

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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S.C. SUPREME COURT

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.....Petitioners.

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**THE STATE OF SOUTH CAROLINA
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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 the Appellants.

Appellate Case No. 2016-000840

Appeal From Darlington County
Paul M. Burch, Circuit Court Judge

Opinion No. 5697
Heard June 7, 2018 – Filed December 18, 2019

AFFIRMED

Karl Huggins Smith, of Smith Watts & Associates, LLC,
of Hartsville, for Appellants.

Jonathan M. Robinson, of DuBose Robinson Morgan,
PC, of Camden, for Respondent.

MCDONALD, J.: This is a declaratory judgment action to determine whether
State Farm Mutual Automobile Insurance Co. (State Farm) has a duty to defend

and provide liability and underinsured motorist (UIM) coverage following the death of an unattended child (S.G.) in a vehicle insured by a State Farm automobile policy. Appellants Beverly Goyeneche (Grandmother) and Amanda Goyeneche (Mother) appeal the circuit court's order finding their claims arising from S.G.'s death are excluded from coverage and State Farm has no duty to defend or indemnify Grandmother, Mother, or David R. Gray, III (Father).¹ Appellants argue the circuit court erred in (1) finding the State Farm policies issued to S.G.'s parents and grandmother provide no coverage for S.G.'s death; (2) rejecting persuasive authority from other jurisdictions; and (3) determining S.G. was a resident relative of only Mother's household. We affirm.

Stipulated Facts²

The underlying facts of this case are tragic. On the morning of May 8, 2014, Father placed thirteen-month-old S.G. into her car seat in the back seat of his truck, intending to take her to daycare. However, Father instead drove to work, leaving S.G. unattended in the back seat of the truck. Father's truck was parked, with the ignition off, from approximately 9:30 a.m. until 1:00 p.m., 1:15 p.m. until 2:15 p.m., and again from 2:30 p.m. until 5:15 p.m. At the end of his work day, Father found S.G. unresponsive in his vehicle; she was pronounced dead from complications of hyperthermia at 5:50 p.m.

Mother made claims under the liability and UIM coverage of the following insurance policies (the Policies) issued by State Farm:

1. Policy Number 4891-309-40: issued to Father on February 28, 2014, insuring a 2001 Ford F150 pickup truck, and providing liability and UIM coverage of \$25,000 per person, \$50,000 per occurrence, and \$25,000 for property damage.
2. Policy Number C483241E: issued to Mother on October 30, 1998, insuring a 2013 Jeep Wrangler, and providing liability and UIM coverage of \$50,000 per

¹ Father was a defendant in the underlying action but is not a party to this appeal.

² S.G.'s residence is disputed.

person, \$100,000 per occurrence, and \$25,000 for property damage.

3. Policy Number 1003667A: issued to Grandmother on September 27, 2004, insuring a 2004 Chevrolet Impala, and providing liability and UIM coverage of \$50,000 per person, \$100,000 per occurrence, and \$25,000 for property damage.

4. Policy Number 1772085A: issued to Grandmother on June 3, 2008, insuring a 2007 Chevrolet C1500, and providing liability and UIM coverage of \$50,000 per person, \$100,000 per occurrence, and \$25,000 for property damage.

The Policies provided coverage for "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."

Procedural History

On September 24, 2014, State Farm brought this declaratory judgment action seeking a declaration that the Policies did not provide coverage for S.G.'s death, and, therefore, State Farm owed no duty to defend or indemnify Grandmother, Mother, or Father. Appellants filed a joint answer and counterclaim, asserting S.G.'s death arose from the operation, ownership, maintenance or use of vehicles covered by the Policies. Appellants also sought a declaration that the Policies provide coverage for S.G.'s death.

The parties entered a stipulation of facts, and Appellants gave deposition testimony. The circuit court held a nonjury trial on April 7, 2015; State Farm's South Carolina Policy Form 9840a and the deposition testimonies were offered into evidence without objection. By order dated June 1, 2015, the circuit court declared that the Policies did not provide coverage in this matter. Specifically, the circuit court concluded there was no evidence Father's truck was an "active accessory" in S.G.'s death. The court further determined that even if a causal connection existed between the truck and the injury, Father's neglect was an act of independent significance severing the causal connection. The court also found the

third prong of the *Aytes* test, the "transportation" element, was not satisfied.³ Finally, the circuit court determined S.G. was a resident solely of Mother's home. Defendants' filed a Rule 59(e), SCRCP, motion to alter or amend; following a hearing, the circuit court denied this motion.

Standard of Review

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." *Crossmann Cmty. 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 (quoting *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009)). "When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct. App. 2003) (quoting *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000)). "In such cases, the appellate court owes no particular deference to the trial court's legal conclusions." *Id.* at 301–02, 584 S.E.2d at 155 (quoting *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999)).

Law and Analysis

I. The *Aytes* Test

Appellants assert the circuit court erred in applying the three-pronged test of *State Farm Fire & Casualty Co. v. Aytes* in determining the Policies provide no coverage. We disagree.

In *Aytes*, the insured, Donna Dawson, and Randy Aytes became involved in an altercation while at the home of Aytes's mother. *Id.* at 32, 503 S.E.2d at 745. Aytes took Dawson's keys and forced her into her car. *Id.* Although Aytes was

³ *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998) (discussing the factors analyzed when determining whether damages arose from the "ownership, maintenance, or use" of an insured vehicle).

forbidden to drive Dawson's car, he drove Dawson to his mother's property with the expressed intent of killing her. *Id.* While standing outside the car on the passenger side, Aytes fired a pistol towards Dawson, striking her in the foot. *Id.*

In response to certified questions from the United States district court, our supreme court restated South Carolina's three-prong test for determining whether "[a]n insured is legally entitled to recover damages arising out of the 'ownership, maintenance, or use' of an uninsured vehicle." *Id.* at 33, 503 S.E.2d at 745; *see also* S.C. Code § 38-77-140(A) ("An automobile insurance policy may not be issued or delivered in this State . . . unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles"). "First, the party seeking coverage must establish a causal connection between the vehicle and the injury. Second, there must exist no act of independent significance breaking the causal link. . . . [Third,] it must be shown the vehicle was being used for transportation at the time of the assault." *Id.*

In applying this test to the facts presented, the supreme 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.

Id. at 35, 503 S.E.2d at 746.

This court considered the first two requirements that later became part of the *Aytes* test in *Hite v. Hartford Accident and Indemnity Co.*, 288 S.C. 616, 344 S.E.2d 173 (Ct. App. 1986). Hite was employed by a car dealership, which provided an automobile for his use. *Id.* at 617, 344 S.E.2d at 174. On the evening of his injury, Hite returned to the dealership and, leaving the car running, exited the vehicle. While approaching the dealership on foot, Hite heard the night watchman yell that someone (William Martin) had backed into a new truck. *Id.* at 618, 344 S.E.2d at 175. Hite walked fifty feet across the parking lot to tell Martin, who was sitting in a car, not to leave. *Id.* However, Martin accelerated the vehicle and ran over

Hite's legs. *Id.* In holding there was no causal connection between the insured vehicle Hite had been driving and Hite's injuries, this court concluded, "[i]t is difficult to see where use of the insured automobile was directly connected with or a cause of the ensuing accident." *Id.* at 621–22, 344 S.E.2d at 177.

Before *Aytes*, our supreme court considered the availability of automobile insurance coverage for a passenger's gunshot injuries in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992). There, a passenger in a Chevrolet Blazer was injured when an unknown assailant in another vehicle bumped, pursued, and then shot at the Blazer. *Id.* at 271, 422 S.E.2d at 107. Relying on *Continental Western Insurance Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987), the supreme court explained:

In *Klug*, the court first considered the causal connection between the vehicle and the injury. The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. 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. 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, 309 S.C. at 272–73, 422 S.E.2d at 108 (citations omitted). In determining the necessary causal connection for coverage that existed between the uninsured vehicle and the injuries Howser sustained, the court stated, "[t]he 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." *Id.* at 273, 422 S.E.2d at 108.

Again relying on *Klug*, the *Howser* court further explained, "[o]nce causation is established, the court must determine if an act of independent significance occurred breaking the causal link." *Id.* The court noted consideration of the existence of such an independent act 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.

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, 309 S.C. at 273–74, 422 S.E.2d at 108–09 (citations omitted).

The supreme court added an additional factor to the coverage test in *Canal Insurance Co. v. Insurance Co. of North America*, 315 S.C. 1, 431 S.E.2d 577 (1993). There, the owner and operator of a truck crane was using the crane to lift a condenser onto a roof when the crane became unbalanced, tipped over, and crashed into the building. *Id.* at 2–3, 431 S.E.2d at 578–79. In construing section 38-77-140, the court defined "'use of a motor vehicle' as limited to transportation uses." *Id.* at 4, 431 S.E.2d at 579. Thus, because the truck crane was not being used for transportation at the time of the accident, the supreme court reversed the circuit court's judgment finding coverage available under the subject policy. *Id.* at 4, 431 S.E.2d 577, 579–80; *see also Peagler v. USAA Ins. Co.*, 368 S.C. 153, 165, 628 S.E.2d 475, 481 (2006) (finding no coverage for decedent's fatal injury due to accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle that had been used for hunting purposes the previous day).

Our appellate courts have subsequently addressed the "ownership, maintenance, or use" of a vehicle numerous times in the context of assaults involving intentional

conduct by an assailant. *See e.g., State Farm Mut. Auto. Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181, 182 (1999) (holding injuries arising from gunshots fired from a truck in a restaurant parking lot were excluded from coverage because such injuries are not "foreseeably identifiable with the normal use of an automobile" (quoting *Aytes*, 332 S.C. at 33, 503 S.E.2d at 746)); *Doe v. S.C. State Budget and Control Bd.*, 337 S.C. 294, 297, 523 S.E.2d 457, 45 (1999) (concluding injuries suffered by sexual assault victims were not covered by police department's automobile and general liability policies because the injuries did not arise out of "use" of officer's patrol car within meaning of auto policy); *Home Ins. Co. v. Towe*, 314 S.C. 105, 107–08, 441 S.E.2d 825, 827 (1994) (holding necessary causal connection existed between use of insured's vehicle and serious injuries sustained by tractor trailer driver struck by bottle thrown from passing vehicle; the causal connection was not broken by the insured's passenger's intentionally throwing bottle at a road sign). But our supreme court has clarified that "[n]o distinction is made as to whether [an] injury resulted from a negligent, reckless, or intentional act." *Towe*, 314 S.C. at 107, 441 S.E.2d at 827.

A. Causal Connection

Appellants challenge the circuit court's application of the *Aytes* coverage factors to the facts here, arguing the court erroneously found there was no causal connection between the "ownership, maintenance or use" of Father's truck and S.G.'s death. Regarding the initial "causal connection" prong of the coverage inquiry, our supreme court has found a party must demonstrate: "(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.'" *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182 (quoting *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745–46). "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." *Aytes*, 332 S.C. at 33, 503 S.E.2d at 746.

We agree with Appellants that Father's truck was an active accessory to S.G.'s death. At trial, State Farm argued S.G.'s hyperthermia was "caused by the atmospheric conditions around us when we were in Hartsville [in] May 2014. The heat is what caused the hyperthermia to eventually—if this happened in February, we'd likely have a different story." However, Appellants contend it is well known that vehicles trap heat and the vehicle itself was the producing cause of the onset of S.G.'s hyperthermia. At trial, Appellants stated they did not know whether S.G. would have died if she had been left outside the vehicle: "[She] may have had a

sunstroke. [She] may have had heat exhaustion. [She] may have died of dehydration but in this particular case[, she] died from being inside a vehicle."

In their brief to this court, Appellants assert, "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." And at oral argument, Appellants explained Father's truck was not merely the site of the injury, it caused the injury; the very nature of the vehicle produced the excessive heat that concentrated inside, causing S.G.'s fatal injury. *See e.g., Towe*, 314 S.C. at 107, 441 S.E.2d at 827 (determining automobile was an active accessory that gave rise to the injuries because insured's use of the automobile placed his passenger in the position to throw a bottle at a road sign and the vehicle's speed contributed to the velocity of the bottle, which increased the seriousness of victim's injuries); *Howser*, 309 S.C. at 273, 422 S.E.2d at 108 (finding a sufficient causal connection existed between use of assailant's vehicle and insured's injuries because the use of the vehicle allowed the assailant to closely pursue Howser; the gunshot was the culmination of an ongoing assault in which the vehicle played "an essential and integral part;" and only an automobile could have provided the assailant with the means to escape).

It is undisputed that Father placed S.G. in his truck to transport her to daycare and that she was ultimately harmed because Father forgot she was in her car seat and left her in the vehicle for over seven hours. Because the physical makeup of automobiles and trucks causes them to trap heat—and the excessive temperature caused S.G.'s death—we find Father's truck not only contributed to but played "an essential and integral part" in her death. *Contra Aytes*, 332 S.C. at 33, 503 S.E.2d at 746 ("The required causal connection does not exist when the only connection between an injury and the insured vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred.").

Additionally, the fatal injury was foreseeably identifiable with the normal use of a vehicle. *See Aytes*, 332 S.C. at 33, 503 S.E.2d at 745–46 ("The injury must be foreseeably identifiable with the normal use of the vehicle."). Many vehicles in South Carolina are used to transport children; transporting children to and from daycare is neither an abnormal nor an unanticipated use. Significantly, our Legislature has recognized that the intentional or unintentional act of leaving a child inside a locked vehicle is foreseeably identifiable with the normal use a vehicle. *See S.C. Code Ann § 15-3-700* (2016) ("A person is immune from civil liability for property damage resulting from his forcible entry into a motor vehicle

for the purpose of removing a minor or vulnerable adult from the vehicle if the person has a reasonable good faith belief that forcible entry into the vehicle is necessary because the minor or vulnerable adult is in imminent danger of suffering harm."). Accordingly, we find Appellants established the necessary causal connection between Father's truck and S.G.'s death.

B. Act of Independent Significance

However, we disagree with Appellants' contention that the circuit court erred in finding Father's leaving the child unattended in the truck for over seven hours was an act of independent significance that broke any causal connection between Father's truck and S.G.'s death.

While our appellate courts have not addressed the factual scenario presented here, South Carolina courts have previously found an assailant's exiting an insured vehicle prior to injuring another to be an act of independent significance breaking the causal chain. *See e.g., 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."); *Carraway v. Smith by S.C. Ins. Co.*, 321 S.C. 23, 26, 467 S.E.2d 120, 121 (Ct. App. 1995) ("Smith exited the car and carried on a conversation with a third person for several minutes before the shooting occurred. Even if the use of the car and the shooting were connected, that link was broken by Smith's actions."). We agree with the circuit court that Father's act of abandoning S.G. for over seven hours, however unintentional, was an act of independent significance breaking the causal connective link between Father's truck and S.G.'s death.

C. Transportation

Appellants next contend the circuit court erroneously found that even if no act of independent significance existed to break the causal chain, the Policies provide no coverage because the truck was not being used for transportation at the time of S.G.'s death. We find no error.

The parties stipulated that Father turned off his ignition, left the truck unattended in the parking lot at his place of employment, and did not occupy the truck for approximately seven hours. The truck never left the parking space, and only S.G. occupied the vehicle. Thus, we agree with the circuit court's finding that Father's truck was not being used for transportation at the time of S.G.'s fatal injury.

II. Authority from Other Jurisdictions

When there is no South Carolina case directly on point, our courts may look to persuasive authority from other jurisdictions. *Williams v. Morris*, 320 S.C. 196, 200, 464 S.E.2d 97, 99 (1995). However, in considering such cases, we may not apply them in such a manner that we overrule supreme court precedent. See S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

Appellants rely heavily on *Lincoln General Insurance Co. v. Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006) to support their argument that the circuit court erred in finding the Policies provide no coverage here. There, the Fifth Circuit applied Texas law, reasoning that because a vehicle was being used to transport children to a destination—even though the vehicle had been parked for seven hours and was no longer in motion—the vehicle's intended purpose had not yet been fulfilled and was thus ongoing. *Id.* at 860. The Fifth Circuit acknowledged "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.'" *Id.* at 859 (quoting *Tucker v. Allstate Tex. Lloyds Ins. Co.*, 180 S.W.3d 880, 886 (Tex. App. 2005)). The Fifth Circuit's analysis includes not only a broader meaning of the term "use" than our supreme court has set forth, but also a fundamentally different consideration of "transportation" in the context automobile insurance coverage.

As noted above, South Carolina courts have held the party seeking coverage must show the vehicle was being used for transportation at the time of injury. See *Canal*, 315 at 4, 431 S.E.2d at 479 (construing section 38-77-140 and defining "'use of a motor vehicle' as limited to transportation uses"). The law on which the Fifth Circuit relied, however, has no such transportation requirement. The Fifth Circuit applied Texas's test, which considers a person's "intended" use of a vehicle. See *Lincoln General*, 486 F.3d at 861 ("Whether a person is using a vehicle as a vehicle depends not only on his conduct but on his intent." (quoting *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999))). South Carolina courts have not adopted a party's intended use of a vehicle in relation to the *Aytes* test; thus, we believe the Fifth Circuit's expanded definitions of the terms "use" and "transportation" are inconsistent with existing South Carolina law. See *Aytes*, 332 S.C. at 33, 503 S.E.2d at 745 (recognizing "it must be shown the vehicle was being used for transportation at the time of the assault.").

The California state court case cited by Appellants offers another illustration of a broader standard of coverage that does not include the transportation prong required in South Carolina. In *Prince v. United National Insurance Co.*, the

California Court of Appeals noted "[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." 47 Cal. Rptr. 3d 727, 730 (Cal. App. 2006) (quoting *State Farm Mut. Auto Ins. Co. v. Partridge*, 514 P.2d 123, 127 (Cal. 1973)). Because these jurisdictions apply a broader definition of "use" than that recognized in existing South Carolina precedent and do not require a similar "transportation" analysis, we find the circuit court appropriately declined to follow these authorities.

III. Residency

Appellants argue the circuit court erred in finding S.G. was a resident relative of only Mother's household. Appellants further argue the circuit court erred in declaring the residency issue unpreserved for appellate review.

In *Elam v. South Carolina Department of Transportation*, our supreme court explained:

[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.

361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). "If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review." *Id.* at 25, 602 S.E.2d at 780.

In their Rule 59(e) motion to alter or amend, Appellants listed 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

[Infant] 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.

In its order denying Appellants' motion to alter or amend, the circuit court reaffirmed its prior ruling and noted Appellants failed to raise the resident relative issue in their motion to reconsider. However, Appellants' motion stated, "The Court's Order denies the Defendants' grounds for insurance coverage under the existing vehicular policies of the Plaintiff." Arguably, this statement placed the circuit court on notice that Appellants were seeking a review of *all* of the court's rulings—including its ruling on the question of S.G.'s residency. Furthermore, because Appellants made a permissive motion for reconsideration and not a mandatory motion necessary to preserve an unaddressed error, we find the residency issue is preserved for our review.

Our supreme court first analyzed whether a person was a resident relative of the same household as a named insured in *Buddin v. Nationwide Mutual Insurance Co.*, 250 S.C. 332, 157 S.E.2d 633 (1967). The court stated "'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.'" *Id.* at 339, 157 S.E.2d at 636 (quoting *Hardware Mut. Cas. Co. v. Home Indem. Co.*, 50 Cal.Rptr. 508, 514 (Cal.

App. 1966)). The supreme court noted several factors for possible consideration—rent or boarding payments; the presence or absence of control over the relative; and whether there was a lack of a permanent living arrangement—but found none were determinative of the issue. *Id.* at 338–39, 157 S.E.2d at 636.

In *Auto-Owners Insurance Company v. Horne*, 356 S.C. 52, 66, 586 S.E.2d 865, 873 (Ct. App. 2003), this court concluded "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." While the *Horne* court found the seventeen-year-old child was not a resident relative of her non-custodial father's household, the question of whether a person may be a resident relative of more than one household has not yet been addressed. See *Smith v. Auto-Owners Ins. Co.*, 377 S.C. 512, 516, 660 S.E.2d 271, 273 (Ct. App. 2008) ("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." (footnote omitted)).

Here, Father admitted Mother was S.G.'s primary custodian because she lived with Mother. Father explained that while he was allowed very liberal visitation with S.G., the parties had no set visitation schedule. Father testified S.G.'s first overnight visit with him occurred in January 2014, and Mother sent an overnight bag whenever S.G. stayed with him. Father also acknowledged he has never claimed S.G. as a dependent on his taxes.

At the time of S.G.'s death, Mother lived with her parents, whose home was listed as the principal address for documentation relating to S.G. Mother testified she and Father never shared a residence and S.G. stayed exclusively with her during her six-week maternity leave. She explained that beginning in December 2013, S.G. began staying with Father on a regular basis. According to Mother, she and Father had a "four-three schedule" meaning S.G. "would stay four days with one parent, three days with the [other parent,] and then we would often alternate and change the schedule if something came up." Mother admitted Father kept a Pack N' Play (portable crib) while she had a permanent wooden crib at her home. Mother concluded her deposition testimony by stating, "I believe we had shared custody but I would say I would be primary."

Grandmother testified Mother was living at her home on April 8, 2013, the day S.G. was born. She characterized S.G.'s home in May 2014 as Mother's house and Father's house. Grandmother explained that in the last three or four months of her life, S.G. stayed "so many nights at [Father's] house and so many nights at our house with [Mother]." Cognizant of our standard of review, we find evidence exists to reasonably support the circuit court's decision that S.G. was a "resident relative" of only Mother's household. *See Crossmann Cmty. of N.C., Inc.*, 395 S.C. at 46–47, 717 S.E.2d at 592 ("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." (quoting *Newman*, 385 S.C. at 191, 684 S.E.2d at 543)).

Conclusion

We find Father's act of leaving S.G. in his truck for over seven hours was an act of independent significance breaking any causal link between the use of the truck and her tragic death. Moreover, Appellants are unable to establish the vehicle was being used for transportation during the time S.G. was left in the truck. Finally, evidence supports the circuit court's finding that S.G. was a resident relative of only Mother's household. Thus, the judgment of the circuit court is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

The South Carolina Court of Appeals

State Farm Mutual Automobile Insurance Company,
Respondent,

v.

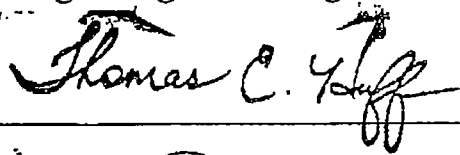
Beverly Goyeneche, David R. Gray, III and Amanda
Goyeneche (a/k/a Amanda Goyeneche-Gray),
individually and as Parent and Natural Guardian of S.G.,
Defendants,

Of Whom Beverly Goyeneche, and Amanda Goyeneche
are the Appellants.

Appellate Case No. 2016-000840

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

FILED

February 20, 2020

cc:

Karl Huggins Smith, Esquire

Jonathan M. Robinson, Esquire

Allison Paige Sullivan, Esquire

Whitney Boykin Harrison, Esquire

91739

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

RECEIVED
DEC 23 2019
SC Court of Appeals

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.

PETITION FOR REHEARING

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs rehearing petitions. Rule 240 governs motions and petitions.

The Court issued its decision December 18, 2019. See Op. No. 5697 (Shearouse Adv. Sh. No. 49 at 53). This petition is timely under Rule 221(a).

Beverly and Amanda Goyeneche respectfully resubmit the arguments from their briefs. They understand and respect that the Court has considered and rejected those arguments. They nevertheless file this petition for the purpose of preserving their ability to seek further review.

Additionally, and in light of Rule 221's requirement that the Goyeneches state with specificity grounds overlooked in the decision, they respectfully submit the Court may have overlooked the fact that negligently leaving a child strapped in a car seat inside a vehicle is not independent of the vehicle's use for transportation. That negligence has a direct relationship with the vehicle's active use as an automobile.

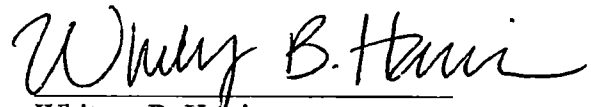
Also, though the opinion discusses certain cases from other jurisdictions, the opinion does not discuss the Minnesota cases the Goyeneches cited in support of their argument. The Court may have overlooked these cases, and the Court may have further overlooked the fact that the Minnesota statute has similar language to the statute at issue here. Both South Carolina and Minnesota require automobile policies to insure against damages "arising out of the ownership, maintenance, or use of motor vehicles." See S.C. Code Ann. § 38-77-140 and *Norwest Bank Minnesota, N.A. v. State Farm Mut. Auto. Ins. Co.*, 588 N.W.2d 743, 747 (Minn. 1999) (citing the Minnesota statute).

Furthermore, and on the subject of residency, the only evidence is that the parties acted as though they had joint custody and that this father was fully involved in the child's life. He said he had "liberal visitation." (R.p.33). He also said he was either at the mother's house or that the mother was at his house, but either way, he and the mother were always together and they were always with the child. (R.p.175). The child had clothes, bathroom and food items at both mother's residence at father's residence. (R.p.208). Given these circumstances, it seems difficult to dispute that there was an expectation the child would be with the father and at his residence both frequently and regularly.

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should grant this petition and reverse the judgment below.

December 23, 2019

Respectfully submitted,

A handwritten signature in black ink, reading "Whitney B. Harrison". The signature is written in a cursive style with a horizontal line underneath the name.

Whitney B. Harrison
McGowan, Hood & Felder, LLC
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ATTORNEY FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

RECEIVED

Paul M. Burch, Circuit Court Judge

DEC 23 2019

SC Court of Appeals

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

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

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individually and as Parent and Natural Guardian of S.G.,..... Defendants,

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

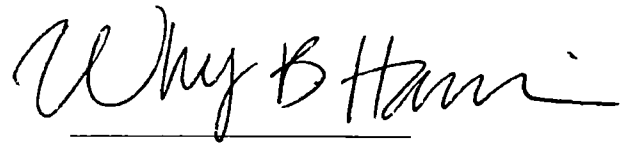
PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel with
a copy of the *Petition for Rehearing* and *Notice of Appearance* by mailing copies of the same by
United States Mail with first class postage prepaid to the following address:

Jonathan M. Robinson
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Signature Page to Follow

December 23, 2019

A handwritten signature in black ink, reading "Whitney B. Harrison". The signature is fluid and cursive, with the first name "Whitney" being the most prominent.

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December 23, 2019

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
DEC 23 2019
SC Court of Appeals

RE: *State Farm v. Goyeneche*
Case No. 2016-000840

Dear Ms. Kitchings,

Enclosed please find for filing my Notice of Appearance for Appellants, along with the Petition for Rehearing. Also included is the filing fee and an additional copy to be stamped and returned to my office. Please let me know if you have any questions or concerns.

Sincerely,

Whitney B. Harrison

cc: Jonathan M. Robinson
Karl H. Smith

Enclosures

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

RECEIVED

Paul M. Burch, Circuit Court Judge

FEB 27 2017

SC Court of Appeals

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.

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the circuit court err in holding that the automobile policies 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)?
 - 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.
 - 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."
 - 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.
 - 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.
- II. Did the circuit court err in rejecting foreign authority Defendants cited as contrary to the test set forth in *Aytes*?
- III. Did the circuit court err in holding that Infant was a resident of Mother's household only and was not also a "resident relative" of Father for purposes of Motor Vehicle Insurance Coverage?
- 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 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 be 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 residence, 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, SCRCF, 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, SCRCF, 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.

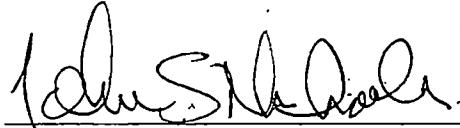
Even if *Hatfield* may be read in a manner that would prevent the circuit court from addressing the issue, *Hatfield* predates the Supreme Court cases of *I'On* and *Elam*. Furthermore, *Hatfield* is a Court of Appeals decision, and may not be read in a manner that conflicts with the decisions of the 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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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

RECEIVED

FEB 27 2017

State Farm Mutual Automobile
Insurance Company, ...

SC Court of Appeals
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

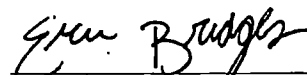
Beverly Goyeneche and Amanda
Goyeneche are Appellants.

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:

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February 27, 2017


Erin Bridges

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

RECEIVED
FEB 27 2017
SC Court of Appeals

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

v.

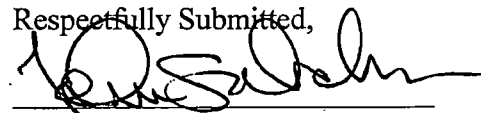
Beverly Goyeneche, David R. Gray, III, and
Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray),
individually and as Parent and Natural Guardian of S.G., ... Defendants,

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.

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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

RECEIVED
FEB 27 2017
SC Court of Appeals

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
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THOMPSON & DELGADO, LLC

/emb

Enclosures

cc: Karl H. Smith, Esquire
Jonathan M. Robinson, Esquire

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FEB 21 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2014-CP-16-0792
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State Farm Mutual Automobile
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v.

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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.

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In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

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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, SCR?

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 Cmty. 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* in 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 purpose 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 arisen out 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 Cmty. 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

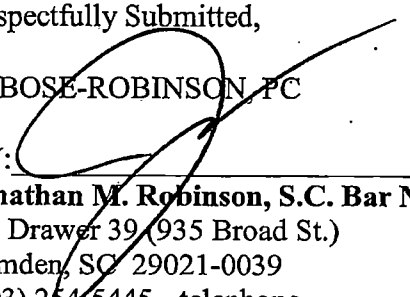
The death of the minor S.G. was caused by the independent act of her biological father abandoning her in a park unattended vehicle and hyperthermia. Although she died in a vehicle, no evidence has been presented that the operation and use of the vehicle caused her death. The evidence is in fact to the 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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February 16, 2017

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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

RECEIVED

FEB 27 2017

SC Court of Appeals

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.

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ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Peagler*, the Supreme Court stated:

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

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

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

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

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

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

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

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

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

Respondent contends that the circuit court's "statement that the issue had not been raised for reconsideration is a truism and such statement requires no further action."

(Resp. Br. p. 33). This statement minimizes what the circuit court actually ruled.

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

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

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

In the order denying reconsideration, however, the circuit court ruled the "issue was not timely raised" in the motion for reconsideration, and cited to a case holding such issue "not preserved for review." (R. p. 16) The court went further to hold that the evidence supported the court's finding that Infant was a resident relative of Mother's household. (R. p. 17).

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

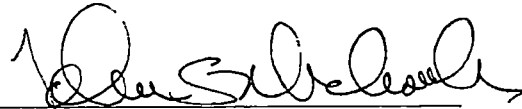
trial court) and *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 442, 526 S.E.2d 716, 724 (2000) (motion to alter or amend judgment required only if lower court fails to rule on an issue losing party raised).

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

CONCLUSION

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

Respectfully submitted,



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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

RECEIVED

FEB 27 2017

State Farm Mutual Automobile
Insurance Company, ...

SC Court of Appeals
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

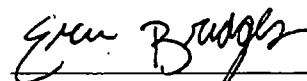
Beverly Goyeneche and Amanda
Goyeneche are Appellants.

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
PO Drawer 39
Camden, SC 29021-0039

February 27, 2017


Erin Bridges

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

RECEIVED
FEB 27 2017
SC Court of Appeals

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

v.

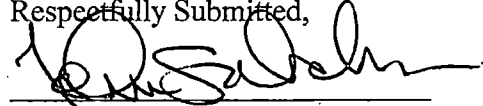
Beverly Goyeneche, David R. Gray, III, and
Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray),
individually and as Parent and Natural Guardian of S.G., ... Defendants,

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

Attorney for Appellants



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
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

RECEIVED
FEB 27 2017
SC Court of Appeals

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
Jonathan M. Robinson, Esquire

June 6, 2018

The Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JUN 06 2018
SC Court of Appeals

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

Dear Mrs. Kitchings:

I am writing this letter to advise the Court of authority that has come to my attention after the filing of the briefs. See Rule 208(b)(7), SCACR.

The supplemental citations are Norwest Bank Minnesota v. State Farm, 588 N.W.2d 743 (Minn. 1999) and Alexis v. State Farm, 696 N.W.2d 109 (Minn. Ct. App. 2005). The reason for these citations (as required by Rule 208) is that both cases discuss the requirement that a car be used for "transportation purposes." The parties discuss this requirement throughout their briefs.

Please accept my apology for the timing of this communication. I discovered the supplemental citations late yesterday afternoon when preparing for tomorrow's oral argument. I am separately extending the same apology to opposing counsel.

If you have any questions or need any additional information, please do not hesitate to contact me.

Yours sincerely,

Blake Hewitt

Blake A. Hewitt by embowl express permission
Bluestein Thompson Sullivan, LLC

/emb

Enclosures

cc: Karl H. Smith, Esquire (via e-mail and U.S. Mail)
Jonathan M. Robinson, Esquire (via e-mail and U.S. Mail)

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

RECEIVED

FEB 08 2017

SC Court of Appeals

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.

RECORD ON APPEAL

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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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON)

CIVIL ACTION NO. 2014-CP-16-0792

State Farm Mutual Automobile Insurance)
Company,)

Plaintiff,)

v.)

**ORDER GRANTING
DECLARATORY JUDGMENT IN
FAVOR OF PLAINTIFF**
(Denial of Coverage)

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.)

Automobile insurer filed declaratory judgment action to determine whether policy of automobile insurance issued to victim's parents and grandmother provided motor vehicle coverage for claims relating to the death of minor S.G. who was left in her father's unattended parked vehicle for more than seven hours. The Plaintiff seeks a declaratory judgment that the insurance policies which are delineated herein below do not provide coverage for the claims relating to the death of S.G. The Defendants have counterclaimed for declaratory judgment seeking to extend coverage for the death of S.G.

The parties further seek a Declaratory Judgment as to which household the minor was considered a resident relative as contemplated by Plaintiff's policy. The parties stipulated to the facts of loss and submitted to the court a Stipulation of Facts and State Farm Policy 9840a, which were entered into evidence. A factual dispute exists as to whether the minor was a resident relative of the father, the mother, or both. While the Plaintiff and Defendant Gray contend that the minor was a resident of the mother, Defendants Goyeneche contend the minor

qualifies as a resident relative of both the mother and father. Depositions of the Defendants were taken on the issue of the minor's residency. The deposition testimony of David R. Gray, III, Amanda Goyeneche, and Beverly Goyeneche was admitted into evidence without objection. Counsel for Plaintiff and for Defendants Goyeneche presented briefs and oral arguments. Counsel for Defendant Gray did not participate in oral arguments or submit briefs.

For the reasons set forth below, the court grants Declaratory Judgment in favor of Plaintiff and finds the death of the minor did not arise out of the ownership, maintenance or use of a vehicle and therefore, the claims arising therefrom are excluded from coverage.

FINDINGS OF FACTS

The court adopts the parties stipulated facts of loss which are as follows:

1. Plaintiff is an insurance company organized and existing under the laws of one of the states of the United States of America and is authorized to and does conduct business in the State of South Carolina.

2. Defendant Beverly Goyeneche is the mother of Amanda Goyeneche and grandmother of S.G. and is a citizen and resident of Darlington County, South Carolina.

3. Defendants David R. Gray, III and Amanda Goyeneche individually and as Parents and Natural Guardians of S.G. are citizens and residents of Darlington County, South Carolina. Amanda Goyeneche is the proper name of the Defendant "Amanda Goyeneche-Gray" and is a property party to this action and consents to the jurisdiction and venue of this court.

4. The events described herein below which give rise to this Complaint occurred on May 8, 2014 at Carolina Printing Sports and Trophy located at 618 S. Fifth Street, Hartsville,

Darlington County, South Carolina.

5. This action is being brought pursuant to South Carolina Code Ann. § 15-53-10, *et seq.* and Rule 57 of the South Carolina Rules of Civil Procedure.

6. This court has jurisdiction over the parties hereto and the subject matter hereof and that venue is proper in Darlington County, South Carolina.

7. On or about February 28, 2014, Plaintiff issued a policy of insurance, bearing Policy Number 4891-309-40, to Defendant David R. Gray, III insuring a 2011 Ford F150 pickup. Said policy was effective from February 28, 2014 to August 28, 2014 and provided Liability and Underinsured coverage of \$25,000 each person; \$50,000 each accident; and \$25,000 property damage.

8. On or about October 30, 1998, Plaintiff also issued to a policy of insurance bearing Policy Number C483241E to Defendant Amanda Goyeneche, insuring a 2013 Wrangler. Said policy was effective from April 30, 2014 to October 30, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

9. On or about September 27, 2004, Plaintiff also issued to a policy of insurance bearing Policy Number 1003667A to Beverly Goyeneche insuring a 2004 Impala. Said policy was effective from March 27, 2014 to September 27, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

10. On or about June 3, 2008 Plaintiff also issued to a policy of insurance bearing Policy Number 1772085A to Beverly Goyeneche insuring a 2007 C1500. Said policy was

effective from December 3, 2013 to June 3, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

11. State Farm policies of insurance provide coverage to insured persons subject to the terms, definitions, exclusions, and other limitations of the policies.

12. Among the terms and conditions of the relevant State Farm policies denominated above, it provides that the automobile insurance policies issued by the Plaintiff 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. Relevant portions of the policies include but are not limited to the following:

THIS POLICY

3. We agree to provide insurance according to the terms of this policy:

b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:

(1) The named insured shown on the Declarations Page is the sole owner of *your car*.

DEFINITIONS

Owned By means:

1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

LIABILITY COVERAGE

Insured means:

1. *you* and *resident relatives* for:
 - a. the ownership, maintenance, or use of:
 - (1) *your car*;
 - b. the maintenance or use of:

- (1) a non-owned car; or
- (2) a temporary substitute car;

Insuring Agreement

1. We will pay:

- a. damages an *insured* becomes legally liable to pay because of:

(1) *bodily injury* to others; and

(2) damage to property

caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;

UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "W" is shown under "SYMBOLS" on the Declarations page.

Additional Definitions

***Insured* means:**

1. *you*;
2. *resident relatives*;
3. any other *person while occupying* or using:
 - a. *your car*;with the expressed or implied consent of *you*; and
4. any *person* to the extent he or she may recover damages under a state wrongful death statute because of death of an *insured* under 1., 2., or 3. above

Underinsured Motor Vehicle means a *motor vehicle* the ownership, maintenance, and use of which is either;

1. *insured* or bonded for bodily injury and property damage liability at the time of the accident; or
2. the *insured's* damages exceed any damages cap or limitation imposed by statute.

Insuring Agreement

We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to recover from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* and *property damage* must be caused by an accident that involved operation, maintenance, or use of an *underinsured motor vehicle*.

13. Defendant Amanda Goyeneche has presented a claim damages in which she alleges that her daughter S.G. died in an unattended parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by David R. Gray, III.

14. Minor S.G. died in an unattended, parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by Defendant David R. Gray, III.

15. Defendant 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.

16. The minor S.G. was left unattended in the back seat of the above described vehicle while it was parked 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.

17. The minor S.G. was left unattended in the back seat of the above described vehicle while it was parked and with the ignition off from approximately 1:15 p.m. to approximately 2:15 p.m. on the day of loss.

18. The minor S.G. was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia.

19. Defendant Amanda Goyeneche has presented a claim for bodily injury under the liability coverage and underinsured coverage of the insurance policies referenced hereinabove arising from the death of S.G. on May 8, 2014.

20. The minor S.G. was found unresponsive in Defendant David

R. Gray, III's vehicle while it was turned off and unoccupied by any other persons.

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.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. An action to determine coverage under an insurance policy is an action at law. Auto-Owners Ins. Co. v. Horne, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003) see also Smith v. Auto-Owners Ins. Co., 377 S.C. 512, 660 S.E.2d 271 (Ct. App. 2008).

LAW AND ANALYSIS

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 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).

In support of extending coverage in the present case, Defendants cite several cases from foreign jurisdictions which involve similar facts. As noted by the Defendants, cases cited from

foreign jurisdictions have no precedential value but may be considered to the extent not in conflict with South Carolina law. However, the cases cited by Defendants are not consistent with South Carolina law. The analysis and conclusions in these cases do not include the application of the three part test adopted in Aytes and are, therefore, not determinative of the outcome of this case.

Causal Connection

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).

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 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.

332 S.C. at 32-35, 503 S.E.2d at 745-46.

In the present case, Defendants 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. Plaintiff, on the other hand, contends that the minor, S.G. died from hyperthermia, which was a result of exposure to extreme temperatures produced by atmospheric conditions because she was left unattended in a vehicle. Although, the vehicle was the site of her untimely death, no evidence has been presented that the death was caused by anything but hyperthermia.

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.

Act of Independent Significance

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.").

Defendants argue that Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) provides a basis for this court to conclude that Defendant Gray's conduct was not an independent act of significance which broke the causal link. Defendants' reliance on Wausau is misplaced. Wausau involved a shooting that occurred during a *vehicular chase*. Defendants contend that if the purposeful act in Wausau did not break the causal link, then Defendant Gray's negligent act could not break the causal link. "In analyzing whether an injury arose out of the ownership, maintenance, or use of a vehicle, 'no distinction is made as to

whether the injury resulted from a negligent, reckless, or intentional act.” Peagler v USAA Ins. Co. 368 S.C. at 160, 628 S.E.2d at 479 (2006) citing Home Ins. Co. v. Towe, 314 S.C. 105, 107, 441 S.E.2d 825, 827 (1994); Wright v. North Area Taxi, Inc., 337 S.C. 419, 424, 523 S.E.2d 472, 474 (Ct.App.1999). 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 too 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.

Transportation Limitation

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. See Canal Ins. Co. v. Insurance Co. of North America, 315 S.C. 1, 431 S.E.2d 577 (1993) (“We now construe § 38-77-140 and define “use of a motor vehicle” as limited to transportation uses.”). 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. In requiring that the use be limited to transportation uses, the court adopted the definition used in Continental Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn.1987), a case

upon which the 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). "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 4-5, 431 S.E.2d at 579-580 (1993).

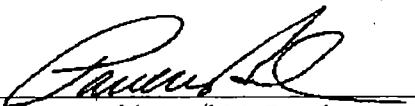
Since 1993 our courts have required that a vehicle be used for transportation purposes in order to fall within the "use and operation" definition found in statute and insurance policies. Our courts have since held a parked vehicle, even when occupied, does not meet the third requirement of Aytes if the vehicle is not being used for transportation at the time of injury. In Doe v. South Carolina State Budget and Control Bd., et al, 337 S.C. 294, 523 S.E.2d 457 (1999) 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.

It is stipulated that Defendant Gray turned off the ignition, exited the vehicle, and left the minor in the unattended vehicle for seven hours and fifteen minutes. It is further stipulated that minor died in the unattended parked vehicle from complications relating to hyperthermia. At the time of the minor'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.

CONCLUSION

The preponderance of evidence establishes that the minor was a resident relative of only the mother's household. Furthermore, 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. Therefore, the Plaintiff has no duty to defend or indemnify any party relating to the death of the minor S.G.

AND IT IS SO ORDERED.


The Honorable Paul M. Burch
Judge of the Fourth Judicial Circuit

June 1 2015
Chesterfield, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON)

CIVIL ACTION NO. 2014-CP-16-0792

State Farm Mutual Automobile Insurance)
Company,)

Plaintiff,)

v.)

**ORDER DENYING
DEFENDANTS' MOTION TO
ALTER OR AMEND JUDGMENT**

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.)

This matter comes before the Court upon a Motion filed by Defendants Goyeneche on June 15, 2015 to Alter or Amend the Order Granting Declaratory Judgment to the Plaintiff denying coverage filed June 1, 2015. A hearing was held on December 15, 2015 on Defendants' Motion. Appearing on behalf of Plaintiff State Farm was Jonathan M. Robinson, Esquire. Appearing on behalf of Defendants Goyeneche were John Nichols, Esquire and Karl Smith, Esquire. No one appeared on behalf of Defendant Gray. For the reasons stated herein below, the Court denies Defendants' Motion to Alter or Amend.

Defendant's Motion to Alter or Amend requests the court "...alter or amend its Order of June 1, 2015 to find in favor of coverage for the death of the infant". The Defendants cite the following grounds in support of the Motion to Alter or Amend:

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,

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CLERK OF COURT
JANET W. SCOTT
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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 it's 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.

The grounds stated in Number 1 above are simply a restatement of the court's findings which the Court affirms for the reasons stated in the Order Granting Declaratory Relief in Favor of Plaintiff.

The grounds stated in Number 2 above allege the Court based its ruling on State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998). Aytes sets out the test adopted by the South Carolina Supreme Court for determining whether a claim arises out of the ownership, maintenance or use of a vehicle. Therefore, the Court's reliance on Aytes does not constitute an error of law. Defendant also alleges the Court ignored the case law presented by Defendants and that the Court failed to fully explain why said cases and arguments are different from the facts set forth in the present case. However, the contrary is present in the text of the Order. On pages 7-8, the Court specifically addresses the case law cited by Defendants, explaining that while cases from foreign jurisdictions may be considered, they have no precedential value (as admitted in Defendants Memorandum of Law, p.5). The Court did not ignore Defendant's cited foreign cases and arguments; it simply ruled that they were not consistent with South Carolina law inasmuch as they did not include the application of the three part test found in State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998).

AMB

In the final grounds listed for which relief is requested, Defendants assert "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". When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided. Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 520-21, 769 S.E.2d 453, 460-61 (Ct. App. 2015) (internal citations omitted). As acknowledged by the parties, the facts of loss were stipulated and the parties agreed to submit the case on briefs, Stipulated Facts, the insurance policy, and the deposition testimony of the parties. No evidence was presented at the motion hearing to indicate otherwise. The issue before the Court is whether policy of automobile insurance issued to victim's parents and grandmother provided motor vehicle coverage for claims relating to the death of minor S.G.

who was left in her father's unattended parked vehicle for more than seven hours. Applying the Aytes test, this claim does not arise out of the ownership, maintenance or use of a vehicle and, therefore, is excluded from coverage.

At the hearing, Defendants Goyeneche also argued that the Court erred in finding that the minor was resident on only the mother Amanda Goyeneche. This issue was not timely raised in Defendants' Motion to Alter or Amend Judgment. Hatfield v. Hatfield, 327 S.C. 360, 489 S.E.2d 212 (S.C.App. 1997) (Issue of whether stock husband inherited from his former wife before he remarried was transmuted into marital property was not preserved for review, where wife filed motion for reconsideration of family court order awarding stock to husband, but did

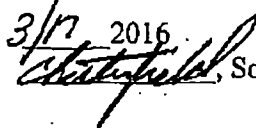
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not specifically raise transmutation issue). Furthermore, the evidence contained in the Stipulated Facts, deposition testimony, and policy information support this Court's finding that the minor, was a resident relative of the mother's household for the reasons stated in the Order denying coverage.

For the reasons stated herein and heretofore, Defendants' Motion to Alter or Amend is DENIED.

AND IT IS SO ORDERED.


The Honorable Paul M. Burch
Judge of the Fourth Judicial Circuit

3/17 2016
 South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014-CP-16-

14CP160792

**COMPLAINT
Declaratory Judgment**

Plaintiff State Farm Mutual Automobile Insurance Company (hereinafter referred to as
"Plaintiff"), complaining of the Defendants herein, would respectfully show unto the Court as
follows:

1. Plaintiff is an insurance company organized and existing under the laws of one
of the states of the United States of America and is authorized to and does conduct business in
the State of South Carolina.

2. Plaintiff is informed and believes that Defendants Beverly Goyeneche, David R.
Gray, III and Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray, hereinafter referred to as
Amanda Goyeneche), individually and as Parent and Natural Guardian of
S.G.,
are citizens and residents of Darlington County, South Carolina.

3. Plaintiff is informed and believes that the events described hereinbelow which
give rise to this Complaint occurred on May 8, 2014 at Carolina Printing Sports and Trophy
located at 618 S. Fifth Street, Hartsville, Darlington County, South Carolina.

4. This action is being brought pursuant to South Carolina Code Ann. § 15-53-10,
et seq. and Rule 57 of the South Carolina Rules of Civil Procedure.

5. Plaintiff is informed and believes that this Court has jurisdiction over the parties

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Scott B. Suggs
**CLERK OF COURT/RMC
DARLINGTON COUNTY, SC**

hereto and the subject matter hereof and that venue is proper in Darlington County, South Carolina.

FACTS

6. Plaintiff reiterates paragraphs 1-5 as fully and effectively as if set forth verbatim herein.

7. On or about February 28, 2014, Plaintiff issued a policy of insurance, bearing Policy Number 4891-309-40, to Defendant David R. Gray, III insuring a 2011 Ford F150 pickup. Said policy was effective from February 28, 2014 to August 28, 2014 and provided coverage of \$25,000 each person; \$50,000 each accident; and \$25,000 property damage.

8. On or about October 30, 1998, Plaintiff also issued to a policy of insurance bearing Policy Number C483241E to Defendant Amanda Goyeneche, insuring a 2013 Wrangler. Said policy was effective from April 30, 2014 to October 30, 2014 and provided coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

9. On or about September 27, 2004, Plaintiff also issued to a policy of insurance bearing Policy Number 1003667A to Beverly Goyeneche, who allegedly resides in the same household as Defendant Amanda Goyeneche, individually and as Parent and Natural Guardian of S.G. , insuring a 2004 Impala. Said policy was effective from March 27, 2014 to September 27, 2014 and provided coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

10. On or about June 3, 2008 Plaintiff also issued to a policy of insurance bearing Policy Number 1772085A to Beverly Goyeneche, who allegedly resides in the same household as Defendant Amanda Goyeneche, individually and as Parent and Natural Guardian of S.G.

, insuring a 2007 C1500. Said policy was effective from December 3, 2013 to

June 3, 2014 and provided coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

11. That State Farm policies of insurance provide coverage to insured persons subject to the terms, definitions, exclusions, and other limitations of the policies.

12. Among the terms and conditions of the relevant State Farm policies denominated above, it provides that the automobile insurance policies issued by the Plaintiff 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. Relevant portions of the policies include but are not limited to the following:

THIS POLICY

3. We agree to provide insurance according to the terms of this policy:
- b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:
 - (1) The named insured shown on the Declarations Page is the sole owner of *your car*.

DEFINITIONS

Owned By means:

- 1. owned by;
- 2. registered to; or
- 3. leased, if the lease is written for a period of 31 or more consecutive days, to.

LIABILITY COVERAGE

Insured means:

- 1. *you* and *resident relatives* for:
 - a. the ownership, maintenance, or use of:
 - (1) *your car*;
 - b. the maintenance or use of:
 - (1) *a non-owned car*; or
 - (2) *a temporary substitute car*;

Insuring Agreement

1. We will pay:

a. damages an *insured* becomes legally liable to pay because of:

(1) *bodily injury* to others; and

(2) damage to property

caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;

UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "W" is shown under "SYMBOLS" on the Declarations page.

Additional Definitions

Insured means:

1. *you*;
2. *resident relatives*;
3. any other *person while occupying* or using:
 - a. *your car*;with the expressed or implied consent of *you*; and
4. any *person* to the extent he or she may recover damages under a state wrongful death statute because of death of an *insured* under 1., 2., or 3. above

Underinsured Motor Vehicle means a *motor vehicle* the ownership, maintenance, and use of which is either;

1. insured or bonded for bodily injury and property damage liability at the time of the accident; or
2. the *insured's* damages exceed any damages cap or limitation imposed by statute.

Insuring Agreement.

We will pay damages for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an underinsured motor vehicle. The bodily injury must be sustained by an insured. The bodily injury and property damage must be caused by an accident that involved operation, maintenance, or use of an underinsured motor vehicle.

13. Upon information and belief, Defendant Amanda Goyeneche has presented a claim damages in which she alleges that her daughter S.G. died in an

unattended parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by David R. Gray, III.

14. Upon information and belief named insured David Gray, III was to deliver his 13-month-old daughter S.G. to day care the morning of the loss. The minor S.G. was, however, allegedly left unattended in the back seat of the above described vehicle from approximately 9:30 a.m. to approximately 5:15 p.m. on the day of loss.

15. Upon information and belief, the minor S.G. was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia.

16. Defendant Amanda Goyeneche has presented a claim for bodily injury under the liability coverage and underinsured coverage of the insurance policies referenced hereinabove arising from the death of S.G. on May 8, 2014.

**FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)**

17. Plaintiff reiterates paragraphs 1-16 as fully and effectively as if set forth verbatim herein.

18. Plaintiff seeks a determination from the Court that there is no coverage under Plaintiff's policy for any injuries, damages, or claims for the reasons stated herein.

19. The events described herein which led to the untimely death of S.G. do not arise out of the operation, ownership, maintenance, or use of an insured vehicle as these terms have been construed under South Carolina law.

20. This court should inquire into the matter, which is a proper subject for declaratory relief, and issue its order declaring Plaintiff's policy does not provide liability or first party insurance coverage for any of the claims against the Plaintiff's insured(s) as they arise from the aforementioned loss and that the Plaintiff, therefore, owes no duty to defend any

parties or indemnify any parties with regard to the aforementioned loss which took place on or about May 8, 2014 in Darlington County, South Carolina.

WHEREFORE, Plaintiff prays the Court inquire into this matter and issue its judgment:

- 1) declaring that Policy Numbers 4891-309-40, C483241E, 1003667A, and 1772085A issued by Plaintiff do not provide insurance under the terms and provisions of the policies for the any claims that may be alleged relating to the death of S.G.;
- 2) that the Plaintiff, therefore, owes no duty to defend or indemnify any party who makes a claim for damages as a result of the aforementioned loss; and
- 3) for such other and further relief as the court may deem just and proper under the circumstances.

DuBOSE-ROBINSON, PC

BY: _____

Jonathan M. Robinson, Esquire

J. Kennedy DuBose, Jr., Esquire

John K. DuBose, III, Esquire

H. Thomas Morgan, Jr.

ATTORNEYS FOR PLAINTIFF

P.O. Drawer 39 (935 Broad St.)

Camden, SC 29021-0039

(803) 432-1992 – telephone

(803) 432-0784 – facsimile

Columbia, South Carolina

September 17, 2014

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2014-CP-160792

ANSWER

2014 OCT 30 AM 11:00
FILED
SCOTT B. SUGGS
CLERK OF COURT/R.D.
DARLINGTON COUNTY, S.C.

Amanda Goyenche and Beverly Goyeneche herein answer the Complaint of the Plaintiff
in the name of the Defendants as follows:

FOR A FIRST DEFENSE

1. Except herein specifically admitted, each and every allegation in the Complaint is expressly denied.
2. The Defendants admit the allegations contained in paragraphs One (1) and Two (2) of the Complaint.
3. The Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph Three (3) of the Complaint and therefore deny the same.
4. The Defendants admit the allegations contained in paragraphs Four (4) and Five (5) of the Complaint.

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Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, SC.

5. The Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph Seven (7) of the Complaint and therefore deny the same.

6. The Defendants admit the allegations contained in paragraph Eight (8), Nine (9), and Ten (10) of the Complaint.

7. The Defendants deny the allegations contained in paragraph Eleven (11) and Twelve (12) of the Complaint and require strict proof thereof.

8. The Defendants admit the allegations contained in paragraph Thirteen (13) of the Complaint.

9. The Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph Fourteen (14) of the Complaint and therefore deny the same.

10. The Defendants admit the allegations contained in paragraph Fifteen (15) and Sixteen (16) of the Complaint.

FOR A SECOND DEFENSE AND COUNTER-CLAIM

11. Further answering the Plaintiff's Complaint, and as a Second Defense thereto, the Defendants reiterate the allegations contained in the First Defense as if repeated herein.

12. The Plaintiff seeks a determination from the Court as to the issue of policy coverage on the Defendant, David R. Gray III's, vehicle policy which was the site of the decedent minor, S.G. , demise and as to the issue of policy coverage on other first party policies, issued by the Plaintiff, in which the decedent minor was an insured.

13. The Defendants allege that on May 8, 2014 Co-defendant David R. Gray, III's was transporting the minor infant, S.G. to her daycare facility.

However, Co-defendant David R. Gray, III negligently forgot to remove S.G.

from the vehicle, in which she remained for an entire work day during which she passed away. Thus, S.G.'s death did arise out of the operation, ownership, maintenance, and use of an insured vehicle as these terms have been construed under South Carolina Law.

14. The Defendants join the Plaintiff's request for the Court to inquire into this matter, which is a proper subject for declaratory relief.

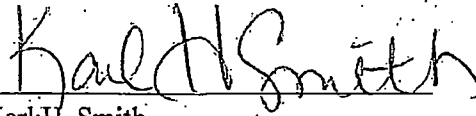
15. The Defendants, however, request the Court to issue its Order declaring that the Defendants policies, issued by the Plaintiff, do provide insurance coverage for the claims made in this matter and the Plaintiff should be held liable for the loss of life of the minor child.

WHEREFORE, having fully answered, Defendants pray that the Court inquire into this matter and issue its judgment:

1. Declaring that S.G.'s death did arise out of the operation, ownership, maintenance, and use of an insured vehicle;
2. That the Plaintiff owes a duty to defend and indemnify against any party who makes a claim for damages as a result of the aforementioned loss; and
3. For such other and further relief as the Court may deem just and proper under the circumstances.

(Signature Page to Follow)

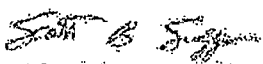
Respectfully Submitted By:
SMITH WATTS & ASSOCIATES, LLC



Karl H. Smith
508 South Fourth Street
Hartsville, South Carolina 29550
(843) 332-4700
(843) 332-0048 (Facsimile)
Attorney for the Defendant

October 29, 2014
Hartsville, South Carolina

TRUE CERTIFIED COPY,


CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON)

CIVIL ACTION NO. 2014-CP-16-0792

State Farm Mutual Automobile Insurance)
Company,)

Plaintiff,)

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.)

**REPLY OF STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY
TO ANSWER OF DEFENDANTS
AMANDA GOYENECHÉ AND
BEVERLY GOYENECHÉ**

Plaintiff State Farm Mutual Automobile Insurance Company (hereinafter referred to as "Plaintiff"), replies to the Answer of Defendants Amanda Goyeneche and Beverly Goyeneche as follows:

1. Allegations contained in Paragraph 1 through 12 in the Answer do not require a response from the Plaintiff. Plaintiff reasserts and reaffirms each and every allegation of its complaint and denies the allegations contained in Paragraphs 1 through 12 to the extent the allegations state or imply that Plaintiff acted wrongfully or is liable to Defendants and strict proof thereof is demanded.

2. As to Paragraph 13 of the Answer, it is admitted upon information and belief that Defendants Amanda Goyeneche and Beverly Goyeneche allege that on May 8, 2014, Co-Defendant David R. Gray, III was transporting the minor infant, S.G. to her daycare facility and Defendant David R. Gray, III negligently forgot to remove S.G.

from the vehicle, in which she remained for an entire work day during which she passed away. The remainder of the allegations of Paragraph 13 of the Answer (also styled as Counter-Claim) is denied and demands strict proof thereof.

3. Plaintiff admits the allegations contained in Paragraph 14 of the Answer (also styled as Counter-Claim) upon information and belief.

4. Plaintiff denies the allegations contained in Paragraph 15 of the Answer (also style as Counter-Claim) demands strict proof thereof.

5. Plaintiff denies Defendants Amanda Goyeneche and Beverly Goyeneche prayer for relief against Plaintiff.

FOR A FIRST AFFIRMATIVE DEFENSE

6. All admissions, denials, and allegations set forth above are incorporated herein as if repeated verbatim.

7. Defendants Amanda Goyeneche and Beverly Goyeneche's Counter-Claim lacks a Summons as required by Rule 4(d) of the South Carolina Rules of Civil Procedure and therefore should be dismissed pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (4) insufficiency of process; (5) insufficiency of service of process; and (6) failure to state facts sufficient to constitute a cause of action.

WHEREFORE, the Plaintiff prays that the above-captioned action be dismissed.

DuBOSE-ROBINSON, PC

BY: _____

Jonathan M. Robinson, Esquire

J. Kennedy DuBose, Jr., Esquire

John K. DuBose, III, Esquire

H. Thomas Morgan, Jr.

ATTORNEYS FOR PLAINTIFF

P.O. Drawer 39 (935 Broad St.)

Camden, SC 29021-0039

(803) 432-1992 – telephone

(803) 432-0784 – facsimile

Columbia, South Carolina

November 26, 2014

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014-CP-16-0792

**PLAINTIFF'S REQUEST
FOR ADMISSIONS TO
DEFENDANT DAVID R. GRAY, III**

TO: ATTORNEY PAUL V. CANNARELLA, ESQUIRE, ATTORNEY FOR
DEFENDANT

Plaintiff State Farm Mutual Automobile Insurance Company (hereinafter referred to as
"Plaintiff"), herein requests; pursuant to the South Carolina Rules of Civil Procedure 36, that
the Defendant David R. Gray, III admit the truth of the matters set forth herein:

1. Admit or deny that the Defendant David R. Gray, III was the Parent and the
Natural Guardian of S.G. and is a citizen and resident of Darlington
County, South Carolina.

2. Admit or deny that the events described in the Complaint filed on September
24, 2014, occurred on May 8, 2014 at Carolina Printing Sports and Trophy located at 618 S.
Fifth Street, Hartsville, Darlington County, South Carolina.

3. Admit or deny that on or about February 28, 2014, Plaintiff issued a policy of
insurance, bearing Policy Number 4891-309-40, to Defendant David R. Gray, III insuring a
2011 Ford F150 pickup. Said policy was effective from February 28, 2014 to August 28,

2014 and provided coverage of \$25,000 each person; \$50,000 each accident; and \$25,000 property damage.

4. Admit or deny that minor S.G. died in an unattended parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by Defendant David R. Gray, III.

5. Admit or deny insured/Defendant 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.

6. Admit or deny that the minor S.G. was left unattended in the back seat of the above described vehicle while it was parked 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.

7. Admit or deny that the minor S.G. was left unattended in the back seat of the above described vehicle while it was parked and with the ignition off from approximately 1:15 p.m. to approximately 2:15 p.m. on the day of loss.

8. Admit or deny that the minor S.G. was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia.

9. Admit or deny that Defendant Amanda Goyeneche has presented a claim for bodily injury under the liability coverage and underinsured coverage of the insurance policies referenced hereinabove arising from the death of minor S.G. on May 8, 2014.

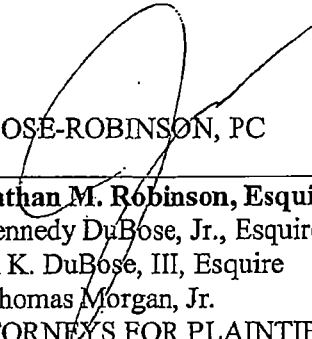
10. Admit or deny that the events described herein which led to the untimely death of minor S.G. do not arise out of the operation, ownership, maintenance,

or use of an insured vehicle as these terms have been construed under South Carolina law.

11. Admit or deny that the Plaintiff's claims owes no duty to defend any parties or indemnify any parties with regard to the aforementioned loss which took place on or about May 8, 2014 in Darlington County, South Carolina.

10. Admit or deny that the minor S.G. was found unresponsive in Defendant David R. Gray, III's vehicle while it was turned off and unoccupied by any other persons.

DuBOSE-ROBINSON, PC

BY: 

Jonathan M. Robinson, Esquire

J. Kennedy DuBose, Jr., Esquire

John K. DuBose, III, Esquire

H. Thomas Morgan, Jr.

ATTORNEYS FOR PLAINTIFF

P.O. Drawer 39 (935 Broad St.)

Camden, SC 29021-0039

(803) 432-1992 – telephone

(803) 432-0784 – facsimile

Columbia, South Carolina

February 6, 2015

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

) CIVIL ACTION NO.:2014-CP-16-0792

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

**DEFENDANT'S REPLY TO
PLAINTIFF'S REQUEST FOR
ADMISSIONS**

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

Defendants.

TO: ATTORNEY JONATHAN M. ROBINSON, J. KENNEDY DUBOSE, III, AND H.
THOMAS MORGAN, JR., ATTORNEYS FOR PLAINTIFF

Gray answers the Plaintiff's requests by stating that he:

1. Defendant admits Plaintiff's requests 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.
2. Defendant admits Plaintiff's request in paragraphs 2-9 and paragraphs number 12 (last number reads 10).
3. Defendant denies requests in paragraph 10 (the first one) and 11 because these requests call for a legal conclusion.

Date: March 6, 2015

Respectfully,



Paul V. Cannarella
Attorney For Defendant
Post Office Box 38
Hartsville, SC 29551
(843)332-0106 office

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

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.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014-CP-16-0792

**BRIEF IN SUPPORT OF PLAINTIFF'S
COMPLAINT FOR DECLARATORY
JUDGMENT AND PRAYER FOR RELIEF**

NATURE OF THE CASE

This action involves the applicability of automobile insurance coverage for claims relating to the death of minor S.G. who met her untimely demise from complications related to hyperthermia (hereinafter "loss"). The Plaintiff, an insurance company authorized to do business in the State of South Carolina seeks a declaratory judgment that the insurance policies which are delineated herein below do not provide coverage for the claims relating to the death of S.G. The Defendants have Counterclaimed for declaratory judgment seeking to extend coverage for the claims relating to the death of S.G.

y. The parties have stipulated to the (1) facts of loss and (2) admissibility of State Farm Policy 9840a. The deposition testimony of David R. Gray, III, Amanda Goyeneche, and Beverly Goyeneche is being offered into evidence without objection.

For the reasons set forth below, Plaintiff seeks to exclude coverage for the claims of the Defendants.

FILED
2015 APR - 7 PM 12:53
SCOTT B. JOHNS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

SUMMARY OF STIPULATED FACTS

Defendants Beverly Goyeneche is the mother of Amanda Goyeneche and grandmother of

S.G. Amanda Goyeneche is the proper name of the Defendant referenced as "Amanda Goyeneche-Gray". David R. Gray, III (hereinafter "David Gray") and Amanda Goyeneche are the parents of S.G.

On the morning of May 8, 2014, Defendant David R. Gray, III was to deliver his 13-month-old daughter, S.G., to daycare but failed to do so. The minor S.G.

was left unattended in the back seat of a 2011 Ford F150 pickup insured by Plaintiff and owned by Defendant David Gray while it was parked at Carolina Printing Sports and Trophy located at 618 S. Fifth Street, Hartsville, Darlington County, South Carolina, 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. Minor S.G. died in the unattended parked 2011 Ford F150 vehicle on May 8, 2014. The minor S.G.

was found unresponsive in Defendant David R. Gray, III's 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. from complications related to hyperthermia.

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

Plaintiff 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 Defendant 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 Beverly Goyeneche, insuring a 2004 Impala 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 Beverly Goyeneche, insuring a 2007 C1500 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 Plaintiff 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, has indicated in his responses to Plaintiff's Request to Admit and deposition testimony that the mother Amanda Goyeneche was the custodial parent. The mother, Amanda Goyeneche, contends that the minor was a resident relative (as defined by the policies referenced herein and applicable state law) of both the father's household and mother's household.

PROCEDURAL HISTORY

Plaintiff filed a Summons and Complaint on September 24, 2014. Defendants Amanda

Goyeneche and Beverly Goyeneche filed an Answer and Counterclaim for Declaratory Judgment on October 30, 2014. State Farm Mutual Automobile Insurance Company filed a Reply to the Answer and Counterclaim of Defendants Amanda Goyeneche and Beverly Goyeneche on December 1, 2014. On October 22, 2014 Defendant David R. Gray, III filed an Answer denying all allegations.

STATEMENT OF ISSUES

- I. The death of the minor did not arise out the ownership, maintenance or use of a motor vehicle and is therefore excluded from coverage under Plaintiff's policy.
- II. If coverage exists, the evidence establishes that the minor was as a resident relative of only the mother's household.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. An action to determine coverage under an insurance policy is an action at law. Auto-Owners Ins. Co. v. Horne, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003) see also Smith v. Auto-Owners Ins. Co., 377 S.C. 512, 660 S.E.2d 271 (Ct. App. 2008).

ISSUE I

The death of the minor did not arise out the ownership, maintenance or use of a motor vehicle and is therefore excluded from coverage under Plaintiff's policy?

LAW

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 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).

ANALYSIS

Applying the Aytes tests and the consistent reasoning of the cases which have followed, 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. The stipulated facts of this case establish that the minor S.G. was left in Defendant David Gray's vehicle for approximately seven 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. No evidence has been presented that the vehicle was an active accessory to the death. The stipulated facts establish that Defendant David Gray's actions in leaving the vehicle parked with the ignition off interrupted any causal connection between the vehicle and the minor's death. Furthermore, the vehicle was not being used for transportation at the time of the minor's death.

Our appellate courts have applied the Aytes test to a number of factual scenarios which provide parameters as to whether an injury arises out of "ownership, maintenance, or use" of a vehicle. The three part test established in Aytes comes from a case in which Aytes forcibly took the keys from a female and drove her to a remote area where he 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. In answering a certified question from the U.S. District Court, the Court

declined to extend coverage and determined that there was not a causal connection as the vehicle was not an active accessory to the injury. The Court concluded "The causal connection is established where it can be shown the vehicle was an "active accessory" to the assault. The causation required is something less than proximate cause and something more than the vehicle being the mere site of the injury. 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 shooting occurred." State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998), (internal citations omitted).

Unlike the facts in previous cases in which the vehicle *was* an active accessory to 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 Howser, thereby enabling him to carry out the 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.)) the Court concluded that the vehicle in Aytes was not an active accessory, nor was it being used for transportation at the time of the injury. The court further held that even if there was a causal link, it was broken when the assailant exited the vehicle. State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998).

The Supreme Court, again in response to a certified question, declined to extend coverage where it was determined that any injury did not arise out of the ownership, maintenance, or use

of the vehicle. Peagler v. USAA Insurance Company, 368 S.C. 153, 628 S.E.2d 475 (2006).

The question before the court was:

Did Decedent's fatal injury arise out of the "ownership, maintenance, or use" of a motor vehicle pursuant to S.C. Code Ann. § 38-77-140 (2002), such that the vehicle's insurance policy provides coverage for the accidental discharge of a shotgun which occurred during the unloading of firearms from a stationary, occupied vehicle which had been used for hunting purposes the previous day?

The Court determined that "The injury was foreseeably identifiable with the normal use of the pickup truck.... However, Plaintiff has not demonstrated the truck was an active accessory to the injury. The truck was not actively used or involved in causing the injury; it was merely the site of the injury. As stated in Aytes, "[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." Peagler 368 S.C. at 164, 628 S.E.2d at 481 (2006) *citing* Aytes, 332 S.C. at 33, 503 S.E.2d at 746.

The minor, S.G. died from hyperthermia. The hyperthermia was a result of exposure to extreme temperatures produced by atmospheric conditions because she was left unattended in a vehicle. Although, the vehicle was the site of her untimely death, no evidence has been presented that the death was caused by anything but hyperthermia.

Even if the court were to determine that a causal connection exists between the vehicle and the minor's death, the second element of the Aytes test requires that there be no independent act of significance which breaks the causal link. 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.

Leaving the minor in the vehicle was at the very least an act of negligence and one of independent significance breaking any arguable causal link between the vehicle and the death of the minor. Another break in any potential causal link occurred when the atmospheric conditions produced temperatures resulting in hyperthermia. Had the child been left in the vehicle during cooler months, the results may very well have been different. However, hyperthermia is a condition caused by exposure to heat. Heat, in this case, was another independent significant factor breaking any potential causal link between the vehicle and the hyperthermia induced death. Any causal connection was broken when (1) Defendant Gray left his 13 month old child unattended for seven hours and fifteen exposed to the elements and (2) those elements, the atmospheric conditions, produced hyperthermia. These two independent factors clearly create a break in any arguable causal link between the vehicle and minor's death.

Even if the court finds 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 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. 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 580 (1993).

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 since 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 Doe v. South Carolina State Budget and Control Bd., et al., 337 S.C. 294, 523 S.E.2d 457 (1999) 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.

It is stipulated that Defendant Gray turned off the ignition, exited the vehicle, and left the minor in the unattended vehicle for seven hours and fifteen minutes. It is further stipulated that minor died in the unattended parked vehicle from complications relating to hyperthermia. At the time of injury, in this case death, the vehicle was admittedly parked and was incapable of being used for transportation purposes for an extended period of time. The abandonment of the vehicle defeats the "use for transportation requirement" of the Aytes test thereby precluding coverage.

ISSUE II

If coverage exists, the evidence establishes that the minor was a resident relative of only the mother's household.

LAW

The South Carolina code defines "insured" to include both the insured person or 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).

ANALYSIS

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 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". (Deposition of David R. Gray, III p. 17, l. 18 - p. 18, l. 10). The father testified that the minor's first overnight with him did not occur until January 2014. (Deposition of David R. Gray, III p. 14, l. 13-22). He indicated that he and Amanda Goyeneche

tried to establish a schedule of joint custody but that it never worked out. (Deposition of David R. Gray, III p. 15, l. 2-8, p. 16, l. 4-18) Defendant Amanda Goyeneche claims that she and Defendant Gray established a visitation schedule in December 2013. (Deposition of Amanda Goyeneche p. 20, l. 9 – p. 22, l. 1). However, the Defendant Amanda Goyeneche admits she listed her address (1112 Salem Road, Harstville, SC) as the residence of the child for purposes of (1) social security card application, (2) health insurance, (3) the death certificate, and (3) day care application. (Deposition of Amanda Goyeneche p. 23, l. 11 – p. 25, l. 22). Defendant Amanda Goyeneche admitted that the father, David Gray, maintained a portable pack-n-play crib at his home for the minor but had nothing of a permanent nature. Defendant Amanda Goyeneche, however, maintained a permanent wooden crib at her home. (Deposition of Amanda Goyeneche p. 27, l. 3 – p. 28, l. 3). The mother, Defendant Amanda Goyeneche, admitted that she would send an overnight bag when the minor stayed overnight with the father. (Deposition of Amanda Goyeneche p. 26, l. 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. (Deposition of David R. Gray, III p. 16, l. 19 – p. 17, l. 17). The grandmother, Beverly Goyeneche, acknowledges in her deposition that Defendants Amanda Goyeneche and David Gray would be in the best position to provide the most accurate testimony regarding the living situation of the minor S.G.

(Deposition of Beverly Goyeneche p. 9, l. 24 – p.10, l. 3).

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. The totality of the evidence establishes that the minor lived with her mother at 1112 Salem Road, Harstville, SC and visited with her father. The father’s own admissions and the manner in which the minor was

documented as a resident of the mother's household leads to the conclusion that the minor resided with the mother and was therefore a resident relative of only the mother's household.

CONCLUSION

However, tragic the death of the minor S.G., her death was caused by the inattentiveness of her biological father and complications related to hyperthermia. Although she died in a vehicle, the operation and use of the vehicle did not cause her death. Furthermore, the vehicle was parked and left unattended, thereby rendering it incapable of use for transportation at the time of injury. Inasmuch as the claims of the Defendants/Counterclaimants do not rise out of the use and operation of the vehicle under the three part Aytes test, the Plaintiff respectfully requests this Court issue an Order declaring that Plaintiff has no duty to defend or indemnify any party as a result of the loss. Should the court find coverage exists under the policies herein and applicable state law, Plaintiff submits that the overwhelming evidence establishes that the minor was a resident relative of only the mother's household.

DuBOSE-ROBINSON, PC

BY: _____

Jonathan M. Robinson, Esquire

J. Kennedy DuBose, Jr., Esquire

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April 6, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

State Farm Mutual Automobile Insurance)
Company,)

Plaintiff,)

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.)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2014-CP-16-0792

MEMORANDUM OF LAW

SCOTT B.
CLERK OF C.
DARLINGTON
S.D.
F.Y.S.C.

2015 APR -7 4:12:44

FILED

The Defendants, Beverly Goyeneche and Amanda Goyeneche, by and through their undersigned counsel submit the following brief:

Question Presented

Under South Carolina law, does the leaving of an infant child in an unattended automobile for approximately eight hours on a hot and sunny day until the infant dies from complications of hyperthermia arise out of the ownership, maintenance, or use of an automobile so that liability and underinsured motorist insurance coverages apply to compensate for damages?

Additionally, should the infant child be considered a resident relative of both her mother and father's homes so that underinsured motorist coverages from both households may apply to compensate for the damages resulting from the infant child's unfortunate death?

Brief Answer

Yes, S.G.'s injuries arose from the ownership, maintenance, or use of an automobile so that liability and underinsured motorist coverages will apply. The vehicle was being used for transportation at the time of S.G.'s injuries because it was being used to transport her to daycare, and although the truck was no longer in motion, its purpose as to the infant child had not yet been fulfilled and was thus ongoing. A causal connection existed between S.G.'s injuries and the pickup truck since the truck was an active accessory to her death by causing the conditions that led her to develop hyperthermia. David Gray's negligence was not an act of independent significance that broke the causal link, because his conduct was integrally connected to the use of the vehicle. He did not merely leave S.G. unattended; he left her strapped into her car seat in a sweltering pickup truck. S.G.'s onset of hyperthermia was foreseeably

identifiable with the normal use of a vehicle because of the inherent heat that the cabin area of a vehicle can accumulate, and an infant's easy susceptibility to injury from extreme heat.

Additionally, S.G. should be considered a resident relative of both her mother and father's homes because the two exercised a shared custody arrangement. Whereby, both parents would generally get equal time with the child. S.G. had clothes, toys, food, toiletries, etc. at both parents' homes. S.G. shared a room at the residence of both her mother and father, both having a crib in such room for S.G. to sleep. Given the short period of S.G.'s life, her parents change in residences during this time, the parents shared custody, no formal custody order from any Family Court, this Court should rule that S.G. was a resident relative of both her mother and father for automobile insurance purposes.

Facts

S.G. was born on April 8, 2013. Her mother, Amanda Goyeneche, and her father, David R. Gray, III were never married and lived in different households. Amanda and David shared custody of S.G. whereby one parent would keep S.G. for four days throughout the week and the other parent would keep S.G. for the other three days throughout the week, alternating each week as to who got four days and who got three. There was no formal order of custody from any Court because the parents were able to share custody without any conflict. However, the mother lived with her parents and this was the principle address for documentation for the minor child.

S.G. spent the night with her father, David, on May 7, 2014 and on the morning of May 8, 2014 David was supposed to take S.G. to her daycare facility (Children's Corner Daycare School). Unfortunately, due to his negligence, David failed to deliver S.G. to her daycare facility that day. David instead drove straight to his job, parked his truck, turned off the ignition, got out of his truck, and went to work. David left S.G. unattended in his 2011 Ford F-150 pickup from approximately 9:30 a.m. to approximately 1:00 p.m. At this time he returned to his vehicle and went to lunch and stopped to retrieve clothing items from the mother. He then

returned to work and left the child again in the vehicle alone from approximately 2:30 p.m. to 5:15 p.m.

Amanda was going to pick S.G. up from the Children's Corner Daycare School at 5:00 p.m. When Amanda arrived there to pick up S.G., the daycare staff told Amanda that they had not seen S.G. that day. Amanda immediately called David to inquire as to S.G.'s location. When Amanda reached David and told him that the daycare had not seen S.G., David realized that S.G. must still be in his pickup truck. David rushed to his truck and removed S.G. from her car seat and the extremely hot vehicle. He took S.G. inside the building where he worked. Emergency services were called and S.G. was speedily taken to the emergency room at Carolina Pines medical Center in Hartsville, South Carolina. S.G. was pronounced dead at approximately 5:50 pm from complications of hyperthermia.

Discussion

This Court should find that a death resulting from hyperthermia of being left in a hot automobile is a loss that arises out of the ownership, maintenance, or use of a motor vehicle. South Carolina has mandatory insurance laws in which damages inflicted from the ownership, maintenance, or use of vehicle must be covered under each and every automobile policy issued for an insurable interest in the state of South Carolina. No automobile insurance policy may be issued in South Carolina unless it contains a provision protecting the person defined as an insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the motor vehicle. *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (S.C. App. 2008). Ergo, any particular policy provision is irrelevant at this point.

The prevalent statute under South Carolina's Code of Laws is SC Code Section 38-77-140. It states that:

"An automobile insurance policy may not be issued or delivered in this State to the owner of a motor vehicle or may not be issued or delivered by an insurer licensed in this State upon a motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the persons defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States"

If this loss is ruled to have arisen out of the ownership, maintenance, or use of a motor vehicle then the liability insurance coverage on the vehicle S.G. was left in will apply to compensate for damages, as will its underinsured coverage and every other underinsured policy in which S.G. is an Omnibus Clause Class 1 insured as a resident relative as described in SC Code 38-77-30(1) & (7).

There is an abundance of South Carolina case law analyzing the steps a court must take to see if a loss arises out of the ownership, maintenance, or use of a motor vehicle. There is a specific test used to analyze this specific issue. The Supreme Court of South Carolina adopted the test in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) from the one used by the Minnesota Supreme Court in *Western Insurance Co. v. Klug*, 415 N.W.2d 876 (Minn. 1987). The test was restated by the South Carolina Supreme Court in *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998).

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 is as follows:

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 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. The injury must be foreseeably identifiable with the normal use of the automobile.

Currently, there are no South Carolina cases directly on point for the issue at the case *sub judice*, but there is an abundance of cases that apply the test above. There are a few cases from courts around the country that analyze whether an injury arose from the use of an automobile and thus excluded from coverage from a commercial general liability (CGL) policy, in the context of leaving a child in a hot vehicle. These cases have no precedential value, but they should be considered for whatever persuasive force their reasoning may contain, provided it is not inconsistent with South Carolina Law.

In *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992), the plaintiff was driving in her vehicle when another driver intentionally bumped the back of her vehicle multiple times. Then the other driver drove beside the plaintiff and yelled at her; to roll down her window, slow down, and stop the car. The other driver then pointed a pistol at the plaintiff's passenger window, the plaintiff made a quick left turn in an attempt to avoid the other driver's gun. The other driver fired his gun and the bullet entered the plaintiff's vehicle. The bullet struck the plaintiff in the back, in three places. The Supreme Court of South Carolina applied the above-mentioned test and found that there was a causal connection between the plaintiff's injury and the other vehicle.¹ The Court reasoned that the unknown vehicle was an active accessory to the assault because the gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part. The Court further stated that no independent act occurred to break the causal link because the unknown driver's use of his vehicle and the shooting were "inextricably linked" as one continuing assault. *Wausau*, 309 S.C. 269, 422 S.E.2d 106 (1992).

¹ Note that in *Wausau*, the other driver that shot into the Plaintiff's vehicle was not found so the plaintiff sought compensation for her damages under her own uninsured motorist policy.

In *State Farm Fire & Cas. Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998), Dawson forbade Aytes from driving Dawson's car, but when an altercation ensued between the two, Aytes forcibly took Dawson's car and forced Dawson into the car. Aytes drove the car to an area and expressed the intent of killing Dawson. While standing outside of the car on the passenger side, Aytes fired a pistol towards Dawson striking her in the foot. The Supreme Court analyzed the facts under the three-prong test to determine if Aytes' damages arose out of the ownership, maintenance, or use of an uninsured vehicle. The Court stated that 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. Additionally, the Court reasoned that if there was a causal link when Dawson stepped outside of the vehicle, the causal link was broken by an act of independent significance. The only connection between Aytes' injuries and the car was that she was sitting in the car when she was shot. *Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998).

In *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (S.C. App. 2008) a planned robbery and shooting of a taxi driver by two fare-paying passengers did not constitute the requisite causal connection between the use of the vehicle and the damages inflicted. Thus, these actions did not trigger liability coverage under South Carolina's mandatory insurance law. The Court stated that no causal connection existed between the taxi driver's injuries and the vehicle, because the vehicle served merely as the situs of the shooting. Further stating that, the required causal connection does not exist when the only connection between an injury and the insured's vehicle's use is the fact that the injured person was an occupant of the vehicle when the shooting occurred. Although, the Court agreed with the argument that the injuries sustained to the taxi driver was reasonably foreseeable with the normal use of a taxi cab, they further analyzed that such danger was merely inherent in the occupation of a taxi driver and not in the

use of the motor vehicle as a motor vehicle. Additionally, the assault of the gunman broke any causal connection between the vehicle and the taxi driver's injury because it arose from an act of independent significance. *Wright*, 337 S.C. 419, 523 S.E.2d 472 (S.C. App. 2008).

In *Nationwide Property & Cas. Co. v. Lain*, 402 F.Supp.2d 644 (4th Cir. 2005), Lain and her boyfriend, Oliver, had a heated argument after they had been out drinking together. When the couple decided to go home, Lain locked the doors of the vehicle and began to drive away. Oliver punched out the driver's side window and told Lain to move over and let him drive. At some point while driving, Lain started to open her door and Oliver stopped the car. The couple got out of the car in the middle of the road and argued. Eventually, Lain got back in the car in the back seat and Oliver drove the car behind a church where he parked. Oliver got in the back seat with Lain and the couple continued to argue. Oliver put his hands over Lain's mouth and throat, thereby causing her death by strangulation. The Court decided that Lain's death did NOT arise out of the ownership, maintenance, and use of the vehicle in which Oliver strangled her. The Court concluded that a causal connection did not exist because the vehicle was merely the site of the injury, not an active accessory to the injury, and Lain's death was not foreseeably identifiable with the normal use of the vehicle. The Court also stated that even if a causal connection did exist, it was broken by an act of independent significance. The fatal injuries that Lain sustained resulted from Oliver's strangling her neck with his hands. The Court found it relevant that the same result would have occurred if Oliver strangled Lain in their home, in the bar, or even on the hood of or beside the car, the injuries Lain sustained would not have been any different. Additionally, the Court found that the vehicle was not being used for transportation at the time of the injury because Oliver parked the car, got in to the backseat, and strangled Lain to death.

The United States Court of Appeals for the 5th Circuit decided a case with very similar facts to our case. In *Lincoln General Ins. Co. v. Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006), a van owned and operated by Aisha's Learning Center (ALC) transported a two year old child from her home to the daycare center. Upon arriving at ALC, the driver did not unload the two-year-old child along with the other children. The child was trapped in the parked van for approximately seven hours. ALC was insured by a commercial general liability (CGL) insurance policy. The CGL policy sought to enforce an exclusion for injuries arising from the "use" of ALC's van. The specific policy provision excludes: "[b]odily injury . . . arising out of the ownership, maintenance, use or entrustment to others of any . . . auto . . . owned or operated by or rented or loaned to any insured." *Id.* at 859. In Texas, for liability to arise out of the use of a motor vehicle, a causal connection or relation must exist between the accident or injury and the use of the motor vehicle. Further stating, if the vehicle at issue is only the locational setting for an injury, the injury does not arise out of the use of the vehicle. *Id.* Also, an approved list of factors to determine whether an injury falls within the use coverage of an automobile policy are as follows: (1) the accident must have arisen out of the inherent nature of the automobile, as such, (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have been terminated, (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury. The Court concluded that 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 the children to ALC. Although the van was no longer in motion, its purpose as to the [two-year-old child] 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 actual transportation of the

[two-year-old child] to ALC terminated. Third, the vehicle caused, rather than merely contributed to, the conditions that produced the injury. [The two-year-old child] was injured because she was left in a hot, unventilated vehicle by the driver. The vehicle was not the 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 [two-year-old child], she would not have been injured." The Court further reasoned that, although the 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 the injury. Also stating, that the negligence of not removing a child from the van or having a system in place 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.

A California Court of Appeals Court also decided a case with very similar facts to our case. The issue raised in *Prince v. United Nat. Ins. Co.*, 47 Cal.Rptr.3d 727, 142 Cal.App.4th 233 (Cal. App. 2006) was whether an insurance policy's exclusion for injuries arising out of the use of an automobile precludes coverage for the deaths of two young children who were negligently left in a vehicle on a hot day by their foster mother. The exclusion was as follows: "This insurance does not apply to: . . . Bodily injury or property damage arising out of ownership, maintenance, use or entrustment to others of any aircraft, auto or watercraft owned or operated by or rented or loaned to any insured." *Id.* The Court reasoned that, "the relationship between the use of the automobile and the injury was sufficient to trigger the exclusion. [The children] died when they were left in an overheated SUV. Unlike rape or assault, which can happen anywhere, the type of rapid onset hyperthermia suffered by the children occurs almost

exclusively in a motor vehicle. The combination of a small confined glass and metal space and a warm sunny day creates a unique environment in which heat is trapped and hazardous temperatures develop within a startling brief period of time. There are no other commonplace localities where this can take place unconnected to the use of an automobile. Thus, the vehicle, far from being merely the situs of the injury, was itself the instrumentality of it." *Id.*

Additionally, the Court stated that no separate independent acts of negligence occurred, unrelated to the use of the automobile, to break the causal link between the SUV and the injuries. "The children's foster mother's conduct was integrally connected to the use of the vehicle. She did not merely leave the children unattended; she left them strapped into their car seats in a sweltering SUV." *Id.* In conclusion the Court stated that, "[The foster mother's] negligence in leaving the children in the hot SUV simply cannot be dissociated from the use of the vehicle. It was her abandonment that subjected them to the conditions causing their deaths. Had she left them on a park bench, in a grocery store, or on a neighbor's porch, they would not have expired from hyperthermia." *Id.*

The Alabama Supreme Court addressed a similar fact scenario in *St. Paul Mercury Ins. Co. v. Chilton-Shelby Mental Health Center*, 595 So.2d 1375 (Ala. 1992). In *St. Paul Mercury*, a Health Center had contracted with the Young Woman's Christian Association (YWCA) to transport children between their homes and the YWCA. An 18-month-old infant was transported to the YWCA in the Health Center's van, but was not removed from the van at the YWCA. The child was unknowingly transported back to the Health Center, where he remained in the parked van until his death. The issue in this case was if the Health Center's general liability policy covered the death of the child, or did an exclusion preclude recovery from injuries caused by the ownership or use of an automobile. The Alabama Supreme Court stated that the child died in the

van while it was being used for transportation services to the communities it served and that the child's death was due to the ownership or use of the van.

In the case *sub judice*, this Court should rule that liability and underinsured coverage exists with regard to S.G.'s death by hyperthermia caused by being left unattended in David R. Gray, III's 2011 Ford F-150 pickup truck on May 8, 2014. A causal connection did exist between the pickup truck and S.G.'s death by hyperthermia.

The pickup truck was obviously an "active accessory" to S.G.'s death because the vehicle itself was the producing cause of the onset of hyperthermia. It is well known that vehicles trap heat inside of them. Additionally, the death of S.G. by hyperthermia was the culmination of excessive heat inside the vehicle, in which the vehicle played an essential and integral part to cause. This is similar to that in *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992), where the Court stated that the unknown vehicle was an active accessory to the assault because the gunshot was the culmination of an ongoing assault, in which the vehicle played an essential and integral part.

Also, David Gray's pickup truck was not merely the location where S.G.'s injury occurred, but was actually the instrument that caused the conditions that ultimately resulted in S.G.'s death. This is similar to that in *Wausau Underwriters*, where the unknown vehicle was used to help the assailant pursue the victim and get into position to fire his weapon. Thus, not being merely the site of the victim's injury, but a contributing factor to her gunshot wounds. However, these facts are distinguishable from *Nationwide Property & Cas. Co. v. Lain*, where the vehicle was just the location in which the victim was strangled to death. Also, distinguishable from *Wright v. North Area Taxi, Inc.* where the taxi was just the place where the taxi driver was shot.

S.G. a's death was, also, definitely a result from injuries that are foreseeably identifiable with the normal use of a car. It is well known that vehicles trap heat inside of them. In *Lincoln General Ins. Co. v. Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006), the United States Court of Appeals for the 5th Circuit (who used a similar three prong test as the one South Carolina uses) stated that 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 [two-year-old child], she would not have been injured.

Additionally, no act of independent significance broke the causal connection between David Gray's pickup truck and S.G. 's death by hyperthermia. State Farm will argue that David Gray's negligence in leaving S.G. unattended in his pickup truck for such a long time is sufficient negligence to break the causal link between S.G. 's injuries and the vehicle. However, in *Wausau*, 309 S.C. 269, 422 S.E.2d 106 (1992) the South Carolina Supreme Court stated that no independent act occurred to break the causal link because the unknown driver's use of his vehicle and the shooting were "inextricably linked" as one continuing assault. If a purposeful act like that in *Wausau* did not break the causal link, then David Gray's negligence in forgetting to take S.G. out of the vehicle cannot break the causal link. This is distinguishable from *State Farm Fire & Cas. Co. v. Ayles* where the assailant got out of the vehicle to fire his gun at the victim. Also distinguishable from *Wright v. North Area Taxi, Inc.*, where the fatal injuries that the victim sustained were unrelated to any use of the vehicle. The Court of Appeals in South Carolina stated in *Wright* that the same injuries could have occurred when the vehicle was parked, or otherwise not moving, or when the victim or the gunmen were standing outside of the vehicle. Here, S.G. 's injuries were specific to those that could happen to an infant being

left unattended in a very hot car, for a long period of time. The California Court of Appeals correctly and succinctly stated that, "Unlike rape or assault, which can happen anywhere, the type of rapid onset hyperthermia suffered by the children occurs almost exclusively in a motor vehicle. The combination of a small confined glass and metal space and a warm sunny day creates a unique environment in which heat is trapped and hazardous temperatures develop within a startling brief period of time. There are no other commonplace localities where this can take place unconnected to the use of an automobile." Thus, David Gray's negligence cannot be completely dissociated with the use of the vehicle because it was his abandonment that subjected S.G. to the conditions of the hot vehicle that caused her death.

David Gray's vehicle was being used for transportation at the time of S.G.'s injuries that caused her death by hyperthermia. In *Nationwide Property & Cas. Co. v. Lain*, 402 F.Supp.2d 644 (4th Cir. 2005), the Court said that the vehicle was not being used for transportation when Oliver strangled Lain. Part of the Court's reasoning for this was because Oliver, the assailant, got out of the parked car to get into the back seat (where Lain was) to strangle her. I respectfully disagree with the Court's reasoning here. Although the vehicle was parked, it had not stopped being used by Lain for transportation because she had not yet exited the vehicle. Until Lain got out of the vehicle, it had not completely served its purpose of getting her to where she was going. In *Lincoln General Ins. Co. v. Aisha's Learning Center*, 468 F.3d 857 (5th Cir. 2006), the United States Court of Appeals for the 5th Circuit said that the child's injuries occurred while the van was being used for one of its inherent purposes: transportation of the children. Although the van was longer in motion, its purpose as to the two-year-old child had not yet been fulfilled and was thus ongoing. Distinguishing from *Nationwide Property & Cas. Co. v. Lain*, S.G. was an infant child and not capable of exiting the vehicle on her own, so the

act of the pickup truck being used for her transportation could not have practically ended until a capable person removed her from the truck. In *Lain*, the victim was physically capable from exiting the vehicle.

Resident Relative Issue:

"The analysis in cases of this type is generally fact-specific and no bright line test exists for determining under what instances a child is a resident relative. . . . *Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003). The totality of the circumstances must be analyzed when residency is being established for car insurance applicability purposes. In this case, Amanda Goyencche and David Gray were not married. There was no formal order of custody issued by any Family Court. S.G.'s parents exercised a shared custody situation in which both parents had equal access to the child. Near the end of S.G.'s unfortunately short life, her parents exercised a four day/three day schedule. Whereby, in one week one parent would keep S.G. for four consecutive days and nights and the other parent would keep her for three consecutive days and nights. Then the parents would switch the next week in regards to who got four days. S.G. had clothes, toys, food, toiletries, etc. at both parents' homes. S.G. had a crib at both parents' homes inside of each of their rooms, respectively. Given the short period of S.G.'s life, her parents change in residences during this time, the parents shared custody, and no formal custody order from any Family Court, this Court should rule that S.G. was a resident relative of both her mother and father for automobile insurance purposes.

Conclusion

S.G.'s death from complications of hyperthermia should be covered under David Gray's liability and underinsured insurance coverage issued by State Farm Insurance Co. and any other applicable car insurance policies because a causal connection

existed between those damages and the vehicle, no act of independent legal significance broke the causal connection, and the pickup truck was still being used as transportation. Additionally, given the facts surrounding residency, this Court should rule that S.G. was a resident relative of both Amanda Goyeneche, and David Gray.

Respectfully Submitted By:
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April 7th, 2015
Hartsville, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON)

CIVIL ACTION NO. 2014-CP-16-0792

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

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.

**REPLY BRIEF IN SUPPORT OF
PLAINTIFF'S COMPLAINT FOR
DECLARATORY JUDGMENT AND
PRAYER FOR RELIEF**

FILED
2015 APR 16 PM 2:15
SCOTT B. SUGGS
CLERK OF COURT/ROD
DARLINGTON COUNTY, S.C.

Defendants have been unable to identify any authority, which applying the three part test adopted by South Carolina, extends coverage for the death of the minor under the facts in evidence in this case.

Initially it should be noted that Defendant Gray has failed to present any evidence or present any argument that the minor's death arose out of the ownership, maintenance or use of the his vehicle or that the minor was a resident relative of his household as contemplated by his policy of auto insurance. Therefore, Plaintiff's Complaint and prayer for relief as to Defendant Gray should be granted. Additionally, Defendants Goyeneche, in their brief and oral argument, rely on facts not in evidence. Facts not admitted into evidence should not be considered. 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").

As to the underlying legal question of whether the minor's death arises from the ownership, maintenance, or use of the vehicle, none of the cases presented by Defendants extend

coverage when applying all three factors of the Aytes test. State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998). Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) is the only South Carolina case cited by Defendants 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.") The remaining South Carolina cases cited by Defendants declined to extend coverage.

The remaining cases cited by Defendants in support of extending coverage, come from foreign jurisdictions which apply substantively different analysis to the issue in the case *sub judice*. Defendants acknowledge in their brief that the 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, these cases are in conflict with South Carolina law. Defendants 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.

Lincoln General Ins. Co v. Aisha's Learning Center, 468 F.3d 857 (5th Cir. 2006) is offered by Defendant as a basis to replace our court's requirement of "being used for transportation" to a new "intended purpose fulfilled" standard. Applying Texas law, the 5th Circuit reasoned that because the 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 purpose hadn't been fulfilled and thus the transportation was ongoing. *Id.* 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. Texas' expanded definition of transportation is inconsistent with the outcome of coverage cases in South Carolina.¹ The Alabama case cited by Defendants also lacks the required transportation analysis required under *Aytes*. 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

¹ As noted by the 5th Circuit, the Texas standard also 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")

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*.

The California state court case cited by Defendants was likewise decided using a much broader standard of coverage which did not include a "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*.

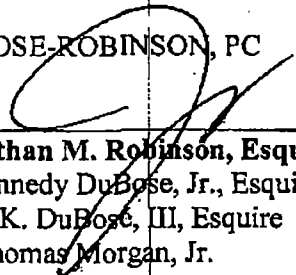
Lastly, the Defendants cite a S.C. District court case in which the court declined to extend coverage where an individual was strangled in the back seat of a vehicle. In *Nationwide Property & Cas. Co. v. Lain*, 402 F.Supp.2d 644 (D.S.C .2005), the court, applying the *Aytes*

test, determined that 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. Here Defendants Goyeneche simply contend the District Court was wrong. We submit that the District Court properly applied the Aytes test thereby reaching the same conclusion that should be rendered in the present case.

CONCLUSION

Inasmuch as the claims of the Defendants/Counterclaimants do not rise out of the use and operation of the vehicle under the three part Aytes test, the Plaintiff respectfully requests this Court issue an Order declaring that Plaintiff has no duty to defend or indemnify any party as a result of the loss. Should the court find coverage exists under the policies herein and applicable state law, Plaintiff submits that the evidence establishes that the minor was a resident relative of only the mother's household.

DuBOSE-ROBINSON, PC

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April 14, 2015

gk

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

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.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2014-CP-16-0792

**NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND**

TO: PLAINTIFF, BY AND THROUGH ITS ATTORNEY OF RECORD,
JONATHAN M. ROBINSON, ESQUIRE:

Please take notice that Defendants in the above-captioned matter will move the Court for an Order Altering or Amending the Order of the Honorable Paul M. Burch, at a hearing to occur ten (10) days from the date of this notice or at such time the Court deems appropriate.

COMES NOW Defendants in the above-captioned matter and moves this Court, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend its Order on June 1, 2015. This motion is timely as Defendants received notice of entry of the Order on June 5, 2015. Defendants make this motion on 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 child did not arise out of the ownership, maintenance or use of the vehicle.

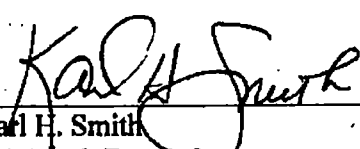
FILED
2015 JUN 15 PM 2:55
SCOTT B. SUGGS
CLERK OF COURT/R.D.
DARLINGTON COUNTY, SC

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 it's 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.

WHEREFORE, Defendants respectfully request that this Court alter or amend its Order of June 1, 2015 to find in favor of coverage for the death of the infant.

Respectfully Submitted By:
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Attorney for the Defendants

June 15, 2015
Hartsville, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON)

CIVIL ACTION NO. 2014-CP-16-0792

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

v.

**PLAINTIFF'S BRIEF IN OPPOSITION
DEFENDANTS' MOTION TO
ALTER OR AMEND JUDGMENT**

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.

FILED
2015 DEC 15 PM 1:46
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

Plaintiff respectfully submits this brief in opposition to Defendants' Rule 59 Motion to Alter or Amend and Defendants' follow up correspondence to the Court dated July 8, 2015.

Defendants' Motion to Alter or Amend

Defendant's Motion to Alter or Amend filed with the court on June 15, 2015 requests the court "...alter or amend its Order of June 1, 2015 to find in favor of coverage for the death of the infant". The Defendants cite the following grounds in support of the Motion to Alter or Amend:

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 it's 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.

The grounds stated in Number 1 above are simply a restatement of the court's findings. If interpreted as a request for reconsideration, Plaintiff submits the case law in South Carolina overwhelmingly supports the court's findings that the death did not arise out of the (1) ownership, (2) operation, (3) or use of the vehicle for the reasons stated in Plaintiff's prior briefs and in the Order Granting Declaratory Relief in Favor of Plaintiff.

The grounds stated in Number 2 above allege the Court based its ruling on State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998). Aytes sets out the test adopted by the South Carolina Supreme Court for determining whether a claim arises out of the ownership, maintenance or use of a vehicle. Therefore, the Court's reliance on Aytes does not constitute an error of law. Defendant also alleges the Court ignored the case law presented by Defendants and that the court failed to fully explain why said cases and arguments are different from the facts set forth in the present case. However, the contrary is present in the text of the Order. On pages 7-8, the Court specifically addresses the case law cited by Defendants, explaining that while cases from foreign jurisdictions may be considered, they have no precedential value (as admitted in Defendants Memorandum of Law, p.5). The Court did not ignore Defendant's cited foreign cases and arguments; it simply ruled that they were not consistent with South Carolina law inasmuch as they did not include the application of the three part test found in State Farm Fire & Cas. Co. v. Aytes, 332 S.C. 30, 503 S.E.2d 744 (1998).

In the final grounds listed for which relief is requested, Defendants assert that the facts further failed to set forth the details of the "use" of the vehicle by the Defendant as stipulated.

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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". As the court is aware, all parties stipulated to the facts of loss and agreed to submit the case on briefs, the insurance policy, and the deposition testimony of the parties. In Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 520-21, 769 S.E.2d 453, 460-61 (Ct. App. 2015) the court explained the significance of a Stipulation in judicial proceedings.

A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys." *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392-93, 496 S.E.2d 624, 626 (1998). "Stipulations, of course, are binding upon those who make them." *Id.* (citing 73 Am.Jur.2d *Stipulations* § 8, at 543 (1974)); see *Belue v. Fetner*, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968) ("When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine **461 the facts upon which the case is to be decided."); see also *Indep. Grain Dealers Mktg. Ass'n v. Beard*, 284 S.C. 309, 312, 326 S.E.2d 169, 171 (Ct.App.1985) ("When the parties entered into an agreed stipulation of fact as basis for the decision by the master, both were bound by the stipulations and the master could not go beyond the stipulations to determine the facts upon which the case was to be decided.").

A stipulation will not be enforced if it is contradictory and confusing and stands in the way of a true determination *521 of the parties ['] rights or where it is subject to different constructions and there is a disagreement as to what was intended to be included therein." *Suddeth v. Knight*, 280 S.C. 540, 544-45, 314 S.E.2d 11, 14 (Ct.App.1984). However, a stipulation will not be abrogated without "the written consent of both parties, or one of the parties has been relieved from its operation by an order of the Court based upon such a showing as satisfies the Court that the interests of justice require that he should be so relieved." *Brown v. Pechman*, 55 S.C. 555, 567, 33 S.E. 732, 737 (1899).

Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 520-21, 769 S.E.2d 453, 460-61 (Ct. App. 2015)

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The Stipulated Facts are not contradictory or confusing in this case and therefore cannot be simply discarded. Furthermore, the grounds upon which Defendant seeks relief from judgment were already raised at hearing and in briefs and have been ruled upon.¹ It appears now that Defendant, unsatisfied with the result, wants another bite at the apple- wants to present evidence in support of already made arguments. The parties have already stipulated that Defendant Gray "was to deliver his 13-month old daughter S.G. to daycare the morning of the loss but failed to do so." (Stipulation of Facts #15). Defendant now asserts, as it did previously, that because the child never made it to daycare, the vehicle was still being used for transportation. This argument is not in accord with South Carolina law. Whether the Defendant made one stop or multiple stops during the day, the stipulated facts remain that the child was left in the father's unattended parked vehicle for seven hours and fifteen minutes during a seven hour and forty-five minute time period which resulted in death due to complications from hyperthermia. The court, having already considered Defendants argument, properly rejected it as South Carolina has not adopted an "intended purpose fulfilled" standard.

Subsequent to filing its Motion to Alter or Amend, Defendants sought to clarify and expand the scope of its previously filed motion.

Defendants' follow up correspondence to the Court dated July 8, 2015

Defendants' follow up correspondence to the Court dated July 8, 2015 outlines the details of what Defendants seek to introduce through additional testimony, stating:

The minor Defendant was occupying the insured vehicle while being transported to daycare. The insured driver failed to deliver her to daycare. This was a

¹ The issues raised in Defendants' Motion were also raised in their brief and at trial. Defendant had the opportunity to present evidence at trial but agreed to submit the case on briefs, Stipulated Facts, Deposition Transcripts of the parties, and the State Farm Policy.

negligent act on the insured's part. As defined by the Webster Dictionary, a negligent act is "an accident". At lunch time, he returned to his vehicle and operated such again while the minor infant was occupying the vehicle, only to return from lunch without delivering the deceased child to daycare. The failure to complete the transportation of the child to daycare was a negligent act again. The child was not deceased until after her discovery in the vehicle after Five O'clock in the afternoon."

Defendants argue that testimony regarding the 15 minute gaps which may account for the time that Defendant Gray allegedly went to and from lunch somehow changes the outcome of this case. Again, the parties stipulated that the minor was left in the back seat of an unattended parked car from approximately 9:30 a.m. to approximately 1:00 p.m., from approximately 1:15 p.m. to 2:15 p.m., and from approximately 2:30 p.m. to 5:15 p.m. (Stipulation of Facts #16 and #17). The parties also stipulated that the minor S.G.

was found unresponsive in Defendant David R. Gray, III's vehicle while it was turned off and unoccupied by any other persons and was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia. (Stipulation of Facts #18 and #20). Assuming arguendo Defendant did drive to lunch between 1:00-1:15 and return between 2:15-2:30, the use of the vehicle, during those trips, could not arguably have been a contributing factor or active accessory to the minor's death, thereby failing the first element of the Aytes test which still results in a denial of coverage. Furthermore, the fact remains that the minor died from hyperthermia at a time when the vehicle was turned off, unattended, and not in use. Defendants are simply seeking another avenue to argue an "intended purpose fulfilled" standard which is contrary to South Carolina law. A fifteen minute trip to lunch and back did not result in the death of the minor, leaving the minor unattended in a parked vehicle with the ignition off for more

than seven hours resulted in the death of the minor. That the minor began a trip but never arrived at daycare is not a factor under the Aytes analysis. See Doe v. South Carolina State Budget & Control Bd., 337 S.C. 294, 297, 523 S.E.2d 457, 458 (1999) (Vehicle not being used for transportation where victim was taken to another location where she was assaulted in vehicle.) and Nationwide Prop. & Cas. Co. v. Lain, 402 F.Supp.2d 644 (D.S.C.2005) (Vehicle not being used for transportation where vehicle was parked *before arriving home* when victim was strangled.) Therefore, the minor does not satisfy the transportation use requirement in Aytes.

As to the remaining issues raised in Defense Counsel's letter of July 8, 2015, Plaintiff seeks to clarify that its Motion to Alter or Amend is actually a Rule 59(a)2 Motion which states:

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

While Rule 59(a)2 *may* permit the opening of a judgment in a nonjury case to take additional testimony, etc; it does not stand for the premise that all nonjury matters *must* be reopened upon the motion of a party. Rule 59(a)2 limits a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State". See Blejski v. Blejski, 325 S.C. 491, 480 S.E.2d 462, 466 (Ct.App. 1997) (declining to affirm the granting of a new trial affirm the granting of a new trial

when the basis is insufficient as a matter of law) see also Blejski at n.4 ("[A] reading of Rule 59(a)(2) indicates that in non-jury actions a new trial may be granted "for any of the reasons for which rehearings have heretofore been granted in the courts of [this] state." A reading of Rule 59(a)(2) indicates that in non-jury actions a new trial may be granted "for any of the reasons for which rehearings have heretofore been granted in the courts of [this] state." One of the grounds for granting a new trial is the discovery of new evidence after trial. Assuming the wife's motion for a new trial is predicated on after-discovered evidence, we hold she has not met the test for after-discovered evidence.) Defendants have failed to provide a sufficient basis as a matter of law which would permit the court to grant a new trial. The Crossman decision referenced above would indicate that altering the stipulations of counsel would not be a basis to grant a new trial. See Crossmann, 411 S.C. 506, 520-21, 769 S.E.2d 453, 460-61 (Ct. App. 2015).

Furthermore, contrary to Plaintiff's assertion, Plaintiff agrees and confirms that the automobile policy and deposition testimony of the parties were made part of the record along with the Stipulation of Facts. Defense counsel goes a step further, however, and seeks to overturn the Court's Order on the grounds that the term "accident" is not defined in the State Farm policy. This is the first time Defendants' have raised this issue. See Collins Cadillac, Inc. v. Bigelow-Sanford, Inc., 276 S.C. 465, 468, 279 S.E.2d 611, 612 (1981) (holding a party's failure to raise issue in directed verdict motion precluded assertion of issue in support of motion for new trial) and Brown v. Singletary, 226 S.C. 482, 484, 85 S.E.2d 738, 738 (1955) (finding a party's failure to object to prejudicial remarks by the trial court during ruling on directed verdict motion prevented trial court

from granting the party's motion for a new trial based on its prejudicial remarks).

Defendants' analysis of the policy and assertion that the lack of a definition of the term "accident" changes the outcome of the case is misplaced. Our courts have stated that test for determining whether a claim is covered under an insurance policy doesn't hinge on whether an "accident" took place but rather did the claim arise out of the ownership, maintenance, or use of the vehicle. "In analyzing whether an injury arose out of the ownership, maintenance, or use of a vehicle, 'no distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act'. 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. 153, 628 S.E.2d 475, 478 (S.C.2006) (internal citations omitted). The policy which Defendant correctly states is in the record has three applicable coverages; Liability, Underinsured, and Property Damage. (See Stipulation of Facts #7, #8, and #9).² The coverages at issue in this case contain a requirement that coverage arise from the ownership, maintenance, or use of the vehicle. (See Liability Coverage "A" - Additional Definitions - "Insured", Underinsured Motorist Coverage "W"- Additional Definitions- "Underinsured Motor Vehicle"). The Court correctly applied the three part test found in Aytes to determine whether the minors claim arose from the ownership, maintenance, or use of the vehicle.

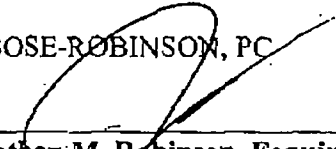
² Defendant also references policy language found in the Personal Injury Protection Coverage. The policies involved did not provide Personal Injury Protection Coverage.

Defendants request that the Court hear the matter again to "...consider the Contract/Policy itself and whether coverage must exist as Contract Law provides".

Plaintiff submits the policy of insurance was in the record when the court ruled and the arguments regarding the term "accident" are not determinative of coverage thereby rendering a rehearing unwarranted.

For the reasons stated herein and heretofore, Defendant respectfully request the Defendants' Motion to Alter or Amend be denied.

DuBOSE-ROBINSON, PC

BY: 

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December 15, 2015

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SCOTT B. SUGGS
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DARLINGTON COUNTY, S.C.

State of South Carolina) In the Court of Common Pleas
County of Darlington) Fourth Judicial Circuit
2014-CP-16-0792

State Farm Mutual Automobile)
Insurance Company)

Plaintiff,)

vs.)

Transcript of Record

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

Defendants.)

Darlington, South Carolina
April 7, 2015

B E F O R E:

The Honorable Paul M. Burch

A P P E A R A N C E S:

Jonathan Robinson,, ESQUIRE
Attorney for Plaintiffs

Karl Smith, Esquire
Attorney for Defendants

LISA S. CARTER
CIRCUIT COURT REPORTER

I N D E X

WITNESSESPAGE

(NO WITNESSES CALLED DURING HEARING)

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EXHIBITSNO.DESCRIPTIONEV.

(NO EXHIBITS INTRODUCED DURING HEARING)

1 MR. ROBINSON: Your Honor, if I may approach? I have a
2 notebook for you and your - - for the file and for you and
3 your clerk.

4 THE COURT: Thank you.

5 MR. ROBINSON: May it please the Court? Your Honor, my
6 name is John Robinson and I practice at DuBose - Robinson in
7 Camden and I represent State Farm in this case. This is a
8 declaratory judgment action, Judge, that is now, the parties
9 have crossed - claimed for a declaratory judgment action.
10 The case deals with insurance coverage and issues arising out
11 of the death of a minor.

12 Judge, the facts of this case like about all the cases
13 we've heard today are pretty tragic. This is a case in which
14 a minor was left in a - - a thirteen month-old minor, was
15 left in a parked vehicle in Hartsville in May of last year
16 for seven hours and fifteen minutes unattended with the
17 ignition off. She was left there by her father and she died
18 as a result of hypothermia. As we noted during the roster
19 meeting, Judge, the parties have stipulated to the facts of
20 loss as to how the minor died and as to the events leading up
21 to the death of the minor.

22 THE COURT: Did you say that the ignition was left on or
23 off?

24 MR. ROBINSON: Off.

25 THE COURT: Off.

1 MR. ROBINSON: Judge, a brief summary of the stipulated
2 facts are as follows: on May 8, 2014, David Gray, name
3 defendant, who the father of the minor, S.G.

4 , David and his wife - - I'm sorry, David and the mother
5 of the minor, are not married. They had a child together,
6 the mother is Amanda Goyeneche. On May 8, 2014, David Gray,
7 intended to drive his thirteen month-old daughter, S.G. ,
8 off to daycare on his way to work. However, he forgot to do
9 it. He was distracted for whatever reason. He went to work;
10 he parked his car in Hartsville at Carolina Trophy - - at
11 Carolina Printing Sports and Trophy; got out of the vehicle;
12 went to work; turned off the car, of course, and did not
13 realize until approximately five o'clock that afternoon that
14 he had left his daughter in the vehicle. She was found
15 unresponsive when he found her and she was pronounced dead
16 shortly, thereafter, for complications related to
17 hypothermia. Those facts are stipulated as to what happened.

18 They're four policies - - well the mother of the minor
19 has filed a claim with State Farm for damages related to the
20 injury and death of her daughter. They're four policies at
21 play here, Your Honor. David Gray had a vehicle insured by
22 State Farm that had \$25,000 liability and \$25,000 UIM.
23 Amanda the mother, who lived with her mother, Beverly, three
24 household policies between the two of them, each \$50,000 in
25 liability and \$50,000 in uninsured motorist coverage. While

1 the facts are stipulated as to what happened to the minor and
2 how she died and the facts are stipulated to the four
3 policies that State Farm has that are potentially available
4 for coverage, the facts are not stipulated as to where the
5 minor was a residence relative. We took three, last week,
6 short depositions of the mother, father, and the grandmother
7 on only the issues of residency. A copy of those depositions
8 are included in the trial notebook which we filed today. So
9 the Court has before it two issues: Issue number one, could
10 resolve the need to decide issue two, but the first issue,
11 Your Honor, is did death of the minor arise out of the use,
12 operation, and maintenance of the vehicle? Also, being
13 submitted in our trial notebook and as we indicated earlier,
14 is a copy of the State Farm policy. The State Farm policy
15 mirrors the statutory language found in 38-77-140 which uses
16 the terms of ownership, maintenance, and use of a motor
17 vehicle regarding what events are covered.

18 Your Honor, in 19 - - well first of all, Your Honor, as
19 you are aware, they're a number of cases that have come out
20 in the last ten or fifteen years regarding what is the
21 maintenance, use, and operation of a vehicle. In 1998,
22 however, the Supreme Court in State Farm versus Aytes,
23 established a three-part test and it's really a three-part
24 common sense test. Did the - - was the injury causally
25 related to the vehicle? Number two, was there an active

1 independence significance that broke any potential causal
2 relationship? Number three, and perhaps in this case the
3 most important, was the vehicle being used for transportation
4 purposes at the time of the injury? In the Aytes case, Your
5 Honor, Aytes drove someone to a remote location; exited the
6 vehicle - - parked the car and exited the vehicle; walked
7 around to the passenger side; passenger attempted to get a
8 gun out of the glove box fearful for her life; a struggle
9 with Aytes who was standing outside of the passenger side,
10 shot the victim in the foot. Their report determined, Your
11 Honor, that this was not a covered event. There was - - the
12 vehicle in determining the causal relationship, the Court
13 broke it down in kind of three factors that they look at.
14 Number one, was the vehicle an act of accessory to the
15 injury? The Court determined that it was not. Was the
16 vehicle merely the site of the injury or was it, in other
17 words, was the vehicle more than just the site of the injury?
18 The Court determined that it didn't have to be the
19 approximate cause but it had to be something more than just
20 site of the injury. And lastly, Your Honor, was the injury
21 foreseeably identifiable? So it asked the Court to determine
22 that number one, the vehicle was not an act of accessory in
23 that case and they also determine, and this is very
24 important, that when Aytes exited the vehicle, if there was
25 any causal relationship, it was broken at that point. It

1 also terminated the transportation is when he exited the
2 vehicle. The vehicle, not at that point, was being used for
3 transportation. Your Honor, right after Aytes a number of -
4 - well, first of all, in Aytes, the Court went over a number
5 of cases in the past that had held where a vehicle was found
6 to be an act of accessory. Two cars going down the road at
7 equal speed, one shoots into the other, the Court determined
8 that is an act of accessory. You can't complete that assault
9 without the vehicle. It's needed for that assault. Driving
10 down the road and throwing a bottle at another car, the Court
11 determined that, that's covered. Your Honor, in '98 Aytes
12 happened. In '99, the Court again looked at another case, it
13 was Doe versus Budget and Control Board. The police officer
14 agrees not to arrest the woman if she allows him to sexually
15 assault her which she does in the back seat of his vehicle.
16 The Court determined it's not covered; it's not an act of
17 accessory; that it was not being used for transportation at
18 the time of the injury. Once the vehicle was parked the
19 transportation issue precluded from being used. And, Judge,
20 finally there's a case in which the third element arose, it's
21 the case that occurred in Canal Insurance in 1993 and it's
22 the first time that the Supreme Court put into place what
23 would become the third element of Aytes and that's the
24 transportation use. The Court adopted of all places, a
25 Minnesota Rule - - that the Court clearly adopted it in '93,

1 the Minnesota Rule which covers two cases and in one of those
2 cases, Your Honor, the Court determined where an insurer
3 turned on her vehicle and allow the exhaust to fill the
4 garage killing her and her children in the house. They
5 determined that in that case coverage was not - - did not
6 exist. The vehicle was not being used for transportation
7 purposes. Here, Judge, the facts are undisputed that Mr.
8 Gray got out of his vehicle; he parked it; and he left it
9 there for seven hours and fifteen minutes. The facts are
10 undisputed that the child died of hypothermia. The
11 hypothermia in this case, Your Honor, in relation to the
12 Aytes case, the vehicle was not an act of accessory to the
13 death. Even if the Court determines that there is some
14 causal relationship to the death, they're two independent
15 acts of significance which breaks that causal relationship.
16 Number one, the father's negligence leaving the child in the
17 parked vehicle for seven hours and fifteen minutes. And
18 second; heat, Your Honor, hypothermia is caused by heat.
19 It's an independent factor of the vehicle. It's caused by
20 the atmosphere conditions around us when we were in
21 Hartsville of May 2014. That heat is what caused the
22 hypothermia to eventually - - if this would've happened in
23 February, we'd likely have a different story, Judge, but this
24 happened in May. And then finally, Your Honor, as it relates
25 to the third test, the transportation test. The cases are on

1 point that when the vehicle becomes parked and not used, it's
2 not being used for transportation anymore, and, in this case,
3 this vehicle wasn't used for transportation for seven hours
4 and fifteen minutes during that day; he exited; it was
5 unattended; the ignition was off. When he left the vehicle
6 to go to work that trip ended until he started back. It was
7 parked there for the day, the transportation use ended and;
8 therefore, it clearly fails the third test.

9 As it relates, Your Honor, to resident relative, the
10 issue here, the defendants in this case have alleged that the
11 minor is a resident relative of both the father and the
12 mother. Of course, the Court doesn't get to this decision
13 unless coverage is found. We submit, of course, there is no
14 coverage, but should the Court determine that this is a
15 covered event and, unfortunately, Judge, as the Court is
16 probably aware that this event, this type of event is
17 occurring more often than it seems like it used to; but if
18 the Court determines that this is covered and does arise out
19 of the ownership, maintenance, or use of vehicle, we submit,
20 of course, the Courts have clearly said it was not; but the
21 Court would then need to determine which policies cover the
22 event. The defendants allege that the minor was a resident
23 relative of the mother and the father. As we've indicated
24 they were not married. The Appellate Courts have repeatedly,
25 and in my brief I've outline, said that, that issue has not

1 been decided in South Carolina. Can a child be a resident
2 relative of two different households for the purpose of
3 automobile insurance? The last Court of Appeals case that
4 addressed it said exactly that, that the issue had not been
5 decided in South Carolina. And, in fact, that Court said
6 they weren't going to decide it because the evidence was
7 overwhelming, that the child clearly had just one household
8 in which it was a resident relative. A test was set out in
9 1993 - - I'm sorry, in 1996 in the context of homeowners
10 insurance as to whether a - - to determine whether a child is
11 a resident relative or determine if anybody is a resident
12 relative for that matter, that was in 1996 in the State Farm
13 Breazell case. In 1998 the a Court of Appeals applied that
14 test to automobile insurance. But the Court of Appeals have
15 said that the issue is not resolved as to whether a child can
16 be a resident relative of both households. What we learned
17 in this case, Judge, however, as in the cases that I've
18 cited, that the factors a Court would look at, are clearly
19 establish in this case that the child was just a resident of
20 the mother's household. The mother admitted in her
21 deposition that she filled out her Social Security
22 application with her address. The daycare application with
23 her address. The health insurance application with her
24 address. She said that the child didn't even stay with the
25 father until the child was six months-old and that was one

1 night. According to the mother in three months leading,
2 three or four months leading up to the death, she says they
3 attempted to get on some schedule where this child would stay
4 with the father who, at one point, was living with some
5 roommates but then later lived in a vacant house own by his
6 grandfather. The father, in his request to admit, admits
7 that the mother is the custodial resident. The father in his
8 deposition said that when the child - - that he never filed
9 the child on his taxes, the mother always filed the child on
10 her taxes. The mother said that when the child went there,
11 she always send an overnight bag. We believe that the
12 evidence clearly establishes the child was a resident
13 relative, as our case has determined, of just the mother and
14 we believe that in this case if the Court determines that
15 there is coverage, the mother's household would be the only
16 household in which the child would have coverage available.
17 Obviously, Mr. Gray's policy had liability limits but really
18 the result of this would only affect Mr. Gray's UIM if it
19 were determined he was a resident of both houses, if the
20 child was a resident of both households.

21 For those reasons, Judge, and the reasons we put in a
22 memorandum we've submitted to the Court, we'd asked that the
23 Court determined through declaratory judgment action that the
24 death of the minor, however, tragic was not a result of the
25 use, operation, and maintenance of the vehicle as defined in

1 our policy and state law that we have here. Also, I will say
2 this, that Mr. Smith and I respectfully, I believe and I will
3 let him speak for himself, would ask that we be allowed ten
4 days to provide any responsive briefs, very short responsive
5 briefs in the event after today if we feel one is needed.
6 Mr. Cannarella did put on the record in the deposition of his
7 client, David Gray, that he did not intend to appear today
8 and we'd just put that on the record.

9 THE COURT: Okay. Thank you, counsel. Mr. Smith?

10 MR. SMITH: Thank you, Your Honor. I'm going to take
11 this a little bit different. Instead of talking about the
12 first issue that Mr. Robinson spoke about, I'm going to speak
13 about the second issue first. You know, Your Honor, family
14 court in South Carolina has long recognized joint custody of
15 children. It has gone on to share custody; joint custody.
16 We've had share custody with somebody primary and somebody
17 secondary. It has been going on for years and years and one
18 year somebody files the child on taxes and then the next year
19 the other person files. It is a recognized principle in this
20 state. In this particular case these parties were never
21 married. They never actually lived together but they had a
22 child. My client, the mother, is employed by Coker College
23 and has been for number of years. The father is, of course,
24 a local person from Darlington County and works in a printing
25 business there in Hartsville. These parties through mature

1 adult approach decided to work together to share this child
2 and the child, and you'll see it in the depositions that are
3 being presented, that four days on, three days off. Four
4 days on the other, then three days with the other. It was a
5 four/three situation for the last three or four months. And
6 so they each had residents; that had cribs; they each had
7 places of clothing; and they each had car seats; and they
8 each did that and they worked together.

9 One of the things that Mr. Robinson didn't say about
10 this particular situation is the night before this day, the
11 child had stayed with the father and he did, was suppose to
12 transport the child to the daycare and for whatever reason
13 forgot and the child remained in the vehicle. And at lunch,
14 at lunch, he got back in his truck and drove over to see the
15 mother to get additional clothing for the child and talk with
16 her about the child outside of the vehicle. Got back into
17 the vehicle and drove back to his workplace and got out of it
18 a second time leaving the child in there. Now, the purpose,
19 I'll go into later on, but clearly, Your Honor, these parties
20 shared joint custody. Now, what's important about that? If
21 I am in your vehicle, Your Honor, and you have liability and
22 uninsured and you're at fault in an accident, you're at
23 fault, I can collect on both of your policies. If I'm a
24 passenger in your vehicle whether we live together or not,
25 and then I can go collect on my uninsured policies at my

1 house, okay, as long as I'm Class I insured. The only thing
2 that matters about joint custody in this is that the father
3 was living with someone else who may have coverage and we
4 might be able to go after that, but right now State Farm's
5 got \$350,000 on the line here so that's why we're here. And
6 when you start looking at the case law dealing with - - and
7 he - - Your Honor, Mr. Usher, who is a young attorney at my
8 office this year, he and I worked together on this brief, it
9 is fifteen pages. Your Honor, has never seen me do a fifteen
10 page brief in a civil case. It is an excellent brief.
11 Everything that Mr. Robinson talked about is addressed in
12 this brief in detail so I'm not going to spend a lot of time
13 talking about it. But I will tell you this, if you go on the
14 website they're approximately fifty deaths a year to children
15 left in cars, fifty. Approximately fifty a year and that's
16 been going on for fifteen years. Do you know how many cases
17 that we found across - - and that's in the United States,
18 that's not worldwide - - do you know how many cases that we
19 found in the United States where in that claim for a child
20 negligently left in the car who died from hypothermia or
21 whatever cause when the car was left sitting, not operating,
22 do you know how many cases we found with just that issue that
23 insurance coverage was denied? None. None. You know why?
24 Because in most of those cases there was either a minimum
25 policy or a small policy and the companies paid without

1 arguing about it. We did find a couple of cases out there,
2 Your Honor, that are addressed in this brief that actually
3 nationwide contested in a case, another company contested it
4 in a case, do you know what the Court found? Coverage
5 applied. Coverage applied. When you look at what South
6 Carolina set up in the Aytes case, State Farm Fire & Casualty
7 versus Aytes it says, the three examples. There exist of
8 cause of connection between the vehicle and the injury. In
9 our brief, we clearly talk about that. This child was being
10 transported to daycare and dad forgot. Then dad gets back
11 into vehicle, goes to see mom, transporting the child again.
12 The time of death is after five. So this child has been
13 transported not only once away from the father's home but
14 then to the mother's workplace and then back to the father's
15 workplace during the middle of the day. Transportation,
16 clear. Workmen's Comp. cases have addressed where an
17 employee gets into an employee truck going to eat lunch and
18 that's covered. It's got nothing to do with the work,
19 they're just going to eat lunch. In this particular case
20 transportation was taking place, dad just forgot. He just
21 forgot.

22 The next thing is, an active independent significance
23 breaks the cause of length. In all the cases that Mr.
24 Robinson cited there were some other causal breaks. In the
25 case of a gun being fired or a bottle being thrown out or

1 something else. In this case transportation was being
2 provided to move the child to the daycare and that's it. Dad
3 got out to work and left it in there and, Your Honor it's
4 just hard to phantom that approximately fifty times a year
5 that happens but it does. It's our society. It's what's
6 going on.

7 Now, part of the three prone is, is the vehicle being
8 used for transportation at the time of the injury? Yes.
9 This child was in it to be transported to daycare and also
10 during lunch was transported again. The vehicle itself,
11 we've addressed in our brief, as to being the cause of the
12 death. The heat with inside the vehicle. If this child had
13 been outside of the vehicle I don't know whether she would
14 have died or not. It may have had sunstroke. It may have
15 had heat exhaustion. It may have died of dehydration but in
16 this particular case it died from being inside this vehicle.
17 And, Your Honor, is very aware of animals dying in vehicles
18 that are left; other children being found in Walmart parking
19 lots that have died this particular way. We do not see, and
20 our brief addresses it, no independent act breaking the cause
21 of length. In all the cases we found right on point - -
22 right on point, identical facts, parents leaving children in
23 cars, every time the Court found coverage.

24 Now, Your Honor, this is a very tragic loss for my
25 clients. Mr. Cannarella is representing the father on the

1 criminal charges that are - - the father's living with an act
2 and a loss that is unbearable and you can see it in his face.
3 He cannot look at the mother. He cannot look at her family.
4 The mother's family is still very indecisive about whether to
5 pursue prosecution; whether they even want to; whether they
6 want to go through this nightmare again. The solicitor's
7 office is really not interested in prosecuting this man for
8 his acts. It is a very tragic, tragic case but we have a
9 loss of life and it definitely was related to a vehicle and
10 it was definitely involved in transportation even though at
11 the time it happened, when you are parked in a parking lot
12 and you're sitting still at Walmart, and your car is turned
13 off and something happens, a blow to the car or whatever,
14 it's a payable claim. The car is not running, it's still a
15 payable claim. Here the child was in the car; was left in
16 the car all day; there was no causal break; that's all that
17 happened. The child was loaded to be carried to the daycare.
18 Unfortunately, Your Honor, it wasn't until the mother after
19 work, went to the daycare; walked in and says I'm here to get
20 S.G. ; and they said, we haven't seen her all day; and she
21 picks up her cell phone and calls the dad and says, did you
22 come and get S.G. and he said, no. She says, well she
23 hasn't been at the daycare all day. And all of a sudden the
24 father drops his phone and rushes out the back door from
25 work; rushes out to the vehicle, the truck; throws open the

1 door; gets the child out of the seat; and rushes the child
2 inside to try and revive the child; EMS was called; 9-1-1
3 came; they treated the child; but fifty minutes later the
4 child was pronounced dead. Coverage is here, Your Honor.
5 Whether or not it's joint custody, the Court's clearly
6 recognize that, but even in the most plain circumstances, the
7 father's insurance coverage cover an injury to any passenger
8 in that vehicle and the mother, yes, the Social Security is
9 filed at the her mother's house. All the documentation is
10 filed for her mother's house that was her residence. Those
11 policies apply because this is a Class I insurer. In our
12 situation, we're saying, basically, you may have a Class I
13 insurer in both households because of the joint custody
14 situation.

15 Again, Your Honor, we feel like this brief clearly
16 addresses every issue. We do not attach the cases of each
17 but I believe, Mr. Robinson, did in his brief and we would
18 ask the Court to review the depositions. They are very
19 short, very short but they all say the same thing and we feel
20 like we've addressed those here. Thank you, Your Honor.

21 THE COURT: Anything else?

22 MR. ROBINSON: Very briefly, Your Honor. I'll try to
23 address them in the order in which they were presented.

24 As to the joint custody issue, the mother did say in her
25 deposition that they tried to put in a schedule of four days

1 on and three days off, but the father in his deposition said
2 that's true they did try to put that into place, but it never
3 worked. It never worked out. That schedule was never put
4 into place according to the father.

5 As to the crib, the father says he didn't have a crib.
6 He had a portable pack-n-play in his bedroom that he would
7 open up when the child was there. You know, the - - again,
8 the father's testimony is it's verily clear that he did not
9 have custody of the child. There was no custody order
10 obviously, - - I mean, the parents weren't married. In this
11 case, Judge, the evidence is overwhelming that the child had
12 one residence and have lived in one place. The child, of
13 course, was only thirteen months-old so her life was short
14 but in those thirteen months she had spent it at her mother's
15 home.

16 As far as some of the other issues that Mr. Smith
17 raised, Your Honor, the parties have stipulated to the facts.
18 The number of facts that he raised are not in the record.
19 They are not in the record of this case. Of course, the
20 record in this case is important as all records are, but the
21 stipulated facts which are in your trial notebook, they've
22 been signed by the parties; they've been stipulated to and as
23 well as the depositions. There was a, and you'll see in our
24 stipulated facts, the minor was left unattended in the
25 vehicle; Number Sixteen, with the ignition off from 9:30 to

1. 1:00 o'clock and from 2:30 to 5:15 and also from
2. approximately from 1:15 to 2:15. Those are what the
3. stipulated facts are. Was there a trip in the middle of the
4. day where he went and got some lunch and got back in his car
5. and took off? The relevancy of that, I don't think, of
6. course, it's not - - it's not in the record but I just note,
7. Your Honor, if the vehicle were running for some period
8. during that day, I don't know if they're contending that
9. would have for some reason caused the death, of course, we
10. would contend that, that certainly didn't contribute to the
11. death at all if the vehicle were running at any point during
12. the day but what we do know is that there were seven hours
13. and fifteen minutes the vehicle was off with the ignition off
14. and parked. And what we, - - of course, he talked about in
15. other states, Your Honor, he didn't find any case that denied
16. coverage. Our Supreme Court, as often the case, I won't say
17. often but sometimes it's the case, that says in Peagler in
18. 2006 that we are the minority view. Our three-part test is
19. a minority view. It is not accepted by a number of other
20. states. Our minority view is a more restrictive view than
21. other states. That's in Peagler in 2006, Peagler versus USA.
22. And the minority view has a very important third element and
23. that's the use of transportation. That element doesn't exist
24. in a lot of the other states, Judge. The analysis three-part
25. test, in the sub-parts of that test doesn't exist in others.

1 This fact scenario has not been decided in South Carolina but
2 the law has been in place for some time. You know, he
3 mentioned, Mr. Smith mentioned, if you're in the parking lot
4 at Walmart and you're parked and you're just sitting there
5 and you get hit that would be covered; completely different.
6 To take Mr. Smith's example to the next step in order to find
7 coverage, if you're in a parking lot at Walmart and your
8 vehicle is off and you're having a heart attack, are we to
9 say now that, that is covered?

10 Your Honor, the facts are very simple this vehicle was
11 not being used for transportation. In all the cases that I
12 have cited in my brief, obviously, the vehicle had been used
13 at some point for transportation; otherwise, the vehicle
14 would've been the issue but that point ends in this case as
15 in the cases that I've cited. The transportation ends in
16 this case when he exited the vehicle and leaves it there. It
17 ended. And again, were bound - - we, me and Mr. Smith are
18 bound by the stipulated facts and things that have been
19 presented into evidence and we'd asked the Court to make the
20 determination based on those facts, Your Honor.

21 THE COURT: All right. Fifteen days for the briefs if
22 you so desire and proposed orders.

23 MR. ROBINSON: And proposed order, Judge?

24 THE COURT: Please.

25 MR. SMITH: Your Honor, we'd agree to ten. Is ten still

1 okay with, Your Honor?

2 THE COURT: I was going to give you fifteen.

3 MR. SMITH: Ten's good.

4 THE COURT: Ten days?

5 MR. SMITH: Yeah.

6 THE COURT: All right. Interesting.

7 MR. ROBINSON: Judge, if it's all right with the Court
8 since were doing this order to, I'll take the fifteen, if
9 it's all right?

10 THE COURT: Why don't we do it this way, ten days for
11 your briefs so you can look at each other's and then fifteen
12 to the proposed order.

13 MR. ROBINSON: Thank you, sir.

14 MR. SMITH: Thank you.

15 THE COURT: That's a better plan.

16 MR. ROBINSON: Judge, I have the original depositions
17 that are sealed. I can put them in the Court file if the
18 Court would like them. A copy is in our trial brief - - -

19 THE COURT: Please do that. It probably

20 MR. ROBINSON: Okay. Thank you, Judge.

21 MR. SMITH: Your Honor, I don't have any problem if you
22 choose to take those with you if the copies remain in the
23 file.

24 MR. ROBINSON: A copy is in the brief.

25 MR. SMITH: Okay. All right.

1 THE COURT: All right. So the original is there and I
2 got copies in the brief?

3 MR. SMITH: Yes, sir.

4 THE COURT: Put the original's - - -

5 COURT REPORTER: Do you want me to put - - -

6 THE COURT: Yeah.

7 MR. SMITH: Thank you, Your Honor.

8 THE COURT: All right. Y'all have a good day.

9 (CONCLUSION OF HEARING HELD ON APRIL 7, 2015)

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STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF DARLINGTON) 2014-CP-16-00792

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY)
) PLAINTIFF)

vs.)

TRANSCRIPT OF RECORD

BEVERLY GOYENECHÉ, DAVID R.)
GRAY, III AND AMANDA GOYENECHÉ)
(A/K/A AMANDA GOYENECHÉ-GRAY),)
INDIVIDUALLY AND AS PARENT AND)
NATURAL GUARDIAN OF S.G.)

)
DEFENDANTS)

December 15, 2015
Darlington, South Carolina

B E F O R E:

THE HONORABLE PAUL M. BURCH, JUDGE.

A P P E A R A N C E S:

JONATHAN M. ROBINSON, ESQUIRE
Attorney for the Plaintiff

JOHN S. NICHOLS, ESQUIRE
Attorney for the Defendant

CARL H. SMITH, ESQUIRE
Attorney for the Defendant

HATTIE O. GORDON
Circuit Court Reporter

I N D E X

Colloquy	4
Certificate of Reporter	31

EXHIBITS

NO EXHIBITS WERE MARKED OR ADMITTED INTO THE RECORD

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COLLOQUY

THE COURT: Okay. Motion to reconsider or alter.

MR. NICHOLS: Yes, sir, Judge. John Nicols, and I'm here with Carl Smith here for the defendants in this case. This was a declaratory judgment matter to determine whether there was insurance coverage for the death of a 13 month old, S.G. , and you entered an order, Judge, that essentially ruled on two things.

One of those things covered two different issues, but the first thing that you found was that the child was not the resident of both of her parents, and we challenged that. And I don't know, Judge. Do you want to take each issue up or would you just like for me to just put our position on both issues?

THE COURT: Go ahead. You can do it all.

MR. NICHOLS: Okay. Judge, I understand that this was presented to you on stipulated facts. You made the finding that the child was the resident of her mother's, but not the resident of her father.

The evidence, as I understand the facts stipulated, were that the parties had never married. The child spent four days with mom and three days with dad; and that this was a regular thing that they had.

I point you to a couple of cases that, unfortunately, we didn't cite here, but going back to Pug Ravanel, a

1 fellow that ran for governor. The Supreme Court said you
2 can have more than one residence. That's different from
3 domicile and that's different from citizenship. And Judge
4 Curitan, in a case called Cook v. Federal -- I'm sorry.
5 That's judge Hayes. Judge Hayes indicated that -- was the
6 trial Judge, Justice Louion, I'm sorry, indicated that
7 it's been held that residences are of a more, lasting term
8 than domicile and citizenship. A person may have only one
9 domicile but may have several residences. And that was
10 back in 1975.

11 Under Smith v. Auto Owners, Judge Curitan indicated
12 that, "Although the courts have contemplated the meaning
13 of residence relative to numerous occasions the issue of
14 whether an insured may reside in multiple households
15 simultaneously is one of first impression," and then they
16 went forward and said, "We don't have to decide that. We
17 do not reach that issue at this time."

18 Our position would be that the evidence, even under
19 the stipulations, the evidence was the child was in fact a
20 residence of both places. And I can cite you a couple of
21 other examples, Judge. I've got a U.C.C.J.A. case which
22 the Court found multiple residences. I have a case,
23 Russell v. Cox, which the Supreme Court decided this in
24 2009, in which the Court recognized multiple residences.

25 The contract in this case and in accordance with the

1 statute says that you have to be a resident and
2 relative domicile. You only have one domicile under the
3 law, but you can have multiple residences.

4 The second issue in this case which is I think the
5 more significant issue is whether or not the automobile in
6 this case was being used for transportation at the time of
7 the injury. Just to remind you, Judge, this was an infant
8 in a car seat. She was with dad. He forget he put the
9 infant in the car seat. He went to work. He actually
10 went home to lunch and then went back to work.

11 And it wasn't until later in the day that mom went
12 looking for the child that they realized what happened to
13 the child. The child suffered hyperthermia from in the
14 car seat in the car all day. and E.M.S. was call, but the
15 child was passed away.

16 Our position and I understand that the Court has
17 looked at all of the assault cases and has looked at all
18 the active accessory cases. Our position, however, is
19 that when the father placed the child in the child seat in
20 the back transportation began. And it wasn't until that
21 child was removed from the car seat that transportation,
22 if at all, ended.

23 We've cited to you a number of cases from other
24 jurisdictions. It's interesting, in those cases, the
25 insurance company, which was a C.G.L. policy or home

1 owner's policy, they were pushing the idea that these
2 other competing cases that they're actually using the
3 because that benefited them to deny coverage. And the
4 Courts, with the exception of one case that I found, which
5 was in an unpublished federal case, the Courts have been
6 pretty uniform that where a child is left in a child
7 seat -- generally, this happens in a van, being
8 transported that the -- that it's related to the use of
9 the automobile. And, therefore, the automobile insurance
10 coverage would cover. And so an exclusion in the C.G.L.
11 policy or home owner's policy would apply.

12 Judge, another issue that you ruled with regard to
13 that was that the father's act, even if this were used for
14 transportation, and even if she's a residence relative;
15 that his act in stepping out was an act of independent
16 significance which is one of the factors that the Court
17 has applied but not explained.

18 And it's fairly interesting, Judge, the concept of an
19 act of independent -- independent significance is a --
20 that's an idea that came out in Probate law, but for some
21 reason Booker, the Court went on to use that phrase, and
22 the Court went on to use it in a -- Judge Conner wrote it
23 in a '95 Court of Appeals case called Carroway v. Smith.
24 They never really explained what that meant. I think that
25 what the Court is doing is applying tort theory of

1 superseding an independent and intervening act which would
2 break the father's case.

3 But the fact is under tort laws that even if it's a
4 superseding act that intervenes if it's perceivable it
5 doesn't relieve the original tort feason. Now, I realize
6 what we're talking about here is insurance coverage, but
7 one thing that the Court tried to explain in the Carroway
8 case was for an act of independent significance to break
9 the causal chain so to speak or to act so as to relieve
10 the insurance company Judge Conner wrote, "It must be
11 wholly disassociated from, independent of and remote from
12 the use of the automobile."

13 And, Judge, we would submit that that is a pretty
14 high standard. That language coming right out of a prior
15 case called Hyatt, which Judge Conner cited which is a
16 Supreme Court case. Our argument --

17 MR. ROBINSON: Could you cite that, please.

18 MR. NICHOLS: Oh, I'm sorry. Yes. And Carroway v.
19 Smith, 2 -- 321 SC 23, 467 SE Second, 120. It's a 1995
20 Court of Appeals case, and I provided you to. But, Judge,
21 without the automobile the child isn't in the car seat.
22 The child doesn't suffer from a hyperthermia. As one
23 Court said if she had been left out on a park bench or if
24 she had been left out in some other area where she was out
25 in the open she's not sitting in a car seat. Where the

1 temperature just goes astronomical. But all of these
2 courts have looked at the role that an automobile plays in
3 any type of a hyperthermia cases. And without the car you
4 don't have the injury.

5 So our position, first off, is that she's a resident;
6 that the facts are that she's a resident of both homes,
7 and that she can be under South Carolina law a residence
8 of each home.

9 Secondly, that the car in this case, the truck, was
10 being used for transportation purposes and had been
11 continuously used for transportation purposes at the time
12 of the injury. And in fact one of the cases that we
13 cited, the Michigan case of McKenzie, puts it in terms of
14 whether the vehicle was being used for a transportational
15 function at the time of the injury.

16 The court said, as I said with the exception of one
17 unpublished federal case that I found, they are very
18 uniform in saying that these cases is -- it falls within
19 the maintenance, use and the ownership of an automobile
20 would be used for transportation purposes. But South
21 Carolina has not ruled on that. The South Carolina
22 Supreme Court or the Court of Appeals has not ruled on
23 that.

24 And then, third, with regard to the intervening act,
25 we would argue that, first off, it's not an intervening

1 act. It is the act. He is the -- the child can't get
2 herself out to the car seat. Judge, the child the relying
3 on an adult to be able to do that. So the father's act
4 here are foreseeable as well because these kinds of
5 injuries have happened numerous times around the country.
6 We just haven't seen one in South Carolina where our
7 courts had the opportunity to decide whether there would
8 be coverage for this type of injury.

9 So we would ask that you reconsider your order and
10 withdraw the order and rule in our favor. I'll answer any
11 questions you might have, Judge.

12 THE COURT: Counsel.

13 MR. ROBINSON: Your Honor, John Robinson of
14 DeBose-Robinson Law Firm for State Farm. My response was
15 likely a bit lengthier and it still may be. And I'll put
16 it in context.

17 The Court, of course, is aware, you've already ruled
18 that the claim does not arise out of the use of the
19 vehicle. After Your Honor signed the order defense
20 counsel filed a motion of -- I'm sorry. A notice of
21 motion and motion to alter or amend, and has provided,
22 basically, three grounds for it's motion.

23 Subsequently, on July 8th defense counsel provided to
24 the Court a letter in response to my letter of July 6th
25 which appeared to attempt to either alter or expand the

1 original motion which was entitled, "To alter or amend.
2 The letter of July 8th appears to expand it to a Rule
3 59(a) (2) motion for a new trial and a request for the
4 Court to examine a certain part of the policy which was
5 not raised in the brief and in oral arguments and
6 stipulated facts and that is the issue of significance of
7 the word, 'accident'.

8 I haven't heard any of that -- any of that today, but
9 since it's been filed with the Court I would like to
10 respond to it briefly, and then I would like to also
11 address the arguments that are raised today but will
12 address those lastly.

13 THE COURT: Okay.

14 MR. ROBINSON: Your Honor, the, as I said earlier,
15 the plaintiff -- I'm sorry. The defendant's original
16 motion to alter or amend cites three grounds.

17 The first ground is basically just a statement of the
18 Court's order; that the Court denied the Defendant's
19 ground for coverage under the existing vehicular policy of
20 the Plaintiff. The Court found that the death of the
21 minor did not arise out of the ownership, maintenance or
22 use of the vehicle. Your Honor, that is again just a
23 restatement of the Court's findings.

24 Second, the Defendant alleges the grounds for
25 altering or amending his -- the Court based the ruling on

1 State Farm v. Ates which sets forth the three prong test
2 and ignored the case law presented by the Defendants.
3 That's the second grounds.

4 Your Honor, the Court did base its ruling in the
5 order from State Farm v. Ates, and we would submit,
6 correctly so, because State Farm v. Ates doesn't describe
7 the three types under the three prong analysis which
8 should be undertaken in determining whether a claim arises
9 out of an ownership, maintenance or use of vehicle.

10 The second part of Number Two is the Plaintiff -- the
11 Defendants indicates that the Court failed to fully
12 explain why said cases presented by the Defendant and
13 arguments are different from the facts of this present
14 case or the Court simply ignored the cases.

15 As the Defendant pointed out, in its brief, the cases
16 submitted by the Defendant were from foreign jurisdictions
17 and not of precedential value. And the Court, in our
18 opinion, correctly ruled that the cases submitted by the
19 Defendant are not consistent with South Carolina law.
20 They do not undergo the three prong test. They are under
21 foreign jurisdiction.

22 And, finally, the third point, Your Honor, states
23 that the stipulated facts further fail to set forth
24 details of the use of vehicle. Judge, the stimulated
25 facts are the stipulated facts. All right. I understand

1 from Mr. Nichols today that they -- it appears they
2 consent to the facts that are stipulated, and I don't know
3 if they are abandoning the -- whether this motion the
4 facts need to be somehow altered or amended. It does not
5 sound like that today, but in the event the Crossland case
6 was cited in my letter and also I have a brief which I'll
7 present to the Court today.

8 The Crossland case basically states that the
9 stipulation is an agreement or concession of a judicial
10 proceedings. Stipulations, of course, are binding upon
11 those who make them. As I indicated in my letter, Your
12 Honor, the fact that they proposed don't change the
13 outcome of the case. They are basically asserting the
14 exact same argument that the child never made it to the
15 daycare.

16 That the child got into the vehicle and never made it
17 to the daycare. That's an intend purpose fulfilled
18 doctrine. If you do not get to the destination in which
19 you have originally planned then your transportation is
20 ongoing. That doctrine has not been adopted by South
21 Carolina. South Carolina says the vehicle has to be used
22 for transportation at the time the claim arises, and in
23 this case, of course, the death is the claim. Nothing
24 changes.

25 They admitted today; that the child was in the

1 vehicle left unattended for seven hours and 45 -- 15 --
2 seven hours and 15 minutes -- for a seven hours and 45
3 minutes period, and suffered hyperthermia. That's all the
4 stipulated facts, Judge. We have not adopted an intended
5 purpose fulfilled standard.

6 In the letter, Your Honor, of July 8th in what
7 appears to be an answer and clarification of the original
8 motion, first of all we would submit that it's untimely.
9 It was not until July 8th that it was presented.

10 The first issue they that bring to the Court's
11 attention is that the 15 minute gap somehow changes the
12 outcome of the case. As I just stated it does not. The
13 child died from being in the vehicle for seven hours and
14 45 minutes or seven hours and 15 minutes. A 15 minute
15 trip during the -- during that seven hour time period did
16 not result in the child's death. The child died from
17 being -- from hyperthermia while the car was not being
18 used for transportation, Judge.

19 The remaining issues, the 59(a)(2), which was raised
20 for the first time in the July 8th letter, the Defendants
21 appear to -- appear to clarify or indicate, suggest, that
22 59(a)(2) is not a jury matter, and hopes that you open --
23 that you can open a non-jury matter, may open a non-jury
24 matter to, as the rule says, to receive new evidence, to
25 take additional testimony and then finding of fact and

1 conclusions of law.

2 But the rule says the Court may do that, and the rule
3 does give a standard, and the standard, Your Honor, is for
4 any of the reasons for which trial has, therefore, been
5 granted in passage of law of the State. The rule does not
6 say that upon motion it shall be opened. In fact the
7 Lajeski case, if I'm saying it correctly, of 1997, a South
8 Carolina Court of Appeals case, held that the trial court
9 was wrong to open the non-jury matter and grant a new
10 trial because there wasn't insufficient basis as a matter
11 of law.

12 The Court says you have to have a basis. You can't
13 just say we didn't like the results that came from the
14 original trial. You have to have a basis, and in that
15 case the Court opined that, perhaps, under that motion of
16 59(a)(2) they wish to alter or amend under (E). A reason
17 for doing that would be the discovery of new evidence,
18 additional evidence, evidence that was wrong. Here there
19 is not any additional evidence that has been discovered.
20 These are simply the same facts requesting a different
21 result. So the motion really is what appears to be to us
22 is just a motion for a different result on the same facts.

23 And, lastly, Your Honor, two things. The Plaintiff
24 asserts that -- I'm sorry. The Defendant asserts that for
25 some reason we have in this letter we have objected that

1 the deposition testimony and that the insurance policy is
2 part of the record. We consent, agree and confirm that it
3 is part of the record. The trial notebook, which has been
4 submitted to the Court and with -- is in the Court's file,
5 contain not only -- contains stipulates of fact. It
6 contains the deposition testimony of the parties, and it
7 contains the policy, the applicable State Farm policy.

8 Your Honor, those things are in the record, and we
9 agree that they are in the record, and that was presented
10 to the Court, but on the record and in briefs the
11 stipulated facts, the policy of insurance, and the
12 deposition transcripts.

13 The last thing as far as the submission to the Court
14 by the Defendants are concerned is the issue of accident.
15 The fact that accident is not defined, Your Honor. The
16 cases that have dealt with coverage, including the Ates
17 case, say that accident is not determinative word. Arises
18 out of the use, ownership and maintenance of the vehicle.

19 Your Honor, this is first of all the first time the
20 Defendant raised this issue in their letter of July 8th.
21 Again, we would submit that that would be untimely. But
22 as to the issue of accident the courts, Fiegler -- Fiegler
23 court, which cites a number of different cases within that
24 and was also cited in my original memorandum to the Court
25 and I believe in the Court order it says, "In analyzing

1 ownership, maintenance and use of the vehicle no
2 distinction is made as to whether the injuries resulted
3 from a negligent, reckless, or intentional act. The three
4 part test in Ates applies regardless of whether the injury
5 occurred as a result of an intentional assault or an
6 accident.

7 The focus is on the extend of the role if any the
8 vehicle played causing the injury of damage or whether a
9 particular activity is a covered use as required by
10 statute or policy."

11 And this case, of course, Your Honor, the Court ruled
12 that the vehicle was not the accident; that there was an
13 intervening act under the Ates test, and the car was not
14 being used admittedly for transportation for seven hours
15 and 15 minutes. They also raise, Your Honor, that the
16 coverage issue in this case contains a requirement -- I'm
17 sorry. They also raise that the word, 'accident' is not
18 defined in the case. Again, accident is not defined in
19 the policy letter.

20 But under the coverages that apply which are
21 liability and under insured, and I do want to point out
22 that although the letter indicates that personal injury
23 protection language may apply the stipulation of facts
24 indicate that there is no personal injury protection in
25 this case. State Farm referring to there is no personal

1 injury protection coverage in this case. The potential
2 were liability and under insurability both of which in the
3 policy on -- I'll give you the page numbers -- in the
4 policy on Page 6 and Page 25 of the liability and under
5 insured, protectively, both of those coverages have a
6 requirement that coverage arise from the ownership,
7 maintenance and use of the vehicle.

8 So while accident is not defined, accident doesn't
9 need to be defined for personal coverage. Our courts have
10 determined that the word, 'accident' is of little
11 significance in determining how the vehicle was used.

12 As to the issues raised today, Judge, Mr. Nichols
13 first indicates that the child was not a resident of both
14 parents, and therefore, the Court should reexamine the
15 facts regarding that matter. Again, that issue is not
16 raised in the Plaintiff's or the Defendant's motion or in
17 the letter requesting a new hearing in the case.

18 He is correct that the closest that South Carolina
19 has come to determining the issue was the Appellate Court
20 which was in our original submission to -- our original
21 brief. The Appellate Court determined that it was an
22 issue of first impression, and they determined not to
23 decide the issue of first impression in as much as the
24 child was a resident of one parent.

25 But I think he indicated that there were some things

1 in the stipulated facts regarding this issue such as the
2 fact that they were never married and other things. I
3 don't know that they were stipulated facts, but in the
4 deposition testimony we indicated in the first hearing the
5 deposition of the parties was taken for the sole purpose
6 of determining residency. It was agreed among the parties
7 that that would be -- that was the only contested issue
8 was the issue of residency, and we took the deposition of
9 the parties on that issue.

10 The Court had the deposition testimony regarding that
11 issue, and we submit made the correct determination. The
12 Court may recall that the Defendant Gray, the father, in
13 his deposition testified that the first night -- the
14 minor's first night with him did not occur until 2014; he
15 admitted that the mother was the primary custodian. The
16 child lived with the mother, and he had very liberal
17 visitation.

18 We believe, of course, the child had a short life,
19 but in its short life the child was a residence relative
20 of the mother. Of course, we contend that that issue did
21 not determinative of the case because the coverage doesn't
22 apply for the claim itself.

23 The second issue raised by Mr. Nichols -- the second
24 issue raised by Mr. Nichols, I've already addressed in as
25 much that it was partly addressed in the Defendant's

1 motion and letter. It appears in argument today and
2 argument of counsel that were made during the hearing was
3 that this child did die after suffering hyperthermia and
4 being in the car all day. Mr. Nichols indicates that
5 there is only one case. It is an unpublished opinion of a
6 child -- it held that a child was in the car when it was
7 not covered. I'm sorry. Was in the car when it -- was
8 that a child that dies in a vehicle from hyperthermia in
9 all cases it's been covered under the policy except for
10 one which was an un unpublished opinion.

11 As I indicated in my reply brief, Judge, Mount Vernon
12 Fire Insurance Company which is 343. I believe it's
13 listed as 353. 343 at 3rd, 309. Mount Vernon -- it's a
14 Wisconsin -- I'm sorry -- Illinois case. That Illinois
15 case held that the similar situation was not covered. The
16 Illinois case, however, undertook the transportation
17 analysis that Ates includes and in fact points out that
18 the transportation analysis in the other cases was not
19 undertake.

20 So the only case that actually addresses the three
21 facts that South Carolina looks at ruled that there was no
22 coverage. I'm sorry. Ruled that there was not coverage,
23 not coverage, and that, of course, is Mount Vernon
24 Insurance Company.

25 As to the act of independent significance, Judge, the

1 facts would indicate that the father stepping out was an
2 act of independent significance. Your Honor, those are
3 the same arguments -- I'm sorry. I guess not the acts of
4 independent significance. These are the same arguments
5 raised in my brief and in the prior arguments, oral
6 arguments. Nothing has changed, Judge.

7 Our courts have held that an act of independent
8 significance it does in fact break the causal link. We
9 cited the cases, the Doe case, you know, where the victim
10 was sexually assaulted in the back of a vehicle. The car
11 in that case was parked. Highway patrolman parked
12 the case -- parked the -- the police officer parked his
13 vehicle, got out, sexually assaulted. They held that
14 there was independent -- act of independent significance
15 there far removed from the vehicle.

16 We also have, Your Honor, the I think it's that Lair
17 Lane case in which an individual was on their way home,
18 got in an argument with their spouse or boyfriend. The
19 vehicle was parked. The boyfriend got in the back with
20 the victim and strangled the victim. That was, again, an
21 act of independent significance.

22 Judge, I did, in reviewing their motions, I did find
23 another something what appears to be right on point
24 regarding this intended purpose fulfill doctrine. I
25 understand that Ates is not adopted, and if the Court

1 adopts this independent -- this intended purpose fulfill
2 doctrine it would be a new standard in South Carolina.

3 The cases, Doe v. South Carolina and Nationwide
4 Property v. Lane also involve individuals who are on their
5 way somewhere but never got to their destination were
6 assaulted or injured in some way, and the Court determined
7 that this is not coverage. The car is not being used for
8 transportation at the time. The fact that you are on your
9 way home and something happens before you get to your
10 intended destination in a vehicle does not in and of
11 itself make it a covered event. And that's basically what
12 the Defendants argue.

13 Because the child left the house to go to the
14 daycare, remained in the vehicle and died in the vehicle
15 and never got to the daycare but for some reason it should
16 be covered. That's not the law, and in fact the cases
17 that have dealt with the Ates test have had facts which
18 are the -- similar in that the intended purpose for
19 fulfill doctrine the cases would have resulted in perhaps
20 a different outcome. But that is not the case. The test
21 is the vehicle must be used for transportation at the time
22 of injury.

23 And, Your Honor, and the very last note that I have,
24 Mr. Nichols said without the child being in the vehicle
25 that the injury would not have happened. In our prior

1 hearings, Your Honor, Mr. Smith said had this child been
2 outside of the vehicle I don't know whether it would have
3 died or not. It may have been sun stroke. It may have
4 had heat exhaustion. It may have died of dehydration, but
5 in this particular case it died from being inside the
6 vehicle.

7 Your Honor, again, the significance of it is there
8 was a break in the causal link. The car was not being
9 used for transportation. It was unintended, unmoveable.
10 So, therefore, it was not being used for transportation,
11 and a 15 minute, two 15 minute intervals during a seven
12 hour, 45 minute day could in no arguable way have
13 contributed to the death of the minor.

14 And, therefore, we ask the Court to deny the motion
15 to alter or amend or grant a new trial or the Court use
16 the motion -- I did -- the Court is aware that when an
17 attorney begins to prepare for a hearing and often write
18 everything down ends up being a brief, and that's what
19 happened last night. I do have one, and I filed it when I
20 got here. So I am about to submit it to the Court and
21 submit another copy to opposing counsel. If I may
22 approach?

23 THE COURT: Yes. Thank you. Mr. Nichols, anything
24 else?

25 MR. NICHOLS: Judge, just hopefully, very briefly.

1 First off, I think what I heard was that we can't make
2 just a motion asking you to reconsider that. If we come
3 in under Rules 52 and 59 motion we've got to do more than
4 just ask you to rethink it. And, Judge, the Supreme Court
5 of South Carolina adopted the federal construction of Rule
6 59(E) which says, "You can ask the judge to reconsider any
7 rule." You don't have to come up with some new idea or
8 anything like this. I realize that there was some
9 exchange of letters. I'm not concerned. I didn't mention
10 those letters as Mr. Robinson pointed out.

11 But our version of the Rule 59(A) that under *Ela v.*
12 the South Carolina Department of Transportation the
13 Supreme Court said, "You may make a Rule 59 motion as to
14 any ruling by a judge." Where you get into trouble is if
15 you make a subsequent motion that the Judge has already
16 considered and decided. And then you get into one of
17 those colloquien IDP or the Howard Hunn problems of
18 successive motions. And then that affects your time to
19 appeal under Rule 203.

20 That's what happened in those cases. But in *Ela* the
21 Court says we can do exactly what we're doing here today
22 which is to come back to you and say, "Judge, we ask that
23 you rethink these issues." I have provided you with a
24 little bit of a different argument or a little bit
25 different authority, but we're making the same argument

1 here today.

2 We -- our position is that this vehicle was being
3 used for transportation at the time of this child's death.
4 Now, we talked about the Ates case. We talked about Ates.
5 We talked about Lane case, the Doe case. All these are
6 cited cases involving somebody either an attack or as in
7 the Lane case where the fellow got -- crawled in the back
8 and strangled his wife.

9 The Ates case which also involved an assault. Those
10 were focused on the causal connection; whether that was a
11 causal connection between the vehicle and the injury in
12 that case. And they said there was. There was, in
13 Peadler, it was a fellow who accidentally shot his wife
14 because he was removing a hunting -- I guess he'd been
15 hunting and it accidentally went off.

16 None of those things rely on existence of an
17 automobile for the type of injury that occurred in Ates.
18 The fellow walks around his wife. The gun discharged and
19 hits his girlfriend in the foot. None of that -- and the
20 Supreme Court focused in on where the vehicle is merely
21 the site of the injury. Merely the site, and that's all.
22 That's the only connection to the vehicle.

23 Then under Ates that vehicle is not being used for
24 transportation. Judge, we've got more than that here.
25 We've got a child who is placed in a car seat to be

1 transported to the daycare. The father, and I saw the
2 language in here, 'abandoned her'. Well, I don't like
3 that term because of the jarred nature. He just forgot
4 about her. And it's tragic, but by -- but that is much,
5 much, much different than what happened in Ates, what
6 happened in Lane, what happened in Doe.

7 And as I just go back to Judge Conner's words from
8 1995, "you're looking -- what we're focused on in -- is --
9 we're focused on is that without the automobile you don't
10 have the injury, and that's what it boils down to.

11 Secondly, it's not an act of independent significance
12 for him to step out and go back because it's not wholly
13 disassociated with his use of the automobile which is what
14 the Courts were looking at in Brooker, what the Courts
15 looked at in Carroway.

16 So, Judge, you know, I'm not really focused in. I
17 didn't make any argument about whether it's an act or not
18 because South Carolina goes back about 200 years. There
19 is no doubt that this was an accident. We're not making
20 that argument. An accident is an foreseeable thing from
21 the point of view from the injured party. That is long
22 held South Carolina law.

23 And certainly, you would not only Mr. Gray, but
24 certainly the child would not have been expected that this
25 kind of an injury when it happened. But I'm not -- I

1 didn't get into the letter, Judge, because I want to focus
2 in on the issue that's here which is a novel issue, and
3 that is under these cases is there coverage under an
4 automobile insurance policy is what happened here.

5 With regard to the residency, Judge, we made this
6 motion under Rule 59. We're asking you to reconsider all
7 of the issues in the actual motion itself. We don't
8 mention the residency. It's either in the proposed order
9 that Mr. Smith sent to you. There was a ruling that would
10 have found joint residency.

11 So it's not -- I would say that whether or not she's
12 a resident of both homes what's certainly before the Court
13 and on notice is that we're asking you to reconsider the
14 whole thing cause I'll understand if you said I didn't
15 raise it. I think it's been adequately placed before the
16 Court.

17 I heard counsel say the car was admittedly not being
18 used for transportation. Judge, that's the whole point of
19 this case. We're arguing that it was used. We're not
20 arguing that it wasn't being used. In fact they admit,
21 Page One in their reply, Paragraph Two, admits, "David
22 Gray was transporting the child when he negligently forgot
23 to remove her." There is an admission there. So we do
24 not -- it is not admitted I think the car was not being
25 used for transportation. That's the essential issue in

1 dispute in this case.

2 And, Judge, other than that we made the argument, and
3 I have not had a chance to look at the brief that's been
4 handed up. It was handed to me right at the same time it
5 was handed to you. But, certainly, if you would like
6 certainly respond to this.

7 THE COURT: Okay. Well, I'm going to take it under
8 advisement. Sam and I, we didn't make any snap decision
9 in this thing before. I mean we burned the midnight oil
10 on this. In fact we spent a lot of time looking over
11 this. There is not any help out there from our courts
12 that we could find. So, let us go through this and adjust
13 this, take a look, and certainly, if y'all want to send me
14 some more briefs.

15 MR. NICHOLS: I'll get up with Mr. Robinson, you
16 know. I'll look at this. We'll get together, Judge, and
17 if I'm going to submit something I'll get it to you within
18 20 days, and certainly I will talk to Mr. Robinson.

19 THE COURT: Yes. The holidays coming up y'all got
20 more important things to do than to worry about meeting
21 the deadline.

22 MR. ROBINSON: Judge, let me just say. My brief
23 covers a lot of things that -- only because I was
24 responding to everything that I had received since the
25 Court order. It sounds to me like that they are now just

1 simply asking for a motion to reconsider the previous
2 order. Not a new trial. Not a -- that's what it sounds
3 like to me. My brief addresses that as well in the motion
4 to reconsider.

5 He is correct to cite his cases that are named, but
6 also the Canal Insurance which was my cited case; that's
7 the case that determines that the vehicle had to be used
8 for transportation. And Delta Granton, you know, the
9 crane that fell. Drops something on the building and then
10 that case, a South Carolina case, Canal Insurance case,
11 cited a Minnesota case in which the children were left in
12 the house, and the vehicle left on and died of
13 asphyxiation.

14 That's the case they cited that they said was not a
15 covered event. So that's in my brief, but as to the case
16 of South Carolina. But in that case it really wasn't
17 cited. It was the fact that it was an accident. The care
18 wasn't being used for transportation. It was sitting
19 there, sitting there idling in what appeared to be an
20 attempted suicide by one of the parents and ended up
21 killing the children in an unfortunately situation in the
22 vehicle.

23 That's the case that I cited. Thank you, Judge.
24 I'll get with Mr. Nichols.

25 MR. NICHOLS: And let me just say one thing here,

1 Judge. Rule 59 is a new file rule. It's this, new trial.
2 That's the rule. When you make a motion under Rule 59(A)
3 or Rule 59(E), which is really just a timing motion to
4 alter or amend the judgment, when you make that motion you
5 are in effect -- you are necessarily under the new trial
6 rule. But as I understand it this was presented to you
7 for a bench trial on the stipulated facts. We're not
8 asking to reopen.

9 I do want that clear. We're not asking you to take
10 new evidence all over. But Rule 59(A) does -- actually
11 does allow that in a non-jury. We're not asking for that.
12 As I understand it Mr. Smith, Mr. Robinson got together.
13 They had stipulated facts, and it was presented to you on
14 that matter. That's all, Judge.

15 MR. ROBINSON: That's correct.

16 THE COURT: Okay. Good to see y'all.

17 END OF TRANSCRIPT OF RECORD

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON)

CIVIL ACTION NO. 2014-CP-16-0792

State Farm Mutual Automobile Insurance
Company,

Plaintiff,

v.

STIPULATION OF FACTS

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.

The Plaintiff and Defendants by and through their undersigned counsel stipulate to the following facts:

1. Plaintiff is an insurance company organized and existing under the laws of one of the states of the United States of America and is authorized to and does conduct business in the State of South Carolina.

2. Defendants Beverly Goyeneche is the mother of Amanda Goyeneche and grandmother of S.G. and is a citizen and resident of Darlington County, South Carolina.

3. David R. Gray, III and Amanda Goyeneche individually and as Parents and Natural Guardians of S.G. , are citizens and residents of Darlington County, South Carolina. Amanda Goyeneche is the proper name of the Defendant "Amanda Goyeneche-Gray" and is a property party to this action and consents to the jurisdiction and venue of this court.

2015 APR -7 PM12:53
SCOTT B. SUESS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

4. The events described herein below which give rise to this Complaint occurred on May 8, 2014 at Carolina Printing Sports and Trophy located at 618 S. Fifth Street, Hartsville, Darlington County, South Carolina.

5. This action is being brought pursuant to South Carolina Code Ann. § 15-53-10, *et seq.* and Rule 57 of the South Carolina Rules of Civil Procedure.

6. This court has jurisdiction over the parties hereto and the subject matter hereof and that venue is proper in Darlington County, South Carolina.

7. On or about February 28, 2014, Plaintiff issued a policy of insurance, bearing Policy Number 4891-309-40, to Defendant David R. Gray, III insuring a 2011 Ford F150 pickup. Said policy was effective from February 28, 2014 to August 28, 2014 and provided Liability and Underinsured coverage of \$25,000 each person; \$50,000 each accident; and \$25,000 property damage.

8. On or about October 30, 1998, Plaintiff also issued to a policy of insurance bearing Policy Number C483241E to Defendant Amanda Goyeneche, insuring a 2013 Wrangler. Said policy was effective from April 30, 2014 to October 30, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

9. On or about September 27, 2004, Plaintiff also issued to a policy of insurance bearing Policy Number 1003667A to Beverly Goyeneche insuring a 2004 Impala. Said policy was effective from March 27, 2014 to September 27, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

10. On or about June 3, 2008 Plaintiff also issued to a policy of insurance bearing Policy Number 1772085A to Beverly Goyeneche insuring a 2007 C1500. Said policy was effective from December 3, 2013 to June 3, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

11. State Farm policies of insurance provide coverage to insured persons subject to the terms, definitions, exclusions, and other limitations of the policies.

12. Among the terms and conditions of the relevant State Farm policies denominated above, it provides that the automobile insurance policies issued by the Plaintiff 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. Relevant portions of the policies include but are not limited to the following:

THIS POLICY

3. We agree to provide insurance according to the terms of this policy:

b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:

(1) The named insured shown on the Declarations Page is the sole owner of *your car*.

DEFINITIONS

Owned By means:

1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

LIABILITY COVERAGE

Insured means:

1. *you and resident relatives for:*
 - a. the ownership, maintenance, or use of:
 - (1) *your car*;
 - b. the maintenance or use of:
 - (1) *a non-owned car*; or
 - (2) *a temporary substitute car*;

Insuring Agreement

1. *We will pay:*
 - a. damages an *insured* becomes legally liable to pay because of:
 - (1) *bodily injury* to others; and
 - (2) damage to property

caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;

UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "W" is shown under "SYMBOLS" on the Declarations page.

Additional Definitions

Insured means:

1. *you*;
2. *resident relatives*;
3. any other *person while occupying* or using:
 - a. *your car*;with the expressed or implied consent of *you*; and
4. any *person* to the extent he or she may recover damages under a state wrongful death statute because of death of an *insured* under 1., 2., or 3. above

Underinsured Motor Vehicle means a *motor vehicle* the ownership, maintenance, and use of which is either;

1. insured or bonded for bodily injury and property damage liability at the time of the accident; or
2. the *insured's* damages exceed any damages cap or limitation imposed by statute.

Insuring Agreement

We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to recover from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* and *property damage* must be caused by an accident that involved operation, maintenance, or use of an *underinsured motor vehicle*.

13. Defendant Amanda Goyeneche has presented a claim damages in which she alleges that her daughter S.G. died in an unattended parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by David R. Gray, III.

14. Minor S.G. died in an unattended parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by Defendant David R. Gray, III.

15. Defendant 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.

16. The minor S.G. was left unattended in the back seat of the above described vehicle while it was parked 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.

17. The minor S.G. was left unattended in the back seat of the above described vehicle while it was parked and with the ignition off from approximately 1:15 p.m. to approximately 2:15 p.m. on the day of loss.

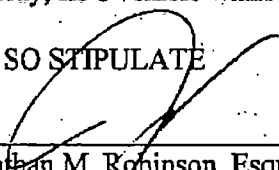
18. The minor S.G. was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia.

19. Defendant Amanda Goyeneche has presented a claim for bodily injury under the liability coverage and underinsured coverage of the insurance policies referenced hereinabove

arising from the death of S.G. on May 8, 2014.

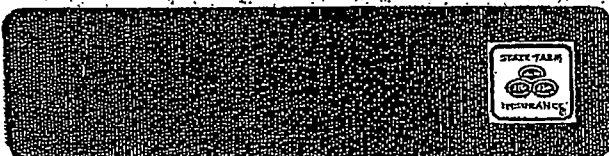
20. The minor S.G. was found unresponsive in Defendant David R. Gray, III's vehicle while it was turned off and unoccupied by any other persons.

WE SO STIPULATE


Jonathan M. Robinson, Esquire
Attorney for Plaintiff
4-2, 2015


Paul Cannarella, Esquire
Attorney for Defendant Gray
April 2, 2015


Karl H. Smith, Esquire
Attorney for Defendants Amanda and Betty Goyeneche
4-2, 2015



Please read the policy carefully. If there is an accident, contact your State Farm agent or one of our Claim Offices at once. (See "INSURED'S DUTIES" in this policy booklet.)

Georgia-South Carolina Office
11350 Johns Creek Parkway
Duluth, GA 30099-0001
Phone: (770) 418-5000

State Farm® Car Policy Booklet

South Carolina
Policy Form 9840A

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THIS POLICY

1. This policy consists of
 - a. the most recently issued Declarations Page;
 - b. the policy booklet version shown on that Declarations Page; and
 - c. any endorsements that apply, including those listed on that Declarations Page as well as those issued in connection with any subsequent renewal of this policy.
2. This policy contains all of the agreements between all named insureds who are shown on the Declarations Page and all applicants and:
 - a. us; and
 - b. any of our agents.
3. We agree to provide insurance according to the terms of this policy:
 - a. based on payment of premium for the coverages chosen; and
 - b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET, & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:
 - (1) The named insured shown on the Declarations Page is the sole owner of your car.
 - (2) Neither you nor any member of your household has, within the past three years, had:
 - (a) vehicle insurance canceled or nonrenewed by an insurer; or
 - (b) either:
 - (i) a license to drive; or
 - (ii) a vehicle registration suspended, revoked, or refused.

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- (3) Your car is used for pleasure and business.
4. All named insureds shown on the Declarations Page and all applicants agree by acceptance of this policy that:
 - a. the statements in 3.b. above are made by such named insured or applicant and are true; and
 - b. we provide this insurance on the basis those statements are true.
5. Your purchase of this policy may allow you to purchase certain coverages, coverage options, coverage deductibles, coverage limits, or coverage terms on other policies from the State Farm Companies, subject to their applicable eligibility rules.

DEFINITIONS

We define certain words and phrases below for use throughout the policy. Each coverage includes additional definitions only for use with that coverage. These definitions apply to the singular, plural, possessive, and any other form of these words and phrases. Defined words and phrases are printed in boldface italics.

Bodily Injury means bodily injury to a person and sickness, disease, or death that results from it.

Car means a land motor vehicle with four or more wheels, designed for use primarily on public roads. *Car* does not include:

1. Any vehicle while located for use as a dwelling or other premises; or
2. A truck-tractor designed to pull any type of trailer.

Car Business means a business or job where the purpose is to sell, lease, rent, repair, service, modify, transport, store, or park land motor vehicles or any type of trailer.

Financial Responsibility Act means the Motor Vehicle Financial Responsibility Act of South Carolina.

Fungi means any type or form of fungus or fungi and includes:

1. Mold;
2. Mildew; and

3. Any of the following that are produced or released by fungi:
 - a. Mycotoxins;
 - b. Spores;
 - c. Scents; or
 - d. Byproducts.

Newly Acquired Car means a car newly owned by you. A car ceases to be a newly acquired car on the earlier of:

1. the effective date and time of a policy, including any binder, issued by us or any other company that describes the car as an insured vehicle; or
2. the end of the 14th calendar day immediately following the date the car is delivered to you.

If a newly acquired car is not otherwise afforded comprehensive coverage or collision coverage by this or any other policy, then this policy will provide Comprehensive Coverage or Collision Coverage for that newly acquired car, subject to a deductible of \$500. Any coverage provided as a result of this paragraph will apply only until the end of the 5th calendar day immediately following the date the newly acquired car is delivered to you.

Non-Owned Car means a car that is in the lawful possession of you or any resident relative and that neither:

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1. is owned by:
 - a. you;
 - b. any resident relative;
 - c. any other person who resides primarily in your household; or
 - d. an employer of any person described in a., b., or c. above; nor
2. has been operated by, rented by, or in the possession of:
 - a. you; or
 - b. any resident relative

during any part of each of the 31 or more consecutive days immediately prior to the date of the accident or loss.

Occupying means in, on, entering, or exiting.

Our means the Company issuing this policy as shown on the Declarations Page.

Owned By means:

1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

Pedestrian means a person who is not occupying:

1. a motorized vehicle; or
2. a vehicle designed to be pulled by a motorized vehicle.

Person means a human being.

Private Passenger Car means:

1. a car of the private passenger type, other than a pickup truck, van, minivan, or sport utility vehicle, designed primarily to carry persons and their luggage; or
2. a pickup truck, van, minivan, or sport utility vehicle:
 - a. that is not used for:
 - (1) wholesale; or
 - (2) retail

pickup or delivery; and

- b. that has a Gross Vehicle Weight Rating of 10,000 pounds or less.

Resident Relative means a person, other than you, who resides primarily with the first person shown as a named insured on the Declarations Page and who is:

1. related to that named insured or his or her spouse by blood, marriage, or adoption, including an unmarried and unannounced child of either who is away at school and otherwise maintains his or her primary residence with that named insured; or
2. a ward or a foster child of that named insured, his or her spouse, or a person described in 1. above.

State Farm Companies means one or more of the following:

1. State Farm Mutual Automobile Insurance Company;
2. State Farm Fire and Casualty Company; and
3. Subsidiaries or affiliates of either 1. or 2. above.

Temporary Substitute Car means a car that is in the lawful possession of the person operating it and that:

1. replaces your car for a short time while your car is out of use due to its:
 - a. breakdown;
 - b. repair;
 - c. servicing;
 - d. damage; or
 - e. theft; and
2. neither you nor the person operating it own or have registered.

If a car qualifies as both a non-owned car and a temporary substitute car, then it is considered a temporary substitute car only.

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Trailer means:

1. a trailer:

- a. designed to be pulled by a private passenger car;
- b. not designed to carry persons; and
- c. while not used as premises for office, store, or display purposes; or

2. a farm implement or farm wagon while being pulled on public roads by a car.

Us means the Company issuing this policy as shown on the Declarations Page.

We means the Company issuing this policy as shown on the Declarations Page.

You or Your means the named insured, or named insureds shown on the Declarations Page. If a named insured shown on the Declarations Page is a person, then "you" or "your"

includes the spouse of the first person shown as a named insured if the spouse resides primarily with that named insured.

Your Car means the vehicle shown under "YOUR CAR" on the Declarations Page. Your car does not include a vehicle that you no longer own or lease.

If a car is shown on the Declarations Page under "YOUR CAR", and you ask us to replace it with a car newly owned by you, then the car being replaced will continue to be considered your car until the earliest of:

1. the end of the 30th calendar day immediately following the date the car newly owned by you is delivered to you;
2. the date this policy is no longer in force; or
3. the date you no longer own or lease the car being replaced.

LIABILITY COVERAGE

This policy provides Liability Coverage if "A" is shown under "SYMBOLS" on the Declarations Page.

Additional Definition

Insured means:

1. you and resident relatives for:
 - a. the ownership, maintenance, or use of:
 - (1) your car;
 - (2) a newly acquired car; or
 - (3) a trailer; and
 - b. the maintenance or use of:
 - (1) a non-owned car; or
 - (2) a temporary substitute car;
2. the first person shown as a named insured on the Declarations Page and that named insured's spouse who resides primarily with that named insured for the maintenance or

use of a car that is owned by, or furnished by an employer to, a person who resides primarily in your household, but only if such car is neither owned by, nor furnished by an employer to, the first person shown as a named insured on the Declarations Page or that person's spouse.

3. any other person for his or her use of:

- a. your car;
- b. a newly acquired car;
- c. a temporary substitute car; or
- d. a trailer while attached to a car described in a., b., or c. above.

Such vehicle must be used with the expressed or implied consent of you; and

4. any other person or organization vicariously liable for the use of a vehicle by an insured as defined in 1., 2., or 3. above, but only for such vicarious liability. This

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provision applies only if the vehicle is neither owned by, nor hired by, that other person or organization.

Insured does not include the United States of America or any of its agencies.

Insuring Agreement

1. We will pay:

- damages an *insured* becomes legally liable to pay because of:
 - bodily injury* to others; and
 - damage to property caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;
- attorney fees for attorneys chosen by us to defend an *insured* who is sued for such damages; and
- court costs charged to an *insured* and resulting from that part of a lawsuit:
 - that seeks damages payable under this policy's Liability Coverage; and
 - against which we defend an *insured* with attorneys chosen by us.

We have no duty to pay attorney fees and court costs incurred after we deposit in court or pay the amount due under this policy's Liability Coverage.

2. We have the right to:

- investigate, negotiate, and settle any claim or lawsuit;
- defend an *insured* in any claim or lawsuit, with attorneys chosen by us; and
- appeal any award or legal decision for damages payable under this policy's Liability Coverage.

Supplementary Payments

We will pay, in addition to the damages, fees, and costs described in the Insuring Agreement

above, the interest, premiums, costs, and expenses listed below that result from such accident:

1. Interest on damages owed by the *insured* that accrues:

- before a judgment, where owed by law, but only on that part of the judgment we pay; and
- after a judgment. We will not pay interest on damages paid or payable by a party other than the *insured* or us.

We have no duty to pay interest that accrues after we deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage;

2. Premiums for bonds, provided by a company chosen by us, required to appeal a decision in a lawsuit against an *insured*. We have no duty to:

- pay for bonds that exceed this policy's applicable Liability Coverage limit;
- furnish or apply for any bonds; or
- pay premiums for bonds purchased after we deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage; and

3. The following costs and expenses if related to and incurred after a lawsuit has been filed against an *insured*:

- Loss of wages or salary, but not other income, up to \$200 for each day an *insured* attends, at our request:
 - an arbitration;
 - a mediation; or
 - a trial of a lawsuit; and
- Reasonable expenses incurred by an *insured* at our request other than loss of wages, salary, or other income.

The amount of any of the costs or expenses listed above that are incurred by an *insured* must be reported to us before we will pay such incurred costs or expenses.

Limits

- The Liability Coverage limits for *bodily injury* are shown on the Declarations Page under "Liability Coverage - Bodily Injury Limits - Each Person, Each Accident".
 - The limit shown under "Each Person" is the most we will pay for all damages resulting from *bodily injury* to any one person injured in any one accident. "Bodily injury to any one person" includes all injury and damages to other persons resulting from that *bodily injury*, and all emotional distress resulting from that *bodily injury* sustained by other persons who do not sustain that *bodily injury*.
 - The limit shown under "Each Accident" is the most we will pay, subject to the limit for "Each Person", for all damages resulting from *bodily injury* to two or more persons injured in the same accident.
- The Liability Coverage limit for damage to property is shown on the Declarations Page under "Liability Coverage - Property Damage Limit - Each Accident". The limit shown is the most we will pay for all damages resulting from damage to property in any one accident.
- These Liability Coverage limits are the most we will pay regardless of the number of:
 - insureds*;
 - claims made;
 - vehicles insured; or
 - vehicles involved in the accident.

Nonapplication

We will not pay any damages or expenses under Liability Coverage that have already been paid under Uninsured Motor Vehicle Coverage of any policy issued by the State Farm Companies to you or any resident relative.

Exclusions

THERE IS NO COVERAGE FOR AN *INSURED*:

- TO THE EXTENT THE LIABILITY COVERAGE LIMITS OF THIS POLICY EXCEED THE LIABILITY COVERAGE LIMITS REQUIRED BY THE FINANCIAL RESPONSIBILITY ACT IF SUCH *INSURED* INTENTIONALLY CAUSES *BODILY INJURY* OR DAMAGE TO PROPERTY;
- OR FOR THAT *INSURED*'S INSURER FOR ANY OBLIGATION UNDER ANY TYPE OF WORKERS' COMPENSATION, DISABILITY, OR SIMILAR LAW;
- FOR *BODILY INJURY* TO THAT *INSURED*'S EMPLOYEE WHICH ARISES OUT OF THAT EMPLOYEE'S EMPLOYMENT. This exclusion does not apply to that *insured*'s household employee who is neither covered, nor required to be covered, under workers' compensation insurance;
- FOR *BODILY INJURY* TO THAT *INSURED*'S FELLOW EMPLOYEE WHILE THE FELLOW EMPLOYEE IS IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT. This exclusion does not apply to you and resident relatives who are legally liable for *bodily injury* to fellow employees;
- FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN *INSURED*;
- FOR DAMAGES ARISING OUT OF THE OWNERSHIP, MAINTENANCE, OR USE OF A VEHICLE WHILE IT IS BEING USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to the use of a *private passenger car* on a share-the-expense basis;
- WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH

THAT INSURED'S EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A CAR BUSINESS. This exclusion does not apply to:

- a. you;
- b. any resident relative; or
- c. any agent, employee, or business partner of you or any resident relative; or
- d. any person other than a person described in a, b., or c. above up to the liability coverage limits required by the Financial Responsibility Act;

while maintaining or using your car, a newly acquired car, a temporary substitute car, or a trailer owned by you;

8. WHILE THAT INSURED IS VALET PARKING A VEHICLE. This exclusion does not apply up to the liability coverage limits required by the Financial Responsibility Act while an insured is valet parking your car, a newly acquired car, a temporary substitute car, or a trailer owned by you;
9. WHILE MAINTAINING OR USING ANY VEHICLE OTHER THAN YOUR CAR, A NEWLY ACQUIRED CAR, A TEMPORARY SUBSTITUTE CAR, OR A TRAILER IN ANY BUSINESS OR OCCUPATION OTHER THAN A CAR BUSINESS OR VALET PARKING. This exclusion does not apply to the maintenance or use of a private passenger car;
10. FOR DAMAGE TO PROPERTY WHILE IT IS:
 - a. OWNED BY;
 - b. RENTED TO;
 - c. USED BY;
 - d. IN THE CARE OF; OR
 - e. TRANSPORTED BY YOU, A RESIDENT RELATIVE, OR THE PERSON WHO IS LEGALLY LIABLE FOR THE DAMAGE. This exclusion does not apply to damage to:

- a. motor vehicle owned by the employer of you or any resident relative if such damage is caused by an insured while operating another motor vehicle;
- b. residence while rented to or leased to an insured; or
- c. private garage while rented to or leased to an insured;

11. FOR LIABILITY ASSUMED UNDER ANY CONTRACT OR AGREEMENT;

12. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION;

13. WHILE USING A TRAILER WITH A MOTOR VEHICLE IF THAT INSURED IS NOT PROVIDED LIABILITY COVERAGE BY THIS POLICY FOR THE USE OF THAT MOTOR VEHICLE;

14. FOR THE OWNERSHIP, MAINTENANCE, OR USE OF ANY VEHICLE WHILE IT IS:

- a. OFF PUBLIC ROADS AND BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
- b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

This exclusion (14.) does not apply to your car up to the liability coverage limits required by the Financial Responsibility Act, OR

15. WHO IS AN EMPLOYEE OF THE UNITED STATES OF AMERICA OR ANY OF ITS AGENCIES, IF THE PROVISIONS OF THE FEDERAL TORT CLAIMS ACT APPLY.

If Other Liability Coverage Applies

1. If Liability Coverage provided by this policy and one or more other Car Policies issued to you or any resident relative by the State Farm Companies apply to the same accident, then:

- a. the Liability Coverage limits of such policies will not be added together to determine the most that may be paid; and
- b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. We may choose one or more policies from which to make payment.

2. The Liability Coverage provided by this policy applies as primary coverage for the ownership, maintenance, or use of your car or a trailer attached to it.

a. If

- (1) this is the only Car Policy issued to you or any resident relative by the State Farm Companies that provides Liability Coverage which applies to the accident as primary coverage; and

- (2) liability coverage provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident.

then we will pay the proportion of damages payable as primary that our applicable limit bears to the sum of our applicable limit and the limits of all other liability coverage that apply as primary coverage.

b. If

- (1) more than one Car Policy issued to you or any resident relative by the State Farm Companies provides Liability Coverage which applies to the accident as primary coverage; and

- (2) liability coverage provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident.

then the State Farm Companies will pay the proportion of damages payable as primary that the maximum amount that may be paid by the State Farm Companies as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as primary coverage.

3. Except as provided in 2. above, the Liability Coverage provided by this policy applies as excess coverage.

a. If

- (1) this is the only Car Policy issued to you or any resident relative by the State Farm Companies that provides Liability Coverage which applies to the accident as excess coverage; and

- (2) liability coverage provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident.

then we will pay the proportion of damages payable as excess that our applicable limit bears to the sum of our applicable limit and the limits of all other liability coverage that apply as excess coverage.

b. If

- (1) more than one Car Policy issued to you or any resident relative by the State Farm Companies provides Liability Coverage which applies to the accident as excess coverage; and

- (2) liability coverage provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident.

then the *State Farm Companies* will pay the proportion of damages payable as excess that the maximum amount that may be paid by the *State Farm Companies* as determined in 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as excess coverage.

Required Out-of-State Liability Coverage

III

1. an *insured* is in another state of the United States of America, a territory or possession of the United States of America, the District of Columbia, or any province or territory of Canada, and as a nonresident becomes subject to its motor vehicle compulsory insurance law,

financial responsibility law, or similar law; and

2. this policy does not provide at least the minimum liability coverage required by such law for such nonresident,

then this policy will be interpreted to provide the minimum liability coverage required by such law.

This provision does not apply to liability coverage required by law for motor carriers of passengers or motor carriers of property.

Financial Responsibility Certification

When this policy is certified under any law as proof of future financial responsibility, and while required during the policy period, this policy will comply with such law to the extent required.

PERSONAL INJURY PROTECTION COVERAGE

This policy provides Personal Injury Protection Coverage if "P" with a number beside it is shown under "SYMBOLS" on the Declarations Page. "P" with a number beside it is your "coverage symbol".

Check your coverage symbol with the Schedule in the provision titled Limits for the choice of coverage you made.

Additional Definitions

Insured means:

1. you and resident relatives;
 - a. while occupying a motor vehicle other than a motorcycle; or
 - b. if struck as a pedestrian by a motor vehicle; or
2. any other person while occupying:
 - a. your car;
 - b. a newly acquired car;

- a. a temporary substitute car; or
- d. a trailer while attached to a car described in a., b., or c. above.

Such vehicle must be used with the expressed or implied consent of you.

Medical Expenses mean reasonable expenses for medical services.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the bodily injury;
2. rendered by a healthcare provider:
 - a. who is licensed as a healthcare provider or if a license is required by law; and
 - b. within the legally authorized scope of that healthcare provider's practice;
3. commonly and customarily recognized throughout the medical profession and

within the United States of America as appropriate for the treatment of the bodily injury;

4. primarily designed to serve a medical purpose;
5. not experimental; and
6. not for research purposes.

Motor Vehicle means a vehicle or trailer of a kind required to be registered under South Carolina law.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar medical services in the geographical area in which the charges were incurred;
2. The fee specified in any fee schedule:
 - a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where medical services are provided; and
 - b. as prescribed or authorized by the law of the state where medical services are provided;
3. The fees agreed to by both the *insured's* healthcare provider and us; or
4. The fees agreed upon between the *insured's* healthcare provider and a third party when we have a contract with such third party.

Insuring Agreement

Medical Expenses and Funeral Expenses apply to all Personal Injury Protection Coverages. Loss of Income and Essential Services Expenses apply only to coverages with coverage symbol P1, P2, P3, P4, P5, P6, and P7.

1. Medical Expenses

We will pay medical expenses incurred because of bodily injury that is sustained by an *insured* and caused by accident resulting from the maintenance or use of a motor vehicle as a vehicle if:

- a. that *insured* is first provided medical services within one year immediately following the date of the accident; and
- b. such medical expenses are for medical services that are provided within three years immediately following the date of the accident.

2. Funeral Expenses

We will pay funeral expenses incurred for an *insured* who dies within three years immediately following the date of a motor vehicle accident if the death is a direct result of bodily injury sustained in such accident.

3. Loss of Income

We will pay 85% of an *insured's* actual loss of earnings from work due to bodily injury that is sustained by an *insured* and caused by a motor vehicle accident. This applies only if the *insured* was receiving earnings from work at the time of the accident. The loss must be incurred within three years of the date of the accident and while the *insured* is living.

4. Essential Services Expenses

We will pay reasonable expenses incurred for needed services the *insured* would have done for his or her family, but is unable to do because of bodily injury that is sustained by that *insured* and caused by a motor vehicle accident. This benefit applies only if the *insured* was not receiving earnings from work at the time of the accident. The expense must be incurred within three years of the date of the accident and while the *insured* is living.

Determining Medical Expenses

We have the right to:

1. obtain and use:
 - a. utilization reviews;
 - b. peer reviews; and
 - c. medical bill reviews
 to determine if the incurred charges are *medical expenses*;
2. use a medical examination of the insured to determine if:
 - a. the bodily injury was caused by a motor vehicle accident; and
 - b. the expenses incurred are *medical expenses*; and
3. enter into a contract with a third party that has an agreement with the insured's health care provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to:

- a. whether incurred charges are *medical expenses*; or
- b. the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses

then the disagreement will be resolved by arbitration upon written request of the insured or us.

2. The arbitration will take place in the county in which the insured resides unless the parties agree to another location.

The insured and we will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the insured or we may petition a court that has jurisdiction to select the third arbitrator.

Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.

3. The arbitrators shall only decide whether incurred charges are *medical expenses* and the amount due under this coverage for Funeral Expenses, Loss of Income, or Essential Services Expenses. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.

4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:
 - a. us;
 - b. the insured;
 - c. any assignee of the insured; and
 - d. any person or organization with whom the insured expressly or impliedly contracts for medical services, funeral services, or essential services.

- a. us;
- b. the insured;
- c. any assignee of the insured; and
- d. any person or organization with whom the insured expressly or impliedly contracts for medical services, funeral services, or essential services.

5. Subject to 1., 2., 3., and 4. above, state court rules governing procedure and admission of evidence will be used.

6. We do not waive any of our rights by submitting to arbitration.

Limits

1. The most we will pay is the amount shown under "Aggregate Limit" in the Schedule for your coverage symbol. This limit is the most we will pay for all loss and expense combined, incurred by or on behalf of any one insured as a result of any one accident, regardless of the number of:
 - a. insureds;
 - b. claims made;
 - c. vehicles insured; or
 - d. vehicles involved in the accident.

- a. insureds;
- b. claims made;
- c. vehicles insured; or
- d. vehicles involved in the accident.

2. Subject to the aggregate limit shown in the Schedule for your coverage symbol, the most we will pay for funeral expenses incurred for any one insured is \$3,000.

3. Schedule

Coverage Symbol	Medical Expenses	Funeral Expenses	Loss of Income	Essential Services Expenses	Aggregate Limit
P1	Yes	Yes	Yes	Yes	\$1,000
P2	Yes	Yes	Yes	Yes	\$1,500
P3	Yes	Yes	Yes	Yes	\$2,000
P4	Yes	Yes	Yes	Yes	\$2,500
P5	Yes	Yes	Yes	Yes	\$3,000
P6	Yes	Yes	Yes	Yes	\$10,000
P7	Yes	Yes	Yes	Yes	\$25,000
P8	Yes	Yes	No	No	\$1,000
P9	Yes	Yes	No	No	\$1,500
P10	Yes	Yes	No	No	\$2,000
P11	Yes	Yes	No	No	\$2,500
P12	Yes	Yes	No	No	\$3,000
P13	Yes	Yes	No	No	\$10,000
P14	Yes	Yes	No	No	\$25,000

Exclusions

THERE IS NO COVERAGE FOR AN INSURED:

1. WHO INTENTIONALLY CAUSES AN ACCIDENT WHICH RESULTS IN THAT INSURED'S BODILY INJURY;
2. WHILE VOLUNTARILY OCCUPYING A MOTOR VEHICLE KNOWN BY THAT PERSON TO BE STOLEN;
3. WHILE COMMITTING A FELONY;
4. WHILE ATTEMPTING TO ELUDE A POLICE OFFICER;
5. WHILE OCCUPYING, USING, OR MAINTAINING A MOTORCYCLE;
6. WHO IS EITHER OCCUPYING OR STRUCK AS A PEDESTRIAN BY A VEHICLE OWNED BY THAT INSURED, YOU, OR ANY RESIDENT RELATIVE IF IT IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR;
7. WHO IS OCCUPYING A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN INSURED;

8. WHO IS OCCUPYING A VEHICLE WHILE IT IS BEING USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to:
 - a. the use of a private passenger car on a share-the-expense basis; or
 - b. an insured while occupying a non-owned car as a passenger;

9. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT INSURED'S EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A CAR BUSINESS. This exclusion does not apply to:
 - a. you;
 - b. any resident relative; or
 - c. any agent, employee, or business partner of a or b. above

while maintaining or using your car, a newly acquired car, a temporary substitute car, or a trailer owned by you;

10. WHILE THAT INSURED IS VALET PARKING A VEHICLE.

11. WHILE MAINTAINING OR USING A NON-OWNED CAR IN ANY BUSINESS OR OCCUPATION OTHER THAN A CAR BUSINESS OR VALET PARKING. This exclusion does not apply to the maintenance or use of a private passenger car.

12. WHO IS EITHER OCCUPYING OR STRUCK AS A PEDESTRIAN BY A VEHICLE THAT:

- IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS;
- RUNS ON RAILS OR CRAWLER-TREADS; OR
- IS LOCATED FOR USE AS ADWELLING OR OTHER PREMISES;

13. WHOSE BODILY INJURY RESULTS FROM WAR OR ANY KIND;

14. WHOSE BODILY INJURY RESULTS FROM:

- NUCLEAR REACTION;
- RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
- THE ACCIDENTAL OR INTENTIONAL DETONATION OF, OR RELEASE OF RADIATION FROM, ANY NUCLEAR OR RADIOACTIVE DEVICE.

15. WHOSE BODILY INJURY RESULTS FROM THE DISCHARGE OF A FIRE-ARM;

16. WHOSE BODILY INJURY RESULTS FROM EXPOSURE TO FUNGI; OR

17. WHO IS OCCUPYING A VEHICLE WHILE IT IS:

- BEING PREPARED FOR, USED IN PRACTICES FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion, (17.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Personal Injury Protection Coverage or Similar Vehicle Insurance Applies

1. An insured shall not recover for the same expense or loss under both this coverage and other similar vehicle insurance.
2. If Personal Injury Protection Coverage is provided by this policy and one or more other vehicle policies issued to you or any resident relative by the State Farm Companies apply to the same bodily injury, then:
 - a. the Personal Injury Protection Coverage limits of such policies shall not be added together to determine the most that may be paid; and
 - b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. We may choose one or more policies from which to make payment.
3. The Personal Injury Protection Coverage provided by this policy applies as primary coverage for an insured who sustains bodily injury while occupying your car or a trailer attached to it.

a. If:

- (1) this is the only vehicle policy issued to you or any resident relative by the State Farm Companies that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and
- (2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident,

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then we will pay the proportion of expenses or loss payable as primary that our applicable limit bears to the sum of our applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

b. If:

- (1) more than one vehicle policy issued to you or any resident relative by the State Farm Companies provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as primary coverage; and
- (2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same accident,

then the State Farm Companies will pay the proportion of expenses or loss payable as primary that the maximum amount that may be paid by the State Farm Companies as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as primary coverage.

4. Except as provided in 3. above, the Personal Injury Protection Coverage provided by this policy applies as excess coverage, but only in the amount by which the limits of this coverage exceed the primary coverage.

a. If:

- (1) this is the only vehicle policy issued to you or any resident relative by the State Farm Companies that provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and
- (2) personal injury protection coverage or other similar vehicle insurance

provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident,

then we will pay the proportion of expenses or loss payable as excess that our applicable limit bears to the sum of our applicable limit and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

b. If:

- (1) more than one vehicle policy issued to you or any resident relative by the State Farm Companies provides Personal Injury Protection Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and
- (2) personal injury protection coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident,

then the State Farm Companies will pay the proportion of expenses or loss payable as excess that the maximum amount that may be paid by the State Farm Companies as determined in 2. above bears to the sum of such amount and the limits of all other personal injury protection coverage or similar vehicle insurance that apply as excess coverage.

Workers' Compensation Coordination

Any Personal Injury Protection Coverage provided by this policy applies as excess over any benefits recovered under any workers' compensation law or any other similar law.

Our Payment Options

We may, at our option, make payment to one or more of the following:

1. The insured;
2. The insured's surviving spouse;

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3. A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent person;
4. A person authorized by law to receive such payment; or
5. Any person or organization that provides the *medical services*, funeral services, or other services payable under this coverage.

MEDICAL PAYMENTS COVERAGE

This policy provides Medical Payments Coverage if "C" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. you and resident relatives:

a. while occupying:

- (1) your car;
- (2) a newly acquired car;
- (3) a temporary substitute car;
- (4) a non-owned car; or
- (5) a trailer while attached to a car described in (1), (2), (3), or (4) above; or

b. if struck as a pedestrian by a motor vehicle or any type of trailer; and

2. any other person while occupying:

- a. your car;
- a. a newly acquired car;
- c. a temporary substitute car; or
- d. a trailer while attached to a car described in a, b, or c. above.

Such vehicle must be used with the expressed or implied consent of you.

Medical Expenses mean reasonable expenses for medical services.

Medical Services mean treatments, procedures, products, and other services that are:

1. necessary to achieve maximum medical improvement for the *bodily injury*;

2. rendered by a healthcare provider:
 - a. who is licensed as a healthcare provider if a license is required by law; and
 - b. within the legally authorized scope of that healthcare provider's practice;

3. commonly and customarily recognized throughout the medical profession and within the United States of America as appropriate for the treatment of the *bodily injury*;

4. primarily designed to serve a medical purpose;

5. not experimental; and

6. not for research purposes.

Reasonable Expenses mean the lowest one of the following charges:

1. The usual and customary fees charged by a majority of healthcare providers who provide similar *medical services* in the geographical area in which the charges were incurred;

2. The fee specified in any fee schedule;

- a. applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle liability policies issued in the state where *medical services* are provided; and

- b. as prescribed or authorized by the law of the state where *medical services* are provided;

3. The fees agreed to by both the *insured's* healthcare provider and us; or

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4. The fees agreed upon between the *insured's* healthcare provider and a third party when we have a contract with such third party.

Insuring Agreement

We will pay:

1. *medical expenses* incurred because of *bodily injury* that is sustained by an *insured* and caused by accident resulting from the maintenance or use of a motor vehicle as a vehicle if:

- a. that *insured* is first provided *medical services* within one year immediately following the date of the accident; and

- b. such *medical expenses* are for *medical services* that are provided within three years immediately following the date of the accident; and

2. funeral expenses incurred for an *insured* who dies within three years immediately following the date of a motor vehicle accident if the death is a direct result of *bodily injury* sustained in such accident.

Determining Medical Expenses

We have the right to:

1. obtain and use:

- a. utilization reviews;
- b. peer reviews; and
- c. medical bill reviews

- to determine if the incurred charges are *medical expenses*;

2. use a medical examination of the *insured* to determine if:

- a. the *bodily injury* was caused by a motor vehicle accident; and
- b. the expenses incurred are *medical expenses*; and

3. enter into a contract with a third party that has an agreement with the *insured's* healthcare provider to charge fees as determined by that agreement.

Arbitration

1. If there is a disagreement as to whether incurred charges are *medical expenses*, then the disagreement will be resolved by arbitration upon written request of the *insured* or us.

2. The arbitration will take place in the county in which the *insured* resides unless the parties agree to another location.

The *insured* and we will each select a competent arbitrator. These two arbitrators will select a third competent arbitrator. If they are unable to agree on the third arbitrator within 30 days, then either the *insured* or we may petition a court that has jurisdiction to select the third arbitrator.

Each party will pay the cost of its own arbitrator, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third arbitrator.

3. The arbitrators shall only decide whether incurred charges are *medical expenses*. Arbitrators shall have no authority to decide any other questions of fact, decide any questions of law, or conduct arbitration on a class-wide or class-representative basis.

4. A written decision that is both agreed upon by and signed by any two arbitrators, and that also contains an explanation of how they arrived at their decision, will be binding on:

- a. us;
- b. the *insured*;
- c. any assignee of the *insured*; and

- d. any person or organization with whom the *insured* expressly or impliedly contracts for *medical services*.

5. Subject to 1, 2, 3, and 4. above, state court rules governing procedure and admission of evidence will be used.

6. We do not waive any of our rights by submitting to arbitration.

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Limit

The Medical Payments Coverage Limit is shown on the Declarations Page under "Medical Payments Coverage - Limit - Each Person". This limit is the most we will pay for the medical expenses and funeral expenses combined, incurred by or on behalf of any one insured as a result of any one accident, regardless of the number of:

1. insureds;
2. claims made;
3. vehicles insured; or
4. vehicles involved in the accident.

Subject to the limit shown on the Declarations Page, the most we will pay for funeral expenses incurred for any one insured is \$3,000.

Exclusions

THERE IS NO COVERAGE FOR AN INSURED:

1. WHO IS STRUCK AS A PEDESTRIAN BY A MOTOR VEHICLE, OWNED BY THAT INSURED OR YOU, IF IT IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR;
2. IF ANY WORKERS' COMPENSATION LAW OR ANY SIMILAR LAW APPLIES TO THAT INSURED'S BODILY INJURY;
3. WHO IS OCCUPYING A VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN INSURED;
4. WHO IS OCCUPYING A VEHICLE WHILE IT IS BEING USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to:
 - a. the use of a private passenger car on a share-the-expense basis; or
 - b. an insured while occupying a non-owned car as a passenger;
5. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT INSURED'S EMPLOYMENT IN

OR ENGAGEMENT OF ANY KIND IN A CAR BUSINESS. This exclusion does not apply to:

- a. you;
- b. any resident relative; or
- c. any agent, employee, or business partner of a. or b. above

while maintaining or using your car, a newly acquired car, a temporary substitute car, or a trailer owned by you;

6. WHILE THAT INSURED IS VALET PARKING A VEHICLE;
7. WHILE MAINTAINING OR USING A NON-OWNED CAR IN ANY BUSINESS OR OCCUPATION OTHER THAN A CAR BUSINESS OR VALET PARKING. This exclusion does not apply to the maintenance or use of a private passenger car;
8. WHO IS EITHER OCCUPYING OR STRUCK AS A PEDESTRIAN BY A VEHICLE THAT IS LOCATED FOR USE AS ADJUTING OR OTHER PREMISES;
9. WHO IS STRUCK AS A PEDESTRIAN BY A VEHICLE THAT:
 - a. IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
 - b. RUNS ON RAILS OR CRAWLER-TREADS;
10. WHOSE BODILY INJURY RESULTS FROM WAR OF ANY KIND;
11. WHOSE BODILY INJURY RESULTS FROM:
 - a. NUCLEAR REACTION;
 - b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE; OR
 - c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF OR RELEASE OF RADIATION FROM ANY NUCLEAR OR RADIOACTIVE DEVICE;

12. WHOSE BODILY INJURY RESULTS FROM THE DISCHARGE OF A FIRE-ARM;

13. WHOSE BODILY INJURY RESULTS FROM EXPOSURE TO FUNGUS OR

14. WHO IS OCCUPYING A VEHICLE WHILE IT IS:

- a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
- b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (14.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Medical Payments Coverage or Similar Vehicle Insurance Applies

1. An insured shall not recover for the same medical expenses or funeral expenses under both this coverage and other medical payments coverage or similar vehicle insurance.
2. If Medical Payments Coverage provided by this policy and one or more other vehicle policies issued to you or any resident relative by the State Farm Companies apply to the same bodily injury, then:
 - a. the Medical Payments Coverage limits of such policies shall not be added together to determine the most that may be paid; and
 - b. the maximum amount that may be paid from all such policies combined is the single highest applicable limit provided by any one of the policies. We may choose one or more policies from which to make payment.
3. If other medical payments coverage, personal injury protection coverage, or similar

vehicle insurance applies, then the Medical Payments Coverage provided by this policy applies as excess coverage.

a. If

- (1) this is the only vehicle policy issued to you or any resident relative by the State Farm Companies that provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and
- (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident;

then we will pay the proportion of medical expenses and funeral expenses payable as excess that our applicable limit bears to the sum of our applicable limit and the limits of all other medical payments coverage or similar vehicle insurance that apply as excess coverage.

b. If

- (1) more than one vehicle policy issued to you or any resident relative by the State Farm Companies provides Medical Payments Coverage or other similar vehicle insurance which applies to the accident as excess coverage; and
- (2) medical payments coverage or other similar vehicle insurance provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident;

then the State Farm Companies will pay the proportion of medical expenses and funeral expenses payable as excess that the maximum amount that may be paid by the State Farm Companies is determined in 2. above

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bears to the sum of such amount and the limits of all other medical payments coverage or similar vehicle insurance that apply as excess coverage.

Our Payment Options

We may, at our option, make payment to one or more of the following:

1. The insured;

2. The insured's surviving spouse;
3. A parent or guardian of the insured, if the insured is a minor or an incompetent person;
4. A person authorized by law to receive such payment; or
5. Any person or organization that provides the medical services or funeral services.

UNINSURED MOTOR VEHICLE COVERAGE

This policy provides Uninsured Motor Vehicle Coverage if "U" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. you;
2. resident relatives;
3. any other person while occupying or using:
 - a. your car;
 - b. a newly acquired car; or
 - c. a temporary substitute car,
 with the expressed or implied consent of you; and
4. any person to the extent he or she may recover damages under a state wrongful death statute because of the death of an insured under 1., 2., or 3. above.

Motor Vehicle means a self-propelled vehicle or trailer designed for use on public roads, but does not include tractor engines, road rollers, farm trailers, tractor cranes, power shovels, well drillers, or electric trolleys.

Property Damage means damage to property of the insured.

Uninsured Motor Vehicle means a motor vehicle:

1. the ownership, maintenance, and use of which is:

- a. not insured or bonded for bodily injury and property damage liability at the time of the accident; or
- b. insured or bonded for bodily injury and property damage liability at the time of the accident; but
 - (1) the limits are less than required by the Financial Responsibility Act;
 - (2) the insuring company:
 - (a) denies that its policy provides liability coverage for damages that result from the accident; or
 - (b) is or becomes insolvent; or
 - (3) a cause of action for the bodily injury or property damage is barred by the South Carolina Tort Claims Act; or

2. the owner and driver of which remain unknown, but only if:

- a. the bodily injury or property damage was caused by physical contact with the unknown vehicle, or the accident was witnessed by someone other than the owner or driver of the insured vehicle. The witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit; and

- b. the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

Uninsured Motor Vehicle does not include a motor vehicle owned by:

1. a self-insurer in accordance with the applicable provisions of law; or
2. the State or any of its political subdivisions when the vehicle is operated by a person with proper authorization.

Insuring Agreement

We will pay damages for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. The bodily injury must be sustained by an insured. The bodily injury and property damage must be caused by an accident that involves the operation, maintenance, or use of an uninsured motor vehicle.

Our Right to Defend

We have the right to appear and defend in the name of the owner and driver of the uninsured motor vehicle on the issues of legal liability of, and the damages owed by, such owner or driver.

Limits

1. The Uninsured Motor Vehicle Coverage limits for bodily injury are shown on the Declarations Page under "Uninsured Motor Vehicle Coverage - Bodily Injury Limits - Each Person, Each Accident".
 - a. The most we will pay for all damages resulting from bodily injury to any one person injured in any one accident is the lesser of:
 - (1) the amount of all damages resulting from that bodily injury reduced by the sum of all payments for damages resulting from that bodily injury made by or on behalf of any person or organization who is or may be held legally liable for that bodily injury; or

- (2) the limit shown under "Each Person".

"Bodily injury to any one person" includes all injury and damages to other persons resulting from that bodily injury, and all emotional distress resulting from that bodily injury sustained by other persons who do not sustain that bodily injury.

- b. Subject to a. above, the most we will pay for all damages resulting from bodily injury to two or more insureds injured in the same accident is the limit shown under "Each Accident".

2. The Uninsured Motor Vehicle Coverage limit for property damage is shown on the Declarations Page under "Uninsured Motor Vehicle Coverage - Property Damage Limit - Each Accident". The most we will pay for property damage is the lesser of:

- a. the amount of property damage reduced by the sum of all payments made by or on behalf of any person or organization who is or may be held legally liable for that property damage; or
- b. the limit shown under "Each Accident".

3. These Uninsured Motor Vehicle Coverage limits are the most we will pay regardless of the number of:

- a. insureds;
- b. claims made;
- c. vehicles insured; or
- d. vehicles involved in the accident.

Non duplication

We will not pay under Uninsured Motor Vehicle Coverage any damages:

1. that have already been paid to or for the insured;
- a. by or on behalf of any person or organization who is or may be held legally liable for the bodily injury to the insured; or

- b. for *bodily injury* under Liability Coverage of any policy issued by the *State Farm Companies* to you or any resident relative;
2. that:
- have already been paid;
 - could have been paid; or
 - could be paid
- to or for the *insured* under any workers' compensation law, disability benefits law, or similar law; or
3. that are *property damage* paid or payable under any policy of property insurance.
- Exclusions**
- THERE IS NO COVERAGE:**
- FOR AN *INSURED* WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY PERSON OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* OR *PROPERTY DAMAGE* AND THEREBY IMPAIRS OUR RIGHT TO RECOVER OUR PAYMENTS;
 - TO THE EXTENT THE UNINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE *FINANCIAL RESPONSIBILITY ACT*:
 - FOR AN *INSURED* WHO SUSTAINS *BODILY INJURY* WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU OR ANY RESIDENT RELATIVE IF:
 - THE MOTOR VEHICLE IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR; AND
 - IT WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;

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- b. IF THE UNINSURED MOTOR VEHICLE IS OWNED BY YOU OR ANY RESIDENT RELATIVE; OR
- a. FOR *PROPERTY DAMAGE*:
- TO A MOTOR VEHICLE; OR
 - IN A MOTOR VEHICLE OWNED BY YOU OR ANY RESIDENT RELATIVE IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;
3. FOR *PROPERTY DAMAGE* THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF YOUR CAR OR A NEWLY ACQUIRED CAR;
4. FOR AN *INSURED* WHOSE *BODILY INJURY* RESULTS FROM THE DISCHARGE OF A FIREARM;
5. TO THE EXTENT IT BENEFITS:
- ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;
 - A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR
 - ANY PROPERTY INSURER;
6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION; OR
7. FOR THE FIRST \$200 OF *PROPERTY DAMAGE* SUSTAINED BY EACH *INSURED* IN EACH ACCIDENT.
- If Other Uninsured Motor Vehicle Coverage Applies**
1. The Uninsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an *insured* who sustains *bodily injury* or *property damage* while occupying your car.

2. Except as provided in item 1. above, the Uninsured Motor Vehicle Coverage provided by this policy applies as excess coverage.
3. If:
- you or any resident relative sustains *bodily injury* or *property damage*:
 - while occupying a motor vehicle not owned by you or any resident relative; or
 - while not occupying a motor vehicle; and
 - Uninsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to you or any resident relative by the *State Farm Companies* apply to the same *bodily injury* or *property damage*, then:
 - the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. We may choose one or more policies from which to make payment.
 - If you or any resident relative sustains *bodily injury* or *property damage* while occupying a motor vehicle other than your car that is owned by you or any resident relative, then this coverage applies only to the extent of the uninsured motor vehicle coverage applicable to the motor vehicle that the *insured* was occupying.
- However, if the motor vehicle that the *insured* was occupying was not insured for uninsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies

- combined that are issued to you or any resident relative by the *State Farm Companies* is the minimum limits required by the *Financial Responsibility Act*. We may choose one or more policies from which to make payment.
5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources provide uninsured motor vehicle coverage for the same damages on a:
- primary basis, then we will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as primary coverage; or
 - excess basis, then we will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other uninsured motor vehicle coverage that apply as excess coverage.
- Our Payment Options**
- We may, at our option, make payment to one or more of the following:
- The *insured*;
 - The *insured's* surviving spouse;
 - A parent or guardian of the *insured*, if the *insured* is a minor or an incompetent person; or
 - A person authorized by law to receive such payment.

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UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "U" is shown under "SYMBOLS" on the Declarations Page.

Additional Definitions

Insured means:

1. you;
2. resident relatives;
3. any other person while occupying or using:
 - a. your car;
 - b. a newly acquired car; or
 - c. a temporary substitute car;
 with the expressed or implied consent of you; and
4. any person to the extent he or she may recover damages under a state wrongful death statute because of the death of an insured under 1., 2., or 3. above.

Motor Vehicle means a self-propelled vehicle or trailer designed for use on public roads, but does not include tractor engines, road rollers, farm tractors, tractor cranes, power shovels, well drillers, or electric trolleys.

Property Damage means damage to property of the insured.

Underinsured Motor Vehicle means a motor vehicle the ownership, maintenance, and use of which is either:

1. insured or bonded for bodily injury and property damage liability at the time of the accident; or
2. self-insured under any motor vehicle financial responsibility law, any motor carrier law, or any similar law.

In an amount that is at least equal to the amount required by the *Financial Responsibility Act* and:

1. the amount of the insurance, bonds, and self-insurance from all sources is less than the amount of the insured's damages; or

2. the insured's damages exceed any damages cap or limitation imposed by statute.

Underinsured Motor Vehicle does not include a motor vehicle while located for use as a dwelling or other premises.

Insuring Agreement

We will pay damages for bodily injury and property damage an insured is legally entitled to recover from the owner or driver of an underinsured motor vehicle. The bodily injury must be sustained by an insured. The bodily injury and property damage must be caused by an accident that involves the operation, maintenance, or use of an underinsured motor vehicle.

We will pay only if all bodily injury and property damage liability bonds, policies, and self-insurance plans that apply to the insured's bodily injury or property damage have been:

1. used up by payment of judgments or settlements; or
2. paid to the extent required by any damages cap or limitation imposed by statute.

Our Right to Defend

We have the right to appear and defend in the name of the owner and driver of the underinsured motor vehicle on the issues of legal liability of, and the damages owed by, such owner or driver.

Limits

1. The Underinsured Motor Vehicle Coverage limits are shown on the Declarations Page under "Underinsured Motor Vehicle Coverage - Bodily Injury Limits - Each Person, Each Accident".

- a. The most we will pay for all damages resulting from bodily injury to any one person injured in any one accident is the lesser of:

- (1) the amount of all damages resulting from that bodily injury reduced by the sum of all payments for damages resulting from that

bodily injury made by or on behalf of any person or organization who is or may be held legally liable for that bodily injury; or

- (2) the limit shown under "Each Person".

"Bodily injury to any one person" includes all injury and damages to other persons resulting from that bodily injury, and all emotional distress resulting from that bodily injury sustained by other persons who do not sustain that bodily injury.

- b. Subject to a. above, the most we will pay for all damages resulting from bodily injury to two or more insureds injured in the same accident is the limit shown under "Each Accident".

2. The Underinsured Motor Vehicle Coverage limit for property damage is shown on the Declarations Page under "Underinsured Motor Vehicle Coverage - Property Damage Limit - Each Accident". The most we will pay for property damage is the lesser of:

- a. the amount of property damage reduced by the sum of all payments made by or on behalf of any person or organization who is or may be held legally liable for that property damage; or
- b. the limit shown under "Each Accident".

3. These Underinsured Motor Vehicle Coverage limits are the most we will pay regardless of the number of:

- a. insureds;
- b. claims made;
- c. vehicles insured; or
- d. vehicles involved in the accident.

Nonduplication

We will not pay under Underinsured Motor Vehicle Coverage any damages:

1. that have already been paid to or for the insured:
 - a. by or on behalf of any person or organization who is or may be held

legally liable for the bodily injury to the insured; or

- b. for bodily injury under Liability Coverage of any policy issued by the State Farm Companies to you or any resident relative.

Exclusions

2. that:
 - a. have already been paid;
 - b. could have been paid; or
 - c. could be paid
 to or for the insured under any workers' compensation law, disability benefits law, or similar law; or
3. that any property damage paid or payable under any policy of property insurance.

Exclusions

THERE IS NO COVERAGE:

1. FOR AN INSURED WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY PERSON OR ORGANIZATION WHO MAY BE LIABLE FOR THE BODILY INJURY OR PROPERTY DAMAGE AND THEREBY IMPAIRS OUR RIGHT TO RECOVER OUR PAYMENTS;

2. TO THE EXTENT THE UNDERINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE COVERAGE LIMITS REQUIRED BY THE FINANCIAL RESPONSIBILITY ACT.

- a. FOR AN INSURED WHO SUSTAINS BODILY INJURY WHILE OCCUPYING A MOTOR VEHICLE OWNED BY YOU OR ANY RESIDENT RELATIVE IF:

- (1) THE MOTOR VEHICLE IS NOT YOUR CAR OR A NEWLY ACQUIRED CAR; AND

- (2) IT WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE

- COVERAGE AT THE TIME OF THE ACCIDENT:**
- b. IF THE UNDERINSURED MOTOR VEHICLE IS OWNED BY YOU OR ANY RESIDENT RELATIVE; OR
 - c. FOR PROPERTY DAMAGE:
 - (1) TO A MOTOR VEHICLE; OR
 - (2) IN A MOTOR VEHICLE OWNED BY YOU OR ANY RESIDENT RELATIVE IF THE MOTOR VEHICLE WAS NOT INSURED FOR UNDERINSURED MOTOR VEHICLE COVERAGE AT THE TIME OF THE ACCIDENT;
 3. FOR PROPERTY DAMAGE THAT WAS PROXIMATELY CAUSED BY THE DRIVER OF YOUR CAR OR A NEWLY ACQUIRED CAR;
 4. FOR AN INSURED WHOSE BODILY INJURY RESULTS FROM THE DISCHARGE OF A FIREARM;
 5. TO THE EXTENT IT BENEFITS:
 - a. ANY WORKERS' COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY;
 - b. A SELF-INSURER UNDER ANY WORKERS' COMPENSATION LAW, DISABILITY BENEFITS LAW, OR SIMILAR LAW; OR
 - c. ANY PROPERTY INSURER; OR
 6. FOR ANY ORDER OF RESTITUTION ISSUED BY A COURT IN A CRIMINAL PROCEEDING OR EQUITABLE ACTION.
- If Other Underinsured Motor Vehicle Coverage Applies**
1. The Underinsured Motor Vehicle Coverage provided by this policy applies as primary coverage for an insured who sustains bodily injury or property damage while occupying your car.
 2. Except as provided in item 1. above, the Underinsured Motor Vehicle Coverage provided by this policy applies as excess coverage.
 3. If
 - a. you or any resident relative sustains bodily injury or property damage:
 - (1) while occupying a motor vehicle not owned by you or any resident relative; or
 - (2) while not occupying a motor vehicle; and
 - b. Underinsured Motor Vehicle Coverage provided by this policy and one or more other vehicle policies issued to you or any resident relative by the State Farm Companies apply to the same bodily injury or property damage, then the maximum amount that may be paid from all such policies combined is the single highest limit provided by any one of the policies. We may choose one or more policies from which to make payment.
 4. If you or any resident relative sustains bodily injury or property damage while occupying a motor vehicle other than your car that is owned by you or any resident relative, then this coverage applies only to the extent of the underinsured motor vehicle coverage applicable to the motor vehicle that the insured was occupying. However, if the motor vehicle that the insured was occupying was not insured for underinsured motor vehicle coverage at the time of the accident, then the maximum amount that may be paid from all policies combined that are issued to you or any resident relative by the State Farm Companies is the minimum limits required by the Financial Responsibility Act. We may choose one or more policies from which to make payment.
 5. Subject to items 1., 2., 3., and 4. above, if this policy and one or more other sources

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provide underinsured motor vehicle coverage for the same damages on a:

- a. primary basis, then we will pay the proportion of damages payable as primary that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits of all other underinsured motor vehicle coverage that apply as primary coverage; or
- b. excess basis, then we will pay the proportion of damages payable as excess that the applicable limit of this coverage under this policy bears to the sum of such amount and the limits

of all other underinsured motor vehicle coverage that apply as excess coverage.

Our Payment Options

We may, at our option, make payment to one or more of the following:

1. The insured;
2. The insured's surviving spouse;
3. A parent or guardian of the insured, if the insured is a minor or an incompetent person; or
4. A person authorized by law to receive such payment.

PHYSICAL DAMAGE COVERAGES

The physical damage coverages are Comprehensive Coverage, Collision Coverage, Emergency Road Service Coverage, and Car Rental and Travel Expenses Coverage.

This policy provides:

1. Comprehensive Coverage if "D";
2. Collision Coverage if "G";
3. Emergency Road Service Coverage if "H";
4. Car Rental and Travel Expenses Coverage if "R".

is shown under "SYMBOLS" on the Declarations Page.

If a deductible applies to Comprehensive Coverage, then it is shown on the Declarations Page. The deductible that applies to Collision Coverage is shown on the Declarations Page.

Additional Definitions

Covered Vehicle means:

1. your car;

2. a newly acquired car;
3. a temporary substitute car;
4. a camper that is designed to be mounted on a pickup truck and shown on the Declarations Page;
5. a non-owned car while it is:
 - a. being driven by an insured; or
 - b. in the custody of an insured if at the time of the loss it is:
 - (1) not being driven; or
 - (2) being driven by a person other than an insured and being occupied by an insured;
6. a non-owned trailer while it is being used by an insured; and
7. a non-owned camper while it is being used by an insured;

including its parts and its equipment that are common to the use of the vehicle as a vehicle. However, parts and equipment of trailers and

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campers must be securely fixed as a permanent part of the trailer or camper.

Daily Rental Charge means the sum of:

1. the daily rental rate;
2. mileage charges; and
3. related taxes.

Insured means you and resident relatives.

Loss means:

1. direct, sudden, and accidental damage to; or
2. total or partial theft of

a covered vehicle. Loss does not include any reduction in the value of any covered vehicle after it has been repaired, as compared to its value before it was damaged.

Loss Caused By Collision means a loss caused by:

1. a covered vehicle hitting or being hit by another vehicle or another object; or
2. the overturning of a covered vehicle.

Any loss caused by missiles, falling objects, windstorm, hail, fire, explosion, earthquake, water, flood, total or partial theft, malicious mischief, vandalism, riot, civil commotion, or hitting or being hit by a bird or an animal is not a Loss Caused By Collision.

Non-Owned: Camper means a camper designed to be mounted on a pickup truck that is in the lawful possession of an insured and that neither:

1. is owned by:
 - a. an insured;
 - b. any other person who resides primarily in your household; or
 - c. an employer of any person described in a. or b. above; nor

2. has been used by, rented by, or in the possession of an insured during any part of each of the 31 or more consecutive days immediately prior to the date of the loss.

Non-Owned Trailer means a trailer that is in the lawful possession of an insured and that neither:

1. is owned by:
 - a. an insured;
 - b. any other person who resides primarily in your household; or
 - c. an employer of any person described in a. or b. above; nor

2. has been used by, rented by, or in the possession of an insured during any part of each of the 31 or more consecutive days immediately prior to the date of the loss.

Insuring Agreements

1. Comprehensive Coverage

We will pay:

- a. for loss, except loss caused by collision, to a covered vehicle; and
- b. transportation expenses incurred by an insured as a result of the total theft of your car or a newly acquired car. These transportation expenses are payable:

(1) during the period that:

- (a) starts on the date you report the theft to us; and

(b) ends on the earliest of:

- (i) the date the vehicle is returned to your possession in a drivable condition;
- (ii) the date we offer to pay for the loss if the vehicle has not yet been recovered; or
- (iii) the date we offer to pay for the loss if the vehicle is recovered, but is a total loss as determined by us; and

(2) during the period that:

- (a) starts on the date the vehicle is left at a repair facility if the

stolen vehicle is recovered, returned to your possession in a drivable condition, and has unrepaired damage that resulted from the total theft; and

- (b) ends on the date the vehicle is repaired.

These transportation expenses must be reported to us before we will pay such incurred expenses.

2. Collision Coverage

We will pay for loss caused by collision to a covered vehicle.

3. Emergency Road Service Coverage

We will pay the fair cost incurred by an insured for:

- a. up to one hour of labor to repair a covered vehicle at the place of its breakdown;
- b. towing to the nearest repair facility where necessary repairs can be made if a covered vehicle is not drivable;
- c. towing a covered vehicle out of a location where it is stuck, if the vehicle is on or immediately next to a public road;
- d. delivery of gas, oil, battery, or tire necessary to return a covered vehicle to driving condition. We do not pay the cost of the gas, oil, battery, or tire; and
- e. up to one hour of labor for locksmith services to unlock a covered vehicle if its key is lost, stolen, or locked inside the vehicle.

4. Car Rental and Travel Expenses Coverage

a. Car Rental Expense

We will pay the daily rental charge incurred when you rent a car from a car business while your car or a newly acquired car is:

- (1) not drivable; or

(2) being repaired

as a result of a loss which would be payable under Comprehensive Coverage or Collision Coverage.

We will pay this daily rental charge incurred during a period that:

(1) starts on the date:

- (a) the vehicle is not drivable as a result of the loss; or

- (b) the vehicle is left at a repair facility if the vehicle is drivable; and

(2) ends on the earliest of:

- (a) the date the vehicle has been repaired or replaced;

- (b) the date we offer to pay for the loss if the vehicle is repairable but you choose to delay repairs; or

- (c) five days after we offer to pay for the loss if the vehicle is:

- (i) a total loss as determined by us; or
- (ii) stolen and not recovered.

The amount of any such daily rental charge incurred by you must be reported to us before we will pay such amount.

b. Travel Expenses

We will pay expenses for commercial transportation, lodging, and meals if your car or a newly acquired car is not drivable as a result of a loss which would be payable under Comprehensive Coverage or Collision Coverage. The loss must occur more than 50 miles from your home. We will only pay these expenses if they are incurred by:

(1) an insured during the period that:

- (a) starts after the loss occurs; and

- (b) ends on the earliest of:

- (i) the insured's arrival at his or her destination or home if the vehicle is left behind for repairs; or
- (ii) the repair of the vehicle if the insured waits for repairs before continuing on to his or her destination or returning home; and

- (2) you, or any person you choose, to travel to retrieve the vehicle and drive it to either the original destination or your home if the vehicle was left behind for repairs.

These expenses must be reported to us before we will pay such incurred expenses.

c. Rental Car - Reimbursement of Deductible Expense

We will pay the comprehensive deductible or collision deductible an insured is required to pay the owner of a car rented from a car business.

Supplementary Payments - Comprehensive Coverage and Collision Coverage

If the covered vehicle sustains loss for which we make a payment under Comprehensive Coverage or Collision Coverage, then we will pay reasonable expenses incurred for:

- 1. to tow the covered vehicle immediately after the loss:
 - a. for a reasonable distance from the location of the loss to any one repair facility chosen by an insured or the owner of the covered vehicle, if the covered vehicle is not drivable; or
 - b. to any one repair facility or commercial storage facility, neither of which was chosen by an insured or the owner of the covered vehicle. We will also pay reasonable expenses incurred to tow the covered vehicle for a reasonable distance from this facility to any one repair facility chosen by an

insured or the owner of the covered vehicle, if the covered vehicle is not drivable;

- 2. store the covered vehicle, if it is not drivable immediately after the loss, at:
 - a. any one repair facility or commercial storage facility, neither of which was chosen by an insured or the owner of the covered vehicle; and
 - b. any one repair facility chosen by the owner of the covered vehicle, and we determine such vehicle is a total loss.

If the owner of the covered vehicle consents, then we may move the covered vehicle at our expense to reduce storage costs. If the owner of the covered vehicle does not consent, then we will pay only the storage costs that would have resulted if we had moved the damaged covered vehicle; and

- 3. clean up debris from the covered vehicle at the location of the loss. The most we will pay to clean up the debris is \$250 for any one loss.

Limits and Loss Settlement - Comprehensive Coverage and Collision Coverage

- 1. We have the right to choose to settle with you or the owner of the covered vehicle in one of the following ways:

- a. Pay the cost to repair the covered vehicle minus any applicable deductible. The deductible amount does not apply to loss to safety glass.

- (1) We have the right to choose one of the following to determine the cost to repair the covered vehicle:

- (a) The cost agreed to by both the owner of the covered vehicle and us;

- (b) A bid or repair estimate approved by us; or

- (c) A repair estimate that is written based upon or adjusted to:

- (i) the prevailing competitive price;

- (ii) the lower of painless dent repair pricing established by an agreement we have with a third party or the painless dent repair price that is competitive in the market; or

- (iii) a combination of (i) and (ii) above.

The prevailing competitive price means prices charged by a majority of the repair market in the area where the covered vehicle is to be repaired as determined by a survey made by us. If asked, we will identify some facilities that will perform the repairs at the prevailing competitive price. The estimate will include parts sufficient to restore the covered vehicle to its pre-loss condition.

You agree with us that the repair estimate may include new, used, recycled, and reconditioned parts. Any of these parts may be either original equipment manufacturer parts or non-original equipment manufacturer parts.

You also agree that replacement glass need not have any insignia, logo, trademark, etching, or other marking that was on the replaced glass.

- (2) The cost to repair the covered vehicle does not include any reduction in the value of the covered vehicle after it has been repaired, as compared to its value before it was damaged.
- (3) If the repair or replacement of a part results in betterment of that part, then you or the owner of the

covered vehicle must pay for the amount of the betterment.

- b. Pay the actual cash value of the covered vehicle minus any applicable deductible.

- (1) The owner of the covered vehicle and we must agree upon the actual cash value of the covered vehicle. If there is disagreement as to the actual cash value of the covered vehicle, then the disagreement will be resolved by appraisal upon written request of the owner or us, using the following procedures:

- (a) The owner and we will each select a competent appraiser.

- (b) The two appraisers will select a third competent appraiser. If they are unable to agree on a third appraiser within 30 days, then either the owner or we may petition a court that has jurisdiction to select the third appraiser.

- (c) Each party will pay the cost of its own appraiser, attorneys, and expert witnesses, as well as any other expenses incurred by that party. Both parties will share equally the cost of the third appraiser.

- (d) The appraisers shall only determine the actual cash value of the covered vehicle. Appraisers shall have no authority to decide any other questions of fact, decide any questions of law, or conduct appraisal on a class-wide or class-representative basis.

- (e) A written appraisal that is both agreed upon by and signed by any two appraisers, and that also contains an explanation of how they arrived at their appraisal, will be binding on the

owner of the covered vehicle and as:

- (5) We do not waive any of our rights by submitting to an appraisal.
 - (2) The damaged covered vehicle must be given to us in exchange for our payment, unless we agree that the owner may keep it. If the owner keeps the covered vehicle, then our payment will be reduced by the value of the covered vehicle after the loss; or
 - c. Return the stolen covered vehicle to its owner and pay, as described in 1.a. above, for any direct, sudden, and accidental damage that resulted from the theft.
 2. The most we will pay for transportation expenses under Comprehensive Coverage is \$25 per day subject to an aggregate limit of \$750 per loss.
 3. The most we will pay for loss to a non-owned trailer or a non-owned camper is \$2,500.
- Limits - Car Rental and Travel Expenses Coverage**
1. **Car Rental Expense**
The limit for Car Rental Expense is shown on the Declarations Page under "Limit - Car Rental Expense - Each Day, Each Loss".
 2. The limit shown under "Each Day" is the most we will pay for the daily rental charge. If
 - (1) a dollar amount is shown, then we will pay the daily rental charge up to that dollar amount;
 - (2) a percentage amount is shown, then we will pay that percentage of the daily rental charge.
 - b. Subject to the "Each Day" limit, the limit shown under "Each Loss" is the

most we will pay for Car Rental Expense incurred as a result of any one loss.

2. **Travel Expenses**
The most we will pay for Travel Expenses incurred by all insureds as a result of any one loss is \$500.
3. **Rental Car - Repayment of Deductible Expense**
The most we will pay for Rental Car - Repayment of Deductible Expense incurred as a result of any one loss is \$500.

Non duplication

We will not pay for any loss or expense under the Physical Damage Coverages for which the insured or owner of the covered vehicle has already received payment from, or on behalf of, a party who is legally liable for the loss or expense.

Exclusions

THERE IS NO COVERAGE FOR:

1. ANY COVERED VEHICLE THAT IS:
 - a. INTENTIONALLY DAMAGED; OR
 - b. STOLEN BY OR AT THE DIRECTION OF AN INSURED;
2. ANY COVERED VEHICLE WHILE IT IS RENTED TO OR LEASED TO OTHERS BY AN INSURED;
3. ANY COVERED VEHICLE WHILE IT IS USED TO CARRY PERSONS FOR A CHARGE. This exclusion does not apply to the use of a private passenger car on a share-the-expense basis;
4. ANY COVERED VEHICLE DUE TO:
 - a. THEFT;
 - b. CONVERSION;
 - c. EMBEZZLEMENT; OR
 - d. SECRETION

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BY AN INSURED, A CONSIGNEE, AN AGENT OF A CONSIGNEE, OR A PERSON WHO OBTAINS POSSESSION OF THE COVERED VEHICLE WITH THE PERMISSION OF A CONSIGNEE OR AGENT OF A CONSIGNEE;

5. **LOSS TO YOUR CAR OR A NEWLY ACQUIRED CAR IF AN INSURED VOLUNTARILY RELINQUISHES POSSESSION OF THAT CAR TO A PERSON OR ORGANIZATION UNDER AN ACTUAL OR PRESUMED SALES AGREEMENT;**
6. **ANY COVERED VEHICLE TO THE EXTENT OUR PAYMENT WOULD BENEFIT ANY CARRIER OR OTHER BAILEE FOR HIRE THAT IS LIABLE FOR LOSS TO SUCH COVERED VEHICLE;**
7. **LOSS TO ANY COVERED VEHICLE DUE TO FUNGI. THIS APPLIES REGARDLESS OF WHETHER OR NOT THE FUNGI RESULT FROM A LOSS THAT IS PAYABLE UNDER ANY OF THE PHYSICAL DAMAGE COVERAGES. WE WILL ALSO NOT PAY FOR ANY TESTING OR REMEDIATION OF FUNGI OR ANY ADDITIONAL COSTS REQUIRED TO REPAIR ANY COVERED VEHICLE THAT ARE DUE TO THE EXISTENCE OF FUNGI.**
8. **LOSS TO ANY COVERED VEHICLE THAT RESULTS FROM:**
 - a. NUCLEAR REACTION;
 - b. RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE OR
 - c. THE ACCIDENTAL OR INTENTIONAL DETONATION OF OR RELEASE OF RADIATION FROM ANY NUCLEAR OR RADIOACTIVE DEVICE;
9. **LOSS TO ANY COVERED VEHICLE THAT RESULTS FROM THE TAKING OF OR SEIZURE OF THAT COVERED**

VEHICLE BY ANY GOVERNMENTAL AUTHORITY;

10. **LOSS TO ANY COVERED VEHICLE THAT RESULTS FROM WAR OF ANY KIND;**
11. **YOUR CAR WHILE SUBJECT TO ANY:**
 - a. LIEN AGREEMENT;
 - b. RENTAL AGREEMENT;
 - c. LEASE AGREEMENT; OR
 - d. SALES AGREEMENT NOT SHOWN ON THE DECLARATIONS PAGE;
12. **ANY NON-OWNED CAR WHILE IT IS:**
 - a. BEING MAINTAINED OR USED BY ANY PERSON WHILE THAT PERSON IS EMPLOYED IN OR ENGAGED IN ANY WAY IN A CAR BUSINESS; OR
 - b. USED IN ANY BUSINESS OR OCCUPATION OTHER THAN A CAR BUSINESS. This exclusion (12.b.) does not apply to a private passenger car;
13. **ANY PART OR EQUIPMENT OF A COVERED VEHICLE IF THAT PART OR EQUIPMENT:**
 - a. FAILS OR IS DEFECTIVE; OR
 - b. IS DAMAGED AS A DIRECT RESULT OF:
 - (1) WEAR AND TEAR;
 - (2) FREEZING; OR
 - (3) MECHANICAL, ELECTRICAL, OR ELECTRONIC BREAKDOWN OR MALFUNCTION OF THAT PART OR EQUIPMENT.

This exclusion does not apply if the loss is the result of theft of the covered vehicle.
14. **ANY PART OR EQUIPMENT:**
 - a. THAT IS NOT LEGAL FOR USE IN OR ON THE COVERED VEHICLE

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IN THE JURISDICTION WHERE THE COVERED VEHICLE IS REGISTERED; OR

- b. THE USE OF WHICH IS NOT LEGAL IN THE JURISDICTION WHERE THE COVERED VEHICLE IS REGISTERED BECAUSE OF HOW OR WHERE THAT PART OR EQUIPMENT IS INSTALLED IN OR ON THE COVERED VEHICLE.

However, if there is a legal version of the part or equipment that is necessary for the safe operation of the covered vehicle, then we will pay the cost that we would otherwise have paid to repair the vehicle with the legal version of the part or equipment. We will not pay any cost necessary to modify the vehicle for installation of the legal version of the part or equipment.

15. TIRES. This exclusion does not apply if:

- a. loss is caused by missiles, falling objects, windstorm, hail, fire, explosion, earthquake, water, flood, total or partial theft, malicious mischief, vandalism, riot, civil commotion, or hitting or being hit by a bird or an animal; or

- b. loss caused by collision to another part of the covered vehicle causes loss to tires.

16. REMOVABLE PRODUCTS USED FOR STORAGE OF AUDIO, VIDEO, OR OTHER DATA, INCLUDING BUT NOT LIMITED TO TAPES, DISCS, AND MEMORY CARDS; NOR IS THERE COVERAGE FOR THE RECONSTRUCTION OF DATA CONTAINED THEREIN;

17. ANY EQUIPMENT USED TO DETECT OR INTERFERE WITH SPEED MEASURING DEVICES;

18. A CAMPER, INCLUDING ITS PARTS AND ITS EQUIPMENT, THAT IS:

- a. DESIGNED TO BE MOUNTED ON A PICKUP TRUCK;

- b. OWNED BY AN INSURED; AND
c. NOT SHOWN ON THE DECLARATIONS PAGE; OR

19. ANY COVERED VEHICLE WHILE IT IS:

- a. BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR

- b. ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (19.b.) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving.

If Other Physical Damage Coverage or Similar Coverage Applies:

1. If the same loss or expense is payable under more than one of the physical damage coverages provided by this policy, then only the one coverage that pays the most for that loss or expense applies.

2. If any of the physical damage coverages provided by this policy and one or more other policies issued to an insured by the State Farm Companies apply to the same loss or expense, then only one policy applies. We will select a policy that pays the most for the loss or expense.

3. The physical damage coverages provided by this policy apply as primary coverage for a loss to your car.

If similar coverage provided by one or more sources other than the State Farm Companies also applies as primary coverage for the same loss or expense, then the State Farm Companies will pay the proportion of the loss or expense payable as primary that the maximum amount that may be paid by the State Farm Companies bears to the sum of such amount and the limits of

all other similar coverage that applies as primary coverage.

4. Except as provided in 3. above, the physical damage coverages provided by this policy apply as excess coverage.

If similar coverage provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same loss or expense, then the State Farm Companies will pay the proportion of the loss or expense payable as excess that the maximum amount that may be paid by the State Farm Companies bears to the sum of such amount and the limits of all other similar coverage that applies as excess coverage.

Financed Vehicle

1. If a creditor is shown on the Declarations Page, then any Comprehensive Coverage or Collision Coverage provided by this policy applies to that creditor's interest in your car. Coverage for the creditor's interest is only provided for a loss that is payable to you.

However, if this policy is cancelled or nonrenewed, then we will provide coverage for the creditor's interest until we notify the creditor of the termination of such coverage. This coverage for the creditor's interest is only provided for a loss that would have been payable to you if this policy had not been cancelled or nonrenewed. The date such termination is effective will be at least 10 days after the date we mail or electronically transmit a notice of the termination to the creditor.

2. If we pay such creditor, then we are entitled to the creditor's right of recovery against you to the extent of our payment.

Our right of recovery does not impair the creditor's right to recover the full amount of its claim.

Our Payment Options

1. Comprehensive Coverage and Collision Coverage

- a. We may, at our option, make payment to one or more of the following for loss to a covered vehicle owned by you:

- (1) You;

- (2) The repairer; or

- (3) A creditor shown on the Declarations Page, to the extent of its interest.

- b. We may, at our option, make payment to one or more of the following for loss to a covered vehicle not owned by you:

- (1) You;

- (2) The owner of such vehicle;

- (3) The repairer; or

- (4) A creditor, to the extent of its interest.

2. Emergency Road Service Coverage and Car Rental and Travel Expenses Coverage

We may, at our option, make payment to one or more of the following:

- a. You;

- b. The insured who incurred the expense; or

- c. Any party that provided the service for which payment is owed.

DEATH, DISMEMBERMENT AND LOSS OF SIGHT COVERAGE

This policy provides Death, Dismemberment and Loss of Sight Coverage if "S" is shown under "SYMBOLS" on the Declarations Page.

Additional Definition

Insured means a person whose name is shown under "Death, Dismemberment and Loss of Sight Coverage - Persons Insured" on the Declarations Page.

Insuring Agreement

We will pay the highest applicable benefit shown in the following Death, Dismemberment and Loss of Sight Benefits Schedules if an **Insured**:

1. dies; or
2. suffers dismemberment or permanent loss of sight, as described in the schedule

as the direct result of an accident that involves the use of a land motor vehicle or any type of trailer as a vehicle and not due to any other cause.

The **Insured** must be *occupying* or be struck as a *pedestrian* by a land motor vehicle or any type of trailer at the time of the accident. The death, dismemberment, or permanent loss of sight must occur within 90 days immediately following the date of the accident.

Benefit

The applicable benefit shown in the schedule is the most we will pay for any one **Insured** in any one accident. Any benefit paid or payable for dismemberment or permanent loss of sight reduces the death benefit.

The benefits shown in the schedules are doubled for an **Insured** who at the time of the accident was *occupying* a *private passenger car* and using a seat belt in the manner recommended by the vehicle's manufacturer.

Death, Dismemberment and Loss of Sight Benefits Schedules

If the amount shown on the Declarations Page for the **Insured** is \$5,000, then we will pay the applicable benefit shown below for death or for the described dismemberment or permanent loss of sight:

Death	\$5,000
Loss of both hands, both feet, all sight of both eyes, one hand and one foot, or one hand or one foot and all sight of one eye	\$5,000
Loss of one hand or one foot, or all sight of one eye	\$2,500
Loss of the thumb and a finger on one hand, or any three fingers	\$1,500
Loss of any two fingers	\$1,000

The hand must be cut off through or above the wrist. The foot must be cut off through or above the ankle. The whole thumb or finger must be cut off.

If the amount shown on the Declarations Page for the **Insured** is \$10,000, then we will pay the applicable benefit shown below for death or for the described dismemberment or permanent loss of sight:

Death	\$10,000
Loss of both hands, both feet, all sight of both eyes, one hand and one foot, or one hand or one foot and all sight of one eye	\$10,000
Loss of one hand or one foot, or all sight of one eye	\$5,000
Loss of the thumb and a finger on one hand, or any three fingers	\$3,000
Loss of any two fingers	\$2,000

The hand must be cut off through or above the wrist. The foot must be cut off through or above the ankle. The whole thumb or finger must be cut off.

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Exclusions

DEATH, DISMEMBERMENT AND LOSS OF SIGHT COVERAGE DOES NOT APPLY TO AN **INSURED**:

1. WHILE IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT IN A **CAR BUSINESS**;
2. WHILE *OCCUPYING*, *LOADING*, OR *UNLOADING*:
 - a. AN EMERGENCY VEHICLE IN THE COURSE AND SCOPE OF HIS OR HER EMPLOYMENT;
 - b. A VEHICLE OTHER THAN AN EMERGENCY VEHICLE, WHILE USED IN THE:
 - (1) **INSURED'S BUSINESS**; OR
 - (2) COURSE AND SCOPE OF HIS OR HER EMPLOYMENT IN OTHER THAN A **CAR BUSINESS**.

This exclusion (2.b.) does not apply if the vehicle is a *private passenger car*.

- c. A MILITARY VEHICLE; OR
- d. A VEHICLE WHILE IT IS:
 - (1) BEING PREPARED FOR, USED IN PRACTICE FOR, OR OPERATED IN ANY RACING CONTEST, SPEED CONTEST, HILL-CLIMBING CONTEST, JUMPING CONTEST, OR ANY SIMILAR CONTEST; OR
 - (2) ON A TRACK DESIGNED PRIMARILY FOR RACING OR HIGH-SPEED DRIVING. This exclusion (2.d.(2)) does not apply if the vehicle is being used in connection with an activity other than racing, high-speed driving, or any type of competitive driving;
2. WHILE *OCCUPYING*, *LOADING*, *UNLOADING*, OR WHO IS STRUCK AS A **PEDESTRIAN** BY:
 - a. A MOTOR VEHICLE THAT RUNS ON RAILS OR CRAWLER-TREADS;
 - b. A MOTOR VEHICLE THAT IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
 - c. A MOTOR VEHICLE OR ANY TYPE OF TRAILER, EITHER OF WHICH IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES; OR

2. A MOTOR VEHICLE THAT RUNS ON RAILS OR CRAWLER-TREADS;

b. A MOTOR VEHICLE THAT IS DESIGNED FOR USE PRIMARILY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR

c. A MOTOR VEHICLE OR ANY TYPE OF TRAILER, EITHER OF WHICH IS LOCATED FOR USE AS A DWELLING OR OTHER PREMISES; OR

4. FOR DEATH, DISMEMBERMENT, LOSS OF SIGHT, OR TOTAL DISABILITY THAT RESULTS FROM:

- a. WAR OF ANY KIND;
- b. NUCLEAR REACTION, RADIATION OR RADIOACTIVE CONTAMINATION FROM ANY SOURCE, OR THE ACCIDENTAL OR INTENTIONAL DETONATION OR RELEASE OF RADIATION FROM ANY NUCLEAR OR RADIOACTIVE DEVICE;
- c. THE DISCHARGE OF A FIREARM;
- d. EXPOSURE TO FUNGI;
- e. SUICIDE OR ATTEMPTED SUICIDE REGARDLESS OF WHETHER THE **INSURED** WAS SANE OR INSANE; OR
- f. DISEASE except pus-forming infection due to bodily injury sustained in the accident.

Our Payment Options

We may, at our option, make payment to one or more of the following:

1. The **Insured**;
2. The **Insured's** surviving spouse;
3. A parent or guardian of the **Insured**, if the **Insured** is a minor or an incompetent person; or
4. A person or organization authorized by law to receive such payment.

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INSURED'S DUTIES

1. Notice to Us of an Accident or Loss

The *insured* must give us or one of our agents notice of the accident or loss as soon as reasonably possible. The notice must give us:

- your name;
- the names and addresses of all persons involved in the accident or loss;
- the hour, date, place, and facts of the accident or loss; and
- the names and addresses of witnesses to the accident or loss.

2. Notice to Us of a Claim or Lawsuit

- If a claim is made against an *insured*, then that *insured* must immediately send us every demand, notice, and claim received.
- If a lawsuit is filed against an *insured*, then that *insured* must immediately send us every summons and legal process received.

3. Insured's Duty to Cooperate With Us

- The *insured* must cooperate with us and, when asked, assist us in:
 - making settlements;
 - securing and giving evidence;
 - attending, and getting witnesses to attend, depositions, hearings, and trials; and
 - preserving his or her right to recover damages from others.
- The *insured* must not, except at his or her own cost, voluntarily:
 - make any payment to others; or
 - assume any obligation to others unless authorized by the terms of this policy.
- Any person or organization making claim under this policy must, when we

require, give us proof of loss on forms we furnish.

4. Questioning Under Oath

Under:

- Liability Coverage, each *insured*;
- Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, or Death, Dismemberment and Loss of Sight Coverage, each *insured*, or any other person or organization making claim or seeking payment; and
- Physical Damage Coverages, each *insured* or owner of a covered vehicle, or any other person or organization making claim or seeking payment.

must, at our option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as we require. Such person or organization must answer questions under oath, asked by anyone we name, and sign copies of the answers. We may require each person or organization answering questions under oath to answer the questions with only that person's or organization's legal representative, our representatives, any person or persons designated by us to record the questions and answers, and no other person present.

5. Other Duties Under the Physical Damage Coverages

When there is a loss, you or the owner of the covered vehicle must:

- protect the covered vehicle from additional damage. We will pay any reasonable expense incurred to do so that is reported to us;
- make a prompt report to the police when the loss is the result of theft;
- allow us to:

- inspect any damaged property before its repair or disposal;

- test any part or equipment before that part or equipment is removed or repaired; and

- move the covered vehicle at our expense in order to conduct such inspection or testing;

d. provide us all:

- records;
- receipts; and
- invoices

that we request and allow us to make copies; and

- not abandon the covered vehicle to us.

6. Other Duties Under Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage

A person making claim under:

- Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, or Death, Dismemberment and Loss of Sight Coverage must:

- notify us of the claim and give us all the details about the death, injury, treatment, and other information that we may need as soon as reasonably possible after the injured *insured* is first examined or treated for the injury. If the *insured* is unable to give us notice, then any other person may give us the required notice;
- be examined as reasonably often as we may require by physicians chosen and paid by us. A copy of the report will be sent to the person upon written request;

- provide written authorization for us to obtain:

- medical bills;
- medical records;
- wage, salary, and employment information; and
- any other information we deem necessary to substantiate the claim.

If an injured *insured* is a minor, unable to act, or dead, then his or her legal representative must provide us with the written authorization.

If the holder of the information refuses to provide it to us despite the authorization, then at our request the person making claim or his or her legal representative must obtain the information and promptly provide it to us; and

- allow us to inspect the vehicle that the *insured* occupied in the accident;

- Uninsured Motor Vehicle Coverage must report an accident involving a motor vehicle whose owner and driver remain unknown, to the police and to us within a reasonable period of time; and

- Uninsured Motor Vehicle Coverage and Underinsured Motor Vehicle Coverage must:

- send us immediately a copy of all lawsuit papers if the *insured* files a lawsuit against the party liable for the accident; and

- if making a claim for property damage:

- allow us to:

- inspect any property damage before its repair or disposal;

- (ii) test any part or equipment before that part or equipment is removed or repaired; and
- (iii) move the damaged property at our expense in order to conduct such inspection or testing; and
- (b) protect the damaged property from additional damage. We will pay any reasonable expense incurred to do so that is reported to us;
- (c) provide us all:
 - (i) records;
 - (ii) receipts; and
 - (iii) invoices

- that we request and allow us to make copies;
- (d) not abandon the damaged property to us; and
- (e) give us sworn proof of claim within 60 days of the accident. This proof of claim must state:
 - (i) who owns the property and how much they own;
 - (ii) the amount of any claims or liens on the property;
 - (iii) the value of the property at the time of the accident;
 - (iv) details of the accident; and
 - (v) details of any other insurance applicable to the property.

GENERAL TERMS

1. When Coverage Applies

The coverages provided by this policy are shown on the Declarations Page and apply to accidents and losses that occur during the policy period. The policy period is shown on the Declarations Page and is for successive periods of six months each for which the renewal premium is paid. The policy period begins and ends at 12:01 AM Standard Time at the address shown on the Declarations Page.

2. Where Coverage Applies

The coverages provided by this policy are shown on the Declarations Page and apply to accidents and losses that occur:

- a. in the United States of America and its territories and possessions;
- b. in Canada; and
- c. while a vehicle for which coverage is provided by this policy is being

shipped between the ports of the United States of America, its territories, its possessions, and Canada.

The Liability Coverage, Personal Injury Protection Coverage, Medical Payments Coverage, and Physical Damage Coverages also apply in Mexico within 50 miles of the United States border. A Physical Damage Coverage loss in Mexico is determined on the basis of cost at the nearest United States point.

Death, Dismemberment and Loss of Sight Coverage applies anywhere in the world.

3. Newly Owned or Newly Leased Car

If you want to insure a car newly owned by you with the State Farm Companies after that car ceases to be a newly acquired car, then you must either:

- a. request we replace the car currently shown on the Declarations Page of this policy with the car newly owned by

you and pay us any added amount due. If you make such request while this policy is in force and:

- (1) before the car newly owned by you ceases to be a newly acquired car, then that car newly owned by you will be insured by this policy as your car beginning on the date the car newly owned by you is delivered to you. The added amount due will be calculated based on that date; or
- (2) after the car newly owned by you ceases to be a newly acquired car, then that car newly owned by you will be insured by this policy as your car beginning on the date and time you make the request. The added amount due will be calculated based on that date; or

- b. apply to the State Farm Companies for a separate policy to insure the car newly owned by you. Such policy will be issued only if both the applicant and the vehicle are eligible for coverage at the time of the application.

4. Changes to This Policy

a. Changes in Policy Provisions

We may only change the provisions of this policy by:

- (1) issuing a revised policy booklet, a revised Declarations Page, or an endorsement; or
- (2) revising this policy to give broader coverage without an additional premium charge. If any coverage provided by this policy is changed to give broader coverage, then we will give you the broader coverage as of the date we make the change effective in the state of South Carolina without issuing a revised policy booklet, a revised Declarations Page, or an endorsement.

b. Change of Interest

- (1) No change of interest in this policy is effective unless we consent in writing.

- (2) Except under Death, Dismemberment and Loss of Sight Coverage, if a named insured shown on the Declarations Page dies, then the definition of insured under each of the coverages provided by this policy is changed to include:

- (a) any person with lawful custody of your car, a newly acquired car, or a temporary substitute car until a legal representative is qualified; and

- (b) the legal representative of the deceased named insured.

This only applies while such person is maintaining or using your car, a newly acquired car, or a temporary substitute car.

Policy notice requirements are met by mailing the notice to the most recent policy address that we have on record for the deceased named insured.

c. Joint and Individual Interests

If you consists of more than one person or entity, then each acts for all to change or cancel the policy.

d. Change of Policy Address

We may change the named insured's policy address as shown on the Declarations Page and in our records to the most recent address provided to us by:

- (1) you; or
- (2) the United States Postal Service.

5. Premium

- a. Unless as otherwise provided by an alternative payment plan in effect with the State Farm Companies with respect to the premium for this policy, the premium is due and payable in full on or before the first day of the policy period shown on the most recently issued Declarations Page or Renewal Notice.
- b. The renewal premium for this policy will be based upon the rates in effect, the coverages carried, the applicable limits, deductibles, and other elements that affect the premium that apply at the time of renewal.
- c. The premium for this policy may vary based upon the purchase of other insurance from the State Farm Companies.
- d. The premium for this policy is based upon information we have received from you or other sources. You must inform us if any information regarding the following is incorrect or incomplete, or changes during the policy period, and you must answer questions we ask regarding the following:
 - (1) Your car, or its use, including annual mileage;
 - (2) The persons who regularly drive your car, including newly licensed family members;
 - (3) Your marital status; or
 - (4) The location where your car is primarily garaged.If the above information or any other information used to determine the premium is incorrect, incomplete, changes during the policy period, or is not provided to us when we ask, then we may decrease or increase the premium during the policy period. If we decrease the premium during the policy period, then we will provide a refund or a credit in

the amount of the decrease. If we increase the premium during the policy period, then you must pay the amount of the increase.

6. Renewal

We agree to renew this policy for the next policy period upon payment of the renewal premium when due, unless we mail or deliver a nonrenewal notice or a cancellation notice as set forth in 7. and 8. below.

7. Nonrenewal

If we decide not to renew this policy, then, at least 30 days before the end of the current policy period, we will mail or deliver a nonrenewal notice to the most recent policy address that we have on record for the named insured who is shown on the Declarations Page.

8. Cancellation

a. How You May Cancel

You may cancel this policy by providing to us advance notice of the date cancellation is effective. We may confirm the cancellation in writing.

b. How and When We May Cancel

We may cancel this policy by mailing or delivering a written notice to the most recent policy address that we have on record for the named insured who is shown on the Declarations Page. The notice will provide the date cancellation is effective.

(1) If we mail or deliver a cancellation notice:

(a) during the first 90 days following this policy's effective date; or

(b) because the premium is not paid when due, then the date cancellation is effective will be at least 15 days after the date we mail or deliver the cancellation notice.

Otherwise, the date cancellation is effective will be at least 20 days after the date we mail or deliver the cancellation notice.

(2) After this policy has been in force for more than 90 days, we will not cancel this policy before the end of the current policy period unless:

(a) the premium is not paid when due; or

(b) you, any resident relative, or any other person who usually drives your car has had his or her driver's license under suspension or revocation;

(1) during the policy period; or

(2) if the policy is a renewal, during its policy period or the 90 days immediately preceding the last anniversary of the effective date of the policy.

c. Return of Unearned Premium

If you cancel this policy, then premium may be earned on a short rate basis. If we cancel this policy, then premium will be earned on a pro rata basis.

Any unearned premium may be returned within a reasonable time after cancellation. Delay in the return of any unearned premium does not affect the cancellation date.

9. Assignment

No assignment of benefits or other transfer of rights is binding upon us unless approved by us.

10. Bankruptcy or Insolvency of the Insured

Bankruptcy or insolvency of the insured or his or her estate will not relieve us of our obligations under this policy.

11. Concealment or Fraud

There is no coverage under this policy if you or any other person insured under this

policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

12. Our Right to Recover Our Payments

a. Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, and Death, Dismemberment and Loss of Sight Coverage payments are not recoverable by us.

b. To the extent allowed by law, under Uninsured Motor Vehicle Coverage:

(1) the right of recovery of the insured passes to us, to the extent of our payments;

(2) we will pay our share of the reasonable costs of any recovery. Our share is the percent that our recovery bears to the total recovery. We reserve the right to select an attorney to handle the recovery; and

(3) an insured making claim for property damage must assign to us, to the extent of our payments, the right to any other compensation for it. We do not have to make any payment until the insured has done this.

c. Under all other coverages, the following apply:

(1) Subrogation

If we are obligated under this policy to make payment to or for a person or organization who has a legal right to collect from another person or organization, then we will be subrogated to that right to the extent of our payment.

The person or organization to or for whom we make payment must help us recover our payments by:

(a) doing nothing to impede that legal right.

- (b) executing any documents we may need to assert that legal right; and
 - (c) taking legal action through our representatives when we ask.
- (2) **Reimbursement**
If we make payment under this policy and the person or organization to or for whom we make payment recovers or has recovered from another person or organization, then the person or organization to or for whom we make payment must:
- (a) hold in trust for us the proceeds of any recovery; and
 - (b) reimburse us to the extent of our payment.

15. Legal Action Against Us

Legal action may not be brought against us until there has been full compliance with all the provisions of this policy. In addition, legal action may only be brought against us regarding:

- a. **Liability Coverage** after the amount of damages an insured is legally liable to pay has been finally determined by:
 - (1) judgment after an actual trial, and any appeals of that judgment if any appeals are taken; or
 - (2) agreement between the claimant and us.
- b. **Personal Injury Protection Coverage, Medical Payments Coverage, Uninsured Motor Vehicle Coverage, Underinsured Motor Vehicle Coverage, and Physical Damage Coverages** if the legal action relating to these coverages is brought against us within three years immediately following the date of the accident.
- c. **Underinsured Motor Vehicle Coverage** if copies of the pleadings in the action

establishing liability are served upon us in the manner provided by law.

14. Choice of Law

Without regard to choice of law rules, the law of the state of:

- a. South Carolina will control, except as provided in b. below, in the event of any disagreement as to the interpretation and application of any provision in this policy; and
- b. Illinois will control in the event of any disagreement as to the interpretation and application of this policy's:
 - (1) **Mutual Conditions** provision found on the most recently issued Declarations Page, if this policy was issued by the State Farm Mutual Automobile Insurance Company; or
 - (2) **Participating Policy** provision found on the most recently issued Declarations Page, if this policy was issued by any subsidiary or affiliate of the State Farm Mutual Automobile Insurance Company.

15. Severability

If any provision of this policy is held invalid or unenforceable by a court that has jurisdiction, then:

- a. such provision will remain in full force to the extent not held invalid or unenforceable; and
- b. all other provisions of this policy will remain valid and enforceable.

16. Conformity to Law

The coverage provided by this policy is done so in accordance with South Carolina insurance law. If any provisions of this policy are in conflict with South Carolina statutes, the policy is amended to conform to the minimum requirements of the statutes.

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Policy Form 9840A
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1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF DARLINGTON) C/A #: 2014-CP-16-0792
3
4 State Farm Mutual Automobile,)
Insurance Company,)
5 Plaintiff,)
6 v.)
7 Beverly Goyeneche, David R.)
Gray, III and Amanda Goyeneche)
8 (a/k/a Amanda Goyeneche-Gray),)
including and as a Parent and)
9 Natural Guardian of S.G.)
10)
11 Defendants.)

DEPOSITION OF

DAVID R. GRAY, III

Thursday, April 2, 2015
11:41 a.m. - 12:09 p.m.

The deposition of DAVID R. GRAY, III, taken on
behalf of the Plaintiff at Smith Watts & Associates,
508 South Fourth Street, Hartsville, South Carolina,
on the 2nd day of April, 2015 before M. Sean Cary,
Court Reporter and Notary Public in and for the State
of South Carolina, pursuant to Notice of Deposition
and/or agreement of counsel.

APPEARANCES

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(Notice of Deposition of David R. Gray, III)	
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STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby waived.

1 DAVID R. GRAY, III, having been duly sworn, deposes
2 and testifies as follows:

3 MR. GRAY - EXAMINATION BY MR. ROBINSON:

4 Q: Mr. Gray, I've consulted with your attorney and
5 also with opposing for the Goyeneches. This
6 case is scheduled for trial next Tuesday, April
7 the 7th, I believe. I understand that you nor
8 your attorney intend to attend the trial and
9 that you would waive any objections to the
10 trial proceeding in your absence on Tuesday, is
11 that correct?

12 A: Correct.

13 Q: All right. And also in that regard, as you are
14 aware, we entered into a stipulation of facts
15 which you've agreed to and your attorney's
16 signed. I put on the record in the other
17 depositions as I will do the same with this.
18 I served on you a Notice of Deposition along
19 with Subpoenas Duces Tecum requesting documents
20 from you if you have them regarding this case.
21 And for the record I've not received any
22 documents, so we would of course reserve the --
23 our objections to any documents that may be
24 submitted prior to the trial of this case or
25 during the trial of this case inasmuch we have

1 not received a response to that subpoena. And
2 therefore it would be our position that the
3 case is going to be submitted based on the
4 stipulation of facts and based on what your
5 deposition testimony is today regarding
6 residency, which is what we're going to talk
7 about today. Is that your understanding and
8 Mr. Cannarella, is that your understanding?

9 MR. CANNARELLA: Yes, sir.

10 Q: All right. And yours as well, is that correct?

11 A: Yes.

12 Q: All right, great. If you will please state
13 your full name for the record.

14 A: David Richard Gray, III.

15 Q: And let's give that to the court reporter and
16 have it marked as Exhibit One.

17 (Plaintiff's Exhibit Number One was marked for
18 identification purposes.)

19 Q: Mr. Gray, my name is Jon Robinson and I
20 represent State Farm regarding the coverage
21 case. This case is not about who is at fault,
22 this case is not about damages, it's about what
23 insurance policies, if any, provide coverage in
24 this case; okay?

25 A: (Nods head affirmatively.)

- 1 Q: First of all, let me extend my sympathy for
2 what happened. And I don't know if you've ever
3 given a deposition before, but all of your
4 answers need to be out loud. That means you're
5 free to shake your head, just make sure you say
6 yes or no or whatever the answer may be.
7 Because the court reporter is recording what
8 we're saying, and obviously shaking of the head
9 doesn't register on the tape recorder; okay?
- 10 A: Okay.
- 11 Q: Thank you. Mr. Gray, where's your current
12 address?
- 13 A: 1281 Brittany Drive, Florence, South Carolina,
14 29501.
- 15 Q: How long have you lived there?
- 16 A: Three weeks now.
- 17 Q: So you moved in about March, middle of March?
- 18 A: March the 15th.
- 19 Q: Prior to Brittany Drive, where did you live?
- 20 A: 1092 Bullard, B-U-L-L-A-R-D, Ford Road,
21 Hartsville, South Carolina, 29550.
- 22 Q: How long did you live at Bullard Ford Road?
- 23 A: Approximately five to six years.
- 24 Q: When did you move to Bullard Ford Road?
- 25 A: Maybe 2000 -- late 2008, 2009.

1 Q: And were you at Bullard Ford Road from late
2 2008 early 2009 up until March 15th, 2013?
3 A: I was not.
4 Q: All right.
5 A: There were two years that I stayed in
6 Hartsville.
7 Q: Well Bullard Ford Road's in Hartsville, right?
8 A: Well in the city limits ---
9 Q: Okay.
10 A: --- yeah. I had moved temporarily.
11 Q: Okay. Well, let's go back. So you moved to
12 Bullard Ford Road in late 2008, 2009?
13 A: Yeah, I just -- I never changed any of my
14 address information on my ---
15 Q: Okay. As far as your actual ---
16 A: --- license and stuff.
17 Q: I'm sorry. As far as your actual residence,
18 you moved there in 2008 or 2009?
19 A: Right.
20 Q: And whose house is that?
21 A: That is my grandmother's -- or grandfather.
22 Grandfather.
23 Q: Your grandfather's house?
24 A: Yes, sir.
25 Q: All right. When you moved in late 2008 early

1 2009, who lived there?

2 A: No one.

3 Q: It was empty?

4 A: Yes. The previous tenant had died..

5 Q: Okay.

6 A: So.

7 Q: All right. Do your grandparents live there?

8 Have they ever lived there?

9 A: No, no, no. They just own the property.

10 Q: Okay. Is this a house or an apartment?

11 A: This is a trailer.

12 Q: All right. And after late 2008 early 2009,
13 after moving there, tell me where you lived
14 next.

15 A: I moved to West Home Avenue. I'm trying to
16 remember the actual address? I think it was
17 632 West Home.

18 Q: And that was in Hartsville?

19 A: Yes, sir. That was an apartment.

20 Q: Was there a number?

21 A: Like a phone number?

22 Q: No, apartment number.

23 A: Oh, apartment number. Honestly, I can't
24 remember.

25 Q: All right.

1 A: It's been a while.

2 Q: When did you move to West Home Avenue?

3 A: That was probably 2011 maybe.

4 Q: Okay. And how long did you live there, from
5 2011 until when?

6 A: It was from February until the next February.
7 We started moving out and moving down the road.

8 Q: So February 11th until February 2012?

9 A: Yeah, that's ...

10 Q: All right. Where did you go in February 2012?

11 A: That was down the road to Kenwood Avenue. I
12 think that was 212 Kenwood.

13 Q: Is that a house or an apartment?

14 A: That is a house. We had issues with the
15 apartment so we had to move out.

16 Q: That was also in Hartsville?

17 A: Yes, sir.

18 Q: 29550 on all of these?

19 A: Yes, sir.

20 Q: And ---

21 A: Stayed there a year.

22 Q: Until when?

23 A: It was -- I moved back out to Bullard Ford in
24 November of 2013.

25 Q: So you stayed at Kenwood Avenue from February

- 1 2012 to November 2013?
- 2 A: Yes.
- 3 Q: And in November 2013 you moved back to ---
- 4 A: Bullard Ford Road. I had roommates, had a
- 5 baby; don't mix.
- 6 Q: All right. I want to start with April 2013.
- 7 I understand from what you've just told me,
- 8 that at that time you were living at 212
- 9 Kenwood Avenue?
- 10 A: That's correct.
- 11 Q: Who was living with you in April of 2013? Of
- 12 course, I'm specifically talking about April
- 13 the 8th, 2013, the day S.G. was born. Who
- 14 was living at Kenwood Avenue?
- 15 A: That would have been Marcos Sola.
- 16 Q: Tell me that again.
- 17 A: Marcos Sola, S-O-L-A.
- 18 Q: Okay. Who's he?
- 19 A: He is a graphic designer over at Sunoco. We
- 20 went to school together at Coker.
- 21 Q: He's a friend of yours?
- 22 A: Yes.
- 23 Q: Not a relative?
- 24 A: No relatives.
- 25 Q: All right. So we've got graphic designer

1 Marcos Sola, friend from Coker.

2 A: Right.

3 Q: Who else?

4 A: Paul Linger.

5 Q: Who is he?

6 A: He was just a friend. He worked for Duke
7 Energy.

8 Q: Okay. Who else?

9 A: That was it. Just three of us.

10 Q: All right. And those people lived at your
11 house from April 2013 until when?

12 A: Well we moved in with Paul, so it was -- that
13 was November when I moved out.

14 Q: All right. And from April 2013 to November of
15 2013, did those three people live in that
16 house: Marcos, Paul and yourself?

17 A: Correct.

18 Q: From April 2013 up until November 2013, did
19 S.G. ever stay at the house at Kenwood
20 Avenue?

21 A: She did not. She would visit but she never
22 stayed a full night.

23 Q: All right. In November 2013, where did you
24 move to? I think you said ---

25 A: Back to Bullard Ford Road.

- 1 Q: And who lived at Bullard Ford Road when you
2 moved back, in November 2013?
- 3 A: Me.
- 4 Q: You lived there by yourself?
- 5 A: Yes. My brother, he had dogs there so he would
6 stay most days during the week, but he never
7 really moved everything in there, so.
- 8 Q: Okay. So when you moved to Bullard Ford Road
9 in November 2013, you were the only person
10 living there?
- 11 A: Yes.
- 12 Q: From November 2013 up until May of 2014, May
13 8th to be exact, did anybody else live at the
14 Bullard Ford Road address?
- 15 A: No.
- 16 Q: Not any roommates?
- 17 A: No. I mean, like I said, it was two bedrooms,
18 my brother would stay most nights, but -- I
19 mean, he took care of his dogs.
- 20 Q: Who is your brother?
- 21 A: John Shearer.
- 22 Q: Do y'all have the same father or the same
23 mother?
- 24 A: No, neither.
- 25 Q: Okay.

- 1 A: He's -- my aunt and uncle, his mom and dad,
2 raised me.
- 3 Q: Okay.
- 4 A: So, I call him ---
- 5 Q: Technically your first cousin?
- 6 A: Yes, technically.
- 7 Q: And his -- spell his last name.
- 8 A: S-H-E-A-R-E-R.
- 9 Q: And where is John Shearer's home? What address
10 does he consider home?
- 11 A: 913 Locust, like the bug, Street, Hartsville,
12 South Carolina.
- 13 Q: All right. And who lives there at 913 Locust
14 Street?
- 15 A: His parents, Ron and Nancy Shearer.
- 16 Q: Does John keep all his things at the Locust
17 Street address?
- 18 A: Pretty much most of his stuff. He would bring
19 clothes and, you know -- of course we had an
20 extra TV and everything and we'd watch movies
21 in there, but most of the time it was just
22 clothes.
- 23 Q: But he keeps his primary room at Locust Street?
24 Has a bedroom suit there, a bedroom ---
- 25 A: Correct.

1 Q: --- chest of drawers ---

2 A: Correct.

3 Q: --- clothes?

4 A: Yes.

5 Q: All right. And would Locust Street be the
6 street that is on his driver's license as well
7 probably?

8 A: Yes.

9 Q: Okay. Do you know that for a fact?

10 A: Yeah.

11 Q: Okay.

12 A: Yes, I do.

13 Q: From November 2013 to May 8th, 2014, did S.G.
14 stay overnight at the Bullard Ford Road?

15 A: She did.

16 Q: All right. When do you recall the first time
17 she stayed there?

18 A: It was probably, maybe January.

19 Q: Of 2015?

20 A: 2014.

21 Q: January 2014.

22 A: Yeah.

23 Q: All right.

24 A: Because it was a month. I was trying to get
25 everything ready, you know, baby proof and

1 stuff like that, so.

2 Q: So about January of 2014, S.G. stayed. How
3 long would she stay when she first came?

4 A: She stayed a night. And then -- we never
5 really had a set schedule you know. It was all
6 catered to S.G. . She was -- I mean I was
7 either over at Amanda's house or she was over
8 at mine. We were always together with S.G. .

9 Q: Were y'all dating at the time?

10 A: Yes. I mean, it's one of those things where --
11 I mean yeah. Go ahead and say we were, yeah.

12 Q: All right. At the time of -- in May of 2014
13 were y'all dating?

14 A: Yes.

15 Q: You were?

16 A: It was the same, yes.

17 Q: Did you never get married?

18 A: No.

19 Q: Did you ever live with Amanda.

20 A: No, I did not.

21 Q: So y'all always kept separate residences?

22 A: We did. We did.

23 Q: All right.

24 A: We didn't have the finances, so.

25 Q: I'm sorry?

- 1 A: We didn't have the finances to ---
- 2 Q: Okay.
- 3 A: --- you know ...
- 4 Q: All right. So you did not have a set schedule
- 5 with S.G. ---
- 6 A: No.
- 7 Q: --- as far as overnight visitations?
- 8 A: No. We just -- we tried to make a schedule: 2
- 9 days -- or two nights there, two nights at my
- 10 place. Most of the time it didn't work out
- 11 because she lived in town. I'd get off of work
- 12 and go, you know, see them, do dinner at her
- 13 house. And if she was -- if it was late, then
- 14 she'd stay there still, you know, with Amanda.
- 15 It was only the nights I pretty much picked her
- 16 up from day care and took her straight to my
- 17 house that she really stayed, so. There was no
- 18 real set schedule.
- 19 Q: Okay. You file taxes?
- 20 A: I do.
- 21 Q: In April of 2104, I presume you filed your 2013
- 22 taxes April 15th, 2014. Did you file as a
- 23 single individual?
- 24 A: I did, I did not -- the mother claimed S.G.
- 25 Q: All right. You did not claim S.G. on your

1 taxes?

2 A: I didn't.

3 Q: And when you say the mother claimed her, Amanda
4 claimed S.G. on her taxes?

5 A: Amanda did.

6 Q: And you probably haven't filed them yet this
7 year, but when you file taxes in two weeks do
8 you intend to claim S.G. on your taxes?

9 A: I've already filed and I didn't.

10 Q: You did not?

11 A: I didn't.

12 Q: Okay. So you filed your 2013 taxes and your
13 2014 taxes and neither of those did you claim
14 S.G. as a dependant?

15 A: No.

16 Q: Okay. And you filed single both years?

17 A: I did.

18 Q: Okay. During the course of this case we sent
19 to your attorney, and to you in care of your
20 attorney, some questions: some admit or deny
21 their called. The first one in Plaintiff's
22 Request for Admission to Defendant David R.
23 Gray we asked, number one, admit or deny that
24 David R. Gray, III was the parent and the
25 natural guardian of S.G. , and

1 as a citizen and resident of Darlington County,
2 South Carolina. I'm going to hand you a copy
3 of your response. If you will, look at number
4 one which states, Defendant admits Plaintiff's
5 requests in paragraph one because he was the
6 parent but the mother was the primary custodian
7 because the child lived with her mother,
8 however, Defendant had very liberal visitation.
9 Is that a true and correct statement?

10 A: It is true.

11 Q: Okay.

12 MR. ROBINSON: We'll mark that as Exhibit Number
13 Two. For identification purposes only, we'll
14 mark that as Exhibit Number Two.

15 (Plaintiff's Exhibit Number Two was marked for
16 identification purposes.)

17 Q: All right. In May of 2014, what vehicles did
18 you own?

19 A: Just the 2011 Ford F-150.

20 Q: Did anyone -- well, I think you've already
21 indicated. No one else lived at the Bullard
22 Ford Road in May of 2014, is that correct,
23 other than you?

24 A: Yes.

25 Q: All right. You were the only person that lived

1 at the 1092 Bullard Ford Road, Hartsville,
2 South Carolina address on May 8th, 2014?

3 A: Correct.

4 Q: That's all the questions I have.

5 (Off the record discussion)

6 MR. GRAY - EXAMINATION BY MR. USHER:

7 Q: Rich, we spoke earlier, my name's Chris.

8 A: Yeah.

9 Q: You spoke about John Shearer.

10 A: Yeah.

11 Q: You said he didn't live with you but he stayed
12 usually five days out of the week with you, is
13 that right?

14 A: Well, yeah, he stayed the night, he just never
15 really moved his permanent address over.

16 Q: Okay. Did he have a vehicle?

17 A: He did have a vehicle.

18 Q: Was it in his name?

19 A: No, it was in his parents name.

20 Q: Okay. Do you know what type of car insurance
21 he had?

22 A: I'm not sure.

23 Q: But do you know he had car insurance for sure?

24 A: Yes, and also under his parent's names.

25 Q: All right. Thank you. How many cars are you

1 aware of that John had in his parent's policy?

2 A: Only one.

3 Q: Just one, they didn't have vehicles?

4 A: Oh, how many cars they had in total ---

5 Q: Right.

6 A: --- in the family?

7 Q: Right.

8 A: Three. Well, hold on, four: my other brother.

9 Q: Four?

10 A: Yeah.

11 Q: Do you know what kind of cars they were?

12 A: Yes. All the vehicles for them ---

13 Q: Start with John's.

14 A: Okay. John's is a Toyota Camry. I'm not sure

15 of the years.

16 Q: Okay. That's fine.

17 A: Christian, the other -- his younger brother, is

18 a Mustang.

19 Q: How do you spell it, Christian?

20 A: C-H-R-I-S-T-I-A-N. And then Nancy drives a,

21 I'm trying to think what kind, it's a mini-van.

22 It's like a Plymouth Voyager maybe? I don't

23 even know what brand hers is, might be a

24 different kind. And then Brian drives a Tahoe,

25 I think it's a GMC.

1 Q: And all their last names are Shearer also?

2 A: Yes. All those are Shearer.

3 Q: Are those the only vehicles they had at the
4 time of S.G. 's death?

5 A: Yes.

6 Q: Was anybody else living with Mr. Shearer's
7 parents at that time?

8 A: No, just John and Christian. That's about it.

9 Q: Thank you, sir.

10 MR. ROBINSON: I have follow-up.

11 MR. GRAY - RE-EXAMINATION BY MR. ROBINSON:

12 Q: Where does John live now?

13 A: He is still at 913. He's been staying out at
14 the house, out at Bullard Ford, helping get
15 everything together and move and stuff; but
16 he's not a permanent resident of there.

17 Q: When you say he's still at 913, 913 ---

18 A: Locust Street, I'm sorry.

19 Q: Locust Street? So he still lives at 913 Locust
20 Street?

21 A: Yes. Yes.

22 Q: All right. Is there anybody living at the
23 Bullard Road house now?

24 A: Not that I'm aware of.

25 Q: Okay.

1 A: I never really rented. Basically just paid
2 utilities because it was already paid for, so.

3 Q: Your grandfather is still alive?

4 A: He is.

5 Q: Where does he live?

6 A: Right across the street.

7 Q: On Bullard?

8 A: Yes. It's pretty much across the street.

9 Q: Does anybody ever stay with him?

10 A: Not that I know of. I mean and him and my
11 grandmother. Maybe my mother every now and
12 then just to help out, but that's about it.

13 Q: That's all I have. Thank you very much. Have
14 you understood all our questions?

15 A: I did.

16 Q: All right. Thank you.

17 (There being no further questions, the deposition
18 concluded at 12:09 p.m.)

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2)
3 COUNTY OF DARLINGTON) C/A #: 2014-CP-16-0792
4
5 State Farm Mutual Automobile,)
6 Insurance Company,)
7)
8 Plaintiff,)
9)
10 v.)
11)
12 Beverly Goyeneche, David R.)
13 Gray, III and Amanda Goyeneche)
14 (a/k/a Amanda Goyeneche-Gray),)
15 including and as a Parent and)
16 Natural Guardian of S.G.)
17)
18)
19 Defendants.)
20)
21)
22)
23)
24)
25)

DEPOSITION OF
AMANDA GOYENECHE

Thursday, April 2, 2015
10:20 a.m. - 10:59 a.m.

The deposition of AMANDA GOYENECHE, taken on
behalf of the Plaintiff at Smith Watts & Associates,
Attorneys at Law, 508 South Fourth Street,
Hartsville, South Carolina, on the 2nd day of April,
2015 before M. Sean Cary, Court Reporter and Notary
Public in and for the State of South Carolina,
pursuant to Notice of Deposition and/or agreement of
counsel.

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EXHIBITS

(Plaintiff's Exhibit Number One was marked following the completion of the deposition.)

Plaintiff's Exhibit Number One	30
(Notice of Deposition of Defendant Amanda Goyeneche)	

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby waived.

1 AMANDA GOYENECHE, having been duly sworn, deposes and
2 testifies as follows:

3 MS. GOYENECHE - EXAMINATION BY MR. ROBINSON:

4 Q: Ms. Goyeneche, my name is Jon Robinson and I
5 represent State Farm in this case that is about
6 insurance coverage. First of all, let me
7 express to you my sympathies about your loss.
8 I am sorry to be here under these
9 circumstances. Again, this case is really not
10 about who was at fault, this case is simply
11 about what coverage is available, if any, in
12 this case, under several insurance policies
13 that you, your mother and Mr. Gray and perhaps
14 others may have had, okay? I'm going to ask
15 you some questions about this case, mainly
16 about residency. We had stipulated to the
17 facts. And I understand you've read through
18 those, is that correct?

19 A: Yes, sir.

20 Q: We have stipulated to the facts and we have a
21 stipulation of facts, which all the attorneys
22 have signed, we're waiting on Mr. Cannarella,
23 but we understand that all of the attorneys
24 will be signing the stipulation of facts. So,
25 therefore I'm not going to have to ask you

1 about these facts today because they've already
2 been stipulated and they're going to be
3 submitted to the court, okay?

4 A: (No response.)

5 Q: Okay?

6 A: Yes, sir.

7 Q: All right. But the questions I do ask you, I
8 want you, if you will to make sure that your
9 answers are out loud. We have the court
10 reporter who's recording everything we're
11 saying and he is going to be providing a
12 transcript, a written transcript of what's
13 being said at the end of this, okay. So all of
14 your answers need to be out loud. We often
15 shake our head, I do the same thing. Just make
16 sure you say something when you shake your
17 head, okay?

18 A: Yes, sir.

19 Q: All right, good. Are you under the influence
20 of any drugs or alcohol today or have any
21 reason you would not be able to answer my
22 questions truthfully?

23 A: No, sir.

24 Q: All right. Have you ever been arrested before?

25 A: No, sir.

- 1 Q: No criminal history or anything like that?
- 2 A: No, sir.
- 3 Q: What name do you go by, your first name?
- 4 A: Amanda.
- 5 Q: Amanda. Where do you currently live?
- 6 A: 113 East Home Avenue, Hartsville.
- 7 Q: East Home Avenue?
- 8 A: Yes, sir.
- 9 Q: That's H-O-M-E?
- 10 A: Yes, sir.
- 11 Q: And how long have you lived there?
- 12 A: Since September of 2014.
- 13 Q: Who lives there with you?
- 14 A: My husband.
- 15 Q: And who is that?
- 16 A: Robert Theus.
- 17 Q: Can you spell his last name for me?
- 18 A: T-H-E-U-S.
- 19 Q: And when did you get married?
- 20 A: March 25th, 2015.
- 21 Q: Last month?
- 22 A: Last week.
- 23 Q: Last week, congratulations.
- 24 A: Thank you.
- 25 Q: And is East Home Avenue a house, an apartment?

1 A: It's an apartment.

2 Q: Do you have an apartment number?

3 A: Two.

4 Q: Is it a duplex or an apartment building?

5 A: It's a home. It's an apartment building.

6 Q: Okay. So it's a home that has -- is sectioned

7 off into -- how many ---

8 A: Yes, sir.

9 Q: --- apartments are in there?

10 A: Four.

11 Q: Four. Does anyone else live with you other

12 than Robert?

13 A: No, sir.

14 Q: Before September of 2014, where did you live?

15 A: With my mother.

16 Q: And what was that address?

17 A: 1112 Salem Road, Hartsville.

18 Q: And that zip code is 29 ...

19 A: 550.

20 Q: All right. And how long had you lived with

21 your mother leading up to September of 2014?

22 A: Since October of 2012.

23 Q: So from October of 2012 to September of 2014

24 you lived with your mother?

25 A: Yes, sir.

- 1 Q: And was that always at the 1112 Salem Road
2 address?
- 3 A: Yes, sir.
- 4 Q: All right. And who owns the home at 1112 Salem
5 Road?
- 6 A: My parents.
- 7 Q: All right. During your time from October of
8 2012 to September 2014, tell me everyone who
9 lived in that house during that two-year period
10 of time.
- 11 A: My father, my mother, myself, S.G. and my
12 aunt.
- 13 Q: What's your father's name?
- 14 A: Charles Goyeneche.
- 15 Q: And your mother's name?
- 16 A: Beverly Goyeneche.
- 17 Q: And your aunt's name?
- 18 A: Jacquelyn Goyeneche.
- 19 Q: How old is your aunt approximately?
- 20 A: She's in her 50s.
- 21 Q: Does she drive?
- 22 A: No.
- 23 Q: Does she own a vehicle?
- 24 A: Yes, sir.
- 25 Q: So she owns a car but she does not drive?

1 A: No, sir.

2 Q: Does she have a driver's license?

3 A: No, sir.

4 Q: What vehicle does she own?

5 A: It is her son's. She owns a vehicle for her

6 son.

7 Q: All right. Did your aunt live in your house on

8 May 8th, 2014 ---

9 A: Yes, sir.

10 Q: --- the day that this happened?

11 A: Yes, sir.

12 Q: Where does your aunt's son live?

13 A: New York.

14 Q: And is the car located in New York as well?

15 A: Yes, sir.

16 Q: Does your aunt have an insurance policy on that

17 car, if you know?

18 A: I do not know.

19 Q: What kind of car is it?

20 A: I don't recall.

21 Q: Okay. Has your aunt's son ever lived with you?

22 A: No, sir.

23 Q: Did your aunt's son live at Salem Road between

24 October 2012 and September 2014?

25 A: No, sir.

1 Q: Does your father own a car?

2 A: Yes, sir.

3 Q: Okay. What kind of car does your father own?

4 A: A Chevrolet. A Chevrolet Impala.

5 Q: A 2004 Impala?

6 A: Yes.

7 Q: All right. And is there only one 2004 Impala

8 in that household?

9 A: Yes, sir.

10 Q: All right. Does your father or mother own any

11 other vehicles?

12 A: A Chevrolet truck.

13 Q: Is that a C1500 truck?

14 A: I believe so, yes, sir.

15 Q: All right. And does anyone else at your mother

16 and father's household own a vehicle?

17 A: No, sir.

18 Q: All right. Do you own a car?

19 A: Yes, sir.

20 Q: What do you own?

21 A: 2013 Jeep Wrangler.

22 Q: All right. Other than those three vehicles,

23 the ones we've just talked about, the Jeep, the

24 Chevy pick-up and the Impala, were there any

25 other vehicles in your house at 1112 Salem

1 Road?
2 A: No, sir.
3 Q: Okay. Prior to October 2012 where did you
4 live?
5 A: In Hartsville..
6 Q: Okay. What was the address?
7 A: 413 Law Street.
8 Q: 413 Law Street?
9 A: L-A-W, uh-huh.
10 Q: All right. And was that a house?
11 A: Yes.
12 Q: And who lived there with you if anybody?
13 A: I lived alone.
14 Q: Did you own that house?
15 A: It was a rental property.
16 Q: What prompted you to move in with your parents
17 in October of 2012? Why did you leave?
18 A: I was pregnant.
19 Q: So you left the Law Street house and moved in
20 with your parents in October of 2012 ---
21 A: Yes, sir.
22 Q: --- because you were pregnant?
23 A: Yes, sir.
24 Q: All right. Other than the people you've told
25 me, Charles, Beverly and your aunt Jacquelyn,

1 and you and your daughter S.G. , no one else
2 lived in the house between October 2012 and
3 September 2014?

4 A: No, sir.

5 Q: Okay. S.G. , I understand, was born on April
6 8th?

7 A: Yes, sir.

8 Q: 2013?

9 A: Yes, sir.

10 Q: How many bedrooms is your parent's house on
11 Salem Road?

12 A: Four.

13 Q: When S.G. was born, tell me what the bedroom
14 arrangement was?

15 A: She stayed in the room with me.

16 Q: Okay. So you and S.G. shared a room?

17 A: Yes.

18 Q: All right. For the entire time she was there?

19 A: Yes, sir.

20 Q: And to stipulate the facts, it is stipulated
21 that David Gray is the father?

22 A: Yes, sir.

23 Q: Is that correct?

24 A: Yes, sir.

25 Q: Have you and David Gray ever shared a

- 1 residence?
- 2 A: No, sir.
- 3 Q: Do you know where David Gray lived in May of
- 4 2014?
- 5 A: He lived with his brother. I believe it was
- 6 Bullard Ford Road.
- 7 Q: Bullard Ford Road?
- 8 A: Yes, sir.
- 9 Q: All right. And who is his brother?
- 10 A: I'm sorry, his cousin who he calls his brother,
- 11 Jonathan Shearer.
- 12 Q: Can you spell that for me?
- 13 A: S-H-E-A-R-E-R.
- 14 Q: All right. Did anyone else live at the Bullard
- 15 Ford Road to the best of your knowledge other
- 16 than David Gray and Jonathan Shearer?
- 17 A: No, sir.
- 18 Q: All right. Was Jonathan married?
- 19 A: No, sir.
- 20 Q: Did Jonathan have any children?
- 21 A: No, sir.
- 22 Q: All right. Was David Gray married in 2014?
- 23 A: No, sir.
- 24 Q: Did David have any children other than S.G.
- 25 in May of 2014?

1 A: No, sir.

2 Q: All right. So to the best of your knowledge in
3 May of 2014, David Gray and Jonathan Bullard --
4 I'm sorry, and Jonathan Shearer lived on
5 Bullard Ford Road?

6 A: Yes, sir.

7 Q: Is that a house or an apartment?

8 A: It was a mobile home.

9 Q: Mobile home. Had you been to the mobile home
10 before?

11 A: Yes, sir.

12 Q: How many bedrooms was the mobile home?

13 A: Two.

14 Q: All right. And do you know what the sleeping
15 arrangements were in that mobile home?

16 A: S.G. stayed in the room with David.

17 Q: When she was there?

18 A: Yes, sir.

19 Q: And presumably Jonathan has his own bedroom?

20 A: Yes, sir.

21 Q: Do you work?

22 A: Yes, sir..

23 Q: Did you work in May of 2014?

24 A: Yes, sir.

25 Q: All right. Let me ask you this question.

1 Between April 8th of 2013 and May 2014, did you
2 work?

3 A: Yes, sir.

4 Q: All right. And where did you work during that
5 year?

6 A: Coker College.

7 Q: Were you working before you had S.G. ?

8 A: Yes, sir.

9 Q: All right. Did you take maternity leave?

10 A: Yes, sir.

11 Q: All right. How long did you take for maternity
12 leave?

13 A: Six weeks.

14 Q: All right. And is it fair to say six weeks
15 immediately following the birth of S.G. that
16 you were home on Salem Road taking care of
17 S.G. ?

18 A: Yes, sir.

19 Q: And S.G. stayed with you during that six-week
20 period exclusively?

21 A: Yes, sir.

22 Q: Did she, during your maternity leave, did she
23 stay anywhere else?

24 A: No, sir.

25 Q: All right. Once you went back to work after

1 maternity leave to Coker College, what were the
2 care arrangements for S.G. ?

3 A: She went to a daycare center during working
4 hours.

5 Q: At six weeks?

6 A: At six weeks.

7 Q: All right.. And what daycare center did she go
8 to?

9 A: Children's Corner Daycare.

10 Q: And that's in Hartsville?

11 A: Yes, sir.

12 Q: And did she do a 9:00 to 5:00 type of
13 arrangement, or 8:00 to 5:00, was it a full-day
14 daycare?

15 A: Yes, sir.

16 Q: All right. And what were their operating
17 hours?

18 A: Their operating hours, I believe, are 6:00 a.m.
19 to 6:00 p.m.; so she would stay between 8:30
20 a.m. and 5:00 p.m.

21 Q: And when's the first time after your maternity
22 leave, if any time, that S.G. stayed in a
23 place other than the Salem Road address? And
24 when I say stayed, spend the night away from
25 home.

- 1 A: She traveled to Las Vegas with me at two months
2 old, so that ...
- 3 Q: Las Vegas at ten months old?
- 4 A: Two.
- 5 Q: Two months old. Did y'all drive or fly?
- 6 A: Fly.
- 7 Q: Hotel or family?
- 8 A: Family.
- 9 Q: How long did you stay in Las Vegas?
- 10 A: Eleven days, I believe.
- 11 Q: Did the two of you travel alone?
- 12 A: I traveled with my family.
- 13 Q: Who were the people that traveled with you?
- 14 A: My mother, my father and my aunt.
- 15 Q: Okay. That aunt who lived with you?
- 16 A: Yes, sir.
- 17 Q: And that would have been her first time away
18 from home overnight?
- 19 A: Yes, sir.
- 20 Q: All right. When would the next time be after
21 the eleven day trip to Las Vegas?
- 22 A: I believe in October of 2013. I believe she
23 was six months old. I traveled to Chicago with
24 her.
- 25 Q: Was that for family or business?

- 1 A: Family.
- 2 Q: And you have family in Chicago?
- 3 A: Yes, sir.
- 4 Q: Did you fly?
- 5 A: Yes, sir.
- 6 Q: How long did you stay in Chicago?
- 7 A: Four days.
- 8 Q: All right. When is the next time after Chicago
- 9 that S.G. stayed away from home? When I say
- 10 home I'm talking about Salem Road.
- 11 A: Late October or November of 2013.
- 12 Q: And where was that?
- 13 A: She stayed with David when he lived on Kenwood
- 14 Avenue, a previous residence.
- 15 Q: On what road?
- 16 A: Kenwood Avenue in Hartsville.
- 17 Q: All right. Let me backtrack for one moment.
- 18 We had David at Bullard Ford Road. Do you know
- 19 when he moved to Bullard Ford Road?
- 20 A: November or December of 2013.
- 21 Q: And where did he live prior to that, just prior
- 22 to Bullard Ford Road?
- 23 A: Kenwood Avenue.
- 24 Q: How long did he live at Kenwood Avenue, if you
- 25 know?

- 1 A: Maybe six months.
- 2 Q: And who lived with him at Kenwood Avenue?
- 3 A: Two of his friends.
- 4 Q: Was it a house or an apartment?
- 5 A: It was a house.
- 6 Q: So was he living at the Kenwood Avenue when
- 7 S.G. was born?
- 8 A: Yes, sir.
- 9 Q: And then moved away from Kenwood Avenue in the
- 10 late -- or, I'm sorry, in late November or
- 11 December?
- 12 A: Yes, sir.
- 13 Q: And in late October early November when she
- 14 stayed -- when S.G. stayed with David on
- 15 Kenwood Avenue, how many nights did she stay
- 16 there?
- 17 A: Kenwood Avenue?
- 18 Q: At the first time she went in late October or
- 19 November, how many nights did S.G. stay?
- 20 A: One.
- 21 Q: All right. When was the next time that S.G.
- 22 stayed away from home, from Salem Avenue --
- 23 Salem Road?
- 24 A: In December 2013. We visited Asheville, North
- 25 Carolina.

1 Q: Family or just a trip?

2 A: Vacation.

3 Q: Vacation. Who went on vacation?

4 A: David.

5 Q: You and David?

6 A: Yes, sir.

7 Q: And how long did you stay in Asheville?

8 A: Two days.

9 Q: All right. When's the next time S.G. stayed
10 away from the Salem Road address after the
11 Asheville trip in December of 2013?

12 A: She began to stay at the Bullard Ford location.
13 I cannot recall each time that she went.

14 Q: When did the times start where -- when's the
15 first time she stayed at the Bullard -- when
16 did that start when she stayed at the Bullard
17 Ford ---

18 A: In December.

19 Q: Okay. So in December of 2013. She stayed at
20 the Bullard Ford address in December 2013?

21 A: Yes, sir.

22 Q: Okay. Did she stay there before Christmas of
23 2013?

24 A: Yes, sir.

25 Q: All right. Did she stay there before you went

1 to Asheville at the Bullard Ford address?

2 A: I cannot recall.

3 Q: Do you know when in December you went to
4 Asheville, was it before Christmas?

5 A: Yes, sir.

6 Q: Do you know if it was the first, second or
7 third week in December?

8 A: I can't recall.

9 Q: All right. Beginning in December of 2013 you
10 indicated that she, I believe you said, began
11 staying at the Bullard Ford address.

12 A: Yes, sir.

13 Q: Tell me what the schedule was.

14 A: Typically it was a four-three schedule. So
15 she, S.G. , would stay four days with one
16 parent, three days with the next and then we
17 would often alternate and change the schedule
18 if something came up.

19 Q: Did the same parent always have the four days?

20 A: No.

21 Q: So there may be a period of time where S.G.
22 would stay with you for four straight days?

23 A: Yes, sir.

24 Q: And then she would stay at the Bullard Road
25 address for four straight days or either three

1 straight days depending on the schedule?

2 A: Yes, sir.

3 Q: And if that started in December of 2013, did it
4 occur -- what was the schedule in January 2014?

5 A: The same.

6 Q: What about February ---

7 A: The same.

8 Q: --- of 2014? All right. And how about March
9 of 2014?

10 A: The same.

11 Q: All right. And how about April of 2014?

12 A: The same.

13 Q: Was there any period of time in December,
14 January, February, March or April, beginning in
15 December 2013 and ending in -- we'll just say
16 May 8th of 2014, was there any period of time
17 where that schedule was interrupted? In other
18 words, that you varied from that schedule?

19 A: She was sick in April of 2014.

20 Q: So she was sick in April of 2014. Tell me
21 about that.

22 A: She stayed with me maybe two extra days, and
23 then back to the schedule.

24 Q: So she would've stayed with you for six
25 straight days?

1 A: Yes, sir.

2 Q: During the days on and days off, were there
3 visitation allowed, in other words, if you were
4 ---

5 A: Yes, sir.

6 Q: --- gone for four days would you see her during
7 that four-day period?

8 A: Yes, sir.

9 Q: How did that work?

10 A: I would pick her up from daycare each day when
11 I got off of work.

12 Q: So if it was his turn, you would pick her up
13 from daycare and then take her over to his
14 house?

15 A: Yes.

16 Q: And if it was your turn, if you had custody,
17 would he do the same, would he pick her up from
18 daycare or would you pick her up when you had
19 her?

20 A: I would pick her up when I had her and he would
21 sometimes meet us at the park or ---

22 Q: All right. So if your visitation -- is it fair
23 to say that your visitation during a month
24 would typically be more than his because you --
25 even if you didn't have her those four days you

1 would go see S.G. ---
2 A: Yes, sir.
3 Q: --- during the week?
4 A: Yes, sir.
5 Q: And he not always did that, is that fair to
6 say?
7 A: Sometimes.
8 Q: All right. Would you say that you did it more
9 than he did it?
10 A: Yes, sir.
11 Q: Did S.G. have a social security card?
12 A: Yes, sir.
13 Q: Did you apply for that social security card?
14 A: Yes, sir.
15 Q: Did you have to put an address on your
16 application for the social security card?
17 A: I believe so.
18 Q: And what address did you put?
19 A: Salem Road.
20 Q: All right. Did she have health insurance?
21 A: Yes, sir.
22 Q: And who is your health insurance with?
23 A: Blue Cross Blue Shield.
24 Q: All right. And did you have to provide an
25 address for her health insurance, for S.G. ?

1 A: Yes, sir.

2 Q: All right. And what address did you provide
3 for the health insurance application?

4 A: Salem Road.

5 Q: Was there an application for the daycare? To
6 get her into the daycare, did you have to fill
7 in any paperwork?

8 A: Yes, sir.

9 Q: Was there an address for her residence that was
10 listed on that?

11 A: Yes, sir.

12 Q: And what was the address given to the daycare?

13 A: Salem Road.

14 Q: And Ms. Goyeneche, I know that this is very
15 difficult, but at the very end, I understand
16 you probably spoke with the coroner and gave
17 information regarding S.G. . Did you provide
18 an address to the coroner for the death
19 certificate?

20 A: Yes, sir.

21 Q: And what address did you provide was S.G. 's
22 residence?

23 A: Salem Road.

24 Q: Are you aware of any documentation that either
25 you or David Gray may have that would indicate

1 S.G. 's address was anything other than Salem
2 Road?

3 A: Perhaps the daycare application might have his
4 address as well.

5 Q: All right. Do you have a copy of that?

6 A: I do not.

7 Q: All right. Who filled that out?

8 A: I did.

9 Q: A minute ago when I asked you about the daycare
10 application, you said that you provided the
11 Salem Road address as her address of residence?

12 A: Yes, sir.

13 Q: Do you think you may have put a different
14 address on there as well?

15 A: Yes, sir.

16 Q: Would that have been as it relates to David,
17 where he lived?

18 A: Yes, sir.

19 Q: All right. Would there be anything on that
20 daycare application that would indicate that

21 S.G. lived anywhere other than Salem Road?

22 A: No.

23 Q: Okay. Has David ever been married that you
24 know of?

25 A: No, sir.

- 1 Q: Did S.G. , when she stayed with David, take an
2 overnight bag or did she keep clothes -- where
3 did she keep all of her clothes? Where was her
4 chest of drawers with her clothes in it, if she
5 had one?
- 6 A: She took an overnight bag, but she did have
7 clothes and bathroom and food items there as
8 well.
- 9 Q: But you would send an overnight bag with her or
10 a suitcase with things in it for her when she
11 would go to David's?
- 12 A: For her daycare the next day.
- 13 Q: Okay. What about like just to wear the next
14 day, would you send her clothes so that she
15 would have clothes to wear while she was at
16 daycare whenever she was staying with David?
- 17 A: Yes, sir.
- 18 Q: You would?
- 19 A: (Nods head affirmatively.)
- 20 Q: Would David, when he brought S.G. back to you
21 or when you picked back -- would he return that
22 bag to you?
- 23 A: Yes, sir.
- 24 Q: And who washed her clothes?
- 25 A: We both did.

- 1 Q: I assume that she was in a crib?
- 2 A: Yes, sir.
- 3 Q: Did you have a crib at your house?
- 4 A: Yes, sir.
- 5 Q: Did David have a crib at his house?
- 6 A: Yes, sir.
- 7 Q: Was it a temporary crib or a full blown crib?
- 8 Like a Pack 'n Play or did he have a crib?
- 9 A: It was a Pack 'n Play crib.
- 10 Q: So David had a Pack 'n Play at his house?
- 11 A: Yes, sir.
- 12 Q: And what did you have at your house? Was it
- 13 like a ---
- 14 A: It's a wood crib.
- 15 Q: --- permanent crib?
- 16 A: It's a wooden crib.
- 17 Q: Not something you could break down and put in
- 18 a closet?
- 19 A: No.
- 20 Q: I guess you could break it down, but not like
- 21 a Pack 'n Play that would fit into a carrying
- 22 case?
- 23 A: It was not mobile.
- 24 Q: Not mobile, okay. But what David had was a
- 25 Pack 'n Play?

1 A: Mobile.

2 Q: A mobile crib?

3 A: Yes, sir.

4 Q: Is that something he bought or ---

5 A: It was a gift.

6 Q: Okay. If S.G. were sick -- and I know you
7 indicated sometime in April she was; but if

8 S.G. were sick, would you be the primary
9 person to take care of her?

10 A: Yes, sir.

11 Q: And she would stay at your house with your
12 parents?

13 A: Yes, sir.

14 Q: And you would take her to the doctor's office?

15 A: We both took her to the doctor usually.

16 Q: All right. Mr. Gray has responded to some
17 written questions that we had sent to him, and
18 his response in one question states that the
19 mother was the primary custodian because the
20 child lived with her mother; however, the
21 defendant Gray had very liberal visitation. Is
22 that a true statement in your opinion?

23 A: Could you repeat his statement?

24 Q: Certainly. And I think just for the purposes
25 of the -- for the record, I want to read the

1 entire question. The question that was
2 presented to Mr. Gray was admit or deny that
3 the defendant, David R. Gray, III, was the
4 parent and the natural guardian of S.G.
5 Goyeneche Gray and is a citizen and resident of
6 Darlington County, South Carolina. In response
7 to that question, Mr. Gray states quote,
8 Defendant admits Plaintiff's request in
9 paragraph one because he was the parent, but
10 the mother was the primary custodian because
11 the child lived with her mother, however, the
12 defendant had very liberal visitation. Is that
13 a true statement?

14 A: I believe we had shared custody but I would say
15 I would be primary.

16 Q: Okay. All right. Let's go off the record for
17 one minute.

18 (Off the record discussion)

19 Q: At this point, that's all the questions I have
20 for you. I don't know if your attorneys have
21 any questions. They certainly have an
22 opportunity to ask if they do, but we're going
23 to leave this deposition open until Mr. Gray's
24 attorney gets here so that we can confirm that
25 all parties have stipulated to the facts. And

1 we reserve the right to go back on the record
2 just for the sole purpose of verifying
3 stipulated facts with you should there be any
4 objection from Mr. Cannarella. That's all I
5 have.

6 A: Thank you.

7 (There being no further questions, the deposition
8 concluded at 10:59 a.m.)

9 STIPULATIONS ON THE RECORD:

10 MR. ROBINSON: In the deposition of Amanda

11 Goyeneche, I want to mark as Exhibit Number
12 One, the only exhibit, the Notice of
13 Deposition, along with Subpoena Duces Tecum
14 that was served with the deposition.

15 (Plaintiff's Exhibit Number One to the Amanda
16 Goyeneche deposition was marked for identification
17 purposes.)

18 MR. ROBINSON: And for the record, indicate no
19 documents, as of today's date, have been
20 produced in response to the Subpoena Duces
21 Tecum. I've consulted with Ms. Goyeneche's
22 counsel and although we have entered into a
23 stipulation of facts, I want to just put on the
24 record that no documents have been provided to
25 us in response to our Subpoena Duces Tecum; and

1 we are prepared to submit the case to the Court
2 next Tuesday upon the stipulation of facts and
3 briefs. In the event any extraneous documents,
4 or any documents outside of the stipulation of
5 facts entered into, any extraneous documents,
6 we reserve objection to the admissibility of
7 those documents, if there are any. And I
8 understand from my opposing counsel, Mr. Smith,
9 that he is not aware of any at this point; and
10 that he will notify me if and when there are
11 any identified.

12 MR. SMITH: Agreed.

13 MR. ROBINSON: And we're going to do the same
14 stipulation on Beverly Goyeneche, the Notice of
15 Deposition and Subpoena Duces Tecum, and that
16 we're entering into the same stipulation
17 regarding Beverly, as it relates to the trial
18 of this case; is that agreed?

19 MR. SMITH: Agreed.
20 (Plaintiff's Exhibit Number One to the Beverly
21 Goyeneche deposition was marked for identification
22 purposes.)

23 MR. ROBINSON: All right. Now ---

24 MR. SMITH: Can I ask you a query off the record?

25 MR. ROBINSON: No.

1 MR. SMITH: Are you going to be providing the Court
2 with a copy of those State Farm policies?

3 MR. ROBINSON: I have a copy of the policies.

4 MR. SMITH: Right.

5 MR. ROBINSON: I have quoted the relevant portions,
6 but I am not opposed to introducing the entire
7 policy.

8 MR. SMITH: Okay.

9 MR. ROBINSON: So if you want me to change that
10 stipulation ---

11 MR. SMITH: Right.

12 MR. ROBINSON: --- that we will stipulate that
13 policy 9840a in its entirety can be entered
14 into the record, I'm fine with that.

15 MR. SMITH: I would want the -- each policy
16 referenced in our stipulation be included.

17 MR. ROBINSON: Well, they're all 9840a.

18 MR. SMITH: Okay.

19 MR. ROBINSON: They're all, you know ---

20 MR. SMITH: His too?

21 MR. ROBINSON: They have one policy.

22 MR. SMITH: Okay.

23 MR. ROBINSON: It's the policy for all South
24 Carolina policies.

25 MR. SMITH: Okay. That's good.

1 MR. ROBINSON: It's called the State Farm Car Policy
2 Booklet ---

3 MR. SMITH: Okay.

4 MR. ROBINSON: --- Georgia/South Carolina office.
5 South Carolina policy form through the
6 Department of Insurance.

7 MR. SMITH: Which would be the form that -- that all
8 the policies being discussed and the facts of
9 stipulation would be modeled to?

10 MR. ROBINSON: That's right. This is the form
11 that's approved by the Department of Insurance
12 ---

13 MR. SMITH: Okay.

14 MR. ROBINSON: --- for State Farm to issue on their
15 policies.

16 MR. SMITH: Okay.

17 MR. ROBINSON: And it's 9840a, all those polic- --
18 all those individual policies are governed by
19 this document, so do you want me -- we can put
20 that on the record too, I'm fine with it.

21 MR. SMITH: Okay.

22 MR. ROBINSON: We'll also, in addition to the
23 stipulation of facts, the parties have agreed
24 that the policy form 9840a, which is referenced
25 in the stipulation of facts, can be attached --

1 or will be attached to the stipulation of facts
2 and will be admitted into evidence without
3 objection.

4 MR. SMITH: Agreed.

5 MR. ROBINSON: Mr. Cannarella, any objections?

6 MR. CANNARELLA: No objections.

7 MR. ROBINSON: All right.

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
))
 2 COUNTY OF DARLINGTON) C/A #: 2014-CP-16-0792
 3
 4 State Farm Mutual Automobile,)
 Insurance Company,)
 5 Plaintiff,)
)
 6 v.)
)
 7 Beverly Goyenêche, David R.)
 Gray, III and Amanda Goyeneche)
 8 (a/k/a Amanda Goyeneche-Gray),)
 including and as a Parent and)
 9 Natural Guardian of S.G.)
)
 10)
 Defendants.)
 11 _____)

12
 13 DEPOSITION OF
 14 BEVERLY GOYENECHE

15 *****

16 Thursday, April 2, 2015
 11:01 a.m. - 11:14 a.m.

17
 18
 19 The deposition of BEVERLY GOYENECHE, taken on
 20 behalf of the Plaintiff at Smith Watts & Associates,
 21 508 South Fourth Street, Hartsville, South Carolina,
 22 on the 2nd day of April, 2015 before M. Sean Cary,
 23 Court Reporter and Notary Public in and for the State
 24 of South Carolina, pursuant to Notice of Deposition
 25 and/or agreement of counsel.

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EXHIBITS

(Plaintiff's Exhibit Number One was marked following the completion of the deposition.)

Plaintiff's Exhibit Number One 11

(Notice of Deposition of Defendant Beverly Goyeneche)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.

It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby waived:

1 BEVERLY GOYENECHÉ, having been duly sworn, deposes
2 and testifies as follows:

3 MS. GOYENECHÉ - EXAMINATION BY MR. ROBINSON:

4 Q: Ms. Goyeneche, my name is Jon Robinson and I
5 represent State Farm in a case about the
6 coverage: that's what this case is about.
7 We're not here to determine any fault or
8 anything other than what insurance policies, if
9 any, are available for this case, okay? I'm
10 sorry to meet you under these circumstances and
11 I want to express my deepest sympathy for your
12 loss. I'm going to ask you some questions
13 about residency. The party's have stipulated
14 to the facts of this case ---

15 A: Uh-huh.

16 Q: --- with the exception of the issue dealing
17 with residency of your granddaughter.

18 A: Uh-huh.

19 Q: So that's what we're going to talk about today.
20 If you don't understand any of my questions,
21 please feel free to stop me; I'll be happy to
22 repeat or rephrase the question. If you don't
23 do that, I'm going to assume that you
24 understand the question before you answer it.
25 I ask this of everyone, so I will ask it of

1 you: Are you under the influence of any drugs
2 or alcohol, or have any reason you would not be
3 able to answer my questions truthfully today?

4 A: No.

5 Q: Have you ever been arrested?

6 A: No.

7 Q: All right.

8 MR. SMITH: Jon, I'm going to call Mr. Cannarella,
9 okay?

10 MR. ROBINSON: Do you want me to wait?

11 MR. SMITH: You can go ahead.

12 MR. ROBINSON: Okay.

13 MR. SMITH: Keep going.

14 Q: If you will, please state your full name for
15 the record.

16 A: Beverly Manning Goyeneche.

17 Q: Say that last name again.

18 A: Goyeneche.

19 Q: And where do you currently live?

20 A: Here in Hartsville.

21 Q: What's your address?

22 A: 1112 Salem Road.

23 Q: 2-9 ...

24 A: 29550.

25 Q: All right. And who lives with you currently?

1 A: My husband, Charles, and his sister Jacqueline
2 Goyeneche.

3 Q: Okay. And do y'all own or rent that home?

4 A: Own.

5 Q: How long have you been on Salem Road?

6 A: Since 1991, I believe.

7 Q: How many children do you have?

8 A: Three.

9 Q: Who are they?

10 A: Rose Marie Goyeneche Diven, D-I-V-E-N; and then
11 Catherine Goyeneche.

12 Q: With a K or a C?

13 A: C. And Amanda Goyeneche.

14 Q: The party's have stipulated that the vehicles
15 in your household are -- include a 2004 Impala

16 ---

17 A: Yes.

18 Q: --- a 2007 C1500 ---

19 A: Chevy Silverado I guess, I don't know.

20 Q: All right.

21 A: Not too into cars.

22 Q: And then Amanda owned a 2013 Wrangler?

23 A: Yes.

24 Q: Are there any other vehicles in your household
25 other than those?

1 A: No, not that I know. My sister-in-law, I don't
2 know what her finances are. She has a car, she
3 and her son, but her son has that in New York.
4 I don't know actually who owns it.

5 Q: Okay. Does your sister-in-law have a car ---

6 A: No.

7 Q: --- that she has in Hartsville?

8 A: No. She doesn't have a license, she doesn't
9 drive.

10 Q: All right. So she has no license, doesn't
11 drive, therefore would not be a driver of any
12 vehicle.

13 A: Right.

14 Q: Okay. Has she ever had a car -- let me ask you
15 this. In 2014, did she have any vehicle at
16 your house ---

17 A: No.

18 Q: --- physically located at your house for ---

19 A: No.

20 Q: --- the year 2014?

21 A: (Shakes head negatively.)

22 Q: Okay. That's a no?

23 A: No.

24 Q: Okay. I want to start with April 8th, 2013.

25 A: Uh-huh.

1 Q: That is the day your granddaughter, S.G. , was
2 born.

3 A: Uh-huh.

4 Q: Where was Amanda living on April 8th, 2013?

5 A: At our house.

6 Q: Salem Road?

7 A: Yes.

8 Q: All right. In April of 2013, who was living at
9 the Salem Road house?

10 A: Myself; my husband, Charles; his sister,
11 Jacqueline; and Amanda.

12 Q: And S.G. ?

13 A: After her bir- ---

14 Q: Right.

15 A: Yeah, after her birth. Yes.

16 Q: Okay. From the time S.G. was born until the
17 time that she passed away in May of 2014, did
18 the makeup of your household change at all as
19 far as the people who lived there?

20 A: No.

21 Q: All right. So, those people that you just
22 named: yourself; your husband, Charles; your
23 sister-in-law, Jacqueline; your daughter,
24 Amanda; and your granddaughter, S.G. lived at
25 your house from April 2013 to May 2014?

1 A: Yes.

2 Q: Specifically May 8th, 2014?

3 A: Yes.

4 Q: I understand that Amanda took six weeks
5 maternity leave?

6 A: I think that -- I believe it was six weeks.

7 Q: All right. Did you ever keep S.G. ? Babysit?

8 A: Sure. Yes.

9 Q: All right. Did you ever pick up S.G. from
10 school or from her daycare?

11 A: I believe I picked her up once.

12 Q: All right. So in one year, you picked her up
13 one time?

14 A: Yes.

15 Q: How would you characterized S.G. 's living
16 arrangement as it relates to where she stayed?

17 A: She lived with Amanda. Towards, I want to say
18 maybe the last three or four months prior to
19 her death, Richie had -- or David had moved in
20 with a brother; and once he had his residence
21 fixed for the care of S.G. , then she would
22 stay with him so many nights at his house and
23 so many nights at our house with Amanda.

24 Q: Where would you characterize S.G. 's home in
25 May of 2014?

1 A: I would characterize it as our house and
2 Richie's house.

3 Q: Did S.G. , to the best of your knowledge, have
4 her items equally, as far as clothes, furniture
5 ---

6 A: Yes.

7 Q: During the period from April 2013 to May 8th,
8 2014, did Amanda have any other place where she
9 may have stayed or lived?

10 A: No.

11 Q: All right. One second. Do you and your
12 husband file joint tax returns?

13 A: Yes.

14 Q: Do you claim any of your children on your tax
15 returns?

16 A: No.

17 Q: Did you claim your grand- -- any of your
18 grandchildren on your tax returns?

19 A: No.

20 Q: Do you know any -- did you ever have Amanda or
21 S.G. listed on any insurance policies that
22 you had?

23 A: No.

24 Q: Would it be fair to say that Amanda and David
25 would be the best -- would be able to provide

1 the most accurate testimony regarding what the
2 living situation was with S.G. ?

3 A: Yes.

4 Q: As I indicated earlier, we had stipulated to
5 the facts. I believe your attorney has gone
6 through those with you ---

7 A: Yes.

8 Q: --- so I'm not going to go over those
9 stipulated facts. We'll leave the deposition
10 open in the event that there is some issue with
11 Mr. Gray, which I understand from his attorney
12 there will not be, regarding the stipulated
13 facts. But we'll leave this deposition open
14 for the purpose of going over those stipulated
15 facts should we need to. Have you understood
16 all my questions?

17 A: Yes.

18 Q: All right. I think that's all I have.

19 MR. SMITH: I need one second to talk to him.

20 (A break was taken from 11:13 a.m. until 11:14
21 a.m.)

22 MR. SMITH: Thank you, Jon. We're done.

23 (There being no further questions, the deposition
24 concluded at 11:14 a.m.)

25 STIPULATIONS ON THE RECORD:

1 MR. ROBINSON: In the deposition of Amanda
2 Goyeneche, I want to mark as Exhibit Number
3 One, the only exhibit, the Notice of
4 Deposition, along with Subpoena Duces Tecum
5 that was served with the deposition.

6 (Plaintiff's Exhibit Number One to the Amanda
7 Goyeneche deposition was marked for identification
8 purposes.)

9 MR. ROBINSON: And for the record, indicate no
10 documents, as of today's date, have been
11 produced in response to the Subpoena Duces
12 Tecum. I've consulted with Ms. Goyeneche's
13 counsel and although we have entered into a
14 stipulation of facts, I want to just put on the
15 record that no documents have been provided to
16 us in response to our Subpoena Duces Tecum; and
17 we are prepared to submit the case to the Court
18 next Tuesday upon the stipulation of facts and
19 briefs. In the event any extraneous documents,
20 or any documents outside of the stipulation of
21 facts entered into, any extraneous documents,
22 we reserve objection to the admissibility of
23 those documents, if there are any. And I
24 understand from my opposing counsel, Mr. Smith,
25 that he is not aware of any at this point; and

1 that he will notify me if and when there are
2 any identified.
3 MR. SMITH: Agreed.
4 MR. ROBINSON: And we're going to do the same
5 stipulation on Beverly Goyeneche, the Notice of
6 Deposition and Subpoena Duces Tecum, and that
7 we're entering into the same stipulation
8 regarding Beverly, as it relates to the trial
9 of this case; is that agreed?
10 MR. SMITH: Agreed.
11 (Plaintiff's Exhibit Number One to the Beverly
12 Goyeneche deposition was marked for identification
13 purposes.)
14 MR. ROBINSON: All right. Now ---
15 MR. SMITH: Can I ask you a query off the record?
16 MR. ROBINSON: No.
17 MR. SMITH: Are you going to be providing the Court
18 with a copy of those State Farm policies?
19 MR. ROBINSON: I have a copy of the policies.
20 MR. SMITH: Right.
21 MR. ROBINSON: I have quoted the relevant portions,
22 but I am not opposed to introducing the entire
23 policy.
24 MR. SMITH: Okay.
25 MR. ROBINSON: So if you want me to change that

1 stipulation ---

2 MR. SMITH: Right.

3 MR. ROBINSON: --- that we will stipulate that
4 policy 9840a in its entirety can be entered
5 into the record, I'm fine with that.

6 MR. SMITH: I would want the -- each policy
7 referenced in our stipulation be included.

8 MR. ROBINSON: Well, they're all 9840a.

9 MR. SMITH: Okay.

10 MR. ROBINSON: They're all, you know ---

11 MR. SMITH: His too?

12 MR. ROBINSON: They have one policy.

13 MR. SMITH: Okay.

14 MR. ROBINSON: It's the policy for all South
15 Carolina policies.

16 MR. SMITH: Okay. That's good.

17 MR. ROBINSON: It's called the State Farm Car Policy
18 Booklet ---

19 MR. SMITH: Okay.

20 MR. ROBINSON: --- Georgia/South Carolina office.
21 South Carolina policy form through the
22 Department of Insurance.

23 MR. SMITH: Which would be the form that -- that all
24 the policies being discussed and the facts of
25 stipulation would be modeled to?

1 MR. ROBINSON: That's right. This is the form
2 that's approved by the Department of Insurance.

3 ---

4 MR. SMITH: Okay.

5 MR. ROBINSON: --- for State Farm to issue on their
6 policies.

7 MR. SMITH: Okay.

8 MR. ROBINSON: And it's 9840a, all those polic- --
9 all those individual policies are governed by
10 this document, so do you want me -- we can put
11 that on the record too, I'm fine with it.

12 MR. SMITH: Okay.

13 MR. ROBINSON: We'll also, in addition to the
14 stipulation of facts, the parties have agreed
15 that the policy form 9840a, which is referenced
16 in the stipulation of facts, can be attached --
17 or will be attached to the stipulation of facts
18 and will be admitted into evidence without
19 objection.

20 MR. SMITH: Agreed.

21 MR. ROBINSON: Mr. Cannarella, any objections?

22 MR. CANNARELLA: No objections.

23 MR. ROBINSON: All right.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON)

CIVIL ACTION NO. 2014-CP-16-0792

State Farm Mutual Automobile Insurance)
Company,)

Plaintiff,)

v.)

ORDER OF THE COURT

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.)

Date of Trial:

April 7, 2015

Presiding Judge:

The Honorable Paul M. Burch

Attorney for Defendants,

Amanda & Beverly Goyeneche:

Karl H. Smith

Attorney for Plaintiff:

Jonathan M. Robinson

Court Reporter:

Lisa S. Carter

THE ACTION:

This matter came before the Court on the Plaintiff's Summons and Complaint filed with the Darlington County Clerk of Court by way of a Declaratory Judgment Action. The Defendants Amanda and Beverly Goyeneche timely filed their Answer to the Complaint through counsel. Depositions were taken on April 2, 2015 of all three Defendants. A Bench Trial was held on April 7, 2015. The parties submitted stipulated facts, oral arguments, and briefs to the Court for consideration. No testimony was taken at trial. The parties sought guidance from the Court on two issues. The first being, whether or not the death of the minor child, S.G., arose out of the ownership, maintenance, or use of a motor vehicle so that the loss would be covered under the Defendant David Gray's liability and underinsured policies and also

covered under the Defendants Amanda and Beverly' Goyeneche's underinsured policies. The second being, whether or not the deceased minor child was a resident relative of both her mother, Amanda Goyeneche, and her father, David R. Gray, III, for automobile insurance purposes. The Court answers both of these issues affirmatively.

STIPULATED FACTS:

1. Plaintiff is an insurance company organized and existing under the laws of one of the states of the United States of America and is authorized to and does conduct business in the State of South Carolina.

2. Defendant Beverly Goyeneche is the mother of Amanda Goyeneche and grandmother of S.G. and is a citizen and resident of Darlington County, South Carolina.

3. David R. Gray, III and Amanda Goyeneche individually and as Parents and Natural Guardians of S.G. , are citizens and residents of Darlington County, South Carolina. Amanda Goyeneche is the proper name of the Defendant "Amanda Goyeneche-Gray" and is a proper party to this action and consents to the jurisdiction and venue of this court.

4. The events described herein below which give rise to this Complaint occurred on May 8, 2014 at Carolina Printing Sports and Trophy located at 618 S. Fifth Street, Hartsville, Darlington County, South Carolina.

5. This action is being brought pursuant to South Carolina Code Ann. § 15-53-10, *et seq.* and Rule 57 of the South Carolina Rules of Civil Procedure.

6. This court has jurisdiction over the parties hereto and the subject matter hereof and that venue is proper in Darlington County, South Carolina.

7. On or about February 28, 2014, Plaintiff issued a policy of insurance, bearing

Policy Number 4891-309-40, to Defendant David R. Gray, III insuring a 2011 Ford F150 pickup. Said policy was effective from February 28, 2014 to August 28, 2014 and provided Liability and Underinsured coverage of \$25,000 each person; \$50,000 each accident; and \$25,000 property damage.

8. On or about October 30, 1998, Plaintiff also issued a policy of insurance bearing Policy Number C483241E to Defendant Amanda Goyeneche, insuring a 2013 Wrangler. Said policy was effective from April 30, 2014 to October 30, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

9. On or about September 27, 2004, Plaintiff also issued a policy of insurance bearing Policy Number 1003667A to Beverly Goyeneche insuring a 2004 Impala. Said policy was effective from March 27, 2014 to September 27, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

10. On or about June 3, 2008 Plaintiff also issued a policy of insurance bearing Policy Number 1772085A to Beverly Goyeneche insuring a 2007 C1500. Said policy was effective from December 3, 2013 to June 3, 2014 and provided Liability and Underinsured coverage of \$50,000 each person; \$100,000 each accident; and \$25,000 property damage.

11. State Farm policies of insurance provide coverage to insured persons subject to the terms, definitions, exclusions, and other limitations of the policies.

12. Among the terms and conditions of the relevant State Farm policies denominated above, it provides that the automobile insurance policies issued by the Plaintiff 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. Relevant portions of the policies include but are not limited to the following:

THIS POLICY

3. We agree to provide insurance according to the terms of this policy:
 - b. unless otherwise stated in "EXCEPTIONS, POLICY BOOKLET & ENDORSEMENTS" on the Declarations Page, in reliance on the following statements:
 - (1) The named insured shown on the Declarations Page is the sole owner of *your car*.

DEFINITIONS

Owned By means:

1. owned by;
2. registered to; or
3. leased, if the lease is written for a period of 31 or more consecutive days, to.

LIABILITY COVERAGE

Insured means:

-
1. *you* and *resident relatives* for:
 - a. the ownership, maintenance, or use of:
 - (1) *your car*;
 - b. the maintenance or use of:
 - (1) *a non-owned car*; or
 - (2) *a temporary substitute car*;

Insuring Agreement

1. We will pay:
 - a. damages an *insured* becomes legally liable to pay because of:
 - (1) *bodily injury* to others; and
 - (2) damage to property
- caused by an accident that involves a vehicle for which that *insured* is provided Liability Coverage by this policy;

UNDERINSURED MOTOR VEHICLE COVERAGE

This policy provides Underinsured Motor Vehicle Coverage if "W" is shown under "SYMBOLS" on the Declarations page.

Additional Definitions

Insured means:

1. *you*;
2. *resident relatives*;
3. any other *person while occupying* or using:
 - a. *your car*;with the expressed or implied consent of *you*; and
4. any *person* to the extent he or she may recover damages under a state wrongful death statute because of death of an *insured* under 1., 2., or 3. above

Underinsured Motor Vehicle means a *motor vehicle* the ownership, maintenance, and use of which is either;

1. insured or bonded for bodily injury and property damage liability at the time of the accident; or
2. the *insured's* damages exceed any damages cap or limitation imposed by statute.

Insuring Agreement

We will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to recover from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured*. The *bodily injury* and *property damage* must be caused by an accident that involved operation, maintenance, or use of an *underinsured motor vehicle*.

13. Defendant Amanda Goyeneche has presented a claim for damages in which she alleges that her daughter S.G. died in an unattended parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by David R. Gray, III, which was being used to transport her to daycare.

14. Minor S.G. died after being left in an unattended parked 2011 Ford F150 vehicle on May 8, 2014 (hereinafter "loss") insured by Plaintiff and owned by Defendant David R. Gray, III.

15. Defendant David R. Gray, III was to deliver his 13-month-old daughter S.G. to daycare the morning of the loss but negligently failed to do so.

16. The minor S.G. was left unattended in the back seat of the above described vehicle while it was parked 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.

17. The minor S.G. y was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia.

18. Defendant Amanda Goyeneche, as Executor of the deceased's estate, has presented a claim for bodily injury under the liability coverage and underinsured coverage of the insurance policies referenced hereinabove arising from the death of S.G. on May 8, 2014.

19. The minor S.G. was found unresponsive in Defendant David R. Gray, III's vehicle while it was turned off and unoccupied by any other persons.

AS TO APPLICABILITY OF CAR INSURANCE:

The Court finds that the death of S.G. was a loss that arose out of the ownership, maintenance, or use of a motor vehicle so that the liability and all underinsured policies stated in the above stipulated facts apply to compensate for her loss. No automobile insurance policy may be issued in South Carolina unless it contains a provision protecting the person defined as an insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the motor vehicle. *Wright v. North Area Taxi, Inc.*, 337 S.C. 419, 523 S.E.2d 472 (S.C. App. 2008). 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 is as follows:

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 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. The injury must be foreseeably identifiable with the normal use of the automobile.

A causal connection did exist between the Defendant David Gray's pickup truck and the deceased child's death by hyperthermia. The pickup truck was obviously an "active accessory" to S.G.'s death because the vehicle itself was the producing cause of the onset of hyperthermia. It is well known that vehicles trap heat inside of them. The death of S.G. by hyperthermia was the culmination of excessive heat inside the vehicle, in which the vehicle played an essential and integral part to the cause. Also, David Gray's pickup truck was not merely the location where S.G.'s injury occurred, but was actually the instrument that caused the conditions that ultimately resulted in S.G.'s death. S.G.'s death was, also, definitely a result from injuries that are foreseeably identifiable with the normal use of a car. 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. Additionally, no act of independent significance broke the causal connection between David Gray's pickup truck and S.G.'s death by hyperthermia. In *Wausau*, 309 S.C. 269, 422 S.E.2d 106 (1992) the South Carolina Supreme Court stated that no independent act occurred to break the causal link because the unknown driver's use of his vehicle and the shooting were "inextricably linked" as one continuing assault. If a purposeful act like that in *Wausau* did not break the causal link, then David Gray's negligence in forgetting to take S.G. out of the vehicle cannot break the causal link. The combination of a small confined glass and metal space and a warm sunny day creates a unique environment in which heat is

trapped and hazardous temperatures develop within a startling brief period of time. There are no other commonplace localities where this can take place unconnected to the use of an automobile. Furthermore, David Gray's vehicle was being used for transportation at the time of S.G.'s injuries that caused her death by hyperthermia. Distinguishing from *Nationwide Property & Cas. Co. v. Lain*, 402 F.Supp.2d 644 (4th Cir. 2005), S.G. was an infant child and not capable of exiting the vehicle on her own, so the act of the pickup truck being used for her transportation could not have practically ended until a capable person removed her from the truck. In *Lain*, the victim was physically capable from exiting the vehicle. In this case, the transportation of the deceased minor was never completed as the Defendant David Gray failed to deliver her to the daycare once the transportation began.

AS TO DUAL RESIDENCY:

The Court finds, for automobile insurance purposes, that S.G. was both a resident relative of her mother, Amanda Goyeneche, and her father, David Gray. The totality of the circumstances must be analyzed when residency is being established for car insurance

applicability purposes. In this case, Amanda Goyeneche and David Gray were not married.

There was no formal order of custody issued by any Family Court. S.G.'s parents exercised a shared custody situation in which both parents had equal access to the child. Near the end of S.G.'s unfortunately short life, her parents exercised a four day/three day schedule. Whereby, in one week one parent would keep S.G. for four consecutive days and nights and the other parent would keep her for three consecutive days and nights. Then the parents would switch the next week, in regards to who got four days. S.G. had clothes, toys, food, toiletries, etc. at both parents' homes. S.G. had a crib at both parents' homes inside of each of their rooms, respectively. Given the short period of S.G.'s life, her parents change in residences during this

time, the parents shared custody, and no formal custody order from any Family Court, this Court finds that S.G. was a resident relative of both her mother and father for automobile insurance purposes. Additionally, since Amanda Goyeneche lived with her mother Beverly Goyeneche, then S.G. was also a resident relative of her grandmother (Beverly).

IT IS SO ORDERED.

At Chambers

This ____ day of April, 2015

Honorable Paul M. Burch
Presiding Circuit Court Judge
Fourth Judicial Circuit

DuBose-Robinson, PC

ATTORNEYS AT LAW
935 Broad Street
Camden, South Carolina 29020
Telephone: 803-432-1992
Fax: 803-432-0784

J. Kennedy DuBose, Jr.
Jonathan M. Robinson
John K. DuBose, III
H. Thomas Morgan, Jr.
L. Shawn Sullivan

REPLY TO: Mailing Address
PO Drawer 39
Camden, SC 29021

Columbia Office
2725 Devine St.
Columbia, SC 29205
Telephone: 803-254-5445

July 6, 2015

The Honorable Paul Michael Burch
Fourth Circuit Court Judge
P.O. Box 276
Pageland, South Carolina 29728
E-mail and US First Class
pburchl@sccourts.org
pburchlc@sccourts.org

**RE: *State Farm Mutual Automobile Insurance Company 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.
Civil Action No.: 2014-CP-16-0792**

Dear Judge Burch,

I am writing to express Plaintiff's opposition to Defense counsel's Rule 59 Motion to Alter or Amend filed with the court on June 15, 2015. Defendant asserts the court did not fully explain why the cases and arguments cited by Defendants "...are different from the facts set forth in the present case." Defendant further argues that additional testimony should be taken as to the use of the vehicle during Defendant Gray's lunch hour in what Defendant argues was an ongoing trip to the daycare facility that had never ceased.

As the court is aware, all parties stipulated to the facts of loss and agreed to submit the case on briefs. In Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 520-21, 769 S.E.2d 453, 460-61 (Ct. App. 2015) the court explained the significance of a Stipulation in judicial proceedings.

A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys." *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 392-93, 496 S.E.2d 624, 626 (1998). "Stipulations, of course, are binding upon those who make them." *Id.* (citing 73 Am.Jur.2d *Stipulations* § 8, at 543 (1974)); see *Belue v. Fetner*, 251 S.C. 600, 606, 164 S.E.2d 753, 755 (1968) ("When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine **461 the facts upon which the case is to be decided."); see also *Indep.*

Grain Dealers (Ag. Ass'n v. Beard, 284 S.C. 309, (), 326 S.E.2d 169, 171 (Ct.App.1985) ("When the parties entered into an agreed stipulation of fact as basis for the decision by the master, both were bound by the stipulations and the master could not go beyond the stipulations to determine the facts upon which the case was to be decided.").

A stipulation will not be enforced if it is contradictory and confusing and stands in the way of a true determination *521 of the parties ['] rights or where it is subject to different constructions and there is a disagreement as to what was intended to be included therein." *Suddeth v. Knight*, 280 S.C. 540, 544-45, 314 S.E.2d 11, 14 (Ct.App.1984). However, a stipulation will not be abrogated without "the written consent of both parties, or one of the parties has been relieved from its operation by an order of the Court based upon such a showing as satisfies the Court that the interests of justice require that he should be so relieved." *Brown v. Pechman*, 55 S.C. 555, 567, 33 S.E. 732, 737 (1899).

Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 520-21, 769 S.E.2d 453, 460-61 (Ct. App. 2015)

The Stipulated Facts are not contradictory or confusing in this case and therefore cannot be simply discarded. Furthermore, the grounds upon which Defendant seeks relief from judgment were already raised at hearing and in briefs and have been ruled upon. It appears now that Defendant, unsatisfied with the result, wants another bite at the apple- wants to present evidence in support of already made arguments. "A trial court may relieve a party from a final judgment, order, or proceeding based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). Rule 60(b)(2), SCRPC. The motion must be made within a reasonable time and not more than one year after the judgment was entered. Rule 60(b), SCRPC. To obtain relief based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching." *Spreuw v. Barker*, 385 S.C. 45, 62-63, 682 S.E.2d 843, 851-52 (Ct. App. 2009) citing *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2004).

While Rule 59 permits procedures for altering or amending judgments based on receipt of newly discovered evidence, Defendant seeks to open the record not to add newly discovered evidence but rather to add previously referenced testimony in support of it's previously made arguments to the court at trial and in briefs. The parties have already stipulated that Defendant Gray "was to deliver his 13-month old daughter S.G.

to daycare the morning of the loss but failed to do so." (Stipulation of Facts #15). Defendant now asserts, as it did previously, that because the child never made it to daycare, the vehicle was still being used for transportation. This argument is not in accord with South Carolina law. The court, having considered this argument, properly rejected it as South Carolina has not adopted an "intended purpose fulfilled" standard. Additionally, Defendant's argument that testimony regarding the 15 minute intervals which may account for the time that Defendant Gray allegedly went to and from lunch somehow changes the outcome of this case. Assuming arguendo Defendant did drive to lunch between 1:00-1:15 and return between 2:15-2:30, the use of the vehicle, during those trips, could not arguably have been a contributing factor or active accessory to the minor's death, thereby failing the first element of

the Aytes test which still results in a denial of coverage.

Based on the foregoing, Plaintiff respectfully requests that Defendant's Rule 59 Motion to Alter or Amend be denied. Should the court require additional information, oral argument, or a proposed order, please let us know. In the event the court is inclined to consider the reopening of the case, we would respectfully request an opportunity to be heard so that we may fully respond to Defendant's requests.

Very truly yours,

DeBOSE-ROBINSON, PC

Jonathan M. Robinson

JMR/sec
Enclosure

cc: Paul V Cannarella, Esquire (via e-mail paul@pvclaw.com)
Karl H. Smith, Esquire (via e-mail karllaw@aol.com and
chris.usher@hartsvillesclaw.com)

SMITH



WATTS

& ASSOCIATES

July 8, 2015

VIA FACSIMILE, EMAIL, & US MAIL
(843) 672-5960 / pburchj@sccourts.org

The Honorable Paul M. Burch
Fourth Circuit Court Judge
Post Office Box 276
Pageland, South Carolina 29728-0276

Re: State Farm Mutual Automobile Insurance Company versus Beverly Goyeneche,
David R. Gray, III and Amanda Goyeneche, individually and as Parent and
Natural Guardian of S.G.
Civil Action Number: 2014-CP-16-0792

Dear Judge Burch:

I am in receipt of Mr. Robinson's letter dated July 6, 2015. I am surprised at his resistance to this Motion and request the Court consider the following factors:

(1) South Carolina Rules of Civil Procedure Section 59(a)(2) provides:

A new trial may be granted to all or any party and on all or part of the issues: (2) ~~in an action tried without a jury, for any of the reasons for which rehearing have~~ heretofore been granted in the Courts of the State. On a Motion for a new trial in an action tried without a jury, the Court may open the Judgment, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new Judgment.

Based on this Rule, the Defendant has motioned for the Court to reconsider this matter. The significance of this case and others so situate, require all review and consideration be exhausted before this matter is concluded. The Defendant's request no more than the Rules allow.

(2) The Plaintiff wishes to limit the facts as he says were stipulated at the hearing and cites cases to impose such. However, we note to the Court that the Defendant requested and the Plaintiff agreed that the automobile insurance policy and deposition testimony of the parties be made a part of the record. The Plaintiff now argues against such review of "all the facts" as were stipulated in the parties' Agreement. The Defendant fails to understand the Plaintiff's protest to such when all documents were submitted for the Court's consideration.

Karl H. Smith

W.S. 'Trey' Watts III

T. Brooke Hunt

508 South Fourth Street - Hartsville, South Carolina 29550

Ph: (843) 332 - 4700 or (888) 332 - 4703

Fax: (843) 332 - 0048

www.hartsvillesclaw.com

(3) The issue of whether or not coverage applies in this case should depend on the Contract of coverage that the Plaintiff maintained on the vehicles in question. That Contract/Policy was provided to the Court. In reviewing that Contract/Policy, we note the following:

- (a) Pages Four (4) through Six (6) of the Policy sets forth the definitions within the Policy. The Defendants notes that the term "accident" was not defined in this Contract. Definitions that were provided are:
 - i. "Car" means a land motor vehicle with four or more wheels designated for use primarily on public roads. (Page 4)
 - ii. "Occupying" means in, on, entering, or exiting. (Page 5)
 - iii. "Pedestrian" means a person who is not occupying. (Page 5)

The Policy further goes on to define "Insuring Agreement" on Page Seven (7) as:

- (a) We will pay:
 - i. Damages insured becomes legally liable to pay because of:
 - a. Bodily injury to other; and
 - b. Damage to property caused by an accident that involves a vehicle for which that insured is provided Liability Coverage by this Policy.

The term "insured" is defined in the Policy and the minor Defendant does fall under such definition. Again, the term accident is not defined in the Policy. The Policy/Contract goes on to define what is not covered under the provisions set forth on Page Eight (8) and Nine (9) of the Policy, but nothing listed applies to this factual situation.

The Defendant points out to the Court that the minor child was occupying the vehicle. This is not disputed. With no definitions of "accident" defined in the Policy/Contract, the Plaintiff seeks exclusion by other means separate from the provisions of the Contract/Policy.

In viewing the Order issued by the Court, the Defendant points out on Page Four (4) of the Order itself and the providing of "Additional Definitions" and what insured means as to Underinsurance Coverage:

- (1) You
- (2) Resident relative
- (3) Any other person while occupying "or" using"
 - a. Your car.

Based on this language alone and the failure of the Policy to define the terms of "accident", the minor Defendant was occupying the vehicle as a resident relative. Therefore, UIM coverage should apply.

The Defendant further alleges that the Policy provides under Personal Injury Protection Coverage, set forth on Page Eleven (11), the definition of "insured, which again states "while occupying". We find these terms and language important when determining coverage.

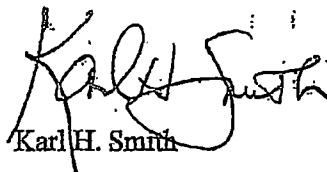
The minor Defendant was occupying the insured vehicle while being transported to daycare. The insured driver failed to deliver her to daycare. This was a negligent act on the insured's part. As defined by the Webster Dictionary, a negligent act is "an accident". At lunch time, he returned to his vehicle and operated such again while the minor infant was occupying the vehicle, only to return from lunch without delivering the deceased child to daycare. The failure to complete the transportation of the child to daycare was a negligent act again. The child was not deceased until after her discovery in the vehicle after Five O'clock in the afternoon (5:00 p.m.) that day.

Based on the Policy language, the Defendant respectfully requests this Court again hear this matter to consider the Contract/Policy itself and whether coverage must exist as Contract law provides.

By copy of this correspondence, I am notifying opposing counsels of my client's request and stance. Should you have any questions or concerns with regards to this matter or the above, do not hesitate to contact my office.

With kindest regards, I am,

Sincerely yours,


Karl H. Smith

KHS/jsn

CC: Jonathan M. Robinson, Esquire (803-432-0784 - Facsimile & Email)
Paul V. Cannarella, Esquire (843-332-0108 - Facsimile & Email)

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 COUNSEL

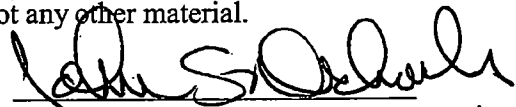
The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

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SC Court of Appeals

February 6, 2017



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