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S.C. SUPREME COURT

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
Trial Court 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.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

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. **(App. 18, ¶ 10) (App. 22, ¶ 11): (App. 84, #6); (App. 88, #6).** Harrison "was operating her vehicle in a normal and reasonably foreseeable fashion." **(App. 98, #7).**

Jimi Carl Redman, Jr. ("Redman") was driving a red Ford Escape eastbound on Old Trolley Road in the lane, directly to Harrison's right. **(App. 84, #8); (App. 89, #8).** Redman had driven his vehicle from Texas to South Carolina with a rife located in his vehicle. **(App. 98, #6)** (Petitioners admitting 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."). While driving toward the stop light at the intersection of Old Trolley Road and Bacons Bridge Road, Redman blew kisses and made hand gestures toward Harrison from his vehicle. **(App. 97, #1)** (Petitioners admitting that Redman was blowing kisses and making hand gestures toward Harrison *while driving*). **(R.p.85, 16); (App. 102-103).** Then, after pulling up to the stop light, Redman shot Harrison from his vehicle. **(App. 97, #2)** (Petitioners admitting that ". . . Redman stopped in the right hand lane and Lynn Harrison's vehicle stopped in the left hand lane where the shooting occurred."). Both Redman and Harrison's vehicles were "***turned on and in drive***" when Redman shot Harrison. **(App. 97-98, #3)** (double emphasis added); **(App. 98, #8)** (Petitioners 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. **(App. 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. **(App. 85, #14); (App. 89, #14).**

The Ford Escape operated by Redman was not insured at the time of the shooting. **(App. 86, #19); (App. 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.[1] **(App. 38-49).** The policies each provide uninsured motorist coverage with limits of twenty-five thousand ($25,000.00) dollars per person and fifty thousand ($50,000.00) per accident, as well as uninsured property damage coverage. **(R.pp.38-39).**

Following the death of Lynn Harrison ("Harrison"), Respondent Progressive Direct Insurance Co. ("Progressive") sued Respondent, Shanna Groves[2] as the Personal Representative of the Estate of Lynn Harrison ("Respondent" or "the Estate"), seeking a declaratory judgment that the uninsured motorist policy Progressive had issued did not provided coverage for the death of Ms. Harrison. **(App. 12-15).** On September 17, 2015, Progressive and USAA General Indemnity Company ("USAA") (collectively, "Petitioners" or "the Insurers") filed an Amended Complaint, adding USAA as an

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[1] At all times relevant to this case, Harrison was married to James M. Harrison and resided in his household. **(App. 84, #5); (App. 88, #5).**

[2] 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. **(App. 10-11).**

additional Plaintiff. In the Amended Complaint, the Insurers sought a declaratory judgment that that the uninsured motorist policies Petitioners had issued did not provide coverage for the death of Ms. Harrison. **(App. 16-20)**

Respondent 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. **(App. 21-24)**. On May 9, 2016, the Insurers filed a Motion for Summary Judgement. **(App. 25-26).** On January 27, 2017, the Estate filed a Cross Motion for Summary Judgement. **(App. 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. **(App. 3-7)**. On August 2, 2017, Judge Lee issued an Order granting the Insurers' motion and denying the Estate's motion. **(App. 3-7).** Appellant timely served a Notice of Appeal on September 15, 2017. **(Notice of Appeal).** On July 22, 2020, the Court of Appeals issued an Opinion reversing the Circuit Court because the "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" (the "Opinion"). **(App. 203).** Judge Geathers authored the Opinion and Chief Judge Lockemy and Judge Hewitt both joined in the Opinion. **(App. 203).** There was no dissent.

In determining that the circuit court erred, the Court of Appeals analyzed the undisputed facts and applied them to the applicable test for whether an injury arose out of the ownership, maintenance, or use of an uninsured vehicle:

> 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.

(App. 192) (quoting 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)). Only the first two elements above are at issue in the case because it is undisputed that both Harrison and Redman's vehicles were being used for transportation. **(App. 192).** With regard to the first inquiry, the Court of Appeals determined a causal connection existed between the vehicle and the injury because based upon the undisputed facts, the vehicle was an active accessory to the assault, something less than proximate cause but more than mere situs of the injury and injury was foreseeably identifiable with the normal use of the automobile. **(App. 193- 201).** The Court of Appeals also found that no act of independent significance broke the causal link because Redman's use of his vehicle and the shooting were inextricably linked as one continuing assault. **(App. 201-02).**

Following the Opinion, Petitioners filed a Petition for Rehearing and for Rehearing *en banc*. **(App. 204-24).** The Court of Appeals found there was no basis for a rehearing because the Court of Appeals did not overlook or disregard any material fact or principle of law in issuing the Opinion. **(App. 227).** Petitioner then sought to have this Court exercise its discretionary review of the Court of Appeals decision.

STANDARD OF REVIEW

South Carolina Rule of Appellate Procedure 242(b) provides the applicable considerations for the granting of a petition for writ of certiorari. None of the listed considerations are present here. (1) There is no novel question of law at issue—the Court of Appeals applied existing law to the undisputed facts of this case. (2) There was no

dissent at the Court of Appeals—the decision was unanimous. (3) The decision of the Court of Appeals does not conflict with any prior decision of this Court— the Court of Appeals applied decisions of this Court to undisputed facts of this case. (4) There are no constitutional issues involved in this appeal. (5) There are no federal questions involved in this appeal or conflicts with any decision of the United States Supreme Court. While the decision to grant certiorari is discretionary and the reasons stated in the rule are not a controlling list of prerequisites to granting a petition, there is simply no reason certiorari is appropriate here.

ARGUMENT

I. Petitioners' argument that Howser and Towe are no longer good law is not properly included in their Petition for Certiorari because the Petitioners argued to the Court of Appeals that those cases were distinguishable on their facts and did not assert they were no longer good law until their Petition for Rehearing.

"Only those questions raised in the Court of Appeals ***and*** in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." SCACR 242 (double emphasis added). As discussed in detail below, Petitioners' primary argument is that the Opinion "relies upon cases that are no longer good law." **(Pet. 5-10).** The cases Petitioners assert are no longer good law are 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).[3] See **(Pet. 5-10).** At the Court of Appeals, Petitioners did not dispute those cases were good law and instead argued that the facts of those case were distinguishable from this case. **(App. 167-72);** see also, **(App. 172-74)** (Petitioners citing Howser for the standard applicable to whether an act is an act of

[3] As explained in detail below, neither case has been overturned and both have been cited by courts well after Petitioners claim they were overturned.

independent significance breaking the causal link between the use of the vehicle and the injury). Petitioners even asserted that "[Howser and Towe] stand separately on their facts." **(App. 170).** It was not until the Court of Appeals rejected their arguments that Petitioners began to assert those cases were not good law. Specifically, following the Court of Appeals decision rejecting their arguments attempting to distinguish Howser and Towe on their facts, Petitioners filed a Petition for Rehearing asserting for the first time that those cases had been overturned. **(App. 192-201)** (Court of Appeals rejecting Petitioners' attempts to distinguish Howser and Towe and draw analogies to other cases); **(App. 205-209)** (Petitioners raising for the first time in their Petition for Rehearing that Howser and Towe are no longer good law).

Petitioners now ask this Court to grant certiorari on the basis that those two cases are no longer good law. Because that argument was not submitted to the Court of Appeals prior to the Petition for Rehearing, certiorari must be denied. See SCACR 242 ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."); see also, Kleckley v. Northwestern Nat. Cas. Co., 526 S.E.2d 218, 221, 338 S.C. 131, 138 (2000) (stating that an issue not raised until the Petition for Rehearing stage is not preserved for review by the Supreme Court); Norton v. Opening Break of Aiken, Inc., 462 S.E.2d 861, 862, 319 S.C. 469, 470 (1995) ("Opening Break failed to raise this argument to the Court of Appeals, however, and consequently we decline to address it").

II. The Petition should be denied as to all three questions presented by Petitioners.[4]

Under South Carolina law, automobile insurance policies must contain 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. Here, the Court of Appeals found, based on the undisputed evidence and applicable legal test that Harrison's injuries arose out of the ownership use and maintenance of an automobile. **(App. 190-205).** 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.[5] State Farm & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998). For the reasons explained below, the Court of Appeals correctly ruled that Harrison's death arose out of the ownership, maintenance, or use the vehicle and therefore the polices provide uninsured motorist coverage.

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]." Bookert, at

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[4]Respondent has not included a counterstatement of the questions presented because the Petition should be denied as to all questions presented by Petitioners.

[5]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.

293, 523 S.E.2d at 182 (citing Aytes, 332 S.C. at 33, 503 S.E.2d at 745–46); Howser, at 272, 422 S.E.2d at 108. "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) (citation omitted).

In their Petition, Petitioners present three issues they assert this Court should review. First, Petitioners question whether the Court of Appeals correctly found that that the injury in this case was foreseeably identifiable with the normal use of an automobile. Second, Petitioners question whether the firing of a gun constitutes an act of independent significance that breaks any causal connection with the use of the automobile. Third, Petitioners question whether the Court of Appeals improperly shift the burden of proof to Petitioners and incorrectly interpreted the facts in the record.

Taken as a whole, the Petition asks this Court to overturn at least two of its prior decisions and change established South Carolina law by adopting for the first time a bright line rule that no uninsured motorist coverage will be available in any situation where a firearm is involved. The Petition should be denied.

a. The Court of Appeals correctly applied this Court's precedent in determining that the injuries in this case were foreseeably identifiable with the normal use of an automobile.

    i. The Court of Appeals correctly ruled, based upon the undisputed facts, that a causal connection exists between the vehicle and the injury when, among other things, the injury is foreseeably identifiable with the normal use of the vehicle.

As stated above, a causal connection exists between the vehicle and the injury when, among other things, the injury is foreseeably identifiable with the normal use of the

vehicle.[6] Here, the Court of Appeals correctly determined that Harrison's death was foreseeably identifiable with the use of Redman's vehicle. **(App. 200-01).** Redman and Harrison were both driving at the time Redman shot Harrison. Redman shot Harrison while both his vehicle and Harrison's were being operated, turned on and in drive. **(App. 97-98, #3); (App. 98, #8)** (Petitioners 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 undisputed Redman shot Harrison while she was operating her vehicle in a normal and reasonably foreseeable fashion. **(App. 97, #1)** (Petitioners admitting that Redman was blowing kisses and making hand gestures toward Lynn Harrison while driving); **(App. 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 Court of Appeals correctly recognized that this Court has twice found a causal connection between a vehicle and an injury on facts similar to the instant case. See Howser, at 274, 422 S.E.2d at 109; and Towe, at 108, 441 S.E.2d at 827. In Howser, this 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

[6] In considering whether a causal connection exists between the injures and the automobile, which includes whether the injury was foreseeably identifiable with the normal use of a vehicle "[n]o 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)).

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 the 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.

This 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, 422 S.E.2d at 108. (double emphasis added).[7]

[7] 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.").

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 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 held 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.

The Court of Appeals properly found this case was most analogues to Howser and Towe. In fact, as discussed above, even the Petitioners abandoned their efforts to distinguish these cases after the Opinion. At that point, they shifted to claiming the decisions were no longer good law.

ii. Howser and Towe are good law.

Petitioners assert that the Court of Appeals wrongfully cited to Howser and Towe, which Petitioners claim are no longer good law. **(Pet. 5-10).** According to Petitioners, following Aytes and Bookert, Howser and Towe were not good law. Petitioners are wrong.

This Court cited extensively to Howser and Towe in its opinion in Aytes. See Aytes, at 33-35, 503 S.E.2d at 745-46. In Aytes, there was no negative discussion of Howser or Towe. See id. In fact, both were cited as examples of when an insured is legally entitled to recover damages arising out of the ownership, maintenance, or use of an uninsured vehicle based upon the test summarized in Aytes.[8] In Bookert, this Court made clear that Aytes did not create new law, but rather "restated" and "reiterated" the then existing test. Bookert, 523 S.E.2d at 182, 337 S.C. at 293 ("In Aytes, we restated the three part test for determining whether an individual's personal injuries arise out of the 'ownership, maintenance, or use' of an automobile"); id. ("Aytes reiterated the components of the causal connection requirement.").

Further belying Petitioners' suggestion that Howser and Towe are no longer good law is that courts (including this Court) have continued to cite to those cases well after Aytes and Bookert. See generally, Peagler v. USAA Ins. Co., 628 S.E.2d 475, 480, 368 S.C. 153, 163 (2006) (distinguishing Towe and Howser from the facts at issue); 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); Norris v. Allstate Ins. Co., No. 2005–UP–124, 2005 WL 7083469, at *3 (Ct. App. 2005) (Beatty, J concurring, "Until our Supreme Court overrules Howser. . .").

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[8] Petitioners assert that Howser did not consider whether the injuries arose out of the normal use of the automobile. The Howser opinion is at odds with Petitioners' repeated statements that did not consider whether the injuries arose out of the normal use of the automobile. Howser, at 272, 422 S.E.2d at 108 (discussing at length that to establish a causal connection an insured must show that the injuries arose out of the use of the uninsured automobile). Petitioners' creative reading of Howser should be rejected. Howser was even cited in Aytes as a case where the causal connection (which requires a showing that the injuries arose out of the normal use of the automobile) was established. Aytes, at 33, 503 S.E.2d at 745.

For all these reasons, Howser and Towe are still good law.

iii. The Opinion does not conflict with Bookert.

Petitioners assert the Court of Appeals decision conflicts with Bookert. Petitioners' assertion that the Court of Appeals decision conflicts with Bookert is based upon the two extraordinary assumptions: that Bookert stands for the proposition that all gunshot injuries are not foreseeably identifiable with the normal use of an automobile and that Bookert overruled Howser. Neither of Petitioners assumptions are correct. Nowhere in Bookert is a rule stating that all gunshot injuries are not foreseeably identifiable with the normal use of an automobile. To have issued the bright line rule argued by Petitioners, this Court would have had to have overruled Howser, which it did not.

The Court of Appeals correctly recognized Bookert did not create a bright line rule establishing that all gunshot injuries are not foreseeably identifiable with the normal use of an automobile. See **(App. 201)** ("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."). The Court of Appeals also correctly determined that the undisputed facts of this case are more similar to Howser than to Bookert. **(App. 200-201); (App. 201)**. One of the most important distinctions is that the victim in Bookert was a pedestrian, whereas in this case both the victim and assailant were operating their vehicles on a public roadway. Bookert simply established that when a pedestrian is the victim of a shooting originating from a vehicle, their injuries are not foreseeably identifiable with the normal use of an automobile. Id. In Bookert, the assailant merely used the vehicle as transportation to the site of the shooting and did not need the vehicle to shoot the victim because the victim was a stationary pedestrian.

Here, as explained by the Court of Appeals in detail, 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. **(App. 84, #8); (App. 89, #8); (App. 98, #7); (App.97, #1).** Therefore, the Opinion does not conflict with Bookert.

iv. The Opinion does not conflict with this Court's prior decision in Aytes.

Petitioners also assert the Court of Appeals decision conflicts with Aytes. Petitioners assert that the decision conflicts with Aytes because Aytes allegedly created a new test for determining whether an injury results from the ownership, maintenance, or use of her vehicle. See **(Pet. 9).** However, Aytes did not purport to create any new test, but rather simply enumerated the tests based on case law existing at that time, including with citations to Howser and Towe. See Aytes, at 33-35, 503 S.E.2d at 745-46.

In Aytes Donna Dawson was forced into her car by Randy Aytes (Aytes) after an altercation. Id. at 32, 503 S.E.2d at 745. Although Aytes was forbidden to drive her car, he drove her to a particular area with the expressed intent of killing her. Id. While standing outside of the car on the passenger side, Aytes fired a pistol towards Dawson striking her in the foot. Id. The Court found that the car was merely the situs of the injury. In so finding, the Court distinguished its decision in Howser where "the insured sustained gunshot wounds while traveling on a public highway in an insured vehicle and during a vehicular chase by an unknown assailant in an unidentified vehicle." Id. The Court also cited to and distinguished Towe because in Towe (unlike Aytes) the use of the automobile and the assault were inextricably linked as one continuing act. Id. at 34-35, 503 S.E.2d at 746.

Here, the Court of Appeals correctly applied the decisions of this Court, including Aytes. The Court also correctly found that Aytes was distinguishable from the facts of this case, which more closely resembles Howser and Towe. The ruling in Aytes was that the "required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." Aytes, at 33, 503 S.E.2d at 746. As correctly found by the Court of Appeals and discussed in detail above, this case includes numerous facts which distinguish it from Aytes. For example, in Aytes the assailant had exited the vehicle that was merely used to get to the location of the assault. Whereas in this case Redman and Harrison were both operating their vehicles on a public roadway at the time of the shooting. Therefore, the Opinion does not conflict with Aytes.

v. The Opinion does not create a split in authority between the Court of Appeals and United States District Court.

Petitioners assert the Court of Appeals decision conflicts with Holmes v. Allstate Ins. Co., 786 F.Supp.2d 1022, 1023 (D.S.C. 2009). The Court of Appeals decision is entirely consistent with that of the district court in Holmes. The Holmes case involved a shooting wherein the assailant drove to a spot where the victim was "parked on the side of the road awaiting the arrival of the school bus." Id. at 1024. After the assailant stopped his car next to the vehicle pulled over on the side of the road and the victim heard the assailant say her name, he shot her several times. Id. The court in Holmes discussed Howser and Towe at length and found that "unlike the incidents giving rise to the South Carolina Supreme Court's decisions in Howser and Towe, the court does not find that Williams' car acted as an active accessory to his assault on Plaintiff." Id. at 1027. The Court further found that the case was similar to Bookert in that the assailant "used his

vehicle in the same manner in which the vehicle was used in Bookert: to locate Plaintiff, to position himself next to Plaintiff's vehicle, and to leave the scene of the crime." Id. at 1027.

The Court of Appeals correctly found that the undisputed facts of this case are different than those at issue in Holmes for several material reasons: Harrison's car was in drive and she was driving it on a public roadway during the shooting, whereas in Holmes, the victim's vehicle was parked and on the side of the road. **(App. 197).** In Holmes, the assailant did not need the use of his vehicle to put himself in a position to shoot the victim, like Redman did in this case. In Holmes, the assailant could have spotted the vehicle while on foot, walked up to the window, and shot the victim, but Redman could not have kept pace with Harrison's car and positioned himself to shoot her but for his use of the automobile. **(App.197).** Unlike Redman in this case, once the ex-boyfriend was in position to shoot Holmes, he did not need the use of his vehicle to maintain his ability to shoot Holmes, who was parked on the side of the road. **(App. 198).** As has been stated, it is undisputed that both Redman and Harrison were operating their vehicles at the time of the assault, which is clearly different than the facts in Holmes. In distinguishing Holmes, the Court of Appeals noted that in Howser this Court found it significant 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.*" **(App. 199)** (emphasis supplied by the Court of Appeals). Simply put, the Opinion does not conflict with Holmes.

vi. The acceptance of a certified question in Silva is irrelevant to whether this Court should exercise its discretion to grant certiorari in this case.

Rule 242, SCACR sets forth the considerations for whether this Court should grant certiorari. Petitioner suggests that because this Court previously accepted a certified question that may (or may not) have been similar to the facts of this case, it should grant certiorari even though none of the enumerated considerations for granting it are present here. The first certified question in Silva was "Can a law enforcement officer who conducts an official investigation of an accident that was not contemporaneously observed by any identified, surviving person be a "witness" under South Carolina Code § 38-77-170." Silva for Estate of Silva v. Allstate Property and Casualty Insurance Company, 818 S.E.2d 753, 755, 424 S.C. 512, 516 (2018). In answering it, this Court concluded that a law enforcement officer does not qualify as a witness under the appliable statute when he did not observe the incident. Id. at 758, 424 S.C. at 520. Having determined that there was no witness to the assault in that case, this Court declined to address the second question: "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 vehicle and blocked from escape by the assailant vehicle during the shooting?" Id. at 755, 424 S.C. at 516. Petitioner seems to assert that the question was the same as presented here. However, it is unclear exactly what the facts were in Silva, because there was no eyewitness. It is also unclear whether those facts were the same as the facts here. Therefore, for these reasons the acceptance of a certified question in Silva is irrelevant to whether this Court should exercise its discretion to grant certiorari in this case. The Petition should be denied.

b. The Court of Appeals correctly held that Redman's vehicle was not the mere situs of the assault and Redman's act of shooting Harrison was not an intervening act of independent significance that broke the causal connection between the use of the vehicle and the assault when the use of the vehicle and the shooting were inextricably linked.

The Court of Appeals correctly held that Redman's vehicle was not the mere situs of the assault and Redman's firing of the gun was not an intervening act of independent significance that broke the causal connection between the use of the vehicle and the assault when the use of the vehicle and the shooting were inextricably linked. **(App. 198-99); (App. 201-02)**. Petitioner citing Wright v. North Area Taxi, Inc., 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999) asserts the Court of Appeals should have found that the shooting was an act of independent significance and Redman's vehicle was nothing more than the site from which he fired.

In Wright, the assailants hailed a taxi, they entered the taxi once the driver parked his car on the side of the road, and they shot 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 the 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.

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. [9]

[9] 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 is an undisputed fact that Redman never exited his vehicle prior to the shooting.

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. **(App. 97-98, #3)** Redman could not have positioned himself next to Harrison at the stop light without a car. **(App. 98, #4).** Harrison's vehicle was stopped for less than the length of a red light before the shooting occurred. **(App. 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 Court of Appeals correctly ruled that Redman's use of a gun was not 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.

c. The Court of Appeals did not improperly shift the burden of proof to Petitioners or rely on any facts beyond the record.

Petitioners' final question presented is a compilation of immaterial and inaccurate criticisms of the decision of the Court of Appeals. All should be rejected as explained below.

Petitioners assert the Court of Appeals shifted the burden of proof to them because it stated in a footnote that there was no evidence Harrison was aware of Redman. See **(App. 194).** This footnote, simply explained, as an aside, that while the circuit court

decision found "there was no evidence that Harrison saw Redman driving beside her or that she was aware of him making hand gestures toward her," there was also no evidence that Harrison was aware of Redman. **(App. 194, n. 8).** The observation was not material or inaccurate, and certainly did not shift the any burden.

The Opinion went on, in explaining this cases' similarities to Towe, to state that "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." **(App. 195).** Simply put, the Court of Appeals did not shift any burden, it simply ruled based on the undisputed facts and appliable law.

Petitioners also assert that the Court of Appeals erred in stating that Redman "closely pursued" Harrison. It is important to note that whether Redman closely pursued is not the legal test applied by the Court of Appeals. The Court of Appeals use of the term "closely pursued" is not material to its decision. It is however, fully supported by the undisputed record.

It is undisputed that Harrison was driving 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. **(App.18. ¶ 10) (App. 22, ¶ 11)**; **(App.84 , #6); (App. 88, #6).** It is also undisputed that Redman was driving on Old Trolley Road in the lane directly to Lynn Harrison's right. **(App. 84 #8); (App. 89, #8).** Further, it is undisputed that 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. **(App. 97, #1); (App. 85, 16); (App. 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. **(App. 97-98, #3)** (double emphasis added); **(App. 98, #8)**. The statement that Redman closely pursued Harrison is entirely consistent and supported by the undisputed facts above.

Petitioners also claim that the Court of Appeals' statement that "Redman's vehicle contributed to the concealment of his weapon" is unsupported by the record. This is inaccurate. For example, the eyewitness, who observed Redman blowing kisses and making gestures stated that she did not see a gun. **(App. 102)** ("Did you see a gun? No"). Additionally, the admitted facts are that Redman travelled from Texas to South Carolina where the shooting occurred and that the rifle was in the vehicle during the road trip. **(App. 98, # 5 & #6).** Finally, it is worth noting that this statement was included in a paragraph following the Court's conclusion that Redman's vehicle was an active accessory to the shooting and offered as an additional factor supporting the Court of Appeals' decision, not as a material basis for the decision. **(App. 196).**

CONCLUSION

Therefore, for all the reasons above, the Petition for Certiorari should be **DENIED**.

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