THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2016-CP-10-00363

LEVI THOMAS BROWN

Appellant

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

Respondent.

PETITION FOR REHEARING

The Appellant requests rehearing of the decision in this appeal on the following grounds:

This case involves the industry-wide effort of automobile insurers in South Carolina to utilize two very fact-specific Supreme Court decisions, State Farm v. Aytes (SC 1998)[1] and Bookert v. State Farm (SC 1999)[2], to broaden limitations of coverage for injury claims that have historically been covered by South Carolina case law as "arising out of the use of a vehicle"—specifically, injuries and deaths arising out of the very common vehicle-to-vehicle drive-by shootings that occur on our public roads.

[1] State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E. 744 (1998).
[2] State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999).

To this end, Respondent and other automobile insurance carriers have begun denying claims for injuries sustained by innocent victims of vehicle-to-vehicle drive-by shootings by arguing that the common law excludes coverage for such injuries as not "foreseeably identifiable within the normal use of an automobile" (hereinafter "Issue One"). Issue One requires the analysis of how Aytes and Bookert have or have not changed the precedent established in Howser[3] and Towe[4].

Respondent, unlike some of the other carriers who are also denying such vehicle-to-vehicle drive-by shootings pursuant to the common law, has also taken the additional step of including a written policy exclusion in its policies which broadly excludes all claims for injuries resulting from firearms. This policy exclusion (hereinafter "Issue Two") was cited in very short form in the arguments by Respondent at the trial court level and in its brief to this Court. Appellant addressed Issue Two in its argument to the trial court in the same short fashion but chose to frame the argument on appeal around Issue One, because Issue Two is completely dependent upon this Court's ruling on Issue One. It is axiomatic that a policy exclusion cannot exclude coverage contrary to the common law. Therefore, Issue Two does not stand on its own as a lawful ground for the trial court's ruling. This Court's decision as to Issue One renders Issue Two moot.

The trial court Order does not say that in spite of the clear precedent that makes the court decide this matter in favor of Appellant, alas, there is this policy exclusion that must stand to exclude the coverage for these injuries. The Order decides Issue One on its merits in detail and, then, because of the trial court's ruling on Issue One, the policy exclusion is not unlawful and is allowed to stand as an exclusion. If the trial court, as with this Court, decided with Appellant on

[3] Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1991).
[4] Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1993).

Issue One, the policy exclusion in Issue Two would have simply been found inapplicable as it could not exclude coverage for something covered by Issue One.

Because of the effect Issue One has upon Issue Two, the Appellant framed the arguments before this Court as the trial court's errors in (1) not following the precedent that establishes coverage for vehicle-to-vehicle drive-by shootings [Howser and Towe] and in (2) reading Aytes and Bookert too broadly such that they effectively overturn precedent without expressly stating that they intended to do so.

Respondent State Farm framed its arguments by lumping both of Appellant's arguments into one argument, presumably to focus the Court's attention on the Aytes / Bookert argument rather than the violation of clear precedent, and then reminded this Court of the policy exclusion ground that is mentioned in the trial court's Order. The policy exclusion is not an independent basis for the trial court's decision—it was and is completely dependent upon the ruling as to Issue One—despite Respondent's framing of the issues in its brief.

The policy exclusion for claims involving firearms would be a sound basis for denying coverage only if the law does not take a position about the unlawfulness of such exclusions. The very point of this appeal is to have the Court rule on the lawfulness of State Farm's denial of coverage. Whether it cites the common law as the grounds for the exclusion or cites its policy language, the merits of this case depend upon the two arguments presented in Appellant's brief—not the fact that State Farm has added language to its policy.

This Court's opinion, as it currently stands, cites two cases that are very much distinguishable from the case at hand. These two cases support the principle that an appellate court should affirm a trial court ruling unless all grounds have been appealed, "because the unappealed ground will become the law of the case." In order for an unappealed ground of a trial court decision

to remain as a valid lawful basis for the trial court's decision, the ground that was determined to not have been appealed must be a completely distinct and independent basis for the lower court's ruling. Otherwise, the appellate court's ruling on a dependent issue would inevitably decide the dependent issue and render a discussion of that second issue moot. That is the circumstance of the case at hand.

In Jones v. Lott[5], a wrongful death case with many causes of action and defenses arising out of police use of force, the Supreme Court held that failure to appeal the trial court's ruling as to the S.C. Tort Claims Act granting the police immunity for the method of providing protection for someone in custody required the appellate court to affirm the trial court, because this Tort Claim Act issue was a fourth and independent ground for the lower court's decision that was not appealed. The appellant in that case only appealed three other independent rulings of the trial court and forced the appellate court into the position of leaving a trial court ruling against the appellant regardless of how the court decided the other three issues. Similarly, in Anderson v. Short[6], a medical malpractice case with damages being sought by an injured woman's spouse by way of loss of consortium, the spouse's appeal failed because he only appealed the trial court's ruling that his claim was derivative of his wife's claims and did not appeal the independent (and substantive) ground that decided his wife's appeal--the discovery rule. The husband's failure to appeal the discovery rule issue placed the Supreme Court in the position of having to affirm the trial court as to the husband, because a ruling on the derivative nature of consortium would not undo the law of the trial court's decision.

A review of the record on appeal in this case and the briefs before the Court makes clear that the basis for the trial court's ruling in this matter was its decision to read Aytes and Bookert

[5] Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010).
[6] Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996).

as authority to overlook the precedential cases of Howser and Towe. The policy exclusion was simply tacked on the end of the Order and added in the appeal by Respondent as if it was a separate and distinct basis for denying coverage. Because policy exclusions cannot violate the law, it is only necessary for this Court to rule on the substantive common law issues. If this Court reads Aytes and Bookert as compatible with and not overturning Howser and Towe and, therefore, finds Appellant's injury was on this common law basis foreseeably identifiable with the normal use of an automobile, it is not necessary for the Court to rule on the trial court's observation that the policy contained an exclusion for claims arising out of the use of a firearm. That exclusion would become moot, as exclusions are not allowed to contradict the common law. This Court would not be forced to leave an unappealed issue from the trial court as dispositive of the case.

CONCLUSION

The courts have crafted a clear common law analysis for determining which injuries are foreseeably identifiable with the normal use of an automobile. Injuries and deaths resulting from vehicle-to-vehicle drive-by shootings have been established as covered by this common law analysis, while many other circumstances involving firearms have been ruled not covered. Respondent is allowed to exclude by way of policy provision claims related to any use of a firearm. But, it can only do that for claims the common law defines as not foreseeably identifiable with the normal use of an automobile. Such policy language would be inapplicable to claims falling within the common law definition of "foreseeably identifiable with the normal use of an automobile." Therefore, this appeal depends entirely on this Court's ruling as to the common law (Issue One).

Appellant respectfully requests rehearing in this case on the grounds raised above.

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July 25, 2018
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July 25, 2018

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
1220 Senate Street
Columbia, SC 29201

Re: Levi Thomas Brown v. State Farm Fire and Casualty Insurance Company
Case No.: 2016-CP-10-00363
Appellate Case No.: 2017-000479

Dear Madam Clerk:

Please find enclosed the following:

(1) One (1) unbound original and nine (9) stapled copies of the Petition for Rehearing;
(2) Original Certificate of Service of the Petition for Rehearing; and
(3) Filing fee

Please file the original Petition for Rehearing and Certificates of Service and return the other three (3) file-stamped copies of each to our office in the enclosed, self-addressed, stamped envelope.

If you have any questions or require additional information, please do not hesitate to contact me at (843) 569-1700.

With kindest regards, I am,

Very truly yours,

For Patrick T. Napolski

PTN/jav

Enclosures

cc: Timothy A. Domin, Esq.

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CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing on State Farm Fire and Casualty Insurance Company by depositing a copy of it in the United States mail, postage prepaid, on July 25, 2018 addressed to its attorney of record as follows:

Timothy A. Domin, Esq.
Clawson and Staubes, LLC
126 Seven Farms Drive, Ste. 200
Charleston, SC 29492-8144
Attorney for Respondent

Dated: July 25, 2018
North Charleston, South Carolina

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