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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.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

SOUTH CAROLINA CASES

FOREIGN JURISDICTION CASES

STATUTES

RULES

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court properly apply South Carolina law as set forth in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998) in holding death of the minor did not arise out the ownership, maintenance, or use of a motor vehicle, for purposes of automobile insurance.

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

B. The circuit properly held the "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."

C. The circuit court properly held that even if the court were to determine that a causal connection exists between the vehicle and the minor's death, it was broken by an act of independent significance.

D. The circuit court properly held that even if a causal connection existed and that there was no act of independent significance that broke the causal connection, the third element of the *Aytes* test—that the vehicle be used for transportation at the time of the injury—is not satisfied.

II. Did the circuit court properly reject the cases from foreign jurisdictions which apply an analysis in determining coverage which is contrary to South Carolina law.

III. Did evidence exist to reasonably support the trial court's decision that the minor was a resident relative of only the mother's household.

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, SCRP?

STATEMENT OF THE CASE

Respondent commenced this action by filing a Petition and Complaint on September 24, 2014, seeking a Declaratory Judgement as to whether coverage would apply under the State Farm Auto Insurance Policy. Defendant David R. Gray III filed an Answer October 22, 2014. Appellant Amanda Goyeneche (a/k/a Amanda Goyeneche - Gray), individually and as Parent and Natural Guardian of S.G. filed an Answer on October 30, 2014. Appellant Beverly Goyeneche filed an Answer on October 30, 2014. The parties entered into a Stipulation of Facts on April 2, 2015. By agreement of all parties, the Depositions of Beverly Goyeneche, Amanda Goyeneche and David Gray, III were taken on April 2, 2015, as to residency of the minor. At trial, the parties submitted the deposition transcripts, insurance policy, Stipulation of Facts, briefs, and oral arguments to the circuit court.

The Honorable Paul M. Burch ruled in favor of State Farm by Order dated June 1, 2015, finding that the minor's death did not arise out the ownership, maintenance, or use of a vehicle and therefore claims arising therefrom are excluded from coverage and that State Farm has no duty to defend or indemnify any party relating to the death of the minor. The circuit court further found that the preponderance of the evidence established that the minor was a resident relative of only the mother's household. The Order was filed June 8, 2015. Appellants filed a Motion to Alter or Amend on June 15, 2015. Appellant's Motion to Alter or Amend was denied by Order on March 17, 2016. State Farm received a Notice of Appeal from John S. Nichols dated April 21, 2016.

Appellants Beverly Goyeneche and Amanda Goyeneche filed a Notice of Appeal on April 25, 2016.

FACTS

The parties stipulated to the facts of loss (R. pp. 132-137). State Farm Policy 9840a and the deposition testimonies of David R. Gray, III, Amanda Goyeneche, and Beverly Goyeneche were offered into evidence without objection. No other evidence was presented to the court. (R. pp. 81-83, R. pp. 2-7).

SUMMARY OF STIPULATED FACTS

Appellant Beverly Goyeneche is the mother of Appellant Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray, hereinafter referred to as Amanda Goyeneche) and grandmother of S.G. . David R. Gray, III and Amanda Goyeneche, are the parents of S.G. .

On May 8, 2014, David R. Gray, III was to deliver his 13-month-old daughter S.G. to daycare the morning of the loss but failed to do so. The minor S.G. was left unattended in the back seat of 2011 Ford F150 pickup insured by Respondent and owned by Defendant David R. Gray while it was parked at Carolina Printing Sports and Trophy located at 618 S. Fifth Street, Hartsville, Darlington County, South Carolina and with the ignition off from approximately 9:30 a.m. to approximately 1:00 p.m. and from approximately 2:30 p.m. to 5:15 p.m. on the day of loss. The minor S.G. was found unresponsive in Defendant David R. Gray, III's parked 2011 Ford F150 vehicle while it was turned off and unoccupied by any other persons. The minor S.G. was pronounced dead at approximately 5:50 p.m. on May 8, 2014, from complications related to hyperthermia.

Appellant Amanda Goyeneche has presented a claim for bodily injury under the liability coverage and underinsured coverage of the insurance policies referenced herein arising from the death of S.G. .

Respondent issued the following policies of insurance relative to this action:

1. Policy Number 4891-309-40, to Defendant David R. Gray, III insuring a 2011 Ford F150 pickup which provided Liability and Underinsured provided coverage of $25,000 each person; $50,000 each accident; and $25,000 property damage.

2. Policy Number C483241E to Appellant Amanda Goyeneche, insuring a 2013 Wrangler which provided Liability and Underinsured coverage of $50,000 each person; $100,000 each accident; and $25,000 property damage.

3. Policy Number 1003667A to Appellant Beverly Goyeneche, which provided Liability and Underinsured coverage of $50,000 each person; $100,000 each accident; and $25,000 property damage.

4. Policy Number 1772085A to Appellant Beverly Goyeneche, which provided Liability and Underinsured coverage of $50,000 each person; $100,000 each accident; and $25,000 property damage.

State Farm policies of insurance provide coverage to insured persons subject to the terms, definitions, exclusions, and other limitations of the policies. Among the terms and conditions of the relevant State Farm policies denominated above, it provides that the automobile insurance policies issued by the Respondent only provides insurance 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.

DISPUTED FACTS

The residence of the minor is disputed. The father, David Gray, indicated in his responses to Respondent's Request to Admit, that the mother Amanda Goyeneche-Gray was the custodial parent. The mother, Amanda Goyeneche-Gray, contended that the minor was a resident relative of both the father's household and mother's household.

ARGUMENTS

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Id.* at 46–47, 717 S.E.2d at 592. However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard. *Id.* at 47, 717 S.E.2d at 592.

Respondent asserts that the circuit court properly applied the law as set out in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998) in concluding that the death of the minor did not arise out the ownership, maintenance, or use of a motor vehicle, for purposes of automobile insurance.[1] The circuit court also properly rejected cases offered by Appellant from foreign jurisdictions which applied a broadened definition of "use" and an "intended purpose fulfilled" standard not adopted by South Carolina courts. Furthermore, even if coverage exists, the evidence supports the circuit court's conclusion that the minor was a resident relative of only the mother's household.

[1] It should be noted that Defendant Gray has not appealed the circuit court order. Therefore, Respondent asserts it has no duty to defend or indemnify Defendant Gray.

I. The circuit court properly applied South Carolina law as set forth in *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998) in holding death of the minor did not arise out the ownership, maintenance, or use of a motor vehicle, for purposes of automobile insurance.

An insured is legally entitled to recover damages arising out of the "ownership, maintenance, or use" of an insured vehicle. S.C. Code Ann. § 38-77-140. The South Carolina Supreme Court has established a three-part test to determine whether an injury arises out of the "ownership, maintenance, or use" of a motor vehicle. The party seeking coverage must show (1) a causal connection exists between the vehicle and the injury, (2) no act of independent significance breaks the causal link between the vehicle and the injury, and (3) the vehicle was being used for transportation purposes at the time of the injury. *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998).

Applying the analysis provided by the Supreme Court, the circuit court properly concluded that the death of the minor S.G. did not arise out of the "ownership, maintenance, or use" of a motor vehicle and therefore is excluded from coverage of the State Farm policies and that Respondent has no duty to defend or indemnify any party relating to the death of the minor S.G.

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

Appellants argue the appellate court must look to foreign jurisdictions in order to decide this case. However, the circuit court properly found the foreign cases cited by Appellants apply an analysis which not been adopted by the South Carolina Supreme Court. (R. pp. 7-8). Applying the analysis which the South Carolina Supreme Court *has* adopted in *Aytes* and the consistent reasoning of the cases which have addressed

coverage, the circuit court correctly held the death of the minor S.G. did not arise out of the "ownership, maintenance, or use" of a motor vehicle and therefore is excluded from coverage of the State Farm policy. As the circuit court noted, the first element of the *Aytes* test requires a causal connection to exist between the vehicle and the injury. "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) that the 'injury must be foreseeably identifiable with the normal use of [the vehicle].'" *State Farm Mut. Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999) (citing *Aytes,* 332 S.C. at 33, 503 S.E.2d at 745–46*);* see also *Peagler v. USAA Insurance Company*, 368 S.C. 153, 161, 628 S.E.2d 475, 479 (2006); *Doe v. South Carolina State Budget & Control Bd.,* 337 S.C. 294, 297, 523 S.E.2d 457, 458 (1999); *Wausau Underwriters Ins. Co. v. Howser,* 309 S.C. 269, 422 S.E.2d 106 (1992). "The required causal connection does not exist when the only connection between an injury and the insured vehicle's use is that fact that the injured person was an occupant of the vehicle when the [injury] occurred." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745–46(internal citations omitted).

As the circuit court noted, the three-part test established in *Aytes* arises out of a factual situation in which Mr. Aytes forcibly took the keys from a female and drove her to a remote area where he exited the vehicle and attempted to kill her. While standing outside of the vehicle, *Aytes* fired into the passenger side of the vehicle hitting the passenger in the foot. The *Aytes* court concluded:

> There was not a causal connection in this case as the vehicle was not an active accessory, nor was it being used for transportation at the time of the injury. Further, if there was a causal link, it was broken when the assailant exited the vehicle. The only connection between the car and the injury is

> the fact that Dawson was sitting in the car when she was shot. Therefore, we do not find Dawson's injuries resulted from the ownership, maintenance, or use of her vehicle.
>
> *Aytes*, 332 S.C. at 32–35, 503 S.E.2d at 745–46.

Appellants argue that the vehicle was an active accessory to the minor's death because the vehicle itself was the producing cause of the onset of hyperthermia and that the hyperthermia was the culmination of excessive heat inside the vehicle. The circuit court properly found that no evidence had been presented in this case that the vehicle was an active accessory to the death. (R. pp. 9-10). At trial, Appellants acknowledged that "If the child had been outside the vehicle, I don't know whether she would have died or not. It may have had a sunstroke. It may have had heat exhaustion. It may have died of dehydration but in this particular case it died from being inside a vehicle." (R. p. 94). Appellant offered no evidence at trial to support its argument that the vehicle was as active assessor to the minor's death. At the hearing on Appellants' Motion for Reconsideration, Appellants reaffirmed to the circuit court that the case should be decided on the stipulated facts submitted to the court and that Appellant was not asking the court to take new evidence. (R. p. 131).

The stipulated facts of this case establish that the minor S.G. was left in Defendant David R. Gray's vehicle for approximately six hours and fifteen minutes while the vehicle was turned off and unoccupied by any other persons. The minor S.G. was found unresponsive in the vehicle and was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia. (R. pp. 136-137). As the circuit court correctly reasoned:

> Other cases which have held that the vehicle was an active accessory to the injury involved situations in which the *operation* of the vehicle was an

> essential part of the injury (see *Wausau Underwriters Ins. Co. v. Howser,* 309 S.C. 269, 422 S.E.2d 106 (1992) (finding coverage where only through use of his vehicle was the assailant able to closely pursue victim, thereby enabling him to carry out pistol assault) and *Home Ins. Co. v. Towe,* 314 S.C. 105, 441 S.E.2d 825 (1994) (injuries sustained by a victim when he was struck by a bottle thrown by a passenger in a passing car were covered where "the use of the automobile placed [assailant] in the position to throw the bottle at the sign and the vehicle's speed contributed to the velocity of the bottle increasing the seriousness of [victim's] injuries.)). Here, no evidence has been presented in this case that the vehicle was an active accessory to the death. This court is bound by the facts in evidence. *Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006) (holding "It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence"). Additionally, 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. pp. 9-10).

The circuit court correctly distinguished cases such as *Wausau* and *Home Ins. Co.* from the present case noting that in those cases it was only through the use and *operation* of the moving vehicles that the injury could have occurred. The circuit court's conclusion that there was no causal connection between the ownership, maintenance, or use of the Father's truck and the Infant's death should be affirmed.

B. The circuit properly held that "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."

Appellants argue that the circuit court erred in holding that "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." Appellants first assert that the circuit court applied the *Aytes* test "outside of the context of the test *Aytes* announced." Appellants misapply the holding in *Aytes*. The *Aytes* Court does not narrowly define its analysis, as Appellants suggest, to the "context" of cases involving an intentional act or

assault. In fact, the word "context" does not even appear in the *Aytes* decision. While the *Aytes* Court does not mention "context", the *Bookert* Court does. The *Bookert* Court reiterated that the *Aytes* Court defined the meaning of "causal connection" in the "context" of the three-part test. *State Farm Mut. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) ("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. that the "injury must be foreseeably identifiable with the normal use of the automobile."). Furthermore, as noted in *Pealger*, "The three-part test in *Aytes* applies regardless of whether the injury occurred as a result of an intentional assault or an accident. The focus is on the extent of the role, if any, the vehicle played in causing the injuries or damage, or whether a particular activity is a covered use as required by statute or a policy provision." *Peagler v USAA Ins. Co.* 368 S.C. at 160, 628 S.E.2d at 479 (2006).

The circuit court correctly concluded that 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 was not. (R. p. 10).

C. The circuit court properly held that even if the court were to determine that a causal connection exists between the vehicle and the minor's death, it was broken by an act of independent significance.

The circuit found that even if the court were to determine that a causal connection exists between the vehicle and the minor's death, it was broken by an act of independent significance. See *Aytes*, 332 S.C. at 35, 503 S.E.2d at 746 ("[I]f there was a causal link, it was broken when the assailant exited the vehicle."); *Doe v. South Carolina State Budget & Control Bd., 329* S.C. 214, 219, 494 S.E.2d 469, 471 (1997), aff'd, 337 S.C. 294, 523

S.E.2d 457 (1999) ("Even if we were to hold that Appellants had satisfied the first prong of the test and had demonstrated a causal connection between the vehicle and the injury, we believe Roberson's assaults of Appellants were acts of independent significance which broke the causal chain."); *Wright*, 337 S.C. at 427, 523 S.E.2d at 476 ("[T]he assault of the gunmen broke any causal connection between the vehicle and Rogers' injury because it arose from an act of independent significance."). (R. p. 10).

Appellants do not address that the trial court's ruling that the act of abandoning a child was an act of independent significance thereby breaking any causal link. Rather, Appellants argue that because the intended purpose of using the vehicle to go to daycare had not been fulfilled, the minor's death was not "wholly disassociated from, independent of, and remote from that use." (Appellants cite *Hite v. Hartford Acc. and Indem. Co.*, 288 S.C. 616, 344 S.E.2d 173 (S.C. Ct. App. 1986) where the Court actually declined coverage and held that permissive user was not using covered automobile when he was injured in parking lot while outside of car.) Determining whether there was an act of independent significance which breaks the causal link is a separate and independent requirement which must be analyzed as part of the three-part test. *Doe v. South Carolina State Budget & Control Bd.*, 329 S.C. 214, 219, 494 S.E.2d 469, 471 (1997), aff'd, 337 S.C. 294, 523 S.E.2d 457 (1999). Appellants argue that since the "purpose" of the trip was not completed, no act of independent significance occurred which broke the causal link. Appellants make reference to a 1969 case which was cited in *Wausau* is support of this position. Prior to the adoption of the *Aytes* test, the *Wausau* court held that "Once causation is established, the court must determine if an act of independent significance occurred breaking the causal link." *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. at

269, 273 422 S.E.2d 106, 108 (1992). The *Wausau* court stated:

> 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. The 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 273, 108

Appellants place emphasis on the phrases "*Once this was accomplished*" and "*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*". Appellants' reliance on these phrases is misplaced. The *Wausau* court posited that "...any causal connection was broken and the accident resulted from the use of the plane and not the vehicle." However, a reading of the *Plaxco* case reveals that in declining to afford coverage under the auto policy, the *Plaxco* court case held that the connection between the plane and vehicle was coincidental only and that the accident did not result from the use of the automobile.

> The accident in question did not result from the use of plaintiff's automobile. The only connection between the automobile and the airplane was the use of the automobile battery to start the airplane engine. This purpose had been completed when the airplane moved forward, after the brakes failed to hold. We find nothing in the facts or circumstances to show a causal connection between the use of the automobile battery as a source of power to start the airplane engine and the subsequent forward movement of the airplane. As stated by the trial judge, 'the power source was coincidental only.' The facts show that the accident resulted from the use of the airplane and not the insured automobile.
>
> *Plaxco v. United States Fidelity and Guaranty Co.*, 252 S.C. 437, 441, 166 S.E.2d 799, 801 (1969)

The Appellants' contortion of this isolated phrase from a case referring to another case in support of what would later become the second prong of the *Aytes* test is misplaced. In *Wausau*, the vehicle was being actively used for transportation during an ongoing assault. In this case, the father exited the vehicle, thereby abandoning the child, which is no less of an assault than those committed in cases where the victim was shot or strangled or suffocated. As the circuit court properly noted:

> In the case sub judice, it is stipulated that the driver, Defendant Gray, 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. Defendant Gray'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 to was the causal link broken when Defendant Gray 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 affirm the circuit court's decision and dismiss the appeal.

D. The circuit court properly held that even if a causal connection existed and that there was no act of independent significance that broke the causal connection, the third element of the *Aytes* test—that the vehicle be used for transportation at the time of the injury—is not satisfied.

The circuit court correctly held that "Even if a causal connection existed and that there was no act of independent significance that broke the causal connection, the third element of the *Aytes* test—that the vehicle be used for transportation at the time of the injury—is not satisfied". (R. p. 11). The transportation use requirement was first established in *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993). In *Canal*, the Court declined to extend coverage wherein a truck crane lifted

a condenser onto the roof of respondent's building. While lifting the condenser, the crane became unbalanced and tipped over, crashing into the building. The Court established the requirement that the term "use of vehicle" be limited to transportation uses.

> We now construe § 38-77-140 and define "use of a motor vehicle" as limited to transportation uses. This is the definition used in *Continental Western Ins. Co. v. Klug*, 415 N.W.2d 876 (Minn.1987), a case upon which this Court relied in *Wausau*. See also *Classified Ins. Corp. v. Vodinelich*, 368 N.W.2d 921 (Minn.1985) (coverage not mandated where auto used by insured to commit suicide in garage and her children were accidentally asphyxiated in the home); *Waldbillig v. St. Farm Mut. Auto. Ins. Co.*, 321 N.W.2d 49 (Minn.1982) (coverage not mandated where insured's hand was injured working on backhoe permanently mounted on back of truck). Such a construction of § 38-77-140 is consistent with legislative intent to mandate coverage for the benefit of the public since it encompasses those uses foreseeable to the parties to an automobile insurance policy."

Canal Ins. Co. v. Insurance Co. of North America, 315 S.C. at 4, 431 S.E.2d at 579 (1993).

As the circuit court noted, "Since 1993 our courts have required that a vehicle be used for transportation purposes in order to fall within the "use and operation" definition found in statute and insurance policies. Our courts have held a parked vehicle, even when occupied, does not meet the third requirement of *Aytes* if the vehicle is not being used for transportation at the time of injury." In support of the circuit court's finding, the court cited *Doe v. South Carolina State Budget and Control Bd.*, et al, 337 S.C. 294, 523 S.E.2d 457 (1999). In *Doe* a police officer forced individuals to have sex with him in his parked vehicle in order to avoid arrest. The Court held the claimants could not meet the *Aytes* requirements inasmuch as the cruiser was not being used for transportation at the time of the assaults, it was not an "active accessory," and the petitioners' acceptance of Roberson's offers were acts of independent significance which broke any causal link.

Id. See also *Nationwide Property & Cas. Co. v. Lain*, 402 F.Supp.2d 644 (D.S.C. 2005) (applying the *Aytes* test, court declined to extend coverage where an individual was strangled in the back seat of a vehicle finding there was no causal relationship; there was an act of independent significance; and the vehicle was not being used for transportation at the time of injury.)

It is stipulated that the driver, Defendant Gray, 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. The vehicle was incapable of transportation during the time period for which the minor suffered injuries and death. Therefore, the circuit court should be affirmed in its finding that the vehicle was not being used for transportation at the time of injury and that the minor's claim is excluded from coverage.

II. The circuit court properly rejected the cases from foreign jurisdictions which apply an analysis in determining coverage which is contrary to South Carolina law.

Appellants have been unable to identify any authority applying the three-part test adopted by South Carolina that extends coverage for the death of the minor under the facts in evidence in this case. Appellants urge this court to depart from the three-part analysis undertaken by South Carolina courts. Appellants, in one instance, did not attempt to distinguish a South Carolina District court case, *Lain*, in which coverage was declined but rather argued to the circuit court that they simply disagreed with the ruling, that declined to extend coverage after applying the three-part test., (R. p. 59), *Nationwide Property & Cas. Co. v. Lain,* 402 F.Supp.2d 644 (D.S.C. 2005). We submit that the District Court properly applied the *Aytes* test thereby reaching the same

conclusion that should be rendered in the present case.

Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) and *Chapman v. Allstate Insurance* Co., 263 S.C. 565, 211 S.E.2d 876 (1975) are the only South Carolina cases cited by Appellants in which coverage was extended. Unlike the parked and unattended vehicle in the present case, *Wausau* involved a shooting injury *during a vehicular chase* and, as such, being used for transportation was not an issue. See *Canal Ins. Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993). ("In *Wausau*, however, we specifically declined to decide whether the vehicle must be used for transportation at the time of the injury to be included in mandatory coverage.") In *Chapman v. Allstate Insurance* Co., 263 S.C. 565, 211 S.E.2d 876 (1975) the Court held injuries to guest, who fell from uninsured motorist's *moving* automobile, were caused by accident and arose out of the ownership, maintenance or use of an uninsured automobile, and thus were within coverage afforded by guest's father's automobile liability policy. The remaining South Carolina cases cited by Appellants declined to extend coverage.

In an effort obtain coverage, the Appellants turn to cases from foreign jurisdictions which apply substantively different analysis to the issue in the case sub judice. Appellants acknowledge and the circuit court affirms that cases cited come from foreign jurisdictions and have no precedential value but should be considered to the extent not in conflict with South Carolina law. However, as noted by the circuit court, these cases are in conflict with South Carolina law. (R. pp. 7-8). Appellants now seek 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.

Appellants offer *Lincoln General Ins. Co., v Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006) as its principal case in overturning the circuit court's order denying coverage.[2] The *Lincoln General* court acknowledges that "Texas courts define "use" broadly: "the phrase 'arising from use' is treated as being a 'general catchall ... designed and construed to include all *proper* uses of the vehicle not falling within other terms of definition ....' " *Tucker v. Allstate Tex. Lloyds Ins. Co.,* 180 S.W.3d 880, 886 (Tex.App.2005)(quoting))." Id at 859. The Fifth Circuit's analysis as well as the analysis of the other cases upon which the Fifth Circuit (and also the Appellants) relies, includes not only a broader meaning of the term "use" but also a fundamentally different definition of "transportation" in the context automobile insurance coverage. As noted above, South Carolina courts have held that the party seeking coverage must show that the vehicle was being used for transportation at the time of injury. The Fifth Circuit and the cases cited by the Fifth Circuit do not require that the vehicle is "being used for transportation at the time of injury". Instead, the Fifth Circuit's test looks to the parties' intended use, not actual use. This "intended purpose fulfilled" doctrine, has not been adopted by South Carolina courts in *Aytes* or otherwise. The Fifth Circuit states "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." *Lincoln General,* 468 F.3d at 861 citing *Lindsey,* 997 S.W.2d at 156. The inclusion of the broader definition of "use" and of an "intent" factor is so fundamentally different from the *Aytes* analysis that

[2] All of the foreign cases cited by Appellant regarding use, operation, and maintenance are cited within *Lincoln General.*

the conclusions reached in several of the cases cited by the Fifth Circuit in support of its conclusion are opposite to those conclusions reached by South Carolina courts cases considering similar facts. The Fifth Circuit held:

> *Lindsey* demonstrates just how broadly its test for "use" is interpreted. The case involved a child who attempted to enter his parents' parked and locked truck through its rear to retrieve an article of clothing. Id. at 154. While doing so, he inadvertently caused a loaded shotgun in the truck's gun rack to fire, injuring a passenger in another vehicle. Id. The court concluded that the injury arose from the use of the truck as a matter of law. The child's sole purpose was to gain entry to the truck, his unorthodox method of entry was not an unexpected or unnatural use of the vehicle for a child, and it was his intent to enter the vehicle that directly caused the gun to discharge, thus causing the injury. Id. at 158. The court reasoned that, had the truck's movement caused the shotgun to discharge, there would be little question that the vehicle produced the injury; although a moving vehicle would have more of a role in the accident, it would not be significantly more. Id. at 158-59. Although it was a close call, the truck "produced" the injury and was not merely the situs of activity, unrelated to the accident. Id. at 159.
> Similarly, in *Lyons v. State Farm Lloyds & Nat'l Cas. Co., 41 S.W.3d 201, 205 (Tex.App.2001)*, the court held that a woman's injury in trying to enter the trailer of a parked car arose out of the "use" of the vehicle. Although the vehicle was not in motion, the injury occurred within the territorial limits of the vehicle, the vehicle produced rather than simply contributed to the injury, and the woman intended to use it as a vehicle. *Id. at 205-06.*[2] (footnote omitted)
>
> Id at 859.

The holdings in the Fifth Circuit cases are not in accord with South Carolina law. As noted by the 5th Circuit, the Texas standard affords coverage where injury results from accidental firearm discharges in a parked vehicle; a conclusion rejected by our courts. See *Peagler v. USAA Insurance Company*, 368 S.C. 153, 628 S.E.2d 475 (2006) ("[t]he 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.")

Applying Texas law, the 5th Circuit has reasoned that because a vehicle was being used to transport children to a destination, and even though the vehicle had been parked for seven hours and was no longer in motion, the intended purposed hadn't been fulfilled and thus the transportation was ongoing. *Lincoln General Ins. Co., v Aisha's Learning Center*, 468 F.3d at 860. South Carolina has not adopted an intended purpose analysis as it relates to the third element of the *Aytes* test which specifically requires that the vehicle is "being used for transportation" at the time of injury. In addition to broadening the definition of "use", Appellants argue the third factor of the *Aytes* test should be altered to include "an intended purpose fulfilled" doctrine. In this new standard, it would not matter if the vehicle in which an injury occurred was being "used for transportation" at the time of injury. The new standard would hinge on whether the intended destination was actually reached. Appellants argue that the transportation is ongoing until the *intended destination is reached*; in this case, the child's daycare. This reading of the "being used for transportation" element of the *Aytes* test is irreconcilable with the holdings in *Doe v. South Carolina State Budget and Control Bd.*, et al, 337 S.C. 294, 523 S.E.2d 457 (1999) and *Nationwide Property & Cas. Co. v. Lain*, 402 F.Supp.2d 644 (D.S.C. 2005). In *Doe* and *Lain*, the victims of the assaults were in the vehicle at the time of the assaults but neither reached their intended destination; though Ms. Lain and her boyfriend were heading home, they never reached home. Instead, the boyfriend drove behind a church and strangled Ms. Lain. *Lain*, 402 F.Supp.2d at 646. In *Doe*, Doe and another victim were taken to locations by police officer where they were then assaulted in the vehicle. *Doe,* 337 S.C. at 296. The locations of their assaults were clearly not their intended destinations. South Carolina has not adopted an "intended

purpose fulfilled" doctrine and the circuit court properly rejected the cases from foreign jurisdictions that have adopted this doctrine. The courts within the Fifth Circuit's expanded definitions of use and transportation are inconsistent with the outcomes of coverage cases in South Carolina.

The Alabama case cited by Appellants and by the Fifth Circuit succinctly illustrates the differences between the analysis offered by Appellants and the analysis adopted by South Carolina. In *St. Paul Mercury Ins. Co. v. Chilton-Shelby Mental Health Center,* 595 So.2d 1375 (Ala.1992) the court found an infant's death was excluded from the general liability portion of a CGL policy under an auto exclusion. Contrary to the requirements in South Carolina, the Alabama court did not undertake any analysis as to whether the vehicle was being used for transportation at the time of injury. In a similar case in which a child died from a heat stroke in a parked vehicle, the Illinois Appellate Court, in finding the vehicle was not being used at all when the child's death occurred, noted the lack of analysis by the Alabama court regarding transportation use:

> We recognize that the Supreme Court of Alabama reached a different conclusion in *St. Paul Mercury* different from the one we have reached in the instant case. However, we are not bound by the holding in the *St. Paul Mercury* case because cases from foreign jurisdictions are not binding upon this court. See *VanPlew v. Riccio,* 317 Ill.App.3d 179, 184, 251 Ill.Dec. 90, 739 N.E.2d 1023 (2000). Moreover, by stating that the victim died in the van "while it was being used" by the day-care facility, the court in *St. Paul Mercury* merely stated a conclusion in the absence of analysis. We further note that the *St. Paul Mercury* court held that there *was* coverage under the professional liability portion of the CGL policy at issue. The court held that the providing of transportation services was within the meaning of "professional services" as contemplated by the parties to the insurance agreement. Mount Vernon posits that, unlike the insurance policy at issue here, the professional liability coverage portion of the policy in *St. Paul Mercury* "apparently" contained no auto exclusion as the Supreme Court of Alabama did not discuss it. This omission also undercuts Mount Vernon's position that we should follow *St. Paul Mercury.*

Mount Vernon Fire Ins. Co. v Heaven's Little Hands Day Care, 343 Ill.App.3d 309 (2003).

Unlike the cases from foreign jurisdictions cited the by Appellant, the Illinois court undertook an analysis of what the vehicle was being used for at the time of injury. The *Mt. Vernon* court stated:

> "Here, Tyrelle's death occurred when the van was not being used at all, rather than when it was being used as a method of transportation. Unlike the situation in *Northbrook,* the death of an infant from heat stroke when left unattended in a vehicle for an eight-hour period is attenuated from the actual legitimate purpose of the van. Although the transport of children to Heaven's Little Hands is certainly a legitimate purpose of the van, the deserting of a small child in the vehicle for an extended period of time is not."
>
> *Id.* at 319

The *Aytes* analysis is in accord with the analysis in *Mount Vernon* as both exclude coverage where (1) the vehicle is not being used for transportation at the time of injury and (2) the act is attenuated from the normal use of a vehicle.

The California state court case cited by Appellants offers another illustration of a much broader standard of coverage which does not include a "being used for transportation" analysis as required in South Carolina. The court in *Prince v. United Nat. Ins. Co.*, 47 Cal.Rptr.3d 727, 142 Cal.app.4th 233 (2006) noted that "[p]ast California cases have established beyond contention that this language of 'arising out of the use,' when utilized in a coverage or insuring clause of an insurance policy, has a broad and comprehensive application, and affords coverage for injuries bearing almost any causal relation with the vehicle." *Id.* citing *State Farm v Partridge*, (1973) 10 Cal.3d 94, 109 Cal. Rptr. 811, 514 P2. 123. The *Prince* court further held "Finally, it is clear that a vehicle need not even have been in operation for injuries to have risen of its use." *Prince*

at 241. This premise is contrary to the "being used for transportation" requirement set out in *Canal* and *Aytes*.

The circuit court properly rejected Appellants arguments to adopt the analysis from foreign jurisdictions which are not in accord with the South Carolina Supreme Court's three-part test in *Aytes*.

III. Evidence exists to reasonably support the trial court's decision that the minor was a resident relative of only the mother's household.

Having weighed the evidence, the circuit properly ruled that even if coverage existed, the minor was a resident relative on only the mother. The South Carolina code defines "insured" to include both the insured person and persons named in a policy and "while resident of the same household, the spouse of any named insured and relatives of either." S.C. Code Ann. § 38-77-30(7). To determine whether a person is a relative resident of an insured, the Supreme Court adopted what is known as the *Waite* test. "The determination under the *Waite* test is dependent upon three factors: 1) living under the same roof; 2) in a close, intimate and informal relationship, and 3) where the intended duration of the relationship is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the relationship in contracting about such matters as insurance or in their conduct in reliance thereon." *State Farm Fire & Cas. Co. v. Breazell*, 324 S.C. 228, 478 S.E.2d 831 (1996) citing *A.G. by Waite v. Travelers Ins. Co.*, 112 Wis.2d 18, 331 N.W.2d 643 (App.1983).

In 2003, the South Carolina Court of Appeals undertook an analysis of cases in other jurisdictions regarding whether a child is a resident relative of a noncustodial parent's household when the child's parents are divorced or separated, the child is living

with one parent, and custody of the child has been established. The Court noted "As evident from these cases, 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. Rather, the courts generally look at the facts and circumstances of each case in totality to determine the child's residency." *Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 60-61, 586 S.E.2d 865, 870 (Ct. App. 2003). However, the issue of whether a person may be considered a "resident relative" of more than one household has not yet been determined. "No statute provides guidance concerning whether an insured may maintain more than one household simultaneously. Although the courts have contemplated the meaning of "resident relative" on numerous occasions, the issue of whether an insured may reside in multiple households simultaneously is one of first impression. Our task here is limited to determining whether facts in the record supported the circuit court's finding the Smiths and Tracy did not reside in the same household. Consequently, we do not reach the issue of whether an insured may reside in multiple households." *Smith v. Auto-Owners Ins. Co.*, 377 S.C. 512, 516, 660 S.E.2d 271, 273 (Ct. App. 2008) (citing in footnote 2: *See* e.g., *Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 340, 157 S.E.2d 633, 637 (1967) (asserting nephew who actively participated in uncle's household activities and who did not intend to live elsewhere was a resident relative of uncle); *Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 68, 586 S.E.2d 865, 874 (Ct.App.2003), *cert. denied* August 4, 2004 (finding child of divorced parents was not a resident relative of her non-custodial parent's household); *Auto Owners Ins. Co. v. Langford*, 330 S.C. 578, 584, 500 S.E.2d 496, 499 (Ct.App.1998) (holding grandchild and great-grandchild who occasionally visited named insured were not "insureds").

Here, the father, David Gray, has admitted in his responses to Request to Admit No. 1 and his deposition that "Defendant admits Plaintiff's request in paragraph one because he was the parent but the mother was the primary custodian because the child lived with her mother, however, Defendant had very liberal visitation." (R. p. 177, line 18- p. 178, line 10, R. p. 33, ¶ 1). The father testified that the minor's first overnight with him did not occur until January 2014. (R. p. 174, lines 13-22). He indicated that he and Amanda Goyeneche tried to establish a schedule of joint custody but that it never worked out. (R. p. 175, lines 2-8, p. 176, lines 4-18). The mother claims that the child spent equal time at her residence and that of the father beginning in about December 2013. (R. p. 202, line 9 - p. 204, line 1). However, the mother admits she listed her address (Road, Hartsville, South Carolina) as the residence of the child for purposes of (1) social security card application, (2) health insurance, (3) the death certificate, and (4) day care application. (R. p. 205, line 11 - p. 207, line 22). The mother admitted that the father maintained a portable pack-n-play crib at his home for the minor but had nothing of a permanent nature. The mother, however, maintained a permanent wooden crib at her home. (R. p. 209, line 3 - p. 210, line 3).The father admitted that the mother would send an overnight bag when the minor stayed overnight with the father. (R. p. 208, lines 1-23). Also, the father acknowledged that he has not claimed the minor as a dependent on his taxes but the mother did claim the minor. (R. p. 176, line 19 - p. 177, line 17).

While the issue of whether a person may be a "resident relative" of more than one household in the context of insurance policies has not been decided by South Carolina appellate courts, the issue does not need to be decided in the present case as coverage does not extend to the facts of this case. However, having received the evidence admitted

at trial, the circuit court found that the evidence established that the minor lived with her mother at Road, Hartsville, South Carolina and visited with her father. The father's admissions and manner in which the minor was documented as a resident of the mother's household lead to the conclusion that the minor resided with the mother and was therefore a resident relative of only the mother's household. "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*,395 S.C. at 46–47, 717 S.E.2d at 592. Clearly, evidence exists to support the circuit court's decision regarding residency of the minor. Therefore, the circuit court's decision should be affirmed.

IV. The circuit court did not 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, SCRP.

Appellants argue that the circuit court erred in ruling that Appellants failed to preserve the issue of Minor's residence by failing to raise the issue in their motion for reconsideration pursuant to Rule 59, SCRP. In their Motion to Alter or Amend, Appellants cite the following grounds:

> 1. 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 did not arise out of the ownership, maintenance or use of the vehicle.
> 2. The Court based the ruling on State Farm Fire and Casualty company v. Aytes, 322 S. C. 30, 503 S.E. 2d 744 (1998), which sets forth a three (3) pronged test for determining coverage. The Order ignored the case law presented by the Defendants to support their argument or the Order failed to fully explain why said cases and arguments are different from the facts set forth in the present case.
> 3. The stipulated facts further failed to set forth the details of the "use" of the vehicle by the Defendant driver during the lunch hour while the infant was still present in the vehicle and ignored the fact that the infant's transportation to the daycare facility had never ceased. The

> Defendants request the Court reopen its judgment, take additional testimony or evidence, amend its findings of fact and conclusion of law or make new findings and conclusions and direct entry of a new judgment.
>
> (R. pp. 67-68)

The circuit court ruled minor was a resident relative of only the mother in the Order Granting Declaratory Judgment to the Plaintiff dated June 1, 2015. (R. p. 7). Appellants did not seek to have the court reconsider its ruling that the minor was a resident relative of only the mother. In the Order Denying Defendants' Motion to Alter or Amend Judgment, the circuit correctly noted that the Appellants had failed to raise the issue in the Motion to Reconsider but also reaffirmed its prior ruling. (R. p. 16). The circuit court's statement that the issue had not been raised for reconsideration is a truism and such statement requires no further action.

CONCLUSION

The death of the minor S.G. was caused by the independent act of her biological father abandoning her in a park unattended vehicle and hyperthermia. Although she died in a vehicle, no evidence has been presented that the operation and use of the vehicle caused her death. The evidence is in fact to the contrary. The vehicle was neither being used nor operated at the time of her untimely death. The vehicle was parked and left unattended, thereby rendering it incapable of use for transportation.

Application of the analysis from foreign jurisdictions offered by Appellants would require the court to depart from the analysis set out by the South Carolina Supreme Court in *Aytes*. Inasmuch as the claims of the Appellants do not rise out of the use and operation of the vehicle under the three-part *Aytes* test, the Respondent respectfully requests this Court affirm the circuit court order declaring that Respondent has no duty to defend or indemnify any party as a result of the loss. Should the court find coverage exists under the policies, Respondent submits that sufficient evidence was submitted to sustain the trial court's decision that the minor was a resident relative of only the mother's household.

The undersigned certifies that this Final Brief complies with Rule 211 (b), SCACR.

Respectfully Submitted,

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