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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2017-001946
Trial Court Case No. 2015-CP-18-01571

Progressive Direct Insurance Co., and
USAA General Indemnity Company, ... Respondents,

v.

Shanna Groves as the Personal Representative of the
Estate of Lynn Harrison.....Appellant.

**MOTION AND PETITION FOR REHEARING AND FOR REHEARING *EN BANC* AND
MEMORANDUM IN SUPPORT**

Respondents Progressive Direct Insurance Co. (“Progressive”) and USAA General Indemnity Company (“USAA”), respectfully move and petition pursuant to Rules 219 and 221, SCACR, for rehearing and rehearing *en banc* of the above-referenced matter.

SUMMARY

This Court’s Opinion of July 22, 2020 upends more than two decades of precedent from the South Carolina Supreme Court. In doing so, this Court finds that it is a “normal” use of an automobile for a driver to point a .30-06 rifle out of his driver’s side window while stopped at a red light and to shoot the driver of the neighboring car. The decision does not articulate how this is a “normal” use of a vehicle. Moreover, in order to support its conclusions in the July 22 Opinion, this Court creates facts that are not in the record, speculates about facts that are not established in

the record, and shifts the burden of proof to Respondents, contrary to established law. This goes far beyond the confines of an appellate court's standard of review on cross motions for summary judgment. Because the Opinion of this Court changes the substantive law of South Carolina, contrary to binding Supreme Court precedent, and goes beyond the record to find facts that were never presented or even argued, Respondents respectfully petition for a rehearing and for this matter to heard by the entire Court *en banc*.

ARGUMENT

I. The Court's July 22 Opinion Disregards Binding Supreme Court Precedent in *Aytes* and *Bookert* and, Instead, Relies Upon Cases That are No Longer Good Law.

In *State Farm Mutual Automobile Insurance Company v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999), the South Carolina Supreme Court held that injuries resulting from gunshots fired from a vehicle were not "foreseeably identifiable with the normal use of an automobile." This Court's July 22 Opinion disregards *Bookert*, holding that "*Bookert* is limited to the facts of that case." (Op. p. 14). The facts of *Bookert* involved gunshot injuries. The Supreme Court held injuries sustained by the firing of a gun were not "foreseeably identifiable with the normal use of an automobile." *Id.* Even if limited to those facts, *Bookert* applies to this case, which involves injuries sustained by the firing of a gun from an automobile. *Bookert* is controlling, and the July 22 Opinion fails to apply this binding precedent from the Supreme Court.

Instead of applying the *Bookert* holding, this Court's July 22 Opinion relies almost exclusively on two cases that predated *Bookert* and that applied a former test that is no longer the applicable law in South Carolina. In particular, the July 22 Opinion relies on the Supreme Court's 1992 decision of *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 296, 422 S.E.2d 106 (1992) and the Supreme Court's 1994 decision of *Home Insurance Company v. Towe*, 314 S.C. 105, 441

S.E.2d 825 (1994). Neither of these cases applied the modern *Aytes* test for whether injuries arise out of the use of an auto. Moreover, both cases are distinguishable on their facts.

Before this Court's July 22 Opinion, the *Howser* case was the only published case in South Carolina's jurisprudence holding that gunshot injuries arose out of the ownership, maintenance or use of an automobile. Every South Carolina appellate decision involving a shooting since the 1992 *Howser* decision has distinguished *Howser* and found that automobile insurance does not apply to gunshot injuries.

More importantly, the 1992 *Howser* case predates South Carolina's adoption of the 3-part test in *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998). In *Aytes*, the Supreme Court adopted the current test for determining whether a vehicle is an "active accessory" to injuries such that the injuries arise out of the ownership, maintenance or use of an automobile. Importantly, the Supreme Court in *Aytes* adopted the requirement that "the 'injury must be foreseeably identifiable with the normal use of the automobile.'" *Id.* (emphasis added). This was not part of the Supreme Court's consideration in *Howser* (or *Towe*) because the test had not yet been adopted when those cases were decided.

Shooting a bullet from a .30-06 rifle out of the driver's side window of a vehicle is not a "normal use of an automobile," and gunshot injuries resulting from such conduct are not "foreseeably identifiable with the normal use of the automobile." This was the Supreme Court's holding in *Bookert*, and it has been reiterated by courts applying South Carolina law for decades since. See e.g., *GEICO v. Bland*, 2019 WL 6463792 (D.S.C. Dec. 2, 2019) (holding gunshot injuries did not arise out of use of an automobile); *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009) (holding injuries from bullets fired from one vehicle into another vehicle were not foreseeably identifiable with the normal use of an automobile). This Court itself held that

gunshot injuries during a robbery inside a moving taxicab did not arise out of an automobile because, finding that, although the injuries may have been foreseeably identifiable with dangers inherent in the occupation of a taxicab driver, such injuries were not inherent “in the use of the motor vehicle as a motor vehicle.” *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523, 523 S.E.2d 472, 476 (Ct. App. 1999) (emphasis added). Thus, this Court’s July 22 Opinion fundamentally changes the law in South Carolina and, in doing so, disregards two decades of precedent.

The appellate history in *Bookert* is enlightening here. This Court rendered its opinion in *Bookert* before the Supreme Court adopted the *Aytes* “normal use” standard. Relying on *Howser* and *Towe*, this Court found that the drive-by shooting in *Bookert* arose out of the use of an automobile. This Court found significant that: (1) the vehicle was used to transport “the assailants and their weapons to the scene of the shooting”; (2) the vehicle served as the “launching pad” for the assault; (3) the vehicle allowed the assailants to circle the McDonald’s restaurant while seeking out their targets; and (4) “[t]he vehicle also put the assailants in the position to shoot and then escape quickly and easily.” *State Farm Mut. Auto. Ins. Co. v. Bookert*, 330 S.C. 221, 499 S.E.2d 480 (Ct. App. 1998), *rev’d* 337 S.C. 291, 523 S.E.2d 181 (1999). Notably, these are the same justifications that this Court relies upon in its July 22 Opinion: (1) Redman used the car to transport himself and the rifle to the place of the shooting; (2) Redman shot at Harrison from his vehicle; (3) “Redman used his vehicle, like the assailant in *Howser* to closely pursue her to the point where he shot her;”¹ and (4) “but for Redman’s use of his vehicle, he would not have been in a position to shoot Harrison” and “like the assailant in *Howser*, Redman used his vehicle to immediately flee the scene.” (Op. p. 9).

¹ As discussed below, there is no evidence in the record that there was a pursuit in this case. Appellant Groves bore the burden of presenting evidence of a pursuit, and she did not do so.

On review, the Supreme Court reversed this Court's decision in *Bookert*. Despite all of the above-summarized factual findings in *Bookert*, the Supreme Court explained the basis for reversal in very concise terms:

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 arose out of the "ownership, maintenance, or use" of an automobile such that they are covered by an automobile insurance policy. The three part test is met when:

1. There exists a causal connection between the vehicle and the injury; and
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.

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 & Casualty Co. v. Aytes, supra*. Accordingly, the decision of the Court of Appeals is REVERSED.

Bookert, 337 S.C. at 293, 523 S.E.2d at 182.

Notably, the Supreme Court did not rely upon the specific facts in *Bookert*. The Supreme Court did not attempt to distinguish the circumstances at issue in *Bookert* from those at issue in *Howser* or *Towe*. Instead, the Supreme Court in *Bookert* made a broad holding that gunshot injuries did not arise out of the use of an auto despite that facts in that case. The Supreme Court

made a broad ruling that gunshot injuries were not “foreseeably identifiable with the normal use of an automobile.” *Id.* Harrison’s injuries in this case are exactly the same as in *Bookert* – gunshot injuries. By limiting the holding in *Bookert* to its facts, this Court did the opposite of what the Supreme Court did in *Bookert*.

The July 22 Opinion concludes the “normal use” analysis by stating in conclusory fashion: “Consequently, we conclude that Redman’s assault was foreseeably identifiable with the normal use of an automobile.” (Op. p. 14). The Opinion does not explain what was normal about Redman’s use of a vehicle or what normal use of a vehicle could foreseeably cause gunshot injuries.² Automobiles are normally used for transportation. They are not normally used as a place from which a person fires bullets at someone else. The injuries sustained by Harrison are not the sort of injury that is foreseeably identifiable with the normal use of an automobile.

II. The Court’s July 22 Opinion Distinguishes *Bookert* and *Wright* Based on Immaterial Facts and then Finds this Case Similar to *Howser* and *Towe* Based Upon Immaterial Facts.

In reaching its decision, the July 22 Opinion relies heavily, and almost exclusively, on *Howser* and *Towe*. Those two cases stand for two different propositions, but this Court treated the two cases as stating one and the same rule.³

² For example, in *Peagler v. USAA Insurance Company*, 368 S.C. 153, 164, 628 S.E.2d 475, 481 (2006), the Supreme Court found that injuries from the accidental discharge of a hunting rifle while unloading the rifle from the cab of a pickup truck the morning after the rifle had been used on a hunting excursion was foreseeably identifiable with the normal use of a pickup truck because “[m]any 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.” Shooting a .30-06 out of the driver’s side window of a vehicle at a random stranger is not.

³ As argued above, to the extent *Howser* or *Towe* could be read to hold that injuries resulting from a gunshot arise out of the use an automobile, *Bookert* has overruled those cases.

In *Howser*, the Supreme Court found – pre *Aytes* – that the shooting arose out of the use of an automobile because “[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part.” *Howser*, 309 S.C. 269, 273, 422 S.E.2d 106, 108 (1992). The vehicle was an “essential and integral” part of the “ongoing assault” because the assailant in that case bumped the victim’s vehicle three times, pursued the vehicle even when the victim accelerated to escape, and ultimately shot the victim during the ongoing vehicular assault and pursuit. Thus, if *Howser* is still good law after *Aytes*, then it is only applicable when the vehicle is used in a vehicular chase and assault, and the shooting is the culmination of the ongoing assault. None of these facts exist in this case.

In *Towe*, a passenger of a moving vehicle threw a bottle at a sign. He missed, and the bottle struck the operator of a tractor. The Supreme Court found that “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 McLaskey’s injuries.”⁴ See *Home Ins. Co. v. Towe*, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994) (emphasis added). Thus, *Towe* stands for

⁴ As discussed above, this Court in *Bookert* found that the use of the vehicle placed the assailants in the position to shoot the victim, and the Supreme Court in that case still held that the injuries did not arise out of the use of an auto. Likewise, in *Holmes v. Allstate Insurance Company*, 786 F. Supp. 2d 1022 (D.S.C. 2009), the assailant was driving in one direction, saw the victim driving in the opposite direction, and turned around to follow her. Only through the use of his vehicle, could he have followed the victim. Nonetheless, the District Court found the victim’s gunshot injuries did not arise out of the ownership, maintenance or use of an automobile. Therefore, the mere fact that the vehicle placed the assailant in the position to fire the injuring shot is not determinative.

In its July 22 Opinion, this Court also finds that the shooter in *Holmes* could have simply walked up and shot the victim. (Op. p. 11). However, the facts in *Holmes* show that both the victim and assailant were operating their vehicles in opposite directions when the assailant saw the victim, and “turned his vehicle around to go after her.” *Holmes*, 786 F. Supp. 2d at 1024. Had he been on foot, the assailant in that case would not have been in a position to follow the victim. Nonetheless, the District Court in that case found that there was no coverage.

the proposition that there is a causal connection between the use of the vehicle and the injury when the speed of the vehicle directly contributes to the severity of the victim's injuries. None of these facts exists in this case. .

The District Court in *Holmes* properly delineated the different holdings in *Howser* and *Towe*. It found that the *Howser* court “found a causal connection based on its consolidation of both the vehicular chase and the gunshot assault as a single ‘ongoing assault.’” *Id.* at 1026. “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.” *Id.*

Instead of recognizing that *Howser* and *Towe* stand for two different rules, neither of which applies in this case, this Court’s July 22 Opinion treats the two cases as standing for the same rule and looks to immaterial facts in those cases to compare with this case. For example, this Court finds, “like the two vehicles in the present case, the vehicles in *Towe* never made contact.” (Op. p. 8). Then, this Court finds, “in *Howser*, the use of the vehicle did not contribute to the severity of Howser’s injuries” (Op. p. 8). Whether the vehicles made contact in *Towe* is immaterial because the speed of the vehicle in *Towe* contributed to the severity of the victim’s injuries. Likewise, whether the speed of the vehicle contributed to the injuries in *Howser* is not relevant because the vehicle was used as part of an “ongoing assault” in which the vehicle was used to ram and chase the fleeing victim’s vehicle.⁵

⁵ The July 22 Opinion also finds that “In fact, Howser only traveled one-tenth of a mile before being bumped a few times and then making an evasive maneuver onto a side street before being fired upon.” (Op. p. 8). The facts stated in *Howser* actually show that Howser had traveled one tenth of a mile from a prior stop light before the assailant first bumped her vehicle and before the vehicular chase began. *Howser*, 309 S.C. at 271, 422 S.E.2d at 107.

Finally, the July 22 Opinion finds facts of this case “similar” to *Howser*, but it fails to acknowledge those same facts applied in *Bookert* and *Holmes*, and they were not dispositive. The July 22 Opinion repeatedly finds that Redman used the vehicle to “flee the scene.”⁶ In *Bookert* this Court specifically found that the driver and assailant used the vehicle to immediately flee the scene. 330 S.C. at 232, 499 S.E.2d at 486 (“The vehicle also put the assailants in the position to shoot and then escape quickly and easily.”). Nonetheless, the Supreme Court reversed, finding the injuries did not arise out of the use of an auto, regardless of whether the vehicle was used to flee the scene. Likewise, in *Holmes*, the shooter “immediately left the scene” after shooting the victim. 786 F. Supp. 2d at 1024. Nonetheless, the District Court found the injuries did not arise out of the shooter’s use of an auto. Both of these cases show that using a vehicle to flee a scene is not a material fact. Moreover, the July 22 Opinion’s use of this fact to align this case with *Howser* while ignoring that the same fact applied in cases that reached a different result is irreconcilable.

Likewise, in its discussion of whether the vehicle was the mere site of the shooting, this Court finds *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999), distinguishable because that case dealt with a self-insurer, and this case deals with purported uninsured motorist coverage. (Op. p. 12). The inference from this distinction is that *Wright* did not involve statutory coverage. However, the Court of Appeals in *Wright* held that “as a self-insurer, North Area Taxi, was required to provide the same minimum protection to the public as the minimum limits required by a statutory liability policy.” *Id.* at 423, 523 S.E.2d at 474. Thus, the distinction between uninsured motorist coverage and self-insurer coverage is irrelevant because both deal with limits required by statutory policies.

These are additional examples of the July 22 Opinion relying upon irrelevant similarities and distinctions to fit the facts of this case into those of *Howser* and *Towe* and place them outside of those cases finding that injuries did not arise out of the use of an automobile.

⁶ “First, like the assailant in *Howser*, Redman used his vehicle to immediately flee the scene.” (Op. p. 9); “Rather, as discussed in section I(A), Redman’s position from which he shot Harrison, his ability to inconspicuously transport his rifle, and his ability to flee the scene were dependent on the use of his vehicle.” (Op. p. 15).

Respondents have always recognized that the facts of this case are tragic. However, even tragic facts must yield to binding precedent from the South Carolina Supreme Court. In *Aytes*, the South Carolina Supreme Court held that injuries must be “foreseeably identifiable with the normal use of an automobile” in order to arise out of the use of an automobile. In *Bookert*, the Supreme Court held that gunshot injuries are not foreseeably identifiable with the normal use of an automobile. The Supreme Court’s holdings in *Aytes* and *Bookert* are the controlling law in this case. Reliance on *Howser* – which is distinguishable on its facts – is misplaced because that case pre-dated the test set forth in *Aytes* and predated the Supreme Court’s holding in *Bookert*. In short, the law has changed since *Howser*, and *Howser* is no longer good law. The holding in *Towe* is even less relevant. Not only has the law changed, but the facts in that case showed a direct connection between the speed of the vehicle and the severity of the victim’s injuries. Those facts simply are not applicable here. Therefore, Respondents respectfully ask that the Court’s July 22 Opinion be withdrawn and that an Opinion be issued affirming the Circuit Court’s decision.

III. In Order to Justify its Opinion, this Court Improperly Relied on Facts that are Not in the Record and Shifted the Burden of Proof Contrary to Established Law.

Despite the very narrow facts presented to the Circuit Court, this Court’s July 22 Opinion finds facts that are not in the record and even creates new facts that were never argued by Appellants at summary judgment or on appeal. This goes far beyond the appellate standard of review on cross-motions for summary judgment.

In its Order granting Respondents’ Summary Judgment motion and denying Appellant Groves’ Motion, the Circuit Court stated the facts presented in the evidence:

This case arises from a shooting incident that occurred when Redman pulled up at a red light beside an automobile operated by Lynn Harrison, pointed a rifle at her, shot her, and drove away. At some point prior to the shooting, Redman pulled next to Harrison and began making hand gestures and blowing kisses towards Harrison as they approached the red light where the shooting

occurred. There is no evidence that Harrison was aware of Redman's conduct. While stopped at the red light, Redman pointed a rifle at Harrison, fired in her direction, striking her in the neck. Harrison died as a result of the shooting.

(ROA p. 4). Later in its decision, the Circuit Court held, "Redman did not use his automobile to keep up with Harrison and did not make contact with her vehicle. There also is no evidence Harrison saw Redman driving beside her or that she was aware of Redman's gestures towards her. There was no attempt by Harrison to evade Redman." (ROA p. 4).

The July 22 Opinion makes factual findings that are contrary to the Circuit Court's findings. Specifically, the July 22 Opinion relies upon the following three facts:

- 1) Redman used his vehicle to "closely pursue" Harrison;⁷
- 2) Redman used his vehicle to "conceal" the rifle;⁸
- 3) This Court rejects the finding that there was no evidence Harrison was aware of Redman.⁹

As discussed below, the first finding is not supported by evidence presented at summary judgment, the second finding was never even argued by any party, and the third finding is incorrect and improperly shifts the burden of proof to Respondents.

⁷ "After spotting Harrison, Redman used his vehicle, like the assailant in *Howser*, to closely pursue her to the point where he shot her. Had Redman not been in his vehicle, he would not have been able to keep pace with and follow Harrison." (Op. p. 9).

⁸ "Redman's vehicle contributed to the concealment of his weapon." (Op. p. 9).

⁹ "We find the circuit court improperly determined this lack of evidence distinguished the facts at bar from *Howser* and *Towe*. Notably, there is no evidence in the record that Harrison was unaware of Redman." (Op. pp. 7-8, n. 8).

A. The factual findings in this July 22 Opinion go beyond the Record on Appeal.

The Record on Appeal in this case is concise, and the factual part of the record makes up a very small portion of the overall Record on Appeal. The primary facts take the form of admissions set out in each sides' responses to Requests to Admit.

Appellant Groves admitted in response to Requests to Admit from Respondents that Lynn Harrison stopped for a red light in the middle eastbound lane of Old Trolley Road at an intersection near the Sawmill Shopping Center. (ROA p. 84, ¶ 7, p. 89, ¶ 7). At the same time, Jimi Carl Redman stopped at the red light in the right-hand lane, to the right of Ms. Harrison's vehicle. (ROA p. 84, ¶ 9, p. 89, ¶ 9). While stopped at the red light, Redman pointed a rifle at Lynn Harrison and fired in her direction. The bullet went through the passenger window of Harrison's vehicle, striking and killing her. Neither vehicle was in motion at the time of the shooting, and the vehicles never made contact. (ROA p. 84, ¶¶ 10-12 & 15, p. 89, ¶¶ 10-12 & 15). Redman and Harrison were complete strangers. (ROA p. 84, ¶ 17, p. 89, ¶ 17).

The window of time presented in the evidence is very narrow. The only evidence of what happened before the two vehicles stopped at the intersection comes from the admission that "while driving toward the stop light," Redman blew kisses and made hand gestures toward Lynn Harrison. (ROA p. 97, ¶ 1) (emphasis added). Appellant Groves failed to present any evidence of what transpired before that moment in time.

i. Appellant Groves did not present evidence that Redman "closely pursued" Harrison.

As the party seeking coverage, Appellant Groves bears the burden of presenting facts to show that the Harrison's injuries arose out of Redman's ownership, maintenance or use of an automobile. *See e.g., Jericho State Capital Corp. of Florida v. Chicago Title Ins. Co.*, __ S.E.2d __, 2020 WL 3067564 at *3 (Ct. App. June 10, 2010) ("The insured bears the burden of proving

its claim falls within the policy's coverage."). Thus, if Appellant Groves contends that Redman "pursued" Harrison, then Appellant Groves bears the burden of presenting evidence to prove that contention.

Evidence that Redman blew kisses at Harrison – a complete stranger – seconds before stopping at the stop light does not establish Redman "closely pursued" Harrison. The July 22 Opinion makes the factual determination that: "After spotting Harrison, Redman used his vehicle, like the assailant in *Howser*, to closely pursue her to the point where he shot her." (Op. p. 9). Respectfully, there is no evidence of a pursuit, much less that Harrison "closely pursued" Harrison. Redman was seen blowing kisses towards Harrison as the two vehicles approached the stop light, with Harrison's vehicle being operated in a normal fashion. There is a complete lack of evidence of what happened at any time before the two vehicles were "driving toward the stop light." A finding that Redman "closely pursued" Harrison before that point in time is conjecture. *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture.").

A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 213 (4th Cir. 1985) (cited favorably by this Court in *Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 182 (Ct. App. 2019)). Moreover, the Supreme Court has held that the Court of Appeals cannot "elevate what is, at best, a metaphysical doubt into a genuine issue of material fact." *Grimsley v. South Carolina Law Enforcement Div.*, 415 S.C. 33, 42, 780 S.E.2d 897, 901 (2015).

The first and only evidence of what happened before the shooting is that Redman blew kisses at Harrison while approaching the stoplight where the shooting occurred. The undisputed

evidence in the case also shows that, “at all times relevant to this incident [in the moments leading up to the shooting and at the time of the shooting] Lynn Harrison was operating her vehicle in a normal and reasonably foreseeable fashion.” (ROA p. 98, ¶ 7). There is no evidence she ever accelerated or otherwise attempted to flee from her assailant. Moreover, the evidence shows that she remained stopped at the red light when Redman pointed a rifle out of his window and shot her. There is no evidence that Harrison was aware of Redman, much less that there was any vehicular pursuit, and a finding of any such pursuit is speculative.¹⁰

The Circuit Court found, based on the evidence presented at summary judgment: “Redman did not use his automobile to keep up with Harrison and did not make contact with her vehicle. There also is no evidence Harrison saw Redman driving beside her or that she was aware of Redman’s gestures towards her. There was no attempt by Harrison to evade Redman.” (ROA p. 6). This Court’s July 22 Opinion changes the facts of the case by speculating about factual matters not in the record.

ii. The July 22 Opinion’s finding that Redman used the vehicle to conceal the rifle was never presented via evidence, and no party claimed the rifle was concealed.

The July 22 Opinion goes a step beyond merely speculating based upon evidence that was presented – it creates new evidence that was not even argued on summary judgment or on appeal. In the portion of the Opinion addressing whether the vehicle was an active accessory to the

¹⁰ The July 22 Opinion’s speculation as to a vehicular pursuit goes even further beyond the evidence when the Court holds: “We note that the stoplight, where Redman was able to quickly catch up with Harrison and shoot her, may have been the only thing that prevented Redman’s pursuit of Harrison from turning into an extended chase as in *Howser*.” (Op. p. 8) (emphasis added). Redman did not “catch up” with Harrison at the red light. They were side-by-side in two separate lanes and approached the red light “at the same time.” (ROA p. 84, ¶¶ 7-8, p. 89, ¶¶ 7-8). There is no evidence that Redman “pursued” Harrison before or as they were “approaching” the stop light. This entire holding that the stoplight prevented a prolonged pursuit is conjecture based upon an underlying conjecture.

shooting, this Court finds that “unlike the assailants in *Howser* and *Towe*, Redman’s vehicle contributed to the concealment of his weapon.” (Op. p. 9) (emphasis added). There is no evidence before the Court as to where Redman’s gun was located prior to the shooting. It could have been on the dash, on his lap, in his hands, or anywhere else in the vehicle.¹¹

The July 22 Opinion again relied upon this newly created fact to find that the shooting was not an act of independent significance that broke the causal connection. (Op. p. 15) (“Rather, as discussed in section I(A), Redman’s position from which he shot Harrison, his ability to inconspicuously transport his rifle, and his ability to flee the scene were dependent on the use of his vehicle.”) (emphasis added). This *sua sponte* factual determination in the July 22 Opinion, with no supporting evidence on which to make the determination, is simply not in evidence. Moreover, Appellant Groves never even argued that such a fact existed.

iii. By rejecting the Circuit Court’s finding that there was no evidence Harrison was aware of Redman, this the July 22 Opinion improperly shifted the burden of proof to Respondents.

Lastly, the July 22 Opinion disputes unassailable facts in the Circuit Court’s opinion. The Circuit Court found: “There is also no evidence Harrison saw Redman driving beside her or that she was aware of Redman’s gestures towards her. There was no attempt by Harrison to evade Redman.” (ROA p. 6). In its July 22 Opinion, this Court disputes this finding, stating that the Circuit Court “improperly determined this lack of evidence” because “there is no evidence in the record indicating that Harrison was unaware of Redman.” (Op. pp. 7-8, n.8). Once again, as the party seeking coverage, Appellant bore the burden of proof in this case. Appellant did not present any evidence that Harrison was aware of Redman. In fact, Appellant conceded that Harrison “was

¹¹ This speculative conclusion is even more improper on cross motions for summary judgment because, had Appellants tried to make such an argument before the Circuit Court, Respondent would have had an opportunity to present evidence that Redman had not concealed the gun prior to this shooting and had actually brandished it to other drivers prior to the shooting.

operating her vehicle in a normal and reasonably foreseeable fashion” at all relevant times. (ROA p. 98, ¶ 7). Thus, this Court’s footnote not only improperly shifts the burden of proof from Appellant to Respondents, but it also overlooks the undisputed evidence. Even if Appellant had contended Harrison was aware of Redman, she presented no evidence to establish that contention.¹²

B. The July 22 Opinion relies heavily on these improper factual findings.

The factual findings in the July 22 Opinion are not inconsequential. Instead, these factual determinations are critical to the July 22 Opinion’s conclusions. For example, the opinion finds that this case is “on all fours with the facts in *Howser*” by finding that “Redman used his vehicle, like the assailant in *Howser*, to closely pursue her to the point where he shot her. Had Redman not been in his vehicle, he would not have been able to keep pace with and follow Harrison.” (Op. p. 9).

Likewise, the Court’s finding of concealment was necessary to its holding that Redman’s vehicle was an active accessory: “Two additional factors support the conclusion that Redman’s vehicle was an active accessory to the shooting. . . . Second, unlike the assailants in *Howser* and *Towe*, Redman’s vehicle contributed to the concealment of his weapon. . . . Had Redman not been in a vehicle, he likely could not have transported his rifle down a public street to the stoplight where he shot Harrison without drawing her attention, the attention of law enforcement, or the attention of the public at large to the weapon.”¹³ (Op. p. 9).

¹² The Opinion also finds that both carriers issued uninsured and underinsured motorist coverage. This is also factually inaccurate. Progressive’s policy only provided uninsured motorist coverage. (ROA p. 39).

¹³ Again, this *sua sponte* factual determination is particularly problematic because, had it been argued before the Circuit Court, Respondents could have presented evidence showing that the

The July 22 Opinion relies heavily on fact that are not in evidence. Speculation and conjecture are not permitted at the summary judgment stage. Therefore, these factual determinations – which contradict the evidence and the findings of the Circuit Court – serve as an additional basis for rehearing.

IV. Although Failure on Any One Component of the *Aytes* Test is Sufficient, the Presented Facts Also Require Findings That Redman’s Vehicle Was the Mere Situs of the Shooting and That the Shooting Constitutes an Act of Independent Significance.

As discussed above, Appellant did not present evidence of what happened before the two vehicles approached the stop light. Thus, Appellant did not present facts to establish a vehicular chase. However, even assuming that a pursuit occurred – which is not in evidence – the undisputed facts show that both vehicles were stopped at the stoplight when Redman pointed the rifle at Harrison and fired the gun. (ROA p. 85, ¶ 12, p. 89, ¶ 12). Thus, when the shooting occurred, the vehicle was the mere site from which Redman committed the shooting, and his shooting was an act of independent significance that broke any causal connection with the vehicle.

With both vehicles stopped, Redman could have placed his car in park, stepped out of the driver’s side door, and fired the gun. His vehicle was not being used to “keep up” with Harrison. His vehicle was not being used as part of an assault. His vehicle was stationary, and so was Harrison’s.

South Carolina’s jurisprudence is full of cases showing that exiting a vehicle breaks any causal connection with the use of a vehicle. *See e.g., Carraway v. Smith*, 321 S.C. 23, 467 S.E.2d 120 (Ct. App. 1996) (holding shots fired after assailant exited vehicle were an act of independent significance); *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 984 (4th Cir. 1985) (holding shooting

general public was aware of the rifle. It was unnecessary to present any such evidence because Appellant Groves never made any such argument.

that happened immediately after assailant used truck to ram and disable victim's vehicle and then exited truck was an act of independent significance)¹⁴; *Aytes*, 332 S.C. at 35, 503 S.E.2d at 746 (finding any causal connection broke when assailant exited vehicle).

However, an assailant does not have to actually exit a vehicle for an assault to break any causal connection. The relevant question is whether the assault could have taken place outside the vehicle when it occurred. In *Wright*, this Court recognized that a causal connection is broken if the assault could have just as easily taken place outside of the vehicle:

Likewise, the assault of the gunmen broke any causal connection between the vehicle and Rogers' injury because it arose from an act of independent significance. The fatal injuries that Rogers sustained were unrelated to any use of the vehicle. The same injuries could have occurred when the vehicle was parked, or otherwise not moving, or when Rogers or the gunmen were standing outside of the vehicle.

Wright, 337 S.C. at 427, 523 S.E.2d at 476 (emphasis added).

Once stopped at the red light, there was no causal connection between Redman's use of his vehicle and the shooting. Both vehicles were stationary. The fact that Redman stayed in his car as opposed to stepping out of it to shoot Harrison makes no difference. In *Wright*, the taxicab was still in motion, and the assailants and victim were both in the vehicle. The question is whether the shooting injury was "related to the use of the vehicle." *Id.* It was not. Instead, the shooting was an act of independent significance, and the vehicle was merely the site from which Redman fired the gun. The same applies here.

¹⁴ Predicting South Carolina law, and before South Carolina adopted the *Aytes* test, the Fourth Circuit held, "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." *Id.* at 989. Of course, the Supreme Court did not adopt this factor until years later in the *Aytes* case.

CONCLUSION

For over two decades, the law in South Carolina has held that gunshot injuries are not foreseeably identifiable with the normal use of an automobile. Shooting a random stranger with a .30-06 rifle out of the driver's side window of a vehicle while sitting at a stoplight is not a "normal" use of an automobile. Therefore, Lynn Harrison's injuries are not "foreseeably identifiable with the normal use of an automobile." The July 22 Opinion fails to follow the binding Supreme Court precedent set forth in *Aytes* and *Bookert*.

Moreover, the July 22 Opinion relies upon immaterial facts in *Howser*, *Towe*, and *Wright* to justify the result that it reaches. There is no question that this is a tragic case. However, based on the precedent in *Aytes* and *Bookert*, coverage is not triggered even though the facts are sad.

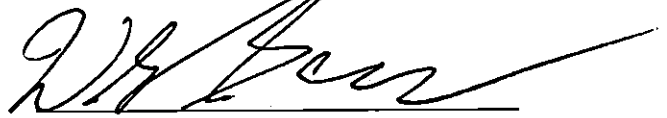
The July 22 Opinion finds facts that are not in the record and, some of which, were not even argued by any party on summary judgment or on appeal. Redman shot Harrison from his stationary vehicle to Harrison's stationary vehicle. Appellant Groves did not present evidence of what happened before the two vehicles were "approaching" the stop light. There is no evidence of a vehicular chase. Harrison did not attempt to drive away when Redman pointed a rifle at her, and there is no evidence she was aware of Redman or that she ever tried to evade him. Redman's use of the vehicle did not contribute to the injury, it was not part of an "ongoing assault," and he could have just as easily parked the car at the stop light, stepped out of the car, and shot his rifle while she was at the stop light.

Finally, and most importantly, the injuries are not foreseeably identifiable with the normal use of an auto. Therefore, the vehicle was not an active accessory to the shooting, Redman's vehicle was the mere site from which the assault occurred, and Redman's act of shooting Harrison was an act of independent significance that broke any alleged causal connection.

The Circuit Court's Order faithfully applied the law of South Carolina, and it should be affirmed. Therefore, Respondents respectfully petition for a rehearing *en banc*, for withdrawal of the July 22 Opinion, and for entry of an Opinion affirming the Circuit Court's Order.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'J.R. Murphy', is written over a horizontal line.

J.R. Murphy, Esquire

S.C. Bar # 7941

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Attorneys for Respondents

Columbia, South Carolina
August 5, 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

AUG 05 2020

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

SC Court of Appeals

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2017-001946
Case No. 2015-CP-18-1571

Progressive Direct Insurance Co., and USAA General Indemnity Company,
.....Respondents,

v.

Shanna Groves as the Personal Representative of the Estate of Lynn Harrison,
.....Appellant.

PROOF OF SERVICE

I certify that I have served one copy of the Petition for Rehearing and for Rehearing
En Banc, on Appellant by depositing a copy in the United States Mail, postage prepaid, on
August 5, 2020, addressed to their attorneys of record as follows:

Ryan H. Sigal, Esquire
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8310 Rivers Avenue, Suite D
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John P. Linton, Jr., Esquire,
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August 5, 2020

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AUG 05 2020

SC Court of Appeals

HAND DELIVERED

Jenny A. Kitchings
South Carolina Court of Appeals
1205 Pendleton St.
P.O. Box 11629
Columbia, SC 29211

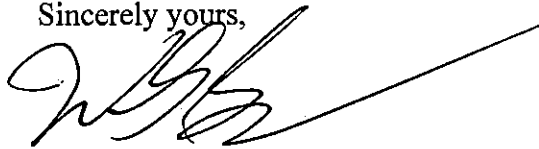
Re: Progressive Direct Insurance Co., and USAA General Indemnity Company vs. James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison
Civil Action No.: 2015-CP-18-1571
Claim No.: 155621943 (Progressive) 31913153-5 (USAA)
Date of Loss: 4-2-15
Our File No.: 1115-2637/3250-0892

Dear Ms. Kitchings:

Enclosed please find herewith for filing with the Court the original and one (1) copies of the Motion and Petition for Rehearing and for Rehearing *En Banc* and Memorandum in Support, along with our check in the amount of \$50.00. I would appreciate your filing the original and returning the clocked copy to me in the envelope provided. By copy of this letter I am serving same on opposing counsel.

With warm personal regards, I am

Sincerely yours,



Wesley B. Sawyer

WSB

Enclosures

cc: Ryan H. Sigal, Esquire
John P. Linton, Jr., Esquire

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AUG 10 5 2020
SC Court of Appeals



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