THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2013-CP-27-577

Mary Wiggins, as Personal Representative of Kelvin Marquise Wiggins, Appellant,

v.

Enterprise Leasing Company – South East, LLC Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On November 14, 2013, Mary Wiggins, as Personal Representative of Kelvin Marquise Wiggins, filed a declaratory judgment action for a determination that Kelvin Wiggins (hereinafter, "Mr. Wiggins") was entitled to uninsured motorist coverage for injuries sustained in the vehicle owned, and insured by Enterprise Leasing Company – South East, LLC (hereinafter, "Enterprise"). Enterprise moved for Summary Judgment, and arguments on the motion were heard by the circuit court on August 13, 2015.

The circuit court granted Enterprise's motion, and entered judgment as a matter of law for Enterprise. A timely notice of a Rule 59 motion was filed, and served by Mary Wiggins, which was denied without hearing or comment. A timely Notice of Appeal was filed and served.

FACTS

On October 5, 2011, Mr. Wiggins was the driver of Enterprise's rental vehicle traveling south on Deerfield Road in Hardeeville, South Carolina. (R. pp. 65-66). While traveling south, Mr. Wiggins' vehicle passed a vehicle traveling in the opposite direction on Deerfield Road. *Id.* While both vehicles were still in motion, passing each other, the driver of the vehicle traveling north, an unknown John Doe, fired a shot into Mr. Wiggins' vehicle. Mr. Wiggins was fatally struck in the head by a round fired at the vehicle. (R. p. 65-67). The vehicle driven by Mr. Wiggins was owned by Enterprise, a self-insured owner that leased the vehicle to Mr. Wiggins' cousin, Shala Kelly (hereinafter, "Ms. Kelly"). A week prior to the incident, Ms. Kelly rented the vehicle

from a branch of Enterprise located in Bluffton, South Carolina. (R. p. 19, ln. 18-25). Kelly signed an Enterprise Rental Agreement that reflects that no additional drivers were authorized by Enterprise. (R. p. 29). At the time she rented the vehicle, Ms. Kelly purchased additional insurance from Enterprise to cover additional damages not normally covered by Enterprise, or her insurance. (R. p 20, ln. 9-23). Prior to the incident that resulted in Mr. Wiggins' death, Ms. Kelly gave Mr. Wiggins and another cousin, Mr. Travis Wiggins, permission to operate the vehicle. (R. p. 19, ln. 23-25; p. 20, ln. 2-8; p. 23, ln. 4-8).

ARGUMENTS

I. BECAUSE MR. WIGGINS WAS GIVEN PERMISSION TO OPERATE THE AUTOMOBILE BY THE INSURED, MR. WIGGINS WAS INSURED AS A PERMISSIVE USER WHEN HIS INJURIES OCCURRED.

The circuit court erred in holding that Enterprise was entitled to Summary Judgment in this matter when it found that Mr. Wiggins was not a permissive user and was uninsured. The rationale provided by the circuit court was that there was no evidence that Enterprise, a self-insured company, gave Mr. Wiggins permission to operate the vehicle. The court further erred in holding that only Enterprise was the named insured, even though Enterprise is an insurer that sold an insurance policy to Ms. Kelly, the lessee of the automobile.

Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56 SCRCP. Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence, and all reasonable inferences in the light most favorable to the non-moving party. To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of

proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. See eg. *Fronenberger v. Smith*, 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013) *Other ct's omitted.*

Enterprise is a self-insured company pursuant to S.C. Code Ann. § 56-9-60. A self-insurer holds a dual role as an insurer, and an insured. *Collins Cadillac, Inc. v. Bigelow-Sanford, Inc.*, 276 S.C. 465, 467, 279 S.E.2d 611, 612 (1981). A self-insured company must provide the same minimum liability limits to the public as the minimum limits required by a statutory liability policy. *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 421, 523 S.E.2d 472, 474 (Ct. App. 1999); *Southern Home Ins. Co. v. Burdette's Leasing Service, Inc.*, 268 S.C. 472, 234 S.E.2d 870 (1977). Moreover, a self-insured lessor of rental vehicles must provide coverage for persons using its rental automobile with its express, or implied consent. *Southern Home Ins. Co.*, 268 S.C. at 475. A self-insurer must further provide uninsured motorist coverage to insure against "damages arising out of the ownership, maintenance or use" of a motor vehicle, pursuant to S.C. Code Ann. § 38-77-140. A person seeking coverage under an automobile insurance policy as a permissive user has the burden to establish that permission was granted by a named insured. *Liberty Mutual Insurance Company v. Edwards, et. al.*, 294 S.C. 368, 370, 364 S.E.2d 750 (1988) (citing *Allstate Insurance Co. v. Federated Mutual Implement and Hardware Insurance Co.*, 251 S.C. 203, 161 S.E.2d 240 (1968)).

In holding that Mr. Wiggins was not an insured permissive user of the automobile leased and insured by Enterprise, the Court mischaracterized the relationship between the parties involved in this action. As a self-insured owner of the vehicle, Enterprise expressly, or implicitly, provided

the statutorily mandated minimum liability and uninsured motorist coverage to Ms. Kelly when Enterprise leased the vehicle. Enterprise further acted as an insurer when it sold Ms. Kelly insurance to cover any damages in excess of those covered by her insurance or Enterprise. Indeed, as a self-insurer, Enterprise is an insurer and an insured as to the automobile. However, when Enterprise offered, and sold Ms. Kelly an insurance policy covering property damage and personal injuries arising from the use of the leased automobile, Ms. Kelly became a named insured as to that automobile. As a named insured, Ms. Kelly permitted Mr. Travis Wiggins to operate and use the automobile. Mr. Wiggins was, thus, a permissive user of the automobile and was an insured, because Ms. Kelly, a named insured, gave him express or implied permission to operate and use the automobile. Therefore, the Circuit Court erred in granting Summary Judgment to the Defendant because Enterprise failed to meet its burden of clearly establishing the absence of a genuine issue of material fact that entitled them to judgment as a matter of law and because Ms. Wiggins met her burden of proving that Mr. Wiggins was insured as a permissive user.

II. THE COURT ERRED IN BASING ITS RULING ON MATTERS NOT INCLUDED IN DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND BECAUSE THE ASSAILANT'S VEHICLE WAS USED AS AN ACTIVE ACCESSORY IN THE ASSAULT OF MR. WIGGINS, THE COURT FURTHER ERRED IN HOLDING THAT MR. WIGGINS' INJURIES DID NOT ARISE OUT OF THE USE OF A VEHICLE.

The circuit court further erred in ruling upon the issue of whether Mr. Wiggins's death arose out of the use of the vehicle. This issue did not arise in the Defendant's Motion and Memorandum in Support of Summary Judgment or in the hearing. The first time this issue was brought to the circuit court's attention was in Defendant's Supplemental Memorandum in Support of Defendant's Motion for Summary Judgment filed after the hearing, and the Court did not address this issue during oral arguments on the Motion. Specifically, the Plaintiff did not have notice and opportunity to be heard on either the facts or the law, as to that issue at the hearing.

The Plaintiff had no reason to exercise her right to file counter affidavits, or present other evidence in support of her claim. Therefore, the Court's ruling on the issue was improper. However, assuming *arguendo* that ruling on the issue was proper, and not outside of the scope of Defendant's Motion for Summary Judgment, the Court further erred in holding that Ms. Wiggins failed to establish that Mr. Wiggins' death arose out of the use of the automobile.

Liability and uninsured motorist coverage are mandated under South Carolina law to insure against "damages arising out of the ownership, maintenance, or use" of a motor vehicle. S.C. Code Ann. 38-77-140. In determining whether damages arise out of the ownership, maintenance, or use of an automobile, South Carolina courts require that:

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

State Farm Mutual Automobile Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 182 (1999); *State Farm v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998). In situations where the vehicle is used in connection with an assault, it may be shown that a causal connection exists between the vehicle and the injury if the vehicle was an "active accessory" to the assault.

The Court has emphasized that "[a]lthough the assault, not the use of the vehicle, was the cause of the insured's injuries," the use of a vehicle may be found to have causally contributed to an insured's injuries. *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 272, 422 S.E.2d 106, 108 (1992); See also *Coletrain v. Coletrain*, 238 S.C. 555, 121 S.E.2d 89 (1961). The claimant in *Howser* was the driver of an automobile that was pursued by an unknown John Doe in another vehicle. The John Doe pulled alongside Howser's vehicle and pointed a gun at Howser, causing her to make a quick turn. The John Doe continued to pursue Howser's vehicle and fired several shots, injuring Howser. In holding that Howser's injuries arose out of John Doe's use of

his automobile, the Court differentiated this case from cases in which "the assailant merely used the vehicle to provide transportation to the situs of the shooting." *Id.* See also *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985). The Court reasoned that "only through use of his vehicle was the assailant able to closely pursue Howser, thereby enabling him to carry out a pistol assault," and that "[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part." *Howser*, 309 S.C. at 273. The Court further noted that only a motor vehicle could have given the assailant the means to escape the scene so quickly.

The circumstances surrounding Mr. Wiggins' injuries and subsequent death are very similar to those involved in the injuries of the insured in *Howser*. Much like Howser, Mr. Wiggins' gunshot wounds were caused by an unknown motorist who utilized his vehicle to carry out a shooting attack. Mr. Wiggins' assailant did not merely use his vehicle to provide transportation to the site of the accident. Rather, the unknown assailant used his vehicle as an active accessory to the assault by using the vehicle to pursue the Wiggins vehicle, then as a moving shooting platform, and finally, as a means of escape. (R. p. 65-67). Without the assistance of the vehicle, the assailant would not have been able to carry out the assault.

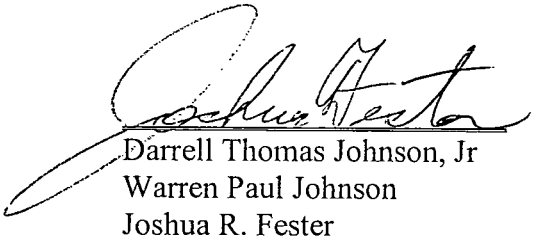
Additionally, the circuit court's holding seems to erroneously rely upon non-binding authority from the federal court for the District of South Carolina. Specifically, the circuit court cited *Holmes v. Allstate*, 786 F.Supp.2d 1022 (D.S.C. 2009), wherein the claimant was assaulted by a motorist in an adjacent vehicle while the motorists were stationary in a parking lot. The holding in *Holmes* could not be further from the merits of the present case, because rather than the assailant using the automobile as an accessory or instrumentality of his assault, it was merely coincidental that the assailant and the victim were inside the automobiles at the time of the shooting.

Therefore, Mr. Wiggins' injuries, and subsequent death arose out of the unknown assailant's use of his automobile. Accordingly, the circuit court erred in holding that Ms. Wiggins failed to meet her burden of proving that Mr. Wiggins' injuries arose out of the ownership, maintenance, or use of the automobile.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the circuit court.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

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

October 5, 2016

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