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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Thomas W. McGee, III, Circuit Court Judge

Case No. 2022-CP-40-000830
Appellate Case No. 2025-000028

Bron Cornett .... Appellant,

v.

United Services Automobile Association D/B/A USAA. .... Respondent.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court correctly held that, under the *Aytes* test, Plaintiff's injuries—resulting from a physical assault occurring outside a parked vehicle—did not arise out of the ownership, maintenance, or use of a motor vehicle.

2. Whether the Circuit Court correctly held that Appellant is not entitled to stack uninsured motorist coverage pursuant to section 38-77-160 of the South Carolina Code.

COUNTER-STATEMENT OF FACTS

In addition to the facts stated by Appellant, the following facts are relevant.

A. The "Collision"

In the light most favorable to Appellant, there was a minor accident between Appellant's Ford Mustang and the Mercedes driven by John Kingkade ("Kingkade"). When interviewed by the police, Appellant, who was under medication, said "I *think* our vehicles touched." (R._) (Cornett Dep. p. 25, ln 1-16) (emphasis added). Appellant's briefing has consistently described the accident as a "bump," leaving a small smudge mark on his Mustang. (R._) (Memorandum in Opposition, pp. 6, 7, 8); (MSJ Hearing Transcript, p. 26, ln 9, p. 27, ln 11,18); (Motion to Reconsider, pp. 3, 4, 5, 7); (Appellant's Brief, pp. 19, 21, 23). Cornett was not injured at all when the vehicles touched. (R._) (*Id.* 52:14-17).

B. The Three-Mile Drive

In addition to the facts described in Appellant's brief, it should be noted that during the three-mile drive on Two-Notch Road following the "collision" the vehicles passed through seven traffic lights. (R._) (Cornett Dep., p. 35:12-18).

C. The Dollar Tree

Though there is no video evidence of the "collision" or the three-mile drive, the events described in the Complaint were captured on video beginning with Kingkade's white Mercedes

and Cornett's gray Mustang parking adjacent to a Dollar Tree parking lot. (R._) (Cornett Dep., p. 66:8-25). For purposes of the motion for summary judgment, in the light most favorable to Plaintiff, it was agreed the vehicles were placed in park but left running.

D. First Confrontation

As shown at 18:59:35 in the video[1] Kingkade exited his Mercedes and walked back toward Cornett's Mustang. At 18:59:41, Cornett exited the Mustang and stood between the vehicle and the driver's side door. The two men talked for several seconds. (R._) (Cornett Dep., p. 68:02-03). It was not until about fifteen seconds after the vehicles parked that Kingkade walked back to the Mercedes, at 18:59:50. (R._) (*Id.* 68:07-09). While near the Mercedes, Kingkade took off his shirt.

E. The Door Kick

After Kingkade got out of the car and saw Cornett, Cornett agreed "his demeanor all of the sudden changed…and this racist personality came out." (R._) (*Id.* 50:16-22). "That's when he took his shirt off, eyes just wide like he was on drugs. That's exactly what it seemed like. He kicked my door and it was just, he was a whole different person. He didn't seem like the person that I was just talking to at the light. It seemed like him on rabies. It was crazy." (R._) (*Id.* 50:23-51:04). Cornett became concerned for his safety after Kingkade took off his shirt. (R._) (*Id.* 48:19-49:02).

Cornett was not injured at all when Kingkade kicked his door. (R._) (*Id.* 52:11-13).

F. The Second Confrontation

After the door kick, Kingkade retreated toward the Mercedes. Cornett then left his Mustang, walked towards Kingkade, and confronted him. (R._) (Cornett Dep, p. 69:05-06). Both men stood facing each other in a fighting posture adjacent to Kingkade's vehicle. (R._) (*Id.* 69:13-70:03).

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[1] A time stamp is visible in the top left corner of the video.

At 19:00:03, Cornett turned his back on Kingkade and walked back to the Mustang. Cornett decided "F that" and told his girlfriend, Elena Vawter, who was a passenger in the Mustang, to call the cops. (R._) (*Id.* 69:22-70:06). Vawter called the police about seven times, but they never answered. (R._) (*Id.* 47:08-19).

G. The Third Confrontation

After Cornett retreated back to the Mustang at 19:00:09 in the video, Kingkade walked between the cars, toward the passenger side of the Mercedes, and pointed at Cornett as Kingkade passed between the cars. At 19:00:10, as Kingkade walked away, Cornett left the Mustang and chased after Kingkade. After Kingkade's wife turned the Mercedes around and parked it two to three car lengths in front of the Mustang, Cornett and Kingkade confronted each other again between the cars, standing inches apart for several seconds. (R._) (Cornett Dep., p. 70:07-17).

At 19:00:27, Kingkade disengaged and walked back toward the Mercedes. At 19:00:31, Kingkade's wife exited the Mercedes.

H. The Fourth Confrontation and Assault

At 19:00:35, Kingkade returned to the passenger side of the Mercedes, Kingkade's wife was on the driver's side, and Cornett was still between the Mercedes and the Mustang. At 19:00:41, Cornett walked past Kingkade's wife towards the rear of the Mercedes and was then approached by Kingkade and his wife.

At 19:00:44 a commotion occurred but was obscured by the Mercedes. Vawter exited the Mustang and ran towards the others. Cornett testified that he went behind the car to photograph the license plate when Mrs. Kingkade "snatched it" out of his hand. (R._) (Cornett Dep., p. 53:17-18). During this time, Kingkade continued to hurl racial obscenities toward Cornett, and Mrs. Kingkade was also making racial hate speech. (R._) (*Id.* 53:19-54:01). Cornett pushed Mrs.

Kingkade after she took his phone, and within a "couple of seconds," Kingkade "came up behind me and started hitting me and everything." (R._) (*Id*. 55:08-17). Kingkade did not push Cornett "into the car or anything like that." (R._) (*Id*. 56:14-25).

STANDARD OF REVIEW

This appeal is from the circuit court's order granting USAA's motion for summary judgment. When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Marlowe v. S.C. Dep't of Transportation*, No. 2023-001808, 2025 WL 909152, at *2 (S.C. Mar. 26, 2025).

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 217, 837 S.E.2d 910, 913 (Ct. App. 2019) (Internal quotations omitted)*; Progressive Direct Ins. Co. v. Groves*, 438 S.C. 26, 31, 882 S.E.2d 464, 466 (2022) ("Whether coverage exists under an insurance contract is a question of law for the Court.").

Summary judgment should be affirmed "when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Marlowe*, 2025 WL 909152, at *2; *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (eliminating the "mere scintilla" standard and holding the proper standard is the "genuine issue of material fact" standard set forth in the text of Rule 56(c), SCRCP).

Additionally, "[s]tatutory interpretation is a question of law." *Floyd v. C.B. Askins & Co. Contractors*, 382 S.C. 84, 87, 675 S.E.2d 450, 452 (Ct. App. 2009) (citation omitted). Determining

the proper interpretation of a statute is a question of law and an appellate court reviews questions of law de novo. *Southeast Toyota Distr., LLC v. Jim Hudson Superstore, Inc.*, 387 S.C. 508, 512, 693 S.E.2d 33, 35 (Ct. App. 2010) (citing *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)); *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011).

ARGUMENT AND CITATION TO AUTHORITY

The core relief Appellant seeks is a determination that his injuries are covered under USAA's uninsured motorist policy because, according to Appellant, his injuries arise out of the ownership, maintenance, or use of the uninsured motorist vehicle. The Circuit Court disagreed and held USAA was entitled to summary judgment based on three primary conclusions. First, the Circuit Court found that there is no causal connection between the uninsured vehicle and Appellant's injuries. (R. _) (Order, pp. 5-7). Second, the Circuit Court found that there were numerous acts of independent significance that broke any causal chain between the insured vehicle and Appellant's injuries. (R. _) (Order, pp. 7-9). Third, the Court found that the uninsured vehicle was not being used for transportation at the time of Appellant's injury. (R._) (Order, pp. 9-10). Based on these conclusions, the Circuit Court determined Appellant is not entitled to uninsured motorist coverage under South Carolina law. (R. _) (Order, p. 10).

I. Appellant's argument that his injuries arose from the "maintenance" or "ownership" of Kingkade's vehicle fails for several reasons.

A. Appellant's argument was neither raised to nor ruled on by the Circuit Court and is, therefore, not preserved for appeal.

As a threshold matter, the first argument raised in Appellant's Brief is not preserved for appellate review. Specifically, Appellant argues for the first time on appeal, that *State Farm Fire & Cas. Co. v. Aytes*, and its progeny have no bearing on this matter because "the *Aytes* test does not account for or address injuries arising out of the ownership or maintenance of an uninsured

vehicle." (Appellant's Brief, pp. 10-11). Appellant asserts that *Aytes* "does not address each disjunctive term in the statute" and is limited to "use" of the vehicle. (Appellant's Brief, pp. 10-11). Accordingly, Appellant argues *Aytes* and its progeny are wholly inapplicable to these facts and this Court and the court below must determine whether the injuries arose from the ownership or maintenance of Kingkade's vehicle without regard to any precedent or authority beyond the dictionary. (*Id.* pp. 11-12).

However, Appellant did not make this argument at the hearing before the Circuit Court, nor did Appellant assert this argument in any of its motions or memoranda filed with the trial court below. In fact, Appellant argued the opposite: that the *Aytes* test did apply, and that his injuries satisfied that test. For example, the first two lines of argument in Appellant's motion for summary judgment read as follows:

> III. LAW AND ARGUMENT
> Under South Carolina law, an insured driver is entitled to recover under an automobile insurance policy's uninsured motorist coverage if the driver's damages arose "out of the ownership, maintenance, or use" of the uninsured motor vehicle. S.C. Code Ann. § 38–77–140. South Carolina Courts have established a three-prong test to determine whether an insured driver's damages meet that requirement: "(1) the party seeking coverage must establish a causal connection between the injury and the uninsured vehicle, (2) there is no act of independent significance which breaks the chain of causation, and (3) the uninsured vehicle must have been used for transportation at the time." *Progressive Direct Ins. Co. v. Groves*, 438 S.C. 26, 31-32, 882 S.E.2d 464, 466 (2022)(*quoting State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998)).

(R._) (Memo in Opp., p. 5).[2] Appellant then went on at sections III (a.)(i), (ii), and (iii), to explain why the facts of this case satisfy the *Aytes* test. (R._) (*Id.* pp. 6-9). At no point did his brief suggest

[2] This block quote is an accurate statement of the law and is taken, nearly in its entirety from. *Groves*, 438 S.C. at 31–32, 882 S.E.2d at 466–67.

that *Aytes* or its progeny should not be considered when ruling on USAA's motion for summary judgment.

Appellant's oral argument was similar. Appellant never informed the Circuit Court of his position that *Aytes* and its progeny did not apply to the facts of this case or should not be considered. In fact, he informed the lower court "our client meets all three factors in South Carolina's test for whether damages arise out of the uninsured policy" and discussed each factor. (R._) (Transcript, pp. 26-28).

Finally, Appellant's Motion to Reconsider did not raise this new argument. In fact, Appellant began the argument on the Motion to Reconsider with the same block quote contained above (acknowledging "a three prong test to determine whether an insured driver's damages" "arose 'out of the ownership, maintenance, or use' of the uninsured motor vehicle" and citing to *Groves* and *Aytes*). (R._) (Mot. to Reconsider, p. 2). And again, the Motion to Reconsider analyzed each of the three *Aytes* elements one by one. (R._) (*Id.,* pp. 2-7). At no time did the Motion to Reconsider suggest that *Aytes* and its progeny were inapplicable.

In sum, instead of arguing that the *Aytes* test is inapplicable to this case, at every opportunity below Appellant acknowledged the *Aytes* test is "**South Carolina's test for whether damages arise out of the uninsured policy."** (R._) (Transcript, p. 26, lns 3-5) (emphasis added); (R._) (Rule 59, p. 8) ("Accordingly, based on the *Aytes* factors, Plaintiff has demonstrated his injuries arose out of the use, maintenance, or ownership of the Kingkade vehicle."). Appellant cannot now, for the first time on appeal, take an opposite position and claim the *Aytes* test does not apply. It was incumbent on Appellant to make that argument below, which he failed to do. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be

preserved for appellate review."); *Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 468 (Ct. App. 2020) ("A party may not argue one ground at trial and an alternate ground on appeal." (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)); *Pryor v. Nw. Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (finding argument that circuit court erred by granting summary judgment because discovery requests were outstanding was not preserved because the issue was not raised to the lower court.).

B. Appellant's new position that *Aytes* is inapplicable to claims of injuries caused by "maintenance" or "ownership" is incorrect.

It is now Appellant's position that one can avoid the law as stated in *Aytes* by merely alleging injuries were caused not by "use" but by "ownership" or "maintenance." Even if it were preserved, this argument is belied by the plain language of *Aytes,* its progeny, and Appellant's arguments to the lower court.

First, nothing in *Aytes* limits its holding to "use" of the vehicle. Rather, the Supreme Court expressly stated that it was analyzing the question of whether the insured's injuries arose from "the ownership, maintenance, or use" of the subject vehicle. *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 35, 503 S.E.2d 744, 746 (1998) ("The only connection between the car and the injury is the fact that Dawson was sitting in the car when she was shot. Therefore, we do not find Dawson's injuries resulted from the **ownership, maintenance**, or use of her vehicle.") (emphasis added). Subsequent to *Aytes*, the South Carolina Supreme Court has repeatedly stated the *Aytes* test is used to determine whether injuries arose from the ownership, maintenance, or use of a vehicle. *See, e.g., Groves*, 438 S.C. at 31–34, 882 S.E.2d at 466–68 (discussing *Aytes* and its progeny in a discussion of the state's "jurisprudence as to whether such injuries arise out of the 'ownership, maintenance, or use" of an automobile."); *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 160, 628 S.E.2d 475, 479 (2006) ("We enunciated a three-part test in *Aytes* to determine whether an injury arises out of the

'ownership, maintenance, or use' of a motor vehicle."); *see also, Goyeneche,* 429 S.C. at 217, 837 S.E.2d at 913 (describing *Aytes* as "discussing the factors analyzed when determining whether damages arose from the 'ownership, maintenance, or use' of an insured vehicle"). Finally, as detailed in section I(A), above, prior to his brief to this Court, Appellant had always maintained that he satisfied South Carolina's "three prong test to determine whether an insured driver's damages" "arose 'out of the ownership, maintenance, or use' of the uninsured motor vehicle." (R._) (Memo in Opp. p. 5) (Mot to Reconsider, p. 2).

C. Plaintiff's injuries did not arise from the non-use ownership or non-use maintenance of Kingkade's Mercedes.

Moreover, even assuming *arguendo*, Appellant has preserved a valid argument that under South Carolina law injuries not arising out of the use of an automobile under *Aytes* can still arise out of the non-use maintenance or non-use ownership of an automobile, Appellant has failed to show how his injuries arose out of the "ownership or maintenance" of the uninsured vehicle. There is no testimony, evidence, or any other material in the record connecting the ownership of the Mercedes to Appellant's injuries. Similarly, there is no testimony, evidence, or other material in the record connecting the maintenance of the Mercedes to Appellant's injuries. Appellant contends his "injuries arose from his attempts to exchange insurance information … discover the Kingkade's license plate information, … ascertain the ownership of the vehicle and facilitate any necessary repairs." (Appellant's Brief, p. 11). Notably, these allegations are all actions of *Appellant*, not Kingkade. It is Kingkade's vehicle at issue. There is no evidence in the record that *Kingkade* was attempting to ascertain ownership, facilitate repairs, or exchange insurance information. Kingkade's taking off his shirt and hurling racial obscenities at Appellant and his wife would suggest the contrary. Even if there were evidence that Kingkade wanted to exchange insurance information, there would be no causal connection between this desire and Appellant's

injuries for the reasons discussed below. Regardless, Appellant's position would turn *Aytes* on its head and violate numerous rules of statutory construction by granting coverage due to mere "ownership," defined by Appellant as "the state, relation, or fact of being an owner." (Appellant's Brief, pp. 11-12). This tortured reading of the statute would lead to an absurd result in which, for example, the shooting of a pedestrian from inside of a vehicle would not be covered but the assault of a pedestrian outside of a vehicle would be covered if the pedestrian alleged he wondered who owned the vehicle. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993); *Bass v. Isochem*, 365 S.C. 454, 471-72, 617 S.E.2d 369, 378 (Ct. App. 2005) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

"Finally, there is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). Here, Appellant claims *Aytes* fails to encompass legislative intent; however, the legislature has amended Section 38-77-140 since the *Aytes* decision. If *Aytes* ran contrary to legislative intent, that body could have and would have altered the subject language at the time of the amendment.

II. The Circuit Court properly granted Respondent summary judgment because Appellant's injuries do not satisfy the *Aytes* Test.

The Circuit Court properly found that Appellant's injuries do not satisfy the *Aytes* test. To recover under an automobile insurance policy's uninsured motorist coverage, the insured's damages must "arise out of the ownership, maintenance, or use" of the uninsured motor vehicle. S.C. Code Ann. § 38-77-140 (2015). A three-prong test is used to determine whether an insured

meets that requirement: (1) the party seeking coverage must establish a causal connection between the injury and the uninsured vehicle, (2) there is no act of independent significance which breaks the chain of causation, and (3) the uninsured vehicle must have been used for transportation at the time. *Groves*, 438 S.C. at 32, 882 S.E.2d at 466-67 (quoting *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745).

A. There is no causal connection between the vehicle and Appellant's injuries.

Appellant cannot satisfy the "causal connection" requirement because the assault occurred outside of the vehicles, and a racially motivated physical assault in a parking lot is not foreseeably identifiable with the "normal use" of an automobile. (R. _) (Order, pp. 5-7).

To meet the "causal connection" requirement, the Appellant must show (a) the vehicle was an "active accessory" to the assault, (b) "something less than proximate cause and something more than the vehicle being the mere site of the injury," and (c) an injury "foreseeably identifiable with the normal use of the vehicle." *Aytes*, 332 S.C. at 33, 403 S.E.2d at 745-46 (citations omitted); *cf. State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (discussing the test). If Appellant fails to establish any one of these "*Aytes* requirements," summary judgment is appropriate. *Doe v. S.C. State Budget & Control Bd., Off. of Ins. Servs., Ins. Rsrv. Fund*, 337 S.C. 294, 297, 523 S.E.2d 457, 458 (1999).

1. *The Mercedes was not an active accessory.*

The Mercedes was neither active nor an accessory to Kingkade's assault of Appellant. (R. _) (Order, p. 6). At the time of the assault, the Mercedes was parked and no one was inside. All parties to the assault were outside of the vehicle, and they did not make contact with the vehicle during the assault. (R. _) (Cornett Dep., 56:14-25); (Order, p. 6).

Appellant contends that the vehicle was an accessory to the assault because Kingkade's acts of bumping Appellant's vehicle and failing to stop resulted in the perceived need to trade

information or identify the driver of the vehicle for insurance purposes. (Appellant's Brief, p. 14). Appellant provides no case law to support his position. (*See id.*). At most, the Mercedes served as transportation to and from the scene of the assault. This does not make it an active accessory. *See, Aytes*, 332 S.C. at 35, 503 S.E.2d at 746 ("the vehicle was not an active accessory" where vehicle used by uninsured motorist who "drove [victim] to an area … with the expressed intent of killing [victim]."); *Wright v. N. Area Taxi, Inc.*, 337 S.C. 419, 425, 523 S.E.2d 472, 475 (Ct. App. 1999) (vehicle is not an active accessory to the assault unless it somehow "serve[s] as a launching pad for the assault[.]"); *Travelers Indem. Co. v. Auto World of Orangeburg, Inc.*, 334 S.C. 137, 148, 511 S.E.2d 692, 698 (Ct. App. 1999) (where cars were used to drive to location of shooting, pull to the side of the road, and then leave the scene after the shooting, "the vehicles were not 'active accessories'"); *Holmes v. Allstate Ins. Co.*, 786 F. Supp. 2d 1022 (D.S.C. 2009) (same); *GEICO v. Bland*, No. 2:19-cv-0820, 2019 WL 6463792, at *2 (D.S.C. Dec. 2, 2019) (same); *Groves*, 438 S.C. at 35–36, 882 S.E.2d at 468–69 (2022) (no causal connection where uninsured vehicle used to drive up next to victim, shoot her, and then drive away).

Appellant argues the vehicle was an active accessory based on Kingkade's turning the vehicle so Appellant could not see the license plate, which led Appellant to walk to the rear of the vehicle. Yet *after* she parked the vehicle facing forwards, Appellant and Kingkade confronted each other again between the vehicles, then disengaged, then walked separately behind the Mercedes. Behind the Mercedes, Mrs. Kingkade, who was out of the vehicle and certainly not using it, grabbed Appellant's phone, causing Appellant to push Mrs. Kingkade. A few seconds later, the subject assault occurred. Merely turning the Mercedes around prior to and multiple out-of-vehicle confrontations before the assault, does not make it either active or an accessory to the assault. *See e.g., Travelers Indem. Co.*, 334 S.C. at 150, 511 S.E.2d at 699 (where cars were used to drive to

location of shooting, pull to the side of the road, and then leave the scene after the shooting, "the vehicles were not 'active accessories'").

2. *The Mercedes was not more than the "mere site" of Appellant's injuries; in fact it was not even the mere site of his injuries.*

To establish a causal connection, Appellant must also show "something more than the vehicle being the mere site of his injuries." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745–46 (citations omitted). The Circuit Court agreed that it is plainly impossible where, as here, no vehicle was the site of the injury. (R._) (Order, p. 6). Rather, Appellant was injured when his assailant and his assailant's wife were standing <u>behind</u> the Mercedes. After he was attacked, he "end[ed] up on the ground" with Kingkade on top of him. (R._) (Cornett Dep., p. 20:16-18); (Order, p. 7). At no point did Kingkade and Cornett hit the car, and they "both went straight down" when Cornett was attacked. (R._) (Cornett Dep, p. 56:14-22); (Order, p. 7). For these reasons, the Circuit Court properly found that the Mercedes was not the site of Cornett's injuries. (R._) (Order, pp. 6-7).

Appellant asserts that the Kingkade vehicle was more than the mere site of injury because "it was the means by which the Kingkades caused the initial damages to Appellant's vehicle, isolated Appellant in a business parking lot, lured him to the point he was attacked, and disposed of the evidence of the incident." (Appellant's Brief, p. 14). In making this contention, Appellant relies on case law that is no longer controlling. (Appellant's Brief, p. 14) (citing *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992)). The South Carolina Supreme Court has since described *Howser* as "an aberration in our jurisprudence" making clear it is no longer current law. *Groves*, 438 S.C. at 33, 882 S.E.2d at 467 ("While the Court in Aytes did not specifically overrule *Howser* and *Towe*, in retrospect we believe it was a game-changer.").

3. *Appellant's injuries were not foreseeably identifiable with a vehicle's normal use.*

Appellant contends that his injuries were reasonably foreseeable because it is reasonably

foreseeable that Appellant would seek to exchange ownership and insurance information with the Kingkades after their vehicles were involved in a collision. (Appellant's Brief, p. 14). This argument misses the mark. The fact that Appellant could foreseeably seek to exchange ownership and insurance information after an incident is not the inquiry. The inquiry is whether Appellant's injuries from the assault were foreseeably identifiable with the normal use of the vehicle. *See Aytes*, 332 S.C. at 33, 503 S.E.2d at 745-46. Injuries at the hands of an attacker are not foreseeably identifiable with a vehicle's normal use. *See, e.g.*, *Wright*, 337 S.C. at 426, 523 S.E.2d at 476. The mere fact that some kind of injury is foreseeable is not enough—the risk of injury must be related to the use of the vehicle as a vehicle. *Id.* (noting that, even though "the potential for injury to taxi drivers [at the hands of a mugger] is foreseeably identifiable[,]" such a danger is "inherent *in the occupation*[,]" not in the use of a car as a car) (emphasis added).

Appellant attempts to distinguish his facts from the facts in *Wright* because before the assault occurred "the Kingkades hit Appellant's vehicle with their vehicle."(Appellant's Brief, p. 15). Such a distinction is not recognized in any South Carolina case, and it was explicitly rejected by *Nationwide v. Brown*, which is a cornerstone of South Carolina law on this subject.[3] In *Brown*, a husband caused a tow truck in which he was a passenger to collide into a different car driven by his wife. *Nationwide v. Brown,* 779 F.2d 984 (4th Cir. 1985). After that collision, the husband exited the tow truck and shot his wife while she sat in the wrecked car. The *Brown* court held that while the injuries suffered by the wife as a result of the collision were compensable under an uninsured motorist policy, the injuries she suffered as a result of the gun assault after the husband exited the tow truck did not arise from the use of an automobile and therefore were not

[3] *See Travelers Indem. Co.* 334 S.C. at 141, 511 S.E.2d at 694 ("The development of our current law began with [*Brown*].").

compensable. *Id*. at 991 ("Because the collision, as opposed to the shooting, clearly arose out of the 'use of an auto as an auto,' … any injuries resulting from the collision itself are on that basis covered under the policy.").

Appellant also argues this case is different because the Kingkades used the accident to lure Appellant to the assault location, used their vehicle to conceal their license information, and used their vehicle to dispose of the evidence of the incident. (Appellant's Brief, p. 15). Again, this "continuum" theory relies upon South Carolina case law that has been, at best, severely limited by modern authority. Compare, *Howser*, 309 S.C. 269, with *Groves*, 438 S.C. at 33–34, 882 S.E.2d at 467–68. Indeed, while the Supreme Court has not "specifically overrule[d]" *Howser*, thirty-two years of subsequent jurisprudence make clear it no longer reflects the law of this state. *Groves*, 438 S.C. at 33, 882 S.E.2d at 467 ("While the Court in *Aytes* did not specifically overrule *Howser* and *Towe*, in retrospect we believe it was a game-changer.") Accordingly, neither *Howser*, nor any valid South Carolina authority, supports Appellant's "continuum" theory.

Here, the Circuit Court agreed Appellant's injuries are not foreseeably identifiable with a vehicle's normal use because his injuries were not caused by the mechanical force associated with the use of a vehicle—they were caused by human hands and feet. (R._) (Order, p. 7). Appellant testified that when he was cut off or even when he followed Kingkade into the Dollar Tree, he had no idea that he would be assaulted. (R. _) (Cornett Dep., p. 59:20-04). Appellant also admitted he had never been kicked or assaulted by someone using an automobile and had never kicked or assaulted someone else while using an automobile (R. _) (*Id.* 60:05-18). As such, his injuries do not stem from a car accident and were not foreseeably identifiable with a vehicle's normal use.

Appellant's assertion that the exchange of ownership/insurance information is required pursuant to S.C. Code Ann. § 56-5-1230 is a non sequitur. Although South Carolina law imposes

a statutory duty on drivers involved in a collision to stop and exchange information (*see* S.C. Code Ann. § 56-5-1230), this requirement does not render every potential consequence of that exchange foreseeably identifiable under the *Aytes* test. The legal foreseeability analysis under *Aytes* hinges on whether the injury is "foreseeably identifiable with the normal use of an automobile." A statutory requirement to stop and exchange information does not transform an assault or other criminal act into a foreseeable consequence of operating a vehicle. This is particularly true where the assault occurred long after the parties had pulled over, one party had kicked another car and caused property damage, ripped off his shirt, yelled racial obscenities, and where the parties had engaged and disengaged several times and Appellant had pushed his assailant's wife, all before the assault—clearly, the time for exchanging insurance information had long passed at the time of the assault. And again, there is no evidence the uninsured motorist (whose conduct is at issue) had any intention of exchanging insurance information; in fact his undisputed actions in the minutes leading up to the assault proves the contrary.

Appellant's unsupported claim that "road rage" is a common occurrence and therefore, an assault by one driver to another is reasonably foreseeable is equally unavailing.[4] Under *Aytes*, an injury is only covered (or foreseeable) if it is "foreseeably identifiable with the normal use of an automobile." The injury here is Appellant's broken leg. This is not the case in which Appellant's own "road rage" resulted in a collision of the cars that resulted in injury. Regardless, if "road rage"

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[4] Here, Appellant advances two inconsistent positions. When arguing there is no act of independent significance, as well as in advancing his "maintenance or ownership" theory, the three-mile, seven-traffic-light pursuit was a dispassionate, run-of-the-mill effort to exchange insurance information. But when arguing the assault was a foreseeable result of the "bump" outside of Walmart, he recasts the pursuit as part of a continuous act of "road rage." However, Cornett's testimony is that it was Cornett, not Kingkade, who was the pursuer for three miles, honked his horn, and attempted to get Kingkade's attention. He further testified that Kingkade's demeanor abruptly changed—becoming a "whole different person" with a "racist personality"— only after the cars were parked and Kingkade exited his vehicle. (R. _).

occurred, the events that caused Appellant's injury occurred long after the cars left the road, long after they were parked, and all occupants were outside of the vehicles. Nonetheless, intentional acts of violence, like acts characteristic of road rage, are intervening causes that sever the chain of foreseeability. *See e.g., Roque v. Allstate Ins. Co*., 318 P.3d 1, (Colo. App. 2012), *cert. denied* (2012) (injuries from "road rage" attack with a golf club taken out of the trunk of a car, when both combatants were outside their cars, were not injuries "due to use of car" for UM coverage).

B. <u>Multiple acts of independent significance broke any possible causal chain.</u>

Under *Aytes's* second factor, Appellant must show that no act of independent significance breaks the causal chain between the insured vehicle and his injuries. The Circuit Court found numerous acts of independent significance broke any causal chain in this case. The first was simply Kingkade's exiting of the vehicle. (R. _) (Order, p. 7). South Carolina courts have regularly held that "an assailant's exiting an insured vehicle prior to injuring another [is] an act of independent significance breaking the causal chain." *Goyeneche*, 429 S.C. at 224, 837 S.E.2d at 916; *see also, Aytes*, 332 S.C. at 35, 503 S.E.2d at 746 ("[I]f there was a causal link, it was broken when the assailant exited the vehicle."); *Carraway v. Smith by S.C. Ins. Co*., 321 S.C. 23, 26, 467 S.E.2d 120, 121 (Ct. App. 1995) ("Smith exited the car and carried on a conversation with a third person for several minutes before the shooting occurred. Even if the use of the car and the shooting were connected, that link was broken by Smith's actions."); *Travelers Indem. Co.*, 334 S.C. at 150, 511 S.E.2d at 699 ("Assuming arguendo a causal link existed, the causal link was broken when the assailant exited the vehicle being driven by him."); *see also, Nationwide Mut. Fire Ins. Co. v. Jeter,* 2013 WL 3109214, at *5 (D.S.C. June 18, 2013) ("Once Jeter exited the vehicle, any causal connection that might have existed was broken"). Accordingly, the Circuit Court properly found that Appellant could not establish the second element of the *Aytes* test since Kingkade exited the vehicle. (R._) (Order p. 8).

Additionally, the Circuit Court found that Kingkade's racially motivated assault was another act of independent significance that broke the causal chain. (R. _) (Order p. 8). Cornett testified that after Kingkade exited the vehicle "his demeanor all of the sudden changed" "and this racist personality came out." (R. _) (Cornett Dep., p. 50:16-22) (*Id.* 50:23-51:04). Cornett testified he believed Kingkade's actions after he exited the vehicle were racially motivated. He testified that Kingkade "was definitely racist. It was racially motivated." And Cornett agreed that if Cornett had been white, "this would not have happened." (R. _) (*Id.* 50:04-12). Clearly, a racially motivated hate crime occurring after the tortfeasor exits the vehicle is an act of independent significance that breaks the causal chain. *See, e.g.*, *Doe v. S.C. State Budget & Control Bd.*, 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997), *aff'd sub nom. Doe v. S.C. State Budget & Control Bd., Off. of Ins. Servs., Ins. Rsrv. Fund*, 337 S.C. 294, 523 S.E.2d 457 (1999) (finding that police officer's assaults of plaintiffs were acts of independent significance); *Groves*, 438 S.C. at 35, 882 S.E.2d at 468 (Driving and shooting are acts of independent significance).

Apart from exiting the vehicle, and Kingkade's racially motivated assault, Appellant's own actions, including his decision to follow Kingkade for three miles, engage in confrontations with Kingkade after Cornett began to fear for his safety and after Kingkade disengaged, Mrs. Kingkade's stealing of Cornett's phone, as well as Cornett's own pushing of Mrs. Kingkade before the assault, all similarly qualify as acts of independent significance. *Doe v. S.C. State Budget & Control Bd., Off. of Ins. Servs., Ins. Rsrv. Fund*, 337 S.C. at 297, 523 S.E.2d at 458 ("the [plaintiffs'] acceptance of [the officer]'s offers were acts of independent significance which broke any causal link."); (R.__) (Order, p. 9).

On appeal, Appellant argues that the cases relied upon by the Circuit Court are distinguishable from this case because in each of those cases, the assailant exited the vehicle before

causing any accident or damage or before assaulting another party. (Appellant's Brief, p. 16). In making this argument, Appellant refers to the events that unfolded as "one continuing assault" instead of separate independent intervening events. (*See id.*). Again, as discussed in section II (A), above, there is no valid case law to support Appellant's theory.

C. The Mercedes was not being used for transportation at the time of the assault.

Under the third *Aytes* factor, Kingkade's vehicle would have to be "used for transportation at the time of the injury." At the time Kingkade assaulted Cornett, Kingkade's vehicle was parked and stationary. No one was inside the vehicle. Neither Cornett nor Kingkade made contact with the vehicle at the time of the assault. (R. _) (Cornett Dep., p. 56:14-25). The vehicle was not being used at all, and it certainly was not being used for transportation:

> **Q. At the time you were assaulted, the Kingkades' vehicle was not being used for transportation. True?**
> A. Correct.
>
> **Q. In fact, it was not being used at all at the time you were assaulted. True?**
> A. Correct.

(R.) (*Id.*, 62:18 - 63:07).

Under South Carolina law, a car parked next to an altercation is not being "used for transportation at the time" of injuries resulting from the altercation. *See Travelers Indem. Co.*, 334 S.C. at 150, 511 S.E.2d at 699. In fact, even had the assault taken place inside of the Mercedes, Cornett would fail the *Aytes* factors because using a vehicle for an assault is not a "transportation use" of the vehicle. Numerous cases have so held. In *Aytes,* where the victim was shot while sitting in the passenger seat of the subject automobile, it was not "being used for transportation at the time of the injury." Additionally, where sexual assaults occurred on the hood of a police cruiser and in the back seat, "the cruiser was not being used for transportation at the time of the assaults." *Doe v. S.C. State Budget & Control Bd., Off. of Ins. Servs., Ins. Rsrv. Fund*, 337 S.C. at 297, 523

S.E.2d at 458; *see also, Wright,* 337 S.C. 419, 523 S.E.2d 472 (the vehicle served merely as the situs of shooting as opposed to an instrumentality that furthered the cause of the assailants); *Nationwide Prop. & Cas. Co. v. Lain,* 402 F. Supp. 2d, 644, 650 (D.S.C. 2005) (when an assault occurred after the vehicle had been placed in park, although in the back seat, "at the time of the injury … the vehicle was not being used for transportation."). Appellant asserts this case is distinguishable from all the cases relied upon by the Circuit Court because in this case there is a "continuum of events." (Appellant's Brief, p. 19). As set forth *supra*, such an argument is not supported by the law in this State.

The Circuit Court's order granting Respondent summary judgment should be affirmed because the Circuit Court properly held Plaintiff's injuries, which resulted from a physical assault that occurred outside of a parked vehicle, do not "arise out of the ownership, maintenance, or use" of the uninsured motor vehicle.

III. Appellant is not entitled to stack insurance coverage under S.C. Code Section 38-77-160.

Appellant argues he should be able to stack UM coverages on at home vehicles, but acknowledges stacking is only available when the insured's vehicle is "involved in the accident." Thus, Appellant acknowledges his own vehicle—the Mustang—would have to be involved in the assault for him to stack. However, his brief does not allege *how* it was involved in his assault. His entire argument, contained in one paragraph on page 21 argues "Appellant's vehicle was involved in the assault" but does not explain how other than Kingkade "kicked Appellant's driver's side door." That is it. But Appellant has admitted, and the testimony is undisputed, that he was uninjured at the time his driver's side door was kicked. (R.) (Cornet Dep., p. 52:11-13). Appellant does not offer any way in which his own vehicle which remained parked and stationary for over a minute before the assault actually injured him had any involvement in that assault. Accordingly,

the Circuit Court properly granted summary judgment to Respondent finding that no stacking is available for the assault and that Order should be affirmed. (R.) (Order).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests this Court to affirm the Circuit Court's grant of summary judgment to Respondent.

Respectfully submitted,

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