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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2014-CP-16-0792
Appellate Case No. 2016-000840

State Farm Mutual Automobile
Insurance Company, ... Respondent,

v.

Beverly Goyeneche, David R. Gray, III, and
Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray),
individually and as Parent and Natural Guardian of S.G., ... Defendants,

Of whom
Beverly Goyeneche and Amanda Goyeneche are . . . . . Appellants.

INITIAL REPLY BRIEF

John S. Nichols, SC Bar No. 4210
Bluestein, Nichols, Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
jsnichols@bntdlaw.com
(803) 779-7599

Karl H. Smith, SC Bar No. 5272
Smith Watts & Associates, LLC
508 South Fourth Street
Hartsville, SC 29550
karllaw@aol.com
(843) 332-4700

Attorneys for Appellants

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Appellants reply briefly to the arguments Respondent presented to the Court.

I. Appellants Appropriately Cited to Foreign Jurisdictions to Inform this Case

Respondent asserts Appellants contend this Court "must look to foreign jurisdictions in order to decide this case." (Resp. Br. p. 13). Respondent mischaracterizes Appellants' argument.

Contrary to Respondent's contention, the Supreme Court of South Carolina has *not* addressed the circumstances found in this case. Not even *Aytes*, upon which the circuit court and Respondent relies heavily, addresses this situation. Contrary to Respondent's contention, there are no cases which have "adopted" a rule or even addressed coverage in this situation. (Resp. Br. pp. 13-14). Thus, Appellants provided the circuit court and this Court with persuasive authority from other jurisdictions which *have* addressed the precise factual scenario found in this case. (App. Br. pp. 10-16). *See Bass v. Isochem*, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (Ct. App. 2005) ("When there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority.") (citing several cases).

Respondent also asserts that "these cases are in conflict with South Carolina law" and accuses Appellants of seeking "to alter the three-part test established by our Supreme Court by interjecting analysis and conclusions applied in foreign jurisdictions using legal principles and interpretations which have not been adopted by South Carolina appellate courts and therefore, should not be applied to the facts of this case." (App. Br. pp. 23-24). Neither assertion is so. Current South Carolina law does not preclude coverage.

The Court should reject Respondent's characterization of Appellants' argument as well as Respondent's contention that those cases are contrary to South Carolina law. The Court should review the cases Appellants provided, follow the analysis set forth therein, and reverse the circuit court's order.

II. *Nationwide Prop. & Cas. Co. v. Lain* Does Not Advance the Inquiry

Respondent points to *Nationwide Property & Cas. Co. v. Lain*, 402 F. Supp.2d 644 (2005), contending "the District Court properly applied the *Aytes* test thereby reaching the same conclusion that should be rendered in the present case." (Resp. Br. pp. 22-23). Respondent criticizes Appellants since they "did not attempt to distinguish" *Lain*, asserting Appellants "simply disagreed with the ruling, that declined to extend coverage after applying the three-part test." (Resp. Br. p. 22). The Court should not find Respondent's argument or the District Court's order in *Lain* to be persuasive.

The District Court described the facts of *Lain* as follows:

> Some time before March 15, 2003, Melanie Lain and Defendant Oliver began dating. On Friday, March 14, 2003, Ms. Lain and Oliver went out together; while out, the couple drank and argued. At some point, the couple headed home to the house they shared. However, after Oliver got out of the vehicle, Ms. Lain locked the doors and began to drive away. Oliver then punched out the driver's side window and told Ms. Lain to move over and let him drive. At some point while driving, Ms. Lain started to open her door so Oliver stopped the car. The couple got out of the car and argued in the middle of the road. Eventually, Ms. Lain got back in the car, in the backseat, and Oliver then drove behind a church on Folly Road. After hitting a telephone [pole], Oliver parked behind the church. According to Oliver's statement, he "then got out of the front seat and got into the backseat to talk to" Ms. Lain. Ms. Lain kept saying she was going to call another man named Tony, and Oliver "lost it and was enraged," putting his hands over Ms. Lain's mouth and throat, thereby causing her death by strangulation.

Lain, at 646. The District Court applied *Aytes* and, predictably, found no coverage.

Appellants saw no need to point out the difference between *Lain* and this case as those distinctions are obvious. The facts of *Lain* mirror the facts of *Aytes* (assailant drove victim to a remote area, parked the car, got out with the keys, walked to the other side, and shot the victim) and *Doe*, *infra* (assailant parked the car in a remote area, got into the back seat, and sexually assaulted the victim). The facts of *Lain* are also akin to *Bookert* (victim standing outside fast food restaurant deliberately shot by passenger in car that was rolling in traffic lane around restaurant; Court held assault was not foreseeably identifiable with the normal use of the vehicle) and *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 628 S.E.2d 475 (2006) (husband was lifting shotguns from back seat of stopped vehicle when one gun discharged, killing wife who was in driver's seat; nothing about the vehicle contributed to the gun's discharge and wife's resulting death). The result in *Lain* (a federal court applying state substantive law) was controlled by the rulings in *Aytes* and *Doe*. But the facts of *Lain*, involving an intentional act of murder in the back seat of a stopped and parked vehicle, are vastly different from the facts of this case, which do not dictate reaching the "same conclusion" reached in *Lain*.

III. *Peagler v. USAA* Does Not Preclude Recovery in this Case

Respondent also contends that *Peagler* undercuts the distinctions Appellants drew between this case and *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998), *Doe v. SC State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999) and *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999).

(Resp. Br. p. 17). The Court should not be persuaded by this argument.

In *Peagler*, the Supreme Court stated:

> The determination of whether coverage exists in this case rises or falls on the analysis of the first *Aytes* factor. A causal connection between the vehicle and the injury must exist in order in order for an injury to be covered by an automobile insurance policy. In this context, we have held that causal connection means: (a) the vehicle was an "active accessory" to the injury; (b) the vehicle was something less than the proximate cause but more than the mere site of the injury; and (c) the injury was foreseeably identifiable with the normal use of the vehicle. *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (citing *Aytes*). "The required causal connection does not exist when the *only* connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 746.

Peagler, at 161, 628 S.E.2d at 479 (emphasis added). The key to *Peagler* was that the plaintiff in that case failed to demonstrate "that the truck was an active accessory to the injury. The truck was not actively used or involved in causing the injury; it was merely the site of the injury." *Peagler*, at 164, 628 S.E.2d at 481.

Unlike the facts of *Peagler*, the vehicle in this case was more than the mere site of the injury. Father was transporting Infant to daycare, and was using his vehicle to do so. He had not completed the transport when the injury occurred. And the truck was most definitely involved in causing the hyperthermia that killed Infant. That is, that the child was an occupant of the truck was not the "only connection" between the injury and the vehicle. *Peagler* is distinct from this case in very meaningful ways.

The Court should not find the Supreme Court's holding in *Peagler* precludes coverage in this case.

IV. The Evidence Establishes Infant Was a Resident of Both Parents' Homes

Respondent asserts the preponderance of the evidence supports the circuit court's ruling that Infant was a resident of Mother's home only. The Court should reject Respondent's argument.

First, Respondent points to Father's admissions that Mother was the "primary custodian because [Infant] lived with her mother, however, [Father] had very liberal visitation." (Resp. Br. p. 31). Respondent points to other evidence to establish that Infant's primary residence was with Mother (Resp. Br. pp. 31-32), the implication being that a person may have only one residence for insurance coverage purposes, and *that* residence is with the "primary custodian." But that is not the law, as Appellants set forth in their principal brief. (App. Br. pp. 27-33)

Respondent contends this Court's scope of review is limited to a determination of whether evidence supports the circuit court's determination. (Resp. Br. p. 32). Of course, if that determination is based upon an error of law, this Court should reverse. And the *only* evidence in this record (including Father's admissions) is that Infant's status with each parent rose to the level of "residency" for purposes of insurance coverage. Thus, the trial court's holding to the contrary lacks support and is controlled by an error of law.

V. The Circuit Court Erroneously Ruled Appellants Failed to Preserve the Issue of Infant's Residency

Respondent contends that the circuit court's "statement that the issue had not been raised for reconsideration is a truism and such statement requires no further action." (Resp. Br. p. 33). This statement minimizes what the circuit court actually ruled.

In the final order, the circuit court noted the parties' conflicting arguments regarding Infant's residency (Order, pp. 1-2). The court found the preponderance of the evidence established that Infant lived with her mother and grandmother, and added:

> The father's admissions, the manner in which the minor was documented as a resident of the mother's household, and the brief and irregular visits with the father lead to the conclusion that the minor was a resident relative of only the mother's household.

(Order, p. 7). The issue, therefore, was raised to and ruled upon by the trial court.

In the order denying reconsideration, however, the circuit court ruled the "issue was not timely raised" in the motion for reconsideration, and cited to a case holding such issue "not preserved for review." (Order on Reconsideration, p. 3) The court went further to hold that the evidence supported the court's finding that Infant was a resident relative of Mother's household. (Order on Reconsideration, p. 4).

Appellants contend the circuit court's ruling is erroneous as a matter of law. They do not contend that the circuit court failed to address it, just that the circuit court got it wrong under the controlling and applicable law. A child may be a primary resident with one parent without precluding a finding that the child meets the test of residency for the other, noncustodial parent, yet the circuit court ruled based upon where the court determined the child "lived" (i.e., who had primary custody). No motion pursuant to Rule 59, SCRCP, was required to preserve a challenge to that ruling for this Court's review. *See Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004) (party may use Rule 59 to ask a court to reconsider its ruling but such is not required for error preservation unless the issue was raised to, but not ruled upon by, the

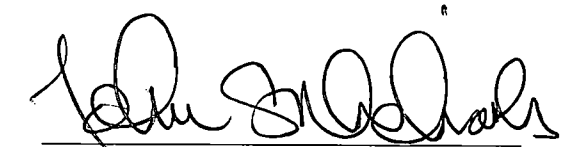
trial court) and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 442, 526 S.E.2d 716, 724 (2000) (motion to alter or amend judgment required only if lower court fails to rule on an issue losing party raised).

The Court should reject the circuit court's holding that Appellants failed to preserve the issue in their Rule 59 motion.

CONCLUSION

For the reasons stated this Court should reverse the judgment of the circuit court and should remand the matter for entry of an order consistent with this Court's ruling.

Respectfully submitted,



John S. Nichols, SC Bar No. 4210
Bluestein, Nichols, Thompson & Delgado, LLC
Post Office Box 7965
Columbia, South Carolina 29202
jsnichols@bntdlaw.com
(803) 779-7599

Karl H. Smith, SC Bar No. 5272
Smith Watts & Associates, LLC
508 South Fourth Street
Hartsville, SC 29550
karllaw@aol.com
(843) 332-4700

Attorneys for Appellants

January 9, 2017

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Beverly Goyeneche and Amanda
Goyeneche are . . . . . Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel with a copy of the *Initial Reply Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Jonathan M. Robinson
DuBose-Robinson, PC
PO Drawer 39
Camden, SC 29021-0039

Erin Bridges

January 9, 2017

Erin Bridges

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

January 9, 2017

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State Farm v. Goyeneche et. al.
Case Tracking No.: 2016-000840

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Reply Brief. I have also enclosed a proof of service upon counsel for the Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Karl H. Smith, Esquire
Jonathan M. Robinson, Esquire