THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

RECEIVED

NOV 16 2018

S.C. SUPREME COURT

Unpublished Opinion No. 2018-UP-317
Submitted June 1, 2018 – Filed July 11, 2018
Appellate Case No. 2017-000479

LEVI THOMAS BROWN

Petitioner,

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

Respondent.

APPENDIX

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Charleston, SC 29492-8144
Attorney for Respondent

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

RECEIVED
AUG 14 2017
SC Court of Appeals

Case No. 2016-CP-10-00363
Appellate Case No. 2017-000479

LEVI THOMAS BROWN

Appellant

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

Respondent.

RECORD ON APPEAL

GEORGE SINK, P.A. INJURY LAWYERS
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STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON)) LEVI THOMAS BROWN) Plaintiff,) vs.)) STATE FARM FIRE AND CASUALTY) INSURANCE COMPANY Defendant.)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.:2016-CP-10-00363 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney: Robert Treacy, Jr., Bar No. Address: George Sink, P.A. Injury Lawyers PO Box 63506 North Charleston, SC 29419-3506 Phone: (843) 569-1700 Fax (843) 569-1848 E-mail: rtreacy@sinklaw.com Other: ____	Defendant's Attorney: Timothy A. Domin Bar No: 65264 Address: CLAWSON and STAUBES, LLC 126 Seven Farms Drive, Suite 200 Charleston, South Carolina 29492-8144 Phone: (843) 577-2026 Fax: (843) 722-2867 E-mail: tdomin@clawsonandstaubes.com

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed:__ Court Reporter Needed: ☐YES/☐ NO

SECTION II: Motion/Order Type

☐Written motion attached
☒Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff /☒ Defendant — February 6, 2017 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☒ Other: Paid at Motion Hearing

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LEVI THOMAS BROWN,

Plaintiff,

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-00363

FILED
2017 FEB -7 PM 1:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

FINAL ORDER

This matter came before the court on January 6, 2017 on cross motions for summary judgment. The parties announced at the hearing that a written stipulation of fact had been reached. The parties agreed there were no disputes of material fact and their cross-motions for summary judgments should be heard as a non-jury trial on the merits.

This is a declaratory judgment case relating to an automobile insurance policy issued by the defendant State Farm Fire and Casualty Insurance Company and a shooting involving Levi Brown, the plaintiff-victim. Plaintiff and three friends were riding in a Cadillac Deville sedan owned by the mother of one of the passengers. The vehicle was insured by State Farm. At approximately 4:25 a.m., while the Cadillac Deville sedan was in the right hand eastbound lane of I-526, a gray/silver older model Dodge Durango came alongside of the Cadillac in one of the other eastbound lanes of the interstate. A black male with dreadlocked hair and a baseball hat was hanging out of the rear passenger side window of the Durango. This unknown

assailant opened fire on the Cadillac. One of those shots struck Levi Thomas Brown causing serious injury.

The attack was entirely unprovoked. The assailant vehicle did not hit the Cadillac. The assailant vehicle did not attempt to ram, block, or otherwise strike the Cadillac. The assailant vehicle continued on I-526 East as Levi Brown exited at Montague Road after being shot. The assailants were never found.

State Farm's policy provides coverage "for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured. The bodily injury and property damage must be caused by an accident that involves the operation, maintenance, or use of an uninsured motor vehicle." Similarly under S.C. Code 38-77-140, an insured is legally entitled to recover damages arising out of the ownership, maintenance or use of an uninsured vehicle.

The South Carolina Supreme Court cases of *Aytes* and *Bookert* have established a three-part test for determining whether an individual's injuries, as a result of an assault or shooting, arise out of "ownership, maintenance, or use" of an automobile so as to trigger automobile insurance coverage. The test is as follows:

1. There exists a causal connection between the [assailant's] vehicle and the injury; and
2. No act of independent significance breaks the causal link, and
3. The [assailant's] vehicle is being used for transportation at the time of the assault.

For there to be a "causal connection" in this context:

1. The [assailant's] vehicle must be an "active accessory" to the assault; and
2. Something less than proximate cause but more than mere site of the injury; and

3. That the "injury must be foreseeably identifiable with the normal use of the automobile."

State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998); *State Farm Mut. Auto. Ins. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999).

In *Bookert*, 523 S.E. 2d 181 (S.C. 2000), the victim (Bookert) and a group of his friends got into an altercation with two soldiers at Hardees. The victim and his friends left Hardees and went to McDonalds. The two soldiers used a vehicle to leave Hardees and picked up a third soldier. The three soldiers drove around McDonalds parking lot looking for the men from Hardees. Bookert was near the entrance when the soldiers yelled from the vehicle. The passenger had a handgun and another man was in the back with a shotgun. The vehicle jerked forward and the man with the shotgun fell and fired his shotgun. This blast did not strike Bookert, but the passenger then fired a handgun---while the vehicle was still moving forward--- and struck Bookert once in each leg. The assailants then escaped from the parking lot in the vehicle, except for the man with the shotgun who fled on foot. The Court of Appeals found the assailant vehicle acted as a "launching pad" for the assault, noting the use of the vehicle to circle the McDonalds to seek out their targets, to put the assailants into a position to shoot Bookert and for two assailants to quickly flee the scene. The Court of Appeals found there was coverage under Bookert's mother's uninsured motorist policy. The Supreme Court reversed---though it did not reverse the finding of the assailant vehicle an "active accessory", it found the gunshot injuries were not "foreseeably identifiable with the normal use of an automobile".

In *Wright v. North Area Taxi*, 523 S.E.2d 472 (S.C. Ct. App. 1999), the Court of Appeals of South Carolina gave further guidance with regards to the *Aytes* and *Bookert*

standard. The court held that a cab driver who was shot by a passenger inside the vehicle while the vehicle was moving was not entitled to uninsured motorist coverage. The court held that despite the fact the passenger's position in the vehicle gave him the opportunity to gain proximity shoot the driver from behind, the connection to the vehicle was lacking. The vehicle was not an active accessory. Furthermore, the Court concluded that even though taxi drivers face special dangers of robbery, a gunshot injury is not foreseeably identifiable within the normal use of a vehicle. (citing and quoting *Nationwide v. Brown*, 779 F.2d 984, 989 (4th Cir.1985)) ("An assault by an armed assailant upon the driver of a car is not the type of conduct that is foreseeably identifiable with the normal use of a motor vehicle.")

In *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984, 989 (4th Cir.1985), a pre-*Aytes* and pre-*Bookert* case, an estranged husband rammed the car of his wife. He then exited his vehicle and shot her in her car. The Fourth Circuit Court of Appeals found that the damages from the car collision would be covered, but concluded the fatal gun assault was not foreseeably identifiable within the normal use of a motor vehicle.

South Carolina District Court cases also reach the same conclusion that a gunshot injury is not foreseeably identifiable with the normal use of a vehicle.

In *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009), an old boyfriend pursued a woman for years, making unusual threats and following her. One day, he saw her driving to pick up a child at a school bus stop. He turned around and pulled next to her stopped vehicle at the bus stop. He called to her and when she looked, he shot her several times with a handgun. Using the framework established by the South Carolina Supreme Court in *Aytes* and *Bookert*, the District Court found that

the vehicle of the assailant was not an active accessory and the gunshot injuries were not within the foreseeable normal use of a motor vehicle.

Although plaintiff argues the gunshots would have been harder to make as a stationary person standing on the side of the road, it is not clear that an assailant could more easily hit a target while leaning out the window of a moving vehicle. Further, even if true, that single fact would not seem enough to satisfy the "active accessory" prong. There is no evidence that there was any road rage, or chasing, or use of the assailant vehicle to block the victim's vehicle, nor any evidence of physical contact.

Using the framework provided by *Aytes* and *Bookert*, it is this Court's conclusion the "causal connection" prong is not met. The vehicle does not appear to be an "active accessory." Furthermore, the gunshot injury of this type is not foreseeably identifiable within the normal use of the vehicle per in *Bookert, Wright v. North Area Taxi, Nationwide v Brown,* and *Holmes* v. Allstate.

State Farm also submits this matter should be excluded because the policy contains an exclusion "for an insured whose bodily injury results from the discharge of a firearm." Plaintiff argues this provision is invalid. Defendant counters that there is no requirement to insure firearm injuries or any injuries that do not arise out of the use of vehicle. Based on the facts of this case, there is no requirement that State Farm insure this gunshot injury and the exclusion adds further reason for the court to conclude that no coverage exists.

Based on the stipulated facts, the policy language, and the law of South Carolina as established by *Aytes* and *Bookert* and their progeny, this Court finds that the gunshot

injuries sustained by Levi Brown are not covered by the State Farm uninsured motorist policy on the Cadillac he was occupying.

W. Jeffery Young
Presiding Judge

Sumter, South Carolina
January 10, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO. 2016-CP-10-363
LEVI THOMAS BROWN, SUE MANUCY,	)	
Plaintiffs,	)	**SUMMONS**
-vs-	)	
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,	)	
Defendant.	)	

FILED
2016 JAN 25 AM 11:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: THE DEFENDANT ABOVE NAMED AND DEFENDANT'S ATTORNEY(S):

YOU WILL PLEASE TAKE NOTICE that you are hereby summoned and required to Answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the attorney for the Plaintiff listed below at his office at 7011 Rivers Avenue, Ste 105, North Charleston, South Carolina, 29406, within thirty (30) days after service hereof excluding the date of such service. IF YOU FAIL TO ANSWER THE COMPLAINT WITHIN THE TIME AFORESAID, PLAINTIFF WILL APPLY TO THE COURT FOR A JUDGMENT BY DEFAULT FOR THE RELIEF DEMANDED IN THE COMPLAINT AND ANY OTHER RELIEF DEEMED APPROPRIATE.

GEORGE SINK, P.A. INJURY LAWYERS

Robert E. Treacy, Jr. SC Bar#12102
Attorney for the Plaintiff
7011 Rivers Avenue, Suite 105
North Charleston, S.C. 29406
(843) 569-1700

North Charleston, SC
January 20 2016

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
	CASE NO: 2016-CP-10- 363
LEVI THOMAS BROWN,)	
Plaintiff,)	
v.)	COMPLAINT (NON-JURY) (DECLARATORY JUDGEMENT) (SPEEDY HEARING REQUESTED PURSUANT TO RULE 57)
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,)	
Defendant.)	

FILED
2016 JAN 25 AM 11:53
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: DEFENDANT AND DEFENDANT'S ATTORNEYS:

Plaintiff, Levi Thomas Brown, complaining of Defendant herein, would respectfully allege unto this Court as follows:

1. The Plaintiff, Levi Thomas Brown is a citizen and resident of the County of Charleston, State of South Carolina.

2. That the Defendant, State Farm Fire and Casualty Insurance Company, is an automobile insurance carrier registered and licensed to do business in the State of South Carolina and has agents for the transaction of business in the State of South Carolina, and specifically in Charleston County.

3. That this declaratory judgment action is brought pursuant to the South Carolina Declaratory Judgments Act; as such, it does not seek monetary damages, but a declaration from the Court as to the parties' respective rights and obligations under an automobile insurance policy issued by Defendant State Farm Fire and Casualty Insurance Company, S.C. Code Ann. Section 15-53-10 thru 140 (1976), and S.C.R.C.P. Rule 57. The total possible coverage provided

for Plaintiff's claims under the insurance policy in issue is $25,000. The amount in controversy in this action does not exceed the sum of $75,000.

4. That on or about February 10, 2013, Martha Fleming was the owner of a 2003 Cadillac (herein referred to as the "Vehicle")

5. That on or about February 10, 2013, Plaintiff Levi Thomas Brown was operating the Vehicle with permission.

6. Plaintiff Levi Thomas Brown was the operator of the vehicle owned by Martha Fleming, and by definition, in S.C. Code. Ann. Section 38-77, is an insured under claim no. 402 T 80 066.

7. That on or about February 10, 2013, while Levi Thomas Brown was the operator of the Vehicle he was shot in a drive-by shooting in Charleston, South Carolina (hereinafter referred to as the "Event").

8. That Levi Thomas Brown was seriously injured in the shooting.

9. That Plaintiff contends the aforesaid accident was caused by the negligent, grossly negligent, negligence *per se*, carelessness and recklessness of John Doe who was in a Durango vehicle when Plaintiff was shot by a drive-by shooter in the Durango vehicle who fled the scene and, by reason thereof, Plaintiff asserts a claim under the uninsured motorists coverage of the aforesaid policy.

10. At the time of the Event, State Farm Fire and Casualty Insurance Company had in effect an automobile insurance policy with a claim no. 402 T 80 066.

11. Said policy was delivered to Martha Fleming, in the State of South Carolina and provided uninsured coverage for John Doe's negligence.

12. The State Farm Fire and Casualty Insurance Company Policy listed the Vehicle as the vehicle covered thereunder.

13. The State Farm Fire and Casualty Insurance Policy provided, among other things, uninsured motorist (UM) coverage, subject to the terms and conditions included in the Policy and as allowed by law.

14. At the time of the Event, Plaintiff Levi Thomas Brown was an insured for purposes of UM coverage under the State Farm Fire and Casualty Insurance Company Policy.

15. As a result of the Event, Plaintiff Levi Thomas Brown made a claim (hereinafter referred to as "Claim") State Farm Fire and Casualty Insurance Company.

16. That Plaintiff Levi Thomas Brown's claim and this lawsuit is covered by the State Farm Fire and Casualty Insurance Company Policy UM coverage as Plaintiff Levi Thomas Brown's injuries arose out of the operation of the Vehicle.

17. Plaintiff requests the Court Order a speedy hearing of the action herein since this action will have a material bearing on the uninsured motorists claim which is being litigated as a result of the Event herein.

WHEREFORE, Plaintiff prays that this Court enter an Order that Plaintiff is entitled to uninsured motorists coverage under the insurance policy issued by State Farm Fire and Casualty Insurance Company, together with the costs of this action and for such other relief as this Court may deem just and proper.

Respectfully submitted,

GEORGE SINK, P.A. INJURY LAWYERS

Robert E. Treacy, Jr. SC Bar#12102
Attorney for the Plaintiff
7011 Rivers Avenue, Suite 105
North Charleston, S.C. 29406
(843) 569-1700

North Charleston, SC
January 20, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LEVI THOMAS BROWN,

Plaintiff,

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-00363

ANSWER
(Non-Jury)
(Declaratory Judgment)

FILED
2016 MAY -4 PM 3:00
JULIE J. ARMSTRONG
CLERK OF COURT

That the Defendant, above named, answering the Complaint of the Plaintiff, above named, alleges and says as follows:

1. The Defendant admits the allegations contained in paragraph 1 of the Complaint.

2. The Defendant admits the allegations contained in paragraph 2 of the Complaint.

3. The Defendant admits the allegations contained in paragraph 3 of the Complaint.

4. The Defendant admits the allegations contained in paragraph 4 of the Complaint.

5. The Defendant admits the allegations contained in paragraph 5 of the Complaint.

6. That the Defendant would deny the allegations of paragraph 6 of the Complaint as stated but would admit that as an occupant of the vehicle, Brown would qualify as a potential UM insured subject to the terms of the policy and South

Carolina law. That no coverage is provided, however, for a gunshot injury or any of the injuries in this case.

7. In response to paragraph 7 of the Complaint, upon information and belief, Defendant admits Levi Brown sustained a gunshot injury.

8. In response to paragraph 8 of the Complaint, Defendant admits Levi Brown sustained a serious injury.

9. In response to paragraph 9 of the Complaint, State Farm denies that the gunshot injury arises out of the use of an uninsured John Doe vehicle as required by South Carolina law as provided in the case law, statutes and policy.

10. In response to paragraph 10 of the Complaint, State Farm admits it had a policy on the Cadillac.

11. That State Farm denies the allegations of paragraph 11 as stated.

12. In response to paragraph 12 of the Complaint, State Farm admits the Cadillac was a covered vehicle as provided in the policy.

13. The Defendant admits the allegations contained in paragraph 13 of the Complaint.

14. In response to paragraph 14 of the Complaint, State Farm admits Levi Brown was an insured for UM purposes, but denies that coverage is applicable based on the law of South Carolina and the policy language.

15. The Defendant admits the allegations contained in paragraph 15 of the Complaint.

16. The Defendant denies the allegations contained in paragraph 16 of the Complaint.

17. That the allegations of paragraph 17 of the Complaint are conclusions of law which need not be admitted or denied. If said response is required, the same are denied.

18. That the Defendant denies each and every allegation not specifically admitted.

FOR A FIRST DEFENSE
(Injuries Do Not Arise Out Of Use Of An Uninsured Vehicle)

19. That the gunshot injury sustained by Brown does not arise out of the ownership, maintenance, use or operation of the alleged John Doe vehicle as provided under the case law of South Carolina including Aytes, Bookert and their progeny.

FOR A SECOND DEFENSE
(Exclusion)

20. That State Farm's policy does contain an exclusion for injuries sustained from a firearm which would be applicable.

Timothy A. Domin
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126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: tdomin@clawsonandstaubes.com
Attorney for State Farm Fire & Casualty Company

Charleston, South Carolina
April 29, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LEVI THOMAS BROWN,

Plaintiff,

vs.

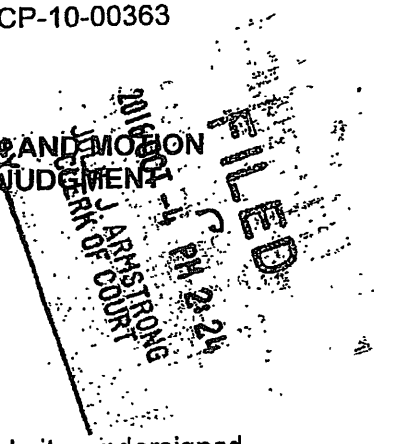
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-00363

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT



PLEASE TAKE NOTICE that the Defendant, by and through its undersigned attorney, shall, and hereby does, move this Honorable Court for an Order granting summary judgment in favor of the Defendant in the above-captioned matter upon the grounds that there is no dispute of material fact that the injuries in this case do not arise out of the use of an uninsured motor vehicle to the extent the actions fail to meet the multi-prong test of Aytes v. State Farm and State Farm v. Bookert and their progeny. In addition there is an exclusion for damages from the discharge of a firearm. This motion will be supported by the policy of insurance, attached, and the deposition of Levi Thomas Brown.

This Motion is based upon the pleadings in the within action, memorandum in support of this motion and attachments thereto, upon Rule 56 of the South Carolina Rules of Civil Procedure, and upon such additional law and argument as shall be appropriate.

(Signature on next page)

CLAWSON and STAUBES, LLC

Timothy A. Domin
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126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Phone: (843) 577-2026
Fax: (843) 722-2867
Email: tdomin@clawsonandstaubes.com
Attorney for Defendant

Charleston, South Carolina

September 29, 2016

StateFarm

Certified Policy Record

I, the undersigned, do hereby confirm that I am custodian of the records pertaining to the issuance of policies by State Farm Fire and Casualty Company.

I certify that the attached documents represent a true and accurate record of the terms and conditions of Policy Number 259 7225-B01-40C including any endorsements, if applicable, for the policy term(s) February 01, 2013 to May 19, 2013 and insuring Martha Fleming & Roy Walker of 100 Tweed Ct, Summerville, SC 29483-1743 based on available records.

The following endorsements are included:
6940A AMENDATORY ENDORSEMENT - EFFECTIVE DATE 02-01-12.

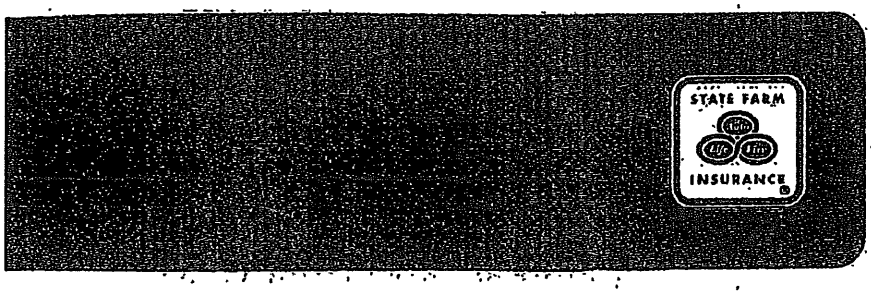
It is State Farm's business practice to print a new Declarations Page only when a policy issuance transaction such as a change of coverage occurs. Therefore, the included Declarations Page which was in effect at the time of loss will indicate the policy period of the last policy issuance transaction.

The policy was in effect on the loss date of February 10, 2013.

Michael N. Young
Michael N Young
Underwriting Team Manager
Date: 09/22/2016

1004516

2000 143551 200 03-21-2012



Please read the policy carefully. If there is an accident, contact your State Farm agent or one of our Claim Offices at once. (See "INSURED'S DUTIES" in this policy booklet.)

Georgia-South Carolina Office
11350 Johns Creek Parkway
Duluth, GA 30098-0001
Phone: (770) 418-5000

State Farm® Car Policy Booklet

South Carolina
Policy Form 9840A

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THIS POLICY

1. This policy consists of:
   a. the most recently issued Declarations Page;
   b. the policy booklet version shown on that Declarations Page; and
   c. any endorsements that apply, including those listed on that Declarations Page as well as those issued in connection with any subsequent renewal of this policy.
2. This policy contains all of the agreements between all named insureds who are shown on the Declarations Page and all applicants and:
   a. ***us***; and
   b. any of ***our*** agents.
3. ***We*** agree to provide insurance according to the terms of this policy:
   a. based on payment of premium for the coverages chosen; and
   b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET, & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:
      (1) The named insured shown on the Declarations Page is the sole owner of ***your car***.
      (2) Neither ***you*** nor any member of ***your*** household has, within the past three years, had:
         (a) vehicle insurance canceled or nonrenewed by an insurer; or
         (b) either:
            (i) a license to drive; or
            (ii) a vehicle registration suspended, revoked, or refused.

(3) *Your car* is used for pleasure and business.

4. All named insureds shown on the Declarations Page and all applicants agree by acceptance of this policy that:
   a. the statements in 3.b. above are made by such named insured or applicant and are true; and
   b. *we* provide this insurance on the basis those statements are true.
5. *Your* purchase of this policy may allow *you* to purchase certain coverages, coverage options, coverage deductibles, coverage limits, or coverage terms on other policies from the ***State Farm Companies***, subject to their applicable eligibility rules.

DEFINITIONS

We define certain words and phrases below for use throughout the policy. Each coverage includes additional definitions only for use with that coverage. These definitions apply to the singular, plural, possessive, and any other form of these words and phrases. Defined words and phrases are printed in boldface italics.

Bodily Injury means bodily injury to a ***person*** and sickness, disease, or death that results from it.

Car means a land motor vehicle with four or more wheels, designed for use primarily on public roads. *Car* does not include:

1. Any vehicle while located for use as a dwelling or other premises; or
2. A truck-tractor designed to pull any type of trailer.

Car Business means a business or job where the purpose is to sell, lease, rent, repair, service, modify, transport, store, or park land motor vehicles or any type of trailer.

Financial Responsibility Act means the Motor Vehicle Financial Responsibility Act of South Carolina.

Fungi means any type or form of fungus or fungi and includes:

1. Mold;
2. Mildew; and
3. Any of the following that are produced or released by fungi:
   a. Mycotoxins;
   b. Spores;
   c. Scents; or
   d. Byproducts.

Newly Acquired Car means a *car* newly ***owned by you.*** A *car* ceases to be a ***newly acquired car*** on the earlier of:

1. the effective date and time of a policy, including any binder, issued by ***us*** or any other company that describes the *car* as an insured vehicle; or
2. the end of the 14th calendar day immediately following the date the *car* is delivered to ***you.***

If a ***newly acquired car*** is not otherwise afforded comprehensive coverage or collision coverage by this or any other policy, then this policy will provide Comprehensive Coverage or Collision Coverage for that ***newly acquired car***, subject to a deductible of $500. Any coverage provided as a result of this paragraph will apply only until the end of the 5th calendar day immediately following the date the ***newly acquired car*** is delivered to ***you.***

Non-Owned Car means a *car* that is in the lawful possession of ***you*** or any ***resident relative*** and that neither:

1. is *owned by*:
   a. *you*;
   b. any *resident relative*;
   c. any other *person* who resides primarily in *your* household; or
   d. an employer of any *person* described in a., b., or c. above; nor
2. has been operated by, rented by, or in the possession of:
   a. *you*; or
   b. any *resident relative*

   during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or *loss*.

Occupying means in, on, entering, or exiting.

Our means the Company issuing this policy as shown on the Declarations Page.

Owned By means:

1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

Pedestrian means a *person* who is not *occupying*:

1. a motorized vehicle; or
2. a vehicle designed to be pulled by a motorized vehicle.

Person means a human being.

Private Passenger Car means:

1. a *car* of the private passenger type, other than a pickup truck, van, minivan, or sport utility vehicle, designed primarily to carry *persons* and their luggage; or
2. a pickup truck, van, minivan, or sport utility vehicle:
   a. that is not used for:
      (1) wholesale; or
      (2) retail pickup or delivery; and
   b. that has a Gross Vehicle Weight Rating of 10,000 pounds or less.

Resident Relative means a *person*, other than *you*, who resides primarily with the first *person* shown as a named insured on the Declarations Page and who is:

1. related to that named insured or his or her spouse by blood, marriage, or adoption, including an unmarried and unemancipated child of either who is away at school and otherwise maintains his or her primary residence with that named insured; or
2. a ward or a foster child of that named insured, his or her spouse, or a *person* described in 1. above.

State Farm Companies means one or more of the following:

1. State Farm Mutual Automobile Insurance Company;
2. State Farm Fire and Casualty Company; and
3. Subsidiaries or affiliates of either 1. or 2. above.

Temporary Substitute Car means a *car* that is in the lawful possession of the *person* operating it and that:

1. replaces *your car* for a short time while *your car* is out of use due to its:
   a. breakdown;
   b. repair;
   c. servicing;
   d. damage; or
   e. theft; and
2. neither *you* nor the *person* operating it own or have registered.

If a *car* qualifies as both a *non-owned car* and a *temporary substitute car*, then it is considered a *temporary substitute car* only.

Trailer means:

1. a trailer:
   a. designed to be pulled by a *private passenger car*;
   b. not designed to carry *persons*; and
   c. while not used as premises for office, store, or display purposes; or
2. a farm implement or farm wagon while being pulled on public roads by a *car*.

Us means the Company issuing this policy as shown on the Declarations Page.

We means the Company issuing this policy as shown on the Declarations Page.

You or *Your* means the named insured or named insureds shown on the Declarations Page. If a named insured shown on the Declarations Page is a *person*, then "*you*" or "*your*" includes the spouse of the first *person* shown as a named insured if the spouse resides primarily with that named insured.

Your Car means the vehicle shown under "YOUR CAR" on the Declarations Page. *Your car* does not include a vehicle that *you* no longer own or lease.

If a *car* is shown on the Declarations Page under "YOUR CAR", and *you* ask *us* to replace it with a *car* newly *owned by you*, then the *car* being replaced will continue to be considered *your car* until the earliest of:

1. the end of the 30th calendar day immediately following the date the *car* newly *owned by you* is delivered to *you*;
2. the date this policy is no longer in force; or
3. the date *you* no longer own or lease the *car* being replaced.

LIABILITY COVERAGE

This policy provides Liability Coverage if "A" is shown under "SYMBOLS" on the Declarations Page.

Additional Definition

Insured means:

1. *you* and *resident relatives* for:
   a. the ownership, maintenance, or use of:
      (1) *your car*;
      (2) a *newly acquired car*; or
      (3) a *trailer*; and
   b. the maintenance or use of:
      (1) a *non-owned car*; or
      (2) a *temporary substitute car*;
2. the first *person* shown as a named insured on the Declarations Page and that named insured's spouse who resides primarily with that named insured for the maintenance or use of a *car* that is *owned by*, or furnished by an employer to, a *person* who resides primarily in *your* household, but only if such *car* is neither *owned by*, nor furnished by an employer to, the first *person* shown as a named insured on the Declarations Page or that *person's* spouse;
3. any other *person* for his or her use of:
   a. *your car*;
   b. a *newly acquired car*;
   c. a *temporary substitute car*; or
   d. a *trailer* while attached to a *car* described in a., b., or c. above.

   Such vehicle must be used with the expressed or implied consent of *you*; and
4. any other *person* or organization vicariously liable for the use of a vehicle by an *insured* as defined in 1., 2., or 3. above, but only for such vicarious liability. This

provision applies only if the vehicle is neither ***owned by***, nor hired by, that other ***person*** or organization.

Insured does not include the United States of America or any of its agencies.

Insuring Agreement

1. ***We*** will pay:
   a. damages an ***insured*** becomes legally liable to pay because of:
      (1) ***bodily injury*** to others; and
      (2) damage to property
      caused by an accident that involves a vehicle for which that ***insured*** is provided Liability Coverage by this policy;
   b. attorney fees, for attorneys chosen by ***us***, to defend an ***insured*** who is sued for such damages; and
   c. court costs charged to an ***insured*** and resulting from that part of a lawsuit:
      (1) that seeks damages payable under this policy's Liability Coverage; and
      (2) against which ***we*** defend an ***insured*** with attorneys chosen by ***us***.

   We have no duty to pay attorney fees and court costs incurred after ***we*** deposit in court or pay the amount due under this policy's Liability Coverage.
2. ***We*** have the right to:
   a. investigate, negotiate, and settle any claim or lawsuit;
   b. defend an ***insured*** in any claim or lawsuit, with attorneys chosen by ***us***; and
   c. appeal any award or legal decision

   for damages payable under this policy's Liability Coverage.

Supplementary Payments

We will pay, in addition to the damages, fees, and costs described in the **Insuring Agreement** above, the interest, premiums, costs, and expenses listed below that result from such accident:

1. Interest on damages owed by the ***insured*** that accrues:
   a. before a judgment, where owed by law, but only on that part of the judgment ***we*** pay; and
   b. after a judgment. ***We*** will not pay interest on damages paid or payable by a party other than the ***insured*** or ***us***.

   We have no duty to pay interest that accrues after ***we*** deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage;
2. Premiums for bonds, provided by a company chosen by ***us***, required to appeal a decision in a lawsuit against an ***insured***. ***We*** have no duty to:
   a. pay for bonds that exceed this policy's applicable Liability Coverage limit;
   b. furnish or apply for any bonds; or
   c. pay premiums for bonds purchased after ***we*** deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage; and
3. The following costs and expenses if related to and incurred after a lawsuit has been filed against an ***insured***:
   a. Loss of wages or salary, but not other income, up to $200 for each day an ***insured*** attends, at ***our*** request:
      (1) an arbitration;
      (2) a mediation; or
      (3) a trial of a lawsuit; and
   b. Reasonable expenses incurred by an ***insured*** at ***our*** request other than loss of wages, salary, or other income.

The amount of any of the costs or expenses listed above that are incurred by an ***insured*** must be reported to ***us*** before ***we*** will pay such incurred costs or expenses.

Limits

1. The Liability Coverage limits for ***bodily injury*** are shown on the Declarations Page under "Liability Coverage – Bodily Injury Limits – Each Person, Each Accident."

   a. The limit shown under "Each Person" is the most *we* will pay for all damages resulting from ***bodily injury*** to any one ***person*** injured in any one accident. ***"Bodily injury*** to any one ***person"*** includes all injury and damages to other ***persons*** resulting from that ***bodily injury***, and all emotional distress resulting from that ***bodily injury*** sustained by other ***persons*** who do not sustain that ***bodily injury***.

   b. The limit shown under "Each Accident" is the most *we* will pay, subject to the limit for "Each Person", for all damages resulting from ***bodily injury*** to two or more ***persons*** injured in the same accident.

2. The Liability Coverage limit for damage to property is shown on the Declarations Page under "Liability Coverage – Property Damage Limit – Each Accident". The limit shown is the most *we* will pay for all damages resulting from damage to property in any one accident.

3. These Liability Coverage limits are the most *we* will pay regardless of the number of:

   a. ***insureds***;

   b. claims made;

   c. vehicles insured; or

   d. vehicles involved in the accident.

Nonduplication

We will not pay any damages or expenses under Liability Coverage that have already been paid under Uninsured Motor Vehicle Coverage of any policy issued by the ***State Farm Companies*** to ***you*** or any ***resident relative***.

Exclusions

THERE IS NO COVERAGE FOR AN ***INSURED***:

1. TO THE EXTENT THE LIABILITY COVERAGE LIMITS OF THIS POLICY EXCEED THE LIABILITY COVERAGE LIMITS REQUIRED BY THE ***FINANCIAL RESPONSIBILITY ACT*** IF SUCH ***INSURED*** INTENTIONALLY CAUSES ***BODILY INJURY*** OR DAMAGE TO PROPERTY;
2. OR FOR THAT ***INSURED'S*** INSURER FOR ANY OBLIGATION UNDER ANY TYPE OF WORKERS' COMPENSATION, DISABILITY, OR SIMILAR LAW;
3. FOR ***BODILY INJURY*** TO THAT ***INSURED'S*** EMPLOYEE WHICH ARISES OUT OF THAT EMPLOYEE'S EMPLOYMENT. This exclusion does not apply to that ***insured's*** household employee who is neither covered, nor required to be covered, under workers' compensation insurance;
4. FOR ***BODILY INJURY*** TO THAT ***INSURED'S*** FELLOW EMPLOYEE WHILE THE FELLOW EMPLOYEE IS IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT. This exclusion does not apply to ***you*** and ***resident relatives*** who are legally liable for ***bodily injury*** to fellow employees;
5. FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN ***INSURED***;
6. FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS BEING USED TO CARRY ***PERSONS*** FOR A CHARGE. This exclusion does not apply to the use of a ***private passenger car*** on a share-the-expense basis;
7. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH

THAT *INSURED'S* EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A *CAR BUSINESS*. This exclusion does not apply to:

a. *you*;

b. any *resident relative*; or

c. any agent, employee, or business partner of *you* or any *resident relative*; or

d. any *person* other than a *person* described in a., b., or c. above up to the liability coverage limits required by the *Financial Responsibility Act*;

while maintaining or using *your car*, a *newly acquired car*, a *temporary substitute car*, or a *trailer owned by you*;

8. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE. This exclusion does not apply up to the liability coverage limits required by the *Financial Responsibility Act* while an *insured* is valet parking *your car*, a *newly acquired car*, a *temporary substitute car*, or a *trailer owned by you*;

9. WHILE MAINTAINING OR USING ANY VEHICLE OTHER THAN *YOUR CAR*, A *NEWLY ACQUIRED CAR*, A *TEMPORARY SUBSTITUTE CAR*, OR A *TRAILER* IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a *private passenger car*;

10. FOR DAMAGE TO PROPERTY WHILE IT IS:

a. *OWNED BY*;

b. RENTED TO;

c. USED BY;

d. IN THE CARE OF; OR

e. TRANSPORTED BY

YOU, A *RESIDENT RELATIVE*, OR THE *PERSON* WHO IS LEGALLY LIABLE FOR THE DAMAGE. This exclusion does not apply to damage to a:

a. motor vehicle *owned by* the employer of *you* or any *resident relative* if such damage is caused by an *insured* while operating another motor vehicle;

b. residence while rented to or leased to an *insured*; or

c. private garage while rented to or leased to an *insured*;

11. FOR LIABILITY ASSUMED UNDER ANY CONTRACT OR AGREEMENT;

12. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION;

13. WHILE USING A *TRAILER* WITH A MOTOR VEHICLE IF THAT *INSURED* IS NOT PROVIDED LIABILITY COVERAGE BY THIS POLICY FOR THE USE OF THAT MOTOR VEHICLE;

14. FOR THE OWNERSHIP, MAINTENANCE, OR USE OF ANY VEHICLE WHILE IT IS:

a. OFF PUBLIC ROADS AND BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

This exclusion (14.) does not apply to *your car* up to the liability coverage limits required by the *Financial Responsibility Act*; OR

15. WHO IS AN EMPLOYEE OF THE UNITED STATES OF AMERICA OR ANY OF ITS AGENCIES, IF THE PROVISIONS OF THE FEDERAL TORT CLAIMS ACT APPLY.

If Other Liability Coverage Applies

1. If Liability Coverage provided by this policy and one or more other Car Policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same accident, then:
   a. the Liability Coverage limits of such policies will not be added together to determine the most that may be paid; and
   b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.
2. The Liability Coverage provided by this policy applies as primary coverage for the ownership, maintenance, or use of ***your car*** or a ***trailer*** attached to it.
   a. If:
      (1) this is the only Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** that provides Liability Coverage which applies to the accident as primary coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as primary coverage for the same accident,

      then ***we*** will pay the proportion of damages payable as primary that ***our*** applicable limit bears to the sum of ***our*** applicable limit and the limits of all other liability coverage that apply as primary coverage.
   b. If:
      (1) more than one Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** provides Liability Coverage which applies to the accident as primary coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as primary coverage for the same accident,

      then the ***State Farm Companies*** will pay the proportion of damages payable as primary that the maximum amount that may be paid by the ***State Farm Companies*** as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as primary coverage.
3. Except as provided in 2. above, the Liability Coverage provided by this policy applies as excess coverage.
   a. If:
      (1) this is the only Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** that provides Liability Coverage which applies to the accident as excess coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

      then ***we*** will pay the proportion of damages payable as excess that ***our*** applicable limit bears to the sum of ***our*** applicable limit and the limits of all other liability coverage that apply as excess coverage.
   b. If:
      (1) more than one Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** provides Liability Coverage which applies to the accident as excess coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

then the *State Farm Companies* will pay the proportion of damages payable as excess that the maximum amount that may be paid by the *State Farm Companies* as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as excess coverage.

Required Out-of-State Liability Coverage

If:

1. an *insured* is in another state of the United States of America, a territory or possession of the United States of America, the District of Columbia, or any province or territory of Canada, and as a nonresident becomes subject to its motor vehicle compulsory insurance law, financial responsibility law, or similar law; and
2. this policy does not provide at least the minimum liability coverage required by such law for such nonresident,

then this policy will be interpreted to provide the minimum liability coverage required by such law.

This provision does not apply to liability coverage required by law for motor carriers of passengers or motor carriers of property.

Financial Responsibility Certification

When this policy is certified under any law as proof of future financial responsibility, and while required during the policy period, this policy will comply with such law to the extent required.

PERSONAL INJURY PROTECTION COVERAGE

This policy provides Personal Injury Protection Coverage if "P" with a number beside it is shown under "SYMBOLS" on the Declarations Page. "P" with a number beside it is *your* "coverage symbol".

Check *your* coverage symbol with the Schedule in the provision titled **Limits** for the choice of coverage *you* made.

Additional Definitions

Insured means:

1. *you* and *resident relatives*:
   a. while *occupying* a *motor vehicle* other than a motorcycle; or
   b. if struck as a *pedestrian* by a *motor vehicle*; or
2. any other *person* while *occupying*:
   a. *your car*;
   b. a *newly acquired car*;
   c. a *temporary substitute car*; or
   d. a *trailer* while attached to a *car* described in a., b., or c. above.

   Such vehicle must be used with the expressed or implied consent of *you*.

Medical Expenses mean *reasonable expenses* for *medical services*.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the *bodily injury*;
2. rendered by a healthcare provider:
   a. who is licensed as a healthcare provider if a license is required by law; and
   b. within the legally authorized scope of that healthcare provider's practice;
3. commonly and customarily recognized throughout the medical profession and

within the United States of America as appropriate for the treatment of the ***bodily injury***;

4. primarily designed to serve a medical purpose;
5. not experimental; and
6. not for research purposes.

Motor Vehicle means a vehicle or trailer of a kind required to be registered under South Carolina law.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar ***medical services*** in the geographical area in which the charges were incurred;
2. The fee specified in any fee schedule:
   a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where ***medical services*** are provided; and
   b. as prescribed or authorized by the law of the state where ***medical services*** are provided;
3. The fees agreed to by both the ***insured's*** healthcare provider and ***us***; or
4. The fees agreed upon between the ***insured's*** healthcare provider and a third party when ***we*** have a contract with such third party.

Insuring Agreement

Medical Expenses and **Funeral Expenses** apply to all Personal Injury Protection Coverages. **Loss of Income** and **Essential Services Expenses** apply only to coverages with coverage symbol P1, P2, P3, P4, P5, P6, and P7.

1. **Medical Expenses**

   We will pay ***medical expenses*** incurred because of ***bodily injury*** that is sustained by an ***insured*** and caused by accident resulting from the maintenance or use of a ***motor vehicle*** as a vehicle if:
   a. that ***insured*** is first provided ***medical services*** within one year immediately following the date of the accident; and
   b. such ***medical expenses*** are for ***medical services*** that are provided within three years immediately following the date of the accident.
2. **Funeral Expenses**

   We will pay funeral expenses incurred for an ***insured*** who dies within three years immediately following the date of a ***motor vehicle*** accident if the death is a direct result of ***bodily injury*** sustained in such accident.
3. **Loss of Income**

   We will pay 85% of an ***insured's*** actual loss of earnings from work due to ***bodily injury*** that is sustained by an ***insured*** and caused by a ***motor vehicle*** accident. This applies only if the ***insured*** was receiving earnings from work at the time of the accident. The loss must be incurred within three years of the date of the accident and while the ***insured*** is living.
4. **Essential Services Expenses**

   We will pay reasonable expenses incurred for needed services the ***insured*** would have done for his or her family, but is unable to do because of ***bodily injury*** that is sustained by that ***insured*** and caused by a ***motor vehicle*** accident. This benefit applies only if the ***insured*** was not receiving earnings from work at the time of the accident. The expense must be incurred within three years of the date of the accident and while the ***insured*** is living.

Determining Medical Expenses

We have the right to:

1. obtain and use:
   a. utilization reviews;
   b. peer reviews; and
   c. medical bill reviews

   to determine if the incurred charges are ***medical expenses***;
2. use a medical examination of the ***insured*** to determine if:
   a. the ***bodily injury*** was caused by a ***motor vehicle*** accident; and
   b. the expenses incurred are ***medical expenses;*** and
3. enter into a contract with a third party that has an agreement with the ***insured's*** healthcare provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to:
   a. whether incurred charges are ***medical expenses***; or
   b. the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses

   then the disagreement will be resolved by arbitration upon written request of the ***insured*** or ***us***.
2. The arbitration will take place in the county in which the ***insured*** resides unless the parties agree to another location.

   The ***insured*** and ***we*** will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the ***insured*** or ***we*** may petition a court that has jurisdiction to select the third arbitrator.

   Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.
3. The arbitrators shall only decide whether incurred charges are ***medical expenses*** and the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.
4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:
   a. ***us***;
   b. the ***insured***;
   c. any assignee of the ***insured***; and
   d. any ***person*** or organization with whom the ***insured*** expressly or impliedly contracts for ***medical services***, funeral services, or essential services.
5. Subject to 1., 2., 3., and 4. above, state court rules governing procedure and admission of evidence will be used.
6. *We* do not waive any of ***our*** rights by submitting to arbitration.

Limits

1. The most ***we*** will pay is the amount shown under "Aggregate Limit" in the **Schedule** for ***your*** coverage symbol. This limit is the most ***we*** will pay for all loss and expense combined, incurred by or on behalf of any one ***insured*** as a result of any one accident, regardless of the number of:
   a. insureds;
   b. claims made;
   c. vehicles insured; or
   d. vehicles involved in the accident.
2. Subject to the aggregate limit shown in the **Schedule** for ***your*** coverage symbol, the most ***we*** will pay for funeral expenses incurred for any one ***insured*** is $3,000.

3. **Schedule**

Coverage Symbol	Medical Expenses	Funeral Expenses	Loss of Income	Essential Services Expenses	Aggregate Limit
P1	Yes	Yes	Yes	Yes	$1,000
P2	Yes	Yes	Yes	Yes	$1,500
P3	Yes	Yes	Yes	Yes	$2,000
P4	Yes	Yes	Yes	Yes	$2,500
P5	Yes	Yes	Yes	Yes	$5,000
P6	Yes	Yes	Yes	Yes	$10,000
P7	Yes	Yes	Yes	Yes	$25,000
P8	Yes	Yes	No	No	$1,000
P9	Yes	Yes	No	No	$1,500
P10	Yes	Yes	No	No	$2,000
P11	Yes	Yes	No	No	$2,500
P12	Yes	Yes	No	No	$5,000
P13	Yes	Yes	No	No	$10,000
P14	Yes	Yes	No	No	$25,000

Exclusions

THERE IS NO COVERAGE FOR AN *INSURED*:

1. WHO INTENTIONALLY CAUSES AN ACCIDENT WHICH RESULTS IN THAT *INSURED'S BODILY INJURY*;
2. WHILE VOLUNTARILY *OCCUPYING* A *MOTOR VEHICLE* KNOWN BY THAT *PERSON* TO BE STOLEN;
3. WHILE COMMITTING A FELONY;
4. WHILE ATTEMPTING TO ELUDE A POLICE OFFICER;
5. WHILE *OCCUPYING*, USING, OR MAINTAINING A MOTORCYCLE;
6. WHO IS EITHER *OCCUPYING* OR STRUCK AS A *PEDESTRIAN* BY A VEHICLE, *OWNED BY* THAT *INSURED*, *YOU*, OR ANY *RESIDENT RELATIVE* IF IT IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*;
7. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
8. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS BEING USED TO CARRY *PERSONS* FOR A CHARGE. This exclusion does not apply to:
   a. the use of a *private passenger car* on a share-the-expense basis; or
   b. an *insured* while *occupying* a *non-owned car* as a passenger;
9. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT *INSURED'S* EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A *CAR BUSINESS*. This exclusion does not apply to:
   a. *you*;
   b. any *resident relative*; or
   c. any agent, employee, or business partner of a. or b. above;

   while maintaining or using *your car*, a *newly acquired car*, a *temporary substitute car*, or a *trailer owned by you*;

10. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE;

11. WHILE MAINTAINING OR USING A *NON-OWNED CAR* IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a *private passenger car*;

12. WHO IS EITHER *OCCUPYING* OR STRUCK AS A *PEDESTRIAN* BY A VEHICLE THAT:
    a. IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS;
    b. RUNS ON RAILS OR CRAWLER-TREADS; OR
    c. IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES;

13. WHOSE *BODILY INJURY* RESULTS FROM WAR OF ANY KIND;

14. WHOSE *BODILY INJURY* RESULTS FROM:
    a. NUCLEAR REACTION;
    b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
    c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

15. WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIREARM;

16. WHOSE *BODILY INJURY* RESULTS FROM EXPOSURE TO *FUNGI*; OR

17. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS:
    a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
    b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (17.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Personal Injury Protection Coverage or Similar Vehicle Insurance Applies

1. An *insured* shall not recover for the same expense or loss under both this coverage and other similar vehicle insurance.

2. If Personal Injury Protection Coverage is provided by this policy and one or more other vehicle policies issued to *you* or any *resident relative* by the *State Farm Companies* apply to the same *bodily injury*, then:
    a. the Personal Injury Protection Coverage limits of such policies shall not be added together to determine the most that may be paid; and
    b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. *We* may choose one or more policies from which to make payment.

3. The Personal Injury Protection Coverage provided by this policy applies as primary coverage for an *insured* who sustains *bodily injury* while *occupying your car* or a *trailer* attached to it.
    a. If:
        (1) this is the only vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and
        (2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as primary coverage for the same accident,

then *we* will pay the proportion of expenses or loss payable as primary that *our* applicable limit bears to the sum of *our* applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

b. If:

(1) more than one vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as primary coverage for the same accident,

then the *State Farm Companies* will pay the proportion of expenses or loss payable as primary that the maximum amount that may be paid by the *State Farm Companies* as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

4. Except as provided in 3. above, the Personal Injury Protection Coverage provided by this policy applies as excess coverage, but only in the amount by which the limits of this coverage exceed the primary coverage.

a. If:

(1) this is the only vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as excess coverage for the same accident,

then *we* will pay the proportion of expenses or loss payable as excess that *our* applicable limit bears to the sum of *our* applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

b. If:

(1) more than one vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as excess coverage for the same accident,

then the *State Farm Companies* will pay the proportion of expenses or loss payable as excess that the maximum amount that may be paid by the *State Farm Companies* as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

Workers' Compensation Coordination

Any Personal Injury Protection Coverage provided by this policy applies as excess over any benefits recovered under any workers' compensation law or any other similar law.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;

3. A parent or guardian of the ***insured***, if the ***insured*** is a minor or an incompetent ***person***;
4. A ***person*** authorized by law to receive such payment; or
5. Any ***person*** or organization that provides the ***medical services***, funeral services, or other services payable under this coverage.

MEDICAL PAYMENTS COVERAGE

This policy provides Medical Payments Coverage if "C" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. ***you*** and ***resident relatives***:
   a. while ***occupying***:
      (1) ***your car***;
      (2) a ***newly acquired car***;
      (3) a ***temporary substitute car***;
      (4) a ***non-owned car***; or
      (5) a ***trailer*** while attached to a ***car*** described in (1), (2), (3), or (4) above; or
   b. if struck as a ***pedestrian*** by a motor vehicle or any type of trailer; and
2. any other ***person*** while ***occupying***:
   a. ***your car***;
   b. a ***newly acquired car***;
   c. a ***temporary substitute car***; or
   d. a ***trailer*** while attached to a ***car*** described in a., b., or c. above.

   Such vehicle must be used with the expressed or implied consent of ***you***.

Medical Expenses mean ***reasonable expenses*** for ***medical services***.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the ***bodily injury***;
2. rendered by a healthcare provider:
   a. who is licensed as a healthcare provider if a license is required by law; and
   b. within the legally authorized scope of that healthcare provider's practice;
3. commonly and customarily recognized throughout the medical profession and within the United States of America as appropriate for the treatment of the ***bodily injury***;
4. primarily designed to serve a medical purpose;
5. not experimental; and
6. not for research purposes.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar ***medical services*** in the geographical area in which the charges were incurred;
2. The fee specified in any fee schedule:
   a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where ***medical services*** are provided; and
   b. as prescribed or authorized by the law of the state where ***medical services*** are provided;
3. The fees agreed to by both the ***insured's*** healthcare provider and ***us***; or

4. The fees agreed upon between the ***insured's*** healthcare provider and a third party when ***we*** have a contract with such third party.

Insuring Agreement

We will pay:

1. ***medical expenses*** incurred because of ***bodily injury*** that is sustained by an ***insured*** and caused by accident resulting from the maintenance or use of a motor vehicle as a vehicle if:
   a. that ***insured*** is first provided ***medical services*** within one year immediately following the date of the accident; and
   b. such ***medical expenses*** are for ***medical services*** that are provided within three years immediately following the date of the accident; and
2. funeral expenses incurred for an ***insured*** who dies within three years immediately following the date of a motor vehicle accident if the death is a direct result of ***bodily injury*** sustained in such accident.

Determining Medical Expenses

We have the right to:

1. obtain and use:
   a. utilization reviews;
   b. peer reviews; and
   c. medical bill reviews

   to determine if the incurred charges are ***medical expenses***;
2. use a medical examination of the ***insured*** to determine if:
   a. the ***bodily injury*** was caused by a motor vehicle accident; and
   b. the expenses incurred are ***medical expenses***; and
3. enter into a contract with a third party that has an agreement with the ***insured's*** healthcare provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to whether incurred charges are ***medical expenses***, then the disagreement will be resolved by arbitration upon written request of the ***insured*** or ***us***.
2. The arbitration will take place in the county in which the ***insured*** resides unless the parties agree to another location.

   The ***insured*** and ***we*** will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the ***insured*** or ***we*** may petition a court that has jurisdiction to select the third arbitrator.

   Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.
3. The arbitrators shall only decide whether incurred charges are ***medical expenses***. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.
4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:
   a. ***us***;
   b. the ***insured***;
   c. any assignee of the ***insured***; and
   d. any ***person*** or organization with whom the ***insured*** expressly or impliedly contracts for ***medical services***.
5. Subject to 1., 2., 3., and 4. above, state court rules governing procedure and admission of evidence will be used.
6. ***We*** do not waive any of ***our*** rights by submitting to arbitration.

Limit

The Medical Payments Coverage limit is shown on the Declarations Page under "Medical Payments Coverage – Limit – Each Person". This limit is the most *we* will pay for the *medical expenses* and funeral expenses combined, incurred by or on behalf of any one *insured* as a result of any one accident, regardless of the number of:

1. *insureds*;
2. claims made;
3. vehicles insured; or
4. vehicles involved in the accident.

Subject to the limit shown on the Declarations Page, the most *we* will pay for funeral expenses incurred for any one *insured* is $3,000.

Exclusions

THERE IS NO COVERAGE FOR AN *INSURED*:

1. WHO IS STRUCK AS A *PEDESTRIAN* BY A MOTOR VEHICLE, *OWNED BY* THAT *INSURED* OR *YOU*, IF IT IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*;
2. IF ANY WORKERS' COMPENSATION LAW OR ANY SIMILAR LAW APPLIES TO THAT *INSURED'S BODILY INJURY*;
3. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
4. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS BEING USED TO CARRY *PERSONS* FOR A CHARGE. This exclusion does not apply to:
   a. the use of a *private passenger car* on a share-the-expense basis; or
   b. an *insured* while *occupying* a *non-owned car* as a passenger;
5. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT *INSURED'S* EMPLOYMENT IN THE *CAR BUSINESS*. This exclusion does not apply to:
   a. *you*;
   b. any *resident relative*; or
   c. any agent, employee, or business partner of a. or b. above

   while maintaining or using *your car*, a *newly acquired car*, a *temporary substitute car*, or a *trailer owned by you*;
6. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE;
7. WHILE MAINTAINING OR USING A *NON-OWNED CAR* IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a *private passenger car*;
8. WHO IS EITHER *OCCUPYING* OR STRUCK AS A *PEDESTRIAN* BY A VEHICLE THAT IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES;
9. WHO IS STRUCK AS A *PEDESTRIAN* BY A VEHICLE THAT:
   a. IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
   b. RUNS ON RAILS OR CRAWLER-TREADS;
10. WHOSE *BODILY INJURY* RESULTS FROM WAR OF ANY KIND;
11. WHOSE *BODILY INJURY* RESULTS FROM:
    a. NUCLEAR REACTION;
    b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
    c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

12. WHOSE ***BODILY INJURY*** RESULTS FROM THE DISCHARGE OF A FIREARM;

13. WHOSE ***BODILY INJURY*** RESULTS FROM EXPOSURE TO ***FUNGI***; OR

14. WHO IS ***OCCUPYING*** A VEHICLE WHILE IT IS:

    a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

    b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Medical Payments Coverage or Similar Vehicle Insurance Applies

1. An ***insured*** shall not recover for the same ***medical expenses*** or funeral expenses under both this coverage and other medical payments coverage or similar vehicle insurance.

2. If Medical Payments Coverage provided by this policy and one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same ***bodily injury***, then:

    a. the Medical Payments Coverage limits of such policies shall not be added together to determine the most that may be paid; and

    b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

3. If other medical payments coverage, personal injury protection coverage, or similar vehicle insurance applies, then the Medical Payments Coverage provided by this policy applies as excess coverage.

    a. If:

        (1) this is the only vehicle policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** that provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

        (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

    then ***we*** will pay the proportion of ***medical expenses*** and funeral expenses payable as excess that ***our*** applicable limit bears to the sum of ***our*** applicable limit and the limits of all other medical payments coverage or similar vehicle insurance that apply as excess coverage.

    b. If:

        (1) more than one vehicle policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

        (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

    then the ***State Farm Companies*** will pay the proportion of ***medical expenses*** and funeral expenses payable as excess that the maximum amount that may be paid by the ***State Farm Companies*** as determined in 2. above

bears to the sum of such amount and the limits of all other medical payments coverage or similar vehicle insurance that apply as excess coverage.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The ***insured***;
2. The ***insured's*** surviving spouse;
3. A parent or guardian of the ***insured***, if the ***insured*** is a minor or an incompetent ***person***;
4. A ***person*** authorized by law to receive such payment; or
5. Any ***person*** or organization that provides the ***medical services*** or funeral services.

UNINSURED MOTOR VEHICLE COVERAGE

This policy provides Uninsured Motor Vehicle Coverage if "U" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. ***you***;
2. ***resident relatives***;
3. any other ***person*** while ***occupying*** or using:
   a. ***your car***;
   b. a ***newly acquired car***; or
   c. a ***temporary substitute car***;

   with the expressed or implied consent of ***you***; and
4. any ***person*** to the extent he or she may recover damages under a state wrongful death statute because of the death of an ***insured*** under 1., 2., or 3. above.

Motor Vehicle means a self-propelled vehicle or trailer designed for use on public roads, but does not include tractor engines, road rollers, farm trailers, tractor cranes, power shovels, well drillers, or electric trolleys.

Property Damage means damage to property of the ***insured***.

Uninsured Motor Vehicle means a ***motor vehicle***:

1. the ownership, maintenance, and use of which is:
   a. not insured or bonded for bodily injury and property damage liability at the time of the accident; or
   b. insured or bonded for bodily injury and property damage liability at the time of the accident; but
      (1) the limits are less than required by the ***Financial Responsibility Act***;
      (2) the insuring company:
         (a) denies that its policy provides liability coverage for damages that result from the accident; or
         (b) is or becomes insolvent; or
      (3) a cause of action for the ***bodily injury*** or ***property damage*** is barred by the South Carolina Tort Claims Act; or
2. the owner and driver of which remain unknown, but only if:
   a. the ***bodily injury*** or ***property damage*** was caused by physical contact with the unknown vehicle, or the accident was witnessed by someone other than the owner or driver of the insured vehicle. The witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit; and

b. the *insured* was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

Uninsured Motor Vehicle does not include a motor vehicle *owned by*:

1. a self-insurer in accordance with the applicable provisions of law; or
2. the State or any of its political subdivisions when the vehicle is operated by a *person* with proper authorization.

Insuring Agreement

We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to recover from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* and *property damage* must be caused by an accident that involves the operation, maintenance, or use of an *uninsured motor vehicle*.

Our Right to Defend

We have the right to appear and defend in the name of the owner and driver of the *uninsured motor vehicle* on the issues of legal liability of, and the damages owed by, such owner or driver.

Limits

1. The Uninsured Motor Vehicle Coverage limits for *bodily injury* are shown on the Declarations Page under "Uninsured Motor Vehicle Coverage – Bodily Injury Limits – Each Person, Each Accident".
   a. The most *we* will pay for all damages resulting from *bodily injury* to any one *person* injured in any one accident is the lesser of:
      (1) the amount of all damages resulting from that *bodily injury* reduced by the sum of all payments for damages resulting from that *bodily injury* made by or on behalf of any *person* or organization who is or may be held legally liable for that *bodily injury*; or
      (2) the limit shown under "Each Person".

      "*Bodily injury* to any one *person*" includes all injury and damages to other *persons* resulting from that *bodily injury*, and all emotional distress resulting from that *bodily injury* sustained by other *persons* who do not sustain that *bodily injury*.
   b. Subject to a. above, the most *we* will pay for all damages resulting from *bodily injury* to two or more *insureds* injured in the same accident is the limit shown under "Each Accident".
2. The Uninsured Motor Vehicle Coverage limit for *property damage* is shown on the Declarations Page under "Uninsured Motor Vehicle Coverage – Property Damage Limit – Each Accident". The most *we* will pay for *property damage* is the lesser of:
   a. the amount of *property damage* reduced by the sum of all payments made by or on behalf of any *person* or organization who is or may be held legally liable for that *property damage*; or
   b. the limit shown under "Each Accident".
3. These Uninsured Motor Vehicle Coverage limits are the most *we* will pay regardless of the number of:
   a. *insureds*;
   b. claims made;
   c. vehicles insured; or
   d. vehicles involved in the accident.

Nonduplication

We will not pay under Uninsured Motor Vehicle Coverage any damages:

1. that have already been paid to or for the *insured*:
   a. by or on behalf of any *person* or organization who is or may be held legally liable for the *bodily injury* to the *insured*; or

b. for *bodily injury* under Liability Coverage of any policy issued by the *State Farm Companies* to *you* or any *resident relative*;

2. that:
   a. have already been paid;
   b. could have been paid; or
   c. could be paid

   to or for the *insured* under any workers' compensation law, disability benefits law, or similar law; or

3. that are *property damage* paid or payable under any policy of property insurance.

Exclusions

THERE IS NO COVERAGE:

1. FOR AN *INSURED* WHO, WITHOUT *OUR* WRITTEN CONSENT, SETTLES WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* OR *PROPERTY DAMAGE* AND THEREBY IMPAIRS *OUR* RIGHT TO RECOVER *OUR* PAYMENTS;
2. TO THE EXTENT THE UNINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE *FINANCIAL RESPONSIBILITY ACT*:
   a. FOR AN *INSURED* WHO SUSTAINS *BODILY INJURY* WHILE *OCCUPYING* A MOTOR VEHICLE *OWNED BY YOU* OR ANY *RESIDENT RELATIVE* IF:
      (1) THE MOTOR VEHICLE IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*; AND
      (2) IT WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;
   b. IF THE *UNINSURED MOTOR VEHICLE* IS *OWNED BY YOU* OR ANY *RESIDENT RELATIVE*; OR
   c. FOR *PROPERTY DAMAGE*:
      (1) TO A MOTOR VEHICLE; OR
      (2) IN A MOTOR VEHICLE *OWNED BY YOU* OR ANY *RESIDENT RELATIVE* IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;
3. FOR *PROPERTY DAMAGE* THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF *YOUR CAR* OR A *NEWLY ACQUIRED CAR*;
4. FOR AN *INSURED* WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIREARM;
5. TO THE EXTENT IT BENEFITS:
   a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;
   b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR
   c. ANY PROPERTY INSURER;
6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION; OR
7. FOR THE FIRST $200 OF *PROPERTY DAMAGE* SUSTAINED BY EACH *INSURED* IN EACH ACCIDENT.

If Other Uninsured Motor Vehicle Coverage Applies

1. The Uninsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an *insured* who sustains *bodily injury* or *property damage* while *occupying your car.*

2. Except as provided in item 1. above, the Uninsured Motor Vehicle Coverage provided by this policy applies as excess coverage.

3. If:

   a. *you* or any *resident relative* sustains *bodily injury* or *property damage*:

      (1) while *occupying* a motor vehicle not *owned by you* or any *resident relative*; or

      (2) while not *occupying* a motor vehicle; and

   b. Uninsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to *you* or any *resident relative* by the *State Farm Companies* apply to the same *bodily injury* or *property damage*, then

   the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. *We* may choose one or more policies from which to make payment.

4. If *you* or any *resident relative* sustains *bodily injury* or *property damage* while *occupying* a motor vehicle other than *your car* that is *owned by you* or any *resident relative*, then this coverage applies only to the extent of the uninsured motor vehicle coverage applicable to the motor vehicle that the *insured* was *occupying*.

   However, if the motor vehicle that the *insured* was *occupying* was not insured for uninsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies combined that are issued to *you* or any *resident relative* by the *State Farm Companies* is the minimum limits required by the *Financial Responsibility Act*. *We* may choose one or more policies from which to make payment.

5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources provide uninsured motor vehicle coverage for the same damages on a:

   a. primary basis, then *we* will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as primary coverage; or

   b. excess basis, then *we* will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as excess coverage.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;
3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent *person*; or
4. A *person* authorized by law to receive such payment.

UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "W" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. ***you***;
2. ***resident relatives***;
3. any other ***person*** while ***occupying*** or using:
   a. ***your car***;
   b. a ***newly acquired car***; or
   c. a ***temporary substitute car***;

   with the expressed or implied consent of ***you***; and
4. any ***person*** to the extent he or she may recover damages under a state wrongful death statute because of the death of an ***insured*** under 1., 2., or 3. above.

Motor Vehicle means a self-propelled vehicle or trailer designed for use on public roads, but does not include tractor engines, road rollers, farm trailers, tractor cranes, power shovels, well drillers, or electric trolleys.

Property Damage means damage to property of the ***insured***.

Underinsured Motor Vehicle means a ***motor vehicle*** the ownership, maintenance, and use of which is either:

1. insured or bonded for bodily injury and property damage liability at the time of the accident; or
2. self-insured under any motor vehicle financial responsibility law, any motor carrier law, or any similar law

in an amount that is at least equal to the amount required by the ***Financial Responsibility Act*** and:

1. the amount of the insurance, bonds, and self-insurance from all sources is less than the amount of the ***insured's*** damages; or
2. the ***insured's*** damages exceed any damages cap or limitation imposed by statute.

Underinsured Motor Vehicle does not include a motor vehicle while located for use as a dwelling or other premises.

Insuring Agreement

We will pay damages for ***bodily injury*** and ***property damage*** an ***insured*** is legally entitled to recover from the owner or driver of an ***underinsured motor vehicle***. The ***bodily injury*** must be sustained by an ***insured***. The ***bodily injury*** and ***property damage*** must be caused by an accident that involves the operation, maintenance, or use of an ***underinsured motor vehicle***.

We will pay only if all bodily injury and property damage liability bonds, policies, and self-insurance plans that apply to the ***insured's bodily injury*** or ***property damage*** have been:

1. used up by payment of judgments or settlements; or
2. paid to the extent required by any damages cap or limitation imposed by statute.

Our Right to Defend

We have the right to appear and defend in the name of the owner and driver of the ***underinsured motor vehicle*** on the issues of legal liability of, and the damages owed by, such owner or driver.

Limits

1. The Underinsured Motor Vehicle Coverage limits are shown on the Declarations Page under "Underinsured Motor Vehicle Coverage – Bodily Injury Limits – Each Person, Each Accident".
   a. The most ***we*** will pay for all damages resulting from ***bodily injury*** to any one ***person*** injured in any one accident is the lesser of:
      (1) the amount of all damages resulting from that ***bodily injury*** reduced by the sum of all payments for damages resulting from that

bodily injury made by or on behalf of any ***person*** or organization who is or may be held legally liable for that ***bodily injury***; or

(2) the limit shown under "Each Person".

"Bodily injury to any one ***person"*** includes all injury and damages to other ***persons*** resulting from that ***bodily injury,*** and all emotional distress resulting from that ***bodily injury*** sustained by other ***persons*** who do not sustain that ***bodily injury.***

b. Subject to a. above, the most ***we*** will pay for all damages resulting from ***bodily injury*** to two or more ***insureds*** injured in the same accident is the limit shown under "Each Accident".

2. The Underinsured Motor Vehicle Coverage limit for ***property damage*** is shown on the Declarations Page under "Underinsured Motor Vehicle Coverage – Property Damage Limit – Each Accident". The most ***we*** will pay for ***property damage*** is the lesser of:
   a. the amount of ***property damage*** reduced by the sum of all payments made by or on behalf of any ***person*** or organization who is or may be held legally liable for that ***property damage***; or
   b. the limit shown under "Each Accident".
3. These Underinsured Motor Vehicle Coverage limits are the most ***we*** will pay regardless of the number of:
   a. ***insureds***;
   b. claims made;
   c. vehicles insured; or
   d. vehicles involved in the accident.

Nonduplication

We will not pay under Underinsured Motor Vehicle Coverage any damages:

1. that have already been paid to or for the ***insured***:
   a. by or on behalf of any ***person*** or organization who is or may be held legally liable for the ***bodily injury*** to the ***insured***; or
   b. for ***bodily injury*** under Liability Coverage of any policy issued by the ***State Farm Companies*** to ***you*** or any ***resident relative***;
2. that:
   a. have already been paid;
   b. could have been paid; or
   c. could be paid

   to or for the ***insured*** under any workers' compensation law, disability benefits law, or similar law; or
3. that are ***property damage*** paid or payable under any policy of property insurance.

Exclusions

THERE IS NO COVERAGE:

1. FOR AN ***INSURED*** WHO, WITHOUT ***OUR*** WRITTEN CONSENT, SETTLES WITH ANY ***PERSON*** OR ORGANIZATION WHO MAY BE LIABLE FOR THE ***BODILY INJURY***, OR ***PROPERTY DAMAGE*** AND THEREBY IMPAIRS ***OUR*** RIGHT TO RECOVER ***OUR*** PAYMENTS;
2. TO THE EXTENT THE UNDERINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE ***FINANCIAL RESPONSIBILITY ACT***:
   a. FOR AN ***INSURED*** WHO SUSTAINS ***BODILY INJURY*** WHILE ***OCCUPYING*** A MOTOR VEHICLE ***OWNED BY YOU*** OR ANY ***RESIDENT RELATIVE*** IF:
      (1) THE MOTOR VEHICLE IS NOT ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR***; AND
      (2) IT WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE

COVERAGE AT THE TIME OF THE ACCIDENT;

b. IF THE ***UNDERINSURED MOTOR VEHICLE*** IS ***OWNED BY YOU*** OR ANY ***RESIDENT RELATIVE***; OR

c. FOR ***PROPERTY DAMAGE***:

(1) TO A MOTOR VEHICLE; OR

(2) IN A MOTOR VEHICLE

OWNED BY YOU OR ANY ***RESIDENT RELATIVE*** IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;

3. FOR ***PROPERTY DAMAGE*** THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR***;

4. FOR AN ***INSURED*** WHOSE ***BODILY INJURY*** RESULTS FROM THE DISCHARGE OF A FIREARM;

5. TO THE EXTENT IT BENEFITS:

a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;

b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR

c. ANY PROPERTY INSURER; OR

6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION.

If Other Underinsured Motor Vehicle Coverage Applies

1. The Underinsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an ***insured*** who sustain ***bodily injury*** or ***property damage*** while ***occupying your car.***

2. Except as provided in item 1. above, the Underinsured Motor Vehicle Coverage provided by this policy applies as excess coverage.

3. If:

a. ***you*** or any ***resident relative*** sustains ***bodily injury*** or ***property damage***:

(1) while ***occupying*** a motor vehicle not ***owned by you*** or any ***resident relative***; or

(2) while not ***occupying*** a motor vehicle; and

b. Underinsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same ***bodily injury*** or ***property damage***, then

the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

4. If ***you*** or any ***resident relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle other than ***your car*** that is ***owned by you*** or any ***resident relative***, then this coverage applies only to the extent of the underinsured motor vehicle coverage applicable to the motor vehicle that the ***insured*** was ***occupying***.

However, if the motor vehicle that the ***insured*** was ***occupying*** was not insured for underinsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies combined that are issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** is the minimum limits required by the ***Financial Responsibility Act***. ***We*** may choose one or more policies from which to make payment.

5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources

provide underinsured motor vehicle coverage for the same damages on a:

a. primary basis, then *we* will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as primary coverage; or

b. excess basis, then *we* will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as excess coverage.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;
3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent *person*; or
4. A *person* authorized by law to receive such payment.

PHYSICAL DAMAGE COVERAGES

The physical damage coverages are Comprehensive Coverage, Collision Coverage, Emergency Road Service Coverage, and Car Rental and Travel Expenses Coverage.

This policy provides:

1. Comprehensive Coverage if "D";
2. Collision Coverage if "G";
3. Emergency Road Service Coverage if "H";
4. Car Rental and Travel Expenses Coverage if "RI"

is shown under "SYMBOLS" on the Declarations Page.

If a deductible applies to Comprehensive Coverage, then it is shown on the Declarations Page. The deductible that applies to Collision Coverage is shown on the Declarations Page.

Additional Definitions

Covered Vehicle means:

1. *your car*;
2. a *newly acquired car*;
3. a *temporary substitute car*;
4. a camper that is designed to be mounted on a pickup truck and shown on the Declarations Page;
5. a *non-owned car* while it is:
   a. being driven by an *insured*; or
   b. in the custody of an *insured* if at the time of the *loss* it is:
      (1) not being driven; or
      (2) being driven by a *person* other than an *insured* and being *occupied* by an *insured*;
6. a *non-owned trailer* while it is being used by an *insured*; and
7. a *non-owned camper* while it is being used by an *insured*;

including its parts and its equipment that are common to the use of the vehicle as a vehicle. However, parts and equipment of *trailers* and

campers must be securely fixed as a permanent part of the *trailer* or camper.

Daily Rental Charge means the sum of:

1. the daily rental rate;
2. mileage charges; and
3. related taxes.

Insured means *you* and *resident relatives*.

Loss means:

1. direct, sudden, and accidental damage to; or
2. total or partial theft of

a *covered vehicle*. *Loss* does not include any reduction in the value of any *covered vehicle* after it has been repaired, as compared to its value before it was damaged.

Loss Caused By Collision means a *loss* caused by:

1. a *covered vehicle* hitting or being hit by another vehicle or another object; or
2. the overturning of a *covered vehicle*.

Any *loss* caused by missiles, falling objects, windstorm, hail, fire, explosion, earthquake, water, flood, total or partial theft, malicious mischief, vandalism, riot, civil commotion, or hitting or being hit by a bird or an animal is not a *Loss Caused By Collision*.

Non-Owned Camper means a camper designed to be mounted on a pickup truck that is in the lawful possession of an *insured* and that neither:

1. is *owned by*:
   a. an *insured*;
   b. any other *person* who resides primarily in *your* household; or
   c. an employer of any *person* described in a. or b. above; nor
2. has been used by, rented by, or in the possession of an *insured* during any part of each of the 31 or more consecutive days immediately prior to the date of the *loss*.

Non-Owned Trailer means a *trailer* that is in the lawful possession of an *insured* and that neither:

1. is *owned by*:
   a. an *insured*;
   b. any other *person* who resides primarily in *your* household; or
   c. an employer of any *person* described in a. or b. above; nor
2. has been used by, rented by, or in the possession of an *insured* during any part of each of the 31 or more consecutive days immediately prior to the date of the *loss*.

Insuring Agreements

1. **Comprehensive Coverage**

   We will pay:

   a. for *loss*; except *loss caused by collision*, to a *covered vehicle*; and
   b. transportation expenses incurred by an *insured* as a result of the total theft of *your car* or a *newly acquired car*. These transportation expenses are payable:
      (1) during the period that:
         (a) starts on the date *you* report the theft to *us*; and
         (b) ends on the earliest of:
            (i) the date the vehicle is returned to *your* possession in a drivable condition;
            (ii) the date *we* offer to pay for the *loss* if the vehicle has not yet been recovered; or
            (iii) the date *we* offer to pay for the *loss* if the vehicle is recovered, but is a total loss as determined by *us*; and
      (2) during the period that:
         (a) starts on the date the vehicle is left at a repair facility if the

stolen vehicle is recovered, returned to *your* possession in a drivable condition, and has unrepaired damage that resulted from the total theft; and

(b) ends on the date the vehicle is repaired.

These transportation expenses must be reported to *us* before *we* will pay such incurred expenses.

2. **Collision Coverage**

We will pay for *loss caused by collision* to a *covered vehicle.*

3. **Emergency Road Service Coverage**

We will pay the fair cost incurred by an *insured* for:

a. up to one hour of labor to repair a *covered vehicle* at the place of its breakdown;

b. towing to the nearest repair facility where necessary repairs can be made if a *covered vehicle* is not drivable;

c. towing a *covered vehicle* out of a location where it is stuck if the vehicle is on or immediately next to a public road;

d. delivery of gas, oil, battery, or tire necessary to return a *covered vehicle* to driving condition. *We* do not pay the cost of the gas, oil, battery, or tire; and

e. up to one hour of labor for locksmith services to unlock a *covered vehicle* if its key is lost, stolen, or locked inside the vehicle.

4. **Car Rental and Travel Expenses Coverage**

a. **Car Rental Expense**

We will pay the *daily rental charge* incurred when *you* rent a *car* from a *car business* while *your car* or a *newly acquired car* is:

(1) not drivable; or

(2) being repaired

as a result of a *loss* which would be payable under Comprehensive Coverage or Collision Coverage.

We will pay this *daily rental charge* incurred during a period that:

(1) starts on the date:

(a) the vehicle is not drivable as a result of the *loss*; or

(b) the vehicle is left at a repair facility if the vehicle is drivable; and

(2) ends on the earliest of:

(a) the date the vehicle has been repaired or replaced;

(b) the date *we* offer to pay for the *loss* if the vehicle is repairable but *you* choose to delay repairs; or

(c) five days after *we* offer to pay for the *loss* if the vehicle is:

(i) a total loss as determined by *us*; or

(ii) stolen and not recovered.

The amount of any such *daily rental charge* incurred by *you* must be reported to *us* before *we* will pay such amount.

b. **Travel Expenses**

We will pay expenses for commercial transportation, lodging, and meals if *your car* or a *newly acquired car* is not drivable as a result of a *loss* which would be payable under Comprehensive Coverage or Collision Coverage. The *loss* must occur more than 50 miles from *your* home. *We* will only pay these expenses if they are incurred by:

(1) an *insured* during the period that:

(a) starts after the *loss* occurs; and

(b) ends on the earlier of:

(i) the *insured's* arrival at his or her destination or home if the vehicle is left behind for repairs; or

(ii) the repair of the vehicle if the *insured* waits for repairs before continuing on to his or her destination or returning home; and

(2) *you*, or any *person you* choose, to travel to retrieve the vehicle and drive it to either the original destination or *your* home if the vehicle was left behind for repairs.

These expenses must be reported to *us* before *we* will pay such incurred expenses.

c. **Rental Car – Repayment of Deductible Expense**

We will pay the comprehensive deductible or collision deductible an *insured* is required to pay the owner of a *car* rented from a *car business*.

Supplementary Payments – Comprehensive Coverage and Collision Coverage

If the *covered vehicle* sustains *loss* for which *we* make a payment under Comprehensive Coverage or Collision Coverage, then *we* will pay reasonable expenses incurred to:

1. tow the *covered vehicle* immediately after the *loss*:

   a. for a reasonable distance from the location of the *loss* to any one repair facility chosen by an *insured* or the owner of the *covered vehicle*, if the *covered vehicle* is not drivable; or

   b. to any one repair facility or commercial storage facility, neither of which was chosen by an *insured* or the owner of the *covered vehicle*. *We* will also pay reasonable expenses incurred to tow the *covered vehicle* for a reasonable distance from this facility to any one repair facility chosen by an *insured* or the owner of the *covered vehicle*, if the *covered vehicle* is not drivable;

2. store the *covered vehicle*, if it is not drivable immediately after the *loss*, at:

   a. any one repair facility or commercial storage facility, neither of which was chosen by an *insured* or the owner of the *covered vehicle*; and

   b. any one repair facility chosen by the owner of the *covered vehicle*, and *we* determine such vehicle is a total loss.

   If the owner of the *covered vehicle* consents, then *we* may move the *covered vehicle* at *our* expense to reduce storage costs. If the owner of the *covered vehicle* does not consent, then *we* will pay only the storage costs that would have resulted if *we* had moved the damaged *covered vehicle*; and

3. clean up debris from the *covered vehicle* at the location of the *loss*. The most *we* will pay to clean up the debris is $250 for any one *loss*.

Limits and Loss Settlement – Comprehensive Coverage and Collision Coverage

1. *We* have the right to choose to settle with *you* or the owner of the *covered vehicle* in one of the following ways:

   a. Pay the cost to repair the *covered vehicle* minus any applicable deductible. The deductible amount does not apply to *loss* to safety glass.

      (1) *We* have the right to choose one of the following to determine the cost to repair the *covered vehicle*:

         (a) The cost agreed to by both the owner of the *covered vehicle* and *us*;

         (b) A bid or repair estimate approved by *us*; or

         (c) A repair estimate that is written based upon or adjusted to:

(i) the prevailing competitive price;

(ii) the lower of paintless dent repair pricing established by an agreement *we* have with a third party or the paintless dent repair price that is competitive in the market; or

(iii) a combination of (i) and (ii) above.

The prevailing competitive price means prices charged by a majority of the repair market in the area where the ***covered vehicle*** is to be repaired as determined by a survey made by ***us***. If asked, *we* will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the ***covered vehicle*** to its pre-loss condition.

You agree with *us* that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

(2) The cost to repair the ***covered vehicle*** does not include any reduction in the value of the ***covered vehicle*** after it has been repaired, as compared to its value before it was damaged.

(3) If the repair or replacement of a part results in betterment of that part, then *you* or the owner of the ***covered vehicle*** must pay for the amount of the betterment;

b. Pay the actual cash value of the ***covered vehicle*** minus any applicable deductible.

(1) The owner of the ***covered vehicle*** and *we* must agree upon the actual cash value of the ***covered vehicle.*** If there is disagreement as to the actual cash value of the ***covered vehicle,*** then the disagreement will be resolved by appraisal upon written request of the owner or ***us,*** using the following procedures:

(a) The owner and *we* will each select a competent appraiser.

(b) The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or *we* may petition a court that has jurisdiction to select the third appraiser.

(c) Each party will pay the cost of its own appraiser, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.

(d) The appraisers shall only determine the actual cash value of the ***covered vehicle.*** Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class-representative basis.

(e) A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they arrived at their appraisal, will be binding on the

owner of the *covered vehicle* and *us*.

(f) *We* do not waive any of *our* rights by submitting to an appraisal.

(2) The damaged *covered vehicle* must be given to *us* in exchange for *our* payment, unless *we* agree that the owner may keep it. If the owner keeps the *covered vehicle*, then *our* payment will be reduced by the value of the *covered vehicle* after the *loss*; or

c. Return the stolen *covered vehicle* to its owner and pay, as described in 1.a. above, for any direct, sudden, and accidental damage that resulted from the theft.

2. The most *we* will pay for transportation expenses under Comprehensive Coverage is $25 per day subject to an aggregate limit of $750 per *loss*.

3. The most *we* will pay for *loss* to a *non-owned trailer* or a *non-owned camper* is $2,500.

Limits – Car Rental and Travel Expenses Coverage

1. **Car Rental Expense**

The limit for Car Rental Expense is shown on the Declarations Page under "Limit – Car Rental Expense – Each Day, Each Loss".

a. The limit shown under "Each Day" is the most *we* will pay for the *daily rental charge*. If:

(1) a dollar amount is shown, then *we* will pay the *daily rental charge* up to that dollar amount;

(2) a percentage amount is shown, then *we* will pay that percentage of the *daily rental charge*.

b. Subject to the "Each Day" limit, the limit shown under "Each Loss" is the most *we* will pay for Car Rental Expense incurred as a result of any one *loss*.

2. **Travel Expenses**

The most *we* will pay for Travel Expenses incurred by all *insureds* as a result of any one *loss* is $500.

3. **Rental Car – Repayment of Deductible Expense**

The most *we* will pay for Rental Car – Repayment of Deductible Expense incurred as a result of any one *loss* is $500.

Nonduplication

We will not pay for any *loss* or expense under the Physical Damage Coverages for which the *insured* or owner of the *covered vehicle* has already received payment from, or on behalf of, a party who is legally liable for the *loss* or expense.

Exclusions

THERE IS NO COVERAGE FOR:

1. ANY *COVERED VEHICLE* THAT IS:
   a. INTENTIONALLY DAMAGED; OR
   b. STOLEN

   BY OR AT THE DIRECTION OF AN *INSURED*;
2. ANY *COVERED VEHICLE* WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
3. ANY *COVERED VEHICLE* WHILE IT IS USED TO CARRY *PERSONS* FOR A CHARGE. This exclusion does not apply to the use of a *private passenger car* on a share-the-expense basis;
4. ANY *COVERED VEHICLE* DUE TO:
   a. THEFT;
   b. CONVERSION;
   c. EMBEZZLEMENT; OR
   d. SECRETION

BY AN ***INSURED***, A CONSIGNEE, AN AGENT OF A CONSIGNEE, OR A ***PERSON*** WHO OBTAINS POSSESSION OF THE ***COVERED VEHICLE*** WITH THE PERMISSION OF A CONSIGNEE OR AGENT OF A CONSIGNEE;

5. ***LOSS*** TO ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR*** IF AN ***INSURED*** VOLUNTARILY RELINQUISHES POSSESSION OF THAT ***CAR*** TO A ***PERSON*** OR ORGANIZATION UNDER AN ACTUAL OR PRESUMED SALES AGREEMENT;

6. ANY ***COVERED VEHICLE*** TO THE EXTENT ***OUR*** PAYMENT WOULD BENEFIT ANY CARRIER OR OTHER BAILEE FOR HIRE THAT IS LIABLE FOR ***LOSS*** TO SUCH ***COVERED VEHICLE***;

7. ***LOSS*** TO ANY ***COVERED VEHICLE*** DUE TO ***FUNGI***. THIS APPLIES REGARDLESS OF WHETHER OR NOT THE ***FUNGI*** RESULT FROM A ***LOSS*** THAT IS PAYABLE UNDER ANY OF THE PHYSICAL DAMAGE COVERAGES. ***WE*** WILL ALSO NOT PAY FOR ANY TESTING OR REMEDIATION OF ***FUNGI***, OR ANY ADDITIONAL COSTS REQUIRED TO REPAIR ANY ***COVERED VEHICLE*** THAT ARE DUE TO THE EXISTENCE OF ***FUNGI***;

8. ***LOSS*** TO ANY ***COVERED VEHICLE*** THAT RESULTS FROM:
   a. NUCLEAR REACTION;
   b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
   c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

9. ***LOSS*** TO ANY ***COVERED VEHICLE*** THAT RESULTS FROM THE TAKING OF OR SEIZURE OF THAT ***COVERED VEHICLE*** BY ANY GOVERNMENTAL AUTHORITY;

10. ***LOSS*** TO ANY ***COVERED VEHICLE*** THAT RESULTS FROM WAR OF ANY KIND;

11. ***YOUR CAR*** WHILE SUBJECT TO ANY:
    a. LIEN AGREEMENT;
    b. RENTAL AGREEMENT;
    c. LEASE AGREEMENT; OR
    d. SALES AGREEMENT

    NOT SHOWN ON THE DECLARATIONS PAGE;

12. ANY ***NON-OWNED CAR*** WHILE IT IS:
    a. BEING MAINTAINED OR USED BY ANY ***PERSON*** WHILE THAT ***PERSON*** IS EMPLOYED IN OR ENGAGED IN ANY WAY IN A ***CAR BUSINESS***; OR
    b. USED IN ANY BUSINESS OR OCCUPATION OTHER THAN A ***CAR BUSINESS***. This exclusion (12.b.) does not apply to a ***private passenger car***;

13. ANY PART OR EQUIPMENT OF A ***COVERED VEHICLE*** IF THAT PART OR EQUIPMENT:
    a. FAILS OR IS DEFECTIVE; OR
    b. IS DAMAGED AS A DIRECT RESULT OF:
       (1) WEAR AND TEAR;
       (2) FREEZING; OR
       (3) MECHANICAL, ELECTRICAL, OR ELECTRONIC BREAKDOWN OR MALFUNCTION

    OF THAT PART OR EQUIPMENT.

    This exclusion does not apply if the ***loss*** is the result of theft of the ***covered vehicle***;

14. ANY PART OR EQUIPMENT:
    a. THAT IS NOT LEGAL FOR USE IN OR ON THE ***COVERED VEHICLE***

DEATH, DISMEMBERMENT AND LOSS OF SIGHT COVERAGE

This policy provides Death, Dismemberment and Loss of Sight Coverage if "S" is shown under "SYMBOLS" on the Declarations Page.

Additional Definition

Insured means a ***person*** whose name is shown under "Death, Dismemberment and Loss of Sight Coverage – Persons Insured" on the Declarations Page.

Insuring Agreement

We will pay the highest applicable benefit shown in the following Death, Dismemberment and Loss of Sight Benefits Schedules if an ***insured***:

1. dies; or
2. suffers dismemberment or permanent loss of sight, as described in the schedule

as the direct result of an accident that involves the use of a land motor vehicle or any type of trailer as a vehicle and not due to any other cause.

The ***insured*** must be ***occupying*** or be struck as a ***pedestrian*** by a land motor vehicle or any type of trailer at the time of the accident. The death, dismemberment, or permanent loss of sight must occur within 90 days immediately following the date of the accident.

Benefit

The applicable benefit shown in the schedule is the most *we* will pay for any one ***insured*** in any one accident. Any benefit paid or payable for dismemberment or permanent loss of sight reduces the death benefit.

The benefits shown in the schedules are doubled for an ***insured*** who at the time of the accident was ***occupying*** a ***private passenger car*** and using a seat belt in the manner recommended by the vehicle's manufacturer.

Death, Dismemberment and Loss of Sight Benefits Schedules

If the amount shown on the Declarations Page for the ***insured*** is $5,000, then *we* will pay the applicable benefit shown below for death or for the described dismemberment or permanent loss of sight:

Death	$5,000
Loss of both hands; both feet; all sight of both eyes; one hand and one foot; or one hand or one foot and all sight of one eye	$5,000
Loss of one hand or one foot; or all sight of one eye	$2,500
Loss of the thumb and a finger on one hand; or any three fingers	$1,500
Loss of any two fingers	$1,000

The hand must be cut off through or above the wrist. The foot must be cut off through or above the ankle. The whole thumb or finger must be cut off.

If the amount shown on the Declarations Page for the ***insured*** is $10,000, then *we* will pay the applicable benefit shown below for death or for the described dismemberment or permanent loss of sight:

Death	$10,000
Loss of both hands; both feet; all sight of both eyes; one hand and one foot; or one hand or one foot and all sight of one eye	$10,000
Loss of one hand or one foot; or all sight of one eye	$5,000
Loss of the thumb and a finger on one hand; or any three fingers	$3,000
Loss of any two fingers	$2,000

The hand must be cut off through or above the wrist. The foot must be cut off through or above the ankle. The whole thumb or finger must be cut off.

Exclusions

DEATH, DISMEMBERMENT AND LOSS OF SIGHT COVERAGE DOES NOT APPLY TO AN ***INSURED***:

1. WHILE IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT IN A ***CAR BUSINESS***;
2. WHILE ***OCCUPYING***, LOADING, OR UNLOADING:
   a. AN EMERGENCY VEHICLE IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT;
   b. A VEHICLE, OTHER THAN AN EMERGENCY VEHICLE, WHILE USED IN THE:
      (1) ***INSURED'S*** BUSINESS; OR
      (2) COURSE AND SCOPE OF HIS OR HER EMPLOYMENT IN OTHER THAN A ***CAR BUSINESS***.

      This exclusion (2.b.) does not apply if the vehicle is a ***private passenger car***;
   c. A MILITARY VEHICLE; OR
   d. A VEHICLE WHILE IT IS:
      (1) BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
      (2) ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (2.d.(2)) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving;
3. WHILE ***OCCUPYING***, LOADING, UNLOADING, OR WHO IS STRUCK AS A ***PEDESTRIAN*** BY:
   a. A MOTOR VEHICLE THAT RUNS ON RAILS OR CRAWLER-TREADS;
   b. A MOTOR VEHICLE THAT IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
   c. A MOTOR VEHICLE OR ANY TYPE OF TRAILER, EITHER OF WHICH IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES; OR
4. FOR DEATH, DISMEMBERMENT, LOSS OF SIGHT, OR ***TOTAL DISABILITY*** THAT RESULTS FROM:
   a. WAR OF ANY KIND;
   b. NUCLEAR REACTION, RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE, OR THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;
   c. THE DISCHARGE OF A FIREARM;
   d. EXPOSURE TO ***FUNGI***;
   e. SUICIDE, OR ATTEMPTED SUICIDE REGARDLESS OF WHETHER THE ***INSURED*** WAS SANE OR INSANE; OR
   f. DISEASE except pus-forming infection due to ***bodily injury*** sustained in the accident.

Our Payment Options

We may, at ***our*** option, make payment to one or more of the following:

1. The ***insured***;
2. The ***insured's*** surviving spouse;
3. A parent or guardian of the ***insured***, if the ***insured*** is a minor or an incompetent ***person***; or
4. A ***person*** or organization authorized by law to receive such payment.

INSURED'S DUTIES

1. **Notice to Us of an Accident or Loss**

   The *insured* must give *us* or one of *our* agents notice of the accident or *loss* as soon as reasonably possible. The notice must give *us*:

   a. *your* name;

   b. the names and addresses of all *persons* involved in the accident or *loss*;

   c. the hour, date, place, and facts of the accident or *loss*; and

   d. the names and addresses of witnesses to the accident or *loss*.

2. **Notice to Us of a Claim or Lawsuit**

   a. If a claim is made against an *insured*, then that *insured* must immediately send *us* every demand, notice, and claim received.

   b. If a lawsuit is filed against an *insured*, then that *insured* must immediately send *us* every summons and legal process received.

3. **Insured's Duty to Cooperate With Us**

   a. The *insured* must cooperate with *us* and, when asked, assist *us* in:

      (1) making settlements;

      (2) securing and giving evidence;

      (3) attending, and getting witnesses to attend, depositions, hearings, and trials; and

      (4) preserving his or her right to recover damages from others.

   b. The *insured* must not, except at his or her own cost, voluntarily:

      (1) make any payment to others; or

      (2) assume any obligation to others

      unless authorized by the terms of this policy.

   c. Any *person* or organization making claim under this policy must, when *we* require, give *us* proof of loss on forms *we* furnish.

4. **Questioning Under Oath**

   Under:

   a. Liability Coverage, each *insured*;

   b. Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, or Death, Dismemberment and Loss of Sight Coverage, each *insured*, or any other *person* or organization making claim or seeking payment; and

   c. Physical Damage Coverages, each *insured* or owner of a *covered vehicle*, or any other *person* or organization making claim or seeking payment;

   must, at *our* option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as *we* require. Such *person* or organization must answer questions under oath, asked by anyone *we* name, and sign copies of the answers. *We* may require each *person* or organization answering questions under oath to answer the questions with only that *person's* or organization's legal representative, *our* representatives, any *person* or *persons* designated by *us* to record the questions and answers, and no other *person* present.

5. **Other Duties Under the Physical Damage Coverages**

   When there is a *loss*, *you* or the owner of the *covered vehicle* must:

   a. protect the *covered vehicle* from additional damage. *We* will pay any reasonable expense incurred to do so that is reported to *us*;

   b. make a prompt report to the police when the *loss* is the result of theft;

   c. allow *us* to:

(1) inspect any damaged property before its repair or disposal;

(2) test any part or equipment before that part or equipment is removed or repaired; and

(3) move the ***covered vehicle*** at ***our*** expense in order to conduct such inspection or testing;

d. provide ***us*** all:

(1) records;

(2) receipts; and

(3) invoices

that ***we*** request and allow ***us*** to make copies; and

e. not abandon the ***covered vehicle*** to ***us***.

6. Other Duties Under Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage

A ***person*** making claim under:

a. Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, or Death, Dismemberment and Loss of Sight Coverage must:

(1) notify ***us*** of the claim and give ***us*** all the details about the death, injury, treatment, and other information that ***we*** may need as soon as reasonably possible after the injured ***insured*** is first examined or treated for the injury. If the ***insured*** is unable to give ***us*** notice, then any other ***person*** may give ***us*** the required notice;

(2) be examined as reasonably often as ***we*** may require by physicians chosen and paid by ***us***. A copy of the report will be sent to the ***person*** upon written request;

(3) provide written authorization for ***us*** to obtain:

(a) medical bills;

(b) medical records;

(c) wage, salary, and employment information; and

(d) any other information ***we*** deem necessary to substantiate the claim.

If an injured ***insured*** is a minor, unable to act, or dead, then his or her legal representative must provide ***us*** with the written authorization.

If the holder of the information refuses to provide it to ***us*** despite the authorization, then at ***our*** request the ***person*** making claim or his or her legal representative must obtain the information and promptly provide it to ***us***; and

(4) allow ***us*** to inspect the vehicle that the ***insured occupied*** in the accident;

b. Uninsured Motor Vehicle Coverage must report an accident, involving a motor vehicle whose owner and driver remain unknown, to the police and to ***us*** within a reasonable period of time; and

c. Uninsured Motor Vehicle Coverage and Underinsured Motor Vehicle Coverage must:

(1) send ***us*** immediately a copy of all lawsuit papers if the ***insured*** files a lawsuit against the party liable for the accident; and

(2) if making a claim for ***property damage***:

(a) allow ***us*** to:

(i) inspect any ***property damage*** before its repair or disposal;

(ii) test any part or equipment before that part or equipment is removed or repaired; and

(iii) move the damaged property at *our* expense in order to conduct such inspection or testing; and

(b) protect the damaged property from additional damage. *We* will pay any reasonable expense incurred to do so that is reported to *us*;

(c) provide *us* all:

(i) records;

(ii) receipts; and

(iii) invoices

that *we* request and allow *us* to make copies;

(d) not abandon the damaged property to *us*; and

(e) give *us* sworn proof of claim within 60 days of the accident. This proof of claim must state:

(i) who owns the property and how much they own;

(ii) the amount of any claims or liens on the property;

(iii) the value of the property at the time of the accident;

(iv) details of the accident; and

(v) details of any other insurance applicable to the property.

GENERAL TERMS

1. When Coverage Applies

The coverages provided by this policy are shown on the Declarations Page and apply to accidents and *losses* that occur during the policy period. The policy period is shown on the Declarations Page and is for successive periods of six months each for which the renewal premium is paid. The policy period begins and ends at 12:01 AM Standard Time at the address shown on the Declarations Page.

2. Where Coverage Applies

The coverages provided by this policy are shown on the Declarations Page and apply to accidents and *losses* that occur:

a. in the United States of America and its territories and possessions;

b. in Canada; and

c. while a vehicle for which coverage is provided by this policy is being shipped between the ports of the United States of America, its territories, its possessions, and Canada.

The Liability Coverage, Personal Injury Protection Coverage, Medical Payments Coverage, and Physical Damage Coverages also apply in Mexico within 50 miles of the United States border. A Physical Damage Coverage *loss* in Mexico is determined on the basis of cost at the nearest United States point.

Death, Dismemberment and Loss of Sight Coverage applies anywhere in the world.

3. Newly Owned or Newly Leased Car

If *you* want to insure a *car* newly *owned by you* with the *State Farm Companies* after that *car* ceases to be a *newly acquired car*, then *you* must either:

a. request *we* replace the *car* currently shown on the Declarations Page of this policy with the *car* newly *owned by*

you and pay *us* any added amount due. If *you* make such request while this policy is in force and:

(1) before the *car* newly *owned by you* ceases to be a *newly acquired car*, then that *car* newly *owned by you* will be insured by this policy as *your car* beginning on the date the *car* newly *owned by you* is delivered to *you*. The added amount due will be calculated based on that date; or

(2) after the *car* newly *owned by you* ceases to be a *newly acquired car*, then that *car* newly *owned by you* will be insured by this policy as *your car* beginning on the date and time *you* make the request. The added amount due will be calculated based on that date; or

b. apply to the *State Farm Companies* for a separate policy to insure the *car* newly *owned by you*. Such policy will be issued only if both the applicant and the vehicle are eligible for coverage at the time of the application.

4. Changes to This Policy

a. Changes in Policy Provisions

We may only change the provisions of this policy by:

(1) issuing a revised policy booklet, a revised Declarations Page, or an endorsement; or

(2) revising this policy to give broader coverage without an additional premium charge. If any coverage provided by this policy is changed to give broader coverage, then *we* will give *you* the broader coverage as of the date *we* make the change effective in the state of South Carolina without issuing a revised policy booklet, a revised Declarations Page, or an endorsement.

b. Change of Interest

(1) No change of interest in this policy is effective unless *we* consent in writing.

(2) Except under Death, Dismemberment and Loss of Sight Coverage, if a named insured shown on the Declarations Page dies, then the definition of *insured* under each of the coverages provided by this policy is changed to include:

(a) any *person* with lawful custody of *your car*, a *newly acquired car*, or a *temporary substitute car* until a legal representative is qualified; and then

(b) the legal representative of the deceased named insured.

This only applies while such *person* is maintaining or using *your car*, a *newly acquired car*, or a *temporary substitute car*.

Policy notice requirements are met by mailing the notice to the most recent policy address that *we* have on record for the deceased named insured.

c. Joint and Individual Interests

If *you* consists of more than one *person* or entity, then each acts for all to change or cancel the policy.

d. Change of Policy Address

We may change the named insured's policy address as shown on the Declarations Page and in *our* records to the most recent address provided to *us* by:

(1) *you*; or

(2) the United States Postal Service.

5. **Premium**

a. Unless as otherwise provided by an alternative payment plan in effect with the ***State Farm Companies*** with respect to the premium for this policy, the premium is due and payable in full on or before the first day of the policy period shown on the most recently issued Declarations Page or Renewal Notice.

b. The renewal premium for this policy will be based upon the rates in effect, the coverages carried, the applicable limits, deductibles, and other elements that affect the premium that apply at the time of renewal.

c. The premium for this policy may vary based upon the purchase of other insurance from the ***State Farm Companies.***

d. The premium for this policy is based upon information *we* have received from *you* or other sources. *You* must inform *us* if any information regarding the following is incorrect or incomplete, or changes during the policy period, and *you* must answer questions *we* ask regarding the following:

(1) ***Your car***, or its use, including annual mileage;

(2) The ***persons*** who regularly drive ***your car***, including newly licensed family members;

(3) *Your* marital status; or

(4) The location where *your car* is primarily garaged.

If the above information or any other information used to determine the premium is incorrect, incomplete, changes during the policy period, or is not provided to *us* when *we* ask, then *we* may decrease or increase the premium during the policy period. If *we* decrease the premium during the policy period, then *we* will provide a refund or a credit in the amount of the decrease. If *we* increase the premium during the policy period, then *you* must pay the amount of the increase.

6. **Renewal**

We agree to renew this policy for the next policy period upon payment of the renewal premium when due, unless *we* mail or deliver a nonrenewal notice or a cancellation notice as set forth in 7. and 8. below.

7. **Nonrenewal**

If *we* decide not to renew this policy, then, at least 30 days before the end of the current policy period, *we* will mail or deliver a nonrenewal notice to the most recent policy address that *we* have on record for the named insured who is shown on the Declarations Page.

8. **Cancellation**

a. **How You May Cancel**

You may cancel this policy by providing to *us* advance notice of the date cancellation is effective. *We* may confirm the cancellation in writing.

b. **How and When We May Cancel**

We may cancel this policy by mailing or delivering a written notice to the most recent policy address that *we* have on record for the named insured who is shown on the Declarations Page. The notice will provide the date cancellation is effective.

(1) If *we* mail or deliver a cancellation notice:

(a) during the first 90 days following this policy's effective date; or

(b) because the premium is not paid when due,

then the date cancellation is effective will be at least 15 days after the date *we* mail or deliver the cancellation notice.

Otherwise, the date cancellation is effective will be at least 20 days after the date *we* mail or deliver the cancellation notice.

(2) After this policy has been in force for more than 90 days, *we* will not cancel this policy before the end of the current policy period unless:

(a) the premium is not paid when due; or

(b) *you*, any *resident relative*, or any other *person* who usually drives *your car* has had his or her driver's license under suspension or revocation:

(1) during the policy period; or

(2) if the policy is a renewal, during its policy period or the 90 days immediately preceding the last anniversary of the effective date of the policy.

c. **Return of Unearned Premium**

If *you* cancel this policy, then premium may be earned on a short rate basis. If *we* cancel this policy, then premium will be earned on a pro rata basis.

Any unearned premium may be returned within a reasonable time after cancellation. Delay in the return of any unearned premium does not affect the cancellation date.

9. **Assignment**

No assignment of benefits or other transfer of rights is binding upon *us* unless approved by *us*.

10. **Bankruptcy or Insolvency of the Insured**

Bankruptcy or insolvency of the *insured* or his or her estate will not relieve *us* of *our* obligations under this policy.

11. **Concealment or Fraud**

There is no coverage under this policy if *you* or any other *person* insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

12. **Our Right to Recover Our Payments**

a. Personal Injury Protection Coverage, Medical Payments Coverage, Underinsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage payments are not recoverable by *us*.

b. To the extent allowed by law, under Uninsured Motor Vehicle Coverage:

(1) the right of recovery of the *insured* passes to *us*, to the extent of *our* payments;

(2) *we* will pay *our* share of the reasonable costs of any recovery. *Our* share is the percent that *our* recovery bears to the total recovery. *We* reserve the right to select an attorney to handle the recovery; and

(3) an *insured* making claim for *property damage* must assign to *us*, to the extent of *our* payments, the right to any other compensation for it. *We* do not have to make any payment until the *insured* has done this.

c. Under all other coverages, the following apply:

(1) **Subrogation**

If *we* are obligated under this policy to make payment to or for a *person* or organization who has a legal right to collect from another *person* or organization, then *we* will be subrogated to that right to the extent of *our* payment.

The *person* or organization to or for whom *we* make payment must help *us* recover *our* payments by:

(a) doing nothing to impair that legal right;

(b) executing any documents *we* may need to assert that legal right; and

(c) taking legal action through *our* representatives when *we* ask.

(2) **Reimbursement**

If *we* make payment under this policy and the *person* or organization to or for whom *we* make payment recovers or has recovered from another *person* or organization, then the *person* or organization to or for whom *we* make payment must:

(a) hold in trust for *us* the proceeds of any recovery; and

(b) reimburse *us* to the extent of *our* payment.

13. **Legal Action Against Us**

Legal action may not be brought against *us* until there has been full compliance with all the provisions of this policy. In addition, legal action may only be brought against *us* regarding:

a. Liability Coverage after the amount of damages an *insured* is legally liable to pay has been finally determined by:

(1) judgment after an actual trial, and any appeals of that judgment if any appeals are taken; or

(2) agreement between the claimant and *us*.

b. Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, and Physical Damage Coverages if the legal action relating to these coverages is brought against *us* within three years immediately following the date of the accident.

c. Underinsured Motor Vehicle Coverage if copies of the pleadings in the action establishing liability are served upon *us* in the manner provided by law.

14. **Choice of Law**

Without regard to choice of law rules, the law of the state of:

a. South Carolina will control, except as provided in b. below, in the event of any disagreement as to the interpretation and application of any provision in this policy; and

b. Illinois will control in the event of any disagreement as to the interpretation and application of this policy's:

(1) Mutual Conditions provision found on the most recently issued Declarations Page, if this policy was issued by the State Farm Mutual Automobile Insurance Company; or

(2) Participating Policy provision found on the most recently issued Declarations Page, if this policy was issued by any subsidiary or affiliate of the State Farm Mutual Automobile Insurance Company.

15. **Severability**

If any provision of this policy is held invalid or unenforceable by a court that has jurisdiction, then:

a. such provision will remain in full force to the extent not held invalid or unenforceable; and

b. all other provisions of this policy will remain valid and enforceable.

16. **Conformity to Law**

The coverage provided by this policy is done so in accordance with South Carolina insurance law. If any provisions of this policy are in conflict with South Carolina statutes, the policy is amended to conform to the minimum requirements of the statutes.

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6940A AMENDATORY ENDORSEMENT

This endorsement is a part of the policy. Except for the changes this endorsement makes, all other provisions of the policy remain the same and apply to this endorsement.

1. **THIS POLICY**

   Item 5. is changed to read:

   Your purchase of this policy may allow:

   a. ***you*** to purchase or obtain certain coverages, coverage options, coverage deductibles, coverage limits, or coverage terms on other products from the ***State Farm Companies***, subject to their applicable eligibility rules; or

   b. the premium or price for other products or services purchased by ***you***, including non-insurance products or services, to vary. Such other products or services must be provided by the ***State Farm Companies*** or by an organization that has entered into an agreement or contract with the ***State Farm Companies***. The ***State Farm Companies*** do not warrant the merchantability, fitness, or quality of any product or service offered or provided by that organization.

2. **LIABILITY COVERAGE**

   Insuring Agreement and **Supplementary Payments** are replaced by the following:

   Insuring Agreement

   1. ***We*** will pay damages an ***insured*** becomes legally liable to pay because of:

      a. ***bodily injury*** to others; and

      b. damage to property

      caused by an accident that involves a vehicle for which that ***insured*** is provided Liability Coverage by this policy.

   2. ***We*** have the right to:

      a. investigate, negotiate, and settle any claim or lawsuit;

      b. defend an ***insured*** in any claim or lawsuit, with attorneys chosen by ***us***; and

      c. appeal any award or legal decision

      for damages payable under this policy's Liability Coverage.

   Supplementary Payments

   We will pay, in addition to the damages described in the **Insuring Agreement** of this policy's Liability Coverage, those items listed below that result from such accident:

   1. Attorney fees for attorneys chosen by ***us*** to defend an ***insured*** who is sued for such damages. ***We*** have no duty to pay attorney fees incurred after ***we*** deposit in court or pay the amount due under the **Insuring Agreement** of this policy's Liability Coverage;

   2. Court costs awarded by the court against an ***insured*** and resulting from that part of the lawsuit:

      a. that seeks damages payable under this policy's Liability Coverage; and

      b. against which ***we*** defend an ***insured*** with attorneys chosen by ***us***.

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We have no duty to pay court costs incurred after *we* deposit in court or pay the amount due under the **Insuring Agreement** of this policy's Liability Coverage;

3. Interest the ***insured*** is legally liable to pay on damages payable under the **Insuring Agreement** of this policy's Liability Coverage:
   a. before a judgment, but only the interest on the lesser of:
      (1) that part of the damages *we* pay; or
      (2) this policy's applicable Liability Coverage limit; and
   b. after a judgment.

   We have no duty to pay interest that accrues after *we* deposit in court, pay, or offer to pay, the amount due under the **Insuring Agreement** of this policy's Liability Coverage. *We* also have no duty to pay interest that accrues on any damages paid or payable by a party other than the ***insured*** or ***us***;
4. Premiums for bonds, provided by a company chosen by ***us***, required to appeal a decision in a lawsuit against an ***insured***. *We* have no duty to:
   a. pay for any bond with a face amount that exceeds this policy's applicable Liability Coverage limit;
   b. furnish or apply for any bonds; or
   c. pay premiums for bonds purchased after *we* deposit in court, pay, or offer to pay, the amount due under the **Insuring Agreement** of this policy's Liability Coverage; and
5. The following costs and expenses if related to and incurred after a lawsuit has been filed against an ***insured***:
   a. Loss of wages or salary, but not other income, up to $200 for each day an ***insured*** attends, at ***our*** request:
      (1) an arbitration;
      (2) a mediation; or
      (3) a trial of a lawsuit; and
   b. Reasonable expenses incurred by an ***insured*** at ***our*** request other than loss of wages, salary, or other income.

   The amount of any of the costs or expenses listed above that are incurred by an ***insured*** must be reported to ***us*** before *we* will pay such incurred costs or expenses.

3. **GENERAL TERMS**
   a. The paragraph under **Where Coverage Applies** that reads:

      Liability Coverage, Personal Injury Protection Coverage, Medical Payments Coverage, and Physical Damage Coverages also apply in Mexico within 50 miles of the United States of America border. A Physical Damage Coverage ***loss*** in Mexico is determined on the basis of cost at the nearest United States of America point.

      is deleted.
   b. The following is added:

      Limited Coverage in Mexico

      This policy does not provide Mexican auto insurance and does not comply with Mexican auto insurance requirements. If ***you*** or any other ***insured*** plan to drive in Mexico, then auto insurance providing

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coverage in Mexico should be purchased from a Mexican insurance company.

Subject to the above paragraph, the following coverages apply in Mexico, but only for accidents and ***losses*** that occur in Mexico within 50 miles of the United States of America border and only for ***insureds*** as defined under each of the following coverages:

a. **Liability Coverage**

For claims brought against an ***insured*** in Mexico, the **Supplementary Payments** provision of this policy's Liability Coverage is changed to read:

We may, in addition to the damages described in item 1. of the **Insuring Agreement** of this policy's Liability Coverage, pay or reimburse, at our option, reasonable attorney fees for an attorney licensed in Mexico to appear for and provide advice to ***insureds*** as defined under this policy's Liability Coverage. The amount of such attorney fees incurred by an ***insured*** must be reported to ***us*** before ***we*** will make payment.

b. **Personal Injury Protection Coverage**

c. **Medical Payments Coverage**

d. **Physical Damage Coverages**

Any amount payable for the repair or replacement of the ***covered vehicle*** under the **Limits and Loss Settlement – Comprehensive Coverage and Collision Coverage** provision of this policy will be limited to the cost to repair or replace the ***covered vehicle*** in the United States of America.

WE HAVE NO DUTY TO PROVIDE A DEFENSE FOR ***YOU*** OR ANY OTHER ***INSURED*** IN ANY CRIMINAL, CIVIL, OR OTHER ACTION.

WE HAVE NO DUTY TO PAY ANY CLAIM OR COST THAT WOULD NOT BE PAYABLE UNDER THIS POLICY IF THE ACCIDENT OR ***LOSS*** HAD OCCURRED IN THE STATE OF SOUTH CAROLINA IN THE UNITED STATES OF AMERICA.

All other policy provisions not in conflict with the provisions in this **Limited Coverage in Mexico** provision of this policy apply.

If Other Coverage Applies

Any coverage provided by this **Limited Coverage in Mexico** provision is excess over any other applicable insurance.

Legal Action Against Us

Any legal action against ***us*** arising out of an accident or ***loss*** occurring in Mexico must be brought in a court that has jurisdiction in the state of South Carolina in the United States of America.

c. Paragraph c. of 5. **Premium** is changed to read:

c. The premium for this policy may vary based upon:

(1) the purchase of other products or services from the ***State Farm Companies***;

(2) the purchase of products or services from an organization that has entered into an agreement or contract with

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the ***State Farm Companies***. The ***State Farm Companies*** do not warrant the merchantability, fitness, or quality of any product or service offered or provided by that organization; or

(3) an agreement, concerning the insurance provided by this policy, that the ***State Farm Companies*** has with an organization of which ***you*** are a member, employee, subscriber, licensee, or franchisee.

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AGENT

URQUIT A MORRIS INS AGCY INC
1700 ASHLEY RIVER RD
CHARLESTON, SC 29407-5904

PHONE:(843)556-4111

DO NOT PAY PREMIUMS SHOWN ON THIS PAGE.
IF AN AMOUNT IS DUE, THEN A SEPARATE STATEMENT IS ENCLOSED.

YOUR CAR

YEAR	MAKE	MODEL	BODY STYLE	VEHICLE ID NUMBER	CLASS
2003	CADILLAC	DEVILLE	4DR	1G6KD54Y23U173030	3B00111300

SYMBOLS	COVERAGE & LIMITS	PREMIUMS
A	Liability Coverage	$390.89
	Bodily Injury Limits	
	Each Person, Each Accident	
	$25,000 $50,000	
	Property Damage Limit	
	Each Accident	
	$25,000	
D	Comprehensive Coverage - $500 Deductible	$150.75
G	Collision Coverage - $500 Deductible	$281.51
H	Emergency Road Service Coverage	$2.64
U	Uninsured Motor Vehicle Coverage	$16.38
	Bodily Injury Limits	
	Each Person, Each Accident	
	$25,000 $50,000	
	Property Damage Limit	
	Each Accident	
	$25,000	
W	Underinsured Motor Vehicle Coverage	$39.85
	Bodily Injury Limits	
	Each Person, Each Accident	
	$25,000 $50,000	
	Property Damage Limit	
	Each Accident	
	$25,000	

Total premium for AUG 01 2011 to FEB 01 2012 $882.02 This is not a bill

IMPORTANT MESSAGES

leplaced policy number 2597225-40B.

XCEPTIONS, POLICY BOOKLET & ENDORSEMENTS (See policy booklet & individual endorsements for coverage details.)

OUR POLICY CONSISTS OF THIS DECLARATIONS PAGE, THE POLICY BOOKLET -
ORM 9840A, AND ANY ENDORSEMENTS THAT APPLY, INCLUDING THOSE ISSUED TO YOU
ITH ANY SUBSEQUENT RENEWAL NOTICE.
REDITOR- CITIFINANCIAL AUTO, PO BOX 47260, ATLANTA GA 30362-0660.

The named insured or named insureds shown on this Declarations Page are entitled to participate in a distribution of the earnings of the company as determined by our Board of Directors in accordance with the Company's Articles of Incorporation, as amended.

In Witness Whereof, the State Farm Fire and Casualty Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois.

Lynne M. Yauvell
Secretary

Edward B. Rust Jr.
President

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	CIVIL ACTION NO. 2016-CP-10-00363
LEVI THOMAS BROWN, Plaintiffs, -vs- STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, Defendant.	**NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

FILED
2016 OCT 31 PM 2:00
JULIE J. ARMSTRONG
CLERK OF COURT

PLEASE TAKE NOTICE that the Plaintiff, by and through his undersigned attorney, shall, and hereby does, move this Honorable Court for an Order granting summary judgment in favor of the Plaintiff in the above-captioned matter upon the grounds that there is no dispute of material fact that the injuries in this case arise out of the use of an uninsured motorist vehicle to the extent the actions meet the multi-pong test of Aytes v. State Farm and State Farm v. Bookert and their precedents, particularly Wausau v. Howser and Home v. Towe which are controlling. This Motion will be supported by Plaintiff's Memorandum as to Cross Motions for Summary Judgment.

This Motion is based upon the pleadings in this within action, discovery conducted thus far, stipulated facts and conclusions of law, memorandum of law in support of this motion and attachments thereto, upon Rule 56 of the South Carolina Rules of Civil Procedure, and upon such further and additional law and argument as shall be presented.

- SIGNATURE ON FOLLOWING PAGE -

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North Charleston, SC
October 20, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LEVI THOMAS BROWN,

Plaintiff,

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-00363

MEMORANDUM IN SUPPORT OF STATE FARM'S MOTION FOR SUMMARY JUDGMENT/TRIAL ON MERITS

FILED
2017 JAN -6 PM 1:28
CHARLIE J. ARMSTRONG
CLERK OF COURT

The parties have stipulated to the facts of the case and have agreed there are no disputes of material fact and their cross-motions for summary judgments should be regarded as a non-jury trial on the merits.

Summary of Fact

This case arises out of an incident in which an unknown assailant shot the plaintiff. Prior to the shooting, Plaintiff and three friends were riding in a Cadillac Deville sedan that was owned by the mother of one of the passengers and was insured by State Farm. At approximately 4:25 a.m., while the Cadillac Deville sedan was in the right-most lane between the exits, a gray/silver older model Dodge Durango came alongside of the Cadillac in one of the other eastbound lanes of the interstate with a black male with dreadlocked hair and a baseball hat hanging out of the rear passenger side window. This unknown assailant opened fire on the Cadillac. One of those shots struck Levi Thomas Brown.

The attack was entirely unprovoked. The assailant vehicle did not hit the Cadillac. The assailant vehicle did not attempt to ram, block, or otherwise strike the

Cadillac. The assailant vehicle continued on I-526 East as Levi Brown exited at Montague Road after being shot.

Legal Argument

Plaintiff has filed this declaratory judgment action alleging that the gunshot injuries to Mr. Levi Brown fall within the scope of State Farm's uninsured motorist coverage on the vehicle Mr. Brown was occupying at the time he was shot. However, under these facts, the bodily injury resulting from the shooting is not covered by the State Farm uninsured motorist coverage. The damages are not covered in the policy because the damages do not arise out of the ownership, operation or use of an uninsured vehicle.

State Farm's policy provides coverage "for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured. The bodily injury and property damage must be caused by an accident that involves the operation, maintenance, or use of an uninsured motor vehicle."

Similarly under S.C. Code 38-77-140, an insured is legally entitled to recover damages arising out of the ownership, maintenance or use of an uninsured vehicle. S.C. Code Ann. § 38-77-140 (1989).

I. LEVI BROWN'S GUNSHOT INJURY DOES NOT ARISE OUT OF THE OWNERSHIP, OPERATION OR USE OF THE JOHN DOE VEHICLE.

The South Carolina Supreme Court cases of *Aytes* and *Bookert* have established a three-part test for determining whether an individual's injuries, as a result of an assault

or shooting, arise out of "ownership, maintenance, or use" of an automobile so as to trigger automobile insurance coverage. The test is as follows:

1. There exists a causal connection between the [assailant's] vehicle and the injury; and
2. No act of independent significance breaks the causal link, and
3. The [assailant's] vehicle is being used for transportation at the time of the assault.

For there to be a "causal connection" in this context:

1. The [assailant's] vehicle must be an "active accessory" to the assault; and
2. Something less than proximate cause but more than mere site of the injury; and
3. That the "injury must be foreseeably identifiable with the normal use of the automobile."

State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998); *State Farm Mut. Auto. Ins. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999).

In the Supreme Court decision in *Bookert*, 523 S.E. 2d 181 (S.C. 2000), the victim (Bookert) and a group of his friends got into an altercation with two soldiers at Hardees. The victim and his friends left Hardees and went to McDonalds. The two soldiers used a vehicle to leave Hardees and picked up a third soldier. The three soldiers drove around McDonalds parking lot looking for the men from Hardees. Bookert was near the entrance when the soldiers yelled from the vehicle. The passenger had a handgun and another man was in the back with a shotgun. The vehicle jerked forward and the man with the shotgun fell and fired his shotgun. This blast did not strike Bookert, but the passenger then fired a handgun---while the vehicle was still moving forward--- and struck Bookert once in each leg. The assailants then escaped from the parking lot in the vehicle, except for the man with the shotgun who fled on foot. The Court of Appeals found the assailant vehicle acted as a "launching

pad" for the assault, noting the use of the vehicle to circle the McDonalds to seek out their targets, to put the assailants into a position to shoot Bookert and for two assailants to quickly flee the scene. The Court of Appeals found there was coverage under Bookert's mother's uninsured motorist policy. The Supreme Court reversed---though it did not reverse the finding of the assailant vehicle an "active accessory", it found the gunshot injuries were not "foreseeably identifiable with the normal use of an automobile".

In *Wright v. North Area Taxi*, 523 S.E.2d 472 (S.C. Ct. App. 1999), the Court of Appeals of South Carolina gave further guidance with regards to the *Aytes* and *Bookert* standard. The court held that a cab driver who was shot by a passenger inside the vehicle while the vehicle was moving was not entitled to uninsured motorist coverage. The court held that despite the fact that the passenger's position in the vehicle gave them the opportunity to gain proximity to and shoot the driver from behind, the connection to the vehicle was lacking. The vehicle itself did not produce the gunshot injury. The vehicle was not an active accessory. Furthermore, the Court concluded that even though taxi drivers face special dangers, a gunshot injury is not foreseeably identifiable within the normal use of a vehicle. (citing and quoting *Nationwide v. Brown*, 779 F.2d 984, 989 (4th Cir.1985)) ("An assault by an armed assailant upon the driver of a car is not the type of conduct that is foreseeably identifiable with the normal use of a motor vehicle.")

In *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984, 989 (4th Cir.1985), a pre-*Aytes* and pre-*Bookert* case, an estranged husband rammed the car of his wife. He then exited his vehicle and shot her in her car. The Fourth Circuit Court of Appeals found that

the damages from the car collision would be covered, but concluded the fatal gun assault was not foreseeably identifiable within the normal use of a motor vehicle.

South Carolina District Court cases also reach the same conclusion that a gunshot injury is not foreseeably identifiable with the normal use of a vehicle.

In *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009), an old boyfriend pursued a woman for years, making unusual threats and following her. One day, he saw her driving to pick up a child at a school bus stop. He turned around and pulled next to her stopped vehicle at the bus stop. He called to her and when she looked, he shot her several times with a handgun. Using the framework established by the South Carolina Supreme Court in *Aytes* and *Bookert*, the District Court found that the vehicle of the assailant was not an active accessory AND that the injuries were not within the foreseeable normal use of a motor vehicle.

Here, the assailant vehicle was simply in the same vicinity as the vehicle the victim was driving. Like in *Holmes*, the assailant vehicle simply pulled alongside the victim. As in *Wright*, the victim was in a position where he could be shot, but that was not enough to create a causal connection with the vehicle. At no time did the assailant vehicle strike or threaten to strike the victim or the vehicle he was in. The assailant vehicle was not used as an "active accessory" to circle the victim or victim's vehicle or to chase it into a vulnerable position. The assailant vehicle was not used to trap the victim or victim's vehicle.

Additionally, Plaintiff's only injuries are from a gunshot wound. It is clear in light of *Aytes*, *Bookert, Brown and Holmes,* that gunshot injuries are not "foreseeably identifiable with the normal use of an automobile." Therefore, Levi Brown's injuries did

not arise out of the ownership, maintenance, or use of the motor vehicle as they fail the third prong of the causal connection test.

If this Court uses the framework established by the South Carolina Supreme Court in *Aytes* and *Bookert* and applies it as the District Court of South Carolina did in *Holmes* and as the South Carolina Court of Appeals did in *Wright v. North Area Taxi*, this court should deny coverage of this incident because the required causal connection did not exist when the only connection between the injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred. Additionally, the gunshot injuries were not foreseeably identifiable with the normal use of a car--therefore the injuries were not covered by State Farm's automobile insurance policy.

II. STATE FARM'S POLICY CONTAINS A SPECIFIC EXCLUSION FOR FIREARM INJURIES.

Plaintiff should be denied coverage because State Farm's automobile insurance policy contains a provision which excludes firearm injuries.

Policy language must be given its plain, ordinary, and popular meaning. *Auto-Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 138, 781 S.E.2d 137, 138 (Ct. App. 2015). The burden rests with an insurer to clearly enumerate the terms in its policy and ambiguous terms are to be construed strictly against the insurer. *Id.* Words are ambiguous when their signification seems doubtful and uncertain to persons of competent skill and knowledge to understand them. *Id.*

Here, the policy excludes coverage "for an insured whose bodily injury results from the discharge of a firearm." As the South Carolina Supreme Court stated in

Bookert and *Aytes*, gunshot wounds do not arise out of the ownership, maintenance or use of an uninsured vehicle; therefore, State Farm's exclusion is not in contravention of S.C. Code § 38-77-150. Since the exclusion is not in contravention of S.C. Code § 38-77-150, State Farm is entitled to limit their liability as State Farm chose to do in this insurance policy.

Further, this policy unambiguously states that injuries resulting from the discharge of a firearm are not covered under the automobile insurance. In the present case, the only injuries sustained occurred as a result of the unknown assailant shooting the Plaintiff. This type of injury is clearly and unambiguously excluded in the automobile insurance policy; therefore, State Farm is not required to provide coverage for this injury which they specifically excluded in their policy.

Conclusion

Plaintiff is barred from coverage under State Farm's automobile insurance policy because the gunshot wound suffered did not arise out of the ownership, maintenance, or use of the motor vehicle. Levi Brown's injuries fail to meet the three part test because the assailant vehicle is not an active accessory and because the gunshot injuries are not within the foreseeably identifiable use of a motor vehicle.

In addition, State Farm's policy specifically excludes firearm injuries. State Farm is not required to provide coverage for the injuries sustained by Plaintiff because State Farm's policy specifically excludes firearm injuries.

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Charleston, South Carolina

January 5, 2017

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	CIVIL ACTION NO. 2016-CP-10-363
LEVI THOMAS BROWN, Plaintiff, -vs- STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, Defendant.	**PLAINTIFF'S MEMORANDUM AS TO CROSS MOTIONS FOR SUMMARY JUDGMENT**

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

INTRODUCTION

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) and Bookert v. State Farm (SC 1999)—to broaden exclusions of coverage for claims that have historically been covered by South Carolina case law as "arising out of the use of a vehicle," namely vehicle-to-vehicle drive-by shootings. Regrettably, such random acts of violence on our interstates are very common. Counsel for the Plaintiff currently has two vehicle-to-vehicle John Doe shooting uninsured motorist claims, one with Allstate and this one with State Farm, that seek to deny coverage based upon the same Court opinions while ignoring the older Court opinions that are squarely on point with our facts and that are still good law. Plaintiff seeks a ruling from this trial court that is consistent with the law as it presently stands. If the carriers want to obtain a reversal of precedent from the Supreme Court, then that is the level from which such a ruling should come.

Plaintiff Levi Brown was shot in a random early morning vehicle-to-vehicle shooting on the interstate in North Charleston by a John Doe leaving him with a bullet permanently lodged between his heart and spine. Please see the filed *Stipulation of Facts* filed in this matter. Plaintiff properly filed an uninsured motorist claim for damages against the State Farm policy covering the vehicle he was driving at the time of the assault. State Farm has not challenged the propriety of the uninsured motorist claim filing, as it has the proper police reporting and affidavit from an independent witness. State Farm has denied coverage arguing that the facts as stipulated do not describe damages caused by conduct "arising out of the use of a vehicle". State Farm, as other carriers are doing, has chosen to latch on to language in more recent cases that distinguish their facts from the two controlling cases that are still good law and have never been reversed by the more recent cases. Plaintiff will set forth herein a survey of the cases in this area developing the analysis used to determine whether damages are caused by conduct "arising out of the use of a vehicle" such that the automobile insurance must cover the damages.

In this brief survey, the two clearly-controlling cases for our facts will become apparent—Howser and Towe. All of the other cases resolving the question of whether injuries from an assault are covered by automobile insurance deny coverage based upon the distinguishability of their facts from the very narrow field of covered claims defined by Howser and Towe. For claims to "arise out of the use of a vehicle, South Carolina case law as it stands presently requires injuries to be caused in the following very specific scenarios: (1) only through the use of the vehicle was the assailant able to pursue the victim and the vehicle enabled the assailant to carry out the assault, (2) the vehicle was involved in the actual infliction of damage, not just part of the event, or (3) the speed of the vehicle or force of the vehicle increases the damages.

Being careful not to issue broad decisions that include or exclude types of conduct, the courts have used a case-by-case analysis of facts. There is a clear type of scenario that the precedent defines as covered. Howser and Towe are the cases which define what "covered" looks like, and the other case opinions, including those relied upon by State Farm, show how the facts of those cases are "not covered" by analyzing how their facts are distinguishable from what has been successful. The recent reference to foreseeability as an element in the analysis only describes a feature of the Howser and Towe facts that was not present in those opinions cited by State Farm; that is, the use of a vehicle as part of a vehicle-to-vehicle drive-by shooting on an interstate is foreseeable by the parties to an insurance contract because it so intimately involves the vehicle in causing the harm, whereas the harm caused in the other cases could have been caused and to the same extent without the vehicle.

The facts of the present case are identical to the facts in Howser and squarely on point with the facts in Towe. State Farm will be citing and relying on cases which distinguish themselves factually from Howser and Towe, and State Farm cannot tell this court that Howser and Towe are not good law. Perhaps State Farm looks to put the question squarely before our Supreme Court as to whether Howser is still good law. If so, the facts of this case will force the Court to address what it has chosen not to state in any of its subsequent opinions when it cites Howser and Towe. Until that day, Plaintiff asks this court to follow the precedent of Howser and Towe and find that the facts as stipulated by the parties in this case describe damages caused by conduct which "arises out of the use of a vehicle" such that State Farm's uninsured motorist coverage applies and, furthermore and therefore, the policy provision attempting to exclude such coverage is unlawful since exclusions cannot be inconsistent with common law.

PROCEDURAL POSTURE

The Plaintiff herein responds to arguments put forth by the Defendant in its Notice of Motion and Motion for Summary Judgment dated September 29, 2016, in which State Farm seeks a dismissal of the Plaintiff's case based upon arguments (1) that the facts of this case fail to put forth a case in which the injuries arise out of the use of an uninsured motor vehicle pursuant to case law, and (2) that the policy exclusion in State Farm's applicable policy regarding damages from the discharge of a firearm lawfully bars recovery under this UM claim. Because all relevant facts have been stipulated to by the parties, and because the outcome of this case turns solely upon the declaratory relief sought by the Plaintiff as to coverage, which is a matter of law, the Plaintiff filed a Notice of Motion and Motion for Summary Judgment dated October 31, 2016 based upon the same questions addressed in State Farm's Motion for Summary Judgment—that is, (1) the facts of this case succeed in putting forth a case in which the injuries arise out of the use of an uninsured motor vehicle pursuant to case law and (2) that the State Farm policy exclusion regarding damages from the discharge of a firearm does not bar recovery in this case because it is unlawful. The parties ask that this Court treat the opportunity to decide these cross motions as an opportunity to decide the issue of declaratory relief and the underlying tort action as a matter of law such that the ruling on these cross motions will serve as a dispositive and appealable Order resolving both 2016-CP-10-363 and 2016-CP-10-364.

SURVEY OF CASE LAW : VEHICLE-TO-VEHICLE DRIVE-BY SHOOTINGS

The line of cases establishing the test and standard for determining whether injuries arise out of the ownership, maintenance or use of an automobile begins with Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961). The Supreme Court of South Carolina was presented with the question of whether injuries sustained by a passenger of a taxi cab who had her hand

slammed in the car door by her fellow passenger as they were alighting from the taxi cab were covered as a "use of the insured vehicle" within the terms of the automobile liability policy on the taxi cab. In construing the omnibus clause of an insurance policy, the Court begins with the rule of construction that "if the language of an insurance policy admits of more than one construction, that most favorable to the insured must be adopted." Id. at 558. Citing Fidelity and Casualty Company of New York v. Lott, et al., 5 Cir., 273 F.2d 500, 502 (a case in which injuries caused by the negligent discharge of a rifle where the automobile was being used as a gun rest were held to constitute a use of the automobile within the phrase "arising out of the ownership, maintenance or use of the automobile), our Court responded to the insurance carrier's contention that the use contemplated by the policy was that of driving or operating the automobile by finding that the passengers of the cab were insureds and were "using" the taxi cab when they were opening and closing the doors to unload. "The term 'use' in a policy must be considered with regard to the setting in which it is employee... [citation omitted]." Id. at 561.

In Plaxico v. U.S. Fidelity & Guaranty Co., 252 S.C. 437, 166 S.E.2d 799 (1969), the South Carolina Supreme Court was presented with the question of "whether the use by an insured of his automobile battery to crank the engine of his airplane, by connecting the batteries of the two vehicles with 'jumper cables,' constituted a use of the automobile within the meaning of an automobile liability insurance policy which provided coverage for damages 'arising out of the ownership, maintenance or use of any automobile.'" Id. at 800. The specific facts of this case provided that the insured's airplane brakes failed causing the airplane to move forward and damage another plane. The only connection between the tort and the automobile was that the incident occurred while the insured was using the car to charge the airplane battery via jumper cables. The Court reasoned that a causal connection must exist between an accident or injury

and the ownership, maintenance or use of the automobile for coverage to apply. Because the use of the automobile to start the airplane engine was not enough to create a causal connection to the event which actually caused the damages, the airplane brakes failing to secure the airplane after its engine was started, the Court refused to find coverage.

In Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1975), the South Carolina Supreme Court was presented with the question whether injuries sustained by a victim who falls from a moving vehicle (under circumstances that may be an intentional act of violence by the driver against the victim passenger) arise out of the ownership, maintenance or use of an uninsured automobile. The Court found that where the injury is as to the victim unforeseen and not the result of his own misconduct, the general rule is that the injury is accidentally sustained within the meaning of the ordinary accident insurance policy and the insurer is liable therefor in the absence of a policy provision excluding such liability. Id. at 879.

In Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (C.A.4 (S.C.) 1985), the United States Court of Appeals for the Fourth Circuit decided a case from South Carolina which presented a question of whether a shooting death arose out of the ownership, maintenance or use of the vehicles involved. While using a customer's truck for errands, the owner of an auto service shop had one of his mechanics drive him to locate his estranged wife so he could kill her if she refused to speak with him. The two found the victim in her car, and the assailant shoved his driver and the steering wheel causing the truck to collide with the victim's car. The assailant then jumped out of the truck and shot and killed his wife. The claimant in this case sought damages from the negligence by the driver of the truck in knowingly transporting a dangerous person to effectuate an assault. The question before the court was whether the use of the truck for this purpose was covered under the policy.

The "accident" upon which insurance coverage is claimed must bear a "causal relation or connection" with the ownership, maintenance or use of the automobile. [Citing Plaxico.]

Courts confronted with the general question of whether personal injuries resulting from physical assaults by insured vehicle passengers or operators "arose out of" the ownership, maintenance or use of the vehicle, have almost unanimously found no causal relation between the "use" of the vehicle and such assault-caused injuries. For instance, in Government Employees Insurance Co. v. Melton, 357 F.Supp. 416 (D.S.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973), the district court applying South Carolina law, found no "use" coverage where the claimants had been struck and injured by soft drink bottles thrown from a truck driven by the insured. Concluding that the "arising out of" language contemplates a close causal relationship between "ownership, maintenance or use" and claimed injuries, the court stated: "An automobile policy cannot properly be construed to cover injuries that result from acts wholly disassociated from, independent of, or remote from the use of the vehicle." 357 F.Supp. at 418, quoting with approval, 7 Appleman Insurance Law and Practice Sec. 4316(3), at 142. See also Commercial Union Insurance Co. of New York v. Hall, 246 F.Supp. 64 (E.D.S.C. 1965).

In cases dealing with the specific situation here in issue—a shooting by a passenger in or operator of an insured vehicle—the decisions have uniformly applied and found unmet a comparable causal relation requirement. Representative is Detroit Automobile Inter-Insurance Exchange v. Higginbotham, 95 Mich.App. 213, 290 N.W.2d 414 (1980), in which the Michigan court determined that injuries sustained by a wife from a shooting by her estranged husband did not arise out of the ownership, maintenance or use of either the wife's car or that of her husband. The husband had driven his car into the side of his wife's car, forcing it to the curb. While she remained trapped in the car, he got out of his car, walked over to hers, and shot her several times. Holding first that the fact that the wife was an occupant of her car at the time she sustained her injuries was an insufficient basis for finding that her injuries arose out of the use of her car, the court then ruled that the injuries did not either arise out of the use of the husband's car:

> Cases construing the phrase "arising out of the ... use of a motor vehicle" uniformly require that the injured person establish a causal connection between the use of the motor vehicle and the injury. (Citation omitted.) Such causal connection must be more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use of the vehicle. (Citations omitted.)
>
> Applying this requirement to the present case leads to the conclusion that appellant's injuries did not arise out of Mr. Higginbotham's use of his motor vehicle. **An assault by an armed assailant upon the driver of a car is not the type of**

> **conduct that is foreseeably identifiable with the normal use of a motor vehicle.** (Citations omitted.)
>
> To the same general effect, see also Love v. Farmers Insurance Group, 121 Ariz. 71, 588 P.2d 364 (app. 1978); Aetna Casualty and Surety Co. v. Goldman, 374 So.2d 539 (Fla.App. 1979); Nationwide Mutual Insurance Co. v. Knight, 34 N.C.App. 96, 237 S.E.2d 341 (1977).
>
> We believe, with the district court, that South Carolina courts would employ a comparable rationale in determining whether the shooting assault here arose out of the "ownership, maintenance or use" of either the Dunn or Brown vehicles. Applying that rationale, we conclude that under South Carolina law there is no coverage of this tragic assault and its consequences under either policy.
>
> First, under the Nationwide Dunn policy, it is clear that the use of Dunn's truck for transportation of Toby Brown to the scene of the shooting was merely incidental, remote from the type of conduct that is reasonably foreseeable with the normal use of such a vehicle; and not the causative factor in producing Lynda Brown's death; see Goldman, 374 So.2d 539; Plaxco, 166 S.E.2d 799. Rather, Toby Brown's assault, an act wholly independent of the use of the truck, caused the death. Thus, the incidental use of Dunn's truck in the shooting does not meet the causal relation test of coverage.
>
> Neither does the INA Brown policy provide coverage for the consequences of the shooting under this rationale. It is even clearer that the required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the insured vehicle when the shooting occurred. See, e.g., Love v. Farmers Insurance Group, 121 Ariz. 71, 588 P.2d 364 (App. 1978); Washington v. Hartford Accident & Indemnity Co., 161 GaApp. 431, 288 S.E.2d 343 (1982).
>
> -Brown at 988-989. (bold added)

Importantly, although it cites the assessment of the Michigan court regarding Higginbotham (an assault by an armed assailant upon the driver of a car is not the type of conduct that is foreseeably identifiable with the normal use of a motor vehicle), the court in Brown does not find this phrase dispositive and explains the use of the truck to transport the assailant, alone, is merely incidental and not a causative factor in producing the injuries. As we will see in later cases, assaults by armed assailants upon other drivers can in fact be foreseeably identifiable if inextricably linked to the use of the vehicle.

In Hite v. Hartford Acc. And Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) (1986), the South Carolina Court of Appeals was presented with a question of coverage under Hartford's uninsured motorist coverage for injuries sustained by a car dealership employee who returned from supper to the dealership in a vehicle owned and insured by the dealership for which he had permission to be driving. Hite stopped the vehicle, left it running, and exited the vehicle on foot to tell someone who might have backed into a new truck not to leave the parking lot. That person accelerated and ran over Hite's legs. The court reviewed three cases cited by Hite which supported coverage for injuries sustained while a vehicle was being used for unloading: Federated Mutual Implement & Hardware Ins. Co. v. Gupton, 357 F.2d 155 (4th Cir. 1966) (vehicle being used in loading and involved in the actual injury); Wrenn & Outlaw, Inc. v. Employees Liability Assurance Corp., 246 S.C. 97, 142 S.E.2d 741 (1965) (bag boy closing door on customer's hand is "use"); and Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961) (spouse closing taxi door on spouse's hand is "use" of cab). The court pointed out cases in which leaving a car running and operable while being injured outside of the car has been inadequate to find coverage and applied the facts of Hite's injuries to the analysis.

> What appears to be crucial to many courts in determining whether an injury produced by another vehicle or person falls within the ambit of "use" is the existence of a causal connection between an accident or injury and the use of a vehicle. Chicago Ins. Co. v. Security Ins. Co., 111 N.J.Super. 291, 268 A.2d 296 (1970). It has been held that the existence of a causal connection obviates the necessity of finding that the injury was directly and proximately caused by the use of the vehicle, Insurance Co. v. Royal Indem. Co., 429 F.2d 1014 ([6th Cir.] 1970), and affords coverage for injuries bearing almost any causal relation with the insured vehicle, State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal.3d 94 [109 Cal.Rptr. 811] 514 P.2d. 123 (1973). The injury must, however, be foreseeably identifiable with normal use, maintenance, and ownership of the vehicle. Kangas v. Aetna Casualty & Surety Co., 64 Mich.App. 1, 235 N.W.2d 42 (1975). If the injury was directly caused by some independent or intervening cause wholly disassociated from, independent of or remote from the use of the automobile, the injury cannot be said to arise out of its "use." Worthington v.

State, Wyo, 598 P.2d 796, 807 (1979). Even if there is some remote connection between the use of the automobile and the injury complained of, if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile, the injury is not the result of the "use" of an automobile. Norgaard v. Nodak Mut. Ins. Co., ND, 201 N.W.2d 871, 875 (1972)....

In the instant case [Hite] left the insured automobile, walked toward the dealership, and answered the call of the night watchman by walking fifty feet to tell Martin not to leave after he had backed into a truck. [Hite's] injury was directly caused by Martin, and this was an independent or intervening cause wholly disassociated from, independent of, and remote from the use of the insured automobile. It cannot be said that being struck fifty feet from the insured automobile by another vehicle while answering a call for assistance of the night watchman is foreseeably identifiable with normal use, maintenance and ownership of the vehicle. It is difficult to see where use of the insured automobile was directly connected with or a cause of the ensuing accident.

In this case there was no loading or unloading of the insured automobile, or even an involvement of the vehicle in the production of the injury, that would put the fact situation within the parameters of "use" as defined in South Carolina. Other jurisdictions have decided cases similar in fact to the one presented here, and the key to determining whether injuries remote to the operation of an automobile occur during a "use" of the vehicle is the existence of a causal connection between the injury and the use. Such a causal connection has not been established in this case, where the injuries are the direct result of an intervening cause.

-Hite at 176-177.

Leading up to 1992, the case law had articulated the "foreseeably identifiable" element of the analysis. Armed assaults upon drivers had even been described as not foreseeably identifiable with the use of an automobile. However, the causation analysis was much more complex than mere foreseeability, and after several decisions articulating injuries by assaults that were not covered as arising out of the ownership, maintenance or use of vehicles, the Court heard the first of two cases that describe facts which have been held to meet the necessary causal connection with such a clear causal connection as to overcome the broad characterization by the earlier Court as "foreseeably identifiable." In 1992, our Supreme Court was presented a case that, Plaintiff Levi Brown contends, is firmly controlling upon the case at hand.

In Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992), our Supreme Court was presented the certified question from the United States Court of Appeals for the Fourth Circuit as follows: "Is the insurer liable under the uninsured motorist provision involving injuries 'arising out of the ownership, maintenance, or use' of an uninsured vehicle (§38-7-140, S.C. Code Ann.) **for gunshot injuries sustained by a person traveling on a public highway in an insured vehicle and inflicted during a vehicular chase by an unknown owner or operator of an unidentified vehicle?**" (bold added) Because the facts of Howser are so squarely on point with the facts of the present case, the analysis of the Howser Court is worth citing verbatim:

> It is mandatory that all automobile insurance policies issued in South Carolina contain an uninsured motorist provision "undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." S.C. Code Ann. §38-77-150 (1989). An insured is legally entitled to recover damages "arising out of the ownership, maintenance or use" of an uninsured vehicle. S.C. Code Ann. §38-77-140 (1989). Thus, the issue presented is whether Howser's injuries arose out of the ownership, maintenance or use of the assailant's vehicle.
>
> The pertinent facts presented here are virtually identical to those found in Continental Western Insurance Co. v. Klug, 415 N.W.2d 876 (Minn. 1987). The Klug court found the gunshot injuries arose out of the use of the uninsured motorist vehicle. We find the analysis employed by the Minnesota Supreme Court is consistent with South Carolina law.
>
> In Klug, the court first considered the causal connection between the vehicle and the injury. The causation requirement is something less than proximate cause and something more than the vehicle being the mere site of the injury. Id. We employed a similar analysis in Chapman v. Allstate Insurance Co., 263 S.C. 565, 211 S.E.2d 876 (1975), wherein an uninsured motorist assaulted the insured while traveling in the uninsured's vehicle. The insured was injured when she fell or jumped from the moving vehicle as a result of the attack. Accordingly, we held it was clear the injury arose out of the use of the uninsured automobile. Id. at 570, 211 S.E.2d at 879. Although the assault, not the use of the vehicle, was the cause of the insured's injuries, we found that the use of the vehicle causally contributed to the claimant's injuries. Id. See also Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961) (Court cited with approval Fidelity & Casualty Co. of N.Y. v. Lott, 273 F.2d 500 (5th Cir. 1960), wherein the death caused by the negligent discharge of a rifle when the automobile was being used

as a gun rest was held to have arisen out of the use of an automobile for purposes of insurance policy).

In the case at bar, 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 as was found in Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir. 1985). 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.

Once causation is established, the court must determine if an act of independent significance occurred breaking the causal link. Klug, 415 N.W.2d at 878. This also is consistent with South Carolina precedent. In Plaxco v. United States Fidelity and Guaranty Co., 252 S.C. 437, 166 S.E.2d 799 (1969), the vehicle's battery was used to start the engine of an airplane. Once this was accomplished, the airplane's brakes failed, causing it to move forward and damage another plane. This Court found the only connection between the vehicle and the plane was the use of the vehicle to start the plane. Since that purpose had been completed when the plane moved forward, any causal connection was broken and the accident resulted from the use of the plane and not the vehicle. Id. at 441, 166 S.E.2d at 801. See also Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) ("if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of the automobile, the injury is not the result of the "use" of the automobile).

In this case, no independent act occurred to break the causal link. Here, as in Klug, the unknown driver's use of his vehicle and the shooting were inextricably linked as one continuing assault. Accordingly, we conclude that for the purposes of Howser's uninsured motorist coverage, her injuries arose out of the use of her assailant's vehicle.

-Howser at 309 S.C. 272 – 274.

Other courts have also found, under similar facts, the gunshot injuries arose out of the use of the vehicle. Nationwide Mut. Ins. Co. v. Munoz, 199 Cal.App.3d 1076, 245 Cal.Rptr. 324 (1988); Fortune Ins. Co. v. Ferreiro, 458 So.2d 834 (Fla.App. 1984); Ganiron v. Hawaii Ins. Guar. Ass'n., 69 Haw. 432, 744 P.2d 1210 (1987). Contra Nationwide Mut. Ins. Co. v. Knight, 34 N.C.App. 96, 237 S.E.2d 341 (1977) rev.den., 293 N.C. 589, 239 S.E.2d 263 (1977).

-Howser at footnote 1.

The Howser decision is squarely on point with the Plaintiff Levi Brown's case. The facts of Howser are indistinguishable from the facts of Levi Brown's case. Howser and a friend left a bowling alley in Columbia and headed home in the inside lane of a four-lane road. Howser's vehicle was bumped from behind several times by a car that was unknown to either Howser or her friend. The assailant pulled his car alongside Howser's vehicle in the outside lane and yelled at them and pointed a gun at the passenger window where the friend was sitting. Howser made a quick left turn onto a side street to avoid the assault. As she completed her turn, the gunman shot at Howser's vehicle and a bullet pierced the driver's seat and entered Howser's back. Howser at 271.

Levi Brown and friends were leaving a club headed to another club and were driving on the interstate in North Charleston in the right-hand lane when a vehicle unknown to either Brown or his friends pulled alongside of their vehicle in the left lane and shot at their vehicle as Brown attempted to exit to the right off of an exit. A bullet struck the vehicle and entered Brown's back between his heart and spine. John Doe's vehicle was used by the assailant to chase the Plaintiff, to get along side of the Plaintiff on the interstate in a position enabling the assailant to discharge a gunshot so that would hit the Plaintiff moving at the same speed, and the assailant's vehicle enabled him to make a quick getaway. Without the assailant's vehicle, Levi Brown would not have been able to have been shot by the assailant.

The Court in Howser cites the case of Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987) as having "virtually identical" facts and finds the analysis employed by the Minnesota Supreme Court is consistent with South Carolina law. The facts of Klug are stipulated as follows in that opinion:

> Klug was driving home from work in the right-hand lane of a highway at 55 miles per hour. Klug looked to his left as a car pulled next to him in the passing lane 3 to 5 feet away. He recognized the driver as Daniel Bahe, a fellow worker. He also noticed that Bahe was pointing a shotgun out the passenger window directly at him.
>
> Klug immediately swerved his car right and ducked down to avoid being shot. Only Klug's left arm, which he used to drive the car, remained exposed through the window. Klug heard a gunshot, and sat hup to steer the car back into the right-hand lane; unknown to Klug at the time, he had been wounded in the left arm. Klug turned to look left and saw the shotgun was still pointed at him. Klug accelerated ahead of Bahe as a second shot was fired. Klug then pulled into the left lane in an attempt to prevent Bahe from approaching along the driver's side. Bahe then sped up and rammed Klug's vehicle from behind. Klug swerved back and forth across the highway to prevent Bahe from pulling alongside.
>
> The two cars maneuvered along the highway until they approached an exit. Klug noticed for the first time that he had been shot. He slammed on his brakes and pulled off the exit ramp. Bahe was unable to slow down quickly enough to exit with Klug. Klug stopped his car and received assistance.
>
> The only injury claimed by Klug was the gunshot wound. The assailant Bahe was driving an uninsured car at the time of the incident.
>
> -Klug at 876.

The facts in Klug are even more indistinguishable from the fact in the case at hand. Although presented with "an assault by an armed assailant upon the driver of a car" that has been found in the past to be "not the type of conduct that is foreseeably identifiable with the normal use of a motor vehicle," both the Minnesota and South Carolina Supreme Courts recognized a more intense causal connection between these injuries and vehicle uses.

In 1993, the United States Court of Appeals for the Fourth Circuit decided an appeal from South Carolina District Court using the Howser analysis to find coverage under the boat liability policy for injuries caused by a collision between a vehicle and a boat being towed by another vehicle. See State Farm Fire and Cas. Co. v. Pinson, 984 F.2d 610 (C.A.4 (S.C.) 1993). After finding that a towed vehicle is a "used" vehicle, the court reasoned as follows:

> Second, we find State Farm's principal argument—that South Carolina law "clearly mandates a narrow interpretation of the term 'use' in an insurance contract"—unpersuasive. ... In South Carolina, the term "use" has been broadly,

not narrowly, construed. For example, in Hite v. Hartford Acc. & Indem. Co., 288 S.C. 616, 344 S.E.2d 173, 175 (1986), the court stated that the concept of "use" was broader than the "operation" of a motor vehicle. The South Carolina Supreme Court has frequently cited with approval cases from other jurisdictions defining the concept of use very broadly. See Howser, 422 S.E.2d at 107; Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961). One case cited approvingly in both Coletrain and Howser is Fidelity & Casualty Co. of N.Y. v. Lott, 273 F.2d 500 (5th Cir. 1960). In Fidelity, the driver of the insured vehicle was using its roof as a gun rest to shoot a deer when, "[f]or some unexplained reason, ... the bullet tore through the top of the car, was deflected downward and inflicted the fatal injuries [to the passenger]. Id. at 501.

-Pinson at 612.

The court in Pinson finds that a towed boat is in "use" and goes on to find that the injuries sustained by the victim "resulted from" the boat's use, again citing Howser, because the victim actually struck the boat and, therefore, was more than the mere site of the injury.

Another 1993 case, Canal Ins. Co. v. Insurance Co. of North America, 315 S.C. 1, 431 S.E.2d 577 (1993), presented our South Carolina Supreme Court with a review of coverage for damages sustained when a single-engine truck crane tipped over into a building while the crane portion of the truck was in use (wheels lifted off of the ground onto retractable hydraulic outriggers which level the crane while in use). An exclusion in the automobile liability coverage for the "1975 Linkbelt Truck Crane" provided coverage only when the truck crane was in use for transportation, not when it was in use as a crane. The Court considered the resulting question of whether such an exclusion is allowable under § 38-77-140's requirement that automobile insurance policies in South Carolina must insure "for damages arising out of the ownership, maintenance, or use of these motor vehicles...".

In the recent case of Howser [citation omitted and made consistent], this Court interpreted "use of a motor vehicle" to mandate coverage for gunshot wounds sustained by a driver who was shot by the driver of another vehicle during a vehicular chase. In Howser, however, we specifically declined to decide whether the vehicle must be used for transportation at the time of the injury to be included

> in the mandated coverage. 422 S.E.2d at 109, n.2. Here, the truck crane was not being used for transportation at the time of the accident.
>
> We now construe § 38-77-140 and define "use of a motor vehicle" as limited to transportation uses. This is the definition used in Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987), a case upon which this Court relied in Wausau. See also Classified Ins. Corp. v. Vodinelich, 368 N.W.2d 921 (Minn. 1985) (coverage not mandated where auto used by insured to commit suicide in garage and her children were accidentally asphyxiated in the home); Waldbillig v. St. Farm Mut. Auto. Ins. Co., 321 N.W.2d 49 (Minn. 1982) (coverage not mandated where insured's hand was injured working on backhoe permanently mounted on back of truck). Such a construction of § 38-77-140 is consistent with legislative intent to mandate coverage for the benefit of the public since it encompasses those uses foreseeable to the parties to an automobile insurance policy.
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> -Canal at 579-580.

Canal reinforces the intention of the Court to carve out an exception to "foreseeably identifiable with the normal use of a motor vehicle" for gunshot wounds sustained by a driver who was shot by the driver of another vehicle during a vehicular chase. The Court, one year later, describes such coverage as being mandated by Howser.

Two years after Howser, our Supreme Court decided another case squarely on point with and controlling our facts—Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994). In a case where the insurance carrier contended that injuries received by an operator of a tractor when struck by a ricocheting bottle thrown by a passenger named Alexander from Towe's passing car did not arise out of the "ownership, maintenance or use" of Towe's automobile, the Court disagreed. Home Insurance first argued that the Howser analysis only applies to intentionally inflicted injuries.

> The test for determining whether an injury arose out of the use of a vehicle turns on the causal connection between the vehicle and the injury. [Howser] at 422 S.E.2d at 108. No distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act. See Westchester Fire Ins. Co. v. Continental Ins. Co., 126 N.J.Super. 29, 312 A.2d 664 (Super.App.Div. 1973), aff'd, 65 N.J. 152, 319 A.2d 732 (1974) (substantial nexus existed between injury

and the use of the car regardless of whether the object blew out of the car window, fell out, or was pushed or thrown out).
-Towe at 827.

Home Insurance next argued the lower court erred in finding a causal connection between the automobile and the victim's injuries.

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. [citation omitted] As in [Howser], the automobile was an active accessory that gave rise to the injuries. [citation omitted] Therefore, we find that the Court of Appeals did not err in holding that a causal connection exists between the use of Towe's automobile and [victim's] injuries.
-Towe at 827.

Home Insurance next argued that the assailant's act of throwing the bottle is an act of independent significance that breaks the causal connection between the victim's injuries and the use of Towe's automobile.

The use of the automobile and [assailant's] throwing of the bottle were, as in [Howser], "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 [victim's] injuries. Accord Valdes v. Smalley, 303 So.2d 342 (Fla.Dist.Ct.App. 1974) (injuries that resulted from passenger's throwing a bottle from a car were causally connected with the use of the automobile and no intervening event broke the causal link.
-Towe at 827.

Towe became the second case to mandate coverage for assault conduct that was deemed uncovered in a broad sense before cases such as Klug and Howser made narrow exceptions for injuries that arise out of conduct which is so inextricably linked to the active use of the vehicle in causing the injuries.

In 1994, the Supreme Court of New Hampshire decided an assault-on-the-roadway-case and pointed out that in the cases where courts have denied coverage, "the assailant left his

vehicle before assaulting the other party." Cannon v. Main Bonding & Cas. Co., 639 A.2d 270, 138 N.H. 365 (N.H. 1994).

In 1995, our Court of Appeals decided Carraway v. Smith by South Carolina Ins. Co., 321 S.C. 23, 467 S.E.2d 120 (Ct. App. 1995). Here, a known shooter, Smith, exited a red vehicle that was stopped behind Carraway, and stood for several minutes outside of the red car before opening fire at someone on the sidewalk, Carraway was injured inside of his own car by fragmented glass caused by a bullet from Smith's gun that went through the windshield of Carraway's car. Carraway instituted an uninsured motorist claim with his carrier South Carolina Insurance Company and filed suit against Smith. The insurer moved for summary judgment on the issue of whether it was liable for Carraway's injuries under the statutory uninsured motorist provision involving injuries "arising out of the ownership, maintenance, or use" of an uninsured vehicle. The Court of Appeals reasoned as follows:

> In [Howser] [citation omitted and made consistent], our supreme court considered the question of whether an insurer was liable, pursuant to S.C. Code Ann. § 38-77-140, for gunshot injuries sustained by a person traveling on a public highway in an uninsured vehicle and inflicted during a vehicular chase by an unknown owner or operator of an unidentified vehicle. In holding [Howser] was liable for the claimant's injuries, the Court articulated a **two-pronged test** for determining when an injury arises out of the ownership, maintenance, or use of an uninsured vehicle. Id. First, the party seeking coverage must establish a "causal connection" between the vehicle and the injury. As defined by the [Howser] Court, the causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. Id. In addition, there must exist no act of independent significance breaking the causal link. Id. at 274, 422 S.E.2d at 109, citing Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986) ("if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of the automobile, the injury is not the result of the 'use' of the automobile").
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> -Carraway at 25.

Carraway's argument that the red car was an active accessory because it was used to deliver the assailant to the site of the shooting and to keep Carraway within the zone of danger until after the injury occurred was rejected by the Court of Appeals, specifically distinguishing the facts of Carraway's case from those in Howser. Having the assailant get out of the car for several minutes broke any causal link between the car and the shooting. "Unlike the facts in [Howser], there was no ongoing use of a vehicle in this case to carry out the attack." Id. at 26. The Court of Appeals expressly declined to "extend the reasoning of the [Howser] case to these facts."

In 1997, our Court of Appeals decided Doe v. South Carolina State Budget and Control Bd., 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997). In Doe, the question before the court was whether a police officer's use of his patrol car as part of fact patterns involving sexual assault provided coverage under the automobile coverage for injuries. The Court of Appeals described a "three-pronged test" to determine the scope and meaning of the phrase "ownership, maintenance, or use" of a covered vehicle.

> First, the claimant must show a causal connection between the vehicle and the injury. Wausau Underwriter's Ins. Co. v. Howser, 309 S.C. 269, 272-73, 422 S.E.2d 106, 108 (1992). Next the court must determine if the injuries were caused by an act independent of the vehicle's use. Id. at 273-74, 422 S.E.2d at 108-09; Carraway v. Smith, 321 S.C. 23, 25-26, 467 S.E.2d 120, 122 (Ct. App. 1995) (finding no coverage for injuries caused by an independent act wholly separate from the vehicle's use, even where the use of a car and injuries were connected). Finally, the court must determine how the vehicle was used and allow coverage to the extent the vehicle was used for transportation purposes. Canal Ins. Co. v. Insurance Co. of N. Am., 315 S.C. 1, 4, 431 S.E.2d 577, 579-80 (1993) (limiting S.C. Code Ann. § 38-77-140 and "use of motor vehicle" to transportation uses); see also Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 621, 344 S.E.2d 173, 176 (Ct. App. 1986) (defining "use" as "foreseeably identifiable with the normal use, maintenance and ownership of the vehicle").

The Court of Appeals worked the fact pattern of a police officer who sexually assaults women he has pulled over for DUI through the analysis. "In this case, we find no causal relationship

between the vehicle and Appellants' injuries as required by [Howser]." The court found that the situs of an injury is "not necessarily a causal link" and found that the officer's assaults were "acts of independent significance which broke the causal chain." Id. at 219.

> The injuries to Appellants resulted from Roberson's assaults of them, not from his use of the vehicle. To hold otherwise would subject automobile liability carriers to exposure for any criminal act committed in the insured vehicle. This would certainly expand the reasoning of [Howser], which we decline to do. Accord Doe v. State Farm Fire & Cas. Co., 878 F.Supp. 862, 868-69 (E.D.Va. 1995).
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> -Id. at 219.
>
> Doe addressed whether an insured was entitled to uninsured motorist coverage arising out of the use of a stolen vehicle, where the vehicle was used to transport the insured to several locations for the purpose of sexually assaulting her. Id. at 862-63. The United States District Court for the Eastern District of Virginia refused to extend coverage. The court noted the existence of some causal connection between the vehicle's use and the insured's injuries, but held that this did not amount to the requisite connection needed to establish coverage. Id. at 864-65. "[T]he relevant inquiry is whether the vehicle is being used as a vehicle at the time of injury, and if so, whether the injury resulted from that use. In this case, Doe's injuries arose not from the abduction where the vehicle was used as a means of transportation, but from the assault, where the vehicle was used simply as a situs, or enclosure." Id. at 868.
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> -Id. at footnote 5.

While the courts in both Doe v. State Farm and Doe v. SC Budget and Control Bd. took a fairly harsh view toward the "injury" of being abducted or unlawfully detained by an operator of a vehicle, the reasoning used by these courts is consistent with Howser and does nothing to restrict its holding or the holding of Towe. Vehicle-to-vehicle drive-by shootings and drive-by assaults with bottles or other objects propelled by the force of the vehicle are distinguishable from criminal ventures which involve the vehicle as a smaller part of the overall scheme. Vehicle-to-vehicle drive-by shooters or "throwers" are utilizing the vehicle for transportation purposes at the moment of the assault. The assault is not possible without the use of the assailant's vehicle. The movement of the vehicle allows the infliction of damage and increases the likelihood and

severity of damage. The assault and the use of the vehicle are inextricably linked, and there is no break in the causal link.

In State Far Mut. Auto. Ins. Co. v. Bookert, 330 S.C. 221, 499 S.E.2d 480 (Ct. App. 1997), State Farm attempted to deny underinsured motorist coverage to the victim of a shooting who was standing in the doorway of a McDonalds when he was shot by assailants in a Geo Tracker who had followed the victim to the McDonalds from a prior incident, circled the lot looking for him and used the Geo tracker as a platform for the assault, was moving when the shots were fired and then used it to escape. The Court of Appeals rejected State Farm's argument that that the intentional firing of the handgun was an act of independent significance which broke the causal link between the underinsured automobile and the assault. State Farm claimed "the assault was wholly independent of and remote to the use of the underinsured vehicle. We disagree." State Farm argued:

> [T]he criminal act of shooting a gun at another with the intent to harm or kill is an act which should break any causal connection between the use of an automobile and the resulting injuries. This argument is unpersuasive. If the act of firing a gun is enough to establish an intervening cause, then the Court in Howser could not have reached the conclusion that it did...
>
> To the extent State Farm argues for and seeks a re-examination of the Howser opinion, this Court is bound by existing precedent of the South Carolina Supreme Court. McKenney v. Jack Eckerd Co., 299 S.C. 523, 386 S.E.2d 263 (Ct. App. 1989), rev'd on other grounds, 304 S.C. 21, 402 S.E.2d 887 (1991) (Court of Appeals has no authority to overrule or modify previous decisions of Supreme Court). Moreover, when determining whether the injury arose out of the "use" of the vehicle, no distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act. Home Ins. Co. v. Towe [citation omitted]. See also Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1975) (when insured is intentionally injured and injury is as to him unforeseen and not result of his own misconduct, general rule is that injury is accidentally sustained within meaning of ordinary accident insurance policy and insurer is liable therefor in absence of policy excluding such liability).

Prior to the Supreme Court reversing the Court of Appeals decision in Bookert in 1999, our Supreme Court decided the Aytes case and takes the opportunity to clearly delineate the elements of the test for injuries arising out of the ownership, maintenance or use of a vehicle. Nothing about the Aytes case changes the analysis that has been used for decades.

State Farm would have this Court believe that Aytes somehow officially heightens the importance of "foreseeably identifiable with the normal use of the automobile," simply because the Bookert Court limits its explanation of why it disagreed with the Court of Appeals to this phrase. Resting its decision on this phrase does not mean that the phrase means more than simply stating that the Court did not find the facts presented to describe the necessary causal connection to fit into the narrow lane occupied by Howser and Towe.

In 1998, our Supreme Court heard the case of State Farm v. Aytes, in which opposing counsel argued for State Farm. The facts of the Aytes case are as follows: Randy Aytes forcibly took Donna Dawson's car key and forced her into the car then drove her to a secluded area with the expressed intent of killing Dawson. Aytes got out of the car and stood outside of the car on the passenger side and fired a pistol striking Dawson in the foot. Certified questions were presented to the Supreme Court from our United States District Court, the dispositive question being "Did Donna Dawson's injuries result from the ownership, maintenance, or use of her vehicle?" Our Supreme Court summarized the precedent as follows:

> An insured is legally entitled to recover damages arising out of the "ownership, maintenance, or use" of an uninsured vehicle. S.C. Code Ann. § 38-77-140 (1989). The two-pronged test for determining when an injury arises out of the ownership, maintenance, or use of an uninsured vehicle is set out in Wausau Underwriters' Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). First, the party seeking coverage must establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. A third requirement was added in Canal Ins. Co. v.

of the assault had nothing to do with the operational nature of a vehicle as a vehicle nor the functional characteristics of a motor vehicle." In contrast, the victim attempted to distinguish the facts from Aytes by highlighting the role the vehicle played in the ongoing assault and the fact that the parties never exited the vehicle.

The District Court decided that the "use of the vehicle for transportation to the location of the assault was not the causative factor in Lain's death and was not foreseeably identifiable with the normal use of the vehicle." What is important to note is that the ruling explains why the use was not "foreseeably identifiable"—because the use was not the causative factor in Lain's death—NOT the other way around. "Foreseeable identifiability" is a conclusion to be reached after determining the causal connection. The court does not find a lack of causal connection because the use was not foreseeably identifiable. The District Court goes on to also find that the facts of this case fail the "act of independent significance" and "transportation" elements. Lain at 648-650.

In Peagler v. USAA Ins. Co., 368 S.C. 153, 628 S.E.2d 475 (2006), 448 F.3d 286 (4th Cir. 2006) the South Carolina Supreme Court addressed a certified question from the United States Fourth Circuit Court of Appeals of whether an injury arose out of the ownership, maintenance or use of a vehicle such that the vehicle's insurance policy provides coverage for the accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle which had been used for hunting purposes the previous day. The Court reviews all of the cases cited herein, including the Supreme Court's reversal in Bookert.

> In Bookert, we found no causal connection between the vehicle and the injury when a soldier fired gunshots from a vehicle which was moving forward while in the traffic lane at a fast food restaurant, injuring a pedestrian. The assault was not foreseeably identifiable with the normal use of an automobile. Bookert, 337 S.C. at 293, 523 S.E.2d at 182.

-Peagler at 479.

The Supreme Court's opinion in Peagler draws a distinction between the line of cases finding no causal connection between the vehicle and injury and those in which coverage exists.

> ...because the vehicle was actively used to perpetuate an assault or injury on another person. See Towe, 314 S.C. 105, 441 S.E.2d 825 (finding a causal connection between vehicle and injury where victim, who was driving an oncoming tractor, suffered injuries when the steering wheel of his tractor was struck by a bottle thrown by passenger in passing car; car was an active accessory that gave rise to the injury); Wassau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992)(finding causal connection between vehicle and injury where insured suffered gunshot wounds during vehicular chase by an unknown assailant using an unidentified vehicle).
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> -Peagler at 480.

The Court found that the accidental discharge of a firearm being unloaded after hunting purposes is "foreseeably identifiable" with the normal use of a pickup truck; however, the Court found the Plaintiff failed to show a causal connection exists between the truck and the accidental shooting because the truck was merely the site of the injury and not actively used or involved in the injury.

Holmes v. Allstate Ins. Co., 766 F. Supp.2d 1022 (D.S.C. 2009) presented facts to the Charleston Division of our District Court of a stalker who drove his vehicle next to the victim, stopped, called her name and shot her with a handgun when she looked over at him, then left the scene. The victim sought to recover the jury award from both the assailant's Allstate liability coverage and also the victim's own underinsured motorist coverage, also with Allstate. The District Court distinguished the holdings of Howser and Towe from the facts of Holmes' assault.

> [T]he court, after careful consideration, is not convinced that the events underlying this dispute invoke the conclusions reached in either Howser or Towe. In Howser, the court found a causal connection based on its consolidation of both the vehicular chase and the gunshot assault as a single "ongoing assault." The categorization stemmed from the assailant's use of his vehicle to ram Howser's vehicle numerous times as it continuously pursued her in a chase on a public highway and from the assailant's reliance

State Farm would have the "foreseeably identifiable with normal use" component of the long-standing analysis be elevated now to exclude the conduct previously found to be covered (drive-by shootings from one moving vehicle into another moving vehicle and bottles thrown from moving vehicles). Bookert does not overturn Howser or Towe—the Supreme Court simply disagreed with the Court of Appeals and found that the Bookert fact pattern fell outside of the standard without a detailed explanation. There is much distinguishable about the Bookert facts from Howser and Towe. Bookert was a pedestrian seeking UIM coverage. The shots in Bookert were fired from a stopped vehicle that had lurched forward. The vehicle was not such a crucial part of the infliction of injury in Bookert as in Howser or Towe or as in the case at hand here. Our case finds the vehicle in the exact same causal connection with the injury as Howser.

Our Columbia Division of the United States District Court decided recent assault coverage case in Nationwide Mut. Fire Ins. Co. v. Jeter, ____ (D.S.C. 2013). In this fact pattern, the court was presented with injuries resulting from an assault upon a victim-passenger by her personal assistant involving deployment of pepper spray by the assailant onto the victim both while the victim was inside the assailant's vehicle and by the assailant standing outside of the vehicle after the victim exited the vehicle. The court found these injuries did not arise out of the ownership or maintenance or use of the assailant's vehicle, but, rather than simply analyzing the facts pursuant to the standard set forth in Howser and Towe, the court struggled with how to articulate the standard after Aytes and Bookert.

> Although Howser and Towe are pertinent to the analysis of whether Jeter's vehicle was merely the sight of, or an active accessory to the assault, those cases' relevance is limited due to the fact that both were decided before Aytes. Significantly, Aytes added to the causal connection analysis the requirement that the "injury must be foreseeably identifiable with the normal use of the automobile." Although prior to Aytes a few courts had acknowledged that such a requirement might be relevant to the causation analysis, see, e.g., Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir. 1985); Hite v. Hartford Accident and Indem. Co., 344 S.E.2d 173 (S.C. Ct. App. 1986), the South Carolina Supreme Court did not consider the foreseeability of the victim's injuries in Howser or Towe.

-Jeter.

The court confuses the absence of the word "foreseeability" in the opinions of Howser and Towe with lack of consideration of the concept of foreseeability in these decisions. Foreseeability pre-dated Howser, Towe and other decisions analyzing whether injuries arise out of the ownership, maintenance or use of an automobile. While the Aytes decision articulated foreseeability as part of its overall analysis, as other opinions in the past have, the Aytes Court went through the *entire* analysis and cited both Howser and Towe. If foreseeability was intended by the Court to be the new rule, there would have been no reason to restate and work through the machinations of the other parts of the test. Arguably none of the conduct described in any of these cases is "foreseeably identifiable with the use of an automobile." It is illogical that the Court would have allowed the elements to exist concurrently for decades within this test if one of the oldest components should simply be read as trumping all other aspects of the analysis. Vehicle-to-vehicle drive-by shooting and bottle throwing from vehicles could not have been determined to arise out of the use of a vehicle if foreseeability means what the District Court in Jeter takes it to mean. What the courts have done over the years is to define what "foreseeably identifiable with the normal use of a vehicle" means by developing the more in-depth analysis which defines vehicle-to-vehicle drive-by shootings and bottle throwing from vehicles as covered because they involve continuous vehicular movement and an inextricable link between the vehicle and the injury. All of the other parts of the analysis give foreseeability its context. By failing to describe any other context besides lack of foreseeability, Bookert has left the insurance carriers with the false and overly-simplistic impression that any conduct that is unforeseeable cannot be considered arising out of the ownership, maintenance or use of a vehicle. Not only would all of the other elements be rendered meaningless by this interpretation of foreseeability in this context, but the insurance carriers would be primed to begin excluding all conduct they deem "unforeseeable" from coverage—where would the line be drawn? As we know from this case, State Farm has already seized the opportunity to attempt to exclude all injuries resulting from the

discharge of a gun. Exclusions for injuries arising from the throwing of a bottle, or from the distraction of a cell phone, or from the distraction of a pet, etc.

In Jeter, the District Court did what the court did in Holmes—that is, the court properly distinguished the facts before the court from Howser and Towe, but then the court elevates the Bookert opinion to the posture of rendering all of the prior machinations with precedent moot.

> Coulter's reliance on Howser and Towe is unavailing. In those cases, the at-fault parties harnessed the speed and force of their vehicles and caused injuries that would have been difficult to inflict otherwise. Neither case involved an assault that occurred within a moving vehicle. ... the court does not find that the moving vehicle was essential to accomplishing the assault, as Jeter easily could have deployed pepper spray against Coulter when the vehicle was motionless, or while the women were standing outside the vehicle.

The inability failure of the facts in Jeter to fall within the standard from Howser and Towe—the harnessing of speed and force and causing of injuries that would have been difficult to inflict otherwise—should be enough to find that the long-time two or three-pronged test was simply failed. Regrettably, the District Court uses language in its opinion that takes the analysis too far and to a place the carriers would like the Court to go:

> Even if the court were to find that Jeter's vehicle was more than merely the site of the assault, under Bookert, Coulter's injuries are not foreseeably identifiable with the normal use of a vehicle. Coulter argues that Bookert is distinguishable because the assailant in that case intended to use the vehicle in an abnormal manner—to carry out a drive-by shooting—whereas Jeter's assault was a spontaneous act, during what was an otherwise normal use of a vehicle. This is not a meaningful distinction because the test is not whether the vehicle was being used in a foreseeable or normal manner at the time of the injuries, but whether the injuries are foreseeable with the normal use of a vehicle.
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> -Jeter at 8.

Spraying a passenger inside a vehicle with pepper spray does not arise from the ownership, maintenance or use of the vehicle pursuant to Howser and Towe, as well as their progeny such as Aytes and Bookert. Nothing about Aytes nor Bookert is needed to find that the facts of Jeter fall outside of the defined types of injuries our courts have required to be covered by our state's automobile insurance carriers. The

injuries claimed by Jeter were not foreseeable with the normal use of a vehicle because their cause was not inextricably linked to the speed and force of the vehicle and were not difficult to inflict without the involvement of the vehicle.

In 2013, the Charleston Division of the United States District Court decided United Fin. Cas. Co. v. Butler, (D.S.C. 2013). In evaluating whether injuries sustained to a victim—who was tased by police who were called to the property by repo men who were sitting in a tow truck watching the police confrontation with the victim—arose out of the ownership, maintenance or use of the tow truck, the court articulated and applied the test as stated in Aytes but did so without the confusing addition of the word "foreseeability" into the analysis.

> Under South Carolina law, 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 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, 503 E.E.2d 744, 745 (S.C. 1998).

The court in Butler found that the facts set forth in the complaint by Butler failed each of the three elements of the test—with citations to Howser and Towe providing meat to the explanation. The tow truck was not an active accessory by simply providing the perch from which the defendants watched the assault, the police involvement was a clear act of independent significance and the truck was not being used for transportation at the time of the assault.

Nationwide Ins. Co. of Am. v. Jackson (D.S.C. 2015) presented the United States District Court, Florence Division, with a declaratory judgment action as to underinsured motorist coverage for an accidental shooting of a passenger victim, after hunting, who had exited his vehicle and was then shot in the back of the leg when the driver exited the vehicle and attempted to retrieve his gun from the back seat of the vehicle. Dismissing suggestions from the plaintiff that static electricity from contact between the rifle and the seat of the vehicle may have contributed to the accidental discharge of the rifle, the court

cited Peagler as clearly controlling and found that there was no evidence the truck was an active accessory in the way Peagler requires.

POLICY EXCLUSION FOR DAMAGES FROM THE DISCHARGE OF A FIREARM

In addition to seeking to expand the decision of *Bookert* beyond its holding, State Farm seeks to deny coverage to victims of drive-by shootings by policy exclusion language. Because the injuries sustained by Levi Brown arose out of the ownership, maintenance or use of a motor vehicle and South Carolina insurance policies are required to provide coverage consistent with South Carolina law, the policy exclusion is unlawful in this case.

CONCLUSION

While the courts have expounded on the analysis used to determine whether injuries arise out of the ownership, use or maintenance of a vehicle to include an expressed foreseeability element that provides the Court a broad brush with which to paint claims outside of the already small coverage universe, none of the opinions since Howser and Towe have overturned or reversed the holdings in or the precedential value of these two cases. To the contrary, Howser and Towe are consistent with Aytes and Bookert. What makes the narrow universe of claims "arising out of the use of a vehicle" consistent in their foreseeability is how involved the vehicle contributed to the damage or severity of damage as an actor rather than simply part of the setting. By demanding that the facts of a case be "foreseeable" as common usage of a vehicle, the Aytes and Bookert opinions are simply demanding that the facts of a case fall into the narrow descriptions of precedent such as Howser and Towe: that is (1) only through the use of the vehicle was the assailant able to pursue the victim and the vehicle enabled the assailant to carry out the assault, (2) the vehicle was involved in the actual infliction

of damage, not just part of the event, or (3) the speed of the vehicle or force of the vehicle increases the damages.

Aytes and Bookert do clarify that the analysis for arising out of the use of a vehicle will not simply be asking whether the assault utilized a vehicle as the platform for the assault. Just because the assailants in Bookert rolled through the McDonald's parking lot and lurched forward as they shot the victim does not mean that this assault could not have just as effectively been accomplished with the same damages outside of the vehicle. The use of the vehicle and assault were not "inextricably linked." In Aytes, the causal connection is much weaker than Bookert, as the assailant is standing outside of the vehicle when he shoots the victim, so the causal connection between the vehicle and assault fails by any measure.

The history of analysis in South Carolina of "arising out of the use of a vehicle", as the survey above demonstrates is very much an "I know it when I see it" logic. State Farm and the rest of the automobile insurance industry in our state would love to stretch the phrase "foreseeably identifiable with the use of a vehicle" element to obliterate the narrow field of claims our Court has already decided should be covered, but there is no reason to believe our Court intended such a reading. The Court could have easily expressed such an intent, had it desired it so.

Plaintiff argues that nothing in Aytes v. State Farm or State Farm v. Bookert overturns the precedent established in Howser and Towe. While Aytes seems to formally add a 3rd prong of "foreseeably identifiable with the use of a vehicle" to the analysis for the facts of that case, Bookert clearly relies on the precedent of Howser and Towe and makes no suggestion that for facts similar to those in Howser and Towe, as we have here, coverage should not be had. Plaintiff argues that State Farm seeks to expand the precedential value of Bookert beyond its

holding and asks for an Order finding coverage in this case for the Plaintiff's damages as "arising out of the use of a vehicle" and a finding that State Farm's exclusion of damages caused by firearms to be thusly void, unlawful or inapplicable to this case.

Respectfully submitted,

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January 4, 2017

-Jeter.

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TABLE OF AUTHORITY AND ATTACHED COPIES

Arising Out of Ownership, Maintenance or Use

STATUTES:

§ 38-77-140

§ 38-77-150

CASES:

Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961)

Plaxico v. U.S. Fidelity & Guaranty Co., 252 S.C. 437, 166 S.E.2d 799 (1969)

Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1975)

Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (C.A.4 (S.C.) 1985)

Hite v. Hartford Acc. & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986)

Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987)

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

State Farm Fire and Cas. Co. v. Pinson, 984 F.2d 610 (C.A.4 (S.C.) 1993)

Canal Ins. Co. v. Insurance Co. of North America, 315 S.C. 1, 431 S.E.2d 577 (1993)

Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994)

Cannon v. Main Bonding & Cas. Co., 639 A.2d 270, 138 N.H. 365 (N.H. 1994)

Carraway v. Smith by South Carolina Ins. Co., 321 S.C. 23, 467 S.E.2d 120 (Ct. App. 1995)

Doe v. South Carolina State Budget and Control Bd., 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997)

State Far Mut. Auto. Ins. Co. v. Bookert, 330 S.C. 221, 499 S.E.2d 480 (Ct. App. 1997),

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

State Farm & Cas. Co. v. Aytes, 503 E.E.2d 744, 745 (S.C. 1998)

Travelers Indem. Co. v. Auto World, 334 S.C. 137, 511 S.E.2d 692 (Ct. App. 1999)

Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004)

Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006)

Nationwide Property & Cas. Co. v. Lain, 402 F.Supp.2d 644 (D.S.C. 2005)

Peagler v. USAA Ins. Co., 368 S.C. 153, 628 S.E.2d 475 (2006), 448 F.3d 286 (4th Cir. 2006)

Holmes v. Allstate Ins. Co., 766 F. Supp.2d 1022 (D.S.C. 2009)

Nationwide Mut. Fire Ins. Co. v. Jeter, ____ (D.S.C. 2013)

United Fin. Cas. Co. v. Butler, (D.S.C. 2013)

Nationwide Ins. Co. of Am. v. Jackson (D.S.C. 2015)

Section 38-77-140 Bodily injury and property damage limits; general requirements

(A) An automobile insurance policy may not be issued or delivered in this State to the owner of a motor vehicle or may not be issued or delivered by an insurer licensed in this State upon a motor vehicle then principally garaged or principally used 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 these motor vehicles within the United States or Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows:

(1) twenty-five thousand dollars because of bodily injury to one person in any one accident and, subject to the limit for one person;

(2) fifty thousand dollars because of bodily injury to two or more persons in any one accident; and

(3) twenty-five thousand dollars because of injury to or destruction of property of others in any one accident.

(B) Nothing in this article prevents an insurer from issuing, selling, or delivering a policy providing liability coverage in excess of these requirements.

HISTORY: Former 1976 Code Section 56-9-820 [1962 Code Section 46-750.32; 1963 (53) 526; 1974 (58) 2718] recodified as Section 38-77-140 by 1987 Act No. 155, Section 1; 1997 Act No. 154, Section 12; 2006 Act No. 395, Section 3.A, eff June 14, 2006 affecting policies issued or renewed on or after January 1, 2007.

Editor's Note

2013 Act No. 47, Section 5, provides as follows:

"SECTION 5. An automobile liability insurer is not required to make a new offer of coverage or obtain a new prescribed form on any automobile insurance policy, within the contemplation of Section 38-77-350, to comply with statutory changes to the minimum required limits set forth in Section 38-77-140 and Section 38-77-150."

Section 38-77-150 Uninsured motorist provision; defense of action by insurer; subrogation and assignment of benefits

(A) No automobile insurance policy or contract may be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which may be no less than the requirements of Section 38-77-140. The uninsured motorist provision also must provide for no less than twenty-five thousand dollars' coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of the loss or damage. The director or his designee may prescribe the form to be used in providing uninsured motorist coverage and when prescribed and promulgated no other form may be used.

(B) No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the uninsured motorist provision. The insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record.

(C) Benefits paid pursuant to this section are subject to subrogation and assignment if an uninsured motorist has selected the option to be uninsured by paying the fee pursuant to Section 56-10-510.

HISTORY: Former 1976 Code Section 56-9-830 [1962 Code Section 46-750.33; 1963 (53) 526; 1971 (57) 854; 1974 (58) 2718] recodified as Section 38-77-150 by 1987 Act No. 155, Section 1; 1993 Act No. 181, Section 807; 1997 Act No. 154, Section 13; 2013 Act No. 47, Section 1, eff January 1, 2014.

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121 S.E.2d 89
238 S.C. 555
Martha COLETRAIN, Respondent,
v.
Mack COLETRAIN and Canal Insurance Company, Defendants, of whom Canal Insurance Company, is Appellant.
No. 17809.
Supreme Court of South Carolina.
July 25, 1961.

[238 S.C. 556] Wright, Scott, Blackwell & Powers, Florence, for appellant.

McEachin, Townsend & Zeigler, Florence, for respondent.

TAYLOR, Chief Justice.

This appeal is from an Order of the County Court of Florence County overruling defendant Canal Insurance Company's demurrer.

The complaint sets forth that pursuant to the ordinance of the City of Florence requiring liability insurance on taxicabs for bodily injury arising out of the negligent operation of such taxicabs, the defendant insurance company issued its policy of automobile liability insurance, wherein it insured one Foster Matthews and any person while using the automobile described in the policy with the insured's consent against bodily injury arising out of the ownership, maintenance, or use of the said automobile. The complaint further alleges that in November, 1959, plaintiff was riding in the insured automobile with her husband, Mack Coletrain, [238 S.C. 557] said car being driven by Foster Matthews, the named insured; that while in the act of alighting from such taxicab, and while using said taxicab, her husband negligently closed the door on plaintiff's hand causing severe injuries for which she seeks damages in the amount of $5,000, actual and punitive. Upon hearing thereof, however, the parties agreed to withdraw any claim for punitive damages; and the only question before the Court at the time of hearing was whether the language of the policy of insurance in question may be construed to afford coverage under the circumstances.

The policy in question covered the named insured, Foster Matthews; and under the provision of the policy defining the insured, it is stated that such term includes any person while using the automobile with the permission of the named insured, the express language being:

'* * * (a) With respect to the insurance for bodily injury liability and

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for property damage liability the unqualified word 'insured' includes the named insured and, if the named insured is an individual, his spouse if a resident of the same household, and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either. * * *'

The bodily injury portion of the policy agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damage because of bodily injury caused by accidents arising out of ownership, maintenance or use of the automobile. The question, therefore, is whether the using of a door of the taxicab to alight therefrom by a passenger constitutes a use of the insured vehicle within the terms of the policy.

The word 'use' is defined in Webster's New International Dictionary as 'To put into operation, to cause to function; * * * to act with regard to; * * * act of employing anything, * * *'

fastcase

[238 S.C. 558] In Fidelity and Casualty Company of New York v. Lott, et al., 5 Cir., 273 F.2d 500, 502, an injury and death caused by the negligent discharge of a rifle where the automobile was being used as a gun rest was held to constitute a use of the automobile within the phrase 'caused by accident and arising out of the ownership, maintenance or use of the automobile.' With respect to the contention, as here, that the use contemplated by the policy was that of driving or operating the automobile, the Court stated:

'* * * It is unquestionably true that in the ordinary sense of the words Miller's death was 'caused by accident * * * arising out of the * * * use of the automobile.'

* * *

* * *

'Even were we to conclude that the terms used by the insurance company to spell out its liability were susceptible of more than the simple meaning we have already indicated, this would, of course, be of no benefit to the appellant. This is so because all must agree that one perfectly permissible construction of the words would be such as would comprehend the acts resulting in this injury. Thus, there would come into play the rule which appellant recognizes as applicable in Texas (as in South Carolina): That if the language of an insurance policy admits of more than one construction, that most favorable to the insured must be adopted, * * *'

The omnibus clause of a policy of insurance may be put into operation expressly or by implication, but in either case, it must originate in the language or conduct of the named insured or by someone having authority to bind him in that respect. Rakestraw v. Allstate Insurance Co., S.C., 119 S.E.2d 746, and Eagle Fire Company of New York v. Mullins et al., S.C., 120 S.E.2d 1.

Martha Coletrain and Mack Coletrain were using and occupying, as passengers, the taxicab of Foster Matthews, the insured. They were being transported from one place in the city of Florence to another. The question arises as to whether [238 S.C. 559] Mack Coletrain became an additional insured, under the omnibus clause of the insurance policy issued to Foster Matthews, and whether the insurer was responsible for his acts where he was using the taxicab with the admitted permission of the named insured.

The case of Bolton v. North River Insurance Company, La.App., 102 So.2d 544, 547, is very similar to the case under consideration. In such case, plaintiff appealed from a judgment of the District Court holding that no cause of action was stated against the insurer for the recovery of damages for personal injuries allegedly caused when a passenger in the back seat of the insured automobile slammed the back

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door thereof on the plaintiff's left hand while she was standing on the outside of said automobile with her hands thereon. It appears that the insurance policy issued by the insurer obligated it to pay on behalf of the insured, and on behalf of any person using and operating such vehicle with the permission of the insured, all sums which the insured might become obligated to pay by reason of liability imposed by law for damages caused by or arising out of the ownership, maintenance or use of said automobile. The complaint alleged that plaintiff was standing outside of the automobile with her hands on a portion thereof, and that Don Bolton, a passenger in the back seat of the said automobile, slammed the back door thereof, which was standing ajar, on the plaintiff's left hand. The Court of Appeals of Louisiana, in reversing and remanding the case for trial, said:

fastcase

'In stating that the defendant would be responsible under the omnibus clause of the policy for the negligent act or acts of the passenger, Don Bolton, which might be established on the trial of the case as a proximate cause of the injury and damage to [the] plaintiff, we are agreeing with the contention of counsel for plaintiff that Don Bolton at the time was 'using' the motor vehicle under the liberal interpretation required of such clauses in an insurance policy, Pullen v. Employers' Liability Assurance Corp., 230 La. 897, 89 So.2d 373; Spurlock v. Boyce-Harvey Machinery, Inc., La.App., [238 S.C. 560] 90 So.2d 417, 422. Also 45 C.J.S. Insurance, § 829, p. 902. 'The use contemplated in a provision for coverage while an automobile is used with the owner's consent generally is regarded as not limited to physical operation or driving.' Also Sec. 4316(e), 7 Appleman, 'Insurance Law and Practice' pp. 84-85, as supplemented by 1958 pocket part, pg. 25, wherein it states: 'The term 'use' is the general catchall of the insuring clause, designed and construed to include all proper uses of the vehicle not falling within one of the previous terms of definition * * *. A person clearly could be using an automobile without operating it personally. So long as 'use' as distinguished from operation, is with permission of the named insured, the insurer is liable for any accident.' Also Liberty Mutual Ins. Co. v. Steenberg Construction Co., 8 Cir., 1955, 225 F.2d 294; also the concurring opinion in the case of American Farmers Mutual Automobile Ins. Co., Riise, 214 Minn. 6, 8 N.W.2d 18, 19, decided by the Supreme Court of Minnesota.'

It thus appears that the Louisiana Court of Appeals concluded that the passenger, Don Bolton, was an omnibus insured because he was using the car in question, with the permission of the named insured. It further held that the insurer was liable for the negligent acts of the omnibus insured which were a proximate cause of the plaintiff's injury.

The provisions of the policy under consideration do not confine the use of the automobile to any part thereof or restrict its use to driving or operating same. The coverage extends to the ownership, maintenance or use of the automobile with the named insured's consent; and the use to which the automobile was being put at the time required the opening and closing of its doors, which was being done by the defendant Coletrain, a fellow passenger rather than the driver. This matter being before us upon demurrer, the allegations of the complaint must be accepted as true; and we are constrained to the view that no such limited interpretation should be read into its provisions, 45 C.J.S. Insurance § 829, cc. p. 902.

[238 S.C. 561] Under Item 5(c) of the policy in question, use of the automobile for the purposes stated includes the loading and unloading thereof. The automobile in question was being used as a taxicab for the purpose of transporting passengers, and the complaint states that the injury was

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the result of negligent unloading thereof. In order to put the taxicab to the use for which it was intended, it was necessary to open and close the doors for the purpose of loading and unloading such passengers and was an integral part of the use to which the automobile was put and within the meaning of the provisions of the policy. See 45 C.J.S. Insurance § 829, Subsec. b, p. 889. The term 'use' in a policy must be considered with regard to the setting in which it is employed, Boswell v. Travelers Indemnity Company, 38 N.J.Super. 599, 120 A.2d 250; see also 13 Appleman, Insurance Law and Practice, Sec. 7386. It may well develop upon trial that the opening and closing of the doors of the taxicab was not only with the permission of the insured but was actually expected or required.

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For the foregoing reasons, we are of opinion that the Order appealed from should be affirmed; and it is so ordered. Affirmed.

MOSS and LEWIS, JJ., concur.

LEGGE and OXNER, JJ., dissent.

LEGGE, Justice (dissenting).

Pursuant to the requirement of a city ordinance, the appellant, Canal Insurance Company, issued its policy of automobile liability insurance to Foster Matthews, the owner and operator of a taxicab. In her complaint the plaintiff Martha Coletrain, alleges that she and her husband, Mack Coletrain, were carried by Matthews as passengers in his taxicab to their destination; that the taxicab stopped, and plaintiff's husband got out first; and that while she was getting out her husband negligently and wilfully slammed the door on her hand, causing injury for which she sues her [238 S.C. 562] husband and Canal Insurance Company for actual and punitive damages. She does not sue Matthews; she charges him with no negligence; she does not allege that the taxicab was in any way unsafe or defective.

The policy, incorporated by agreement as part of the complaint, provided that with respect to the insurance for bodily injury liability the word 'insured' should incude, in addition to the named insured, 'his spouse, if a resident of the same household, and also * * * any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either.'

The single question bcforc us is whether, under the facts alleged in the complaint, the plaintiff's husband was an 'additional insured' for whose alleged negligent and wilful act a cause of action exists in her favor against the defendant insurer.

The ordinance pursuant to which the insurance was furnished, which is therefore to be considered as part of the insurance contract, Bryant v. Blue Bird Cab Co., 202 S.C. 456, 25 S.E.2d 489; Dobson v. American Indemnity Co., 227 S.C. 308, 87 S.E.2d 869, and upon which alone must depend the right of the plaintiff here to join the insurance company as defendant, Code, 1952, Section 10-702, Watts v. Baker, 233 S.C. 446, 105 S.E.2d 605, required insurance for the protection of persons who might be injured by the 'negligent operation' of the taxicab. Taken in connection with the ordinance, I do not think that the quoted clause of the insurance contract may reasonably be construed as evidencing intention on the part of the contracting parties that he insurer should be liable under the facts here alleged. There is no allegation that Matthews, the named insured, had entrusted the operation of the taxicab to plaintiff's husband or had given him permission to use it otherwise than to ride in it as a fare-paying passenger. To [238 S.C. 563] predicate liability of the insurer under such a policy, through its 'additional insured' provisions, upon negligence and wilfulness of one whose relationship to the named insured, as appears from the allegations of the complaint here, is nothing more than that of a passenger in a public conveyance, is,

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in my opinion, to read into the insurance contract a meaning not warranted by either its language or the circumstances of its making.

Bolton v. North River Insurance Company, La.App., 102 So.2d 544, 546, was an action by an injured bystander against the automobile liability insurer. There the automobile was a private one, operated by and in the control of one Mable Alexander, the wife of the named insured, who was allegedly engaged in a community errand with the full knowledge and consent of the

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insured. The complaint alleged that while the plaintiff was standing beside the automobile in conversation with Mrs. Alexander and with her hand on the automobile, one Ray Don Bolton, a guest passenger in the back seat, negligently slammed the rear door on plaintiff's hand. Plaintiff based her claim, under the 'additional insured' clause, not only upon the alleged negligence of Ray Don Bolton, but also upon alleged negligence of Mable Alexander 'in failing to exercise the proper control over her guest passenger, which resulting (resulted?) in the latter's negligence.' Demurrer to the complaint was upon the ground that its allegations affirmatively established contributory negligence of the plaintiff. It appears to have been taken for granted that the act of the guest passenger was 'with the permission of the insured', the court's discussion (as quoted in the majority opinion in the instant case) being directed to whether the act of slamming the door constituted the 'using' of the automobile within the meaning of the 'additional insured' clause. And prior to that discussion the court, disposing of the only issue raised by the demurrer, said: 'The allegations of fact, supra, set forth in plaintiff's petition do not exclude every reasonable hypothesis other than that the proximate cause of the accident was the negligence[238 S.C. 564] of the plaintiff herein. * * *. The negligence of plaintiff may have been, so to speak, passive, whereas the sole cause of the accident could have been Don Bolton's gross carelessness. Furthermore, the plaintiff also alleges the named insured was negligent, which contributed to the accident, by failing to exercise the proper control over a guest passenger. (Actually, the complaint as quoted in the report of the case charged that negligence not to the named insured, but to his wife.) Only by a trial and full development of the facts can be negligence charged against the passenger and the operator of the automobile be eliminated as the proximate cause of plaintiff's injury and the establishment (sic) of plaintiff's contributory negligence as the sole proximate cause.' (Parentheses and italics added.)

Bolton v. North River Insurance Company, supra, as reported, does not disclose whether the guest passenger, Ray Don Bolton, was a child, or for what reason Mrs. Alexander was under legal duty to control him. But it is interesting to note that the plaintiff in that case, less ready than either the defendant or the court to assume that his negligent act was with the permission of the named insured, charged the latter's wife, obviously an 'additional insured', with negligence in failing to properly control him.

In Fidelity and Casualty Company of New York v. Lott, 5 Cir., 273 F.2d 500, no 'additional insured' was involved. The negligent act alleged was that of the named insured, and the only issue was whether the accident resulting from that act arose out of the insured's 'use' of the automobile.

Consent by the owner of a vehicle that it shall be operated or used by another necessarily implies that the owner knows who that person is and is willing to entrust the operation or use of the vehicle to him. And such consent should be considered as limited to the purpose for which it was given. Rakestraw v. Allstate Insurance Co., S.C., 119 S.E.2d 746; Eagle Fire Company of New York v. Mullins, S.C., 120 S.E.2d 1. In accordance with that rule, the right [238 S.C. 565] of such other person to use the vehicle so in his charge, being commensuratewith

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the purpose for which permission has been given him to use it, is not necessarily limited to the driving of the vehicle. But I am unable to agree that permission to open and close the doors of a public taxicab must, as a matter of law and without allegation, be presumed to have been given by the owner of the taxicab to every passenger that may be carried in it.

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The majority opinion concludes with the suggestion that upon the trial of the case the evidence may show that the named insured not only permitted, but expected or required, that the doors of the taxicab be opened and closed by the passengers. But that is a far cry from the issue now before us. The case here concerns a demurrer to the complaint.

I would reverse the order appealed from.

OXNER, J., concurs.

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166 S.E.2d 799
252 S.C. 437
Lee PLAXCO, Appellant,
v.
UNITED STATES FIDELITY & GUARANTY COMPANY, Respondent.
No. 18896.
Supreme Court of South Carolina.
March 24, 1969.

[252 S.C. 438] Eddie R. Harbin, Greenville, S.C., for appellant.

Haynsworth, Perry, Bryant, Marion & Johnstone, Greenville, S.C., for respondent.

[252 S.C. 439] LEWIS, Justice.

The question to be decided in this case is whether the use by an insured of

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his automobile battery to crank the engine of his airplane, by connecting the batteries of the two vehicles with 'jumper cables,' constituted a use of the automobile within the meaning of an automobile liability insurance policy which provided coverage for damages 'arising out of the ownership, maintenance or use of any automobile.' We have concluded that it did not.

The automobile liability policy involved was issued by the defendant, United States Fidelity & Guaranty Company, to the plaintiff, Lee Plaxco, and obligated the company 'to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.' In addition, the policy provided that the insurer, with respect to such coverage, 'shall: (a) defend any suit against the insured alleging such * * * destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; * * *.'

[252 S.C. 440] The facts are stipulated. On the morning of December 25, 1966, the plaintiff drove his automobile to the Greenville Municipal Airport for the purpose of making a trip in his airplane. The battery in his airplane was either dead or too weak to start the engine. He then drove his automobile under the left wing of the airplane and connected the batteries of the two vehicles by the use of 'jumper cables' so that he could use the automobile battery as a booster to start the airplane engine. When this had been done, he entered the airplane, started its engine, engaged the brakes, and then alighted to disconnect the 'jumper cables,' leaving the airplane engine running. After plaintiff had disconnected one of the cables from the automobile battery and while he was preparing to disconnect the other, the brakes on the airplane failed to hold and it moved forward a short distance, striking and damaging an airplane owned by John H. Hudson, Jr. and Associates, Inc. As the airplane moved forward, the other 'jumper cable' pulled loose from the battery of the automobile. The automobile did not move during the entire incident.

Subsequently, suit was brought against plaintiff by John H. Hudson, Jr. and Associates, Inc. to recover the damages sustained to its airplane. The defendant denied any obligation to defend that action on behalf of plaintiff or to pay any judgment obtained against him on the ground that the damage to the airplane did not arise out of the Use of plaintiff's automobile within the meaning of the foregoing policy provisions. Thereupon, plaintiff instituted the present action seeking a declaratory judgment as to the liability of the defendant under the policy for the damages in question. The lower court resolved the issues against plaintiff and this appeal followed.

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The parties are in agreement as to the applicable principles. They properly concede that a causal relation or connection must exist between an accident and the ownership, maintenance or use of the insured vehicle [252 S.C. 441] in order for coverage to be provided under the present policy provision. 8 Blashfield--Cyclopedia of Automobile Law & Practice, Third Edition, Section 317.1; 7 Appleman Insurance Law and Practice, Section 4317; Annotation: 89 A.L.R.2d 150. The cited A.L.R. annotation states at page 153: 'All the cases agree that a causal relation or connection must exist between an accident or injury and the ownership, maintenance, or use of a vehicle in order for the accident or injury to come within the meaning of the clause 'arising out of the ownership, maintenance or use' of a vehicle, and where such causal connection or relation is absent coverage will be denied.'

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The accident in question did not result from the use of plaintiff's automobile. The only connection between the automobile and the airplane was the use of the automobile battery to start the airplane engine. This purpose had been completed when the airplane moved forward, after the brakes failed to hold. We find nothing in the facts or circumstances to show a causal connection between the use of the automobile battery as a source of power to start the airplane engine and the subsequent forward movement of the airplane. As stated by the trial judge, 'the power source was coincidental only.' The facts show that the accident resulted from the use of the airplane and not the insured automobile.

Neither was the defendant obligated to defend the action brought against plaintiff to recover the damages caused by his airplane. The policy required defendant to defend suits against plaintiff, the insured, in which the pleadings allege facts within the policy coverage, even if such suit is groundless, false or fraudulent. This provision does not require the insurer to defend a suit where the complaint shows that the loss is not within the coverage afforded by the policy. 7A Appleman Insurance Law and Practice, Section 4683 et seq.

The complaint in the action brought against plaintiff was based solely upon allegations that such damages were due [252 S.C. 442] to the failure to control or properly operate the airplane. Neither that complaint nor the agreed statement of the facts in this case reveal any negligent act in the use of the automobile. Therefore, under the allegations of the pleadings and the facts, the loss involved was not within the coverage of the policy. Under these circumstances, the defendant was under no obligation to defend.

Affirmed.

MOSS, C.J., and BUSSEY, BRAILSFORD and LITTLEJOHN, JJ., concur.

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211 S.E.2d 876
263 S.C. 565
Patsy CHAPMAN, Respondent,
v.
ALLSTATE INSURANCE COMPANY, Appellant.
No. 19957.
Supreme Court of South Carolina.
Feb. 10, 1975.

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Haynsworth, Perry, Bryant, Marion & Johnstone, Greenville, for appellant.

[263 S.C. 566] Chapman & Lowery, Anderson, and Joseph W. Board, Pickens, for respondent.

[263 S.C. 567] PER CURIAM:

Patsy Chapman, the respondent herein, on May 1, 1970, was riding as a passenger in an automobile operated by one Earl McCoy, he being at the time, an uninsured motorist. She alleged that she sustained personal injuries caused by accident and arising out of the ownership, maintenance and use of the uninsured automobile. Earl McCoy died subsequent to the accident from a totally unrelated cause, and a default judgment was entered against his estate and in favor of the respondent.

The present action was instituted by the respondent against Allstate Insurance Company, the appellant herein, to recover the amount of the default judgment obtained against the estate of Earl McCoy, under the uninsured motorist endorsement of a policy of automobile liability insurance issued to her father, she being, at the time, a member of his household. The appellant denies that the respondent was injured as the result of an accident arising out of the use of an uninsured motor vehicle or that its policy afforded coverage to her.

This action is one at law and was, by agreement of the parties, tried before the Honorable Clarence E. Singletary, presiding judge, without a jury, on a stipulation of facts. We have held that where a law case is tried by a judge without a jury, his findings of fact have the force and effect of a jury verdict upon the issues, and are conclusive upon appeal when supported by competent evidence. Beheler v. National Grange Mut. Ins. Co., 252 [263 S.C. 568] S.C. 530, 167 S.E.2d 436. We have carefully examined the stipulation and conclude that the trial judge has reached a conclusion of which the facts are susceptible. We are bound by his finding of fact.

We are convinced that the order of the trial judge, as reported herewith, correctly disposes of the issues raised by the appellant. The exceptions of the appellant are overruled and the judgment below is,

Affirmed.

ORDER OF JUDGE SINGLETARY

This action arises out of an incident which occurred in May of 1970. It was instituted by the Plaintiff in an effort to

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recover from the Defendant the amount of a default judgment obtained against the estate of Earl McCoy, an uninsured motorist. It is before this Court on an agreed statement of fact and was argued orally on March 4, 1974.

The Plaintiff brought an action against the estate of Earl McCoy, Mr. McCoy having died subsequent to this incident from totally unrelated causes, and a default judgment was entered against his estate. This action was then instituted against Allstate Insurance Company to recover the amount of the default judgment obtained against the estate of Earl McCoy, under the uninsured motorist

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endorsement to a policy of automobile liability insurance issued to Plaintiff's father.

According to the facts submitted to this Court, on the afternoon of May 1, 1970 the Plaintiff was in an establishment known as the Rock Quarry when she was invited by one Earl McCoy to accompany him and another young lady to Liberty, South Carolina. The Plaintiff accepted the invitation and rode with Earl McCoy and this unidentified young lady to Liberty where the young lady departed. The Plaintiff was then invited by Mr. McCoy to accompany him to Easley, South Carolina where he was to pick up his pay [263 S.C. 569] check. After accomplishing this task, the Plaintiff and Mr. McCoy went to an establishment in Easley called the Spot where Mr. McCoy consumed several beers. The Plaintiff and Mr. McCoy then left the Spot and went to the Party Shop where Mr. McCoy consumed several more beers. The Plaintiff then left the Party Shop with Mr. McCoy, apparently planning to return home. Mr. McCoy drove instead to a wooded area and attempted to molest the Plaintiff. When the Plaintiff refused his advances, Mr. McCoy became angry and chased the Plaintiff from the car and into the woods. For reasons not explained to the Court Mr. McCoy gave up the chase and returned to his car. The Plaintiff began walking up the road and Mr. McCoy drove along side her and coaxed her back into the car with a promise that he would take her back to the Rock Quarry. The Plaintiff got back into the car with Mr. McCoy and he started toward Anderson, South Carolina. The Plaintiff apparently insisted that Mr. McCoy stop the car and get her a coke, but he refused to do so.

At this point, the parties are unable to agree on the facts. Plaintiff testified under oath, in the action against McCoy, that McCoy began pushing her around and the door came open and she fell from the moving car. Another version of the events is set out in a statement taken from Plaintiff by Defendant's adjustor. In her statement she says McCoy hit her in the face with his fist and knocked her unconscious, and she woke up in a hospital suffering from severe personal injuries. Her statement to the adjustor includes hearsay statements that her parents were told by McCoy and Pickens County deputies that she jumped from the car and had scratches on her back. At the trial she testified that her injuries consisted of a brain concussion, an eye injury which required surgery, stitches in her head, injuries to her left ear resulting in the loss of hearing in the ear, and bruises and scratches all over her body.

After considering the disputed facts recited in the foregoing paragraph, the Court concludes the only reasonable [263 S.C. 570] inference to be drawn from all of the testimony and stipulations is that Plaintiff was injured in a fall from the uninsured motorist's moving automobile.

The uninsured motorist endorsement to the motor vehicle liability insurance policy in issue provides that the Defendant insurer will:

'Pay all sums which the insured or his legal representative shall be entitled to recover as damages from the owner or operator because of bodily injury . . . sustained by the insured caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile.'

The issues presented to this Court for resolution are:

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'1. Was the injury to the Plaintiff 'caused by accident'?

'2. Did the injury to the Plaintiff arise out of the ownership, maintenance or use of an uninsured automobile?'

Each of these questions must be resolved in favor of the Plaintiff. Viewed from the

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Plaintiff's standpoint, her injuries were caused by accident. While no cases in South Carolina involving automobiles has come to the attention of the court, consider Page v. North Carolina Mutual Life Insurance Company, 207 S.C. 277, 35 S.E.2d 716 (1945), dealing with accidental life policies. The same conclusion was reached in a recent North Carolina case involving an automobile, holding when an insured is intentionally injured and the injury is as to him unforeseen and not the result of his own misconduct, the general rule is that the injury is accidentally sustained within the meaning of the ordinary accident insurance policy and the insurer is liable therefor in the absence of a policy provision excluding such liability. Nationwide Mutual Insurance Company v. MacRay Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Having concluded the injury to the Plaintiff was caused by accident, as to her unforeseen and not the result of her own misconduct, it is clear the injury arose out of the use of the uninsured automobile. Plaintiff received injuries in [263 S.C. 571] a fall from the automobile while it was being driven by McCoy, while Plaintiff was a guest passenger.

Plaintiff argued additionally that the above quoted uninsured motorist endorsement failed to comply with the requirements of the uninsured provision of the South Carolina law. It is unnecessary to consider this question in view of the favorable resolution of questions 1 and 2 for the Plaintiff, . . .

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779 F.2d 984
NATIONWIDE MUTUAL INSURANCE COMPANY, Appellee,
v.
Mary Melissa BROWN, etc., et al. a minor under the age of fourteen (14) years and James E. Hunter, administrator of the Estate of Lynda S. Brown, Deceased, Appellants,
and
Toby A. Brown, Aaron Proctor and Anne K. Dunn, Defendants,
and
Insurance Company of North America, Appellee.
No. 85-1205.
United States Court of Appeals, Fourth Circuit.
Argued Oct. 7, 1985.
Decided Dec. 18, 1985.

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Frank A. Barton (Oswald & Floyd, West Columbia, S.C., on brief), for appellants.

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Steven W. Ouzts (Turner, Padget, Graham & Laney on brief) and James B. Lybrand, Jr. (Robert A. McKenzie, McDonald, McKenzie, Fuller, Rubin & Miller, Columbia, S.C., on brief), for appellees.

Before PHILLIPS and SNEEDEN, Circuit Judges, and BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

JAMES DICKSON PHILLIPS, Circuit Judge.

This diversity case involves the potential coverage, under South Carolina law, of three automobile policies in respect of a collision and a fatal shooting. The claimants, the estate and daughter of the shooting victim, appeal the grant of summary judgment for the insurance companies. The district court found that the policies provided no coverage for the shooting on the basis that the shooting-caused injuries did not arise out of the ownership, maintenance, or use of the motor vehicle, did not arise out of garage operations, and were not accidental. After determining that the claimants had presented no evidence of injuries resulting solely from the collision, the court also concluded that there was no liability in respect of the collision.

We affirm on the issue of non-coverage as to the shooting. On the question of collision-caused injuries, however, we find genuine issues of material fact which might result in insurer liability; accordingly, we vacate and remand on this issue for further proceedings.

I

On December 15, 1982, Toby Brown, owner of Brown's Auto Service, and Aaron Proctor, a mechanic at Brown's auto shop, borrowed Anne Dunn's pickup truck in order to pick up some Christmas presents, and, in return for the favor, Proctor and Brown offered to change the tires on the truck. The following day, Proctor picked up the gifts and returned the truck to the shop. The repairs were never made. On December 17, 1982, Brown told Proctor to use the Dunn truck to meet Brown in a neighboring town to pick up a customer's car. After Proctor picked up Brown in that town, Brown explained that he wanted to locate his estranged wife, Lynda Brown. Brown told Proctor that he had a gun and would kill his wife if she refused to speak with him. Brown and Proctor eventually found Lynda Brown in her car with their child, Mary Melissa Brown. As the vehicles approached, Brown shoved Proctor and the steering wheel, causing Dunn's truck to collide with Lynda Brown's car. Following the collision, Toby Brown jumped out of the truck and shot and killed his wife while she sat in the car.

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The administrator of Lynda Brown's estate and Mary Melissa Brown brought wrongful death and survival actions in South Carolina state court against Brown and Proctor. At the time of the incident, there were three liability insurance policies providing general coverage for the Dunn and Brown vehicles. Two of the policies were issued by Nationwide Mutual Insurance (Nationwide). One of these was a garage liability policy (Nationwide garage policy) issued to Toby Brown d/b/a Brown's Auto Service, and the other was a standard automobile liability policy issued to Anne Dunn (Nationwide Dunn policy) covering her truck. Insurance Company of North America (INA) issued the third policy, an automobile liability insurance policy, issued to Toby and Lynda Brown (INA Brown policy), providing uninsured, underinsured, and personal injury protection coverage.

With the state actions pending, Nationwide commenced this federal declaratory judgment action, in which INA subsequently joined, seeking a declaration of non-coverage under the three insurance policies. With issue joined, the insurance companies moved for summary judgment on the basis that the injuries for which liability was asserted by Brown did not arise out of the ownership, maintenance or use of a motor vehicle and, therefore, were not covered under the policies.

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Both the Nationwide Dunn policy and the INA Brown policy require as a condition of coverage that the injuries for which coverage is claimed arise out of the ownership, maintenance or use of an automobile. [1] Both insurance companies claimed that as a matter of law, on the undisputed facts, this condition of coverage was not met. Nationwide further claimed non-coverage under its two policies on the basis that because the acts upon which liability was claimed were intentional, they were excluded from coverage by express provisions of both policies. [2] Finally, Nationwide asserted, as an additional basis for non-coverage under the Nationwide garage policy, that the acts upon which liability was claimed did not arise out of "garage operations" as required by the policy and, hence, were excluded from coverage. [3]

The district court granted the motions for summary judgment on the several grounds alleged by the insurance companies. The court determined that as a matter of law the shooting related injuries did not arise out of the ownership, maintenance or use of the vehicles because no causal relation existed between the injuries and the use of the automobiles as automobiles. The court also concluded that the injuries resulted from an intentional act and that under South Carolina law the insurance companies had, and could properly have, excluded intentional acts under automobile insurance policies. Finally, the court concluded that the shooting neither resulted from garage operations nor was accidental and, thus, was not covered under the Nationwide garage policy.

Having disposed of the basic question of coverage for the shooting, the court then held additionally that the claimants had presented no evidence of injuries resulting directly from the collision itself. On this basis, therefore, the court granted summary judgment for the insurance companies as to any collision related injuries. [4]

This appeal followed.

II

We deal initially with the issue of insurance coverage as to the shooting. We agree with the district court's holding and analysis in its grant of summary judgment on this question and find no coverage for the shooting related injuries under any of the three policies.

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First off, the claim of liability based upon the act of shooting does not meet the threshold requirement under the Nationwide

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Dunn policy and the INA Brown policy that the claim arise "out of the ownership, maintenance or use" of the automobiles. The appellants premise their claim of coverage upon a unique negligence theory: Proctor's negligence in transporting in an insured vehicle a dangerous person to carry out a known threat. Proctor knew that Brown had a gun, had a propensity for violence, and had threatened to kill his wife. Proctor created the dangerous situation in which Brown was able to fulfill his threats. This use of the truck for transportation, the appellants contend, constituted a normal "use" of a motor vehicle under these policies and the negligence and resulting death are therefore covered.

The closest authority supporting such a general theory of coverage is found in several cases from other jurisdictions involving the transportation in insured vehicles of animals which, in one way or another, inflicted injuries upon persons incident to their transportation. See, e.g., Duvigneaud v. Government Employees Insurance Co., 363 So.2d 1292 (La.App.1978). [5] The great weight of authority in more closely related contexts, however, convinces us that the South Carolina courts would not apply such a negligent transportation theory to find insurance coverage here. This negligence theory and, particularly, the transportation of animal cases relied upon by appellants, gloss over the critical causal relation test. The "accident" upon which insurance coverage is claimed must bear a "causal relation or connection" with the ownership, maintenance or use of the automobile. Plaxco v. United States Fidelity and Guaranty Co., 252 S.C. 437, 166 S.E.2d 799 (1969).

Courts confronted with the general question of whether personal injuries resulting from physical assaults by insured vehicle passengers or operators "arose out of" the ownership, maintenance or use of the vehicle, have almost unanimously found no causal relation between the "use" of the vehicle and such assault-caused injuries. For instance, in Government Employees Insurance Co. v. Melton, 357 F.Supp. 416 (D.S.C.1972), aff'd, 473 F.2d 909 (4th Cir.1973), the district court, applying South Carolina law, found no "use" coverage where the claimants had been struck and injured by soft drink bottles thrown from a truck driven by the insured. Concluding that the "arising out of" language contemplates a close causal relation between "ownership, maintenance or use" and claimed injuries, the court stated: "An automobile policy cannot properly be construed to cover injuries that result from acts wholly disassociated from, independent of, or remote from the use of the vehicle." 357 F.Supp. at 418, quoting with approval, 7 Appleman Insurance Law and Practice Sec. 4316(3), at 142. See also Commercial Union Insurance Co. of New York v. Hall, 246 F.Supp. 64 (E.D.S.C.1965).

In cases dealing with the specific situation here in issue--a shooting by a passenger in or operator of an insured vehicle--the decisions have uniformly applied and found unmet a comparable causal relation requirement. Representative is Detroit Automobile Inter-Insurance Exchange v. Higginbotham, 95 Mich.App. 213, 290 N.W.2d 414 (1980), in which the Michigan court determined that injuries sustained by a wife from a shooting by her estranged husband did not arise out of the ownership, maintenance or use of either the wife's car or that of her husband. The husband had driven his car into the side of his wife's car, forcing it to the curb. While she remained trapped in the car, he got out of his car, walked over to hers, and shot her several times. Holding first that the fact that the wife was an occupant of her car at the time she sustained her injuries was an insufficient basis for finding that her injuries

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arose out of the use of her car, the court then ruled that the injuries did not either arise out of the use of the husband's car:

Cases construing the phrase "arising out of the ... use of a motor vehicle" uniformly require that the injured person establish a causal connection between the use of the motor vehicle and the injury. (Citation omitted.) Such causal connection must be more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use of the vehicle. (Citations omitted.)

Applying this requirement to the present case leads to the conclusion that appellant's injuries did not arise out of Mr. Higginbotham's use of his motor vehicle. An assault by an armed assailant upon the driver of a car is not the type of conduct that is foreseeably identifiable with the normal use of a motor vehicle. (Citations omitted.)

To the same general effect, see also Love v. Farmers Insurance Group, 121 Ariz. 71, 588 P.2d 364 (App.1978); Aetna Casualty and Surety Co. v. Goldman, 374 So.2d 539 (Fla.App.1979); Nationwide Mutual Insurance Co. v. Knight, 34 N.C.App. 96, 237 S.E.2d 341 (1977).

We believe, with the district court, that South Carolina courts would employ a comparable rationale in determining whether the shooting assault here arose out of the "ownership, maintenance or use" of either the Dunn or Brown vehicles. Applying that rationale, we conclude that under South Carolina law there is no coverage of this tragic assault and its consequences under either policy.

First, under the Nationwide Dunn policy, it is clear that the use of Dunn's truck for transportation of Toby Brown to the scene of the shooting was merely incidental, remote from the type of conduct that is reasonably foreseeable with the normal use of such a vehicle; and not the causative factor in producing Lynda Brown's death; see Goldman, 374 So.2d 539; Plaxco, 166 S.E.2d 799. Rather, Toby Brown's assault, an act wholly independent of the use of the truck, caused the death. Thus, the incidental use of Dunn's truck in the shooting does not meet the causal relation test of coverage.

Neither does the INA Brown policy provide coverage for the consequences of the shooting under this rationale. It is even clearer that the required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the insured vehicle when the shooting occurred. See, e.g., Love v. Farmers Insurance Group, 121 Ariz. 71, 588 P.2d 364 (App.1978); Washington v. Hartford Accident & Indemnity Co., 161 Ga.App. 431, 288 S.E.2d 343 (1982).

The shooting-related injuries are also excluded under both Nationwide policies as a result of the intentional act exclusions. The Nationwide Dunn policy specifically excludes injuries "caused intentionally by or at the direction of the insured," while the Nationwide garage policy limits liability to injuries caused by an "accident and resulting from garage operations." The policy defines "accident" as being neither expected nor intended, from the perspective of the insured, not the victim.

Seeking to avoid this alternative basis for finding non-coverage, the appellants contend that the exclusion of coverage for the insured's intentional acts contravenes the South Carolina Motor Vehicle Financial Responsibility Act. S.C.Code Section 56-9-10 to -910. While some state courts have so construed comparable compulsory insurance provisions, see, e.g., Nationwide Mutual Insurance Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964), we conclude that South

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Carolina law is to the contrary. While the appellate courts of South Carolina have apparently not directly addressed this precise issue, we defer to the conclusion of the United States District Court for the District of South Carolina that the South Carolina courts would uphold the intentional act exclusion as not violative of that State's compulsory insurance law. In Pennsylvania National Mutual Casualty Insurance Co. v. Dawkins,

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551 F.Supp. 971 (D.S.C.1982), Judge Wilkins, construing state law, concluded that the "plain wording of the Financial Responsibility Act is not contravened by the exclusion of intentional torts. The Act requires only that 'accidents' be covered.... Nowhere does the Act mandate that intentional torts be covered. Consequently, intentional torts may be excluded in an automobile insurance policy." 551 F.Supp. at 973. [6]

Because Toby Brown's act of shooting was obviously an intentional one, coverage in respect of his potential liability for that act is not provided under either of the Nationwide policies.

Finally, the Nationwide garage policy provides no coverage for the shooting for the additional reason that the shooting did not arise out of garage operations. The garage policy contemplates a two-prong test in determining the insurance company's potential liability: the injury must be caused by an "accident and resulting from garage operations." Neither prong has been met.

In addition to the fact that Toby Brown's act was intentional, the incident does not fall within the ambit of "garage operations." While the policy includes employees, this coverage is strictly limited to employees only while acting within the scope of their duties as employees of Brown's auto shop. The Dunn truck driven by Proctor and Brown had been borrowed primarily for personal use rather than for repairs. The minor repair, changing a tire, was never accomplished. Moreover, while initially Proctor had an ostensible business purpose in driving the truck to the neighboring town to pick up a car at Brown's direction, that purpose terminated the moment Brown revealed his true purpose--to locate his wife. Thus, from the time of this revelation, the actions of Brown and Proctor had no business purpose, and the use of the truck did not result from garage operations.

Under all three of the preceding bases, we affirm the lower court's grant of summary judgment denying coverage under the insurance policies for the shooting related injuries.

III

In addition to the lower court's denial of coverage as to the shooting related injuries, the court also held as a matter of law that the claimants were not entitled to recover under any of the policies for any injuries claimed to have been sustained as a result of the collision preceding the shooting. The court so concluded on the stated basis that the claimants had failed to produce any forecast of evidence of any injuries resulting from the collision itself. On this basis, the court concluded that the insurance companies were entitled as a matter of law to summary judgment in respect of any such claim of liability.

We disagree with the district court's conclusion that the summary judgment record contained no evidence of injuries independent of the shooting that sufficed to withstand a motion for summary judgment. We conclude instead that, inter alia, Proctor's deposition testimony concerning the collision and its immediate aftermath suffices to hold open as a disputable issue the fact that the collision resulted in compensable injuries. For instance

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Proctor testified in his deposition that the impact was "severe" and sounded "like a train (sic) run together." Further, he testified directly to Lynda Brown's condition following the impact:

I heard her screaming. Because right after--when I was getting up out of the impact, you know, I was almost in the floorboard. And when I got up, I glimpsed her again, up there. And she had her mouth open.... But the impact might have--you know, she might have hit the steering wheel. Because she was slumped over the steering wheel, with her mouth open ... [she was] just screaming. I ain't never heard screaming like that before in my life.

We therefore hold that the court erred in granting on this basis summary judgment in respect of insurer liability for collision-caused injuries.

That does not mean, however, that the insurance companies were not entitled to any declaration of non-coverage with respect to collision-caused injuries. Irrespective of whether such injuries could be proven, there exist other bases for declaring non-coverage as to such injuries with respect to both the Nationwide garage policy and the Nationwide Dunn policy.

For the same reasons that the Nationwide garage policy does not by its terms cover shooting-caused injuries, it does not cover collision-caused injuries. Briefly to repeat, the collision, like the shooting, simply did not "arise out of garage operations," a condition to that policy's coverage. Nationwide is therefore entitled to a declaration of non-coverage with respect to its garage policy on that basis.

The Nationwide Dunn policy presents a different set of problems respecting coverage as to any collision-caused injuries that could be proven. Assuming that Toby Brown was an "insured" under that policy, [7] any liability for collision-caused injuries based solely upon his acts would not be covered under the intentional act exclusion, for the same reasons that that exclusion would bar coverage with respect to shooting-caused injuries. Further assuming that Proctor was an "insured" under this policy, and for reasons earlier developed, no acts of his in merely transporting Brown to the collision scene could be the basis of liability "arising out of the ... use" of the Dunn vehicle, a condition of coverage under this policy. Hence the policy does not provide coverage for Proctor's acts. Nationwide is therefore entitled to a declaration of non-coverage with respect to its Dunn policy on these bases.

There is, however, no basis for a declaration of non-coverage with respect to the INA Brown policy. That policy, as indicated, is an uninsured, underinsured motorist's policy. It also expressly excludes coverage with respect to intentional acts. But South Carolina follows the general rule that "intention" for this purpose is determined by reference to the viewpoint of the insured rather than the uninsured tortfeasor. See Chapman v. Allstate Insurance Co., 263 S.C. 565, 211 S.E.2d 876 (1975); Page v. North Carolina Mutual Life Insurance Co., 207 S.C. 277, 35 S.E.2d 716 (1945). Because Lynda Brown, as the insured under this policy, obviously cannot be charged with any causative intentional act, the exclusion has no application. Because the collision, as opposed to the shooting, clearly arose out of the "use of an auto as an auto," see note 1, supra, any injuries resulting from the collision itself are on that basis covered under the policy.

IV

In summary, we affirm that portion of the district court judgment declaring that none of the three policies in issue provides coverage with respect to liability arising from the shooting of Lynda Brown; we

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vacate that portion of the judgment declaring that none of the policies in issue provides coverage with respect to liability arising from the collision between the Dunn and Brown vehicles; and we remand for entry of a modified declaratory judgment in respect of coverage as to liability arising from the collision, in accordance with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR ENTRY OF A MODIFIED JUDGMENT.

---

1 The Nationwide Dunn policy provides under the "Auto Liability" provisions that it will pay damages "resulting from the ownership, maintenance, use, loading or unloading of your auto." According to both the uninsured and the underinsured provisions of the INA Brown policy, the liability of the owner of the uninsured or underinsured vehicle "must arise out of the ownership, maintenance or use of the uninsured [or underinsured] motor vehicle." Likewise, the Personal Injury Protection provisions of the INA policy require that the bodily injury to the covered person must "result from the ownership, maintenance or use of an auto as an auto."

2 The Nationwide Dunn policy contains an express exclusion providing that liability coverage does not apply for injuries or damages "caused intentionally by or at the direction of an insured." The Nationwide Garage policy also limits the carrier's liability to personal or property damage "caused by an accident and resulting from garage operation." The policy defines "accident" as occurrences which are neither expected nor intended from the perspective of the insured, rather than that of the victim.

3 The Nationwide Garage policy stipulates that "we will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies caused by an accident and resulting from garage operations." (Emphasis added.)

4 It is at least questionable whether the insurance companies had sought more than an adjudication of coverage under the various policy terms. Were this the limit of the requested declaration of rights, it would not of course encompass an adjudication of tortfeasor, hence insurer, non-liability for failure to establish compensable injury. Whether this particular adjudication of non-liability was within the permissible scope of the court's remedial power, see Fed.R.Civ.P. 54(c), is a question we need not resolve in view of our determination that in any event, there were factual issues of tortfeasor liability, that could not be resolved against the claimants on this summary judgment record. See Part III, infra.

5 Duvigneaud involved a dog which jumped out of an insured car's window causing injury to a motorcyclist. The court held that the insured rider's uninsured motorist insurance provided coverage, because the injuries arose out of the use of the car as it was being used to transport a large animal. Negligence was premised upon the transportation of the dog in a congested area without rolling up the windows.

6 In Heaton v. State Farm Mutual Automobile Insurance Co., 278 F.Supp. 725 (D.C.S.C.), aff'd, 398 F.2d 824 (4th Cir.1968) (interpreting South Carolina law), Judge Russell rejected the claimant's contention that an exclusionary clause in the insurance contract conflicted with the Financial Responsibility Act's and, therefore, was void. Judge Russell noted that "reasonable exclusionary clauses" do not contravene the Act and that no provision in the Act "either expressly or by implication, requires that such a[n insurance] policy must insure against any and all liability regardless of the circumstances." See also Stanley v. Reserve Insurance Co., 238 S.C. 533, 121 S.E.2d 10 (1961). (In upholding the validity of an

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exclusionary clause against a claim of contravention of the Act, the court declared "[w]e cannot read into the insurance contract, under the guise of public policy, provisions which are not required by law and which the parties thereto clearly and plainly have failed to include. If the Act in question fails to accomplish the legislative purpose, the remedy lies with the Legislature and not with the courts." 121 S.E.2d at 13. Citations omitted.)

7 Any person using an insured vehicle with the permission of the insured owner is an "insured" for purposes of the South Carolina Financial Responsibility Act. S.C.Code Sec. 56-9-810(2). The evidence suggests that both Toby Brown and Proctor might qualify as "insureds" under this provision. Of course, if either did not, that would be a separate basis for non-coverage as to his liability.

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Brown v. State Farm; Appendix 135

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344 S.E.2d 173
288 S.C. 616
Lester HITE, Appellant,
v.
HARTFORD ACCIDENT AND INDEMNITY COMPANY, Respondent.
No. 0700.
Court of Appeals of South Carolina.
Heard March 27, 1986.
Decided May 12, 1986.

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[288 S.C. 617] Richard J. Breibart, Lexington, for appellant.

R. Davis Howser and W. Hugh McAngus, Richardson, and Plowden, Grier & Howser, Columbia, for respondent.

SHAW, Judge:

Appellant Lester Hite initiated this action against respondent Hartford Accident and Indemnity Company seeking Eight Thousand ($8,000.00) Dollars in damages for Hartford's alleged breach of contract. Hite now appeals the trial court's directed verdict for Hartford. We affirm.

Because this court considers Judge Bristow's order a clear and thorough analysis of the issue on appeal, we adopt and publish his order, as modified and supplemented, as the view of this court. The modifications and supplements are reflected by either ellipses or bracketed material.

ORDER OF JUDGE BRISTOW

.... The threshold question to be determined in this action seeking third party benefits under a contract of insurance is should [Hite] be construed as an "insured" under S.C. Code Sec. 56-9-810(2) (1976), the uninsured motorist law.

The parties have stipulated to the following facts. On March 27, 1981, [Hite] was an employee of Jim Rawls Ford Mercury, Inc. The employer gave permission and provided automobiles for [Hite's] use. The automobiles were insured by [Hartford], who provided for uninsured motorists' protection as required by South Carolina law. On March 27, 1981, [Hite] was struck by an automobile driven by William Martin. At that time [Hite] was not in, on, or touching a vehicle insured by [Hartford]. [Hartford] was served with notice of the lawsuit on May 3, 1982, and elected not to take part in it as long as the suit was defended by National Grange Mutual Insurance Company, insurer of the automobile driven by Martin. National Grange contended that it did not provide coverage on Martin as he did not have permission to operate the automobile. The insurance policy issued by [Hartford] [288 S.C. 618] would provide uninsured motorist

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coverage to [Hite] if (1) Martin was operating an uninsured vehicle, and (2) [Hite] was occupying or using a covered automobile, and (3) [Hite] met and complied with all of the policy provisions, and (4) [Hite] did not violate any of the policy provisions. [Hite] was awarded a jury verdict against Martin of Fifteen Thousand ($15,000.00) Dollars on March 15, 1983.

[Hartford] was contacted by [Hite] as to the result of the trial and [Hartford], aware that National Grange alleged that Martin was not a permissive user, refused to pay the verdict on various grounds. [Hite] was cognizant of testimony that Martin lacked express permission to operate the car and ... released all claims against National Grange, William Martin, Ruth Holloway, or Cleveland Cyrus for Seven Thousand ($7,000.00) Dollars.

Several facts presented at trial are crucial to a determination of the threshold question

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in this case. [Hite] testified that on the evening of his injury he drove back from supper to the car dealership in an automobile provided by his employer. Leaving the car running, [Hite] got out of the car, approached the dealership on foot, and heard the night watchman yell to him that someone (Martin) had backed into a new truck. [Hite] walked fifty feet across the parking lot to tell Martin, who was sitting in a car, not to leave. Martin then accelerated the vehicle, and [Hite's] legs were run over by the left rear tire.

In determining whether [Hite] is covered under [Hartford's] policy, we must look first to the uninsured motorist law. S.C.Code Sec. 56-9-810(2) (1976) defines two classes of "insured." The first is a "named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise...." The parties have stipulated that [Hite] is not a named insured under [Hartford's] policy, nor is he a spouse or a relative or a resident of the household of any individual named in the policy. The second class of "insured" is "any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above." [Emphasis added.] In Davidson v. Eastern [288 S.C. 619] Fire & Casualty Co. Ins. Co., 245 SC 472, 141 SE2d 135 (1965), the Supreme Court analyzed Sec. 56-9-810(2) by stating, "The members of the first class are covered 'while in a motor vehicle or otherwise,' i.e., at all times. The members of the second, viz.: the permissive user and the guest, are covered while using, or a guest in, the motor vehicle to which the policy applies ..." It is clear that [Hite], claiming uninsured motorist benefits from a vehicle of which he was a permissive user, must prove that he sustained his injuries while "using" the motor vehicle.

... It has been held that the "use" of an automobile involves its employment for some purpose of the user, while its "operation" involves the user's direction and control of its mechanism as its driver for the purpose of propelling it as a vehicle. Metcalf v. Hartford Acc. & Indem. Co., 176 Neb 468, 126 NW2d 471, 474 (1964). One who operates a motor vehicle obviously uses it, but one can use a motor vehicle without operating it; an automobile is being used, for example, by one riding in it, although another is driving or operating it. Orrill v. Garrett, 100 IllApp2d 194, 241 NE2d 1, 3 (1968).

Although "use" is unquestionably a broader term than "operate" or "drive," the difficult determination is whether this situation of an injury sustained remote to the actual operation of the vehicle is encompassed by the term "use."

[Hite] cites the case of [Federated Mutual Implement & Hardware Ins. Co. v. Gupton, 357 F2d 155 (4th Cir.1966),] as an interpretation of the word "use" broad enough to encompass [his] actions.... The insured vehicle in Federated was being used at the time of the accident by being unloaded, and the vehicle was involved in

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the actual injury. Neither of these facts is present in the instant case.

In Wrenn & Outlaw, Inc. v. Employees Liability Assurance Corp., 246 SC 97, 142 SE2d 741 (1965), the Supreme Court held that where a bag boy at a supermarket placed groceries in the customer's automobile and closed the car door on the customer's hand, this was a "use" of the automobile with the customer's permission. As in Federated, the vehicle was being used in loading and was involved in the actual injury.... Our Supreme Court emphasized in Wrenn that the loading and injury constituted one continuous operation[288 S.C. 620] without

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interruption, highlighting the importance of the loading activity to the finding of a use. No loading took place in the instant case.

In Coletrain v. Coletrain, 238 SC 555, 121 SE2d 89 (1961), the court held that a husband who closed the door on his wife's hand as she was leaving a taxicab was using the taxicab, although they were both passengers exiting from the cab. The court noted that the complaint stated that the injury was the result of negligent unloading, and reasoned that in order to put the taxicab to the use that was intended, it was required that the doors be opened and closed. This was done negligently by the defendant husband. Once again, the "use" enunciated by the court involved loading and unloading of the insured vehicle, and the vehicle was also involved in producing the actual injury.

... [Hite] emphasizes that the insured automobile was left running and remained operable when he was injured by the vehicle driven by Martin. It has been held that the injury of a pedestrian who was struck by an automobile while pushing his disabled car off the street at the direction of a police officer did not arise from the "operation, maintenance, or use" of the police car, even though the police car's lights were flashing while it was parked at the side of the road. Hartford Acci. & Indem. Co. v. Wilson, FlaApp, 356 So2d 24 (1978). Two cases involving police officers aid in delineating the borders of "use." The first, cited by [Hartford] involved an officer who parked his insured cruiser, walked 164 feet to serve a warrant, and was struck and killed by an uninsured motorist. Insurance Co. of North America v. Perry, 204 Va 833, 134 SE2d 418 (1964). In the second case a patrolman stopped a motorist for a traffic violation and was stabbed seven times removing a bottle from under the driver's seat. Tomlin v. State Farm Mut. Auto. Liability Ins. Co., 95 Wis2d 215, 290 NW2d 285 (1980). In both cases the courts ruled that the causes of the injuries were not "uses" of the motor vehicles.

What appears to be crucial to many courts in determining whether an injury produced by another vehicle or person falls within the ambit of "use" is the existence of a causal connection between an accident or injury and the use of the vehicle. Chicago Ins. Co. v. Security Ins. Co., 111 NJSuper [288 S.C. 621] 291, 268 A2d 296 (1970). It has been held that the existence of a causal connection obviates the necessity of finding that the injury was directly and proximately caused by the use of the vehicle, Insurance Co. v. Royal Indem. Co., 429 F2d 1014 ([6th Cir.] 1970), and affords coverage for injuries bearing almost any causal relation with the insured vehicle, State Farm Mut. Auto. Ins. Co. v. Partridge, 10 Cal3d 94 [109 Cal.Rptr. 811] 514 P2d 123 (1973). The injury must, however, be foreseeably identifiable with normal use, maintenance, and ownership of the vehicle. Kangas v. Aetna Casualty & Surety Co., 64 MichApp 1, 235 NW2d 42 (1975). If the injury was directly caused by some independent or intervening cause wholly disassociated from, independent of or remote from the use of the automobile, the injury cannot be said to arise out of its "use." Worthington v. State, Wyo, 598 P2d 796, 807 (1979). Even if there is some remote connection between the use of the automobile and the injury complained of, if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of

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the automobile, the injury is not the result of the "use" of an automobile. Norgaard v. Nodak Mut. Ins. Co., ND, 201 NW2d 871, 875 (1972)....

In the instant case [Hite] left the insured automobile, walked toward the dealership, and answered the call of the night watchman by walking fifty feet to tell Martin not to leave after he had backed into a truck. [Hite's] injury was directly caused by Martin, and this was an independent or intervening cause

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wholly disassociated from, independent of, and remote from the use of the insured automobile. It cannot be said that being struck fifty feet from the insured automobile by another vehicle while answering a call for assistance of the night watchman is forseeably identifiable with normal use, maintenance and ownership of the vehicle. It is difficult to see where use of the insured automobile was directly connected with or a cause of the ensuing accident.

In this case there was no loading or unloading of the insured automobile, or even an involvement of the vehicle in the production of the injury, that would put the fact situation within the parameters of "use" as defined in South Carolina. Other jurisdictions have decided cases similar in [288 S.C. 622] fact to the one presented here, and the key to determining whether injuries remote to the operation of an automobile occur during a "use" of the vehicle is the existence of a causal connection between the injury and the use. Such a causal connection has not been established in this case, where the injuries are the direct result of an intervening cause. I therefore grant the motion for a directed verdict by [Hartford].

In granting [Hartford's] motion for a directed verdict I need no longer address the issues of whether Martin was uninsured or whether [Hite] complied with the provisions of the policy....

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

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415 N.W.2d 876
56 USLW 2347
CONTINENTAL WESTERN INSURANCE COMPANY, Respondent,
v.
Russell KLUG, et al., Petitioners, Appellants.
No. C8-86-731.
Supreme Court of Minnesota.
Dec. 4, 1987.

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Syllabus by the Court

Appellant's injuries, caused when uninsured motorist drove alongside of appellant and assaulted him with a shotgun, arose out of the use of assailant's automobile for motoring purposes.

Theodore J. Smetab, Minneapolis, for petitioners, appellants.

Thomas F. Van Horn, St. Paul, for respondent.

Considered and decided by the court en banc without oral argument.

OPINION

AMDAHL, Chief Justice.

Appellants Russell and Wendy Klug petitioned this court to review a decision by the court of appeals affirming the trial court's granting of summary judgment in favor of respondent Continental Western Insurance Company (Continental). The court held that Russell Klug's gunshot injury did not arise out of the maintenance or use of a motor vehicle, and that therefore the appellants' claims were not covered under no-fault or uninsured motorist benefits. We granted the Klugs' petition for review and we reverse and remand to the court of appeals for further proceedings.

The parties have stipulated to the facts. On August 1, 1984, Russell Klug was driving home from work in the right-hand lane of a highway at 55 miles per hour. Klug looked to his left as a car pulled next to him in the passing lane 3 to 5 feet away. He recognized the driver as Daniel Bahe, a fellow worker. He also noticed that Bahe was pointing a shotgun out the passenger window directly at him.

Klug immediately swerved his car right and ducked down to avoid being shot. Only Klug's left arm, which he used to drive the car, remained exposed through the window. Klug heard a gunshot, and sat up to steer the car back into the right-hand lane; unknown to Klug at the time, he had been wounded in the left arm. Klug turned to look left and saw the shotgun was still pointed at him. Klug accelerated ahead of Bahe as a second shot was fired. Klug then pulled into the left lane in an attempt to prevent Bahe from approaching along the driver's side. Bahe sped up and rammed Klug's vehicle from behind. Klug swerved back and forth across the highway to prevent Bahe from pulling alongside.

The two cars maneuvered along the highway until they approached an exit. Klug noticed for the first time that he had been shot. He slammed on his brakes and pulled off the exit ramp. Bahe was unable to slow down quickly enough to exit with Klug. Klug stopped his car and received assistance.

The only injury claimed by Klug was the gunshot wound. The assailant Bahe was driving an uninsured car at the time of the incident. Both parties stipulated that Bahe's actions were the result of Bahe's mental illness.

Upon the facts stated, Continental sought summary judgment in its declaratory judgment action. The trial court granted

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judgment for Continental, stating, "[t]he injuries could have occurred anywhere; the automobile was merely the situs of the assault. There was no causal connection between use of the vehicle for transportation purposes and Klug's injuries. Accordingly, the insurer is not required to pay no-fault benefits under the policy."

The court of appeals affirmed, finding that Bahe's vehicle was the mere situs of his attack on Klug, and was not an "active accessory" of the incident. Continental Western Ins. Co. v. Klug, 394 N.W.2d 872, 877 (Minn.App.1986).

The legal issue of whether an accident arises out of the use or maintenance of an automobile is a recurring question which defies a simple test. Instead, "each case presenting such a question must, to a great degree, turn on the particular facts

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presented." Assoc. Indep. Dealers, Inc. v. Mutual Service Ins. Cos., 304 Minn. 179, 182, 229 N.W.2d 516, 518 (1975). We have set forth general factors to consider when addressing the issue.

The first consideration is the extent of causation between the automobile and the injury. In Holm v. Mutual Service Cas. Ins. Co., 261 N.W.2d 598, 603 (Minn.1977), we stated that the vehicle must be an "active accessory" in causing the injury. This causation standard was clarified to be "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury." Tlougan v. Auto-Owners Ins. Co., 310 N.W.2d 116, 117 (Minn.1981) (girl burned while playing with matches in parked truck not victim of injuries caused by vehicle); see also Engeldinger v. State Auto and Casualty Underwriters, 306 Minn. 202, 236 N.W.2d 596 (1975) (man freezing to death in parked car after passing out from intoxication held not entitled to recover).

If a court finds the requisite degree of causation, it should next determine whether an act of independent significance occurred, breaking the causal link between "use" of the vehicle and the injuries inflicted. In Holm, we found an act of independent significance where a police officer, after pursuing a motorcycle, left his vehicle to make an arrest and committed a battery upon the motorcyclist. We stated, "[the officer] had completely left the vehicle before he administered the tortious battery. The police car had served only to transport him to the scene of the incident. The battery could as easily have occurred had [the officer] come upon the stationary motorcycle while on foot." Holm, 261 N.W.2d at 603. See also Wieneke v. Home Mutual Ins. Co., 397 N.W.2d 597 (Minn.App.1986) (act of independent significance where assailant and plaintiff drove alongside each other yelling insults, both cars stopped, and assailant got out of car, walked to plaintiff's car, and punched plaintiff), petition for review denied (Minn., January 21, 1987); Edwards v. State Farm Mutual Auto. Ins. Co., 399 N.W.2d 95 (Minn.App.1986) (intervening act where assailant drove victim to countryside, stopped car, then raped and killed her, leaving her body in the country), petition for review denied (Minn., March 13, 1987).

If a court finds the requisite degree of causation and no intervening independent act, it must consider one final inquiry. Though there may be a causal link between use of the car and the injury, the court must determine what type of "use" of the automobile was involved. In Classified Ins. Corp. v. Vodinelich, 368 N.W.2d 921, 923 (Minn.1985), we explained that coverage should exist only for injuries resulting from use of an automobile for transportation purposes. Thus in Vodinelich we denied coverage where insured's children were accidentally asphyxiated when their mother

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used the vehicle to commit suicide in the garage of their home. See also Waldbillig v. State Farm Mutual Auto. Ins. Co., 321 N.W.2d 49 (Minn.1982) (plaintiff injured by defective engine in back of parked pickup truck not covered because truck not being used as a vehicle).

Applying this to the facts of the present case, we initially conclude that the requisite degree of causation exists between Klug's injuries and Bahe's use of the car. It is apparent Bahe's car was an "active accessory" to the assault; Bahe used his car to keep up with Klug for over 2 miles in order to try and shoot Klug.

We also conclude that no act of independent significance occurred to break the causal link; Bahe's actions of driving and shooting were inextricably linked. Had Bahe used his vehicle to drive ahead of Klug, left his vehicle, and shot Klug from the side of the road, we might have found an intervening act. Under the circumstances of this case, however, we hold that the causal link between Klug's injuries and the use of the car was not broken.

Finally, we conclude that Bahe was using his car for motoring purposes. Bahe used his vehicle as more than just a gun rest-- see Nat'l Farmers Union Property and Cas. Co. v. Gibbons, 338 F.Supp. 430 (D.N.D.1972)--he also used it to drive alongside Klug to assault him. Indeed, Bahe used his car not only to maneuver himself into a

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position to harm Klug but also to maneuver Klug into a position from which Klug could be harmed.

We conclude that Klug's injuries arose out of the use of uninsured motorist Bahe's automobile. We do not address or decide the issue of whether an "accident" occurred within the terms of the policy, which covers injuries for "accidents" arising out of maintenance or use of a motor vehicle. Because of its decision, the court of appeals did not reach this issue. In view of our holding, we remand to the court of appeals for further proceedings.

The decision of the court of appeals is reversed and remanded to the court of appeals for further proceedings.

POPOVICH, J., took no part in the consideration or decision of this case.

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422 S.E.2d 106
309 S.C. 269
WAUSAU UNDERWRITERS INSURANCE COMPANY, Appellee,
v.
Nancy Reece HOWSER, Appellant.
No. 23710.
Supreme Court of South Carolina.
Heard Sept. 23, 1991.
Decided Aug. 31, 1992.

[309 S.C. 270] Charles E. Hill of Turner, Padget, Graham & Laney, P.A., Columbia, for appellant.

Hoover C. Blanton of Whaley, McCutchen, Blanton & Rhodes, Columbia, for appellee.

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PER CURIAM:

Pursuant to Rule 228, SCACR, the following questions have been certified to this Court by the United States Court of Appeals for the Fourth Circuit:

1. "Is the insurer liable under the uninsured motorist provision involving injuries 'arising out of the ownership, maintenance, or use' of an uninsured vehicle (Section 38-7-140, S.C. Code Ann.) for gunshot injuries sustained by a person traveling on a public highway in an insured vehicle and inflicted during a vehicular chase by an unknown owner or operator of an unidentified vehicle?"

2. "Is, under the circumstances of this case, subsection 2 of Section 38-77-170 ('Conditions to sue or recover under uninsured motorist provision ...') satisfied by the presence of an independent witness to the accident causing the injury of the defendant in this case, even though the injury was not caused by 'physical contact with the unknown vehicle?' "

We respond to both questions affirmatively.

FACTS

Nancy Reece Howser ("Howser"), while driving her father's vehicle, was injured by an unknown assailant. Mr. Howser's vehicle was insured by Wausau Underwriters Insurance Company ("Wausau").

The details surrounding the incident are set forth in the Order of the United States District Court in Wausau Underwriters Insurance Co. v. Howser, 727 F.Supp. 999 (D.S.C.1990):

On the night of June 13, 1987, Howser and her friend, Lisa Annette Shealy ("Shealy"), left a bowling alley in [309 S.C. 271] their hometown of Columbia, South Carolina, and headed home in a 1985 Chevrolet S-10 Blazer driven by Howser and owned by her father. After stopping at a McDonald's restaurant at the intersection of Decker Boulevard and Trenholm Road, they drove down Trenholm Road in the inside lane of the four-lane road. After about one-tenth of a mile, the Blazer was "bumped" from behind. Howser looked in the rear view mirror and saw a car behind them with a driver and no passengers. The car bumped the Blazer two more times and Howser accelerated the Blazer. The driver of the other car, who was unknown to them, pulled his car alongside the Blazer in the outside lane and yelled at them to roll down their window, slow down and stop their car. He pointed a pistol at the Blazer's passenger window where Shealy was seated. Howser made a quick left turn onto a side street to avoid the stranger's assault. As she completed her turn, the gunman shot at the Blazer. A bullet entered the rear of the vehicle, fragmented, pierced the driver's car seat and entered Howser's back in three places. Howser managed to bring the Blazer to a stop before losing consciousness and Shealy summoned help. The gunman continued

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traveling down Trenholm Road. Neither he nor his vehicle has been identified.

The injuries that Howser sustained were the result of the gunshot. Neither Howser nor Shealy was hurt when the other vehicle bumped the Blazer.

Howser initially brought a 'John Doe' action in the Court of Common Pleas for Richland County, South Carolina, seeking to establish liability under the uninsured motorist (UM) provision of her father's automobile liability policy. See S.C. Code Ann. § 38-77-180 (1989). Wausau then brought this action seeking a declaration that Howser's injuries are not covered under the policy.

The District Court granted Wausau's motion for summary judgment, holding that Howser's injury did not arise out of the use of the assailant's vehicle. Wausau, 727 F.Supp. at 1006. Additionally, the District Court found Howser failed to establish that the gunman's vehicle caused her injury as required by section 38-77-170. Id.

[309 S.C. 272] LAW/ANALYSIS

1. Is the insurer liable under the uninsured motorist provision involving injuries 'arising out of the ownership, maintenance, or use' of an uninsured vehicle (Section 38-77-140, S.C. Code Ann.) for

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gunshot injuries sustained by a person traveling on a public highway in an insured vehicle and inflicted during a vehicular chase by an unknown owner or operator of an unidentified vehicle?

It is mandatory that all automobile insurance policies issued in South Carolina contain an uninsured motorist provision "undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." S.C. Code Ann. § 38-77-150 (1989). An insured is legally entitled to recover damages "arising out of the ownership, maintenance or use" of an uninsured vehicle. S.C. Code Ann. § 38-77-140 (1989). Thus, the issue presented is whether Howser's injuries arose out of the ownership, maintenance or use of the assailant's vehicle.

The pertinent facts presented here are virtually identical to those found in Continental Western Insurance Co. v. Klug, 415 N.W.2d 876 (Minn.1987). The Klug court found the gunshot injuries arose out of the use of the uninsured motorist vehicle. [1] We find the analysis employed by the Minnesota Supreme Court is consistent with South Carolina law.

In Klug, the court first considered the causal connection between the vehicle and the injury. The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. Id. We employed a similar analysis in Chapman v. Allstate Insurance Co., 263 S.C. 565, 211 S.E.2d 876 (1975), wherein an uninsured motorist assaulted the insured while traveling in the uninsured's vehicle. The insured was injured when she fell or jumped from the moving vehicle as a result of [309 S.C. 273] the attack. Accordingly, we held it was clear the injury arose out of the use of the uninsured automobile. Id. at 570, 211 S.E.2d at 879. Although the assault, not the use of the vehicle, was the cause of the insured's injuries, we found that the use of the vehicle causally contributed to the claimant's injuries. Id. See also Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961) (Court cited with approval Fidelity & Casualty Co. of N.Y. v. Lott, 273 F.2d 500 (5th Cir.1960), wherein the death caused by the negligent discharge of a rifle when the automobile was being used as a gun rest was held to have arisen out of the use of an automobile for purposes of insurance policy).

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In the case at bar, 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 as was found in Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir.1985). 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.

Once causation is established, the court must determine if an act of independent significance occurred breaking the causal link. Klug, 415 N.W.2d at 878. This also is consistent with South Carolina precedent. In Plaxco v. United States Fidelity and Guaranty Co., 252 S.C. 437, 166 S.E.2d 799 (1969), the vehicle's battery was used to start the engine of an airplane. Once this was accomplished, the airplane's brakes failed, causing it to move forward and damage another plane. This Court found the only connection between the vehicle and the plane was the use of the

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vehicle to start the plane. Since that purpose had been completed when the plane moved forward, any causal connection was broken and the accident resulted from the use of the plane and not the vehicle. Id. at 441, 166 S.E.2d at 801. See also Hite v. [309 S.C. 274] Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct.App.1986), ("if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of the automobile, the injury is not the result of the 'use' of the automobile").

In this case, no independent act occurred to break the causal link. Here, as in Klug, the unknown driver's use of his vehicle and the shooting were inextricably linked as one continuing assault. Accordingly, we conclude that for the purposes of Howser's uninsured motorist coverage, her injuries arose out of the use of her assailant's vehicle. [2]

2. Is, under the circumstances of this case, subsection 2 of Section 38-77-170 ('Conditions to sue or recover under uninsured motorist provision ...') satisfied by the presence of an independent witness to the accident causing the injury of the defendant in this case, even though the injury was not caused by 'physical contact with the unknown vehicle?'

The applicable statute referred to in this question provides:

Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:

(1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;

(2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle;

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[309 S.C. 275] (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

S.C. Code Ann. § 38-77-170 (1989) (emphasis added). The underlined portion was added to the statute in 1987. [3] Prior to that time, some physical contact with an unidentified vehicle was a prerequisite to coverage. Davis v. Doe, 285 S.C. 538, 331 S.E.2d 352 (1985).

The purpose of the second condition in this statute is to assure adequate proof the accident involved a second unknown vehicle. Coker v. Nationwide Insurance Co., 251 S.C. 175, 161 S.E.2d 175 (1968). The legislature, by the 1987 amendment, has determined an independent witness is sufficient to reduce the possibility of false claims. Nevertheless, Wausau maintains that the prefatory language of Section 38-77-170 which provides "[i]f the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown ..." (emphasis added) continues to restrict application of this statute to cases in which the vehicle is the direct cause of the injury. We find this language is not intended to require any more of a causal relationship than is necessary for the determination that the injury or damage arose out of the ownership, maintenance or use of the uninsured vehicle as required in Section 38-77-140. The

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interpretation urged by Wausau clearly would be contrary to the legislature's intent in amending the statute deleting the physical contact requirement. Accordingly, 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.

CERTIFIED QUESTIONS ANSWERED.

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1 Other courts have also found, under similar facts, the gunshot injuries arose out of the use of the vehicle. Nationwide Mut. Ins. Co. v. Munoz, 199 Cal.App.3d 1076, 245 Cal.Rptr. 324 (1988); Fortune Ins. Co. v. Ferreiro, 458 So.2d 834 (Fla.App.1984); Ganiron v. Hawaii Ins. Guar. Ass'n., 69 Haw. 432, 744 P.2d 1210 (1987). Contra Nationwide Mut. Ins. Co. v. Knight, 34 N.C.App. 96, 237 S.E.2d 341 (1977) rev. den., 293 N.C. 589, 239 S.E.2d 263 (1977).

2 The third prong of the Klug analysis requires the use of the vehicle be limited to that of providing transportation. Here the vehicle was being used for transportation. Thus, we need not determine whether this element is mandated under our law.

3 1987 S.C. Acts 166 § 25. This provision was amended again in 1989 to provide the witness must attest to the facts of the accident by an affidavit which prominently displays in bold print the following: "A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW." 1989 S.C. Acts 148 § 53.

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984 F.2d 610
STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff-Appellant,
v.
Joseph Wilburn PINSON; Nationwide Mutual Insurance Company, Defendants-Appellees,
and
Donald Charles Rider; Ashley Graham Rider; South Carolina Insurance Company, Defendants (Two Cases).
Nos. 92-1275, 92-1401.
United States Court of Appeals, Fourth Circuit.
Argued Oct. 28, 1992.
Decided Jan. 22, 1993.

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Bradford Neal Martin, Leatherwood, Walker, Todd & Mann, Greenville, SC, argued (Bernard F. Hawkins, on brief), for plaintiff-appellant.

Sharon McCain Rickborn, Columbia, SC, John Bagnel Duggan, Duggan, Reese & McKinney, P.A., Greer, SC, argued, for defendants-appellees.

Before ERVIN, Chief Judge, HALL, Circuit Judge, and DOUMAR, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

K.K. HALL, Circuit Judge:

State Farm Fire and Casualty Company appeals the district court's grant of summary judgment for State Farm's insured in this declaratory action. We must decide whether a boatowner's liability insurance policy covers injuries caused by a collision between a vehicle and a boat being towed by another vehicle. Finding that coverage exists, we affirm the district court's grant of summary judgment against State Farm.

I.

On June 17, 1990, Donald Rider was towing his pontoon boat behind his pickup truck in Waterloo, South Carolina. Because vandals had removed the stop sign at the intersection of highways 54 and 6, Rider entered the intersection without stopping. Rider's truck and boat were struck by a vehicle driven by Joseph Pinson. Pinson was seriously injured.

Rider's truck was insured by South Carolina Insurance Company; his boat by State Farm. Rider's State Farm Boatowners Liability Policy ("Policy") stated:

COVERAGE L--WATERCRAFT LIABILITY

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage resulting from the ownership, maintenance or use of your watercraft, we will:

1. [Pay the policy limits] for the damage for which the insured is legally liable; and

2. [Provide a defense.]

State Farm filed this action seeking a declaratory judgment that the Policy did not cover Pinson's injuries. Pinson and his underinsurance carrier, Nationwide Mutual Insurance Company, moved for summary judgment, arguing that Pinson's injuries arose in part from the boat's "use" or "ownership" or both.

The district court ruled that the boat was in "use," and that there was a causal connection between the boat's use and Pinson's injuries. Accordingly, the court

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granted the motion for summary judgment. State Farm filed this appeal.

II.

Summary judgment is appropriate where there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. This Court reviews the district court's ruling de novo. United States v. Lee, 943 F.2d 366, 368 (4th Cir.1991).

The issue is whether the district court properly determined that coverage was provided under the "use" clause of Rider's Policy. [1] To resolve this issue, we must make two [2] separate inquiries: (a) whether the boat was in "use" within the meaning of the Policy's language, and (b) whether Pinson's injuries "resulted from" the boat's "use." Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106, 108 (S.C.1992). Because this is a diversity case, we apply South Carolina's substantive law. Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

A. Was Rider's boat in "use?"

As a threshold matter, we must determine whether a towed boat is in "use." For the following reasons, we find that it is.

First and foremost, this Court has already held that a towed vehicle is a "used" vehicle. American Fire & Casualty Co. v. Allstate Ins. Co., 214 F.2d 523 (4th Cir.1954) (applying South Carolina law to identical policy language); see also Bray v. Ins. Co. of State of Pennsylvania, 917 F.2d 130, 133 (4th Cir.1990) (applying Virginia law, cites American Fire with approval); see generally cases collected in Annotation, Automobile liability insurance: what are accidents or injuries "arising out of ownership, maintenance, or use" of insured vehicle. 89 A.L.R.2d 150 § 9(f) (1963 & Supp.). Although these cases address towed automobiles rather than boats, the policy language is identical, and, therefore, the analysis is the same. Arguably a towed boat presents a stronger case for coverage than a towed vehicle. Usually, a vehicle is towed only when its owner is unable to put it to its intended purpose. A boat, on the other hand, must be towed in order for a landlocked owner to derive any enjoyment from boat ownership.

Second, we find State Farm's principal argument--that South Carolina law "clearly mandates a narrow interpretation of the term 'use' in an insurance contract"--unpersuasive. Significantly, the principal case upon which State Farm's argument is based, Wausau Underwriters Ins. Co. v. Howser, 727 F.Supp. 999 (D.S.C.1990), was reversed by this court in Wausau Underwriters Ins. Co. v. Howser, 978 F.2d 1257 (4th Cir.1992) (conforming to certified questions answered in Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106 (S.C.1992)), after State Farm's brief was filed.

In South Carolina, the term "use" has been broadly, not narrowly, construed. For example, in Hite v. Hartford Acc. & Indem. Co., 288 S.C. 616, 344 S.E.2d 173, 175 (1986), the court stated that the concept of "use" was broader than the "operation" of a motor vehicle. The South Carolina Supreme Court has frequently cited with approval cases from other jurisdictions defining the concept of use very broadly. See Howser, 422 S.E.2d at 107; Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961). One case cited approvingly in both Coletrain and Howser is Fidelity & Casualty Co. of N.Y. v. Lott, 273 F.2d 500 (5th Cir.1960). In Fidelity, the driver of the insured vehicle was using its roof as

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a gun rest to shoot a deer when, "[f]or some unexplained reason, ... the bullet tore through the top of the car, was deflected downward and inflicted the fatal injuries [to the passenger]." Id. at 501. The Fifth Circuit

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found that using the car as a gun rest was within the liability policy. The court explained that the policy language was "not restricted to occasions when the insured party was hurt either because of the running of the automobile or because of its standing after normal use." Id. at 502. Certainly, resting a gun on a car is a more obscure "use" of a vehicle than the commonplace occurrence in this case.

Contrary to the dissent's statements that our decision is "driven by a desire to create coverage," Dissent Op. at p. 617, we feel that the parties to the contract intended a towed boat to be in "use." In determining the scope of Rider's coverage, it is critical to consider the Policy's subject matter. Obviously, there is a significant distinction between boats, vehicles, and the dissent's travelling tubs and water heaters. Dissent Op. at p. 616. A water heater is taken to the consumer's home when purchased and left there, even if the original purchaser moves, until it is disposed of. On the other hand, unless a boat is permanently moored, it must be frequently transported to-and-from the water to be put to its intended purpose.

Because many boats are not permanently moored, an insurance company writing a boatowner's liability policy knows that landlocked policyholders will frequently tow their boats. This is clearly distinguishable from the dissent's strained analogies to transported water heaters under a general homeowner's liability policy. This is a complex and lengthy policy. If State Farm had wanted to exclude towing from the boat's liability coverage, it could easily have done so.

Therefore, we disagree with the dissent's conclusion that South Carolina would follow the smattering of courts that have ruled that a towed boat is cargo and is not in "use." See Hannah v. Erie Ins. Exchange, 537 A.2d 182 (Del.1987); State Farm Fire & Casualty Co. v. Thomas, 1986 WL 9001 (Tenn.App.); but see State Farm Fire & Casualty Co. v. Erwin, 393 So.2d 996 (Ala.1981) (towing a boat in order to have it repaired was within the "maintenance" clause of the boat's policy). The term "cargo" is defined as a "load (i.e. freight) of a vessel, train, truck, airplane or other carrier." Black's Law Dictionary (5th ed. 1979). The term "freight" means "goods transported by ... carriers." Id. Clearly, the term cargo has a strong commercial connotation. To find that a boat being towed by an individual boatowner becomes cargo would restrict this Policy far beyond the parties' intent. We also note a difference between the method used to transport Rider's boat and the transportation of "cargo." We are not faced with a situation where a tractor trailer was involved in a collision--Rider's trailer was nothing more than a flimsy rack with wheels on it.

For the aforementioned reasons we believe that South Carolina would continue to construe "use" broadly and find that a towed boat is in "use."

B. Whether Pinson's injuries "resulted from" the boat's use.

In response to this Court's recent certification of an analogous issue of state law, the South Carolina Supreme Court enunciated the test for determining whether an injury "arises" out of a vehicle's "use." See Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106 (S.C.1992). [3] We think the same causal test would be applied to the slight variation of policy

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language presented in this case: whether the injuries "result from" the boat's use.

In Wausau, the insured driver was pursued by an unknown assailant driving another car. During the chase, the insured driver's car was bumped several times before the insured was shot by the other driver. In resolving whether the assailant's vehicle was

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in "use" within the meaning of the insured's uninsured motorist coverage, the South Carolina Supreme Court stated that the test was "something less than proximate cause and something more than the vehicle being the mere site of the injury" or, more simply, whether "the use of the vehicle causally contributed to the claimant's injuries." Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d at 108, relying on Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn.1987). Applying this test, the South Carolina Supreme Court determined that the uninsured vehicle's "use" causally contributed to the claimant's injuries.

In this case, there is no question that the towing of the boat causally contributed to Pinson's injuries. As the district court noted, the causal connection is particularly strong because Pinson actually struck the boat, as well as Rider's truck, during the accident. [4] In sum, the causal link in this case is much stronger than Wausau; Pinson's injuries "resulted" from Rider's "use" of his boat.

III.

For the aforementioned reasons, the district court's judgment is affirmed.

AFFIRMED.

DOUMAR, District Judge, dissenting:

I respectfully dissent and restate the facts. State Farm Fire and Casualty Company ("State Farm") appeals from the district court's order granting summary judgment against State Farm in a declaratory judgment action. State Farm brought the action against Donald C. Rider, Ashley Graham Rider, Joseph W. Pinson, South Carolina Insurance Company, and Nationwide Mutual Insurance Company ("Nationwide"). State Farm sought a declaration that the liability coverage of its "boatowners" insurance policy does not apply to damages sustained by Pinson, the driver of a vehicle which collided with the pickup truck, trailer and boat of State Farm's insured, Donald Rider. Specifically, State Farm contended that under South Carolina law such damages do not result from the "use" of the insured boat, and, therefore, are not covered by the policy.

The district court rejected State Farm's argument and held that the "boatowners" policy does provide coverage for damages sustained by Pinson in the collision. Therefore, the principal question on appeal is whether the district court erred in holding that a boat is in "use" when that boat rests passively as cargo on a trailer which is being pulled by a pickup truck.

There does not appear to be a precedent in South Carolina which, in the opinion of the undersigned, can be relied on as determinative of the issues in this case. Accordingly, the undersigned would certify the questions to the Supreme Court of South Carolina. Since the majority feels otherwise, the undersigned must dissent, being unable to adopt the opinion of the majority in this case.

I. BACKGROUND

In or around Waterloo, South Carolina, on June 17, 1990, at approximately 11:30 p.m., Donald C. Rider drove south on State Highway 54 in a pickup truck towing a trailer bearing Rider's boat. Rider, unfamiliar with the road, failed to stop upon reaching the intersection of State Highway 54 and State Highway 6, because the stop sign for Highway 54 had been removed by unknown individuals. A vehicle, driven by Joseph W. Pinson, travelling eastbound on State Highway 6, the road with the right of way, collided with Rider's pickup truck, trailer and boat in the intersection.

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There is no dispute as to the cause of the accident: Rider pulled into the path of an oncoming vehicle which possessed the right-

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of-way. The accident resulted from no negligence associated with Rider's handling of the boat. No one contends that Rider improperly loaded or secured the boat to the trailer, or that the boat contributed in any way to causing the collision. Indeed, the collision would have occurred whether Rider's trailer carried the boat, any other cargo, or no cargo at all. The boat was involved merely because it happened to be on the trailer at the time of the collision, during which Pinson's car struck Rider's pickup truck, his trailer, and the boat.

At the time of the accident, both Rider and Pinson were insured. Pinson had underinsured motorist coverage through Nationwide. Rider had automobile insurance through South Carolina Insurance Company. [1]

Rider also had a "boatowners" policy issued by State Farm. The "boatowners" policy includes "Watercraft Liability" coverage of up to $100,000 per occurrence "[i]f a claim is made or a suit is brought ... for damages because of bodily injury or property damage resulting from the ownership, maintenance or use of [the insured's] watercraft." The "boatowners" policy does not provide liability coverage for boat trailers. [2] Pinson has demanded and been denied compensation under Rider's State Farm "boatowners" policy.

II. ANALYSIS

As noted above, State Farm's "boatowners" policy insured Rider against claims or suits "brought ... for damages because of bodily injury or property damage resulting from the ownership, maintenance or use of [the insured's] watercraft." Application of this provision to a given fact pattern raises two distinct issues: first, whether Rider's boat was in "use"; second, if so, did the damages "result[ ] from" that "use." The threshold inquiry is whether Rider's boat was in "use." Because the boat was not in "use," the threshold inquiry is determinative of this case. Therefore, I feel that it is unnecessary to reach the issue whether the accident or injury "resulted from" the "use" of the boat being carried on the towed trailer.

The case law of South Carolina's highest court provides little guidance in resolving the question before this Court. The South Carolina Supreme Court has not addressed whether a boat is in "use" while resting as cargo upon a trailer being towed by another vehicle. Indeed, there appear to be no decisions of the South Carolina Supreme Court which analyze "use" in either a boat case or a towing case. Accordingly, this issue should be referred to the Supreme Court of South Carolina. Because the majority does not wish to resort to certification herein, the undersigned is obligated to offer the following analysis of the issue.

Initially, it should be noted that, contrary to appellees' assertions, South Carolina's high court has not held the term "use" to be ambiguous. Appellees inaccurately cite Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961), for the proposition that "use" is an ambiguous term. Coletrain held that, for purposes of an automobile liability insurance policy, one passenger exiting a cab had "used" the cab by unintentionally shutting the cab's door on the hand of another passenger. Id. In reaching that conclusion, the Coletrain court determined that a vehicle does not have to be driven or operated to be in "use." Id. at 91. No part of its analysis depended on a finding that "use" is an ambiguous term.

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Appellees support their claim that Coletrain held the term "use" to be ambiguous by noting that Coletrain quotes the following language from a Fifth Circuit opinion:

Even were we to conclude that the terms used by the insurance company to spell out its liability were susceptible of more than the

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simple meaning we have already indicated, this would, of course, be of no benefit to the appellant. This is so because all must agree that one perfectly permissible construction of the words would be such as would comprehend the acts resulting in this injury. Thus, there would come into play the rule which appellant recognizes as applicable in Texas (as in South Carolina): That if the language of an insurance policy admits of more than one construction, that most favorable to the insured must be adopted....

121 S.E.2d at 90 (quoting Fidelity & Casualty Co. v. Lott, 273 F.2d 500, 502 (5th Cir.1960)). Appellees neglect to mention that Lott did not find ambiguous the language, "arising out of the ... use of the automobile." 273 F.2d at 502. More importantly, Coletrain itself does not hold "use" to be an ambiguous term; nor does Coletrain apply the rule of construing ambiguous language in favor of the insured.

Like the South Carolina Supreme Court, I do not perceive any ambiguity in the term "use." Accordingly, I am bound to follow the established principle of South Carolina law that "[i]nsurance policies are subject to the general rules of contract construction. Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." Sloan Constr. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 236 S.E.2d 818, 819 (1977); accord Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983); see also Standard Fire v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460, 461 (1990) ("Insurance companies are subject to general rules of contract construction."). [3] It simply does not comport with the "plain, ordinary and popular" meaning of the word "use" to say that a boat is in "use" when the boat is resting passively on a trailer as cargo.

The extent to which the interpretation asserted by the appellees departs from the "plain, ordinary and popular" meaning of the word "use" is easily demonstrated. For instance, according to the logic employed by appellees, were one to load a water heater onto a trailer, tow the trailer behind one's car, and have a collision, the water heater would be in "use." As such, a homeowner's insurance policy providing liability insurance for damages resulting from the "use" of the water heater would presumably cover damages caused by the collision. Indeed, the same result would obtain if it were a hot tub or any other type of cargo.

In short, the majority holds that any cargo is in "use" when it is being carried, hauled or toted. To so distort the meaning of the term "use" can serve only one purpose: increasing the pool of funds out of which an injured party may recover. Under South Carolina law, such is not the Court's role in interpreting an insurance policy. See Torrington Co. v. Aetna Casualty & Sur. Co., 264 S.C. 636, 216 S.E.2d 547, 550 (1975) (stating that "the parties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties").

Appellees place much emphasis on this Court's decision in the case of American Fire & Casualty Co. v. Allstate Ins. Co., 214 F.2d 523 (4th Cir.1954). The issue presented in American Fire & Casualty was whether under South Carolina law a powerless, unmanned Jeep being towed by an automobile was being "used" under an insurance policy covering the Jeep. The court noted that the "jeep was moving on the road by means of its own running gear, ... subject to the vicissitudes and dangers

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of travel on the public highway and ... propelled under circumstances not infrequently encountered." Id. at 525. The Court found the situation not sufficiently "unusual" as to be outside "the contemplation

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of the parties to the insurance contract." Id. Therefore, the Court held that the Jeep was in "use." Id.

Appellees fail to appreciate the importance of a factual distinction between American Fire & Casualty and the case presently before the Court. American Fire & Casualty involved a Jeep pulled behind another automobile. The Jeep was travelling on its own tires. Rider's boat was of necessity travelling on a trailer. The trailer--not the boat--was travelling on its own tires. Accordingly, it is Rider's trailer rather than his boat which is analogous to the Jeep in American Fire & Casualty.

The distinction between the Jeep and Rider's boat is crucial in considering whether the latter was in "use" under the "plain, ordinary and popular" meaning of the term. In American Fire & Casualty, as noted by the Court, a part of the Jeep itself was being utilized--the running gear. Id. No part of Rider's boat was being utilized--it merely rested passively on the trailer. It may comport with the "plain, ordinary and popular sense" of the term "use" to hold that a vehicle is in "use" when some part of that vehicle is being utilized. Where an object, such as Rider's boat, merely lies upon a trailer as cargo in transit, and no part of it is being utilized in any manner, the same conclusion cannot be reached. Simply put, to hold that Rider's boat was in "use" is to extend the word "use" far beyond its "plain, ordinary and popular" meaning.

This conclusion is strengthened by reference to the decisions of the only other courts in the nation to have interpreted the word "use" in a similar situation. See Hannah v. Erie Ins. Exch., 537 A.2d 182 (Del.1987); State Farm Fire & Casualty Co. v. Thomas, No. 22, 1986 WL 9001 (Tenn.Ct.App. Aug. 21, 1986). Both courts held that towing a boat on a trailer does not constitute a "use" of the boat for purposes of liability insurance covering the boat. See Hannah, 537 A.2d 182; Thomas, 1986 WL 9001.

Another court has held that towing a boat on a trailer for the purpose of obtaining repairs to the boat constitutes maintenance under a boatowner's liability insurance policy providing coverage for damages "arising out of the ownership, maintenance or use" of the boat. State Farm Fire & Casualty Co. v. Erwin, 393 So.2d 996 (Ala.1981). Observing that it had, in a previous case, held the term "maintenance" to be ambiguous, the Erwin court stated that "the word 'maintenance,' which is the act of maintaining, should be given one or more of the meanings that will give effect to the purpose of the insurance, which is to afford protection." Id. at 998 (quoting Alabama Farm Bureau Mut. Casualty Ins. Co. v. Tubbs, 293 Ala. 432, 304 So.2d 589, 591 (1974)). Thus, the Alabama court's decision was expressly motivated by a policy of interpreting the contractual language in a way which would expand coverage.

In contrast, neither the Delaware court, in Hannah, nor the Tennessee court, in Thomas, interpreted the term "use" with the goal of either expanding or restricting insurance coverage. Likewise, under South Carolina law, a court's analysis of an unambiguous term in an insurance contract may not be driven by a desire to create coverage. See Torrington Co., 216 S.E.2d at 550 (stating that "it is not the function of this Court to rewrite ... or torture the meaning of a policy to extend coverage never intended by the parties"). Therefore, while Erwin offers no guidance in addressing the question before this court, both Hannah and Thomas are instructive.

Hannah involved injuries sustained by a passenger in a pickup truck towing a boat when the pickup ran a stop sign and collided with a tractor-trailer. 537 A.2d at 182. An endorsement to a homeowner's insurance policy extended coverage for personal liability

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and medical payments to others "to apply to the ownership or use of any [insured] watercraft." Id. at 182-83. The Delaware Supreme Court agreed with the

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trial court that the term "use" is "clear and unambiguous" and stated that:

[a]s the trial court explained, "... it would contradict the ordinary meaning of words ... to say that the Hannah boat was 'in use' merely because it was carried on a trailer to a water site ... at most, the boat was in transit, preliminary to use." The trial court determined that the distinction between an insured vehicle in tow and an insured boat merely being transported as cargo is crucial, and this Court agrees with that determination.

Id. at 183. [4]

Thomas involved damages sustained by a motorist whose automobile was struck when the trailer and boat being towed by the insured pushed the insured's car into the path of the motorist's oncoming automobile. 1986 WL 9001, at *1. The insured's "boatowners" insurance policy provided watercraft liability coverage for "bodily injury or property damage resulting from the ownership, maintenance or use of [the insured's] watercraft." Id. The court correctly noted that an "insurance contract seeks to keep the insurance risks within reasonable bounds. The premium is based on this. Not every risk can be insured against." Id. at *2. The Thomas court further noted that the "boatowners" policy insured against property damage to the trailer, but did not insure against liability resulting from use of the trailer. [5] Id. at * 3. The court concluded that while being towed on a trailer, the boat "is then cargo. It is the trailer that is being used.... A boat has no use on a trailer and it is only cargo at this place." Id.

The facts in Hannah and Thomas are similar to the facts presented in this appeal, and the reasoning employed by the Hannah and Thomas courts is persuasive. Those cases confirm what is already clear: to hold that a boat is in "use" while it rests passively as cargo on a trailer is to stretch the unambiguous word "use" beyond its "plain, ordinary, and popular" meaning. If South Carolina law is to be extended in this manner, it should be left to that state's supreme court to do so. Unless this Court desires to certify the question to the South Carolina Supreme Court, this case is an improper vehicle for such an unwarranted extension of South Carolina law. Accordingly, I would hold that Rider's boat was not in "use" merely because it was being carried as cargo on Rider's trailer.

III. CONCLUSION

For the above stated reasons, I would reverse the district court's decision and remand for entry of an order declaring that the "Watercraft Liability" insurance issued by State Farm to Donald C. Rider, does not cover damages sustained by Joseph W. Pinson during his collision with Rider's pickup truck, boat trailer and boat.

---

1 The district court did not address whether coverage was also provided under the Policy's "ownership" clause. We also decline to address this issue.

2 South Carolina cases have sometimes failed to clearly differentiate whether the vehicle was in "use" and whether the vehicle's "use" contributed to the injuries. See Hite v. Hartford Acc. & Indem. Co., 288 S.C. 616, 344 S.E.2d 173, 176 (1986) ("What appears to be crucial to many courts in determining whether an injury produced by another vehicle or person falls within the ambit of 'use' is the existence of a causal connection between an accident or injury and the use of

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the vehicle." (citations omitted)). Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106, 108 (S.C.1992), indicates that these are separate inquiries.

3 The following question was certified: "Is the insurer liable under the uninsured motorist provision involving injuries 'arising out of the ownership maintenance, or use' of an uninsured vehicle ... for gunshot injuries sustained by a person traveling on a public highway in an insured vehicle and inflicted during a vehicular chase by an unknown operator of an unidentified vehicle?" Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106 (S.C.1992) (relied upon by this Court to reverse Wausau Underwriters Ins. Co. v. Howser, 727 F.Supp. 999 (D.S.C.1990), in Wausau Underwriters Ins. Co. v. Howser, 978 F.2d 1257 (4th Cir.1992)).

4 Of course, we express no opinion on whether the Policy would have provided coverage if Pinson's vehicle had only come into contact with Rider's truck.

1 Pinson has collected $15,000.00 from South Carolina Insurance Company. In exchange for that payment, Pinson released Rider from personal liability for damages arising out of the June 17, 1990, collision. Pinson reserved his right to proceed against Rider for the limited purpose of establishing claims under Pinson's Nationwide underinsured motorist policy and Rider's State Farm "boatowners" policy.

2 In its Definitions section, the policy states that "watercraft" means "the boats and motors described in the declaration; and[ ] newly acquired watercraft." In the same section, the policy defines "newly acquired watercraft" to mean "a boat, motor or boat trailer under Section I [property damage coverage]; [ ] a boat or motor under Section II [liability coverage]."

3 Similarly, this Court has held that if not ambiguous, "the terms of the policy are to be taken and understood in their ordinary sense and the policy must receive a practical, reasonable and fair interpretation consonant with the apparent object and intent of the parties." See Abady v. Hanover Fire Ins. Co., 266 F.2d 362, 364 (4th Cir.1959).

4 Appellees maintain that Hannah turns only on a lack of causal connection between the boat and the injuries. However, the Hannah court addressed both causal connection and "use," stating that "the trial court did not err in holding that ... the boat was not in 'use' and that no causal connection existed between the alleged use of the boat and the injuries sustained." 537 A.2d at 184 (emphasis added).

5 Rider's "boatowners" policy also provides coverage for damage to a trailer, but not for damages from the use of a trailer.

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431 S.E.2d 577
315 S.C. 1
CANAL INSURANCE COMPANY, Appellant,
v.
The INSURANCE COMPANY OF NORTH AMERICA, M & R Packing Company of Walterboro, Inc., and James L. Murdaugh, a/k/a Jimmy Murdaugh, d/b/a Jimmy's Welding, Respondents.
No. 23863.
Supreme Court of South Carolina.
Heard April 7, 1993.
Decided June 1, 1993.

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Joseph S. Brockington, of Wise & Cole, P.A., Charleston, for appellant.

Stephen P. Groves, of Young, Clement, Rivers & Tisdale; and Stephen F. DeAntonio, Charleston, for respondents The Insurance Co. of North America and M & R Packing Co. of Walterboro, Inc.

Lee R. Moody, of Moody & Smoak, Walterboro, for respondent James L. Murdaugh, a/k/a Jimmy Murdaugh d/b/a Jimmy's Welding.

MOORE, Justice.

This is a declaratory judgment action to determine coverage under an automobile insurance policy for damage to a building caused by a truck crane. The trial judge found coverage. We reverse.

FACTS

Appellant (Canal) issued an automobile insurance policy to respondent Murdaugh, the owner and operator of the truck crane. Respondent Insurance Company of North America has a subrogation interest.

The truck crane is a single unit which uses the same power source to drive the truck and activate the crane. To use the

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45-ton crane, the truck is hoisted off its tires on retractable hydraulic outriggers which level the crane while in use. The accident occurred while Murdaugh was using the truck crane to lift a condenser onto the roof of respondent M & R's building. While lifting the condenser, the crane became unbalanced and tipped over, crashing into the building.

ISSUES

1. Whether the policy excludes coverage?

2. Whether coverage is mandated under S.C.Code Ann. § 38-77-140 (1989)?

DISCUSSION

Canal argues the accident is not covered under its policy with Murdaugh for two reasons. First, it argues the exclusion for "mobile equipment" precludes coverage. The policy excludes from the definition of "automobile" any "mobile equipment" which is defined to include "a land vehicle ... designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes...." The trial judge found this exclusion did not apply.

We find the trial judge properly construed this exclusion in the policy. The truck crane is the only vehicle listed in the policy as a covered vehicle. The exclusion cannot be read to prohibit coverage for the only vehicle contemplated by the parties to the policy. Accord U.S. Fid. & Guar. Co. v. Gillis, 164 Ga.App. 278, 296 S.E.2d 253

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the vehicle." (citations omitted)). Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106, 108 (S.C.1992), indicates that these are separate inquiries.

3 The following question was certified: "Is the insurer liable under the uninsured motorist provision involving injuries 'arising out of the ownership maintenance, or use' of an uninsured vehicle ... for gunshot injuries sustained by a person traveling on a public highway in an insured vehicle and inflicted during a vehicular chase by an unknown operator of an unidentified vehicle?" Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106 (S.C.1992) (relied upon by this Court to reverse Wausau Underwriters Ins. Co. v. Howser, 727 F.Supp. 999 (D.S.C.1990), in Wausau Underwriters Ins. Co. v. Howser, 978 F.2d 1257 (4th Cir.1992)).

4 Of course, we express no opinion on whether the Policy would have provided coverage if Pinson's vehicle had only come into contact with Rider's truck.

1 Pinson has collected $15,000.00 from South Carolina Insurance Company. In exchange for that payment, Pinson released Rider from personal liability for damages arising out of the June 17, 1990, collision. Pinson reserved his right to proceed against Rider for the limited purpose of establishing claims under Pinson's Nationwide underinsured motorist policy and Rider's State Farm "boatowners" policy.

2 In its Definitions section, the policy states that "watercraft" means "the boats and motors described in the declaration; and[ ] newly acquired watercraft." In the same section, the policy defines "newly acquired watercraft" to mean "a boat, motor or boat trailer under Section I [property damage coverage]; [ ] a boat or motor under Section II [liability coverage]."

3 Similarly, this Court has held that if not ambiguous, "the terms of the policy are to be taken and understood in their ordinary sense and the policy must receive a practical, reasonable and fair interpretation consonant with the apparent object and intent of the parties." See Abady v. Hanover Fire Ins. Co., 266 F.2d 362, 364 (4th Cir.1959).

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431 S.E.2d 577
315 S.C. 1
CANAL INSURANCE COMPANY, Appellant,
v.
The INSURANCE COMPANY OF NORTH AMERICA, M & R Packing Company of Walterboro, Inc., and James L. Murdaugh, a/k/a Jimmy Murdaugh, d/b/a Jimmy's Welding, Respondents.
No. 23863.
Supreme Court of South Carolina.
Heard April 7, 1993.
Decided June 1, 1993.

Page 578

Joseph S. Brockington, of Wise & Cole, P.A., Charleston, for appellant.

Stephen P. Groves, of Young, Clement, Rivers & Tisdale; and Stephen F. DeAntonio, Charleston, for respondents The Insurance Co. of North America and M & R Packing Co. of Walterboro, Inc.

Lee R. Moody, of Moody & Smoak, Walterboro, for respondent James L. Murdaugh, a/k/a Jimmy Murdaugh d/b/a Jimmy's Welding.

MOORE, Justice.

This is a declaratory judgment action to determine coverage under an automobile insurance policy for damage to a building caused by a truck crane. The trial judge found coverage. We reverse.

FACTS

Appellant (Canal) issued an automobile insurance policy to respondent Murdaugh, the owner and operator of the truck crane. Respondent Insurance Company of North America has a subrogation interest.

The truck crane is a single unit which uses the same power source to drive the truck and activate the crane. To use the

Page 579

45-ton crane, the truck is hoisted off its tires on retractable hydraulic outriggers which level the crane while in use. The accident occurred while Murdaugh was using the truck crane to lift a condenser onto the roof of respondent M & R's building. While lifting the condenser, the crane became unbalanced and tipped over, crashing into the building.

ISSUES

1. Whether the policy excludes coverage?

2. Whether coverage is mandated under S.C.Code Ann. § 38-77-140 (1989)?

DISCUSSION

Canal argues the accident is not covered under its policy with Murdaugh for two reasons. First, it argues the exclusion for "mobile equipment" precludes coverage. The policy excludes from the definition of "automobile" any "mobile equipment" which is defined to include "a land vehicle ... designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes...." The trial judge found this exclusion did not apply.

We find the trial judge properly construed this exclusion in the policy. The truck crane is the only vehicle listed in the policy as a covered vehicle. The exclusion cannot be read to prohibit coverage for the only vehicle contemplated by the parties to the policy. Accord U.S. Fid. & Guar. Co. v. Gillis, 164 Ga.App. 278, 296 S.E.2d 253

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(1982) (truck with boom and ladder covered despite exclusion for mobile equipment).

Second, Canal argues the accident is not covered because the policy includes the following endorsement:

It is hereby understood and agreed that no coverage is afforded for any accident resulting [from] the use of the crane.

The trial judge found this endorsement invalid because it would exclude coverage for the only covered vehicle in the policy.

We disagree with the trial court's construction of this endorsement. The endorsement specifies use of the crane, whereas the vehicle listed for coverage is a "1975 Linkbelt Truck Crane." It is unambiguous that the endorsement is intended to exclude from coverage only accidents caused by use of the crane part of the truck. Since the crane can be used only when the truck is hoisted on the outriggers, this endorsement would not exclude coverage for damages caused by the truck crane while used as a means of transportation. Thus, the endorsement provides a limited and facially valid exclusion.

Since the policy contemplates an exclusion for use of the crane, the question then becomes whether such an exclusion is allowable under the statutes governing automobile insurance.

Section 38-77-140 (1989) provides in pertinent part:

No automobile insurance policy may be issued ... 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 these motor vehicles ....

The question here is whether use of the crane constitutes use of a motor vehicle to mandate coverage under the statute.

In the recent case of Wausau Underwriters Ins. v. Howser, --- S.C. ----, 422 S.E.2d 106 (1992), this Court interpreted "use of a motor vehicle" to mandate coverage for gunshot wounds sustained by a driver who was shot by the driver of another vehicle during a vehicular chase. In Wausau, however, we specifically declined to decide whether the vehicle must be used for transportation at the time of the injury to be included in the mandated coverage. 422 S.E.2d at 109, n. 2. Here, the truck crane was not being used for transportation at the time of the accident.

We now construe § 38-77-140 and define "use of a motor vehicle" as limited to transportation uses. This is the definition used in Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn.1987), a

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case upon which this Court relied in Wassau. See also Classified Ins. Corp. v. Vodinelich, 368 N.W.2d 921 (Minn.1985) (coverage not mandated where auto used by insured to commit suicide in garage and her children were accidentally asphyxiated in the home); Waldbillig v. St. Farm Mut. Auto. Ins. Co., 321 N.W.2d 49 (Minn.1982) (coverage not mandated where insured's hand was injured working on backhoe permanently mounted on back of truck). Such a construction of § 38-77-140 is consistent with legislative intent to mandate coverage for the benefit of the public since it encompasses those uses foreseeable to the parties to an automobile insurance policy.

Accordingly, the judgment of the circuit court is

REVERSED.

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HARWELL, C.J., and CHANDLER, FINNEY and TOAL, JJ., concur.

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441 S.E.2d 825
314 S.C. 105
The HOME INSURANCE COMPANY, A Corporation, Petitioner,
v.
Brian Eugene TOWE, Jerry Edward Alexander, and William Wayne McClaskey, Defendants,
of whom William Wayne McClaskey is Respondent.
No. 24016.
Supreme Court of South Carolina.
Heard Oct. 19, 1993.
Decided Feb. 22, 1994.

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[314 S.C. 106] Dana C. Mitchell, III, and Jesse A. McCall, Jr., both of Mitchell, Bouton, Yokel, & McCall, Greenville, for petitioner.

Steven M. Krause, of Epps, Krause & Nicholson, Anderson, for respondent.

Robert L. Waldrep, Jr., Anderson, for defendant Jerry Edward Alexander.

R. Daniel Day, Seneca, for defendant Brian Eugene Towe.

HARWELL, Chief Justice.

We granted Home Insurance Company's (Home) petition for writ of certiorari to review Home Insurance Company v. Towe, --- S.C. ----, 425 S.E.2d 784 (Ct.App.1992). Home contends that the Court of Appeals erred in ruling that the injuries William McClaskey (McClaskey) received when struck by a bottle thrown from a passing car arose out of the "ownership, maintenance or use" of Brian Towe's (Towe) automobile. We disagree and affirm.

I. FACTS

While riding in an automobile driven by Towe, Jerry Alexander (Alexander) threw a bottle from the moving vehicle at a road sign. Instead of striking the sign, the bottle shattered on the steering wheel of a tractor McClaskey was driving in the opposite direction, seriously injuring McClaskey and causing minor damage to the tractor. Thereafter, McClaskey filed suit against Towe and Alexander.

Home, Towe's insurer, brought this declaratory judgment [314 S.C. 107] action to determine whether McClaskey's injuries arose out of the "ownership, maintenance or use" of Towe's automobile. The trial judge found that McClaskey's injuries did not arise out of the use of Towe's automobile and McClaskey appealed. While McClaskey's appeal was pending, this Court held that for purposes of uninsured motorist coverage, an injury arises out of the use of an automobile if there is a causal connection between the vehicle and the injury and if no act of independent significance breaks the causal link. Wausau Underwriters Ins. Co. v. Howser, --- S.C. ----, 422 S.E.2d 106 (1992). The Court of Appeals reversed the trial judge's ruling, finding that under Wausau, McClaskey's injuries arose out of the use of Towe's vehicle.

II. DISCUSSION

Home first argues that Wausau applies only to intentionally inflicted injuries and,

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therefore, the Court of Appeals erred in applying the Wausau test to the facts of this case. We disagree.

The test for determining whether an injury arose out of the use of a vehicle turns on the causal connection between the vehicle and the injury. Wausau at ----, 422 S.E.2d at 108. No distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act. See Westchester Fire Ins. Co.

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v. Continental Ins. Co., 126 N.J.Super. 29, 312 A.2d 664 (Super.App.Div.1973), aff'd, 65 N.J. 152, 319 A.2d 732 (1974) (substantial nexus existed between injury and the use of the car regardless of whether the object blew out of the car window, fell out, or was pushed or thrown out). We reject Home's claim that the Court of Appeals erred in applying Wausau to the facts of this case.

Home next argues that the Court of Appeals erred in finding that there is a causal connection between the automobile and McClaskey's injuries. We disagree.

The 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 McClaskey's injuries. Home, --- S.C. at ----, 425 S.E.2d at 786. As in Wausau, the automobile was an active accessory that gave rise to the injuries. Home at ----, 425 S.E.2d at 786. Therefore, we find that the Court of Appeals [314 S.C. 108] did not err in holding that a causal connection exists between the use of Towe's automobile and McClaskey's injuries.

Home next argues that Alexander's act of throwing the bottle is an act of independent significance that breaks the causal connection between McClaskey's injuries and the use of Towe's automobile. We disagree.

The use of the automobile and Alexander's throwing of the bottle were, as in Wausau, "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 McClaskey's injuries. Accord Valdes v. Smalley, 303 So.2d 342 (Fla.Dist.Ct.App.1974) (injuries that resulted from passenger's throwing a bottle from a car were causally connected with the use of the automobile and no intervening event broke the causal link).

For the foregoing reasons, the Court of Appeals' holding that McClaskey's injuries arose out of the use of Towe's car is

AFFIRMED.

CHANDLER, FINNEY, TOAL and MOORE, JJ., concur.

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639 A.2d 270
138 N.H. 365
James and Carol CANNON
v.
MAINE BONDING & CASUALTY COMPANY.
MAINE BONDING & CASUALTY COMPANY
v.
UNIVERSAL UNDERWRITERS GROUP.
No. 93-115.
Supreme Court of New Hampshire.
March 25, 1994.

Wiggin & Nourie, P.A., Manchester (Peter E. Hutchins, orally and on the brief, and John P. Fagan, on the brief), for James and Carol Cannon.

Devine, Millimet & Branch, P.A., Manchester (Eileen Fox, on the brief, and Julie Ann Boyle, orally), for Maine Bonding & Cas. Co.

Ouellette, Hallisey, Dibble and Tanguay, P.A., Dover (Stephen J. Dibble, on the brief and orally), for Universal Underwriters Group.

JOHNSON, Justice.

These declaratory judgment actions, involving issues of automobile insurance coverage, arose after David Castles assaulted James Cannon on Interstate 93. Castles had been driving his employer's car, which was insured by Universal Underwriters Group (Universal Underwriters), while Cannon had been driving his own car, insured by Maine Bonding & Casualty Company (Maine Bonding). The Superior Court (Hollman, J.) ruled that Cannon's injuries did not arise out of any use of Castles' employer's car and, therefore, that Universal Underwriters is not obligated to provide Castles with liability

coverage and that Maine Bonding is not obligated to provide James and Carol Cannon with uninsured motorist benefits. The Cannons appeal, and we affirm.

[138 N.H. 366] For purposes of this appeal, the parties agree to the following. Castles and Cannon were driving in separate cars on Interstate 93 in Manchester when Castles engaged Cannon in a "cat-and-mouse" game, alternatively accelerating and decelerating, and not letting Cannon pass. Castles used certain hostile hand signals to indicate that he wanted Cannon to pull over to the side of the road. Cannon refused and drove closely behind Castles to determine Castles' license plate number. Castles slammed on his brakes, causing Cannon to do likewise and stall his car. The cars came to a stop on the highway without touching. Castles then ran over to Cannon's car, in which Cannon remained seated, smashed the driver's side window with his fist, and punched Cannon. This attack left Cannon with a severe eye injury. The Cannons sued Castles, and these declaratory judgment actions followed.

The narrow issue on appeal is whether the superior court correctly ruled that Cannon's injuries did not arise out of any use of the car Castles was driving. Universal Underwriters' contractual and statutory obligations to provide liability coverage for Castles depend on Cannon's injuries arising out of the use of this car. See RSA 259:61, I (1993); RSA 264:20 (1993). Under the Maine Bonding insurance policy, uninsured motorist coverage depends on the same condition.

We recently explained in Akerley v. Hartford Insurance Group, 136 N.H. 433, 616 A.2d 511 (1992), that "arising out of" a car's use means "originating from, or growing out of, or flowing from the use." Id. at 439, 616 A.2d at 515 (quotation omitted); see also Union Mut. Fire Ins. Co. v. King, 113 N.H. 39,

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41, 300 A.2d 335, 336 (1973); Carter v. Bergeron, 102 N.H. 464, 470-71, 160 A.2d 348, 353 (1960). To warrant coverage, the use need not be the proximate cause of the injuries, but the causal connection between the two must be more than "tenuous." Akerley, 136 N.H. at 439, 616 A.2d at 515. For example, in Akerley, where a police officer was injured while apprehending a suspect who had been firing a gun from his car, we denied coverage in part because the suspect was not "using his vehicle or behaving as a motorist" at the time the officer was injured. Id. at 440, 616 A.2d at 515.

Similarly, at the time of Castles' assault on Cannon, Castles was no longer using his vehicle or acting as a motorist. Thus, under Akerley, the causal connection between use and injury here is tenuous. The Cannons counter that Castles used his employer's car to trap Cannon and render him helpless against Castles' attack. This argument, however, ignores the salient point in this fact pattern: Castles brought his employer's car to a stop and left it unattended before [138 N.H. 367] hurling his fist through Cannon's car window. Under similar facts, courts in other jurisdictions have come to the same conclusion as did the superior court. See, e.g., Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984, 986, 989 (4th Cir.1985); Commercial Union Ins. Co. of New York v. Hall, 246 F.Supp. 64, 65, 66 (E.D.S.C.1965); Detroit Auto. Inter-Ins. Exch. v. Higginbotham, 95 Mich.App. 213, 215-16, 222, 290 N.W.2d 414, 416, 419 (1980).

In the cases chiefly relied on by the Cannons, the assailant shot the victim while driving or riding in a moving vehicle. See State Farm Mut. Auto. Ins. Co. v. Davis, 937 F.2d 1415, 1417 (9th Cir.1991); Continental Western Ins. Co. v. Klug, 415 N.W.2d 876, 877 (Minn.1987); Wausau Underwriters Ins. Co. v. Howser, 422 S.E.2d 106, 107 (S.C.1992). Significantly, two of these cases, Davis and Howser, specifically distinguish cases such as Brown and Higginbotham, whose facts so resemble ours. Davis, 937 F.2d at 1422; Howser, 422 S.E.2d at 108. The conspicuous difference is that in the cases where the courts have denied coverage, "the assailant left his vehicle before assaulting the other party." Davis, 937 F.2d at 1422. This is precisely what happened here. We conclude that Cannon's injury did not arise out of Castles' use of his employer's car and, therefore, affirm the superior court's ruling.

Affirmed.

All concurred.

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467 S.E.2d 120
321 S.C. 23
Dewayne CARRAWAY, Respondent,
v.
James SMITH, by SOUTH CAROLINA INSURANCE COMPANY, Appellant.
No. 2433.
Court of Appeals of South Carolina.
Heard Nov. 7, 1995.
Decided Dec. 19, 1995.
Rehearing Denied Feb. 22, 1996.

Michael M. Nunn and D. Andrew Williams, both of Coleman, Aiken & Chase, Florence, for appellant.

[321 S.C. 24] Karl H. Smith and Fred S. Reynolds, both of Stanton, Jones & Smith, Hartsville, for respondent.

HEARN, Judge:

This declaratory judgment action involves determination of the extent of coverage under the uninsured motorist provision of an automobile insurance policy. The circuit court held Dewayne Carraway's insurance policy provided coverage for damages he sustained during a shooting incident. South Carolina Insurance Company, defending on behalf of James Smith, appeals. We reverse.

On April 25, 1991, while driving his mother's car in Hartsville, South Carolina, Carraway approached an intersection behind a red car in which Smith was traveling. The red car stopped at the intersection's stop sign and Carraway stopped behind it. While Carraway was waiting to proceed, Smith exited the red car and began speaking with a third party who was standing on the adjacent sidewalk. Carraway waited in his own car, with the engine running, as Smith conversed with the third party for approximately five minutes and the red car remained stopped at the intersection.

After standing outside the red car and talking for several minutes, Smith pulled out a gun and began shooting at someone on the sidewalk. One of the bullets Smith fired went through Carraway's windshield, causing glass fragments to strike Carraway in the face. After the bullet hit his windshield, Carraway ducked down in his car until he no longer heard shots being fired. When Carraway arose, Smith had fled and the red car was gone. Thereafter, Carraway was treated for injuries to his eye caused by the flying glass fragments.

Carraway instituted this action for damages against Smith in June of 1992, alleging negligence, willfulness, recklessness, and intentional misconduct in connection with the shooting incident. South Carolina Insurance Company (Insurer), Carraway's uninsured

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motorist carrier, exercised its statutory right under S.C.Code Ann. § 38-77-150 (Supp.1994) to appear and defend the case in Smith's name. Prior to trial, Insurer moved for summary judgment on the issue of whether it was [321 S.C. 25] liable for Carraway's injuries under the statutory uninsured motorist provision involving injuries "arising out of the ownership, maintenance, or use" of an uninsured vehicle. S.C.Code Ann. § 38-77-140 (Supp.1994).

At the hearing on Insurer's summary judgment motion, counsel for Insurer agreed to have its motion heard in the posture of a declaratory judgment action. After hearing arguments from both parties, the circuit court found there was a causal connection between Smith's use of the red vehicle and Carraway's injuries, and awarded Carraway $4,500 in actual damages and $4,000 in punitive damages. This appeal followed.

In Wausau Underwriter's Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992),

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our supreme court considered the question of whether an insurer was liable, pursuant to S.C.Code Ann. § 38-77-140, for gunshot injuries sustained by a person traveling on a public highway in an insured vehicle and inflicted during a vehicular chase by an unknown owner or operator of an unidentified vehicle. In holding Wausau was liable for the claimant's injuries, the Court articulated a two-pronged test for determining when an injury arises out of the ownership, maintenance, or use of an uninsured vehicle. Id. First, the party seeking coverage must establish a "causal connection" between the vehicle and the injury. As defined by the Wausau Court, the causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. Id. In addition, there must exist no act of independent significance breaking the causal link. Id. at 274, 422 S.E.2d at 109, citing Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (Ct.App.1986) ("if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of the automobile, the injury is not the result of the 'use' of the automobile").

In the instant case, Insurer argues the trial court erred in finding an adequate causal link existed between Smith's use of the red vehicle and Carraway's injuries. Specifically, Insurer asserts the only connection between Smith's use of the red car and Carraway's injuries is that Smith used the vehicle to travel to the scene of the crime. Carraway argues that the red car was an active accessary because it was used to deliver the assailant to the site of the shooting and to keep Carraway [321 S.C. 26] within the zone of danger until after the injury occurred. [1] We disagree.

We believe the trial judge erred in finding a causal connection between Smith's use of the red vehicle and Carraway's injuries. Smith exited the car and carried on a conversation with a third person for several minutes before the shooting occurred. Even if the use of the car and the shooting were connected, that link was broken by Smith's actions. Unlike the facts in Wausau, there was no ongoing use of a vehicle in this case to carry out the attack.

The trial judge also erred in finding that the red vehicle "blocked the roadway at the intersection and prevented [Carraway] from leaving the scene." There is no evidence in the record that Carraway was prevented from extricating himself from the situation or that he believed himself to be trapped by the placement of the red car. Carraway made no attempt to leave the scene because, as he testified, it was not unusual for cars to stop in that area of town and for people to get out and talk to others. He said: "I thought nothing of it because I grew up around stuff like that."

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We decline to extend the reasoning of the Wausau case to this fact situation. We hold that Carraway's injuries were caused by an independent act wholly separate from the use of the vehicle. Accordingly, the judgment is

REVERSED.

SHAW and CONNOR, JJ., concur.

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1 See S.C.Code Ann. § 56-5-1880(a)(2) (Rev.1991 & Supp.1994) (providing that no vehicle shall travel on the left side of a roadway when approaching within one hundred feet of or traversing any intersection). See also S.C.Code Ann. § 56-5-3810(b) (Rev.1991) (providing that no driver shall back a vehicle upon any shoulder or roadway of any controlled-access highway); S.C.Code Ann. § 56-5-613 (Rev.1991) (defining "controlled access highway" as every highway street or roadway to which owners and occupants of abutting lands and other

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persons have no legal right of access to or from except at such points and in such manner as may be determined by the public authority having jurisdiction over such highway street or roadway.).

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494 S.E.2d 469
329 S.C. 214
Jane DOE and Mary Roe, Appellants,
v.
S.C. STATE BUDGET AND CONTROL BOARD, Office of Insurance Services, Insurance Reserve Fund; Gary Wayne Roberson, in his individual and official capacities; John Short, in his individual and official capacity as Chief of Police; Joe Gebbia, in his individual and official capacities; and the City of Tega Cay, Defendants.
Of Whom, S.C. State Budget and Control Board, Office of Insurance Services, Insurance Reserve Fund is Respondent.
No. 2764.
Court of Appeals of South Carolina.
Heard Sept. 9, 1997.
Decided Dec. 8, 1997.
Rehearing Denied Jan. 23, 1998.
Certiorari Granted Oct. 21, 1998.

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[329 S.C. 216] A. Philip Baity, of Baity & Lang, Fort Mill; Frank Anthony Barton and J. Marvin Mullis, Jr., both of Mullis & Barton, Columbia, for appellants.

Andrew F. Lindemann and William H. Davidson, II, both of Ellis, Lawhorne, Davidson & Sims, Columbia, for respondent.

Herbert Hamilton and Dan Ballou, both of Kennedy, Covington, Lobdell & Hickman, Rock Hill, for the City of Tega Cay; and Isaac McDuffie Stone, III, for Gary Wayne Roberson, defendants.

HEARN, Judge:

In this declaratory judgment action, Jane Doe and Mary Roe appeal the special circuit court judge's grant of summary judgment in favor of the Insurance Reserve Fund. Appellants argue the Fund has a duty to defend

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and indemnify the defendants named in their complaint. [1] We affirm.

[329 S.C. 217] FACTS

Appellants commenced a federal lawsuit and this declaratory judgment action after Officer Gary Roberson sexually assaulted each of them on separate occasions. In their district court action, they asserted numerous claims, including federal constitutional and state tort claims.

According to Appellants' Amended Complaint, Roberson preceded each assault by stopping Appellants' vehicles for DUI investigations. When he stopped Jane Doe, he told her that if she would have intercourse and oral sex with him, he would not charge her with DUI. He instructed her to meet him at a secluded location, which she did, and then coerced her into having sex with him inside his car and on its hood, as well as in a parked bus. Similarly, when Roberson stopped Mary Roe, he informed her that he would forgo arresting her in exchange for sex. It is disputed whether Roe followed Roberson to a golf course in her own vehicle or whether she accompanied Roberson in his car. [2] At the golf course they had sex in his car. [3] As a result of the assault, Roe became pregnant and underwent an abortion.

The district court judge granted summary judgment to Appellants as against the Defendant Gary Wayne Roberson. All other defendants were dismissed in the federal lawsuit. Doe and Roe sought a declaratory judgment in state court that the Fund was required to provide coverage under an automobile liability policy and a general tort

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liability policy for personal injuries suffered by them at the hands of Roberson.

The Insurance Reserve Fund counterclaimed and cross-claimed, seeking declaratory judgments that it does not have a duty to defend or indemnify the defendants under either its automobile or general tort liability policies. The special circuit [329 S.C. 218] court judge granted the Fund's motions for summary judgment on both grounds.

DISCUSSION

Appellants argue the special circuit court judge improperly granted the Insurance Reserve Fund's motion for summary judgment. They contend their case involves unresolved questions of fact and that the grant of summary judgment was error. [4] We disagree.

A. Automobile Liability Policy

Appellants contend the Fund's automobile policy provides coverage for their injuries because the injuries inflicted upon them arose out of the use of Roberson's patrol car. We disagree.

Our supreme court has adopted a three-pronged test to determine the scope and meaning of the phrase "ownership, maintenance, or use" of a covered vehicle. First, the claimant must show a causal connection between the vehicle and the injury. Wausau Underwriter's Ins. Co. v. Howser, 309 S.C. 269, 272-73, 422 S.E.2d 106, 108 (1992). Next, the court must determine if the injuries were caused by an act independent of the vehicle's use. Id. at 273-74, 422 S.E.2d at 108-09; Carraway v. Smith, 321 S.C. 23, 25-26, 467 S.E.2d 120, 122 (Ct.App.1995) (finding no coverage for injuries caused by an independent act wholly separate from the vehicle's use, even where the use of a car and injuries were connected). Finally, the court must determine how the vehicle was used and allow coverage to the extent the vehicle

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was used for transportation purposes. Canal Ins. Co. v. Insurance Co. of N. Am., 315 S.C. 1, 4, 431 S.E.2d 577, 579-80 (1993) (limiting S.C.Code Ann. § 38-77-140 and "use of motor vehicle" to transportation uses); see also Hite v. Hartford Accident & Indem. Co., 288 S.C. 616, 621, 344 S.E.2d 173, 176 (Ct.App.1986) (defining "use" as "foreseeably identifiable with the normal use, maintenance and ownership of the vehicle").

[329 S.C. 219] In this case, we find no causal relationship between the vehicle and Appellants' injuries as required by Howser. The situs of an injury is not necessarily a causal link, even though it is connected spatially to the harm. Although we agree with Appellants that Roberson probably could not have stopped them for DUI without the color of authority provided by his patrol car, the stop itself did not cause the harm to Appellants. Moreover, the assaults did not occur at the time of the stop; rather, they occurred sometime later at another location.

Even if we were to hold that Appellants had satisfied the first prong of the test and had demonstrated a causal connection between the vehicle and the injury, we believe Roberson's assaults of Appellants were acts of independent significance which broke the causal chain. The injuries to Appellants resulted from Roberson's assaults of them, not from his use of the vehicle. To hold otherwise would subject automobile liability carriers to exposure for any criminal act committed in the insured vehicle. This would certainly expand the reasoning of Howser, which we decline to do. Accord Doe v. State Farm Fire & Cas. Co., 878 F.Supp. 862, 868-69 (E.D.Va.1995). [5]

Appellants also argue the trial court erred in finding Roberson's assaults were not

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"accidents." This amounts to an assertion that Roberson's actions were unintentional. It is undisputed, however, that Roberson intentionally coerced Appellants into having sex with him. Because of our conclusion that Appellants' injuries did not arise out of the use of his patrol car, we need not address this issue.

[329 S.C. 220] B. General Tort Liability Policy

The special circuit court judge also found the general tort liability policy did not provide coverage for Appellants' injuries. Appellants argue the policy provides coverage, citing South Carolina State Budget & Control Board v. Prince in support of their contention. 304 S.C. 241, 403 S.E.2d 643 (1991). We agree with the special circuit court judge.

Appellants misapprehend Prince 's holding. Prince held that when insurance policies are ambiguous because of internal inconsistencies, courts must resolve all doubts in favor of coverage. Id. at 248, 403 S.E.2d at 647. Here, however, the policy is not ambiguous. It is undisputed that Roberson's "sex for freedom" deals grossly exceeded the scope of his official duties, which is an express limitation of the policy's definition of "persons insured." Contrary to Appellants' assertions, Roberson's "duties" as a police officer do not include all conduct that Roberson might have engaged in while on duty. See South Carolina Medical Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry, 291 S.C. 460, 463, 354 S.E.2d 378, 381 (1987) (scope of professional services does not include all forms of conduct engaged in by members of a profession).

Moreover, South Carolina Code section 1-11-140 provides that tort liability coverage protects government employees "against tort liability arising in the course of employment."

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S.C.Code Ann. § 1-11-140(A) (Supp.1996). Our Supreme Court has defined "in the course of employment" as requiring some act in the furtherance of the employer's business. Prince, 304 S.C. at 247, 403 S.E.2d at 646. In the present case, no cogent argument can be made that Roberson was furthering the business of his employer at the time he sexually assaulted Appellants.

Accordingly, the decision of the special circuit court judge is

AFFIRMED.

CURETON and STILWELL, JJ., concur.

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1 None of the parties to whom a potential defense was owed have appealed the trial judge's order. Thus, the "duty to defend" issue is not before this court.

2 This conflict is due to inconsistencies within the Amended Complaint. In her statement of factual allegations, Roe alleges Roberson instructed her to "follow him in her car." In her Tenth Cause of Action, however, Roe alleges Roberson "transported her" to the golf course after forcing her inside his car.

3 Roberson was arrested in May 1991 and charged with six counts of criminal sexual assault. He later pled guilty to four counts of misuse of office and received a two-year sentence.

4 Although Appellants argue their case involves unresolved questions of fact, they presented no affidavits, deposition testimony, or other evidence in response to Respondent's motion for summary judgment to show any disputed issues of fact.

5 Doe addressed whether an insured was entitled to uninsured motorist coverage arising out of the use of a stolen vehicle, where the vehicle was used to transport the insured to several locations for the purpose of

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sexually assaulting her. Id. at 862-63. The United States District Court for the Eastern District of Virginia refused to extend coverage. The court noted the existence of some causal connection between the vehicle's use and the insured's injuries, but held that this did not amount to the requisite connection needed to establish coverage. Id. at 864-65. "[T]he relevant inquiry is whether the vehicle is being used as a vehicle at the time of injury, and if so, whether the injury resulted from that use. In this case, Doe's injuries arose not from the abduction where the vehicle was used as a means of transportation, but from the assault, where the vehicle was used simply as a situs, or enclosure." Id. at 868.

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shotgun, who escaped from the McDonald's parking lot on foot.

21. The two assailants who fled the scene in the Tracker were immediately captured by the police a few blocks away from the McDonald's restaurant.

22. The third assailant who fled on foot was arrested and charged a few days later.

23. All three assailants were charged with and convicted of various criminal violations, including assault and battery with intent to kill, aggravated assault, and accessory after the fact to a felony.

PROCEDURAL BACKGROUND

Based on the stipulated facts, both parties moved for summary judgment.[2] The court granted summary judgment in the Bookerts' favor and held the underinsured motorist provisions of the policy issued by State Farm to Mary Bookert were inconsistent with S.C.Code Ann. § 38-77-160 (Supp. 1996). The court reformed the policy by substituting the words "ownership, maintenance, or use" for the words "operation or ownership" in the portion of the policy relating to underinsured motorist coverage. The policy initially provided underinsured motorist coverage as follows:

> We will pay damages for bodily injury or property damage an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle. The bodily injury or property damage must be caused by accident arising out
>
> [330 S.C. 227]
>
> of the *operation or ownership* of the underinsured motor vehicle. (emphasis added).[3]

Additionally, the court determined Bookert's injuries arose out of the "ownership, maintenance, or use" of a motor vehicle. Finally, the court concluded the underinsured motorist provisions of the policy provided coverage for the gunshot injuries sustained by Michael Bookert. State Farm filed a motion for reconsideration, which was denied.

ISSUES

> I. Did the trial court err in reforming the insurance policy when it found the language relating to underinsured motorist coverage inconsistent with S.C.Code Ann. § 38-77-160 (Supp.1996)?
>
> II. Did the trial court err in finding underinsured motorist coverage was available to Michael Bookert under the reformed policy?
>
> III. Did the trial court err in considering an affidavit submitted by the Bookerts in support of their summary judgment motion where the case was submitted on stipulated facts?

LAW/ANALYSIS

I. REFORMATION OF POLICY

State Farm contends the trial court erred in reforming the contractual language of the policy when it found the policy language inconsistent with S.C.Code Ann. § 38-77-160 (Supp. 1996).

In its motion for summary judgment, State Farm conceded the bodily injury incurred by Michael Bookert was an "accident" within the terms of its policy. However, State Farm argued the bodily injury

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did not arise out of the *"operation"* of the underinsured motor vehicle, nor did the bodily injury arise out of the *"use."* In *Hite v. Hartford Accident & Indent. Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct.App.1986), this Court

[330 S.C. 228]

recognized the term "use" was broader than the term "operate" and explained:

> It has been held that the "use" of an automobile involves its employment for some purpose of the user, while its "operation" involves the user's direction and control of its mechanism as its driver for the purpose of propelling it as a vehicle. One who operates a motor vehicle obviously uses it, but one can use a motor vehicle without operating it; an automobile is being used, for example, by one riding in it, although another is driving or operating it.

Hite, 288 S.C. at 619, 344 S.E.2d at 175 (citations omitted).

In South Carolina, automobile insurance policies are statutorily required to contain liability and uninsured motorist coverage in certain basic limits. S.C.Code Ann. §§ 38-77-140 and-150 (Rev.1989 and Supp.1996). South Carolina law mandates that no automobile insurance policy may be issued unless it contains (1) 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 these motor vehicles and (2) an uninsured motorist provision to protect against damages an insured is legally entitled to recover which "arise out of the ownership, maintenance or use" of an uninsured vehicle. S.C.Code Ann. §§ 38-77-140 and -150 (Rev.1989 & Supp.1996).

The initial policy language—"operation or ownership"—is inconsistent with the legislative intent behind S.C.Code Ann. § 38-77-160 (Supp.1996). That section provides:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute. If, however, an insured or named insured is protected by uninsured or underinsured motorist coverage in excess of the basic limits,

[330 S.C. 229]

> the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident.

The statute recognizes the insurer providing the underinsured coverage has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. *Id.* Further, in the event the automobile insurance carrier for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its

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insured, the underinsured motorist carrier may assume control of the defense of the action for its own benefit. *Id.*

Because underinsured motorist coverage is intended to provide coverage where the at-fault driver's liability coverage is insufficient, we conclude the legislature intended for underinsured motorist coverage to provide the same type of coverage as liability coverage. Specifically, underinsured motorist coverage should be available for "damages arising out of the ownership, maintenance, or use" of a motor vehicle. *See* S.C.Code Ann. § 38-77-140 (Rev.1989). In light of these statutory provisions, it is logical to conclude underinsured motorist coverage should provide the same spectrum of coverage as liability coverage. If this were not so, then an insured might collect liability limits from an at-fault, underinsured driver, but then be denied underinsured motorist benefits because, while the accident might have arisen out of the "ownership, maintenance, or use" of a motor vehicle, it did not arise out of the more narrow "operation or ownership" of the vehicle as the State Farm policy requires.

Accordingly, the trial court did not err in reforming the language of the State Farm policy to read "ownership, maintenance, or use," in place of "operation or ownership." As a result, underinsured motorist coverage is available under the reformed policy for any of Michael Bookert's injuries which arose out of the "ownership, maintenance, or use" of a motor vehicle.

[330 S.C. 230]

II. COVERAGE UNDER THE POLICY

State Farm argues the trial court erred in concluding the reformed policy provided coverage for the gunshot injuries sustained by Michael Bookert because they arose out of the "ownership, maintenance, or use" of the underinsured vehicle.

In *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992), our Supreme Court articulated a two-pronged test for determining when an injury arises out of the "ownership, maintenance, or use" of an uninsured vehicle. First, the party seeking coverage must establish a "causal connection between the vehicle and the injury." *Howser*, 309 S.C. at 272, 422 S.E.2d at 108. *See also Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994) (test for determining whether injury arose out of use of vehicle turns on causal connection between vehicle and injury). Second, there must exist no act of independent significance breaking the causal link. *Howser, supra.* In *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993), the Court added a further requirement: it must be shown the vehicle was being used for transportation at the time of the assault.

A. Causal Connection

State Farm claims the trial court erred in finding a causal connection between the use of the underinsured vehicle and the gunshot injuries sustained by Bookert because the Geo Tracker merely provided the assailants with transportation to the situs of the shooting. We disagree.

The first prong of the test for determining whether an injury arose out of the "use" of a vehicle requires a "causal connection between the vehicle and the injury." *See Howser, supra.* The causal connection is established where it can be shown the vehicle was an "active accessory" to the assault. *Id.* at 273, 422 S.E.2d at 108.

In *Howser, supra,* our Supreme Court held uninsured motorist coverage was applicable where an insured was injured when she was pursued, threatened, and then shot by an unknown assailant in a car. At the

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time of the shooting, the insured was driving her vehicle when the unknown assailant began following her and then "bumped" the back of her

[330 S.C. 231]

vehicle with his automobile. The assailant pulled alongside Howser and threatened her with a gun while attempting to get her to pull over. When Howser tried to escape in her vehicle, the assailant fired several shots at her vehicle and she was wounded.

The crucial issue in the *Howser* case was whether the injuries sustained by Howser arose out of the "ownership, maintenance, or use" of the assailant's vehicle. The Court determined there was a sufficient causal connection between the use of the assailant's vehicle and Howser's injuries where the assailant's vehicle was an "active accessory" to the ongoing assault. The Court explicated:

> The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury....
>
> In the case at bar, 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 as was found in *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir.1985). 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.

Howser, 309 S.C. at 272-73, 422 S.E.2d at 108. After finding causation, the Court held it must determine if an act of independent significance occurred breaking the causal link. *Id.* The Court concluded there was no act of independent significance which broke the causal link as "the unknown driver's use of his vehicle and the shooting were inextricably linked as one continuing assault." *Id.* at 274, 422 S.E.2d at 109.

[330 S.C. 232]

In *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994), the South Carolina Supreme Court considered whether injuries received by a victim when he was struck by a bottle thrown by a passenger in a passing vehicle arose out of the "ownership, maintenance or use" of Towe's automobile. The passenger threw the bottle from the moving vehicle at a road sign. However, he missed the sign and the bottle shattered on the steering wheel of a tractor being driven by the victim, who sustained serious injuries. The *Towe* Court explained:

> The 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 McClaskey's injuries. As in *Wausau*, the

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scene in the Tracker. Hence, no act of independent significance broke the causal link between the use of the vehicle and the assault.

C. Transportation Limitation

State Farm asserts the trial court erred by failing to consider whether the underinsured vehicle was being used for transportation purposes at the time of Bookert's injury. We disagree.

In *Howser, supra,* the Court did not specifically address whether the vehicle must be used for transportation purposes at the time of the injury to be included in the mandated coverage. Thereafter, in *Canal Ins. Co. v. Insurance Co. of North America,* 315 S.C. 1, 431 S.E.2d 577 (1993), the Court answered this question and held that S.C.Code Ann. § 38-77-140 (Rev.1989), the statute mandating that automobile policies provide coverage for damages arising out of the "use of a motor vehicle," limited the vehicle's use to transportation uses.

Here, the Geo Tracker was being used for transportation purposes. As a result, even if the trial court should have independently analyzed whether the Tracker was used for such a purpose, any failure to do so was harmless error because the stipulated facts show the court could not have reached any conclusion other than the Tracker was being used for transportation.

III. AFFIDAVIT

State Farm contends the trial court erred in considering an affidavit submitted by the Bookerts in support of their

[330 S.C. 236]

summary judgment motion because the case was submitted on stipulated facts.

When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided. *Belue v. Fetner,* 251 S.C. 600, 164 S.E.2d 753 (1968).

The affidavit contains a short statement by Andre Ervin Christian, the assailant who shot Michael Bookert. The statement reads: "The Geo Tracker was moving when the nine milimeter [sic] weapon went off or discharged." This statement is substantially similar to Stipulation of Fact # 16, which reads: "An instant later while said Geo was still moving forward, the soldier in the front passenger seat of the Tracker fired the nine millimeter, hitting Michael Bookert with two bullets, one in each leg."

We find no reversible error as the substance of the affidavit was merely cumulative to several of the stipulated facts.

CONCLUSION

The trial court properly reformed the insurance policy issued by State Farm to Mary Bookert because it was inconsistent with S.C.Code Ann. § 38-77-160 (Supp.1996). Applying the reformed policy to the factual record, we conclude there was a causal connection between the Geo Tracker and Bookert's injuries; there existed no act of independent significance breaking the causal link; and the Tracker was being used for transportation purposes. The use of the Geo Tracker was "ongoing" and the vehicle was an "active accessory" to the assault upon Bookert. Moreover, the use of the vehicle and the shooting were "inextricably linked" as one continuing act. In light of the *Howser, Towe,* and *Carraway* decisions, we hold Bookert's injuries resulting from the gunshot wounds are covered pursuant to the reformed underinsured motorist provision in the State Farm policy at issue. Accordingly, the trial

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court's order finding underinsured motorist coverage was available is

AFFIRMED.

CONNOR and HUFF, JJ., concur.

Notes:

1. Because oral argument would not aid the Court in resolving the issues, we decide this case without oral argument.

2. The insurer for the driver and owner of the Geo Tracker accepted liability and paid its limits in the amount of $15,000 to Michael Bookert.

3. Notably, the State Farm policy utilizes the same "operation or ownership" language in describing the uninsured motor vehicle coverage.

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337 S.C. 291
523 S.E.2d 181

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner,
v.
Mary Ann BOOKERT and Michael Bookert, Respondents.

No. 25021.

Supreme Court of South Carolina.

Heard June 8, 1999.

Decided November 22, 1999.

Rehearing Denied January 6, 2000.

[337 S.C. 292]

John U. Bell, C. Mitchell Brown and William C. Wood, Jr., all of Nelson, Mullins, Riley & Scarborough, L.L.P., of Columbia, for petitioner.

H. Patterson McWhirter, Stacey H. Tarte and Stephen B. Samuels, all of McWhirter, Bellinger & Associates, of Columbia, for respondents.

PER CURIAM:

We granted certiorari to review the Court of Appeals' decision in *State Farm Mutual Auto. Ins. Co. v. Bookert*, 330 S.C. 221, 499 S.E.2d 480 (Ct.App.1997). We reverse.

State Farm brought this declaratory judgment action to determine the extent of coverage it owed under the underinsured motorist provision of an automobile policy issued to respondent Mary Bookert (Mary). The parties stipulated to these facts: Mary's son, respondent Michael Bookert, is an insured under Mary's policy. Michael and some friends stopped at a Hardee's, where two soldiers and about fifteen other young men became involved in an altercation. Michael and his friends left and went to a McDonald's, as did some of the fifteen men from Hardee's. The two soldiers, who were armed, picked up a third soldier and drove to the McDonald's where they circled the parking lot, looking for the Hardee's men. As Michael was about to go in the restaurant, he heard the soldiers yelling, and turned in their direction. The soldiers' vehicle was stopped in the traffic lane with its motor running, one soldier in the back holding a shotgun while the front passenger brandished a handgun. The vehicle jerked forward, the soldier wielding the shotgun fell, and fired his gun. Michael was not hit by the shotgun pellets, but while the

[337 S.C. 293]

vehicle was still moving forward, the passenger fired the handgun striking Michael with a bullet in each leg.

The circuit court granted Michael and Mary summary judgment, and the Court of Appeals affirmed.

After the Court of Appeals handed down its opinion, we decided *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998). In *Aytes*, we restated the three part test for determining whether an individual's personal injuries arise 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; and
>
> 2. No act of independent significance breaks the causal link; and

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> 3. The vehicle is being used for transportation at the time of the assault.

Aytes reiterated the components of the causal connection requirement. In this context, causal connection means:

> 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 automobile."

We find Mary's policy does not cover Michael's injuries because they are not "foreseeably identifiable with the normal use of an automobile." *State Farm Fire & Casually Co. v. Aytes, supra.* Accordingly, the decision of the Court of Appeals is

REVERSED.

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332 S.C. 30
503 S.E.2d 744

STATE FARM FIRE & CASUALTY CO., Plaintiff,
v.
Randy AYTES and Donna Dawson, Defendants.
Donna DAWSON, Third Party Plaintiff,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Third Party Defendant.

No. 24827.

Supreme Court of South Carolina.

Heard January 8, 1998.

Decided July 27, 1998.

[332 S.C. 31]

Timothy A. Domin, of Clawson & Staubes, Charleston, for plaintiff State Farm Fire & Casualty Company.

Edward Paul Gibson, of Riesen Law Offices, North Charleston, for defendants Randy Aytes and Donna Dawson.

[332 S.C. 32]

Henry E. Grimball, of Buist, Moore, Smythe & McGee, Charleston, for Third Party Defendant State Farm Mutual Automobile Insurance Company.

FINNEY, Chief Justice:

This matter is before the Court on certification from the United States District Court to answer the following questions related to uninsured motorist coverage.

1. Pursuant to the Findings of Fact of the District Court, does Randy Aytes' classification as a non-permissive user of the Dawson vehicle invoke the Uninsured Motorist Coverage of Donna Dawson's State Farm Mutual Auto policy so as to allow Ms. Dawson to sue Aytes as an uninsured motorist?

2. Did Donna Dawson's injuries result from the ownership, maintenance, or use of her vehicle?

3. Can the shooting be characterized as accidental?

FACTS

On July 22, 1994, Defendant/Third-Party Plaintiff, Donna Dawson (Dawson) owned a vehicle insured by a policy issued by State Farm Mutual Automobile Insurance Co. Prior to this time, Ms. Dawson had forbidden defendant Randy Aytes (Aytes) to drive her car. Dawson and Aytes were together at the home of his mother, Blanche Aytes. Randy Aytes and Dawson became involved in an altercation. Aytes forcibly took Dawson's car key and forced her into her car. Although Aytes was forbidden to drive Dawson's car, he drove her to an area of Blanche Aytes' property with the expressed intent of killing Dawson. While standing outside of the car on the passenger side, Aytes fired a pistol towards Dawson striking her in the foot.

Blanche Aytes' homeowner's insurer State Farm Fire & Casualty Co. instituted a declaratory judgment action against Randy Aytes and Dawson to determine the coverage available under the homeowner's policy. Dawson brought a third-party action against State Farm Mutual Automobile Insurance Co. to bring into the case the question of coverage under her automobile policy. The parties

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stipulated that there was no coverage under the homeowner's policy. The sole question

[332 S.C. 33]

remaining before the federal court on cross-motions for summary judgment concerns the coverage in effect on July 22, 1994, under the State Farm Mutual Automobile policy insuring Dawson's vehicle.

An insured is legally entitled to recover damages arising out of the "ownership, maintenance, or use" of an uninsured vehicle. S.C.Code Ann. § 38-77-140 (1989). The twopronged test for determining when an injury arises out of the ownership, maintenance, or use of an uninsured vehicle is set out in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992). First, the party seeking coverage must establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. A third requirement was added in *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993): it must be shown the vehicle was being used for transportation at the time of the assault.

The causal connection is established where it can be shown the vehicle was an "active accessory" to the assault. *Howser, supra.* The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. *Id.* The injury must be foreseeably identifiable with the normal use of the vehicle. *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985). The required causal connection does not exist when 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.*

In this case, the vehicle was used to transport Dawson to another location. The assailant driver got out of the car and went around to the passenger side where Dawson was sitting. Dawson retrieved a gun from the glove compartment in an effort to defend herself from Aytes. However, Aytes gained control of the gun and while he was standing outside of the car, he fired the gun striking Dawson in the foot. State Farm contends the stationary car was merely the site of the injury and not an "active accessory" to the assault. Dawson contends her car acted as more than the mere site of the injury.

[332 S.C. 34]

In *Wausau Underwriters v. Howser,* 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 unidentified vehicle. The Court found the unknown vehicle was an active accessory to this assault: it was not a case in which the assailant merely used the vehicle to provide transportation to the situs of the shooting. The Court stated:

> 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.

Wausau Underwriters, supra. Coverage was not found in *Nationwide Mut. Ins. Co. v. Brown, supra,* where fatal shooting occurred when husband, a passenger in a truck, caused

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the truck driver to collide with his wife's vehicle and husband jumped out of truck and shot his wife in her vehicle. The court concluded that the use of the truck for transportation to the scene of the shooting was merely incidental, remote from the type of conduct that is reasonably foreseeable with the normal use of a vehicle and not the causative factor in producing wife's death. Instead, the assault in *Brown* was viewed by the court as an act wholly independent of the use of the truck and the cause of the death. The incidental use of the truck in the shooting was not found to meet the causal relation test of coverage.

In *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994), injuries were sustained by a victim when he was struck by a bottle thrown by a passenger in a passing car. The Court stated that "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 *Home Ins. Co.* found that a causal connection existed between the use of Towe's automobile and the victim's injuries. The court stated further "[t]he use of the automobile

[332 S.C. 35]

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 [victim's] injuries." *Home Ins. Co.*, 314 S.C. at 108, 441 S.E.2d at 827.

There was not a causal connection in this case as the vehicle was not an active accessory, nor was it being used for transportation at the time of the injury. Further, if there was a causal link, it was broken when the assailant exited the vehicle. The only connection between the car and the injury is the fact that Dawson was sitting in the car when she was shot. Therefore, we do not find Dawson's injuries resulted from the ownership, maintenance, or use of her vehicle.

We do not answer questions one and three since our answer to question two is dispositive under these facts and precludes Dawson from recovering damages arising out of the "ownership, maintenance, or use" of an uninsured vehicle regardless of the answers to questions one and three.

CERTIFIED QUESTION ANSWERED.

TOAL, MOORE, WALLER and BURNETT, JJ., concur.

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334 S.C. 137
511 S.E.2d 692

The TRAVELERS INDEMNITY COMPANY, Secondary Appellant,
v.
AUTO WORLD OF ORANGEBURG, INC., Cheryl Diane Albergotti, as Personal Representative of the Estate of Joseph McKewn Albergotti, Jr., deceased, Melissa D. Albergotti, as Personal Representative of the Estate of Gail M. Osborne, deceased; Faye S. Osborne, as Personal Representative of the Estate of Flynn C. Osborne, deceased, and South Carolina Farm Bureau Mutual Insurance Company, Melissa Albergotti, Personal Representative of the Estate of Gail Mims Albergotti Osborne, Respondent,
v.
Travelers Insurance Company, South Carolina Farm Bureau Mutual Insurance Company; and Cheryl Diane Albergotti, as Personal Representative of the Estate of Joseph McKewn Albergotti, Jr., of whom South Carolina Farm Bureau Mutual Insurance Company is, Primary Appellant.

No. 2927.

Court of Appeals of South Carolina.

Heard December 8, 1998.

Decided January 18, 1999.

[334 S.C. 138]

Lewis C. Lanier, of Horger, Horger, Lanier & Knight, of Orangeburg, for Primary Appellant.

William P. Davis, of Baker, Barwick, Ravenel & Bender, of Columbia, for Secondary Appellant.

Charles H. Williams, of Williams & Williams, of Orangeburg; and Gedney M. Howe, III, of Charleston, for Respondent.

[334 S.C. 139]

ANDERSON, Judge:

This declaratory judgment action was brought to determine whether the death of Gail M. Osborne was a covered event under either one or two automobile insurance policies. South Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") issued one of these policies to Flynn C. Osborne. Travelers Indemnity Company ("Travelers") issued the other policy to Auto World of Orangeburg, Inc. ("Auto World"). Farm Bureau and Travelers appeal an order concluding both policies provided coverage. We reverse.

FACTS/PROCEDURAL BACKGROUND

Gail M. Osborne and her husband, Flynn C. Osborne, were killed by shotgun blasts on April 11, 1993, while they were sitting in their car which was stopped offside a rural highway. The parties stipulated the evidence is sufficient for a jury to conclude Joseph Albergotti, Jr., killed the Osbornes. On that day, Albergotti was driving, with permission, a car owned by Auto World. At the time of the shooting, the car driven by Albergotti was parked behind the Osbornes' car. Albergotti shot the couple while standing outside the car. A nearby resident and a driver passing by witnessed the incident. Their recollections differ somewhat.

Heather Hart witnessed the incident from her back porch. She estimated the distance separating herself and the cars was that of a football field. Hart first noticed the cars just before they pulled off of the road. She said they were traveling very slowly, but

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she observed nothing to suggest one of the cars forced the other off the road. She recalled one car came to a stop directly behind the other, leaving enough room that the assailant was able to stand between the cars. The second car was the assailant's. After the cars stopped, the assailant exited his car, approached the rear of the other car, and began firing. He fired one or two shots into the rear window of the Osbornes' car, one or two shots into the passenger's window, and one or two shots into the driver's window. The assailant then got back into his car and drove away in the direction from which he came.

Dennis Keller was driving on Highway 310 toward Holly Hill when he noticed a car on the side of the road facing the

[334 S.C. 140]

opposite direction. The car had its flashers on and a man was inside waving his hands in the air. Another man stood outside the car. Concerned that the man in the car was having a seizure, Keller decided to stop. As Keller passed by, however, the man standing by the car rushed back to the second car, removed a gun from it, and aimed the gun at the first car. Keller recalled the second car was a car-length behind the first. Standing at the rear of the front car, the assailant fired the gun. He did not prop the gun up on his car when firing. The assailant returned to his car. Keller observed the car "swing around" and leave, but could not tell the direction it went. Later that day, Albergotti committed suicide.

Melissa Albergotti, the personal representative of Gail Osborne's estate, sued Joseph Albergotti's estate for wrongful death. Travelers sought a declaratory judgment the garage policy it issued to Auto World provided no liability coverage for Gail Osborne's death. Farm Bureau sought a declaratory judgment the policy it issued to Flynn Osborne provided no underinsured motorist coverage for the death. The parties stipulated that if the Travelers policy provided coverage, the proceeds payable would be limited to $15,000. The parties further stipulated any coverage provided by the Farm Bureau policy would be limited to $15,000.

The Master-in-Equity issued an order concluding both policies provided coverage. Travelers and Farm Bureau appeal that order.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). The dispositive issue in this case is whether the death is a covered event under either the Travelers or Farm Bureau policies. An action to determine coverage under an automobile policy is an action at law. *See Noisette v. Ismail*, 299 S.C. 243, 384 S.E.2d 310 (Ct.App.1989), *rev'd in part on other grounds*, 304 S.C. 56, 403 S.E.2d 122 (1991). *See also United States Fire Ins. Co. v. Macloskie*, 320 S.C. 459, 465 S.E.2d 759 (Ct.App.1995) (declaratory judgment action to determine coverage under insurance policy's omnibus clause is action at law,

[334 S.C. 141]

and in action at law tried without jury, findings of fact made by trial court have same force and effect as those of jury). In an action at law tried without a jury, the findings of fact made by the trial court will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

LAW/ANALYSIS

Farm Bureau and Travelers argue the Master-in-Equity erred in concluding the policies provided coverage for Gail Osborne's

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death because her death did not arise out of the "ownership, maintenance, or use" of the two vehicles. We agree.

The law concerning coverage of events which arise out of the "ownership, maintenance, or use" of automobiles has evolved over time. The development of our current law began with *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir.1985). In that case, a truck's passenger, Toby Brown, grabbed the steering wheel causing the truck to collide with a car. Brown then exited the truck and fatally shot his estranged wife, Lynda Brown, the driver of the car. In affirming the denial of coverage, the Fourth Circuit Court of Appeals reasoned:

> First, under the Nationwide Dunn policy, it is clear that the use of Dunn's truck for transportation of Toby Brown to the scene of the shooting was merely incidental, remote from the type of conduct that is reasonably foreseeable with the normal use of such a vehicle; and not the causative factor in producing Lynda Brown's death. Rather, Toby Brown's assault, an act wholly independent of the use of the truck, caused the death. Thus, the incidental use of Dunn's truck in the shooting does not meet the causal relation test of coverage.

Nationwide Mut. Ins. Co., 779 F.2d at 989 (citations omitted).

The first two requirements of our current test emerged in *Hite v. Hartford Acc. & Indem. Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct.App.1986). Hite worked at a car dealership. His employer gave permission and provided automobiles for Hite's use. The automobiles were insured by Hartford. On March

[334 S.C. 142]

27, 1981, Hite drove back from supper to the car dealership in an automobile provided by his employer. Leaving the car running, Hite got out of the car and approached the dealership on foot. He heard the night watchman yell to him that someone (William Martin) had backed into a new truck. Hite walked fifty feet across the parking lot to tell Martin, who was sitting in a car, not to leave. Martin then accelerated the vehicle. Hite's legs were run over by the left rear tire. At that time, Hite was not in, on, or touching a vehicle insured by Hartford. In determining whether an injury sustained remote to the actual operation of the vehicle was encompassed by the term "use," this Court held:

> What appears to be crucial to many courts in determining whether an injury produced by another vehicle or person falls within the ambit of "use" is the existence of a causal connection between an accident or injury and the use of the vehicle. It has been held that the existence of a causal connection obviates the necessity of finding that the injury was directly and proximately caused by the use of the vehicle, and affords coverage for injuries bearing almost any causal relation with the insured vehicle. The injury must, however, be foreseeably identifiable with normal use, maintenance, and ownership of the vehicle. If the injury was directly caused by some independent or intervening cause wholly disassociated from, independent of or remote from the use of the automobile, the injury cannot be said to arise out of its "use." Even if there is some remote

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connection between the use of the automobile and the injury complained of, if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile, the injury is not the result of the "use" of an automobile.

In the instant case [Hite] left the insured automobile, walked toward the dealership, and answered the call of the night watchman by walking fifty feet to tell Martin not to leave after he had backed into a truck. [Hite's] injury was directly caused by Martin, and this was an independent or intervening cause wholly disassociated from, independent of, and remote from the use of the insured automobile. It cannot be said that being struck fifty feet from the insured automobile by another vehicle while answering a call for

[334 S.C. 143]

assistance of the night watchman is foreseeably identifiable with normal use, maintenance and ownership of the vehicle. It is difficult to see where use of the insured automobile was directly connected with or a cause of the ensuing accident.

... [T]he key to determining whether injuries remote to the operation of an automobile occur during a "use" of the vehicle is the existence of a causal connection between the injury and the use. Such a causal connection has not been established in this case, where the injuries are the direct result of an intervening cause.

Hite, 288 S.C. at 620-22, 344 S.E.2d at 176-77 (citations omitted).

In *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992), our Supreme Court articulated a two-pronged test for determining when an injury arises out of the "ownership, maintenance, or use" of a vehicle. First, the party seeking coverage must establish a "causal connection between the vehicle and the injury." *Howser*, 309 S.C. at 272, 422 S.E.2d at 108. Second, there must exist no act of independent significance breaking the causal link. *Id.*

In *Howser, supra,* the Court ruled uninsured motorist coverage was applicable where an insured was injured when she was pursued, threatened, and then shot by an unknown assailant in a car. At the time of the shooting, the insured was driving her vehicle when the unknown assailant began following her and then "bumped" the back of her vehicle with his automobile. The assailant pulled alongside Howser and threatened her with a gun while attempting to get her to pull over. When Howser tried to escape in her vehicle, the assailant fired several shots at her vehicle and she was wounded.

The crucial issue in the *Howser* case was whether the injuries sustained by Howser arose out of the "ownership, maintenance, or use" of the assailant's vehicle. The Court determined there was a sufficient causal connection between the use of the assailant's vehicle and Howser's injuries where the assailant's vehicle was an "active accessory" to the ongoing assault. The Court explicated:

[334 S.C. 144]

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> The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury....
>
> In the case at bar, 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 as was found in *Nationwide Mut. Ins. Co. v. Brown,* 779 F.2d 984 (4th Cir.1985). 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.

Howser, 309 S.C. at 272-73, 422 S.E.2d at 108. After finding causation, the Court held it must determine if an act of independent significance occurred breaking the causal link. *Id.* The Court concluded there was no act of independent significance which broke the causal link as "the unknown driver's use of his vehicle and the shooting were inextricably linked as one continuing assault." *Id.* at 274, 422 S.E.2d at 109.

The *Howser* Court did not specifically address whether the vehicle must be used for transportation purposes at the time of the injury to be included in the mandated coverage. Thereafter, in *Canal Ins. Co. v. Insurance Co. of North America,* 315 S.C. 1, 431 S.E.2d 577 (1993), the Court added a third requirement to the two-pronged *Howser* test: it must be shown the vehicle was being used for transportation at the time of the assault.

In *Home Ins. Co. v. Towe,* 314 S.C. 105, 441 S.E.2d 825 (1994), the South Carolina Supreme Court addressed whether injuries received by a victim when he was struck by a bottle thrown by a passenger in a passing vehicle arose out of the "ownership, maintenance, or use" of Towe's automobile. The

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passenger threw the bottle from the moving vehicle at a road sign. However, he missed the sign and the bottle shattered on the steering wheel of a tractor being driven by the victim, who sustained serious injuries. The *Towe* Court explained:

> The 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 McClaskey's injuries. As in *Wausau,* the automobile was an active accessory that gave rise to the injuries. Therefore, we find that the Court of Appeals did not err in holding that a causal connection exists between the use of Towe's automobile and McClaskey's injuries.
>
> ....

> The use of the automobile and Alexander's throwing of the bottle were, as in *Wausau*, "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 McClaskey's injuries.

Towe, 314 S.C. at 107-08, 441 S.E.2d at 827 (citations omitted).

This Court considered the extent of coverage under the uninsured motorist provision of an automobile insurance policy in *Carraway v. Smith*, 321 S.C. 23, 467 S.E.2d 120 (Ct.App. 1995). The victim was injured by broken glass when a bullet struck his windshield as he sat at an intersection. The bullet was fired by the driver of an uninsured vehicle which had stopped in front of the victim's car. The driver had exited the vehicle and engaged in conversation with another person on the sidewalk. The victim remained in his vehicle stopped behind the assailant's car. After talking for several minutes, the driver pulled out a gun and began shooting at the person on the sidewalk. One of the bullets hit the victim's windshield.

In applying the test enunciated by our Supreme Court in *Howser*, this Court expounded:

> We believe the trial judge erred in finding a causal connection between Smith's use of the red vehicle and Carraway's injuries. Smith exited the car and carried on a conversation with a third person for several minutes before the shooting occurred. Even if the use of the car and the shooting were connected, that link was broken by Smith's actions. Unlike the facts in *Wausau*, there was no ongoing use of a vehicle in this case to carry out the attack.
>
> ....
>
> We decline to extend the reasoning of the *Wausau* case to this fact situation. We hold that Carraway's injuries were caused by an independent act wholly separate from the use of the vehicle.

Carraway, 321 S.C. at 26, 467 S.E.2d at 121-22.

This Court found coverage in *State Farm Mut. Auto. Ins. Co. v. Bookert*, 330 S.C. 221, 499 S.E.2d 480 (Ct.App.1998), *cert. granted*, (November 6, 1998), which involved a shooting in the parking lot of a McDonald's restaurant. Two of the three assailants were involved in a dispute with the victim and his friends at another restaurant earlier in the evening. The victim, while standing at the McDonald's entrance, was shot by the front seat passenger of a moving vehicle. This Court concluded:

> Here, the entire incident was a shooting by the occupants of the Tracker against a group of people with whom they had the initial altercation. Besides transporting the assailants and their weapons to the scene of the shooting, the vehicle served as a "launching pad" for the assault. The gunman's car was not the situs of the accident nor was it merely the means by which the assailant traveled to the situs. It was the "launching pad" for the attack. Further, the vehicle allowed the assailants to circle the McDonald's restaurant while seeking out

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> their targets. The vehicle also put the assailants in the position to shoot and then escape quickly and easily. Two of the assailants, including the one who shot Bookert, used the vehicle to immediately flee the scene. *See Howser, supra* (Court held only motor vehicle could have provided assailant a quick and successful escape). Furthermore, the automobile was in motion when the shots which injured Michael Bookert were fired.
>
> We conclude the Geo Tracker was an "active accessory" to the assault sufficient to constitute a causal connection.

Bookert, 330 S.C. at 232-33, 499 S.E.2d at 486.

Additionally, this Court found no act of independent significance broke the causal link:

> [334 S.C. 147]
>
> Here, the use of the automobile and the assault are "inextricably linked" as one continuing act. The assailants used the vehicle to arrive at the scene, to circle the parking lot searching for the group with which they had a previous encounter, and to travel in while shooting Bookert. The vehicle began to move forward immediately before the shots were fired and was moving when the assault occurred. After the shooting, two of the assailants fled the scene in the Tracker. Hence, no act of independent significance broke the causal link between the use of the vehicle and the assault.

Bookert, 330 S.C. at 235, 499 S.E.2d at 487 (citation omitted). Finally, this Court ruled the vehicle was being used for transportation purposes at the time of the attack. *Id.*

Recently, our Supreme Court revisited the issue as to when an injury arises out of the "ownership, maintenance, or use" of a vehicle. In *State Farm Fire and Cas. Co. v. Aytes,* 332 S.C. 30, 503 S.E.2d 744 (1998), our Supreme Court applied the current three-pronged test to a situation where the victim was shot by her assailant while she sat in the passenger seat of her own car after her assailant had driven her, against her will, to an area on his mother's property. The assailant stood outside the passenger door when he shot the victim in the foot. Holding the causal connection requirement was not satisfied, the Court elucidated:

> An insured is legally entitled to recover damages arising out of the "ownership, maintenance, or use" of an uninsured vehicle. S.C.Code Ann. § 38-77-140 (1989). The two-pronged test for determining when an injury arises out of the ownership, maintenance, or use of an uninsured vehicle is set out in *Wausau Underwriters Ins. Co. v. Howser,* 309 S.C. 269, 422 S.E.2d 106 (1992). First, the party seeking coverage must establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. A third requirement was added in *Canal Ins. Co. v. Insurance Co. of North America,* 315 S.C. 1, 431 S.E.2d 577 (1993): it must be shown

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the vehicle was being used for transportation at the time of the assault.

The causal connection is established where it can be shown the vehicle was an "active accessory" to the assault.

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Howser, supra. The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. *Id.* The injury must be foreseeably identifiable with the normal use of the vehicle. *Nationwide Mut. Ins. Co. v. Brown,* 779 F.2d 984 (4th Cir.1985). The required causal connection does not exist when 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.

In this case, the vehicle was used to transport Dawson to another location. The assailant driver got out of the car and went around to the passenger side where Dawson was sitting. Dawson retrieved a gun from the glove compartment in an effort to defend herself from Aytes. However, Aytes gained control of the gun and while he was standing outside of the car, he fired the gun striking Dawson in the foot. State Farm contends the stationary car was merely the site of the injury and not an "active accessory" to the assault....

... Coverage was not found in *Nationwide Mut. Ins. Co. v. Brown, supra,* where fatal shooting occurred when husband, a passenger in a truck, caused the truck driver to collide with his wife's vehicle and husband jumped out of truck and shot his wife in her vehicle. The court concluded that the use of the truck for transportation to the scene of the shooting was merely incidental, remote from the type of conduct that is reasonably foreseeable with the normal use of a vehicle and not the causative factor in producing wife's death. Instead, the assault in *Brown* was viewed by the court as an act wholly independent of the use of the truck and the cause of the death. The incidental use of the truck in the shooting was not found to meet the causal relation test of coverage.

....

There was not a causal connection in this case as the vehicle was not an active accessory, nor was it being used for transportation at the time of the injury. Further, if there was a causal link, it was broken when the assailant exited the vehicle. The only connection between the car and the injury is the fact that Dawson was sitting in the car when she was shot. Therefore, we do

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not find Dawson's injuries resulted from the ownership,

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> maintenance, or use of her vehicle.

Aytes, 332 S.C. at 33-35, 503 S.E.2d at 745-46 (emphasis added).

Farm Bureau and Travelers challenge three of the Master's findings of fact. The challenged findings were:

> 3. I find that on April 11, 1993, Gail M. Osborne was riding as a passenger in a vehicle owned and operated by her husband, Flynn C. Osborne, and that Joseph M. Albergotti, Jr., was operating a Ford LTD automobile which was proceeding behind the automobile in which Gail M. Osborne was riding.
>
> 4. I find that Joseph M. Albergotti caused the vehicle in which Gail M. Osborne was riding to pull off of the roadway and thereafter exited his vehicle and shot and killed Gail M. Osborne, after which he used his vehicle as a means of quick escape after shooting Gail M. Osborne.
>
> 5. I find that Joseph McKewn Albergotti, Jr. used the Auto World vehicle to pursue his ex-wife, carrying his shotgun in this vehicle in order to carry out his attack. He also used the vehicle in order to closely follow the Osborne car at a very close distance and thus cause it to pull off the road. The Osborne car pulled over in a rural, desolate section of the highway with its hazard lights on indicating an emergency situation. Additionally, I find that at some point Mr. Osborne had his arms over his head with his hands moving indicating his surrender and leading me to conclude that the Albergotti vehicle had forced the Osborne vehicle to stop. I find that the Auto World vehicle played an essential and integral part in the ongoing assault and it was only through the use of his vehicle that he was able to carry out the assault. Thus, in accordance with my findings above I also find that there was a causal connection existing between the use of the vehicle and the injuries to Gail M. Osborne.

As to the Master's findings regarding facts occurring outside the presence of eyewitnesses, the record lacks evidence to support those findings. With regard to the findings which were directly supported by the eyewitness accounts, we find no error.

[334 S.C. 150]

CONCLUSION

In the present case, there was *no* causal connection as the vehicles were not "active accessories," nor were the vehicles being used for transportation at the time of the injury. Assuming arguendo a causal link existed, the causal link was broken when the assailant exited the vehicle being driven by him. Further, the only connection between the Osborne car and the injuries is the fact that the Osbornes were sitting in the car when they were shot. Significantly, neither vehicle was being used for transportation at the time of the attack, as required by *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993). Accordingly, the order of the Master-in-Equity is

REVERSED.

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HOWELL, C.J., and STILWELL, J., concur.

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357 S.C. 197
592 S.E.2d 626

Angel Ann Brown GILLILAND, Petitioner,
v.
John DOE, an unknown motorist, Respondent.

No. 25777.

Supreme Court of South Carolina.

Heard December 3, 2003.

Decided January 27, 2004.

Bryan D. Ramey, of Bryan D. Ramey & Associates, P.A., of Piedmont and John S. Nichols, of Bluestein & Nichols, of Columbia, for Petitioner.

[357 S.C. 198]

Samuel C. Weldon, of Clarkson, Walsh, Rheney & Turner, of Greenville, for Respondent.

Chief Justice TOAL:

Angel Gilliland ("Petitioner") sought coverage for personal injuries she sustained from a car accident involving an unknown driver. At trial, Gayle Norris ("Norris") testified that she saw Petitioner's accident. The parties dispute whether this witness testimony implicated the unknown car's involvement in Petitioner's accident. The jury awarded Petitioner actual and punitive damages. Respondent made a motion for JNOV, which was denied. The Court of Appeals later reversed and granted the JNOV on grounds that Norris's testimony did not satisfy S.C.Code § 38-77-170 because she was unable to provide evidence that the unknown car caused Petitioner's accident. *Gilliland v. Doe*, 351 S.C. 497, 570 S.E.2d 545 (Ct.App.2002). Petitioner seeks this Court's review of that ruling.

FACTUAL/PROCEDURAL BACKGROUND

At trial, Petitioner testified that on the night of March 29, 1996, as she was leaving a grocery store in Greenville, SC, two young men waved at her from a pick-up truck. As she drove from the store, the boys began to follow her.

Soon after Petitioner turned north on Berea Drive, the boys began to closely pursue her vehicle. She testified that they "rode her bumper" for a two-mile stretch. Petitioner sped up in a frightened attempt to get away from the boys' truck. As she accelerated, Petitioner lost control of her car, ran off the road, and hit a tree. Upon impact, she suffered substantial bodily injuries and spent nine days in the hospital.

Petitioner testified that the boys' truck never made contact with her car and that the boys "backed off" once she began to lose control.

The investigating officer testified that when he questioned Petitioner at the scene of the accident, she told him that she was run off the road by an unknown vehicle.

During the accident, Gayle Norris was stopped at a nearby intersection. She testified that she saw the lights of two cars

[357 S.C. 199]

as the cars came around the curve. She also testified that after the accident, she saw the lights of the car behind Petitioner's "arc through a field" as if it were making a Uturn.

After the jury returned a verdict for Petitioner, Respondent made a JNOV Motion, which Judge Alison Lee denied. The Court of Appeals reversed Judge Lee's ruling and

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granted the JNOV. Petitioner asks the following on appeal:

> Did the Court of Appeals err when it granted Respondent's JNOV because Norris's testimony did not meet the "independent witness" requirements of § 38-77-170?

LAW/ANALYSIS

Petitioner argues that the Court of Appeals erred when it granted Respondent's JNOV Motion. We agree.

This Court recently reiterated the standard for appellate review of JNOVs:

> ... [u]nder the state standard the trial court should not grant JNOV where the evidence yields more than one inference. An appellate court may not overturn the decision of the trial court, under the state standard, if there is any evidence to support the trial court's ruling

Rogers v. Norfolk Southern Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). We have also held that "[i]n ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

The Legislature first enacted a "John Doe" statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions. The initial safeguard was a requirement that the unknown vehicle make "physical contact" with the plaintiff's car. Act No. 312, 1963 S.C. Acts 535.

[357 S.C. 200]

Then in 1987, the Legislature amended the statute once again to allow insureds to bring a "John Doe" action regardless of physical contact as long as an independent person witnessed the accident. Act. No. 166, 1987 S.C. Acts 1122.

In 1989, the Legislature again amended the statute to require that the independent witness provide the court with a signed affidavit attesting to the unknown vehicle's involvement in the accident.

This Court must now determine to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in "John Doe" actions.

South Carolina Code § 38-77-170 (Supp.2002) provides:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:
>
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all circumstances, after its occurrence;

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> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

In *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106, (1992) this Court indicated that the statute required an independent witness to attest to facts that provide at least some causal connection between an unknown driver and the accident. The Court provided that the adequacy of the "causal connection" should pass the same test used in determining whether an injury or damage arose out of the ownership, maintenance, or use of the uninsured vehicle. *Id.*

[357 S.C. 201]

at 275, 422 S.E.2d at 110. The Court explained that this test regarding the sufficiency of the evidence is "something less than proximate cause and something more than the vehicle being the mere site of the injury." *Id.* at 272, 422 S.E.2d at 108 (citing *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn.1987)).

Based on the test set forth in *Howser*, § 38-77-170(2) may be satisfied even though an independent witness fails to provide a clear answer to the question of proximate cause. *Howser* suggests that § 38-77-170(2) should be interpreted liberally. This Court arguably abandoned a liberal interpretation of § 38-77-170(2) in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002).

In *Collins*, this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, *Collins* suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to *Collins*, is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the statute's purpose. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

In the case at hand, the Court of Appeals held that the witness must "be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." *Gilliland*, 351 S.C. at 500, 570 S.E.2d at 548. We agree that this analysis is consistent with *Howser* and constitutes a fair interpretation of the ambiguous fact requirement of § 38-77-170(2). However, the Court of Appeals found that Norris failed to attest to the existence of

[357 S.C. 202]

an unknown vehicle. *Gilliland*, 351 S.C. at 498, 570 S.E.2d at 546. We find the record

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includes sufficient evidence that an unknown vehicle was involved in Petitioner's accident.

In *Marks v. Indus. Life & Health Ins. Co.*, 212 S.C. 502, 505, 48 S.E.2d 445, 446, this Court held that "[t]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty."

We now hold that the testimony of Gayle Norris contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury.

CONCLUSION

We believe that the record includes sufficient circumstantial evidence for the jury to find the requisite causation necessary to satisfy § 38-77-170(2). We therefore reverse the Court of Appeals and reinstate the trial court's judgment for Petitioner.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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634 S.E.2d 45
Jason SHEALY, Appellant,
v.
John DOE, Respondent.
No. 4128.
Court of Appeals of South Carolina.
Heard June 15, 2006.
Decided June 26, 2006.
Rehearing Denied August 25, 2006.

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Ralph Shealy Kennedy, Jr., and Robert M. Cook, II, both of Batesburg-Leesville, for Appellant.

David Cooper Cleveland, Thomas J. Keaveny, II, and Bob J. Conley, all of Charleston, for Respondent.

ANDERSON, J.

Jason Shealy appeals the trial court's order dismissing his claim for uninsured motorist (UM) coverage, arguing the trial court erred in (1) finding Shealy failed to comply with the witness affidavit requirement of South Carolina Code Annotated section 38-77-170 (2002); and (2) refusing to treat a letter from Safeco Insurance Company as an admission against interest. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On June 7, 2003, Eddie Bolin was driving a pickup truck owned by Dale Leaphart. Shealy and Ronald Cromer sat in the bed of the truck. Bolin swerved abruptly, throwing Shealy and Cromer from the truck. Shealy sustained serious injuries, including a fractured skull. Bolin later explained to Shealy and the police that he swerved to avoid hitting an unknown vehicle.

Shealy filed a complaint against the unknown driver, John Doe, to recover against Safeco, Leaphart's UM carrier. Shealy submitted an affidavit, which he attached and incorporated into the complaint. The affidavit states:

Personally appeared before me, Jason Shealy, who being duly sworn deposes and says as follows:

That he is Jason Shealy and that on or about June 7, 2003, he was a passenger in a pickup truck being driven by Eddie Bolin and, upon information and belief, owned by Dale Leaphart. That the pickup truck was being driven on Highway 391 near Batesburg-Leesville, South Carolina. That Eddie Bolin sharply, unexpectedly and suddenly swerved the truck near the entrance to Leaphart Acres, throwing the affiant and another passenger from the bed of the truck onto the roadway. **That the day following the incident the affiant was told by Eddie Bolin that an unknown vehicle and driver had come onto the roadway in the path of the truck causing Eddie Bolin to sharply and unexpectedly maneuver the truck he was driving to avoid a collision.**

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A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

(Emphasis added.)

Doe moved to dismiss Shealy's action or, alternatively, to change venue. At the motions hearing, Shealy submitted the affidavit of Ronald Cromer, which contains identical language to Shealy's affidavit. In addition, Shealy submitted a letter from Safeco to his attorney. The letter explained:

[Safeco has] remained consistent in the lack of negligence and lack of liability of Mr. Eddie Bolin, the driver of the automobile in which your client was occupying [sic]. Mr.

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Bolin's lack of negligence is due to the phantom vehicle which pulled out in front of him and caused the accident. . . .

Shealy argued the letter was an admission against interest.

The trial court granted Doe's motion to dismiss, recognizing its consideration of Cromer's affidavit and Safeco's letter converted Doe's motion to dismiss into one for summary judgment. The court held Shealy failed to comply with the witness affidavit requirement of section 38-77-170(2). Shealy filed a motion to reconsider, which the trial court denied.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss a complaint for "failure to state facts sufficient to constitute a cause of action." Rule 12(b) additionally provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]

In this case, the trial court considered Cromer's affidavit and the letter from Safeco before granting Doe's motion to dismiss. Accordingly, we review the trial court's order as if it were an appeal from a grant of summary judgment.

When reviewing a grant of summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004); *see* Rule 56(c), SCRCP ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005); *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005).

LAW/ANALYSIS

I. Witness Affidavit Requirement

Shealy argues the trial court erred in holding the affidavits he submitted were insufficient to satisfy section 38-77-170(2) of the South Carolina Code Annotated (2002). We disagree.

Section 38-77-170 provides:

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:

(1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a

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reasonable time, under all the circumstances, after its occurrence;

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(2) the injury or damage was caused by physical contact with the unknown vehicle, **or the accident must have been *witnessed* by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;**

(3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

The following statement must be prominently displayed on the face of the affidavit provided in subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C.Code Ann. § 38-77-170 (2002) (emphasis added). "An insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met." *Miller v. Doe*, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994).

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). The first question of statutory interpretation is whether the statute's meaning is clear on its face. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002); *Eagle Container Co., LLC v. County of Newberry*, 366 S.C. 611, 622, 622 S.E.2d 733, 738 (Ct.App.2005).

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this Court has no right to impose another meaning. *See Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Mun. Ass'n of S.C. v. AT & T Communications of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); *see also Miller*, 312 S.C. at 447, 441 S.E.2d at 321 ("In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning, nothing to the contrary appearing.").

Section 38-77-170(2) is clear on its face. It expressly requires that someone other than the owner or operator of the insured vehicle **witness** the accident. As stated in *Wausau Underwriters Insurance Company v. Howser*, 309 S.C. 269, 275, 422 S.E.2d 106, 110 (1992), "no physical contact with the unknown vehicle is necessary when a witness other than the owner or driver of the insured vehicle is able to **attest to the facts of the accident.**" (Emphasis added.) *See also Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 744 (2002) ("The plain language of § 38-77-170 requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident '*must* have been witnessed by someone other than the owner or operator of the insured vehicle' and the 'witness *must* sign an affidavit attesting to the truth of the facts of the accident contained therein.'"). Shealy asserts section 38-77-170(2) does not require the witness affidavit to be based on personal knowledge. This argument directly contravenes the language of the statute. Shealy submitted affidavits of two people who apparently did not witness the accident; their affidavits do not attest to facts they perceived, but merely restate the perceptions of the vehicle's operator. Thus, Shealy produced no evidence that someone other than Bolin, the operator of the insured vehicle, witnessed the accident. Shealy's and Cromer's affidavits do not comply with this express directive.

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Shealy's interpretation of section 38-77-170(2) would totally eviscerate the statute's efficacy as it would allow an owner or operator to inform any third-party of the facts of the accident and have that third-party swear out an affidavit as to the owner or operator's version of the events. In *Collins*, our supreme court elucidated that the "obvious purpose" of the affidavit requirement of section 38-77-170(2) is "fraud prevention." *Collins*,

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352 S.C. at 470, 574 S.E.2d at 743. Shealy's reading of the statute would circumvent the fraud-preventing function of subsection (2), rendering that section meaningless.

According to Shealy, requiring the affiant to have witnessed the accident creates an unreasonably harsh result because a sleeping passenger or blind passenger injured by a John Doe driver might be precluded from recovery. Yet the statute indubitably bars an operator and lone occupant of a vehicle from recovery where no contact is made with the unknown driver and where no one else witnesses the accident. In both instances, the result is lamentable to the injured party, but mandated by the statute. Section 38-77-170 demonstrates a policy decision by the legislature which balances the interest of parties injured in accidents with unknown drivers, with the interest of insurance companies in preventing fraudulent claims. Where the legislature determines policy and promulgates a clear rule of law, there is no room for the courts to alter that decision.

Finally, Shealy contends the affidavits comply with *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004), because the affidavits he submitted provide circumstantial evidence of the accident. In *Gilliland*, two young men in a truck were closely pursuing Angel Gilliland. As Gilliland sped up to get away from the truck, she lost control of her car and hit a tree. The truck never made contact with Gilliland's vehicle. A witness who was stopped at a nearby intersection testified that she "saw the lights of two cars as the cars came around the curve," and that "after the accident, she saw the lights of the car behind Petitioner's `arc through the field' as if it were making a U-turn." 357 S.C. at 198-99, 592 S.E.2d at 627. A jury returned a verdict for Gilliland, but we held a witness "must testify to more than the actual collision itself. The witness must also be able to attest to the circumstances surrounding the accident, i.e. what actions of the unknown driver contributed to the accident." *Gilliland v. Doe*, 351 S.C. 497, 501-02, 570 S.E.2d 545, 548 (Ct.App.2002). Accordingly, we reversed the trial court and granted Doe's motion for a judgment notwithstanding the verdict. However, the South Carolina Supreme Court reversed and reinstated the judgment of the trial court.

The supreme court began with a historical review of the unknown driver statute:

The Legislature first enacted a "John Doe" statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions. The initial safeguard was a requirement that the unknown vehicle make "physical contact" with the plaintiff's car. Act No. 312, 1963 S.C. Acts 535.

Then in 1987, the Legislature amended the statute once again to allow insureds to bring a "John Doe" action regardless of physical contact as long as an independent person witnessed the accident. Act. No. 166, 1987 S.C. Acts 1122.

In 1989, the Legislature again amended the statute to require that the independent witness provide the court with a signed

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affidavit attesting to the unknown vehicle's involvement in the accident.

357 S.C. at 199-200, 592 S.E.2d at 627-28.

The question for the *Gilliland* court was "to what extent an independent witness must testify about the causal connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in `John Doe' actions." *Id.* at 200, 592 S.E.2d at 628. The court answered the question with the following analysis:

In *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106, (1992) this Court indicated that the statute required an independent witness to attest to facts that provide at least some causal connection between an unknown driver and the accident. The Court provided that the adequacy of the "causal connection" should pass the same test used in determining whether an injury or damage arose out of the ownership, maintenance, or use of the uninsured vehicle. *Id.* at 275, 422 S.E.2d at 110. The Court explained that this test regarding the sufficiency of the evidence is "something less than proximate cause and

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something more than the vehicle being the mere site of the injury." *Id.* at 272, 422 S.E.2d at 108 (citing *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987)).

Based on the test set forth in *Howser*, 38-77-170(2) may be satisfied even though an independent witness fails to provide a clear answer to the question of proximate cause. *Howser* suggests that 38-77-170(2) should be interpreted liberally. This Court arguably abandoned a liberal interpretation of 38-77-170(2) in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002).

In *Collins*, this Court strictly interpreted 38-77-170(2). This Court held that while the purpose of the affidavit requirement of 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, *Collins* suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to *Collins*, is not); therefore, a strict interpretation of 38-77-170(2) would undermine the statute's purpose. *See Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

In the case at hand, the Court of Appeals held that the witness must "be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." *Gilliland*, 351 S.C. at 500, 570 S.E.2d at 548. We agree that this analysis is consistent with *Howser* and constitutes a fair interpretation of the ambiguous fact requirement of 38-77-170(2). However, the Court of Appeals found that Norris failed to attest to the existence of an unknown vehicle. *Gilliland*, 351 S.C. at 498, 570 S.E.2d at 546. We find the record includes sufficient evidence that an unknown vehicle was involved in Petitioner's accident.

Gilliland, 357 S.C. at 199-202, 592 S.E.2d at 628-29. The linchpin of the court's ruling was its determination that the witness affidavit contained circumstantial evidence

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corroborating Gilliland's testimony that an unknown vehicle contributed to her accident:

In *Marks v. Indus. Life Health Ins. Co.*, 212 S.C. 502, 505, 48 S.E.2d 445, 446, this Court held that "[t]he attending circumstances along with direct testimony may be taken into account by the jury in arriving at its decision as any fact in issue may be established by circumstantial evidence, if the circumstances, which must themselves be proven lead to the conclusion with reasonable certainty."

We now hold that the testimony of Gayle Norris **contained circumstantial evidence that supports Petitioner's testimony** that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident **sufficiently corroborates** Petitioner's testimony creating a question of fact as to causation for the jury.

Gilliland, 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added).

"For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference, not for mere speculation." *Gastineau v. Murphy*, 331 S.C. 565, 570 n. 2, 503 S.E.2d 712, 714 n. 2 (1998) (citing *Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 204-05, 51 S.E.2d 744, 749 (1949)).

Circumstantial evidence means proof that does not actually assert or represent the proposition in question, **but that asserts or describes something else,** from which the trier of fact may either (1) reasonably infer the truth of the proposition, in which case the evidence is not only

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relevant under Rule 401 but is sufficient as well, or (2) at least reasonably infer an increase in the probability that the proposition is in fact true, in which case the evidence is relevant under Rule 401 (assuming that the proposition is of consequence to the determination of the action) but may not be sufficient by itself to create a question for the trier of fact to decide.

29 Am.Jur.2d *Evidence* 313 (1994) (emphasis added) (footnotes omitted).

Unlike in *Gilliland,* the affidavits submitted by Shealy do not contain circumstantial evidence supporting the driver's version of the accident. Shealy failed to corroborate the driver's account. In *Gilliland,* the court found "the testimony of Gayle Norris contained circumstantial evidence that **supports** Petitioner's testimony." 357 S.C. at 202, 592 S.E.2d at 629 (emphasis added). Contradistinctively, Shealy's affidavits merely repeat the driver's account and fail to provide **any** support for his assertions.

The purpose of section 38-77-120(2) is to prevent fraud. Concomitantly, the affidavit of the independent witness must contain some independent evidence that an unknown vehicle was involved in the accident. Shealy failed to satisfy the statute's mandate; thus, the court properly granted summary judgment.

II. Admission Against Interest

Shealy contends the trial court erred in granting summary judgment to Doe because Safeco's letter constituted an admission against interest. The trial court did not rule on this issue, and Shealy did not raise it in a Rule 59, SCRCP, motion. Therefore, this issue is not preserved. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding where "the circuit court did not

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explicitly rule" on an argument, and no Rule 59(e) motion was made, "the issue was thus not properly before the Court of Appeals and should not have been addressed"); *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct.App. 2005) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."); *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 381, 597 S.E.2d 181, 186 (Ct.App.2004) (holding an issue must be raised to and ruled upon by the trial court to be preserved for appellate review).

Additionally, Shealy fails to cite any case law for this proposition and makes only conclusory arguments in support thereof. Thus, Shealy has abandoned this issue on appeal. *See Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App.2005) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal). Accordingly, we decline to address this issue.

CONCLUSION

We hold Shealy failed to comply with the witness affidavit requirement of section 38-77-170(2). Furthermore, Shealy failed to preserve the issue of whether Safeco's letter should be considered an admission against interest that precludes a grant of summary judgment. The trial court's order is

AFFIRMED.

HEARN, C.J., and GOOLSBY, J., concur.

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402 F.Supp.2d 644
NATIONWIDE PROPERTY & CASUALTY COMPANY Plaintiff,
v.
Joe LAIN, as Personal Representative of the Estate of Melanie Lain, and Leonard Herbert Oliver, III, Defendants.
No. C.A. 2:04-23045-23.
United States District Court, D. South Carolina, Charleston Division.
November 28, 2005.

Page 645

Michael Baxter McCall, II, and Timothy A. Domin, Clawson and Staubes, Charleston, SC, for Plaintiff.

Page 646

Anne L. Peterson-Hutto, William A. Green Law Office, N. Charleston, SC, for Defendants.

ORDER

DUFFY, District Judge.

This matter is before the court upon cross motions for summary judgment filed by Plaintiff Nationwide Property and Casualty Company ("Nationwide") and Defendants Joe Lain ("Lain") and Leonard Herbert Oliver, III ("Oliver"). For the reasons set forth below, Plaintiff Nationwide's Motion for Summary Judgment is granted and Defendants Motion for Summary Judgment is denied.

BACKGROUND

Some time before March 15, 2003, Melanie Lain and Defendant Oliver began dating. On Friday, March 14, 2003, Ms. Lain and Oliver went out together; while out, the couple drank and argued. At some point, the couple headed home to the house they shared. However, after Oliver got out of the vehicle, Ms. Lain locked the doors and began to drive away. Oliver then punched out the driver's side window and told Ms. Lain to move over and let him drive. At some point while driving, Ms. Lain started to open her door so Oliver stopped the car. The couple got out of the car and argued in the middle of the road. Eventually, Ms. Lain got back in the car, in the backseat, and Oliver then drove behind a church on Folly Road. After hitting a telephone poll, Oliver parked behind the church. According to Oliver's statement, he "then got out of the front seat and got into the backseat to talk to" Ms. Lain. Ms. Lain kept saying she was going to call another man named Tony, and Oliver "lost it and was enraged," putting his hands over Ms. Lain's mouth and throat, thereby causing her death by strangulation.

On September 10, 2004, Ms. Lain's father, Defendant Joe Lain, as personal representative of the estate of Ms. Lain, filed a summons and complaint in state court alleging causes of action for wrongful death and survival against Oliver. On November 18, 2004, Nationwide filed a declaratory judgment action in this court to determine whether a policy of automobile insurance issued to Ms. Lain provides coverage with regard to Ms. Lain's strangulation. Specifically, Nationwide seeks declarations that Defendant Oliver, who confessed to the murder of Ms. Lain, is not an insured under the policy issued to her, that the injuries to Ms. Lain resulted from Oliver's intentional act, and that the injuries to Ms. Lain did not arise out of the ownership, maintenance, or use of any motor vehicle for the purpose of liability, uninsured, or underinsured motor vehicle coverage.[1] After the parties entered into

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a stipulation of facts, both parties filed motions for summary judgment.

STANDARD OF REVIEW

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To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The judge is not to weigh the evidence but rather must determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir.1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir.1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The "obligation of the nonmoving party is `particularly strong when the nonmoving party bears the burden of proof.'" *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir.1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir.1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548.

DISCUSSION

The fundamental issue before the court is whether Ms. Lain's death arose out of the ownership, maintenance, and use of the vehicle in which Defendant Oliver strangled her. In light of relevant South Carolina case law, the court finds that it does not.

Under South Carolina law, "[n]o automobile insurance policy may 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 Ann. § 38-77-140. Additionally, pursuant to *State Farm & Cas. Co. v. Aytes*, 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. 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998). Of course, the parties' disagreement on the application of this test brings the matter before the court. Plaintiff contends that none of the elements are satisfied by the circumstances of this case while Defendants contend that all elements are satisfied. As discussed below, the court is of the opinion that not all elements are satisfied, and therefore, Ms. Lain's death is not covered under the terms of the subject policy.

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1. Causal Connection

The first element of the *Aytes* test requires a causal connection to exist between the vehicle and the injury. "In this context, causal connection means: (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); *see also Peagler v. USAA Ins. Co.*, 411 F.3d 469, 472 (4th Cir.2005); *Doe v. South Carolina State Budget & Control Bd.*, 337 S.C. 294, 297, 523 S.E.2d 457, 458 (1999); *Wausau*

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Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). "The required causal connection does not exist when the only connection between an injury and the insured vehicle's use is that fact that the injured person was an occupant of the vehicle when the [injury] occurred." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745-46 (internal citations omitted). "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 (S.C.Ct.App.1999) (citing *Home Ins. Co. v. Towe*, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994)).

In *Aytes*, an argument developed between Mr. Aytes and Ms. Dawson when the couple was on the property of Mr. Aytes's mother. At some point, Mr. Aytes forced Ms. Dawson into her car, which he was forbidden to drive, and he drove Ms. Dawson to an area of his mother's property with the expressed intent of killing her. When Mr. Aytes got out of the car and went around to the passenger side, Ms. Dawson retrieved a gun from the glove compartment to defend herself. However, Mr. Aytes gained control of the gun and fired it while he was standing outside of the vehicle. Ultimately, the court found the following:

There was not a causal connection in this case as the vehicle was not an active accessory, nor was it being used for transportation at the time of the injury. Further, if there was a causal link, it was broken when the assailant exited the vehicle. The only connection between the car and the injury is the fact that Dawson was sitting in the car when she was shot. Therefore, we do not find Dawson's injuries resulted from the ownership, maintenance, or use of her vehicle.

332 S.C. at 32-35, 503 S.E.2d at 745-46.

In the case *sub judice*, Nationwide claims that "[t]he facts of *Aytes* are too similar to ignore." (Pl.'s Response to Defs.' Mot. at 3.) Specifically, Nationwide contends that the vehicle was not an active accessory because the only connection between it and Ms. Lain's death is that Ms. Lain was seated in the backseat when Oliver strangled her. Nationwide also suggests that the vehicle played no role in the creation of the injury because "[t]he nature of the assault had nothing to do with the operational nature of a vehicle as a vehicle nor the functional characteristics of a motor vehicle." (Pl.'s Response to Defs.' Mot. at 5.)

In contrast, Defendants attempt to distinguish the facts of this case from *Aytes* and claim that a causal connection does exist because the vehicle was an active accessory. Specifically, Defendants contend that the vehicle was not the mere site of Ms. Lain's injuries, but rather that Oliver used the vehicle "to frighten [Ms. Lain], take control of her and carry her to a remote location where Oliver climbed into the back seat of the vehicle to kill her while continuing the argument that began

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when Oliver punched out the vehicle's window." (Defs.' Response to Pl.'s Mot. at 4.) In addition to claiming that Ms. Lain was the victim of a long, continuous assault, Defendants also state that "the parties never exit the vehicle."[2] (Defs.' Response to Pl.'s Mot. at 4.)

Ultimately, the court concludes that no causal connection exists. It seems that Ms. Lain's vehicle was merely the site of the injury and not an active accessory. Moreover, even if the vehicle was an active accessory as Defendants contend, the use of the vehicle for transportation to the location where Oliver strangled Ms. Lain was not the causative factor in Ms. Lain's death and was not foreseeably identifiable with the normal use of the vehicle. Therefore, Defendants cannot establish the casual connection element of the

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Aytes test. *See Bookert,* 337 S.C. 291, 293, 523 S.E.2d 181, 182; *Wright v. North Area Taxi, Inc.,* 337 S.C. 419, 426, 523 S.E.2d 472, 475-76 (S.C.Ct.App.1999). Because no causal connection exists between the injuries and the use of the automobile as an automobile, the court concludes that Ms. Lain's tragic death did not arise out of the ownership, maintenance, or use of the vehicle.

2. Act of Independent Significance

Even if a causal connection did exist, it was broken by an act of independent significance. *See Aytes,* 332 S.C. at 35, 503 S.E.2d at 746 ("[I]f there was a causal link, it was broken when the assailant exited the vehicle."); *Doe v. South Carolina State Budget & Control Bd.,* 329 S.C. 214, 219, 494 S.E.2d 469, 471 (1997), *aff'd,* 337 S.C. 294, 523 S.E.2d 457 (1999) ("Even if we were to hold that Appellants had satisfied the first prong of the test and had demonstrated a causal connection between the vehicle and the injury, we believe Roberson's assaults of Appellants were acts of independent significance which broke the causal chain."); *Wright,* 337 S.C. at 427, 523 S.E.2d at 476 ("[T]he assault of the gunmen broke any causal connection between the vehicle and Rogers' injury because it arose from an act of independent significance.").

In the case *sub judice,* Defendants contend that because Oliver never exited the vehicle and Ms. Lain was the victim of one long, continuous assault, no act of independent significance broke the casual link. The court disagrees.

First, it is clear from the parties' stipulation that regardless of the manner in which Oliver got into the backseat with Ms. Lain, both parties exited the vehicle in the middle of the road to argue at some point before Oliver drove the vehicle behind the church. Thus, the use of the vehicle and Oliver's strangling Ms. Lain are not necessarily inextricably linked as one continuing act or assault. Second, even if a causal connection did exist, it was broken by Oliver's strangulation of Ms. Lain even though Oliver may not have gotten out of the car before strangling her[3] because the assault arose from an act of independent significance — namely, Oliver getting on top of Ms. Lain and strangling her neck with his hands. The fatal injuries that Ms. Lain sustained resulted from Oliver's strangling her and not from

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his use of the vehicle. Plaintiff states that "South Carolina courts have consistently held that assaults unrelated to the use of the vehicle break any causal link that may have existed." (Pl.'s Response to Defs.' Mot. at 6, 7.) Defendants concede that "this is true, *for injuries caused by gunshots.*" (Defs.' Response to Pl.'s Mot. at 7.) (emphasis in original). In attempting to distinguish being shot from being strangled, Defendants claim that Oliver could not have overpowered Ms. Lain and caused her injury without her vehicle. Unfortunately, the court does not agree with this leap of logic because the fact that Oliver did not stand outside the vehicle and shoot Ms. Lain, but rather, he used his own hands to kill her in the backseat should not affect the result. Oliver admits that he got into the backseat to talk to Ms. Lain, and at some point he lost it and strangled her. Had Oliver strangled Ms. Lain in their home, in the bar, or even on the hood of or beside the car, the injuries Ms. Lain sustained would not have been any different.[4]

3. Transportation Limitation

Additionally, even if a causal connection existed and no act of independent significance broke the causal connection, the third element of the *Aytes* test — that the vehicle be used for transportation at the time of the injury — is not satisfied. *See Canal Ins. Co. v. Ins. Co. of N. Am.,* 315 S.C. 1, 5, 431 S.E.2d 577, 580 (1993) (defining the use of a motor vehicle as limited to transportation uses).

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In the case *sub judice,* the stipulated facts establish an ongoing argument and not necessarily an ongoing assault. It is undisputed that Oliver parked the vehicle, got into the backseat, and strangled Ms. Lain to death. Therefore, in light of *Aytes,* the court concludes that at the time of the injury, when Oliver strangled Ms. Lain, the vehicle was not being used for transportation. *See* 332 S.C. at 35, 503 S.E.2d at 747 (finding that the vehicle was not being used for transportation at the time of the injury where the assailant drove the victim to a remote area and shot her). Ultimately, because the three-pronged *Aytes* test is not satisfied, Ms. Lain's tragic death did not arise out of the ownership, maintenance, or use of the vehicle.

CONCLUSION

It is, therefore, **ORDERED** for the foregoing reasons that Plaintiff's Motion for Summary Judgment is **GRANTED.**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment be **DENIED.**

AND IT IS SO ORDERED.

Notes:

1. The Liability section of the Nationwide policy issued to Ms. Lain provides:

We will pay for damages which **you** are legally liable as a result of an accident arising out of the:

1. ownership;

2. maintenance or use; or

3. loading or unloading;

of **your auto.** A **relative** also has this protection while using **your auto.** So does any person who is liable for use of **your auto** while used with **your** permission.

Because the parties agree that Oliver's use was non-permissive, this section is inapplicable and renders moot the discussion of any intentional acts exclusion.

The Uninsured Motorist and Underinsureds Motorist section of the policy provides:

We will pay damages, including derivative claims, because of **bodily injury** suffered by **you** or a **relative,** and because of **property damage.** Such damage must be due by law to **you** or a **relative** from the owner or driver of:

1. an **uninsured motor vehicle;** or

2. an **underinsured motor vehicle** if the **policyholder** has selected Underinsured Motorists coverage, as shown in the declarations and has paid the required premium for such coverage.

Damages must result from an accident arising out of the ownership, maintenance, or use of the **uninsured motor vehicle or underinsured motor vehicle.**

2. Defendants are incorrect in their assertion that the parties never exited the vehicle. According to the parties' stipulation, both parties exited the vehicle and argued in the middle of the road before Oliver drove the vehicle to the back of the church.

3. In his voluntary statement, Oliver states that he "got out of the front seat and got into the backseat to talk to [Ms. Lain]." (Pl.Mot.Ex. B.) In a statement taken two days later, when asked how he got into the backseat with Ms. Lain, Oliver replied, "I just climbed over I think." (Pl.Mot.Ex. C.)

4. The parties' stipulation states:

[T]o a reasonable degree of medical certainty, Oliver's actions of struggling with Lain and wrapping his hands around/over Lain's neck and mouth caused Lain's bodily injury and death. The parties stipulate that

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the medical examiners cannot state to a reasonable degree of medical certainty that any injury to Ms. Lain was a result of any automobile collision.

(Def.Mot.Ex. 3.)

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325 F.Supp.2d 620
David PEAGLER, Personal Representative of the Estate of Kathy Marie Thompson, Plaintiff,
v.
USAA INSURANCE COMPANY, Defendant.
No. CIV.A. 2:02-3977-18.
United States District Court, D. South Carolina, Charleston Division.
June 24, 2004.

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J. Calhoun Land, IV, Land, Parker and Reaves, Manning, SC, for Plaintiff.

William O Sweeny, III, Sweeny, Wingate and Barrow, Columbia, SC, for Defendant.

ORDER

NORTON, District Judge.

I. Background

This matter comes before the court on the parties' cross motions for summary judgment pursuant to Fed.R.Civ.P. 56. Plaintiff seeks a declaration from this court that the tragic death of Kathy Marie Thompson ("Mrs. Thompson") is a covered event under an automobile insurance policy issued by defendant, USAA Casualty Insurance Company ("USAA"). The facts of the case are undisputed and have been formally stipulated to by the parties.

Mrs. Thompson died suddenly on August 31, 2001 as a result of wounds she received from the discharge of a shotgun. At the time of her death, she was seated in the driver's seat of a 4 × 4 SuperCab, 2000 Ford F-150 pickup truck (hereinafter referred to as "the truck"), owned by her husband, Greg Thompson ("Mr. Thompson").[1]

Both parties agree that Mrs. Thompson's death was the result of a terrible accident. On the morning of her death, Mrs. Thompson was in the process of loading her children into her Ford Taurus to take them to school. She was unable to start the Taurus and Mr. and Mrs. Thompson agreed that she would take the children to school in the pickup truck while Mr. Thompson attempted to repair the Taurus at their home. Once Mrs. Thompson and the Thompsons' older son were sitting in the truck, their younger son noticed that two cased shotguns were laying on the backseat. The guns were left in the truck from the day before, when Mr. Thompson and his older son were target shooting in preparation for the upcoming hunting season. At Mrs. Thompson's request,

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the younger son asked his father to remove the shotguns from the truck. When Mr. Thompson came to retrieve the guns from the truck he was under the mistaken assumption that both guns were unloaded. Tragically, the gun which the older son had used during the previous day was still loaded with its safety off. As Mr. Thompson removed the guns the loaded gun discharged, killing Mrs. Thompson almost instantaneously.[2] At the time of the accident, the truck was in park and was idling, but both parties agree that this fact was not a contributing cause of the accident.

Plaintiff thereafter brought this action for declaratory relief pursuant to S.C.Code Ann. § 15-53-10 *et seq.* seeking a determination that Mrs. Thompson's death is covered under the USAA automobile insurance policy. For the reasons set forth below, the court concludes that judgment should be granted in plaintiff's favor.

II. Standard of Review

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Summary judgment shall be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party carries its burden of showing that there is an absence of evidence to support a claim, then the non-moving party must demonstrate by affidavit, depositions, answers to interrogatories, and admissions on file that there is a genuine issue of material fact for trial. *Id.* at 324-25, 106 S.Ct. 2548. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of fact is "material" only if establishment of the fact might affect the outcome of the lawsuit under the governing substantive law. *Id.* When determining whether there is an issue for trial, the court must view the inferences to be drawn from the underlying facts in the light most favorable to the non-moving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123-24 (4th Cir.1990).

III. Discussion

Both parties acknowledge that the fundamental issue facing the court is whether Mrs. Thompson's death may be

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interpreted as arising out of the "ownership, maintenance or use" of the truck in which she was fatally shot. This specific issue arises from statute, as S.C.Code Ann. § 38-77-30 defines the term, "policy of automobile insurance," in relevant part as "a policy or contract for bodily injury or property damage liability insurance issued or delivered in this State covering liability arising from the ownership, maintenance or use of any motor vehicle...."[3] (Def.'s Mem. in Supp. at 3).

The parties additionally agree that the South Carolina Supreme Court has addressed this issue and has provided a three-pronged test for its determination. First, the party seeking coverage must establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. And third, it must be shown that the vehicle was being used for transportation purposes at the time of the accident. *Travelers Indemnity Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 511 S.E.2d 692, 698 (App.1999) (citing *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744, 745 (1998)). Each of these elements must be shown by the plaintiff before coverage will be extended. Of course, the parties' disagreement on the application of this test has brought the matter before this court. USAA contends that none of the three elements are satisfied by the circumstances surrounding Mrs. Thompson's untimely death, while plaintiff asserts that each element is fulfilled. As discussed below, this court is of the opinion that each element is satisfied and, therefore, concludes that Mrs. Thompson's death is covered under the terms of the subject policy.

a. Whether a causal connection exists between the use of the truck and Mrs. Thompson's death

With respect to this first element, the South Carolina Supreme Court observed in *Aytes* that:

The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. The injury must be foreseeably identifiable with the normal use of the

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vehicle. The required causal connection does not exist when 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 where the shooting occurred.

Aytes, 503 S.E.2d at 745-46 (citations omitted). In other words, where it may be said that the vehicle's use was merely "incidental" to the harm caused, then coverage does not apply.[4] Rather, the "use" of the vehicle and the attendant injury must be "inextricably linked." *Travelers Indemnity Co.*, 511 S.E.2d at 696 (quoting *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825, 827 (1994)).

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In arguing that the requisite causal connection is absent in this case, USAA contends that the shooting death of Mrs. Thompson could just as easily have occurred at some other location as within the truck and, therefore, asserts that the accident was not dependent upon the "use" of the truck. In USAA's words, "this was purely a firearm accident, not a vehicle accident." (Def.'s Mem. in Supp. at 6). Furthermore, USAA contends that the fact that *Aytes* involved an intentional assault, as opposed to an accidental shooting, does not distinguish it from the factual circumstances of this dispute. USAA is correct as to this latter point, as it was observed in *Towe* that: "No distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act." 441 S.E.2d at 827. Therefore, the sole issue for this court's determination with respect to the first element is whether a sufficient causal connection existed between the use of the truck and Mrs. Thompson's death.

Plaintiff insists that such a connection is present in this case. Specifically, plaintiff asserts that:

> Mrs. Thompson had placed herself in the driver's position and started the engine for the purpose of transporting her children to school and herself to work. She directed that the shotguns, which were being transported in the truck for hunting purposes, be removed so that her 9 year old son could sit on the rear seat.... But for the use of the truck would Mrs. Thompson have been placed in the position to cause the damage by the negligent unloading of the shotguns[?] The loading of passengers and unloading of firearms and resulting discharge are causally connected to the truck. The connection here is close to the proximate cause of the injury and is certainly more than the truck being the mere site of the injury.
>
> (Pl.'s Mem. in Opp. at 3-4).

It must be acknowledged that while several other jurisdictions have dealt with coverage disputes involving the accidental discharge of a firearm in or near a vehicle, the parties have not directed the court to any precedent directly on point within this State nor has this court been able to locate any precedent addressing an injury arising out of the unloading of a firearm from a vehicle. Nevertheless, this court concludes that a causal connection exists. Mr. Thompson was clearly "using" the truck at the time of the accident in that he was unloading the firearms from the truck at the time the accident occurred. Moreover, this use was a reasonable one and, as such, it was neither unforeseeable nor unexpected. Indeed, given that the particular vehicle in question was a 4 × 4 pickup truck, it was entirely foreseeable that it would have been used at some point by its owners for hunting purposes. Likewise, it could be expected that hunting gear, including guns, would necessarily be loaded and unloaded from the truck. *See Taliaferro v. Progressive Specialty Ins. Co.*, 821 So.2d 976, 979-80 (Ala.2001) (observing that the transportation of firearms for hunting is an ordinary and customary use of a motor vehicle, especially for pickup trucks, for purposes of automobile insurance coverage).

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Because this use of the truck was ordinary and expected and because the accident arose out of this use, the causal connection with Mrs. Thompson's death is not, as defendant insists, merely incidental or "but for." Nor can it simply be said that the truck was the "mere situs" of the accident. *Cf. Hartford Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 264 Ark.

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743, 574 S.W.2d 265 (1978) (denying coverage for a fatal shooting of a child standing outside of a camper parked in the owner's driveway without the motor running or the keys in the ignition by a child who had picked up a gun inside the camper and playfully pointed it at the decedent); *Sizemore v. Erie Ins. Exchange*, 789 N.E.2d 1037 (Ind.Ct.App.2003) (denying coverage because the vehicle only remotely contributed to the injury where a minor child was shot in the eye when he stuck his head through a friend's car window and a paintball gun accidently discharged from within the car); *Raines v. St. Paul Fire & Marine Ins. Co.*, 9 N.C.App. 27, 175 S.E.2d 299 (1970) (denying coverage where the insured's son accidentally killed a passenger of the vehicle while playing with a gun which discharged while he was sitting in the driver's seat with the car stopped and the engine turned off). Indeed, as other courts have noted, there exists a category of cases involving "injuries that occur when a firearm discharges, while being *loaded into, or unloaded from,* the vehicle[,][and] `[c]ourts generally view liability policies as *extending* coverage to the loading and unloading process.'" *Taliaferro*, 821 So.2d at 979-80 (quoting *Quarles v. State Farm Mut. Auto. Ins. Co.*, 533 So.2d 809, 811 (Fla.Ct.App.1988) (emphasis in original)); *see also Cameron Mut. Ins. Co. v. Ward*, 599 S.W.2d 13, 16 (Mo.Ct.App.1980) (observing that a category of decisions involves the accidental discharge of guns during the process of loading them into or unloading them from vehicles and that, "without exception," these decisions "hold that coverage exists").

Accordingly, this court concludes that a sufficient causal connection exists between the use of the truck and Mrs. Thompson's death so as to satisfy the first element of the applicable test.

b. Whether an act of independent significance broke the causal link existing between the truck's use and Mrs. Thompson's death

As noted, the second element requires that there exist no act of independent significance capable of breaking the causal link between the use of the vehicle and the accident. USAA offers three distinct acts which it contends broke the causal connection between the use of the truck and Mrs. Thompson's death: (1) the fact that the shotgun's safety was not engaged at the time of the shooting; (2) Mr. Thompson's negligent manner of removing the guns as if they were unloaded; and (3) an assertion that Mr. Thompson was in fact not occupying the truck at the time of the shooting. USAA contends that any of these separate acts would operate to break the requisite causal link. The court, however, does not find any of these suggestions to be persuasive.

The first two suggestions may be generally described as alleging superceding negligent acts of leaving a loaded shotgun within the confines of the truck. These suggestions, however, frame the issue too narrowly. Perhaps because of this fact, other courts have found no difficulty in awarding coverage where a mistakenly loaded weapon was stored within a vehicle and caused injury as a result. *See Viani v. Aetna Ins. Co.*, 95 Idaho 22, 501 P.2d 706 (1976) (holding that coverage existed despite the fact that the injury was caused by the discharge of a loaded pistol unwittingly stored inside a rolled carpet while being unloaded from the vehicle), *overruled on other grounds by Sloviaczek v.*

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Estate of Puckett, 98 Idaho 371, 565 P.2d 564 (1977); *Allstate Ins. Co. v. Truck Ins. Exchange*, 63 Wis.2d 148, 216 N.W.2d 205 (1974) (coverage provided where a fatal shooting occurred while a loaded weapon was being removed from a truck during a

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hunting trip). Further, plaintiff has pointed out that the facts, as stipulated to, indicate that Mr. Thompson was in the process of getting out of the truck when the gun discharged and was not completely outside of the truck at the time of the accident. And as plaintiff also notes, the policy defines the term "occupying" as "in, on, getting into or out of." (Pl.'s Mem. in Opp. at 6). Therefore, even assuming that Mr. Thompson's exact physical location at the time of the shooting could create an act of independent significance capable of breaking the causal connection between the use of the truck and Mrs. Thompson's death, the facts as stipulated by the parties reveal that Mr. Thompson was not located outside of the truck so as to place the accident beyond the scope of the insurance policy as USAA suggests.

Accordingly, notwithstanding any suggestion to the contrary, the court concludes that the causal connection between the truck's use and the accident remained intact.

c. Whether the truck was being used for transportation purposes at the time of the accident

Finally, it must be shown that the vehicle was being used for transportation purposes at the time of the accident. This third requirement has not always been a part of the overall analysis and was added to the above factors in the decision of *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577, 579-80 (1993). In adding this requirement, the South Carolina Supreme Court stated that: "We now construe § 38-77-140 and define `use of a motor vehicle' as limited to transportation uses.... Such a construction of § 38-77-140 is consistent with legislative intent to mandate coverage for the benefit of the public since it encompasses those uses foreseeable to the parties to an automobile insurance policy." *Canal Ins. Co.*, 431 S.E.2d at 579-80.

In arguing that the truck was not being used for transportation purposes at the time of Mrs. Thompson's death, USAA emphasizes that the truck was not moving at the time of her death. USAA asserts that this particular fact is dispositive and, therefore, appears to contend that any coverage would be dependent upon a finding that a truck was moving at the time of the incident in question. This argument, however, presupposes a viewpoint much too narrow for the law to adequately allow for coverable incidents. Indeed, under USAA's theory coverage conceivably would not extend to injuries sustained under any factual scenario where a vehicle is parked only momentarily or, far worse, where injuries are sustained while a vehicle is stationary at an intersection during the course of travel. Furthermore, contrary to what USAA argues, South Carolina law does not make it clear that a vehicle must be moving in order for coverage to exist. Rather, the vehicle must have been in the process of being utilized for transportation *purposes* at the time of the accident — a vehicle need not be moving for this purpose to exist.

In adopting this third prong of analysis, the South Carolina Supreme Court specifically relied on three separate decisions by the Minnesota Supreme Court. *See Canal Ins. Co.*, 431 S.E.2d at 579. In each of these decisions coverage was not extended because the vehicle in question was not being used for transportation purposes at the time of the incident. The Minnesota Court made clear that such a purpose was essential to any finding of coverage because this type of "use"

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was normal and expected and was the use contemplated by the legislature in its decision to link coverage to vehicle use. The Minnesota Court's position was best described in the decision of *Classified Ins. Corp. v. Vodinelich,* 368 N.W.2d 921 (Minn.1985), wherein a mother's children accidentally died from asphyxiation

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when the mother committed suicide by leaving her car idling in a closed garage. There, the Court observed that:

In previous decisions we have uniformly repeated that for coverage to exist, the vehicle must have been used "for transportation purposes" .... The requirement that coverage will exist only for injuries resulting from uses for transportation purposes is intended to limit an automobile insurance company's liability to those risks the policy was intended to insure against, that is, against risks associated with "motoring." Situations may arise that our existing language will prove insufficient to meet. If so, other alternatives may be explored; as we have stated, "each case presenting such a question must, to a great degree, turn on the particular facts presented" .... We hold that the deaths of the ... children did not arise out of the use of a motor vehicle for purposes of ... automobile liability insurance coverage because the vehicle was not being used "for transportation purposes."

Vodinelich, 368 N.W.2d at 923 (citations omitted).

In stark contrast to the circumstances of *Vodinelich,* the facts of this case demonstrate that the truck was being used for transportation purposes at the time of Mrs. Thompson's death. At the time of the shooting, Mrs. Thompson was seated in the drivers' seat with her seatbelt fastened and the engine running. She was preparing to take her children to school and to go to work and would have done so were it not for the cased shotguns laying on the backseat of the pickup truck. Under these circumstances it must be said that the truck was being used for one reason: to transport herself and her children. Accordingly, contrary to what USAA argues, this court concludes that the third and final element favors coverage for Mrs. Thompson's death as well.

IV. Conclusion

For the foregoing reasons it is **ORDERED** that plaintiff's Motion for Summary Judgment be **GRANTED** based upon this court's conclusion that the applicable automobile insurance policy issued by USAA extends coverage to the accident causing Mrs. Thompson's death. This conclusion is based upon the court's determination that Mrs. Thompson's death arose out of the "ownership, maintenance or use" of the Ford truck as that term is defined under the applicable law.

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment be denied.

AND IT IS SO ORDERED.

Notes:

1. The truck was insured by defendant USAA pursuant to the terms of an insurance policy numbered 00036-72-21C-7104-4. Both the truck and the Thompsons' other vehicle, a 1992 Ford Taurus four-door sedan, were insured under this policy.

2. The parties' Stipulation of Facts describes the factual details leading up to the accident as follows:

That Mr. Thompson came out of his residence along with his 9 year old son at which time his son went around to the rear passenger side door, which he had previously

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Thompson was to repair Mrs. Thompson's Taurus sedan and switch vehicles with her later in the day.

3. That Mrs. Thompson exited the Thompson residence, gathered up her two sons, and began loading her children and herself into the parked Ford pickup truck. That Mrs. Thompson entered the cab of the four-door pickup truck taking a seat in the driver's position at which time she cranked the engine of the truck, closed the door and wrapped her seatbelt around her. That their oldest son, age 14, entered the front passenger section of the Ford pickup truck taking a seat in the right front passenger seat fastening his seatbelt and shutting the door. That Mrs. Thompson's youngest son, age 9, opened the rear driver's side door for purposes of entering the vehicle at which time he saw two cased shotguns lying across the rear seating area of the pickup truck with the butt ends of the shotguns lying in the passenger side rear seat area and the barrel ends of the shotgun lying in the driver's side rear seat area. That Mrs. Thompson's son alerted his mother to the existence of the guns at which time Kathy Marie Thompson instructed her youngest [son] to go into the house and advise Mr. Thompson to come out and unload the guns from the vehicle.

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4. That Mr. Thompson came out of his residence along with his 9 year old son at which time his son went around to the rear passenger side door, which he had previously opened. That Greg Thompson went to the passenger side rear door which he opened and then entered the cab area of the truck lifting the guns off the rear seating area and placing the barrel of the guns pointing toward the floor with the butt ends pointing towards the truck's rear window. That he assisted his 9 year old son in getting into the truck cab, moved his book bag over, and helped him fasten his seat belt at which point his 9 year old son shut his door. That Mr. Thompson, now situated with his left knee on the truck's rear seat and his right foot on a truck running board, again lifted the guns and began to exit the vehicle, when almost instantaneous with his lifting the guns from the floor and beginning to exit the vehicle, one of the shotguns discharged striking Kathy Marie Thompson in the torso with shotgun pellets traveling between the front seats on to break the left side driver's door glass. None penetrated the metal skin of the truck. The fact that the truck's engine was running did not cause or contribute to the discharge of the shotgun.

5. That Kathy Marie Thompson died within seconds as a result of wounds received from the discharge of a shotgun.

6. That the shooting of Mrs. Thompson was not intentional and it occurred when Mr. Thompson was unloading two or more cased shotguns from the Ford pickup truck. That Mr. Thompson believed that all the shotguns were unloaded, based on his knowledge of having unloaded his shotgun after its use the previous day and after having asked his 14 year old son if he had unloaded his shotgun prior to putting it in the truck to which his son answered in the affirmative. That the Mossburg shotgun that discharged was the gun used by Mr. Thompson's 14 year old son.

7. That the prior day Mr. Thompson and his older son loaded two shotguns into the Ford pickup and traveled to hunting grounds to scout deer and practice shooting their guns preparing for hunting season which opened September 1, 2001. That while out of the vehicle, on August 30, 2001, while the guns were uncased, it began to rain at which time Mr. Thompson and his oldest son placed their guns back in their cases and placed them on the rear seating area of the Ford truck. That Mr. Thompson and his son returned home over a route of approximately 40 miles which involved both improved and unimproved roadways. That USAA did not specifically know that Mr. Thompson was a hunter, but

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understood and foresaw that trucks of this type are frequently used in hunting.

8. That the definition of "transportation," "operation," and "use of vehicle" are not defined in the definition section of the policy. The term "occupying" is defined in the policy.

(J.A. 12-15).[1]

As noted above, in November 2002, Peagler's declaratory judgment action was removed to the United States District

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Court for the District of South Carolina. After the parties entered into the stipulation of facts, both parties filed motions for summary judgment. On June 24, 2004, the district court granted Peagler's motion and denied USAA's motion. USAA filed a motion to alter or amend under Rule 59(e), which was denied. USAA filed a timely notice of appeal.

III

Contentions of the Parties

We begin our discussion by noting that the parties do not take issue with certain South Carolina legal principles. First, the parties agree that, in South Carolina, "[n]o automobile insurance policy may 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 Ann. § 38-77-140; *see also* S.C.Code Ann. § 38-77-30(10.5) (defining "[p]olicy of automobile insurance" as a "a policy or contract for bodily injury or property damage liability insurance issued or delivered in this State covering liability arising from the ownership, maintenance, or use of any motor vehicle"). The parties also agree that, when determining whether an injury arises out of the ownership, maintenance, or use of a motor vehicle, the three-part test enunciated in *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998), applies. The three-part test, as set forth in *Aytes*, is as follows: (1) "the party seeking coverage must establish a causal connection between the vehicle and the injury," *id.* at 745; (2) "there must exist no act of independent significance breaking the causal link," *id.*; and (3) "it must be shown the vehicle was being used for transportation at the time" of the injury. *Id.*

With regard to the first part of the *Aytes* test, the South Carolina Supreme Court explained in *Aytes* that causal connection means: (1) the vehicle was an "active accessory" to the assault; (2) something less than proximate cause, but something more than the vehicle being the mere site of the injury; and (3) that the injury was "foreseeably identifiable with the normal use of the vehicle." *Id.* at 745-46 (citation and internal quotation marks omitted); *see also State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999) (applying the *Aytes* factors in determining whether the necessary causal connection was present).

USAA contends that there was no causal connection between the pickup truck and the injury. According to USAA, the truck was not an active accessory because the only connection between the truck and the injury is the fact that Kathy Thompson was seated in the vehicle at the time of the shooting. Along a similar vein, USAA suggests the truck played no role in the creation of the injury because, in effect, the injury did not depend on the truck, as Kathy Thompson's injury could have happened "anywhere else." Appellant's Br. at 12. Moreover, USAA posits that the truck was the mere situs of the injury. Finally, USAA suggests that the accidental discharge of a shotgun is not foreseeably identifiable with the normal use of a vehicle.

Peagler counters by arguing that there is a causal connection between the pickup truck and the injury because the loading and

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unloading of firearms is an acceptable and foreseeable use of the truck. Peagler posits that Kathy Thompson's fatal injury would not have occurred unless the truck was being used to unload firearms for the purpose of transporting passengers. Finally, Peagler suggests that the accidental discharge of a shotgun is foreseeably identifiable

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with the common event of unloading of firearms.

With regard to the second part of the *Aytes* test, USAA contends that three acts of independent significance broke the alleged causal link between the pickup truck and the injury. First, USAA contends that the alleged causal link is broken because at least one of the shotguns was left in the truck for approximately twelve hours with its safety disengaged. According to USAA, this fact "dispels any notion that the injury was caused by a normal use of the vehicle." Appellant's Br. at 19. Second, USAA contends that the alleged causal link is broken because Greg Thompson picked up the two shotguns in his "arms at once rather than taking them out of the truck one-by-one." *Id.* According to USAA, if Greg Thompson had taken the shotguns out of the truck one at a time, the accident would not have occurred. Third, USAA contends that the alleged causal link is broken because the shotgun that discharged was in its case.

In response, Peagler contends that there was no act of independent significance breaking the causal link between the pickup truck and the injury. According to Peagler, the injury occurred when Greg Thompson negligently handled the shotguns while removing them from the truck. As Peagler's argument goes, each of the alleged acts of independent significance were not independent of the cause of the injury — the negligent use and handling of shotguns.

With regard to the third part of the *Aytes* test, USAA contends that the pickup truck was not being used for transportation purposes at the time the injury occurred. USAA points out that, at the time the injury occurred, the truck was not moving and the passenger side door was open. USAA suggests that the truck was not in the process of transporting passengers to another location, though it concedes that such transportation was imminent. USAA also suggests that the intended use of the truck — transportation of the children to school — could not begin until the shotguns were removed because it would "have been unlawful for Mrs. Thompson to carry weapons onto the school grounds in the truck." Appellant's Br. at 22.

Peagler, in response, takes the position that the pickup truck was being used for transportation purposes at the time of the injury. According to Peagler, Kathy Thompson's use of the truck for transportation purposes "commenced when the driver's side door was opened, the driver loaded herself into the driver's seat, and started the truck's engine awaiting the remaining passengers to load." Appellee's Br. at 27. Moreover, Peagler suggests that the "truck was being used for transportation inasmuch as loading passengers into and concurrently, in accommodation, and in adherence to South Carolina gun laws, unloading the guns from the truck was inextricably linked part and parcel of the use to which the truck was then being put." *Id.*

We have reviewed the existing South Carolina case law on the question of what constitutes ownership, maintenance, or use of a motor vehicle, particularly the following cases: *Doe v. S.C. State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999); *Bookert; Aytes; Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994); *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992); *Wrenn & Outlaw, Inc. v. Employers' Liab. Assurance Corp.*, 246 S.C. 97, 142 S.E.2d 741 (1965);

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Aytes test. *See Bookert,* 337 S.C. 291, 293, 523 S.E.2d 181, 182; *Wright v. North Area Taxi, Inc.,* 337 S.C. 419, 426, 523 S.E.2d 472, 475-76 (S.C.Ct.App.1999). Because no causal connection exists between the injuries and the use of the automobile as an automobile, the court concludes that Ms. Lain's tragic death did not arise out of the ownership, maintenance, or use of the vehicle.

2. Act of Independent Significance

Even if a causal connection did exist, it was broken by an act of independent significance. *See Aytes,* 332 S.C. at 35, 503 S.E.2d at 746 ("[I]f there was a causal link, it was broken when the assailant exited the vehicle."); *Doe v. South Carolina State Budget & Control Bd.,* 329 S.C. 214, 219, 494 S.E.2d 469, 471 (1997), *aff'd,* 337 S.C. 294, 523 S.E.2d 457 (1999) ("Even if we were to hold that Appellants had satisfied the first prong of the test and had demonstrated a causal connection between the vehicle and the injury, we believe Roberson's assaults of Appellants were acts of independent significance which broke the causal chain."); *Wright,* 337 S.C. at 427, 523 S.E.2d at 476 ("[T]he assault of the gunmen broke any causal connection between the vehicle and Rogers' injury because it arose from an act of independent significance.").

In the case *sub judice,* Defendants contend that because Oliver never exited the vehicle and Ms. Lain was the victim of one long, continuous assault, no act of independent significance broke the casual link. The court disagrees.

First, it is clear from the parties' stipulation that regardless of the manner in which Oliver got into the backseat with Ms. Lain, both parties exited the vehicle in the middle of the road to argue at some point before Oliver drove the vehicle behind the church. Thus, the use of the vehicle and Oliver's strangling Ms. Lain are not necessarily inextricably linked as one continuing act or assault. Second, even if a causal connection did exist, it was broken by Oliver's strangulation of Ms. Lain even though Oliver may not have gotten out of the car before strangling her[3] because the assault arose from an act of independent significance — namely, Oliver getting on top of Ms. Lain and strangling her neck with his hands. The fatal injuries that Ms. Lain sustained resulted from Oliver's strangling her and not from

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his use of the vehicle. Plaintiff states that "South Carolina courts have consistently held that assaults unrelated to the use of the vehicle break any causal link that may have existed." (Pl.'s Response to Defs.' Mot. at 6, 7.) Defendants concede that "this is true, *for injuries caused by gunshots.*" (Defs.' Response to Pl.'s Mot. at 7.) (emphasis in original). In attempting to distinguish being shot from being strangled, Defendants claim that Oliver could not have overpowered Ms. Lain and caused her injury without her vehicle. Unfortunately, the court does not agree with this leap of logic because the fact that Oliver did not stand outside the vehicle and shoot Ms. Lain, but rather, he used his own hands to kill her in the backseat should not affect the result. Oliver admits that he got into the backseat to talk to Ms. Lain, and at some point he lost it and strangled her. Had Oliver strangled Ms. Lain in their home, in the bar, or even on the hood of or beside the car, the injuries Ms. Lain sustained would not have been any different.[4]

3. Transportation Limitation

Additionally, even if a causal connection existed and no act of independent significance broke the causal connection, the third element of the *Aytes* test — that the vehicle be used for transportation at the time of the injury — is not satisfied. *See Canal Ins. Co. v. Ins. Co. of N. Am.,* 315 S.C. 1, 5, 431 S.E.2d 577, 580 (1993) (defining the use of a motor vehicle as limited to transportation uses).

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In the case *sub judice*, the stipulated facts establish an ongoing argument and not necessarily an ongoing assault. It is undisputed that Oliver parked the vehicle, got into the backseat, and strangled Ms. Lain to death. Therefore, in light of *Aytes*, the court concludes that at the time of the injury, when Oliver strangled Ms. Lain, the vehicle was not being used for transportation. *See* 332 S.C. at 35, 503 S.E.2d at 747 (finding that the vehicle was not being used for transportation at the time of the injury where the assailant drove the victim to a remote area and shot her). Ultimately, because the three-pronged *Aytes* test is not satisfied, Ms. Lain's tragic death did not arise out of the ownership, maintenance, or use of the vehicle.

CONCLUSION

It is, therefore, **ORDERED** for the foregoing reasons that Plaintiff's Motion for Summary Judgment is **GRANTED.**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment be **DENIED.**

AND IT IS SO ORDERED.

Notes:

1. The Liability section of the Nationwide policy issued to Ms. Lain provides:

We will pay for damages which **you** are legally liable as a result of an accident arising out of the:

1. ownership;

2. maintenance or use; or

3. loading or unloading;

of **your auto.** A **relative** also has this protection while using **your auto.** So does any person who is liable for use of **your auto** while used with **your** permission.

Because the parties agree that Oliver's use was non-permissive, this section is inapplicable and renders moot the discussion of any intentional acts exclusion.

The Uninsured Motorist and Underinsureds Motorist section of the policy provides:

We will pay damages, including derivative claims, because of **bodily injury** suffered by **you** or a **relative,** and because of **property damage.** Such damage must be due by law to **you** or a **relative** from the owner or driver of:

1. an **uninsured motor vehicle;** or

2. an **underinsured motor vehicle** if the **policyholder** has selected Underinsured Motorists coverage, as shown in the declarations and has paid the required premium for such coverage.

Damages must result from an accident arising out of the ownership, maintenance, or use of the **uninsured motor vehicle or underinsured motor vehicle.**

2. Defendants are incorrect in their assertion that the parties never exited the vehicle. According to the parties' stipulation, both parties exited the vehicle and argued in the middle of the road before Oliver drove the vehicle to the back of the church.

3. In his voluntary statement, Oliver states that he "got out of the front seat and got into the backseat to talk to [Ms. Lain]." (Pl.Mot.Ex. B.) In a statement taken two days later, when asked how he got into the backseat with Ms. Lain, Oliver replied, "I just climbed over I think." (Pl.Mot.Ex. C.)

4. The parties' stipulation states:

[T]o a reasonable degree of medical certainty, Oliver's actions of struggling with Lain and wrapping his hands around/over Lain's neck and mouth caused Lain's bodily injury and death. The parties stipulate that

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Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (S.C.1961); *Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 511 S.E.2d 692, 698 (S.C.Ct.App.1999); *Carraway*

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v. Smith, 321 S.C. 23, 467 S.E.2d 120 (1995); and *Hite v. Hartford Accident & Indem. Co.*, 288 S.C. 616, 344 S.E.2d 173 (1986). Following this review, we conclude that there is no South Carolina case dispositive on the close question of whether Kathy Thompson's fatal injury arose out of the ownership, maintenance, or use of a motor vehicle.

IV
Questions Certified

We certify the following question to the South Carolina Supreme Court:

(1) Did Kathy Thompson's fatal injury arise out of the "ownership, maintenance, or use" of a motor vehicle? S.C.Code Ann. §§ 38-77-30(10.5), 38-77-140.

This court acknowledges that the Supreme Court of South Carolina may reformulate this question.

V
Conclusion

We conclude that there is no precedent from the South Carolina Supreme Court or the South Carolina Court of Appeals dispositive of the question certified. Pursuant to the privilege made available by Rule 228 of the South Carolina Appellate Court Rules, we respectfully:

(1) Certify this matter to the South Carolina Supreme Court for resolution of the question presented in Part IV of this Order of Certification;

(2) Order the Clerk of this court to forward to the South Carolina Supreme Court, under the official seal of this court, a copy of this Order of Certification, together with the original or copies of the record before this court to the extent requested by the South Carolina Supreme Court; and

(3) Order that any request for all or part of the record be fulfilled by the Clerk of this court simply upon notification from the Clerk of the South Carolina Supreme Court.

This Order of Certification is entered with the concurrences of Judge Gregory and Judge Duncan, United States Circuit Judges.

/s/Clyde H. Hamilton

Judge Clyde H. Hamilton

Senior United States Circuit Judge.

Notes:

1. The policy defines "occupying" as "in, on, getting into or out of." (J.A. 25).

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628 S.E.2d 475
David PEAGLER, as personal representative of the Estate of Kathy Marie Thompson, Plaintiff-Appellee,
v.
USAA INSURANCE COMPANY, Defendant-Appellant.
No. 26128.
Supreme Court of South Carolina.
Heard November 2, 2005.
Decided March 20, 2006.

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William O. Sweeny, III, and William R. Calhoun, Jr., both of Sweeny, Wingate & Barrow, P.A., of Columbia, for Defendant-Appellant.

J. Calhoun Land, IV, of Land, Parker & Welch, P.A., of Manning, for Plaintiff-Appellee.

Timothy A. Domin and Michael B. McCall, II, both of Clawson & Staubes, LLC, of Charleston, for State Farm Insurance Companies, Amicus Curiae.

CERTIFIED QUESTION ANSWERED

Justice BURNETT.

We accepted this certified question regarding coverage for an accidental weapon discharge under an automobile insurance policy pursuant to Rule 228, SCACR.

FACTUAL AND PROCEDURAL BACKGROUND

David Peagler (Plaintiff), as personal representative of the Estate of Kathy M. Thompson (Decedent), filed a declaratory judgment action against USAA Insurance Co. (Insurer), seeking a declaration that an automobile insurance policy provided coverage for the accident which occurred in this case. Insurer removed the case from state court to federal district court. From the decision of the district court, Plaintiff effected an appeal to the United States Court of Appeals for the Fourth Circuit. The facts, as stipulated by the parties, are drawn from the Court of Appeal's certification order.

Decedent was fatally injured on August 31, 2001, when her husband, Gregory A. Thompson (Thompson), was unloading two shotguns from the pickup truck Decedent was occupying. On that morning, Decedent and the couple's two sons, ages nine and fourteen, were preparing to depart from home to go to work and school. The automobile customarily driven by Decedent failed to start. Decedent and the boys planned to take Thompson's vehicle, a Ford F-150 4×4 super cab pickup truck.

Decedent entered the pickup truck, closed the door, started the engine, and wrapped the seatbelt around her. The older son got in the front passenger seat, closed the door, and fastened his seatbelt. When the younger son opened the rear driver-side door to enter the truck, he saw two cased shotguns lying on the rear seat, with the barrels facing toward him. Decedent instructed him to go in the house and ask Thompson to come remove the shotguns.

Thompson opened the rear passenger-side door to enter the cab area. He lifted the shotguns off the rear seat and placed the barrel of the guns pointing toward the floor, with the butt ends pointing toward the truck's rear window. Thompson then helped his younger son load his bookbag and buckle his seatbelt. As Thompson picked up the shotguns and began to exit the vehicle, one of the shotguns discharged, striking Decedent. She died within seconds as a result of wounds received from the accidental discharge of the shotgun.

On the day before the accident, Thompson and the older son had placed the

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two shotguns into the truck and traveled to a hunting area to scout deer and practice shooting in preparation for the upcoming hunting season. Thompson and the older son returned the shotguns back to their cases and placed them on the rear seat to return home. The guns remained there during a ride of about forty miles over dirt and paved roads. Both shotguns were believed to be unloaded, however, one of them was not and that gun's safety was not engaged.

The parties further stipulate that the fact the truck's engine was running did not cause or contribute to the discharge of the shotgun; that Insurer did not specifically know Thompson was a hunter, but understood and foresaw that pickup trucks are frequently used in hunting; that the terms "transportation," "operation," and "use of vehicle" are not defined in the insurance policy; and that the term "occupying" is defined in the policy as "in, on, getting into or out of."

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After entering into a stipulation of facts, both parties filed motions for summary judgment on whether the policy provided coverage under the facts of this case. The federal district court granted Plaintiff's motion, finding that coverage existed, and denied Insurer's motion. *Peagler v. USAA Ins. Co.*, 325 F.Supp.2d 620 (D.S.C.2004). Insurer appealed to the Fourth Circuit, which has certified the following question to this Court:

Did Decedent's fatal injury arise out of the "ownership, maintenance, or use" of a motor vehicle pursuant to S.C.Code Ann. § 38-77-140 (2002), such that the vehicle's insurance policy provides coverage for the accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle which had been used for hunting purposes the previous day?[1]

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C.Code Ann. § 14-3-320 and -330 (1976 & Supp.2004), and S.C.Code Ann § 14-8-200 (Supp.2004)); *Osprey, Inc. v. Cabana Ltd. Partnership*, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); *Antley v. New York Life Ins. Co.*, 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to 'choose ye this day whom ye will serve'; and, in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

LAW AND ANALYSIS

Insurer argues no coverage exists in this case because its policy does not define "loading and unloading" to be within the definition of "use" of the insured vehicle. Insurer contends it would constitute an erroneous and improper "rewriting" of the liability policy to include loading and unloading as covered uses. Insurer further argues that coverage does not exist under the analysis previously set forth by this Court in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998).

Plaintiff contends that coverage exists in this case based on South Carolina and foreign authority which demonstrate that the loading and unloading of an insured vehicle are covered "uses" under the circumstances of this case, and further asserts that coverage properly exists under the *Aytes* analysis.

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As an initial matter, we may easily resolve one argument raised by the parties. Insurer asserts that because "use" is not defined in the insurance policy, this Court would have to "rewrite" the policy in order to conclude that the loading and unloading of vehicles is a covered use.

Plaintiff argues this Court's precedent teaches that loading and unloading are covered uses when a vehicle is being used in a normal, foreseeable manner. Thus, coverage exists because Thompson was unloading shotguns from a pickup truck used in hunting activities, an expected and foreseeable use of such a vehicle. Plaintiff relies on *Home Indemnity Co. v. Harleysville Mut. Ins. Co.*, 252 S.C. 452, 166 S.E.2d 819 (1969) (policy which provided that "use of an automobile includes the loading and unloading thereof" included coverage, under the "complete operation doctrine," for injury to person struck by truck being moved for purposes of weighing and unloading it); *Wrenn & Outlaw, Inc. v. Employers' Liability Assurance Corp.*, 246 S.C. 97, 142 S.E.2d 741 (1965) (policy which provided that "use of an automobile includes the loading and unloading thereof" included coverage for injury to customer whose hand was injured when bagboy slammed customer's car door on it; loading of groceries, which required opening the door, was normal and expected use of the car); and *Coletrain v. Coletrain*, 238 S.C. 555, 121 S.E.2d 89 (1961) (policy which provided that use of an automobile for the purposes stated includes

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the loading and unloading included coverage for injury to wife whose hand was injured when husband slammed taxicab door on it).[2]

We reject both parties' reasoning and conclude the present case does not raise an issue of policy revision or interpretation. Unlike the South Carolina cases cited by Plaintiff, the policy in this case is silent on the issue; it simply says nothing about whether loading or unloading a vehicle is a covered use. Therefore, the issue must be resolved based on statutes which mandate coverage for damages arising out of the "ownership, use, or maintenance" of a motor vehicle, and cases arising under those statutes which establish a method of resolving the issue. *Cf. Hogan v. Home Ins. Co.*, 260 S.C. 157, 194 S.E.2d 890 (1973) (statute controls when provision in automobile policy excluding coverage conflicts with statute).

Turning to the statute-based question, South Carolina Code Ann. 38-77-140 (2002) provides that "[n]o automobile insurance policy may be issued or delivered in this State to the owner of a motor vehicle or may be issued or delivered by an insurer licensed in this State upon any motor vehicle then principally garaged or principally used 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 these motor vehicles. . . ." *See also* S.C.Code Ann. § 38-77-30(10.5) (2002) ("`policy of automobile insurance' or `policy' means a policy or contract for bodily injury or property damage liability insurance issued or delivered in this State covering liability arising from the ownership, maintenance, or use of any motor vehicle. . ."); S.C.Code Ann. 38-77-142 (2002) (tracking the "ownership, maintenance, or use" language of Section 38-77-140 in requiring certain provisions in automobile insurance policies); S.C.Code Ann. 38-77-141 (2002) (requiring notice to policyholder of increased premium for uninsured and under-insured motorist coverage "to protect you against liability arising out of the ownership, maintenance, or use of the motor vehicles covered by this policy," unless otherwise rejected by policyholder).

We enunciated a three-part test in *Aytes* to determine whether an injury arises out of the "ownership, maintenance, or use" of a

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motor vehicle. The party seeking coverage must show (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 purposes at the time of the injury. *Aytes,* 332 S.C. at 33, 503 S.E.2d at 745. To date, this issue has been addressed by our appellate courts primarily in the context of various types of assault involving intentional conduct by an assailant; it has not been addressed in the context of an accident involving unintentional conduct, with one exception.[3]

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In analyzing whether an injury arose out of the ownership, maintenance, or use of a vehicle, "no distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act." *Home Ins. Co. v. Towe,* 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994); *Wright v. North Area Taxi, Inc.,* 337 S.C. 419, 424, 523 S.E.2d 472, 474 (Ct. App.1999). The three-part test in *Aytes* applies regardless of whether the injury occurred as a result of an intentional assault or an accident. The focus is on the extent of the role, if any, the vehicle played in causing the injuries or damage, or whether a particular activity is a covered use as required by statute or a policy provision. *See also Chapman v. Allstate Ins. Co.,* 263 S.C. 565, 211 S.E.2d 876 (1975) (when an insured is intentionally injured and the injury from insured's viewpoint is unforeseen and not the result of his own misconduct, the general rule is that the injury is accidentally sustained within the meaning of the ordinary accident insurance policy and the insurer is liable therefor in the absence of a policy provision excluding such liability); *State Farm Mut. Auto. Ins. Co. v. Moorer,* 330 S.C. 46, 56-59, 496 S.E.2d 875, 881-82 (Ct.App.1998) (fatal injuries that victim suffered when shot by insured, who was a passenger in non-owned vehicle, resulted from an "accident" within meaning of insured's automobile liability insurance policies, thus liability coverage existed; "accident" is defined from point of view of victim rather than insured); *S.C. Farm Bureau Mut. Ins. Co. v. Mumford,* 299 S.C. 14, 382 S.E.2d 11 (Ct.App.1989) (insurer may not exclude coverage of intentional acts from statutorily required policies of insurance coverage).

The determination of whether coverage exists in this case rises or falls on the analysis of the first *Aytes* factor. A causal connection between the vehicle and the injury must exist in order for an injury to be covered by an automobile insurance policy. In this context, we have held that causal connection means: (a) the vehicle was an "active accessory" to the injury; (b) the vehicle was something less than the proximate cause but more than the mere site of the injury; and (c) the injury was 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) (citing *Aytes*). "The required causal connection does not exist when 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." *Aytes,* 332 S.C. at 33, 503 S.E.2d at 746.

In *Bookert,* we found no causal connection between the vehicle and the injury when a soldier fired gunshots from a vehicle which was moving forward while in the traffic lane at a fast food restaurant, injuring a pedestrian. The assault was not foreseeably identifiable with the normal use of an automobile. *Bookert,* 337 S.C. at 293, 523 S.E.2d at 182. Similarly, in *Aytes,* an assailant used a car to transport the victim to a location with the expressed intent of killing the victim. The assailant got out of the car, took from the victim a handgun she had retrieved from the car's glove compartment and shot at the victim as she sat in the car, injuring her. We held, in part, the assault was not covered by the insurance policy because the parked car

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was not an "active accessory" in the shooting; it was merely the site of the injury. *Aytes*, 332 S.C. at 33-35, 503 S.E.2d at 746.

Our appellate courts have found no causal connection between the vehicle and the injury in similar assault cases. *See Doe v. S.C. State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999) (no causal connection between vehicle and injury where police officer forced female motorist to engage in sexual activity in the officer's parked cruiser and also used the cruiser to drive both to another location to engage in sexual activity; vehicle was not an active accessory in the assault); *Travelers Indemnity Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 511 S.E.2d 692 (Ct.App.1999) (no causal connection between vehicle and injury where deaths occurred from gunshots fired by assailant standing outside of parked car; vehicles were not active accessories in the assault); *Wright*, 337 S.C. 419, 523 S.E.2d 472 (no causal connection between vehicle and injury where taxi driver was fatally shot by two

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fare-paying passengers; vehicle was not active accessory in the assault, but was merely site of the shooting); *Carraway v. Smith*, 321 S.C. 23, 467 S.E.2d 120 (Ct.App.1995) (no causal connection between vehicle and injury where driver of car was injured when bullet fired by bystander on sidewalk shattered his windshield; any causal link was broken by assailant exiting vehicle in front of motorist and conversing on sidewalk with another person for several minutes before shooting occurred); *Hite v. Hartford Accident Indem. Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct.App. 1986) (no causal connection between vehicle and injury where insured, an automobile dealership employee, left his idling vehicle and walked fifty feet to instruct another motorist to remain at the dealership because the motorist had backed into a new truck, and motorist's car struck plaintiff as it left the scene; insured's vehicle played no role in the incident); *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984, 986-89 (4th Cir.1985) (no causal connection, under South Carolina law, between vehicle and injury when husband, a passenger in a truck, caused the truck driver to collide with his wife's vehicle and husband jumped out of truck and shot his wife in her vehicle; court concluded use of truck for transportation to scene of crime was merely incidental and not a causative factor in producing wife's death).

There is a distinction between the above cases and those in which coverage exists because the vehicle was actively used to perpetrate an assault or injury on another person. *See Towe*, 314 S.C. 105, 441 S.E.2d 825 (finding causal connection between vehicle and injury where victim, who was driving an oncoming tractor, suffered injuries when the steering wheel of his tractor was struck by a bottle thrown by passenger in passing car; car was an active accessory that gave rise to the injury); *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) (finding causal connection between vehicle and injury where insured suffered gunshot wounds during vehicular chase by an unknown assailant using an unidentified vehicle).

We have considered, but decline to follow, precedent in which other courts have found that insurance coverage exists for accidental injuries or deaths which occur during the loading and unloading of a firearm from a vehicle, despite the lack of a policy provision which addressed whether the loading or unloading of a vehicle was a covered use. *See Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308, 310-11 and n. 1 (Me.1987) (injury which occurred during unloading of shotgun from insured's automobile was covered under automobile policy's "ownership, maintenance or use" clause where automobile was being used to transport insured and his companion on hunting trip, a reasonable and foreseeable

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use of the vehicle; fact that policy did not define "use" in terms of loading or unloading did not affect the analysis); *Kohl v. Union Ins. Co.*, 731 P.2d 134, 135-37 and n. 2 (Colo.1986) (injuries caused by accidental discharge of weapon as motorist removed it from vehicle's gun rack in order to store it safely for travel arose out of ownership, maintenance, or use of vehicle; motorist was using vehicle in ordinary manner that was not foreign to its inherent purpose and thus injuries were covered under automobile insurance policy); *Allstate Ins. Co. v. Truck Ins. Exchange*, 63 Wis.2d 148, 216 N.W.2d 205, 210 (1974) (injuries caused by accidental discharge of weapon as passenger unloaded the rifle from parked van in order to go hunting were covered by automobile insurance policy; use of vehicle for hunting purposes was a reasonable and expected use, and the loading and unloading of a firearm was a normal incident to such use); *Cameron Mut. Ins. Co. v. Ward*, 599 S.W.2d 13, 15-16 (Mo.App.1980) (analyzing distinctions courts have drawn in accidental weapon discharge cases involving vehicles and concluding courts generally have found insurance coverage to exist when the discharge occurs during loading and unloading of vehicles); *Shinabarger v. Citizens Mut. Ins. Co.*, 90 Mich.App. 307, 282 N.W.2d 301, 306 (1979) (in cases involving accidental discharge of firearms, courts generally have been more liberal in finding a causal connection between use of the vehicle and injury when accident occurs during the loading or unloading process than when accident simply occurs in or near the vehicle, but not during loading).

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We decline to depart from or modify the *Aytes* analysis in this accidental weapon discharge case. The injury was foreseeably identifiable with the normal use of the pickup truck. Many vehicles in South Carolina, and certainly many pickup trucks, are used for hunting purposes. Using a vehicle to transport firearms to and from hunting grounds is not an abnormal or unanticipated use of a vehicle. However, Plaintiff has not demonstrated the truck was an active accessory to the injury. The truck was not actively used or involved in causing the injury; it was merely the site of the injury. As stated in *Aytes*, "[t]he required causal connection does not exist when 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." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 746. Plaintiff has failed to show, under the facts as stipulated, that a causal connection exists between the pickup truck and the accidental shooting of Decedent.

Our resolution of the causal connection factor makes it unnecessary to analyze the remaining *Aytes* factors, *i.e.*, whether an act of independent significance broke the causal link between the vehicle and the injury, and whether the vehicle was being used for transportation purposes at the time of the injury. *See Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

CONCLUSION

We answer "no" to the question certified by the Court of Appeals. Decedent's fatal injury, under the facts as stipulated, did not arise out of the "ownership, maintenance, or use" of a motor vehicle pursuant to Section 38-77-140, such that the vehicle's insurance policy provides coverage for the accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle which had been used for hunting purposes the previous day. Plaintiff has not shown that a causal connection exists between the pickup truck and the accidental shooting of Decedent. Consequently, the automobile insurance policy does not provide coverage for Decedent's accidental death.

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CERTIFIED QUESTION ANSWERED.

Acting Justices H. SAMUEL STILWELL and JOHN W. KITTREDGE, concur.

WALLER, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

Notes:

1. We have redrafted the question to refine the issue before us.

2. It is our impression from a review of numerous cases that automobile insurance policies routinely provided the loading or unloading of vehicles was a covered use until perhaps the late 1960s. Many insurance carriers apparently began modifying their standard policy forms to delete this provision, which ultimately resulted in courts relying on statutory requirements or other policy language when deciding whether coverage existed in accidental weapon discharge cases.

3. *See State Farm Mut. Auto. Ins. Co. v. Bookert,* 337 S.C. 291, 523 S.E.2d 181 (1999) (assault involving intentional firing of weapon); *Doe v. S.C. State Budget and Control Bd.,* 337 S.C. 294, 523 S.E.2d 457 (1999) (sexual assault); *Aytes,* 332 S.C. 30, 503 S.E.2d 744 (assault involving intentional firing of weapon); *Home Ins. Co. v. Towe,* 314 S.C. 105, 441 S.E.2d 825 (1994) (assault involving intentional throwing of bottle); *Wausau Underwriters Ins. Co. v. Howser,* 309 S.C. 269, 422 S.E.2d 106 (1992) (assault involving intentional firing of weapon); *Travelers Indemnity Co. v. Auto World of Orangeburg, Inc.,* 334 S.C. 137, 511 S.E.2d 692 (Ct.App.1999) (assault involving intentional firing of weapon); *Wright v. North Area Taxi, Inc.,* 337 S.C. 419, 523 S.E.2d 472 (Ct.App.1999) (assault involving intentional firing of weapon); *Carraway v. Smith,* 321 S.C. 23, 467 S.E.2d 120 (Ct.App.1995) (assault involving intentional firing of weapon); *Hite v. Hartford Accident Indem. Co.,* 288 S.C. 616, 344 S.E.2d 173 (Ct.App.1986) (assault using a vehicle).

The one exception is *Canal Ins. Co. v. Ins. Co. of North America,* 315 S.C. 1, 431 S.E.2d 577 (1993). In that case, a truck-mounted crane tipped over and damaged a building. Answering a question we had declined to reach in *Howser,* we held the accident was not covered by the liability policy on the truck crane because it was not being used for transportation purposes at the time of the injury.

Justice WALLER, dissenting.

I respectfully dissent. I would hold the injury here arose out of the "ownership, maintenance, and use" of the pickup truck.

Under the three-prong test set forth by this Court in *State Farm Fire & Cas. Co. v. Aytes,* 332 S.C. 30, 503 S.E.2d 744 (1998), the party seeking coverage must first establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. And third, it must be shown that the vehicle was being used for transportation purposes at the time of the accident. *State Farm Fire & Cas. Co. v. Aytes,* 332 S.C. 30, 503 S.E.2d 744, 745 (1998).

In my opinion, the unloading of the firearms from the vehicle, in preparation for transportation of the children to school, with the motor running, provides a sufficient causal connection to warrant coverage. *See Taliaferro v. Progressive Specialty Ins. Co.,* 821 So.2d 976, 979-80 (Ala.2001) (because the principal use of an automobile is transportation — being dependent upon the operations of loading and unloading — the act of removing a rifle was an inherent use of a pickup truck for purposes of insurance coverage); *Kohl v. Union Ins. Co.,* 731 P.2d 134 (Colo. 1986) (where accident occurred as

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truck owner lifted rifle out of the jeep's gun rack in preparation to unload rifle and store it for journey home, owner's actions were intimately related to his use of the vehicle as transportation for himself and his rifle); *Allstate Ins. Co. v. Truck Ins. Exchange*, 63 Wis.2d 148, 216 N.W.2d 205 (1974) (loading and unloading of guns from van constitutes "use" of the vehicle in spite of the absence of any specific "loading and unloading" clause from the policy).

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Other courts have reached similar conclusions in cases of accidental weapon discharges. *See Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308, 310-11 and fn. 1 (Me.1987) (injury which occurred during unloading of shotgun from insured's automobile was covered under automobile policy's "ownership, maintenance or use" clause where automobile was being used to transport insured and his companion on hunting trip, a reasonable and foreseeable use of the vehicle; fact that policy did not define "use" in terms of loading or unloading did not affect the analysis); *Cameron Mut. Ins. Co. v. Ward*, 599 S.W.2d 13, 15-16 (Mo. App.1980) (analyzing distinctions courts have drawn in accidental weapon discharge cases involving vehicles and concluding that courts generally have found insurance coverage to exist when the discharge occurs during loading and unloading of vehicles); *Shinabarger v. Citizens Mut. Ins. Co.*, 90 Mich.App. 307, 282 N.W.2d 301, 306 (1979) (in cases involving accidental discharge of firearms, courts generally have been more liberal in finding a causal connection between use of the vehicle and injury when accident occurs during the loading or unloading process than when accident simply occurs in or near the vehicle, but not during loading).

Further, I would hold that no act of independent significance broke the causal link between the vehicle and the injury. There was no intervening cause wholly disassociated from, independent of, or remote from the use of the truck in this case. On the contrary, the injury here occurred due to the insured's foreseeable use of unloading his vehicle of the shotguns loaded in the back. *Accord Allstate Ins. Co. v. Truck Ins. Exchange*, 63 Wis.2d 148, 216 N.W.2d 205 (1974) (coverage provided where a fatal shooting occurred while a loaded weapon was being removed from a truck during a hunting trip).

Lastly, I would find the pickup truck was being used for transportation purposes when the injury occurred. Kathy Thompson and her children were sitting in the car, ready to leave home and go to work and school. They were preparing to drive away, and the engine was running. As the District Court in this case noted, under "USAA's theory coverage conceivably would not extend to injuries sustained under any factual scenario where a vehicle is parked only momentarily or, far worse, where injuries are sustained while a vehicle is stationary at an intersection during the course of travel." *Peagler v. USAA Ins. Co.*, 325 F.Supp.2d 620, 627 (D.S.C.2004). Clearly, the vehicle here was being used for transportation.

I would hold that the "ownership, maintenance, or use" of a vehicle includes the loading and unloading of firearms after the vehicle has been used for hunting purposes, a use which is foreseeably identifiable with normal use of the vehicle. Accordingly, I would conclude insurance coverage exists in this case. I respectfully dissent.

PLEICONES, J., concurs.

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448 F.3d 286
David PEAGLER, personal representative of the ESTATE OF Kathy Marie THOMPSON, Plaintiff-Appellee,
v.
USAA INSURANCE COMPANY, Defendant-Appellant.
No. 04-2257.
United States Court of Appeals, Fourth Circuit.
Argued May 27, 2005.
Decided May 17, 2006.
May 17, 2006.

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (CA-02-3977-2-18).

ARGUED: William Oglesby Sweeny, III, Sweeny, Wingate & Barrow, P.A., Columbia, South Carolina, for Appellant. John Calhoun Land, IV, Land, Parker & Welch, Manning, South Carolina, for Appellee. **ON BRIEF:** William R. Calhoun, Jr., Sweeny, Wingate & Barrow, P.A., Columbia, South Carolina, for Appellant.

Before GREGORY and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Reversed by published opinion. Senior Judge HAMILTON wrote the opinion, in which Judge GREGORY and Judge DUNCAN joined.

OPINION

HAMILTON, Senior Circuit Judge.

On August 31, 2001, Kathy Thompson was fatally injured when her husband, Greg, was unloading shotguns from the pickup truck she was occupying. At the time of the accident, Kathy Thompson and her husband were covered under an automobile insurance policy issued to them by USAA Insurance Company (USAA).

On October 24, 2002, David Peagler (Peagler), the personal representative of the estate of Kathy Thompson, brought this action in the South Carolina Court of Common Pleas for Clarendon County. The action was removed to the United States District Court for the District of South Carolina on November 25, 2002, based on diversity of citizenship. The action sought a declaration that the automobile insurance policy issued to the Thompsons provided coverage for the accident that occurred in this case.

After the parties entered into a stipulation of facts, both parties filed motions for summary judgment. On June 24, 2004, the district court granted Peagler's motion and denied USAA's motion. USAA filed a timely notice of appeal.

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In order to resolve USAA's appeal, we certified a question to the South Carolina Supreme Court. The South Carolina Supreme Court reformulated the question and answered the following question in the negative:

Did Decedent's fatal injury arise out of the "ownership, maintenance, or use" of a motor vehicle pursuant to S.C.Code Ann. § 38-77-140 (2002), such that the vehicle's insurance policy provides coverage for the accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle which had been used for hunting purposes the previous day?

The South Carolina Supreme Court's negative answer to this question requires that we reverse the district court's grant of summary judgment in favor of Peagler with respect to the coverage issue presented in this appeal."

REVERSED

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Notes:

* We note that Peagler filed a petition for rehearing in the South Carolina Supreme Court which was denied by that court on April 26, 2006.

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786 F.Supp.2d 1022

Lucille HOLMES, Plaintiff,
v.
ALLSTATE INSURANCE COMPANY, Defendant.

C.A. No. 2:08–CV–2232–PMD.

United States District Court, D. South Carolina, Charleston Division.

May 7, 2009.

[786 F.Supp.2d 1023]

George J. Kefalos, George J. Kefalos Law Office, Charleston, SC, for Plaintiff.W.C. Barnes, Jr., Turner Padget Graham and Laney, Florence, SC, for Defendant.

ORDER

PATRICK MICHAEL DUFFY, District Judge.

This matter is before the court upon cross-motions for summary judgment filed by Plaintiff Lucille Holmes and Defendant Allstate Insurance Company ("Allstate"). For the reasons set forth below, the court grants Defendant Allstate's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

BACKGROUND

Some time before the events giving rise to this suit occurred, Plaintiff Lucille Holmes ("Plaintiff") had a personal relationship with a Mr. Willie Williams. The record suggests that Williams never got over the fact that his relationship with Plaintiff ended. At trial, Plaintiff testified that, after their relationship ended, he would send her letters indicating that "he

[786 F.Supp.2d 1024]

was going to shoot [her] or shoot [her] legs from under her if he ever saw her again." Plaintiff further testified that Williams would follow her and her husband, Jim, around town in his car; so much in fact, her husband bought a new truck so that Williams would not recognize them while driving. This alleviated the problem of Williams following them around town until Wednesday, March 24, 2004, when Plaintiff and her husband ran into Williams at a local bank, and Williams observed them in the new truck.

On March 25, the next day, Plaintiff and her husband went to a friend's house so her husband could clean the friend's carpet. While at her friend's house, Plaintiff noticed Williams slowly driving back and forth in front of the house. Sometime later in the day, Plaintiff left her friend's house to pick up a neighbor's child at a local school bus stop. Williams happened to still be driving around town and noticed Plaintiff drive past him—in the opposite direction—on her way to the bus stop. He turned his vehicle around to go after her.[1] He eventually found Plaintiff parked on the side of the road awaiting the arrival of the school bus and stopped his car next to her window. Plaintiff heard Williams say, "Lucille," [2] and as she looked over at him, he aimed a handgun at her and shot her several times, resulting in serious bodily injury. Williams immediately left the scene. The school bus was approaching its stop when Williams shot Plaintiff, and the bus driver witnessed the crime.

On August 25, 2005, Plaintiff filed a civil suit against Williams, seeking damages for the gunshot wounds he inflicted upon her. The jury awarded Plaintiff $50,000 in actual damages and $200,000 in punitive damages, and Plaintiff now seeks to recover these amounts from both Williams' Allstate liability coverage as well as her Allstate underinsured motorist coverage. At the time of this incident, Allstate insured Williams under an automobile policy with liability coverage limits of $15,000 per person and insured Plaintiff under an automobile policy issued to her husband that provided underinsured motorist coverage of $200,000 per person.

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Both policies covered injuries "arising out of the ownership, maintenance, or use" of the automobiles.

LEGAL STANDARD FOR SUMMARY JUDGMENT

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The judge is not to weigh the evidence but rather must determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 123–24 (4th Cir.1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir.1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The

[786 F.Supp.2d 1025]

"obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof.' " *Hughes v. Bedsole*, 48 F.3d 1376, 1381 (4th Cir.1995) (quoting *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir.1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548.

ANALYSIS

The issue before the court is whether Plaintiff's injuries arose out of the ownership, maintenance, or use of either Plaintiff's or Williams' vehicle. Under South Carolina law, no automobile insurance policy may 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 Ann. § 38–77–140. In *State Farm & Cas. Co. v. Aytes*, the South Carolina Supreme Court instructed that 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. 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998).

The first element of the *Aytes* test requires a causal connection to exist between the vehicle and the injury. "In this context, causal connection means: (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 automobile.' " *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). "The required causal connection does not exist when 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 [injury] occurred." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 746. With regard to the vehicle covered by her husband's insurance policy, Plaintiff merely occupied this vehicle at the time Williams shot her, as she parked it on the side of the road in anticipation of the school bus's arrival. Thus, her injuries did not arise out of the ownership, maintenance, or use of the vehicle insured by her husband's Allstate policy.

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Determining whether or not a causal connection exists between Williams' use of his vehicle and the gunshot injuries he ultimately inflicted upon Plaintiff requires a review of prior case law that has addressed this issue. Allstate contends that the two vehicles were merely the site of the shooting; therefore, a causal connection does not exist between Williams' use of his vehicle and Plaintiff's injuries. Plaintiff contends that a causal connection does exist, as "the gunshot was the culmination of an ongoing assault, in which the vehicle played an essential part, and only a motor vehicle could have provided [Williams] a quick and successful escape." Plaintiff supports her contention by directing the court's attention to *Wausau Underwriters Insurance Company v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) and *Home Insurance Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994).

In *Wausau Underwriters Ins. Co. v. Howser*, the South Carolina Supreme Court considered the question of whether an insurer was liable, pursuant to S.C.Code Ann. § 38-77-140, for gunshot injuries sustained by a person traveling on a public highway and inflicted during a vehicular chase by an unknown operator of

[786 F.Supp.2d 1026]

an unidentified vehicle. 309 S.C. at 272, 422 S.E.2d at 107-08. In the case, Howser was driving down a public highway when an unidentified assailant used his vehicle to bump her vehicle from behind. Howser attempted to speed away from the assailant, but the assailant continued to pursue Howser and rammed his vehicle into hers on two more occasions. At some point, Howser managed to evade the assailant, but not before the assailant fired a gunshot at her car, which struck and injured her. Neither the assailant nor his vehicle was ever identified. In finding that a causal connection existed between the use of the assailant's vehicle and Howser's injuries, the court considered the assailant's vehicle to be an active accessory to the assault on Howser as "only through the use of his vehicle was the assailant able to closely pursue Howser ... and carry out the pistol assault.... Additionally, only a motor vehicle could have provided the assailant with a quick and successful escape." *Id.* at 273, 422 S.E.2d at 108.

In *Home Insurance Co. v. Towe*, the South Carolina Supreme Court found that a causal connection existed between an assailant's use of his vehicle and the injuries sustained by the driver 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. The bottle seriously injured the driver of the tractor and caused minor damage to the tractor itself. The South Carolina Supreme Court determined that a causal connection did exist 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. As such, the court determined that Towe's car was an active accessory that gave rise to the injuries sustained. Like *Howser*, the court considered the "use of the automobile and Alexander's throwing of the bottle ... 'inextricably linked' as one continuing act." *Id.* at 108, 441 S.E.2d at 827.

Although Plaintiff relies on these precedents to establish that Williams' vehicle acted as an active accessory in the assault on Plaintiff because it enabled him "to closely pursue [Plaintiff], thereby enabling him to shoot her while she was in her vehicle," the court, after careful consideration, is not convinced that the events underlying this

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dispute invoke the conclusions reached in either *Howser* or *Towe*. In *Howser*, the court found a causal connection based on its consolidation of both the vehicular chase and the gunshot assault as a single "ongoing assault." This categorization stemmed from the assailant's use of his vehicle to ram Howser's vehicle numerous times as it continuously pursued her in a chase on a public highway and from the assailant's reliance on his vehicle to keep up with Howser's position to shoot her. Likewise, in *Towe*, the South Carolina Supreme Court considered the assailant's vehicular movement and the ultimate assault as a single continuing act because the movement of the vehicle increased the severity of the assault. In this case, it's not so clear that Williams' use of his vehicle was such an active accessory to his ultimate assault on Plaintiff.

Unlike *Howser*, Williams did not use his vehicle to assault Plaintiff, as nothing in the record indicates that Plaintiff knew Williams was approaching her as she waited at the school bus stop or that Williams' vehicle ever made contact with Plaintiff's. Nor was Plaintiff traveling in her vehicle

[786 F.Supp.2d 1027]

at the time Williams fired the gun, thus making Williams' position in relation to Plaintiff dependant on the use of his vehicle. Moreover, unlike *Towe*, Williams' use of his car did not increase the severity of potential harm inflicted by his gunshots. He merely used his car to approach Plaintiff, stopped his car next to her parked car, fired several gunshots at Plaintiff, and drove off. Thus, unlike the incidents giving rise to the South Carolina Supreme Court's decisions in *Howser* and *Towe*, the court does not find that Williams' car acted as an active accessory to his assault on Plaintiff.

Even if Williams' use of his vehicle should be considered an active accessory to his assault on Plaintiff, the South Carolina Supreme Court's opinion in *State Farm Mutual Automobile Insurance Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999), which addressed a factual scenario similar to the one presented here, precludes a finding that a causal connection exists between Williams' use of his vehicle and his assault on Plaintiff. 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. Similar to Plaintiff's argument, the South Carolina Court of Appeals found that a causal connection existed between the use of the vehicle and the victim's injuries, as the vehicle was used as a "launching pad" for the assailant's assault. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 330 S.C. 221, 232, 499 S.E.2d 480, 486 (S.C.Ct.App.1998). The South Carolina Supreme Court, however, reversed the court of appeals' decision. Despite the facts that the vehicle transported the assailant to the scene, that the vehicle circled the parking lot before positioning assailant in front of the victim, and that the vehicle moved while assailant shot the victim so as to make an escape easier, the Supreme Court found that the insurance policy did not cover the victim's injuries because the injuries were not "foreseeably identifiable with the normal use of an automobile." *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182. In this case, Williams appears to have used his vehicle in the same manner in which the vehicle was used in *Bookert:* to locate Plaintiff, to position himself next to Plaintiff's vehicle, and to leave the scene of the crime. While Plaintiff likens the assault on her with that of a drive-by shooting, *Bookert* establishes that such use of a vehicle will not satisfy the causal connection requirement necessary to invoke insurance coverage, since such conduct is not foreseeably identifiable with the normal use of an automobile. Thus, the court does not find that a causal connection exists between Williams' use of his vehicle and Plaintiff's injuries.

CONCLUSION

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Therefore, based on the foregoing, it is **ORDERED** that Defendant Allstate Insurance Company's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED.**

AND IT IS SO ORDERED.

Notes:

[1] At trial, Williams testified that Plaintiff made a hand gesture to him when he drove by which angered him.

[2] At trial, Williams's testimony slightly differed in that he remembered a short, verbal exchange taking place before he shot Plaintiff.

Nationwide Mutual Fire Insurance Company, Plaintiff,
v.
Trentcina Jeter and Carla M. Coulter, Defendants.

C/A No. 3:12-1759-MBS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

June 18, 2013

ORDER AND OPINION

On June 26, 2012, Nationwide Mutual Fire Insurance Company ("Nationwide") filed a complaint against Trentcina Jeter ("Jeter") and Carla M. Coulter ("Coulter"), seeking a declaration that the tort claims in an underlying lawsuit in state court do not give rise to a duty to indemnify under an automobile insurance policy. ECF No. 1. On September 12, 2012, Coulter filed an answer and a counterclaim seeking a declaration to the contrary. ECF No. 8. Jeter failed to file an answer, and on September 19, 2012, Nationwide requested entry of default, which the clerk's office entered. ECF Nos. 11 & 14. Coulter and Nationwide filed cross-motions for summary judgment. ECF Nos. 26 & 27. On June 6, 2013, the court held a hearing and, following oral argument, granted Nationwide's motion for summary judgment and denied Coulter's motion for summary judgment. The court issues this written order to supplement that ruling.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The following facts are based on Jeter's and Coulter's deposition testimonies from the underlying lawsuit. Their testimonies are materially consistent, and the parties do not dispute the facts.

In February 2012, Coulter, who is unable to drive due to a health condition, hired Jeter as a "personal assistant." ECF No. 26-1 at 4 & 8. On February 14, 2012, Jeter used her vehicle to drive Coulter to a job interview at Synergy Home Care ("Synergy"), located on Harmon Street in Lexington, South Carolina. ECF No. 26-1 at 11. After the interview had ended, as the women were leaving the Synergy building, a dispute ensued between them. ECF No. 26-1 at 15. The dispute continued inside the vehicle, as Jeter reversed her vehicle out of the Synergy building parking lot, and drove the short distance towards the intersection of Harmon and East Main Street. ECF No. 26-1 at 15-16; ECF No. 26-4 at 19-20. As the vehicle approached the intersection, Jeter removed a can of pepper spray attached to her key chain and deployed it in Coulter's direction, making contact with Coulter's face. ECF No. 26-4 at 13; ECF No. 26-1 at 19-20. When the vehicle reached the intersection, Coulter exited. ECF No. 26-1 at 36-37; ECF No. 26-4 at 20. Jeter deployed pepper spray from the driver's side window of the vehicle as Coulter walked away, but none of the spray contacted her. ECF No. 26-1 at 23-24.

After Coulter had distanced herself from the vehicle, Jeter made a right turn on to East Main Street, entered a parking lot to turn her vehicle back in the direction of Harmon Street, and returned to the parking lot of the Synergy building. ECF No. 26-4 at 14. There, Jeter exited her vehicle to confront Coulter and, again, deployed pepper spray in Coulter's direction, this time making contact. *Id.* at 14-15. Thereafter, Jeter left the scene in her vehicle. ECF No. 26-1 at 17. Coulter dialed 9-1-1, and police officers and EMS arrived at the scene. In the days that followed, Jeter sought treatment for her eyes at several healthcare facilities, and doctors prescribed her medication. ECF No. 26-1 at 28-32, 37.

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Nationwide issued a policy that provided liability insurance coverage for Jeter's vehicle, which policy was in effect on February 14, 2012. ECF Nos. 26-6 at 4. The policy states that, "[Nationwide] will pay for damages for which [the insured] [is] legally liable as a result of an accident arising out of the: a) ownership; b) maintenance or use; or c) loading or unloading" of the insured's vehicle. ECF No. 26-6 at 11-13.

II. STANDARD OF REVIEW

A. *Summary Judgment*

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986).

B. *Insurance Coverage and the Duty to Indemnify*

According to South Carolina law, a liability insurer's duty to indemnify is based on evidence found by the fact finder. *Ellett Bros., Inc. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 388-89 (4th Cir. 2001) (citing *Jourdan v. Boggs/Vaughn Contracting, Inc.*, 476 S.E.2d 708 (S.C. Ct. App. 1996)).[1]

III. DISCUSSION

The sole issue before the court is whether Coulter's injuries arose out of the ownership, maintenance, or use of Jeter's vehicle.

As an initial matter, the parties appear to agree that the record contains evidence of three separate instances in which Jeter assaulted Coulter: the first occurred inside the vehicle as it approached the intersection of Harmon and East Main Street (the "First Assault"); the second occurred after Coulter had exited the vehicle but while Jeter remained inside the vehicle (the "Second Assault"); and the third occurred in the Synergy building parking lot, after both Jeter and Coulter had exited the vehicle (the "Third Assault"). The court will separately analyze whether each assault produced injuries that arose from the ownership, maintenance, or use of Jeter's vehicle.

South Carolina courts have devised a three-part test to determine whether injuries arise out of the "ownership, maintenance, or use" of a vehicle: (1) there must be a causal connection between the vehicle and the injury; (2) no independent act breaks the causal link; and (3) the vehicle is being used for transportation at the time of the injury. *State Farm Fire & Cas. Co. v. Aytes*, 503 S.E.2d 744, 745 (S.C. 1998). The first element of the *Aytes* test requires a causal connection to exist between the vehicle and the injury. "In this context, causal connection means: (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 automobile.' " *State Farm Mut. Ins. Co. v. Bookert*, 523 S.E.2d 181, 182 (S.C. 1999) (quoting *Aytes*); *see Peagler v. USAA Ins. Co.*, 411 F.3d 469, 472 (4th Cir. 2005). "The required causal connection does not exist when the only connection between an injury and the insured vehicle's use

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is that fact that the injured person was an occupant of the vehicle when the [injury] occurred." *Aytes*, 503 S.E.2d at 745-46.

1. *First Assault*

Nationwide maintains that, with respect to the first assault, a causal connection does not exist between Jeter's use of her vehicle and Coulter's injuries. Nationwide argues that the vehicle was not an active accessory to the assault but merely its location. To the contrary, Coulter argues that a causal connection exists by virtue of the fact that the close confines of the vehicle coupled with its movement prevented her escape and enabled Jeter to harm her.

For support, Coulter relies on *Wausau Underwriters Insurance Co. v. Howser*, 422 S.E.2d 106 (S.C. 1992), and *Home Insurance Co. v. Towe*, 441 S.E.2d 825 (S.C. 1994). In *Howser*, the South Carolina Supreme Court found that a causal connection existed between the injuries sustained by the victim and the assailant's use of his vehicle. 422 S.E.2d at 107. In the course of a high-speed pursuit, the assailant bumped the victim's vehicle, pulled alongside it, and fired a gun in its direction, wounding the victim. *Id.* The court distinguished the case from those in which the vehicle was only used to provide transportation to the site of the assault, or in which the assailant happened to be sitting in a stationary vehicle at the time of the assault. *Id.* at 108 (citing *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985)). The court held that the vehicle was an "active accessory to [the] assault," reasoning that "[o]nly through use of his vehicle was the assailant able to closely pursue [the victim], 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." *Id.*

In *Towe*, the South Carolina Supreme Court held that injuries sustained by a tractor driver were causally connected to the use of a passing vehicle. 441 S.E.2d at 826. In *Towe*, a passenger

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in a moving vehicle threw a glass bottle out the window, attempting to hit a road sign but, instead, seriously injuring a tractor driver who was traveling down the road in the opposite direction. *Id.* The court explained, "[t]he use of the automobile placed [the passenger] 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[,]" thus determining that the vehicle served as an active accessory that gave rise to the injuries. *Id.* at 827.

Although *Howser* and *Towe* are pertinent to the analysis of whether Jeter's vehicle was merely the site of, or an active accessary to the assault, those cases' relevance is limited due to the fact that both were decided before *Aytes*. Significantly, *Aytes* added to the causal connection analysis the requirement that the "injury must be foreseeably identifiable with the normal use of the automobile." Although prior to *Aytes* a few courts had acknowledged that such a requirement might be relevant to the causation analysis, *see, e.g.*, *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985); *Hite v. Hartford Accident and Indem. Co.*, 344 S.E.2d 173 (S.C. Ct. App. 1986), the South Carolina Supreme Court did not consider the foreseeability of the victims' injuries in *Howser* or *Towe*.

For guidance post-*Aytes*, the court turns to *State Farm Mutual Automobile Insurance Co. v. Bookert*, 523 S.E.2d 181 (S.C. 1999), upon which Nationwide relies. In *Bookert*, the South Carolina Supreme Court analyzed whether a pedestrian, shot and wounded by a gunman riding in a vehicle, sustained injuries

covered by an automobile insurance policy. *Id.* at 181-82. The court of appeals' decision relied on *Howser* and *Towe* to find that the vehicle was an active accessory to the assault, causally connected with the victim's injuries. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 499 S.E.2d 480, 486 (S.C. Ct. App. 1997). The court of appeals reasoned that the vehicle was the "launching

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pad" for the assault and the assailant's means of escape. *Id.* After granting certiorari to review that decision, the supreme court decided *Aytes*. The supreme court reversed the court of appeals, holding that the pedestrian's injuries were not foreseeably identifiable with the normal use of a vehicle. 526 S.E.2d at 182 (citing *Aytes*).

Nationwide also relies on *Wright v. North Area Taxi, Inc.*, 523 S.E.2d 472 (S.C. Ct. 1999), a case the South Carolina Court of Appeals decided after *Aytes*. *Wright* involved two assailants who, while riding as passengers in a taxi, attempted to rob the driver. *Id.* at 473. The driver was shot during the incident, causing her to lose control of the vehicle and crash into a parked car. *Id.* The driver died from her injuries. *Id.* The court of appeals held that there was no causal connection between the driver's injuries and the vehicle because "the vehicle served merely as the situs of shooting[,]" as opposed to an instrumentality that furthered the cause of the assailants. *Id.* at 475. The court observed that "the same injuries could have occurred when the vehicle was parked, or otherwise not moving, or when [the driver] and [the assailants] were standing outside the vehicle." *Id.* at 476. In addition, the court held that the injuries the driver sustained were not foreseeably identifiable with the normal use of a vehicle. *Id.* at 475-76.

Coulter's reliance on *Howser* and *Towe* is unavailing. In those cases, the at-fault parties harnessed the speed and force of their vehicles and caused injuries that would have been difficult to inflict otherwise. Neither case involved an assault that occurred within a moving vehicle. In this regard, *Wright* is more apt. In *Wright*, the court rejected the argument that the moving vehicle was "essential" to accomplishing the passengers' criminal objective. *Id.* at 476. Likewise, in this case, the court does not find that the moving vehicle was essential to accomplishing the assault, as Jeter easily could have deployed pepper spray against Coulter when the vehicle was motionless, or while

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the women were standing outside the vehicle. Indeed, Coulter accomplished the Third Assault after both women had exited the vehicle.

With respect to Jeter's argument that the inescapable nature of a moving vehicle could be the basis for finding that a vehicle served as an active accessory to an assault, the court is unpersuaded. Safe escape from a moving vehicle is rarely feasible, and the narrow confines of a vehicle make it especially difficult for a potential victim to avoid any sort of sudden attack. To find a causal connection based on the facts here would, in effect, carve out for moving vehicles an exception to the general limitation that coverage does not lie when a vehicle is merely the site of an injury. As such, the court finds that Jeter's vehicle was merely the site of, and not an active accessory to the First Assault.

Even if the court were to find that Jeter's vehicle was more than merely the site of the assault, under *Bookert*, Coulter's injuries are not foreseeably identifiable with the normal use of a vehicle. Coulter argues that *Bookert* is distinguishable because the assailant in that case intended to use the vehicle in an abnormal manner—to carry out a drive-by shooting—whereas Jeter assault's was a spontaneous act, during what was an otherwise normal use of a vehicle. This is not

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a meaningful distinction because the test is not whether the vehicle was being used in a foreseeable or normal manner at the time of the injuries, but whether the injuries are foreseeable with the normal use of a vehicle. Injuries sustained during a pepper spray attack are no more foreseeable than the injuries sustained by the shooting victims in *Bookert* and *Wright.*

For those reasons, the court finds that there is no causal connection between the injuries Coulter sustained and Jeter's use of her vehicle. Rather, Jeter's assault was an act of independent significance that incidentally occurred within a vehicle. To the extent Jeter's liability in the

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underlying lawsuit stems from the First Assault, that liability did not arise from the ownership, maintenance, or use of a vehicle.

2. *Second Assault*

Nationwide argues that a causal connection does not exist between the injuries Coulter sustained during the Second Assault and Jeter's vehicle. By Coulter's own admission, Jeter's second attempt to spray her with pepper spray was unsuccessful. Even if the pepper spray had contacted Coulter, Jeter's position within the stationary vehicle was merely the location from which she carried out the assault. Moreover, for the reasons provided above, had Coulter sustained injuries, those injuries would not be the type foreseeably identifiable with the normal use of a vehicle. To the extent Jeter's liability in the underlying lawsuit stems from the Second Assault, that liability did not arise from the ownership, maintenance, or use of a vehicle.

3. *Third Assault*

Nationwide argues that a causal connection does not exist between the injuries Coulter sustained during the Third Assault and Jeter's vehicle. The Third Assault occurred in a parking lot, after both women had exited Jeter's vehicle. Once Jeter exited the vehicle, any causal connection that might have existed was broken. *See Carraway v. Smith by S.C. Ins. Co.*, 467 S.E.2d 120, 121 (S.C. Ct. App. 1995). Although Jeter used the vehicle to return to the parking lot, the use of a vehicle solely as a means of transportation to the location of where an assault takes place does not trigger coverage under an automobile insurance policy. *See Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984, 989 (4th Cir. 1985). The court finds that these facts do not establish a causal connection, rather they show that the assault was an act of independent significance. To the extent Jeter's

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liability in the underlying lawsuit stems from the Third Assault, that liability did not arise from the ownership, maintenance, or use of a vehicle.

Because none of the three assaults resulted in injuries that arose from the ownership, maintenance, or use of the vehicle, Nationwide's insurance policy does not require it to indemnify Jeter in the underlying lawsuit.

IV. CONCLUSION

For the foregoing reasons, Nationwide's motion for summary judgment, ECF No. 27, is **GRANTED**, and Coulter's motion for summary judgment, ECF No. 26, is **DENIED.**

IT IS SO ORDERED.

Margaret B. Seymour
Senior United States District Judge

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Columbia, South Carolina
June 18, 2013

Notes:

[1] By contrast, whether an insurer has a duty to defend is determined based on the allegations in the complaint from the underlying lawsuit. *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 677 S.E.2d 574 (S.C. 2009).

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Nationwide Mutual Fire Insurance Company, Plaintiff,
v.
Trentcina Jeter and Carla M. Coulter, Defendants.

C/A No. 3:12-1759-MBS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Dated: July 10, 2013

ORDER AND OPINION

On June 26, 2012, Nationwide Mutual Fire Insurance Company ("Nationwide") filed a complaint against Trentcina Jeter ("Jeter") and Carla M. Coulter ("Coulter"), seeking a declaration that the tort claims in an underlying lawsuit in state court do not give rise to a duty to indemnify under an automobile insurance policy. ECF No. 1. On September 12, 2012, Coulter filed an answer and a counterclaim seeking a declaration to the contrary. ECF No. 8. Jeter failed to file an answer, and on September 19, 2012, Nationwide requested entry of default, which the clerk's office entered. ECF Nos. 11 & 14. Coulter and Nationwide filed cross-motions for summary judgment. ECF Nos. 26 & 27. On June 18, 2013, the court issued an order that granted Nationwide's motion for summary judgment and denied Coulter's motion for summary judgment. ECF No. 41. The within matter is before the court on Nationwide's unopposed motion for default judgment as to Jeter, ECF No. 42, which motion was filed on June 24, 2013.

When a party against whom judgment is sought fails to file a responsive pleading or otherwise defend the action, the plaintiff may request, and the court may enter, default judgment against the nonresponsive party. FED R. CIV. P. 55. When a party defaults, all of the allegations against that party in the pleadings are deemed admitted. *See Certaineed Corp. v. Pinnacle Bldg. Solutions, Inc.*, C/A No. 3:07-72, 2007 WL 4287641 (D.S.C. Dec. 4, 2007). Although the court

"must accept the facts alleged in a complaint as true and construe them in the light most favorable to the plaintiff," *Coleman v. Md. Ct. of App.*, 626 F.3d 187, 188 (4th Cir. 2010), threadbare "legal conclusion[s] . . . [are] not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

The court need not resolve Nationwide's motion for default judgment based on the pleadings alone. In addressing the parties' cross-motions for summary judgment, the court had the opportunity to consider the different positions of Coulter and Nationwide and, in its June 18, 2013 order, held that the automobile insurance policy Nationwide issued Jeter does not indemnify her for liability that results from the underlying state court litigation. Incorporating the reasoning of that order here, Nationwide is entitled to the declaratory relief it requests against Jeter.

For the foregoing reasons, Nationwide's motion for default judgment, ECF No. 42, is **GRANTED.**

IT IS SO ORDERED.

Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina
July 10, 2013

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UNITED FINANCIAL CASUALTY COMPANY, Plaintiff,
v.
ANTHONY BUTLER, KENNETH WILSON HIERS, JOHN BOLAND, individually and d/b/a SOUTHCOAST TOWING RECOVERY, a/k/a SOUTHCOAST RECOVERY, ROBER BOLAND, and GRALIN HAMPTON AUTO SALES, INC., Defendants.

No. 2:11-cv-02897-DCN

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

Dated: March 18, 2013

ORDER

This is a declaratory judgment action brought by an insurer. This matter comes before the court on a motion for summary judgment brought by plaintiff United Financial Casualty Company (United). For the reasons set forth below, the court grants the motion for summary judgment.

I. BACKGROUND

A. Procedural History

Butler filed a complaint in the Berkeley County Court of Common Pleas on June 20, 2011, and an amended complaint on August 22, 2011. United filed a declaratory judgment action in this court on October 25, 2011, to determine its rights and obligations under an insurance policy. United seeks a determination as to whether it owes Kenneth Hiers, John Boland, individually and d/b/a Southcoast Towing Recovery, a/k/a Southcoast Recovery (Southcoast Recovery), Robert Boland, and/or Gralin Hampton

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Auto Sales, Inc. (Gralin Hampton) a duty to defend and/or indemnify in the underlying state court action. United filed an amended complaint on November 8, 2011.

On December 27, 2011, Butler filed a motion to dismiss United's federal court complaint or, in the alternative, to stay this case pending resolution of the underlying state court action. The court held a hearing on February 21, 2012, but stayed resolution of the motion until all defendants could be served. The court held another hearing on September 6, 2012, during which it denied the motion to dismiss and motion to stay. United filed a motion for default judgment and for summary judgment on January 23, 2013.[1] Butler filed a response in opposition on February 11, 2013, along with an answer to the amended complaint.

B. Factual Allegations

In his amended state court complaint, Butler alleges that on or about June 13, 2008, Kenneth Hiers and Robert Boland attempted to enter his property in Moncks Corner with a tow truck owned by John Boland, d/b/a Southcoast Recovery. Am. State Ct. Compl. ¶ 7. Despite asking them not to enter his property, Hiers and Boland entered the property and attempted to remove a vehicle owned by someone other than Butler.[2] Id. ¶ 8. According to Butler, Hiers and Boland were acting at the direction of Gralin Hampton and Southcoast Recovery to repossess the vehicle. Id. ¶ 7.

Hiers and Boland called the Moncks Corner Police Department to report that Butler had threatened them and pulled a shotgun on them. Id. ¶¶ 10, 14. Butler was surrounded by officers and tased three times, causing him to fall to the ground and pass out. Id. ¶ 11. Butler suffered serious injuries and required surgery on his arm. Id. ¶¶ 12,

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17. He was later charged with two counts of assault, but these charges were dropped on the day of trial. Id. ¶ 16. Butler sued in state court for false arrest, false imprisonment, refusing or neglecting to prevent unlawful conduct, malicious prosecution, malicious abuse of process, assault and battery, conspiracy, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress.

United underwrote a Commercial Automobile Insurance Policy issued to John Boland/Southcoast Recovery on March 27, 2008 and March 27, 2009. See Am. Compl. Ex. 1. The policy insures a 2004 Chevrolet automobile and provides coverage for "**bodily injury** or **property damage**: 1. sustained by an **insured**; 2. caused by an **accident**; and 3. arising out of the ownership, maintenance, or use of an **insured auto**." Id. at 4. It further provides, "Coverage under this Part I, including **our** duty to defend, does not apply to: 1. **Bodily injury** or **property damage** either expected by or caused intentionally by or at the direction of any **insured**." Id. at 22.

In its amended federal court complaint, United asserts it is entitled to a declaratory judgment that it does not owe a duty to defend or indemnify because the underlying incident does not trigger policy coverage, as Butler's alleged injuries did not arise out of the "ownership, maintenance, or use of an insured auto." Am. Compl. ¶ 18.

II. STANDARDS

Summary judgment shall be granted if the movant shows there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[S]ummary judgment will not lie if the

dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. At the summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. Id. at 255.

In South Carolina, "an insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." Cook v. State Farm Auto. Ins. Co., 656 S.E.2d 784, 786 (S.C. Ct. App. 2008). "It is well settled in South Carolina that provisions of an insurance policy are to be liberally construed in favor of the insured." State Farm Fire & Cas. Co. v. Barrett, 530 S.E.2d 132, 135 (S.C. Ct. App. 2000). Courts must not "rewrite . . . or torture the meaning of a policy to extend coverage never intended by the parties." Torrington Co. v. Aetna Cas. & Sur. Co., 216 S.E.2d 547, 550 (S.C. 1975). In the absence of ambiguity, "the insurance policy's terms must be interpreted and enforced according to their plan, ordinary, and popular meaning." Barrett, 530 S.E.2d at 135. "In an action for a declaratory judgment, the obligation of a liability insurance company to defend and indemnify is determined by the allegations in the [underlying] complaint." Collins Holding Corp. v. Wausau Underwriters Ins. Co., 666 S.E.2d 897, 899 (S.C. 2008).

III. DISCUSSION

The parties agree that defendants Hiers and Boland drove to Butler's property to repossess a vehicle. They drove in a tow truck covered by a Commercial Automobile Insurance Policy underwritten by United. An insured is legally entitled to recover damages arising out of the "ownership, maintenance, or use" of an insured vehicle. S.C. Code Ann. §

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38-77-140. In its motion for summary judgment, United contends no

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coverage exists over the state court allegations because the alleged injuries to Butler did not arise out of the "ownership, maintenance, or use" of an insured vehicle.

Under South Carolina law, 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 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, 503 S.E.2d 744, 745 (S.C. 1998).

A. Causal Connection

First, the South Carolina Supreme Court in Wausau Underwriters Insurance Co. v. Howser, 422 S.E.2d 106 (S.C. 1992), held that the causal connection requirement is satisfied where it can be shown that the vehicle was an "active accessory" to an assault. Moreover, the "injury must be foreseeably identifiable with the normal use of the vehicle." Aytes, 503 S.E.2d at 745-46. Compare Home Ins. Co. v. Towe, 441 S.E.2d 825 (S.C. 1994) (holding that automobile was active accessory giving rise to injuries when an assailant used the automobile to throw a bottle at a passenger in another car), with Carraway v. Smith, 467 S.E.2d 120, 121 (S.C. Ct. App. 1995) (holding that when assailant exited car prior to shooting, there was no "ongoing use of a vehicle . . . to carry out the attack").

Here, the injuries were allegedly inflicted upon Butler by a Moncks Corner police officer who did not ride in the covered vehicle nor have any connection to that vehicle. Butler argues, "Hiers admits that both he and Boland sat in the Truck when Law Enforcement arrived. Boland and Hiers watched as Mr. Butler was being assaulted." Defs.' Resp. Opp. 4. This argument actually supports United's contention that the tow

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truck was not an "active accessory" to the assault. Therefore, the court finds no causal connection between the vehicle and alleged injuries.

B. Act of Independent Significance Breaking Causal Link

Next, assuming there was a causal connection between the covered vehicle and the alleged assault, the court must decide whether an act of independent significance broke the causal chain. The question is whether the use of the vehicle and the assault were "inextricably linked as one continuing assault." Howser, 422 S.E.2d at 109. In the instant case, the tow truck was parked and had no involvement with the alleged assault. Instead, it was the Moncks Corner Police Department that arrived on the scene and tased Butler. This finding is supported by Heirs' witness statement to police, in which he wrote that after "the police showed up . . . we stayed in the truck after that." Defs.' Resp. Opp. Ex. 2. As such, the court finds that an act of independent significance broke any causal link between the covered vehicle and Butler's injuries.

C. Use for Transportation at the Time of Assault

Finally, assuming the first two elements were met, the covered vehicle would have to have been used for transportation purposes at the time of the tasing. It appears to be undisputed that the vehicle was parked when the tasing occurred, and courts have held that in such cases the vehicle was not being used for transportation at the time of the assault. See Nationwide Prop. & Cas. Co. v. Lain, 402 F. Supp. 2d 644, 650 (D.S.C. 2005) ("It is undisputed that Oliver parked the vehicle, got into the backseat, and strangled Ms. Lain to

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death. Therefore, in light of Aytes, the court concludes that at the time of the injury, when Oliver strangled Ms. Lain, the vehicle was not being used for transportation.").

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In sum, after reviewing the allegations of the underlying complaint, the court finds three independent reasons why the injuries alleged by Butler did not arise from the "ownership, maintenance, or use" of an insured vehicle. Therefore, United has no duty to defend or indemnify.

IV. CONCLUSION

Based on the foregoing, the court **GRANTS** plaintiff's motion for summary judgment.

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March 18, 2013
Charleston, South Carolina

Notes:

1. As stated at the hearing on this motion, the court denies the motion for default judgment.

2. The vehicle was owned by Raymond and Wanda President. Id. ¶ 9.

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Nationwide Insurance Company of America, Plaintiff,
v.
Graham Keith Jackson, Defendant.

Graham Keith Jackson, Plaintiff,
v.
Nationwide Insurance Company of America, Defendant.

Civil Action No.: 4:14-273-BHH
Civil Action No.: 4:14-945-BHH

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

September 17, 2015

OPINION AND ORDER

This matter is before the Court on the Nationwide Insurance Company of America's ("Nationwide") motion for summary judgment. (ECF No. 34.) Graham Keith Jackson ("Jackson") has responded. Nationwide filed the 4:14-273 action in this Court and removed the action in 4:13-945 from state court. Both are declaratory judgment actions related to underinsurance motorist coverage, which were consolidated on November 10, 2014, and placed under the 4:14-273-BHH docket number. (ECF No. 31.)

BACKGROUND

On or about October 27, 2012, Jackson and his stepbrother, William C. "Christian" Burris-Durham went hunting together. (Burris-Durham Dep. at 7-8.) When they returned home, Burris-Durham parked the car, turned off the ignition, and removed the keys. *Id.* at

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16-17. He remained in the car for a moment texting someone while Jackson got out of the vehicle and shut the front passenger door. *Id.* at 18-19. Jackson opened the rear door of the vehicle and retrieved his items. (Jackson Dep. at 11-13.) Jackson then turned away from the vehicle and put his bag on his back. *Id.* at 11. Jackson was walking away from the passenger side of the vehicle when Burris-Durham exited the vehicle, opened the rear driver side door, and reached into the vehicle to retrieve his gun. *Id.*; (Burris-Durham Dep. at 19-20.) As Burris-Durham grasped the gun, it discharged, and the bullet struck Jackson in the back of the leg. (Jackson Dep. at 12; Burris-Durham Dep. at 21.)

Jackson asserted a claim for his injuries. Nationwide settled the liability portion of the claim and brought this declaratory judgment action for a declaration as to coverage under its underinsured motorist (UIM) coverage. Jackson counterclaimed by means of his declaratory judgment action, C.A. No. Case No. 4:14-273.

STANDARD

The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If a movant asserts that a fact cannot be disputed, it must support that assertion either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" or "showing . . . that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P.

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56(c)(1).

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Under this standard, the existence of a mere scintilla of evidence in support of the Jackson's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

DISCUSSION

This case does not require any certification to the South Carolina Supreme Court, as Jackson urges. It involves a very typical exercise in applying existing state court precedent to particular facts. Indeed, seldom does the Court have occasion to apply a case as directly controlling, as *Peagler v. USAA Ins. Co.*, 628 S.E.2d 475, 478 (S.C. 2006).

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The Supreme Court of South Carolina has expressly held that accidental gunshot injuries, during loading and unloading of an insured vehicle, do not "arise out of the ownership, maintenance, or use" of the vehicle at issue. *Peagler v. USAA Ins. Co.*, 628 S.E.2d 475, 478 (S.C. 2006). In *Peagler*, a family was preparing to depart from home to go to work and school. *Id.* at 476. At the time of the accident, the decedent was in the vehicle with the door closed, her seatbelt buckled, and the engine running. *Id.* The insured was attempting to remove the shotgun from the vehicle so one of the children could get into the vehicle when the shotgun discharged. *Id.* The supreme court held that the vehicle was not an active accessory to the injury; it was merely the site of the injury. *Id.* at 481.

The Court agrees fairly readily that *Peagler* is controlling in this case.

The UIM portion of the policy at issue covers damages resulting from an accident "arising out of the ownership, maintenance, or use of the 'underinsured motor vehicle.'" (Complaint, Ex. A at U1.) This language tracks the language of South Carolina's financial responsibility statutes. *See Peagler*, 628 S.E.2d at 478 (quoting S.C. Code §§ 38-77-140, -30(10.5), -141, and -142). The policy language in this case is essentially identical to the language at issue in *Peagler*. *Id.*

As the parties recognize, South Carolina courts have developed a three-part test to determine whether an injury "arises out of the ownership, maintenance, or use" of the insured motor vehicle. *Id.* The party seeking coverage must show:

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> (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 purposes at the time of the injury.

Peagler, 628 S.E.2d at 478. There is a separate three-part test for the determination

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whether a causal connection exists to satisfy the first element. A causal connection exists when:

> (a) The vehicle was an "active accessory" to the injury;
>
> (b) The vehicle was something less than the proximate cause but more than the mere site of the injury; and
>
> (c) The injury was foreseeably identifiable with the normal use of the vehicle.

Id. at 479.

Jackson cannot satisfy the first element that a causal connection exists between the vehicle and the injury. Namely, there is no evidence that the car was any accessory to the injury, passive or active. It is undisputed that the vehicle had been parked and the motor shut off when the accident occurred. (Burris-Durham Dep. at 16-17.) Jackson and Burris-Durham had both exited the vehicle. *Id.* at 19-21; (Jackson Dep. at 11-13). Burris-Durham was merely reaching into the back seat to remove his hunting rifle when the accident occurred. *Id.*

Jackson tries to satisfy these causation elements by citation to Burris-Durham's deposition testimony with only a sentence explanation. (Jackson Resp., ECF No. 38, at 3.) Specifically, Jackson offers that it is reasonable to "infer" that "the friction between the rifle and the back seat" caused the gun to accidentally fire. *Id.* In fact, Burris-Durham posited that "some kind of static electricity or something like that" caused the gun to fire. (Burris-Durham Dep. at 23-24.) His full testimony is as follows:

> Q: Was there anything about the vehicle itself that caused the weapon to discharged [sic]?
>
> A: It did have cloth seats, if that has anything to do with it. It might have caused some kind of static electricity or something like that, because I mean, it was - I was kind of careless. I should have picked it up, not thinking, because I mean, static electricity probably did have

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> something to do with it.

(Burris-Durham Dep. at 23-24; see also Burris-Durham Dep. at 31-32.)

This is a guess. It is not appropriate evidence of any kind - of any thing. It would not matter to the undersigned, but Burris-Durham did not even offer testimony that he heard, saw, or felt any static electricity. It is not based on personal knowledge or even some anecdotal experience that such static electricity could make *a gun to fire* inadvertently. The fact that Burris-Durham is generally aware of the phenomenon of static electricity is literally of no moment. (Burris-Durham Dep. at 31-32.) It is a hunch and almost certainly an erroneous one. But, besides being entirely speculative on the actual facts of this case, the opinion is not an

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opinion suitable for lay testimony. The Court would need some expert evidence that static electricity could fire a weapon. The defendant spends some energy debunking this theory as a matter of obvious physics and engineering. The Court need not go anywhere near so far. There is simply no evidence in the record that it either happened as alleged or that it could ever happen as alleged.

"The focus is on the extent of the role, if any, the vehicle played in causing the injuries or damage, or whether a particular activity is a covered use as required by statute or a policy provision." *Peagler*, 628 S.E.2d at 479. As in *Peagler*, Jackson "has not demonstrated the truck was an active accessory to the injury. The truck was not actively used or involved in causing the injury; it was merely the site of the injury." *Id.* at 481.

Jackson attempts to distinguish *Peagler* from the present case based on differences in the two cases with respect to the temporal proximity of the gun accident to the usage of the vehicle for gun-related activity. Namely, Jackson says that in *Peagler* the guns were removed the day after the hunting trip and, therefore, more remote in time from the hunting purposes for which the vehicle was used than the removal of the gun, in this case, which

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came mere moments after they had returned from hunting.

But, *Peagler* did not turn on any such detail. In fact, it readily concluded, in spite of the elapsed time, that the car, as in this present case, was foresseably used for hunting purposes:

> The injury was foreseeably identifiable with the normal use of the pickup truck. Many vehicles in South Carolina, and certainly many pickup trucks, are used for hunting purposes. Using a vehicle to transport firearms to and from hunting grounds is not an abnormal or unanticipated use of a vehicle.

Id. The supreme court did not make any distinction about "use" because the hunting trip was more remote in time, indeed, the opposite.

There is no evidence that the vehicle was any accessory to the accident or otherwise caused it, in the way *Peagler* requires.

Having concluded that no causal connection exists, the Court need not consider the whether an act of independent significance broke the causal link between the vehicle and the injury, and whether the vehicle was being used for transportation purposes at the time of the injury. *Id.*

CONCLUSION

Based on the foregoing, Nationwide's motion for summary judgment (ECF No. 34) is GRANTED. The accident in this case does not "arise out of the ownership, maintenance, or use" of the vehicle.

IT IS SO ORDERED.

s/Bruce Howe Hendricks
United States District Judge

September 17, 2015
Greenville, South Carolina

fastcase

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON LEVI THOMAS BROWN, Plaintiff, vs. STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2016-CP-10-00363 **STIPULATION OF FACTS**

FILED
2017 JAN -6 PM 1:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY

1. On 2/10/2013, Levi Thomas Brown, Jasper Terrell Banks and Roy B. Walker left after a supper gathering with their female companions for a "boy's night out." The three men went in Roy B. Walker's mother's 2003 Cadillac Deville sedan to Charlie O's, a night club located at 4224 Dorchester Road in North Charleston. When Charlie O's closed, the three men decided to go to IHOP at nearby Centre Point Drive by way of Dorchester Road northbound to the on ramp of I-526 eastbound to the next exit at Montague Ave eastbound. As the three left Charlie O's, Levi Thomas Brown was driving and Jasper Terrell Banks and Roy B. Walker were riding as passengers.

2. Levi Thomas Brown drove the 2003 Cadillac Deville sedan onto the on ramp of I-526 East. The on ramp for I-526 East from Dorchester Road to Montague Avenue creates a third lane which runs adjacent to the two existing East-bound lanes and runs the distance of approximately one tenth of a mile where that third lane ends as the off-ramp of I-526 East at Montague Ave.

3. At approximately 4:25 a.m., while the Cadillac Deville sedan was in the right-most lane between the exits, a gray/silver older model Dodge Durango came alongside of the Cadillac in one of the other eastbound lanes of the interstate with a black male with

dreadlocked hair and a baseball hat hanging out of the rear passenger side window. This unknown assailant opened fire on the Cadillac. The men did not see the vehicle prior to shots being fired. They do not know where the vehicle came from. The persons in the Cadillac still to this day have no idea as to the identity of the driver or passenger. There was nothing they did that night either at the club or on the roadway to provoke any hostility towards them.

4. Four gunshots struck the Cadillac. And one of those shot struck Levi Thomas Brown. There is one bullet hole on the hood near the grill and three bullet holes in the driver's side of the Cadillac—two holes in the window to the backseat behind the driver and one bullet hole in the driver's window. The hole in the driver's side window is located at approximately the same height and location where Levi Thomas Brown's wound is and presumably passed through the driver's side window and into Levi Brown's body, where it lodged between his heart and spine.

5. The assailant vehicle did not hit the Cadillac. The assailant vehicle did not attempt to ram, block, or otherwise strike the Cadillac. The assailant vehicle continued on I-526 East as Levi Brown exited at Montague Road. The Cadillac did not try to ram, block, chase or otherwise strike the assailant mother's vehicle belonging to Roy B. Walker.

6. Jasper Terrell Banks swore out an affidavit describing witnessing a silver Durango pulling alongside the left side of the Cadillac and without warning or provocation a passenger hanging out of the passenger window firing gun shots at the Cadillac. Jasper testified in his affidavit that he heard Levi say "I've been hit!"

7. The shooting incident was witnessed by someone other than the owner or operator of the insured vehicle, that being Jasper Terrell Banks, and his signed affidavit attests to the truth of the facts of the accident. State Farm is not disputing that Banks satisfies the witness requirement of 38-77-170 of the SC Code of Laws, but disputes Levi Brown's claim is a valid uninsured motorist claim.

8. Levi Thomas Brown reported this incident within a reasonable amount of time to police and was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident, all in compliance with the uninsured motorist statute section 38-77-170 of the SC Code of Laws, with the qualification that State Farm in no way concedes this is a valid uninsured motorist claim.

9. After coming down the exit ramp to Montague Road, Levi Thomas Brown pulled over and moved to the passenger seat and Jasper Terrell Banks drove Brown to the emergency room where they reported the incident to the North Charleston police who prepared an incident report detailing this description of events and the denial of Brown of either being involved in gang activity or having any idea who the shooter might be or who may own the Durango.

10. The North Charleston police recovered four bullet casings at the area of I-526 East between Dorchester Road and Montague Road as evidence in the course of their investigation of this incident.

11. On 2/10/2013, Roy B. Walker was using his mother's 2003 Cadillac Deville sedan with her express permission.

12. On 2/10/2013, Levi Thomas Brown was using the 2003 Cadillac Deville sedan belonging to Roy B. Walker's mother with Roy B. Walker's express permission.

13. As a result of the gunshot from the unknown assailant in this case, Levi Thomas Brown incurred over $46,000 in medical costs and has a bullet lodged between his heart

and spine. The parties agree that if the uninsured motorist coverage is applicable to the loss and not otherwise excluded, the value of Brown's damages entitles him to the entire $25,000.00 per person bodily injury limit from the uninsured motorist coverage under State Farm's policy on the 2003 Cadillac Deville

14. A copy of the State Farm Mutual Automobile Insurance Company's policy on the 2003 Cadillac Deville is attached as Exhibit A and incorporated by reference.

WE SO STIPULATE:

CLAWSON and STAUBES, LLC

Timothy A. Domin
Bar No.: 65264
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
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Email: tdomin@clawsonandstaubes.com
Attorney for Defendant

WE SO STIPULATE:

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7011 Rivers Avenue, Suite 105
North Charleston, South Carolina 29406
Phone: (843) 569-1700
Fax: (843) 569-1848
Email: rtreacy@sinklaw.com
Attorney for Plaintiff

StateFarm

Certified Policy Record

I, the undersigned, do hereby confirm that I am custodian of the records pertaining to the issuance of policies by State Farm Fire and Casualty Company.

I certify that the attached documents represent a true and accurate record of the terms and conditions of Policy Number 259 7225-B01-40C including any endorsements, if applicable, for the policy term(s) February 01, 2013 to May 19, 2013 and insuring Martha Fleming & Roy Walker of 100 Tweed Ct, Summerville, SC 29483-1743 based on available records.

The following endorsements are included:
6940A AMENDATORY ENDORSEMENT - EFFECTIVE DATE 02-01-12.

It is State Farm's business practice to print a new Declarations Page only when a policy issuance transaction such as a change of coverage occurs. Therefore, the included Declarations Page which was in effect at the time of loss will indicate the policy period of the last policy issuance transaction.

The policy was in effect on the loss date of February 10, 2013.

Michael N. Young
Michael N Young
Underwriting Team Manager
Date: 09/22/2016

1004516

2000 143551 200 03-21-2012

Exhibit A

StateFarm State Farm Fire and Casualty Company
11350 Johns Creek Parkway
Duluth GA 30098

60030-5-F FIRE OVL

DECLARATIONS PAGE

NAMED INSURED
AT1 000195 40-1579-54DF A
FLEMING, MARTHA & WALKER, ROY
100 TWEED CT
SUMMERVILLE SC 29483-1743

POLICY NUMBER 259 7225-B01-40C
POLICY PERIOD AUG 01 2011 to FEB 01 2012
12:01 A.M. Standard Time

AGENT
URQUIT A MORRIS INS AGCY INC
1700 ASHLEY RIVER RD
CHARLESTON, SC 29407-5904

PHONE: (843)556-4111

DO NOT PAY PREMIUMS SHOWN ON THIS PAGE.
IF AN AMOUNT IS DUE, THEN A SEPARATE STATEMENT IS ENCLOSED.

YOUR CAR

YEAR	MAKE	MODEL	BODY STYLE	VEHICLE ID NUMBER	RATE CLASS
2003	CADILLAC	DEVILLE	4DR	1G6KD54Y23U173030	3B00111300

SYMBOLS	COVERAGE & LIMITS	PREMIUMS
A	Liability Coverage	$390.89
	Bodily Injury Limits Each Person / Each Accident	
	$25,000 $50,000	
	Property Damage Limit Each Accident	
	$25,000	
D	Comprehensive Coverage - $500 Deductible	$150.75
G	Collision Coverage - $500 Deductible	$281.51
H	Emergency Road Service Coverage	$2.64
U	Uninsured Motor Vehicle Coverage	$16.38
	Bodily Injury Limits Each Person / Each Accident	
	$25,000 $50,000	
	Property Damage Limit Each Accident	
	$25,000	
W	Underinsured Motor Vehicle Coverage	$39.85
	Bodily Injury Limits Each Person, Each Accident	
	$25,000 $50,000	
	Property Damage Limit Each Accident	
	$25,000	
	Total premium for AUG 01 2011 to FEB 01 2012	$882.02 This is not a bill

IMPORTANT MESSAGES

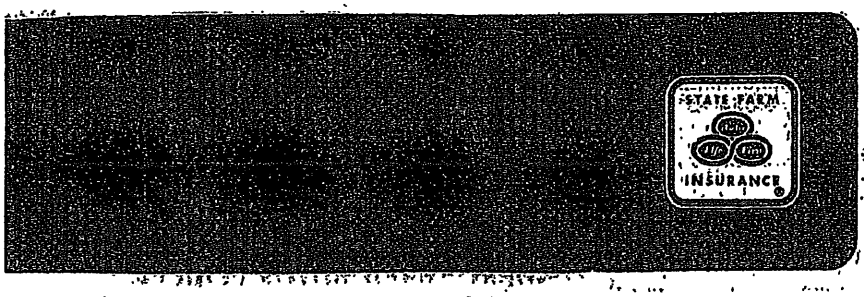
Replaced policy number 2597225-40B.

EXCEPTIONS, POLICY BOOKLET & ENDORSEMENTS (See policy booklet & individual endorsements for coverage details.)

YOUR POLICY CONSISTS OF THIS DECLARATIONS PAGE, THE POLICY BOOKLET -
FORM 9840A, AND ANY ENDORSEMENTS THAT APPLY, INCLUDING THOSE ISSUED TO YOU
WITH ANY SUBSEQUENT RENEWAL NOTICE.
LIENHOLDER- CITIFINANCIAL AUTO, PO BOX 47260, ATLANTA GA 30362-0660.

Agent: URQUIT A MORRIS INS AGCY INC
Telephone: (843)556-4111

00239/03826 See Reverse Side (01e0254c) Prepared AUG-03 2011 1579-342



Please read the policy carefully. If there is an accident, contact your State Farm agent or one of our Claim Offices at once. (See "INSURED'S DUTIES" in this policy booklet.)

Georgia-South Carolina Office
11350 Johns Creek Parkway
Duluth, GA 30098-0001
Phone: (770) 418-5000

State Farm® Car Policy Booklet

South Carolina
Policy Form 9840A

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THIS POLICY

1. This policy consists of:
   a. the most recently issued Declarations Page;
   b. the policy booklet version shown on that Declarations Page; and
   c. any endorsements that apply, including those listed on that Declarations Page as well as those issued in connection with any subsequent renewal of this policy.
2. This policy contains all of the agreements between all named insureds who are shown on the Declarations Page and all applicants and:
   a. *us*; and
   b. any of *our* agents.
3. *We* agree to provide insurance according to the terms of this policy:
   a. based on payment of premium for the coverages chosen; and
   b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET, & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:
      (1) The named insured shown on the Declarations Page is the sole owner of *your car*.
      (2) Neither *you* nor any member of *your* household has, within the past three years, had:
         (a) vehicle insurance canceled or nonrenewed by an insurer; or
         (b) either:
            (i) a license to drive; or
            (ii) a vehicle registration suspended, revoked, or refused.

(3) *Your car* is used for pleasure and business.

4. All named insureds shown on the Declarations Page and all applicants agree by acceptance of this policy that:
   a. the statements in 3.b. above are made by such named insured or applicant and are true; and
   b. *we* provide this insurance on the basis those statements are true.
5. *Your* purchase of this policy may allow *you* to purchase certain coverages, coverage options, coverage deductibles, coverage limits, or coverage terms on other policies from the ***State Farm Companies,*** subject to their applicable eligibility rules.

DEFINITIONS

We define certain words and phrases below for use throughout the policy. Each coverage includes additional definitions only for use with that coverage. These definitions apply to the singular, plural, possessive, and any other form of these words and phrases. Defined words and phrases are printed in boldface italics.

Bodily Injury means bodily injury to a ***person*** and sickness, disease, or death that results from it.

Car means a land motor vehicle with four or more wheels, designed for use primarily on public roads. ***Car*** does not include:

1. Any vehicle while located for use as a dwelling or other premises; or
2. A truck-tractor designed to pull any type of trailer.

Car Business means a business or job where the purpose is to sell, lease, rent, repair, service, modify, transport, store, or park land motor vehicles or any type of trailer.

Financial Responsibility Act means the Motor Vehicle Financial Responsibility Act of South Carolina.

Fungi means any type or form of fungus or fungi and includes:

1. Mold;
2. Mildew; and
3. Any of the following that are produced or released by fungi:
   a. Mycotoxins;
   b. Spores;
   c. Scents; or
   d. Byproducts.

Newly Acquired Car means a ***car*** newly ***owned by you***. A ***car*** ceases to be a ***newly acquired car*** on the earlier of:

1. the effective date and time of a policy, including any binder, issued by ***us*** or any other company that describes the ***car*** as an insured vehicle; or
2. the end of the 14th calendar day immediately following the date the ***car*** is delivered to ***you***.

If a ***newly acquired car*** is not otherwise afforded comprehensive coverage or collision coverage by this or any other policy, then this policy will provide Comprehensive Coverage or Collision Coverage for that ***newly acquired car***, subject to a deductible of $500. Any coverage provided as a result of this paragraph will apply only until the end of the 5th calendar day immediately following the date the ***newly acquired car*** is delivered to ***you***.

Non-Owned Car means a ***car*** that is in the lawful possession of ***you*** or any ***resident relative*** and that neither:

1. is *owned by*:
   a. *you*;
   b. any *resident relative*;
   c. any other *person* who resides primarily in *your* household; or
   d. an employer of any *person* described in a., b., or c. above; nor
2. has been operated by, rented by, or in the possession of:
   a. *you*; or
   b. any *resident relative*

   during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or *loss*.

Occupying means in, on, entering, or exiting.

Our means the Company issuing this policy as shown on the Declarations Page.

Owned By means:

1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

Pedestrian means a *person* who is not *occupying*:

1. a motorized vehicle; or
2. a vehicle designed to be pulled by a motorized vehicle.

Person means a human being.

Private Passenger Car means:

1. a *car* of the private passenger type, other than a pickup truck, van, minivan, or sport utility vehicle, designed primarily to carry *persons* and their luggage; or
2. a pickup truck, van, minivan, or sport utility vehicle:
   a. that is not used for:
      (1) wholesale; or
      (2) retail pickup or delivery; and
   b. that has a Gross Vehicle Weight Rating of 10,000 pounds or less.

Resident Relative means a *person*, other than *you*, who resides primarily with the first *person* shown as a named insured on the Declarations Page and who is:

1. related to that named insured or his or her spouse by blood, marriage, or adoption, including an unmarried and unemancipated child of either who is away at school and otherwise maintains his or her primary residence with that named insured; or
2. a ward or a foster child of that named insured, his or her spouse, or a *person* described in 1. above.

State Farm Companies means one or more of the following:

1. State Farm Mutual Automobile Insurance Company;
2. State Farm Fire and Casualty Company; and
3. Subsidiaries or affiliates of either 1. or 2. above.

Temporary Substitute Car means a *car* that is in the lawful possession of the *person* operating it and that:

1. replaces *your car* for a short time while *your car* is out of use due to its:
   a. breakdown;
   b. repair;
   c. servicing;
   d. damage; or
   e. theft; and
2. neither *you* nor the *person* operating it own or have registered.

If a *car* qualifies as both a *non-owned car* and a *temporary substitute car*, then it is considered a *temporary substitute car* only.

Trailer means:

1. a trailer:
   a. designed to be pulled by a *private passenger car*;
   b. not designed to carry *persons*; and
   c. while not used as premises for office, store, or display purposes; or
2. a farm implement or farm wagon while being pulled on public roads by a *car*.

Us means the Company issuing this policy as shown on the Declarations Page.

We means the Company issuing this policy as shown on the Declarations Page.

You or *Your* means the named insured or named insureds shown on the Declarations Page. If a named insured shown on the Declarations Page is a *person*, then "*you*" or "*your*" includes the spouse of the first *person* shown as a named insured if the spouse resides primarily with that named insured.

Your Car means the vehicle shown under "YOUR CAR" on the Declarations Page. *Your car* does not include a vehicle that *you* no longer own or lease.

If a *car* is shown on the Declarations Page under "YOUR CAR", and *you* ask *us* to replace it with a *car* newly *owned by you*, then the *car* being replaced will continue to be considered *your car* until the earliest of:

1. the end of the 30th calendar day immediately following the date the *car* newly *owned by you* is delivered to *you*;
2. the date this policy is no longer in force; or
3. the date *you* no longer own or lease the *car* being replaced.

LIABILITY COVERAGE

This policy provides Liability Coverage if "A" is shown under "SYMBOLS" on the Declarations Page.

Additional Definition

Insured means:

1. *you* and *resident relatives* for:
   a. the ownership, maintenance, or use of:
      (1) *your car*;
      (2) a *newly acquired car*; or
      (3) a *trailer*; and
   b. the maintenance or use of:
      (1) a *non-owned car*; or
      (2) a *temporary substitute car*;

   the first *person* shown as a named insured on the Declarations Page and that named insured's spouse who resides primarily with that named insured for the maintenance or use of a *car* that is *owned by*, or furnished by an employer to, a *person* who resides primarily in *your* household, but only if such *car* is neither *owned by*, nor furnished by an employer to, the first *person* shown as a named insured on the Declarations Page or that *person's* spouse;
3. any other *person* for his or her use of:
   a. *your car*;
   b. a *newly acquired car*;
   c. a *temporary substitute car*; or
   d. a *trailer* while attached to a *car* described in a., b., or c. above.

   Such vehicle must be used with the expressed or implied consent of *you*; and
4. any other *person* or organization vicariously liable for the use of a vehicle by an *insured* as defined in 1., 2., or 3. above, but only for such vicarious liability. This

provision applies only if the vehicle is neither *owned by*, nor hired by, that other *person* or organization.

Insured does not include the United States of America or any of its agencies.

Insuring Agreement

We will pay:

a. damages an *insured* becomes legally liable to pay because of:

(1) *bodily injury* to others; and

(2) damage to property

caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;

b. attorney fees for attorneys chosen by *us* to defend an *insured* who is sued for such damages; and

c. court costs charged to an *insured* and resulting from that part of a lawsuit:

(1) that seeks damages payable under this policy's Liability Coverage; and

(2) against which *we* defend an *insured* with attorneys chosen by *us*.

We have no duty to pay attorney fees and court costs incurred after *we* deposit in court or pay the amount due under this policy's Liability Coverage.

2. *We* have the right to:

a. investigate, negotiate, and settle any claim or lawsuit;

b. defend an *insured* in any claim or lawsuit; with attorneys chosen by *us*; and

c. appeal any award or legal decision

for damages payable under this policy's Liability Coverage.

Supplementary Payments

We will pay, in addition to the damages, fees, and costs described in the **Insuring Agreement** above, the interest, premiums, costs, and expenses listed below that result from such accident.

1. Interest on damages owed by the *insured* that accrues:

a. before a judgment, where owed by law, but only on that part of the judgment *we* pay; and

b. after a judgment. *We* will not pay interest on damages paid or payable by a party other than the *insured* or *us*.

We have no duty to pay interest that accrues after *we* deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage.

2. Premiums for bonds, provided by a company chosen by *us*, required to appeal a decision in a lawsuit against an *insured*. *We* have no duty to:

a. pay for bonds that exceed this policy's applicable Liability Coverage limit;

b. furnish or apply for any bonds; or

c. pay premiums for bonds purchased after *we* deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage; and

3. The following costs and expenses if related to and incurred after a lawsuit has been filed against an *insured*:

a. Loss of wages or salary, but not other income, up to $200 for each day an *insured* attends, at *our* request:

(1) an arbitration;

(2) a mediation; or

(3) a trial of a lawsuit; and

b. Reasonable expenses incurred by an *insured* at *our* request other than loss of wages, salary, or other income.

The amount of any of the costs or expenses listed above that are incurred by an *insured* must be reported to *us* before *we* will pay such incurred costs or expenses.

Limits

1. The Liability Coverage limits for ***bodily injury*** are shown on the Declarations Page under "Liability Coverage – Bodily Injury Limits – Each Person, Each Accident."

   a. The limit shown under "Each Person" is the most ***we*** will pay for all damages resulting from ***bodily injury*** to any one ***person*** injured in any one accident. ***"Bodily injury*** to any one ***person"*** includes all injury and damages to other ***persons*** resulting from that ***bodily injury,*** and all emotional distress resulting from that ***bodily injury*** sustained by other ***persons*** who do not sustain that ***bodily injury.***

   b. The limit shown under "Each Accident" is the most ***we*** will pay, subject to the limit for "Each Person", for all damages resulting from ***bodily injury*** to two or more ***persons*** injured in the same accident.

2. The Liability Coverage limit for damage to property is shown on the Declarations Page under "Liability Coverage – Property Damage Limit – Each Accident". The limit shown is the most ***we*** will pay for all damages resulting from damage to property in any one accident.

3. These Liability Coverage limits are the most ***we*** will pay regardless of the number of:

   a. ***insureds***;

   b. claims made;

   c. vehicles insured; or

   d. vehicles involved in the accident.

Nonduplication

We will not pay any damages or expenses under Liability Coverage that have already been paid under Uninsured Motor Vehicle Coverage of any policy issued by the ***State Farm Companies*** to ***you*** or any ***resident relative.***

Exclusions

THERE IS NO COVERAGE FOR AN ***INSURED***:

1. TO THE EXTENT THE LIABILITY COVERAGE LIMITS OF THIS POLICY EXCEED THE LIABILITY COVERAGE LIMITS REQUIRED BY THE ***FINANCIAL RESPONSIBILITY ACT*** IF SUCH ***INSURED*** INTENTIONALLY CAUSES ***BODILY INJURY*** OR DAMAGE TO PROPERTY;
2. OR FOR THAT ***INSURED'S*** INSURER FOR ANY OBLIGATION UNDER ANY TYPE OF WORKERS' COMPENSATION, DISABILITY, OR SIMILAR LAW;
3. FOR ***BODILY INJURY*** TO THAT ***INSURED'S*** EMPLOYEE WHICH ARISES OUT OF THAT EMPLOYEE'S EMPLOYMENT. This exclusion does not apply to that ***insured's*** household employee who is neither covered, nor required to be covered, under workers' compensation insurance;
4. FOR ***BODILY INJURY*** TO THAT ***INSURED'S*** FELLOW EMPLOYEE WHILE THE FELLOW EMPLOYEE IS IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT. This exclusion does not apply to ***you*** and ***resident relatives*** who are legally liable for ***bodily injury*** to fellow employees;
5. FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN ***INSURED***;
6. FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS BEING USED TO CARRY ***PERSONS*** FOR A CHARGE. This exclusion does not apply to the use of a ***private passenger car*** on a share-the-expense basis;
7. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH

THAT *INSURED'S* EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A *CAR BUSINESS*. This exclusion does not apply to:

a. *you*;

b. any *resident relative*; or

c. any agent, employee, or business partner of *you* or any *resident relative*; or

d. any *person* other than a *person* described in a., b., or c. above up to the liability coverage limits required by the *Financial Responsibility Act*;

while maintaining or using *your car*, a *newly acquired car*, a *temporary substitute car*, or a *trailer owned by you*;

8. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE. This exclusion does not apply up to the liability coverage limits required by the *Financial Responsibility Act* while an *insured* is valet parking *your car*, a *newly acquired car*, a *temporary substitute car*, or a *trailer owned by you*;

9. WHILE MAINTAINING OR USING ANY VEHICLE OTHER THAN *YOUR CAR*, A *NEWLY ACQUIRED CAR*, A *TEMPORARY SUBSTITUTE CAR*, OR A *TRAILER* IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a *private passenger car*;

10. FOR DAMAGE TO PROPERTY WHILE IT IS:

a. *OWNED BY*;

b. RENTED TO;

c. USED BY;

d. IN THE CARE OF; OR

e. TRANSPORTED BY

YOU, A *RESIDENT RELATIVE*, OR THE *PERSON* WHO IS LEGALLY LIABLE FOR THE DAMAGE. This exclusion does not apply to damage to a:

a. motor vehicle *owned by* the employer of *you* or any *resident relative* if such damage is caused by an *insured* while operating another motor vehicle;

b. residence while rented to or leased to an *insured*; or

c. private garage while rented to or leased to an *insured*;

11. FOR LIABILITY ASSUMED UNDER ANY CONTRACT OR AGREEMENT;

12. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION;

13. WHILE USING A *TRAILER* WITH A MOTOR VEHICLE IF THAT *INSURED* IS NOT PROVIDED LIABILITY COVERAGE BY THIS POLICY FOR THE USE OF THAT MOTOR VEHICLE;

14. FOR THE OWNERSHIP, MAINTENANCE, OR USE OF ANY VEHICLE WHILE IT IS:

a. OFF PUBLIC ROADS AND BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

This exclusion (14.) does not apply to *your car* up to the liability coverage limits required by the *Financial Responsibility Act*; OR

15. WHO IS AN EMPLOYEE OF THE UNITED STATES OF AMERICA OR ANY OF ITS AGENCIES, IF THE PROVISIONS OF THE FEDERAL TORT CLAIMS ACT APPLY.

If Other Liability Coverage Applies

1. If Liability Coverage provided by this policy and one or more other Car Policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same accident, then:
   a. the Liability Coverage limits of such policies will not be added together to determine the most that may be paid; and
   b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.
2. The Liability Coverage provided by this policy applies as primary coverage for the ownership, maintenance, or use of ***your car*** or a ***trailer*** attached to it.
   a. If:
      (1) this is the only Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** that provides Liability Coverage which applies to the accident as primary coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as primary coverage for the same accident,

   then ***we*** will pay the proportion of damages payable as primary that ***our*** applicable limit bears to the sum of ***our*** applicable limit and the limits of all other liability coverage that apply as primary coverage.
   b. If:
      (1) more than one Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** provides Liability Coverage which applies to the accident as primary coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as primary coverage for the same accident,

   then the ***State Farm Companies*** will pay the proportion of damages payable as primary that the maximum amount that may be paid by the ***State Farm Companies*** as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as primary coverage.
3. Except as provided in 2. above, the Liability Coverage provided by this policy applies as excess coverage.
   a. If:
      (1) this is the only Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** that provides Liability Coverage which applies to the accident as excess coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

   then ***we*** will pay the proportion of damages payable as excess that ***our*** applicable limit bears to the sum of ***our*** applicable limit and the limits of all other liability coverage that apply as excess coverage.
   b. If:
      (1) more than one Car Policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** provides Liability Coverage which applies to the accident as excess coverage; and
      (2) liability coverage provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

then the ***State Farm Companies*** will pay the proportion of damages payable as excess that the maximum amount that may be paid by the ***State Farm Companies*** as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as excess coverage.

Required Out-of-State Liability Coverage

If:

1. an ***insured*** is in another state of the United States of America, a territory or possession of the United States of America, the District of Columbia, or any province or territory of Canada, and as a nonresident becomes subject to its motor vehicle compulsory insurance law, financial responsibility law, or similar law; and
2. this policy does not provide at least the minimum liability coverage required by such law for such nonresident,

then this policy will be interpreted to provide the minimum liability coverage required by such law.

This provision does not apply to liability coverage required by law for motor carriers of passengers or motor carriers of property.

Financial Responsibility Certification

When this policy is certified under any law as proof of future financial responsibility, and while required during the policy period, this policy will comply with such law to the extent required.

PERSONAL INJURY PROTECTION COVERAGE

This policy provides Personal Injury Protection Coverage if "P" with a number beside it is shown under "SYMBOLS" on the Declarations Page. "P" with a number beside it is *your* "coverage symbol".

Check *your* coverage symbol with the **Schedule** in the provision titled **Limits** for the choice of coverage *you* made.

Additional Definitions

Insured means:

1. *you* and *resident relatives*:
   a. while *occupying* a *motor vehicle* other than a motorcycle; or
   b. if struck as a *pedestrian* by a *motor vehicle*; or
2. any other *person* while *occupying*:
   a. *your car*;
   b. a *newly acquired car*;
   c. a *temporary substitute car*; or
   d. a *trailer* while attached to a *car* described in a., b., or c. above.

   Such vehicle must be used with the expressed or implied consent of *you*.

Medical Expenses mean *reasonable expenses* for *medical services*.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the *bodily injury*;
2. rendered by a healthcare provider:
   a. who is licensed as a healthcare provider if a license is required by law; and
   b. within the legally authorized scope of that healthcare provider's practice;
3. commonly and customarily recognized throughout the medical profession and

within the United States of America as appropriate for the treatment of the ***bodily injury***;

4. primarily designed to serve a medical purpose;
5. not experimental; and
6. not for research purposes.

Motor Vehicle means a vehicle or trailer of a kind required to be registered under South Carolina law.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar ***medical services*** in the geographical area in which the charges were incurred;
2. The fee specified in any fee schedule:
   a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where ***medical services*** are provided; and
   b. as prescribed or authorized by the law of the state where ***medical services*** are provided;
3. The fees agreed to by both the ***insured's*** healthcare provider and ***us***; or
4. The fees agreed upon between the ***insured's*** healthcare provider and a third party when ***we*** have a contract with such third party.

Insuring Agreement

Medical Expenses and **Funeral Expenses** apply to all Personal Injury Protection Coverages. **Loss of Income** and **Essential Services Expenses** apply only to coverages with coverage symbol P1, P2, P3, P4, P5, P6, and P7.

1. **Medical Expenses**

   We will pay ***medical expenses*** incurred because of ***bodily injury*** that is sustained by an ***insured*** and caused by accident resulting from the maintenance or use of a ***motor vehicle*** as a vehicle if:
   a. that ***insured*** is first provided ***medical services*** within one year immediately following the date of the accident; and
   b. such ***medical expenses*** are for ***medical services*** that are provided within three years immediately following the date of the accident.
2. **Funeral Expenses**

   We will pay funeral expenses incurred for an ***insured*** who dies within three years immediately following the date of a ***motor vehicle*** accident if the death is a direct result of ***bodily injury*** sustained in such accident.
3. **Loss of Income**

   We will pay 85% of an ***insured's*** actual loss of earnings from work due to ***bodily injury*** that is sustained by an ***insured*** and caused by a ***motor vehicle*** accident. This applies only if the ***insured*** was receiving earnings from work at the time of the accident. The loss must be incurred within three years of the date of the accident and while the ***insured*** is living.
4. **Essential Services Expenses**

   We will pay reasonable expenses incurred for needed services the ***insured*** would have done for his or her family, but is unable to do because of ***bodily injury*** that is sustained by that ***insured*** and caused by a ***motor vehicle*** accident. This benefit applies only if the ***insured*** was not receiving earnings from work at the time of the accident. The expense must be incurred within three years of the date of the accident and while the ***insured*** is living.

Determining Medical Expenses

We have the right to:

1. obtain and use:
   a. utilization reviews;
   b. peer reviews; and
   c. medical bill reviews

   to determine if the incurred charges are ***medical expenses***;
2. use a medical examination of the ***insured*** to determine if:
   a. the ***bodily injury*** was caused by a ***motor vehicle*** accident; and
   b. the expenses incurred are ***medical expenses***; and
3. enter into a contract with a third party that has an agreement with the ***insured's*** healthcare provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to:
   a. whether incurred charges are ***medical expenses***; or
   b. the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses

   then the disagreement will be resolved by arbitration upon written request of the ***insured*** or ***us***.
2. The arbitration will take place in the county in which the ***insured*** resides unless the parties agree to another location.

   The ***insured*** and ***we*** will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the ***insured*** or ***we*** may petition a court that has jurisdiction to select the third arbitrator.

   Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.
3. The arbitrators shall only decide whether incurred charges are ***medical expenses*** and the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.
4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:
   a. ***us***;
   b. the ***insured***;
   c. any assignee of the ***insured***; and
   d. any ***person*** or organization with whom the ***insured*** expressly or impliedly contracts for ***medical services***, funeral services, or essential services.
5. Subject to 1., 2., 3., and 4. above, state court rules governing procedure and admission of evidence will be used.
6. *We* do not waive any of ***our*** rights by submitting to arbitration.

Limits

1. The most ***we*** will pay is the amount shown under "Aggregate Limit" in the **Schedule** for ***your*** coverage symbol. This limit is the most ***we*** will pay for all loss and expense combined, incurred by or on behalf of any one ***insured*** as a result of any one accident, regardless of the number of:
   a. insureds;
   b. claims made;
   c. vehicles insured; or
   d. vehicles involved in the accident.
2. Subject to the aggregate limit shown in the **Schedule** for ***your*** coverage symbol, the most ***we*** will pay for funeral expenses incurred for any one ***insured*** is $3,000.

3. **Schedule**

Coverage Symbol	Medical Expenses	Funeral Expenses	Loss of Income	Essential Services Expenses	Aggregate Limit
P1	Yes	Yes	Yes	Yes	$1,000
P2	Yes	Yes	Yes	Yes	$1,500
P3	Yes	Yes	Yes	Yes	$2,000
P4	Yes	Yes	Yes	Yes	$2,500
P5	Yes	Yes	Yes	Yes	$5,000
P6	Yes	Yes	Yes	Yes	$10,000
P7	Yes	Yes	Yes	Yes	$25,000
P8	Yes	Yes	No	No	$1,000
P9	Yes	Yes	No	No	$1,500
P10	Yes	Yes	No	No	$2,000
P11	Yes	Yes	No	No	$2,500
P12	Yes	Yes	No	No	$5,000
P13	Yes	Yes	No	No	$10,000
P14	Yes	Yes	No	No	$25,000

Exclusions

THERE IS NO COVERAGE FOR AN ***INSURED***:

1. WHO INTENTIONALLY CAUSES AN ACCIDENT WHICH RESULTS IN THAT ***INSURED'S BODILY INJURY***;
2. WHILE VOLUNTARILY ***OCCUPYING*** A ***MOTOR VEHICLE*** KNOWN BY THAT ***PERSON*** TO BE STOLEN;
3. WHILE COMMITTING A FELONY;
4. WHILE ATTEMPTING TO ELUDE A POLICE OFFICER;
5. WHILE ***OCCUPYING***, USING, OR MAINTAINING A MOTORCYCLE;
6. WHO IS EITHER ***OCCUPYING*** OR STRUCK AS A ***PEDESTRIAN*** BY A VEHICLE, ***OWNED BY*** THAT ***INSURED***, ***YOU***, OR ANY ***RESIDENT RELATIVE*** IF IT IS NOT ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR***;
7. WHO IS ***OCCUPYING*** A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN ***INSURED***;
8. WHO IS ***OCCUPYING*** A VEHICLE WHILE IT IS BEING USED TO CARRY ***PERSONS*** FOR A CHARGE. This exclusion does not apply to:
   a. the use of a ***private passenger car*** on a share-the-expense basis; or
   b. an ***insured*** while ***occupying*** a ***non-owned car*** as a passenger;
9. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT ***INSURED'S*** EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A ***CAR BUSINESS***. This exclusion does not apply to:
   a. ***you***;
   b. any ***resident relative***; or
   c. any agent, employee, or business partner of a. or b. above.

   while maintaining or using ***your car***, a ***newly acquired car***, a ***temporary substitute car***, or a ***trailer owned by you***;

10. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE;

11. WHILE MAINTAINING OR USING A *NON-OWNED CAR* IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a *private passenger car*;

12. WHO IS EITHER *OCCUPYING* OR STRUCK AS A *PEDESTRIAN* BY A VEHICLE THAT:
    a. IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS;
    b. RUNS ON RAILS OR CRAWLER-TREADS; OR
    c. IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES;

13. WHOSE *BODILY INJURY* RESULTS FROM WAR OF ANY KIND;

14. WHOSE *BODILY INJURY* RESULTS FROM:
    a. NUCLEAR REACTION;
    b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
    c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

15. WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIREARM;

16. WHOSE *BODILY INJURY* RESULTS FROM EXPOSURE TO *FUNGI*; OR

17. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS:
    a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
    b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (17.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Personal Injury Protection Coverage or Similar Vehicle Insurance Applies

1. An *insured* shall not recover for the same expense or loss under both this coverage and other similar vehicle insurance.

2. If Personal Injury Protection Coverage is provided by this policy and one or more other vehicle policies issued to *you* or any *resident relative* by the *State Farm Companies* apply to the same *bodily injury*, then:
    a. the Personal Injury Protection Coverage limits of such policies shall not be added together to determine the most that may be paid; and
    b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. *We* may choose one or more policies from which to make payment.

3. The Personal Injury Protection Coverage provided by this policy applies as primary coverage for an *insured* who sustains *bodily injury* while *occupying your car* or a *trailer* attached to it.
    a. If:
        (1) this is the only vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and
        (2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as primary coverage for the same accident,

then *we* will pay the proportion of expenses or loss payable as primary that *our* applicable limit bears to the sum of *our* applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

b. If:

(1) more than one vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as primary coverage for the same accident,

then the *State Farm Companies* will pay the proportion of expenses or loss payable as primary that the maximum amount that may be paid by the *State Farm Companies* as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

4. Except as provided in 3. above, the Personal Injury Protection Coverage provided by this policy applies as excess coverage, but only in the amount by which the limits of this coverage exceed the primary coverage.

a. If:

(1) this is the only vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as excess coverage for the same accident,

then *we* will pay the proportion of expenses or loss payable as excess that *our* applicable limit bears to the sum of *our* applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

b. If:

(1) more than one vehicle policy issued to *you* or any *resident relative* by the *State Farm Companies* provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

(2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the *State Farm Companies* also applies as excess coverage for the same accident,

then the *State Farm Companies* will pay the proportion of expenses or loss payable as excess that the maximum amount that may be paid by the *State Farm Companies* as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

Workers' Compensation Coordination

Any Personal Injury Protection Coverage provided by this policy applies as excess over any benefits recovered under any workers' compensation law or any other similar law.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;

3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent *person*;
4. A *person* authorized by law to receive such payment; or
5. Any *person* or organization that provides the *medical services*, funeral services, or other services payable under this coverage.

MEDICAL PAYMENTS COVERAGE

This policy provides Medical Payments Coverage if "C" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. *you* and *resident relatives*:
   a. while *occupying*:
      (1) *your car*;
      (2) a *newly acquired car*;
      (3) a *temporary substitute car*;
      (4) a *non-owned car*; or
      (5) a *trailer* while attached to a *car* described in (1), (2), (3), or (4) above; or
   b. if struck as a *pedestrian* by a motor vehicle or any type of trailer; and
2. any other *person* while *occupying*:
   a. *your car*;
   b. a *newly acquired car*;
   c. a *temporary substitute car*; or
   d. a *trailer* while attached to a *car* described in a., b., or c. above.

   Such vehicle must be used with the expressed or implied consent of *you*.

Medical Expenses mean *reasonable expenses* for *medical services*.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the *bodily injury*;
2. rendered by a healthcare provider:
   a. who is licensed as a healthcare provider if a license is required by law; and
   b. within the legally authorized scope of that healthcare provider's practice;
3. commonly and customarily recognized throughout the medical profession and within the United States of America as appropriate for the treatment of the *bodily injury*;
4. primarily designed to serve a medical purpose;
5. not experimental; and
6. not for research purposes.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar *medical services* in the geographical area in which the charges were incurred;
2. The fee specified in any fee schedule:
   a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where *medical services* are provided; and
   b. as prescribed or authorized by the law of the state where *medical services* are provided;
3. The fees agreed to by both the *insured's* healthcare provider and *us*; or

4. The fees agreed upon between the *insured's* healthcare provider and a third party when *we* have a contract with such third party.

Insuring Agreement

We will pay:

1. *medical expenses* incurred because of *bodily injury* that is sustained by an *insured* and caused by accident resulting from the maintenance or use of a motor vehicle as a vehicle if:
   a. that *insured* is first provided *medical services* within one year immediately following the date of the accident; and
   b. such *medical expenses* are for *medical services* that are provided within three years immediately following the date of the accident; and
2. funeral expenses incurred for an *insured* who dies within three years immediately following the date of a motor vehicle accident if the death is a direct result of *bodily injury* sustained in such accident.

Determining Medical Expenses

We have the right to:

1. obtain and use:
   a. utilization reviews;
   b. peer reviews; and
   c. medical bill reviews

   to determine if the incurred charges are *medical expenses*;
2. use a medical examination of the *insured* to determine if:
   a. the *bodily injury* was caused by a motor vehicle accident; and
   b. the expenses incurred are *medical expenses*; and
3. enter into a contract with a third party that has an agreement with the *insured's* healthcare provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to whether incurred charges are *medical expenses*, then the disagreement will be resolved by arbitration upon written request of the *insured* or *us*.
2. The arbitration will take place in the county in which the *insured* resides unless the parties agree to another location.

   The *insured* and *we* will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the *insured* or *we* may petition a court that has jurisdiction to select the third arbitrator.

   Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.
3. The arbitrators shall only decide whether incurred charges are *medical expenses*. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.
4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:
   a. *us*;
   b. the *insured*;
   c. any assignee of the *insured*; and
   d. any *person* or organization with whom the *insured* expressly or impliedly contracts for *medical services*.
5. Subject to 1., 2., 3., and 4. above, state court rules governing procedure and admission of evidence will be used.
6. *We* do not waive any of *our* rights by submitting to arbitration.

Limit

The Medical Payments Coverage limit is shown on the Declarations Page under "Medical Payments Coverage – Limit – Each Person". This limit is the most *we* will pay for the *medical expenses* and funeral expenses combined, incurred by or on behalf of any one *insured* as a result of any one accident, regardless of the number of:

1. *insureds*;
2. claims made;
3. vehicles insured; or
4. vehicles involved in the accident.

Subject to the limit shown on the Declarations Page, the most *we* will pay for funeral expenses incurred for any one *insured* is $3,000.

Exclusions

THERE IS NO COVERAGE FOR AN *INSURED*:

1. WHO IS STRUCK AS A *PEDESTRIAN* BY A MOTOR VEHICLE *OWNED BY* THAT *INSURED* OR *YOU*, IF IT IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*;
2. IF ANY WORKERS' COMPENSATION LAW OR ANY SIMILAR LAW APPLIES TO THAT *INSURED'S BODILY INJURY*;
3. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
4. WHO IS *OCCUPYING* A VEHICLE WHILE IT IS BEING USED TO CARRY *PERSONS* FOR A CHARGE. This exclusion does not apply to:
   a. the use of a *private passenger car* on a share-the-expense basis; or
   b. an *insured* while *occupying* a *non-owned car* as a passenger;
5. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT *INSURED'S* EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A *CAR BUSINESS*. This exclusion does not apply to:
   a. *you*;
   b. any *resident relative*; or
   c. any agent, employee, or business partner of a. or b. above

   while maintaining or using *your car*, a *newly acquired car*, a *temporary substitute car*, or a *trailer owned by you*;
6. WHILE THAT *INSURED* IS VALET PARKING A VEHICLE;
7. WHILE MAINTAINING OR USING A *NON-OWNED CAR* IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS* OR VALET PARKING. This exclusion does not apply to the maintenance or use of a *private passenger car*;
8. WHO IS EITHER *OCCUPYING* OR STRUCK AS A *PEDESTRIAN* BY A VEHICLE THAT IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES;
9. WHO IS STRUCK AS A *PEDESTRIAN* BY A VEHICLE THAT:
   a. IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
   b. RUNS ON RAILS OR CRAWLER-TREADS;
10. WHOSE *BODILY INJURY* RESULTS FROM WAR OF ANY KIND;
11. WHOSE *BODILY INJURY* RESULTS FROM:
    a. NUCLEAR REACTION;
    b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
    c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

12. WHOSE ***BODILY INJURY*** RESULTS FROM THE DISCHARGE OF A FIREARM;

13. WHOSE ***BODILY INJURY*** RESULTS FROM EXPOSURE TO ***FUNGI***; OR

14. WHO IS ***OCCUPYING*** A VEHICLE WHILE IT IS:

    a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

    b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Medical Payments Coverage or Similar Vehicle Insurance Applies

1. An ***insured*** shall not recover for the same ***medical expenses*** or funeral expenses under both this coverage and other medical payments coverage or similar vehicle insurance.

2. If Medical Payments Coverage provided by this policy and one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same ***bodily injury***, then:

    a. the Medical Payments Coverage limits of such policies shall not be added together to determine the most that may be paid; and

    b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

3. If other medical payments coverage, personal injury protection coverage, or similar vehicle insurance applies, then the Medical Payments Coverage provided by this policy applies as excess coverage.

    a. If:

        (1) this is the only vehicle policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** that provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

        (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

    then ***we*** will pay the proportion of ***medical expenses*** and funeral expenses payable as excess that ***our*** applicable limit bears to the sum of ***our*** applicable limit and the limits of all other medical payments coverage or similar vehicle insurance that apply as excess coverage.

    b. If:

        (1) more than one vehicle policy issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and

        (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same accident,

    then the ***State Farm Companies*** will pay the proportion of ***medical expenses*** and funeral expenses payable as excess that the maximum amount that may be paid by the ***State Farm Companies*** as determined in 2. above

b. for *bodily injury* under Liability Coverage of any policy issued by the *State Farm Companies* to *you* or any *resident relative*;

2. that:
   a. have already been paid;
   b. could have been paid; or
   c. could be paid

   to or for the *insured* under any workers' compensation law, disability benefits law, or similar law; or

3. that are *property damage* paid or payable under any policy of property insurance.

Exclusions

THERE IS NO COVERAGE:

1. FOR AN *INSURED* WHO, WITHOUT *OUR* WRITTEN CONSENT, SETTLES WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* OR *PROPERTY DAMAGE* AND THEREBY IMPAIRS *OUR* RIGHT TO RECOVER *OUR* PAYMENTS;
2. TO THE EXTENT THE UNINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE *FINANCIAL RESPONSIBILITY ACT*:
   a. FOR AN *INSURED* WHO SUSTAINS *BODILY INJURY* WHILE *OCCUPYING* A MOTOR VEHICLE *OWNED BY YOU* OR ANY *RESIDENT RELATIVE* IF:
      (1) THE MOTOR VEHICLE IS NOT *YOUR CAR* OR A *NEWLY ACQUIRED CAR*; AND
      (2) IT WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;
   b. IF THE *UNINSURED MOTOR VEHICLE* IS *OWNED BY YOU* OR ANY *RESIDENT RELATIVE*; OR
   c. FOR *PROPERTY DAMAGE*:
      (1) TO A MOTOR VEHICLE; OR
      (2) IN A MOTOR VEHICLE *OWNED BY YOU* OR ANY *RESIDENT RELATIVE* IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;
3. FOR *PROPERTY DAMAGE* THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF *YOUR CAR* OR A *NEWLY ACQUIRED CAR*;
4. FOR AN *INSURED* WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIREARM;
5. TO THE EXTENT IT BENEFITS:
   a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;
   b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR
   c. ANY PROPERTY INSURER;
6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION; OR
7. FOR THE FIRST $200 OF *PROPERTY DAMAGE* SUSTAINED BY EACH *INSURED* IN EACH ACCIDENT.

If Other Uninsured Motor Vehicle Coverage Applies

1. The Uninsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an *insured* who sustains *bodily injury* or *property damage* while *occupying your car*.

2. Except as provided in item 1. above, the Uninsured Motor Vehicle Coverage provided by this policy applies as excess coverage.

3. If:

   a. *you* or any *resident relative* sustains *bodily injury* or *property damage*:

      (1) while *occupying* a motor vehicle not *owned by you* or any *resident relative*; or

      (2) while not *occupying* a motor vehicle; and

   b. Uninsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to *you* or any *resident relative* by the *State Farm Companies* apply to the same *bodily injury* or *property damage*, then

   the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. *We* may choose one or more policies from which to make payment.

4. If *you* or any *resident relative* sustains *bodily injury* or *property damage* while *occupying* a motor vehicle other than *your car* that is *owned by you* or any *resident relative*, then this coverage applies only to the extent of the uninsured motor vehicle coverage applicable to the motor vehicle that the *insured* was *occupying*.

   However, if the motor vehicle that the *insured* was *occupying* was not insured for uninsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies combined that are issued to *you* or any *resident relative* by the *State Farm Companies* is the minimum limits required by the *Financial Responsibility Act*. *We* may choose one or more policies from which to make payment.

5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources provide uninsured motor vehicle coverage for the same damages on a:

   a. primary basis, then *we* will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as primary coverage; or

   b. excess basis, then *we* will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as excess coverage.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;
3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent *person*; or
4. A *person* authorized by law to receive such payment.

UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "W" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. *you*;
2. *resident relatives*;
3. any other *person* while *occupying* or using:
   a. *your car*;
   b. a *newly acquired car*; or
   c. a *temporary substitute car*;

   with the expressed or implied consent of *you*; and
4. any *person* to the extent he or she may recover damages under a state wrongful death statute because of the death of an *insured* under 1., 2., or 3. above.

Motor Vehicle means a self-propelled vehicle or trailer designed for use on public roads, but does not include tractor engines, road rollers, farm trailers, tractor cranes, power shovels, well drillers, or electric trolleys.

Property Damage means damage to property of the *insured*.

Underinsured Motor Vehicle means a *motor vehicle* the ownership, maintenance, and use of which is either:

1. insured or bonded for bodily injury and property damage liability at the time of the accident; or
2. self-insured under any motor vehicle financial responsibility law, any motor carrier law, or any similar law

in an amount that is at least equal to the amount required by the *Financial Responsibility Act* and:

1. the amount of the insurance, bonds, and self-insurance from all sources is less than the amount of the *insured's* damages; or
2. the *insured's* damages exceed any damages cap or limitation imposed by statute.

Underinsured Motor Vehicle does not include a motor vehicle while located, for use as a dwelling or other premises.

Insuring Agreement

We will pay damages for ***bodily injury*** and ***property damage*** an *insured* is legally entitled to recover from the owner or driver of an ***underinsured motor vehicle***. The ***bodily injury*** must be sustained by an *insured*. The ***bodily injury*** and ***property damage*** must be caused by an accident that involves the operation, maintenance, or use of an ***underinsured motor vehicle***.

We will pay only if all bodily injury and property damage liability bonds, policies, and self-insurance plans that apply to the ***insured's bodily injury*** or ***property damage*** have been:

1. used up by payment of judgments or settlements; or
2. paid to the extent required by any damages cap or limitation imposed by statute.

Our Right to Defend

We have the right to appear and defend in the name of the owner and driver of the ***underinsured motor vehicle*** on the issues of legal liability of, and the damages owed by, such owner or driver.

Limits

1. The Underinsured Motor Vehicle Coverage limits are shown on the Declarations Page under "Underinsured Motor Vehicle Coverage – Bodily Injury Limits – Each Person, Each Accident".
   a. The most *we* will pay for all damages resulting from ***bodily injury*** to any one *person* injured in any one accident is the lesser of:
      (1) the amount of all damages resulting from that ***bodily injury*** reduced by the sum of all payments for damages resulting from that

bodily injury made by or on behalf of any ***person*** or organization who is or may be held legally liable for that ***bodily injury***; or

(2) the limit shown under "Each Person".

"***Bodily injury*** to any one ***person***" includes all injury and damages to other ***persons*** resulting from that ***bodily injury***, and all emotional distress resulting from that ***bodily injury*** sustained by other ***persons*** who do not sustain that ***bodily injury***.

b. Subject to a. above, the most ***we*** will pay for all damages resulting from ***bodily injury*** to two or more ***insureds*** injured in the same accident is the limit shown under "Each Accident".

2. The Underinsured Motor Vehicle Coverage limit for ***property damage*** is shown on the Declarations Page under "Underinsured Motor Vehicle Coverage – Property Damage Limit – Each Accident". The most ***we*** will pay for ***property damage*** is the lesser of:
   a. the amount of ***property damage*** reduced by the sum of all payments made by or on behalf of any ***person*** or organization who is or may be held legally liable for that ***property damage***; or
   b. the limit shown under "Each Accident".
3. These Underinsured Motor Vehicle Coverage limits are the most ***we*** will pay regardless of the number of:
   a. ***insureds***;
   b. claims made;
   c. vehicles insured; or
   d. vehicles involved in the accident.

Nonduplication

We will not pay under Underinsured Motor Vehicle Coverage any damages:

1. that have already been paid to or for the ***insured***:
   a. by or on behalf of any ***person*** or organization who is or may be held legally liable for the ***bodily injury*** to the ***insured***; or
   b. for ***bodily injury*** under Liability Coverage of any policy issued by the ***State Farm Companies*** to ***you*** or any ***resident relative***;
2. that:
   a. have already been paid;
   b. could have been paid; or
   c. could be paid

   to or for the ***insured*** under any workers' compensation law, disability benefits law, or similar law; or
3. that are ***property damage*** paid or payable under any policy of property insurance.

Exclusions

THERE IS NO COVERAGE:

1. FOR AN ***INSURED*** WHO, WITHOUT ***OUR*** WRITTEN CONSENT, SETTLES WITH ANY ***PERSON*** OR ORGANIZATION WHO MAY BE LIABLE FOR THE ***BODILY INJURY*** OR ***PROPERTY DAMAGE*** AND THEREBY IMPAIRS ***OUR*** RIGHT TO RECOVER ***OUR*** PAYMENTS;
2. TO THE EXTENT THE UNDERINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE ***FINANCIAL RESPONSIBILITY ACT***:
   a. FOR AN ***INSURED*** WHO SUSTAINS ***BODILY INJURY*** WHILE ***OCCUPYING*** A MOTOR VEHICLE ***OWNED BY YOU*** OR ANY ***RESIDENT RELATIVE*** IF:
      (1) THE MOTOR VEHICLE IS NOT ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR***; AND
      (2) IT WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE

COVERAGE AT THE TIME OF THE ACCIDENT;

b. IF THE ***UNDERINSURED MOTOR VEHICLE*** IS ***OWNED BY YOU*** OR ANY ***RESIDENT RELATIVE***; OR

c. FOR ***PROPERTY DAMAGE***:

(1) TO A MOTOR VEHICLE; OR

(2) IN A MOTOR VEHICLE

OWNED BY YOU OR ANY ***RESIDENT RELATIVE*** IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;

3. FOR ***PROPERTY DAMAGE*** THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF ***YOUR CAR*** OR A ***NEWLY ACQUIRED CAR***;

4. FOR AN ***INSURED*** WHOSE ***BODILY INJURY*** RESULTS FROM THE DISCHARGE OF A FIREARM;

5. TO THE EXTENT IT BENEFITS:

a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;

b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR

c. ANY PROPERTY INSURER; OR

6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION.

If Other Underinsured Motor Vehicle Coverage Applies

1. The Underinsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an ***insured*** who sustain ***bodily injury*** or ***property damage*** while ***occupying your car***.

2. Except as provided in item 1. above, the Underinsured Motor Vehicle Coverage provided by this policy applies as excess coverage.

3. If:

a. ***you*** or any ***resident relative*** sustains ***bodily injury*** or ***property damage***:

(1) while ***occupying*** a motor vehicle not ***owned by you*** or any ***resident relative***; or

(2) while not ***occupying*** a motor vehicle; and

b. Underinsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** apply to the same ***bodily injury*** or ***property damage***, then

the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. ***We*** may choose one or more policies from which to make payment.

4. If ***you*** or any ***resident relative*** sustains ***bodily injury*** or ***property damage*** while ***occupying*** a motor vehicle other than ***your car*** that is ***owned by you*** or any ***resident relative***, then this coverage applies only to the extent of the underinsured motor vehicle coverage applicable to the motor vehicle that the ***insured*** was ***occupying***.

However, if the motor vehicle that the ***insured*** was ***occupying*** was not insured for underinsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies combined that are issued to ***you*** or any ***resident relative*** by the ***State Farm Companies*** is the minimum limits required by the ***Financial Responsibility Act***. ***We*** may choose one or more policies from which to make payment.

5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources

provide underinsured motor vehicle coverage for the same damages on a:

a. primary basis, then *we* will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as primary coverage; or

b. excess basis, then *we* will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as excess coverage.

Our Payment Options

We may, at *our* option, make payment to one or more of the following:

1. The *insured*;
2. The *insured's* surviving spouse;
3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent *person*; or
4. A *person* authorized by law to receive such payment.

PHYSICAL DAMAGE COVERAGES

The physical damage coverages are Comprehensive Coverage, Collision Coverage, Emergency Road Service Coverage, and Car Rental and Travel Expenses Coverage.

This policy provides:

1. Comprehensive Coverage if "D";
2. Collision Coverage if "G";
3. Emergency Road Service Coverage if "H";
4. Car Rental and Travel Expenses Coverage if "R"

is shown under "SYMBOLS" on the Declarations Page.

If a deductible applies to Comprehensive Coverage, then it is shown on the Declarations Page. The deductible that applies to Collision Coverage is shown on the Declarations Page.

Additional Definitions

Covered Vehicle means:

1. *your car*;
2. a *newly acquired car*;
3. a *temporary substitute car*;
4. a camper that is designed to be mounted on a pickup truck and shown on the Declarations Page;
5. a *non-owned car* while it is:
   a. being driven by an *insured*; or
   b. in the custody of an *insured* if at the time of the *loss* it is:
      (1) not being driven; or
      (2) being driven by a *person* other than an *insured* and being *occupied* by an *insured*;
6. a *non-owned trailer* while it is being used by an *insured*; and
7. a *non-owned camper* while it is being used by an *insured*;

including its parts and its equipment that are common to the use of the vehicle as a vehicle. However, parts and equipment of *trailers* and

campers must be securely fixed as a permanent part of the *trailer* or camper.

Daily Rental Charge means the sum of:

1. the daily rental rate;
2. mileage charges; and
3. related taxes.

Insured means *you* and *resident relatives*.

Loss means:

1. direct, sudden, and accidental damage to; or
2. total or partial theft of

a *covered vehicle*. *Loss* does not include any reduction in the value of any *covered vehicle* after it has been repaired, as compared to its value before it was damaged.

Loss Caused By Collision means a *loss* caused by:

1. a *covered vehicle* hitting or being hit by another vehicle or another object; or
2. the overturning of a *covered vehicle*.

Any *loss* caused by missiles, falling objects, windstorm, hail, fire, explosion, earthquake, water, flood, total or partial theft, malicious mischief, vandalism, riot, civil commotion, or hitting or being hit by a bird or an animal is not a *Loss Caused By Collision*.

Non-Owned Camper means a camper designed to be mounted on a pickup truck that is in the lawful possession of an *insured* and that neither:

1. is *owned by*:
   a. an *insured*;
   b. any other *person* who resides primarily in *your* household; or
   c. an employer of any *person* described in a. or b. above; nor
2. has been used by, rented by, or in the possession of an *insured* during any part of each of the 31 or more consecutive days immediately prior to the date of the *loss*.

Non-Owned Trailer means a *trailer* that is in the lawful possession of an *insured* and that neither:

1. is *owned by*:
   a. an *insured*;
   b. any other *person* who resides primarily in *your* household; or
   c. an employer of any *person* described in a. or b. above; nor
2. has been used by, rented by, or in the possession of an *insured* during any part of each of the 31 or more consecutive days immediately prior to the date of the *loss*.

Insuring Agreements

1. **Comprehensive Coverage**

   We will pay:

   a. for *loss*, except *loss caused by collision*, to a *covered vehicle*; and

   b. transportation expenses incurred by an *insured* as a result of the total theft of *your car* or a *newly acquired car*. These transportation expenses are payable:

      (1) during the period that:

         (a) starts on the date *you* report the theft to *us*; and

         (b) ends on the earliest of:

            (i) the date the vehicle is returned to *your* possession in a drivable condition;

            (ii) the date *we* offer to pay for the *loss* if the vehicle has not yet been recovered; or

            (iii) the date *we* offer to pay for the *loss* if the vehicle is recovered, but is a total loss as determined by *us*; and

      (2) during the period that:

         (a) starts on the date the vehicle is left at a repair facility if the

stolen vehicle is recovered, returned to *your* possession in a drivable condition, and has unrepaired damage that resulted from the total theft; and

(b) ends on the date the vehicle is repaired.

These transportation expenses must be reported to *us* before *we* will pay such incurred expenses.

2. **Collision Coverage**

We will pay for *loss caused by collision* to a *covered vehicle*.

3. **Emergency Road Service Coverage**

We will pay the fair cost incurred by an *insured* for:

a. up to one hour of labor to repair a *covered vehicle* at the place of its breakdown;

b. towing to the nearest repair facility where necessary repairs can be made if a *covered vehicle* is not drivable;

c. towing a *covered vehicle* out of a location where it is stuck if the vehicle is on or immediately next to a public road;

d. delivery of gas, oil, battery, or tire necessary to return a *covered vehicle* to driving condition. *We* do not pay the cost of the gas, oil, battery, or tire; and

e. up to one hour of labor for locksmith services to unlock a *covered vehicle* if its key is lost, stolen, or locked inside the vehicle.

4. **Car Rental and Travel Expenses Coverage**

a. **Car Rental Expense**

We will pay the *daily rental charge* incurred when *you* rent a *car* from a *car business* while *your car* or a *newly acquired car* is:

(1) not drivable; or

(2) being repaired

as a result of a *loss* which would be payable under Comprehensive Coverage or Collision Coverage.

We will pay this *daily rental charge* incurred during a period that:

(1) starts on the date:

(a) the vehicle is not drivable as a result of the *loss*; or

(b) the vehicle is left at a repair facility if the vehicle is drivable; and

(2) ends on the earliest of:

(a) the date the vehicle has been repaired or replaced;

(b) the date *we* offer to pay for the *loss* if the vehicle is repairable but *you* choose to delay repairs; or

(c) five days after *we* offer to pay for the *loss* if the vehicle is:

(i) a total loss as determined by *us*; or

(ii) stolen and not recovered.

The amount of any such *daily rental charge* incurred by *you* must be reported to *us* before *we* will pay such amount.

b. **Travel Expenses**

We will pay expenses for commercial transportation, lodging, and meals if *your car* or a *newly acquired car* is not drivable as a result of a *loss* which would be payable under Comprehensive Coverage or Collision Coverage. The *loss* must occur more than 50 miles from *your* home. *We* will only pay these expenses if they are incurred by:

(1) an *insured* during the period that:

(a) starts after the *loss* occurs; and

(b) ends on the earlier of:

(i) the *insured's* arrival at his or her destination or home if the vehicle is left behind for repairs; or

(ii) the repair of the vehicle if the *insured* waits for repairs before continuing on to his or her destination or returning home; and

(2) *you*, or any *person you* choose, to travel to retrieve the vehicle and drive it to either the original destination or *your* home if the vehicle was left behind for repairs.

These expenses must be reported to *us* before *we* will pay such incurred expenses.

c. **Rental Car – Repayment of Deductible Expense**

We will pay the comprehensive deductible or collision deductible an *insured* is required to pay the owner of a *car* rented from a *car business*.

Supplementary Payments – Comprehensive Coverage and Collision Coverage

If the *covered vehicle* sustains *loss* for which *we* make a payment under Comprehensive Coverage or Collision Coverage, then *we* will pay reasonable expenses incurred to:

1. tow the *covered vehicle* immediately after the *loss*:
   a. for a reasonable distance from the location of the *loss* to any one repair facility chosen by an *insured* or the owner of the *covered vehicle*, if the *covered vehicle* is not drivable; or
   b. to any one repair facility or commercial storage facility, neither of which was chosen by an *insured* or the owner of the *covered vehicle*. *We* will also pay reasonable expenses incurred to tow the *covered vehicle* for a reasonable distance from this facility to any one repair facility chosen by an *insured* or the owner of the *covered vehicle*, if the *covered vehicle* is not drivable;
2. store the *covered vehicle*, if it is not drivable immediately after the *loss*, at:
   a. any one repair facility or commercial storage facility, neither of which was chosen by an *insured* or the owner of the *covered vehicle*; and
   b. any one repair facility chosen by the owner of the *covered vehicle*, and *we* determine such vehicle is a total loss.

   If the owner of the *covered vehicle* consents, then *we* may move the *covered vehicle* at *our* expense to reduce storage costs. If the owner of the *covered vehicle* does not consent, then *we* will pay only the storage costs that would have resulted if *we* had moved the damaged *covered vehicle*; and
3. clean up debris from the *covered vehicle* at the location of the *loss*. The most *we* will pay to clean up the debris is $250 for any one *loss*.

Limits and Loss Settlement – Comprehensive Coverage and Collision Coverage

1. *We* have the right to choose to settle with *you* or the owner of the *covered vehicle* in one of the following ways:
   a. Pay the cost to repair the *covered vehicle* minus any applicable deductible. The deductible amount does not apply to *loss* to safety glass.
      (1) *We* have the right to choose one of the following to determine the cost to repair the *covered vehicle*:
         (a) The cost agreed to by both the owner of the *covered vehicle* and *us*;
         (b) A bid or repair estimate approved by *us*; or
         (c) A repair estimate that is written based upon or adjusted to:

(i) the prevailing competitive price;

(ii) the lower of paintless dent repair pricing established by an agreement *we* have with a third party or the paintless dent repair price that is competitive in the market; or

(iii) a combination of (i) and (ii) above.

The prevailing competitive price means prices charged by a majority of the repair market in the area where the ***covered vehicle*** is to be repaired as determined by a survey made by ***us***. If asked, *we* will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the ***covered vehicle*** to its pre-loss condition.

You agree with *us* that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

(2) The cost to repair the ***covered vehicle*** does not include any reduction in the value of the ***covered vehicle*** after it has been repaired, as compared to its value before it was damaged.

(3) If the repair or replacement of a part results in betterment of that part, then *you* or the owner of the ***covered vehicle*** must pay for the amount of the betterment;

b. Pay the actual cash value of the ***covered vehicle*** minus any applicable deductible.

(1) The owner of the ***covered vehicle*** and *we* must agree upon the actual cash value of the ***covered vehicle***. If there is disagreement as to the actual cash value of the ***covered vehicle***, then the disagreement will be resolved by appraisal upon written request of the owner or ***us***, using the following procedures:

(a) The owner and *we* will each select a competent appraiser.

(b) The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or *we* may petition a court that has jurisdiction to select the third appraiser.

(c) Each party will pay the cost of its own appraiser, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.

(d) The appraisers shall only determine the actual cash value of the ***covered vehicle***. Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class-representative basis.

(e) A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they arrived at their appraisal, will be binding on the

owner of the *covered vehicle* and *us*.

(f) *We* do not waive any of *our* rights by submitting to an appraisal.

(2) The damaged *covered vehicle* must be given to *us* in exchange for *our* payment, unless *we* agree that the owner may keep it. If the owner keeps the *covered vehicle*, then *our* payment will be reduced by the value of the *covered vehicle* after the *loss*; or

c. Return the stolen *covered vehicle* to its owner and pay, as described in 1.a. above, for any direct, sudden, and accidental damage that resulted from the theft.

2. The most *we* will pay for transportation expenses under Comprehensive Coverage is $25 per day subject to an aggregate limit of $750 per *loss*.

3. The most *we* will pay for *loss* to a *non-owned trailer* or a *non-owned camper* is $2,500.

Limits – Car Rental and Travel Expenses Coverage

1. **Car Rental Expense**

The limit for Car Rental Expense is shown on the Declarations Page under "Limit – Car Rental Expense – Each Day, Each Loss".

a. The limit shown under "Each Day" is the most *we* will pay for the *daily rental charge*. If:

(1) a dollar amount is shown, then *we* will pay the *daily rental charge* up to that dollar amount;

(2) a percentage amount is shown, then *we* will pay that percentage of the *daily rental charge*.

b. Subject to the "Each Day" limit, the limit shown under "Each Loss" is the most *we* will pay for Car Rental Expense incurred as a result of any one *loss*.

2. **Travel Expenses**

The most *we* will pay for Travel Expenses incurred by all *insureds* as a result of any one *loss* is $500.

3. **Rental Car – Repayment of Deductible Expense**

The most *we* will pay for Rental Car – Repayment of Deductible Expense incurred as a result of any one *loss* is $500.

Nonduplication

We will not pay for any *loss* or expense under the Physical Damage Coverages for which the *insured* or owner of the *covered vehicle* has already received payment from, or on behalf of, a party who is legally liable for the *loss* or expense.

Exclusions

THERE IS NO COVERAGE FOR:

1. ANY *COVERED VEHICLE* THAT IS:
   a. INTENTIONALLY DAMAGED; OR
   b. STOLEN
   BY OR AT THE DIRECTION OF AN *INSURED*;
2. ANY *COVERED VEHICLE* WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
3. ANY *COVERED VEHICLE* WHILE IT IS USED TO CARRY *PERSONS* FOR A CHARGE. This exclusion does not apply to the use of a *private passenger car* on a share-the-expense basis;
4. ANY *COVERED VEHICLE* DUE TO:
   a. THEFT;
   b. CONVERSION;
   c. EMBEZZLEMENT; OR
   d. SECRETION

BY AN *INSURED*, A CONSIGNEE, AN AGENT OF A CONSIGNEE, OR A *PERSON* WHO OBTAINS POSSESSION OF THE *COVERED VEHICLE* WITH THE PERMISSION OF A CONSIGNEE OR AGENT OF A CONSIGNEE;

5. *LOSS* TO *YOUR CAR* OR A *NEWLY ACQUIRED CAR* IF AN *INSURED* VOLUNTARILY RELINQUISHES POSSESSION OF THAT *CAR* TO A *PERSON* OR ORGANIZATION UNDER AN ACTUAL OR PRESUMED SALES AGREEMENT;

6. ANY *COVERED VEHICLE* TO THE EXTENT *OUR* PAYMENT WOULD BENEFIT ANY CARRIER OR OTHER BAILEE FOR HIRE THAT IS LIABLE FOR *LOSS* TO SUCH *COVERED VEHICLE*;

7. *LOSS* TO ANY *COVERED VEHICLE* DUE TO *FUNGI*. THIS APPLIES REGARDLESS OF WHETHER OR NOT THE *FUNGI* RESULT FROM A *LOSS* THAT IS PAYABLE UNDER ANY OF THE PHYSICAL DAMAGE COVERAGES. *WE* WILL ALSO NOT PAY FOR ANY TESTING OR REMEDIATION OF *FUNGI*, OR ANY ADDITIONAL COSTS REQUIRED TO REPAIR ANY *COVERED VEHICLE* THAT ARE DUE TO THE EXISTENCE OF *FUNGI*;

8. *LOSS* TO ANY *COVERED VEHICLE* THAT RESULTS FROM:
   a. NUCLEAR REACTION;
   b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
   c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE;

9. *LOSS* TO ANY *COVERED VEHICLE* THAT RESULTS FROM THE TAKING OF OR SEIZURE OF THAT *COVERED VEHICLE* BY ANY GOVERNMENTAL AUTHORITY;

10. *LOSS* TO ANY *COVERED VEHICLE* THAT RESULTS FROM WAR OF ANY KIND;

11. *YOUR CAR* WHILE SUBJECT TO ANY:
   a. LIEN AGREEMENT;
   b. RENTAL AGREEMENT;
   c. LEASE AGREEMENT; OR
   d. SALES AGREEMENT

   NOT SHOWN ON THE DECLARATIONS PAGE;

12. ANY *NON-OWNED CAR* WHILE IT IS:
   a. BEING MAINTAINED OR USED BY ANY *PERSON* WHILE THAT *PERSON* IS EMPLOYED IN OR ENGAGED IN ANY WAY IN A *CAR BUSINESS*; OR
   b. USED IN ANY BUSINESS OR OCCUPATION OTHER THAN A *CAR BUSINESS*. This exclusion (12.b.) does not apply to a *private passenger car*;

13. ANY PART OR EQUIPMENT OF A *COVERED VEHICLE* IF THAT PART OR EQUIPMENT:
   a. FAILS OR IS DEFECTIVE; OR
   b. IS DAMAGED AS A DIRECT RESULT OF:
      (1) WEAR AND TEAR;
      (2) FREEZING; OR
      (3) MECHANICAL, ELECTRICAL, OR ELECTRONIC BREAKDOWN OR MALFUNCTION

   OF THAT PART OR EQUIPMENT.

   This exclusion does not apply if the *loss* is the result of theft of the *covered vehicle*;

14. ANY PART OR EQUIPMENT:
   a. THAT IS NOT LEGAL FOR USE IN OR ON THE *COVERED VEHICLE*

IN THE JURISDICTION WHERE THE *COVERED VEHICLE* IS REGISTERED; OR

b. THE USE OF WHICH IS NOT LEGAL IN THE JURISDICTION WHERE THE *COVERED VEHICLE* IS REGISTERED BECAUSE OF HOW OR WHERE THAT PART OR EQUIPMENT IS INSTALLED IN OR ON THE *COVERED VEHICLE*.

However, if there is a legal version of the part or equipment that is necessary for the safe operation of the *covered vehicle*, then *we* will pay the cost that *we* would otherwise have paid to repair the vehicle with the legal version of the part or equipment. *We* will not pay any cost necessary to modify the vehicle for installation of the legal version of the part or equipment;

15. TIRES. This exclusion does not apply if:

a. *loss* is caused by missiles, falling objects, windstorm, hail, fire, explosion, earthquake, water, flood, total or partial theft, malicious mischief, vandalism, riot, civil commotion, or hitting or being hit by a bird or an animal; or

b. *loss caused by collision* to another part of the *covered vehicle* causes *loss* to tires;

16. REMOVABLE PRODUCTS USED FOR STORAGE OF AUDIO, VIDEO, OR OTHER DATA, INCLUDING BUT NOT LIMITED TO TAPES, DISCS, AND MEMORY CARDS, NOR IS THERE COVERAGE FOR THE RECONSTRUCTION OF DATA CONTAINED THEREIN;

17. ANY EQUIPMENT USED TO DETECT OR INTERFERE WITH SPEED MEASURING DEVICES;

18. A CAMPER, INCLUDING ITS PARTS AND ITS EQUIPMENT, THAT IS:

a. DESIGNED TO BE MOUNTED ON A PICKUP TRUCK;

b. *OWNED BY* AN *INSURED*; AND

c. NOT SHOWN ON THE DECLARATIONS PAGE; OR

19. ANY *COVERED VEHICLE* WHILE IT IS:

a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (19.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Physical Damage Coverage or Similar Coverage Applies

1. If the same *loss* or expense is payable under more than one of the physical damage coverages provided by this policy, then only the one coverage that pays the most for that *loss* or expense applies.

2. If any of the physical damage coverages provided by this policy and one or more other policies issued to an *insured* by the *State Farm Companies* apply to the same *loss* or expense, then only one policy applies. *We* will select a policy that pays the most for the *loss* or expense.

3. The physical damage coverages provided by this policy apply as primary coverage for a *loss* to *your car*.

If similar coverage provided by one or more sources other than the *State Farm Companies* also applies as primary coverage for the same *loss* or expense, then the *State Farm Companies* will pay the proportion of the *loss* or expense payable as primary that the maximum amount that may be paid by the *State Farm Companies* bears to the sum of such amount and the limits of

all other similar coverage that applies as primary coverage.

4. Except as provided in 3. above, the physical damage coverages provided by this policy apply as excess coverage.

   If similar coverage provided by one or more sources other than the ***State Farm Companies*** also applies as excess coverage for the same ***loss*** or expense, then the ***State Farm Companies*** will pay the proportion of the ***loss*** or expense payable as excess that the maximum amount that may be paid by the ***State Farm Companies*** bears to the sum of such amount and the limits of all other similar coverage that applies as excess coverage.

Financed Vehicle

1. If a creditor is shown on the Declarations Page, then any Comprehensive Coverage or Collision Coverage provided by this policy applies to that creditor's interest in ***your car***. Coverage for the creditor's interest is only provided for a ***loss*** that is payable to ***you***.

   However, if this policy is cancelled or nonrenewed, then ***we*** will provide coverage for the creditor's interest until ***we*** notify the creditor of the termination of such coverage. This coverage for the creditor's interest is only provided for a ***loss*** that would have been payable to ***you*** if this policy had not been cancelled or nonrenewed. The date such termination is effective will be at least 10 days after the date ***we*** mail or electronically transmit a notice of the termination to the creditor.

2. If ***we*** pay such creditor, then ***we*** are entitled to the creditor's right of recovery against ***you*** to the extent of ***our*** payment. ***Our*** right of recovery does not impair the creditor's right to recover the full amount of its claim.

Our Payment Options

1. **Comprehensive Coverage and Collision Coverage**

   a. ***We*** may, at ***our*** option, make payment to one or more of the following for ***loss*** to a ***covered vehicle owned by you***:

      (1) ***You***;

      (2) The repairer; or

      (3) A creditor shown on the Declarations Page, to the extent of its interest.

   b. ***We*** may, at ***our*** option, make payment to one or more of the following for ***loss*** to a ***covered vehicle*** not ***owned by you***:

      (1) ***You***;

      (2) The owner of such vehicle;

      (3) The repairer; or

      (4) A creditor, to the extent of its interest.

2. **Emergency Road Service Coverage and Car Rental and Travel Expenses Coverage**

   We may, at ***our*** option, make payment to one or more of the following:

   a. ***You***;

   b. The ***insured*** who incurred the expense; or

   c. Any party that provided the service for which payment is owed.

coverage in Mexico should be purchased from a Mexican insurance company.

Subject to the above paragraph, the following coverages apply in Mexico, but only for accidents and ***losses*** that occur in Mexico within 50 miles of the United States of America border and only for ***insureds*** as defined under each of the following coverages:

a. **Liability Coverage**

For claims brought against an ***insured*** in Mexico, the **Supplementary Payments** provision of this policy's Liability Coverage is changed to read:

We may, in addition to the damages described in item 1. of the **Insuring Agreement** of this policy's Liability Coverage, pay or reimburse, at our option, reasonable attorney fees for an attorney licensed in Mexico to appear for and provide advice to ***insureds*** as defined under this policy's Liability Coverage. The amount of such attorney fees incurred by an ***insured*** must be reported to ***us*** before ***we*** will make payment.

b. **Personal Injury Protection Coverage**

c. **Medical Payments Coverage**

d. **Physical Damage Coverages**

Any amount payable for the repair or replacement of the ***covered vehicle*** under the **Limits and Loss Settlement – Comprehensive Coverage and Collision Coverage** provision of this policy will be limited to the cost to repair or replace the ***covered vehicle*** in the United States of America.

WE HAVE NO DUTY TO PROVIDE A DEFENSE FOR ***YOU*** OR ANY OTHER ***INSURED*** IN ANY CRIMINAL, CIVIL, OR OTHER ACTION.

WE HAVE NO DUTY TO PAY ANY CLAIM OR COST THAT WOULD NOT BE PAYABLE UNDER THIS POLICY IF THE ACCIDENT OR ***LOSS*** HAD OCCURRED IN THE STATE OF SOUTH CAROLINA IN THE UNITED STATES OF AMERICA.

All other policy provisions not in conflict with the provisions in this **Limited Coverage in Mexico** provision of this policy apply.

If Other Coverage Applies

Any coverage provided by this **Limited Coverage in Mexico** provision is excess over any other applicable insurance.

Legal Action Against Us

Any legal action against ***us*** arising out of an accident or ***loss*** occurring in Mexico must be brought in a court that has jurisdiction in the state of South Carolina in the United States of America.

c. Paragraph c. of **5. Premium** is changed to read:

c. The premium for this policy may vary based upon:

(1) the purchase of other products or services from the ***State Farm Companies***;

(2) the purchase of products or services from an organization that has entered into an agreement or contract with

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the ***State Farm Companies***. The ***State Farm Companies*** do not warrant the merchantability, fitness, or quality of any product or service offered or provided by that organization; or

(3) an agreement, concerning the insurance provided by this policy, that the ***State Farm Companies*** has with an organization of which ***you*** are a member, employee, subscriber, licensee, or franchisee.

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This policy is issued by the State Farm Fire and Casualty Company.

Participating Policy

The named insured or named insureds shown on this Declarations Page are entitled to participate in a distribution of the earnings of the company as determined by our Board of Directors in accordance with the Company's Articles of Incorporation, as amended.

In Witness Whereof, the State Farm Fire and Casualty Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois.

Lynne M. Yauvell
Secretary

Edward B. Rust Jr.
President

STATE OF SOUTH CAROLINA)
) Court of General Sessions
COUNTY OF CHARLESTON) Case No. 2016-CP-10-363
)
STATE OF SOUTH CAROLINA)
)
vs.) Transcript of Record
)
LEVI THOMAS BROWN,)
)
Defendant.)
) DATE: January 6, 2017

B E F O R E:

THE HONORABLE W. JEFFREY YOUNG

A P P E A R A N C E:

PATRICK NAPOLSKI
Attorney for the State

TIMOTHY ALLAN DOMIN
Attorney for the Defendant

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

THE COURT: Please introduce yourselves to the Court.

MR. NAPOLSKI: Your Honor, Patrick Napolski, here on behalf of the plaintiff.

MR. DOMIN: My name is Tim Domin, D-o-m-i-n, law firm of Clawson & Staubes, here for State Farm Fire and Casual.

THE COURT: Say that again.

MR. DOMIN: Tim Domin. I'm with the law firm of Clawson & Staubes. I'm here for the defendant State Farm Fire and Casualty. And here to my side is Johnnie Stewart, also with my law firm, who has been working on this case with me.

THE COURT: Okay. What do we have before us?

MR. DOMIN: Well, Your Honor, we filed cross motions for summary judgment in this declaratory judgment case. We have reached, however, a stipulation of fact. And we would like for you simply to decide this case on the merits. Certainly, we don't think there's any dispute of material fact, which is why we reached the stipulation of fact. That is the signed joint stipulation of fact. The memorandum of State Farm's was submitted earlier.

THE COURT: This is the one where someone was shooting at a car?

MR. DOMIN: Yes, Your Honor.

THE COURT: A little light reading.

MR. NAPOLSKI: If I may, thorough reading.

THE COURT: I will just give you a couple of minutes to argue and then I'll take it under advisement.

MR. NAPOLSKI: Your Honor, before we get started, we request that the plaintiff's memorandum, table authority and cases, stipulation of facts, and defendant's memorandum be introduced for the record.

Today State Farm seeks to expand inclusions that have historically been covered in these situations, namely, drive-by shootings. Plaintiff seeks a ruling consistent with the law as it presently stands.

In South Carolina, the law mandates that no automobile policy may be issued unless it contains: One, a provision insuring the person defined as insured against loss from the liability imposed by the law for damages arising out of the ownership, maintenance or use of a motor vehicle; and, two, an uninsured motorist provision to protect against damages an insured is legally entitled to recover which arises out of the ownership, maintenance or use of an uninsured vehicle.

The test for determining whether an injury arises out of the maintenance, ownership or use of a vehicle was first promulgated in the *Wausau Underwriters Insurance case vs. Howser*. In that case, the insured was injured when she

was pursued and then shot by an unknown assailant in her car. At the time of the shooting, the insured was driving her vehicle when the unknown assailant began following her in his car. He pulled alongside Howser and confronted her with a gun before attempting to get her to pull over. The assailant fired several shots at her from his vehicle while they were both moving, and she was wounded.

The test in the *Howser* case for determining whether the injury arose out of the maintenance, ownership or use of the vehicle was, first, there must be a causal connection between the vehicle and the injury. And, second, there must not be an independent significant act which breaks the causal connection. The causal connection in that case needs to be something less than a proximate cause, but more than just the situs of the injury. And, second, the vehicle must be an active accessory in the event.

The same test was used by the court in the *Towe* case. In that case, the insured was injured by a bottle which was thrown by a passenger in an adverse vehicle. The court held that the injury occurred out of the use of that vehicle.

The facts in our case are eerily similar to those in *Howser*. In our matter, Plaintiff Brown was shot in an early morning vehicle-to-vehicle shooting on the interstate in North Charleston by a John Doe, leaving Brown with a bullet

permanently lodged between his heart and spine.

And, Your Honor, I direct your attention also to the stipulation of facts which goes into detail as to facts of the matter. Thus, plaintiff requests that the Court follow the *Howser* and *Towe* decisions and the precedent and find that Brown's injury arose out of the use of the vehicle.

THE COURT: Mr. Domin, how is this different from the other cases where somebody was shot?

MR. DOMIN: Well, when they say that this is consistent with the other cases, they are only talking about *Howser*, which was decided in 1992. Since *Howser*, there has not been a single shooting case for which coverage has been found and there have been a number of shooting cases since then. And, in fact, after *Howser*, they added an additional prong to the test, which makes all the difference in the world in this case.

Specifically, Your Honor, in the *State Farm vs. Aytes* case, which is cited in our memo, that was a case, actually, I was involved with. They added the third prong that the injury must be foreseeably identifiable within the normal use of an automobile.

Then in the *Bookert* case, which was decided by the Court of Appeals initially and then went up to the Supreme Court, they set forth the *Aytes* test in a very clear, concise, one-two-three test, which is set forth on page 3 of

State Farm's memo.

We believe that this shooting fails under multiple respects of the *Aytes/Bookert* test. And I think that, really, the best starting place for this is *Bookert* itself.

When you look at *Bookert* itself, there was an altercation between some soldiers in Columbia and a group of youths at the Hardees. And then the youths went over to the McDonald's. Soldiers are still mad. They drive, pick up another soldier, go to the McDonald's. And they are circling around the parking lot. They see one of these youths. They yell out to him. The assailant's vehicle lurches. One assailant was holding a shotgun, literally falls on the vehicle. The gun goes off when he falls.

A second person, who is a passenger in the assailant's vehicle, uses a handgun and shoots multiple times, hitting the victim in each leg. And the vehicle in *Bookert* was moving forward at that point.

So the Court of Appeals said, hey, that vehicle was an active accessory; there is coverage.

The Supreme Court came in and said, no, no, no no, those injuries are not foreseeable, identifiable within the normal use of a motor vehicle.

And then there is a succession of cases after *Bookert* where there's shooting after shooting after shooting. And none of those cases are covered, because there is no

foreseeably identifiable connection.

THE COURT: Unless your car has a turret on the top of it for shooting, that would prohibit from being used --

MR. DOMIN: You know, I don't know if any of those vehicles State Farm is insuring them. We need to get the underwriting on to that.

But I don't believe that that is an injury which is foreseeably identifiable within the normal use.

And a great case to contrast and compare is *Wright vs. North Area Taxi*, which we cited to you. That's a cab driver here in Charleston. He picks up a fare and the fare shoots him from behind. The plaintiff's attorney in that case did a very good job in saying, hey, the car and the taxi, the only way you can shoot the guy in the back of the head is sneak up on him like that by virtue of being in the backseat. So the car had a real connection there.

THE COURT: Connection --

MR. DOMIN: Yeah. And, yet, the court said, we don't -- we are mindful of the fact that cab drivers sometimes get shot. That may be an occupational hazard, but it is not something which is foreseeably identifiable within the normal use of the vehicle as far as the gunshot injury.

Now, interestingly, the vehicle goes out of control and hits, I think, a parked vehicle, a SCE&G pole. The court made a point of saying that those damages are covered, the

ones to the SCE&G pole, because those are just damages from a crash. And those are the kind that need to be covered.

And we have multiple shooting cases since then from the Court of Appeals, from the Supreme Court and from our district courts: *Carraway v. Smith* was a shooting case, 1995, no coverage; *Travelers v. Auto World*, no coverage; Wright, which I mentioned; *Holmes v. Allstate*, which is a District Court case, 2009, another shooting, not covered.

Then you go slightly outside the shooting context and there are other assaults. The strangulation case in *Lain v. Nationwide*, which is a 2005 case, no coverage; *Nationwide v. Jeter*, was a pepper spray case. No coverage for somebody being pepper sprayed in connection with being in and around a vehicle.

There was a sexual assault case with *Doe vs. Budget Control Board*, where there was sexual assaults by police officers in and on their patrol vehicles. Again, no coverage because injuries were not sufficiently connected. There is no foreseeable injury.

THE COURT: In this case, your person was just riding along, car came up next to him and fired, correct?

MR. NAPOLSKI: They were the driver of the vehicle, Your Honor. Leroy Brown is the driver.

THE COURT: He was the driver and another car, which is yet to be identified, fired and shot.

MR. DOMIN: Correct. Correct. Same --

THE COURT: Other vehicle was never identified?

MR. NAPOLSKI: Correct, Your Honor.

MR. DOMIN: What's important, I think, to the coverage analysis, in addition to the case law, is there's no road rage motivation here. There's no bump and run. There's no use of the vehicle.

THE COURT: I had a case earlier this week where a trucker in a road rage situation got in a fight with somebody else and they pulled him off the road. And one side is arguing that the truck had nothing to do with it. That's a little different situation.

MR. NAPOLSKI: Little different.

MR. DOMIN: And, Your Honor, we don't have any indication here that there was some high-speed pursuit or anything like that. This vehicle appeared out of nowhere. The first indication he had was the pop, pop, pop. And then it goes off. And so there was no blocking, no bumping.

THE COURT: No contact?

MR. DOMIN: No contact.

THE COURT: Really, your situation is not hardly any different than somebody riding on the road and getting shot from a hill or something like that.

MR. NAPOLSKI: Let me redirect your thought here. First, I want to put in there that the facts of *Bookert* are

factually distinguishable from those in our case. I can get to that in just a minute. But the vehicle-to-vehicle drive-by shooting is different than someone shooting from a hill against a car that was driving. The assailant's vehicle needs to be used in order to keep the same speed of our client's vehicle in order to increase the accuracy and actually have a shot, a chance at shooting that vehicle.

If someone were standing on the shoulder of I-526 with his vehicle where this accident happened and a car was going 60 miles an hour past them three lanes over, the accuracy is certainly going to be less than by that. So the vehicle is an essential part of the shooting and is a foreseeable act within the coverage.

MR. DOMIN: But the damages are no different when the bullet strikes. And there is nothing about the car that causes additional injury.

They also rely on the *Towe* case. That's where they throw the Coca Cola bottle out and it smashes on a guy who is riding a lawn mower, hits the steering wheel. Riding lawn mower sprays glass into his face. The velocity of the car contributes to the injuries in that case, contributes to the injuries in the case.

Even if you get to the point of saying, well, it's easier to shoot somebody from a moving car at the same speed, that still doesn't get you to the point of saying that the

injuries are foreseeably identifiable, nor does it make that causal connection that needs to be there.

And, again, go back to *Bookert*, Court of Appeals said, as best as they could, this is a launching pad. They used the vehicle to circle. It was moving. If there's no coverage under *Bookert*, I don't see how there could possibly be coverage under a situation like this.

MR. NAPOLSKI: *Bookert* is factually distinguishable because the car lurched forward from a stopped position. The same damage in that case could have been inflicted if these soldiers parked the vehicle, got out of the vehicle and shot *Bookert* in the leg from the parking lot. The same damages could have been inflicted if someone was standing on 526 on the shoulder shooting at Mr. Brown's car.

THE COURT: All right. Gentlemen, you have given me a lot to read. I will read it. Please prepare me a proposed order within 10 days. Thank you very much. To my Sumter office.

MR. DOMIN: You want hard copy or e-mail?

THE COURT: Hard copy and e-mail. Hard copy is actually fine. Thank you.

MR. DOMIN: Great.

(Whereupon, proceedings are adjourned.)

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter, Certified Realtime Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete Transcript of Record of the proceedings.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

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
Appellate Case No. 2017-000479

RECEIVED
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SC Court of Appeals

LEVI THOMAS BROWN

Appellant

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

Respondent.

CERTIFICATE OF COUNSEL

Appellant's counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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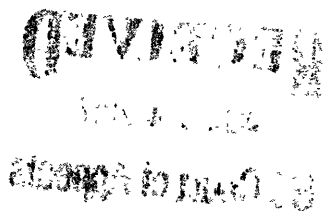

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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Case No. 2016-CP-10-00363
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LEVI THOMAS BROWN

Appellant

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES OF APPEAL

I. DID THE TRIAL COURT ERR IN FAILING TO FOLLOW ESTABLISHED PRECEDENT?

II. DID THE TRIAL COURT ERR IN FINDING THAT THE "'FORESEEABLY IDENTIFIABLE WITH THE USE OF THE AUTOMOBILE" ELEMENT ARTICULATED IN AYTES AND BOOKERT IS INCONSISTEN WITH HOWSER AND TOWE?

STATEMENT OF THE CASE

Levi Thomas Brown filed the Summons and Complaint in this action on January 25, 2016. Defendant State Farm Fire and Casualty Insurance Company, by and through the South Carolina Department of Insurance accepted service of the Summons and Complaint on April 4, 2016. Levi Thomas Brown brought this action seeking a declaratory judgment from the Court as to the parties' respective rights and obligations under an automobile insurance policy issued by State Farm Fire and Casualty Insurance Company. State Farm Fire and Casualty Insurance Company served its Answer on Levi Thomas Brown on May 2, 2016.

State Farm Fire and Casualty Insurance Company filed its Motion for Summary Judgment on October 4, 2016 and Levi Thomas Brown filed his cross Motion for Summary Judgment on October 31, 2016. The parties have polarized arguments as to whether Levi Thomas Brown's injuries arose out of the ownership maintenance or use of an uninsured vehicle. The parties stipulated to the facts of the case and requested the Court hear the motions as a dispositive bench trial.

On January 6, 2017, the Honorable W. Jeffrey Young heard the parties' motions for summary judgment in Charleston County, South Carolina.

The trial court's Order was filed February 7, 2017. The trial court ruled in favor of State Farm Fire and Casualty Insurance Company and held the injuries sustained by Levi Thomas Brown are not covered by the subject State Farm uninsured motorist policy. Levi Thomas Brown received written notice of the entry of the Order on February 14, 2017. Levi Thomas Brown served his Notice of Appeal on State Farm Fire and Casualty Insurance Company on February 16, 2017.

FACTS

Prior to their cross motions for summary judgment, Levi Thomas Brown and State Farm Fire and Casualty Insurance Company stipulated to the following facts:

1. On February 10, 2013, Levi T. Brown, Jasper T. Banks and Roy B. Walker left after a supper gathering with their female companions for a "boy's night out." The three men went in Roy B. Walker's mother's 2003 Cadillac Deville sedan to Charlie O's, a night club located at 4224 Dorchester Road in North Charleston. When Charlie O's closed, the three men decided to go to IHOP at nearby Center Point Drive by way of Dorchester Road northbound to the on-ramp of I-

526 eastbound to the next exit at Montague Ave eastbound. As the three left Charlie O's, Levi T. Brown was driving and Jasper T. Banks and Roy B. Walker were riding as passengers.

2. Levi T. Brow drove the 2003 Cadillac Deville sedan onto the on-ramp of I-526 East. The on ramp for I-526 East from Dorchester Road to Montague Avenue creates a third lane which runs adjacent to the two existing eastbound lanes and runs the distance of approximately one tenth of a mile where that third lane ends as the off-ramp of I-526 East at Montague Avenue.

3. At approximately 4:25 a.m., while the Cadillac Deville sedan was in the right-most lane between the exists, a gray/silver older model Dodge Durango came alongside of the Cadillac in one of the other eastbound lanes of the interstate with a black male with dreadlocked hair and a baseball hat hanging out of the rear passenger side window. The unknown assailant opened fire on the Cadillac. The men did not see the vehicle prior to the shots being fired. They do not know where the vehicle came from. The persons in the Cadillac still to this day have no idea as to the identity of the driver or passenger. There was nothing they did that night either at the club or on the roadway to provoke any hostility towards them.

4. Four gunshots struck the Cadillac. And one of those shot struck Levi T. Brown. There is one bullet hole on the hood near the grill and three bullet holes in the driver's side of the Cadillac—two holes in the window to the backseat behind the driver and one bullet hole in the driver's window. The hole in the driver's side window is located at approximately the same height and location where Levi T. Brown's wound is and presumably passed though the driver's side window and into Levi Brown's body, where it lodged between his heart and spine.

5. The assailant vehicle did not hit the Cadillac. The assailant vehicle did not attempt to ram, block, or otherwise strike the Cadillac. The assailant vehicle continued on I-526 East as Levi T. Brown exited at Montague Avenue.

6. Jasper T. Banks swore out an affidavit describing witnessing a silver Durango pulling alongside the left side of the Cadillac and without warning or provocation a passenger hanging out of the passenger window firing gun shots at the Cadillac. Jasper testified in his affidavit that he heard Levi say "I've been hit!"

7. The shooting incident was witnessed by someone other than the owner or operator of the insured vehicle, that being Jasper T. Banks, and his signed affidavit attests to the truth of the facts of the accident. State Farm is not disputing that Banks satisfies the witness requirement of 38-77-170 of the SC Code of Laws, but disputes Levi Brown's claim is a valid uninsured motorist claim.

8. Levi T. Brown reported this incident within a reasonable amount of time to police and was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident, all in compliance with the uninsured motorist statute section 38-77-170 of the SC Code of Laws, with the qualification that State Farm in no way concedes this is a valid underinsured motorist claim.

9. After coming down the exit ramp to Montague Avenue, Levi T. Brown pulled over and moved to the passenger seat and Jasper T. Banks drove Levi T. Brown to the emergency room

where they reported the incident to the North Charleston Police who prepared an incident report detailing this description of events and the denial of Brown of either being involved in gang activity or having any idea who the shooter might be or who may own the Durango.

10. The North Charleston Police recovered four bullet casing at the area of I-526 East between Dorchester Road and Montague Avenue as evidence in the course of their investigation of this incident.

11. On February 10, 2013, Roy B. Walker was using his mother's 2003 Cadillac Deville sedan with her express permission.

12. On February 10, 2013, Levi T. Brown was using the 2003 Cadillac Deville sedan belonging to Roy B. Walker's mother with Roy B. Walker's express permission.

13. As a result of the gunshot from the unknown assailant in this case, Levi T. Brown incurred over $46,000.00 in medical costs and has a bullet lodged between his heart and spine. The parties agree that if the uninsured motorist coverage is applicable to the loss and not otherwise excluded, the value of Brown's damages entitles him to the entire $25,000.00 per person bodily injury limit from the uninsured motorist coverage under State Farm's policy on the 2003 Cadillac Deville.

14. A copy of the State Farm Mutual Automobile Insurance Company's policy on the 2003 Cadillac Deville is included in the Record on Appeal and incorporated by reference.

ARGUMENTS

I. THE TRIAL COURT FAILED TO FOLLOW ESTABLISHED PRECEDENT

The trial court erred in declining to follow clear precedent promulgated by the Supreme Court of South Carolina when the trial court excluded coverage for injuries sustained as a result of a drive-by shooting which arose out of the ownership, maintenance, or use of an automobile. (R. pp. 2-8). Appellant requests the South Carolina Court of Appeals reverse the trial court and determine Appellant's injuries arose out the ownership, maintenance and use of the subject uninsured vehicle.

It is mandatory that all automobile insurance policies issued in South Carolina contain uninsured motorist provisions "undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle." S.C. Code Ann. § 38-77-150 (1989). An insured is legally entitled to recover damages "arising out of the ownership, maintenance or use" of an uninsured vehicle. S.C. Code. Ann. § 38-77-140 (1989). The Supreme Court of South Carolina adopted the Minnesota Supreme Court's two-pronged test for determining whether an individual's injuries arose out of the ownership, maintenance or use of the assailant's vehicle during a drive-by shooting. *See* Wausau Underwriters Ins. Co. v. Howser, 422 S.E. 2d 106, 309 S.C. 269 (1991) *adopting the analysis from* Continental Western Ins. Co. v. Klug, 415 N.W. 2d 876 (Minn. 1987). The Supreme Court of South Carolina has not reversed its decision in Howser and continues to provide coverage for those injured in vehicle-to-vehicle drive-by shootings like the one at issue in this case.

The Howser facts are squarely "on all fours" with the facts in this case. In Howser, Nancy Howser was injured by an unknown assailant while driving her father's Chevrolet S-10 Blazer vehicle. Howser, 309 S.C. 271. Howser and her friend were driving in the inside lane of a four-

lane road in Columbia, South Carolina. Id. A car driven by an unknown assailant "bumped" Howser's vehicle several times and pulled alongside Howser yelling at Howser and her passenger to roll down their windows, slow, and stop their vehicle. Id. The unknown assailant pointed a pistol at Howser's passenger window. Id. As Howser made a quick left turn down a side street to avoid the assault, the gunman shot at the Chevrolet S-10 Blazer. Id. The bullet entered the rear of Howser's vehicle, fragmented, and entered Howser's back in three places. Id. The gunman continued and neither he nor his vehicle were identified. Id.

Like Nancy Howser, Levi T. Brown was injured by an unknown assailant while driving a friend's mother's Cadillac Deville. (R. pp. 259-262). Brown was driving in the inside lane of a three-lane on-ramp on I-526 between Dorchester Road and Montague Avenue in Charleston when a Dodge Durango pulled alongside at highway speed. (R. p. 259). A black male with dreadlocked hair wearing a baseball cap shot Brown's vehicle from the assailant Dodge Durango. (R. pp. 259-260). The bullets entered the Cadillac Deville and entered Levi T. Brown's torso. (R. p.260). Levi T. Brown was struck and a bullet remains lodged between his heart and spine. (R. p. 260). The Dodge Durango and unknown assailant continued on I-526 and were never identified. (R. p. 260).

The two-pronged Klug test adopted by the Supreme Court of South Carolina in Howser to determine whether an injury arose out of the ownership, maintenance or use of a vehicle in the course of a drive-by shooting is as follows:

1. There exists a causal connection between the [assailant's] vehicle and the injury; and
2. No act of independent significance breaks the causal link.

For there to be a "causal connection" in this context:

a. The [assailant's] vehicle must be an "active accessory" to the assault; and
b. Something less than proximate cause but more than mere site of the injury.

Howser 309 S.C. 274. A third element was added two years after Howser in Canal Ins. Co. v. Insurance Co. of North America, 315 S.C. 1, 431, S.E. 2d 577 (1993): it must be shown the vehicle was being used for transportation at the time of the assault.

Howser Test: Prong #1

In Howser, the Court determined the vehicle was not merely a tool used to transport the assailant to the situs of the shooting, rather it was an active accessory to the assault. Howser, 309 S.C. 273. Nor, the Court said, is it a case where the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack. Id. The Court continued,

> Only through the 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.

Id.

Here, as in Howser, the Dodge Durango played a vital role in allowing the unknown assailant to pursue, pull alongside, and carryout the drive-by shooting. Without the use of the Dodge Durango (or without assailants' vehicles in Klug and Howser), the assailant would not have been able to keep up with the victim and successfully inflict injury or of severe of an injury. Appellant argued to the trial court in this case:

> Napolski: [B]ut the vehicle-to-vehicle drive-by shooting is different than someone shooting from a hill against a car that was driving. The assailant's vehicle needs to be used in order to keep the same speed of our client's vehicle in order to increase the accuracy and actually have a shot, a chance at shooting that vehicle.
>
> If someone were standing on the shoulder of I-526 with his vehicle where this accident happened and a car was going 60 miles an hour past them three lane

> over, the accuracy is certainly going to be less than that. So the vehicle is an essential part of the shooting[.]

(R. p. 325, lines 2-12).

Here, assailant's Dodge Durango played an essential and integral part of the ongoing assault in that it allowed the assailant to pursue Levi T. Brown, carryout the shooting, and provide a quick and successful escape thus satisfying both the "active accessory" and "more than mere site of the injury" elements of the Howser "causal connection" prong.

Howser Test: Prong #2

Second, no act of independent significance broke the causal link in Klug, Howser, or the case at bar. In all three instances, the use of the unknown vehicle was inextricable linked as one continuing assault as opposed to being caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of the automobile. The Howser opinion is consistent with South Carolina precedent as to this element. An independent act is most evident in Plaxco v. United States Fidelity and Guaranty Co., 252 S.C. 437, 166 S.E. 2d 799 (1969) in which an automobile's battery was used to start the engine of an airplane. Once the airplane's engine started, the airplane's brakes failed, causing it to move forward and damage another plane. Plaxco 252 S.C. 437. The Court found the only connection between the automobile and the plane was the use of the automobile to start the plane and its purpose completed when the plane moved forward, thus breaking any causal connection. Id. Because of this break, the Court determined, the accident resulted from the use of the plane and not the automobile. Id.

Here, as in Klug and Howser, nothing interrupted the assailant's pursuit and accomplishment of the drive-by shooting. Rather, it was one continuous uninterrupted event from beginning to end.

Howser Test: Prong #3

Finally, the assailant's vehicle in the present case, as in Klug, and Howser, was being used for transportation purposes at the time of the assault. In Classified Ins. Corp. v. Vodinelich, 368 N.W. 2d 921 (Minn. 1985), a case cited by the Klug court, coverage was denied when the insured's children were accidentally asphyxiated when their mother used the vehicle to commit suicide in the garage of their home. The Vodinelich court reasoned no coverage should exists where injuries result from non-transportation use of the vehicle. This third prong was adopted by the Supreme Court of South Carolina in Canal Ins. Co. v. Insurance Co. of North America, 315 S.C. 1, 431, S.E. 2d 577 (1993) in which the Court determined S.C. Code Ann. § 38-77-140 must be construed to define "use of a motor vehicle" as limited to transportation uses, and not to include damages caused, for example, by a truck crane when hoisted on outriggers. Id.

Here, unquestionably, the vehicles were being used for transportation at the time of the assault, specifically, driving on I-526 between Dorchester Road and Montague Avenue in Charleston. (R. p. 259).

Because the facts in the present case are undistinguishable from those in Howser, they satisfy the Klug test as adopted by the Supreme Court of South Carolina, as well as the additional third prong of during transportation, and the trial court erred in failing to follow the Supreme Court of South Carolina's established precedent.

Home Ins. Co. v. Towe

The Supreme Court of South Carolina affirmed its position and the elements for determining whether injuries arose out of the ownership, maintenance or use of an automobile in Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E. 2d 825 (1993).

In Towe, John Alexander, the assailant, threw a bottle at a road sign from a moving vehicle driven by Towe. Towe, 314 S.C. 106. Instead of striking the sign, the bottle shattered on the steering wheel of a tractor McClaskey was driving in the opposite direction, seriously injuring McClaskey and causing minor damage to the tractor.

The Supreme Court of South Carolina systematically analyzed this case using the Klug test adopted in Howser. Specifically, the Court said, "The test for determining whether an injury arose out of the use of a vehicle turns on the causal connection between the vehicle and the injury." *Citing* Wausau Underwriters Ins. Co. v. Howser, 422 S.E. 2d 106, 309 S.C. 269 (1991).

As to the first element, the Supreme Court disagreed with Home Ins. Co. that the Court of Appeals erred in finding that there is a causal connection between the automobile and McClaskey's injuries. Towe 314 S.C. 107. "The use of the automobile placed [the 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 McClaskey's injuries." Id. Again, this is precisely in line with this case in which the Dodge Durango was used to pursue, pull alongside at high speed, and carryout the subject drive-by shooting. But for the use of the Dodge Durango keeping speed with Levi T. Brown's vehicle, the assault would not have been a success.

Next, Home Ins. Co. argued the assailant's act of throwing the bottle was an act of independent significance that broke the causal connection between McClasky's injuries and the use of Towe's automobile. Id. at 107. The Supreme Court of South Carolina was unconvinced. Rather, the Court explained, "The use of the automobile and Alexander's throwing of the bottle were, as in [Howser], '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 McClaskey's injuries." Id. at 108. As in Towe, the facts of the case at bar constituted one

continuous event. No independent act interrupted the pulling alongside Levi T. Brown's vehicle and shots being fired by the unknown assailant. (R. pp. 259-260).

As evidenced by the Supreme Court's careful analysis of the facts in Towe, a test for determining whether injuries arose out of the ownership, maintenance or use of an automobile has been clearly established. The test adopted by the Court in Howser was not appropriately applied by the trial court in this case. The trial court erred in failing to follow clear precedent. Nothing about the way this test has been articulated in later cases has changed the analysis or altered the precedential value of Howser and Towe.

Appellant requests this Court reverse the trial court and find the facts in the case at bar satisfy the Howser elements without distinguishability, and that the Howser and Towe rulings are not inconsistent with subsequent holdings.

II. THE TRIAL COURT ERRED IN FINDING THAT THE "FORESEEABLY IDENTIFIABLE WITH USE OF THE AUTOMOBILE" ELEMENT ARTICULATED IN AYTES AND BOOKERT IS INCONSISTENT WITH HOWSER AND TOWE

Respondent State Farm Fire and Casualty Insurance Company argues State Farm Fire & Cas. Co. v. Aytes and State Farm Mut. Auto Ins. Co. v. Bookert establish a new and stricter list of factors used to analyze coverage for injuries arising out of the use of an automobile – a list that includes "foreseeably identifiable with the use of an automobile" as part of the "causal connection" prong of the three-pronged Howser test. None of the decisions relied upon by Respondent State Farm for the expanded role of "foreseeable identifiable" as a part of the analysis actually rely on this "additional" factor to reach a conclusion. All of those decisions deny coverage based on one of the other long standing factors as previously articulated in Howser. The mention of foreseeable

identifiableness is a secondary rationale that amounts to little more than a different way of articulating that the injuries that fail the Howser test.

In State Farm Fire & Cas. Co. v. Aytes, 332 S.C 30, 503 S.E. 2d 744 (1998), Randy Aytes forcibly took Donna Dawson's car keys from her, forced her into her own vehicle and drove her to a secluded area with the express intent of killing Dawson. Aytes exited Dawson's vehicle, walked around to the passenger side and fired a pistol into the vehicle striking Dawson's foot. The Court said,

> The causal connection is established where it can be shown the vehicle was an "active accessory" to the assault. Howser, supra. The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. Id. The injury must be foreseeably identifiable with the normal use of the vehicle. Nationwide Mut. Ins. Co. v. Brown, 779 F. 2d 984 (4th Cir. 1985). The required causal connection does not exist when 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.

Aytes, 332 S.C. 34.

The Aytes Court specifically distinguishes its facts with those in Howser. The Aytes Court said,

> In Wausau Underwriters v. Howser, 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 unidentified vehicle. The Court found the unknown vehicle was an active accessory to this assault: it was not a case in which the assailant merely used the vehicle to provide transportation to the situs of the shooting.

Id. The Aytes Court clearly concluded its facts did not meet the threshold for determining that the assailant's vehicle was used as an active accessory to the assault. Rather, because Randy Aytes exited Dawson's vehicle prior to the infliction of the injury, he was no longer using the vehicle and the causal link was broken. "The only connection between the car and the injury is the fact

that Dawson was sitting in the car when she was shot." Id. at 35. The Aytes Court was convinced the facts in Howser demonstrated assailant's vehicle being used as an active accessory to the assault thus meeting the "active accessory" prong of the "causal connection" test. The Aytes Court explains that by establishing the Howser assailant vehicle was an "active accessory," the injuries were thusly foreseeably identifiable with the use of a vehicle.

State Farm Mut. Auto. Ins. Co. v. Bookert, 523 S.E.2d 181, 337 S.C. 291 (1999) articulates the "foreseeably identifiable" factor as a separate numbered factor in the list of how to satisfy the "causal connection" element of the three-pronged Hower test.. In Bookert, the victim (Bookert) and a group of his friends stopped at a Hardee's where two soldiers and about fifteen other young men became involved in an altercation Bookert, 337 S.C. 292. Bookert and his friends left and went to a McDonald's, as did some of the fifteen men from Hardee's. Id. The two soldiers, who were armed, picked up a third soldier and drove to the McDonald's where they circled the parking lot, looking for the fifteen men from Hardee's. Id. As Bookert was about to go in the restaurant, he heard the solders yelling, and turned in their direction. Id. The soldiers' vehicle was stopped in the traffic lane with its motor running with one soldier in the back holding a shotgun while the front passenger brandished a handgun. Id. The vehicle jerked forward and the soldier wielding the shotgun fell and fired his gun. Id. Bookert was not hit by the shotgun pellets, but while the vehicle was still moving forward, the passenger fired the handgun striking Bookert with a bullet in each leg. Id. at 293.

After the Court of Appeals reached a decision finding coverage for Bookert in a thorough analysis, the Supreme Court of South Carolina overturned this holding with a short reference to the elements as listed in Aytes. By over-simplifying the relationship of these factors in the analysis and simply placing them in a numbered list without further analysis of how coverage was found

to be lacking, the Bookert Court provided insurance carriers the foot-in-the-door necessary to create the argument Respondent State Farm is making herein. There is, however, no reason to believe the Bookert Court intended to provide a new catch-all element of foreseeable identifiableness with the normal use of an automobile that would make once covered injuries by Klug, Howser and Towe not covered after Bookert. Bookert (as was Aytes) was decided using the same methodology as Howser and Towe. However, the Bookert and Aytes facts did not rise to the level of causal connection, as the vehicles were not active enough accessories. The assaults in both Bookert and Aytes were not made worse or made successful by the involvement of the assailants' vehicle

This Court must resist posited by Respondent State Farm in this case, namely that Aytes and Bookert hold that gunshot injuries are not foreseeably identifiable with the normal use of an automobile (and can thus be excluded from coverage). The vehicle in Aytes was not an active accessory to the assault. The decision on every State and Federal case cited to the trial court on this issue post-Aytes is grounded in failures of the "causal connection" between the assailant's vehicle and the injury, and/or acts of independent significance breaking the causal link, and/or the assailant's vehicle not being used for transportation at the time injury is inflicted.

None of the subsequent cases are decided based upon "foreseeably identifiableness with the normal use of a vehicle" as the rationale. When this phrase is used, it is merely an expression of why coverage cannot be had with the stated failure of a causal connection. Lack of a causal connection and "unforeseeableness" are synonyms.

The Bookert Court restated the three part test for determining whether an individual's personal injuries arise 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; and
2. No act of independent significance brakes the causal link; and
3. The vehicle is being used for transportation at the time of the assault.

Aytes reiterated the components of the causal connection requirement. In this context, causal connection means:

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 automobile."

Bookert, 337 S.C. 293.

While affirming the Aytes list of elements, the Bookert opinion fails to explain its reasoning for reversal other than to say the "policy does noes cover [Bookert's] injuries because they are not 'foreseeably identifiable with the normal use of an automobile.'" Id. at 293. At the moment the assailant in Bookert fires the pistol that injures the victim, the assailant vehicle is being used for transportation and no act of independent significance has broken the causal link. The assailant vehicle is arguably something less than proximate cause but more than the mere site of the injury. The assailant vehicle was arguably an active accessory to the shooting. However, the Bookert vehicle did not fit within the narrow field of claims defined as "covered" by Klug, Howser, and Towe. That is, the Bookert injuries were not caused and enabled **only** through the use of the vehicle (e.g., the gunman could have just as easily gotten out of the vehicle and shot the victim). The Bookert vehicle was not involved in the actual infliction of damage, as opposed to just being part of the event. And, the speed of the Bookert vehicle nor the force of the vehicle increased the damages.

What the case before this Court now has in common with Klug, Howser, and Towe is that its fact **do** fit squarely in the narrow filed of cases that have found a causal connection to exist and for the injuries to have arisen out of the use of an automobile.

Because the trial court improperly read the dicta of the Bookert opinion citing the "foreseeably identifiable with the normal use of an automobile" as creating a new element of the analysis that would make the facts of this case not controlled by Howser and Towe, Appellant requests this Court reverse the trial court.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the circuit court.

Respectfully submitted,

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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
Appellate Case No. 2017-000479

LEVI THOMAS BROWN

Appellant

vs.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

Respondent.

CERTIFICATE OF COUNSEL

Appellant's counsel certifies that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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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

v.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY ..... Respondent

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RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

Did the trial court err in applying the multi-part test for determining whether injuries arise out of the use of a motor vehicle established by State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998) and State Farm Mut. Auto. Ins. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) and their progeny?

Should the case be affirmed on the independent basis of the policy exclusion for firearms injuries which was not addressed by the Appellant in his brief?

STATEMENT OF THE CASE

The Respondent, State Farm Fire and Casualty, (hereinafter State Farm), does not dispute the Appellant's statement of the case.

FACTS

The facts are stipulated. State Farm does not dispute the Appellant has accurately set forth the stipulation of fact.

LEGAL ARGUMENTS

I. The Trial Court Did Not Err In Applying The Multi-Part Test Established By Aytes And Bookert To Determine The Injuries Of Brown Did Not Arise Out Of The Use Of The Motor Vehicle.

The bodily injury to Levi Brown resulting from this shooting is not covered by the State Farm uninsured motorist coverage. His injuries are not covered by the policy because the damages do not arise out of the ownership, operation or use of an uninsured vehicle. The lower court did not ignore precedent. It applied the correct precedent which is the multi-part test established by State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998) and more expressly stated in State Farm Mut. Auto. Ins. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999). Whether Wausau

Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1991) remains good law is questionable. Although the case has not been expressly overruled, it is undisputable Aytes and Bookert added the requirement the injuries be "foreseeably identifiable with the normal use of the automobile." (emphasis added). And that requirement has served as an obstacle to coverage in shooting cases since Aytes and Bookert. There is not a single appellate firearm injury case since Aytes which has resulted in a finding of coverage. Even if Howser remains good law, the facts of the present case differ from Howser in several material respects.

State Farm's policy provides coverage "for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured. The bodily injury and property damage must be caused by an accident that involves the operation, maintenance, or use of an uninsured motor vehicle." (State Farm policy, R. p. 40) Similarly under S.C. Code § 38-77-140, an insured is legally entitled to recover damages arising out of the ownership, maintenance or use of an uninsured vehicle.

The South Carolina Supreme Court cases of Aytes and Bookert have established a three-part test for determining whether an individual's injuries, as a result of an assault or shooting, arise out of "ownership, maintenance, or use" of an automobile so as to trigger automobile insurance coverage. The test is as follows:

1. There exists a causal connection between the [assailant's] vehicle and the injury; and
2. No act of independent significance breaks the causal link, and
3. The [assailant's] vehicle is being used for transportation at the time of the assault.

For there to be a "causal connection" in this context:

1. The [assailant's] vehicle must be an "active accessory" to the assault; and
2. Something less than proximate cause but more than mere site of the injury; and
3. That the "injury must be foreseeably identifiable with the normal use of the automobile."

Aytes, 332 S.C. at 221; Bookert, 337 S.C. at 291.

The South Carolina Supreme Court decision in Bookert, 337 S.C. at 291. is most instructive. In Bookert, the victim (Bookert) and a group of his friends got into an altercation with two soldiers at Hardee's. Bookert and his friends left Hardee's and went to McDonald's. The two soldiers used a vehicle to leave Hardee's and picked up a third soldier. The three soldiers circled the McDonald's parking lot looking for the men from Hardee's. Bookert was near the entrance when the soldiers yelled from the vehicle. The passenger had a handgun and another man was in the back with a shotgun. The vehicle jerked forward and the man with the shotgun fell and fired his shotgun. This blast did not strike Bookert, but the passenger then fired a handgun--- while the vehicle was still moving forward--- and struck Bookert once in each leg. The assailants then escaped from the parking lot in the vehicle, except for the man with the shotgun who fled on foot.

The Court of Appeals found the assailant vehicle acted as a "launching pad" for the assault, noting the use of the vehicle by the assailants to circle the McDonald's to seek out their targets, to put the assailants into a position to shoot Bookert and for two assailants to quickly flee the scene. The Court of Appeals found there was coverage under Bookert's mother's uninsured motorist policy. The Supreme Court reversed--- though it did not reverse the finding of the assailant vehicle as an "active accessory."

Instead, the South Carolina Supreme Court found the gunshot injuries were not "foreseeably identifiable with the normal use of an automobile".

In Wright v. North Area Taxi, 337S.C419, 523 S.E.2d 472 (S.C. Ct. App. 1999), the Court of Appeals of South Carolina gave further guidance with regards to the Aytes standard. The court held that a cab driver shot from behind by a passenger inside the vehicle while the cab was moving was not entitled to uninsured motorist coverage. There was no dispute the passenger was "using" the vehicle in the sense that he was a passenger. However, the passenger's act of firing a gun into the cab driver was not covered as part of the "use" of the vehicle. The court held so despite noting the passenger's position in the vehicle gave him the opportunity to gain proximity and opportunity to shoot the driver from behind. Still, the connection to the vehicle was lacking. The vehicle itself did not produce the gunshot injury. The vehicle was not an active accessory. Furthermore, the Court concluded that even though taxi drivers face special dangers of firearm-related robberies, a gunshot injury is not foreseeably identifiable within the normal use of a vehicle. It is interesting to note the North Area Taxi court found insurance coverage did exist for the damage to a parked vehicle hit after the shooting of the cab driver. The court explained these damages arose out of the use of an auto as an auto.

The North Area Taxi court cited with approval Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984, 989 (4th Cir.1985), a decision since cited by the South Carolina Supreme Court three times----in Howser, in Aytes, and in Peagler v. USAA Ins. Co., 368 S.C. 153, 628 S.E. 2d 475 (2000). In Nationwide Mutual Ins. Co. v. Brown, an estranged husband riding as a passenger grabbed the wheel and rammed the car of his

"foreseeably identifiable with the normal use of a vehicle." [1] To be clear, this prong does not ask whether the driver and passengers were using the vehicle normally at the time of the assault but instead focuses on whether the injury is foreseeably identifiable with the normal use of a vehicle. There is no question the assailants in Bookert were normally using the vehicle in the sense they were occupying it as it circled the McDonald's moving under the power of the engine while the assailants located and repeatedly shot at their victims.. There is no question the passenger in North Area Taxi was normally occupying the back seat of the cab before firing into the cab driver from behind There is no question that the assailant in Holmes was normally driving his vehicle to the bus stop and was normally seated in the vehicle when he pulled the trigger of a handgun pointed at his victim However, none of the gunshot injuries were foreseeable from the normal use of the motor vehicle as a vehicle.

In the present case, the gunshot injury to Mr. Brown in no way is foreseeable with the normal use of a vehicle. Using the vehicle as a shooting platform is not consistent with its normal use. Plaintiff's only injuries are from a gunshot wound. It is reasonably clear in light of Aytes, Bookert, Brown and Holmes, that gunshot injuries are not "foreseeably identifiable with the normal use of an automobile."

Even if Howser is good law, there are some significant differences with the present case. In Howser, the assailant vehicle bumped the victim's vehicle. The victim vehicle did not stop, presumably because they sensed something was unusual. The

[1] Aytes, 332 S.C. at 33, 503 S.E. 2d at 745 also expressly acknowledged the addition of the transportation prong to Howser. ("A third requirement was added in Canal Ins. Co. v. Ins. Co. of N. Am., 315 S.C. 1, 431 S.E.2d 577 (1993): it must be shown the vehicle was being used for transportation at the time of the assault.")

assailant vehicle bumped the victim's vehicle two more times. So, there was physical contact. More importantly, this series of bumps set off a chase as the Howser vehicle accelerated and the assailant vehicle pursued. That chase could have only succeeded with a motor vehicle. In the present case, there was no physical contact. There was no chase. There was no precipitating road-related event that generated the dispute. There was simply a vehicle that came out of nowhere and opened fire on the Brown vehicle.

The Appellant attempts to construct an argument that it is easier to shoot a moving vehicle from a moving vehicle than it is to shoot a moving vehicle from a stationary position. First, this is not part of the factual stipulation between the parties. Second, it is not necessarily true. While a moving vehicle might allow a car to overtake another and create proximity; a stationary shooting position, and an appropriate angle would probably create at least as good of a chance of hitting a moving target.

Also, the proximity argument is a slippery slope. If the question revolves only around keeping proximity, then there are many cases where the vehicle contributes proximity in different ways. The drive-by shooting creates proximity to the victim to allow a quick discharge of weapons before the victim has a chance to run or take cover. In a physical assault, the vehicle can create proximity to the victim to drive to a remote location---as was in alleged in Aytes or Nationwide Prop. & Cas. Co. v. Lain, 402 F. Supp. 2d 644, (D.S.C. 2005)(strangulation, in backseat after victim driven to a remote location, not covered). Or the nature of the vehicle can create proximity where the victim cannot escape an assault because of locked doors or because the vehicle is

moving. Or because of the position of the cab driver to a passenger as in North Area Taxi.

The Appellant also cites in support of its position the decision in Home Insurance Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1993). The Towe case actually supports State Farm's position. In Towe, the passenger threw a glass bottle out of a moving vehicle. The bottle hit the steering wheel of a tractor driving in the opposite direction. The broken glass sprayed into the face of the tractor driver. The Towe court found coverage for the tractor driver's injuries by expressly noting that the speed of the vehicle contributed to the velocity of the bottle which increased the seriousness of the injuries. With gunshot injuries, vehicles do not contribute velocity to the bullets to cause greater injury. There is no difference in degree of injury between a bullet fired from a moving car versus a bullet fired from a stationary location.

Of course, it is State Farm's position that even if a casual connection exists, the gunshot injury here is not foreseeably identifiable with the normal use of the vehicle. As noted above, in is indisputable the Howser decision did not include this prong. It was not added until Aytes and Bookert.[2] And the Bookert case shows the difference

[2] This point has been made by others, including the Honorable Margaret S. Seymour, United States District Court Judge in Nationwide Mut. Fire, Ins. Co., v. Jeter, 3:112-cv-01759-MBS,2013 U.S. Dist. Lexis 85029 (D.S.C. 2013) ("Although Howser and Towe are pertinent to the analysis of whether Jeter's vehicle was . . . an active accessory . . ., those cases' relevance is limited due to the fact that both were decided before Aytes. Significantly. Aytes added to the causal connection analysis the requirement that the "injury must be foreseeably identifiable with the normal use of the automobile." Although prior to Aytes a few courts had acknowledged that such a requirement might be relevant to the causation analysis, see, e.g., Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir. 1985); Hite v. Hartford Accident and Indem. Co., 288 S.C. 616, 344 S.E.2d 173 (S.C. Ct. App. 1986), the South Carolina Supreme Court did not consider the foreseeability of the victims' injuries in Howser or Towe.

that prong makes in a gunshot injury case. Even though the Bookert vehicle was moving and even though it was a "launching pad," there was no coverage because the gunshot injury was not foreseeable indentifiable with the normal use of a vehicle. The Court of Appeals is bound to follow the most recent governing precedent of the South Carolina Supreme Court. Bookert and its progeny are the most recent applicable governing precedent, not Howser. The Supreme Court in Bookert did not reverse the Court of Appeals' conclusion that the assailant vehicle was an active accessory---a launching pad. The Bookert court did not reverse on the basis of a lack of causal connection. The South Carolina Supreme Court reversed the Court of Appeals because the gunshot injuries were not foreseeably identifiable with the normal use of an automobile. It is impossible to distinguish Bookert's gunshot injuries from Mr. Brown's gunshot injuries. Therefore, the Court should affirm the lower court.

While this decision should be based on precedent, there are obviously underlying policy questions of what risks should be underwritten by our automobile insurance system and the reasonable expectations of the motoring public. This Court can also attempt to discern those policy considerations as an additional guide to its decision in the present case. Bookert appears partially rooted in a decision not to underwrite all risks through automobile insurance coverage. Because each of the prongs must be met, the Bookert court understood there would be cases which have a strong causal connection, but where the injuries are not foreseeable with the normal use of a vehicle. By its nature and design, the foreseeably identifiable with the normal use prong operates as a restriction on the types of injuries covered by an automobile insurance policy. Shootings, stabbings, sexual assaults, strangulations and the like are not the

type of injuries that the motoring public reasonably expects covered by a motor vehicle policy. Nor are those injuries the type contemplated by insurance companies when setting premiums. The injuries foreseeable with the normal use of a vehicle are those that the vehicle will collide with someone or something. That is what the motoring public expects when they purchase insurance. That is the risk contemplated by underwriters and actuaries in setting premiums.

II. State Farm's Policy Contains A Specific Exclusion For Firearm Injuries.

Plaintiff should be denied coverage because State Farm's automobile insurance policy contains a provision which excludes firearm injuries. The trial court ruled in favor of State Farm on this issue and there was no argument made in the Appellant's Initial Brief to the contrary.

Here, the uninsured motorist policy excludes coverage "for an insured whose bodily injury results from the discharge of a firearm." The exclusion is applicable on these facts. State Farm is entitled to limit its liability for firearm injuries.

CONCLUSION

This Court should affirm the decision of the lower court in finding that no coverage applies through the State Farm policy for the injuries sustained by Mr. Brown.

(Signature on next page)

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August 28, 2017

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Levi Thomas Brown, Appellant,

v.

State Farm Fire and Casualty Insurance Company, Respondent.

Appellate Case No. 2017-000479

Appeal From Charleston County
W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2018-UP-317
Submitted June 1, 2018 – Filed July 11, 2018

AFFIRMED

Robert Emmet Treacy, Jr., and Patrick Thomas Napolski, both of George Sink, PA Injury Lawyers, of North Charleston, for Appellant.

Timothy Alan Domin, of Clawson & Staubes, LLC, of Charleston, for Respondent.

PER CURIAM: In this appeal from a declaratory judgment action, Levi Thomas Brown appeals the circuit court's ruling that State Farm Fire and Casualty Insurance Company's uninsured motorist provision provided no coverage for a

gunshot injury Brown sustained while operating the insured vehicle. The circuit court found the injury was not covered under the policy because it was not foreseeably identifiable with the normal use of an automobile and the policy contained an exclusion for bodily injury resulting from the discharge of a firearm. Brown did not appeal the circuit court's ruling concerning the exclusion. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities: *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming the circuit court's decision when it ruled against the appellant on two grounds and the appellant only challenged the second ground on appeal).

AFFIRMED.

SHORT, THOMAS, and HILL, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

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JUL 25 2018
SC Court of Appeals

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.

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[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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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

v.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY ..... Respondent

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RESPONDENT'S RETURN TO MOTION FOR REHEARING

The Appellant's position in its rehearing is that issue one regarding the scope of State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 221, 503 S.E.2d 744 (1998), State Farm Mut. Auto. Ins. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999), Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1991) and Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1991) will determine issue number two (the firearm exclusion) because "It is axiomatic that a policy exclusion cannot exclude coverage contrary to the common law." That is an incorrect statement. An exclusion cannot violate public policy or a statutory requirement, but it is incorrect to say that a policy exclusion cannot be contrary to common law.

Second, Appellant's argument in its brief didn't take the position that issue two would be determined by a ruling on issue one. Normally, issues must be raised by the parties in their briefs in order to be heard on rehearing. The purpose of the petition for rehearing is to address matters overlooked or misapprehended by the Court. The Court has not

overlooked any issue properly raised. If issue one is decided in State Farm's favor without this argument that issue one impacts issue two, then it does render the rest of the case moot and serves as a separate and independent basis for the decision of the lower court to stand.

Of course, State Farm remains of the view that issue one regarding the scope of Aytes, Bookert and Howser should be resolved in favor of State Farm consistent with the decision of the lower court. It appears Appellant's petition for rehearing is an effort to get to the court to hear that issue and not a request that the Court actually rule in its favor on issue one. However, State Farm would incorporate its brief by reference its position that the common law most definitely not support the view that car to car shootings are covered under the most recent prevailing precedents or the facts of this case.

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August 16, 2018

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

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STATE FARM FIRE AND CASUALTY INSURANCE COMPANY ..... Respondent

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PROOF OF SERVICE

I certify that I have served the RESPONDENT'S RETURN TO MOTION FOR REHEARING on Levi Thomas Brown by depositing a copy of it in the United States mail, postage prepaid, on August 16, 2018 addressed to his attorneys of record as follows:

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The South Carolina Court of Appeals

Levi Thomas Brown, Appellant,

v.

State Farm Fire and Casualty Insurance Company,
Respondent.

Appellate Case No. 2017-000479

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, J. J.

J.

J.

Columbia, South Carolina

cc:
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Timothy Alan Domin, Esquire
The Honorable W. Jeffrey Young

FILED
Sept. 20, 2018