

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

RECEIVED

JUN 13 2018

SC Court of Appeals

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

v.

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

BRIEF OF APPELLANT

June 12, 2018

John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
Attorneys for Appellant

Ryan H. Sigal (SC Bar #80223)
Miller, Dawson, Sigal & Ward, LLC
8310 Rivers Avenue, Suite D
North Charleston, SC 29406
(843) 284-7780

Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of Facts 2

Standard of Review 3

Argument 4

I. The circuit court committed error of law in ruling that Redman’s vehicle was not causally connected to the assault when the vehicle was used as an active accessory to the assault, both Redman and Harrison were driving at the time of the incident, Redman’s position in relation to Harrison was completely dependent upon the use of his vehicle, Redman used his vehicle to stalk Harrison before the assault, the vehicle was more than situs of the injury and the injuries were foreseeably identified with the normal use of an automobile. 5

a. The South Carolina Supreme Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case and the circuit court erred in departing from those decisions 6

b. The circuit court erroneously distinguished Howser and Toves 8

i. The circuit court committed error of law in finding that Howser and Toves require a showing that the assailant’s vehicle be used to “keep up” with the victim and that Redman did not use his vehicle to pursue Harrison. 9

ii. The circuit court erred in finding that Howser and Toves require a showing that the assailant’s vehicle make physical contact with the victim’s vehicle. 10

iii. The circuit court erred in finding that Howser and Toves require a showing that the victim was aware of the assailant driving beside them or that he was gesturing towards her. 11

iv. The circuit court erred in finding that Howser and Toves require a showing that the victim was aware of the assailant driving beside them or that he was gesturing towards her. 11

c.	<u>The circuit court committed error of law in finding that Redman’s vehicle was not an active accessory to the assault on the basis that this case is more like a “drive by shooting.”</u>	12
d.	<u>The circuit court committed error of law in finding that the vehicle was 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.</u>	14
e.	<u>The circuit court committed error of law in finding that Appellant’s injuries are not foreseeably identified with the normal use of an automobile when no South Carolina appellate court has ever established a rule that such injuries are, as a rule, not foreseeably identified with the normal use of an automobile.</u>	14
II.	<u>The circuit court erred in finding that Redman’s firing of a gun was an intervening act of independent significance breaking any causal connection with the use of his vehicle when Redman’s use of his vehicle and the shooting were inextricably linked as one continuing assault.</u>	16
	Conclusion	19

TABLE OF AUTHORITIES

CASES

<u>Auto Owners Ins. Co. v. Newman</u> , 385 S.C. 187, 684 S.E.2d 541 (2009).....	4
<u>Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County</u> , 371 S.C. 224, 638 S.E.2d 685 (2006).....	4
<u>Cowburn v. Leventis</u> , 366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005).....	3
<u>Doe v. South Carolina State Budget & Control Bd.</u> , 337 S.C. 294, 523 S.E.2d 457 (1999).....	5
<u>Estes v. Roper Temp. Servs., Inc.</u> , 304 S.C. 120, 403 S.E.2d 157 (Ct. App. 1991).....	4
<u>Holmes v. Allstate Ins. Co.</u> , 786 F. Supp. 2d 1022, (D.S.C. 2009)	8, 12, 13, 16
<u>Home Ins. Co. v. Towe</u> , 314 S.C. 105, 441 S.E.2d 825 (1994).....	5, 6, 7, 8, 9, 10, 11, 12, 15, 16
<u>Horry County v. Ins. Reserve Fund</u> , 344 S.C. 493, 544 S.E.2d 637 (Ct. App. 2001)	4
<u>Norris v. Allstate Ins. Co.</u> , 2005-UP-124, 2005 WL 7083469 (Ct. App. Feb. 17, 2005)..	15
<u>Peagler v. USAA Ins. Co.</u> , 628 S.E.2d 475, 368 S.C. 153 (2006).....	16
<u>S.C. Dept. of Transp. v. Horry Cnty.</u> , 391 S.C. 76, 705 S.E.2d 21 (2011).....	4
<u>State Farm & Cas. Co. v. Aytes</u> , 332 S.C. 30, 503 S.E.2d 744 (1998).....	4, 5, 14, 16, 18
<u>State Farm Mut. Auto Insurance Co. v. Bookert</u> , 337 S.C. 291, 523 S.E.2d 181 (1999)	5, 13, 14, 15, 16
<u>Trousdell v. Cannon</u> , 351 S.C. 636, 572 S.E.2d 264, (2002))	3
<u>Wausau Underwriters Ins. Co. v. Howser</u> , 309 S.C. 269, 422 S.E.2d 106 (1992)	5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19
<u>Wright v. North Area Taxi, Inc.</u> , 337 S.C. 419, 523 S.E.2d 472 (Ct.App.1999).....	5, 13, 16, 17, 18, 19

STATUTES

S.C. Code § 38-77-140	4
-----------------------------	---

RULES

Rule 56(c), SCRCP	3
-------------------------	---

STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in ruling that Redman's vehicle was not causally connected to the assault when the vehicle was used as an active accessory to the assault, both Redman and Harrison were driving at the time of the incident, Redman's position in relation to Harrison was completely dependent upon the use of his vehicle, Redman used his vehicle to stalk Harrison before the assault, the vehicle was more than situs of the injury, and the injuries were foreseeably identified with the normal use of an automobile?

- II. Did the circuit court err in ruling that Redman's firing of a gun was an intervening act of independent significance breaking any causal connection with the use of his vehicle when Redman's use of his vehicle and the shooting were inextricably linked as one continuing assault?

STATEMENT OF THE CASE

Following the death of Lynn Harrison ("Harrison"), Respondent Progressive Direct Insurance Co. ("Progressive") sued Appellant, Shanna Groves¹ as the Personal Representative of the Estate of Lynn Harrison ("Appellant" or "the Estate"), seeking a declaratory judgment that the uninsured motorist policy Respondent had issued did not provided coverage for the death of Ms. Harrison. **(Compl., R.pp.12-165)**. On September 17, 2015, Progressive and USAA General Indemnity Company ("USAA") (collectively, "Respondents" or "the Insurers") filed an Amended Complaint, adding USAA as an additional Plaintiff. In the Amended Complaint, the Insurers sought a declaratory judgment that that the uninsured motorist policies Respondents had issued did not provide coverage for the death of Ms. Harrison. **(Am. Compl., R.pp.16-20)**

Appellant answered the Amended Complaint on November 3, 2015, denying that the Insurers were entitled to a declaratory judgment and asserting that the policies provide coverage. **(Answer, R.pp.21-24)**. On May 9, 2016, the Insurers filed a Motion for Summary Judgement.

¹ The Defendant was initially named as "James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison." However, by Form 4 Order filed on February 8, 2017, Shana Groves was substituted in this case as the Personal Representative of the Estate of Lynn Harrison. **(Form 4 Order filed February 8, 2017, R.pp.10-11)**.

(Pls. Mot. Summ. J., R.pp.25-26). On January 27, 2017, the Estate filed a Cross Motion for Summary Judgement. **(Def. Cross Mot. Summ. J., R.pp.59-60).** On February 17, 2017, the Honorable Alison Renee Lee held a hearing on the Insurers' Motion for Summary Judgement and the Estate's Cross Motion for Summary Judgement. **(Order, R.pp.3-7).** On August 2, 2017, Judge Lee issued an Order granting the Insurers' motion and denying the Estate's motion. **(Order, R.pp.3-7).** Appellant timely served a Notice of Appeal on September 15, 2017. **(Notice of Appeal).**

STATEMENT OF FACTS

On April 2, 2015, Lynn Harrison was driving a 2010 GMC Terrain eastbound on East Carolina Avenue, which became Old Trolley Road, just before the intersection of Old Trolley Road and Bacons Bridge Road in Summerville, South Carolina. **(R.p.18., ¶ 10) (R.p.22, ¶ 11)** (“Defendant admits that Mrs. Harrison was operating a vehicle on East Carolina Avenue in Summerville, South Carolina at the time of the incident.”); **(R.p.84., #6); (R.p.88, #6).** At the same time, Jimi Carl Redman, Jr. (“Redman”) was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Lynn Harrison's right. **(R.p.84. #8); (R.p.89, #8).** She “was operating her vehicle in a normal and reasonably foreseeable fashion.” **(R.p.98, #7).** 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 from his vehicle. **(R.p.97, #1)** (Respondents admitting that Redman was blowing kisses and making hand gestures toward Harrison *while driving*). **(R.p.85, 16); (Witness statement of Jennifer Rojas, R.pp.102-103).** Then, after pulling up to the stop light, Redman shot Harrison from his vehicle. Both Redman and Harrison's vehicles were “*turned on and in drive*” when Redman shot Harrison. **(R.pp.97-98, #3)** (double emphasis added); **(R.p.98, #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.”). It is uncontested that Harrison “was operating her vehicle in a normal and reasonably foreseeable fashion” at the time Redman fatally wounded her. **(R.p.98, #7)**. Harrison’s vehicle, which was turned on, in drive, and being operated in a normal and reasonably foreseeable fashion at the time she was shot, proceeded slowly through the intersection until it came to rest on the median. **(R.p.85, #14); (R.p.89, #14)**.

The Ford Escape operated by Redman was not insured at the time of the shooting. **(R.p.86, #19); (R.p.89, #19)**. Progressive and USAA issued South Carolina Auto Policies to James M. Harrison (Progressive Policy number 19841187-2 and USAA Policy 031913153G71018) (“the policies”) to James M. Harrison, which were in full force and effect on April 2, 2015.² **(R.pp.38-49)**. The policies each provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident. **(R.pp.38-39)**.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRPC. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005) (citing Trousdell v. Cannon, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. “Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might

² At all times relevant to this case, Harrison was married to James M. Harrison and resided in his household. **(R.p.84, #5); (R.p.88, #5)**.

reasonably be drawn therefrom.” Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

“A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue.” Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing Colleton County Taxpayers Ass’n v. Sch. Dist. of Colleton County, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 497, 544 S.E.2d 637, 639-640 (Ct.App.2001). When reviewing an action at law, the scope of review is limited to the correction of errors of law. S.C. Dept. of Transp. v. Horry Cnty., 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). As explained herein, the circuit court committed several errors of law in its Order and the Order should be reversed and judgment entered for Appellant.

ARGUMENT

Under South Carolina law, an automobile insurance policy may not be issued or delivered in this state unless it contains a provision insuring 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 § 38-77-140. An injury arises out of the ownership, maintenance, or use of an automobile if: (1) there is a causal connection between the vehicle and the injury; (2) no act of independent significance occurred which broke the causal link; and (3) the vehicle was being used for transportation at the time of the assault. State Farm & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998).

A causal connection exists between the vehicle and the injury when the following elements are satisfied: “(a) the vehicle was an ‘active accessory’ to the assault; and (b) something less than

proximate cause but more than mere site of the injury; and (c) that the ‘injury must be foreseeably identifiable with the normal use of [the vehicle].’ State Farm Mut. Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) (citing Aytes, 332 S.C. at 33, 503 S.E.2d at 745–46); Doe v. South Carolina State Budget & Control Bd., 337 S.C. 294, 297, 523 S.E.2d 457, 458 (1999); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). “No distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act.” Wright v. North Area Taxi, Inc., 337 S.C. 419, 424, 523 S.E.2d 472, 474 (Ct. App.1999) (citing Home Ins. Co. v. Towe, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994)).

As explained herein, the Circuit Court incorrectly ruled that “[t]here was no causal connection between Redman’s automobile and the gunshot injuries suffered by Harrison” and incorrectly ruled that “the shot fired by Redman was an act of independent significance breaking any causal connection to the use of his automobile.” (**Order, 6**). In fact, as explained herein all three requirements for coverage are present in this case.³

- I. **The circuit court committed error of law in ruling that Redman’s vehicle was not causally connected to the assault when the vehicle was used as an active accessory to the assault, both Redman and Harrison were driving at the time of the incident, Redman’s position in relation to Harrison was completely dependent upon the use of his vehicle, Redman used his vehicle to stalk Harrison before the assault, the vehicle was more than situs of the injury, and the injuries were foreseeably identified with the normal use of an automobile.**

The circuit court committed error of law in ruling that the gunshot injuries suffered by Harrison were not causally connected to Redman’s use of his vehicle. As explained herein, the vehicle was an active accessory to the assault, the vehicle was more than mere site of the injury,

³ There is no dispute that Redman’s vehicle was being used for transportation at the time of the incident. See (R.p.98, #8). Therefore, the only elements at issue are whether “there is a causal connection between the vehicle and the injury” and “no act of independent significance occurred which broke the causal link.” See Aytes, at 33, 503 S.E.2d at 745.

and the injury was foreseeably identifiable with the normal use of the vehicle. Redman used his vehicle for more than transportation to the situs of the incident—he shot Harrison while both his vehicle and Harrison’s were turned on and in drive. (R.pp.97-98, #3); (R.p.98, #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, it is worth noting that Redman shot Harrison while she was operating her vehicle in a normal and reasonably foreseeable fashion. See (R.p.97, #1) (Plaintiff admitting that Redman was blowing kisses and making hand gestures toward Lynn Harrison while driving); (R.p.98, #7) (It is uncontested that Harrison “was operating her vehicle in a normal and reasonably foreseeable fashion” at the time Redman fatally wounded her).

The circuit court did not cite any case wherein both the assailant and the victim were driving at the time of the incident and a court found that the vehicle was not an active accessory to the assault. However, the South Carolina Supreme Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case. The circuit court erred in departing from those decisions. See (Order, R.pp.5-6); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992); and Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994).

a. **The South Carolina Supreme Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case and the circuit court erred in departing from those decisions**

In Wausau Underwriters Ins. Co. v. Howser, our Supreme Court determined that an insurer is liable under the uninsured motorist provision for gunshot injuries inflicted during a vehicular chase by an unknown owner or operator of an unidentified vehicle. In that case, Howser (while driving a vehicle owned by her father) and her passenger were “bumped” from behind. Id. at 270,

422 S.E.2d at 107. Howser looked in the rear-view mirror and saw a car behind them with a driver and no passengers. Id. That car bumped her vehicle two more times and Howser accelerated. Id. “Neither Howser nor Shealy was hurt when the other vehicle bumped [Howser’s vehicle].” Id.

The driver of the other car, who was unknown to them, pulled his car alongside Howser’s vehicle, yelled at them to roll down their window, slow down and stop their car, and pointed a pistol at passenger window. Id. Howser turned onto a side street to avoid the stranger, but as she completed the turn, the gunman shot at her vehicle and a bullet entered Howser’s back. Id. The gunman continued traveling and was never identified. Id. Significantly, “[t]he injuries that Howser sustained were the result of the gunshot. . . . [—]neither Howser nor [the passenger] was hurt when the other vehicle bumped the [Howser’s].” Id.

The Supreme Court found a causal connection existed:

. . . it is apparent that the unknown vehicle was an active accessory to this assault. This 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.* Only through use of his vehicle was the assailant able to closely pursue Howser, 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. Additionally, only a motor vehicle could have provided the assailant a quick and successful escape. Thus, we find a sufficient causal connection exists between the use of the assailant's vehicle and Howser's injuries.

Id. at 273 (double emphasis added).⁴

Home Insurance Co. v. Towe is equally apposite. In that case, the Court found that a causal connection existed between an assailant’s use of his vehicle and the injuries sustained by the driver

⁴ In so ruling, the Court noted that under the statute in effect at the time, no physical contact with the vehicle is necessary when a witness other than the owner or driver of the insured vehicle is available to attest to the facts of the accident. Id. 275, 422 S.E.2d at 110 (“we hold no physical contact with the unknown vehicle is necessary when a witness other than the owner or driver of the insured vehicle is available to attest to the facts of the accident.”).

of a tractor. 314 S.C. 105, 106, 441 S.E.2d 825, 826 (1994). In Towe, Brian Towe drove a vehicle in which Jerry Alexander was a passenger. At some point, Alexander threw a bottle from the moving vehicle at a road sign, but instead of striking the sign, the bottle shattered on the steering wheel of a tractor that was being driven in the opposite direction. Id. at 106, 441 S.E.2d at 826. The glass struck and injured the driver of the tractor. Id. The Court determined that a causal connection existed between Towe's use of his vehicle and the injuries sustained by the driver of the tractor, as "[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. See id. The Court determined that Towe's car was an active accessory that gave rise to the injuries sustained. Like in Howser, the court considered the "use of the automobile and Alexander's throwing of the bottle were ... 'inextricably linked' as one continuing act." Id. at 108, 441 S.E.2d at 827. 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. See e.g., Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022, 1025-26 (D.S.C. 2009) (discussing both Howser and Towe at length).

b. The circuit court erroneously distinguished Howser and Towe.

The circuit court strained to distinguish Howser and Towe. See (Order, 4). The circuit court ultimately ruled those cases distinguishable from this case because, as stated by the circuit court, (i) Redman did not use his automobile to keep up with Harrison; (ii) Redman did not make contact with Harrison's vehicle; (iii) there was no evidence Harrison saw Redman driving beside her or that she was aware of Redman's gestures to her; and (iv) Redman's use of the vehicle did not contribute to the seriousness of Harrison's injuries. **(Order, R.p.6)**.

- i. The circuit court committed error of law in finding that Howser and Towe require a showing that the assailant's vehicle be used to "keep up" with the victim and that Redman did not use his vehicle to pursue Harrison.

Towe does not require that an assailant use the vehicle to "keep up" with his victim. In that case, the victim was travelling on a tractor in the opposite direction of the assailant. See Towe, 314 S.C. 105, 106, 441 S.E.2d 825, 826 (1994). Clearly, Towe does not require that the assailant's vehicle be used to "keep up" with the victim, because the assailant and the victim were moving in opposite directions. Id.

In Howser, the assailant used his vehicle to pursue the victim, who was also driving at the time. See Howser, 309 S.C. at 271, 422 S.E.2d at 107. In reviewing the facts of that case and finding the vehicle was an active accessory to the assault, the Court explained that "[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." Id. at 273, 422 S.E.2d at 108. The Court further noted that "[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part . . . [and]. . . only a motor vehicle could have provided the assailant a quick and successful escape."

The instant case is on all fours with any requirement from Howser that the vehicle be used to "keep up" with the victim and the circuit court ignored the undisputed facts in reaching a contrary conclusion. The circuit court ignored that Redman used his vehicle to stalk Harrison while she was driving. Specifically, the circuit court ignored that Redman was driving his vehicle in the lane directly next to Harrison, that she was operating her vehicle in a normal and reasonably foreseeable fashion, and that while driving toward a stop light Redman was blowing kisses and making hand gestures toward Harrison from his vehicle. **(R.p.84, #8); (R.p.89, #8). (R.p.98, #7).**

(R.p.97, #1). Simply put, Redman used his vehicle to stalk Harrison before shooting her. Therefore, based upon the undisputed facts in the record, Redman's position in relation to Harrison was completely dependent upon the use of his vehicle.

- ii. The circuit court erred in finding that Howser and Towe require a showing that the assailant's vehicle make physical contact with the victim's vehicle.

In Towe, the assailant's vehicle did not make contact with the victim's tractor. See e.g., Towe, at 106, 441 S.E.2d at 826 (discussing the background facts of the case wherein the assailant threw a bottle from the moving vehicle that shattered on the steering wheel of a tractor the victim was driving in the opposite direction). In Howser, there was physical contact between the assailant's vehicle and the victim's vehicle; however, the Court was careful to note that no damage was caused by the contact and the *gunshots*, not the contact between the vehicles, cause the injuries. Howser, at 271, 422 S.E.2d at 107 ("The injuries that Howser sustained were the result of the gunshot. Neither Howser nor Shealy was hurt when the other vehicle bumped the Blazer."). In fact, the physical contact between the assailant's vehicle and the victim's vehicle was not essential to the Court's decision in that case. It was far more important that the gunman's position in relation to the victim was completely dependent upon the use of his vehicle. Here, there can be no dispute that Redman's position in relation to Harrison was completely dependent upon the use of his vehicle.

The circuit court erred in creating a requirement that the assailant's vehicle must make physical contact with the victim's vehicle in order to be an active accessory to the assault. There is no such requirement.

- iii. The circuit court erred in finding that Howser and Towe require a showing that the victim was aware of the assailant driving beside them or that he was gesturing towards her.

Neither Howser, nor Towe require that the victim be aware of the assailant in advance of the incident and the circuit court erred by inserting such a requirement into the caselaw. As has been stated, the victim in Towe was not even the intended target of the bottle thrown from the assailant's vehicle. See Towe, at 106, 441 S.E.2d at 826. Therefore, because there was no mention of any awareness on the part of the victim in Towe of the assailant's actions, the circuit court erred in finding that Towe requires such a showing.

There were no hand gestures mentioned at all in Towe or Howser; however, the circuit court ruled that those cases were distinguishable from this case on the basis that it is unclear in this case whether Harrison saw the hand gestures by Redman. Contrary to the circuit court's order, the undisputed fact that Redman, while driving, gestured towards Harrison, before shooting her from his vehicle makes this case *more* similar to Howser. The gesturing in this case is an interaction between the two vehicles is similar to the physical contact between the vehicles in Howser in that the assailant attempted to engage the victim while both vehicles were still moving.

- iv. The circuit court erred in finding that Howser and Towe require a showing that Redman's use of the vehicle contributed to the seriousness of Harrison's injuries.

In Towe, the Court noted that "[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." Towe, at 107, 441 S.E.2d at 827. The Court did not rule that the use of the vehicle must contribute to the seriousness of the injuries, the Court simply noted as part of its discussion that the speed of the vehicle contributed to the seriousness of the injuries. It is clear that there is no specific legal requirement that the assailant's vehicle increase the seriousness of the injuries, because in Howser, the Court specifically noted that the *gunshots*

caused the injuries. Howser, at 271, 422 S.E.2d at 107 (“The injuries that Howser sustained were the result of the gunshot. Neither Howser nor Shealy was hurt when the other vehicle bumped the Blazer.”).

Therefore, for the reasons discussed above, the circuit court should be reversed because the vehicle was more than situs of the injury, the vehicle was used as an active accessory to the assault, both Redman and Harrison were driving at the time of the incident, and Redman’s position in relation to Harrison was completely dependent upon the use of his vehicle.

c. The circuit court committed error of law in finding that Redman’s vehicle was not an active accessory to the assault on the basis that this case is more like a “drive by shooting.”

After incorrectly distinguishing Howser and Towe, as discussed above, the circuit court found that Redman’s vehicle was not an active accessory to the assault because “[t]he facts of this case are more like the drive-by shooting in *Holmes*, Redman pulled next to Harrison’s vehicle, committed the assault and drove off. . .” **(Order, R.p.6)**. Holmes v. Allstate Ins. Co.,⁵ the case relied upon by the circuit court for its decision that the instant case is more like a “drive by shooting,” is inapposite. 786 F.Supp. 2d 1022 (D.S.C. 2009). In Holmes, the assailant, an estranged lover, found his victim “parked on the side of the road awaiting the arrival of the school bus,” fired multiple shots into the victim’s *parked* car, and drove away. Id. at 1024. The district court found that the assailant’s vehicle was not an active accessory to the crime. Significantly, the district court explained that victim was not “traveling in her vehicle at the time Williams fired the gun, thus making Williams’ position in relation to Plaintiff dependent on the use of his vehicle.” Id.

⁵ In Holmes, our district court discussed Howser and Towe in great detail but ultimately found “after careful consideration, . . . the events underlying this dispute” did not invoke the conclusions reached in either Howser or Towe. Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022, 1026 (D.S.C. 2009).

The Holmes case, according to the district court, was more like the shooting in State Farm Mutual Automobile Insurance Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999). See Holmes, at 1027 (discussing Bookert). In Bookert, the *victim, while standing in front of a fast-food restaurant*, was shot by an assailant who fired from a moving vehicle in the parking lot. Bookert, at 293, 523 S.E.2d at 181. In finding this case analogous to Holmes, the circuit court ignored significant undisputed facts. Redman did not simply use his vehicle as transportation to and from a crime scene as in Holmes and Bookert. Here, Harrison was driving her vehicle at the time of the shooting and thus Redman's position in relation to Harrison was completely dependent upon his use of his vehicle. The circuit court should be reversed because Redman's vehicle was an active accessory to the shooting, without his use of his vehicle Harrison would have simply driven away from the stoplight.

- d. **The circuit court committed error of law in finding that the vehicle was 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.**

The circuit court found that Redman's vehicle was merely the site of Harrison's injury and thus there was no causal connection between the injury and Redman's use of the vehicle. In so finding the circuit court relied on Wright v. N. Area Taxi, Inc., 337 S.C. 419, 523 S.E.2d 472 (Ct App. 1999). In that case, two assailants entered a cabdriver's vehicle under pretext as fare-paying customers. Id. at 422, 523 S.E.2d at 472. Once the cab was in motion, they attempted to rob the driver and ultimately shot and killed her. Id. This court found that the required causal connection did not exist because "the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." Id. at 425, 523 S.E.2d at 475 (citations omitted). The reasoning of the court in Wright was that the vehicle was not an active accessory to the attempted robbery, it just happened to be where the

attempted robbery and shooting occurred. See id. In this case, Redman could not have followed Harrison from the first red light, while gesturing towards her without the use of his vehicle, nor could he have closely pursued Harrison to the second light without using his vehicle. **(R.p.97, #1); (Witness statement of Jennifer Rojas, R.pp.102-103).**

Because Harrison was operating her vehicle throughout the entire series of events that culminated in her shooting, and was only stopped for less than the length of a red light, 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. Therefore, based upon the undisputed facts in the record before the circuit court, the circuit court erred in holding that the relationship between Redman's use of his automobile and Harrison's injuries were "incidental".

- e. **The circuit court committed error of law in finding that Appellant's injuries are not foreseeably identified with the normal use of an automobile when no South Carolina appellate court has ever established a rule that such injuries are, as a rule, not foreseeably identified with the normal use of an automobile.**

The circuit court also found that an insured is not entitled to underinsured benefits for injuries from gunshots fired from a vehicle because such an injury is not foreseeably identified with the normal use of an automobile. 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 Supreme Court, ruled his injuries were not covered by his mother's policy because the injuries were not "foreseeably identifiable with the normal use of an automobile," as defined by Aytes. Id. Nothing in the Bookert ruling held that the mere fact *a gun was shot out of a car* meant that the injuries were not foreseeably identified with the normal use of an automobile, as the circuit court held. See Id. at 293, 523 S.E.2d at 181; **(Order, R.p.7).** Bookert simply established that when the victim(s) of drive by shooting(s) that are not in a car at

the time of the incident are not entitled to insurance benefits because their injuries are not foreseeably identifiable with the normal use of an automobile. Id.

In Bookert, the assailant merely used the jeep as transportation to the site of the shooting. Id. Unlike the assailant in Howser, the assailant in Bookert did not use his vehicle to keep up with the victim's car. See id.; see also, Howser, 309 S.C. at 271, 422 S.E.2d at 107. Moreover, unlike the assailant in Howser, the assailant in Bookert did not need the vehicle to shoot the victim and as such, the relationship between the victim's injuries and the assailant's use of the vehicle were incidental. Id.

The circuit erred in comparing the facts of this case to Bookert in finding Harrison's injuries were not foreseeably identifiable with the normal use of an automobile. See (Order, R.p.75). Redman could not have pursued Harrison but for the use of his automobile and Harrison's automobile was in use throughout this incident, making this case factually akin to Howser and Towe, not Bookert. **(R.p.84, #8); (R.p.89, #8). (R.p.98, #7). (R.p.97, #1)**. The circuit court further erred in holding that “[l]ike *Bookert*, Harrison's injuries from the shot fired by Redman from his automobile were not foreseeably identifiable with the use of an automobile.” **(Order, R.p.7)**. Considering the significant factual distinction between this case and Bookert, the circuit court erred in creating a bright line rule that anytime a gun is fired from a car it is not foreseeably identifiable with the normal use of an automobile. This is simply not the law in South Carolina.⁶

⁶ 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.”).

It is clear from South Carolina jurisprudence that Bookert did not overrule the decision in Howser or Towe. In fact, the District Court in Holmes, expressly discusses the Howser and Towe cases nine (9) years after the Bookert ruling. See also, Peagler v. USAA Ins. Co., 628 S.E.2d 475, 368 S.C. 153 (2006) (Court discussion regarding Howser and Towe as valid law post Bookert). The facts of this case are directly in line with Howser and Towe, which are still controlling law. The undisputed facts and controlling caselaw establish that Harrison's injuries were foreseeably identifiable with the use of an automobile, therefore the circuit court erred in holding Harrison's injuries were not foreseeable identifiable with the use of an automobile and must be reversed.

II. The circuit court erred in finding that Redman's firing of a gun was an intervening act of independent significance breaking any causal connection with the use of his vehicle when Redman's use of his vehicle and the shooting were inextricably linked as one continuing assault.

The circuit court relied on Towe and Wright to determine that Redman's firing of a gun was an intervening act of independent significant breaking any casual connection with the use of his automobile under the Aytes test. **(Order, R.p.8)**. In doing so, the circuit court failed to see the distinct factual difference between this case and Wright.

The circuit court cited Towe to show that certain acts, such as throwing a bottle from a car, are so inextricably linked to the use of the automobile as to constitute one continuing assault, therefore they do not constitute an intervening act of independent significant. See (Order, R.p.8); see also, Towe, 314 S.C. at 827, 441 S.E.2d at 108. The circuit court also noted that Wright addressed whether shooting constitutes an act of independent significance. See (Order, R.p.8). The circuit erred in ruling that Wright established a bright line rule that a shooting was in and of itself an act of independent significance. Id. The circuit failed to recognize the factually distinct scenario that led the Wright court to rule that the shooting in that case was an act of independent significance.

In Wright, the assailants hailed a taxi, entered the taxi once the driver parked his car on the side of the road, they shot and robbed the driver as he began driving. See Wright, 337 S.C. at 422, 523 S.E.2d at 472. The vehicle's movement did not enable the gunman to carry out the attack, as the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or gunmen were standing outside of the vehicle." Id. at 427, 523 S.E.2d at 472. As such, the injuries sustained by the cabdriver resulted from the assault by the gunmen and were unrelated to any functional use of the vehicle because the use of the vehicle was not essential to accomplishing the crime. Id. at 426-27, 523 S.E.2d at 472. Therefore, the gunman's assault was an act of independent significance that broke the causal link because the shooting and the use of the vehicle were not inextricably linked as a continuing assault.

Wright is wholly different from the present case because 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 accomplished the shooting by stopping his vehicle, getting out, shooting Harrison, and driving away because he would not have been able to keep up with Harrison's position from one red light to the next. Moreover, unlike the victim in Wright, Harrison's injuries were directly related to the functional use of the vehicle because the vehicle's movement enabled Redman to carry out the attack.

Furthermore, the circuit court ignored the ruling in Howser in ruling that Harrison's use of a gun was an act of independent significance. The Court in Howser 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. In Howser the assailant could not have completed his attack without using his vehicle, therefore the Court found there was a connection between the use of vehicle and the injuries. See Howser, at 273, 422 S.E.2d at 109. Since that purpose was fulfilled

when the assailant used his vehicle to complete the assault, the Court found the assailant's use of his vehicle and the shooting to be inextricably linked as one continuing assault. Id. at 274, 422 S.E.2d at 109. Therefore, "no independent act occurred to break the causal link." Id.

In this case the circuit court, ignoring Howser, erred in ruling that "[t]he same injuries could have occurred without an automobile involved." (**Order, R.p.8**).⁷ The connection between Redman's vehicle and Harrison's injuries was Redman's use of his vehicle to complete the shooting. Like the assailant in Howser, 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. (**R.pp.97-98, #3**) Redman could not have positioned himself next to Harrison at the stop light without a car. (**R.p.98, #4**). Harrison's vehicle was stopped for less than the length of a red light before the shooting occurred. (**R.p.89, #10 & 13**). Simply put, without the use of Redman's vehicle this assault could not have occurred, and the circuit court erred in ruling otherwise. Redman's purpose for using his vehicle was fulfilled when he pulled beside Harrison and fired into her vehicle. Redman's use of his vehicle and the shooting are inextricably linked as one continuing assault. *See* Howser at 274, 422 S.E.2d at 109. Therefore, no act of independent significance occurred to break the causal link. Id.

Consequently, the facts of this case are distinguishable from Wright and analogous to Howser, therefore the circuit court erred in ruling that Redman's 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

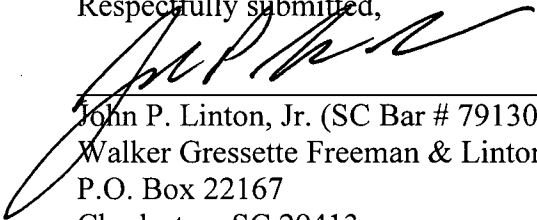
⁷ The Court in Aytes provided additional guidance on the applicable standard for act of independent significant that breaks the causal connection to an injury. *See* Aytes 332 S.C. at 35. In Aytes, the assailant drove his victim from one place to another, **got out of the vehicle and shot the victim**. *See* Id. at 33 (bold added). The court held that "[any causal link was] broken **when the assailant exited the vehicle**. . . [t]he only connection between the car and the injury is the fact that [the victim] was sitting in the car when she was shot." Id. at 35 (bold added). It should be noted that it is an undisputed fact that Redman never exited his vehicle prior to the shooting.

inextricably linked as one continuing assault as in Howser. For the aforementioned reasons the circuit court must be reversed.

CONCLUSION

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

Respectfully submitted,



John P. Linton, Jr. (SC Bar # 79130)
Walker Gressette Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
Attorneys for Appellant

June 12, 2018
Charleston, S.C.

Ryan H. Sigal (SC Bar #80223)
Miller, Dawson, Sigal & Ward, LLC
8310 Rivers Avenue, Suite D
North Charleston, SC 29406
(843) 284-7780
Attorneys for Appellant

Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



John P. Linton, Jr.
Attorneys for Appellant

June 12, 2018
Charleston, South Carolina

RECEIVED
JUN 13 2018
SC Court of Appeals