

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.

REPLY BRIEF OF PETITIONERS

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SUMMARY

In a twenty-nine page brief, Respondent never once attempts to explain how gunshot injuries from the intentional firing of a rifle out of one vehicle into another are foreseeably identifiable with the normal use of an automobile. The reason is simple: they are not. Instead, Respondent spends the entirety of her brief attempting to distract this Court from this key flaw in the Court of Appeals' decision.

In *Aytes*, this Court held a causal connection between an injury and the use of a vehicle is lacking when the injury is not “foreseeably identifiable with the normal use of an automobile.” Otherwise, the injuries do not arise out of the ownership, maintenance or use of a vehicle. Following *Aytes*, this Court in *Bookert* held gunshot injuries from the intentional firing of a gun – the very injury at issue in this case – were not foreseeably identifiable with the normal use of an automobile. Therefore, Respondent's injuries were not foreseeably identifiable with the normal use of an automobile, and the Court of Appeals erred by not affirming the Circuit Court.

Rather than addressing the foreseeability test head-on, Respondent spends her opposition brief focusing on whether *Bookert* establishes a bright-line rule. As an initial matter, it did. The Court of Appeals in *Bookert* found the facts of that case aligned with the facts in *Howser* and *Towe* – the very same cases Respondent relies on here and the Court of Appeals relied on below. On certiorari, this Court in *Bookert* did not debate the Court of Appeals' interpretation of the facts or application of *Howser* and *Towe*. Instead, this Court simply held that gunshot injuries from an assault were not “foreseeably identifiable with the normal use of an automobile” – a factor that was not at issue in *Howser* and *Towe* because that factor was not adopted until this Court's subsequent decision in *Aytes*.

However, even if Respondent is correct that *Bookert* did not create a bright-line rule, Respondent never gets around to answering the critical question in this case. That is, were Lynn Harrison's injuries – gunshot injuries resulting from the intentional firing of a rifle – foreseeably identifiable with the normal use of an automobile? They were not.

I. Addressing the *Aytes* foreseeability test, this Court in *Bookert* held gunshot injuries from an assault were not foreseeably identifiable with the normal use of an automobile, and instead of addressing this prong, Respondent cites to cases that do not apply the foreseeability test and avoids answering the determinative question in this case.

The question before this Court is whether Harrison's injuries arose out of Redman's ownership, maintenance, or use of an automobile. In *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998), this Court established the modern test for this inquiry. Specifically, this Court in *Aytes* adopted a new factor for the ownership, maintenance, or use test: the "injury must be foreseeably identifiable with the normal use of the automobile." *Id.* at 33, 503 S.E.2d at 745-46. Before *Aytes*, South Carolina's case law did not include this foreseeability prong.

This Court addressed the foreseeability prong in two shooting cases, *Bookert* and *Peagler*. See *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999); *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 628 S.E.2d 475 (2006). A plain reading of those two cases shows how this prong is applied. Each case focuses on the use of the vehicle that gave rise to the discharge of the gun. By focusing on the use that gave rise to the discharge of the gun, the analysis connects the two parts of the inquiry: (1) the injury, and (2) the normal use of the vehicle. In *Peagler*, this Court found gunshot injuries from the accidental discharge of a hunting rifle while removing it from the back of a pickup truck were foreseeably identifiable with the normal use of a vehicle. 368 S.C. at 164, 628 S.E.2d at 481. In contrast, this Court in *Bookert* held gunshot injuries during an assault were not foreseeably identifiable with the normal use of a vehicle. 337 S.C. at 293, 523 S.E.2d at 182.

Read together, *Bookert* and *Peagler* stand for a sound and predictable rule. Injuries that foreseeably result from the normal uses of a vehicle – such as an accidental discharge in connection with transporting a hunting rifle to and from a hunting excursion – are foreseeably identifiable with the normal use of an automobile. Injuries that do not foreseeably result from the normal uses of a vehicle – such as using a gun to assault a random victim – are not foreseeably identifiable with the normal use of an automobile.

This Court’s holding in *Bookert* follows the clear majority rule that injuries from an intentional shooting do not arise out of the ownership, maintenance or use of an automobile. Respondent cites to a number of cases applying a minority rule. However, those jurisdictions do not apply the foreseeability test. Also, many of those jurisdictions find coverage in situations where this Court has expressly held coverage does not apply. Therefore, those minority cases are unpersuasive.

Left with no case – either in South Carolina or elsewhere – finding that injuries from the intentional firing of a gun are foreseeably identifiable with the normal use of an automobile, Respondent resorts to avoiding the key question before this Court. The reason Respondent avoids trying to identify how Harrison’s gunshot injuries are foreseeably identifiable with the normal use of an auto is simple. They are not.

A. This Court’s decisions in *Bookert* and *Peagler* – and not *Howser* or *Towe* – show when gunshot injuries are and are not foreseeably identifiable with the normal use of an automobile.

Shortly before the *Aytes* decision – and thus, without the guidance of the foreseeability test – the Court of Appeals issued its decision in *Bookert*. In that decision, the Court of Appeals closely analyzed the specific facts of that case and determined that the shooting arose out of the ownership, maintenance, or use of the automobile by the shooter. In doing so, the Court of Appeals relied almost exclusively on *Howser* and *Towe* and found the facts similar enough to those two cases.

After that decision, this Court issued its decision in *Aytes* and adopted the foreseeability test. *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745-46. After *Aytes*, this Court issued its decision in *Bookert* and reversed the Court of Appeals' opinion.

This Court's decision in *Bookert* is straightforward. First, this Court acknowledged that the Court of Appeals did not have the benefit of the *Aytes* test when it issued its decision in *Bookert* – in other words, the Court of Appeals did not know that it had to address the foreseeability test. Then, this Court listed the *Aytes* factors – including the foreseeability factor. Then, applying its newly established test from *Aytes*, this Court held in *Bookert*: “We find Mary's policy does not cover Michael's injuries because they are not ‘foreseeably identifiable with the normal use of an automobile. *State Farm Fire & Casualty Co. v. Aytes, supra.*” *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (emphasis added).

The *Bookert* decision did not focus on what events led up to the claimant's injuries. Instead, the question was whether the injuries – gunshot wounds from an assault – were foreseeably identifiable with the normal use of an auto. This Court in *Bookert* held they are not.

Respondent contends that *Bookert* did not create a bright-line rule. However, Respondent's entire argument focuses on *Howser* and *Towe* – two cases that predate the *Aytes* test. No matter how hard one scours the opinions in those two cases, there is simply no reference to the foreseeability test. Thus, while *Howser* and *Towe* may be relevant to other factors in the ownership, maintenance, or use test, those cases provide no guidance for the “normal use” factor. Nonetheless, Respondent – and the Court of Appeals below – relied solely on *Howser* and *Towe* for the foreseeability analysis.

Since *Bookert*, this Court has only found gunshot were injuries foreseeably identifiable with the normal use of an automobile in one case. *See Peagler, supra.* In *Peagler*, a hunting rifle

accidentally discharged while being unloaded from the cab of a pickup, killing the driver. This Court found those injuries were foreseeably identifiable with the normal use of a pickup truck because “[m]any vehicles in South Carolina, and certainly many pickup trucks, are used for hunting purposes. Using a vehicle to transport firearms to and from hunting grounds is not an abnormal or unanticipated use of a vehicle.”¹ *Id.* at 164, 628 S.E.2d at 481.

The facts in *Peagler* stand in stark contrast to the facts in this case. Vehicles are routinely used to transport firearms on hunting trips. Vehicles are not routinely used as a place from which to intentionally shoot other persons. Otherwise, this Court in *Bookert* would have found the injuries in that case arose out of the ownership, maintenance or use of an automobile. Thus, *Bookert* and *Peagler* – and not *Howser* or *Towe* – guide the Court’s analysis on the foreseeability test. Because *Bookert* holds gunshot wounds from an assault are not foreseeably identifiable with the normal use of an auto, the Court of Appeals should have affirmed the Circuit Court.

B. As numerous courts have recognized, injuries from an assault are not foreseeably identifiable with the normal use of an automobile.

“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.” *Nationwide Mut. Ins. Co. v. Brown*, 779 F.2d 948, 989 (4th Cir. 1985) (emphasis in original). Respondent attempts to distinguish *Brown* and other cases in which a shooter exits a car immediately prior to the shooting from cases in which a shooter is still in the car when the shooting occurs. Although this distinction may weigh on whether an act of independent significance broke a causal connection,² it does not

¹ This Court found the vehicle in *Peagler* was not an “active accessory” to the injury because it was neither actively used nor involved in causing the injury. It was the mere site of the incident. *Id.*

² As discussed in Section III below, the Court of Appeals’ decision in *Wright Area Taxi* shows that this distinction is not determinative on the independent significance test. The shooters in *Wright*

bear on the foreseeability test. In fact, Respondent fails to point to any case finding gunshot injuries from an assault are foreseeably identifiable with the normal use of an automobile. Instead, courts are clear that shootings are not a normal use of a vehicle.

Faced with an absence of cases to support Respondent's position, Respondent cites cases applying various versions of a minority rule, including cases from Colorado, Oregon, New Mexico, Minnesota, Georgia, and Massachusetts. However, none of these cases applies the foreseeability test adopted by this Court in *Aytes*.³ Moreover, many of the cases cited by Respondent from minority jurisdictions find coverage in situations that this Court has clearly held would not provide coverage under South Carolina law. For example, in *Peagler*, this Court found no coverage for discharge of hunting rifle while it is being unloading from a vehicle. In Colorado, coverage would apply. *See Kohl v. Union Ins. Co.*, 731 P.2d 134 (Colo. 1986) (finding coverage for discharge while unloading rifle).

As another example, this Court in *Carraway v. Smith*, 321 S.C. 23, 467 S.E.2d 120 (1996), and in *Aytes* held shootings by a person standing outside of vehicle into the victim's vehicle did not arise out of ownership, maintenance or use of the vehicle. In Oregon and New Mexico, coverage would have applied in those cases. *See Carrigan v. State Farm Mut. Auto. Ins. Co.*, 326

were passengers inside the vehicle while the vehicle was moving. Nonetheless, the Court of Appeals held that shooting the cab driver was an act of independent significance.

³ Colorado applies a different "normal use" test, which does not focus on whether the injury is foreseeably identifiable with the normal use of an automobile. *See State Farm Mut. Auto. Ins. Co. v. Blystra*, 86 F.3d 1007, 1011-12 (10th Cir. 1996). As a result, the mere fact that a shooter was using a vehicle for transportation at the time of a shooting is sufficient under Colorado law to trigger coverage. *Id.* ("At the time of the shooting, the assailant was utilizing the truck as transportation . . . Clearly, such use falls within *Britt's* 'normal use' requirement."). Under this Court's test in *Aytes*, transportation is a separate element of the ownership, maintenance or use test. Applying the Colorado approach would render the transportation prong superfluous. Moreover, the *Blystra* decision, which found coverage for a pedestrian injured in a drive-by shooting, is directly contrary to this Court's decision in *Bookert*.

Or. 97, 949 P.2d 705 (1997) (holding that a gunshot injury from a sniper while the victim is driving a motor vehicle would arise out of the use of a motor vehicle); *Britt v. Phoenix Indem. Ins. Co.*, 120 N.M. 813, 907 P.2d 994 (1995) (holding stabbing taking place outside of vehicle arose out of ownership, maintenance or use).

Finally, in Georgia, “almost *any* causal connection or relationship will do” to trigger auto coverage. *Abercrombie v. Georgia Farm Bureau Mut. Ins. Co.*, 216 Ga. App. 602, 604, 454 S.E.2d 813, 815 (Ct. App. 1995) (citation omitted) (emphasis added). Thus, cases from these minority jurisdictions are inapplicable because they apply tests that are contrary to South Carolina law.

In stark contrast, cases addressing whether gunshot injuries are foreseeably identifiable with the normal use of an automobile uniformly state that they are not. “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.” *State Farm Mut. Auto. Ins. Co. v. Dehaan*, 393 Md. 163, 192-93, 900 A.2d 208, 225 (2006). 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).

Looking beyond the foreseeability test to jurisdictions addressing vehicle-to-vehicle shootings, the Supreme Courts of Texas, Mississippi, and Louisiana, and intermediate appellate courts in Arkansas, Florida, Indiana, Missouri, New Jersey, and North Carolina hold that gunshot injuries do not arise out of the shooter’s ownership, maintenance or use of an automobile. *State Farm Mut. Auto. Ins. Co. v. Whitehead*, 42 Tex. Sup. Ct. J. 404, 988 S.W.2d 744 (1999); *Coleman v. Sanford*, 521 So.2d 876 (Miss. 1988); *Kessler v. Amica Mut. Ins. Co.*, 573 So.2d 476 (La. 1991); *Williams v. Allstate Prop. and Cas. Inc. Co.*, 2017 Ark. App. 45, 509 S.W.3d 696 (Ct. App. Div. III 2017); *Taylor v. Phoenix Ins. Co.*, 622 So.2d 506 (Fla. Dist. Ct. App. 5th Dist. 1993); *Moons v.*

Keith, 758 N.E.2d 960 (Ind. Ct. App. 2001); *Ward v. International Indem. Co.*, 897 S.W.2d 627 (Mo. Ct. App. 1995); *Zambrana v. National Continental/Progressive Ins. Co.*, 2011 WL 2321398 (N.J. Super. Ct. 2011); *Nationwide Mut. Ins. Co. v. Knight*, 24 N.C. App. 96, 237 S.E.2d 341 (1977). Thus, not only has Respondent failed to identify how Harrison’s injuries were foreseeably identifiable with the normal use of an automobile, but also application of *Bookert* to the facts this of case follows the accepted rule of a majority of jurisdictions addressing this issue.

C. Respondent fails to address how Harrison’s injuries are foreseeably identifiable with the normal use of an automobile.

A close reading of Respondent’s brief reveals a surprising omission: Respondent never identifies how Harrison’s injuries are foreseeably identifiable with the normal use of an automobile. In Section I of Respondent’s brief, Respondent spends thirteen pages arguing that *Bookert* did not establish a bright-line rule. (Br. of Resp’t pp. 9-21). However, in that section, Respondent never identifies how Harrison’s injuries were foreseeably identifiable with the normal use of an automobile. Instead, Respondent continues to focus on *Howser*, *Towe*, and out-of-jurisdiction case law, none of which applies the foreseeability test.⁴

On page twenty-five of Respondent’s brief, Respondent finally appears ready to address the *Aytes* foreseeability prong. However, instead of addressing the issue, Respondent states “this

⁴ Both before this Court and before the Court of Appeals, Respondent cites to then-judge Beatty’s concurrence in the Court of Appeals’ unpublished decision in *Norris v. Allstate Ins. Co.*, 2005-UP-124, 2005 WL 7083469 (S.C. Ct. App. Feb. 17, 2005). As an initial matter, this citation violates Rule 268(d)(2), SCACR. However, Respondent’s reliance on this concurrence is curious for two reasons: (1) the Court of Appeals in *Norris* unanimously applied *Bookert* and found gunshot injuries were not foreseeably identifiable with the normal use of an auto; and (2) then-judge Beatty stated, “I find *Bookert* to be in conflict with *Howser* and *Towe*.” *Id.* at *3. Because *Bookert* is the more recent decision – and the decision was made with the benefit of the *Aytes* test adopted after *Howser* and *Towe* – *Bookert* controls to the extent it conflicts with *Howser* and *Towe*. Therefore, *Norris* and then-judge Beatty’s concurrence in that case actually support Petitioners’ arguments here.

factor was extensively discussed in Section I *infra . . .*” (Br. of Resp’t p. 25). It was not. As noted above, Section I of Respondent’s brief does not answer the foreseeability question.

Respondent proceeds with stating that “Redman shot Harrison while both his vehicle and Harrison’s were being operated, turned on and in drive.”⁵ (Br. of Resp’t p. 25). However, if the test were whether Redman’s vehicle was being operated, turned on and in drive, then this Court in *Bookert* would have found the gunshot injuries in that case were foreseeably identifiable with the normal use of an automobile. It did not, and the reason for its holding is clear. The question for the foreseeability prong is not whether the shooter was putting the vehicle to some normal use when the shooting occurred. A passenger riding in a vehicle – like the passenger in *Bookert* – is putting the vehicle to a normal use. The question is whether the injuries to the claimant are foreseeably identifiable with that normal use.

The Court of Appeals in *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (Ct. App. 1999), correctly identified this distinction. In *Wright*, passengers in a moving taxicab shot the cab driver while trying to rob her. *Id.* at 422, 523 S.E.2d at 473. The claimant argued the injuries were foreseeably identifiable with the cabdriver’s use of the automobile because, as a cabdriver, she was likely to be robbed. At the time of the shooting, the shooters were riding as passengers in the vehicle – a wholly normal use. Thus, the vehicle was “being operated, turned on and in drive.” *See* (Br. of Rep’t p. 25). However, the Court of Appeals found the injuries were not foreseeably identifiable with the normal use of an auto. *Id.* at 426, 523 S.E.2d at 475-76.

In *Wright*, the Court of Appeals distinguished the use of the vehicle and the cab driver’s occupation. While the driver’s injuries were “foreseeably identifiable” with the “occupational or

⁵ Interestingly, Respondent never points out the fact that both vehicles were stopped when the shooting occurred.

commercial use of a motor vehicle as a taxi, . . . the relation of the injury to the functional use of a motor vehicle as a motor vehicle was merely incidental and fortuitous.” *Id.* at 426, 523 S.E.2d at 476. “[M]ere foreseeability of an injury as an incident to a given use of a motor vehicle is not enough to provide . . . coverage where the injury itself does not result from the use of the motor vehicle as a motor vehicle.” *Id.* (citing *Thornton v. Allstate Ins. Co.*, 425 Mich. 643, 391 N.W.2d 320, 328 (1986)) (emphasis added). As a result, the Court of Appeals recognized that the potential for injury to the taxi driver was foreseeably identifiable, but “the danger, however, is inherent in the occupation and not in the use of the motor vehicle as a motor vehicle.” *Id.* Thus, the injury must be foreseeably identifiable with the use of the vehicle as a vehicle. Here, Harrison’s gunshot injuries are not identifiable with the normal use of a vehicle as a vehicle. *See Ward*, 897 S.W.2d at 629 (“Injuries inflicted on a victim of a drive-by shooting by the occupant of a motor vehicle are not injuries which arise out of the ‘use’ of a motor vehicle because . . . the cause of the victim’s injuries and the discharge of the gun is unconnected to the inherent use of the motor vehicle.”) (citations omitted).

The discussion in *Wright* highlights the critical distinction here. There is no “normal use” that would foreseeably give rise to Harrison’s gunshot injuries. Redman could have driven his vehicle a million miles, but it would never have spontaneously fired a bullet. Only by taking the wholly unusual step of pointing a rifle outside of his stopped car, aiming, and firing, did Harrison’s injuries occur. Harrison’s injuries were caused by Redman’s use of a gun, and they are not identifiable with the “use of the motor vehicle as a motor vehicle.” *Wright*, 337 S.C. at 426, 523 S.E.2d at 476.

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). Therefore, Respondent fails to make the requisite showing under the foreseeability test.

II. Redman’s use of the truck to drive up to the red light was, at most, incidental to the shooting.

In *Aytes*, this Court cited with approval the Fourth Circuit’s finding in *Brown* that shooting injuries were merely incidental to the use of the vehicle. *Aytes*, 332 S.C. at 34, 503 S.E.2d at 746. Specifically, “the shooting was merely incidental, remote from the type of conduct that is reasonably foreseeable with the normal use of a vehicle and not the causative factor in producing [the] wife’s death.” *Id.* Numerous other courts have found that the use of vehicles in vehicle-to-vehicle shootings were merely incidental and not causally connected to the resulting bodily injuries.

For example, in *Whitehead*, a van pulled alongside a pickup truck while the two vehicles were driving on the roadway. A passenger in the van pointed a pistol at the pickup truck and fired several shots, killing the driver. *Whitehead*, 988 S.W.2d at 745. The shooting apparently followed a dispute that took place earlier in the evening. *Id.* The Supreme Court of Texas found the injuries did not result from the “use” of the vehicle. Instead, the “shooting was an independent and intentional act not intended to be covered by the policy. ‘Use’ of the vehicle was incidental to the shooting.” *Id.*

The Supreme Court of Mississippi reached the same conclusion in *Coleman*. In that case, the victim and assailant were involved in a traffic collision. When a responding officer allowed the victim to leave, the officer asked the assailant – whom officer suspected was intoxicated – to move his truck off the roadway so the officer could conduct a field sobriety test. However, instead of pulling his truck off the road, the assailant took off in his truck and began following the victim. While both vehicles were moving, the assailant shot the victim. 521 So.2d at 876-77. Even though

the shooter was actually driving his vehicle at the time of the shooting and used his vehicle to catch up with the victim, the Supreme Court found no coverage: “In spite of those facts, the shooting was still . . . a voluntary, deliberate act which rendered the use of the vehicle incidental.” *Id.* at 877.

In both *Whitehead* and *Coleman*, the shootings took place while both vehicles were still in motion on the roadway and the evidence showed that the victims were specifically targeted by the assailants. In *Brown*, the shooter used his vehicle to ram and disable the victim’s vehicle, allowing him the ability to get out and shoot the victim. None of those facts exists here. At most, the evidence shows Redman stopped at the same redlight as Harrison and shot her while the two vehicles were stopped. When the shooting occurred, he did not need his vehicle to “keep up” with Harrison, there is no evidence that Harrison was a specific target,⁶ and he did not use his vehicle to disable Harrison’s vehicle or otherwise trap her. Thus, even more so than the uses in *Whitehead*, *Coleman*, and *Brown* – which were deemed not to arise ownership, maintenance or use of an auto – Redman’s use of his vehicle was merely incidental to the shooting.

III. After both vehicles stopped, Redman’s actions of drawing his rifle, aiming, and firing at Harrison were acts of independent significance that broke any causal connection with the use of his vehicle.

The undisputed evidence shows that Redman did not pull out the rifle, aim, and fire until after both vehicles stopped at the stop light. In fact, traffic behind them had stopped as well. (App. 102) (A witness driving behind Redman and Harrison stated, “[t]he next light was red, while I was waiting for it to turn green, I heard a loud gunshot . . .”). Redman’s actions after both vehicles stopped broke any causal connection with his use of the vehicle.

⁶ It is undisputed Harrison and Redman were strangers. (App. p. 52, ¶ 17; p. 56, ¶ 17).

As she does with every component of the *Aytes* test, Respondent continues to rely on *Howser* and *Towe*. However, neither of those cases deals with similar facts. In *Towe*, the throwing of the bottle was part and parcel of the speed of the vehicle. If the bottle had been thrown from a stationary vehicle, then the victim's injuries would not have been as severe. *See Home Ins. Co. v. Towe*, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (“[T]he vehicle’s speed contributed to the velocity of the bottle increasing the seriousness of McClaskey’s injuries.”). Therefore, this Court in *Towe* found the use of the vehicle and the throwing of the bottle “inextricably linked as one continuing act.” *Id.* at 108, 441 S.E.2d at 827 (internal quotation omitted).

Likewise, the shooting in *Howser* took place during a vehicular chase. *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 271, 422 S.E.2d 106, 107 (1991). When the shot was fired, the victim’s vehicle was actively fleeing, and the shooter was actively pursuing. *Id.* The vehicle was even an instrumentality of the ongoing assault, having been used to bump and chase the fleeing vehicle down the roadway. *Id.* Under those facts, this Court found “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.

The facts in *Towe* and *Howser* are vastly different from the facts here. As to *Towe*, both Redman and Harrison’s vehicles were stopped, and the injuries resulted from the firing of a bullet. Thus, the speed of the two vehicles has no causal connection to the seriousness of the injuries. As for *Howser*, Harrison was not fleeing when Redman shot her. Both vehicles were stationary. Moreover, the assault in *Howser* and the bottle throwing in *Towe* occurred while the vehicles were in motion. Here, the assault did not take place until after both vehicles stopped.

Once stopped at the stop light, Redman could have gotten out of the car, aimed, and fired. Even Respondent does not dispute that, had Redman done so, the shooting would have been an act

of independent significance. (Br. of Resp't p. 27) ("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."). Instead, Respondent relies on the fact that Redman chose not to exit his car. However, the test is not whether Redman chose to get out or not. The test is whether he could have caused the same injuries without the vehicle when the shooting occurred. *See Wright*, 337 S.C. at 426-27, 523 S.E.2d at 476 ("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"); *Doe v. South Carolina State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999) (finding act of independent significance where officer transported victims in cruiser to golf course and then sexually assaulted her in the cruiser).

To be clear, Respondent failed to present evidence that Redman "closely pursued" Harrison. However, even if he did, once the two vehicles were stopped at the red light, the pursuit was finished. The vehicle was no longer needed to keep up with or to maintain a position from which to shoot Harrison. Therefore, any link between the vehicle and the assault ended. At that point, Redman could have just as easily shot her from outside his vehicle. Once stopped, Redman then proceeded to present, aim, and fire his rifle at Harrison. These wholly independent acts broke any alleged causal connection.

IV. Respondent tacitly admits the Court of Appeals found facts that were never presented.

The Court of Appeals' finding that Redman closely pursued Harrison is not in the Record on Appeal. Moreover, this finding is one of the primary bases for the Court of Appeals' holding in this case. Recognizing that the Court of Appeals has placed its ruling on a weak limb, Respondent attempts to minimize the importance of the Court of Appeals' errant finding. Respondent argues: "It is important to note that whether Redman closely pursued is not the legal test applied by the

Court of Appeals. The Court of Appeals use of the term ‘closely pursued’ is not material to its decision.” (Br. of Resp’t p. 30). However, even a cursory reading of the Court of Appeals’ decision disproves Respondent’s contention. In the causal connection section of the Court of Appeals’ decision, the Court of Appeals finds:

Finally, the facts of the case at bar are on all fours with the facts in *Howser*. We note that the stoplight, where Redman was able to quickly catch up with Harrison and shoot her, may have been the only thing that prevented Redman’s pursuit of Harrison from turning into an extended chase as in *Howser*. Accordingly, we do not find that the brevity of Redman’s pursuit, resulting from Harrison’s compliance with the stoplight, distinguishes *Howser* from the case at bar.

(App. p. 195) (emphasis added). The Court of Appeals goes on to find Redman’s vehicle was an active accessory because “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) (emphasis added). The Court of Appeals reiterates this unsupported factual finding when it attempts to distinguish this case from *Holmes*. (App. p. 197) (“Conversely, Redman could not have kept pace with Harrison’s car and positioned himself to shoot her but for his use of the automobile.”).⁷ Thus, Respondent’s contention the Court of Appeals’ finding that Redman “closely pursued” Harrison was “not material to its decision” is, at best, an unfair reading of the Court of Appeals’ decision.

⁷ The Court of Appeals’ decision is replete with findings that rely on the “closely pursued” factual finding. (App. p. 198) (“Conversely, Redman would not have been able to keep pace with Harrison from the moment he spotted her until the moment he shot her but for the use of his vehicle”); (App. p. 199 (“However, this argument ignores the fact that Redman used his vehicle to drive from the point where he first spotted Harrison to the point where he shot her at the stoplight while also keeping pace with her vehicle.”); (App. p. 201) (“Conversely, but for the use of his vehicle, Redman would not have been able to keep pace with Harrison from the point he spotted her to the stoplight where he shot her.”).

Respondent fails to point to competent evidence in the Record on Appeal showing there was a vehicular pursuit. Respondent points to a few facts and suggests that these confirm a vehicular pursuit, namely:

- 1) Harrison was driving eastbound on Old Trolley Road just before the intersection of Old Trolley Road and Bacons Bridge Road before stopping at the stop light. (App. pp. 84-85 & 89, ¶¶ 7 & 9).
- 2) Redman was also driving on the same road in the lane to Harrison's right, and he stopped at the same light. (App. pp. 84 & 89, ¶¶ 8-9).⁸
- 3) As the two vehicles approached the light, Redman was seen blowing kisses and making hand gestures toward Harrison. (App. p. 97, ¶ 1)
- 4) Some time thereafter, while both vehicles were at the stop light, Redman shot Harrison. (App. pp. 85 & 89, ¶ 10).

These facts do not show a vehicular pursuit. In fact, Respondent admits that at all times "Harrison was operating her vehicle in a normal and reasonably foreseeable fashion." (App. p. 98, # 7). Unlike the driver in *Howser*, there was no evidence Harrison was being chased or was fleeing. In fact, the evidence shows she remained stopped at the red light even when Redman pointed a rifle at her and shot her. Her conduct indicates she was not even aware of Redman.

In short, there is no evidence of what happened immediately before the two vehicles were "driving toward the stop light" at the intersection. (App. p. 94, # 1). The Court of Appeals' finding that Redman "closely pursued" Harrison was critical to the Court of Appeals' decision, and it is not in the Record on Appeal. In fact, the Circuit Court found the exact opposite: "Redman did not use his automobile to keep up with Harrison and did not make contact with her. . . . There was no attempt by Harrison to evade Redman." (App. p. 4).

⁸ Neither party admitted to Redman's intent when he stopped at the red light. (App. pp. 89 ¶ 9 and p. 97 ¶ 2). As the party seeking coverage, Respondent bore the burden of proof on this issue. Respondent never presented evidence of Redman's intent when he stopped at the red light, and Respondent did not present evidence that Redman had formed any intent to shoot Harrison prior to stopping at the red light.

Likewise, Respondent never identifies any evidence in the Record on Appeal suggesting Redman used his vehicle to “conceal” his gun. Respondent points to an unsworn statement that someone driving behind Redman did not see the gun. That is not evidence that Redman used the vehicle to conceal the gun, which explains why Respondent never argued this fact to the Circuit Court or to the Court of Appeals. The Court of Appeals made a *sua sponte* factual determination and then relied on that determination in the “active accessory” and “intervening act” prongs of its analysis. In doing so, the Court of Appeals deviated from the standard of review.

As the party seeking coverage, the Respondent bore the burden of presenting facts to show Harrison’s injuries arose out of Redman’s ownership, maintenance or use of an automobile. *See e.g., 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.”); *Jericho State Capital Corp. of Florida v. Chicago Title Ins. Co.*, 431 S.C. 437, 445, 848 S.E.2d 572, 576 (Ct. App. 2020) (same). By adopting facts that were not in the Record on Appeal and for which the Respondent failed to present any evidence, the Court of Appeals improperly shifted the burden of proof to the Petitioners. The Court of Appeals then went even further, finding facts that were never even argued by the Respondent. In doing so, the Court of Appeals applied an incorrect standard of review and reached the wrong conclusion.

CONCLUSION

Respondent bears the burden of proving Harrison’s injuries were foreseeably identifiable with the normal use of an auto. *See Aytes, supra*. The Respondent fails to explain how a normal use of an auto could have caused Harrison’s gunshot injuries. In fact, the Respondent makes no attempt to do so. The reason is simple. Gunshot injuries from an assault are not foreseeably identifiable with the normal use of an auto. *See Bookert, supra*. Lynn Harrison was killed by

gunshot injuries resulting from an assault. Therefore, her injuries were not foreseeably identifiable with the normal use of an automobile.

Even if *Howser* and *Towe* were still good law after *Aytes*, they cannot be used in the foreseeability test because the test did not apply when this Court considered *Howser* and *Towe*. Moreover, the facts of the instant case are different, and none of the salient facts in *Howser* and *Towe* exist here.

Respondent also fails to meet her burden under the other *Aytes* causal connection factors. When the assault occurred, her vehicle and Redman's vehicle were both stopped at a light. Thus, Redman's vehicle was not an "active accessory" to the assault. Instead, Redman's vehicle was merely the site from which he fired the fatal shot. Furthermore, Redman's actions after stopping his vehicle broke any causal connection. After stopping his vehicle, Redman pulled out a rifle. After stopping his vehicle, Redman aimed the rifle at Harrison. And, after stopping his vehicle, Redman pulled the trigger, causing Harrison's fatal injuries. These acts were wholly independent from his use of a vehicle and broke any causal connection.

The Circuit Court correctly held Harrison's injuries did not arise out of Redman's use of an automobile. 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,

MURPHY & GRANTLAND, P.A.

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

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June 28, 2021

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jun 28 2021

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.

CERTIFICATE OF COMPLIANCE

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

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