THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2016-CP-26-798

South Carolina Farm Bureau Mutual Insurance Company ..... Respondent

vs.

Michael David Harrelson, Devora Harrelson, Kevin Duke
and Government Employees Insurance Company ..... Defendants

OF WHOM:
Michael David Harrelson and Devora Harrelson are ..... Appellants
and
Government Employees Insurance Company is..... Respondent

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in granting summary judgment to GEICO in contravention of the South Carolina Financial Responsibility Act?

2. Did the trial court err in granting summary judgment to South Carolina Farm Bureau Mutual Insurance Company on its underinsured/uninsured motorist coverage claim in violation of S.C. Code § 38-77-140 (2013)?

STATEMENT OF THE CASE

This matter is before this Court on appeal based on summary judgment motions filed by South Carolina Farm Bureau Mutual Insurance Company (the uninsured motorist carrier) and Government Employees Insurance Company (the liability insurance carrier). There are two separate actions. *South Carolina Farm Bureau Mutual Insurance Company v. Michael David Harrelson, Devora Harrelson, Kevin Duke and Government Employees Insurance Company*, C/A No. 2016-CP-26-798; and *Government Employees Insurance Company v. Kevin Duke, Michael Harrelson and Devora Harrelson*, C/A No. 2016-CP-26-424. By Court Order both actions were consolidated for trial on May 5, 2016. (R. pp. 21-22).

The facts which arise in this case involve a severe beating of Michael David Harrelson and Devora Harrelson by Kevin Duke at the Wal-Mart Store in Myrtle Beach before Christmas on December 21, 2012. Duke had blocked the Harrelson's car into a parking spot and used his car as a weapon to intentionally injury him. The parties' testimony and versions of the encounter are consistent and all parties agree that the assault occurred over how Michael Harrelson was operating his car in a crowded Wal-Mart parking lot before Christmas while Kevin Duke waited behind him to get out of the same crowded parking lot. Duke, a retired police officer, was eventually convicted of third degree assault for his actions on December 21, 2012. Government Employees Insurance Company (GEICO) is the automobile liability insurance carrier for Kevin Duke. The Plaintiff South Carolina Farm Bureau Mutual Insurance Company is the uninsured/underinsured motorist carrier

which had uninsured/underinsured motorist coverage on the car owned by Michael and Devora Harrelson. The two motions are legally different since the GEICO policy must be construed pursuant to the South Carolina Financial Responsibility Act. (See S.C. Code § 38-77-140). The South Carolina Farm Bureau Mutual Insurance Company policy is for uninsured/underinsured motorist coverage and must be construed pursuant to S.C. Code § 38-77-150, *et. seq*. (2013).

The Appellants, Michael and Devora Harrelson, submit summary judgment was not appropriate and that there are genuine issues of material fact which should be resolved at a jury trial and that this Court should reverse the trial court and return this matter to the trial court for disposition.

STANDARD OF REVIEW

The standard of review for summary judgment pursuant to South Carolina Rule of Civil Procedure 56 is well known in this state. In fact, the West Digest Headnotes for summary judgment contain more citations to case law than any other Rule of Civil Procedure. Under well-established precedent, the Appellate Court reviews the grant of summary judgment using the same standard applied by the trial court. *South Carolina Public Interest Foundation v. Greenville County*, 401 S.C. 377, 737 S.E.2d 502, *rehearing denied, certiorari denied* (S.C.App. 2013).

When reviewing the grant of summary judgment, the Appellate Court applies the same standard applied by the trial courts: Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Savannah Bank NA v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (S.C. 2012) (to withstand a motion for summary judgment in cases applying a preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence). *Savannah Bank NA v. Stalliard*, 400 S.C. at 247, 734 S.E.2d 161 (S.C. 2012).

The nonmoving party standard of review requires that this Court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the nonmoving party below. *USAA Property & Cas. Ins. Co. v. Clegg*, 377 S.C. 643 661 S.E. 791, rehearing denied (S.C. 2008); *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (S.C. 2008); *Young v. S.C. Dept. of Disabilities and Special Needs*, 374 S.C. 360, 649 S.E.2d 488 (S.C. 2007); *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 644 S.E.2d 730 (S.C. 2007); *Vaughan v. McLeod Regional Medical Center*, 372 S.C. 505, 642 S.E.2d 744 (S.C. 2007); *Madison ex. rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (S.C. 2006); *Hurst v. East Coast Hockey League, Inc.*, 371 S.C. 33, 637 S.E.2d 560 (S.C. 2006); *Vaughan v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (S.C. 2006); *Pittman v. Grand Strand Entertainment, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (S.C. 2005); *Trousdell v. Cannon*, 351 S.C. 636, 572 S.E.2d 264 (S.C. 2002); *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 563 S.E.2d 331 (S.C. 2000).

In particular in regard to insurance disputes, this Court has said, "Conflicting statements by driver, car owner and owner's employee create a jury issue as to the driver's permission to use his employer's car and as to liability coverage under the owner's commercial automobile insurance policy." *South Carolina Property & Casualty Guarantee Assoc., v. Yensen*, 345 S.C. 512, 548 S.E.2d 880 (S.C. App. 2001).

Finally, in regard to the standard of review of summary judgment motion, our courts have held summary judgment is a drastic remedy which should be cautiously invoked in the rare case where a verdict is not reasonably possible under the facts presented. *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d. 710 (S.C. 2000).

It is for these reasons that this Court should reverse the trial court and return this matter to the trial court for further proceedings.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO GEICO ON ITS LIABILITY INSURANCE POLICY.

The trial court in its order granted GEICO summary judgment. The court granted summary judgment on two grounds to GEICO. First, the injury did not arise out of the ownership, maintenance or use of a motor vehicle consistent with the case of *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 159, 629 S.E.2d 475, 478 (2006). Second, on reconsideration the trial court addressed Appellants' argument that this case was controlled by a *South Carolina Farm Bureau Mutual Ins. Co. v. Mumford*, 299 S.C. 14, 382 S.E.2d 11 (1989) and the South Carolina Financial Responsibility Act. Appellants assert that the trial court erroneously granted summary judgment on these two grounds in light of the sworn testimony offered at the summary judgment hearing.

A. Testimony of Michael Harrelson.

Michael Harrelson, the victim in this case, offered extensive testimony that the whole dispute in this matter revolved around his driving his car and the heavy traffic in the parking lot at the Wal-Mart where the assault occurred. Harrelson testified that on December 21, 2012, he was in the parking lot at Wal-Mart at the Myrtle Beach store waiting for another individual to pull out of a parking space so he could pull in and all of a sudden he heard somebody blowing the horn behind him and flashing his lights. (Harrelson Depo., R. p. 216, lines 22-24). He further saw that same person back up and come flying back up towards him and get so close he could see his face in the rearview mirror. (Harrelson Depo., R. p. 216, lines 24 25; R. p. 217, lines 1-4). Harrelson stated he had to walk around the back of his car to get by, that he couldn't have backed out of the space if he wanted to as Duke's car was so close to him. (Harrelson Depo., R. p. 217, lines 12-15). Harrelson got out and walked to the back of his car to see what was going on. Duke got out of his car and struck Harrelson so hard he knocked his glasses off and fractured his eye socket (Harrelson Depo., R. p. 219, lines 20-25). Harrelson held up his hands trying to block the blows and Duke pushed

Harrelson right onto the trunk of Duke's BMW (Harrelson Depo., R. p. 220, lines 1-5); that Duke used his car to pin Harrelson against it so he couldn't get away (Harrelson Depo., R. p. 220, lines 4-7); and that Duke pushed Harrelson all the way up against the car as he pushed Harrelson onto it (Harrelson Depo., R. p. 220, lines 8-12). Harrelson also offered testimony that there was blood all over the back of Duke's car because of the way he was pouring blood and the fact that he (Duke) had pushed him (Harrelson) onto the car (Harrelson Depo., R. p. 220, lines 18-21).

Further testimony revealed that Harrelson stated Duke had used his car for a weapon. The salient testimony is as follows:

Q: How was his vehicle a weapon?

A: Because of using it to pin me against. Just like if I come at you and held a baseball bat up to you. I mean it was a weapon. Because if I had—If he hadn't thrown me against the car, I could have got away from him and twisted around. But with him having me pinned to the car there was nowhere for me to go or to get away from him.

Q: Would you agree with me that the fight could have just as easily moved the right or to the left and you could have ended up pinned up against a separate vehicle?

A: No, Sir. Because he made sure to put me on his car. That's where he forced me to. (Harrelson Depo., R. p. 223, lines 18-23).

Q: So that's the only reason that you're saying it's a weapon is because it was there and he pinned you against it?

A: Because of his actions of using it and how he revved the engine and pulled up behind me. The whole—The whole thing.

(Harrelson Depo., R. p. 224, line 25; R. p. 225, lines 1-5).

Q: How would revving the engine have anything to do with it being a weapon?

A: That's like pointing a gun at you. Him revving the engine to threaten you like he's going to run over you.

(Harrelson Depo., R. p. 225, lines 6-9)

Harrelson further described how the car itself caused him injuries:

Q: You would agree that the injuries that you received and which you are complaining about were caused by Mr. Duke's fists?

A: His fists and his car.

Q: And what part of his car caused any injury to you directly?

A: From him pinning me against it where I could not move or get away.

Q: What part of the car caused what injury to you?

A: The car didn't cause the injury, but it helped -- It enabled him to do the injury....If he hadn't been able to force me to his car and use his car, I could have twisted and turned where he couldn't have beat me and caused the brain injury.

(Harrelson Depo., R. p. 227, lines 9-16.)

B. The South Carolina Financial Responsibility Act is applicable to GEICO.

South Carolina has codified the Motor Vehicle Financial Responsibility Act. See S.C. Code § 56-9-10. Numerous South Carolina cases have held "the purpose of the Motor Vehicle Financial Responsibility Act (MVFRA) is to give greater protection to those injured through the negligent operation of automobiles: this legislation requires insurance for the benefit of the public, and an insurer may not nullify its purposes by engrafting exceptions from liability as to uses that the evident purpose of the legislation was to cover." *Williams v. Governmental Employees Insurance Co.*, 409 S.C. 586, 762 S.E.2d 705 (S.C. 2014); *Lincoln General Insurance Co. v. Progressive Northern Insurance Co.*, 406 S.C. 534, 753 S.E.2d 437 (S.C.App. 2013) (the Motor Vehicle Financial Responsibility Act (MVFRA) requires insurance for the benefit of the public...)

Appellants assert that *South Carolina Farm Bureau Mutual Insurance Company v. Mumford*, 299 S.C. 14, 382 S.E.2d 11 (1989) is applicable in this case as to the policy of automobile liability insurance for GEICO.[1] In *Mumford*, the defendant drove her automobile across the center line of a highway intentionally and struck another vehicle in an attempt to commit suicide. Farm Bureau denied responsibility arguing that it was not legally responsible for an intentional act. The Court held that this case presented a matter of first impression in South Carolina: Does the Financial Responsibility Act mandate coverage for intentional acts of the insured? If it does, then the Act prevails over the terms of the insurance contract and the collision with McLamb is covered by Mumford's liability insurance policy with South Carolina Farm Bureau. The Court went on to hold:

> The statute requires any automobile insurance policy issued in this State to insure against "loss from liability imposed by law" for damages arising out of the use of a covered motor vehicle. Code Section 38-77-140. It draws no distinction between intentional acts and negligent acts of the insured if liability for damages is "imposed by law," coverage must be provided. Without question, the law imposes liability on one who intentionally uses an automobile in a manner that causes damage to another. *See M R & R Trucking Company v. Griffin*, 198 So. (2d) 879 (Fla. Dist. Ct. App. 1967), *cert dismissed*, 206 So. (2d) 210 (1968); *Denton v. Arnstein*, 197 Or. 28, 250 P. (2d) 407 (1952). Therefore, by the plain terms of the statute, the insurance policy must provide coverage for McLamb's damages.

See South Carolina Farm Bureau Mutual Insurance Company v. Mumford, 299 S.C. 14, 382 S.E. 2d 11 (1989).

The *Mumford* decision has been cited in numerous states as the modern rule on insurance company liability under financial responsibility laws; *accord Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1169 (Del. 1990); *Martin v. Chicago Ins. Co.*, 184 Ga. App. 472, 361 S.E.2d 835, 837 (Ga. Ct. App. 1987); *Mosley v. W. Am. Ins. Co.*, 743 S.W.2d 854, 855 (Ky. Ct. App. 1987); *Cannon v. Commerce Ins. Co.*, 18 Mass. App. Ct. 984, 470 N.E.2d 805, 806 (Mass. App. Ct. 1984);

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[1] (An insurer may not exclude intentional acts from statutorily required policies of liability coverage.) *State Farm Mutual Automobile Ins. Co. v. Moorer*, 330 S.C. 46, 496 S.E.2d 345 (S.C.App. 1999).

Hartford Accident & Indem. Co. v. Wolbarst, 95 N.H. 40, 57 A.2d 151, 153-55 (N.H. 1948); *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568, 572-74 (W.Va. 1990); *But see Williams v. Diggs*, 593 So.2d 385, 387 (La. Ct. App. 1991); *Snyder v. Nelson*, 278 Ore. 409, 564 P.2d 681, 684 (Or. 1977); *State Farm Mut. Auto Ins. Co. v. Wertz*, 540 N.W.2d 636, 640-41 (S.D. 1995); *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 286 S.E.2d 225, 226 (Va. 1982).

Here, use of the vehicle by Duke was the pinning of Harrelson onto Duke's vehicle outside of the Wal-Mart store. Also, the use of Duke's vehicle to block Harrelson in to assault Harrelson clearly was an intentional act which is a covered event under the Financial Responsibility Act. As the *Mumford* Court said:

> The statute does not say insurers must cover 'accidents' arising from the use of the insured vehicle; it says they must cover 'liability imposed by law' on the insured. See *Mumford*, 382 S.E. 2d at 12.

Further, the *Mumford* Court held:

> The victim's right to recover from the insurance company does not depend upon whether the conduct of his insured was intentional or negligent.
> *Mumford*, 382 S.E.2d at 12-13.

Nine years later the Court of Appeals reaffirmed *Mumford* in *State Farm Mutual Automobile Ins. Co. v. Moorer*, 330 S.C. 46, 496 S.E.2d 875 (S.C.App. 1998). In *Moorer* the Court found coverage for an intentional act when a passenger in one car shot and killed a passenger in another car. The Court stated:

> Insurance against third party loss arising out of the use of a motor vehicle is compulsory under South Carolina law. The primary purpose of compulsory insurance is to compensate injured by at-fault motorists. (496 S.E.2d at 875).

Finally, the Court cited a Supreme Court decision, *State Auto Property and Casualty Ins. Co., v. Gibbs*, 314 S.C. 345, 444 S.E.2d 504 (1994) ("The *Mumford* decision recognized the evolving policy of the legislature in its continuing effort to require that all South Carolinians have the ability to pay for injury on our highways." (444 S.E.2d at 507).

Thus, GEICO's motion for summary judgment should be denied based on the facts and law presented and this Court's prior case law holding that summary judgment must be denied when the nonmoving party presents a mere scintilla of evidence. See *Savannah Bank NA v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (S.C. 2012).

II. SOUTH CAROLINA FARM BUREAU'S MOTION FOR SUMMARY JUDGMENT SHOULD ALSO BE DENIED.

South Carolina Farm Bureau Mutual Insurance Company and GEICO also raise a second ground as to why summary judgment should be denied. For purposes of brevity, Appellants make the same argument to deny South Carolina Farm Bureau Mutual Insurance Company's motion for summary judgment and also to address the trial court's second ruling regarding GEICO because both involve the same statutes and case law announced by the South Carolina Supreme Court pursuant to S.C. Code Ann. § 38-77-140(A) (2013) which provides in pertinent part:

> ...insured against loss from liability imposed by law for damages "arising out of the ownership, maintenance or use of an uninsured vehicle...."

This statute applies to the underinsured and uninsured motorist coverage in this case. A recent case, *South Carolina Farm Bureau Mutual Ins. Co. v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862 (2012) holds that "touching" a vehicle qualifies an injured party for underinsured motorist coverages. In that case the plaintiff had been leaning on a car when another car lost control and came right at the plaintiff. The plaintiff jumped to get away after leaning on the car; however, he was still injured severely.[2]

The three-prong test for determining when an injury arises out of the ownership, maintenance or use of an uninsured vehicle was first set out in *Wassau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992). The test adopted by the South Carolina Supreme

[2] *See Harris v. Nationwide Ins. Co.*, 699 A.2d 447, 117 (MDApp. 1997) (victim's purse snatched from moving vehicle by criminal in car arose out of the ownership, maintenance or use of an uninsured motor vehicle, was covered by uninsured motorists coverage).

Court provides that parties seeking coverage must establish a causal connection between the injury and the vehicle. There must also exist no act of independent significance breaking the causal link. Finally, it must be shown that the vehicle was being used or had been used for transportation at the time of the assault. In *Wassau* the Court held that the causal connection is established when it can be shown the vehicle was an "active accessory" to the assault. The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. In this case, the evidence and testimony offered by Devora Harrelson and Michael Harrelson was that a dispute arose regarding a parking space and the driving conduct of the parties. The assailant driver blocked Harrelson in with his vehicle so that he could not leave the scene and then proceeded to use his vehicle as a weapon. (See previous cites in this brief and Deposition of Michael Harrelson, supra, R. pp. 203-252). Thus the vehicle was and became an "active accessory" to the assault since Duke used the vehicle to actively assault the Harrelsons by blocking them into their parking space and trapping Michael Harrelson on the hood of Duke's vehicle.

In *Wassau Underwriters v. Howser, supra*, the insured sustained gunshot wounds while traveling on a public highway in an insured vehicle and during a vehicular chase by an unknown assailant in an unknown vehicle. The Court found the unknown vehicle was an "active accessory" to the assault. The Court held only through the use of the vehicle was the assailant able to closely pursue Howser thus enabling him to carry out the pistol assault. The gunshot was a culmination of an ongoing assault in which the vehicle played an integral and essential 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. *See Wassau Underwriters, supra.*

In the instant case, the same fact pattern occurred between the parties. A dispute arose between the parties concerning a parking space and the driving conduct of each of the parties in the

Wal-Mart parking lot. Duke, the assailant, used his vehicle to block the vehicle of Harrelson from leaving the scene. (See Depo. of Michael Harrelson, R. p. 217, lines 13-16: "I couldn't back out if I'd wanted to without backing into his car.") Duke then used his vehicle as a weapon to assault Harrelson by pinning him against the car.

The Court also found insurance coverage in similar circumstances. In *The Home Insurance Company v. Towe*, 314 S.C. 105, 441 S.E. 2d 825 (S.C. 1994), the Supreme Court held there was coverage for injuries that were sustained by a victim when he was struck by a bottle thrown by a passenger in a passing car. The Court held:

> The 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 (victim's) injuries.

As in *Wausau*, the automobile was an "active accessory" that gave rise to the injuries. The Court in *The Home Insurance Company, supra* case found that a causal connection existed between the use of Towe's automobile and the victim's injuries. The Court stated further: "The use of the automobile and assailant's throwing of the bottle were 'inextricably linked' as one continuing act." Accordingly, there was no act of independent significance that broke the causal connection between the use of the automobile and the victim's injuries. (*The Home Insurance Company*, 314 S.C. at 108, 448 S.E.2d at 827.)

Finally, summary judgment is not appropriate based on *State Farm Fire and Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998). In *Aytes*, the Supreme Court restated the three part test for determining whether an individual's personal injuries arose out of the "ownership, maintenance or use" of an automobile such that they are covered by an automobile insurance policy. The three part test is met when: (1) there exists a causal connection between the vehicle and the injury; (2) no act of independent significance breaks the causal link; and (3) the vehicle is being used for transportation at the time of the assault

Based on *Aytes*, there is clearly a scintilla of evidence which showed a causal connection between the vehicle and the injury; i.e., the way the parties were driving in the Wal-Mart parking lot and the use of a parking place. There was also no independent act of significance which broke the causal link. Duke blocked Harrelson's vehicle and then Duke used his vehicle to assault Harrelson by pinning him against the vehicle. Finally, the vehicle was being used for transportation at the time of the assault and was used to make Duke's escape since he left the scene.

CONCLUSION

The facts and circumstances of this case prevent the trial court from granting summary judgment to either GEICO or South Carolina Farm Bureau Mutual Insurance Company. The trial court's reasoning was that the South Carolina Financial Responsibility Act was not applicable and that Appellants had not met the three part test established in *Aytes, supra.* The facts, the evidence and the testimony before this Court show more than a scintilla of evidence; and thus summary judgment should be reversed as to both insurers and the case returned to the trial court.

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October 20, 2017
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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Final Brief of Appellants** on the Respondents on the 20th day of October, 2017, by depositing a copy of same in the United States Mail, postage prepaid, to:

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SWORN AND SUBSCRIBED before me,
this 20th day of October, 2017.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26