

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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,.....Petitioners,

v.

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

APPENDIX

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RECEIVED

Oct 08 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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

RECEIVED

JUN 13 2018

SC Court of Appeals

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

v.

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

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015-CP-18-1571

Progressive Direct Insurance Co. 2017 AUG 17 PM 4:15 James Mark Harrison as the Personal
USAA General Indemnity Company Representative of the Estate of Lynn Harrison

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

Plaintiffs Progressive Insurance Co., and USAA General Indemnity Company's Motion for Summary Judgment is granted.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Bill Lee

Judge Code

2118

Date

8/2/2017

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

See Next Page

For Clerk of Court Office Use Only

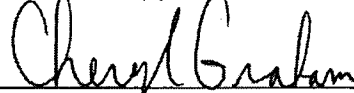
This judgment was entered on 8/17/17, and a copy mailed first class or placed in the appropriate attorney's box on 8/17/17, to attorneys of record or to parties (when appearing pro se) as follows:

Wesley Brian Sawyer
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter:

Cheryl Graham - Clerk of Court

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
)
Progressive Direct Insurance Co., and)
USAA General Indemnity Company,)
)
Plaintiffs,)
)
v.)
)
James Mark Harrison as the Personal)
Representative of the Estate of Lynn)
Harrison,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Docket No. 2015-CP-18-1571

ORDER

RECORDED
2017 AUG 17 PM 4:15
CLERK OF COURT
DORCHESTER COUNTY

This matter came before the Court on Cross Motions for Summary Judgment by Plaintiffs Progressive Direct Insurance Company ("Progressive") and USAA General Indemnity Company ("USAA") (collectively "Plaintiffs"), and James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison ("Defendant"). A hearing on the motions was conducted on February 7, 2017. Present at the hearing were Wesley B. Sawyer, Esquire, attorney for Plaintiffs, and Ryan H. Sigal, Esquire, attorney for Defendant.

Plaintiffs filed an Amended Summons and Complaint against Defendant seeking a declaratory judgment on the basis that neither the Progressive policy nor the USAA policy provides coverage for this incident because Lynn Harrison's ("Harrison") injuries did not arise out of the ownership, maintenance, or use of an automobile by Jimi Carl Redman, Jr. ("Redman"). Defendant filed an Answer on November 5, 2015, requesting the court to deny Plaintiff's request for a declaratory judgment. Defendant alleges the Progressive and USAA policies provide coverage for this incident because Harrison's injuries did arise out of the ownership, maintenance or use of an automobile by Redman. Plaintiffs filed a Motion for Summary Judgment on May 9, 2016. Defendant filed a Cross Motion for Summary Judgment on January 27, 2017.

FACTUAL BACKGROUND

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

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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 and fired in her direction, striking her in the neck. Harrison died as a result of the shooting. Plaintiffs each issued insurance policies with uninsured motorist coverage for injuries arising out of an uninsured owner or operator's ownership, maintenance, or use of a motor vehicle. Harrison's estate submitted claims to the Plaintiffs under the policies.

DISCUSSION

The question on summary judgment is whether Harrison's injuries "arise out of the use" of Redman's automobile, so as to trigger uninsured motorist coverage under the policies issued by Plaintiffs. South Carolina applies a three-pronged test to determine whether injuries arise out of the ownership, maintenance, or use of an automobile. An injury arises out of the ownership, maintenance, or use of a vehicle for purposes of automobile insurance, if (1) a causal connection exists between the vehicle and the injury; (2) no act of independent significance breaks the causal link between the vehicle and the injury; and (3) the vehicle was being used for transportation purposes at the time of the injury. *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 159-60, 628 S.E.2d 475, 478 (2006) (citing *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998)). The three-part test in *Aytes* applies regardless of whether the injury occurred as a result of an intentional assault or an accident. *Id.* at 160, 628 S.E.2d at 479. The focus is 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 a statute or policy provision. *Id.*

I. Causal connection between the automobile and the injury.

Plaintiffs contend that there is no causal connection between Redman's automobile and Harrison's injuries. The causal connection requirement is satisfied if (a) the vehicle was an active accessory to the assault; (b) the vehicle was something less than a proximate cause, but more than the mere site of the injury; and (c) the injury was foreseeably identifiable with the normal use of the automobile. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (2000).

A. Automobile as an active accessory to the assault.

Several cases have addressed this element. Plaintiffs contend Redman's automobile was not an active accessory because it did nothing more than transport Redman to and from the crime scene. The South Carolina Supreme Court in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C.

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269, 422 S.E.2d 106 (1992), held that a vehicle used in the commission of a shooting is an "active accessory" to the assault when the assailant's ability to carry out the attack is dependent on the use of his vehicle. The victim was driving down a public road way and an unidentified assailant used his vehicle to bump the victim's vehicle from behind. The assailant continued to follow the victim, eventually pulling aside her and yelling for her to pull the car over. As the victim attempted to flee, the assailant fired a gun into the vehicle injuring the victim. The Supreme Court found "the vehicle was an active accessory in the assault because only through the use of his vehicle was the assailant able to closely pursue the victim, enabling him to carry out the assault. The gunshot was the culmination of an ongoing assault, in which the vehicle played an integral part. Additionally, only a motor vehicle could have provided the assailant a quick and successful escape." *Id.* at 273, 422 S.E.2d at 108. The Court concluded a sufficient causal connection existed between the assailant's vehicle and the victim's injuries based upon all three prongs of *Aytes*. The use of the assailant's vehicle and the shooting were inextricably linked as one continuing assault, and the victim's injuries arose out of the use of the assailant's vehicle. *Id.*

Subsequently, the South Carolina Supreme Court held a causal connection existed between an assailant's use of his vehicle and the injuries sustained by the driver of the tractor in *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994). While riding in an automobile driven by Towe, a passenger 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 being driven in the opposite direction. *Id.* at 106, 441 S.E.2d at 826. The bottle seriously injured the driver of the tractor and caused minor damage to the tractor itself. *Id.* The Court found the automobile was an active accessory that gave rise to the injuries stating, "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 the [victim's] injuries." *Id.* at 107, 441 S.E.2d at 827.

However, the Federal District Court in South Carolina distinguished the drive-by shooting in *Holmes v. Allstate Ins. Co.*, 786 F.Supp.2d 1022 (D.S.C. 2009), from the assaults in *Wausau* and *Towe*. In *Holmes*, the District Court held that the use of a vehicle in a drive-by shooting does not make the vehicle an "active accessory" to the assault. The assailant, an estranged lover, followed claimant to a bus stop where claimant was parked waiting to pick up a neighbor's child. The assailant stopped his vehicle next to the claimant's parked car, fired multiple shots into her vehicle, and drove away. *Id.* at 1024. The District Court found that a causal connection did not

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exist between the assailant's use of his vehicle and the claimant's injuries. The vehicle was not used to assault the claimant, the claimant was not traveling in her vehicle at the time the assailant fired his gun, and the use of his vehicle did not increase the severity of potential harm inflicted by the gunshots. *Id.* at 1026-1027. Accordingly, the District Court determined the assailant's car did not act as an active accessory to his assault on Plaintiff. *Id.* at 1027.

The facts of this case are also distinguishable from *Wausau* and *Towe*. 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. Further, Redman's automobile was not an active accessory because the manner in which the automobile was operated did not contribute to the seriousness of the injuries as determined in *Towe*. The facts of this case are more like the drive-by shooting in *Holmes*, Redman pulled next to Harrison's vehicle, committed the assault and drove off. Redman's vehicle was not, therefore, an active accessory to the assault.

B. Automobile as the mere site of the injury.

When the vehicle is merely the site of the injury, there is no causal connection with the use of the vehicle. *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999). According to Defendant, Harrison's injuries were directly related to Redman's "functional use of his motor vehicle" and the injuries were more than just incidental. Plaintiffs argue Redman's automobile merely served as the site from which the shots were fired comparable to *Wright*. In *Wright*, two assailants entered a cabdriver's vehicle under pretext as fare-paying customers. Once the cab was in motion, they attempted to rob the driver and ultimately shot and killed her. The Court of Appeals held the injuries to the cab driver were not causally related to the use of the vehicle because the cab merely served as the site of the robbery. *Id.* at 425, 523 S.E.2d at 475. Additionally, the Court determined "the required causal connection does not exist when the *only* connection between an injury and the insured's vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." *Id.* (emphasis added). Such is the case here. The relationship between Redman's use of his automobile and Harrison's injuries were incidental. Redman's automobile was merely the site from which he fired the gun.

C. Use of automobile as being foreseeably identifiable with the normal use of an automobile.

The third element for causal connection requires the injury to be foreseeably identifiable with the normal use of the automobile. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (2000). The South Carolina Supreme Court held the insured was not entitled to underinsured benefits for injuries from gunshots fired from a vehicle. In *Bookert*, a dispute started in a Hardee's parking lot between a group of soldiers and another group of young men. The group of soldiers, in their vehicle, followed the group of men from Hardees to McDonald's. *Id.* at 292, 523 S.E.2d at 182. While riding in the passenger's seat of the soldiers' vehicle, the assailant fired multiple shots into the crowd and struck the victim in both legs. *Id.* The Court restated from *Aytes* 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. *Id.* at 293, 523 S.E.2d at 182. The Court also restated the causal connection requirement. *Id.* The Court held the "policy [did] not cover the [victim's] injuries because they [were] not foreseeably identifiable with the normal use of an automobile." *Id.* Like *Bookert*, Harrison's injuries from the shot fired by Redman from his automobile were not foreseeably identifiable with the use of an automobile. The assault committed by Redman in firing the gun at Harrison did not result from normal ownership, maintenance or use of a vehicle.

The facts of this case fail to satisfy the first prong of *Aytes*. There is no causal connection between Redman's automobile and the injuries sustained by Harrison.

II. An intervening act of independent significant breaking any causal connection with the use of his automobile.

The second prong of *Aytes* to determine whether an injury arises out of the ownership, maintenance, or use of a vehicle requires that no act of independent significance break the causal link between the vehicle and the injury. "If the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of an automobile, the injury is not the result of the 'use' of the automobile." *Wausau*, 309 S.C. 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)).

Plaintiffs argue Redman's act of firing a shot into Harrison's automobile is an act of independent significance that breaks any possible causal connection to the use of his automobile.

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Plaintiffs argue Redman could have committed the same assault by walking up to Harrison's automobile and firing his gun. The Court in *Towe* stated, "[t]he use of the automobile and [assailant'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 [victim's] injuries." 314 S.C. at 827, 441 S.E.2d at 108. The question of whether a shooting constitutes an act of independent significance was addressed in *Wright v. North Area Taxi, Inc.*, *supra*. The Court of Appeals held:

the assault of the gunmen broke any causal connection between the vehicle and the victim's 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, not moving, or when Rogers or gunmen were standing outside the vehicle.

337 S.C. at 427, 523 S.E.2d at 476.

Likewise, in this case, the shooting by Redman was an act of independent significance breaking any causal link that may have existed. The same injuries could have occurred without an automobile involved. The same injuries could have occurred if the vehicle was parked, not moving, as in this case, or if Redman was standing outside of the vehicle. The fatal injuries Harrison sustained were unrelated to the use of the automobile. Thus, even if there was a causal connection under the first prong of the *Aytes* test, the evidence shows an independent significant act that breaks the causal connection.

III. Redman and Harrison's automobile being used for transportation at the time of the shooting.

The final prong of the *Aytes* test asks whether the vehicle was being used for transportation at the time of the assault. 332 S.C. at 33, 503 S.E.2d at 745. There is no factual dispute Redman used his vehicle for transportation before and after the shooting.

CONCLUSION

The three-prong test to determine whether the injuries sustained arose out of the ownership, maintenance or use of an automobile set forth in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998), has not been met. There was no causal connection between Redman's automobile and the gunshot injuries suffered by Harrison. Additionally, the shot fired by Redman was an act of independent significance breaking any causal connection to the use of his automobile. For the foregoing reasons,

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IT IS HEREBY ORDERED, Plaintiffs Progressive Direct Insurance Co., and USAA General Indemnity Company's Motion for Summary Judgment is **GRANTED**. Defendant James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison's Motion for Summary Judgment, is **DENIED**.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

August 2, 2017
Columbia, South Carolina

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FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP1801571**

Progressive Direct Insurance Co	FILED-RECORDED 2017 FEB -8 AM 11:09 CHERYL GRAMM CLERK OF COURT DORCHESTER COUNTY	James Mark Harrison	Lynn Estate Of Harrison
---------------------------------	--	---------------------	-------------------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court: **The Consent Motion to Substitute the Personal Representative of the Estate of Lynn Harrison filed February 7, 2017 is hereby granted and the caption shall be changed to reflect Shana Groves as the Personal Representative of the Estate of Lynn Harrison instead of and in place of James Mark Harrison as the Personal Representative.**

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

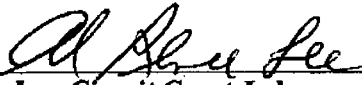
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


 Alison R. Lee, Circuit Court Judge

2118
 Judge Code

2/7/2017
 Date

For Clerk of Court Office Use Only

This judgment was entered on 2/ 8 /2017, and a copy mailed first class or placed in the appropriate attorney's box on 2/ 8 /2017, to attorneys of record or to parties (when appearing pro se) as follows:

Wesley Brian Sawyer PO Box 6648 Columbia, SC 29260

Ryan Harris Sigal 3614 Ashley Phosphate Road North
Charleston, SC 29418

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Court Reporter: Heather Landry

Cheryl Graham - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA - RECORD IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER 2015 AUG -7 PM 4: 52 CIVIL ACTION NO: 2015-CP-18 - 1571

Progressive Direct Insurance Co. Plaintiff,
CLERK OF COURT
DORCHESTER COUNTY

v.

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

**COMPLAINT
(Non-Jury)
(Declaratory Judgment)**

The Plaintiff, Progressive Direct Insurance Co. (hereinafter "Progressive"), complaining of the Defendant above named, does allege and show unto this honorable court as follows:

PARTIES AND JURISDICTION

1. Plaintiff is an insurance company organized and existing pursuant to the laws of the state of Ohio, with its principal place of business in the state of Ohio. Plaintiff is authorized to transact business, including selling insurance policies in South Carolina, and Plaintiff sells insurance policies in South Carolina.

2. Upon information and belief, Decedent Lynn Harrison was a citizen and resident of the County of Dorchester, state of South Carolina at the time of her death, and James Mark Harrison has been duly appointed as the Personal Representative of her Estate by the Dorchester County Probate Court.

3. This matter is brought pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and underlying and pursuant to the Uniformed Declaratory Judgment Act, South Carolina Code Ann. §§ 15-53-10 through 15-53-140; there is a real or justiciable controversy between the parties, and by these proceedings Plaintiff asks this court to inquire into and declare the rights and obligations of the parties hereto arising out of the facts set forth below.

4. Venue is proper in Dorchester County.

FACTS

5. Progressive issued a policy of motorcycle insurance identified by policy number 19841187-2 to James M Harrison which was in full force and effect on April 2, 2015. The policy provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident. Progressive craves reference to its policy for all the terms, conditions and provisions relating to the matter in dispute between the parties.

6. The Progressive policy provides in pertinent part:

PART III – UNINSURED/UNDERINSURED MOTORIST COVERAGE

INSURING AGREEMENT – UNINSURED MOTORIST COVERAGE

If you pay the premium for this coverage, we will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of:

1. an **uninsured motor vehicle** because of **bodily injury**:
 - a. sustained by an **insured person**;
 - b. caused by an accident; and
 - c. arising out of the ownership, maintenance, or use of an **uninsured motor vehicle**

7. Upon information and belief, on or about April 2, 2015, Lynn Harrison was driving on East Carolina Avenue in Summerville, South Carolina when she stopped her vehicle at an intersection near Sawmill Road shopping center.

8. Upon information and belief, Jimi Carl Redman, Jr. stopped his vehicle beside Harrison's vehicle, shot Harrison through the driver's side window of her vehicle, and then drove away.

9. Police apprehended Redman shortly thereafter.

10. Tragically, Harrison died as a result of the shooting.

11. Upon information and belief, The Estate of Lynn Harrison has or will make a claim for uninsured motorist benefits under the Progressive policy.

FOR A FIRST DECLARATION

12. Progressive repeats and re-alleges each and every one of the allegations set forth above as if set forth verbatim below.

13. The Progressive policy only provides uninsured motorist coverage for injuries that arise out of the ownership, maintenance or use of an automobile by the owner or operator of the uninsured motor vehicle.

12. Progressive would show that Harrison's injuries did not arise out of the ownership, maintenance or use of an automobile by Redman.

12. Therefore, Progressive would show that there is no coverage for this incident under the Progressive policy because the policy does not provide coverage for incidents that do not arise out of the ownership, maintenance or use of an automobile.

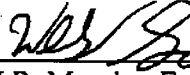
WHEREFORE, Progressive prays that the court inquire into these matters and make the following declarations:

A. That Harrison's injuries did not arise out of the ownership, maintenance, use of an automobile by Redman;

B. That the Progressive policy does not provide coverage for above-described incident and injuries; and

C. For such other and further relief as the court may deem just and proper.

MURPHY & GRANTLAND, P.A.



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Attorneys for the Plaintiff

Columbia, South Carolina
August 5, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,

v.

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

**AMENDED COMPLAINT
(Non-Jury)
(Declaratory Judgment)**

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CLERK OF COURT
DORCHESTER COUNTY

The Plaintiffs, Progressive Direct Insurance Co. (hereinafter "Progressive") and USAA General Indemnity Company (hereinafter "USAA"), complaining of the Defendant above named, do allege and show unto this honorable court as follows:

PARTIES AND JURISDICTION

1. Plaintiff Progressive Direct Insurance Company is an insurance company organized and existing pursuant to the laws of the state of Ohio, with its principal place of business in the state of Ohio. Plaintiff is authorized to transact business, including selling insurance policies in South Carolina, and Plaintiff sells insurance policies in South Carolina.
2. Plaintiff USAA General Indemnity Company is an insurance company organized and existing pursuant to the laws of the state of Texas, with its principal place of business in the state of Texas. Plaintiff is authorized to transact business, including selling insurance policies in South Carolina, and Plaintiff sells insurance policies in South Carolina.
3. Upon information and belief, Decedent Lynn Harrison was a citizen and resident of the County of Dorchester, state of South Carolina at the time of her death, and James Mark Harrison has been duly appointed as the Personal Representative of her Estate by the Dorchester County Probate Court.

4. This matter is brought pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and underlying and pursuant to the Uniformed Declaratory Judgment Act, South Carolina Code Ann. §§ 15-53-10 through 15-53-140; there is a real or justiciable controversy between the parties, and by these proceedings Plaintiffs ask this court to inquire into and declare the rights and obligations of the parties hereto arising out of the facts set forth below.

5. Venue is proper in Dorchester County.

FACTS

6. Progressive issued a policy of motorcycle insurance identified by policy number 19841187-2 to James M Harrison which was in full force and effect on April 2, 2015. The policy provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident. Progressive craves reference to its policy for all the terms, conditions and provisions relating to the matter in dispute between the parties.

7. The Progressive policy provides in pertinent part:

PART III – UNINSURED/UNDERINSURED MOTORIST COVERAGE

INSURING AGREEMENT – UNINSURED MOTORIST COVERAGE

If you pay the premium for this coverage, we will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of:

1. an **uninsured motor vehicle** because of **bodily injury**:
 - a. sustained by an **insured person**;
 - b. caused by an accident; and
 - c. arising out of the ownership, maintenance, or use of an **uninsured motor vehicle**

8. USAA issued a South Carolina Auto Policy identified by policy number 03191 31 53G 7101 8 to James M Harrison which was in full force and effect on April 2, 2015. The policy

provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident for three vehicles. USAA craves reference to its policy for all the terms, conditions and provisions relating to the matter in dispute between the parties.

9. The USAA policy provides in pertinent part:

PART C – UNINSURED MOTORISTS COVERAGE (referred to as UM) and \ **UNDERINSURED MOTORISTS COVERAGE** (referred to as UIM) \

* * *

INSURING AGREEMENT

A. UNINSURED MOTORISTS COVERAGE

We will pay the following damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of an auto accident:

1. **BI** sustained by a **covered person**; and
2. Injury to or destruction of the property of a **covered person**.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **uninsured motor vehicle**.

10. Upon information and belief, on or about April 2, 2015, Lynn Harrison was driving on East Carolina Avenue in Summerville, South Carolina when she stopped her vehicle at an intersection near Sawmill Road shopping center.

11. Upon information and belief, Jimi Carl Redman, Jr. stopped his vehicle beside Harrison's vehicle, shot Harrison through the driver's side window of her vehicle, and then drove away.

12. Police apprehended Redman shortly thereafter.

13. Tragically, Harrison died as a result of the shooting.

14. Upon information and belief, The Estate of Lynn Harrison has or will make a claim for uninsured motorist benefits under the Progressive and USAA policies.

FOR A FIRST DECLARATION

15. Plaintiffs repeat and re-allege each and every one of the allegations set forth above as if set forth verbatim below.

16. The Progressive and USAA policies only provide uninsured motorist coverage for injuries that arise out of the ownership, maintenance or use of an automobile by the owner or operator of the uninsured motor vehicle.

17. Plaintiffs would show that Harrison's injuries did not arise out of the ownership, maintenance or use of an automobile by Redman.

18. Therefore, Plaintiffs would show that there is no coverage for this incident under the Progressive and USAA policies because the policies do not provide coverage for incidents that do not arise out of the ownership, maintenance or use of an automobile.

WHEREFORE, Plaintiffs pray that the court inquire into these matters and make the following declarations:

A. That Harrison's injuries did not arise out of the ownership, maintenance, use of an automobile by Redman;

B. That the Progressive policy does not provide coverage for above-described incident and injuries;

C. That the USAA policy does not provide coverage for the above-described incident and injuries; and

D. For such other and further relief as the court may deem just and proper.

MURPHY & GRANTLAND, P.A.



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September 4, 2015

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Progressive Direct Insurance Co.
USAA General Indemnity Company,

Plaintiffs,

v.

✓ James Mark Harrison as the Personal
Representative of the Estate of Lynn
Harrison,

Defendant.

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IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

CHERYL J. JAMES
CLERK OF COURT
DORCHESTER COUNTY

CASE NUMBER: 2015-CP-18-1571

ANSWER ON BEHALF OF
JAMES MARK HARRISON AS
THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF LYNN
HARRISON

Defendant James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison ("Defendant") submits the following Answer in response to the Amended Complaint for Declaratory Judgment filed in this matter by Progressive Direct Insurance Company ("Progressive") and USAA General Indemnity Company ("USAA") (collectively "Plaintiffs") on September 4, 2015.

FOR A FIRST DEFENSE

1. Except as specifically admitted, qualified, or explained, Defendant denies the allegations and demands strict proof of each allegation.
2. Defendant admits the allegations in paragraph 1.
3. Defendant admits the allegations in paragraph 2.
4. Defendant admits the allegations in paragraph 3.
5. Defendant admits that the complaint purports to set forth a claim for declaratory judgment under SCRCP 57, the Uniformed Declaratory Judgment Act, and South Carolina Code Ann. §§ 15-53-10 through 15-53-140. Except as expressly admitted, Defendant denies the allegations in paragraph 4.

6. Defendant admits the allegations in paragraph 5.
7. Defendant admits the allegations in paragraph 6.
8. Defendant denies that paragraph 7 contains an accurate or complete summary of the terms of the policy.
9. Defendant admits the allegations in paragraph 8.
10. Defendant denies that paragraph 9 contains an accurate or complete summary of the terms of the policy.
11. Defendant admits that Mrs. Harrison was operating a vehicle on East Carolina Avenue in Summerville, South Carolina at the time of the incident. Except as expressly admitted, Defendant denies the allegations in paragraph 10.
12. Defendant admits that Redman shot Mrs. Harrison. Except as expressly admitted, Defendant denies the allegations in paragraph 11.
13. Defendant admits that Redman was at some point apprehended by police. Except as expressly admitted, Defendant denies the allegations contained in paragraph 12.
14. Defendant admits Mrs. Harrison died as a result of being shot by Redman.
15. Defendant admits the allegations in paragraph 14.
16. Defendant adopts and incorporates by reference as though fully set forth herein answers to paragraphs 1 through 15 of the complaint.
17. The allegations in paragraph 16 state a legal conclusion to which no response is required. To the extent a response is required, Defendant admits that the Progressive and USAA policies only provide uninsured motorist coverage for injuries that arise out of the ownership, maintenance, or use of an automobile by Redman but denies that these provisions in any way

preclude coverage for the subject incident under those policies. Except as expressly admitted, Defendant denies the allegations in paragraph 16.

18. The allegations in paragraph 17 state a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 17.

19. The allegations in paragraph 18 state a legal conclusion to which no response is required. To the extent a response is required, Defendant denies the allegations in paragraph 17.

20. Defendant respectfully requests that this Court deny the Plaintiffs' request for relief, including declarations that "Harrison's injuries did not arise out of the ownership, maintenance, [sic] use of an automobile by Redman," that "the progressive policy does not provide coverage for [sic] above-described incident and injuries," that "the USAA policy does not provide coverage for the above-described incident and injuries," and "[f]or such other and further relief as the court may deem just and proper."

WHEREFORE, Defendant prays that the court inquire into these matters and make the following declarations:

A. Denying Plaintiffs' request for a declaratory judgment and determining that Harrison's injuries arose out of the ownership, maintenance, or use of an automobile by Redman;

B. That the Progressive policy provides coverage for the above-described incident and injuries;

C. That the USAA policy provides coverage for the above-described incident and injuries; and

D. For such other further relief as the court may deem just and proper.

[Signature block on next page]

Respectfully Submitted:

By:



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North Charleston, SC
November 3rd, 2015

Attorney for Defendant

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,

v.

**PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT**

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Plaintiffs, Progressive Direct Insurance Company (hereinafter "Progressive") and USAA General Indemnity Company (hereinafter "USAA"), will move before the presiding judge of the Dorchester County Court of Common Pleas at the Dorchester County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order granting summary judgment in favor of the Plaintiffs, on grounds that there is no genuine issue as to any material fact.

Plaintiffs issued policies of insurance providing uninsured and/or underinsured motorist (UM/UIM) coverage. On April 2, 2015, Lynn Harrison stopped at a stop light in Summerville, South Carolina when Jimi Carl Redman shot her from a stationary, adjacent vehicle. Harrison died as a result of her injuries, and Redman was apprehended shortly thereafter. The policies issued by the Plaintiff only provide UM/UIM coverage for injuries arising out of the at-fault motorist's ownership, maintenance or use of an automobile. South Carolina's courts have routinely held that gunshot injuries are not foreseeably identifiable with the normal use of an

automobile. Therefore, Harrison's injuries did not arise out of the use of an automobile by Jimi Carl Redman, and the policies do not provide coverage under the undisputed facts of the case.

This Motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and will be supplemented and supported by the memorandum of law being filed concurrently herewith, as well as such affidavits, depositions, discovery responses, and such other documents as appropriate.

MURPHY & GRANTLAND, P.A.



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Columbia, South Carolina
May 6, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,

v.

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

Progressive Direct Insurance Company (hereinafter "Progressive") and USAA General Indemnity Company (hereinafter "USAA"), by and through their undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment:

SUMMARY

This declaratory action arises out of a tragic shooting incident that occurred when Jimi Carl Redman, Jr. pulled up at a red light beside a vehicle operated by Lynn Harrison, pointed a rifle at her, shot her, and drove away. Harrison died as a result of the shooting. Plaintiffs each issued policies of insurance that provide uninsured motorist coverage for injuries arising out of an uninsured owner or operator's ownership, maintenance or use of a motor vehicle. Harrison's estate submitted claims to the Plaintiffs under the uninsured motorist coverage of the policies. However, South Carolina's Supreme Court has held that shootings such as the one at issue in this case do not arise out of the use of an auto. Therefore, Harrison's injuries do not "arise out of the use" of Redman's auto, and coverage under the policies issued by the Plaintiffs is not triggered.

FACTS

Progressive issued a South Carolina Motorcycle insurance policy identified by policy number 19841187-2 to James M. Harrison that was in full force and effect on April 2, 2015. The policy provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) per person and fifty thousand (\$50,000.00) per accident. (Progressive Policy, excerpts attached as Ex. A).

USAA issued a South Carolina Auto Policy identified by policy number 03191 31 53G 7101 8 to James M. Harrison that was in full force and effect on April 2, 2015. The policy provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident for three vehicles including a 2010 GMC Terrain. (USAA Policy, excerpts attached as Ex. B). Lynn Harrison (deceased) was married to James Mark Harrison at all times relevant to this case, and resided in his household.¹ (Request to Admit No. 5).

On April 2, 2015, Lynn Harrison operated the 2010 GMC Terrain in Summerville, South Carolina eastbound on East Carolina Avenue, which became Old Trolley Road just before the intersection of Old Trolley Road and Bacons Bridge Road. (Request to Admit No. 6). Harrison stopped for a red light in the middle eastbound lane of Old Trolley Road at the intersection of Bacons Bridge Road and Old Trolley Road near the Sawmill Shopping Center. (Request to Admit No. 7).

At the same time, Jimi Carl Redman was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Harrison's right. (Request to Admit No. 8). Redman

¹ The facts are taken from Plaintiffs' Requests to Admit and Defendant's Answers to those requests. (Plaintiff's Request to Admit to Defendant, attached as Ex. C); (Defendant's Responses to Requests to Admit, attached as Ex. D). For ease of reference, the facts cite to the relevant Request to Admit.

stopped at the red light at the intersection of Bacons Bridge Road and Old Trolley Road near Sawmill Village Shopping Center in the eastbound lane immediately to the right of the vehicle operated by Harrison. (Request to Admit No. 9). While stopped at the stop light, Redman pointed a rifle at Harrison and fired in her direction. (Request to Admit No. 10). The bullet went through the passenger window of Harrison's GMC Terrain and struck her in the neck, causing her death. (Request to Admit No. 11). Neither the GMC Terrain nor the Ford Escape were in motion at the time of the shooting. (Request to Admit No. 12).

Redman then disregarded the red light, proceeded through the intersection, and was apprehended a few blocks away. (Request to Admit No. 13). Because her vehicle was still in drive at the time of the shooting, Harrison's GMC Terrain proceeded slowly through the intersection until it came to rest on the median. (Request to Admit No. 14).

The vehicles operated by Redman and Harrison never made contact. (Request to Admit No. 15). There is no evidence that Harrison and Redman knew each other prior to the shooting. (Request to Admit No. 17). Harrison's injuries result solely from the use of the rifle.

Redman was charged with murder and possession of a weapon during a violent crime. According to the South Carolina online public index, those charges are still pending. The Ford Escape operated by Redman was not insured or was underinsured at the time of the shooting. (Request to Admit No. 19).

ARGUMENT

The USAA and Progressive policies only provide uninsured motorist coverage for injuries arising out of the "ownership, maintenance, or use of an uninsured motor vehicle." (Ex. A, Progressive Policy, p. 4); (Ex. B, USAA Policy, p. 7). Because Harrison's injuries did not "arise out of the use" of Redman's Ford Escape, there is no coverage under the two policies for this

incident.

South Carolina applies a three-pronged test to determine if injuries arise out of the ownership, maintenance, or use of an automobile. First, there must be a causal connection between the vehicle and the injury. Second, no act of independent significance can occur that breaks the causal link. Third, the vehicle must have been used for transportation at the time of the accident. *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 159-60, 628 S.E.2d 475, 478 (2006) (citing *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998)). In making this determination, “no distinction is made as to whether the injury resulted from a negligent, reckless or intentional act.” *Id.* at 160, 628 S.E.2d at 479 (citations omitted). “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.” *Id.*

I. There is no causal connection between Redman’s Ford Escape and the gunshot injuries suffered by Harrison.

Both the South Carolina Supreme Court and the District Court of South Carolina have held that use of a vehicle in the commission of a drive-by shooting is not a use that is “foreseeably identifiable with the normal use of the automobile.” See *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (2000); *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009). Because Redman’s use of the Ford Escape in the commission of the shooting is not foreseeably identifiable with the normal use of a vehicle, there is no causal connection between Harrison’s injuries and the use of the Ford Escape. Moreover, the Ford Escape was not an “active accessory” to the shooting because its use neither increased the severity of Harrison’s injuries nor allowed Redman to position himself to harm a fleeing Harrison.

A causal connection between the vehicle and injury means:

- a. the vehicle was an “active accessory” to the assault; and

b. something less than the proximate cause but more than the 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. at 293, 523 S.E.2d at 182. If any of these three factors are not satisfied, the injury does not arise out of the use of the auto and no coverage applies.

A. Redman's use of the Ford Escape to commit a drive-by shooting is not foreseeably identifiable with the normal use of an automobile.

In *Bookert*, a dispute that started in a Hardee's parking lot between two soldiers and a group of about fifteen young men ultimately resulted in a drive-by shooting at a nearby McDonald's. According to stipulated facts in that case, an altercation began between two soldiers from Fort Jackson and a group of young men at a Hardee's parking lot. After the fight was broken up, the two soldiers took a jeep to pick up a third assailant and followed the group of young men to a nearby McDonald's parking lot. The assailants used the jeep to circle the parking lot in search of their intended victims. One soldier stood in the back of the jeep with a shotgun while another soldier sat in the passenger seat with a handgun. While yelling at and taunting the group of young men, the jeep lurched forward. The soldier in the back fell out and fired his shotgun into the crowd. While the jeep was still moving, the passenger fired multiple shots into the crowd and struck the plaintiff in each leg. The two soldiers in the jeep then used the jeep to flee from the scene and the third soldier ran off on foot. The claimant was injured from shots fired by the soldier in the passenger seat, not the soldier that fell out of the jeep. *Bookert*, 330 S.C. 221, 224-26, 499 S.E.2d 480, 481-82 (Ct. App. 1997), *rev'd*, 337 S.C. 291.

The claimant sought underinsured motorist coverage claiming that the injury arose out of the use of an automobile. The Circuit Court and the Court of Appeals found in favor of the

claimant. Specifically, the Court of Appeals found that the vehicle was the “launching pad” for the assault. Moreover, “[t]he vehicle also put the assailants in the position to shoot and then escape quickly and easily. . . . Furthermore, the automobile was in motion when the shots which injured Michael Bookert were fired.” *Bookert*, 330 S.C. at 232-33, 499 S.E.2d at 486.

The Supreme Court reversed and found that there was no causal connection between the vehicle and the injury. *Id.* at 293, 523 S.E.2d at 182. Specifically, the Supreme Court held that the gunshot wounds were “not ‘foreseeably identifiable with the normal use of an automobile.’ ” *Id.* (quoting *Aytes, supra*). Therefore, no causal connection between the vehicle and the injury existed.

In the same way, Redman’s use of the Ford Escape to fire a shot into Harrison’s vehicle is not foreseeably identifiable with the *normal use* of an automobile. In fact, it is exactly the same “use” that was at issue in *Bookert*. Like the assailants in *Bookert*, Redman used his Ford Escape to get to the site of the assault, fired a shot from his vehicle, and then used his vehicle to escape. The South Carolina Supreme Court found such use insufficient to prove any causal connection to the injuries.²

B. The Ford Escape was not an “active accessory” because it did nothing more than transport Redman to and from the crime scene.

The District Court for the District of South Carolina in *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009), held that use of a vehicle in a drive-by shooting does not make the vehicle an “active accessory” to the assault. In that case, an estranged lover had a history of using

² In an unpublished decision, the Court of Appeals applied *Bookert* to hold that a drive-by shooting – even when the assailant uses a vehicle to pursue and shoot a victim in a moving vehicle – was not covered because the injuries were not foreseeably identifiable with the normal use of an automobile. *Norris v. Allstate Ins. Co.*, 2005 WL 7083469 (Ct. App. Feb. 17, 2005) (unpublished).

his truck to stalk the claimant. On the date of the assault, he saw the claimant's vehicle parked in front of her friend's house and drove back and forth, harassing the claimant for some time. Later that day, he saw the claimant driving down the road in the opposite direction. Unbeknownst to her, he turned around to follow. When she stopped her vehicle to wait for a child at a bus stop, the assailant drove up beside her vehicle, stopped briefly, and fired multiple shots into her vehicle before driving away. *Id.* at 1024. The District Court held that the vehicle was not an active accessory to the assault.³ *Id.* at 1027.

The District Court distinguished the drive-by shooting in that case from the assaults in *Wasau* and *Towe*. See *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992); *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994). In *Wasau*, an unidentified assailant used his vehicle to ram the claimant's vehicle multiple times while chasing her down a public roadway. As the claimant turned her vehicle in an attempt to flee from the assailant, he shot at her car and the fragmented bullet struck the claimant, injuring her. The Supreme Court held that the injuries arose out of the assailant's use of the vehicle because, "[o]nly through the use of his vehicle was the assailant able to closely pursue [claimant], 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." *Wasau*, 309 S.C. at 273, 422 S.E.2d at 108.

In *Towe*, a group of kids were riding in an insured auto when a passenger threw a glass bottle at a street sign. He missed and struck a tractor operated by the claimant. The bottle shattered and injured the claimant who argued that the injuries arose out of the passenger's use of the auto.

³ The District Court also held that although "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." *Id.*

The Supreme Court agreed, holding: "[t]he 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 [claimant's] injuries." *Towe*, 314 S.C. at 107, 441 S.E.2d at 827.

After analyzing both *Wasau* and *Towe*, the District Court in *Holmes* recognized that the vehicle in *Wasau* was an active accessory because it was used to ram and chase the plaintiff's vehicle and to keep up with the driver's position to shoot her. The vehicle in *Towe* was an active accessory because its speed actually caused the claimant's injuries to be more severe. Because the victim in *Holmes* was stationary and the severity of her injuries was not affected by the speed of his vehicle, the drive-by shooting in *Holmes* was not comparable:

Unlike *Howser*, [assailant] did not use his vehicle to assault Plaintiff, as nothing in the record indicates that Plaintiff knew [assailant] was approaching her as she waited at the school bus stop or that [assailant's] vehicle ever made contact with Plaintiff's. Nor was Plaintiff traveling in her vehicle at the time [assailant] fired the gun, thus making [assailant's] position in relation to Plaintiff dependent on the use of his vehicle. Moreover, unlike *Towe*, [assailant's] 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 [assailant's] car acted as an active accessory to his assault on the Plaintiff.

Id. at 1026-27.

The District Court's well-reasoned opinion in *Holmes* applies with equal force in this case. The drive-by shooting in this case is wholly different from the vehicular chase and assault in *Wasau* that culminated in a shooting. Like the drive-by shooting in *Holmes*, Redman did not use his vehicle to keep up with a fleeing Harrison, but merely used the vehicle to transport himself to the site of the assault and then to flee. Like the shooter in *Holmes*, Redman pulled up beside the

plaintiff while her vehicle was stationary, fired into her vehicle, and drove away. Therefore, the relevant facts here are indistinguishable from those in *Holmes*.

Furthermore, the basis for the Supreme Court's holding in *Towe* was the fact that the velocity of the vehicle contributed to the severity of the plaintiff's injuries. *Id.* at 1027. However, in a shooting case, the speed of the assailant's vehicle (here, stationary and perpendicular to the victim) does not increase the severity of the victim's injuries. *Id.*

Like the incidents in *Bookert* and *Holmes*, Redman's use of his vehicle as a means of transportation to and from the scene of the shooting does not create the necessary causal connection between the use of the vehicle and the assault.

C. The Ford Escape was merely the site from which Redman committed his assault.

When the only connection between a vehicle and an injury is that the assailant or victim is occupying the vehicle at the time of the assault, the causal connection requirement is not satisfied. For example, in *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999), two assailants entered the victim cabdriver's vehicle under pretext as fare-paying customers. Once the cab was in motion, they attempted to rob the victim and ultimately shot and killed her. The Court of Appeals held that the injuries to the cab driver were not causally related to the use of the vehicle because the cab merely served as the site of the robbery. Like the attempted robbery in *Wright*, Redman's Ford Escape merely served as the site from which he fired the shot at Harrison's vehicle. Therefore, the causal connection between his use of the Ford Escape and Harrison's injuries is insufficient to trigger coverage under Plaintiffs' auto liability policies.

II. Redman's act of firing shots at Harrison's vehicle is an intervening act of independent significance that breaks any causal connection with the use of his vehicle.

The Court of Appeals in *Wright* also addressed the question of whether a shooting constitutes an act of independent significance to break any causal connection between the use of a vehicle and a shooting injury. The Court of Appeals found that the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or the gunmen were standing outside of the vehicle." *Id.* at 427, 523 S.E.2d at 476. Therefore, "the assault of the gunmen broke any causal connection between the vehicle and [the cabdriver's] injury because it arose from an act of independent significance." *Id.*

Likewise, Redman could have committed the same assault by walking up to Harrison's vehicle and firing his gun. Like the robbery in *Wright*, the shooting in this case could just as easily have been accomplished by stopping the Ford Escape and getting out, shooting Harrison, and then leaving in the vehicle. Therefore, Redman's act of firing a shot into Harrison's vehicle is an act of independent significance that breaks any possible causal connection to his use of the Ford Escape, and coverage does not apply to this incident.

CONCLUSION

For the reasons stated above, Plaintiffs are entitled to summary judgment. Harrison's injuries simply do not arise out of the use of Redman's Ford Escape. Injuries resulting from a drive-by shooting do not arise out of the use of an auto because the injuries are not foreseeably identifiable with any normal use of an auto. Therefore, no coverage applies under the Plaintiffs' auto policies for Harrison's injuries. In addition, the Ford Escape acted as the mere site from which Redman fired his gun and had no effect on the severity of Harrison's injuries. Therefore, the Ford Escape was not an active accessory to the shooting, and Redman's conduct in shooting

at Harrison's vehicle broke any possible causal connection between Harrison's injuries and Redman's use of the Ford Escape. Therefore, her injuries do not arise out of the use of an auto.

MURPHY & GRANTLAND, P.A.



Wesley B. Sawyer, Esquire (Bar # 100229)
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Plaintiffs

Columbia, South Carolina
May 6, 2016

PROGRESSIVE
P.O. BOX 31260
TAMPA, FL 33631

FILED - RECORDS
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PROGRESSIVE

JAMES M HARRISON
313 EASTOVER CIRCLE
SUMMERVILLE, SC 29483

CHIEF OF POLICE
CLERK
CORPORATE

Policy number: 19841187-2

Underwritten by:
Progressive Direct Insurance Co
August 14, 2014
Policy Period: Sep 21, 2014 - Sep 21, 2015
Page 1 of 2

www.progressive4usamembers.com

Online Service

Make payments, check billing activity, update
policy information or check status of a claim.

1-877-689-9794

For customer service and claims service,
24 hours a day, 7 days a week.

Motorcycle Insurance Coverage Summary

This is your Renewal Declarations Page

The coverages, limits and policy period shown apply only if you pay for this policy to renew.

Your coverage begins on September 21, 2014 at 12:01 a.m. This policy expires on September 21, 2015 at 12:01 a.m.

Your insurance policy and any policy endorsements contain a full explanation of your coverage. The policy limits shown for a vehicle may not be combined with the limits for the same coverage on another vehicle, unless the policy contract or endorsements indicate otherwise. The policy contract is form 5979 SC (12/09). The contract is modified by form A065 SC (07/11).

Underwriting Company

Progressive Direct Insurance Co
P.O. Box 31260
Tampa, FL 33631
1-877-689-9794

Drivers and household residents

JAMES M HARRISON

Additional information

Named insured

Form 6489 SC (07/07)



Continued

Outline of coverage

2003 Harley-Davidson FLHTCUI Engine displacement: 1450 cc's
VIN 1HD1FCW1D3Y604186

	Limits	Deductible	Premium
Liability To Others			\$180
Bodily Injury Liability	\$100,000 each person/\$300,000 each accident		
Property Damage Liability	\$50,000 each accident		
Uninsured Motorist Bodily Injury	\$25,000 each person/\$50,000 each accident		52
Underinsured Motorist Bodily Injury	Rejected		-
Uninsured Motorist Property Damage	\$25,000 each accident	\$200	4
Comprehensive		\$1,000	43
Collision		\$1,000	114
Accessory Coverage	\$10,000		105
Roadside Assistance			10
Subtotal policy premium			\$518
South Carolina Uninsured Motorist Fund charge			2
Total 12 month policy premium			\$520

Premium discounts

Policy	
19841187-2	Home Owner, Transfer, Prompt Payment and Claim Free Renewal
Driver	
JAMES M HARRISON	Motorcycle Endorsement
Vehicle	
2003 Harley-Davidson FLHTCUI	Anti-Lock Brakes

Important information about Accessories on your motorcycle/off-road vehicle

Coverage for physical damage to your motorcycle/off-road vehicle extends only to the vehicle as it comes from the factory. Accessories added on at the dealership or by an individual, and therefore not provided as original equipment by the manufacturer, are not considered part of the vehicle as delivered from the factory. If you have purchased comprehensive or collision coverage, we provide up to \$3000 of accessory coverage at no additional charge to you. Please review the value of the accessories on your vehicle. Should you wish to purchase coverage for more accessories, additional accessory coverage is available at very reasonable rates.

SOUTH CAROLINA

MOTORCYCLE POLICY

Form 6679 SC (12/00)

OTHER INSURANCE

If there is other applicable vehicle medical payments insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for an insured person occupying a motorcycle, other than a covered motorcycle, will be excess over any other motorcycle insurance providing payments for medical services.

PART III - UNINSURED/UNDERINSURED MOTORIST COVERAGE

INSURING AGREEMENT - UNINSURED MOTORIST COVERAGE

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of:

1. an uninsured motor vehicle because of bodily injury:
 - a. sustained by an insured person;
 - b. caused by an accident; and
 - c. arising out of the ownership, maintenance, or use of an uninsured motor vehicle; or
2. an uninsured motor vehicle because of property damage:
 - a. caused by an accident; and
 - b. arising out of the ownership, maintenance, or use of an uninsured motor vehicle.

INSURING AGREEMENT - UNDERINSURED MOTORIST COVERAGE

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of:

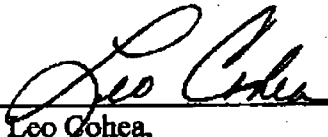
1. an underinsured motor vehicle because of bodily injury:
 - a. sustained by an insured person;
 - b. caused by an accident; and
 - c. arising out of the ownership, maintenance, or use of an underinsured motor vehicle; or
2. an underinsured motor vehicle because of property damage:
 - a. caused by an accident; and
 - b. arising out of the ownership, maintenance, or use of an underinsured motor vehicle.

We will pay under this Part III only after the limits of liability under all applicable liability bonds and policies have been exhausted by payment of judgments or settle-

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2015 MAY -9 PM 2:39
CLERK OF DISTRICT COURT
DORCHESTER COUNTY

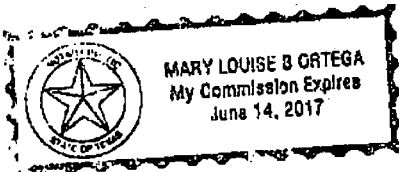
STATE OF TEXAS

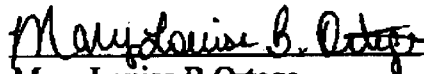
Before me, the undersigned notary public for the State of Texas, on this day personally appeared Leo Cohea, Claims Service Manager and custodian of records of USAA General Indemnity Company, and after being by me duly sworn and upon his oath says that an exact duplicate of the USAA General Indemnity Company, 03191 31 53G 7101 8, including any applicable endorsements and forms, issued to JAMES M HARRISON, effective on April 2, 2015, has been prepared under his direction and is attached hereto.



Leo Cohea,
Claims Service Manager

Subscribed and sworn to before me by said Leo Cohea, Claims Service Manager, this 7th day of August, 2015 at San Antonio, Texas, to certify which witness my hand and seal at office.





Mary Louise B Ortega
Notary Public
State of Texas

My commission expires on June 14, 2017




USAA GENERAL INDEMNITY COMPANY

(A Stock Insurance Company)

9800 Fredericksburg - San Antonio, Texas 78288

SOUTH CAROLINA AUTO POLICY

RENEWAL DECLARATIONS

(ATTACH TO PREVIOUS POLICY)

ADDL INFO ON NEXT PAGE MAIL MCH-M-I

PAGE 4

RENEWAL OF

State	01 02 04	VEH	POLICY NUMBER
SC	117 117 117	Term	03191 31 53G 7101 8
POLICY PERIOD (12:01 A.M. standard time)			
EFFECTIVE MAR 22 2015 TO SEP 22 2015			

OPERATORS

01 JAMES M HARRISON

02 LYNN M HARRISON

Named Insured and Address

 JAMES M HARRISON
 313 EASTOVER CIR
 SUMMERVILLE SC 29483-5202

Description of Vehicle(s)

VEH	YEAR	TRADE NAME	MODEL	BODY TYPE	ANNUAL MILEAGE	IDENTIFICATION NUMBER	VEH USE ¹	WORKSCHOOL
							SYM	Mile Cap Day
01	10	GMC	TERRAIN	4 DOOR	10000	2CTALBEW0A6292332	P	
02	05	GMC	SIERRA 1500	2+ DOOR	12000	1GTEC19X75Z306554	P	
04	92	CHEV	CAMARO 2D	2 DOOR	3000	1G1FP23E4NL110069	P	

 The Vehicle(s) described herein is principally garaged at the above address unless otherwise stated. ¹ WC-Work School P-Business P-Home P-Pleasure

VEH 01 SUMMERVILLE SC 29483-5202

VEH 04 SUMMERVILLE SC 29483-5202

VEH 02 SUMMERVILLE SC 29483-5202

This policy provides ONLY those coverages where a premium is shown below. The limits shown may be reduced by policy provisions and may not be combined regardless of the number of vehicles for which a premium is listed unless specifically authorized elsewhere in this policy.

COVERAGES		LIMITS OF LIABILITY		VEH 01 6-MONTH		VEH 02 6-MONTH		VEH 04 6-MONTH		VEH	
(ACV MEANS ACTUAL CASH VALUE)				D=DED AMOUNT	PREMIUM \$	D=DED AMOUNT	PREMIUM \$	D=DED AMOUNT	PREMIUM \$	D=DED AMOUNT	PREMIUM \$
PART A - LIABILITY											
BODILY INJURY	EA PER \$	25,000									
	EA ACC \$	50,000			57.83		64.27		49.62		
PROPERTY DAMAGE	EA ACC \$	25,000			60.42		68.01		47.00		
PART B - PIP											
PERSONAL INJURY PROTECTION											
WORK LOSS BENEFIT AND ESSENTIAL											
SERVICES EXPENSES EXCLUDED											
					8.09		6.44		8.78		
PART C - UNINSURED MOTORISTS											
BODILY INJURY	EA PER \$	25,000									
	EA ACC \$	50,000									
PROPERTY DAMAGE	EA ACC \$	25,000	D 200		9.20	D 200	9.47	D 200	8.19		
PART C - UNDERINSURED MOTORISTS											
BODILY INJURY	EA PER \$	25,000									
	EA ACC \$	50,000									
PROPERTY DAMAGE	EA ACC \$	25,000			13.65		14.06		12.15		
PART D - PHYSICAL DAMAGE COVERAGE											
COMPREHENSIVE LOSS	ACV LESS	D 500			40.79	D 500	45.26	D 500	33.05		
COLLISION LOSS	ACV LESS	D 500			77.71	D 500	65.05	D 500	44.15		
RENTAL REIMBURSEMENT											
	\$ 30 A DAY/\$	900 MAXIMUM			36.00		36.00		36.00		

TOTAL PREMIUM - SEE FOLLOWING PAGE(S)

ENDORSEMENTS: ADDED 03-22-15 - NONE

REMAIN IN EFFECT (REFER TO PREVIOUS POLICY) - 5100SC(04) A043(04) A400SC(04)

ACCFOR(01) A401CW(02) A100SC(04) AOASA(01)

INFORMATION FORMS: 93984(01) 94629(01) 999SC(23)

MD

01	RMF57p000p0	02	RMM61p000p0	04	XMF57p000p0
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IN WITNESS WHEREOF, we have caused this policy to be signed by our President and Secretary at San Antonio, Texas, on this date FEBRUARY 14, 2015

Steven Alan Bennett, Secretary

Alan W. Kraft, President

 9800 G 05-12
 53384-05-12



USAA GENERAL INDEMNITY COMPANY

(A Stock Insurance Company)

9800 Fredericksburg - San Antonio, Texas 78288

SOUTH CAROLINA AUTO POLICY

RENEWAL DECLARATIONS

(ATTACH TO PREVIOUS POLICY)

RENEWAL OF

State	01 02 04	Veh	POLICY NUMBER
SC	117 117 117	Trk	03191 31 53G 7101 8
POLICY PERIOD		(12:01 A.M. standard time)	
EFFECTIVE MAR 22 2015 TO SEP 22 2015			

Named Insured and Address

JAMES M HARRISON
313 EASTOVER CIR
SUMMERVILLE SC 29483-5202

Description of Vehicle(s)							VEH USE	WORKED	COL
VEH	YEAR	TRADE NAME	MODEL	BODY TYPE	ANNUAL MILEAGE	IDENTIFICATION NUMBER	SYM	Miles Per Day	Days Per Week
01	10	GMC	TERRAIN	4 DOOR	10000	2CTALBEW0A6292332		P	
02	05	GMC	SIERRA 1500	2+ DOOR	12000	1GTEC19X75Z306554		P	
04	92	CHEV	CAMARO 2D	2 DOOR	3000	1G1FP23E4NL110069		P	

The Vehicle(s) described herein is principally garaged at the above address unless otherwise stated. P=Work/School B=Business R=Family P=Platinum

VEH 01 SUMMERVILLE SC 29483-5202

VEH 04 SUMMERVILLE SC 29483-5202

VEH 02 SUMMERVILLE SC 29483-5202

This policy provides ONLY those coverages where a premium is shown below. The limits shown may be reduced by policy provisions and may not be combined regardless of the number of vehicles for which a premium is listed unless specifically authorized elsewhere in this policy.

COVERAGES (ACV MEANS ACTUAL CASH VALUE)	LIMITS OF LIABILITY		VEH 01 6-MONTH		VEH 02 6-MONTH		VEH 04 6-MONTH		VEH	
	D=DED	PREMIUM	D=DED	PREMIUM	D=DED	PREMIUM	D=DED	PREMIUM	D=DED	PREMIUM
PART D - PHYSICAL DAMAGE COVERAGE										
TOWING AND LABOR		10.00		10.00		10.00				
OTHER COVERAGES										
ADDL PERSONAL INJURY PROTECTION										
ADDL AGGREGATE LIMIT \$ 9,000										
WORK LOSS BENEFIT/ESSENTIAL SERVICES EXPENSES EXCLUDED		1.10		.83		1.22				
VEHICLE TOTAL PREMIUM		314.79		319.39		250.16				
6 MONTH PREMIUM \$ 900.28										
PREMIUM DUE AT INCEPTION. THIS IS NOT A BILL, STATEMENT TO FOLLOW.										
\$ 15.94 IS INCLUDED IN YOUR 6 MONTH PREMIUM FOR ACCIDENT FORGIVENESS.										
ADDITIONAL MESSAGE(S) - SEE FOLLOWING PAGE(S)										

01 RMF5700000 02 RMM6100000 04 XMF5700000

In WITNESS WHEREOF, we have caused this policy to be signed by our President and Secretary at San Antonio, Texas, on this date FEBRUARY 14, 2015

Steven Alan Bennett
Steven Alan Bennett, Secretary

Alan W. Krapf
Alan W. Krapf, President

5000 G 05-12
53384-05-12

(A Stock Insurance Company)

SOUTH CAROLINA AUTO POLICY

RENEWAL DECLARATIONS

(ATTACH TO PREVIOUS POLICY)

RENEWAL OF

State	Ver	POLICY NUMBER
SC	Ter	03191 31 53G 7101 8
POLICY PERIOD:		(12:01 A.M. standard time)
EFFECTIVE MAR 22 2015 TO SEP 22 2015		

Named Insured and Address	
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JAMES M HARRISON
313 EASTOVER CIR
SUMMERVILLE SC 29483-5202

Description of Vehicle(s)[illegible]

The Vehicle(s) described herein is principally garaged at the above address unless otherwise stated. * Wk=Work School B=Business F=Farm P=Personal

This policy provides ONLY those coverages where a premium is shown below. The limits shown may be reduced by policy provisions and may not be combined regardless of the number of vehicles for which a premium is listed unless specifically authorized elsewhere in this policy.

COVERAGES		LIMITS OF LIABILITY (ACV MEANS ACTUAL CASH VALUE)		VEH		VEH		VEH		VEH	
				D-DED AMOUNT	PREMIUM \$	D-DED AMOUNT	PREMIUM \$	D-DED AMOUNT	PREMIUM \$	D-DED AMOUNT	PREMIUM \$
\$ 15.94 IS INCLUDED IN YOUR 6 MONTH					PREMIUM	FOR	ACCIDENT	FORGIVENESS.			

In WITNESS WHEREOF, we have caused this policy to be signed by our President and Secretary at San Antonio, Texas,
on this date FEBRUARY 14, 2015

Steven Alan Bennett, Secretary


Alan W. Krapf, President

6000 G 05-12
53384-05-12



USAA
9800 Fredericksburg Road
San Antonio, Texas 78288

SOUTH CAROLINA AUTO POLICY

READ YOUR POLICY, DECLARATIONS AND ENDORSEMENTS CAREFULLY

The automobile insurance contract between the named insured and the company shown on the Declarations page consists of this policy plus the Declarations page and any applicable endorsements. The Quick Reference section outlines essential information contained in the Declarations and the major parts of the policy.

The policy provides the coverages and amounts of insurance shown in the Declarations for which a premium is shown.

This is a participating policy. You are entitled to dividends as may be declared by the company's Board of Directors.

If this policy is issued by United Services Automobile Association ("USAA"), a reciprocal interinsurance exchange, the following apply:

By purchasing this policy you are a member of USAA and are subject to its bylaws.

This is a non-assessable policy. You are liable only for the amount of your premium as USAA has a free surplus in compliance with Article 19.03 of the Texas Insurance Code of 1951, as amended.

The USAA Board of Directors may annually allocate a portion of USAA's surplus to Subscriber's Savings Accounts. Amounts allocated to such accounts remain a part of USAA's surplus and may be used as necessary to support the operations of the Association. A member shall have no right to any balance in the member's account except until following termination of membership, as provided in the bylaws.

QUICK REFERENCE

DECLARATIONS PAGE	
Named Insured and Address Policy Period Operators Description of Vehicle(s) Coverages, Amounts of Insurance and Premiums Endorsements	
Beginning on Page 3	Agreement and Definitions
Part A 4	Liability Coverage
Definitions Insuring Agreement Bodily Injury Liability Coverage and Property Damage Liability Coverage Limit of Liability Supplementary Payments Exclusions Out of State Coverage Other Insurance	
Part B 6	Personal Injury Protection Coverage
Definitions Insuring Agreement Personal Injury Protection Coverage Air Bag and Seat Belt Benefits Limit of Liability Exclusions Other Insurance Conditions Arbitration	
Part B 10	Medical Payments Coverage
Definitions Insuring Agreement Medical Payments Coverage Limit of Liability Exclusions Other Insurance Special Provisions Arbitration	
Part C 12	Uninsured Motorists Coverage Underinsured Motorists Coverage
Definitions Insuring Agreement Uninsured Motorists Coverage Underinsured Motorists Coverage Limit of Liability Exclusions Other Insurance Conformity To Statute Non-Duplication Arbitration	
(Quick Reference continued on Page 2)	

(PART B Cont'd.)

9. Caused by or as a consequence of war, insurrection, revolution, nuclear reaction, or radioactive contamination.
10. Sustained while occupying your covered auto while it is rented or leased to others.
11. Sustained while a participant in, or in practice for, any speed contest.

OTHER INSURANCE

If there is other applicable auto medical payments insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible auto insurance providing payments for medical or funeral expenses.

SPECIAL PROVISIONS

If your covered auto and every other motor vehicle you own are within the policy territory referred to in Part E, General Provisions, then coverage under Part B will apply to you and any family member anywhere in the world.

ARBITRATION

If we and a covered person do not agree:

1. On the reasonable fee;
2. That expenses are reasonable;

3. Whether services or supplies are medically necessary and appropriate medical services; or

4. Whether there is coverage under the terms of the Insuring Agreement for Part B.

then, that disagreement may be arbitrated, provided both parties so agree. This arbitration shall be limited to the aforementioned issues and shall not address any other coverage questions. Any arbitration finding that goes beyond the aforementioned issues shall be voidable by us or the covered person involved in the disagreement.

If both parties agree to arbitrate, each party will select an arbitrator, and those two arbitrators will select a third. If the two arbitrators cannot agree on a third within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally.

Unless both parties agree otherwise, arbitration will take place in the county in which the covered person lived at the time of the accident, and local rules of law as to procedure and evidence will apply. A decision agreed to by two or more of the arbitrators will be binding up to an amount that, when added to amounts previously paid by us, does not exceed the limit of liability for this coverage.

PART C - UNINSURED MOTORISTS COVERAGE (referred to as UM) and \

UNDERINSURED MOTORISTS COVERAGE (referred to as UIM) \

DEFINITIONS

A. Covered person as used in this Part means:

1. You or any family member.
2. Any other person occupying your covered auto.
3. Any person for damages that person is entitled to recover because of BI to which this coverage applies sustained by a person described in 1. or 2. above.

However, the definition of a covered person does not include the Government of the United States of America.

B. Uninsured motor vehicle means a land motor vehicle or trailer of any type:

1. To which neither a liability bond or policy, nor cash or securities deposited with the State Treasurer, applies at the time of the accident.
2. To which a liability bond or policy applies at the time of the accident. In this case its limit for liability must be less than the minimum limits specified by the South Carolina Financial Responsibility Act.

(PART C Cont'd.)

3. That is a hit-and-run motor vehicle whose operator or owner cannot be identified and which hits or which causes an accident resulting in BI or PD without hitting:
 - a. You or any family member;
 - b. A vehicle which you or any family member are occupying;
 - c. Your covered auto; or
 - d. Any of your property.

If there is no physical contact with the hit-and-run vehicle the facts of the accident must be corroborated by an affidavit attesting to the truth of the facts of the accident signed by any eyewitness other than the owner or operator of the vehicle which you or any family member were occupying at the time of the accident.
4. To which a liability bond or policy applies at the time of the accident but the bonding or insuring company:
 - a. Successfully denies coverage;
 - b. Is or becomes insolvent;
 - c. Is in delinquency proceedings, suspension or receivership; or
 - d. Is proven unable to respond to a judgment.
5. For which the owner has not qualified as a self-insurer.

However, uninsured motor vehicle does not include any vehicle or equipment

1. Owned by any governmental unit or agency unless a cause of action against that governmental unit or agency is barred by the Tort Claims Act, South Carolina Laws 1986, Ratification No. 514, Sub-section 15-78-60, or by other applicable statute.
2. Operated on rails or crawler treads, except for a snowmobile.
3. Designed mainly for use off public roads while not on public roads.

- C. Underinsured motor vehicle means a land motor vehicle or trailer of any type to which a liability bond or policy applies at the time of the accident in limits equal to or greater than the minimum limit for liability specified by the South Carolina Financial Responsibility Act, but the limits of that bond or policy are not enough to pay the full amount the covered person is legally entitled to recover as damages.

However, underinsured motor vehicle does not include any vehicle or equipment:

1. Operated on rails or crawler treads, except for a snowmobile.
2. Designed mainly for use off public roads while not upon public roads.
3. While located for use as a residence or premises.

INSURING AGREEMENT

A. UNINSURED MOTORISTS COVERAGE

We will pay the following damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of an auto accident:

1. BI sustained by a covered person; and
2. Injury to or destruction of the property of a covered person.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

We will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements. This provision applies only to Definition B.2. under this Part.

(PART C Cont'd.)

B. UNDERINSURED MOTORISTS COVERAGE

We will pay the following damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of an auto accident:

1. BI sustained by a covered person; and
2. Injury to or destruction of your covered auto. However, this does not include damage to property owned by the covered person while contained in your covered auto.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle.

LIMIT OF LIABILITY

UNINSURED MOTORISTS COVERAGE

- A. If BI or PD is sustained in an accident by you or any family member while occupying your covered auto:

1. Our maximum limit of liability for all resulting damages, including, but not limited to, all direct, derivative or consequential damages recoverable by any persons, is the sum of the limits of liability shown in the Declarations for "each person" for Bodily Injury Liability Uninsured Motorists Coverage.
2. Subject to this limit for "each person", our maximum limit of liability for all damages arising out of BI sustained in that accident is the sum of the limits of liability shown in the Declarations for "each accident" for Bodily Injury Liability Uninsured Motorists Coverage.
3. Our maximum limit of liability for all PD resulting from that accident is the sum of the limits of liability shown in the Declarations for "each accident" for Property Damage Liability Uninsured Motorists Coverage.

4. Subject to the maximum limit of liability set forth in paragraphs 1., 2. or 3. above:

- a. The most we will pay for BI or PD sustained in that accident by a covered person other than you or any family member is that covered person's pro-rata share of the "each person" or "each accident" limit shown in the Declarations for this coverage applicable to the vehicle that covered person was occupying at the time of the accident; and
- b. You or any family member who sustains BI or PD in that accident will also be entitled to a pro-rata share of the "each person" or "each accident" limit described in paragraph a. above.

A person's pro-rata share shall be the proportion that that person's damages bears to the total damages sustained by all covered persons.

The maximum limit of liability is the most we will pay regardless of the number of:

1. Covered persons; <
2. Claims made;
3. Vehicles or premiums shown in the Declarations;
4. Premiums paid; or
5. Vehicles involved in the accident.

- B. If BI or PD is sustained in an accident by you or any family member while not occupying any auto:

1. Our maximum limit of liability for all resulting damages, including, but not limited to, all direct, derivative or consequential damages recoverable by any persons, is the highest "each person" limit of liability shown in the Declarations for Bodily Injury Liability Uninsured Motorists Coverage applicable to any one of your covered autos.

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

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

Plaintiff,

v.

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-18-1571

**PLAINTIFF'S REQUESTS TO ADMIT TO
DEFENDANT**

**TO: RYAN SIGAL, ESQUIRE, ATTORNEY FOR THE DEFENDANT AND TO THE
DEFEDANT ABOVE NAMED:**

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, you are hereby served with this written request for the admissions of fact and genuineness of documents for the purpose of the pending action only. Such requests for admissions, pursuant to the Rule, shall be deemed admitted unless within thirty (30) days from the date hereof, the undersigned at his address receives a written answer or objection. If objection is made, the reasons therefor shall be stated. The answer to each request shall specifically deny the matter or set forth in detail why the answering party cannot truthfully admit or deny the matter. Any such denial shall fairly meet the substance of the requested admissions, and when good faith requires that you qualify an answer or deny only part of the matter which is requested to be admitted, you shall specify so much of the request as being true, and qualify or deny the remainder.

1. Admit that Progressive issued a South Carolina Motorcycle insurance policy identified by policy number 19841187-2 to James M. Harrison that was in full force and effect on April 2, 2015 and that the policy provides uninsured motorist coverage with limits



of twenty-five thousand (\$25,000.00) per person and fifty thousand (\$50,000.00) per accident.

2. Admit that a complete and accurate copy of the policy is attached as Exhibit A to this stipulation and shall be admissible in this case.
3. Admit that USAA issued a South Carolina Auto Policy identified by policy number 03191 31 53G 7101 8 to James M. Harrison that was in full force and effect on April 2, 2015 and that the policy provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident for three vehicles including a 2010 GMC Terrain.
4. Admit that a complete and accurate copy of the policy is attached as Exhibit B to this stipulation and shall be admissible in this case.
5. Admit that Lynn Harrison (deceased) was married to James Mark Harrison at all times relevant to this case, and resided in his household.
6. Admit that on April 2, 2015, Lynn Harrison operated a 2010 GMC Terrain in Summerville, South Carolina eastbound on East Carolina Avenue, which became Old Trolley Road just before the intersection of Old Trolley Road and Bacons Bridge Road.
7. Admit that Lynn Harrison stopped for a red light in the middle eastbound lane of Old Trolley Road at the intersection of Bacons Bridge Road and Old Trolley Road near the Sawmill Shopping Center.
8. Admit that at the same time, Jimi Carl Redman, Jr. was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Lynn Harrison's right.

9. Admit that Jimi Carl Redman, Jr. stopped for the red light at the intersection of Bacons Bridge Road and Old Trolley Road near Sawmill Village Shopping Center in the eastbound lane immediately to the right of the vehicle operated by Lynn Harrison.
10. Admit that while stopped at the stop light, Jimi Carl Redman, Jr. pointed a rifle at Lynn Harrison and fired in her direction.
11. Admit that the bullet went through the passenger window of Lynn Harrison's 2010 GMC Terrain and struck her in the head, causing her death.
12. Admit that neither the 2010 GMC Terrain nor the red Ford Escape were in motion at the time of the shooting.
13. Admit that Jimi Carl Redman, Jr. then disregarded the red light, proceeded through the intersection, and was apprehended a few blocks away.
14. Admit that because her vehicle was still in drive at the time of the shooting, Lynn Harrison's 2010 GMC Terrain proceeded slowly through the intersection until it came to rest on the median.
15. Admit that the vehicles operated by Jimi Carl Redman, Jr. and Lynn Harrison never made contact.
16. Admit that there is no evidence that Lynn Harrison interacted with Jimi Carl Redman, Jr. or even knew of his presence beside her prior to the shooting.
17. Admit that there is no evidence that Lynn Harrison and Jimi Carl Redman, Jr. knew each other prior to the shooting.
18. Admit that Jimi Carl Redman, Jr.'s use of the Ford Escape did not increase the severity of Lynn Harrison's injuries.

19. Admit that the Ford Escape operated by Jimi Carl Redman, Jr. was not insured or was underinsured at the time of the shooting.

Please take notice that you may not give lack of information or knowledge as a reason for failure to admit or deny, unless you shall state that you have made a reasonable inquiry into the information known or readily obtainable by you and it is insufficient to enable you to admit or deny.

You will hereby take notice, that if you fail to admit these Requests for Admissions, and if the undersigned hereafter proves the truth of the matter, the undersigned shall apply to the Court for an Order requiring the party to pay the reasonable expenses incurred in making such proof, which shall include reasonable attorney's fees.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
Murphy & Grantland, PA
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Plaintiff

Columbia, South Carolina
February 3, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

CIVIL ACTION NO: 2015-CP-18-1571

Progressive Direct Insurance Co.,

Plaintiff,

v.

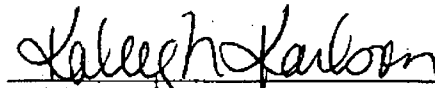
James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A.,
attorneys for the Defendants do hereby certify that on **February 3, 2016**, I have served a copy
of the foregoing **Plaintiff's Requests to Admit to Defendant** in connection with the above-
referenced case placing same in the U.S. mail, postage paid to:

Ryan Sigal, Esquire
Shelly Leake Law Firm, LLC
3614 Ashely Phosphate Road
N. Charleston, SC 29418


Kaleigh Karlson

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,)

v.)

James Mark Harrison as the Personal)
Representative of the Estate)
of Lynn Harrison,)

Defendants.)

**DEFENDANT'S RESPONSES TO
PLAINTIFFS' REQUEST TO ADMIT**

**TO: WESLEY SAWYER, ESQUIRE, ATTORNEY FOR THE ABOVE NAMED
PLAINTIFFS:**

Now comes Defendant, James Mark Harrison as the Personal Representative of the
Estate of Lynn Harrison, by and through the undersigned counsel and pursuant to Rule 36,
South Carolina Rules of Civil Procedure hereby responds to the Plaintiffs' First Request to
Admit dated February 3rd, 2015, as follows:

REQUEST FOR ADMISSION

1. Admit.
2. Admit
3. Admit
4. Admit
5. Admit
6. Admit



7. Admit

8. Admit

9. Defendant denies this request to the extent it explains Mr. Redman's intent for stopping was for the red light as we do not have sufficient evidence at this time to ascertain Mr. Redman's intent, however Defendant does admit that Mr. Redman stopped his car at the red light.

10. Admit

11. Defendant denies that bullet struck Lynn Harrison in the head, however Defendant does admit the bullet struck her in the neck and the rest of the request is admitted.

12. Admit

13. Admit

14. Admit

15. Admit

16. Defendant denies this request as there is evidence that Mr. Redman was making hand gestures and blowing kissing towards Lynn Harrison right before shooting her, which is evidence of a possible interaction between Lynn Harrison and Mr. Redman.

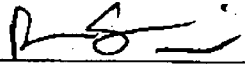
17. Admit

18. Deny

19. Admit

(signature on next page)

Respectfully Submitted:

By: 
Ryan H. Sigal, Esq. (SC Bar No.: 80223)
Shelly Leeke Law Firm, LLC
3614 Ashley Phosphate Road
North Charleston, SC 29418
843-297-8485
843-297-8497 (fax)
ryan@leekelaw.com

North Charleston, SC
March 3rd, 2016

Attorney for Defendant

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

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

Plaintiff,)

v.)

James Mark Harrison as the Personal)
Representative of the Estate)
of Lynn Harrison,)

Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-18-1571

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE this 3 day of March, 2016 served a copy of the Defendant James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison Answer to the Plaintiffs upon the following by mailing a copy of the same with the United States Postal Service in an envelope, with sufficient postage affixed thereto to insure proper delivery addressed to all counsel of record as follows:

Wesley B. Sawyer
PO Box 6648
Columbia, SC 29260



Ryan H. Sigal

March 3rd, 2016

STATE OF SOUTH CAROLINA)
 COUNTY OF DORCHESTER)
 Progressive Direct Insurance Company)
 USAA General Indemnity Company,)
 Plaintiffs,)
 v.)
 James Mark Harrison as the Personal)
 Representative of the Estate of Lynn)
 Harrison,)
 Defendant.)

2017 JAN 27 PM 1:59
 CHERYL L. ALAN
 CLERK OF COURT
 DORCHESTER COUNTY

IN THE COURT OF COMMON PLEAS
 FOR THE FIRST JUDICIAL CIRCUIT
 CASE NUMBER: 2015-CP-18-1571

**DEFENDANT'S CROSS MOTION
 FOR SUMMARY JUDGEMNT**

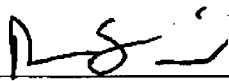
YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendant, James Mark Harrison, as Personal Representative of the Estate of Lynn Harrison, (Hereinafter "Defendant"), will move before the presiding judge of Dorchester County Court of Common Please at the Dorchester County Courthouse on February 7th, 2017 at 2:00 PM for an Order granting summary judgment in favor of the Defendant, on the grounds there is no genuine issue of material fact.

Plaintiffs issued policies of insurance providing uninsured motorist (UM) coverage. On April 2, 2015, Defendant was shot and killed by Jimi Carl Redman while both were at a stop light in Summerville, South Carolina. Both Defendant and Mr. Redman were operating their motor vehicles at the time of the shooting. Mr. Redman was uninsured at the time of the shooting. Defendants UM policies provide coverage for injuries arising out of the at-fault motorists, Jimi Redman's, ownership, maintenance, or use of an automobile. South Carolina law allows for insurance coverage in shooting injuries that arise out of the ownership, maintenance, or use of an automobile. As such, based on the admitted facts in this case, coverage is afforded to Defendant due to Mr. Redman's assault arising out of the use of an automobile.

This Motion is made pursuant to Rule 56 of the South Carolina Rule of Civil Procedure and will be supplemented and supported by the memorandum of law being filed concurrently herewith, as well as such affidavits, depositions, discovery responses, and such other documents as appropriate.

Respectfully Submitted:

By:



Ryan H. Sigal, Esq. (SC Bar No.: 80223)
Shelly Leeke Law Firm, LLC
3614 Ashley Phosphate Road
North Charleston, SC 29418
843-297-8485
843-297-8497 (fax)
ryan@leekelaw.com

North Charleston, SC
January 27, 2017

Attorney for Defendant

STATE OF SOUTH CAROLINA FILED - RECORD IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER 2017 JAN 27) PH 1:55
FOR THE FIRST JUDICIAL CIRCUIT

PROGRESSIVE DIRECT INSURANCE CO., AND)
USAA GENERAL INDEMNITY COMPANY)
CLERK OF COURT)
DORCHESTER COUNTY)

Plaintiffs,

v.

✓ James Mark Harrison as the Personal
Representative of the Estate of Lynn
Harrison,

Defendant.

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGEMENT**

Defendant James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison ("Defendant") submits the following Memorandum in Support of Defendants' Motion for Summary Judgement in in this matter.

Factual Background

On April 2, 2015, the South Carolina Motorcycle insurance policy (identified by policy number 19841187-2) Progressive issued to James M. Harrison was in full force and effect. This policy provided uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) per person and fifty thousand (\$50,000.00) per accident. (Plaintiff's Request to Admit No.1). Additionally, the South Carolina Auto Policy (identified by policy number 03191 31 53G 7101 8) USAA issued to James M. Harrison was in full force and effect on April 2, 2015. This policy provided for uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) per person and fifty thousand (\$50,000.00) per accident for three vehicles including a 2010 GMC Terrain. (Plaintiff's Request to Admit No. 3).

At all times relevant to this case, Lynn Harrison (deceased), was married to and resided in the household of James Mark Harrison. (Plaintiff's Request to Admit No. 5).

On or shortly before April 2, 2015, Jimi Carl Redman (Redman) used his vehicle to drive from Texas to South Carolina with a rifle in his possession. (Defendant's Requests to Admit No. 5 & 6).

On April 2, 2015, in Summerville, South Carolina Lynn Harrison operated the aforementioned 2010 GMC Terrain in eastbound on East Carolina Avenue, which became Old Trolley Road just before the intersection of Old Trolley Road and Bacons Bridge Road. (Plaintiff's Request to Admit No. 6). At the same time, Redman was driving a red Ford Escape eastbound on Old Trolley Road. (Plaintiff's Request to Admit No. 8). At some point, prior to the stoplight at the intersection Old Trolley Road and Bacons Bridge Road, Redman pulled next to Harrison and began making hand gestures and blowing kisses towards Harrison as they were approaching the stop light where the shooting occurred. (Plaintiff's Request to Admit No. 16, Defendant's Request to Admit No. 1, and attached witness statement of Jennifer Rojas). Redman made the taunting gestures towards Harrison while both cars were in use and in motion driving down East Carolina Avenue, which became Old Trolley Road approaching the stoplight. (Plaintiff's Request to Admit No. 16, Defendant's Request to Admit No. 1, and attached witness statement of Jennifer Rojas). Harrison stopped for a red light in the middle eastbound lane of Old Trolley Road at the intersection of Bacons Bridge Road and Old Trolley Road near the Sawmill Shopping Center. (Plaintiff's Request to Admit No. 7). Redman also stopped at the red light at the intersection of Bacons Bridge Road and Old Trolley Road in the eastbound lane immediately to the right of the vehicle being operated by Harrison. (Plaintiff's Request to Admit No. 9). While stopped at the stoplight, Redman pointed a rifle at Harrison and fired in her direction. (Plaintiff's Request to Admit No. 10). The bullet went through the passenger window of Harrison's GMC Terrain and struck her in the neck, causing her death. (Plaintiff's Request to

Admit No. 11). Neither the GMC terrain nor the Ford Escape were in motion at the time of the shooting, but both were in drive and turned on. (Plaintiff's Request to Admit No. 12 & Defendant's Request to Admit No. 3 & 8).

Redman then disregarded the red light, proceeded through the intersection, and was apprehended a few blocks away. (Plaintiff's Request to Admit No. 13). Harrison's car was in drive throughout the entire event, including the moment the shot was fired. After she was shot her foot came off the brake causing her car to proceed slowly through the intersection until it came to rest on the median. (Plaintiff's Request to Admit No. 14). The vehicles operated by Redman and Harrison never made contact. (Plaintiff's Request to Admit No. 15). At no point in time during the entire event did Redman or Harrison exit their vehicles.

Redman was charged with murder and possession of a weapon during a violent crime. According to the South Carolina online public index, those charges are still pending. The Ford Escape operated by Redman was not insured at the time of the shooting. (Plaintiff's Request to Admit No. 17).

The above facts make it clear that Redman had identified Harrison as his target, while driving next to her and taunting her. He then used his vehicle to get in position next to her to fire the fatal shot. He then used his car to flee the scene. *See supra*. Harrison's injuries resulted from a combination of Redman's operation of a vehicle on a public roadway and Redman's use of a rifle while operating a vehicle thereon. ¹

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact and the moving party is entitled

¹ Plaintiffs' Request to Admit and Responses are attached hereto as Exhibit 1, Defendants Request to Admit and Responses are attached hereto as Exhibit 2, and Jennifer Rojas Witness Statement is attached as Exhibit 3.

to prevail as a matter of law. *Knight v. Austin*, 396 S.C. 518, 521-22, 722 S.E.2d 802, 804 (2012); Rule 56(c), SCRPC. “When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted.” *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). “The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Richardson v. The State Record Co., Inc.*, 330 S.C. 562, 566, 499 S.E.2d 822, 824-25 (Ct. App. 1998). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.” *Singleton*, 377 S.C. at 197-98, 659 S.E.2d at 203.

ARGUMENT

South Carolina law prohibits the issuance or delivery of an automobile insurance policy within the state, “unless [the policy] contains a provision insuring the persons defined as insured against loss from 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. The Progressive and USAA policies provided uninsured motorist coverage for injuries arising out of the “ownership, maintenance, or use of an uninsured motor vehicle.” (Progressive Policy, p. 4); (USAA Policy, p. 7). Redman’s use of the Ford Escape on a public roadway gave rise to Harrison’s injuries—it provided him with a unique position that only his motor vehicle could have afforded—allowing him to fatally shoot Harrison. Therefore, Harrison’s injuries “[arose] out of the use” of Redman’s Ford Escape, and coverage should be afforded under the two policies for this incident.

When determining whether an insurer is liable under an uninsured motorist provision for injuries “arising out of the ownership, maintenance, or use” of an uninsured vehicle for gunshot

injuries sustained by a person traveling on a public roadway, the issue is whether the injuries arose out of the “ownership, maintenance, or use” of the victim’s or assailant’s vehicle. See *Holmes v. Allstate. Ins. Co.*, 786 F.Supp.2d 1022, 1025 (D.S.C 2009); *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106, 108 (1992). In South Carolina injuries arising out of the ownership, maintenance, or use of an automobile are covered by insurance when (1) there is a causal connection between the vehicle and the injury; (2) no act of independent significance occurs that breaks the causal link; and (3) the vehicle was being used for transportation at the time of the accident. *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998). “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 v. USAA Ins. Co.*, 368 S.C. 153,160, 628 S.E.2d 478 (2006).

I. There is a causal connection between Redman’s Ford Escape and the gunshot injuries suffered by Harrison.

The South Carolina Supreme Court has found that a causal connection exists where the assailant’s use of the vehicle places the assailant in a unique position – one that could only be achieved through the use of a motor vehicle - that contributes to the seriousness of, or is the source of the assailant’s capacity to cause the victim’s injuries. See *Home Ins. Co. v. Towe*, 314 S.C. 105,107, 314 S.E.2d 825, 827 (1994); *Howser*, 309 S.C. at 273, 422 S.E.2d at 108.

The court in *Aytes* established an additional three-part test to determine if there was a causal connection between the vehicle and the injury. The *Aytes* court looked at whether the vehicle:

- (1) was an “active accessory” to the assault; and
- (2) was 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 33, 503 S.E.2d at 745-46.

A. The Ford Escape was an “active accessory” because it was used as a tool that enabled Redman to carry out the shooting.

The South Carolina Supreme Court in *Wausau Underwriters Ins. Co., v. Howser*, 422 S.E.2d 106 (S.C. 1992), held that a vehicle used in the commission of a shooting is an “active accessory” to the assault when the assailant’s ability to carry out the attack is dependent on the use of his vehicle. In *Howser*, the victim was driving down a public highway when an unidentified assailant used his vehicle to bump her vehicle from behind. The assailant then continued to follow the victim, eventually pulling alongside the victim in the outside lane and yelling at the victim to pull her car over. As the victim attempted to turn her vehicle around and flee the assault she was injured when the assailant fired a gun into the victim’s vehicle. *Id.* at 106.

The Court reasoned that because the victim was operating a motor vehicle at the time of the shooting the assailant’s ability to complete the attack was dependent on the use of his vehicle, as it allowed him to continuously pursue the victim and carry out his attack on a public highway. Consequently, the assailant’s vehicle was not merely used as transportation to the site of the attack, but rather the “vehicle played an essential and integral part” enabling the assailant to complete the attack. *See Id.* at 108. Therefore, the Court ruled that the vehicle was an “active accessory” because the assailant could not have completed his attack without using his vehicle. *See Id.* at 108. Ultimately, the Supreme Court held that the victim’s injuries arose out of the assailant’s use of his vehicle by determining that the assailant’s continuous pursuit of the victim on a public highway coupled with his reliance on the vehicle to keep up with and shoot the

victim were part of a single “ongoing assault.” As such, a causal connection existed because **“[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part.”** *See Id. (emphasis added)*

Furthermore, 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. *See Id. (emphasis added)* 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. *See also Holmes* (District court discusses how *Towe* is still applicable law)

Redman could not have followed Harrison from the first red light, while harassing and gesturing towards her without the use of his vehicle, nor could he have closely pursued Harrison to the second light without using his vehicle. (Plaintiff’s Request to Admit No. 16, Defendant’s Request to Admit No. 1, and attached witness statement of Jennifer Rojas). Considering Harrison

was operating her vehicle throughout the entire series of events that culminated in her shooting, and was only stopped for less than the length of a red light, Redman would not have been able to obtain the position that allowed him to fatally shoot Harrison at the second light without the use of his vehicle. Thus, Redman, like the assailant in *Howser and Towe*, was able to pursue and carry out his assault on Harrison only by using his vehicle as an “essential and integral part” of the crime that enabled him to complete the attack. Therefore, Redman’s vehicle was an “active accessory” to the assault because Redman’s ability to carry out the attack was dependent on the use of his vehicle.

The Plaintiffs suggest that the District Court of South Carolina’s opinion in *Holmes v. Allstate. Ins. Co.*, 786 F.Supp.2d 1022, 1025 (D.S.C 2009) applies to this case claiming the facts of the cases are indistinguishable, and doing so they fail to recognize the fundamental differences between the two cases. In *Holmes*, the assailant, an estranged lover of the claimant, saw the claimant’s vehicle parked in front of her friend’s house and began driving back and forth in front of the friend’s house harassing the claimant for some time. Later that day, when the claimant left her friend’s house to pick up a neighbor’s child at a local bus stop, the assailant saw the claimant driving down the road in the opposite direction. At this time, the assailant turned his vehicle around and followed the claimant to the bus stop. **As the claimant sat parked on the side of the road awaiting the arrival of the school bus**, the claimant stopped his vehicle next to the claimant’s parked car and fired multiple shots into her vehicle before driving away. *See Id.* at 1024. (*emphasis added*).

In this case, the District Court looked to whether the claimant’s injuries arose out of the ownership, maintenance, or use of either the claimant’s or assailant’s vehicle – ultimately finding that neither vehicle’s ownership, maintenance, or use gave rise to the claimant’s injuries. *See Id.*

at 1025-27. With regards to the claimant's vehicle, the Court provided that because the claimant was parked on the side of the road awaiting the bus she merely occupied the vehicle and her injuries did not arise out of the ownership, maintenance, or use of her vehicle. *See Id.* The District Court determined that the assailant's vehicle was not an "active accessory" to the assault by distinguishing the facts of its case from the facts of *Howser*. *See Holmes* at 126.

Specifically, the District Court distinguished the two cases, in part, by finding that the assailant's position in relation to the claimant was not dependent on the use of his vehicle because the claimant was not traveling in her vehicle when the assailant stopped next to her and fired shots into her car. *Id.* The Court held that because the claimant was parked on the side of the road and not operating her vehicle on public roadway the assailant did not need to use his vehicle to position himself to carry out the attack; he could have easily parked his vehicle and carried out the attack on foot. Therefore, the District Court concluded that the vehicle was not an "active accessory" because it was not essential and did not enable the assailant to carry out the assault, it was merely used as transportation to the site of the shooting.

Consequently, the District Court's opinion in *Holmes* does not, as the Plaintiff suggests, apply with equal force in the present case. The shooting in this case is wholly different from assault in *Holmes* and is comparable to the ongoing assault in *Howser* that culminated in a shooting. Unlike in *Holmes*, there is evidence that Redman was harassing and making gestures towards Harrison, while he was pursuing her prior to the shooting. Unlike the assault in *Holmes*, Redman used his vehicle to pursue Harrison as she drove from stop light to stop light and to position himself next to Harrison to carry out the assault. *See supra*.

Moreover, unlike the shooter in *Holmes*, Redman's position in relation to Harrison was dependent on the use of his vehicle because Harrison was operating her vehicle on a public

roadway when Redman fired into her vehicle and drove away. Harrison was not parked on the side of the road waiting for a bus, as was the victim in *Holmes*. Rather, she was continuously operating her vehicle on a public roadway and only stopped briefly when she came to a red light, and never placed her car in park. *See Supra*. As such, the relevant facts here are distinguishable from those in *Holmes* and it is clear that Redman's vehicle was used for more than mere transportation to the site of the shooting because the use of his vehicle played an essential and integral role that enabled Redman to carry out the attack. Therefore, Redman's vehicle was an "active accessory" to the assault because Redman's ability to carry out the attack was dependent on the use of his vehicle.

Furthermore, the shooting in the present case, like the one in *Howser*, began with the assailant using his vehicle to harass and pursue an innocent person who was operating her vehicle on a public highway and culminated in a shooting. Here, the assault commenced at the first red light when Redman identified Harrison as his victim. *See supra*. At which point, he began harassing Harrison while using his vehicle to pursue Harrison to the second light. *See supra*. Finally, the assault culminated when Redman pulled his Ford Escape alongside Harrison at the second red light and fired his rifle into Harrison's vehicle. *See supra*. Therefore, like *Howser* and *Towe*, a sufficient causal connection exists between the use of Redman's vehicle and Harrison's injury because the gunshot was the culmination of an ongoing assault, in which the vehicle played an "essential and integral [role]" in Redman's ability to carry out his attack on Harrison and flee the scene. *See Howser and Towe*. The facts clearly illustrate that Redman had targeted Harrison as his victim and used his car as an "active accessory" to pursue, harass, and ultimately position himself in a place where he was able to shoot her and flee the scene.

B. The Ford Escape was more than the site from which Redman committed his assault.

In *Howser*, the Supreme Court of South Carolina provided that a vehicle is not merely the site of the injury if the use of the vehicle causally contributes to the claimant's injuries. *Howser*, at 273, 422 S.E.2d 106. The Court in *Howser* determined that the assailant relied on the use of his vehicle to carry out the attack; that the assailant was using his vehicle for transportation at the time of the attack; and that the victim was not, incidentally, sitting in a parked vehicle at the time of the attack. Like the assailant in *Howser*, Redman relied on his vehicle to pursue and carry out his attack on Harrison; Both Harrison and Redman were using their vehicle for transportation at the time of the shooting; and Harrison was not, incidentally, sitting in a parked vehicle at the time of the attack. Thus, Harrison's injuries were directly related to Redman's use of his vehicle. As such, the vehicle causally contributed to Harrison's injuries. Therefore, the causal connection between Redman's use of the Ford Escape and Harrison's injuries is sufficient to trigger coverage because the vehicle was more than the site from which Redman committed his assault.

The Plaintiff proposes that *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999) is comparable to the present case; and in doing so, fails to acknowledge clear differences between the two cases. In *Wright*, the Appellate Court provided that the vehicle was merely the site of the attack and the required causal connection did not exist when the relationship between the injuries and the functional use of the motor vehicle were incidental. *See Id.* at 426. Specifically, the Court in *Wright* explained that the relationship between the injury and the vehicle was incidental because the injuries could have occurred whether or not the vehicle was parked, or otherwise not moving, or if the assailant was standing outside the vehicle. *See Id.* at 427. Thus, the Court rejected the claimant's argument that the functional use of the vehicle was essential to the assailant's ability to carry out the attack.

In the present case, the relationship between Harrison's injuries and Redman's use of his vehicle are not incidental, but rather causally connected. Redman could not have kept up with Harrison from one red light to another if he were pursuing her on foot because Harrison was traveling in her vehicle when Redman identified her as his victim and the assault began. Thus, Redman's ability to carry out his attack on Harrison was contingent on the use of his vehicle. Consequently, Harrison's injuries were directly related to Redman's "functional use of his motor vehicle", as a motor vehicle, and were more than just "incidental to the injuries." See *Wright*. Therefore, Redman's Ford Escape was more than the mere site from which Redman committed his assault and the required causal connection exists.

C. Redman's use of the Ford Escape to commit the shooting is foreseeably identifiable with the normal use of an automobile.

In the present case, the Plaintiffs suggests that the holding by the South Carolina Supreme Court in *State Farm Mut. Auto Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (2000) prevents finding a causal connection in the present shooting case because "the use of a vehicle in the commission of a drive-by shooting is not foreseeably identifiable with the normal use of the automobile." This would imply that coverage is automatically prevented from applying in every case in which a gun is fired from a car because of the Court's ruling in *Bookert*. This is simply untrue.

In *Bookert*, an altercation began in a Hardee's parking lot between a group of soldiers (assailants) and another group of young men (victims). When the altercation was broken up, the assailants left the parking lot in their jeep and drove it to pick up another assailant. The assailants returned and followed the victims to a nearby McDonald's parking lot. As the assailants circled the McDonald's parking lot in the jeep, one of the assailant's stood in the back of the jeep with a

shotgun and another assailant sat in the passenger seat with a handgun. At this time, all of the victims were standing in the parking lot; none of the victims were traveling in a vehicle. As the assailant's continued harassing the victims, the assailant standing in the back of the vehicle accidentally fired the shotgun when the jeep lurched forward causing him to fall out of the vehicle. As the jeep continued in motion, the passenger fired multiple shots into the victim. The plaintiff, who was standing in the parking lot when the shots were fired, was injured when one of the passenger's bullets hit him in the leg. The driver and passenger assailants used the jeep to flee the scene while the assailant that fell out of the jeep left on foot. *Bookert*, 330 S.C. 221, 224-26, 499 S.E.2d 480, 481-82 (Ct. App. 1997), *rev'd*, 337 S.C. 291. After reviewing the case, the Supreme Court reversed Court of Appeals' decision and found that there was no causal connection between the vehicle and the injury because the gunshot wounds were "not foreseeably identifiable with the normal use of an automobile." *See Id.* at 293, 523 S.E.2d at 182.

It is clear from South Carolina Jurisprudence that *Bookert* did not overrule the decision in *Howser* or *Towe*. In fact, the District Court in *Holmes*, which Plaintiff discusses at length in their memorandum in support of summary judgment, expressly discusses the *Howser* and *Towe* cases nine (9) years after the *Bookert* ruling. While the court in *Holmes* did not find the holdings in *Howser* and *Towe* were factually applicable to their case they certainly recognized that both were still precedential in South Carolina jurisprudence.² *See also Peagler v. USAA Ins. Co.*, 628 S.E.2d 475, 368 S.C. 153 (S.C. 2006)(Court discussion regarding *Howser* and *Towe* as valid law post

² Defendant would be remiss to not point out that, our current Chief Justice of the South Carolina Supreme Court, Chief Justice Beatty, wrote in concurrence in *Norris v. Allstate Ins. Co.*, No. 2005-UP-124, 2005 WL 7083469, at *3 (S.C. Ct. App. Feb. 17, 2005), that "[u]ntil our Supreme Court overrules *Howser*, we must assume that the fact that an assailant fired a gun from an automobile does not automatically defeat coverage by the automobile's insurer." While this is an unpublished opinion it is clearly illustrative of the fact that our Supreme Court still considers *Howser* precedential law and that *Bookert* merely carved out a factually specific niche for drive by shootings.

Bookert). The major import of the *Holmes* decision on the instant case is that it clearly established that the *Howser* and *Towe* decisions were not overturned by *Bookert*, rather a specific factual niche was established for drive by shootings where the victim(s) are either not in an automobile or not in an automobile that is in use and the shooter(s) are. See *Bookert and Holmes*. In both *Bookert* and *Holmes* the victims were not in automobiles that were in use at the time of the shooting. See *Id.* Therefore, when determining if a causal connection exists between a vehicle used in the commission of shooting and a victim's injuries the specific factual scenario must be applied to both *Bookert* and *Howser* to determine whether coverage exists.

In *Bookert*, unlike *Howser*, the assailant's ability to carry out the attack was not dependent on the use of his vehicle because the victim was not traveling in his vehicle at the time the shots were fired. In *Bookert*, the assailant merely used the jeep as transportation to the site of the shooting. Unlike the assailant in *Howser*, the assailant in *Bookert* did not use his vehicle to keep up with the victim's car. Moreover, unlike the assailant in *Howser*, the assailant in *Bookert* could have easily gotten out of the jeep, walked up to the victim, shot him, and walked away. However, the assailant chose not to exit the vehicle; and as such, the relationship between the victim's injuries and the assailant's use of the vehicle were incidental. Thus, unlike in *Howser*, the vehicle in *Bookert* was not an "active accessory" to the assault; it was merely the site from which the assailant fired the gun.

Furthermore, in *Bookert*, the shooting and the assailant's use of the vehicle are not inextricably linked because the use of the vehicle was not essential to accomplishing the crime. Thus, the assailant's firing of the gun was an act of independent significance that broke any causal link that may have existed because the injuries sustained by the victim as a result of the assailant's assault was unrelated to any functional use of the vehicle.

Consequently, in *Bookert*, no causal connection could be established because the assailant's ability to carry out the attack was not dependent upon use of the vehicle. This prevented the Court from finding that the assailant used his vehicle to carry out the assault; and in turn, required a finding that the assailant's use or "non-use" of the vehicle was not "foreseeably identifiable with the normal use of the automobile" in the attack because the assailant did not actually use the vehicle to carry out the shooting. Thus, the key difference between *Bookert* and *Howser* hinges in the assailant's ability to carry out the attack without the vehicle. If the facts of a case indicate, as they did in *Bookert*, that the assailant could have carried out the attack without using his vehicle, then the use of that vehicle is not foreseeably identifiable with the normal use of the automobile because the normal functional use of that vehicle was not required in completing the shooting. However, when the facts indicate, as they did in *Howser*, that the shooting and the use of the vehicle are inextricably linked, then the use of the vehicle must be foreseeably identifiable with the normal use of the automobile because the functional use of the automobile enabled the assailant to carry out the attack. See *Howser*. Therefore, the use of the vehicle in the commission of a shooting is "foreseeably identifiable with the normal use of the automobile" when at the time of the attack, the assailant's ability to carry out the attack is dependent on the use of his vehicle. See *Id.*

Here, Redman's ability to carry out his attack on Harrison was dependent on the use of his vehicle because Harrison was traveling in her vehicle when the shooting occurred. As such, Redman would have been unable to pursue her from one red light to another and his position in relation to Harrison at the time of the shooting was contingent on the use of his vehicle. Therefore, like in *Howser*, Redman's use of his vehicle in the commission of the shooting must

be foreseeably identifiable with the normal use of the vehicle because the functional use of the vehicle enabled him to carry out his attack.³

II. Redman's act of firing a shot into Harrison's vehicle is not an intervening act of independent significance that breaks any causal connection with the use of his vehicle.

The South Carolina Supreme Court in *Howser* also addressed the question of whether a shooting constitutes an act of independent significance to break any causal connection between the use of a vehicle and a shooting. Here, because the assailant could not have completed his attack without using his vehicle, the Court found that the connection between the vehicle and the injuries was the assailant's use of his vehicle to carry out the attack. *See Howser*, at 273, 422 S.E.2d 108. Since that purpose was fulfilled when the assailant used his vehicle to complete the assault, the Court found the assailant's use of his vehicle and the shooting to be inextricably linked as one continuing assault. *Id.* at 274, 422 S.E.2d 109. Therefore, "no independent act occurred to break the causal link." *Id.*

Like the assailant in *Howser*, Redman could not have completed his attack without using his Ford Escape because he could not have kept up with Harrison's position from the first red light to the second by any other means. Moreover, the connection between Redman's Ford Escape and Harrison's injuries is Redman's use of his vehicle to complete the shooting. Redman's purpose for using his Ford Escape was fulfilled when he pulled beside Harrison and fired into her vehicle. Thus, Redman's use of the Ford Escape vehicle and the shooting are inextricably linked as one

³ Of note, the District Court in *Holmes* when applying the *Ayers* three prong test discussed both the victim and the assailant's cars' causal connection to injury when determining whether coverage applied. The court in *Holmes*, held that since the victim was merely "parked on the side of the road" no causal connection existed to the injury. However, in this case the victim was actively operating her car at the time of the shooting, which is another reason coverage should exist and this case is differentiated from both *Bookert* and *Holmes*.

continuing assault. Therefore, no act of independent significance occurred to break the causal link, and coverage applies to this incident.

Once more, the Plaintiffs suggest that the present case is comparable to *Wright*, and in doing so ignores key differences between the two cases. In *Wright*, the assailants hailed a taxi, entered the taxi once the driver parked his car on the side of the road, then shot and robbed the driver as he began driving. *See Wright* at 422. The vehicle's movement did not enable the gunman to carry out the attack, as the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or gunmen were standing outside of the vehicle." *Id.* at 427. As such, the injuries sustained by the cabdriver resulted from the assault by the gunmen and were unrelated to any functional use of the vehicle because the use of the vehicle was not essential to accomplishing the crime. *Id.* at 426-27. Therefore, the gunman's assault was an act of independent significance that broke the causal link because the shooting and the use of the vehicle were not inextricably linked as a continuing assault.

Wright is wholly different from the present case because Redman's ability to carry out the shooting was entirely dependent on the use of his vehicle to pursue Harrison. Unlike the gunman in *Wright*, Redman could not have accomplished the shooting by stopping his Ford Escape and getting out, shooting Harrison, and driving away because he would not have been able to keep up with Harrison's position from one red light to the next. Moreover, unlike the victim in *Wright*, Harrison's injuries were directly related to the functional use of the vehicle because the vehicle's movement enabled Redman to carry out the attack. Consequently, the facts of the present case are distinguishable from *Wright* and coverage applies because no act of independent significance occurred to break the causal link since Redman's use of his vehicle and the shooting are inextricably linked as one continuing assault.

The Court in *Aytes* gave us additional guidance on the applicable standard for act of independent significant that breaks the causal connection to an injury. *See Aytes* at 35. In *Aytes*, the assailant drove his victim from one place to another, got out of the vehicle and shot the victim. *See Id.* at 33. The court held that “[the causal link was] broken when the assailant exited the vehicle. The only connection between the car and the injury is the fact that [the victim] was sitting in the car when she was shot.” *Id.* at 35. *See also Nationwide Property & Casualty Co. v. Lain*, 402 F.Supp.2d 644 (D.S.C. 2005) (“South Carolina courts have consistently held that an assault unrelated to the use of the vehicle break any causal link that may have existed,” when determining that a strangulation that took place in a car was not causally linked simply because the crime took place in a car). In the instant case, had Redman been in the car with Harrison when he shot her, or had he exited his vehicle prior to shooting Harrison, there would have been an act of independent significant that broke the causal connection. As the facts illustrate, Redman was not in the car with Harrison. He did not exit his vehicle before shooting Harrison, because he needed to be in his vehicle to pursue and position himself next to Harrison. But for, Redman’s use of his vehicle this death could not have occurred.

III. Redman and Harrison’s vehicles were both being used for transportation at the time of the shooting.

The final prong of the *State Farm Fire & Casualty Co. v. Ayetes* test to determine if an injury arose out of the ownership, maintenance, or use of an automobile is whether or not the vehicle[s] were being used for transportation at the time the injury arose. *See Id.* There is no factual dispute that both Redman and Harrison’s vehicles were being used for transportation at the time of the shooting, i.e. injury. *See Supra.*

CONCLUSION

For the reasons stated above, Defendant is entitled to summary judgment. Harrison's death arose out of Redman's ownership, maintenance, or use of his Ford Escape as laid out by the three part *Ayres* analysis because a causal connection between his vehicle and the death exists, no act of independent significance occurred to break the causal link, and the vehicle was being used for transportation at the time of the assault.

Redman's vehicle was an "active accessory" to the assault because his ability to carry out the assault on Harrison was dependent on his use of the vehicle. Moreover, because Redman's use of the Ford Escape causally contributed to Harrison's injuries, the vehicle was more than the mere site of the shooting. Likewise, because the functional use of the vehicle enabled Redman to carry out the attack, Redman's use of the vehicle is foreseeably identifiable with the normal use of the automobile. Therefore, as causal connection exists between Redman's use of his vehicle and Harrison's death.

Therefore, Harrison's injuries arose out of the use of the Ford Escape by Jimi Carl Redman, and the policies' coverage applies.

(signature on next page)

Respectfully Submitted:

By:



Ryan H. Sigal, Esq. (SC Bar No.: 80223)
Shelly Leeke Law Firm, LLC
3614 Ashley Phosphate Road
North Charleston, SC 29418
843-297-8485
843-297-8497 (fax)
ryan@leekelaw.com

North Charleston, SC
January 22, 2017

Attorney for Defendant

RECORD

2017 JAN 27 PM 1:55

CHERYL LAMONT
CLERK OF COURT
DORCHESTER COUNTY

EXHIBIT 1



MURPHY & GRANTLAND, P.A.

RECORDED

2017 JAN 27 PM 1:56

Wesley B. Sawyer
Direct dial 803-454-1233
wsawyer@murphygrantland.com

February 3, 2016
CHERYL BRANHAM
CLERK OF COURT
DORCHESTER COUNTY

Ryan Sigal, Esquire
Shelly Leake Law Firm, LLC
3614 Ashely Phosphate Road
N. Charleston, SC 29418

Re: Progressive Direct Insurance Co. vs. James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison
Civil Action No.: 2015-CP-18-1571
Claim No.: 155621943
Our File No.: 1115-2637

Dear Ryan:

Enclosed please find Plaintiff's Requests to Admit to Defendant in the above-referenced matter. Also enclosed, please find our Certificate of Service.

With warm personal regards, I am

Sincerely yours,

Wesley B. Sawyer

WBS/kak
Enclosures
cc: Jeff Mull (via email)

Telephone 803-782-4100 • Facsimile 803-782-4140
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260

J. R. Murphy John M. Grantland Ron B. Diegel* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull Peter E. Farr
Alice P. Adams Tim J. Newton Chris A. Majure J. Ryan Oates Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson Rogers E. Harrell, III
*Member-American Board of Trial Advocates

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,

v.

**PLAINTIFF'S REQUESTS TO ADMIT TO
DEFENDANT**

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

**TO: RYAN SIGAL, ESQUIRE, ATTORNEY FOR THE DEFENDANT AND TO THE
DEFENDANT ABOVE NAMED:**

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, you are hereby served with this written request for the admissions of fact and genuineness of documents for the purpose of the pending action only. Such requests for admissions, pursuant to the Rule, shall be deemed admitted unless within thirty (30) days from the date hereof, the undersigned at his address receives a written answer or objection. If objection is made, the reasons therefor shall be stated. The answer to each request shall specifically deny the matter or set forth in detail why the answering party cannot truthfully admit or deny the matter. Any such denial shall fairly meet the substance of the requested admissions, and when good faith requires that you qualify an answer or deny only part of the matter which is requested to be admitted, you shall specify so much of the request as being true, and qualify or deny the remainder.

1. Admit that Progressive issued a South Carolina Motorcycle insurance policy identified by policy number 19841187-2 to James M. Harrison that was in full force and effect on April 2, 2015 and that the policy provides uninsured motorist coverage with limits

of twenty-five thousand (\$25,000.00) per person and fifty thousand (\$50,000.00) per accident.

2. Admit that a complete and accurate copy of the policy is attached as Exhibit A to this stipulation and shall be admissible in this case.
3. Admit that USAA issued a South Carolina Auto Policy identified by policy number 03191 31 53G 7101 8 to James M. Harrison that was in full force and effect on April 2, 2015 and that the policy provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident for three vehicles including a 2010 GMC Terrain.
4. Admit that a complete and accurate copy of the policy is attached as Exhibit B to this stipulation and shall be admissible in this case.
5. Admit that Lynn Harrison (deceased) was married to James Mark Harrison at all times relevant to this case, and resided in his household.
6. Admit that on April 2, 2015, Lynn Harrison operated a 2010 GMC Terrain in Summerville, South Carolina eastbound on East Carolina Avenue, which became Old Trolley Road just before the intersection of Old Trolley Road and Bacons Bridge Road.
7. Admit that Lynn Harrison stopped for a red light in the middle eastbound lane of Old Trolley Road at the intersection of Bacons Bridge Road and Old Trolley Road near the Sawmill Shopping Center.
8. Admit that at the same time, Jimi Carl Redman, Jr. was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Lynn Harrison's right.

9. Admit that Jimi Carl Redman, Jr. stopped for the red light at the intersection of Bacons Bridge Road and Old Trolley Road near Sawmill Village Shopping Center in the eastbound lane immediately to the right of the vehicle operated by Lynn Harrison.
10. Admit that while stopped at the stop light, Jimi Carl Redman, Jr. pointed a rifle at Lynn Harrison and fired in her direction.
11. Admit that the bullet went through the passenger window of Lynn Harrison's 2010 GMC Terrain and struck her in the head, causing her death.
12. Admit that neither the 2010 GMC Terrain nor the red Ford Escape were in motion at the time of the shooting.
13. Admit that Jimi Carl Redman, Jr. then disregarded the red light, proceeded through the intersection, and was apprehended a few blocks away.
14. Admit that because her vehicle was still in drive at the time of the shooting, Lynn Harrison's 2010 GMC Terrain proceeded slowly through the intersection until it came to rest on the median.
15. Admit that the vehicles operated by Jimi Carl Redman, Jr. and Lynn Harrison never made contact.
16. Admit that there is no evidence that Lynn Harrison interacted with Jimi Carl Redman, Jr. or even knew of his presence beside her prior to the shooting.
17. Admit that there is no evidence that Lynn Harrison and Jimi Carl Redman, Jr. knew each other prior to the shooting.
18. Admit that Jimi Carl Redman, Jr.'s use of the Ford Escape did not increase the severity of Lynn Harrison's injuries.

19. Admit that the Ford Escape operated by Jimi Carl Redman, Jr. was not insured or was underinsured at the time of the shooting.

Please take notice that you may not give lack of information or knowledge as a reason for failure to admit or deny, unless you shall state that you have made a reasonable inquiry into the information known or readily obtainable by you and it is insufficient to enable you to admit or deny.

You will hereby take notice, that if you fail to admit these Requests for Admissions, and if the undersigned hereafter proves the truth of the matter, the undersigned shall apply to the Court for an Order requiring the party to pay the reasonable expenses incurred in making such proof, which shall include reasonable attorney's fees.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
Murphy & Grantland, PA
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Plaintiff

Columbia, South Carolina
February 3, 2016

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Progressive Direct Insurance Co.,
v. Plaintiff,

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

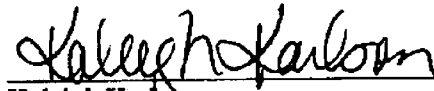
IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-18-1571

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Murphy & Grantland, P.A.,
attorneys for the Defendants do hereby certify that on February 3, 2016, I have served a copy
of the foregoing Plaintiff's Requests to Admit to Defendant in connection with the above-
referenced case placing same in the U.S. mail, postage paid to:

Ryan Sigal, Esquire
Shelly Leake Law Firm, LLC
3614 Ashely Phosphate Road
N. Charleston, SC 29418


Kaleigh Karlson

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2015-CP-18-1571

Progressive Direct Insurance Co. and USAA)
General Indemnity Company,)
Plaintiff,)

**DEFENDANT'S RESPONSES TO
PLAINTIFFS' REQUEST TO ADMIT**

v.)

James Mark Harrison as the Personal)
Representative of the Estate)
of Lynn Harrison,)
Defendants.)

**TO: WESLEY SAWYER, ESQUIRE, ATTORNEY FOR THE ABOVE NAMED
PLAINTIFFS:**

Now comes Defendant, James Mark Harrison as the Personal Representative of the
Estate of Lynn Harrison, by and through the undersigned counsel and pursuant to Rule 36,
South Carolina Rules of Civil Procedure hereby responds to the Plaintiffs' First Request to
Admit dated February 3rd, 2015, as follows:

REQUEST FOR ADMISSION

1. Admit.
2. Admit
3. Admit
4. Admit
5. Admit
6. Admit

7. Admit

8. Admit

9. Defendant denies this request to the extent it explains Mr. Redman's intent for stopping was for the red light as we do not have sufficient evidence at this time to ascertain Mr. Redman's intent, however Defendant does admit that Mr. Redman stopped his car at the red light.

10. Admit

11. Defendant denies that bullet struck Lynn Harrison in the head, however Defendant does admit the bullet struck her in the neck and the rest of the request is admitted.

12. Admit

13. Admit

14. Admit

15. Admit

16. Defendant denies this request as there is evidence that Mr. Redman was making hand gestures and blowing kissing towards Lynn Harrison right before shooting her, which is evidence of a possible interaction between Lynn Harrison and Mr. Redman.

17. Admit

18. Deny

19. Admit

(signature on next page)

Respectfully Submitted:

By:



Ryan H. Sigal, Esq. (SC Bar No.: 80223)
Shelly Leeke Law Firm, LLC
3614 Ashley Phosphate Road
North Charleston, SC 29418
843-297-8485
843-297-8497 (fax)
ryan@leekelaw.com

North Charleston, SC
March 3rd, 2016

Attorney for Defendant

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,)

CERTIFICATE OF SERVICE

v.)

James Mark Harrison as the Personal)
Representative of the Estate)
of Lynn Harrison,)

Defendants.)
_____)

I HEREBY CERTIFY THAT I HAVE this 3 day of March, 2016 served a copy of the Defendant James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison Answer to the Plaintiffs upon the following by mailing a copy of the same with the United States Postal Service in an envelope, with sufficient postage affixed thereto to insure proper delivery addressed to all counsel of record as follows:

Wesley B. Sawyer
PO Box 6648
Columbia, SC 29260



Ryan H. Sigal

March 3rd, 2016

RECORDED

2017 JAN 27 PM 1:56

CHERYL CRANIAN
CLERK OF COURT
DORCHESTER COUNTY

EXHIBIT 2

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

RECORDED
2015 JAN 27 PM 1:56
CHERYL GRAY
CLERK OF COURT
DORCHESTER COUNTY

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2015-CP-18-1571

Progressive Direct Insurance
General Indemnity Company,

Plaintiff,

v.

James Mark Harrison as the Personal
Representative of the Estate
of Lynn Harrison,

Defendants.

**DEFENDANT'S REQUESTS TO
ADMIT TO PLAINTIFF**

**TO: WESLEY SAWYER, ESQUIRE, ATTORNEY FOR THE ABOVE NAMED
PLAINTIFFS:**

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Plaintiffs propound
the following Requests for Admissions to the Defendant.

I. INSTRUCTIONS

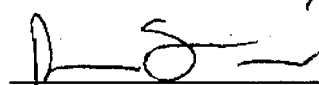
- A. Each request is to be answered by Defendant separately and severally
within thirty days after service hereof.
- B. If objection is made to a request, the reasons for therefore shall be stated.
- C. You may not give lack of information or knowledge as a reason for failure
to admit or deny a request, unless you state that you have made reasonable
inquiry and that the information known or readily obtainable by you in
insufficient to enable you to admit or deny.

REQUEST FOR ADMISSION

1. Admit that Jimi Carl Redman, Jr. was blowing kisses and making hand gestures toward Lynn Harrison while driving toward the stop light at the intersection of Old Trolley Road and Bacons Bridge Road, where the shooting occurred.
2. Admit that Jimi Carl Redman, Jr. used his car to drive next to, behind, and/or near Lynn Harrison's car while driving towards stop light at the intersection of Old Trolley Road and Bacons Bridge Road, where the shooting occurred.
3. Admit that both Jimi Carl Redman, Jr. and Lynn Harrison's vehicles were turned on and in drive at the time of the shooting.
4. Admit that Jimi Carl Redman, Jr. used his vehicle to pull next to Lynn Harrison's vehicle at the stop light at the intersection of Old Trolley Road and Bacons Bridge Road, where the shooting occurred.
5. Admit that Jimi Carl Redman, Jr. used his vehicle to drive from Texas to South Carolina, where the shooting occurred.
6. Admit that Jimi Carl Redman, Jr. used his vehicle to transport the rifle used in the shooting from Texas to South Carolina.
7. Admit that at all times relevant to this incident Lynn Harrison was operating her vehicle in a normal and reasonably foreseeable manner.
8. Admit that Jimi Carl Redman, Jr.'s vehicle was turned on and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting.

Respectfully Submitted:

By:



Ryan H. Sigal, Esq. (SC Bar No.: 80223)
Shelly Leeke Law Firm, LLC
3614 Ashley Phosphate Road
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843-297-8485
843-297-8497 (fax)
ryan@leekelaw.com

North Charleston, SC
January 16th, 2017

Attorney for Defendant

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,)

CERTIFICATE OF SERVICE

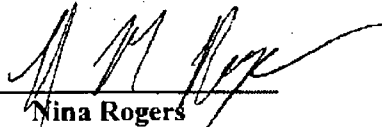
v.)

James Mark Harrison as the Personal)
Representative of the Estate)
of Lynn Harrison,)

Defendants.)
_____)

I HEREBY CERTIFY THAT I HAVE this 16 day of Jan 2017 served a copy of the Defendant James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison Answer to the Plaintiffs upon the following by mailing a copy of the same with the United States Postal Service in an envelope; with sufficient postage affixed thereto to insure proper delivery addressed to all counsel of record as follows:

Wesley B. Sawyer
PO Box 6648
Columbia, SC 29260


Nina Rogers

January 16th, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

CIVIL ACTION NO: 2015-CP-18-1571

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

Plaintiff,

v.

James Mark Harrison as the Personal
Representative of the Estate of Lynn Harrison,

Defendants.

**PLAINTIFFS' AMENDED RESPONSES
TO DEFENDANT'S REQUESTS TO
ADMIT**

**TO: RYAN H. SIGAL, ESQUIRE, ATTORNEY FOR THE ABOVE-NAMED
DEFENDANTS AND TO THE DEFENDANTS ABOVE-NAMED:**

Pursuant to Rule 36 of the South Carolina Rules of civil Procedure, Plaintiffs provide the following Responses to Defendant's Requests to Admit:

1. Admit that Jimi Carl Redman, Jr. was blowing kisses and making hand gestures toward Lynn Harrison while driving toward the stop light at the intersection of Old Trolley Road and Bacons Bridge Road, where the shooting occurred.

RESPONSE: Admitted.

2. Admit that Jimi Carl Redman, Jr. used his car to drive next to, behind, and/or near Lynn Harrison's car while driving towards stop light at the intersection of Old Trolley Road and Bacons Bridge Road, where the shooting occurred.

RESPONSE: Denied as stated. Plaintiffs admit Redman drove his car to a stop light at the intersection of Old Trolley Road and Bacons Bridge Road. Plaintiff admits Redman stopped in the right hand lane and Lynn Harrison's vehicle stopped in the left hand lane where the shooting occurred. Plaintiffs deny Redman used his car for the purpose driving in relation to Harrison's vehicle.

3. Admit that both Jimi Carl Redman, Jr. and Lynn Harrison's vehicles were turned on and in drive at the time of the shooting.

RESPONSE: Admitted upon information and belief.

4. Admit that Jimi Carl Redman, Jr. used his vehicle to pull next to Lynn Harrison's vehicle at the stop light at the intersection of Old Trolley Road and Bacons Bridge Road, where the shooting occurred.

RESPONSE: Denied as stated. Plaintiffs admit Redman used his vehicle to stop at a red light at the intersection of Old Trolley Road and Bacons Bridge Road where the shooting occurred. However, Plaintiffs deny Redman did so "to pull next to Lynn Harrison's vehicle."

5. Admit that Jimi Carl Redman, Jr. used his vehicle to drive from Texas to South Carolina, where the shooting occurred.

RESPONSE: Admitted.

6. Admit that Jimi Carl Redman, Jr. used his vehicle to transport the rifle used in the shooting from Texas to South Carolina.

RESPONSE: Denied as stated. Plaintiff admits that Redman drove the vehicle from Texas to South Carolina and that the rifle used in the shooting was in the vehicle during the trip. However, Plaintiffs deny Redman drove the vehicle for the purpose of transporting the rifle.

7. Admit that at all times relevant to this incident Lynn Harrison was operating her vehicle in a normal and reasonably foreseeable fashion.

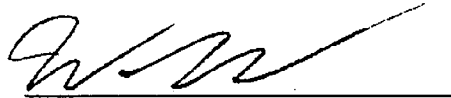
RESPONSE: Admitted.

8. Admit that Jimi Carl Redman, Jr.'s vehicle was turned on and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting.

RESPONSE: Admitted.

(Signature on following page)

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'W. Sawyer', is written over a horizontal line.

Wesley B. Sawyer, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Plaintiffs

Columbia, South Carolina
January 26, 2017

FILED-RECORDED

1-27-2017

Cheryl Graham
Clerk of Court
Dorchester County

EXHIBIT 3



10 YEAR DRIVER RECORD # 1-27-2017

FILED-RECORDED

Cheryl Graham
Clerk of Court
Dorchester County



1514390918

Customer No: 32800120 Driver License No: [REDACTED]
Name: ROJAS, JENNIFER LEAH
Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]
County: [REDACTED]
DOB: [REDACTED] Sex: F Driver Training: N
Height: 5'06 Weight: 152 Race: WHITE
Status - DL: NO SUSPENSION CDL: NO DISQUALIFICATION

License Information

Type	Class	Function	Issued	Expires	First Issued	Restrictions	Endorsements
Current							
DL	D	Modify	05/19/2014	02/04/2021	12/29/2011	N	N
Prior							
DL	D	Original	12/29/2011	02/04/2021	12/29/2011	N	N
DL	D	Modify	01/24/2014	02/04/2021	12/29/2011	N	N

Address Change -

Date Changed: 05/09/2013

Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

Address Change -

Date Changed: 01/24/2014

Address: [REDACTED]
City: [REDACTED] State: [REDACTED] Zip: [REDACTED]

Point Summary

Total Current Points: 2
Driver Credit: -2
Adjusted Current Points: 2

VIOL: 421 - Speeding 10-mph or less

Ticket#: 23445GY

Violation: 01/05/2015 **Conviction:** 02/03/2015

Recd: 02/11/2015 **Post:** 02/19/2015

ACD: S51 **Conviction Loc Ref:**

Conviction Reference:

Conviction State: SC

Court Type: MUN

Violation Points: 2 **Current Points:** 2

5/26/2015 10:32:07 AM

Document obtained from DMV web site:
www.scdmsonline.com

Page 1 of 2

SUMMERVILLE POLICE DEPARTMENT

() Victim
(X) Witness
() Accused

Page 1 of 2

VOLUNTARY STATEMENT FORM

DATE 4/2/15 TIME 1400

OCA # 15025868
NAME Jennifer Briggs SOCIAL SECURITY # _____
ADDRESS _____ PHONE _____
EMPLOYMENT _____ PHONE _____
RACE W SEX F DATE OF BIRTH _____ EDUCATION _____

I was driving down the park way and a male in a red SUV was driving beside me when the light turned green we turned left onto the old highway and when I looked to my right I realized a male in a red SUV driving faster and going hand gestures to a car in front of me. I was in the left lane and was going to move to the right when he pulled in front of me. The next light was green while I was waiting for it to turn green. I heard a loud gun shot and realized that the ~~light turned green~~ the man in the red car drove thru the red light. The light turned green and there was a car in the middle of the road. I went around it and saw that the driver was not moving. I got out of my car and tried to help the victim by breaking the window with my fist. I was able to positively identify the subject as the person who shot the person.

1. Can you describe the white male?

Brown hair wearing not very clean cut.

2. How many gunshots did you hear?

ONE

3. Where was the red SUV when you heard the shot?

far right lane

4. Did you see a gun?

NO

I HAVE READ (HAD READ TO ME) THE FOREGOING STATEMENT WHICH I HAVE MADE FREELY AND VOLUNTARILY, THE FACTS CONTAINED THEREIN ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

WITNESS:

SIGNATURE

SIGNATURE

SIGNATURE

I HAVE RECEIVED A COPY OF THIS STATEMENT

SIGNATURE

SUMMERVILLE POLICE DEPARTMENT

Page 2 of 2

VOLUNTARY STATEMENT FORM

() Victim
(X) Witness
() Accused

DATE 4-2-75 TIME 1415

OCA # 15025808

NAME Jennifer Rojas

SOCIAL SECURITY #

ADDRESS

PHONE

EMPLOYMENT M.A.

PHONE

RACE White

SEX F

DATE OF BIRTH

EDUCATION

5. How many shots did you hear?

ONE

6. Do you remember anything else about the red SUV?

NO.

7. Where was the red SUV in relation to the vehicle that was shot?

They were next to each other at the red light he was his drivers side was stopped beside her passengers side in the far right lane.

8. Could you positively identify the subject if you saw him?

Yes he was the person in police custody when we were by.

9. Any other information you need to add?

The male looks a little disturbed.

I HAVE READ (HAD READ TO ME) THE FOREGOING STATEMENT WHICH I HAVE MADE FREELY AND VOLUNTARILY. THE FACTS CONTAINED THEREIN ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

WITNESS

SIGNATURE

SIGNATURE

SIGNATURE

I HAVE RECEIVED A COPY OF THIS STATEMENT

SIGNATURE

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) CASE NO.: 2015-CP-18-01571

PROGRESSIVE DIRECT INSURANCE)
CO.,)

PLAINTIFF(S))

v.)

JAMES MARK HARRISON, ET AL,)

DEFENDANT(S))

TRANSCRIPT OF RECORD

ORIGINAL

Tuesday, February 7, 2017

COMMENCING AT:
Dorchester County Courthouse
St. George, South Carolina
Before The Honorable Alison Renee Lee, Judge

APPEARANCES:

For the Plaintiff:
Wesley Brian Sawyer, Esquire
Murphy & Grantland, PA
Post Office Box 6648
Columbia, South Carolina 29260

For the Defendant:
Ryan Harris Sigal, Esquire
Shelly Leeke Law Firm, LLC
3614 Ashley Phosphate Road
North Charleston, South Carolina 29418

Heather R. Landry, CVR
Official State Reporter

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
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NO EXHIBITS INTRODUCED

1 (The proceeding began at 2:18 p.m.)

2 THE COURT: The next matter I have is Progressive
3 Direct Insurance versus James Harrison. It's docket number
4 2015-CP-18-01571. Plaintiff is represented by?

5 MR. SAWYER: Wesley Sawyer, Your Honor, for Murphy and
6 Grantland.

7 MR. SIGAL: Ryan Sigal, Your Honor, for the estate.

8 THE COURT: Sigal?

9 MR. SIGAL: Yes, ma'am.

10 THE COURT: Okay. (Brief pause.) And we're here on a
11 motion for summary judgment that was filed by the plaintiff.
12 Is that correct?

13 MR. SAWYER: That's correct, Your Honor. And that was
14 filed in May. And since that time, the estate has also
15 filed a cross motion, and we'd ask the Court to hear the
16 cross motions together if you're willing to, Your Honor. I
17 believe both memorandums were sent to you last week or at
18 the end of the week before.

19 THE COURT: I have only received one that I'm aware of.
20 And that's the memorandum in support of the plaintiff's
21 motion. When was the other one sent?

22 MR. SIGAL: We sent it. I believe it was mailed to
23 your chamber pursuant to the request two weeks ago. I have
24 a copy of it here today.

25 THE COURT: That would be helpful.

Original Transcript of Record - Progressive v. Harrison et al - February 7, 2017 Hearing

1 MR. SIGAL: Okay.

2 THE COURT: Because the only one I received, I received
3 on January 31st. I haven't received anything else.

4 MR. SIGAL: Your Honor, if I may, there's one other
5 issue prior to us arguing this we may need to take up. I
6 have with me Shana Groves today who is the daughter of Lynn
7 Harrison. Originally James Harrison was named as the
8 personal representative of the estate. Tragically,
9 Mr. Harrison was actually murdered as well about nine months
10 to a year after Ms. Lynn Harrison was murdered. And has
11 since, Ms. Groves, the daughter, has been substituted as PR
12 of the estate. We filed this morning a consent motion to --
13 Mr. Sawyer and I filed a consent motion to amend to have her
14 become the personal representative of the estate. I don't
15 know if that needs to be heard first or if we can just
16 proceed as either way. But I wanted to at least bring it to
17 the Court's attention.

18 THE COURT: And you said that information was filed
19 this morning. So it has not yet made it to the file?

20 MR. SIGAL: No, Your Honor.

21 MR. SAWYER: And, Judge, that is by consent. The PR
22 was substituted by the Probate Court. So it's just a
23 clerical changes as to the caption. It's not a substantive
24 motion, Your Honor.

25 THE COURT: I don't have a problem with that. We just

1 need to make sure that your documents actually got into the
2 clerk's office for filing.

3 MR. SIGAL: I have filed this morning. Or, actually,
4 not this morning, but when I arrived here today at the
5 courthouse.

6 THE COURT: Okay. So not that long ago.

7 MR. SIGAL: No, ma'am. But I paid my filing fee and
8 the clerk should have it.

9 THE COURT: Okay. And can you tell me again the name
10 of the PR?

11 MR. SIGAL: Yes. The new PR is Shana Groves. And
12 that's spelled S-h-a-n-a, last name Groves, G-r-o-v-e-s.

13 THE COURT: Okay. And to the extent that it-- is it a
14 consent order or?

15 MR. SIGAL: We filed a motion but by consent of both
16 parties.

17 THE COURT: Okay. So basically all I need to do is
18 just do a form order that grants the request to amend?

19 MR. SIGAL: Yes, Your Honor.

20 THE COURT: All right. We'll do that. Okay. And so I
21 have cross motions for summary judgment arising out of the
22 insurance documents. I have read-- I'm familiar with the
23 circumstances involving Ms. Lynn Harrison. And I understand
24 that what you're asking me to do is basically interpret the
25 insurance policy. Is that correct?

1 MR. SIGAL: Yes, Your Honor.

2 MR. SAWYER: In a nutshell, yes, Judge. That's
3 correct.

4 THE COURT: All right. Then, Mr. Sawyer, I'll hear you
5 first and then I'll hear Mr. Sigal.

6 MR. SIGAL: Thank you, Your Honor.

7 Your Honor, may it please the Court? Thank you for
8 helping us to get through some of the housekeeping matters
9 very quickly. Judge, because you're familiar with the facts
10 of the case, I'll be very brief in summarizing. This is a
11 declaratory judgment action as to uninsured motorist
12 coverage. The facts of the case are tragic. Ms. Harrison
13 was stopped at a stoplight at the intersection of Bacons
14 Bridge Road and Old Trolley Road in Summerville in the
15 left-hand lane. To her right, an individual named Jimi Carl
16 Redman stopped his car at the stoplight. He pointed a rifle
17 out of his driver's side of his vehicle, fired a round
18 killing Ms. Harrison, and then drove off. The question
19 before the Court is whether her injuries arise out of the
20 ownership, maintenance, or use of an auto. And that's the
21 statutory and case law language. It's also the language in
22 the policies.

23 The Supreme Court has provided guidance as to what that
24 phrase means in a series of cases over the span of about 20
25 years. But really the key case that applies to the facts of

1 this situation, Your Honor, is the Bookert case (ph). It's
2 a Supreme Court case from 2000. It's cited heavily in our
3 brief, of course, as you might expect. And if you need cite
4 it's 337 South Carolina 291. And, Judge, without getting
5 into the details of each of three factors as to what arises
6 out of the use of an auto, the Supreme Court in Bookert
7 acknowledged that one of the factors is that the injury has
8 to be foreseeably identifiable with a normal use of an auto.
9 Normal is sort of the key word there. And in that case,
10 like the case here, you had a shooting out of a vehicle that
11 struck a claimant, injuring the claimant in that case.
12 Fortunately, the claimant survived, but otherwise a similar
13 shooting. And in a very succinct order that takes up two
14 pages of the order, the Supreme Court said that shootings
15 like that are not foreseeably identifiable with a normal use
16 of an auto. People don't use vehicles to drive around and
17 shoot people, thankfully. And that's the entire extent of
18 the Court's analysis. It said this is not a foreseeable
19 identifiable with a normal use of an auto; and, therefore,
20 it doesn't arise out of the use of an auto. And that's the
21 entire analysis from the Supreme Court. I think that that
22 holding is applicable on it's plain terms. And therefore
23 there would be no coverage because the injuries to
24 Ms. Harrison just like the injuries in Bookert arose out of
25 shooting from a vehicle.

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1 Judge, if you need to look at any other case law, one
2 very helpful case for the Court's analysis that has facts
3 that are very similar to those in this case is a case from
4 the District Court, a published decision called Holmes; it's
5 Allstate v. Holmes or Holmes v. Allstate -- excuse me -- 786
6 Federal Sub-second 1022. And, Judge, in that case the two
7 individuals did know each other. Here, they were complete
8 strangers. You have an estranged ex-boyfriend driving down
9 the road. He saw his ex-girlfriend driving in the opposite
10 direction. Actually turns around, follows her. She's going
11 to a school bus stop to pick up a child. Stops at the bus
12 stop. He pulls up beside her, shoots her, and drives off.
13 So really the key difference between that case and this
14 case, Judge, is simply that these two were complete
15 strangers. There's no, you know, no following as far as we
16 know; just a pure random act of violence. But the District
17 Court there does a great job at looking at all the cases
18 from the South Carolina Supreme Court, analyzing each of the
19 facts and each of the holdings. And ultimately not only
20 does that court find that the shooting doesn't arise out of
21 the use because of the Bookert case, but it also looks at
22 several other cases and distinguishes them and uses those as
23 well, which provides a great roadmap for the analysis in
24 this case, Judge.

25 But that's really the long and short of the analysis,

1 Judge. Bookert says this is not foreseeable identifiable
2 with normal use of an auto. The Holmes case provides a more
3 detailed roadmap for the analysis. And for those reasons,
4 Judge, we move for summary judgment for a declaratory
5 judgment that Ms. Harrison's injuries do not arise out of
6 Mr. Redman's ownership, maintenance, or use of a motor
7 vehicle.

8 THE COURT: What about all of your other -- all the
9 other elements of your argument are just additional
10 information to show how the automobile basically was used or
11 not used?

12 MR. SAWYER: That's right. Your Honor, I'm happy to
13 get into those details. I figure maybe I'll hear what Mr.
14 Sigal has to argue and I can address them in particular as
15 opposed to giving you a long over, all of everything if that
16 pleases the Court.

17 THE COURT: That's fine. That's fine. Yes, sir,
18 Mr. Sigal?

19 MR. SIGAL: Thank you, Your Honor. May it please the
20 Court? While I do agree with Mr. Sawyer that there has
21 been -- our courts have laid out a number of cases that do
22 lay out the tests for this -- and really the major case for
23 this is actually more of the, in my opinion, is the State
24 Farm v. Aytes test. And that established a three-pronged
25 approach to determining whether or not an injury arose out

1 of the ownership, maintenance, or use of an automobile. As
2 Your Honor as I'm sure has read at this point in time, that
3 relies on whether or not there was a casual -- causal
4 connection between the vehicle and the injury: If there was
5 an act of independent significance that broke the causal
6 link; and whether the vehicle was being used for
7 transportation at the time of the accident or -- excuse me
8 -- at the time of the injury.

9 The Court went one step further and added a subsection
10 to the first prong of the Aytes test about the causal link
11 and said was the car an active accessory? Was it something
12 less than proximate cause before -- sight of injury? And
13 was the injury foreseeably identifiable with the normal use
14 of the automobile as Mr. Sawyer pointed out? His claim that
15 Bookert is simply the controlling case in this jurisdiction
16 is just not true. Bookert is definitely valid law. However,
17 there are a number of other cases that I think are actually
18 more factually distinct to our case, and I think they are
19 controlling. Most notably is the case the Wausau Under
20 Insurance Company versus Howser. Howser was before the
21 Bookert ruling. And essentially in Howser what happened was
22 you have an assailant following a victim in a car. Both
23 cars are in use at the time of the injury. They're driving
24 down the road. The assailant is driving next to the
25 victim's car, bumps the victim's car, uses the car to keep

1 up with the victim as they're driving down the roadway.
2 Eventually pulls up next to her, fires a shot injuring the
3 assailant -- the victim in that case. The Court said this
4 is reasonably foreseeable. The Court said the car was an
5 active accessory. The Court found coverage in that case.

6 Since then there has been a number of cases that dealt
7 with the Howser analysis. Aytes applies to the Howser
8 analysis. And subsequent cases have actually discussed
9 Howser. And the big difference, in my opinion, is they
10 think this case really boils down to not that Bookert is the
11 controlling law. To take counsel's analysis that way would
12 essentially mean that anytime a gun was fired out of a car
13 there's not coverage. That's simply not the case. Multiple
14 cases post Bookert have cited Howser, discussed Howser. And
15 of note, the Holmes case, which he actually discussed in
16 length in his brief; goes through a Howser analysis to
17 decide whether or not there's coverage. Now in that
18 particular case they found there wasn't coverage. But not
19 because a gun was fired out of a car. They found there
20 wasn't coverage in the Holmes case because in Holmes there
21 was a car parked on the side of the road not being used and
22 only the -- the victim was only sitting in the car where, in
23 that case, the assailant pulled up next to that car, shot
24 the car and drove off. And the District Court, Holmes, in a
25 well-reasoned opinion, said the car wasn't necessary to

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1 carry out this assault. It wasn't an active accessory, and
2 it wasn't essential, integral part of the crime. But Howser
3 said the exact opposite. Howser said the car is necessary
4 for this. And I think at this point in time, we need to
5 apply the facts of the case to Howser. Apply the facts of
6 the case to Bookert. Decide which one of these cases is
7 more factually similar to our case at bar.

8 THE COURT: So if I understand what you're saying then
9 the only differences is is that in Howser the victim would
10 have been sitting in the car waiting not in traffic.

11 MR. SIGAL: In Holmes, Your Honor.

12 THE COURT: I'm sorry. Holmes.

13 MR. SIGAL: Yes, Your Honor. In Holmes, the victim --
14 the Court -- I think the actual line from the Court was
15 the -- and I'm paraphrasing -- but the victim was sitting
16 parked in a car on the side of a road waiting for her
17 daughter to be dropped off of a school bus. And, again, I'm
18 paraphrasing. But, essentially, the crux of it is she was
19 sitting on the side of the road in a parked car not using
20 her car for transportation at the time....

21 THE COURT: And you're saying that this one is more --
22 this case is more like Howser because like in Howser both
23 individuals were in cars that were being operated at the
24 time. They were both in -- although in this case, it was
25 sitting at the light and they still had to operate the

1 vehicle they were in in the course of traffic and would have
2 to move along same as with Howser.

3 MR. SIGAL: Correct, Your Honor. And there's a couple
4 facts -- and I don't need to go through a full factual
5 recitation -- but I do believe there's a couple of facts
6 that weren't mentioned in his factual recitation that are
7 quite important. One of the main facts is that she didn't
8 just randomly pull up -- excuse me -- Mr. Redman did not
9 just randomly pull up to Ms. Harrison and fire a shot and
10 drive off. There is -- through a request to admit and
11 through police statements, there is evidence that -- one
12 time request to admit there are facts to the case that
13 Mr. Redman saw Ms. Harrison several lights back, followed
14 her from light to light, actually pulled up next to her, and
15 I think blowing kisses and making had gestures, essentially
16 harassing her, while both cars were in movement. Actually
17 used his car to follow her down the road to a stoplight.
18 And at that point in time, in a very brief amount of time,
19 they're at a stoplight, he fired the shot that killed her,
20 he drove off. And I think the really important part of all
21 that is that he picked out his victim ahead of time. He
22 needed that car to follow her down the road and commit this
23 crime, whereas in all these other cases, every single case
24 cited by plaintiff's in their briefs, the car was not an
25 essential part of the crime. It could have happened just as

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1 easily on foot or someone got out of the car and there was
2 another circumstance.

3 What Bookert did is establish a factual niche in
4 drive-by shootings that says if you get out of the car or if
5 the car is not being in use as an automobile, there's not
6 coverage. That's not the case in Howser. But for this car,
7 this crime never happen. As you said, I can certainly go
8 through each prong of the Aytes test. I've briefed it quite
9 extensively. I'm happy to do whatever Your Honor needs.

10 THE COURT: Unless there's some particular point that
11 you want to bring to my attention so that I can highlight it
12 in your brief. And that applies to both of you since I have
13 my handy highlighter here. It's not necessary because I
14 will review and read all of it again, and particularly since
15 I just received yours today.

16 MR. SIGAL: I apologize, Your Honor.

17 THE COURT: I don't know what happened to it. It may
18 -- it could very well be on my desk at this particular time.

19 MR. SIGAL: We sent it to your chambers in Columbia, I
20 believe.

21 THE COURT: Yeah.

22 MR. SIGAL: But I apologize for that greatly. The only
23 things I would point out, and I think this is -- this is an
24 unpublished opinion. But Chief Justice Beatty when he was
25 on the Appellate Court, *Noris v. Allstate* actually looked at

1 this issue of whether or not Howser is good law. And a
2 direct quote from his concurrence in that case was until our
3 Supreme Court overrules Howser, you must assume that the
4 fact that an assailant fired a gun from an automobile does
5 not automatically defeat coverage by automobile's insurer.
6 And I think that's important to bring up because it shows
7 exactly what our Supreme Court, right now, views Howser, and
8 does use Howser as valid and stirred good law in our
9 jurisprudence. And as such, based on the factual difference
10 between these two cases, I think we must apply Howser
11 factual scenario to define coverage in this case.

12 THE COURT: Thank you. Yes, sir?

13 MR. SAWYER: Yes, ma'am, Your Honor. A few things.
14 First of all as to Howser, that is a case from 1992. It is
15 the only case where the Supreme Court has found that a
16 shooting arises out of the use of an auto. All the cases
17 since then have called back from that holding. It is an
18 anomaly that's been limited to its facts. More importantly,
19 Judge, the facts in Howser are vastly different from the
20 facts here. Now, I dispute the presentation of the facts
21 that was just presented. There is a witness who said that
22 he saw -- or sorry -- that she saw Mr. Redman blowing kisses
23 and making hand gestures towards Ms. Harrison's vehicle
24 prior to stopping at the stoplight. She doesn't say how far
25 back she saw. She just says as they approached the

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1 stoplight. There is no evidence, importantly, that
2 Ms. Harrison was ever aware of that. She didn't change her
3 driving habits or anything that would suggest that she was
4 aware that that had been done.

5 The reason that's important is in Howser the facts of
6 the case are this: Two girls leave a bowling alley. They
7 stop by McDonald's at Decker Boulevard in Columbia. They're
8 driving down a road and an unknown driver comes up and rear
9 ends the back of their car. They continue driving; he
10 continues to chase them down the road as they accelerate.
11 He hits their car three more times. He's using his car to
12 chase and to assault them. Then he pulls up beside them
13 trying to force them to pull over with a gun out of his
14 window. They turn to try to get away. He fires a shot that
15 goes through the back of the car, hits the driver. So his
16 car is used in an active, on-the-highway pursuit of the
17 victims that culminates in a shooting. And in that case,
18 the Supreme Court held that the vehicle was an active part
19 of the assault that culminated in the shooting. Here, the
20 first time there's any evidence of an actual interaction
21 where Ms. Harrison would -- he was even there is the
22 shooting itself. They're both stopped at a stoplight.
23 There's no chase. There is no contact between the vehicles.
24 Those facts are really vastly different.

25 More importantly, Judge, after the Howser case, that's

1 when the Court entered the Aytes decision that set up the
2 actual factor about it being foreseeably identifiable with
3 normal use of an auto. That element, that factor, was not
4 under our jurisprudence under Howser. It is now. And in
5 fact, the Court of Appeals and the Circuit Court in the
6 Bookert case that we rely upon found coverage under Howser.
7 And the Supreme Court said, no, since that decision we've
8 issued Aytes. Aytes says the injuries have to arise out of
9 -- have to be foreseeably identifiable with normal use of an
10 auto. And this shooting is a shooting that's not a normal
11 use of an auto. Therefore, there's no coverage. So even if
12 Howser is good law in certain aspects, after Aytes and as
13 per Bookert, it's not good law for simply holding that a
14 shooting arises out of the use of an auto. And really the
15 facts here are very similar to those in Holmes. Whether
16 you're stopped at a stoplight or stopped briefly at a school
17 bus stop, it's not a long extended stop. And also more
18 importantly, Judge, the analysis is not the victim's use of
19 the vehicle. The question is the at-fault driver's or
20 uninsured motorist's use of the vehicle. And that's what
21 the case law requires. It's what the policy requires. And
22 it's what the statute requires, Your Honor. And here the
23 vehicle was stopped and stationary, and Mr. Redman could
24 have just as easily stopped his car and parked, stepped out,
25 shot, got back in the car and driven away.

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1 And in fact that's what the Court of Appeals held in
2 the Wright case, which is also cited in our brief. Where
3 there is a robbery, armed robbery, inside of a taxi while
4 the taxi was moving. And the Court's said, look, that
5 robbery could've happened when the car was stopped; they
6 could've gotten out of the car and done it. It really is
7 not causally connected with the use of the vehicle, even
8 though there the taxi was in motion. By the way, in
9 Bookert, the vehicle was in motion at the time of the
10 shooting too, Your Honor. Here, both two vehicles are
11 stopped at a stoplight. And he could have just as easily
12 gotten out and shot her. He could've been standing on a
13 street corner and shot her. There's really no connection
14 with the vehicle making it integral to this shooting. And
15 more importantly, of course now we have the extra factor
16 under Bookert that it's not foreseeably identifiable with
17 normal use of an auto. So for all of those reasons, Your
18 Honor, there is not coverage for this shooting as tragic as
19 it is. And we'd ask for summary judgment.

20 MR. SIGAL: Your Honor, may I briefly reply?

21 THE COURT: Briefly.

22 MR. SIGAL: First of all, a couple of facts he said are
23 not completely accurate. He said there's no evidence that
24 Ms. Harrison saw the harassment. There's no evidence that
25 she didn't. There's a car next to her blowing kisses and

1 making hand gestures toward her. Most people are driving
2 down the road and someone is making -- harassing them right
3 directly next to them, they're going to see that. The fact
4 to say that there's no evidence that it happened, the simple
5 fact that he was harassing her, in my opinion, is evidence
6 that she noticed it. But that doesn't necessarily mean
7 whether or not there's coverage or not in this case.
8 Because what it really means is he had picked out his
9 victim.

10 As far as the Bookert facts go, the car that was shot
11 -- in motion when the shooting happened was the assailant's
12 car. The victims in that case weren't even in a car. They
13 were just standing in a parking lot, which is the very
14 reason the Court said there's not coverage because you
15 didn't need car to shoot these people. They were standing
16 in a parking lot. He also discussed how the Aytes case came
17 after the case in Howser. He's absolutely right. But post
18 Bookert and post Aytes, all of these cases still discuss
19 Howser every single time to determine whether or not there's
20 coverage. Holmes does; North area taxi does. Each of these
21 cases he talks about discusses Howser.

22 And, finally, he talked about how they were bumping the
23 car in the Howser case and how that was part of the
24 analysis. There's no line in that case that specifically
25 says no one was injured as a result of the bumping of the

1 car. The reason the Court found coverage in that is because
2 they used the car as an essential integral part to the
3 crime, and it was an active accessory that but for they
4 would not have been able to commit this crime, which is the
5 exact scenario we have here. In the Holmes case, the car
6 wasn't just parked somewhere briefly; the car was not in
7 use. It was on the side of the road. Not in drive. Not
8 the foot on the brake. Parked. Not being used. In our
9 case, the car is being used the entire time. They're
10 driving stoplight to stoplight. The only time she ever
11 stops is briefly at a stop sign. So even if he could have
12 pulled up and got out, the only way to get to her or to use
13 a car to get her because he was following her from stoplight
14 to stoplight. Unless this man can run the speed of a car,
15 he could not have kept up with this motor vehicle, and this
16 accident never would have happened but for his use of the
17 car. Thank you, Your Honor.

18 THE COURT: Do you need this copy back?

19 MR. SIGAL: No, Your Honor. You are more than welcome
20 to it.

21 THE COURT: In light of your arguments, I'll be reading
22 a lot cases. And I will issue an order as quickly as I can.

23 MR. SAWYER: Thank you, Your Honor.

24 MR. SIGAL: Thank you, Your Honor.

25 THE COURT: Thank you for your arguments.

1 MR. SAWYER: To save your clerk printing paper, if you
2 want, I have copies of Bookert, Holmes, and Aytes for Your
3 Honor.

4 THE COURT: That would dandy, yes.

5 MR. SIGAL: Your Honor, I actually in my original
6 packet, I included every single case we cited.

7 THE COURT: Okay.

8 MR. SIGAL: So if you do not have them, please let me
9 know. I'm happy to remail them.

10 THE COURT: And it could, like I said, it could be in
11 Columbia. I've been on the road for the last couple weeks.

12 MR. SIGAL: I have all the cases as well, but they're
13 all highlighted. I assume you don't want those.

14 THE COURT: That's fine. Thank you.

15 MR. SIGAL: I highlighted the important parts, though.

16 MR. SAWYER: I'm sure he did.

17 THE COURT: Of course. I wouldn't expect you to
18 highlight the unimportant parts.

19 MR. SIGAL: There you go. Don't worry about his cases.
20 Just read mine.

21 THE COURT: And I do have a copy of the motion, the
22 consent motion, to substitute a party. And so that can be
23 entered into the file, and I'll just do a form order that
24 grants that motion.

25 MR. SIGAL: We appreciate that, Your Honor.

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1 MR. SAWYER: Thank you, Your Honor.

2 THE COURT: Thank you.

3 (The proceeding concluded at 2:43 p.m.)

4

5 (End of Record)

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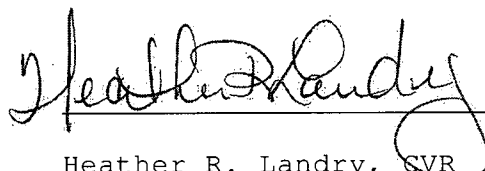
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STATE OF SOUTH CAROLINA)
) CERTIFICATE OF REPORTER
COUNTY OF CHARLESTON)

I, HEATHER R. LANDRY, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas for Dorchester County, South Carolina, on the 7th day(s) of February 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 12, 2017


Heather R. Landry, CVR
Official Court Reporter

This is a certified original of the Transcript of Record requested by and provided to the following party: The Shelly Leeke Law Firm, LLC

Original Transcript of Record - Progressive v. Harrison et al - February 7, 2017 Hearing

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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

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JUN 13 2018
SC Court of Appeals

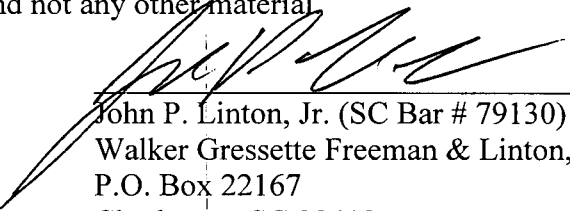
Progressive Direct Insurance Co., and USAA General Indemnity Company,
.....Respondents,

v.

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

CERTIFICATE OF COUNSEL

The undersigned 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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May 23, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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SC Court of Appeals

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

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

BRIEF OF APPELLANT

June 12, 2018

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in ruling that Redman's vehicle was not causally connected to the assault when the vehicle was used as an active accessory to the assault, both Redman and Harrison were driving at the time of the incident, Redman's position in relation to Harrison was completely dependent upon the use of his vehicle, Redman used his vehicle to stalk Harrison before the assault, the vehicle was more than situs of the injury, and the injuries were foreseeably identified with the normal use of an automobile?
- II. Did the circuit court err in ruling that Redman's firing of a gun was an intervening act of independent significance breaking any causal connection with the use of his vehicle when Redman's use of his vehicle and the shooting were inextricably linked as one continuing assault?

STATEMENT OF THE CASE

Following the death of Lynn Harrison ("Harrison"), Respondent Progressive Direct Insurance Co. ("Progressive") sued Appellant, Shanna Groves¹ as the Personal Representative of the Estate of Lynn Harrison ("Appellant" or "the Estate"), seeking a declaratory judgment that the uninsured motorist policy Respondent had issued did not provided coverage for the death of Ms. Harrison. **(Compl., R.pp.12-165)**. On September 17, 2015, Progressive and USAA General Indemnity Company ("USAA") (collectively, "Respondents" or "the Insurers") filed an Amended Complaint, adding USAA as an additional Plaintiff. In the Amended Complaint, the Insurers sought a declaratory judgment that that the uninsured motorist policies Respondents had issued did not provide coverage for the death of Ms. Harrison. **(Am. Compl., R.pp.16-20)**

Appellant answered the Amended Complaint on November 3, 2015, denying that the Insurers were entitled to a declaratory judgment and asserting that the policies provide coverage. **(Answer, R.pp.21-24)**. On May 9, 2016, the Insurers filed a Motion for Summary Judgement.

¹ The Defendant was initially named as "James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison." However, by Form 4 Order filed on February 8, 2017, Shana Groves was substituted in this case as the Personal Representative of the Estate of Lynn Harrison. **(Form 4 Order filed February 8, 2017, R.pp.10-11)**.

(Pls. Mot. Summ. J., R.pp.25-26). On January 27, 2017, the Estate filed a Cross Motion for Summary Judgement. **(Def. Cross Mot. Summ. J., R.pp.59-60).** On February 17, 2017, the Honorable Alison Renee Lee held a hearing on the Insurers' Motion for Summary Judgement and the Estate's Cross Motion for Summary Judgement. **(Order, R.pp.3-7).** On August 2, 2017, Judge Lee issued an Order granting the Insurers' motion and denying the Estate's motion. **(Order, R.pp.3-7).** Appellant timely served a Notice of Appeal on September 15, 2017. **(Notice of Appeal).**

STATEMENT OF FACTS

On April 2, 2015, Lynn Harrison was driving a 2010 GMC Terrain eastbound on East Carolina Avenue, which became Old Trolley Road, just before the intersection of Old Trolley Road and Bacons Bridge Road in Summerville, South Carolina. **(R.p.18., ¶ 10) (R.p.22, ¶ 11)** ("Defendant admits that Mrs. Harrison was operating a vehicle on East Carolina Avenue in Summerville, South Carolina at the time of the incident."); **(R.p.84., #6); (R.p.88, #6).** At the same time, Jimi Carl Redman, Jr. ("Redman") was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Lynn Harrison's right. **(R.p.84. #8); (R.p.89, #8).** She "was operating her vehicle in a normal and reasonably foreseeable fashion." **(R.p.98, #7).** While driving toward the stop light at the intersection of Old Trolley Road and Bacons Bridge Road, Redman was blowing kisses and making hand gestures toward Harrison from his vehicle. **(R.p.97, #1)** (Respondents admitting that Redman was blowing kisses and making hand gestures toward Harrison *while driving*). **(R.p.85, 16); (Witness statement of Jennifer Rojas, R.pp.102-103).** Then, after pulling up to the stop light, Redman shot Harrison from his vehicle. Both Redman and Harrison's vehicles were "***turned on and in drive***" when Redman shot Harrison. **(R.pp.97-98, #3)** (double emphasis added); **(R.p.98, #8)** (Plaintiffs admitting that Redman's "vehicle was turned on

and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting.”). It is uncontested that Harrison “was operating her vehicle in a normal and reasonably foreseeable fashion” at the time Redman fatally wounded her. **(R.p.98, #7)**. Harrison’s vehicle, which was turned on, in drive, and being operated in a normal and reasonably foreseeable fashion at the time she was shot, proceeded slowly through the intersection until it came to rest on the median. **(R.p.85, #14); (R.p.89, #14)**.

The Ford Escape operated by Redman was not insured at the time of the shooting. **(R.p.86, #19); (R.p.89, #19)**. Progressive and USAA issued South Carolina Auto Policies to James M. Harrison (Progressive Policy number 19841187-2 and USAA Policy 031913153G71018) (“the policies”) to James M. Harrison, which were in full force and effect on April 2, 2015.² **(R.pp.38-49)**. The policies each provides uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per person and fifty thousand (\$50,000.00) per accident. **(R.pp.38-39)**.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRPC. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005) (citing Trousdell v. Cannon, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. “Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might

² At all times relevant to this case, Harrison was married to James M. Harrison and resided in his household. **(R.p.84, #5); (R.p.88, #5)**.

reasonably be drawn therefrom.” Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

“A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue.” Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing Colleton County Taxpayers Ass’n v. Sch. Dist. of Colleton County, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 497, 544 S.E.2d 637, 639-640 (Ct.App.2001). When reviewing an action at law, the scope of review is limited to the correction of errors of law. S.C. Dept. of Transp. v. Horry Cnty., 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011). As explained herein, the circuit court committed several errors of law in its Order and the Order should be reversed and judgment entered for Appellant.

ARGUMENT

Under South Carolina law, an automobile insurance policy may not 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 § 38–77–140. 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. State Farm & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998).

A causal connection exists between the vehicle and the injury when the following elements are satisfied: “(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); Doe v. South Carolina State Budget & Control Bd., 337 S.C. 294, 297, 523 S.E.2d 457, 458 (1999); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). “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 (Ct. App.1999) (citing Home Ins. Co. v. Towe, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994)).

As explained herein, the Circuit Court incorrectly ruled that “[t]here was no causal connection between Redman’s automobile and the gunshot injuries suffered by Harrison” and incorrectly ruled that “the shot fired by Redman was an act of independent significance breaking any causal connection to the use of his automobile.” (**Order, 6**). In fact, as explained herein all three requirements for coverage are present in this case.³

- I. **The circuit court committed error of law in ruling that Redman’s vehicle was not causally connected to the assault when the vehicle was used as an active accessory to the assault, both Redman and Harrison were driving at the time of the incident, Redman’s position in relation to Harrison was completely dependent upon the use of his vehicle, Redman used his vehicle to stalk Harrison before the assault, the vehicle was more than situs of the injury, and the injuries were foreseeably identified with the normal use of an automobile.**

The circuit court committed error of law in ruling that the gunshot injuries suffered by Harrison were not causally connected to Redman’s use of his vehicle. As explained herein, the vehicle was an active accessory to the assault, the vehicle was more than mere site of the injury,

³ There is no dispute that Redman’s vehicle was being used for transportation at the time of the incident. See (R.p.98, #8). Therefore, the only elements at issue are whether “there is a causal connection between the vehicle and the injury” and “no act of independent significance occurred which broke the causal link.” See Aytes, at 33, 503 S.E.2d at 745.

and the injury was foreseeably identifiable with the normal use of the vehicle. Redman used his vehicle for more than transportation to the situs of the incident—he shot Harrison while both his vehicle and Harrison’s were turned on and in drive. (R.pp.97-98, #3); (R.p.98, #8) (Plaintiffs admitting that Redman’s “vehicle was turned on and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting.”). Additionally, it is worth noting that Redman shot Harrison while she was operating her vehicle in a normal and reasonably foreseeable fashion. See (R.p.97, #1) (Plaintiff admitting that Redman was blowing kisses and making hand gestures toward Lynn Harrison while driving); (R.p.98, #7) (It is uncontested that Harrison “was operating her vehicle in a normal and reasonably foreseeable fashion” at the time Redman fatally wounded her).

The circuit court did not cite any case wherein both the assailant and the victim were driving at the time of the incident and a court found that the vehicle was not an active accessory to the assault. However, the South Carolina Supreme Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case. The circuit court erred in departing from those decisions. See (Order, R.pp.5-6); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992); and Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994).

a. **The South Carolina Supreme Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case and the circuit court erred in departing from those decisions**

In Wausau Underwriters Ins. Co. v. Howser, our Supreme Court determined that an insurer is liable under the uninsured motorist provision for gunshot injuries inflicted during a vehicular chase by an unknown owner or operator of an unidentified vehicle. In that case, Howser (while driving a vehicle owned by her father) and her passenger were “bumped” from behind. Id. at 270,

422 S.E.2d at 107. Howser looked in the rear-view mirror and saw a car behind them with a driver and no passengers. Id. That car bumped her vehicle two more times and Howser accelerated. Id. “Neither Howser nor Shealy was hurt when the other vehicle bumped [Howser’s vehicle].” Id.

The driver of the other car, who was unknown to them, pulled his car alongside Howser’s vehicle, yelled at them to roll down their window, slow down and stop their car, and pointed a pistol at passenger window. Id. Howser turned onto a side street to avoid the stranger, but as she completed the turn, the gunman shot at her vehicle and a bullet entered Howser’s back. Id. The gunman continued traveling and was never identified. Id. Significantly, “[t]he injuries that Howser sustained were the result of the gunshot. . . . [—n]either Howser nor [the passenger] was hurt when the other vehicle bumped the [Howser’s].” Id.

The Supreme Court found a causal connection existed:

... 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 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.

Id. at 273 (double emphasis added).⁴

Home Insurance Co. v. Towe is equally apposite. In that case, the Court found that a causal connection existed between an assailant’s use of his vehicle and the injuries sustained by the driver

⁴ In so ruling, the Court noted that under the statute in effect at the time, no physical contact with the 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. Id. 275, 422 S.E.2d at 110 (“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.”).

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. Id. at 106, 441 S.E.2d at 826. The glass struck and injured the driver of the tractor. Id. The Court determined that a causal connection existed 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. See id. The Court determined that Towe's car was an active accessory that gave rise to the injuries sustained. Like in Howser, the court considered the "use of the automobile and Alexander's throwing of the bottle were ... 'inextricably linked' as one continuing act." Id. at 108, 441 S.E.2d at 827. Howser and Towe have not been overruled, were binding upon the circuit court's decision, and the circuit court erred by issuing an order inconsistent with these opinions. See e.g., Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022, 1025-26 (D.S.C. 2009) (discussing both Howser and Towe at length).

b. The circuit court erroneously distinguished Howser and Towe.

The circuit court strained to distinguish Howser and Towe. See (Order, 4). The circuit court ultimately ruled those cases distinguishable from this case because, as stated by the circuit court, (i) Redman did not use his automobile to keep up with Harrison; (ii) Redman did not make contact with Harrison's vehicle; (iii) there was no evidence Harrison saw Redman driving beside her or that she was aware of Redman's gestures to her; and (iv) Redman's use of the vehicle did not contribute to the seriousness of Harrison's injuries. **(Order, R.p.6).**

- i. The circuit court committed error of law in finding that Howser and Towe require a showing that the assailant's vehicle be used to "keep up" with the victim and that Redman did not use his vehicle to pursue Harrison.

Towe does not require that an assailant use the vehicle to "keep up" with his victim. In that case, the victim was travelling on a tractor in the opposite direction of the assailant. See Towe, 314 S.C. 105, 106, 441 S.E.2d 825, 826 (1994). Clearly, Towe does not require that the assailant's vehicle be used to "keep up" with the victim, because the assailant and the victim were moving in opposite directions. Id.

In Howser, the assailant used his vehicle to pursue the victim, who was also driving at the time. See Howser, 309 S.C. at 271, 422 S.E.2d at 107. In reviewing the facts of that case and finding the vehicle was an active accessory to the assault, the Court explained that "[t]his is not a case in which the assailant merely used the vehicle to provide transportation to the situs of the shooting Nor is it a case where the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack." Id. at 273, 422 S.E.2d at 108. The Court further noted that "[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part . . . [and]. . . only a motor vehicle could have provided the assailant a quick and successful escape."

The instant case is on all fours with any requirement from Howser that the vehicle be used to "keep up" with the victim and the circuit court ignored the undisputed facts in reaching a contrary conclusion. The circuit court ignored that Redman used his vehicle to stalk Harrison while she was driving. Specifically, the circuit court ignored that Redman was driving his vehicle in the lane directly next to Harrison, that she was operating her vehicle in a normal and reasonably foreseeable fashion, and that while driving toward a stop light Redman was blowing kisses and making hand gestures toward Harrison from his vehicle. **(R.p.84, #8); (R.p.89, #8). (R.p.98, #7).**

(R.p.97, #1). Simply put, Redman used his vehicle to stalk Harrison before shooting her. Therefore, based upon the undisputed facts in the record, Redman's position in relation to Harrison was completely dependent upon the use of his vehicle.

- ii. The circuit court erred in finding that Howser and Towe require a showing that the assailant's vehicle make physical contact with the victim's vehicle.

In Towe, the assailant's vehicle did not make contact with the victim's tractor. See e.g., Towe, at 106, 441 S.E.2d at 826 (discussing the background facts of the case wherein the assailant threw a bottle from the moving vehicle that shattered on the steering wheel of a tractor the victim was driving in the opposite direction). In Howser, there was physical contact between the assailant's vehicle and the victim's vehicle; however, the Court was careful to note that no damage was caused by the contact and the *gunshots*, not the contact between the vehicles, cause the injuries. Howser, at 271, 422 S.E.2d at 107 ("The injuries that Howser sustained were the result of the gunshot. Neither Howser nor Shealy was hurt when the other vehicle bumped the Blazer."). In fact, the physical contact between the assailant's vehicle and the victim's vehicle was not essential to the Court's decision in that case. It was far more important that the gunman's position in relation to the victim was completely dependent upon the use of his vehicle. Here, there can be no dispute that Redman's position in relation to Harrison was completely dependent upon the use of his vehicle.

The circuit court erred in creating a requirement that the assailant's vehicle must make physical contact with the victim's vehicle in order to be an active accessory to the assault. There is no such requirement.

- iii. The circuit court erred in finding that Howser and Towe require a showing that the victim was aware of the assailant driving beside them or that he was gesturing towards her.

Neither Howser, nor Towe require that the victim be aware of the assailant in advance of the incident and the circuit court erred by inserting such a requirement into the caselaw. As has been stated, the victim in Towe was not even the intended target of the bottle thrown from the assailant's vehicle. See Towe, at 106, 441 S.E.2d at 826. Therefore, because there was no mention of any awareness on the part of the victim in Towe of the assailant's actions, the circuit court erred in finding that Towe requires such a showing.

There were no hand gestures mentioned at all in Towe or Howser; however, the circuit court ruled that those cases were distinguishable from this case on the basis that it is unclear in this case whether Harrison saw the hand gestures by Redman. Contrary to the circuit court's order, the undisputed fact that Redman, while driving, gestured towards Harrison, before shooting her from his vehicle makes this case *more* similar to Howser. The gesturing in this case is an interaction between the two vehicles is similar to the physical contact between the vehicles in Howser in that the assailant attempted to engage the victim while both vehicles were still moving.

- iv. The circuit court erred in finding that Howser and Towe require a showing that Redman's use of the vehicle contributed to the seriousness of Harrison's injuries.

In Towe, the Court noted that "[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." Towe, at 107, 441 S.E.2d at 827. The Court did not rule that the use of the vehicle must contribute to the seriousness of the injuries, the Court simply noted as part of its discussion that the speed of the vehicle contributed to the seriousness of the injuries. It is clear that there is no specific legal requirement that the assailant's vehicle increase the seriousness of the injuries, because in Howser, the Court specifically noted that the *gunshots*

caused the injuries. Howser, at 271, 422 S.E.2d at 107 (“The injuries that Howser sustained were the result of the gunshot. Neither Howser nor Shealy was hurt when the other vehicle bumped the Blazer.”).

Therefore, for the reasons discussed above, the circuit court should be reversed because the vehicle was more than situs of the injury, the vehicle was used as an active accessory to the assault, both Redman and Harrison were driving at the time of the incident, and Redman’s position in relation to Harrison was completely dependent upon the use of his vehicle.

c. The circuit court committed error of law in finding that Redman’s vehicle was not an active accessory to the assault on the basis that this case is more like a “drive by shooting.”

After incorrectly distinguishing Howser and Towe, as discussed above, the circuit court found that Redman’s vehicle was not an active accessory to the assault because “[t]he facts of this case are more like the drive-by shooting in *Holmes*, Redman pulled next to Harrison’s vehicle, committed the assault and drove off. . .” **(Order, R.p.6).** Holmes v. Allstate Ins. Co.,⁵ the case relied upon by the circuit court for its decision that the instant case is more like a “drive by shooting,” is inapposite. 786 F.Supp. 2d 1022 (D.S.C. 2009). In Holmes, the assailant, an estranged lover, found his victim “parked on the side of the road awaiting the arrival of the school bus,” fired multiple shots into the victim’s *parked* car, and drove away. Id. at 1024. The district court found that the assailant’s vehicle was not an active accessory to the crime. Significantly, the district court explained that victim was not “traveling in her vehicle at the time Williams fired the gun, thus making Williams’ position in relation to Plaintiff dependent on the use of his vehicle.” Id.

⁵ In Holmes, our district court discussed Howser and Towe in great detail but ultimately found “after careful consideration, . . . the events underlying this dispute” did not invoke the conclusions reached in either Howser or Towe. Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022, 1026 (D.S.C. 2009).

The Holmes case, according to the district court, was more like the shooting in State Farm Mutual Automobile Insurance Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999). See Holmes, at 1027 (discussing Bookert). 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. Bookert, at 293, 523 S.E.2d at 181. In finding this case analogous to Holmes, the circuit court ignored significant undisputed facts. Redman did not simply use his vehicle as transportation to and from a crime scene as in Holmes and Bookert. Here, Harrison was driving her vehicle at the time of the shooting and thus Redman's position in relation to Harrison was completely dependent upon his use of his vehicle. The circuit court should be reversed because Redman's vehicle was an active accessory to the shooting, without his use of his vehicle Harrison would have simply driven away from the stoplight.

- d. **The circuit court committed error of law in finding that the vehicle was merely the site of the injury when Redman and Harrison were driving separate vehicles at the time of the assault and the assault could not have been committed were Redman not driving his vehicle.**

The circuit court found that Redman's vehicle was merely the site of Harrison's injury and thus there was no causal connection between the injury and Redman's use of the vehicle. In so finding the circuit court relied on Wright v. N. Area Taxi, Inc., 337 S.C. 419, 523 S.E.2d 472 (Ct App. 1999). In that case, two assailants entered a cabdriver's vehicle under pretext as fare-paying customers. Id. at 422, 523 S.E.2d at 472. Once the cab was in motion, they attempted to rob the driver and ultimately shot and killed her. Id. This court found that the required causal connection did not exist because "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. at 425, 523 S.E.2d at 475 (citations omitted). The reasoning of the court in Wright was that the vehicle was not an active accessory to the attempted robbery, it just happened to be where the

attempted robbery and shooting occurred. See id. In this case, Redman could not have followed Harrison from the first red light, while gesturing towards her without the use of his vehicle, nor could he have closely pursued Harrison to the second light without using his vehicle. **(R.p.97, #1); (Witness statement of Jennifer Rojas, R.pp.102-103).**

Because Harrison was operating her vehicle throughout the entire series of events that culminated in her shooting, and was only stopped for less than the length of a red light, Redman would not have been able to obtain the position that allowed him to fatally shoot Harrison at the second light without the use of his vehicle as an active accessory. Therefore, based upon the undisputed facts in the record before the circuit court, the circuit court erred in holding that the relationship between Redman's use of his automobile and Harrison's injuries were "incidental".

- e. **The circuit court committed error of law in finding that Appellant's injuries are not foreseeably identified with the normal use of an automobile when no South Carolina appellate court has ever established a rule that such injuries are, as a rule, not foreseeably identified with the normal use of an automobile.**

The circuit court also found that an insured is not entitled to underinsured benefits for injuries from gunshots fired from a vehicle because such an injury is not foreseeably identified with the normal use of an automobile. In Bookert, an insured under his mother's policy, was *standing in a McDonald's parking lot* when he was shot by a passenger in a moving vehicle. Bookert at 292-93, 523 S.E.2d at 181-82. The Supreme Court, ruled his injuries were not covered by his mother's policy because the injuries were not "foreseeably identifiable with the normal use of an automobile," as defined by Aytes. Id. Nothing in the Bookert ruling held that the mere fact a *gun was shot out of a car* meant that the injuries were not foreseeably identified with the normal use of an automobile, as the circuit court held. See Id. at 293, 523 S.E.2d at 181; **(Order, R.p.7).** Bookert simply established that when the victim(s) of drive by shooting(s) that are not in a car at

the time of the incident are not entitled to insurance benefits because their injuries are not foreseeably identifiable with the normal use of an automobile. Id.

In Bookert, the assailant merely used the jeep as transportation to the site of the shooting. Id. Unlike the assailant in Howser, the assailant in Bookert did not use his vehicle to keep up with the victim's car. See id.; see also, Howser, 309 S.C. at 271, 422 S.E.2d at 107. Moreover, unlike the assailant in Howser, the assailant in Bookert did not need the vehicle to shoot the victim and as such, the relationship between the victim's injuries and the assailant's use of the vehicle were incidental. Id.

The circuit erred in comparing the facts of this case to Bookert in finding Harrison's injuries were not foreseeably identifiable with the normal use of an automobile. See (Order, R.p.75). Redman could not have pursued Harrison but for the use of his automobile and Harrison's automobile was in use throughout this incident, making this case factually akin to Howser and Towe, not Bookert. **(R.p.84, #8); (R.p.89, #8). (R.p.98, #7). (R.p.97, #1)**. The circuit court further erred in holding that "[l]ike *Bookert*, Harrison's injuries from the shot fired by Redman from his automobile were not foreseeably identifiable with the use of an automobile." **(Order, R.p.7)**. Considering the significant factual distinction between this case and Bookert, the circuit court erred in creating a bright line rule that anytime a gun is fired from a car it is not foreseeably identifiable with the normal use of an automobile. This is simply not the law in South Carolina.⁶

⁶ Norris v. Allstate Ins. Co., 2005-UP-124, 2005 WL 7083469, at *3 (Ct. App. Feb. 17, 2005) (Beatty, J, concurring in result but explaining "[u]ntil our Supreme Court overrules Howser, we must assume that the fact that an assailant fired a gun from an automobile does not automatically defeat coverage . . . it is arguable that drive-by shootings are foreseeably identifiable with the normal use of a vehicle.").

It is clear from South Carolina jurisprudence that Bookert did not overrule the decision in Howser or Towe. In fact, the District Court in Holmes, expressly discusses the Howser and Towe cases nine (9) years after the Bookert ruling. See also, Peagler v. USAA Ins. Co., 628 S.E.2d 475, 368 S.C. 153 (2006) (Court discussion regarding Howser and Towe as valid law post Bookert). The facts of this case are directly in line with Howser and Towe, which are still controlling law. The undisputed facts and controlling caselaw establish that Harrison's injuries were foreseeably identifiable with the use of an automobile, therefore the circuit court erred in holding Harrison's injuries were not foreseeable identifiable with the use of an automobile and must be reversed.

II. The circuit court erred in finding that Redman's firing of a gun was an intervening act of independent significance breaking any causal connection with the use of his vehicle when Redman's use of his vehicle and the shooting were inextricably linked as one continuing assault.

The circuit court relied on Towe and Wright to determine that Redman's firing of a gun was an intervening act of independent significant breaking any casual connection with the use of his automobile under the Aytes test. **(Order, R.p.8)**. In doing so, the circuit court failed to see the distinct factual difference between this case and Wright.

The circuit court cited Towe to show that certain acts, such as throwing a bottle from a car, are so inextricably linked to the use of the automobile as to constitute one continuing assault, therefore they do not constitute an intervening act of independent significant. See (Order, R.p.8); see also, Towe, 314 S.C. at 827, 441 S.E.2d at 108. The circuit court also noted that Wright addressed whether shooting constitutes an act of independent significance. See (Order, R.p.8). The circuit erred in ruling that Wright established a bright line rule that a shooting was in and of itself an act of independent significance. Id. The circuit failed to recognize the factually distinct scenario that led the Wright court to rule that the shooting in that case was an act of independent significance.

In Wright, the assailants hailed a taxi, entered the taxi once the driver parked his car on the side of the road, they shot and robbed the driver as he began driving. *See Wright*, 337 S.C. at 422, 523 S.E.2d at 472. The vehicle's movement did not enable the gunman to carry out the attack, as the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or gunmen were standing outside of the vehicle." *Id.* at 427, 523 S.E.2d at 472. As such, the injuries sustained by the cabdriver resulted from the assault by the gunmen and were unrelated to any functional use of the vehicle because the use of the vehicle was not essential to accomplishing the crime. *Id.* at 426-27, 523 S.E.2d at 472. Therefore, the gunman's assault was an act of independent significance that broke the causal link because the shooting and the use of the vehicle were not inextricably linked as a continuing assault.

Wright is wholly different from the present case because Redman's ability to carry out the shooting was entirely dependent on the use of his vehicle to pursue Harrison. Unlike the gunman in Wright, Redman could not have accomplished the shooting by stopping his vehicle, getting out, shooting Harrison, and driving away because he would not have been able to keep up with Harrison's position from one red light to the next. Moreover, unlike the victim in Wright, Harrison's injuries were directly related to the functional use of the vehicle because the vehicle's movement enabled Redman to carry out the attack.

Furthermore, the circuit court ignored the ruling in Howser in ruling that Harrison's use of a gun was an act of independent significance. The Court in Howser addressed the question of whether a shooting constitutes an act of independent significance to break any causal connection between the use of a vehicle and a shooting. In Howser the assailant could not have completed his attack without using his vehicle, therefore the Court found there was a connection between the use of vehicle and the injuries. *See Howser*, at 273, 422 S.E.2d at 109. Since that purpose was fulfilled

when the assailant used his vehicle to complete the assault, the Court found the assailant's use of his vehicle and the shooting to be inextricably linked as one continuing assault. *Id.* at 274, 422 S.E.2d at 109. Therefore, "no independent act occurred to break the causal link." *Id.*

In this case the circuit court, ignoring Howser, erred in ruling that "[t]he same injuries could have occurred without an automobile involved." (**Order, R.p.8**).⁷ The connection between Redman's vehicle and Harrison's injuries was Redman's use of his vehicle to complete the shooting. Like the assailant in Howser, Redman could not have completed his attack without using his vehicle. Redman could not have kept up with Harrison from stop light to stop light without a car. (**R.pp.97-98, #3**) Redman could not have positioned himself next to Harrison at the stop light without a car. (**R.p.98, #4**). Harrison's vehicle was stopped for less than the length of a red light before the shooting occurred. (**R.p.89, #10 & 13**). Simply put, without the use of Redman's vehicle this assault could not have occurred, and the circuit court erred in ruling otherwise. Redman's purpose for using his vehicle was fulfilled when he pulled beside Harrison and fired into her vehicle. Redman's use of his vehicle and the shooting are inextricably linked as one continuing assault. See Howser at 274, 422 S.E.2d at 109. Therefore, no act of independent significance occurred to break the causal link. *Id.*

Consequently, the facts of this case are distinguishable from Wright and analogous to Howser, therefore the circuit court erred in ruling that Redman's use of a gun was an act of independent significance breaking the causal link because Redman's use of his vehicle and the shooting are

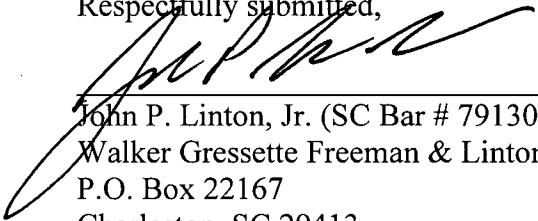
⁷ The Court in Aytes provided additional guidance on the applicable standard for act of independent significant that breaks the causal connection to an injury. See Aytes 332 S.C. at 35. In Aytes, the assailant drove his victim from one place to another, **got out of the vehicle and shot the victim**. See *Id.* at 33 (bold added). The court held that "[any causal link was] broken **when the assailant exited the vehicle**. . . [t]he only connection between the car and the injury is the fact that [the victim] was sitting in the car when she was shot." *Id.* at 35 (bold added). It should be noted that it is an undisputed fact that Redman never exited his vehicle prior to the shooting.

inextricably linked as one continuing assault as in Howser. For the aforementioned reasons the circuit court must be reversed.

CONCLUSION

Therefore, for the reasons explained above, the circuit court's order should be reversed and judgement entered for Appellant.

Respectfully submitted,



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



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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

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v.

Shanna Groves as the Personal Representative of the
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STATEMENT OF ISSUES ON APPEAL

- (I) Whether the Circuit Court correctly applied the South Carolina Supreme Court's holding in *State Farm Mutual Automobile Insurance Company v. Bookert* by deciding that gunshot injuries fired by an assailant from a stationary vehicle are not foreseeably identifiable with the normal use of an automobile.
- (II) Whether the Circuit Court correctly held that when a shooter fires a shot from one stationary vehicle into another stationary vehicle, the vehicle is the mere site from which the assault occurs and the fact that the shooter fires from within a vehicle does not make the vehicle an "active accessory" to the shooting.
- (III) Whether the Circuit Court correctly ruled a shooter's act of firing at a victim after both vehicles are stopped is an intervening act of independent significance that breaks any causal connection with the shooter's use of the vehicle.

STATEMENT OF THE CASE

This appeal arises out of a tragic shooting incident that occurred when Jimi Carl Redman stopped his vehicle at a red light beside Decedent Lynn Harrison's vehicle, pointed a rifle at her, shot her, and drove away. Harrison died as a result of the shooting. Respondents Progressive Direct Insurance Company ("Progressive") and USAA General Indemnity Company ("USAA") issued insurance policies to Harrison's husband providing uninsured motorist coverage for injuries arising out of an uninsured motorist's ownership, maintenance, or use of an automobile.

After receiving a claim for uninsured motorist benefits from Harrison's Estate, Progressive filed this declaratory judgment action seeking a declaration that Harrison's injuries and resulting death did not arise out of Redman's ownership, maintenance, or use of an automobile. Progressive and USAA then filed an Amended Complaint adding USAA as a Plaintiff on September 17, 2015.

After receiving responses to Requests to Admit, Respondents USAA and Progressive filed a Motion for Summary Judgment and supporting memorandum on May 9, 2016. (R. pp. 25-37). On January 27, 2017, shortly before the hearing on Respondents' motion, the Estate filed its own Motion for Summary Judgment and supporting memorandum.

On February 7, 2017, the Honorable Alison Renee Lee heard arguments on the motion. On August 17, 2017, the Circuit Court issued a thorough Order granting Respondents Progressive and USAA's Motion for Summary Judgment and denying the Estate's motion. Applying the three-factor test established in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998), the Circuit Court found Harrison's injuries did not arise out of Redman's ownership, maintenance or use of an auto because there was no causal connection between Redman's use of the auto and Harrison's injuries. First, the Circuit Court held Redman's auto was not an "active accessory" to the assault because "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." (R. p. 6).

Second, the Circuit Court found Redman's vehicle was merely the site from which he fired the gun. (R. p. 6). Third, relying upon the Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (2000), the Circuit Court held Harrison's gunshot injuries were not foreseeably identifiable with the normal use of an auto. (R. p. 7). Even if the vehicle had been an active accessory to the shooting, the Circuit Court alternatively found Redman's act of shooting a rifle out of a stationary vehicle broke any causal connection with his use of the vehicle. (R. p. 8). For all of these reasons, the Circuit Court granted Progressive and USAA's Motion for Summary Judgment. This appeal followed.

STATEMENT OF THE FACTS

A. The shooting.

On April 2, 2015, Lynn Harrison operated a 2010 GMC Terrain in Summerville eastbound on East Carolina avenue, which became Old Trolley Road just before the intersection of Old

Trolley Road and Bacons Bridge Road. (R. pp. 84, 88). Harrison stopped for a red light in the middle eastbound lane of Old Trolley Road at the intersection of Bacons Bridge Road and Old Trolley Road near the Sawmill Shopping Center. (R. pp. 84, 89).

At the same time, Jimi Carl Redman was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Harrison's right. (R. pp. 84, 89). Redman stopped at the red light at the same intersection in the eastbound lane immediately to the right of the vehicle operated by Harrison. (R. pp. 85, 89). As they approached the stop light, one witness indicated she saw Redman blowing kisses and making hand gestures to Harrison. (R. p. 97). As the Circuit Court held, there is no evidence Harrison was aware of Redman. (R. p. 4). In fact, it is undisputed that Lynn Harrison was operating her vehicle in a normal fashion up until stopping at the red light. (R. p. 98). There is no evidence in this case of a pursuit. Moreover, Appellant concedes that Redman and Harrison were complete strangers.¹ (R. pp. 85, 89).

While both vehicles were stopped at the red light, Redman pointed a rifle at Harrison and fired in her direction. (R. pp. 85, 89). The bullet went through the passenger window of Harrison's GMC Terrain and struck her in the neck, causing her death. (R. pp. 85, 89). Neither the GMC Terrain nor the Ford Escape were in motion at the time of the shooting. (R. pp. 85, 89).

¹ Appellant initially describes this fact accurately in her Statement of Facts. (Br. of Appellant, p. 2) ("While driving **toward the stop light** at the intersection of Old Trolley Road and Bacons Bridge Road, Redman was blowing kisses and making hand gestures toward Harrison while driving.") (emphasis added). After accurately describing the interaction in the Statement of Facts, Appellant thereafter repeatedly misstates this fact and claims Redman "stalked" Harrison. (Br. of Appellant, p. 6, 10). Appellant also states Redman "followed Harrison from the first red light, while gesturing towards her" (Br. of Appellant, p. 14). Once again, the evidence presented to the Circuit Court does not show Redman "followed Harrison" from one light to the next or that he "stalked" her. The only evidence is that Redman made gestures towards Harrison "while driving toward the stop light" where the shooting occurred.

Redman then disregarded the red light, proceeded through the intersection, and was apprehended a few blocks away. (R. pp. 85, 89). Because her vehicle was still in drive at the time of the shooting, Harrison's GMC Terrain proceeded slowly through the intersection until it came to rest on the median. (R. pp. 85, 89).

The vehicles operated by Redman and Harrison never made contact. (R. pp. 85, 89). There is no evidence that Harrison and Redman knew each other prior to the shooting. (R. pp. 85, 89). Harrison's injuries resulted solely from the use of the rifle.

Redman was charged with murder and possession of a weapon during a violent crime. According to the South Carolina online public index, those charges are still pending. The Ford Escape operated by Redman was not insured or was underinsured at the time of the shooting.² (R. pp. 86, 89).

B. The policies.

Progressive issued a South Carolina Motorcycle insurance policy to Lynn Harrison's husband, James M. Harrison. (R. pp. 38-41). USAA issued a South Carolina Auto Policy to James M. Harrison. (R. pp. 42-49). Both policies were in force at the time of the shooting, and both policies included uninsured motorist coverage. Lynn Harrison lived with her husband at the time of the shooting. (R. pp. 84, 88).

Both policies limited uninsured motorist coverage to injuries arising out of the ownership, maintenance or use of an uninsured vehicle by an uninsured motorist. The Progressive policy provided in relevant part:

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of:

² For purposes of this case, whether the vehicle was uninsured or underinsured is irrelevant because the same analysis applies regardless.

1. an uninsured motor vehicle because of bodily injury:
 - a. sustained by an insured person;
 - b. caused by an accident; and
 - c. *arising out of the ownership, maintenance, or use of an uninsured motor vehicle; . . .*

(R. p. 41) (emphasis added). Likewise, the USAA policy states:

A. UNINSURED MOTORISTS COVERAGE

We will pay the following damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of an auto accident:

1. BI [Bodily Injury] sustained by a covered person; and
2. injury to or destruction of the property of a covered person.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

(R. p. 48) (emphasis added). Therefore, the policies do not provide coverage for Harrison's injuries unless they arose out of Redman's ownership, maintenance, or use of an auto.

STANDARD OF REVIEW

"When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the trial court." *Ray v. Austin*, 388 S.C. 605, 610-11, 698 S.E.2d 208, 211 (2010) (citation omitted). Pursuant to Rule 56(c), summary judgment is appropriate if "there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law." *Id.* Although the court must view any material disputes of fact in the light most favorable to the nonmoving party, a non-moving party "must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 308, 657 S.E.2d 67, 70 (Ct. App. 2008) (citation omitted).

ARGUMENT

The Circuit Court correctly held that a shooting from one stationary vehicle into another stationary vehicle does not arise out of the use of an auto. Applying the three-factor test from *Aytes*, Redman's use of the vehicle was not causally connected to Harrison's injury. Our Supreme Court in *Aytes* adopted three sub-factors to determine whether a vehicle is causally connected to a claimant's injury. Appellant fails to establish any of those three sub-factors. First, the Supreme Court in *Bookert* held that gunshot injuries such as the one here are not foreseeably identifiable with the normal use of an auto. Second, Redman did not use the vehicle as an active accessory to the assault, and his use of the vehicle did not increase the severity of Harrison's injuries. Third, the vehicle was merely the site from which Redman fired the gun.

Even if Appellant could show a causal connection, Appellant fails to satisfy the second *Aytes* factor. Redman's action of firing the gun after both vehicles were stopped and stationary constitutes an intervening action that breaks any causal connection that may exist between Redman's use of the auto and Harrison's injuries. Therefore, the Circuit Court's Order should be affirmed.

I. The Circuit Court correctly found Redman's use of the Ford Escape was not causally connected to Harrison's injuries because gunshot injuries are not foreseeably identifiable with the normal use of an auto, the vehicle was not an "active accessory" to the shooting, and the vehicle was merely the site from which Redman fired the gun.

"An insured is legally entitled to recover damages arising out of the 'ownership, maintenance, or use' of an uninsured vehicle." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745 (citing S.C. Code Ann. § 38-77-140). The above-quoted Progressive and USAA policies incorporate this statutory language. (R. pp. 41, 48). In *Aytes*, our Supreme Court established the standard for determining whether an injury arises out of the ownership, maintenance, or use of an auto. First, the party seeking coverage – here, the Estate – must prove a causal connection between the vehicle

and the injury. Second, there must be no act of independent significance that breaks the causal link. Third, the vehicle must be used for transportation at the time of the incident.³ *Id.*

In order to prove the causal connection, the Estate must establish three sub-factors: (1) the vehicle was an “active accessory” to the assault; (2) the vehicle was something more than the mere site of the injury; and (3) “[t]he injury must be foreseeably identifiable with the normal use of the vehicle.” *Id.* (citations omitted). Appellant failed to present evidence showing Redman’s vehicle was causally connected with Harrison’s injuries. Instead, his use of the vehicle was merely incidental to the shooting, and Harrison’s injuries were not foreseeably identifiable with the normal use of an auto.

A. Pursuant to the Supreme Court’s holding in *Bookert*, injuries resulting from gunshots fired out of a vehicle window as part of an assault are not foreseeably identifiable with the normal use of an auto.

As the party seeking coverage, Appellant bears the burden of proving a causal connection between Harrison’s injuries and Redman’s ownership, maintenance or use of an auto. *See Carraway v. Smith*, 321 S.C. 23, 25, 467 S.E.2d 120, 121 (Ct. App. 1996). Therefore, Appellant must prove Harrison’s injuries were “foreseeably identifiable with the *normal* use of the automobile.” *Id.* (emphasis added). However, our Supreme Court held in *Bookert* that similar injuries are not foreseeably identifiable with the normal use of an auto. Therefore, Appellant failed to meet this burden.

Our Supreme Court in *Bookert* held gunshots fired in connection with an assault are not foreseeably identifiable with the normal use of an auto. According to stipulated facts in that case, two soldiers from Fort Jackson got into an altercation with a group of young men at a Hardee’s parking lot. *Bookert*, 330 S.C. 221, 224-26, 499 S.E.2d 480, 481-82 (Ct. App. 1997), *rev’d* 337

³ Progressive and USAA do not dispute that Redman was using his vehicle for transportation at the time of the shooting, although his vehicle was stationary.

S.C. 291. After the fight was broken up, the two soldiers took a jeep to pick up a third assailant and followed the group of young men to a nearby McDonald's parking lot. *Id.* The assailants used the jeep to circle the parking lot in search of their intended victims. *Id.* One soldier stood in the back of the jeep with a shotgun while another soldier sat in the passenger seat with a handgun. While yelling at and taunting the group of young men, the jeep lurched forward. The soldier in the back fell out and fired his shotgun into the crowd. While the jeep was still moving, the passenger fired multiple shots into the crowd and struck the plaintiff in each leg. *Id.* The two soldiers in the jeep then used the jeep to flee from the scene, and the third soldier ran off on foot. The claimant was injured from shots fired by the soldier in the passenger seat, not the soldier that fell out of the jeep. *Id.*

The claimant sought underinsured motorist coverage claiming that the injury arose out of the use of an automobile. The Circuit Court and this Court found in favor of the claimant. Specifically, this Court found the vehicle was the "launching pad" for the assault. Moreover, "[t]he vehicle also put the assailants in the position to shoot and then escape quickly and easily. . . . Furthermore, the automobile was in motion when the shots which injured Michael Bookert were fired." *Id.* at 232-33, 499 S.E.2d at 486.

The Supreme Court granted certiorari and reversed, finding there was no causal connection between the vehicle and the injury. *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182. Despite the fact that the assailants used the vehicle to track down the group of young men and fired the gun from a moving vehicle, the Supreme Court held the injuries did not satisfy the third *Aytes* sub-factor: the gunshot wounds were "not 'foreseeably identifiable with the normal use of an automobile.'"

Id. (quoting *Aytes, supra*). Therefore, no causal connection between the vehicle and the injury existed.⁴

The Supreme Court adopted this “normal use” factor from the United States Court of Appeals for the Fourth Circuit’s decision in *Nationwide Mutual Insurance Company v. Brown*, 779 F.2d 984 (4th Cir. 1985). In that case, a vehicle operator drove around with his passenger looking for the passenger’s wife. When the passenger saw the wife’s car, he pushed the operator and caused a collision between the two vehicles. He then got out of his vehicle and shot and killed his wife. *Id.* at 986. The Fourth Circuit held the wife’s injuries did not arise out of the ownership, maintenance or use of an automobile, stating:

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.

Id. at 988. Moreover, “[i]n cases dealing with the specific situation here in issue—shooting by a passenger in or operator of an insured vehicle—the decisions have uniformly applied and found unmet a comparable causal requirement.” *Id.* Applying the “normal use” test, the Fourth Circuit quoted favorably from the Michigan Court of Appeals: “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

⁴ Despite Rule 268(d)(2), SCACR, Appellant cites a concurrence in this Court’s unpublished decision in *Norris v. Allstate Ins. Co.*, 2005-UP-124, 2005 WL 7083469 (Ct. App. Feb. 17, 2005). However, to the extent that case is considered, its holding actually supports the Circuit Court’s decision in this case. In *Norris*, this Court held shooting injuries were not foreseeably identifiable with the normal use of an auto despite the fact that the shooter fired from a moving vehicle that was pursuing the victim at the time of the shooting. *Id.* at *3 (“Because we can discern no material distinction from the facts at hand and the facts in the *Bookert* case, we find no error in the trial judge’s determination there was no coverage because the incident was not ‘foreseeably identifiable with the normal use of an automobile.’”).

motor vehicle.” *Id.* at 989 (quoting *Detroit Automobile Inter-Insurance Exchange v. Higginbotham*, 95 Mich. App. 213, 290 N.W.2d 414 (1980) (emphasis in original).

Like the claimants in *Bookert*⁵ and *Brown*, Harrison’s injuries are not foreseeably identifiable with the *normal use* of an automobile. Redman’s “use” of the auto here is actually less extensive than the purported “use” at issue in *Bookert*. The assailants in *Bookert* used the vehicle to track down the group of young men, the jeep’s “lurch” forward caused the soldier to fall out and fire into the crowd, and the jeep was in motion at the time of the shooting. In contrast, Redman merely drove the vehicle to the red light where the assault took place, fired a shot from his stationary vehicle at Harrison – who was also stationary – and then used his vehicle to escape. Our Supreme Court found the purported use in *Bookert* insufficient to prove any causal connection to the injuries. Even more so, Redman’s use here does not create any causal connection.

Moreover, Harrison’s injuries are exactly the same as those in *Bookert* and *Brown* – gunshot wounds due to an assault. As the Courts held in *Bookert* and *Brown*, gunshot injuries are not the type of injuries that are foreseeably identifiable with the *normal* use of an automobile. Therefore, Harrison’s death did not arise out of Redman’s use of the vehicle.

B. When a shooter fires a shot from one stationary vehicle into another stationary vehicle, the fact that the shooter fires from within a vehicle does not make the vehicle an “active accessory” to the shooting but merely the site of the assault.

The first and second sub-factors under the *Aytes* causal-connection test interrelate. The vehicle must be an “active accessory” to the assault, and the vehicle must be more than the mere

⁵ In explaining its basis for reversing this Court, the Supreme Court in *Bookert* acknowledged that it rendered its decision in *Aytes* after this Court’s ruling in *Bookert*. See *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182. Because the decision in *Aytes* was the first time South Carolina’s Supreme Court had applied the “normal use” factor under the causal connection analysis, the normal use standard was not considered by this Court in its decision in *Bookert*. Likewise, the Supreme Court’s decision of *Howser* does not address the “normal use” factor because it predates *Aytes* and *Bookert*.

site of the injury or the mere site from which the actor fired a weapon. *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (citing *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745-46). Here, Redman's vehicle was merely the site from which he fired the gun. The vehicle has no causal connection to Harrison's injuries, and Redman's use of the vehicle did not increase the severity of her injuries. Therefore, the causal connection does not exist.

The District Court for the District of South Carolina in *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009), held that use of a vehicle in a drive-by shooting does not make the vehicle an "active accessory" to the assault. In that case, an estranged lover had a history of using his truck to stalk the claimant. On the date of the assault, he saw the claimant's vehicle parked in front of her friend's house and drove back and forth, harassing the claimant for some time. Later that day, he saw the claimant driving down the road in the opposite direction. Unbeknownst to her, he turned around to follow. When she stopped her vehicle to wait to pick up a child at a bus stop, the assailant drove up beside her vehicle, stopped briefly, and fired multiple shots into her vehicle seriously injuring the claimant before the assailant drove away. *Id.* at 1024. The District Court held the vehicle was not an active accessory to the assault.⁶ *Id.* at 1027.

In its brief, the Appellant in this case attempts to rely on the *Howser* and *Towe* cases to suggest that uninsured motorist coverage is triggered in this case.⁷ Its reliance on these cases is misplaced for several reasons. The District Court in *Holmes* aptly distinguishes both *Howser* and *Towe* and shows why they do not support Appellant's argument in this case.

⁶ The District Court also held that although "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." *Id.*

⁷ See *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992); *Home Ins. Co. v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994).

In *Howser*, an unidentified assailant used his vehicle to ram the claimant's vehicle multiple times while chasing her down a public roadway. As the claimant made a "quick" turn in an attempt to flee from the assailant, he shot at her car and the fragmented bullet struck the claimant, injuring her. 309 S.C. at 271, 422 S.E.2d at 106. The Supreme Court held the injuries arose out of the assailant's use of the vehicle because "[o]nly through the use of his vehicle was the assailant able to closely pursue [claimant], 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." *Howser*, 309 S.C. at 273, 422 S.E.2d at 108 (emphasis added). The Supreme Court also held, "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 (emphasis added). Of particular note, the Supreme Court contrasted the facts in *Howser* with those where the "assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack." *Id.* at 273, 422 S.E.2d at 108.

In *Towe*, a group of kids were riding in an insured auto when a passenger threw a glass bottle at a street sign. He missed and struck a tractor operated by the claimant. The bottle shattered and injured the claimant who argued that the injuries arose out of the passenger's use of the auto. The Supreme Court agreed, holding: "[t]he 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 [claimant's] injuries*." *Towe*, 314 S.C. at 107, 441 S.E.2d at 827 (emphasis added).

After analyzing both *Howser* and *Towe*, the District Court in *Holmes* recognized that the vehicle in *Howser* was an active accessory because it was used to ram and chase the plaintiff's vehicle and to keep up with the fleeing plaintiff to shoot her. The vehicle in *Towe* was an active accessory because its speed actually caused the claimant's injuries to be more severe. In contrast,

the victim in *Holmes* – and Harrison here – was stationary, and the severity of her injuries was not affected by the speed of the shooter’s vehicle. Therefore, the District Court held the drive-by shooting in *Holmes* was not comparable:

Unlike *Howser*, [assailant] did not use his vehicle to assault Plaintiff, as nothing in the record indicates that Plaintiff knew [assailant] was approaching her as she waited at the school bus stop or that [assailant’s] vehicle ever made contact with Plaintiff’s. Nor was Plaintiff traveling in her vehicle at the time [assailant] fired the gun, thus making [assailant’s] position in relation to Plaintiff dependent on the use of his vehicle. Moreover, unlike *Towe*, [assailant’s] 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 [assailant’s] car acted as an active accessory to his assault on the Plaintiff.

Id. at 1026-27.

The District Court’s well-reasoned opinion in *Holmes* applies with equal force in this case. The drive-by shooting in this case is wholly different from the vehicular chase and assault in *Howser* that culminated in a shooting. Like the drive-by shooting in *Holmes*, Redman did not use his vehicle to keep up with a fleeing Harrison, but merely used the vehicle to transport himself to the site of the assault and then to flee. Like the victim in *Holmes*, Harrison’s car was stationary at the time of the shooting, no contact was ever made between the vehicles, and nothing in the record indicates Harrison knew Redman was beside her as she waited for the red light. Like the shooter in *Holmes*, Redman pulled up beside Harrison while her vehicle was stationary, fired into her vehicle, and drove away. Neither vehicle was in motion, so Redman’s use of the vehicle did not

increase the severity of Harrison's injuries or make his use of the vehicle necessary to carry out the assault. Therefore, the relevant facts here are indistinguishable from those in *Holmes*.⁸

Furthermore, the basis for the Supreme Court's holding in *Towe* was the fact that the velocity of the vehicle contributed to the severity of the plaintiff's injuries. *Id.* at 1027. However, in a shooting case, the speed of the assailant's vehicle (here, stationary and perpendicular to the victim) does not increase the severity of the victim's injuries. *Id.* The use of the vehicle had no connection to the nature or severity of Harrison's injuries. Thus, *Towe* has no bearing on the facts of this case.

Appellant mistakenly cites *Howser* and *Towe* as if they stand for a unified rule. They do not. The two cases stand separately on their facts. In *Howser*, the assailant used the vehicle as part of an ongoing assault, both using the vehicle to ram the victim's vehicle and to pursue the fleeing victim, and he was still pursuing the fleeing victim when he fired the bullet that ultimately caused her injuries. Thus, the use of the vehicle as an "active accessory" to the assault triggered coverage. In *Towe*, the bottle was thrown from a moving vehicle, and the speed of the vehicle contributed to the overall speed of the bottle, thus having a direct causal connection to the extent of the plaintiff's injuries. Therefore, the use of the vehicle in *Towe* had a direct causal connection and was an "active accessory" to causing the physical injuries.

The Circuit Court – relying on the District Court's decision in *Holmes* – properly evaluated the rule from each case and found the facts here do not fall under either rule. As to *Howser*, the

⁸ The facts here are even more remote than those in *Holmes*. In *Holmes*, the evidence showed the shooter saw the victim drive past him, and he turned around to follow her. There is no evidence in this case that Redman knew Harrison or that he followed Harrison for any duration prior to the accident. However, even with Appellant's contention that Redman "stalked" Harrison for the duration between two stop lights, *Holmes* shows that this allegation would not suffice to create a causal connection. Moreover, as discussed below, Redman's act of firing *after* both vehicles were stopped constitutes an act of independent significance that breaks any purported causal connection.

evidence shows there was no chase, there was no contact between Harrison and Redman's vehicles, Harrison was not aware of Redman's conduct, and the vehicles were stationary at the time of the shooting. As to *Towe*, the speed of Redman's vehicle – stationary – was not causally connected with the severity of Harrison's injuries. Thus, the *Howser* and *Towe* cases have no bearing in this case.

At best, the evidence shows Redman's vehicle was the mere site from which he fired the shot at Harrison. However, when the only connection between a vehicle and an injury is that the assailant or victim is occupying the vehicle at the time of the assault, the causal connection requirement is not satisfied. For example, in *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999), two assailants entered the victim cabdriver's vehicle under pretext as fare-paying customers. Once the cab was in motion, they attempted to rob the victim and ultimately shot and killed her. This Court held the injuries to the cabdriver were not causally related to the use of the vehicle because the cab merely served as the site of the robbery. Like the attempted robbery in *Wright*, Redman's Ford Escape merely served as the site from which he fired the shot at Harrison's vehicle. Therefore, the causal connection between his use of the Ford Escape and Harrison's injuries is insufficient to trigger coverage under Plaintiff's auto liability policies.

In sum, the Circuit Court correctly found that the Appellant failed to establish the first prong of the *Aytes* causal connection test because Harrison's injuries did not arise out Redman's use of the vehicle.⁹ Gunshot injuries are not foreseeably identifiable with the normal use of an

⁹ Appellant also appears to argue that coverage should apply because Harrison was using her vehicle at the time of the shooting. (Appellant's Br. p. 6) ("Additionally, it is worth noting that Redman shot Harrison while she was operating her vehicle in a normal and reasonably foreseeable fashion."). However, whether the claimant was using a vehicle is immaterial to whether coverage is triggered. Instead, the proper inquiry focuses on whether the injuries arise out of the uninsured motorist's ownership, use, or maintenance of his vehicle, not the claimant's use of a vehicle. See

automobile. Moreover, Redman's vehicle was not an "active accessory" to the shooting. Neither vehicle was in motion at the time of the shooting, there was no vehicular chase, and Redman's use of his vehicle did not increase the severity of Harrison's injuries. Therefore, Appellants failed to prove the causal connection requirement.

II. The Circuit Court correctly held Redman's act of firing a shot at Harrison's vehicle was an intervening act of independent significance that broke any causal connection with the use of his vehicle.

The second prong of the *Aytes* test to determine whether an injury arises out of the ownership, maintenance, or use of a vehicle requires that no act of independent significance breaks the causal link between the use of the vehicle and the injury. "If the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of an automobile, the injury is not the result of the 'use of the automobile.'" *Howser*, 309 S.C. 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)).

This Court in *Wright* also addressed the question of whether a shooting constitutes an act of independent significance to break any causal connection between the use of a vehicle and a shooting injury. This Court held the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or the gunmen were standing outside of the vehicle." *Wright*, 337 S.C. at 427, 523 S.E.2d at 476. Therefore, "the assault of the gunmen broke any causal connection between the vehicle and [the cabdriver's] injury because it arose from an act of independent significance." *Id.*

Even if there were a causal connection between Redman's use of the Ford Escape and the assault, the shooting was an act of independent significance breaking any causal link that may have

Carraway, supra (focusing on actions of shooter in case where victim was shot while sitting in the driver's seat of a running vehicle waiting for the vehicle in front of him to clear a stop sign).

existed. Redman fired his gun after both vehicles were stopped and stationary. Like the shooters in *Wright*, Redman could have committed the same assault by walking up to Harrison's vehicle and firing his gun. Redman could have accomplished the shooting by stopping the Ford Escape and getting out, shooting Harrison, then leaving in his vehicle. Therefore, Redman's act of firing a shot into Harrison's vehicle after both vehicles were stopped broke any causal connection that may have existed.

Appellant fails to raise any compelling argument that Redman's act of shooting Harrison was not an act of independent significance. Relying on *Howser*, Appellant argues that a shooting does not categorically constitute an independent act. However, the question is not whether a shooting categorically breaks the chain of causal connection. The question is whether *this* shooting between two *stationary* vehicles breaks the causal connection. In *Howser*, the shooter shot ***while the vehicles were in motion, in a car chase, with collisions between the vehicles, and while the victim was trying to flee***. Thus, the Supreme Court in *Howser* held the shooting and the shooter's use of the vehicle were "inextricably linked as one continuing assault." 309 S.C. at 274, 422 S.E.2d at 190. Because the victim was still fleeing, the shooter in that case could not have exited his vehicle to complete the shooting.

Unlike the assault in *Howser*, the shooting here occurred ***after*** both Redman and Harrison had stopped their vehicles for the red light. Thus, to the extent Appellant argues Redman used his vehicle to keep up with Harrison, that "use" stopped when both vehicles stopped at the red light. His act of shooting Harrison while both vehicles were stationary was a separate, independent act, and the two actions cannot logically be considered "inextricably linked as one continuing assault."

Rather, the two acts are independent. Redman did not use his vehicle as part of the assault like the assailant did in *Howser*. Stopping the vehicles in this case broke any possible causal connection.

Moreover, based on the Appellant's flawed contentions, the shooting at issue in *Brown* would have been covered. In *Brown*, the shooter used the vehicle to crash into and **stop** his victim, yet the Court found that shooting did not trigger coverage. Had he not used the vehicle to stop his victim and then stopped his vehicle, he would not have been in a position to step out of the vehicle and shoot the victim. The *Brown* Court found that, although the truck may have been used to track down and physically stop the victim, that use of the truck was "not the causative factor in producing [the victim's] death." 779 F.2d at 989. "Rather, [the assailant's] assault, an act wholly independent of the use of the truck, caused the death." *Id.* It follows in this case that the connection between the use of the vehicle and the shooting was broken when the vehicles were no longer in motion.¹⁰

Put simply, the act of shooting Harrison was independent of Redman's use of the Ford Escape. Her vehicle was stationary and so was the Ford Escape. Unlike the continuous acts in *Towe* and *Howser*, the shooting here was independent of Redman's use of the vehicle. Because both vehicles were stopped, Redman could have carried out the shooting by exiting his vehicle or

¹⁰ Likewise, the act of exiting the vehicle cannot be the dividing line between what constitutes an independent act and what does not. In *Doe v. S.C. State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999), the Supreme Court found sexual assault by an officer in a police cruiser was an act of independent significance despite allegations that the officer transported one of the victims to a golf course where the sex act took place in the police cruiser. The facts in that case did not indicate the victim or assailant exited the vehicle before the assault. Thus, the question is not whether the assailant exited the vehicle, but rather whether the assailant's conduct in carrying out the assault is still dependent on his or her use of the vehicle.

while standing on the corner of the intersection. Therefore, the Circuit Court properly held the shooting was an act of independent significance breaking any potential causal connection.

CONCLUSION

The Circuit Court correctly held Harrison's injuries do not arise out of Redman's use of the Ford Escape. Appellant has not established a causal connection because gunshot injuries resulting from an assault are not foreseeably identifiable with the normal use of an auto. In addition, the Ford Escape was not an "active accessory" to the shooting. The use of the vehicle was not inextricably linked to the shooting as one continuing assault, and Redman's use of the vehicle did not increase the severity of Harrison's injuries. Instead, the Ford Escape merely served as the site from which Redman committed the shooting. Moreover, even if there were a causal connection between Redman's use of the vehicle and Harrison's injuries, Redman's act of firing at Harrison after both vehicles stopped for the red light was an independent act breaking any connection that may have existed. In order for Appellant to prevail, she must show all of these factors, but here she has failed to establish any. Therefore, the Circuit Court's order should be affirmed.

Respectfully submitted,

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June 12, 2018

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

RECEIVED

JUN 13 2018

Appellate Case No. 2017-001946

Trial Court Case No. 2015-CP-18-01571

SC Court of Appeals

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

v.

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

CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Respondent, certify that the Respondents' Final Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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

RECEIVED

JUN 13 2018

SC Court of Appeals

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

v.

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

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. The Bookert case does not stand for the proposition that any injuries resulting from gunshots fired out of a vehicle window are not foreseeably identifiable with the normal use of an automobile, regardless of the circumstances.

Respondents Progressive Direct Insurance Co. and USAA General Indemnity Company's (collectively, "Respondents" or "the Insurers") brief relies heavily on an embellished interpretation of State Farm Mut. Auto Insurance Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999). Respondents assert the Court in Bookert held that, regardless of the factual circumstances, gunshots fired out of a vehicle window are not foreseeably identifiable with the normal use of an automobile. Respondents' argument is unsupported by South Carolina case law. For example, our Supreme Court has held an insurer liable under an uninsured motorist provision for gunshot injuries sustained by person traveling on public highway in an insured vehicle and inflicted during vehicular chase by an unknown owner or operator of unidentified vehicle. See Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). Howser has not been overruled and is still binding law in South Carolina. No South Carolina appellate court has found that Bookert precludes coverage anytime a gun is involved. See Norris v. Allstate Ins. Co., 2005-UP-124, 2005 WL 7083469, at *3 (Ct. App. Feb. 17, 2005) (Beatty, J. concurring in result but explaining "[u]ntil our Supreme Court overrules Howser, we must assume that the fact that an assailant fired a gun from an automobile does not automatically defeat coverage . . . it is arguable that drive-by shootings are foreseeably identifiable with the normal use of a vehicle."); Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022, 1027, 2009 WL 8138328 (D.S.C. 2009) (district court distinguishing the facts of Howser and Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994) in a case nine (9) years after the Bookert ruling); Peagler v. USAA Ins. Co., 628 S.E.2d 475, 368 S.C. 153 (2006) (post-Bookert discussion regarding Howser and Towe).

Furthermore, as explained fully in Appellant's opening brief, the facts in Bookert are distinguishable from the facts of this case and the facts of this case are more analogous to those in Howser and Towe. In Bookert, an insured under his mother's policy, was *standing in a McDonald's parking lot* when he was shot by a passenger in a moving vehicle. Bookert, at 292-93, 523 S.E.2d at 181-82. The Bookert opinion simply established that when the victim(s) of drive-by shooting(s) are not in a car at the time of the incident, their injuries are not foreseeably identifiable with the normal use of an automobile. Id.

In addition to Bookert, Respondents rely on Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984, 986 (4th Cir. 1985).¹ In that case, the passenger in a vehicle "jumped out of the truck and shot and killed his wife while she sat in the car." Id. at 986. In Brown, there was no use of the vehicle at the time of the shooting - the assailant was outside of the vehicle when he fired the shots. The facts in Bookert and Brown are completely dissimilar to the instant case where both Jimi Carl Redman, Jr. ("Redman") and Lynn Harrison's ("Harrison") vehicles were "***turned on and in drive***" at the time of the shooting. **(R.pp.97-98, #3)** (double emphasis added); **(R.p.98, #8)** (Plaintiffs admitting that Redman's "vehicle was turned on and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting."). Additionally, in this case, Harrison "was operating her vehicle in a normal and reasonably foreseeable fashion" at the time she was fatally wounded. **(R.p.98, #7); see also, (R.p.85, #14); (R.p.89, #14).**

As explained in detail in Appellant's opening brief, the undisputed facts establish that Harrison's injuries were foreseeably identifiable with the use of an automobile, therefore the

¹ Brown was decided by the Fourth Circuit Court of Appeals approximately seven years prior to our Supreme Court's ruling in Howser.

circuit court erred in holding to the contrary and must be reversed. See (Appellant's Br. 4-16). No doubt the insurance companies that initiated this action against the estate of an innocent woman aspire for Bookert to be a complete bar to coverage anytime a gun is involved. However, this Court should reject the invitation from these insurance companies to expand the Bookert ruling in a way that would practically overrule at least two decisions of our Supreme Court. Instead, this Court should reverse the circuit court and enter judgment in favor of Respondents.

II. When an assailant uses a vehicle to pursue a victim; both the vehicles are in drive and being operated at the time of the incident; and the assailant would not have been able to obtain the position that allowed him to fatally shoot the victim without the use of his vehicle, the vehicle is an active accessory and more than the mere site of the incident.

As fully explained in Appellant's opening brief, Harrison was operating her vehicle throughout the entire series of events that culminated in her shooting, and her vehicle was only stopped for less than the length of a red light. As such, Redman would not have been able to obtain the position that allowed him to fatally shoot Harrison at the second light without the use of his vehicle as an active accessory. See (Appellant's Br. 4-12).

The vehicle was more than the mere site of the assault.² Here, as has been stated, Redman used his vehicle for more than transportation to the site of the incident - he pursued Harrison using his vehicle and shot Harrison while both vehicles were turned on and in drive. **(R.pp.97-98, #3); (R.p.98, #8)** (Plaintiffs admitting that Redman's "vehicle was turned on and being operated, which includes applying the brakes of his vehicle in drive at a stop light, directly before the shooting, during the shooting, and right after the shooting."); **(R.p.97, #1)** (Plaintiff admitting that Redman

² As explained in Appellant's opening brief, the vehicle was not merely the site of the injury when Redman and Harrison were driving separate vehicles at the time of the assault and the assault could not have been committed were Redman not driving his vehicle. For a full discussion of the reasons the vehicle was more than the site of the incident, see (Appellant's Br. 4-14).

was blowing kisses and making hand gestures toward Lynn Harrison while driving); (R.p.98, #7) (It is uncontested that Harrison “was operating her vehicle in a normal and reasonably foreseeable fashion” at the time Redman fatally wounded her).

Respondents go to great lengths in their brief to mold the facts of this case to fit the case law favoring the result they seek. For example, Respondents refer to the vehicles as “stationary,” completely ignoring that both vehicles were in drive and being used for transportation at the time of the shooting. In fact, Redman could not have followed Harrison from the first red light or closely pursued Harrison to the second light without the use of his vehicle.

Respondents also refer to this incident as a “drive-by shooting,” which ignores Redman’s pursuit of Harrison and further ignores that Redman’s position in relation to Harrison was completely dependent upon the use of his vehicle. No South Carolina appellate court has ruled that the vehicle was not an active accessory in these or similar circumstances. Respondents’ distortion of the facts to make them analogous to the cases finding no coverage should be rejected by this Court.

The South Carolina Supreme Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case. See e.g., Howser, at 273, 422 S.E.2d at 108 (. . . [t]his is not a case in which the assailant merely used the vehicle to provide transportation to the situs of the shooting Nor is it a case where the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack.”); Home Ins. Co. v. Towe, at 107, 441 S.E.2d at 827 (“[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.). Howser and Towe have not been overruled, were

binding upon the circuit court's decision, and the circuit court erred by issuing an order inconsistent with these opinions.³

Therefore, for these reasons and those stated in Appellant's initial brief, the circuit court should be reversed.

III. The firing of a gun from a vehicle that is in drive and being operated, into another vehicle that is in drive and being operated, is not an intervening act of independent significance breaking any causal connection between the use of the assailant's vehicle.

Respondents argue this case is similar to Wright v. North Area Taxi, Inc., 337 S.C. 419, 523 S.E. 2d 472 (Ct. App. 1999) and that gunshots are an act of independent significance breaking any causal connection between the use of the vehicle and the assault. That conclusion is incorrect and unsupported by the facts of this case. Here, Redman's ability to carry out the shooting was entirely dependent on the use of his vehicle to pursue Harrison. Unlike the gunman in Wright, Redman could not have completed his attack without using his vehicle. Redman could not have kept up with Harrison from stop light to stop light without a car. (R.pp.97-98, #3). Redman could not have positioned himself next to Harrison at the stop light without a car. (R.p.98, #4). This case presents circumstances more similar to Howser where the assailant pursued the victim using a vehicle and the gunshots were a continuation of that pursuit.

Respondents also argue that "... Redman could have committed the same assault by walking up to Harrison's vehicle and firing his gun" and that "Redman could have accomplished the shooting by stopping the Ford Escape and getting out, shooting Harrison, then leaving in his vehicle." (Res. Br., 17). Respondents' "could have" argument is nothing more than wild speculation as to under what circumstances Redman's actions "could have" broken the causal

³ For a full discussion of the circuit court's erroneous distinguishing of Howser and Towe, see (Appellant's Br. 9-12).

chain of events if they had been different. Respondents do not dispute the facts establishing that the causal chain of events was not broken.

In addition to arguing what “could have” happened, instead of arguing the facts of this case, Respondents assert that Howser is distinguishable because this case involves “stationary” vehicles. As discussed above, referring to two vehicles that are both in drive and being operated as “stationary” is misleading—a roller-coaster is not “stationary” when it briefly pauses at the apex of a track before speeding through the remainder of the ride.

Respondents’ assertion that the vehicles were “stationary” is completely disingenuous. It is undisputed that Harrison’s vehicle was stopped for less than the length of a red light before the shooting occurred. (R.p.89, #10 & 13). No vehicle in this case was “stationary.” After the shooting Redman drove off and Harrison’s vehicle proceeded slowly through the intersection until it came to rest on the median. (R.p.85, #14); (R.p.89, #14).

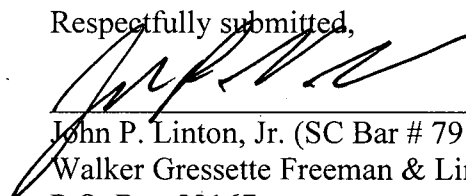
As explained above and in Appellant’s opening brief, the facts of this case are distinguishable from Wright⁴ and analogous to Howser, therefore the circuit court erred in ruling that Redman’s use of a gun was an act of independent significance breaking the causal link because Redman’s use of his vehicle and the shooting are inextricably linked as one continuing assault as in Howser. The circuit court should be reversed and judgment entered for Appellant.

CONCLUSION

Therefore, for the reasons explained above and in Appellant’s opening brief, the circuit court’s order should be reversed and judgement entered for Appellant.

⁴ Respondents also cite to Brown. That case is completely inapposite because the assailant in that case, a passenger in a truck, “jumped out of the truck and shot and killed his wife while she sat in the car.” Brown, at 986. Clearly, that has no bearing on the instant case where both vehicles were in drive and being operated at the time of the shooting.

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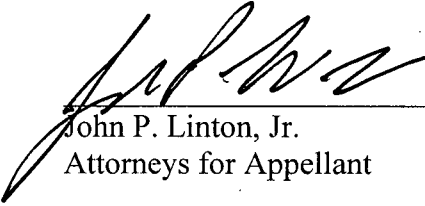
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The undersigned certifies that this Reply Brief complies with Rule 211(b), SCACR.



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2017-001946

Appeal From Dorchester County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5750
Submitted April 15, 2020 – Filed July 22, 2020

REVERSED AND REMANDED

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GEATHERS, J.: In this declaratory judgment action, Shanna Groves, as personal representative of the Estate of Lynn Harrison ("the Estate"), appeals the circuit court's order granting summary judgment to Progressive Direct Insurance Co. and USAA General Indemnity Company (collectively "Respondents"). The underlying action arises out of a vehicle-to-vehicle shooting perpetrated by Jimi Carl Redman,

Jr. against Lynn Harrison. Respondents brought suit against the Estate seeking a declaratory judgment that the killing was not covered by Harrison's uninsured or underinsured motorist policies obtained through Respondents. On appeal, the Estate argues the circuit court erred in concluding that 1) Redman's vehicle was not causally connected to the killing, and 2) Redman's firing of a gun was an intervening act of independent significance that broke any causal connection between his use of the vehicle and the killing. We reverse and remand.

FACTS

On April 2, 2015, Lynn Harrison was driving a 2010 GMC eastbound on East Carolina Road, which became Old Trolley Road just before it intersected Bacon's Bridge Road in Summerville. At the same time, Jimi Carl Redman, Jr. was driving a red Ford Escape eastbound on Old Trolley Road in the lane directly to Harrison's right. Harrison and Redman had not previously met and did not know each other.¹ As both vehicles approached the intersection, a witness saw Redman blowing kisses and making hand gestures toward Harrison. When Harrison and Redman reached the intersection, the light turned red and both vehicles stopped. Moments later, Redman pointed a rifle at Harrison and shot in her direction. The bullet went through the passenger window of Harrison's vehicle, striking her in the neck and killing her. Redman then drove through the red light and fled before being apprehended a few blocks away. Harrison's car rolled slowly through the intersection before coming to a stop on the median.

Redman's Ford Escape was either uninsured or underinsured at the time of the attack. Conversely, Harrison's husband had a South Carolina motorcycle insurance policy through Progressive² and a South Carolina auto insurance policy through USAA. At the time of the shooting, Harrison lived with her husband, both policies were in full force, and both policies contained uninsured and underinsured motorist coverage. The Progressive policy provided in relevant part:

If you pay the premium for this coverage, we will pay for damages that an insured person is legally entitled to recover from the owner or operator of:

¹ The record reveals that Redman traveled to Dorchester County from Texas, and it appears that his killing of Harrison was a random act of violence.

² See *Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007) ("[A]s a general proposition, UIM coverage follows the individual insured rather than the vehicle insured, that is, UIM coverage, like UM, is 'personal and portable.'").

- 1) an uninsured^[3] motor vehicle because of bodily injury:
 - a) sustained by an insured person;
 - b) caused by an accident; and
 - c) arising out of the ownership, maintenance or use of an uninsured motor vehicle[.]

Similarly, the USAA policy provided:

We will pay for the following damages which a covered person is legally entitled to recover from the owner or operator of an uninsured^[4] motor vehicle because of an auto accident:

- 1) BI sustained by a covered person; and
- 2) injury to or destruction of the property of a covered person.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

On August 7, 2015, Progressive filed a complaint against the Estate seeking a declaratory judgment finding that the policy it issued did not provide uninsured motorist coverage⁵ for Harrison's death. On September 17, 2015, Progressive and USAA filed an amended complaint, adding USAA as a plaintiff and seeking a declaratory judgment that neither of their policies provided coverage for Harrison's death. On November 3, 2015, the Estate filed its answer to the amended complaint. On May 9, 2016, Respondents moved for summary judgment and, on January 27, 2017, the Estate filed a cross-motion for summary judgment.

³ Except for the words uninsured and underinsured, the Progressive underinsured motorist policy is virtually identical to the uninsured motorist policy.

⁴ The USAA underinsured motorist policy is virtually identical to the uninsured motorist policy except for the use of the word underinsured instead of uninsured and the following limitation found in the underinsured policy: "However, this does not include damage to property owned by the covered person while contained in your covered auto."

⁵ Respondents assert there is no meaningful difference between the uninsured motorist coverage and the underinsured motorist coverage for the purposes of this appeal.

On February 17, 2017, the circuit court held a hearing and heard arguments on both summary judgment motions. On August 7, 2017, the circuit court entered an order granting summary judgment in favor of Respondents and denying the Estate's summary judgment motion. In its order, the circuit court determined that Harrison's death did not arise out of Redman's ownership, maintenance, or use of a vehicle because there was no causal connection between Redman's use of the vehicle and Harrison's death. Additionally, the circuit court concluded that even if there was a causal connection between Redman's use of the vehicle and Harrison's death, Redman's act of shooting a rifle out of the vehicle was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in concluding that Redman's vehicle was not causally connected to the killing?
2. Did the circuit court err in concluding that Redman's firing of a gun was an intervening act of independent significance that broke any causal connection between his use of the vehicle and the killing?

STANDARD OF REVIEW

"In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the [circuit] court under Rule 56(c), SCRCP." *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). "Pursuant to Rule 56(c), SCRCP, summary judgment may be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id.* "On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party." *Id.* (quoting *Cantrell v. Green*, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990)). In other words, appellate courts must "liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

LAW/ANALYSIS

The Estate argues the circuit court erred in concluding that Harrison's death did not arise out of Redman's ownership, maintenance, or use of his vehicle. Respondents argue the circuit court's conclusion is proper because 1) there was no

causal connection between Redman's vehicle and the assault; and 2) Redman's firing of a gun was an intervening act of independent significance that broke any causal connection between his use of the vehicle and the assault. We agree with the Estate.

Pursuant to South Carolina law, no automobile insurance policy may be issued in this state unless it includes uninsured motorist coverage. *Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 91, 644 S.E.2d 62, 63 (2007); *see also* S.C. Code Ann. § 38-77-150(A) (2015) (requiring that any insurance policy issued in South Carolina include uninsured motorist coverage). Accordingly, "[a]n insured is legally entitled to recover damages arising out of the 'ownership, maintenance, or use' of an uninsured vehicle." *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998) (quoting S.C. Code Ann. § 38-77-140 (1989)). In *Aytes*, our supreme court laid out a three-part test for determining whether an injury arises out of the ownership, maintenance, or use of an uninsured vehicle. *Id.* To satisfy the test, a party must establish the following elements:

- 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.

State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (citing *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745).

Here, it is undisputed that both Harrison and Redman's vehicles were being used for transportation at the time of the shooting. Therefore, whether Harrison's killing falls within the uninsured motorist coverage of Respondents' policies hinges on the remaining two elements. We will address each element in turn.

I. Causal connection

The Estate argues the circuit court erred in concluding that there was no causal connection between Redman's vehicle and the killing because 1) the vehicle was an active accessory to the shooting; 2) the vehicle was more than the mere situs of the fatal injury; and 3) Harrison's death was foreseeably identifiable with the normal use of a vehicle. Respondents argue the circuit court properly determined that no causal connection existed because 1) Redman's vehicle was not an active accessory to the shooting; 2) Redman's vehicle was merely the site from

which he fired the gun; and 3) gunshot injuries are not foreseeably identifiable with the normal use of a vehicle. We agree with the Estate.

Our courts have indicated that a 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. at 293, 523 S.E.2d at 182.

A) Active accessory to the assault

The Estate argues the circuit court erred in concluding that Redman's vehicle was not an active accessory to the assault because, but for the vehicle, Redman would not have been in a position to shoot Harrison. The Estate further contends that Redman would not have been able to follow Harrison to the stoplight without the use of the vehicle. Respondents argue the circuit court's conclusion was proper because Redman's position was not dependent on his use of the vehicle. Respondents further contend that Redman's use of the vehicle did not contribute to the shooting because Redman could have walked up to Harrison's vehicle off the street or after exiting his own vehicle before shooting her.

The Estate argues the facts in the record are similar to the facts of *Wausau Underwriters Ins. Co. v. Howser*⁶ and *Home Ins. Co. v. Towe*,⁷ further asserting that the circuit court erred in distinguishing those cases from the case at bar. In *Howser*, our supreme court found that a vehicle was an active accessory to a vehicle-to-vehicle shooting. 309 S.C. at 273, 422 S.E.2d at 108. On a summer night in 1987, Howser and a friend were driving home after leaving a bowling alley. *Id.* at 270–71, 422 S.E.2d at 107. The two stopped at an intersection and drove about one-tenth of a mile when they were bumped by another vehicle. *Id.* at 271, 422 S.E.2d at 107. The unknown vehicle bumped Howser's vehicle two more times, and Howser accelerated her vehicle. *Id.* The unknown driver then pulled alongside Howser, shouted at her to slow down and stop, and pointed a pistol at the passenger window. *Id.* Howser made a quick left turn onto a side street but as she

⁶ 309 S.C. 269, 422 S.E.2d 106 (1992).

⁷ 314 S.C. 105, 441 S.E.2d 825 (1994).

completed her turn, the unknown driver shot at her vehicle. *Id.* The bullet entered the vehicle, fragmented, and hit Howser's back in three places. *Id.* Notably, the supreme court observed that, "[t]he injuries that Howser sustained were the result of the gunshot[.]" further pointing out that "[n]either Howser nor Shealy w[ere] hurt when the other vehicle bumped [Howser's vehicle]." *Id.* Following the shooting, the unknown driver fled and was never captured. *Id.*

The supreme court held that it was "apparent that the unknown vehicle was an active accessory to th[e] assault." *Id.* at 273, 422 S.E.2d at 108. The court noted that the case was not one in which the assailant merely used his vehicle to provide transportation to the shooting, nor was it a case in which the assailant "happened, incidentally, to be sitting in a stationary vehicle at the time of the attack." *Id.* Rather, the court found that "[o]nly through [the] use of his vehicle was the assailant able to closely pursue Howser, thereby enabling him to carry out the pistol assault." *Id.* (emphasis added). Accordingly, the court determined that "[t]he gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part." *Id.* The court further noted that "only a motor vehicle could have provided the assailant a quick and successful escape." *Id.*

Similarly, in *Towe*, our supreme court concluded that a vehicle was an active accessory to an assault. 314 S.C. at 107, 441 S.E.2d at 827. *Towe* was driving when his passenger threw a bottle from the vehicle at a road sign. *Id.* at 106, 441 S.E.2d at 826. Instead of hitting the sign, the bottle shattered on the steering wheel of a tractor being driven by the victim in the opposite direction. *Id.* The supreme court held the vehicle was an active accessory to the attack because "[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 victim]'s injuries." *Id.* at 107, 441 S.E.2d at 827 (emphasis added).

Here, in determining that Redman's vehicle was not an active accessory to the shooting, the circuit court made the following distinctions between the facts at bar and the facts of *Howser* and *Towe*: 1) Redman did not use his vehicle to keep up with Harrison's vehicle; 2) Redman's vehicle did not make contact with Harrison's vehicle; 3) there was no evidence that Harrison saw Redman driving beside her or that she was aware of him making hand gestures toward her;⁸ 4)

⁸ We find the circuit court improperly determined this lack of evidence distinguished the facts at bar from *Howser* and *Towe*. Notably, there is no

Redman's use of the vehicle did not contribute to the severity of Harrison's injury; and 5) Harrison made no attempt to evade Redman. We find that the circuit court erred in relying on these distinctions.

First, like the two vehicles in the present case, the vehicles in *Towe* never made contact. Moreover, similar to the present case, there was no evidence that the driver of the tractor was aware of the passenger before he threw the bottle, and the tractor's driver made no attempt to evade the vehicle. Second, in *Howser*, the use of the vehicle did not contribute to the severity of Howser's injuries because Howser's injuries, like Harrison's, were the result of the shooting. Additionally, while the assailant bumped Howser's vehicle, the supreme court noted that this act did not cause Howser's injuries. Therefore, the circuit court's distinction of *Howser* from the present case on the ground of vehicle-to-vehicle contact was not meaningful. Finally, the facts of the case at bar are on all fours with the facts in *Howser*. 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*. Accordingly, we do not find that the brevity of Redman's pursuit, resulting from Harrison's compliance with the stoplight, distinguishes *Howser* from the case at bar. 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.

The circuit court erred in finding Redman's vehicle was not an active accessory to the shooting by overlooking one significant factor consistent between *Howser*, *Towe*, and the case at bar; but for the use of the vehicles, the assailants would not have been in a position to injure the victims. See *Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("*Only through [the] use of his vehicle was the assailant able to closely pursue Howser, thereby enabling him to carry out the pistol assault.*" (emphasis added)); *Towe*, 314 S.C. at 107, 441 S.E.2d at 827 ("The use of the automobile *placed [the passenger] in the position* to throw the bottle at the sign" (emphasis added)). Here, the record indicates that Redman drove beside Harrison, making hand gestures at her until the two stopped at a red light.

evidence in the record indicating that Harrison was unaware of Redman. The sole witness to the attack indicated she was driving in the left lane *behind* Harrison at the time Redman was blowing kisses and gesturing towards Harrison. Consequently, the fact that the witness did not see Harrison react to Redman through Harrison's back window and driver seat does not lead to the conclusion that Harrison was unaware of Redman or his actions.

Therefore, whether or not Harrison saw Redman, it is apparent that *Redman saw Harrison* at some point before the two drove down the street and stopped at the light. 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. In other words, but for Redman's use of his vehicle, he would not have been in a position to shoot Harrison.

Two additional factors support the conclusion that Redman's vehicle was an active accessory to the shooting. First, like the assailant in *Howser*, Redman used his vehicle to immediately flee the scene. While the assailant in *Howser* was able to successfully flee and avoid apprehension, the mere fact that Redman was eventually arrested does not diminish the fact that his vehicle was used to flee the scene. Second, unlike the assailants in *Howser* and *Towe*, Redman's vehicle contributed to the concealment of his weapon. The weapons used in *Howser* and *Towe*, a pistol and a bottle, respectively, do not require the use of a vehicle to be transported inconspicuously, and could easily be hidden in an assailant's waistband. Here, Redman used a rifle to shoot Harrison. 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. However, through the use of his vehicle, Redman was able to transport his rifle down the street without notice until he was in position to shoot Harrison. For the foregoing reasons, we find the circuit court erred in concluding Redman's vehicle was not an active accessory to the shooting.

Respondents argue the circuit court properly determined Redman's vehicle was not an active accessory to the shooting because the facts of the case at bar are more similar to the facts of *Holmes v. Allstate Ins. Co.*, 786 F. Supp.2d 1022 (D.S.C. 2009). In *Holmes*, the U.S. District Court for the District of South Carolina found that a vehicle was not an active accessory to an assault. 786 F. Supp.2d at 1027. Holmes and her ex-boyfriend broke up, and he began stalking Holmes, which included following her around town in his vehicle. *Id.* at 1023–24. One day, Holmes went to a friend's house and noticed her ex-boyfriend driving back and forth in front of the house. *Id.* at 1024. Later, Holmes left to pick up her neighbor's child at a local school bus stop. *Id.* Holmes's ex-boyfriend happened to be driving around and saw Holmes drive past him before turning to follow her. *Id.* Holmes's ex-boyfriend eventually found Holmes parked on the side of the road awaiting the arrival of the school bus. *Id.* Holmes's ex-boyfriend then shot Holmes several times before fleeing. *Id.*

In determining that the ex-boyfriend's vehicle was not an active accessory to the assault, the district court noted nothing in the record indicated that Holmes was aware that her ex-boyfriend was approaching or that the ex-boyfriend's vehicle made contact with Holmes's vehicle. *Id.* at 1026. The court further considered the fact that the ex-boyfriend's use of his vehicle did not increase the severity of the harm caused by the gunshots. *Id.* at 1027. Rather, the ex-boyfriend "merely used his car to approach [Holmes], stopped his car next to her parked car, fired several gunshots at [Holmes], and drove off." *Id.* Thus, the court explained that the case was one in which the ex-boyfriend merely "used his vehicle . . . to locate [Holmes], to position himself next to [Holmes]'s vehicle, and to leave the scene of the crime," not a case in which Holmes was "traveling in her vehicle at the time [her ex] fired the gun, thus making [her ex-boyfriend's] position in relation to [Holmes] depend[e]nt on the use of his vehicle." *Id.* at 1026–27.

At the outset, there is a key distinction between *Holmes* and the facts at bar.⁹ Here, Harrison's car was in drive and operational during the shooting, whereas in *Holmes*, the victim's vehicle was parked and on the side of the road. Therefore, in *Holmes*, the assailant did not need the use of his vehicle to put himself in a position to shoot the victim. The assailant could have spotted the vehicle while on foot, walked up to the window, and shot the victim. *See Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("This is not a case in which *the assailant merely used the vehicle to provide transportation to the situs of the shooting* Nor is it a case where *the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack.*" (emphases added)). Conversely, Redman could not have kept pace with Harrison's car and positioned himself to shoot her but for his use of the automobile.

⁹ Furthermore, we note that a federal district court's interpretation of South Carolina insurance law is not binding on this court. *See Unisun Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 552, 436 S.E.2d 182, 184 (Ct. App. 1993) ("A contract of insurance is governed by the law of the state in which [the] application for insurance was made, the policy delivered, and the contract formed."); *see also Santee River Cypress Lumber Co. v. Query*, 168 S.C. 112, 117, 167 S.E. 22, 24 (1932) ("We are not bound by the construction placed upon [a state s]tatute by any [f]ederal [c]ourt, and the [f]ederal [c]ourts should adopt and follow our construction."); *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 237, 659 S.E.2d 213, 223 (Ct. App. 2008), *rev'd on other grounds*, 386 S.C. 108, 687 S.E.2d 29 (2009) (providing that an appellate court is not bound to follow a federal court's interpretation of South Carolina law).

Moreover, in explaining its conclusion, the district court focused on the victim's lack of mobility in distinguishing *Holmes* from scenarios like the one at bar. The court noted that the ex-boyfriend merely used his vehicle to position himself next to Holmes's stationary vehicle before shooting her. *See Holmes*, 786 F. Supp.2d at 1026–27. Thus, the vehicle was not an active accessory to the shooting because once the ex-boyfriend was in position to shoot Holmes, regardless of how he reached that position, he did not need the use of his vehicle to maintain his ability to shoot Holmes. Conversely, the district court explained that had Holmes's car been in motion, the ex-boyfriend's position in relation to Holmes would have been *dependent* on the use of his vehicle. *Id.* at 1026–27. In other words, a would-be assailant would be incapable of maintaining a close position from which to attack a mobile driver but for the use of the assailant's vehicle.

Respondents argue the facts at bar mirror those in *Holmes* because Harrison's vehicle was stationary when Redman shot her. Thus, Respondents argue, Redman could have walked up and shot Harrison without the use of his vehicle. However, Respondents' argument rests on the notion that Redman could have waited at the corner of the intersection with a rifle and approached Harrison on foot. This argument ignores the fact that Redman used his vehicle to drive from the point where he first spotted Harrison, while keeping pace with her vehicle, to the point where he shot her at the stoplight. Accordingly, Harrison's momentary stop at the stoplight is distinguishable from the operation of the car in *Holmes*, which was in park and whose engine was turned off at the time of the assault. This difference is highlighted by the fact that Harrison's vehicle, with engine running and in drive, rolled through the intersection after she was shot.

Respondents also argue that Redman could have put his car in park at the stoplight, exited, shot Harrison, and fled the scene on foot. Thus, Respondents argue that Redman's use of the vehicle did not contribute to the assault. However, while the assailant in *Holmes* could have parked before attacking his victim, he did not need his vehicle to put himself in a position to shoot the victim because the victim was sitting in a vehicle that was turned off and stationary. Conversely, Redman would not have been able to keep pace with Harrison from the moment he spotted her until the moment he shot her but for the use of his vehicle. Therefore, the fact that Harrison's vehicle was operational and in drive distinguishes the facts at bar from *Holmes*.

B) Mere situs of the injury

The Estate argues the circuit court erred in finding Redman's vehicle was "merely the site from which he fired the gun." Respondents argue the circuit court

finding was proper. Respondents further assert Harrison's vehicle is the mere situs of her injury.

Respondents assert the facts of this case are similar to the facts of *Holmes* because Redman merely used his vehicle to approach Harrison's vehicle, stop, and fire at Harrison. This argument mirrors Respondents' previous argument that Redman's vehicle was not an active accessory to the assault because he could have approached Harrison on foot. Thus, Respondents argue that because the car was not necessary to the assault, it is the mere situs from which Redman fired the weapon. See *Holmes*, 786 F.Supp.2d at 1027 ("[The ex] *merely used his car to approach Plaintiff*, stopped his car next to her parked car, fired several gunshots at Plaintiff, and drove off." (emphasis added)). However, this argument ignores the fact that Redman used his vehicle to drive from the point where he first spotted Harrison to the point where he shot her at the stoplight while also keeping pace with her vehicle. See *Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("This is not a case in which *the assailant merely used the vehicle to provide transportation to the situs of the shooting* Nor is it a case where *the assailant happened, incidentally, to be sitting in a stationary vehicle at the time of the attack.*" (emphases added)).

Respondents also argue Harrison's vehicle is the mere situs of her injury, arguing the facts of the case at bar are comparable to the facts in *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999). In *Wright*, this court determined a taxi cab was merely the situs of the driver's injury. *Id.* at 425, 523 S.E.2d at 475. One night while the driver was working, she picked up two men who, in a planned and joint effort, attempted to rob the driver while they were occupying her taxi. *Id.* at 422, 523 S.E.2d at 473. The driver was shot during the robbery and crashed into a parked vehicle. *Id.* The driver eventually died from her injuries. *Id.* This court found that the driver's taxi "served merely as the situs of the shooting." *Id.* at 425, 523 S.E.2d at 475. The court further explained that, "[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." *Id.*

We find the case at bar easily distinguishable from *Wright*. First, in *Wright*, the plaintiffs were not seeking coverage under an uninsured motorist provision of their own policy. Rather, the plaintiffs sought coverage from the driver's taxi company as a self-insurer. *Id.* 422, 523 S.E.2d at 473. Second, the assault was not facilitated by the use of an uninsured vehicle. Rather, the assailants entered the victim's self-insured taxi before the assault occurred. Third, the assailants and the victim were all located in the same vehicle when the assault occurred. Thus, the

taxi was merely the scene of the assault. As such, this court found that the mere fact that the injury occurred in the taxi cab rather than on the street was not enough to invoke coverage. Here, Redman shot Harrison from his own vehicle rather than from within her own vehicle. Accordingly, we do not agree that the findings in *Wright* apply to the facts at bar.

C) Foreseeably identifiable injuries

The Estate argues the circuit court erred in finding Harrison's death was not foreseeably identifiable with the use of Redman's vehicle. Respondents argue the circuit court's finding is proper because a gunshot injury is not foreseeably identifiable with the normal use of an automobile.

Respondents cite *Bookert* for the proposition that gunshot injuries are not "foreseeably identifiable with the normal use of an automobile." 337 S.C. at 293, 523 S.E.2d at 182. Bookert's son Michael was with some friends and stopped at a Hardee's restaurant, where two soldiers and fifteen other young men became involved in an altercation. *Id.* at 292, 523 S.E.2d at 181. Michael and his friends left and went to a McDonald's restaurant, as did the fifteen men from the Hardee's. *Id.* The two soldiers were armed and picked up a third soldier before driving to the McDonald's in search of the men from Hardee's. *Id.* As Michael was about to walk into the McDonald's, he heard the soldiers yelling and turned in their direction. *Id.* The soldiers' vehicle was stopped in the traffic lane with the motor running, and one soldier stood 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.* The shotgun pellets did not hit Michael, but while the vehicle was still moving forward, the front passenger shot Michael, striking him with a bullet in each leg. *Id.* at 292–93, 523 S.E.2d at 181–82. Our supreme court ultimately found that Michael's injuries were not "foreseeably identifiable with the normal use of an automobile." *Id.* at 293, 523 S.E.2d at 182. Notably, however, our supreme court did not overrule *Howser*, in which the court found a causal connection between the use of the vehicle and the injuries suffered by the victim of a vehicle-to-vehicle shooting.

At the outset, the facts at bar are distinguishable from *Bookert*. Notably, Michael was on foot when he was assaulted. Thus, the facts in *Bookert* are consistent with *Holmes* and *Wright*, in which the assailant's ability to carry out the attack was not dependent on the use of the vehicle. *See Howser*, 309 S.C. at 273, 422 S.E.2d at 108 ("This is not a case in which *the assailant merely used the vehicle to provide transportation to the situs of the shooting* Nor is it a case where *the assailant happened, incidentally, to be sitting in a stationary vehicle at*

the time of the attack." (emphases added)). As such, the assailant's use of the vehicle did not contribute to the assault because the assailants could have carried out the same attack after approaching on foot. Conversely, but for the use of his vehicle, Redman would not have been able to keep pace with Harrison from the point he spotted her to the stoplight where he shot her.

Additionally, we disagree with the proposition that *Bookert* created a bright line rule that gunshot injuries are not foreseeably identifiable with the normal use of an automobile. As previously mentioned, the *Bookert* court did not overrule *Howser*. Therefore, we must assume the fact that an assailant fired a gun from an automobile does not automatically defeat coverage by the automobile's insurer. Accordingly, we conclude that the holding in *Bookert* is limited to the facts of that case. Turning to the case at bar, the facts are more consistent with the vehicle-to-vehicle shooting in *Howser* than the vehicle-to-pedestrian shooting in *Bookert*. Consequently, we conclude that Redman's assault was foreseeably identifiable with the normal use of an automobile.

Based on the foregoing, we find that Redman's vehicle was an active accessory to the shooting and more than the mere situs of the attack or injury. Additionally, pursuant to *Howser*, we conclude that Harrison's death was foreseeably identifiable with the normal use of a vehicle. *See Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (indicating that a "causal connection means: a.) the vehicle was an 'active accessory' to the assault; and b.) something less than proximate cause but more than [the] mere site of the injury; and c.) that the 'injury must be foreseeably identifiable with the normal use of the automobile"). Accordingly, the circuit court erred in finding that there was no causal connection between Redman's use of his vehicle and Harrison's death.

II. Intervening act of independent significance

The Estate argues the circuit court erred in concluding that Redman's act of shooting Harrison was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault. Respondents argue the circuit court's conclusion was proper. We agree with the Estate.

"Once causation is established, the court must determine if an act of independent significance occurred breaking the causal link." *Howser*, 309 S.C. at 273, 422 S.E.2d at 108. "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.'" *Hite v.*

Hartford Acc. & Indem. Co., 288 S.C. 616, 621, 344 S.E.2d 173, 176 (Ct. App. 1986).

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.

Id. at 621, 344 S.E.2d at 176–77.

In *Howser*, our supreme court found the unknown driver's gunshot was not an intervening act of independent significance. 309 S.C. at 274, 422 S.E.2d at 109. The court explained that "the unknown driver's use of his vehicle and the shooting were inextricably linked as one continuing assault." *Id.* Similarly, in *Towe*, the supreme court found the use of the vehicle and the passenger's throwing of the bottle were "'inextricably linked' as one continuing act." *Towe*, 314 S.C. at 108, 441 S.E.2d at 827.

Conversely, in *Wright*, this court found the gunmen's shooting was an intervening act of independent significance that broke any causal connection between the vehicle and the driver's injuries. 337 S.C. at 427, 523 S.E.2d at 476. This court found that "[t]he fatal injuries that [the driver] sustained were unrelated to any use of the vehicle." *Id.* The court further explained that "[t]he same injuries could have occurred when the vehicle was parked, or otherwise not moving, or when [the victim] or the gunmen were standing outside of the vehicle." *Id.*

We find the facts at bar more closely resemble those of *Howser* and *Towe* because, unlike the assault in *Wright*, Redman's attack on Harrison was not "unrelated to any use of [his] vehicle." *Id.* 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. Thus, Redman's "use of his vehicle and the shooting were inextricably linked as one continuing assault." *Howser*, 309 S.C. at 274, 422 S.E.2d at 109. Accordingly, the circuit court erred in concluding that Redman's act of shooting Harrison was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault.

Based on the foregoing, we conclude: 1) there was a causal connection between Redman's vehicle and the shooting; 2) there was no act of independent significance breaking the causal link; and 3) the vehicle was being used for transportation at the time of the assault. *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745 (indicating that an injury arises out of the ownership, maintenance, or use of an uninsured vehicle if 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). Therefore, the circuit court erred in concluding that Harrison's death did not arise out of Redman's ownership, maintenance, or use of his vehicle. Thus, we hold the circuit court erred in granting summary judgment in favor of Respondents.

CONCLUSION

Based on the foregoing, we hold the circuit court erred in concluding 1) that there was no causal connection between Redman's vehicle and the assault, and 2) that Redman's act of shooting Harrison was an intervening act of independent significance that broke any causal connection between the use of the vehicle and the assault. Accordingly, the circuit court's grant of summary judgment in favor of Respondents is **REVERSED** and the case is **REMANDED** to the circuit court for further proceedings.

LOCKEMY, CJ., and HEWITT, J., concur.¹⁰

¹⁰ We decide this case without oral argument pursuant to the Supreme Court's order regarding the operation of the appellate courts during the Coronavirus Emergency, dated March 20, 2020, and Rule 215, SCACR. *See RE: Operation of the Appellate Courts During the Coronavirus Emergency* (S.C. Sup. Ct. Order dated March 20, 2020, amended May 29, 2020).

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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.

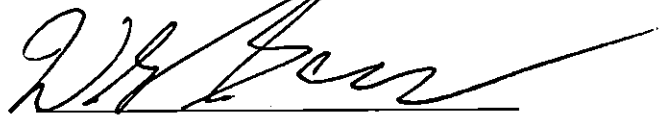
The July 22 Opinion finds facts that are not in the record and, some of which, were not even argued by any party on summary judgment or on appeal. Redman shot Harrison from his stationary vehicle to Harrison's stationary vehicle. Appellant Groves did not present evidence of what happened before the two 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

Wesley B. Sawyer, Esquire

S.C. Bar # 100229

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for Respondents

Columbia, South Carolina
August 5, 2020

RECEIVED

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
Miller, Dawson, Sigal & Ward, LLC
8310 Rivers Avenue, Suite D
North Charleston, SC 29406

John P. Linton, Jr., Esquire,
Walker, Gressette, Freeman & Linton, LLC
P.O. Box 22167
Charleston, SC 29413



Wesley B. Sawyer



MURPHY & GRANTLAND, P.A.

Wesley B. Sawyer
Direct dial 803-454-1233
wsawyer@murphygrantland.com

August 5, 2020

RECEIVED

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

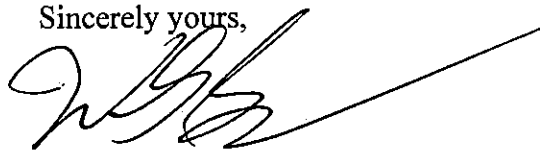
Re: Progressive Direct Insurance Co., and USAA General Indemnity Company vs. James Mark Harrison as the Personal Representative of the Estate of Lynn Harrison
Civil Action No.: 2015-CP-18-1571
Claim No.: 155621943 (Progressive) 31913153-5 (USAA)
Date of Loss: 4-2-15
Our File No.: 1115-2637/3250-0892

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

RECEIVED
AUG 10 5 2020
SC Court of Appeals



Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, South Carolina 29260

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

The South Carolina Court of Appeals

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

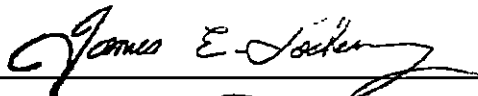
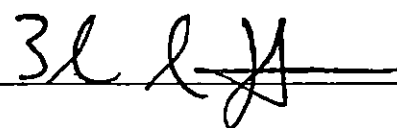
v.

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

Appellate Case No. 2017-001946

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.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:
Ryan Harris Sigal, Esquire
Wesley Brian Sawyer, Esquire

FILED
Sep 10 2020

John Phillips Linton, Jr., Esquire
The Honorable Alison Renee Lee