

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jun 18 2021**

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Honorable Alison Renee Lee, Circuit Court Judge

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S.C. SUPREME COURT

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Appellate Case No. 2020-001337  
Trial Court Case No. 2015-CP-18-01571

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

v.

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

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**BRIEF OF RESPONDENT**  
**SHANNA GROVES AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF**  
**LYNN HARRISON**

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## Statement of Issues on Appeal

- I. Whether the Court of Appeals correctly ruled that there is no bright line rule under existing South Carolina law that injuries from the intentional firing of a gun do not arise out of the ownership, maintenance, or use of a vehicle when no South Carolina court has ever created such a rule.
  
- II. Whether the Court of Appeals correctly ruled, based upon the undisputed facts, that the Circuit Court erred in finding no causal connection exists because Redman's vehicle was an active accessory to the assault upon Harrison, the vehicle was more than the situs of Harrison's injuries, and the injuries suffered by Harrison were foreseeably identifiable with the normal use of a motor vehicle.
  
- III. Whether the Court of Appeals correctly held that 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.
  
- IV. Whether the Court of Appeals correctly based its decision on the undisputed facts in the record.

## STATEMENT OF THE CASE

Lynn Harrison (“Harrison”) was operating her vehicle on a public roadway when she was shot to death by Jimi Carl Redman, Jr. (“Redman”), another motorist operating his vehicle on a public roadway. Petitioner Progressive Direct Insurance Co. (“Progressive”) sued Respondent, Shanna Groves<sup>1</sup> as the Personal Representative of the Estate of Lynn Harrison (“Respondent” or “the Estate”), seeking a declaratory judgment that the uninsured motorist policy Progressive issued to the Harrisons did not provided coverage for the death of Harrison, even though her death occurred while she was operating a covered vehicle in traffic and was caused by an uninsured motorist who was also operating his vehicle at the time he shot and killed her. (App. 12-15). On September 17, 2015, Progressive and USAA General Indemnity Company (“USAA”) (collectively, “Petitioners”) filed an Amended Complaint, adding USAA as an additional Plaintiff. (App. 16-20). In the Amended Complaint, both Petitioners sought a declaratory judgment that that the uninsured motorist policies they issued to the Harrisons did not provided coverage for Harrison’s death. (App. 16-20).

Respondent answered the Amended Complaint on November 3, 2015, denying that the Petitioners were entitled to a declaratory judgment and asserting that the policies provide coverage for the incident that resulted in Harrison’s death. (App. 21-24). On May 9, 2016, Petitioners filed a Motion for Summary Judgment. (App. 25-26). On January 27, 2017, the Respondent filed a Cross Motion for Summary Judgment. (App. 59-60). On February 7, 2017, the Honorable Alison Renee Lee held a hearing on Petitioners’ Motion for Summary Judgment and Respondent’s Cross

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<sup>1</sup> The Respondent 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, Shanna Groves was substituted in this case as the Personal Representative of the Estate of Lynn Harrison. (App. 10-11).

Motion for Summary Judgment. (**App. 3-9**). On August 2, 2017, Judge Lee issued an order granting Petitioners' motion and denying the Respondents' motion. (**App. 3-9**). Respondent timely served a Notice of Appeal on September 15, 2017. (**Notice of Appeal**). After the appeal was fully briefed, the Court of Appeals issued a unanimous Opinion on July 22, 2020 reversing the Circuit Court (the "Opinion"). (**App. 188-203**). Following the Opinion, Petitioners filed a Petition for Rehearing and for Rehearing *en banc*. (**App. 204-24**). The Court of Appeals denied the request for rehearing. (**App. 227-28**). Petitioners filed a Petition for a Writ of Certiorari on October 8, 2020. (**Petition for Writ of Certiorari filed October 8, 2020**). This Court granted Certiorari on April 19, 2021. (**Order Granting Writ of Certiorari entered April 19, 2021**).

#### **STATEMENT OF THE FACTS**

On April 2, 2015, Lynn Harrison was driving a 2010 GMC Terrain eastbound on East Carolina Avenue, which became Old Trolley Road, just before the intersection of Old Trolley Road and Bacons Bridge Road in Summerville, South Carolina. (**App. 18, ¶ 10**); (**App. 22, ¶ 11**); (**App. 84, #6**); (**App. 88, #6**). Harrison was traveling in the middle of the three eastbound lanes of Old Trolley Road. (**App. 84, #7**); (**App. 89, #7**). Harrison "was operating her vehicle in a normal and reasonably foreseeable fashion." (**App. 98, #7**).

Redman was driving a red Ford Escape eastbound on Old Trolley Road in the far-right lane, directly to Harrison's right. (**App. 84, #8**); (**App. 89, #8**). Redman had driven his vehicle from Texas to South Carolina with a rifle located inside 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*); (App. 102-03) (statement from witness traveling behind Harrison who reported that Redman was making gestures and blowing kisses to Harrison while they were all traveling from one green light to the next light ahead). 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); (App. 102-03).

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”), which were in full force and effect on April 2, 2015.<sup>2</sup> (App. 38-49). The policies each provide uninsured motorist coverage with limits of twenty-five thousand (\$25,000.00) dollars per

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<sup>2</sup> 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).

person and fifty thousand (\$50,000.00) per accident, as well as uninsured property damage coverage. **(App. 39, 43).**

Following the death of Harrison, Progressive sued James Mark Harrison, as the Personal Representative of his wife's 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, USAA was added as a Plaintiff by way of Petitioners' Amended Complaint. **(App. 16-20).** In the Amended Complaint, Petitioners sought a declaratory judgment that that the uninsured motorist policies they issued did not provide coverage. **(App. 16-20).**

Respondent answered the Amended Complaint on November 3, 2015, denying that Petitioners were entitled to a declaratory judgment and asserting that the policies provide coverage. **(App. 21-24).** On August 2, 2017, Judge Lee ruled on cross motions for summary judgment, issuing an order granting the Petitioners' motion and denying Respondents' motion. **(App. 3-9).** Respondent 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 based upon the undisputed facts, 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. 188-203).** There was no dissent. **(App. 188-203).**

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 State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998))).

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, more than mere situs of the injury, and the 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. 201-03**).

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 and this Court granted Certiorari on April 19, 2021. (**Order Granting Writ of Certiorari**).

### **STANDARD OF REVIEW**

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRPC. Cowburn v. Leventis, 366 S.C. 20, 30, 619

S.E.2d 437, 443 (Ct. App. 2005) (citing Trousdell v. Cannon, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). Summary judgment should only be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. In this case, the material facts are not in dispute.

“A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue.” Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) (citing Colleton County Taxpayers Ass’n v. Sch. Dist. of Colleton County, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006)). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 497, 544 S.E.2d 637, 639-40 (Ct. App. 2001). When reviewing an action at law, the scope of review is limited to the correction of errors of law. S.C. Dept. of Transp. v. Horry County, 391 S.C. 76, 81, 705 S.E.2d 21, 24 (2011).

### ARGUMENT

Under South Carolina law, automobile insurance policies are required to insure against damages “arising out of the ownership, maintenance, or use” of a motor vehicle. S.C. Code § 38–77–140. An injury arises out of the ownership, maintenance, or use of an automobile if: (1) there is a causal connection between the vehicle and the injury; (2) no act of independent significance occurred which broke the causal link; and (3) the vehicle was being used for transportation at the time of the assault. State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998). 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, or maintenance of an automobile because there was a causal connection between the vehicle and the injury and no act of independent

significance broke the causal link.<sup>3</sup> (**App. 188-205**). For the reasons explained below, the Court of Appeals correctly ruled that Harrison’s death arose out of the ownership, maintenance, or use of motor vehicles and therefore the policies provide uninsured motorist coverage.

Petitioners assert that in State Farm Mut. Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) this Court created a rule of law by “specifically h[olding] injuries from the intentional firing of a gun do not arise out of the ownership, maintenance or use of a vehicle.” (**Pets.’ Br., 10**). Bookert contains no such specific holding. There is no bright line rule under South Carolina law that any and all injuries resulting from the intentional firing of a gun do not arise out of the ownership, maintenance, or use of a vehicle. To the contrary, this Court and others have found injuries arising from intentional assaults, including shootings, arise out of the assailant’s ownership, maintenance, or use of a when the assault occurs when both the victim and assailant are operating vehicles. Among those cases 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), which are particularly on point and remain good law despite Petitioner’s contentions to the contrary.

For the reasons explained below, whether Petitioners ask this Court to find Bookert created a rule of law that the Court did not state it created, or alternatively, ask this Court to change current South Carolina law by creating a *new* rule that injuries from the intentional firing of a gun do not

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<sup>3</sup> There is no dispute that the third element of the test is satisfied, i.e., that Redman’s vehicle was being used for transportation at the time of the incident. (**App. 192**). Therefore, the only elements at issue in this case are whether: (1) there is a causal connection between the vehicle and the injury; and (2) no act of independent significance occurred which broke the causal link. See Aytes, 332 S.C. at 33, 503 S.E.2d at 745.

arise out of the ownership, maintenance, or use of a vehicle, the Court should refuse and should affirm the well-reasoned decision of the Court of Appeals.

I. **The Court of Appeals should be affirmed because it correctly determined that there is no bright line rule under existing South Carolina law that injuries from the intentional firing of a gun do not arise out of the ownership, maintenance, or use of a vehicle.**

Petitioners assert that the appellate history of State Farm Mut. Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999) (Bookert) shows that this Court created a bright line rule that injuries from the intentional firing of a gun do not arise out of the ownership, maintenance, or use of a vehicle, even though no such rule is mentioned in the Bookert opinion. According to Petitioners, because the Court of Appeals found coverage existed in Bookert before this Court's decision in State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 32, 503 S.E.2d 744, 745 (1998) (Aytes) was issued, but then this Court reversed the Court of Appeals' opinion in Bookert, citing to Aytes,<sup>4</sup> it is somehow clear that this Court intended to create a new bright line rule and overturn Howser and Towe. (Pets.' Br., 12-13).

As explained herein, Petitioners' argument is unsupported. In both Aytes and Bookert, the assailant and victim were not both operating vehicles at the time of the assaults (in Aytes, the assailant was outside the vehicle when he shot the victim and in Bookert, the victim was a pedestrian). Neither case mentioned a bright line rule that an intentional shooting cannot ever arise

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<sup>4</sup> This Court's analysis in Bookert was concise. The opinion cites to Aytes for the three-part test for determining whether a victim's personal injuries arise out the ownership, maintenance, or use of an automobile and the three-part subtest for whether a causal connection between the injury and vehicle exists and then, with citation to Aytes, concludes, without any further explanation or elaboration, that "Mary's [the victim's mother's] policy does not cover Michael's [the victim's] injuries because they [were] not 'foreseeably identifiable with the normal use of an automobile.'" Bookert, 337 S.C. at 293, 523 S.E.2d at 182.

out of the ownership, maintenance, or use of a vehicle. Those cases were decided because there was not a causal connection between the insured vehicles and injuries under the specific facts in those cases.

Aytes involved an assailant, on foot, shooting a victim sitting in a vehicle that was not moving. 332 S.C. at 32, 503 S.E.2d at 745. The shooting occurred after Randy Aytes and Donna Dawson became involved in an altercation and Aytes forcibly took Dawson's car key and forced her into her car. Id. at 32, 745. Aytes drove Dawson to his mother's house in her vehicle, with the expressed intent of killing her. Id. Once Aytes got to his mother's house, he "got out of the car and went around to the passenger side where Dawson was sitting." Id. at 33, 746. While standing *outside* of the vehicle on the passenger side, Aytes fired a pistol towards Dawson, striking her in the foot. Id. The Court decided that the injuries in that case did not arise out of the use and operation of the of the uninsured vehicle because the subject vehicle was not being used for transportation at the time of the injury, was not an active accessory to the assault, and the assailant's exit out of the car broke the casual link. Id. at 35, 746 ("There was not a causal connection in this case as the vehicle was not an active accessory, nor was it being used for transportation at the time of the injury. Further, if there was a causal link, it was broken when the assailant exited the vehicle. The only connection between the car and the injury is the fact that Dawson was sitting in the car when she was shot."). In evaluating whether a causal connection existed between the victim's injuries and the vehicle involved, the Court cited to Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir. 1985) for the proposition that the victim's injury must be foreseeably identifiable with the normal use of a vehicle. Aytes, 332 S.C. at 33, 503 S.E.2d at 746. This Court's consideration of Brown was particularly relevant in the Aytes case because Brown also involved an assailant, while not in a vehicle, shooting a victim who was sitting in a

vehicle. Compare Brown, 779 F.2d at 987; Aytes, 332 S.C. at 32, 503 S.E.2d at 745. In Brown, Toby Brown “jumped out the truck and shot and killed his wife while she sat in the car.” Brown, 779 F.2d at 987. In both cases, the injuries inflicted by the assailants were completely independent of the use of the vehicles involved.

In Brown, the Fourth Circuit Court of Appeals, applying South Carolina law, analyzed whether an assault by an armed assailant outside a vehicle upon a victim sitting inside a vehicle is foreseeably identifiable with the normal use of a motor vehicle. 779 F.2d at 988-89. The court in Brown cited to numerous cases involving assailants, on foot, and outside vehicles, carrying-out assaults upon victims who happen to be sitting in a vehicle. See id. (citing Detroit Auto. Inter-Insurance Exchange v. Higginbotham, 95 Mich. App. 213, 290 N.W.2d 414 (1980) (finding that the victim’s injuries did not arise out of the assailant’s use of his vehicle where the assailant got out of his car, walked to the victim’s car, and shot her several times); Commercial Union Ins. Co. of New York v. Hall, 246 F. Supp. 64 (E.D.S.C. 1965) (finding the victim’s injuries did not arise out of the assailant’s use of his vehicle where the assailant got out of his car and physically assaulted the victim); Aetna Cas. & Surety Co. v. Goldman, 374 So. 2d 539 (Fla. App. 1979) (finding that the victim’s injuries did not arise out of the assailants’ use of their automobile where the assailants got out of their vehicle and placed a bomb under the victim’s vehicle which was parked outside the victim’s apartment)). The Fourth Circuit also discussed a case where an assailant was in a vehicle at the time of the assault, but the victim was not. See Brown, 779 F.2d at 989 (discussing Gov’t Employees Ins. Co. v. Melton, 357 F. Supp. 416 (D.S.C.), aff’d, 473 F.2d 909 (4th Cir. 1973), where the Fourth Circuit found no casual connection between the victims’ injuries and use of a vehicle where passengers in a pick-up truck threw a bottle out of the back of

the truck and struck two victims, who were not noted to have been in another vehicle).<sup>5</sup> Therefore, under Brown and Aytes, when the *victim* of an intentional shooting is not moving or operating a vehicle at the time of the shooting, the victim's injuries are not foreseeably identifiable with the normal use of a motor vehicle. That rule is reflected by this Court's short opinion in State Farm Mut. Ins. Co. v. Bookert, 337 S.C. 291, 523 S.E.2d 181 (1999).

In Bookert, the victim, *while standing in front of a fast-food restaurant*, was shot by an assailant who fired from a moving vehicle in the parking lot. Id. at 293, 181. This Court found the pedestrian-victim's injuries did not arise out of the ownership, maintenance, or use of a vehicle because the pedestrian-victim's injuries were not foreseeably identifiable with the normal use of a vehicle. Id. at 293, 182. The victim in that case was not driving or a passenger in any vehicle at the time of the assault.<sup>6</sup> Id. at 292, 181. The sole vehicle involved was merely used to transport the assailant and other "soldiers" to the site of the shooting; the assailant was not operating the vehicle at the time of the assault and did not need the vehicle to carry-out the assault because the victim was a stationary pedestrian.<sup>7</sup> Id.

- a. The Court of Appeals correctly considered and applied Bookert, Aytes, Howser, and Towe.

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<sup>5</sup> The recitation of facts in this opinion suggests the scene of the assault was a filling station and that neither the assailants (passengers in the pick-up truck that stopped at the filling station) or the victims were operating vehicles at the time of the assault, but neither fact is directly set out. Gov't Employees Ins. Co. v. Melton, 357 F. Supp. 416, 417 (D.S.C.), aff'd, 473 F.2d 909 (4th Cir. 1973).

<sup>6</sup> At the time of the shooting, the vehicle the assailant was a passenger in was the host of multiple armed "soldiers" who were hunting-down the pedestrian in a parking lot of a fast-food restaurant. Bookert, 337 S.C. at 292, 523 S.E.2d at 181.

<sup>7</sup> Petitioners also rely on Nationwide Mut. Fire Ins. Co. v. Jeter, No. 3:12-1759-MBS, 2013 WL 3109214 (June 18, 2013). That unpublished order is of little relevance because the assailant in that case injured the victim with pepper spray while both were inside the vehicle and after both had exited the vehicle.

As explained herein, the facts of this case are markedly different from the facts in Aytes and Bookert. Here, the victim (Harrison) and assailant (Redman) were both operating their vehicles before, at the time of, and after the deadly assault of Harrison. Redman was only able to carry out the assault through the use of his vehicle because the use of his vehicle enabled him to keep up and position himself to carry out the assault.

This Court has considered similar facts on two separate occasions. In both instances, the Court found a causal connection between the vehicles involved and the victim's injuries. See Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). The Court of Appeals correctly found this case analogous to those cases and rejected Petitioners' arguments that this case was not similar to those case. (**App. 193-98**) (rejecting the ways in which the Petitioners and Circuit Court asserted the facts of this case were distinguishable from Howser and Towe). Petitioners no longer assert those cases should be distinguished, instead arguing they should be overruled. Therefore, unless this Court were to overrule those decisions, the Court of Appeals must be affirmed.

Notwithstanding, it is important to note that a review of Howser and Towe show the Court of Appeals applied those cases properly to the facts of this case. In Howser, this Court found that a causal connection existed between a victim's gunshot injuries and the use of a vehicle. 309 S.C. 269, 422 S.E.2d 106 (1992). The assailant and Howser, the victim, were driving in different vehicles at the time of the shooting. Id. at 270, 170. The assailant used his vehicle to pursue Howser, and after the assault, the assailant used his vehicle to flee the scene. Id. at 273, 108. First, the assailant used his vehicle to bump the vehicle Howser was operating from behind. Id. at 270, 107. Howser looked in the rear-view mirror and saw a car behind them with a driver and no passengers. Id. That car bumped her vehicle two more times and Howser accelerated. Id.

The assailant, the driver of the other car (who was unknown to the victim and her passenger) pulled his car alongside Howser's vehicle, yelled to roll down the window, slow down and stop the car, and pointed a pistol at the passenger window. Id. Howser turned onto a side street to avoid the unknown stranger, but as she completed the turn, the stranger 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 [solely] 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, 108 (double emphasis added).

In Towe, Brian Towe drove a vehicle in which Jerry Alexander was a passenger. 314 S.C. 105, 106, 441 S.E.2d 825, 826 (1994). 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, 826. The glass struck and injured the driver of the tractor. Id. This 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. This Court determined that Towe's car was an active accessory that gave rise to the injuries sustained. Id. 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.

As is clear, and apparently now acknowledged by Petitioners, the material facts of this case are very similar to those in Howser and Towe. The victim was driving a vehicle in a normal and reasonably foreseeable fashion. (**App. 98, #7**). The assailant was driving his vehicle on the same roadway, and, for at least the length between lights, he was making gestures towards the victim while they were both driving. See (App. 102-103) (statement from witness driving behind Harrison who reported that Redman was making gestures and blowing kisses to Harrison while they were all traveling from one green light to the next light ahead). He ultimately shot her from his vehicle and both Redman and Harrison's vehicles were turned on and in drive at the time of the shooting. (**App. 97-98, #3**); (**App. 98, #8**). Therefore, the Court of Appeals should be affirmed because the analysis of South Carolina law and the application to the undisputed facts in this case was correct.

- b. Howser and Towe were not overruled by this Court's decisions in Aytes and Bookert.

This Court's rulings that coverage did not exist in Aytes and Bookert did not overrule Howser or Towe. Even Petitioners have, at times, asserted Howser and Towe were good law and even argued that the facts of those cases 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 independent significance breaking the causal link between the use of the vehicle and the injury). Petitioners previously asserted that "[Howser and Towe] stand separately on their facts." (**App. 170**). However, 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 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. 205-09**) (Petitioners asserting in their Petition for Rehearing that Howser and Towe are no longer good law).

Furthermore, there is no basis for Petitioners' current assertion that those case are not good law. This Court cited extensively to Howser and Towe in the Aytes opinion. See State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 34-35, 503 S.E.2d 744, 746 (1998). There was no negative discussion of either case. See id. In fact, both cases were cited as examples of when an insured is legally entitled to recover damages arising out of the ownership, maintenance, or use of a vehicle. Id.

Any doubt as to whether Howser and Towe are good law is further expelled by this Court's discussion of Aytes in Bookert. In Bookert, this Court made clear that Aytes did not create new law, but rather "restated" and "reiterated" the then existing test. See State Farm Mut. Auto. Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) ("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. . . . Aytes **reiterated** the components of the causal connection requirement.") (emphasis added). This Court did not state that the reason for its holding in Bookert had anything to with the fact a gun was involved. It simply restated the test as summarized in Aytes and found there was no coverage.

Moreover, courts have continued to cite to Howser and Towe in the two decades that have passed since this Court's decisions in Aytes and Bookert. See e.g., Peagler v. USAA Ins. Co., 368 S.C. 153, 163, 628 S.E.2d 475, 480 (2006) (distinguishing Towe and Howser from the facts at

issue in that case); Holmes v. Allstate Ins. Co., 786 F. Supp. 2d 1022, 1025-26 (D.S.C. 2009) (discussing both Howser and Towe at length and referring to those cases as “precedents” that the plaintiff in that case relied upon); 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. . .”).

For all these reasons, Howser and Towe are still good law and the Court of Appeals properly considered and cited to these cases as part of its decision. The Court of Appeals correctly recognized this Court did not create a bright line rule establishing that all gunshot injuries are not foreseeably identifiable with the normal use of an automobile in Aytes and/or Bookert. See (App. 201) (“[W]e 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 who was not in or operating any vehicle at the time he was shot, 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.

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 Court of Appeals should be affirmed.

c. The Court of Appeals decision is supported by a common-sense application of the law to the undisputed facts and by persuasive authority.

Petitioners assert that “common sense” makes the analytical framework provided for under

South Carolina law unnecessary in this case. Petitioners never explain how common sense dictates that injuries that could not have ever been suffered absent Redman’s normal use of his uninsured automobile should not be covered by insurance that statutorily covers injuries arising out of his use of that vehicle. Instead, Petitioners’ argument in this regard is simply a restated version of its argument that Bookert created a bright light rule that gunshot injuries can never arise from the use and operation of an automobile. See (Pets.’ Br. 23-25). In addition to the argument that Bookert created such a rule, Petitioners cite to out of state opinions from various courts. See (Pets.’ Br. 23-25); (Pets.’ Br. 14-15, n. 5). Significantly, many of the cases cited by Petitioners were decided, at least in part, on the basis that the shootings in those cases were intentional acts or the improper use of the vehicle for the intentional act of shooting a victim.<sup>8</sup> Other cases cited by Petitioners

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<sup>8</sup> For example, in the following cases cited by Petitioners, the courts discussed that the shooting was either intentional, unaccidental, or that the use of the vehicle for a shooting was not the proper use of a vehicle: Farm & City Ins. v. Estate of Davis, 629 N.W.2d 586, 590, 2001 S.D. 71, ¶ 16 (S.D. 2001) (Finding that “[n]ormal use consists of utilizing a vehicle for transportation to and from destinations. . . [and] . . . [u]sing a vehicle to stalk another person with the intent of inflicting injury is in no way a ‘normal’ use . . .”); Victoria Ins. Co. v. Hawkins, 31 S.W.3d 578, 582 (Tenn. Ct. App. 2000) (Tennessee rule requires a determination of whether it was the “proper” use of the vehicle); Ruiz v. Farmers Ins. Co. of Arizona, 865 P.2d 762, 764–65, 177 Ariz. 101, 103–04 (Ariz. 1993) (finding no coverage for injuries that were caused “by-the independent, voluntary, and deliberate acts of a criminal using an uninsured vehicle not as a car, but as a gun platform”); Williams v. Allstate Property and Casualty Insurance Company, 509 S.W.3d 696, 700, 2017 Ark. App. 45, 48 (Ark. App. 2017) (“Additionally, the shooting of Carl was an intentional act, not an accident as contemplated by the policy.”); Mid-Century Ins. Co. of Texas, a Div. of Farmers Ins. Group of Companies v. Lindsey, 997 S.W.2d 153, 159 (Tex. 1999) (noting that if injury occurs from intentionally shooting a gun, 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); Lexie v. State Farm Mut. Auto. Ins. Co., 251 Va. 390, 396, 469 S.E.2d 61, 64 (1996) (focusing on the fact that the assailants were using the uninsured vehicle for an improper use, i.e., to carry-out an intentional shooting); Scales v. State Farm Mut. Auto. Ins. Co., 119 N.C. App. 787, 790, 460 S.E.2d 201, 203 (N.C. Ct. App. 1995) (“[A]n automobile chase with guns blazing is not a regular and normal use of a vehicle.”).

involved circumstances where the vehicle was not even being operated at the time of the assault.<sup>9</sup> Then other out-of-state cases cited by Petitioners find coverage not to exist upon the application of entirely different tests.<sup>10</sup>

However, in South Carolina “[n]o distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act.” Peagler v. USAA Ins. Co., 628 S.E.2d 475, 479, 368 S.C. 153, 160 (2006) (quoting Wright v. North Area Taxi, Inc., 337 S.C. 419, 424, 523 S.E.2d 472, 474 (Ct. App.1999); Home Ins. Co. v. Towe, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994)). The sweeping ruling Petitioners seek is based upon out-of-state cases that are totally inconsistent with established South Carolina law that intent is irrelevant when considering whether injuries arise out

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<sup>9</sup> See, e.g., State Farm Mut. Auto. Ins. Co. v. DeHaan, 900 A.2d 208, 210, 393 Md. 163, 167 (Md. 2006) (assailant shot victim while sitting in victim’s vehicle, while the vehicle was not running, and victim was outside the vehicle); Detroit Auto. Inter-Insurance Exchange v. Higginbotham, 95 Mich. App. 213, 290 N.W.2d 414 (1980) (assailant got out of his car, walked to the victim’s car, and shot her several times while he was on foot and not operating any vehicle). Another case cited by Petitioners, Auto Owners Ins. Co. v. Rucker, 188 Mich. App. 125, 469 N.W.2d 1 (Ct. App. 1991), is distinguishable as the victim was not operating or a passenger in any vehicle, but rather a pedestrian. The pedestrian-victim could have been shot without the use of any vehicle. Id.

<sup>10</sup> See, e.g., Kessler v. Amica Mut. Ins. Co., 573 So. 2d 476, 478 (La. 1991) (describing the applicable test under Louisiana law for determining whether an arising-out-of-use provision has been met to be: (1) whether the conduct of the uninsured to be a legal cause, or cause-in fact, of the plaintiff’s injury; (2) whether the conduct was a breach of a legal duty imposed to protect against the particular risk involved; and (3) a use of the automobile); State Farm Mut. Ins. Co. v. Spotten, 610 N.E.2d 299, 302 (Ind. Ct. App. 3d. 1993) (analyzing coverage based upon the risks expressly contemplated by the parties based upon the terms of the insurance contract, which, in that case only entitled the insured recovery of damages the insured was ‘legally entitled to collect from the owner or driver of an uninsured motor vehicle’ and the assailant was a passenger) (emphasis in original); Ramirez v. State Farm Mut. Auto. Ins. Co., 331 Ill. App. 3d 77, 85, 771 N.E.2d 619, 626 (App. Ct. 2d Dist. 2002) (“[W]e believe that the appropriate analysis for construing ‘arising out of’ language in the context of uninsured motorist provisions of an automobile policy is the reasonable contemplation test.”). Petitioner also cites the Missouri case of Ward v. International Indemnity Co., 897 S.W.2d 627 (Mo. Ct. App. E.D. 1995). Missouri’s law is best summarized in Stosberg v. Electric Ins. Co., -- S.W. 3d --, 2021 WL 445988, \*5 (Mo. Ct. App. W.D. Feb. 9, 2021) (“For an accident causing injury to ‘arise out of the use’ of a vehicle, the purpose for which the vehicle is being employed must be consistent with the vehicle’s inherent nature, and must create a condition which contributes to cause the accident.”).

of the use of an automobile.

Further, it is worth noting that Petitioner does not discuss that numerous out of state cases that are contrary to cases it relies upon. See, e.g., Barncastle v. Am. Nat. Prop. & Cas. Companies, 2000-NMCA-095, 129 N.M. 672, 11 P.3d 1234 (N.M. 2000) (claimant was entitled to uninsured motorist (UM) benefits for injuries he suffered when unidentified passenger of unidentified vehicle shot him as he sat in driver's seat of insured vehicle at intersection; assailant's vehicle was "active accessory" in attack because assailant's driver used it to get into position where assailant could shoot and then to escape scene at high rate of speed, no act of independent significance broke the causal chain, and vehicle in which assailant was riding was put to its normal use in driving alongside claimant.); Cung La v. State Farm Auto. Ins. Co., 830 P.2d 1007, 1011 (Colo. 1992) ("Here, the fact that the firearm contributed to the injuries does not preclude the requisite causal connection. Evidence was presented that it was more than incidental that the assailant was inside a vehicle when he shot the petitioner. At the time the shooting occurred, both the assailant's vehicle and the petitioner's vehicle were proceeding on I-70. Without a vehicle and the assistance of two other vehicles, the assailant would not have been able to restrict the movement of the Mustang and shoot the petitioner."); State Farm Mut. Auto. Ins. Co. v. McMillan, 925 P.2d 785, 795 (Colo. 1996); Abercrombie v. Georgia Farm Bureau Mut. Ins. Co., 216 Ga. App. 602, 604, 454 S.E.2d 813, 815 (1995) ("The movement of the vehicle was integral to, and enabled, the assault. It was not merely incidental; it was inextricably linked. The vehicle was being used for transportation at the time of the shooting and the driving of it facilitated the attack."); Cont'l W. Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987) (The assailant's car was an active accessory to the assault; the assailant used his car to keep up with the victim for over 2 miles in order to shoot the victim. The court also found that no act of independent significance occurred to break the causal link. The

assailant's driving and shooting were inextricably linked, and there were no intervening acts by the assailant, for example, driving ahead of the victim, stopping, leaving his vehicle and shooting the victim, which would break the causal chain); De Zafra v. Farmers Ins. Co., 270 Or. App. 77, 85, 346 P.3d 652, 657 (2015) (“We conclude that ORS 742.504(1)(a) requires UM coverage when the injury arises out of the use of an uninsured vehicle and that coverage cannot be denied based on an interpretation that the gunshots were the ‘direct cause’ of injury.”); Stevens v. MAPFRE Ins./Com. Ins. Co., No. BRCV2018309, 2019 WL 2565235, at \*5 (Mass. Super. Apr. 5, 2019) (“Here, there was a causal relationship between Holloman's use of his uninsured vehicle and Stevens's injuries. Holloman shot in Stevens's direction while operating his uninsured vehicle. It is reasonable to infer that without the use of his uninsured automobile, Holloman would not have been able to keep up with Stevens, who was driving thirty-five to forty miles per hour, in order to inflict his injuries.”).<sup>11</sup>

Therefore, out of state opinions further support a ruling affirming the Court of Appeals.

**II. The Court of Appeals correctly ruled, based upon the undisputed facts, that the Circuit Court erred in finding no causal connection exists because Redman’s vehicle was an active accessory to the assault upon Harrison, the vehicle was more than the situs of Harrison’s injuries, and the injuries suffered by Harrison were foreseeably identifiable with the normal use of the vehicles.**

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

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<sup>11</sup> There are also out-of-state cases that conflict with Bookert. See, e.g., Certification From United States Dist. Court ex rel. Western Dist. of Washington v. GEICO Ins. Co., 366 P.3d 1237, 1241, 184 Wash.2d 925, 934 (Wash. 2016); State Farm Mut. Auto. Ins. Co. v. Blystra, 86 F.3d 1007, 1009 (10th Cir. 1996). While overruling Bookert is unnecessary to affirm the Court of Appeals decision in this case, such a decision as an additional affirming ground would be sound. The test that has developed in South Carolina goes far beyond the statutory language requiring coverage for injuries arising out of the “use” of an uninsured automobile. Even in the Bookert “drive-by-shooting” scenario, the automobile is being used at the time of the injuries.

proximate cause but more than mere site of the injury; and (c) that the ‘injury must be foreseeably identifiable with the normal use of [the vehicle].’” State Farm Mut. Ins. Co. v. Bookert, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (citing State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 33, 503 S.E.2d 744, 745-46 (1998)); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 272, 422 S.E.2d 106, 108 (1992). In considering whether a causal connection exists between the injuries and the 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)).

a. The Court of Appeals correctly held that Redman’s vehicle was an active accessory to the assault carried out upon Harrison.

Petitioner asserts the Court of Appeals should be reversed because, according to Petitioners, Redman’s vehicle was not an “active accessory” to Harrison’s injuries. Petitioner asserts this case is analogous to Holmes v. Allstate Ins. Co., which involved a “drive by shooting.” 786 F. Supp. 2d 1022 (D.S.C. 2009).<sup>12</sup> In Holmes, the assailant, an estranged lover, found his victim “parked on the side of the road awaiting the arrival of the school bus,” fired multiple shots into the victim’s *parked* car, and drove away. Id. at 1024. The district court found that the assailant’s vehicle was not an active accessory to the crime. Significantly, the district court explained that victim was not “traveling in her vehicle at the time Williams fired the gun.” Id.

Here, it is undisputed that Harrison was driving her vehicle at the time of the shooting and thus Redman’s position in relation to Harrison was completely dependent upon Redman’s use of

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<sup>12</sup> In Holmes, our district court discussed Howser and Towe in great detail but ultimately found “after careful consideration, . . . the events underlying this dispute” did not invoke the conclusions reached in either Howser or Towe. Id. at 1026.

his vehicle. There is no way that Redman would have been able to make repeated gestures to Harrison if he were not in a vehicle that could keep with the speed in which she was traveling. Nor would it have been possible for him to keep up with her until the next intersection so that he would be in a position to shoot her at the stop light. In fact, even after the shooting, Harrison's vehicle continued on the roadway until it came to rest. (**App. 102-03**). In Howser, the Court found that because the both vehicles were being driven at the time of the assault, "it [wa]s apparent that the unknown vehicle was an active accessory to this assault." Howser, 309 S.C. at 273, 422 S.E.2d at 108. Unlike in Howser (and this case), the victim in Holmes was not "traveling in her vehicle at the time" the assailant fired the gun. Holmes, at 1026–27.<sup>13</sup> As stated above, in this case there is no dispute that both vehicles were in drive and being operated at the time the shots fired. As discussed in more detail below, Redman also used his vehicle to accomplish the shooting and could not have physically carried out the act without the use of his vehicle. Therefore, the Court of Appeals, based upon the undisputed facts, the Court of Appeals correctly ruled Redman's vehicle was an active accessory to the assault.

- b. The Court of Appeals correctly held that Redman vehicle was not the mere situs of the shooting.

The Court of Appeals correctly held that Redman's vehicle was not the mere situs of the assault. (**App. 198-200**). Petitioner, citing Wright v. North Area Taxi, Inc., 337 S.C. 419, 523

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<sup>13</sup> In Holmes, the district court also found Howser distinguishable because "Williams did not use his vehicle to assault Plaintiff, as nothing in the record indicates that Plaintiff knew Williams was approaching her as she waited at the school bus stop or that Williams' vehicle ever made contact with Plaintiff's vehicle. Holmes, at 1026. While is true that there was physical contact between the two vehicles in Howser, that opinion explained that no injuries were caused by the contact. Howser, at 271, 107 ("The injuries that Howser sustained were the result of the gunshot. Neither Howser nor Shealy was hurt when the other vehicle bumped the Blazer."). No South Carolina case has found that physical contact between two vehicles is a prerequisite to a finding the assailant's vehicle was an active accessory to the assault.

S.E.2d 472 (Ct. App. 1999), asserts Redman's vehicle was nothing more than the site from which he fired. (**Pets.' Br. 20-23**).

In Wright, the assailants hailed a taxi, entered the taxi once the driver parked his car on the side of the road, and then shot the driver as he began driving. See id. at 422, 472. The vehicle's movement did not enable the gunman to carry out the attack, as the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or gunmen were standing outside of the vehicle." Id. at 427, 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. Or, in other words, the taxi was just the situs of the shooting. See also, Aytes, 332 S.C. at 34-35, 503 S.E.2d at 746; Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir. 1985).

This case is wholly different from these cases wherein the vehicle is the mere situs of a shooting, because Redman's ability to carry out the shooting was entirely dependent on the use of his vehicle to pursue, keep-up, and align with Harrison at the stop light and Harrison's was in a position to be injured. See Stevens v. MAPFRE Ins./Com. Ins. Co., No. BRCV2018309, 2019 WL 2565235, at \*5 (Mass. Super. Apr. 5, 2019) (finding it reasonable to infer that the assailant would not have been able to keep-up with the victim without the use of his vehicle). Additionally, unlike the gunman in Wright, Redman could not have accomplished the heinous act by stopping his vehicle, getting out, shooting Harrison, and driving away because he would not have been able keep-up with Harrison's position or position himself to align the same shot he took without the use of the vehicle. Furthermore, Harrison was not in the uninsured vehicle, so it can hardly be said that it was the situs of the injuries.

- c. The Court of Appeals correctly held that Harrison's injuries were foreseeably identifiable with the normal use of the vehicles involved.

While this factor was extensively discussed in Section I *infra*, it is worth reiterating that it is wholly undisputed that both Redman and Harrison were operating their vehicles in a normal way at the time the injuries were sustained. See (App. 98, #7); (App. 84, #8); (App. 89, #8); (App. 98, #6); (App. 97, #2); (App. 97-98, #3); (App. 98, #8). 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).

As discussed in Section I *infra*, the Court of Appeals correctly found that under these undisputed circumstances the injuries were foreseeably identifiable with the normal use of the automobile because Reman's use of his vehicle was required for him to keep pace with Harrison from the time he spotted her to the stoplight where he shot her. The facts of this case are analogous to Howser and Towe, but readily distinguishable from Bookert. The Court of Appeals correctly recognized the factual differences and applied the valid, binding law to the facts of this case. The Court of Appeals' ruling was not in conflict with Bookert.

Additionally, the Court of Appeals did not rule, as Petitioners suggest, that a drive-by shooting, such as the one at issue in Bookert, is foreseeably identifiable with the normal use of a

vehicle. It is worth noting that some courts have recognized that a drive by shooting of a pedestrian, could arise out of the use of an automobile such that coverage is triggered. See generally, Certification From United States Dist. Court ex rel. Western Dist. of Washington v. GEICO Ins. Co., 366 P.3d 1237, 1241, 184 Wash.2d 925, 934 (Wash. 2016) (stating in a case involving a pedestrian shot in a drive-by shooting that “the rule our cases have established is that some causal connection exists when the events leading up to an injury involve vehicle use, unless the vehicle is merely the coincidental location of the accident.”); State Farm Mut. Auto. Ins. Co. v. Blystra, 86 F.3d 1007, 1009 (10th Cir. 1996) (applying New Mexico law and finding a pedestrian’s injuries from a drive-by shooting arose out of the ownership, maintenance, or use of the uninsured vehicle).

As has been stated, Redman could not have pursued Harrison but for the use of his automobile and Harrison’s automobile was in use throughout this incident. (App. 84, #8); (App. 89, #8); (App. 98, #7); (App.97, #1). That was not the case in Bookert. Therefore, the Opinion does not conflict with Bookert.

**III. The Court of Appeals correctly held that 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 second factor of the test whether injuries arise out of the ownership, use, or operation of a motor vehicle at issue in this case is whether there is an intervening act of independent significance that broke the casual connection between the use of the vehicle and the assault. State Farm Mut. 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 745-46); Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 272, 422 S.E.2d 106, 108 (1992). The Court of Appeals correctly held 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 because Redman's use of his vehicle and the shooting were inextricably linked. (**App. 201-02**). This Court, and others, have found a break in the causal link when the assailant has exited his vehicle and then carried out the assault outside the vehicle. See, e.g., Aytes, 332 S.C. at 33, 503 S.E.2d at 745-46; Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984 (4th Cir. 1985); Commercial Union Ins. Co. of New York v. Hall, 246 F. Supp. 64 (E.D.S.C. 1965). In Aytes, the assailant drove his victim from one place to another, **got out of the vehicle and shot the victim**. Aytes, 332 S.C. at 33, 503 S.E.2d at 745-46 (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 (emphasis added).

There is no break in the causal link when the assault could not have been accomplished without the use of the vehicle and it is inextricably linked to the assault in that way. See Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 272, 422 S.E.2d 106, 108 (1992); c.f. Wright v. North Area Taxi, Inc., 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999). In Howser, this Court 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. See id. at 272, 108. In that case, 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. Id. at 273, 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, 109. Therefore, "no independent act occurred to break the causal link." Id.

It is an undisputed fact in this case that Redman never exited his vehicle prior to the shooting and that his vehicle was on and running at the time of the shooting. (App. 97-98, #3); (App. 98, #8). 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. 84, #10& 13); (App. 89, #10 & 13). Simply put, without the use of Redman's vehicle this assault could not have occurred. Redman's use of his vehicle and the shooting are inextricably linked as one continuing assault as in Howser. Therefore, no act of independent significance occurred to break the causal link.

Comparatively, in Wright, the taxi's movement did not enable the gunman to carry out the attack on the cabdriver, as the cabdriver's injuries "could have occurred when the vehicle was parked, or otherwise not moving, or when [the cabdriver] or gunmen were standing outside of the vehicle." Id. at 427, 523 S.E.2d at 472. As such, the injuries sustained by the cabdriver resulted from the assault by the gunmen and were unrelated to any functional use of the vehicle because the use of the vehicle was not essential to accomplishing the crime. Id. at 426-27, 523 S.E.2d at 472. Therefore, the gunman's assault was an act of independent significance that broke the causal link because the shooting and the use of the vehicle were not inextricably linked as a continuing assault. Id.

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. 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 of Appeals correctly held that 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 as in Howser. (**App. 201-02**). Consequently, based on the undisputed facts of this case, 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 continued and that use of the vehicle and the shooting are inextricably linked as one continuing assault.

**IV. The Court of Appeals correctly rendered its decision based upon the undisputed facts in the record and did not improperly shift the burden of proof to Petitioners or rely on any facts beyond the record.**

Petitioners' final argument 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 not aware of Redman. (**App. 194-95, n. 8**). The observation was not material or inaccurate, and certainly did not shift the any burden. The Opinion went on, in explaining this case's similarities to Home Ins. Co. v. Towe, 314 S.C. 105, 441 S.E.2d 825 (1994), 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 applicable law.

Petitioners also asserts 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 “close pursued” is not material to its decision. It is however, fully supported by the undisputed record.

The record reflects that Harrison, Redman, and a witness to the shooting turned left onto Old Trolley Road. (App. 102-03). Harrison’s vehicle was in front of the witness’s vehicle and Redman’s vehicle was in the lane to the right. (App. 102-03). After turning left upon the light turning green, the witness stated she saw Redman making gestures and blowing kisses to Harrison, which is an undisputed fact. (App. 102-03); (App. 97, #1); (App. 85, 16); (App. 102-103). It is undisputed that Harrison and Redman were 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, with Redman in the lane directly to Lynn Harrison’s right. (App. 18, ¶ 10) (App. 22, ¶ 11); (App. 84, #6, 8); (App. 88, #6, 8). 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 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

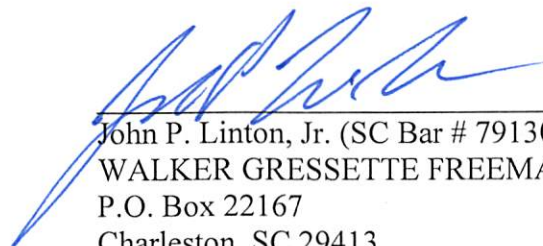
facts are that Redman travelled from Texas to South Carolina where the shooting occurred and that the rifle was in the vehicle during the road trip. (**App. 98, # 5 & #6**). Finally, it is worth noting that this statement was included in a paragraph following the Court's conclusion that Redman's vehicle 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**).

Therefore, contrary to the Petitioners arguments, the Court of Appeals did not find any fact, rely on anything outside the record, or shift any burden. The Court of Appeals applied the law to the undisputed facts. Therefore, the Court of Appeals decision should be affirmed.

### CONCLUSION

The Court of Appeals ruling should be affirmed for the reasons stated above.

Respectfully submitted,



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June 18, 2021  
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jun 18 2021**

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Honorable Alison Renee Lee, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2020-001337  
Trial Court Case No. 2015-CP-18-01571

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

v.

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

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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Brief of Respondent Shanna Groves As the Personal Representative of the Estate of Lynn Harrison complies with Rule 211(b), SCACR.

Respectfully submitted,

*/s/John P. Linton, Jr.*

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