. Id.

In addition to Bookert, Respondents rely on Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984, 986 (4th Cir. 1985).[1] In that case, the passenger in a vehicle "jumped out of the truck and shot and killed his wife while she sat in the car." Id. at 986. In Brown, there was no use of the vehicle at the time of the shooting - the assailant was outside of the vehicle when he fired the shots. The facts in Bookert and Brown are completely dissimilar to the instant case where both Jimi Carl Redman, Jr. ("Redman") and Lynn Harrison's ("Harrison") vehicles were "***turned on and in drive***" at the time of the shooting. **(Pls. Am. Res to Def. Requests for Admission, #3)** (double emphasis added); **(Pls. Am. Res to Def. Requests for Admission, #8)** (Plaintiffs admitting that Redman's "vehicle was turned on and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting."). Additionally, in this case, Harrison "was operating her vehicle in a normal and reasonably foreseeable fashion" at the time she was fatally wounded. **(Pls. Am. Res to Def. Requests for Admission, #7);** see also, **(Pls. Request to Admit to Def. #14); (Def. Res. To Pls. Request to Admit #14).**

[1] Brown was decided by the Fourth Circuit Court of Appeals approximately seven years prior to our Supreme Court's ruling in Howser.

As explained in detail in Appellant's opening brief, the undisputed facts establish that Harrison's injuries were foreseeably identifiable with the use of an automobile, therefore the circuit court erred in holding to the contrary and must be reversed. See **(Appellant's Br. 4-16)**. No doubt the insurance companies that initiated this action against the estate of an innocent woman aspire for Bookert to be a complete bar to coverage anytime a gun is involved. However, this Court should reject the invitation from these insurance companies to expand the Bookert ruling in a way that would practically overrule at least two decisions of our Supreme Court. Instead, this Court should reverse the circuit court and enter judgment in favor of Respondents.

II. When an assailant uses a vehicle to pursue a victim; both the vehicles are in drive and being operated at the time of the incident; and the assailant would not have been able to obtain the position that allowed him to fatally shoot the victim without the use of his vehicle, the vehicle is an active accessory and more than the mere site of the incident.

As fully explained in Appellant's opening brief, Harrison was operating her vehicle throughout the entire series of events that culminated in her shooting, and her vehicle was only stopped for less than the length of a red light. As such, Redman would not have been able to obtain the position that allowed him to fatally shoot Harrison at the second light without the use of his vehicle as an active accessory. See **(Appellant's Br. 4-12)**.

The vehicle was more than the mere site of the assault.[2] Here, as has been stated, Redman used his vehicle for more than transportation to the site of the incident - he pursued Harrison using his vehicle and shot Harrison while both vehicles were turned on and in drive. **(Pls. Am. Res to Def. Requests for Admission, #3); (Pls. Am. Res to Def. Requests for Admission, #8)** (Plaintiffs

[2] As explained in Appellant's opening brief, the vehicle was not merely the site of the injury when Redman and Harrison were driving separate vehicles at the time of the assault and the assault could not have been committed were Redman not driving his vehicle. For a full discussion of the reasons the vehicle was more than the site of the incident, see **(Appellant's Br. 4-14).**

admitting that Redman's "vehicle was turned on and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting."); **(Pls. Am. Res to Def. Requests for Admission, #1)** (Plaintiff admitting that Redman was blowing kisses and making hand gestures toward Lynn Harrison while driving); **(Pls. Am. Res to Def. Requests for Admission, #7)** (It is uncontested that Harrison "was operating her vehicle in a normal and reasonably foreseeable fashion" at the time Redman fatally wounded her).

Respondents go to great lengths in their brief to mold the facts of this case to fit the case law favoring the result they seek. For example, Respondents refer to the vehicles as "stationary," completely ignoring that both vehicles were in drive and being used for transportation at the time of the shooting. In fact, Redman could not have followed Harrison from the first red light or closely pursued Harrison to the second light without the use of his vehicle.

Respondents also refer to this incident as "drive-by shooting," which ignores Redman's pursuit of Harrison and further ignores that Redman's position in relation to Harrison was completely dependent upon the use of his vehicle. No South Carolina appellate court has ruled that the vehicle was not an active accessory in these or similar circumstances. Respondents' distortion of the facts to make them analogous to the cases finding no coverage should be rejected by this court.

The South Carolina Supreme Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case. See e.g., Howser, at 273, 422 S.E.2d at 108 (. . . [t]his is not a case in which the assailant merely used the vehicle to provide transportation to the situs of the shooting . . . . Nor is it a case where the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack."); Home Ins. Co. v. Towe, at 107, 441 S.E.2d at

827 ("[t]he use of the automobile placed Alexander 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 inflicted upon the driver of the tractor.). Howser and Towe have not been overruled, were binding upon the circuit court's decision, and the circuit court erred by issuing an order inconsistent with these opinions.[3]

Therefore, for these reasons and those stated in Appellant's initial brief, the circuit court should be reversed.

III. The firing of a gun from a vehicle that is in drive and being operated, into another vehicle that is in drive and being operated, is not an intervening act of independent significance breaking any causal connection between the use of the assailant's vehicle.

Respondents argue this case is similar to Wright v. North Area Taxi, Inc., 337 S.C. 419, 523 S.E. 2d 472 (Ct. App. 1999) and that gunshots are an act of independent significance breaking any causal connection between the use of the vehicle and the assault. That conclusion is incorrect and unsupported by the facts of this case. Here, Redman's ability to carry out the shooting was entirely dependent on the use of his vehicle to pursue Harrison. Unlike the gunman in Wright, Redman could not have completed his attack without using his vehicle. Redman could not have kept up with Harrison from stop light to stop light without a car. **(Pls. Am. Res to Def. Requests for Admission, #3).** Redman could not have positioned himself next to Harrison at the stop light without a car. **(Pls. Am. Res to Def. Requests for Admission, #4).** This case presents circumstances more similar to Howser where the assailant pursued the victim using a vehicle and the gunshots were a continuation of that pursuit.

[3] For a full discussion of the circuit court's erroneous distinguishing of Howser and Towe, see **(Appellant's Br. 9-12).**

Respondents also argue that ". . . Redman could have committed the same assault by walking up to Harrison's vehicle and firing his gun" and that "Redman could have accomplished the shooting by stopping the Ford Escape and getting out, shooting Harrison, then leaving in his vehicle." **(Res. Br., 17).** Respondents' "could have" argument is nothing more than wild speculation as to under what circumstances Redman's actions "could have" broken the causal chain of events if they had been different. Respondents do not dispute the facts establishing that the causal chain of events was not broken.

In addition to arguing what "could have" happened, instead of arguing the facts of this case, Respondents assert that Howser is distinguishable because this case involves "stationary" vehicles. As discussed above, referring to two vehicles that are both in drive and being operated as "stationary" is misleading—a roller-coaster is not "stationary" when it briefly pauses at the apex of a track before speeding through the remainder of the ride.

Respondents' assertion that the vehicles were "stationary" is completely disingenuous. It is undisputed that Harrison's vehicle was stopped for less than the length of a red light before the shooting occurred. **(Def. Res. to Request to Admission, #10 & 13).** No vehicle in this case was "stationary." After the shooting Redman drove off and Harrison's vehicle proceeded slowly through the intersection until it came to rest on the median. **(Pls. Request to Admit to Def. #14); (Def. Res. To Pls. Request to Admit #14).**

As explained above and in Appellant's opening brief, the facts of this case are distinguishable from Wright[4] and analogous to Howser, therefore the circuit court erred in ruling that Redman's

[4] Respondents also cite to Brown. That case is completely inapposite because the assailant in that case, a passenger in a truck, "jumped out of the truck and shot and killed his wife while she sat in the car." Brown, at 986. Clearly, that has no bearing on the instant case where both vehicles were in drive and being operated at the time of the shooting.

use of a gun was an act of independent significance breaking the causal link because Redman's use of his vehicle and the shooting are inextricably linked as one continuing assault as in Howser. The circuit court should be reversed and judgment entered for Appellant.

CONCLUSION

Therefore, for the reasons explained above and in Appellant's opening brief, the circuit court's order should be reversed and judgement entered for Appellant.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the **APPELLANT'S INITIAL REPLY BRIEF** on Respondents by depositing a copy in the United States Mail, postage prepaid, on April 23, 2018, addressed to their attorneys of record as follows:

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Re: Progressive Insurance Co. & USAA General Indemnity Co. v. Groves, etc.
Appellate Case No. 2017-001946
WGFL File 8057.001

Dear Ms. Kitchings:

Enclosed for filing with the Court please find Appellant's Initial Reply Brief and Proof of Service.

Thank you very much for your courtesies in this matter

Sincerely,

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Enclosures (As Stated)
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