

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2020-001337
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.

BRIEF OF PETITIONERS

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STATEMENT OF ISSUES ON APPEAL

- (I) Whether injuries resulting from the intentional firing of a gun are foreseeably identifiable with the normal use of an automobile?
- (II) If so, whether firing a gun from one stationary vehicle into another stationary vehicle constitutes an act of independent significance that breaks any causal connection with the use of an automobile?
- (III) Whether the Court of Appeals erred by improperly shifting the burden of proof to Petitioners and by finding facts that were not in the record?

SUMMARY

Automobile insurance policies insure against injuries caused by the ownership, maintenance or use of an automobile. On April 2, 2015, Jimi Carl Redman stopped his vehicle at a red light beside Lynn Harrison's vehicle, pointed a rifle out of his driver's side window, fired a shot into Harrison's vehicle, and drove away. The bullet struck and killed Harrison. As a result, her estate sought uninsured motorist (UM) coverage from Petitioners Progressive and USAA.

In *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745-46 (1998), this Court held automobile insurance only applies to injuries that are "foreseeably identifiable with the normal use of an automobile." Then, in *State Farm Mutual Automobile Insurance Company v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (2000), this Court held injuries from the intentional firing of a gun were not foreseeably identifiable with the normal use of an automobile. Relying on these two cases, the Circuit Court below granted Petitioners Progressive's and USAA's Motion for Summary Judgment.

The Court of Appeals below reversed. In doing so, the Court of Appeals disregarded this Court's holding in *Bookert*. In addition, the Court of Appeals failed to identify any normal use of a vehicle that would have caused Harrison's gunshot injuries. Harrison was not killed by the mechanical forces associated with a moving vehicle, while avoiding another vehicle, or in any

other way connected with the normal function of an automobile as an automobile. She was tragically killed by a bullet, not a car.

Although *Bookert* is dispositive, Harrison's Estate falls short on several other elements of the *Aytes* test. Specifically, when Redman shot Harrison, both vehicles were stopped. They were sitting at a red light. Thus, Redman's vehicle was merely the site from which he fired the shot. Also, Redman's acts of pulling out the rifle, aiming it at Harrison, and firing – all after stopping his vehicle – were acts of independent significance that broke any causal connection with the use of the vehicle. He could just as easily have put his car in park, stepped out, and fired the shot. Therefore, Harrison's injuries do not arise out of Redman's ownership, maintenance or use of an auto.

In addition to failing to properly apply *Aytes* and *Bookert*, the Court of Appeals applied the wrong standard of review. First, the Court of Appeals found facts that were not in the record and even created a new "fact" that had never been argued in the case. The Court of Appeals then relied on those facts in supporting its conclusions. Second, the Court of Appeals improperly shifted the burden of proof to Petitioners. For all these reasons, the Court of Appeals' decision should be reversed, and the Circuit Court's grant of summary judgment should be affirmed.

STATEMENT OF THE CASE

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. (R. p. 12). When the Estate submitted a claim under a USAA policy, Petitioners filed an Amended Complaint adding USAA. (R. p. 16).

On August 17, 2017, the Circuit Court issued a thorough Order granting Petitioners' Motion for Summary Judgment and denying the Estate's cross motion. (R. pp. 3-9). The evidence before the Circuit Court depicted a narrow window of time:

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 and fired in her direction, striking her in the neck. Harrison died as a result of the shooting.

(R. pp. 2-3) (emphasis added). Applying the three-factor test established in *Aytes*, 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, applying this Court's decision in *Bookert*, the Circuit Court held Harrison's gunshot injuries were not foreseeably identifiable with the normal use of an auto. (R. p. 7).

In the alternative, even if the vehicle had been an active accessory to the shooting, the Circuit Court 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 these reasons, the Circuit Court granted Progressive's and USAA's Motion for Summary Judgment.

The Estate filed a timely Notice of Appeal. After briefing, the Court of Appeals scheduled oral arguments. However, oral arguments were cancelled due to the Covid crisis. On July 22, 2020, the Court of Appeals issued an Opinion reversing the Circuit Court. (App. p. 188-203). The Court of Appeals adopted factual findings that were contrary to the Circuit Court's factual determinations. For example, the Court of Appeals found Redman used his vehicle to "closely pursue" Harrison and that he used the vehicle to "conceal" his rifle. (App. pp. 194-196). Moreover, the Court of Appeals rejected the Circuit Court's finding that there was no evidence Harrison was aware of Redman. (App. pp. 194-195).

After making new factual findings that were outside the Record on Appeal, the Court of Appeals rejected this Court's holding in *Bookert*, deciding that *Bookert* was limited to its facts. (App. p. 201). Instead, the Court of Appeals relied heavily on *Wausau Underwriters Insurance Company v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) and *Home Insurance Company v. Towe*, 314 S.C. 105, 441 S.E.2d 825 (1994), cases that predated the "normal use" element adopted in *Aytes* and applied in *Bookert*. Although *Howser* predated *Aytes* by six years, the Court of Appeals reasoned that the shooting here must be foreseeably identifiable with the normal use of an auto because the Court in *Howser* found gunshot injuries arose out of the use of an auto. (App. p. 201).

Relying on its findings of facts that were contrary to the Circuit Court's Order, the Court of Appeals also held Redman's act of pointing a rifle out of his window and shooting at Redman after the two vehicles were stopped at the red light was not an act of independent significance. (App. p. 202-203). Specifically, the Court of Appeals found the use of the vehicle to "closely

pursue” Harrison and to “conceal” the rifle in the process created and maintained a sufficient causal connection with the vehicle.

On August 5, 2020, Petitioners filed a timely Petition for Rehearing and Rehearing *en banc*, which the Court of Appeals denied on September 10, 2020. (App. p. 204-224). Petitioners filed a Petition for Writ of Certiorari to this Court on October 8, 2020, which this Court granted.

STATEMENT OF THE FACTS

A. The shooting.

On April 2, 2015, Lynn Harrison operated a vehicle and stopped at a red light in the middle lane of Old Trolley Road at the intersection of Bacons Bridge Road in Summerville. (R. pp. 84, 89). At the same time, Jimi Carl Redman drove his vehicle to the same stop light in the right-hand lane. (R. pp. 84, 89). Redman and Harrison were complete strangers. (R. pp. 85, 89).

One witness indicated she saw Redman blowing kisses and making hand gestures to Harrison as the two vehicles approached the red light. (R. p. 97). As the Circuit Court correctly 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 as she approached and stopped at the red light. (R. p. 98). There is also no evidence in the record of what took place before the two vehicles were approaching the stop light.

After both vehicles and traffic behind them stopped for the light, Redman stuck a rifle out of his driver’s side window and pointed it at Harrison. (R. pp. 85, 89). Once again, there is no evidence Harrison was ever aware of Redman. She did not proceed through the intersection or take any other evasive action. (R. pp. 85, 89). Redman fired a single shot. The bullet went through the passenger window of Harrison’s vehicle and struck her in the neck, causing her death. (R. pp. 85, 89). Neither vehicle was 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). Because her vehicle was still in drive at the time of the shooting, Harrison's vehicle 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. At the time of the summary judgment hearing, those charges were still pending. The Public Index indicates Redman has since pled guilty.¹ Redman's vehicle either 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 UM coverage. Lynn Harrison lived with her husband at the time of the shooting. (R. pp. 84, 88).

¹ Redman's guilty plea is not in the Record on Appeal. This information is provided for the Court's reference, but whether Redman's charges are pending or not is irrelevant to any matter before the Court on cert.

² The Court of Appeals held both policies provided both uninsured and underinsured motorist coverage. That finding is incorrect. The Progressive policy did not include underinsured motorist coverage.

Both policies limited UM coverage to liability 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:

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 unless Redman's liability arises out of the ownership, maintenance, or use of his 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).

As the party seeking coverage, the Estate bears the burden of proving Harrison’s injuries arise out of Redman’s ownership, maintenance, or use of his automobile. *See, e.g., Liberty Mut. Ins. Co. v. Edwards*, 294 S.C. 368, 370, 364 S.E.2d 750, 751 (1988) (holding party seeking coverage must establish facts for 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.”). “The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial.” *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 129, 357 S.E.2d 643, 645 (Ct. App. 2004) (citation omitted). Thus, Petitioners were entitled to summary judgment if the Estate failed to make a factual showing to satisfy each element of the *Aytes* test. 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 in *Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 182 (Ct. App. 2019)).

ARGUMENT

Injuries from the intentional firing of a gun are not foreseeably identifiable with the normal use of an automobile. This rule, adopted by the Court in *Bookert*, has been adopted by a majority of courts across the country. Simply put, the normal use of an automobile does not result in gunshot injuries.

While Harrison’s injuries are not foreseeably identifiable with the normal use of an auto, this is only one of multiple defects in the Estate’s UM claim. Redman’s vehicle had no active role in the shooting. When Redman pointed the rifle out of his window, aimed, and fired, his vehicle was stationary, and so was Harrison’s. The vehicle was merely the place from which he fired the rifle. To the extent Redman used his vehicle in connection with the shooting, that use ended when both vehicles stopped at the red light. Only then did Redman proceed to point the rifle at Harrison and fire. These actions by Redman broke any purported connection between his use of the vehicle and Harrison’s injuries.

Perhaps because of the tragic circumstances, the Court of Appeals found “facts” outside of the Record on Appeal to support its decision. In particular, the Court of Appeals found Redman used his vehicle to “conceal” the rifle and used his vehicle to “closely pursue” Harrison. Those facts are not in the record. To the contrary, there is no evidence of a pursuit, and neither party even suggested to the courts below that Redman concealed the rifle. The Court of Appeals also shifted the burden to Petitioners even though the Estate must prove the injuries arose out of Redman’s ownership, maintenance or use of a vehicle. By forming facts that were not in the record and shifting the burden of proof, the Court of Appeals went well beyond its standard of review.

The Circuit Court correctly applied this Court’s precedent in *Aytes* and *Bookert* and found Harrison’s injuries did not arise out of Redman’s use of a vehicle. The Court of Appeals erred when it held otherwise.

I. The Estate failed to meet its burden under the *Aytes* causal connection test because Redman’s use of a gun – not his use of an automobile – caused Harrison’s injuries.

The Progressive and USAA policies provide UM coverage only if Harrison’s injuries “arise out of” Redman’s “ownership, maintenance or use of an automobile.” (R. pp. 41, 48). In *Aytes*, this Court established the modern standard for determining whether injuries arise out of the

ownership, maintenance, or use of an auto. First, the party seeking coverage must prove a causal connection between the vehicle and the injury. *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745. Second, there must be no act of independent significance that breaks the causal link. *Id.* Third, the vehicle must be used for transportation at the time of the incident. *Id.*

In order to prove the first causal connection element, the Estate must establish three subfactors: (1) the vehicle was an “active accessory” to the assault; (2) the vehicle was more than the mere site of the injury, even if not the proximate cause; and (3) “[t]he injury must be foreseeably identifiable with the normal use of the vehicle.” *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (citation omitted). Failure of any one of these elements is fatal to the Estate’s claim. Here, the Estate’s claim fails each subfactor of the causal connection requirement.

First and foremost, Harrison’s injuries were not caused by any normal use of an automobile. Redman intentionally fired a rifle at Harrison, and it was this action that caused her injuries. There is no normal use of an automobile that involves the intentional firing of a gun. Therefore, the injuries are not causally related to Redman’s use of his automobile.

Even if the Estate could identify how a normal use of Redman’s automobile caused Harrison’s gunshot injuries, the Estate failed to present evidence showing Redman’s vehicle was an “active accessory” to Harrison’s injuries. Instead, his use of the vehicle was only incidental to the shooting, with his stationary vehicle merely being the site from which he fired. Therefore, the Estate fails to meet its burden of establishing the first element of the *Aytes* test.

a. Gunshot injuries from an assault are not foreseeably identifiable with the normal use of an automobile.

This Court in *Bookert* specifically held injuries from the intentional firing of a gun do not arise out of the ownership, maintenance or use of a vehicle. In normal use, vehicles do not fire

bullets. Harrison was injured by a bullet fired from a rifle, not a car. Therefore, her injuries do not arise out Redman's use of an auto.

The Court of Appeals erroneously sidestepped *Bookert* by holding that case was limited to its facts. Instead, the Court of Appeals relied on the earlier decision in *Howser* to find Harrison's injuries were foreseeably identifiable with the normal use of an auto. However, the *Howser* case did not address the "normal use" sub-factor. "[T]he South Carolina Supreme Court did not consider the foreseeability of the victim's injuries in *Howser*" *Nationwide Mut. Ins. Co. v. Jeter*, 2013 WL 3109214, *3 (D.S.C. June 18, 2013). Thus, *Howser* does not provide any guidance on the "normal use" test. More importantly, the Court of Appeals below never identified any normal use by which an auto could cause Harrison's bullet wound.

The appellate history in *Bookert* is particularly enlightening here. According to stipulated facts in *Bookert*, 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 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.* When they found their intended victims, the driver stopped the jeep in the travel lane. 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 Court of Appeals rendered its opinion in *Bookert* before this Court adopted the *Aytes* “normal use” standard. Relying on this Court’s prior decisions in *Howser* and *Towe* – which did not evaluate whether the injuries were foreseeably identifiable with the normal use of an auto – the Court of Appeals found that the drive-by shooting in *Bookert* arose out of the use of an automobile. The Court of Appeals deemed it 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.”³ *Id.* at 232-33, 400 S.E.2d at 486, rev’d 337 S.C. 291.

On review, this Court reversed. Despite all the above-summarized factual findings in *Bookert*, this 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. . . .

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

³ Notably, these are the same faulty 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;” 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.” (App. pp. 195-196).

- 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 [the] policy does not cover [the victim’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, this Court did not rely upon the specific facts in *Bookert*. It did not attempt to distinguish the circumstances at issue from those at issue in *Howser* or *Towe*.⁴ Instead, the Court 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 Court ruled that gunshot injuries were not “foreseeably identifiable with the normal use of an automobile.” *Id.*

The holding in *Bookert* expressly acknowledges that *Aytes* changed the law in South Carolina. Consequently, the Court of Appeals’ reliance on *Howser* and *Towe* in this case was 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 auto. Applying the new *Aytes* test, this Court in *Bookert* held that gunshot injuries were not foreseeably identifiable with the normal use of an auto. In other words, *Howser* was no longer good law.

This Court did not adopt the “normal use” test from thin air. Other courts had already adopted this same factor. For example, United States Court of Appeals for the Fourth Circuit in *Nationwide Mutual Insurance Company v. Brown*, 779 F.2d 984 (4th Cir. 1985), held gunshot injuries from an assault were not foreseeably identifiable with the normal use of an auto. In *Brown*, a driver and his passenger drove around looking for the passenger’s wife. When the passenger saw

⁴ The *Howser* and *Towe* cases are addressed in detail below.

his wife’s car, he pushed the driver and caused a collision between the two vehicles. He then got out of the vehicle and shot and killed his wife. *Id.* at 986. Thus, he used the vehicle to disable the wife’s vehicle, and he used a gun to kill her. The Fourth Circuit held the wife’s gunshot 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 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)).

By reaching the same holding in *Bookert*, this Court adopted the majority rule.⁵ In a case involving an on-highway pursuit and car-to-car shooting, the Supreme Court of Virginia held the

⁵ See *State Farm Mut. Auto. Ins. Co. v. Dehaan*, 393 Md. 163, 192-93, 900 A.2d 208, 225 (2006) (“Shooting people is likewise not the manner in which vehicles are normally used, or for which they are designed, i.e., vehicles are not normally necessary for shooting people.”); *Kessler v. Amica Mut. Ins. Co.*, 573 So.2d 476, 478 (La. 1991) (“The risk that an occupant of another car might suffer a gunshot wound is not within the scope of the duty to stop at a stop sign.”); *Farm & City Ins. v. Estate of Davis*, 629 N.W.2d 586, 589 (S.D. 2001) (“A majority of courts refuse to find that the insurer and insured contemplated that the conduct involved in a [vehicle-to-vehicle] drive-by shooting would be covered under the policy”); *Victoria Ins. Co. v Hawkins*, 31 S.W.3d 578, 582-83 (Tenn. Ct. App. 2000) (holding vehicle-to-vehicle shooting did not arise out of ownership, maintenance or use because shooting was not a “proper use in order for the liability to arise out of the use of the vehicle as required by the policy.”); *State Farm Mut. Auto. Ins. Co. v. Spotten*, 610

“natural and ordinary meaning of ‘use’ of a private, passenger motor vehicle does not contemplate its utilization as a mobile or stationary . . . outpost from which an assailant may inflict intentional injury with a firearm.” *Lexie v. State Farm Mut. Auto. Ins. Co.*, 251 Va. 390, 396, 469 S.E.2d 61, 64 (1996) (quoting *Travelers Ins. Co. v. LaClair*, 250 Va. 368, 373, 463 S.E.2d 461, 464 (1995)). In *Lexie*, the claimants argued the fact that the shootings took place between moving vehicles distinguished the case from prior cases dealing with stationary shootings. The Supreme Court rejected that argument, holding “[t]hese are distinctions without a difference The principal focus is upon the manner in which the vehicle, whether moving or stationary, is being employed” *Id.* at 396-97, 469 S.E.2d at 64.

As the Michigan Court of Appeals recognized, it is “uncontestable that [drive-by shootings] are not identified with the normal use of a motor vehicle.” *Auto Owners Ins. Co. v. Rucker*, 188 Mich. App. 125, 127, 469 N.W.2d 1, 2 (Ct. App. 1991). “Clearly, an automobile chase with guns blazing is not a regular and normal use of a vehicle.” *Scales v. State Farm Mut. Auto. Ins. Co.*, 119 N.C. App. 787, 790, 460 S.E.2d 201, 203 (1995). The “discharge of a gun is unconnected to the inherent use of the motor vehicle.” *Ward v. International Indem. Co.*, 897 S.W.2d 627 (Mo. Ct. App. 1995). Thus, the *Bookert* Court joined the Fourth Circuit and numerous other courts when it

N.E.2d 299, 302 (Ind. Ct. App. 3rd Dist. 1993) (“A random act of violence by a vehicle passenger . . . is not a risk reasonably contemplated by the parties and expressed in the [automobile] contract.”); *Ramirez v. State Farm Mut. Auto. Ins. Co.*, 331 Ill. App. 3d 77, 85-86, 771 N.E.2d 619, 626 (App. Ct. 2nd Dist. 2002) (holding injuries resulting from shots fired from pursuing vehicle were not within reasonable contemplation of parties to insurance contract); *see also Ruiz v. Farmers Ins. Co. of America*, 177 Ariz. 101, 865 P.2d 765 (1993); *Mid-Century Ins. Co. of Texas, a Div. of Farmers Ins. Group of Companies v. Lindsey*, 997 S.W.2d 153, 160 (Tex. 1999) (“Thus, if injury occurs when one is purposefully handling a gun in or around a vehicle, not for purpose of placing the gun in or removing it from the vehicle, but such as playing with it or intentionally shooting it, there is no causal connection between the injury and the use of the vehicle; the vehicle is merely the situs of the injury and its use incidental to the injury-producing act.”).

held injuries from the intentional firing of a gun are not foreseeably identifiable with the normal use of an auto.

Like the claimants in *Bookert* and *Brown*, Harrison's injuries are not foreseeably identifiable with the *normal use* of an auto. 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, the jeep was in motion at the time of the shooting, and the soldiers used the jeep for a quick escape. 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. This Court in *Bookert* found the facts 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 this Court held in *Bookert*, the Fourth Circuit held in *Brown*, and numerous other courts have held in other cases, gunshot injuries are not the type of injuries that are foreseeably identifiable with the *normal* use of an auto. 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 shooter's vehicle is merely the situs of the shooting; it is not an "active accessory."

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 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 fired a bullet from his stationary vehicle into Harrison's stationary vehicle. The vehicle had no causal

connection to Harrison’s injuries, and Redman’s use of the vehicle did not increase the severity of her injuries. Therefore, the required causal connection does not exist.

i. Redman’s vehicle was not an “active accessory” to Harrison’s injuries.

The District Court analyzed this question in *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009), and held use of a vehicle in a drive-by shooting does not make the vehicle an “active accessory.” 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, the claimant left to pick up a neighbor’s child at a local bus stop. The assailant “happened to still be driving around town and noticed plaintiff drive past him—in the opposite direction—on her way to the bus stop.” *Id.* at 1024. Unbeknownst to her, “he turned his vehicle around to go after her.” *Id.* When the claimant stopped her vehicle to wait at the bus stop, the assailant drove up beside her vehicle, stopped briefly, fired multiple shots into her vehicle, and drove away. *Id.*

Like the Estate here, the claimant in *Holmes* relied heavily on this Court’s prior holdings in *Howser* and *Towe*. In a thorough opinion, the District Court aptly distinguished both cases and found the vehicle was not an active accessory.⁶ *Id.* at 1027.

In *Howser*, an unidentified assailant used his vehicle to ram the claimant’s vehicle multiple times while chasing her down a public roadway. When the claimant accelerated in an effort to get away, the assailant sped up and pulled alongside the claimant’s fleeing vehicle. When the assailant pulled out a gun, the claimant made a “quick” turn in an attempt to flee, and the assailant shot at

⁶ The District Court alternatively 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.*

her car. The fragmented bullet struck the claimant, injuring her. 309 S.C. at 271, 422 S.E.2d at 106.

This Court held the injuries in *Howser* 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. The *Howser* 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. Notably, the *Howser* 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. The Supreme Court found the injuries arose out of the use of the auto because the "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).

Thus, *Howser* and *Towe* stand for two separate rules. In *Howser*, the assailant's vehicle was as an "active accessory" to the assault because he used his vehicle to ram (assault) and pursue the fleeing victim, and the shooting was merely the culmination of that ongoing assault to which the vehicle played an integral role. *Howser*, 309 S.C. at 273, 422 S.E.2d at 108. On the other hand, 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.⁷

The District Court’s well-reasoned opinion in *Holmes* addressed these two separate rules in *Howser* and *Towe* and found a shooting from one stationary vehicle at an occupant of another stationary vehicle falls outside of both those cases. In contrast, the vehicle in *Holmes* – and Harrison’s vehicle here – was stationary, and the severity of the victim’s 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 *Holmes* case applies with equal force here.

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

⁷ This distinction is also shown by the different outcomes in *Nationwide Mut. Ins. Co. v. Jeter*, 2013 WL 3109214 (D.S.C. June 18, 2013) and *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1975). Both cases involved assaults that took place inside of moving vehicles. However, the victim in *Jeter* was only injured by the assaulting driver. In contrast, the victim in *Chapman* was injured when she tried to jump out of or fell out of the moving vehicle. *Chapman*, 263 S.C. at 570-71, 211 S.E.2d at 879. Thus, the speed of the vehicle had a direct impact on the victim’s injuries. Notably, the District Court in *Jeter* also found *Howser* and *Towe* were of limited relevance “due to the fact that both were decided before *Aytes*.” 2013 WL 3109214 at *3.

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.⁸

ii. Redman's vehicle was merely the site from which he fired his rifle.

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. The Court of Appeals 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. *Id.* at 424-25, 523 S.E.2d at 475.

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 the Court of Appeals' unfounded finding that Redman "closely pursued" Harrison to the stop light, *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.

Like the attempted robbery in *Wright*, Redman's vehicle merely served as the site from which he fired the shot at Harrison's vehicle. Therefore, the causal connection between his use of the vehicle and Harrison's injuries is insufficient to trigger coverage under the auto policies.

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

II. 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 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)). Shooting a gun from one vehicle into another is an act "wholly disassociated from, independent of, and remote from" the vehicle's normal use." *Scales*, 119 N.C. at 790, 460 S.E.2d at 203.

South Carolina's jurisprudence is full of cases holding 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); *Brown*, 779 F.2d at 989 (holding shooting that happened immediately after assailant

used truck to ram and disable victim's vehicle and then exited truck was an act of independent significance); *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 a causal connection.

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 in *Wright* was 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.

The question here is whether the *shooting* between two *stationary* vehicles breaks the causal connection with the *use* of a *vehicle*. After both vehicles stopped, Redman began the wholly separate and independent act of drawing the rifle, pointing the rifle at Harrison, and firing. These independent acts are the only acts that caused Harrison's injuries, and they are wholly independent from the operation of the vehicle. The two actions cannot logically be considered "inextricably

linked as one continuing assault.” 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.⁹

Put simply, the act of shooting Harrison was independent of Redman’s use of his vehicle. Her vehicle was stationary and so was Redman’s. 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 putting his vehicle in park, exiting his vehicle, and firing. He could also have carried out the shooting if he were merely standing outside at the corner of the intersection. Therefore, the Circuit Court properly held the shooting was an act of independent significance breaking any potential causal connection.

III. A common-sense application of the facts in this case compels a finding that Harrison’s injuries arose out of Redman’s use of a gun, not the use of an auto.

South Carolina Code § 38-77-140 states policies must insure “against loss from the liability imposed by law for damages arising from the ownership, maintenance, or use of these motor vehicles” The test adopted in *Aytes* is an analytical framework to determine whether liability arises out of the use of an auto. However, sometimes common sense makes the analytical framework unnecessary. Here, the analysis need go any further than asking what action of Redman gave rise to Harrison’s injuries?

As the Florida Court of Appeals succinctly put it: “If the uninsured vehicle causes the injury, there is coverage; if the shooting causes the injury, there is no coverage.” *Taylor v. Phoenix*

⁹ 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. South Carolina 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 and 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.

Ins. Co., 622 So.2d 506 (Fla. Dist. Ct. App. 5th Dist. 1993) (vehicle-to-vehicle shooting on interstate). Similarly, courts applying a duty-risk analysis hold that “the duty not to shoot [another] existed independently of the use of the automobile” and therefore, gunshot injuries in a vehicle-to-vehicle shooting did not arise out of the use of an auto. *Reeks v. Johnson*, 587 So.2d 2, 4 (La. Ct. App. 3rd Cir. 1991).¹⁰

Cars are not designed fire bullets. Cars do not have barrels. They do not have triggers or firing pins. In fact, cars are incapable of firing bullets. Focusing solely on Redman’s use of the auto, the undisputed facts show Redman drove his vehicle to a stop light, stopped at the light, and then drove away. This conduct would not give rise to any liability against Redman because his actual use of the car did not cause any injury to Harrison.

On the other hand, guns are specifically designed to fire bullets. Focusing on Redman’s use of the gun, Redman grabbed his gun, aimed it at Harrison, and fired. The bullet hit Harrison, causing her injuries. Thus, Redman’s use of the gun gave rise to Harrison’s injuries. His car did not, and could not have, caused Harrison’s gunshot injuries.

Even in cases where there was indisputably a pursuit, courts applying this same statutory or policy language hold that gunshot injuries are caused by guns, not autos. For example, in

¹⁰ See also *Kessler v. Amica Mut. Ins. Co.*, 573 So.2d 476 (La. 1991) (holding vehicle-to-vehicle shooting on the roadway did not arise out of use of auto because victim was injured by assailant’s use of his gun, not use of an auto); *Williams v. Allstate Prop. and Cas. Ins. Co.*, 509 S.W.3d 696, 700 (Ark. Ct. App. Div. III 2017) (holding injuries to driver suffered from shots fired from one moving vehicle into another moving vehicle on the highway did not arise out of use of the shooter’s vehicle); *Zambrana v. National Continental/Progressive Ins. Co.*, 2011 WL 2321398 (N.J. Super. Ct. App. Div. 2011) (holding injuries from vehicle-to-vehicle shooting that occurred when vehicles were operating on roadway was caused by gunshot, not use of auto); 7 Am. Jur. 2d Automobile Ins. § 171 (“[C]ircumstances in which one intentionally shoots another from a vehicle have generally not been deemed to have arisen from the ownership, maintenance, or use of the vehicle for purposes of automobile liability insurance coverage, because the injuries did not arise from the use of the vehicle . . .”).

Ramirez v. State Farm Mutual Automobile Insurance Company, a pursuing vehicle chased the victim's vehicle for forty blocks. When the victim slowed down for a train crossing, a passenger in the pursuing vehicle shot the victim driver, causing his death. The Illinois Court of Appeals held "the instrumentality of [victim's] injuries and death was the gun that the passenger in the uninsured vehicle fired at" him. *Id.* at 86, 771 N.E.2d at 626. "The operation or use of the uninsured vehicle was not the instrumentality that caused the [victim's] injuries and death." *Id.*

A straightforward application of the *Aytes* test, as applied by this Court in *Bookert*, confirms Harrison's injuries did not arise out of Redman's use of a vehicle. However, even without *Aytes* and *Bookert*, common sense dictates the same outcome. Redman's car did not, and physically could not have, caused Harrison's gunshot injuries. The vehicle was not designed to fire bullets. On the other hand, Redman's gun was designed exactly for that purpose, and the gun was the instrumentality of Harrison's injuries. Therefore, the Circuit Court correctly found Harrison's injuries did not arise out of the ownership, maintenance or use of an automobile.

IV. The Court of Appeals went outside of the standard of review by adopting factual findings that were not in the Record on Appeal, forming "facts" that do not exist, and shifting the burden of proof to Petitioners.

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).

In its opinion reversing the Circuit Court, 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;¹¹
- 2) Redman used his vehicle to “conceal” the rifle;¹²
- 3) The Court of Appeals rejected the finding that there was no evidence Harrison was aware of Redman.¹³

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 are not in 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.

¹¹ “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).

¹² “Redman’s vehicle contributed to the concealment of his weapon.” (App. p. 196).

¹³ “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).

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. (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 Harrison’s injuries arose out of Redman’s ownership, maintenance or use of an automobile. *See e.g., Garrett*, 241 S.C. at 303, 128 S.E.2d at 173 (“[T]he insured had the burden of showing that his injury was covered by the terms of the policy.”); *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (holding burden of proof was on party seeking coverage to show death fell within coverage). 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 that Harrison saw the gestures or 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 mere speculation.¹⁴

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.¹⁵

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

¹⁴ The Court of Appeal’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 conjecture.

¹⁵ 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.

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 rejected 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.” (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.

The Court of Appeals relied heavily on each of these improper factual determinations, none of which was established in the record. This error serves as an additional basis for reversal. The Estate failed to meet its burden of presenting facts to establish each element of the *Aytes* test. Therefore, the Circuit Court’s Order should have been affirmed, and the Court of Appeals’ decision should be reversed.

CONCLUSION

The Circuit Court correctly held Harrison’s injuries did not arise out of Redman’s use of the Ford Escape. As this Court held in *Bookert*, gunshot injuries resulting from an assault are not foreseeably identifiable with the normal use of an auto. In addition, the Redman’s vehicle 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 vehicle merely served as the site from which Redman committed the shooting.

Even if there were a causal connection between Redman’s use of the vehicle and Harrison’s injuries, Redman’s act of pulling out the rifle, aiming it, and firing at Harrison – all after both vehicles stopped for the red light – was an independent act breaking any connection that may have existed. Thus, the Circuit Court’s Order should have been affirmed.

In addition to failing to apply this Court’s precedent in *Aytes* and *Bookert*, the Court of Appeals went outside the confines of the proper standard of review. The Court of Appeals made factual findings that were not supported by facts in the Record on Appeal, created new facts without basis, and improperly shifted the burden of proof.

Contrary to the Court of Appeals’ ruling, the Estate failed to present evidence establishing the requisite causal connection between Redman’s use of the vehicle and Harrison’s injuries. Therefore, the Court of Appeals’ Opinion should be reversed, and summary judgment should be affirmed in favor of Petitioners.

Respectfully submitted,

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

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