

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. 2017-000745

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 RESPONDENT GOVERNMENT EMPLOYEES INSURANCE COMPANY

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TABLE OF CONTENTS

Table of Authoritiesii

Statement of Issue on Appeal 1

Statement of the Case1

Facts2

Arguments.....8

Conclusion.....11

TABLE OF AUTHORITIES

CASES

Doe v. South Carolina State Budget and Control Bd., 329 S.C. 214, 494 S.E.2d 469 . . . 10

Peagler v. USAA Ins. Co., 368 S.C. 153, 159, 628 S.E.2d 475, 478 (2006) 9

State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999).
..... 9

State Farm Mut. Ins. Co. v. Moorer, 330 S.C. 46, 496 S.E.2d 875 (Ct. App. 1998) 10

South Carolina Farm Bureau Mutual Ins. Co. Mumford, 299 S.C. 14, 382 S.E.2d 11
(1989) 10

Wausau Underwriters v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) 9

STATUTES

S.C. Code Ann. § 38-77-140 8

STATEMENT OF ISSUE ON APPEAL

- I. The trial court properly granted summary judgment in favor of GEICO.

STATEMENT OF THE CASE

South Carolina Farm Bureau Mutual Insurance Company (“SCFB”) brought this action against Defendants Michael David Harrelson, Devora Harrelson, Kevin Duke, and Government Employees Insurance Company (“GEICO”) seeking a declaration that SCFB has no liability to pay any claims arising from a December 21, 2012 altercation between Defendants Harrelson and Defendant Duke. (R. p. 41). GEICO sought a similar coverage declaration in its companion case, GEICO v. Harrelson, et al., C.A. No.: 2016-CP-26-424; to wit, that neither Kevin Duke, Michael David Harrelson, nor Devora Harrelson have any valid claims for coverage from GEICO in the form of a legal defense, indemnity, or insured damages under the insurance policy issued to Kevin Duke by GEICO related to an underlying tort action styled Harrelson v. Duke, C.A. No.: 2015-CP-26-6601. (R. pp. 23, 27). The SCFB and GEICO actions were consolidated for discovery and trial by consent order dated May 5, 2016. (R. p. 21). GEICO moved for summary judgment in these consolidated matters. (R. p. 58).

The matter came before the Circuit Judge Benjamin Culbertson for a hearing on February 27, 2017. (R. p. 94). Judge Culbertson granted the summary judgment motions of both SCFB and GEICO. (R. pp. 5, 11, 17, 19). Michael and Devora Harrelson petitioned for reconsideration on March 27, 2017. (R. p. 90). Judge Culbertson denied this motion, and a similar motion filed with respect to SCFB, by order dated May 3, 2017. (R. p. 1). This appeal followed.

FACTS

On December 21, 2012, Kevin Duke, Michael Harrelson, and Devora Harrelson were involved in an altercation in a Wal-Mart parking lot in Myrtle Beach, South Carolina.

The parties testified to notably different versions of the encounter. However, they agree on several key points that patently work to exclude coverage under the GEICO policy.

Harrelson Testimony

According to Devora Harrelson, on Friday, December 21, 2012, just before 6 p.m., she and her husband Michael went to Wal-Mart to purchase washing powder. (R. pp. 131-133). Very few parking spots were available because it was the Friday before Christmas. She and her husband decided to wait for a spot close to the door. Mrs. Harrelson got out of the car to retrieve a customer's shopping cart while her husband waited on the customer to vacate the spot. (R. p. 133). She took the shopping cart and rolled it to the front of the parking row when she heard a car horn. (R. p. 134). She turned and observed a car behind her husband's car, beeping its horn and flashing its lights. (R. p. 135). Michael Harrelson testified that once his wife got out of the car, Duke drove up behind him, flashed his lights, revved his engine, and slammed on the brakes close to the rear of his car. (R. pp. 216-217). At that point, the customer occupying the space Mr. Harrelson was waiting for pulled forward, and Michael Harrelson pulled into that spot. (R. pp. 135, 217).

According to Mrs. Harrelson, the driver of the other vehicle, Kevin Duke, pulled up behind Mr. Harrelson's car after Mr. Harrelson pulled into the parking spot. (R. p. 137).¹

¹ Mrs. Harrelson insisted that Mr. Duke's car was blocking their car, even though the undisputed video evidence clearly reflects otherwise. (R. p. 161).

She testified that she was standing at the end of the aisle on the driver's side of Mr. Duke's car, and Mr. Harrelson was parked on the opposite side. (R. p. 138). She testified that Mr. Duke asked "is that your husband?" and she replied "yes," at which point Michael Harrelson exited his car and walked to where she was standing. (R. p. 138). Michael Harrelson also responded "yes, I am." (R. p. 218).

According to Mrs. Harrelson, Mr. Duke then proceeded as follows: "He said, oh, you want some of this you mf'ing S.O.B. and opened his car door and took about three steps towards Michael and coldcocked him in the face, breaking his glasses with the first punch." (R. pp. 139, 218). She confirmed that Mr. Duke's vehicle was in park, and that he took several steps outside his vehicle to reach and strike Michael Harrelson. (R. p. 139). She claimed that there had been no argument and no warning prior to this attack. (R. pp. 139-140). Mr. Harrelson confirmed that Mr. Duke had parked his vehicle and was completely out of his vehicle when he struck him. He also confirmed that Mr. Duke was not using his vehicle for transportation during the altercation, and he did not use the car to hit Mr. Harrelson. (R. p. 219).

Mrs. Harrelson testified that Michael Harrelson did not hit back, but walked toward Mr. Duke, pushing him away. She stated that Michael Harrelson "did not get anywhere near Mr. Duke's car," but stood beside her. (R. p. 140). According to Mrs. Harrelson, "Michael was pushing back at him. And they ended up walking with the force back over towards his [Duke's] car." (R. p. 141). She stated that Mr. Duke then pinned Mr. Harrelson against the back of his car and continued to try to hit his face from behind. (R. p. 141). She put her hands around Mr. Harrelson's waist and pulled him away from Mr.

Duke. (R. p. 143). She testified that Mr. Duke then hit her as well. (R. p. 144). Then Mr. Harrelson “pulled me back and stepped back in front of Duke,” at which point Mr. Duke hit Michael Harrelson again. (R. p. 145). At that point, Mrs. Harrelson called 911. (R. p. 145). Mr. Duke got back into his car and drove away. (R. p. 146).

Mrs. Harrelson admitted the following facts in her deposition: (1) all of the altercation took place outside of Kevin Duke’s vehicle; (2) Mr. Duke’s car was stationary during the altercation; (3) Mr. Duke’s actions were intentional; and (4) Mr. Duke’s car was not being used for transportation when the altercation occurred. (R. pp. 146-148). Specifically, she testified that “it would be almost impossible for him to be driving a vehicle and beating somebody on the outside of it all at the same time. So it couldn’t have been transporting him at the time.” (R. p. 163).

Mr. Harrelson agreed that Mr. Duke’s action were not foreseeable in the normal use of a vehicle. (R. p. 224). He claimed that Mr. Duke used his vehicle as a “weapon” because he allegedly pinned him against it and hit him, but he agreed that he was not using it for transportation. (R. p. 224). He also agreed that Mr. Duke’s actions were intentional. (R. p. 251).

Duke Testimony

Kevin Duke testified that he and his wife had been shopping for about an hour in Wal-Mart on December 21, 2012. (R. p. 264). He had left the store to retrieve his car from the parking lot and pick up his wife in front of the store. (R. p. 265). The incident occurred near the entrance. (R. p. 267). He testified that he came upon the Harrelson vehicle sitting in the aisle between the parking spaces with no signal on. He tapped his horn, pulled up behind the car, and blew his horn again. He did not see anyone backing out of any spots.

He then saw the car pull into a space because the car that was in it had pulled forward through another empty space. (R. p. 267).

Mr. Duke admitted that he blew his horn and probably flashed his lights. He did not drive around the car because he thought it might cause an accident. (R. pp. 268-269). He did not rev his engine, and testified that his car was a 3 series BMW that was very quiet. (R. p. 269).

After the car pulled into the space, Mr. Duke drove past it to the end of the aisle, where he encountered a woman with a shopping cart who was yelling at him and raising her hand at him to stop. (R. pp. 268, 270). This turned out to be Devora Harrelson. He did not know her, or know that she had been in the stopped vehicle before he pulled up. (R. p. 268). Mr. Duke rolled his window down to see what she was saying, and she screamed and cussed at him, calling him an impatient son of a bitch. (R. pp. 268, 270-271). He asked her what her problem was, because he had no idea who she was. (R. p. 271).

Mr. Harrelson then rounded the corner from behind Mr. Duke's car and came to his driver's side window. Mr. Duke put the car in park. (R. p. 272). Mrs. Harrelson replied "I don't have a problem, you do. Here's your problem." Mr. Duke testified that Mr. Harrelson was a very large man, weighing over 300 pounds. (R. p. 272).

Mr. Duke admitted that he asked Mr. Harrelson to "call his dog off" because Mrs. Harrelson was "barking" and screaming and yelling like a little Chihuahua. (R. p. 273). Mr. Harrelson then reportedly said that he would yank Mr. Duke out the window and "break his go****n" neck." (R. p. 273). Mr. Duke testified that he did not give Mr. Harrelson the opportunity to do this, because he parked his car and got out to defend himself. (R. p. 274). When Mr. Duke exited the car, Mr. Harrelson did not move away, so

Mr. Duke pushed him backwards underneath his chin. (R. p. 275). The men then briefly fought; the fight lasted no more than ten seconds in Mr. Duke's estimation. (R. p. 275). He used his right hand because he was recovering from surgery on his left shoulder. (R. p. 276).

Mr. Duke testified that he did not block the Harrelsons' car, but that they came to his window and threatened him. (R. p. 276). The video evidence supports this statement. According to Mr. Duke, the Harrelsons were free to move away from his vehicle, but instead came toward it. (R. p. 277). When Kevin Duke pushed Mr. Harrelson, he was completely outside of his vehicle. He testified that he did not strike Mrs. Harrelson. (R. p. 277). The altercation was over within a few seconds, and Mr. Duke did not continue to strike Mr. Harrelson when he turned away. Mr. Duke got back in his car and left because he did not want the situation to escalate. (R. p. 278). Mr. Duke, a former police officer, reported the incident to police himself once he arrived home. (R. p. 278).

Mr. Duke denied that the incident was spurred by the either his or Mr. Harrelson's use of either vehicle. He testified that he was not upset until Mrs. Harrelson waved him down and cussed him out, and Mr. Harrelson approached him and threatened him. (R. pp. 288-290). He had no idea that she was associated with Mr. Harrelson, because he had not seen her alight from the car. "What started this whole thing was him threatening me and his wife cussing me. That's what started this. It had nothing to with a car." (R. pp. 292, 295).

Video Evidence (DVD of Wal-Mart security videos)

Three videos of the incident were played for each of the three witnesses at their depositions, identified as Exhibits 1, 2, and 3. The witnesses agreed that Exhibits 1 and 2 accurately represented the incident. (R. pp. 149-150, 153-154, 222-223, 282, 284, 287).

Mr. Harrelson testified that he thought Mr. Duke's car was closer to his car, but testified that he did not disagree with what the videos depict. (R. p. 223). All parties agreed that Exhibit 3 did not actually capture any footage of the incident.

Exhibit 1, entitled "Rooftop cam 12 122112," and Exhibit 2, entitled "PL GM door 122112," depict the same events from different angles. The videos plainly reflect as follows:

- (1) 6:14:35 - the Harrelsons stop in the parking lot to await a spot;
- (2) Mrs. Harrelson exits the vehicle, retrieves a shopping cart, and proceeds to push it towards the store;
- (3) 6:15:00 - Mr. Duke pulls up behind the Harrelson vehicle;
- (4) Mr. Duke flashes his lights during the approximately 30 second period between pulling up behind Mr. Harrelson and Mr. Harrelson pulling into the parking spot – he admits he honked his horn as well;
- (5) 6:15:32 – Mr. Harrelson pulls his vehicle into the parking spot he was waiting on after the former occupant pulls through;
- (6) Mr. Duke pulls forward to the end of the parking lot row – his vehicle does not block the Harrelson vehicle;
- (7) 6:15:43 – both Harrelsons approach the driver's side of Mr. Duke's vehicle and appear to speak to him through the window – Mrs. Harrelson was already standing at the end of the aisle, and Mr. Harrelson walked from his car, crossed behind Mr. Duke's car, to the end of the aisle to stand beside Mr. Duke's driver's side window;

(8) 6:15:58 – Mr. Duke exits his vehicle and the altercation ensues – Kevin Duke and Michael Harrelson tussle and walk backward from Mr. Duke’s vehicle, then Mr. Duke turns around and walks back toward his vehicle;

(9) 6:16:25 – Mr. Duke reenters his vehicle and drives away. (R. p. 374)

The videos establish the following: (1) Mr. Duke never used his vehicle to touch or block the Harrelsons’ vehicle, (2) the Harrelsons approached the driver’s side of Mr. Duke’s vehicle – the side opposite their car - while Mr. Duke was still inside; (3) after they approached, Mr. Duke parked, exited his vehicle, and an altercation ensued, completely outside Mr. Duke’s vehicle, and not involving Mr. Duke’s vehicle; and (4) the entire incident from Mr. Duke exiting his car to alighting and closing the door to his car again lasted approximately 30 seconds.

ARGUMENTS

I. The trial court properly granted summary judgment in favor of GEICO.

The trial court properly found that neither Michael and Devora Harrelson nor Kevin Duke are entitled to recover under the GEICO policy that insured Mr. Duke’s vehicle at the time of the December 21, 2012 Wal-Mart parking lot altercation.

Under South Carolina law, an automobile insurance policy must provide coverage for the insured against “loss from liability imposed by law for damages arising out of the ownership, maintenance, or use of” the insured motor vehicle subject to applicable coverage limits. S.C. Code Ann. § 38-77-140. (R. p. 345).

An injury arises out of the ownership, maintenance, or use of a motor vehicle, for purposes of automobile insurance, if (1) a causal connection exists between the vehicle and the injury, (2) no act of independent significance breaks the causal link between the

vehicle and the injury, and (3) the vehicle was being used for transportation at the time of the injury. Peagler v. USAA Ins. Co., 368 S.C. 153, 159, 628 S.E.2d 475, 478 (2006).

The causal connection test is satisfied if (1) the vehicle was an active accessory to the assault, (2) the vehicle was something less than the proximate cause and something more than the mere site of the injury, and (3) the injury must be foreseeably identifiable with the normal use of the vehicle. State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999).

In Wausau Underwriters v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) - which the Harrelsons tout in support of their coverage claim - the court held that the vehicle in question was an active accessory to a gunshot injury that occurred when a person fired the shot from one moving vehicle into another. The court emphasized that this was not a case where the assailant merely used the vehicle to travel to the site of the assault, or where the assault happened to be in a stationary vehicle while committing the assault. Rather, the gunshot was the culmination of an ongoing assault in which the vehicle played an essential role in chasing down the victim. Compare, Bookert, 337 S.C. at 293, 523 S.E.2d at 182 (1999)(holding that pedestrian's injuries from gunshots fired from inside a vehicle were not causally connected to the vehicle, and therefore did not arise from the ownership, maintenance, or use of a vehicle).

Here, the parties have all admitted that none of the injuries occurred while any of the parties were travelling in the GEICO-insured vehicle. The record is clear that Mr. Duke parked and exited the vehicle prior to the altercation. There was no car chase. The facts are clearly distinguishable from Howser. Even assuming as true Plaintiffs' testimony that at one point Mr. Duke pinned Mr. Harrelson against his vehicle during the fight, the law is clear that a vehicle is not causally connected to an injury by being "the mere site" of an

injury. Wausau, 309 S.C. at 273, 422 S.E.2d at 108 (“The causation required is . . . something more than the vehicle being the mere site of the injury.”); see also Doe v. South Carolina State Budget and Control Bd., 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997)(holding that the situs of an injury is not necessarily a causal link even though it is connected spatially to the harm).

Even if Mr. Duke’s vehicle had somehow been causally related to the assault, there is no question in the record that it was not being used for transportation at the time of the altercation. First, Mr. Duke testified that he parked the car and got out to confront Mr. Harrelson in the parking lot after being threatened. (R. p. 274). Second, the Harrelsons both confirmed that all of the altercation took place outside of Kevin Duke’s vehicle, and that his vehicle was parked during the altercation and not being used for transportation when the altercation occurred. (R. pp. 146-148, 163, 224). Further, Mr. Harrelson further agreed that he did not believe Mr. Duke’s actions were foreseeable in the normal use of a vehicle. (R. p. 224). Finally, the video evidence submitted herewith bears out the facts of this matter, and the parties agree that it is an accurate representation of the events of the evening of December 21, 2012. (R. pp. 149-150, 153-154, 222-223, 282, 284, 287, 374).

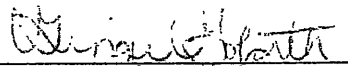
Finally, the cases of South Carolina Farm Bureau Mutual Ins. Co. v. Mumford, 299 S.C. 14, 382 S.E.2d 11 (1989) and State Farm Mutual Ins. Co. v. Moorer, 330 S.C. 46, 496 S.E.2d 875 (Ct. App. 1998), contrary to Appellants’ urging, are inapposite.

GEICO has never, and does not now, rely upon the fact that Mr. Duke’s acts were intentional to shield it from coverage. It makes no argument that intentional acts are excluded from its liability coverage. However, the mere fact that Mr. Duke’s acts were intentional does not mandate coverage either, as Appellants seems to urge. They still must meet the standard that the act – whether accidental or intentional – arose from the

ownership, maintenance, or use of a vehicle. As detailed fully herein, they did not meet this test, and cannot recover under the GEICO policy.

CONCLUSION

The trial court properly construed the facts of record in the light most favorable to the nonmoving parties, and found that they contain no genuine issue of material fact. There is no evidence of the legally-required causal connection between Mr. Duke's vehicle and the Harrelsons' alleged injuries. Mr. Duke's vehicle was parked and the entire altercation took place outside of the vehicle. GEICO submits that the trial court therefore properly granted summary judgment in its favor, and is entitled to judgment as a matter of law.



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October 26, 2017

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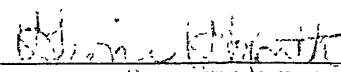
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OF WHOM:

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CERTIFICATE OF COMPLIANCE

Counsel certifies that Respondent Government Employees Insurance Company's Final Brief complies with Rule 211(b), SCACR.



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October 26, 2017

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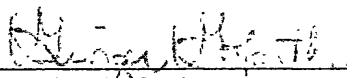
PROOF OF SERVICE

The undersigned hereby certifies that the Respondent, Government Employees Insurance Company's Final Brief and Designation of Matter to be Included in Record on Appeal was served upon all parties of record on October 26, 2017 by depositing copies of the same via process service and/or United States mail, postage affixed, to the following addresses:

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