THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

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S.C. SUPREME COURT

Case No. 2014-CP-16-0792
Appellate Case No. 2020-000745

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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2. Did the Court of Appeals properly apply South Carolina law and find Minor's death did not arise out of the ownership, maintenance, or use of Father's vehicle?

3. Did the Court of Appeals properly find evidence existed to reasonably support the circuit court's ruling that Minor was a resident relative of only Mother's household?

COUNTER-STATEMENT OF THE CASE

Respondent commenced this action by filing a Petition and Complaint on September 24, 2014, seeking a Declaratory Judgment as to whether coverage would apply under four State Farm insurance policies. (App. 140–45). Defendant David R. Gray III ("Father") filed an Answer on October 22, 2014. Petitioners Amanda Goyeneche ("Mother") and Beverly Goyeneche ("Grandmother") (collectively, "Petitioners") filed an answer on October 30, 2014. (App. 146–49). The parties entered into a Stipulation of Facts on April 2, 2015; however, the parties disputed Minor's residence. (App. 254–59). By agreement of all parties, the depositions of Grandmother, Mother, and Father were taken on April 2, 2015, as to the residency of S.G. ("Minor"). (App. 283–352). At trial, the parties submitted the deposition transcripts, insurance policy, Stipulation of Facts, briefs, and oral arguments to the circuit court.

According to the Stipulation of Facts, Father was supposed to deliver Minor, who was thirteen months old, to daycare on May 8, 2014. (App. 258). However, Father left Minor unattended in the back seat of his vehicle while it was parked at Carolina Printing Sports and Trophy. (App. 258). Minor remained in the vehicle while its ignition was off from approximately 9:30 a.m. to approximately 1:00 p.m. and from approximately 2:30 p.m. until 5:15 p.m. on May 8, 2014. (App. 258). Minor was found unresponsive in the vehicle while it was turned off and

unoccupied by any other person. (App. 258–59). Minor was pronounced dead at approximately 5:30 p.m. on May 8, 2014, due to complications from hyperthermia. (App. 258).

Mother presented a claim arising from the death of Minor for bodily injury under the liability coverage and underinsured coverage of the following insurance policies issued by Respondent State Farm Mutual Automobile Insurance Company ("Respondent"): (1) Policy Number 4891-309-40, to Father 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 Mother, 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 Grandmother, which provided Liability and Underinsured coverage of $50,000 each person; $100,000 each accident; and $25,000 property damage; and (4) Policy Number 1772085A to Grandmother, which provided Liability and Underinsured coverage of $50,000 each person; $100,000 each accident; and $25,000 property damage. (App. 254–58). 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 vehicle, and otherwise subject to the terms of the policy. (App. 257).

The circuit court issued an Order on June 8, 2015, finding Minor's death did not arise out of the ownership, maintenance, or use of the vehicle, any claims arising out of Minor's death were excluded from coverage, and Respondent did not have a duty to defend or indemnify any party relating to the death of Minor. (App. 135). The circuit court further found the preponderance of the evidence established Minor was a resident relative of only Mother's household. (App. 135). Petitioners filed a Motion to Alter or Amend on June 15, 2015, which the circuit court denied on March 23, 2016. (App. 136–39, 189–90).

Petitioners filed a Notice of Appeal from the circuit court's orders on April 21, 2016. After briefing and oral argument, the Court of Appeals issued an opinion on December 18, 2019, affirming the circuit court's decision. (App. 1). The Court of Appeals extensively discussed *State Farm Fire & Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998), and the case law surrounding the development and application of the *Aytes* test to determine whether an injury arises out of the ownership, maintenance, or use of the motor vehicle. (App. 4–8). Contrary to the circuit court's order, the Court of Appeals found there was a causal connection because the vehicle was an active accessory to the death, played an integral part in the death, and the death was foreseeably identifiable with the normal use of the vehicle. (App. 8–10). However, the Court of Appeals agreed with the circuit court's interpretation on the remaining *Aytes* factors. Specifically, the Court of Appeals held Father's act of abandoning Minor in the vehicle was an act of independent significance that broke any causal connection and the vehicle, which was left unattended in a parking lot with the ignition off, was not being used for transportation at the time of Minor's death. (App. 10). The Court of Appeals further found the circuit court properly refused to apply contrary case law from other jurisdictions cited by Petitioners. (App. 11–12). Finally, the Court of Appeals held evidence existed to reasonably support the circuit court's finding that Minor was a resident of only Mother's household, relying on the testimony of Father, Mother, and Grandmother. (App. 12–15). Accordingly, the Court of Appeals affirmed the circuit court's decision. (App. 15).

Petitioners filed a Petition for Rehearing on December 23, 2019. (App. 18–20). The Court of Appeals denied the Petition on February 20, 2020, finding Petitioners did not point to any material fact or legal principle the court overlooked. (App. 16). Subsequently, on March 16, 2020, Petitioner filed a Petition for Writ of Certiorari with this Court.

ARGUMENT

I. This Court should deny certiorari because these issues are moot and any opinion by this Court would amount to an advisory opinion

A. Statute of Limitations

Any decision by the Court on whether Respondent has a duty to defend or indemnify under the policies of insurance is moot because no person ever initiated an underlying liability action against the at-fault party regarding the death of Minor. No action can now be initiated because the three-year statute of limitations has passed.[1] *See* S.C. Code Ann. § 15-3-530 (providing for a three-year statute of limitations). Accordingly, even if the Court reverses the Court of Appeal's opinion, the contractual duty to defend or indemnify can never arise, making any decision on whether there is coverage or a contractual duty to defend or indemnify moot. *See, e.g., McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 32, 627 S.E.2d 749, 750 (Ct. App. 2006) (finding the issue of whether to reform an insurance policy to include underinsured motorist coverage was moot where the underlying tort action was decided adversely to the plaintiff such that the plaintiff was not entitled to recover damages from the at-fault driver).

"This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). "Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). Thus, "[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible

[1] This Court may take judicial notice of the fact that the statute of limitations has now passed and Petitioners have not filed an action against Father, the alleged at-fault party, because these facts concern matters that are indisputable. *See Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) ("[W]e hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.").

for [the] reviewing Court to grant effectual relief." *Byrd*, 321 S.C. at 431, 468 S.E.2d at 864 (quoting *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

By its very nature, an insurer's duty to defend or indemnify cannot arise until an injured party files a tort action against the at-fault driver.[2] "The allegations of the third[-]party complaint determine the insurer's duty to defend; and if the facts alleged in the complaint fail to bring a claim within the policy's coverage, the insurer has no duty to defend." *Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 168, 383 S.E.2d 2, 4 (Ct. App. 1989). The insurer's duty to defend continues "as long as there [is] a possibility of liability coverage for [a] tort claim." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 547, 677 S.E.2d 574, 580 (2009). Thus, if an underlying action is never filed, there can be no possibility of liability coverage for a tort claim and an insurer's duty to defend never arises. Similarly, an insurer's duty to indemnify does not arise until there is a judgment rendered against its insured. *See id.* at 544, 677 S.E.2d at 578 (explaining the difference between the duty to defend and the insurer's "obligation to pay a judgment rendered against an insured"); *Nationwide Mut. Ins. Co. v. Tate*, 313 S.C. 444, 447, 438 S.E.2d 266, 268 (Ct. App. 1993) ("[T]he insurer is obligated to pay sums the insured becomes obligated to pay."). If an injured party fails to file an action prior to the expiration of the statute of limitations, this forecloses

[2] In fact, some jurisdictions prohibit an insurer from filing a declaratory judgment action until a tort action has been filed against the insured or the insured has been held liable in an underlying action in recognition of the fact that the duty to defend or indemnify can never arise until suit has been filed. *See, e.g., Mid-Continent Cas. Co. v. Delacruz Drywall Plastering & Stucco, Inc.*, 341 F. Supp. 3d 1289, 1292 (M.D. Fla. 2018) ("For an insurer's duty to indemnify, many district courts in the Eleventh Circuit have held 'that an insurer's duty to indemnify is not ripe for adjudication unless and until the insured or putative insured has been held liable in the underlying action.'" (quoting *Interstate Fire & Cas. Co. v. McMurry Constr. Co., Inc.*, 6:16-CV-841-ORL-41TBR, 2017 WL 821746, at *3 (M.D. Fla. Mar. 2, 2017))); *Molex Inc. v. Wyler*, 334 F. Supp. 2d 1083, 1086 (N.D. Ill. 2004) ("A duty-to-defend claim is ripe during the pendency of that action."); *Allstate Indem. Co. v. Thatcher*,164 P.3d 445, 446 (UT App. 2007) ("Because there is no complaint to analyze, we cannot determine whether Allstate has a duty to defend.").

the insurer's obligation to defend or indemnify its insured.

Although South Carolina courts have not specifically addressed whether the failure of an injured party to file an action against the at-fault driver prior to the expiration of the statute of limitations automatically forecloses a primary liability insurer's obligation to defend or indemnify its insured, South Carolina courts have addressed this question in the context of underinsured motorist ("UIM") and uninsured motorist ("UM") coverage.[3] In *Cobb v. Benjamin*, the Court of Appeals explained "[w]here the statute of limitations on the tort claim expires with no action having been commenced, a UIM claim is foreclosed." 325 S.C. 573, 583, 482 S.E.2d 589, 594 (Ct. App. 1997).

Similarly, in *Williams v. Selective Insurance Company of Southeast*, this Court explained "[a]n insured must . . . preserve the right of action against an at-fault driver so long as the underinsured carrier has not agreed to the amount and payment of underinsured motorist benefits." 315 S.C. 532, 534–35, 446 S.E.2d 402, 404 (1994). In *Williams*, the plaintiff settled with the at-fault driver's insurance company for the liability limits and agreed not to personally execute any judgment obtained against the at-fault driver. *Id.* at 533, 446 S.E.2d at 403. The plaintiff made a claim with her insurance company to recover UIM benefits, and the insurer denied her claim. *Id.* The plaintiff then filed an action against the UIM carrier for breach of contract and bad faith. *Id.* The Court found the plaintiff could not maintain her action against the UIM carrier for breach of contract or bad faith because she failed to file an action against the at-fault driver, which "resulted in a total waiver of Insurer's right to defend." *Id.* at 534, 446 S.E.2d at 404. The Court further noted "an action against the at-fault driver can never be brought since the statute of limitations has run on that cause of action." *Id.* Therefore, the Court affirmed the circuit court's order granting

[3] This Declaratory Judgment action addresses the Liability policies and the Underinsured policies of the Respondents.

summary judgment in favor of the UIM carrier.

As this Court explained in the context of UM claims,

> Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one Ex delicto and the only issues to be determined therein are the liability and the amount of damage. After judgment is entered against the uninsured motorist, a direct action Ex contractu can be brought to recover from the insurance company on its endorsement and in such action policy defenses may be properly raised by the insurance company.

Lawson v. Porter, 256 S.C. 65, 68–69, 180 S.E.2d 643, 644 (1971). The South Carolina District Court, applying South Carolina law, has also held a claim against a UM policy fails as a matter of law if the insured does not "establish[] liability by filing a tort action against the at-fault, uninsured drivers." *Senn Freight Lines Inc. v. Am. Inter-Fid. Corp.*, No. 8:17-CV-02186-JDA, 2020 WL 553854, at *5 (D.S.C. Feb. 4, 2020).

The same analysis applies in the instant case and in all cases involving any kind of insurance coverage. An injured party must first establish legal liability on the party of the at-fault driver and the amount of damages through a tort action against the at-fault driver. At the time the injured party files a suit against the at-fault driver, a liability insurer's duty to defend arises and continues until there is no longer a possibility of liability coverage for the tort claim. Once an injured party establishes liability and damages, the insurer's duty to indemnify arises, and the insurer must pay the judgment up to its policy limits if the coverage applies. If the insurer refuses to defend or indemnify, the insured can bring an action against the insurer for breach of contract or bad faith. The failure of an injured party to establish liability and damages through an action against the at-fault driver within the statute of limitations period forecloses any contractual obligations on behalf of the insurer, whether the insurer provides liability coverage, UIM coverage, or UM coverage.

In the instant declaratory judgment case, the parties stipulated to the fact that Father left Minor unattended in his vehicle for approximately seven hours and Minor died from complications related to hyperthermia. (App. 254). While arguably this stipulation suggests liability on the part of Father, there has been no adjudication or stipulation by the parties as to the damages. Accordingly, Petitioners needed to file an action against Father, or any other alleged at-fault party, within the statute of limitations in order to preserve any right to recover any damages under the insurance policy. Although Respondent filed the instant declaratory judgment, Petitioners were not prohibited from filing an action against Father, or any other at-fault party. If Petitioners did not want to litigate both the tort action and declaratory judgment action simultaneously, Petitioners could have filed the tort action against Father and moved to stay the action until the circuit court decided whether Respondent had a duty to defend or indemnify. However, Petitioners did not attempt to establish liability or damages from the at-fault party and are now precluded from doing so due to the expiration of the statute of limitations. Because an underlying tort action may now never be filed, Respondent's duties to defend and indemnify can never arise and any adjudication on whether Respondent has such duties in the instant case are now moot.

B. Issues Not Preserved Render Appeal Moot

In addition to appeal rendered moot by the statute of limitations, any determination related to whether the insurance policies at issue provide coverage in this case is moot because Petitioners did not specifically appeal the circuit court's ruling that Respondent did not have a duty to defend or indemnify related to the policies.[4] The Circuit Court Order ruled (1) the preponderance of the evidence established Minor was a resident of Mother's household only, (2) there was no coverage

[4] Respondent notes Father did not appeal the circuit court's order, and therefore, the fact that Respondent has no duty to defend or indemnify him is the law of the case. The remaining Respondents appealed only two of the three findings by the circuit court.

under the policies for Minor's death because it did not arise out of the ownership, maintenance, or use of the vehicle, and (3) Respondent had no duty to defend or indemnify any party relating to the death of Minor. (App. 135). Petitioner's appeal specifically raised the first two findings as issues in the appeal and did not discuss the circuit court's finding that Respondent did not have a duty to defend or indemnify. (App. 30). Thus, the circuit court's finding that Respondent had no duty to defend or indemnify any party relating to the death of Minor is the law of the case and makes any decision on whether there is coverage under the policies moot. *See Austin v. Specialty Transp. Servc.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case."). Accordingly, this Court should deny the petition for writ of certiorari because these issues are moot and any consideration by the Court would amount in an advisory opinion.

II. The Court of Appeals properly applied South Carolina law in holding Minor's death did not arise out of 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. This 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, 33, 503 S.E.2d 744, 745 (1998). Applying the analysis provided by this Court in *Aytes*, the Court of Appeals properly concluded the death of Minor did not arise out of the ownership,

maintenance, or use of Father's vehicle, therefore affirming the circuit court's ruling that the policies at issue do not provide coverage and Respondent does not have a duty to defend or indemnify.[5]

A. The Court of Appeals erred in finding there was a causal connection between the ownership, maintenance, or use of Father's vehicle and Minor's death.

Despite reaching the correct conclusion that there was no coverage under the policies, the Court of Appeals erred in finding there was a causal connection between the ownership, maintenance, or use of Father's truck and Minor's death. In its opinion, the Court of Appeals held there was a causal connection because the combination of the heat and Minor being left unattended in Father's vehicle caused her to die from hyperthermia. (App. 8–10). The Court relied on the fact that the "physical makeup of automobiles and trucks causes them to trap heat" to conclude that Father's vehicle played an integral role in Minor's death. (App. 9). Finally, the Court of Appeals held Minor's death was foreseeably identifiable with the normal use of the vehicle because vehicles are often used to transport children. (App. 9). The Court of Appeals further relied on section 15-3-700 of the South Carolina Code[6] to find "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 [of] a vehicle.". (App. 9–10). The Court of Appeals erred in finding there was a causal connection in this case.

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[5] As discussed herein, Respondent argues the Court of Appeals erred in applying the first factor of the *Aytes* test and asks the Court to reverse the Court of Appeals' ruling that a causal connection existed in this case. However, Respondent notes the Court of Appeals correctly found the *Aytes* test, as a whole, established Minor's death did not arise out of the ownership, maintenance, or use of Father's vehicle.

[6] Section 15-3-700 provides: "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."

In the context of the first element of the *Aytes* test, "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); *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 *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.

The Court of Appeals found 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. However, the parties presented no evidence to show the vehicle was an active accessory to the death. At trial, Petitioners

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." (App. 216). Petitioners offered no evidence at trial to support their argument that the vehicle was as active assessor to Minor's death. At the hearing on Petitioners' Motion for Reconsideration, Petitioners reaffirmed to the circuit court that the case should be decided on the stipulated facts submitted to the court and that Petitioners were not asking the court to take new evidence. (App. 253). The stipulated facts of this case establish that Minor was left in Father's vehicle for approximately six hours and fifteen minutes while the vehicle was turned off and unoccupied by any other persons. (App. 258). Minor was found unresponsive in the vehicle and was pronounced dead at approximately 5:50 p.m. from complications related to hyperthermia. (App. 259).

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.

(App. 131–32). 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.

Furthermore, although it is foreseeably identifiable that a vehicle may be used to transport children, it is not foreseeably identifiable that a driver would desert the child in the vehicle for approximately six to seven hours. If the Court grants certiorari, the Court of Appeals' finding on this element should be reversed and 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 Court of Appeals properly held that even if the Court were to determine that a causal connection existed between the vehicle and the minor's death, it was broken by an act of independent significance.

The Court of Appeals properly found that even if the Court were to determine that a causal connection exists between the vehicle and Minor's death, any causal connection 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 v. N. Area Taxi, Inc.*, 337 S.C. 419, 427, 523 S.E.2d 472, 476 (Ct. App. 1999) ("[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."). (App. 10).

Petitioners argue the cases cited by the Court of Appeals are distinguishable from the

instant case because the cited cases concern intentional or criminal acts. However, as noted in *Peagler*,

> 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, 368 S.C. at 160, 628 S.E.2d at 479. Thus, the *Aytes* test requires the Court to look to see if there is *any* act of independent significance that breaks the causal chain, not just if there is an *intentional* act.

In this case, Father exited the vehicle, thereby abandoning Minor, 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 explained:

> 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.

(App. 133). The Court of Appeals properly upheld the circuit court's order and found Father's negligent act of abandoning Minor was an act of independent significance which broke any causal chain.

C. The Court of Appeals 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 transportation use requirement was first established in C*anal 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., 315 S.C. at 4, 431 S.E.2d at 579.

South Carolina courts have found parked vehicles were not being used for transportation when applying the *Aytes* test. *See Doe v. South Carolina State Budget and Control Bd.*, 337 S.C. 294, 523 S.E.2d 457 (1999) (finding a police cruiser was not being used for transportation when a police officer forced individuals to have sex with him in his parked vehicle in order to avoid arrest); *See also Nationwide Property & Cas. Co. v. Lain*, 402 F.Supp.2d 644 (D.S.C. 2005) (applying the *Aytes* test and declining 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).

Petitioners argue Father's vehicle was being used for transportation at the time of Minor's death because Father had not yet completed his objective of transporting Minor to daycare. However, in support of this argument, Petitioners request the Court apply law from other jurisdictions that has not been adopted in South Carolina and does not properly apply the *Aytes* test. Petitioners rely on *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. 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.'" *Id*. at 859 (quoting *Tucker v. Allstate Tex. Lloyds Ins. Co.*, 180 S.W.3d 880, 886 (Tex. App. 2006)). The Fifth Circuit's analysis 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 (quoting *Mid-Century Ins. Co. of Texas, a Div. of Farmers Ins. Grp. of Companies v. Lindsey,* 997 S.W.2d 153, 156 (Tex. 1999)). The inclusion of the broader definition of "use"

and of an "intent" factor is so fundamentally different from the *Aytes* analysis that 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 Court of Appeals properly declined to apply the law from other jurisdictions cited by Petitioners because the analysis used in those other jurisdictions is fundamentally different than the law in South Carolina. As the Court of Appeals properly noted, the vehicle was unattended in the parking lot of Father's work with the ignition off. The unattended vehicle was not occupied by anyone other than the minor decedent for seven hours and fifteen minutes. The vehicle was not being used for transportation during the time period for which the minor suffered injuries and death. The Father's act of leaving Minor in the vehicle for approximately seven hours when it was no longer being used for transportation purposes caused Minor's death. Therefore, the Court of Appeals properly found the vehicle was not being used for transportation at the time of injury and that the minor's claim is excluded from coverage.

III. The Court of Appeals properly found evidence existed to reasonably support the circuit court's finding Minor was a resident relative of only Mother's household

The Court of Appeals properly affirmed the circuit court's ruling that, even if coverage existed, Minor was a resident relative of only Mother's household. In the Opinion, the Court of Appeals carefully discussed and considered all evidence submitted on the issue of Minor's residency and found evidence existed to reasonably support the circuit court's finding. *See Crossmann Cmtys. Of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 46–47, 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." (quoting *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009))).

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*[7] 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, 231, 478 S.E.2d 831, 832 (1996).

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 "there [wa]s 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.

[7] *A.G. by Waite v. Travelers Ins. Co.*, 331 N.W.2d 643 (Wis. App. 1983).

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); *Horne*, 356 S.C. at 68, 586 S.E.2d at 874, *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, Father 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." (App. 155, 299–300). Father testified Minor's first overnight with him did not occur until January 2014. (App. 296). He indicated that he and Mother tried to establish a schedule of joint custody but that it never worked out. (App. 297– 98). In her deposition, Mother claimed Minor spent equal time at her residence and that of Father beginning in about December 2013. (App. 324– 36). However, Mother admitted she listed her address 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. (App. 327–29). Mother admitted Father maintained a portable pack-n-play crib at his home for the minor but had nothing of a permanent nature. (App. 331–32). Mother, however, maintained a permanent wooden crib at her home. (App. 331–32). Mother testified she sent an overnight bag when Minor stayed overnight with Father. (App. 330). Also, Father acknowledged that he has not claimed Minor as a dependent on his taxes, but Mother did claim Minor. (App. 298– 99).

Petitioners argue the Court of Appeals erred in considering the fact that Father had a pack-n-play crib while Mother had a wooden crib because it improperly placed emphasis on a family's economic status. However, this fact is relevant to question of whether Minor resided with Father and was just one of many facts the circuit court and Court of Appeals considered. When determining whether evidence reasonably supports a circuit court's finding, an appellate court has "no power to weigh conflicting evidence." *Hibernian Soc. v. Thomas*, 282 S.C. 465, 469, 319 S.E.2d 339, 342 (Ct. App. 1984). "Only if there is no conflicting evidence to be weighed would the order of the circuit court be erroneous as a matter of law." *Id.* Thus, "[q]uestions regarding credibility and the weight of the evidence are exclusively for the [circuit] court," and an appellate court must "look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47–48, 686 S.E.2d 200, 202 (Ct. App. 2009) (quoting *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)). Petitioners seek to have this Court improperly re-weigh the evidence and place more emphasis on Mother's testimony. While it is true Father tried to play an active role in Minor's life, he admitted Minor lived with Mother, the parties did not follow a set schedule for overnight visitations, and he did not claim Minor as a dependent. This, coupled with Mother's testimony that she packed an overnight bag for Minor to stay with Father, Father had a mobile pack-n-play for Minor to sleep in, and Mother listed her address as Minor's residence on all paperwork regarding Minor, reasonably supports the circuit court's finding that Minor resided with Mother.

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 and weighed the evidence admitted at trial, the circuit court found that the evidence established that the minor lived with her mother at 1112 Salem Road, Hartsville, South Carolina and visited with her father, and the Court of Appeals, reexamining the evidence submitted on this issue, agreed that evidence existed to reasonably support this finding. Father's admissions and manner in which Minor was documented as a resident of Mother's household lead to the conclusion that Minor resided with Mother and was therefore a resident relative of only Mother's household. As the Court of Appeals properly found, evidence exists to support the circuit court's decision regarding residency of the minor.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should deny Petitioner's writ of certiorari.

Respectfully submitted,

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