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.

BRIEF OF APPELLANTS

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IV. Did the circuit court err in ruling that Appellants failed to preserve the issue of Infant's residence by failing to raise the issue in their motion for reconsideration pursuant to Rule 59, SCRCP?

STATEMENT OF THE CASE

On September 24, 2014, State Farm sued Beverly Goyeneche ("Grandmother"), David Gray ("Father"), and Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray)("Mother"), individually and as Parent and Natural Guardian of "S.G." ("Infant"). State Farm sought a declaration that none of the policies it issued to Defendants provided coverage for Infant's death. State Farm also sought a declaration that it owed no duty to defend or indemnify any of the defendants for Infant's death.

On October 22, 2014, Father filed an answer denying all allegations of the Complaint. On October 30, 2014, Mother and Grandmother filed a joint Answer and Counterclaim in which they generally admitted most of the factual allegations of the complaint, denied others, and asserted that Infant's death arose out of the operation, ownership, maintenance or use of the vehicles covered by the various policies. Mother and Grandmother joined in State Farm's request for declaratory relief, but sought a declaration that the policies did, in fact, provide coverage. On November 26, 2014, State Farm filed a Reply to the Answer and Counterclaim.

Following discovery the parties stipulated certain facts. On April 7, 2015, the circuit court held a bench trial in the matter and on June 1, 2015, the court entered an order finding State Farm's policies did not provide coverage and further that Infant was a resident solely of mother's home. Defendants received notice of the entry of the order on June 5, 2015, and on June 15, 2015, moved the court to alter or amend the judgment. Following a hearing on the motion the circuit court entered an order denying the motion on March 23, 2016. Mother and Grandmother appealed those rulings.

FACTS

The underlying facts of this case are tragic. Infant was born April 8, 2013, to Mother and Father, who never married and who lived in different homes. Mother and Father shared custody whereby one parent would keep Infant for four days each week, the other parent would have her the other three days, and they alternated weeks in which a parent had the four days and the other had three days. This was an agreed arrangement without a court order. Mother lived with her parents, and that address was the principal address for documentation for Infant.

On May 7, 2014, Infant spent the night with Father. On the morning of May 8, 2014, Father placed Infant in her car seat in his truck and was to have transported her to Children's Corner Daycare School. Father failed to deliver her, however, instead driving directly to his work where he parked his truck, turned off the ignition, got out of the truck, and went into work. Father left Infant unattended in the truck from about 9:30 a.m. until about 1:00 p.m., when he returned to his truck, went to lunch, and went to Mother's home to retrieve clothing items from Mother for Infant. Father then returned to work and again unknowingly left the child alone in the truck from about 2:30 p.m. to 5:15 p.m.

Mother went to pick Infant up from daycare at 5:00 p.m. When she arrived the staff told Mother they had not seen Infant that day. Mother called Father, who immediately realized Infant must still be in his truck. Father rushed to the truck and removed Infant from her car seat and the extremely hot vehicle. Father took Infant into his workplace and someone called EMS. Infant was transported to the emergency room but was pronounced dead shortly thereafter from complications of hyperthermia.

Stipulated Facts

The parties entered into the following factual stipulations. Father and Mother were the parents of Infant, and Beverly Goyeneche is Amanda's mother and was Infant's grandmother. Infant was 13-months old at the time of her death.

On May 8, 2014, Father was to deliver Infant to daycare but failed to do so. Instead, Infant was left unattended in the back seat of Father's Ford pickup while it was parked at Carolina Printing Sports and Trophy, his place of employment. The ignition of the truck was off from about 9:30 a.m. until about 1:00 p.m. and again from about 2:30 p.m. until 5:15 p.m. on that day. Infant was found unresponsive in Father's truck and at the time the vehicle was turned off and unoccupied by any other person. Infant was pronounced dead at about 5:50 p.m. from complications related to hyperthermia.

State Farm issued four insurance policies relative to this matter:

1. Policy No. 4891-309-40, to Father, insuring the Ford pickup truck and providing Liability and UIM coverage of $25,000 per person, $50,000 per occurrence, and $25,000 property damage.
2. Policy No. C483241E, to Mother, insuring a 2013 Jeep Wrangler and providing Liability and UIM coverage of $50,000 per person, $100,000 per occurrence, and $25,000 property damage.
3. Policy No. 1003667A to Grandmother, insuring a 2004 Chevrolet Impala and providing Liability and UIM coverage of $50,000 per person, $100,000 per occurrence, and $25,000 property damage.
4. Policy No. 1772085A to Grandmother, insuring a 2007 C1500 and providing

Liability and UIM coverage of $50,000 per person, $100,000 per occurrence, and $25,000 property damage.

These policies provided coverage for those "bodily injuries and property damage caused by an accident and arising out of the ownership, maintenance or use of the insured automobile, and otherwise subject to the terms of the policy." (R. pp. 35-36). Mother presented a claim for loss under the liability and UIM coverages under all four policies for Infant's death.

The parties disputed the minor's residence. Father indicated through discovery that Mother was Infant's primary custodial parent. Mother asserted Infant was a resident relative of both Father's household and Mother's household.

Order

The circuit court granted declaratory relief for State Farm, and denied Appellants' request for a declaration of coverage. The court held that Infant's death "did not arise out of the ownership, maintenance or use of a vehicle" so that the claims were excluded from coverage. (R. p. 2).

The court adopted the parties' factual stipulations. (R. pp. 2-7). The court also found the preponderance of the evidence established that Infant lived with Mother and Grandmother and was a "resident relative of only the mother's household." (R. pp. 7, 13).

The circuit court stated the ruling was controlled by a three-part test set forth in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998). The trial court noted "although[] the vehicle was the site of her untimely death, no evidence has been

presented that the death was caused by anything but hyperthermia." (R. p. 9). The court stated "no evidence has been presented in this case that the vehicle was an active accessory to the death." (R. p. 9-10). The court added "while the transport of children is certainly a foreseeable use of the vehicle, the negligent act of deserting of a small child in the vehicle for an extended period of time is not." (R. p. 10). Thus, the circuit court held there was no causal connection between the vehicle and Infant's death.

Next, the court stated that even if a causal connection existed between the vehicle and Infant's death, "it was broken by an act of independent significance." (R. p. 10). The court held:

> In the case sub judice, it is stipulated that the driver, [Father], turned off the ignition and left the vehicle unattended in a parking lot. The unattended vehicle was not occupied by anyone other than the minor decedent for seven hours and fifteen minutes. Abandoning the minor was an act of negligence attenuated from the use of the vehicle. [Father's] desertion of the minor was an act of independent significance thereby breaking any causal link between the vehicle and the death of the minor. Just as our courts have determined the causal link was broken when an assailant exited the vehicle and committed an assault, so[, too,] was the causal link broken when [Father] exited his vehicle and abandoned his 13 month old child for more than seven hours. The act of abandoning a child is not vehicular conduct.

(R. p. 11).

Finally, the court stated that even if a causal connection existed and there was no act of independent significance that broke the causal connection, the *Aytes* requirement that the vehicle be used for transportation at the time of the injury was not satisfied. (R. p. 11). The court held:

> It is stipulated that [Father] turned off the ignition, exited the vehicle, and left [Infant] in the unattended vehicle for seven hours and fifteen minutes.

> It is further stipulated that [Infant] died in the unattended parked vehicle from complications related to hyperthermia. At the time of [Infant's] death the vehicle was admittedly parked and unattended for an extended period of time. Therefore, the vehicle was incapable of being used for transportation purposes and as such fails to satisfy the "use for transportation requirement" of the *Aytes* test.

(R. p. 12).

Regarding Infant's residency, the circuit court stated:

> The court further finds that the preponderance of evidence establishes that the minor lived with her mother and grandmother at 1112 Salem Road, Hartsville, SC (hereinafter "mother's household"). 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 leads to the conclusion that the minor was a resident relative of only the mother's household.

(R., p. 7; see also p. 13).

Appellants moved the circuit court to reconsider its ruling. The parties filed memoranda in support and in opposition to the motion. Following a hearing the circuit court entered an order denying Appellants' motion.

This appeal follows.

ARGUMENTS

Appellants assert the circuit court erred in concluding Infant's death did not arise out of the "ownership, maintenance or use" of Father's vehicle at the time of Infant's death. Appellants also contend the circuit court erred in concluding Infant was a resident of Mother's home only, and was not considered also a "resident relative" of Father's home for purposes of coverage under his motor vehicle coverage. The Court should reverse the circuit court's ruling in favor of State Farm and remand for entry of judgment in favor of Appellants as to both points.

I. The Circuit Court Erred in Ruling That the Policies at Issue in this Matter Did Not Provide Coverage for Infant's Death Under *State Farm Fire & Cas. Co. v. Aytes*, 332, S.C. 30, 503 S.E.2d 744 (1998), and in Denying Relief to Appellants

The circuit court erroneously applied South Carolina law in finding the policies precluded coverage in this case. Under the appropriate view of the law, all of the policies in this case provide coverage for Infant's tragic death. This Court should reverse.

A. The circuit court erroneously held there was no causal connection between the "ownership, maintenance or use" of Father's truck and Infant's death

The circuit court granted State Farm's motion for relief and denied Appellants' claim for coverage under the policies, relying almost exclusively on the test set forth in *State Farm Fire & Cas. Co. v. Aytes*, 332, S.C. 30, 503 S.E.2d 744 (1998). The Supreme Court in *Aytes* "restated the test for determining when an individual's personal injuries arise out of the 'ownership, maintenance, or use' of an automobile such that they are covered by an automobile insurance policy." *Doe v. South Carolina State Budget and*

Control Bd., 337 S.C. 294, 296, 523 S.E.2d 457, 458 (1999). The Court in *Aytes* set forth the following three part test:

1. There exists a causal connection between the vehicle and the injury; and
2. No act of independent significance breaks the causal link; and
3. The vehicle is being used for transportation at the time of the assault.

Doe, at 296-297, 532 S.E.2d at 458.

In the context of injuries caused by the driver committing an assault upon another person, the *Aytes* Court held "causal connection" means:

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; and
c. the "injury must be foreseeably identifiable with the normal use of the automobile."

Doe, at 297, 532 S.E.2d at 458 (applying the test where a police officer declined to charge female drivers with DUI in exchange for engaging in sexual acts; Court held the officer's actions failed the *Aytes* test and further the assaults were acts of independent significance which broke any causal link).

The circuit court held under the *Aytes* test, there was no causal connection between the "ownership, maintenance or use" of Father's truck and Infant's death, as there was no evidence the vehicle was an "active accessory" to the death. (R. pp. 9-10). The court also held that Father's neglect acted as an act of independent significance to break the causal connection between the vehicle and Infant's death. (R. pp. 10-11).

Finally, the court found the "transportation" element of the *Aytes* test was not satisfied. (R. pp. 11-12). The circuit court misapplied the holding in *Aytes* in denying Appellants' coverage under State Farm's policies. This Court should reverse.

South Carolina's appellate courts have not addressed whether automobile insurance policies cover the factual scenario of this case. The Fifth Circuit Court of Appeals, however, addressed the issue in *Lincoln General Ins. Co. v. Aisha's Learning Ctr.*, 468 F.3d 857 (5th Cir. 2006). In *Lincoln General*, a van owned and operated by ALC transported a two year old child from her home to the daycare center. Upon arriving at ALC, the driver did not unload the child along with the other children. The child was trapped in the parked van for approximately seven hours while the external temperature reached 95 degrees Fahrenheit. Her mother sued ALC to redress the resulting injuries.

ALC had a Commercial General Liability (CGL) policy with Lincoln General that contained an exclusion for injuries "arising out of the ownership, maintenance, use or entrustment to others of any ... auto." Lincoln General brought a declaratory judgment action in federal court to enforce the exclusion, arguing the child's injuries arose from the "use" of ALC's van. The district court found for Lincoln General, holding the automobile exclusion precluded coverage under the CGL policy.

The Fifth Circuit affirmed. The Court held under *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999), the child's injuries "arose from the use of ALC's van." The Court stated:

> * * * First, her injuries occurred while the van was being used for one of its inherent purposes: transportation of children to ALC. Although the van was no longer in motion, its purpose - as to McCann - had not yet

been fulfilled and was thus ongoing. Second, the accident occurred within the van's natural territorial limits before the actual use - the transportation of McCann to ALC - terminated.

Third, the vehicle caused, rather than merely contributed to, the conditions that produced the injury. [The child] was injured because she was left in a hot, unventilated vehicle by the driver. The vehicle was not merely the situs of the injury, but a producing cause. Unfortunately, the danger of leaving children in locked vehicles during extreme weather conditions is well known; it is a danger inherent in the manner in which automobiles trap heat. The same dangers are not found in classrooms or parks. Thus, "but for" the use of the van to transport [the child], she would not have been injured.

Finally, the *Lindsey* court noted the importance of intent: "Whether a person is using a vehicle as a vehicle depends not only on his conduct but on his intent." 997 S.W.2d at 156. In this case, the intent of all parties was to use the van to transport the child to ALC. Although the consequences of that use clearly were not intended, this does not negate the fact that the parties placed the young child in the van intending to use it for transportation.

468 F.3d at 860-861. The Fifth Circuit noted its conclusion was in accord with other courts that considered the issue, stating:

This conclusion is in accord with the holdings of other courts that have considered the issue. In *St. Paul Mercury Ins. Co. v. Chilton-Shelby Mental Health Ctr.*, 595 So.2d 1375 (Ala. 1992), the Supreme Court of Alabama held that an automobile exclusion in a general liability insurance policy precluded coverage where an infant suffered a heat-related death after being left unattended in a van. Although the negligence did not relate specifically to the driving of the van, "the fact remain[ed] that [the child] died in the van while it was being used by the Center to provide transportation services ...." Id. at 1377.

Citing *St. Paul*, other courts have enforced auto exclusions in these circumstances. For example, in a similar case, a Maryland appeals court found that, under the plain meaning of the policy's terms, coverage was excluded. *Gallegos v. Allstate Ins. Co.*, 144 Md. App. 213, 797 A.2d 795, 808-09 (Md. App.2002). The result did not change just because the van was not moving at the time of the injury. *Id.* at 808. Most recently, a California court cited that State's expansive view of the term "use" and the

> disinclination to find overlapping coverage between the auto and general liability policies. *Prince v. United Nat'l Ins. Co.*, 142 Cal. App.4th 233, 47 Cal. Rptr.3d 727, 733 (Cal. App.2006). The court accordingly held that the "relationship between the use of the automobile and the injury was sufficient to trigger the exclusion." *Id.* at 735. The court observed that the type of rapid onset hyperthermia that killed the children occurs almost exclusively in motor vehicles, making the car an instrumentality, rather than mere situs, of the injury. *Id.*

468 F.3d at 861. The Fifth Circuit noted a case from the Sixth Circuit that was in accord, stating:

> *See also [Capitol] Indem. Corp. v. Braxton*, 24 Fed. Appx. 434 (6th Cir.2001) (unpublished). The insurance exclusion at issue was identical to the one here, see *id.* at 438, and the hyperthermia-induced death was similarly caused. The court found that the accident arose out of the use of the vehicle, as an unduly narrow interpretation would "defeat the evident purpose of the exclusion." *Id.* at 442."

468 F.3d at 861, n. 4.

The Fifth Circuit also rejected an Illinois case that went the other way, stating:

> ALC points to one decision holding that CGL coverage does exist in a similar situation. *Mt. Vernon Fire Ins. Co. v. Heaven's Little Hands Day Care*, 343 Ill. App.3d 309, 277 Ill. Dec. 366, 795 N.E.2d 1034 (Ill. App.2003). The court found that "leaving an infant in an automobile used to transport him ... is not a normal or reasonable consequence of the use of the vehicle." *Id.* at 1043. The vehicle ceased being used as a method for transportation when the other occupants exited. *Id.* In sum, the negligence leading to the death was "nonvehicular conduct." *Id.*
>
> *Mt. Vernon*'s reasoning is unpersuasive. First, although a vehicle may have ceased being a mode of transportation for its other occupants, the purpose of transportation had not been fulfilled as to the victim at the time of injury. Second, the negligence in not removing a child from the van or having in place a system to insure the removal of all the children is vehicular conduct; it relates directly to ALC's use of the van as a mode of transportation. Third, we are bound by the more expansive treatment of the term "use" in Texas law, *see Lindsey*, 997 S.W.2d 153; [*Lyons v. State Farm Lloyds & Nat'l Cas. Co.*, 41 S.W.3d 201 (Tex. App.2001)], which led to the conclusion that the failure to remove a child from a vehicle after

> using that vehicle to transport the child does arise out of the use of an automobile.
>
> Finally, the inclusion of similar language in the auto and CGL policies indicates an intent by the companies involved to avoid overlapping coverage, whatever the scope of "use" may be. The district court found that American International was required to defend and indemnify ALC under the auto policy, a finding that ALC has not appealed. *See Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr.*, 2005 WL 954997, at *9 (N.D. Tex. Apr.26, 2005). Consistency demands that the same terms in insurance policies, which were written with any eye to governing state case law, be interpreted similarly. Pursuant to *Lindsey*'s factors, when an automobile is being used as a vehicle, and that use has not ended as to the victim, the injury does arise out of the use of the automobile.

468 F.3d at 861-862.

Other courts agree that in a situation where a caretaker leaves a child unattended in a hot vehicle, the injuries arose out of the "use" of the vehicle. *Prince v. United Nat'l Ins. Co.*, 47 Cal. Rptr. 3d 727, 728 and n. 4 (Cal. App. 2006) (exclusion in foster parent liability policy for injuries arising out of use of an automobile precluded coverage for the deaths of two young children who were negligently left in a vehicle on a hot day by their foster mother; court held "use of the automobile was a predominating cause of – and substantial factor in – the injuries to the children, and that the foster mother's negligence was not independent of the use of the vehicle"; court distinguished *Mt. Vernon* because the *Mt. Vernon* court concluded the vehicle was not in use since it was not being used as a method of transportation, which was contrary to California law); *Puckett v. Nationwide Fire Ins. Co.*, No. 2004–CA–000164, 2005 WL 626777 (Ky. Ct. App. 2005) (homeowner's policy did not apply to an off-premises incident which resulted in child's death by hyperthermia as a result of being left in a motor vehicle by babysitter on hot day

where policy excluded coverage for injury "arising out of the ownership, maintenance, or use of ... a motor vehicle owned or operated by, or rented or loaned to an insured.").

The Kentucky Court in *Puckett* explained:

> Pursuant to the foregoing, we interpret the automobile exclusion as applying to the July 13, 1999, incident. [The child] suffered the bodily injury at issue (*i.e.*, death due to hyperthermia) as a result of the high temperatures produced within the passenger compartment of the [owners'] motor vehicle. The expert testimony at the criminal trial established that those excessive temperatures were produced as a result of the physical properties of the vehicle. This establishes a causal relationship between the motor vehicle and [the child's] injury.
>
> Further, [the babysitter] used the motor vehicle as transportation to reach the shopping center, and it was her intention to use the vehicle for transportation upon her departure from the location. In the meantime, [the babysitter] was "using" the motor vehicle as a location of repose for [the child and her child] while she shopped. Hence, [the child's] injury had its origin in [the babysitter's] use of the vehicle the afternoon of July 13, 1999.
>
> Within the ordinary meaning of the word, [the babysitter] was clearly "using" the vehicle at the time [the child] suffered his bodily injury. Moreover, because the physical properties of the vehicle resulted in the excessive temperatures, [the child's] bodily injury arose from the use of the vehicle.
>
> In summary, there is a direct nexus between [the child's] bodily injury and [the babysitter's] use of the motor vehicle in which the injury occurred. As such, we interpret the July 13, 1999, incident as being specifically excluded under the [owners'] homeowner's policy.

Puckett, slip at 3-4.

The upshot of these cases is that courts that have addressed the definition of "ownership, maintenance or use" of an automobile for purposes of an exclusion in CGL or homeowners' coverage conclude that injuries caused to a child left in a car do, in fact, arise out of the ownership, maintenance or use of the vehicle for purposes of automobile

insurance coverage.

As in *Lincoln General*, Infant's injuries occurred while Father was using the truck for one of its inherent purposes: transportation of Infant to daycare. Although the truck was no longer in motion, its purpose - as to Infant - had not yet been fulfilled and was thus ongoing. Second, the accident occurred within the truck's natural territorial limits before the actual use - the transportation of Infant to daycare - terminated.

Third, the truck caused, rather than merely contributed to, the conditions that produced the injury. Infant was injured because she was left in a hot, unventilated vehicle by Father, the driver. The vehicle was not merely the situs of the injury, but a producing cause. As the Court in *Lincoln General* noted, "[u]nfortunately, the danger of leaving children in locked vehicles during extreme weather conditions is well known; it is a danger inherent in the manner in which automobiles trap heat. The same dangers are not found in classrooms or parks. Thus, 'but for' the use of the van to transport [Infant], she would not have been injured." 468 F.3d at 860-861.

As noted in *Lincoln General*, jurisprudence in Maryland and California is in accord. *See Gallegos v. Allstate Ins. Co.*, 797 A.2d at 808-09 (Court held under the plain meaning of the CGL policy's terms, coverage was excluded; the result did not change just because the van was not moving at the time of the injury); *Prince v. United Nat'l Ins. Co.*, 47 Cal. Rptr.3d at 735 (court held the "relationship between the use of the automobile and the injury was sufficient to trigger the exclusion"; court observed that the type of rapid onset hyperthermia that killed the children occurs almost exclusively in motor vehicles, making the car an instrumentality, rather than mere situs, of the injury). Appellants

provided other cases above that follow this reasoning and reach the same result.

The Court should reverse the circuit court's ruling that coverage did not apply under these policies because the there was no causal connection between Father's use of the truck and Infant's injuries.

B. The circuit court erroneously held "while the transport of children is certainly a foreseeable use of the vehicle, the negligent act of deserting a child in the vehicle for an extended period of time is not"

The circuit court noted the first element of the test under *Aytes* requires that there by a causal connection between the vehicle and the injury. (R. p. 8). The court then quoted the following from *Aytes*:

> "*In this context* causal connection means: (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; and (c) the 'injury must be foreseeably identifiable with the normal use of [the vehicle].'" "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 [injury] occurred."

(R. p. 8) (citations omitted; emphasis added). The circuit court held although "the vehicle was the site of her untimely death, no evidence has been presented that the death was caused by anything but hyperthermia." (R. p. 9). The court also concluded "no evidence has been presented in this case that the vehicle was an active accessory to the death." (R. pp. 9-10). The court added "while the transport of children is certainly a foreseeable use of the vehicle, the negligent act of deserting of a small child in the vehicle for an extended period of time is not." (R. p. 10). This Court should reverse the circuit court's analysis on this point.

First, when the *Aytes* Court defined "causal connection" using terms such as "active accessory," "something more than the mere site of injury," and "foreseeably identified with normal use of the vehicle," the Court prefaced those elements with the phrase "in this context." The "context" was a case where the user of the automobile engaged in an assault on the injured party, that is, an intentional act of harm. The circuit court applied the test, however, outside of the context of the test *Aytes* announced. Unlike *Aytes*, this case did not involve a party being injured as the result of an assault or other act specifically intending harm. The context in *Aytes* was a shooting of the victim while she was sitting in the stopped vehicle. The context in *Doe* was a physical sexual assault on the injured party while the police cruiser was parked. In the "context" of both cases the vehicle was virtually irrelevant to the harm; such behavior could have occurred anywhere, but happened to have occurred in the vehicle.

In this case, Infant would not have been in the car seat in the vehicle but for Father transporting her to daycare, a trip that was begun but not completed. The very nature of the car overheating on a hot day led to the hyperthermia that ultimately took Infant's life. That is, the vehicle itself was a critical component of the circumstances that led to this child's death. Hyperthermia would not have happened just anywhere – the nature of the injury is inextricably linked to the fact that Infant was in Father's vehicle, which he then drove and parked, leaving her inside, prior to completing his transport of her to daycare.

The facts in this case are more akin to the injury in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992), the case which gave rise to the basic test applied in *Aytes*. Howser and a friend left a bowling alley in Columbia, South Carolina,

and headed home in a Chevrolet Blazer driven by Howser and owned by her father. After stopping at a restaurant at the intersection of Decker Boulevard and Trenholm Road, they drove down Trenholm Road in the inside lane of the four-lane road. After about one-tenth of a mile, the Blazer was "bumped" from behind. Howser looked in the rear view mirror and saw a car behind them with a driver and no passengers. The car bumped the Blazer two more times and Howser accelerated the Blazer. The driver of the other car, who was unknown to them, pulled his car alongside the Blazer in the outside lane and yelled at them to roll down their window, slow down and stop their car. He pointed a pistol at the Blazer's passenger window.

Howser made a quick left turn onto a side street to avoid the stranger's assault. As she completed her turn, the gunman shot at the Blazer. A bullet entered the rear of the vehicle, fragmented, pierced the driver's car seat and entered Howser's back in three places. Howser managed to bring the Blazer to a stop before losing consciousness and her friend summoned help. The gunman continued traveling down Trenholm Road and neither he nor his vehicle was ever identified.

In analyzing the issue, the Supreme Court turned to a Minnesota case for guidance, *Continental Western Insurance Co. v. Klug*, 415 N.W.2d 876 (Minn.1987). The Court noted *Klug* held the "causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury." *Howser*, at 272, 422 S.E.2d at 108. The Court stated:

> We employed a similar analysis in *Chapman v. Allstate Insurance Co.*, 263 S.C. 565, 211 S.E.2d 876 (1975), wherein an uninsured motorist assaulted the insured while traveling in the uninsured's vehicle. The

> insured was injured when she fell or jumped from the moving vehicle as a result of the attack. Accordingly, we held it was clear the injury arose out of the use of the uninsured automobile. *Id.* at 570, 211 S.E.2d at 879. Although the assault, not the use of the vehicle, was the cause of the insured's injuries, *we found that the use of the vehicle causally contributed to the claimant's injuries*.

Howser, at 272-273, 422 S.E.2d at 108 (emphasis added).

The Court concluded the unknown assailant's vehicle was an "active accessory" to the assault on Howser, and not merely a case where the assailant used the vehicle to simply transport the victim to the site of the assault, nor a case where the assailant just happened to be sitting in a car at the time of the assault. The Court added:

> Only through use of his vehicle was the assailant able to closely pursue Howser, thereby enabling him to carry out the pistol assault. The gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part. Additionally, only a motor vehicle could have provided the assailant a quick and successful escape. Thus, we find a sufficient causal connection exists between the use of the assailant's vehicle and Howser's injuries.

Id.

The Court in *Aytes* turned to rule set forth in *Howser*. The Court noted that the assailant in *Aytes* used the car to transport the victim to a place where he intended to kill her. He stood outside the parked car and fired his gun, striking her in the foot. The Court found no "causal connection" under *Howser* because the car was not an "active accessory" to the assault, nor was it being used for transportation at the time of the injury. The only connection between the victim's injuries and the car was that she was sitting in the vehicle when she was shot.

Here, Father's truck was more than the "mere site" of Infant's injury and death.

Only through use of Father's truck as a means of transporting Infant to daycare was Infant in the precarious and helpless position she found herself. And only a motor vehicle sitting outside on a hot day could have provided the necessary conditions for Infant to suffer temperatures so excessive so as to cause the hyperthermia that ended her life. Use of Father's truck contributed to the injuries Infant suffered, which is all the law requires. *Chapman v. Allstate Insurance Co.*

The Court should reverse the trial court's ruling on this point, and remand the matter for further proceedings consistent with this Court's decision.

C. The circuit court erroneously held any causal connection between the vehicle and Infant's death was broken by an act of independent significance, that is, Father's exiting the car and "abandoning" or "desertion" of Infant

The circuit court held that even if there was a causal connection between Father's truck and Infant's injuries, "it was broken by an act of independent significance." (R. p. 10). The court added:

> * * * In the case sub judice, it is stipulated that the driver, [Father], turned off the ignition and left the vehicle unattended in a parking lot. The unattended vehicle was not occupied by anyone other than the minor decedent for seven hours and fifteen minutes. Abandoning the minor was an act of negligence attenuated from the use of the vehicle. [Father's] desertion of the minor was an act of independent significance thereby breaking any causal link between the vehicle and the death of the minor. Just as our courts have determined the causal link was broken when an assailant exited the vehicle and committed an assault, so[, too,] was the causal link broken when [Father] exited his vehicle and abandoned his 13 month old child for more than seven hours. The act of abandoning a child is not vehicular conduct.

(R. p. 11). This Court should reverse this finding.

The *Howser* Court stated that once the party claiming coverage establishes causation, *Klug* requires the court to "determine if an act of independent significance occurred breaking the causal link." *Howser*, at 272-273, 422 S.E.2d at 108. The Court held:

> * * * This also is consistent with South Carolina precedent. In *Plaxco v. United States Fidelity and Guaranty Co.*, 252 S.C. 437, 166 S.E.2d 799 (1969), the vehicle's battery was used to start the engine of an airplane. *Once this was accomplished*, the airplane's brakes failed, causing it to move forward and damage another plane. This Court found the only connection between the vehicle and the plane was the use of the vehicle to start the plane. *Since that purpose had been completed* when the plane moved forward, *any causal connection was broken* and the accident resulted from the use of the plane and not the vehicle. Id. at 441, 166 S.E.2d at 801. See also *Hite v. Hartford Accident & Indem. Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct. App.1986), ("if the injury is directly caused by some independent act or intervening cause wholly disassociated from, independent of and remote from the use of the automobile, the injury is not the result of the 'use' of the automobile").
>
> In this case, no independent act occurred to break the causal link. Here, as in *Klug*, the unknown driver's use of his vehicle and the shooting were inextricably linked as one continuing assault. Accordingly, we conclude that for the purposes of Howser's uninsured motorist coverage, her injuries arose out of the use of her assailant's vehicle.

Howser, at 273-274, 422 S.E.2d at 108-109 (emphasis added).

Here, the purpose of using the car to transport Infant to daycare had *not* been completed when her injuries occurred. Infant's injuries arose out of Father's use of his vehicle, and her death was not "wholly disassociated from, independent of and remote" from that use. *Howser*, at 274, 422 S.E.2d 109; *Hite v. Hartford Accident & Indem. Co.*

This Court should reverse the trial court's ruling on this point, and remand this matter for further proceedings consistent with this Court's ruling.

D. The circuit court erroneously held even if there was a causal connection and there was no act of independent significance that broke the causal connection, the truck was not being used for transportation at the time of Infant's death

As noted above, the court held that even if there was a causal connection that was not broken by an act of independent significance, Father's truck was not being used for "transportation" at the time Infant died. The court stated:

> It is stipulated that [Father] turned off the ignition, exited the vehicle, and left [Infant] in the unattended vehicle for seven hours and fifteen minutes. It is further stipulated that [Infant] died in the unattended parked vehicle from complications related to hyperthermia. At the time of [Infant's] death the vehicle was admittedly parked and unattended for an extended period of time. Therefore, the vehicle was incapable of being used for transportation purposes and as such fails to satisfy the "use for transportation requirement" of the *Aytes* test.

(R. p. 12). Thus, the court apparently viewed the fact that the car was parked and not moving as precluding a finding of its use for "transportation." This Court should reverse that ruling.

The *Howser* Court noted "the third prong of the *Klug* analysis requires the use of the vehicle be limited to that of providing transportation." *Howser*, at 274 n. 2, 422 S.E.2d at 109 n. 2. *See also Aytes*, 332 S.C. at 33, 503 S.E.2d at 745 (Court noted "[a] third requirement was added in *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993): it must be shown the vehicle was being used for transportation at the time of the assault."); *Canal* (Court construed "use of a motor vehicle" under Code Section 38-77-140 as limited to transportation uses). Because Howser's vehicle was being used for transportation, the Court held it did not need to "determine whether this element is mandated under our law." *Id.*

Other than *Howser*, where the vehicle was obviously being used for transportation at the time of the shooting, the cases in South Carolina that have addressed this element of the test have involved some form of assault or act that occurred after the vehicle was parked and transportation was complete. *See Canal* (truck/crane was on outriggers and being used as a crane at the time it toppled into the building); *Aytes* (assailant took victim's keys, drove victim to an area, got out of the car and while standing near the passenger side fired the pistol towards victim, injuring her); *State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999) (gunshots fired from car in parking lot were not "foreseeably identifiable with the normal use of an automobile"); *Doe v. SC State Budget & Cntr. Bd.* (police officer committed sexual assaults in parked patrol car); *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 628 S.E.2d 475 (2006) (husband was unloading shotguns from pickup truck wife was driving when one accidentally discharged, killing wife; Court held truck "was not actively used or involved in causing the injury" but "was merely the site of the injury").

Unlike every one of those cases, the truck in this case was, in fact, being used for transportation at the time of Infant's death. As in cases from other jurisdictions cited above that addressed this issue, it does not matter that Father parked the truck, removed the keys, and went inside, leaving Infant in the vehicle. When he placed her in the car seat that morning and set out for the daycare center, the transportation had begun. The fact that he got distracted and never completed her transport to daycare does not change the nature of the use of the truck that day – to transport Infant to daycare. That use for transportation is most certainly a contributing, if not a direct and efficient, cause of

Infant's injuries and death.

This Court should reverse the circuit court's ruling on this point, and remand the matter for proceedings consistent with this Court's decision.

II. The Circuit Court Erred in Rejecting Persuasive Authority from Other Jurisdictions

The circuit court noted that Appellants cited cases from other jurisdictions as persuasive of the issue, but rejected these cases out of hand because they "do not include the application of the three part test adopted in *Aytes* and are, therefore, not determinative of the outcome of this case." (R. pp. 7-8). This Court should consider the analysis in those cases even though they "have no precedential value." (R. p. 8).

Appellants cited to these cases as persuasive on the issues before the circuit court. Litigants and courts often turn to jurisprudence of other states where there are no cases on point in this State. *E.g. Golini v. Bolton*, 326 S.C. 333, 343, 482 S.E.2d 784, 789 (Ct. App. 1997) (noting "our supreme court will look to other states for persuasive authority where there are no South Carolina opinions on point.").

Appellants readily admit that the opinions from other jurisdictions are not binding as precedents in this State. However, these decisions do provide the courts of this State with persuasive analysis on the issues to be decided, primarily whether the act of forgetting to remove a helpless child from an automobile while transporting that child to her daycare center but before the child reaches her destination falls within coverage for "ownership, maintenance or use" of a vehicle for transportation.

Aytes held "*[i]n this context*, causal connection means" and then outlined three elements. While *Aytes* provides a general framework for analyzing cases involving assaults in or about an automobile, *Aytes* does not provide an answer to the specific question in this case. The circuit court should have considered these foreign authorities,

and this Court should do so on appeal.

Appellants raise this point here to avoid an argument or a holding that they did not challenge the circuit court's express rejection of those foreign authorities.

III. The Circuit Court Erred in Holding That Infant Was a Resident Only of Mother's Household

The circuit court held the preponderance of the evidence established that Infant was a "resident relative" of Mother's home only, and was not a "resident relative" of Father's home. The court's ruling was based upon its belief that an infant who lives nearly half her life in two different places under a joint custody arrangement may not be a "resident" of both places. The Court should reverse this ruling.

"[A] resident of the same household is one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently." *Buddin v. Nationwide Mutual Ins. Co.*, 250 S.C. 332, 339, 157 S.E.2d 633, 636 (1967). Residency is a question of fact and "there is no single test to determine whether a minor child is a resident of a noncustodial parent's household for purposes of determining UIM benefits." *Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 66, 586 S.E.2d 865, 873 (Ct. App.2003). Rather, the courts generally look at the facts and circumstances of each case in totality to determine a child's residency." *Id.*

The evidence in this case demonstrates Infant had "dual residences" with Father and with Mother. Father testified in his deposition that from November 2013 until May 8, 2014, Infant would stay overnight with him. (R. p. 174, ll. 13-24). He said the parents had no set schedule but catered everything to Infant. (R. p. 175, ll. 2-9; p. 176, ll. 4-18). Father agreed that Mother was the primary custodian but Father had "very liberal visitation." (R. p. 178, ll. 4-10).

Mother testified in her deposition that she lived with her parents, her aunt and Infant. (R. p. 189, ll. 7-12). Infant stayed in the bedroom with Mother. (R. p. 193, ll. 13-19). Infant stayed in the room with Father when she visited his home. (R. p. 195, ll. 14-18). In October or November of 2013, Infant stayed with Father one night when Father lived on Kenwood Avenue in Hartsville. (R. p. 199, ll. 8-14; p. 200, ll. 13-20). Father moved to the Bullard Road address in November or December 2013. (R. p. 199, ll. 17-20).

In December 2013, Mother, Father and Infant took a two-day trip together to Asheville, North Carolina. (R. p. 200, l. 24 - p. 19, l. 8). After that trip Infant began staying with Father at the Bullard Road address. (R. p. 201, ll. 9-13; p. 202, ll. 9-12). When asked what the custody schedule was, Mother stated: "Typically it was a four-three schedule. So she, [Infant], would stay four days with one parent, three days with the next and then we would often alternate and change the schedule if something came up." (R. p. 202, ll. 13-18). The same parent did not always have the four days. (R. p. 202, ll. 19-20). That is, there would be times Infant would be with her for four days and other times she would be with Father for four days. (R. p. 202, l. 21 - p. 203, l. 2). The parents followed this schedule from December 2013 until May 2014, except for when Infant was sick in April. (R. p. 203, ll. 3-23). During the days off, the other parent would visit with Infant. (R. p. 204, l. 2 - p. 205, l. 10).

Mother's address was used for Infant's Social Security card, health insurance information, day care application, and the address for the death certificate. (R. p. 205, l. 11 - p. 206, l. 23). The day care application may have also had Father's address. (R. p.

207, ll. 3-22).

When Infant stayed with Father, she took an overnight bag but she also had clothes, bathroom and food items there as well. (R. p. 208, ll. 1-8). Father would bring the bag with the clothes back with Infant, and both parents washed Infant's clothes. (R. p. 208, ll. 20-25). Mother had a wooden crib at her home, and Father had a "Pack n Play" crib at his home. (R. p. 209, l. 1 - p. 210, l. 5).

When Infant was sick Mother was the primary caretaker and Infant would stay with Mother at Grandmother's home. (R. p. 210, ll. 6-13). Both Mother and Father took Infant to the doctor. (R. p. 210, ll. 14-15). Mother believed they "had shared custody" but agreed she was the primary custodian. (R. p. 211, ll. 14-15).

In her deposition, Grandmother stated that Mother and Infant lived at Grandmother's home from the day Infant was born. (R. p. 222, l. 24 - p. 223, l. 15). Grandmother stated that once Father moved in with his brother, Ritchie, Infant "would stay with him so many nights at his house and so many nights at our house with [Mother]." (R. p. 224, ll. 15-23). When asked to "characterize" Infant's home in May 2014, Grandmother stated "I would characterize it as our house and Ritchie's house." (R. p. 224, l. 24 - p. 225, l. 2).

The *Horne* Court noted that a child of divorced or separated parents may regularly live in the household of both parents. *See Horne*, 356 S.C. at 69 n. 8, 586 S.E.2d at 875 n. 8 (noting a "child of divorced parents may be a resident of two households," citing *Cook v. Fed. Ins. Co.*, 263 S.C. 575, 582, 211 S.E.2d 881, 884 (1975) ("A person may have only one domicile, but may have several residences.")). This is the general view across

the Country:

- *Nationwide v. Budd-Baldwin*, 947 F.2d 1098, 1103 (3d Cir.1991) ("children of divorced parents who live with one parent most of the time but routinely spend a portion of each week or month at the residence of the non-custodial parent. In such cases, the child usually, for the sake of convenience if nothing else, has a room to call his or her own in each residence, keeps clothes, books, games, *etc.* in each residence, and visits at the non-custodial parent's home at regularly scheduled intervals. What distinguishes that situation from the one before us is that the child 'belongs' at the other parent's residence, *i.e.* has a place there to call his or her own, and that the central purpose of the visit is to spend time with the parent. The child is as much a part of that household as he or she is of the household of the parent with primary custody.");
- *Walbro Corp. v. Amerisure Companies*, 133 F.3d 961 (6th Cir.1998) (holding under Michigan's no-fault provisions a child of divorced parents may be "domiciled" in both of his or her parents' households if the evidence shows that the child actually resided with both parents), *abrogated on other grounds Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002);
- *Wainscott v. Ossenkop*, 633 P.2d 237 (Alaska 1981) (noting that a child of divorced parents may, depending on the facts, be regarded as being in the household of both);
- *American Standard Ins. Co. v. Savaiano*, 298 F. Supp.2d 1092, 1100 (D. Colo. 2003) (noting "numerous jurisdictions across the country" have found that "a

child of divorced parents who maintains regular contact with both parents' households pursuant to a typical custody/visitation arrangement is regarded as a relative of each parent for insurance purposes" and predicting "the Supreme Court of Colorado would adopt the prevailing view that a child has dual residency where contacts with the non-custodial parent's home are of a substantial nature.");

- *Alava By and Through Alava v. Allstate Ins. Co.*, 497 So.2d 1286 (Fla. Dist. Ct. App.3d Dist.1986) (absent of formal custody order was immaterial to issue of residency; court noted for purposes of insurance coverage a child of divorced parents was a resident of two households);
- *Coriasco v. Hutchcraft*, 615 N.E.2d 64 (Ill. App. 1993) (holding a minor child of divorced parents who has regular visitation with a noncustodial parent is a resident of both households for purposes of the underinsured motorist);
- *O'Neal v. Blackwell*, 818 So.2d 118 (La. Ct. App. 1st Cir. 2001) (minor who lived in Covington, Louisiana, with father on weekends but would live with mother in Baton Rouge during the school week was considered a resident relative under mother's coverage);
- *Dusharm v. Nationwide*, 92 F. Supp.2d 353 (D. Vt. 2000) (holding child whose "primary residence" was with father was also a resident of mother's household for purposes of automobile insurance coverage where she "regularly resided" with mother);
- *Aetna Cas. and Sur. Co. v. Williams*, 623 So.2d 1005 (Miss.1993) (holding unemancipated minor of divorced parents is a resident of the household of both

parents for purposes of Uninsured Motorist Act);

- *Limoges v. Horace Mann Ins. Co.*, 596 A.2d 125 (N.H. 1991) (holding son was a resident of father's household for purposes of insurance coverage even though he did not "permanently dwell" in father's home);
- *Ohio Cas. Ins. Co. v. Estate of Wittkopp*, 741 A.2d 619 (N.J. App. Div.1999) (court noted children of divorce are commonly recognized as maintaining more than one residence; these children often have to live part-time at either parent's home and considered residents of both homes);
- *Davis v. Maryland Cas. Co.*, 331 S.E.2d 744, 746-47 (N.C. App. 1985) (stating it is not required that a minor be a resident of one parent's household to the exclusion of the other and that a minor could be a resident of two separate households for purposes of insurance coverage);
- *Farmer's Ins. of Columbus, Inc. v. Taylor*, 528 N.E.2d 968 (Ohio App. 1987) (adopting the concept of "dual residency" for purposes of insurance coverage, and noting there is no requirement under the policy that, in order for a person to be a resident of the named insured's household, such residence must be the sole or exclusive residence of the person)
- *Adams v. Great American Ins. Companies*, 942 P.2d 1087 (Wash. App. 1997) (noting child of divorced parents who had joint custody was living in both households for purposes of insurance coverage).
- *See generally* Annotation, *Who Is "Member" or "Resident" of Same "Family" or "Household" Within No-fault or Uninsured Motorist Provisions of Motor Vehicle*

Insurance Policy, 66 A.L.R. 5th 269 (1999).

These authorities demonstrate that the fact that Infant lived with Mother and Grandmother did not preclude Infant from also being a resident of Father's household for purposes of insurance coverage. The only evidence in the case is that Infant lived nearly equal amounts of time at each residence from December 2013 until her death in May 2014, had the same living arrangements at each resident, had a close attachment to both parents at their respective homes, and could not be considered a mere "transient visitor" at either home.

The Code defines "Insured" to mean "the named insured and, while resident of the same household the spouse of any named insured and relatives of either...." S.C. Code Ann. § 38-77-30 (2002). The statute does not provide that an insured may have only one residence. *See Horne*, 356 S.C. at 69 n. 8, 586 S.E.2d at 875 n. 8 (noting a "child of divorced parents may be a resident of two households"). It is true that Infant's parents never married and therefore were not divorced or living under a custodial decree. Such circumstance is not necessary, and the same rules regarding "dual residency" should still apply to their arrangement.

The testimony demonstrates that Infant was more than a mere transient visitor, but had a close connection with both Mother's home and with Father's home. The trial court's determination that Infant's residency was with Mother only lacks support in the record and this Court should reverse that finding.

IV. The Circuit Court Erred in Holding that Appellants Failed to Preserve the Issue of Infant's Residency

In the order denying Appellants' motion for reconsideration under Rule 59, SCRCP, the circuit court held Appellants failed to raise the issue of Infant's residency in their motion for reconsideration and, therefore, the issue was not preserved for the court's consideration. (R. p. 16). The circuit court relied upon *Hatfield v. Hatfield*, 327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997) in making this ruling. This Court should reverse this holding by the trial court.

The circuit court's order includes parenthetical language that derives verbatim from the West headnote in the *Hatfield* opinion. (R. p. 16). See *Hatfield*, headnote 6. This description of the holding in *Hatfield*, however, is too simplistic and misses the mark of the actual holding in that case unless placed back into the context of the case. When the language is placed into proper context, it becomes apparent that *Hatfield* is distinct from this case in a meaningful way.

In *Hatfield*, the family court determined that it would be "fair and equitable" for the husband to receive the remainder of $50,000 of certain stock husband inherited from his prior deceased wife since he had used about $150,000 of the stock during his marriage to the appellant. On appeal, the appellant contended the family court should have found the remaining stock had been transmuted. The Court of Appeals concluded, however, that the transmutation argument was not preserved because appellant had not specifically raised it in her motion pursuant to Rule 59, and the judge had not ruled upon the issue.

Unlike *Hatfield*, the issue of Infant's residency was argued thoroughly and ruled

upon expressly by the circuit court. As set forth below, Appellants' motion pursuant to Rule 59, SCRCP, fairly raised the residency issue for the court's "reconsideration." Furthermore, because Appellants were making a permissive motion for reconsideration and not a mandatory motion for preserving error, the issue of Infant's residency is available for this Court's review.

In *Elam v. South Carolina Dept. of Transp.*, the Supreme Court reaffirmed that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004). The Court reiterated that a Rule 59 motion is required to preserve an issue that was raised to but not ruled upon by the trial court. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 442, 526 S.E.2d 716, 724 (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."). However, the Court saw no reason why a party could not use a Rule 59 motion to seek "reconsideration" of a ruling, even though the word "reconsideration" does not appear in the rule. The Court viewed this type of Rule 59 motion as part and parcel of a litigant's "single bite at the apple." *Elam*, at 21, 602 S.E.2d at 778. The Court stated:

> [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam, at 24, 602 S.E.2d at 780 (emphasis by the Court).

Here, there is no question that the issue of Infant's residency was raised, fully argued, and ruled upon fully by the trial court. Appellants filed a Rule 59 motion seeking reconsideration of all issues in the case by stating "The Court's Order denies the Defendants' grounds for insurance coverage under the existing vehicular policies of the Plaintiff. The Court *further* found that the death of the minor child did not arise out of the ownership, maintenance or use of the vehicle." (R. p. 67, ¶ 1) (emphasis added). This statement fairly places the circuit court on notice that Appellants were seeking a review of all of the court's rulings.

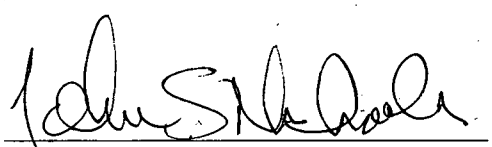
Even if *Hatfield* may be read in a manner that would prevent the circuit court from addressing the issue, *Hatfield* predates the Supreme Court cases of *I'On* and *Elam*. Furthermore, *Hatfield* is a Court of Appeals decision, and may not be read in a manner that conflicts with the decisions of the Supreme Court. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

This Court should reverse the circuit court's ruling that the issue of Infant's residency was not properly before the court by way of Appellants' Rule 59 motion. The Court should address the issue and, as set forth above, reverse the circuit court's ruling that Infant was a resident only of Mother's home and could not be considered a resident relative of Father's home for purposes of automobile insurance coverage.

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,



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Attorneys for Appellants

February 23, 2017

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

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.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel with a copy of the *Final Brief of Appellants, Reply Brief* and *Certificate of Compliance* 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
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Camden, SC 29021-0039

Erin Bridges

February 27, 2017

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.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellants* and *Reply Brief* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully Submitted,

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February 24, 2017

BNTD
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ATTORNEYS AT LAW

February 27, 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 unbound and fifteen (15) bound copies of the Final Brief of Appellants and Reply Brief in reference to this case. I have also enclosed a certificate of compliance and proof of service on counsel for the Respondent. Please return the additional filed copies 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
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