IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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, ...Petitioners,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

The Court of Appeals issued its opinion in this case on July 22, 2020. (App. p. 188). Counsel for the Petitioners certifies that the Petition for Rehearing was filed and served fourteen (14) days later on August 5, 2020. (App. p. 206). The Court of Appeals ruled on the Petition for Rehearing by an order filed on September 10, 2020. (App. p. 229). This Petition for Writ of Certiorari is timely served and filed.

QUESTIONS PRESENTED

1. **Whether injuries resulting from the intentional firing of a gun from one vehicle into another are foreseeably identifiable with the normal use of an automobile?**
2. **If so, whether firing the gun after both vehicles have come to a stop at a stop light constitutes an act of independent significance that breaks any causal connection with the use of an automobile?**
3. **Whether the Court of Appeals improperly shifted the burden of proof to Petitioners and found facts that were not in the record, in direct conflict with this Court's past precedent?**

SUMMARY

Petitioners Progressive Direct Insurance Company and USAA General Indemnity Company (collectively, "Petitioners") respectfully move and petition this Court, pursuant to Rule 242, SCACR, as well as other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. Petitioners respectfully submit that the Court of Appeal's July 22, 2020 decision is in direct conflict with this Court's prior decisions of *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998) and *State Farm Mutual Automobile Insurance Company v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999).

This appeal arises out of a 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. Petitioners 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.

In *Aytes*, this Court established the current test for whether an injury arises out of the ownership, maintenance or use of an automobile for purposes of automobile insurance coverage. The *Aytes* Court adopted a requirement that the injury must be "foreseeably identifiable with the normal use of an automobile." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745-46 (citation omitted). Shortly thereafter, this Court held in *Bookert* that injuries sustained from the intentional firing of a gun were not foreseeably identifiable with the normal use of an automobile. *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182. Therefore, Harrison's injuries did not arise out of the ownership, maintenance or use of an automobile.

In the more than twenty (20) years since those decisions, no appellate court in South Carolina and no federal court applying South Carolina law has found that injuries from the intentional firing of a gun were foreseeably identifiable with the normal use of an automobile. In its July 22, 2020 decision, the Court of Appeals failed to accurately apply this binding Supreme Court precedent and, in doing so, upended more than twenty (20) years of precedent. Moreover, the case creates a conflict between the decisions of the South Carolina Court of Appeals and the United States District Court for the District of South Carolina when applying South Carolina law. *See Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022, 1027 (D.S.C. 2009) ("While Plaintiff likens the assault on her with that of a drive-by shooting, *Bookert* establishes that such use of a vehicle will not satisfy the causal connection requirement necessary to invoke insurance coverage, since such conduct is not foreseeably identifiable with the normal use of an automobile.").

This Court recently accepted a certified question on this issue from the United States District Court for the District of South Carolina as one of two certified question. *See Sylva v.*

Allstate Prop. & Cas. Ins. Co., 424 S.C. 512, 818 S.E.2d 753 (2018). However, this Court did not answer the substantive question because the answer to the first certified question in *Silva* was dispositive. *Id.* at 520, 818 S.E.2d at 758 ("Because our answer is dispositive of the underlying claim, we decline to address question two."). Thus, this Court was unable to provide guidance in that case.

For the above-stated reasons, the Court of Appeals' decision conflicts with binding precedent from this Court. Moreover, this case presents an opportunity for this Court to provide sorely needed direction on this important question, which it was prevented from doing in the *Sylva* case. Therefore, Petitioners respectfully request that this Court grant the Petition.

STATEMENT OF THE CASE

A. Facts

On April 2, 2015, Lynn Harrison operated a 2010 GMC Terrain in Summerville eastbound on East Carolina avenue, which became Old Trolley 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 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). The witness did not indicate that Harrison was driving in an erratic manner. In fact, it is undisputed in this case that Harrison operated her vehicle in a normal manner. (R. p. 98).

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). Redman then disregarded the red light, proceeded through the intersection, and was apprehended a few blocks away. (R. pp. 85, 89).

As the Circuit Court held, there is no evidence Harrison was aware of Redman. (R. p. 4). In fact, the Estate concedes 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, and it is undisputed Redman and Harrison were complete strangers. (R. pp. 85, 89). The vehicles operated by Redman and Harrison never made contact. (R. pp. 85, 89). Harrison's injuries resulted solely from the use of the rifle.[1]

B. Procedural History

On August 17, 2017, the Honorable Alison Renee Lee issued a thorough Order granting Petitioners' Motion for Summary Judgment and denying the Estate's cross-motion. In doing so, the Circuit Court faithfully applied this Court's precedent in *Aytes* and *Bookert* and approved the reasoning of the District Court in *Holmes*.

The Estate filed a timely appeal. Oral arguments were scheduled to take place on April 6, 2020. However, the Court of Appeals cancelled the arguments due to the Coronavirus Emergency. The Court of Appeals issued its decision on July 22, 2020. The July 22 decision failed to apply this Court's precedent. Instead, the Court of Appeals relied upon cases that pre-

[1] Redman was charged with murder and possession of a weapon during a violent crime. According to the South Carolina online public index, Redman pled guilty to the murder charge while this appeal was pending.

dated the test adopted in *Aytes*, namely *Howser* and *Towe*. Importantly, neither of those cases considered whether gunshot injuries were foreseeably identifiable with the normal use of an automobile.

In addition to failing to apply *Aytes* as interpreted by this Court in *Bookert*, the Court of Appeals supported its decision by making factual determinations that were not in evidence. For example, the Court of Appeals found that Redman used his vehicle to "conceal" his rifle. (App. p. 196). This is a fact that is not in the record, and it was never even argued by the parties before either the Circuit Court or the Court of Appeals. Likewise, the Court of Appeals found that there was a vehicular pursuit even though there is no evidence of what transpired before the two vehicles were approaching the red light where the shooting occurred and even though the Circuit Court specifically found there was no evidence of a pursuit. Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *en Banc*, which were denied.

ARGUMENT

I. The Court of Appeals' Decision Directly Conflicts with this Court's Precedent in *Aytes* and *Bookert* and, Instead, Relies Upon Cases That are No Longer Good Law.

In *Bookert*, this Court held that injuries resulting from gunshots fired from a vehicle were not "foreseeably identifiable with the normal use of an automobile." 337 S.C. at 293, 523 S.E.2d at 182. The Court of Appeals disregarded the rule set out in *Bookert*, holding that "*Bookert* is limited to the facts of that case." (App. p. 201). The facts of *Bookert* involved gunshot injuries from a moving vehicle. This 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 its facts, *Bookert* applies to this case, which involves injuries sustained by the intentional firing of a gun from an automobile. *Bookert* is controlling, and the Court of Appeals failed to apply this Court's binding precedent.

Instead of applying the *Bookert* holding, the Court of Appeals relied 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 Court of Appeals relied on this Court's 1992 decision of *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 296, 422 S.E.2d 106 (1992) and this 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.

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 *Aytes*. In *Aytes*, this 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 *Aytes* Court adopted the requirement 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 (emphasis added). This was not part of this 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." That was this 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); *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523, 523 S.E.2d 472, 476 (Ct. App. 1999) (holding gunshot injuries during a robbery inside a moving taxicab were not inherent "in the use of the motor vehicle as a motor vehicle."). Thus, the Court of Appeals' decision in this case fundamentally changes the law in South Carolina and, in doing so, disregards two decades of precedent.

The appellate history in *Bookert* is enlightening here. The Court of Appeals rendered its opinion in *Bookert* before the Supreme Court adopted the *Aytes* "normal use" standard. Relying on *Howser* and *Towe*, the Court of Appeals found that the drive-by shooting in *Bookert* arose out of the use of an automobile. The Court of Appeals 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 the Court of Appeals relied upon in its decision in this case: (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;"[2] and (4) "but for Redman's use of

[2] 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.

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." (App. p. 196).

On review, the Supreme Court in *Bookert* reversed. Despite all 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 the victim's gunshot injuries did not arise out of the use of an auto despite the facts in that case. The *Bookert* court ruled that gunshot injuries were not "foreseeably identifiable with the normal use of an automobile." *Id.*

The holding in *Bookert* acknowledges that *Aytes* changed the law in South Carolina. As a result, the Court of Appeals' reliance on *Howser* and *Towe* were misguided because those cases did not address the new factor adopted in *Aytes* – whether the injuries were foreseeably identifiable with the normal use of an automobile. Applying the new *Aytes* test, this Court in *Bookert* held that gunshot injuries were not foreseeably identifiable with the normal use of an automobile. In other words, *Howser* was no longer good law.

The cause of Harrison's injuries in this case are exactly the same as the cause of the injuries in *Bookert* – the intentional firing of a gun. By limiting the holding in *Bookert* to its facts, the Court of Appeals did the opposite of what this Court did in *Bookert*. In *Bookert*, this Court held that the nuanced facts did not matter because – as a categorical rule – the gunshot injuries resulting from the intentional firing of a gun were not foreseeably identifiable with the normal use of an automobile. Such a broad holding cannot be disregarded by deciding that the case is "limited to its facts."

The Court of Appeals concludes its "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." (App. p. 201). The Opinion does not explain how Redman's normal use of a vehicle could foreseeably cause gunshot injuries.[3] Automobiles are normally used for

[3] 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

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.

By limiting this Court's holding in *Bookert* to its facts, the Court of Appeals failed to apply the law set forth in *Aytes* and *Bookert*. This Court in *Aytes* established a new test for whether injuries arise out of the use of an automobile, requiring that the injuries be foreseeably identifiable with the normal use of an automobile. Then, this Court in *Bookert* held that gunshot injuries resulting from the intentional firing of a gun were not foreseeably identifiable with the normal use of an automobile. By finding that Harrison's injuries in this case – gunshot injuries from the intentional firing of a rifle – were foreseeably identifiable with the normal use of an automobile, the Court of Appeals' decision directly conflicts with this Court's precedent in *Aytes* and *Bookert*.

II. The Court of Appeals' Decision Creates a Split Between the Decisions of the Court of Appeals and the Decisions of the United States District Court for the District of South Carolina Applying South Carolina Law.

As it now stands, there is a split of authority between the Court of Appeals and the District Courts on this issue.[4] In *Holmes*, the District Court held in a published decision that gunshot injuries resulting from the intentional firing of a gun did not arise of the use of an automobile: "*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

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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 an abnormal use of a vehicle.

[4] Although not specifically listed as a basis for granting a writ of certiorari, Rule 242(b) states that the list of factors in that rule is "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general." Rule 242(b), SCACR. Petitioners respectfully submit that this split of authority provides an additional basis for granting the writ.

normal use of an automobile." 786 F. Supp. 2d at 1027; *see also GEICO v. Bland, supra* (holding that injuries from the intentional firing of a gun from a vehicle were not foreseeably identifiable with the normal use of an automobile). Thus, there is a split of authority on this issue. Moreover, the Court of Appeals' decision will not resolve this question because a District Court is bound to apply this Court's precedent, not a decision of a state's intermediate appellate court. *See Progressive Southeastern Ins. Co. v. McLeod*, 489 Fed. Appx. 669, 671 (4th Cir. 2012) ("While sitting in diversity, the federal courts are not bound by the precedent of intermediate appellate courts, but must adjudicate legal questions consistent with the precedent of the state's highest court ...."). The District Court properly applied this Court's precedent in *Bookert*, and it will continue to be required to do so. To avoid confusion of this issue for courts going forward, this Court's guidance is critically needed.

III. This Court Previously Accepted a Certified Question on a Similar Issue in *Sylva*, but it was Prevented from Answering the Certified Question Because Another Issue was Dispositive.

In *Sylva*, this Court accepted the following two certified question:

1. Can a law enforcement officer who conducts an official investigation of an accident that was not contemporaneously observed by an identified, surviving person be a "witness" under South Carolina Code § 38-77-170?

2. Do injuries caused by a drive-by shooting "arise out of" the use of a motor vehicle under Section 38-77-140 of the South Carolina Code where the shooting victim was operating a motor vehicle followed by the assailant and blocked from escape by the assailant vehicle during the shooting?

Sylva, 424 S.C. at 516, 818 S.E.2d at 755. Although this Court accepted both questions, it found the first question determinative. *Id.* at 520, 818 S.E.2d at 758.

Rule 244, SCACR, authorizes this Court to accept a certified question when "it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court."[5] *See also* Rule 242, SCACR(b)(1) (providing that one basis for granting a petition for writ of certiorari is when a case presents a novel question of law). Thus, to the extent that *Aytes* and *Bookert* are not controlling – which Petitioners dispute – then this case certainly presents a novel question of law. Moreover, the fact that this Court previously accepted a certified question on this issue reveals that this Court has previously determined that the question presents an issue worthy of answering.

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.

The undisputed facts show that both vehicles were stopped at the stoplight when Redman pointed the rifle at Harrison and fired the gun. (R. 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

[5] It is important to note that the facts in the certified question in *Sylva* assumed a pursuit and added the factual issue of use of the vehicle to block a victim's escape. Thus, it appear that the issue over which there was no controlling precedent was whether the use of a vehicle to block a victim's escape could cause an injury to arise out of the ownership, maintenance or use of an automobile.

that happened immediately after assailant used truck to ram and disable victim's vehicle and then exited truck was an act of independent significance)[6]; *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 physically 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*, the Court of Appeals 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.

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[6] 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, this Court did not adopt this factor until years later in the *Aytes* case.

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

Despite the very narrow facts presented to the Circuit Court, the Court of Appeals' decision found facts that are not in the record and even created new facts that were never argued by the Estate at summary judgment or on appeal. The Court of Appeals also shifted the burden of proof, finding that the Circuit Court erred in finding no evidence that Harrison was aware of Redman because there was no evidence she was not aware of him. This goes far beyond the appellate standard of review on cross-motions for summary judgment.

In its Order granting Petitioners' Summary Judgment motion and denying the Estate's 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.

(R. 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." (R. p. 4).

The Court of Appeals made factual findings contrary to the Circuit Court's findings. Specifically, the Court of Appeals' decision relied 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) The Court of Appeals rejected 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 Petitioners.

A. The factual findings in the Court of Appeals' decision 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.

The Estate admitted in response to Requests to Admit 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. (R. 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. (R. 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.

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[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." (App. p. 196).

[8] "Redman's vehicle contributed to the concealment of his weapon." (App. p. 196).

[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." (App. pp. 194-95 n. 8).

(R. p. 84, ¶¶ 10-12 & 15, p. 89, ¶¶ 10-12 & 15). Redman and Harrison were complete strangers. (R. p. 84, ¶ 17, p. 89, ¶ 17).

The window of time presented by 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. (R. p. 97, ¶ 1) (emphasis added). The Estate failed to present any evidence of what transpired before that moment in time.

i. The Estate did not present evidence that Redman "closely pursued" Harrison.

As the party seeking coverage, the Estate bore 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."); *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 303, 128 S.E.2d 171, 173 (1962) ("[T]he insured had the burden of showing that his injury was covered by the terms of the policy."). Thus, if the Estate contends that Redman "pursued" Harrison, then the Estate 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 Circuit Court specifically held that there was no evidence of a pursuit. (R. p. 4). However, the Court of Appeals made 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." (App. p. 196). 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.").

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." (R. p. 98, ¶ 7). There is no evidence she ever accelerated or otherwise attempted to flee from Redman. 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]

[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*." (App. p. 195) (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." (R. 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 built upon another underlying conjecture.

ii. The Court of Appeals' finding that Redman used the vehicle to conceal the rifle was never presented via evidence, and no party claimed the rifle was concealed.

The Court of Appeals went a step beyond merely speculating based upon evidence that was presented – it created new evidence that was not even argued on summary judgment or on appeal. In the portion of the decision addressing whether the vehicle was an active accessory to the shooting, the Court of Appeals found that "unlike the assailants in *Howser* and *Towe*, Redman's vehicle contributed to the concealment of his weapon." (App. p. 196) (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 Court of Appeals again relied upon this newly created fact to find that the shooting was not an act of independent significance that broke the causal connection. (App. p. 202) ("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, with no supporting evidence on which to make the determination, is simply not in evidence. Moreover, the Estate never even argued that such a fact existed.

B. By rejecting the Circuit Court's finding that there was no evidence Harrison was aware of Redman, the Court of Appeals improperly shifted the burden of proof to Petitioners.

Lastly, the Court of Appeals disputed 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

[11] This speculative conclusion is even more improper on cross motions for summary judgment because, had the Estate tried to make such an argument before the Circuit Court, Petitioners 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.

Redman." (R. p. 6). In its written decision, the Court of Appeals disputed 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." (App. pp. 194-95 n. 8). Once again, as the party seeking coverage, the Estate bore the burden of proof in this case. The Estate did not present any evidence that Harrison was aware of Redman. In fact, the Estate conceded that Harrison "was operating her vehicle in a normal and reasonably foreseeable fashion" at all relevant times. (R. p. 98, ¶ 7). Thus, the Court of Appeals not only improperly shifted the burden of proof from the Estate to Petitioners, but it also overlooked the undisputed evidence. Even if the Estate had contended Harrison was aware of Redman, the Estate presented no evidence to establish that contention.[12]

The Court of Appeals relied heavily on each of these improper factual determinations, none of which were established in the record. This error serves as an additional basis for granting the petition for writ.

CONCLUSION

Over two decades ago, this Court held that injuries resulting from the intentional firing of a gun 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 did not arise out of the ownership, maintenance or use of an automobile. By reaching the opposite conclusion, the Court of Appeals failed to follow this Court's binding precedent set forth in *Aytes* and *Bookert*.

[12] The Court of Appeals also found that both carriers issued uninsured and underinsured motorist coverage. This is also factually inaccurate. Progressive's policy only provided uninsured motorist coverage. (R. p. 39).

This Court's guidance is needed. The Court of Appeals' decision stands in conflict with *Bookert* and *Aytes*. Moreover, the Court of Appeals decision stands in conflict with the decisions of the District Court applying the holdings in *Bookert* and *Aytes*. Finally, this Court recently accepted a certified question on a similar issue in *Sylva*, but it was unable to answer the question. This case presents an important opportunity for this Court to provide needed guidance on this issue.

For the above-stated reasons, Petitioners respectfully move and petition this Court for a writ of certiorari to answer these important questions and to provide clarity on this issue of law.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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Attorneys for Respondents

Columbia, South Carolina
October 8, 2020

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SC Court of Appeals

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

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 a Writ of Certiorari on Appellant by depositing a copy in the United States Mail, postage prepaid, on October 8, 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
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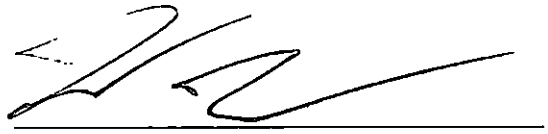
Charleston, SC 29413



Wesley B. Sawyer

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October 8, 2020

Via Hand Delivery
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

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
Appellate Case No.: 2017-001946
Claim No.: 155621943 (Progressive) 31913153-5 (USAA)
Date of Loss: 4-2-15
Our File No.: 1115-2637/3250-0892

Dear Mr. Shearouse:

Enclosed please find our check in the amount of $250.00. This check represents the filing fee for the Petition for a Writ of Certiorari submitted for filing by e-mail on October 8, 2020.

With warm personal regards, I am

Sincerely yours,

S/Wesley B. Sawyer

Wesley B. Sawyer

WSB/dlb
Enclosures
cc: Ryan H. Sigal, Esquire
John P. Linton, Jr., Esquire
Jenny A. Kitchings
Clerk, SC Court of Appeals

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October 8, 2020

Sent Via Email
The Honorable Daniel E. Shearouse
Clerk of Court
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Columbia, SC 29201

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Claim No.: 155621943 (Progressive) 31913153-5 (USAA)
Date of Loss: 4-2-15
Our File No.: 1115-2637/3250-0892

Dear Mr. Shearouse:

Pursuant to the Supreme Court's Amended Order, No. 2020-05-29-02 Regarding the Operation of Appellate Courts During the Coronavirus Emergency, attached please find the Petition for Writ of Certiorari of Petitioners Progressive Direct Insurance Company and USAA General Indemnity Company. For your convenience, we have also prepared the attached Appendix. Our check in the amount of $250.00 for the filing feel will be delivered under separate cover.

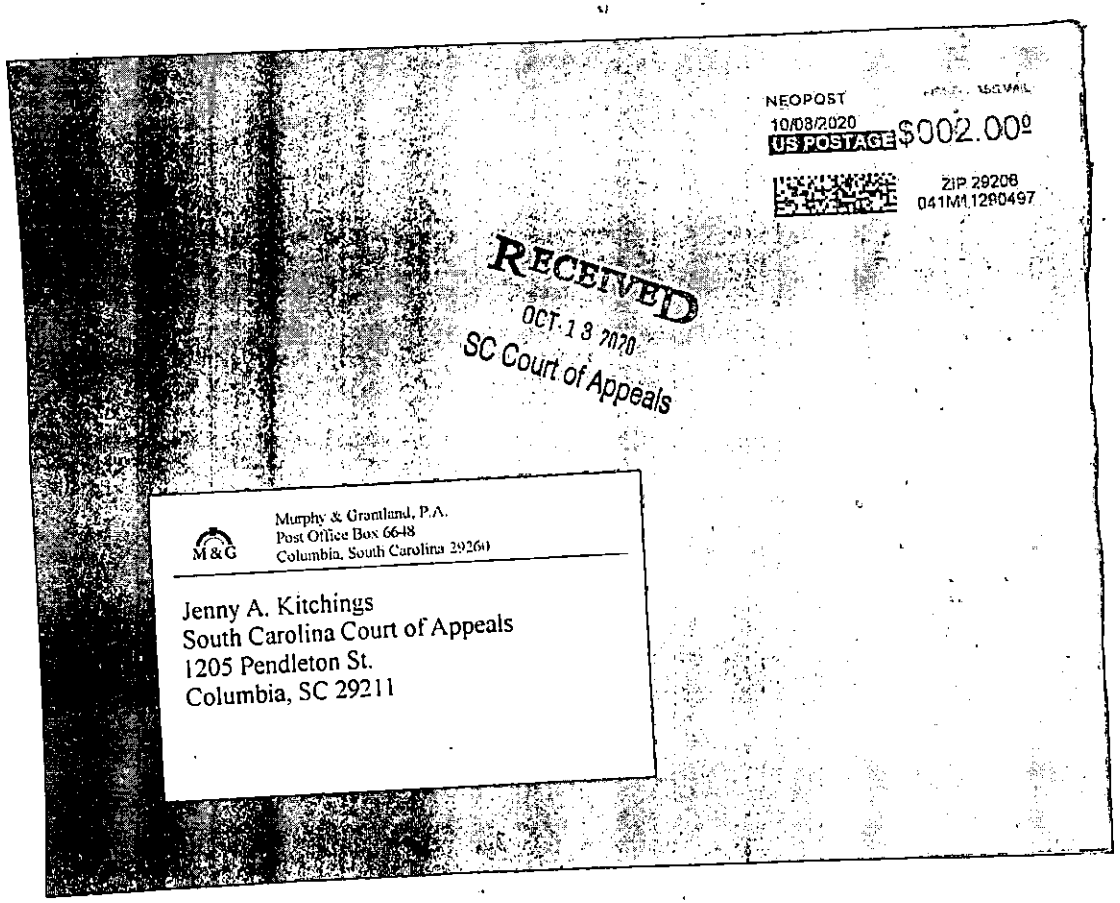
By copy of this letter to the Clerk of Court for the SC Court of Appeals and counsel of record, we are serving them with a copy of the Petition.

With warm personal regards, I am

Sincerely yours,

Wesley B. Sawyer

WSB/dlb
Enclosures
cc: Ryan H. Sigal, Esquire
John P. Linton, Jr., Esquire
Jenny A. Kitchings
Clerk of Court, SC Court of Appeals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