THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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S.C. SUPREME COURT

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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CASE NO. 2016-CP-26-798

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South Carolina Farm Bureau Mutual Insurance Company .................................. Respondent

vs.

Michael David Harrelson, Devora Harrelson, Kevin Duke
and Government Employees Insurance Company ........................................ Defendants

OF WHOM:
Michael David Harrelson and Devora Harrelson are ........................................ Appellants
and
Government Employees Insurance Company is................................................ Respondent

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# FINAL REPLY BRIEF OF APPELLANTS
(As to Respondent South Carolina Farm Bureau Mutual Insurance Company)

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The Appellants offer the following Reply in regard to the captioned case.

## ARGUMENT

## I. THIS CASE IS NOT RIPE FOR SUMMARY JUDGMENT.

Respondent South Carolina Farm Bureau Mutual Insurance Company argues in great detail the facts of this case. Specifically, Respondent argues that neither vehicle played an active role in the altercation and neither vehicle was used for transportation during the assault. (See Respondent's Brief, p. 3.) In fact, both the active role in the altercation and the use of the vehicle during the assault are disputed factual issues which should never have been decided on summary judgment.[1] In this case, the trial court, without hearing the testimony, decided that neither car was used for transportation or played an active role in the altercation -- essentially making a factual finding. Appellants respond by pointing out that Harrelson's testimony was that he was blocked in by Kevin Duke and that Kevin Duke used his vehicle as an active accessory by assaulting him while Harrelson was pushed against his own car.

Respondent South Carolina Farm Bureau does not discuss or address those particular facts in its statement of the facts. In fact, Respondent South Carolina Farm Bureau seems to take issue with Harrelson's statement that Duke pinned Harrelson against Harrelson's vehicle during the altercation – again a disputed factual issue based on the testimony.

Further, Respondent South Carolina Farm Bureau argues it is uncontested that neither vehicle was being used for transportation at the time of the assault. (See Respondent's Brief, p. 6).[2] In fact, Appellants do contest that and argue that both vehicles were being used for transportation and that Duke made his escape by using his vehicle after the altercation occurred.

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[1] Appellants timely requested a jury trial.

[2] The dispute began while both drivers were in their cars and thus they were using them for transportation.

## II. SOUTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY DOES NOT ADDRESS THE STANDARD OF REVIEW IN THIS CASE.

In Respondent South Carolina Farm Bureau's brief it does not discuss that this was a motion for summary judgment before the Court. It is well settled that summary judgment is not appropriate and should not be granted when there is a dispute as to the evidentiary facts and if there is a disagreement concerning the conclusions to be drawn from those facts. *Holmes v. East Cooper Community Hospital, Inc.*, 408 S.C. 138, 758 S.E.2d 4, rehearing denied (S.C. 2014). Further, when the evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury rather than resolved at the summary judgment stage. *Murphy v. Tyndal*, 384 S.C. 50, 681 S.E.2d 28, rehearing denied (S.C.App. 2009). Summary judgment is a drastic remedy and should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.

In this case, there are numerous disputed factual issues which preclude summary judgment.[3] Those issues include the use of the vehicle to carry out the assault, i.e., the fact that Harrelson was pinned against his vehicle during the altercation. Second, the fact that both vehicles were being used for transportation at the time of the incident and that this matter revolved around a dispute over a parking place or in the alternative a dispute over the parties use of their vehicles in that parking lot which would have been a dispute over the transportation at the time of the altercation. In sum, while Respondent does not raise this issue, there were genuine issues of material fact in this case as outlined above in which the trial court should have allowed a jury to resolve by the use of special interrogatories.

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[3] Respondent cites with approval in its brief the case of *Stone v. Traylor Bros.*, 300 S.C. 271, 600 S.E.2d 551 (Ct.App. 2004). In fact, *Stone* is a worker's compensation claim which was tried by the Workers' Compensation Commission and involved an altercation between two people on the job who were living together and had known each other for years. The *Stone* case has no application to this matter other than the fact that it was a trial and not decided on summary judgment.

## III. OTHER COURTS HAVE FOUND COVERAGE UNDER THESE CIRCUMSTANCES.

While Respondent South Carolina Farm Bureau cites a number of cases from Nevada, there are also cases from other jurisdictions which bolster the Appellants' argument. See *Cole v. United Services Auto Assoc.*, 68 P.3d 513 (Ct. App. 2002). In that case, the plaintiff was struck by the driver of another vehicle with a wine bottle while he was out of the car. The Court in *Cole* held there was sufficient causal connection between the plaintiff's injuries and the uninsured car. The reason for this was that the injuries "originated or grew out of the use of the uninsured vehicle." The *Cole* Court noted "An injury arises out of the use of an automobile if it is causally related to a conceivable use of the automobile that is not foreign to its inherent purpose. To establish this causal relationship, the claimant must show that the injury would not have occurred but for the vehicle's use." See *Metro. Prop. & Cas. Ins. Co., v. Neubert*, 969 P.2d 733 (Colo. App. 1988). *Cole* at 68 P.3d 515.

Appellants point out *Britt v. Phoenix Indemnity Ins. Co.*, 120 N.M. 813, 907 P.2d 994 (N.M. Sup. Ct. 1995). In *Britt*, an altercation occurred between two people outside of the vehicle after a minor traffic accident . The Supreme Court of New Mexico held that Britt's injuries resulted from an accident. The *Britt* Court noted that in a particular incident an accident should be viewed from the injured party's perspective. If the event causing the injury was unintended and unexpected from the "injured party's viewpoint", the injury was deemed to have occurred as a result of an accident. [4]

[4] South Carolina also adopts this test. See *State Farm v. Moorer*, 330 S.C. 46, 496 S.E.2d 895 (1998); *Wassau Ins. Co. v. Howser*, 727 F.Supp. 999, 1000 (D.S.C. 1990).

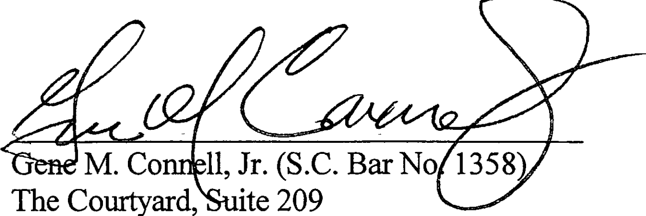
It is also reasonable to conclude pursuant to S.C. Code Ann. § 38-77-140(a) (Sup. 2012) that coverage is available in this case. The case law interpreting that statute provides that to establish an injury out of the "ownership, maintenance or use" of a motor vehicle the party seeking coverage must show (1) a causal connection exists between the vehicle and the injury; (2) that 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." See also *Home Ins. Co. v. Towe*, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994). In *Towe*, the Supreme Court said: "The test for determining whether an injury arose out the use of the vehicle turns on the causal connection between the vehicle and the injury. No distinction is made as to whether the injury resulted from the negligent, reckless or intentional act."

Here, the focus is the role the vehicle played in causing the injury. Obviously, a dispute arose over the use and/or driving of the vehicles in the Wal-Mart parking area. Also, the assailant used the Appellants' vehicle to seriously injure Harrelson by pressing him against the vehicle and then continuously assaulting him. Thus, the facts of this case when applied to the elements clearly created a disputed issue of material fact as to the role of the vehicle in the injuries suffered by Appellants.

## CONCLUSION

In summary each of these cases are fact specific and as a result summary judgment is not appropriate when making a decision in a case like this. Accordingly, Appellants request this Court reverse this matter and remand it for trial.

KELAHER, CONNELL & CONNOR, P.C.



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October 20, 2017
Surfside Beach, South Carolina.

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CERTIFICATE OF COUNSEL

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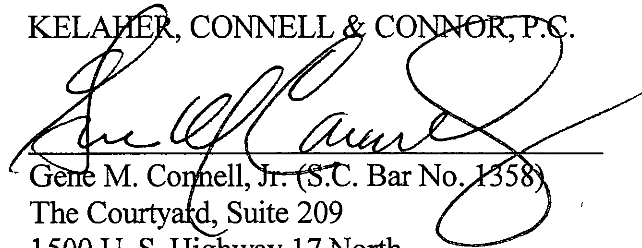
The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b) SCACR.

KELAHER, CONNELL & CONNOR, P.C.



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PROOF OF SERVICE

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PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Final Reply Brief of Appellants (as to SCFB)** on the Respondents on the 20th day of October, 2017, by depositing a copy of same in the United States Mail, postage prepaid, to:

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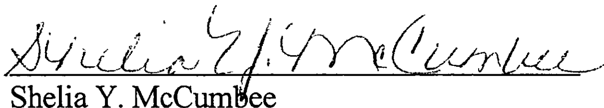
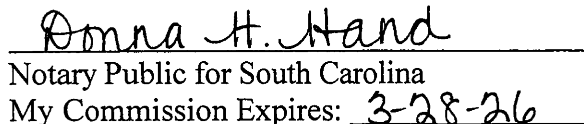


Shelia Y. McCumbee

**SWORN AND SUBSCRIBED** before me,
this 20th day of October, 2017.



Notary Public for South Carolina
My Commission Expires: 3-28-26