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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

APPEAL FROM RICHLAND COUNTY
In the 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

APPELLANT’S FINAL REPLY BRIEF

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ARGUMENT IN REPLY

Without restating the issues or readvancing arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to arguments raised by Respondent.

I. Appellant’s ownership and maintenance argument is preserved.

While before the circuit court, Appellant argued that his injuries arose out of the ownership and maintenance of the Kingkade vehicle.

“Error preservation requirements are intended ‘to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.’” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). As such, “[i]n order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.” *Holy Loch Distribs, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). “If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *I’On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724.

Crucially, “[e]rror preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review.” *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). Rather, “a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.” *Id.* at 502, 697 S.E.2d at 595–96. Consequently, “[o]ur [S]upreme [C]ourt has observed ‘it may be good practice for us to reach the merits of an issue when error preservation is doubtful.’” *State v. Williams*, 417 S.C. 209, 229, 789 S.E.2d 582, 593 (Ct. App. 2016) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398

S.C. 323, 330, 730 S.E.2d 282, 285 (2012)). Thus, “where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.” *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part).

While before the circuit court, Appellant consistently argued that his injuries arose out of the ownership and maintenance of the Kingkade vehicle. In his memorandum in opposition to Respondent’s motion to dismiss, Appellant argued that attempts to exchange insurance involved the maintenance of the vehicle, while attempts to ascertain the license plate information involved the vehicle’s ownership. (R. 128, 130). At the summary judgment hearing, Appellant similarly argued that attempts to trade insurance involved the maintenance of the Kingkade vehicle, while the Kingkades efforts to conceal their license plate information involved the ownership of the vehicle. (R. 62–63). Finally, in Appellant’s motion to reconsider, he again argued that efforts to exchange insurance implicated the maintenance of the Kingkade vehicle, while efforts to determine the license plate information involved the ownership of the vehicle. (R. 136, 139). Ultimately, the circuit court ruled against Appellant and granted summary judgment in favor of Respondent. Implicit in that determination was the courts rejection of Appellant’s argument regarding ownership and maintenance. Accordingly, this issue has been raised to and ruled upon by the circuit court and is preserved for appellate review.

II. The *Aytes* test is limited to injuries arising out of a vehicle’s use.

The *Aytes* test requires that injuries arise from a vehicle’s “use” before insurance coverage applies and, thus, does not address injuries arising solely from the ownership or maintenance of a vehicle.

Pursuant to section 38-77-140, 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. Accordingly, pursuant to the statute, a driver may recover under an uninsured motorist policy if the damages arise out of the use OR the ownership OR the maintenance of the vehicle. *See Michau v. Georgetown Cty.*, 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012) ("[T]he use of the word 'or' in a statute is a disjunctive particle that marks an alternative." (first set of internal quotation marks omitted) (quoting *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009))); *Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) ("The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, *but not both.*" (emphasis added)). However, the *Aytes* test only addresses injuries arising out of a vehicle's use.

Respondent argues that the *Aytes* test addresses all three disjunctive terms because courts have cited the statutory trio when applying the test. However, these references are nominal, as the elements of the test reveal that the test is limited to the use of an uninsured vehicle. That the *Aytes* test only applies to injuries arising from a vehicle's use is apparent from the third prong of the test, which requires that "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) (citing *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 33, 503 S.E.2d 744, 745 (1998)). This third prong also mirrors our Supreme Court's definition of "use" in the statute. *See Canal Ins. Co. v. Ins. Co. of N. Am.*, 315 S.C. 1, 4, 431 S.E.2d 577, 579 (1993) ("We now construe § 38-77-140 and define 'use of a motor vehicle' as limited to transportation uses."). Consequently, the third prong eliminates coverage for all injuries but those arising out of the use of the vehicle for transportation.

Moreover, the *Aytes* test requires a plaintiff to establish a causal connection, which in turn requires a plaintiff to demonstrate “that the ‘injury must be foreseeably identifiable with *the normal use of the automobile.*’” *Groves*, 438 S.C. at 32, 882 S.E.2d at 467 (emphasis added) (quoting *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999)). As a result, this factor also eliminates coverage for all injuries but those arising out of the use of the vehicle.

Ultimately, the *Aytes* test requires a driver to demonstrate that his or her injuries arose out of the “use”, “ownership AND use”, “maintenance AND use,” or “ownership, maintenance, AND use” of an uninsured vehicle, rather than the statutory requirement that the injuries arise out of the “ownership, maintenance, OR use” of such a vehicle. As such, the *Aytes* test limits coverage to injuries arising out of the use of a vehicle.

III. Appellant’s injuries arose out of the ownership and maintenance of the vehicle.

Appellant has demonstrated that his injuries arose out of the ownership and maintenance of the Kingkade vehicle.

At the time his injury occurred, Appellant was attempting to trade insurance information and ascertain ownership of the Kingkade vehicle. As further detailed in Appellant’s Final Brief, these actions directly relate to the ownership and maintenance of the vehicle. For example, a motorist involved in a collision cannot arrange for repairs or compensation to the other driver, or demand the same for himself, without ascertaining the ownership of the other vehicle. Similarly, exchanging insurance information is necessary to filing an FR-10, filing an insurance claim, or otherwise facilitating necessary repairs (or maintenance) on the vehicles. Furthermore, exchanging such information is required by South Carolina law. *See* S.C. Code Ann. § 56-5-1230 (requiring the driver of a vehicle involved in a motor vehicle collision to provide his name, address,

vehicle registration number, and driver's license information to the other driver). As such, injuries arising from a driver's attempts to ascertain and/or exchange such information arise out of the ownership and maintenance of the vehicle.

In its Final Brief, Respondent argues that it is the Kingkade vehicle that is at issue and there is no evidence that Mr. Kingkade was attempting to ascertain vehicle ownership, facilitate repairs, or exchange information. Notably, however, Appellant was attempting to ascertain the ownership of Kingkade's vehicle when he was injured. Accordingly, Appellant's injuries arising out of his attempts to ascertain the vehicle's ownership information and the Kingkade's efforts to conceal the vehicle's license plate would arise out of the ownership of the uninsured motor vehicle. Moreover, the evidence in the record demonstrates that, when Appellant informed Mr. Kingkade of the collision, Mr. Kingkade signaled for Appellant to pull into a nearby parking lot. (R. 103-04, 41:21-42:4, 44:2-45:18). Thus, Mr. Kingkade represented that he intended to exchange information with Appellant and Appellant reasonably relied on that representation. Consequently, injuries arising out of the efforts to exchange insurance arose out of the maintenance of the Kingkade vehicle. Additionally, Respondent argues that Kingkade's acts of taking off his shirt and hurling racial obscenities suggest he did not intend to exchange insurance information but, notably, this conduct did not begin until the vehicles had pulled into the parking lot and the drivers began communicating. (R. 110, 67:19-69:4; R. 148, Incident Video 18:59:39-18:59:51).

Finally, Respondent misconstrues Appellant's argument regarding the ownership and maintenance terms in the statute. Respondent asserts that, under Appellant's argument, coverage would be granted based on mere ownership. As such, Respondent asserts a driver could assault someone outside of his vehicle and any resultant injuries would be covered so long as the injured party alleged that he "wondered" who owned the vehicle. However, Respondent oversimplifies

Appellant’s argument and the language of the statute. Notably, such injuries would not be covered because they would not “arise” out of the ownership of the vehicle. In Respondent’s example, the assault of the injured party is unrelated to determining the vehicle’s ownership, as this hypothetical situation does not contemplate a motor vehicle accident or other scenario in which it would be incumbent upon the injured party to determine or trade ownership information. Conversely, in the case at bar, Appellant and Mr. Kingkade were involved in a motor vehicle collision and Appellant was attempting to trade ownership and insurance information following that collision when his injuries occurred. As such, Appellant’s attempt to determine who owned the vehicle was not merely because he “wondered” who owned the Kingkade vehicle. Rather, it was required of him as a driver under South Carolina law. Thus, Appellant’s injuries arise from the ownership of the Kingkade vehicle because he was injured while attempting to ascertain the vehicle’s ownership after a collision.

IV. Appellant’s injuries satisfy the *Aytes* test.

For purposes of his Reply Brief, Appellant responds only to the arguments raised by Respondent regarding application of the *Aytes* test. However, Appellant relies on and incorporates the *Aytes* test arguments from his Final Brief into this section.

As previously established, under the *Aytes* test, “(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,^[1] and (3) the uninsured vehicle must

¹ To avoid repeating and rehashing arguments presented in his Final Brief, Appellant does not address Respondent’s arguments regarding acts of independent significance in his Reply Brief, as such arguments were addressed in Appellant’s Final Brief. However, Appellant relies on and incorporates the arguments addressing this factor from his Final Brief. *See* AFB, pg. 15–18.

have been used for transportation at the time.” *Groves*, 438 S.C. at 31–32, 882 S.E.2d at 466 (citing *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745).

a. Causal connection

To establish a causal connection, an insured driver must “show three subparts: a) the vehicle was an active accessory to the assault; and b) something less than proximate cause but more than mere site of the injury;^[2] and c) that the injury must be foreseeably identifiable with the normal use of the automobile.” *Id.* at 32, 882 S.E.2d at 467 (internal quotation marks omitted) (quoting *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182).

Respondent asserts that Appellant, in seeking to establish that the vehicle was an active accessory, relies solely on the fact that the Kingkade vehicle was turned so that Appellant could not see the license plate. However, Appellant asserted the Kingkade vehicle was an active accessory based on at least three events occurring at the beginning, middle, and end of the incident. First, Mr. Kingkade’s acts of bumping Appellant’s vehicle and failing to stop resulted in the need to trade information or identify the driver of the vehicle for insurance purposes. Second, Ms. Kingkade’s act of driving the vehicle and parking it with the front facing Appellant so that he could not see the license plate led to Appellant walking around the Kingkade vehicle where he was attacked by the Kingkades. Third, the Kingkades used their vehicle to quickly escape the scene and attempt to destroy the evidence of the incident. *See Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 273, 422 S.E.2d 106, 108 (1992)³ (“[O]nly a motor vehicle could have provided the

² To avoid repeating and rehashing arguments presented in his Final Brief, Appellant does not address Respondent’s arguments regarding the second subpart of the causal connection factor, as such arguments were addressed in Appellant’s Final Brief. However, Appellant relies on and incorporates the arguments addressing this subpart from his Final Brief. *See* AFB, pg. 14.

³ Respondent takes issue with *Howser*, asserting that the case is no longer good law in South Carolina. However, Respondent also concedes that *Howser* has not been overruled by the Supreme Court.

assailant a quick and successful escape.”). As such, the Kingkade vehicle was an active accessory throughout the incident in question. *See id.* (“The gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part.”).

Regarding the foreseeability subpart, Respondent misconstrues Appellant’s argument. Respondent asserts that Appellant casts the entire incident, from the initial bump to the Kingkades fleeing the scene, as a continuous act of road rage. However, Appellant has never made such a claim. To the contrary, Appellant asserted that road rage becomes more likely where an accident has occurred or when another party is attempting to exchange information as a result. Thus, Appellant argued it is reasonably foreseeable that an at-fault driver may become hostile *after* another driver seeks to exchange information following a collision. Moreover, Respondent’s assertion that Kingkade’s demeanor “abruptly changed” after the driver’s pulled over to exchange information is consistent with Appellant’s argument.

b. Used for transportation

Respondent asserts that a car parked next to an altercation is not being used for transportation at the time of the injuries. However, the Kingkade vehicle was used for transportation throughout the incident. The incident began when Kingkade bumped Appellant’s vehicle while both vehicles were used for transportation down Two Notch Road. When the vehicles pulled into the local business, both remained on and Ms. Kingkade used the vehicle for transportation by driving the vehicle, moving it away from Appellant’s vehicle, and turning it around in an attempt to conceal the license plate. Most notably, because the vehicle was still on, the Kingkades were able to use it for transportation as they made a rapid getaway following the incident. *See id.* (“[O]nly a motor vehicle could have provided the assailant a quick and successful escape.”). The Kingkades additionally used their vehicle to transport and dispose of Appellant and

Ms. Vawter's phones, which contained evidence of the incident. Accordingly, the Kingkade vehicle was used for transportation throughout the subject incident.

V. Appellant has demonstrated that his vehicle was involved in the incident as required by S.C. Code Ann. § 38-77-160.

In addressing Appellant's argument regarding stack coverage, Respondent asserts that Appellant relies only on the fact that Mr. Kingkade kicked his door. To the contrary, Appellant asserted that his vehicle was involved throughout the incident and demonstrated the same throughout his Final Brief. Appellant established that the Kingkade vehicle striking his vehicle and causing damage is what ultimately led to the continuum of events that transpired. (R. 98, 21:19-22; R. 101-02, 31:1-34:5). Additionally, Appellant demonstrated that Mr. Kingkade represented that he would exchange information with Appellant by directing him to pull his vehicle into a nearby business parking lot. (R. 103-04, 41:21-42:4, 44:2-45:18). Finally, Appellant also asserted that Mr. Kingkade kicked Appellant's driver side door after the vehicles pulled into the parking lot, which was the first act taken by Mr. Kingkade in his assault of Appellant, which ultimately led to his injuries. (R. 110, 68:7-69:4; R. 148, Incident Video 18:59:51). Accordingly, Appellant demonstrated that his vehicle was involved throughout the incident.

CONCLUSION

Based on the foregoing, as well as the arguments raised in Appellants Final Brief, the circuit court's order granting Respondent's motion for summary judgment and denying coverage to Appellant should be reversed.

Signature included on following page

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant’s Final Reply Brief complies with Rule 211(b),
SCACR.

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