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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

David C. Norton, United States District Judge

Appellate Case No. 2018-001068

Allstate Vehicle and Property Insurance Company.....Plaintiff

v.

Rose Wadford Hunter, Jane Doe, by and through her mother and natural Guardian ad Litem, Mary Roe, and Mary Roe, individually, ...Defendants.

OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Defendants Jane Doe, by and through her mother and natural Guardian ad Litem, Mary Roe ("Doe") and Mary Roe, individually ("Roe", or collectively sometimes referred to as "Plaintiffs"), filed a lawsuit captioned *Jane Doe, by and through her mother and natural Guardian ad Litem, Mary Roe, and Mary Roe, individually v. Joseph Stephen Hunter, Sr. and Rose Wadford Hunter*, C.A. No. 2016-CP-07-1541, which is currently pending in the Court of Common Pleas for Beaufort County, South Carolina ("Underlying Lawsuit") seeking damages resulting from the sexual assault of Doe, a minor. The allegations made and damages sought in the Underlying Lawsuit all find their genesis from the alleged sexual assault of Doe by Joseph Stephen Hunter ("Joseph Hunter"), the husband of Defendant Rose Wadford Hunter ("Rose Hunter," collectively "the Hunters").[1]

Allstate issued several homeowners' policies to the Hunters. At the time the alleged incidents of sexual assault occurred, both the Hunters resided at the residence. Allstate is currently defending Defendant Rose Hunter in connection with the Underlying Lawsuit pursuant to a full reservation of rights.

Allstate has filed a declaratory judgment action seeking a declaration from the United States District Court for the District of South Carolina that it has no duty to defend or indemnify Defendant Rose Hunter in connection with the Underlying Lawsuit. One of the bases upon which Allstate contends that coverage is not afforded under the policies is because the policies' joint obligations provision, which is found in the policies' insuring agreement, operates to bar coverage for Rose Hunter because coverage

[1] The currently pending Second Amended Complaint also contains claims of defamation against Rose Hunter. That cause of action is not germane to the certified question submitted to this Court.

is barred for her husband and resident spouse, Joseph Hunter. The policies' joint obligations provision clearly and unambiguously provides that the responsibilities, acts, and omissions of a Named Insured and resident spouse will be binding upon the other Named Insured and resident spouse. In addition, and as an alternative ground for determining the policies do not afford coverage, the policies' contain an intentional and criminal acts exclusion that also clearly and unambiguously provides that coverage is barred for bodily injury or property damage that is intended by or that may reasonably be expected to result from the intentional or criminal acts or omissions of ***any*** insured person. Courts in South Carolina are required to apply the clear, unambiguous language of policies to determine whether coverage is afforded for claimed damages. There is no South Carolina public policy prohibiting a court in South Carolina from following this established South Carolina precedent in this case. Therefore, the policies, according to their clear terms, do not provide coverage to Rose Hunter.

CERTIFIED QUESTION

In *Manufacturers & Merchants Ins. Co. v. Harvey*, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998), the South Carolina Court of Appeals held that sexual abuse negligence claims constitute "occurrences" and are not barred by the intentional acts exclusion in an insurance policy. How does this holding interact with the intentional or criminal act exclusion and joint obligations provision found in Allstate's insurance policy? Specifically, does Allstate's intentional or criminal act exclusion and the joint obligations provision operate to bar coverage for claims such as negligent supervision and breach of fiduciary duty levied against the non-abusing third party that is the other "named insured" in a policy?

STATEMENT OF THE CASE

A. Insurance Policies

Allstate issued House & Home Policy number 990 100 794 to the Hunters for the June 16, 2015 to June 15, 2016 and June 15, 2016 to June 15, 2017 policy periods and this policy was cancelled effective July 14, 2016. This policy has a Family Liability Protection Limit of $500,000 each occurrence. Allstate also issued House & Home Policy number 990 438 526 to the Hunters for the July 26, 2016 to July 26, 2017 and July 26, 2017 and July 26, 2018 policy periods. This policy has a Family Liability Protection Limit of $300,000 each occurrence. The policies state in pertinent part:

> **Coverage X**
> **Family Liability Protection**
>
> **Losses We Cover Under Coverage X:**
> Subject to the terms, conditions and limitations of this policy, **we** will pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury** or **property damage** arising from an **occurrence** to which this policy applies, and is covered by this part of the policy.
>
> **We** may investigate or settle any claim or suit for covered damages against an **insured person**. If an **insured person** is sued for these damages, **we** will provide a defense with counsel of **our** choice, even if the allegations are groundless, false or fraudulent. **We** are not obligated to pay any claim or judgment after **we** have exhausted **our** limit of liability.

The policies define the pertinent terms as follows:

> **Definitions Used In This Policy**
> Throughout this policy, when the following words appear in bold type, they are defined as follows:
>
> 1. **Bodily injury** – means physical harm to the body, including sickness or disease, and resulting death, except that **bodily injury** does not include:
>   a) any venereal disease;
>   b) Herpes;
>   c) Acquired Immune Deficiency Syndrome (AIDS);

d) AIDS Related Complex (ARC);
e) Human Immunodeficiency Virus (HIV);

or any resulting symptom, effect, condition, disease or illness related to a) through e) listed above.

In addition, **bodily injury** does not include any symptom, effect, condition, disease or illness resulting in any manner from:

a) lead in any form;
b) asbestos in any form;
c) radon in any form; or
d) oil, fuel, oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the **residence premises**.

****

5. **Insured person(s)** – means **you** and, if a resident of **your** household:

a) any relative; and
b) any person under the age of 21 in **your** care.

Under **Family Liability Protection-Coverage X** and **Guest Medical Protection- Coverage Y**, **"insured person"** also means:

a) any person or organization legally responsible for loss caused by animals or watercraft covered by this policy which are owned by an **insured person**. **We** do not cover any person or organization using or having custody of animals or watercraft in any **business** or without permission of the owner.
b) with respect to the use of any vehicle covered by this policy, any person while engaged in the employment of an **insured person**.

****

7. **Occurrence** – means an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury** or **property damage**.

8. **Property damage** – means physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction.

****

17. **You** or **your** – means the person listed under Named Insured(s) on the Policy Declarations as the insured and that person's resident spouse.

****

The policies also include a section entitled "General" provisions, which states in relevant part:

Insuring Agreement

****

Subject to the terms of this policy, the Policy Declarations shows the location of the **residence premises**, applicable coverages, limits of liability and premiums. The policy applies only to losses or **occurrences** that take place during the policy period. The Policy Period is shown on the Policy Declarations. This policy is not complete without the Policy Declarations.

The policy imposes joint obligations on the Named Insured(s) listed on the Policy Declarations and on that person's resident spouse. These persons are defined as **you** or **your**. This means that the responsibilities, acts and omissions of a person defined as **you** or **your** will be binding upon any other person defined as **you** or **your.**

This policy imposes joint obligations on persons defined as an **insured person**. This means that the responsibilities, acts and failures to act of a person defined as an **insured person** will be binding upon another person defined as an **insured person.**

Under the policies, both Joseph Hunter and Defendant Rose Hunter are "insured persons."

The policies also include the following exclusion:

Losses We Do Not Cover Under Coverage X:

1. **We** do not coverage any **bodily injury** or **property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**. This exclusion applies even if:
   a) such **insured person** lacks the mental capacity to govern his or her conduct;

b) such **bodily injury** or **property damage** is of a different kind or degree than intended or reasonably expected; or

c) such **bodily injury** or **property damage** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether such **insured person** is actually charged with, or convicted of, a crime.

The policies contain identical provisions under Coverage Y, Guest Medical Protection.

B. Overview of Factual Background and Allegations of the Second Amended Complaint

Doe and Roe filed the Underlying Lawsuit seeking recovery of damages for various causes of action underlying the sexual molestation of Doe by Joseph Hunter and Rose Hunter's acts regarding the alleged sexual molestation. The Underlying Lawsuit was filed following Joseph Hunter's arrest on multiple counts of Sex/Criminal sexual conduct with a minor, both first and third degree, and Sex/Sexual exploitation of a minor, third degree.[2] Per the allegations of the Second Amended Complaint, Jane Doe was "a minor victim of sexual abuse" and Roe is Doe's mother. Second Amended Complaint ¶¶ 2, 3. Plaintiffs contend Joseph Hunter "was a neighbor of the Plaintiffs" and "was believed by Plaintiffs to be a friend of the Plaintiffs." Second Amended Complaint ¶ 3.

Plaintiffs also contend Rose Hunter was "Hunter's wife, a neighbor of the Plaintiffs" and "was believed by the Plaintiffs to be a friend of the Plaintiffs." Second Amended Complaint ¶ 4. Plaintiffs allege Rose Hunter "knew or should have known" the following:

- That Hunter was engaging in inappropriate intimate/sexual conduct with underage girls during the relevant time periods;
- Of Hunter's sexual attraction and/or inappropriate conduct with minors;

[2] Joseph Hunter was arrested on January 5, 2016

- That the time Hunter was spending with Doe was resulting and/or was likely to result in harm to Plaintiffs

Second Amended Complaint ¶ 5. Plaintiffs further allege Rose Hunter "had the ability, authority, and duty to monitor, supervise, or otherwise control Defendant Hunter prior to the time Plaintiff Doe was harmed, yet did nothing to monitor, supervise, warn, or otherwise protect the Plaintiffs from such harm." *Id.*

Plaintiffs contend that "[u]nbeknownst to either Doe or Roe, Defendant Rose knew her husband was a sexual deviant and had molested other prepubescent girls before" and "[i]n fact, Defendant Rose had known about Defendant Hunter's sexual misconduct since 1994 or 1995 at the latest, at least 8 years prior to Doe meeting the Defendants." Second Amended Complaint ¶ 15. Plaintiffs allege "[b]etween the years of 1992-1995, Jane Doe #2 was molested by Hunter." Second Amended Complaint ¶ 16.

Plaintiffs contend that "[a]pparently emboldened by the ability to get away with this type of conduct without repercussion, Rose Hunter continued to encourage other neighborhood girls, Plaintiff Doe included, to come to [the Hunters'] house, have sleepovers, play in their yard, and otherwise spend time with the [Hunters]." Second Amended Complaint ¶ 27. Plaintiffs allege "[p]redictably, [Joseph] Hunter sexually molested these unsuspecting children, including the Plaintiff." Second Amended Complaint ¶ 28.

Plaintiffs contend the abuse of Doe "began in approximately 2006" when Doe was 7 years old. *Id.* On the first occasion of abuse, Plaintiffs contend Doe and Joseph Hunter were in a hammock on the Hunters' property and Rose Hunter "walked into eyesight and ear shot of Doe and Hunter and Hunter threw Doe off of the hammock" and Rose Hunter "did nothing to stop these acts of molestation as they were occurring or

prevent future molestation." *Id.* Plaintiffs further contend the molestation occurred for the next nine years, with the molestation occurring "repeatedly on nearly a daily basis for approximately three (3) years and multiple (3-4) times per week for approximately the next three (3) years." Second Amended Compliant ¶ 29. Thereafter, Plaintiffs allege, "[f]or approximately the next two years, as Plaintiff Doe got older, Hunter molested her on a weekly or bi-weekly basis" and "[f]or the final year of abuse, the molestation occurred on approximately a monthly or bi-monthly basis." *Id.* Plaintiffs also allege the following regarding Rose Hunter's conduct:

- Rose Hunter walked in on Doe and Joseph Hunter on a number of occasions with Doe straddling Joseph Hunter and Joseph Hunter with his pants down and Rose Hunter did nothing to stop these acts of molestation as they were occurring or prevent future molestation;
- Rose Hunter would be in an adjacent room while Joseph Hunter would make Doe masturbate him, and he would make noises that were loud enough for a person of average hearing ability to hear and that Rose Hunter was such a person and did nothing to stop these acts or prevent this conduct in the future;
- Rose Hunter would be in the kitchen while Doe and Joseph Hunter were in the living room, of which there was a clear and unobstructed view from the kitchen, and Joseph Hunter would molest Doe on the living room sofa while Rose Hunter made them food and that a person of average sight would be able to see the molestation and Rose Hunter was such a person; further Hunter made noises that were loud enough for a person of average hearing ability to hear and Rose Hunter was such a person;
- Rose Hunter was present when Joseph Hunter would use sexual innuendo directed to Doe or would extract Doe from Rose Hunter's presence to be alone with Doe and sexually assault her, which such conduct, combined with the previously described conduct, would cause suspicion to a reasonably prudent person;
- Rose Hunter was home when Hunter would stand at the screen door with his pants down while Doe and her friends were playing in the shared backyard;
- Rose Hunter was home entertaining other young girls in the Hunters' home while Hunter would molest Doe in the backyard;

Second Amended Complaint ¶ ¶ 30, 31, 32, 33, 34. Plaintiffs contend that despite Joseph Hunter's conduct in Rose Hunter's presence, she "*still*, after witnessing such events,

continued to give Doe gifts, take her out to eat, do projects together, and encourage Plaintiff Doe to come over to the Hunter household, to bring her friends with her, to play and have sleepovers at [the Hunters'] home while [her] husband, Defendant Hunter, was there." Second Amended Complaint ¶ 35

Plaintiffs allege Roe went to the Hunters' house and confronted the Hunters, and Rose Hunter, "un-concerned with the well-being of Plaintiff Roe or Doe, expressed that the timing of the Plaintiffs' discovery of Joseph Hunter's sexual abuse was not good for her." Second Amended Complaint ¶ 45. Plaintiffs further allege that when Doe confirmed the allegations against Joseph Hunter, Rose Hunter "thanked Plaintiff Doe for stating what she already knew to be true." Second Amended Complaint ¶ 46.

Doe and Roe's Second Amended Complaint includes a cause of action for negligence against Rose Hunter, among other things. The cause of action specifically incorporates the preceding paragraphs into the cause of action. *See* Second Amended Complaint ¶ 73. Further, the Second Amended Complaint also includes a cause of actions for breach of fiduciary duty and for aiding and abetting breach of fiduciary duty that includes a statement that the foregoing allegations of the Second Amended Complaint are restated in connection with those causes of action. *See* Second Amended Complaint ¶ ¶ 94, 99.

ARGUMENT

If the contract's language is clear and unambiguous, the language of the policy alone will determine its force and effect. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). This is true because "[c]ourts must enforce, not write contracts of insurance, and their language must be given its plain, ordinary and popular meaning."

Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). Further, South Carolina courts will not "torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties." *State Auto. Prop. & Cas. Co. v. Brannon*, 310 S.C. 388, 426 S.E.2d 810, 811 (Ct. App. 1992); *see also S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544, S.E.2d 848, 850 (Ct. App. 2001). In addition, South Carolina courts do not have the "power to interpolate into the agreement between the insurer and the insured a condition or stipulation not contemplated either by the law or by the contract between the parties." *Grayson v. Aetna Ins. Co.*, 308 F. Supp. 922, 926 (D.S.C. 1970); *Rhame v. Nat'l Grange Mut. Ins. Co.*, 238 S.C. 539, 544, 121 S.E.2d 94, 96 (1961) (citing *Chastain v. United Ins. Co.*, 230 S.C. 465, 96 S.E.2d 464 (1957)); *Johnson v. Wabash Life Ins. Co.*, 244 S.C. 95, 99-100, 135 S.E.2d 620, 623 (1964); *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 399-400, 562 S.E.2d 659, 662 (Ct. App. 2002).

Courts "are without authority to alter a contract by construction or to make new contracts for the parties" as their "duty is limited to the interpretation of the contract made by the parties themselves, regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." *C.A.N. Enters., Inc. v S. Carolina Health & Human Servs., Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984); *Evanston Ins. Co. v. Watts*, 52 F. Supp.3d 761, 769 (D.S.C. 2014). An insurance policy should not be interpreted in an unreasonable manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms and courts should not strain to find ambiguity in a policy where none exists. *State Farm Mut. Auto. Ins. Co. v. Boyd*, 377 F.

Supp.2d 511 (D.S.C. 2005); *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 636 (4th Cir. 2005).

Here, the clear and unambiguous language of the policies' joint obligations provision mandates that if coverage for a Named Insured and resident spouse is not afforded or is otherwise barred then coverage is likewise not afforded or is barred for the other Named Insured and resident spouse. Further, the policies intentional or criminal acts exclusion bars coverage for bodily injury and property damage "intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**." Accordingly, per the terms of the policies' joint obligations provision, because coverage is not available for Joseph Hunter's actions because they do not constitute an "occurrence" under the policies, coverage is likewise not available for Rose Hunter, who is also a named insured and resident spouse. In addition, because coverage is barred for Joseph Hunter's intentional and criminal acts with regard to the alleged sexual molestation of Doe, coverage is likewise barred for Rose Hunter per the policies' and intentional and criminal acts exclusion.

A. The South Carolina Court of Appeals' Decision in *Harvey* Does Not Support a Determination that Merely Including a Negligence Cause of Action in a Complaint Mandates Coverage.

The damages alleged in the Underlying Lawsuit arise out of the sexual molestation of Doe and do not arise out of an "occurrence" under the policies. The District Court agrees that Allstate's policy as written unambiguously excludes coverage for the alleged actions of Rose Hunter, but requests guidance from the Court as to whether the South Carolina Court of Appeals' decision in *Manufacturers and Merchants Mutual Insurance Company v. Harvey*, 330 S.C. 152, 498 S.E.2d 222 (Ct. App. 1998) trumps the court's construction of Allstate's clear and unambiguous policy provisions.

Therefore, a detailed analysis of the Court of Appeal's decision in *Harvey* is necessary to show that *Harvey* does not pronounce that "sexual abuse negligence claims" can never been excluded under the terms of a homeowners' policy.

In *Harvey*, the South Carolina Court of Appeals addressed the issue regarding "whether the sexual abuse of a minor by an insured constitutes an 'occurrence' under an insurance contract." *Harvey*, 330 S.C. at 155, 498 S.E.2d at 224. The court agreed with the trial court's determination that sexual abuse of a minor did not constitute an occurrence under the policy and that there is no such creature as "negligent sexual abuse."

The insureds under the policy were the grandfather and grandmother of the minor grandchildren. In a previous criminal case, the grandfather pled guilty to committing lewd acts upon the minor grandchildren, and the grandmother pled guilty to unlawful abuse or neglect of the minor grandchildren. The insurer brought a declaratory judgment action to determine whether coverage was available under the policy for the lawsuits stemming from the insureds' abuse of the minor grandchildren. The court explained that the policy defined "occurrence" to include "an *accident*, including continuous or repeated exposure to substantially the same general harmful conditions which results, during the policy period, in (a) bodily injury..." *Id.* at 158, 498 S.E.2d at 225 (italics in original). Explaining that "accident" was not defined in the policy, the court looked to South Carolina precedent and explained that accident means "'an effect which the actor did not intend to produce and cannot be charged with the design of producing.'" *Id.* at 159, 498 S.E.2d at 225 (quoting *Goethe v. New York Life Ins. Co.*, 183 S.C. 199, 190 S.E.

451 (1937)). The court reasoned that "[m]ore plainly stated, an intended injury cannot be accidental." *Id.*, 498 S.E.2d at 225.

The court held that "the sexual abuse of a child is so inherently injurious to the victim that the perpetrator's intent to harm the child will be inferred as a matter of law." *Id.*, 498 S.E.2d at 226. Further, the court explained that "[t]he intent to act, coupled with the intent to produce the consequences is not an 'accident' as defined by the Supreme Court of South Carolina." *Id.* at 161, 498 S.E.2d at 227 (citing *Goethe*, 183 S.C. 199, 190 S.E. 451). The court reasoned that because the insureds' "intentional acts of sexual abuse carry with them the inferred intent to harm their grandchildren, the acts alleged against the [insureds] are not occurrences and, therefore, are beyond the scope of the [insured]s' insurance coverage." *Id.*, 498 S.E.2d at 227.

The court explained that several lawsuits were filed against the grandparents. The grandchildren brought suit against the grandfather alleging he subjected them to various sexual acts and against the grandmother for engaging in wrongful sexual contact and photographing the children as well as for negligently supervising them during the abuse by the grandfather. *Id.* at *156-157, 498 S.E.2d at 224. The court explained that the grandchildren's parents also brought suit alleging intentional infliction of emotional distress, invasion of privacy, loss of consortium, and negligent supervision. *Id.* at 157, 498 S.E.2d at 224. The court determined that coverage was not afforded in connection with the grandchildren's complaints because it found that "these complaints allege [the grandmother] intentionally abused her grandchildren" and that "[e]ven the sections entitled 'Negligent Supervision' assert intentional acts of willful, deliberate misconduct" and "[w]hile alternative pleading is permitted in South Carolina, parties may not attempt

to invoke coverage by couching intentional acts in negligence terms." *Id.* at 162, 498 S.E.2d at 227 (citing *South Carolina Med. Malpractice Liab. Ins. v. Ferry*, 291 S.C. 460, 354 S.E.2d 378 (1987)).

Likewise, the court determined that coverage was not afforded in connection with the parents of three of the children because the complaint's cause of action for negligence incorporated the following:

> At all times herein, the Defendants caused the Plaintiffs to vest in them their trust and the care of the Plaintiffs' minor children well knowing that they intended to, and did, engage in a pattern of sexual contact and other wrongs with each of the children, as well as exposure to each child to ritualistic, aberrant and deviant sexual practices, all for their own personal sexual gratification.

Id. at 163, 498 S.E.2d at 228. The court reasoned "[t]hese underlying facts do not support a cause of action for negligent conduct" and that these parents could not "assert that [the grandparents] committed intentional acts, incorporate these intentional acts into each cause of action, and then seek recovery based on a negligence theory." *Id.*, 498 S.E.2d at 228. The court further reasoned that "[t]hese allegations do not constitute mere alternative pleading" and "[r]ather, the allegations are factually incompatible in that they characterize intentional conduct as negligent conduct." *Id.*, 498 S.E.2d at 228. In addition, the court explained "[t]his characterization provides no basis for coverage where, as here, it is clearly negated by the underlying factual assertions upon which it is premised." *Id.*, 498 S.E.2d at 228 (citing *Ferry*, 291 S.C. 460, 354 S.E.2d 378).

Finally, based on the allegations of the complaint of the parent of two of the grandchildren, the court determined that coverage was not precluded by the specific intentional acts exclusion included in the policy. In making this determination, the court

distinguished this complaint from the complaints filed in the other lawsuits and explained:

> Each of the other complaints allege that the conduct of the [grandparents] was intentional and these allegations were incorporated into each cause of action. [This parent]'s complaint does not incorporate her allegations of intentional conduct into each cause of action. Therefore, whether referring to one [grandparent] negligently entrusting the other [grandparent], or to third parties, the conduct described in subparagraphs a., b., d., and e. allege actions which, if established, would constitute an "occurrence" under the [grandparent]s' policies.

Id. at 164, 498 S.E.2d at 229. The court also determined that the specific exclusion for intentional acts included in the grandparents' policies did not preclude coverage because "[t]he South Carolina Supreme Court has held that, for an act to be an intentional act excluded by the intentional act exclusion of a policy, 1) the act which produces the loss must be intentional, and 2) the results of the act must be intended." *Id.* at 165, 498 S.E.2d at 229 (citing *Miller v. Fidelity-Phoenix Ins. Co.*, 268 S.C. 72, 231 S.E.2d 701 (1997)). The court reasoned that because the complaint did not allege that the grandparents intended to harm the grandchildren through their negligent supervision, the exclusion would not operate to bar coverage. *Id.*, 498 S.E.2d at 229.

It is clear that the *Harvey* court did not issue a mandate providing that if a complaint seeking damages arising out of sexual molestation/abuse included a cause of action for negligent entrustment or similar claim coverage would be afforded. Rather, it is clear that the court's decision in *Harvey* was not decided in a vacuum and was tailored to the facts of that case in determining whether coverage would be afforded in the different lawsuits based on the allegations of the different complaints. South Carolina law requires that courts consider the allegations of the complaint in conjunction with the terms of the policy. *See S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 638

S.E.2d 103 (Ct. App. 2006). Therefore, contrary to Doe and Roe's belief, *Harvey* does not stand for the wholesale proposition that a negligence claim against a non-abusing third person is always an "occurrence" in the context of a sexual abuse coverage case. (Order, pp. 9-10)

The insurance policy at issue in *Harvey* contained an intentional act exclusion different than that found in the policies issued to Rose Hunter and did not contain a joint obligations provision. In determining whether coverage is afforded to Rose Hunter, the court should analyze operative complaint in this case and the specific insurance policies issued to her by Allstate. Based on the facts of the operative complaint in *this* case, it is clear that no coverage is triggered under Allstate's policies.

B. The Policies' "Joint Obligations" Provision Is Clear and Unambiguous.

The language of the "joint obligations" provision is clear and unambiguous, and the District Court has agreed with Allstate in this regard. (Order, p. 7) ("Because the language of the Policy is clear and unambiguous, the court holds that the joint obligations provision operates to bar coverage—where the actions of one insured person excludes him from coverage, those acts are binding upon the other insured parties and preclude coverage for any claims against the other insured as well.") While, as the District Court pointed out, South Carolina state courts have not considered this specific policy provision, other jurisdictions have considered joint obligations provisions in other policies and have examined the impact of the actions of one insured on the coverage available under the policy for other insureds. *See Bass v. Isochem*, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (Ct. App. 2005), cert. granted ("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.").

As the District Court noted in its Order, another South Carolina federal district has considered this provision and determined it operated to bar coverage for the other insureds under the policy where coverage was barred or otherwise not available to a co-insured under established South Carolina law.

In *Allstate Indemnity Company v. Tilmon*, Civil Action No. 1:13-00690-JMC, 2014 U.S. Dist. LEXIS 37160 (D.S.C. Mar. 21, 2014) (Childs, J.), Allstate brought a declaratory judgment action seeking a declaration whether it had a duty to defend and/or indemnify the grandfather and mother of the grandson as a result his alleged sexual molestation of a minor. Initially, the underlying plaintiff bought suit against the grandson, grandfather, and mother, and the complaint included causes of actions against the grandfather and mother for intentionally inflicting severe emotional distress; for negligence, gross negligence, for carelessness, recklessness, willfulness, or wantonness; for breach of fiduciary duty to provide a safe environment; for conspiracy to conceal their knowledge about the sexual abuse; and for negligently failing to recognize that the grandson would act out the sexual abuse he suffered as a child on the minor. *Tilmon*, 2014 U.S. Dist. LEXIS 37160, at *5. The complaint included causes of action against the grandson for civil assault and battery, for false imprisonment, and for negligent failure to recognize that he would act out his own sexual abuse on the minor. *Id.* at *5-6. The underlying plaintiff amended the complaint to remove the claims against the grandson and only asserted causes of action against the grandfather and mother for negligence, gross negligence, recklessness, or carelessness and for breach of fiduciary duty. *Id.* at *7.

The court adopted Allstate's arguments regarding the application of the policy's joint obligations provision. The court explained that the provision provided: "[t]he terms of this policy impose joint obligations on the persons defined as an insured person...[and] [t]his means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person." *Id.* at *19-20. In considering the operation of this provision, the court reviewed the decisions identified by both Allstate and the underlying plaintiff. After reviewing these decisions, the court adopted the reasoning employed in the following decisions:

- *Allstate Ins. Co. Berge*, 522 F. Supp.2d 1180, 1187 (D.N.D. 2007) ("Thus, the claims of negligence asserted against the Streepers are barred by the intentional or criminal acts exclusion in the Allstate condominium owners policy, particularly when read in conjunction with the joint obligations provision in the policy."

- *Allstate Ins. Co. v. Ervin*, C/A No. 05-02800, 2006 U.S. Dist. LEXIS 56802, 2006 WL 2372237, at *5 (E.D. Pa. Aug. 14, 2006) ("Thus, the joint obligations clause attributes the simple assault committed by Doug Ervin and Daniel Ervin to William and Wilma Ervin, and Allstate does not have a duty to defend the Ervins pursuant to the criminal acts exclusion;

- *Allstate Ins. Co. v. Pond Bar*, 1995 U.S. Dist. LEXIS 12447, (D. Minn. May 19, 1995);

- *Castro v. Allstate Ins. Co.*, 855 F. Supp. 1152, 1154-1155 (S.D. Cal. 1994) ("Because Carmelita Cook's alleged liability in the underlying Castro lawsuit arose out of the criminal and/or intentional acts of Ariel Cook – an 'Insured Person' under the Policy – the court determines the Policy did not provide coverage as a matter of law;

- *Allstate Ins. Co. v. Lobracco*, 1992 Ohio App. LEXIS 6120 (Ohio Ct. App. Nov. 24, 1992);

- *Allstate Ins. Co. v. McCranie*, 716 F. Supp. 1440, 1447-1449 (S.D. Fla. 1989).

The court specifically explained:

> In analyzing the Tilmon Policy's joint obligations provision, the court adopts the reasoning in the above decisions in finding that

> the language in the joint obligations provisions is plain and unambiguous – where one insured's acts excluded coverage, those acts are binding upon the other insured and preclude coverage for any claims against the other insured as well. As applied in this case, the joint obligations provision attributes the sexual battery committed on K.K. by Anthony Tilmon to Roosevelt Tilmon and Mona Tilmon. As a result, the intentional and criminal acts of Anthony Tilmon are binding upon all other persons defined as "insured persons," which clearly and unequivocally include Roosevelt Tilmon and Mona Tilmon.

Tilmon, 2014 U.S. Dist. LEXIS 37160, at *22. The court ultimately determined that Allstate did not have a duty to defend or indemnify the grandfather and mother. *Id.* at *22, 23.

The *Tilmon* court cited to the decision in *Allstate Insurance Company v. Berge*, 522 F. Supp.2d 1180 (D.N.D. 2007) in support of its ultimate determination that the joint obligations provision precluded coverage for the other insureds under the policy. In *Berge*, the court considered an identical provision and determined that coverage was not available under the policy. Allstate brought a declaratory judgment action to determine whether it owed a duty to defend and/or indemnify the insureds against a negligence action brought by the parents of a guest of the insureds who was killed by the insureds' son, who lived with the insureds. The policy included the following provision:

> The terms of this policy impose *joint obligations on persons defined as an insured person.* This means that the responsibilities, acts and failures to act of a person defined as an insured person will be binding upon another person defined as an insured person.

Berge, 522 F. Supp.2d at 1184 (emphasis added by court).

The court looked to decisions issued by other jurisdictions construing the joint obligations provision. For example, the court looked to the decision issued in *Allstate Insurance Company v. Blount*, 491 F.3d 903 (8th Cir. 2007) interpreting the same joint obligations provision. The court explained that in *Blount*, Allstate brought a declaratory

judgment action to determine whether claims brought against one of the insureds for negligence would be barred as a result of the criminal acts of another of the insureds. The court noted that in *Blount*, the "Eighth Circuit held that the negligence claims were specifically excluded by the criminal acts exclusion of the policy" and explained that the underlying criminal act provided the basis for the claims related to negligence. *Berge*, 522 F. Supp.2d at 1185. Further, the court explained:

> Other jurisdictions have followed the logic and rationale of the Eighth Circuit, have interpreted policy language identical to that in this case, and have held that the joint obligation provision of the Allstate insurance policy renders the criminal acts exclusion application to claims against all other insured persons. *See Allstate Ins. Co. v. Ervin*, No. Civ. A. 05-02800, 2006 WL 2372237, (E.D.Pa., August 14, 2006); *Allstate Ins. Co. v. Grimes*, Case No. M2003-01542-COAR3-CV, 2004 WL 2533826 (Tenn.Ct.App.2004).

Id. at 1187. *See also Allstate Ins. Co. v. Morgan*, 123 F. Supp. 3d 1266, 1269-1270 (D. Ore. 2015) ("The Court finds that the joint obligations clause and criminal acts exclusion operate to relieve Allstate from its duty to defend any of the insureds under the policy at issue here from any claim that arises out of Adam Morgan's criminal act."); *Allstate Indem. Co. v. Riverson*, No. 3:10-cv-05366 RBL, 2012 U.S. Dist. LEXIS 78687, *9 (W.D. Wash. June 6, 2012) ("Finally, because [the daughter] is an insured person under the policy and her acts are excluded from coverage, the joint obligations clause applies. This clause holds [the insured mother] responsible for the acts of her daughter and also excluded from coverage."); *Moyer v. Allstate Ins. Co.*, No. 3:09-CV-1290, 1020 U.S. Dist. LEXIS, *24 (M.D. Pa. Aug. 20, 2010) ("[T]he policy clearly and unambiguously imposed upon [the son] and his mother joint obligations. Therefore, we are constrained to conclude that [the insured mother] is not entitled to recover under the policy."); *and Allstate Ins. Co. v. Jordan*, 16 S.W.3d 777, 781-782 (Tenn. App. 1999) (explaining that

"[s]everal other courts in other jurisdictions have examined situations involving intentional acts by one insured and allegations of negligence by another insured and have concluded that the determination of whether the policy precludes coverage for the action brought against the insureds turns on whether the policy imposes a joint obligation between insureds and the insurer or whether the policy was several, creating a separate contract with each insured...[and t]he policy language in the instant case specifically excluded coverage for intentional criminal acts of any insured person.").

Here, the policies' joint obligations provisions operate to render any provision of the policies applicable to all claims against all insureds. The policies were issued to both Joseph Hunter and Rose Hunter, and therefore, they both are named insureds under the policies. As an insured, the acts of Joseph Hunter are binding upon Rose Hunter and those acts will determine whether Allstate had a duty to defend Rose Hunter in connection with the Underlying Lawsuit. Because Joseph Hunter's acts 1) do not constitute an "occurrence" under the policies and 2) because coverage is also excluded for Joseph Hunter under the policies' intentional or criminal acts exclusion, no coverage is available for the claims against Rose Hunter.

C. The Policies' Intentional or Criminal Acts Exclusion Operates to Bar Coverage Per Its Clear and Unambiguous Terms.

As noted above, the policies' intentional or criminal acts exclusion bars coverage for bodily injury or property damage that is intended by ***or that may reasonably be expected to result from*** the intentional or criminal acts or omissions of ***any*** insured person. Further, the policies' provide that this exclusion bars coverage even if 1) such insured person lacked the mental capacity to govern his or her conduct; 2) such bodily injury or property damage is of a different kind or degree than intended or reasonably

expected; or 3) such bodily injury or property damage is sustained by a different person than intended or expected. Finally, the policies state that this exclusion will bar coverage regardless of whether such insured person is actually charged with or convicted of a crime. As the *Harvey* court decided, sexual molestation of a minor is inherently an intentional act. *See Harvey*, 530 S.C. at 159, 498 S.E.2d at 226. And, there is no dispute among the parties that Joseph Hunter's alleged actions are intentional and criminal in nature and that Allstate has no duty to defend or indemnify him. Therefore, per the clear, unambiguous terms of the ***actual policies at issue***, coverage is also barred for Rose Hunter.

The Court of Appeals of South Carolina has addressed the operation of a very similar intentional or criminal acts exclusion in *S.C. Farm Bureau Mutual Insurance Company v. Dawsey*, 371 S.C. 353, 638 S.E.2d 103 (Ct. App. 2006). In *Dawsey*, the policy at issue excluded coverage for injury "'resulting from intentional acts or directions of you or any insured. The expected or unexpected results or (sic) these acts or directions are not covered.'" *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 355, 638 S.E.2d 103, 104 (Ct. App. 2006). The facts of the case are important. The insured's son sought to recover damages for injuries he sustained from gunshot wounds. The son drove to his father's home and the father fired his pistol at the tires of his son's truck. The bullets ricocheted off the driveway and hit the son in the jaw. *Dawsey*, 371 S.C. at 355, 638 S.E.2d at 104. The son argued that the policy provided coverage and the master in equity erred in not applying the Supreme Court of South Carolina's interpretation of the exclusion as set forth in *Miller v. Fidelity-Phoenix Insurance Company*, 268 S.C. 72, 231 S.E.2d 701 (1997) and *Vermont Mutual Insurance Company v. Singleton*, 316 S.C. 5, 446

S.E.2d 417 (1994). The *Dawsey* court affirmed the master's decision ***based on the language of the policy at issue***. *Id.* at 357, 638 S.E.2d at 105.

In rejecting the son's argument that the "second prong of the *Miller* test should still apply to provide coverage," the court reasoned "[t]o read the policy in the manner urged by the son would require us to rewrite the policy, rather than interpret it as written." *Id.* at 357, 638 S.E.2d at 105. The court ultimately "agree[d] with the master that the policy excludes coverage for the son's injuries, which were unexpected consequences of the father's intentional act of shooting at the son's tire." *Id.*, 638 S.E.2d at 105. *See also Allstate Indem. Co. v. Revan*, Civil Action No. 6-14-cv-00704, 2014 U.S. Dist. LEXIS 198604, *5-7 (D.S.C. Dec. 17, 2014) (citing *Amica Mutual Insurance Company v. Edwards*); *Amica Mut. Ins. Co. v. Edwards*, C/A No. 8:10-cv-1143-GRA, 2011 U.S. Dist. LEXIS 79188, *9 (D.S.C. July 20, 2011) ("Noting that the policies in *Miller* and *Singleton* did not specifically exclude coverage for the unintentional consequences of intentional acts, insurance companies added specific language excluding coverage for the unexpected results of intentional acts by insureds....Thus, under *Dawsey*, an insurance company can exclude coverage for the unintentional or unexpected results of an insured's intentional acts by using express language to that effect in the policy "). *See, e.g., State Farm Fire & Cas. Co. v. Blanton*, C/A No. 4:13-cv-2508-RBH, 2015 U.S. Dist. LEXIS 168563 (D.S.C. Dec. 17, 2015) ("Some insurance companies have revised their policies to exclude, not only injuries expected or intended by the insured, but also injuries resulting from intentional acts with expected or unexpected results.").

The holding in *Harvey* is limited to the allegations of the complaints and the terms of the policy issued by the insurer in that case. As recognized by the *Dawsey* court, the holding in *Harvey* is not controlling and the application of the test set forth in *Miller* is improper where the language of the policy at issue is different than that at issue in *Harvey*. Here, the language of the policies' exclusion and joint obligations provision mandates an application that bars coverage for Rose Hunter as it bars coverage for Joseph Hunter.

Further, although there are no South Carolina cases discussing the *specific* exclusion found in Allstate's policy, previous decisions by South Carolina appellate courts have found that the "any insured" language precludes first-party coverage for co-insureds when another insured intentionally causes damages. *See S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 547 S.E.2d 871 (Ct. Ap. 2001) *and State Farm Fire & Cas. Co. v. Mitchell*, Op No. 98-UP-100 (S.C. Ct. App. Feb. 19, 1998) (unpublished). These cases have specifically found that the term "any insured" constitutes specific policy language, as required by *McCracken v. Government Employees Ins. Co.*, 325 S.E.2d 62 (1985), denying coverage to a co-insured based upon the intentional acts of another insured. *See also, Allstate Ins. Co. v. Gilbert*, 852 F.2d 449 (9th Cir. 1988); *Allstate Ins. Co. v. Foster*, 693 F. Supp. 886 (D. Nev. 1988); and *Allstate Ins. Co. v. McCranie*, 716 F. Supp. 1440, 1449 (S.D. Fla. 1989) (Allstate's criminal or intentional act exclusion precludes coverage of negligent supervision claims related to injuries caused by the criminal or intentional acts of any insured person).

The reasoning in these cases should apply equally to the intentional and criminal act exclusion found in Allstate's policies. In addition, they are instructive in that there is

no public policy in South Carolina requiring coverage for an "innocent" co-insured where another insured intentionally causes damage.

South Carolina courts have also held in other situations that derivative negligence claims arising out of excluded causes of injury are not covered. *See McPherson v. Michigan Mut. Ins. Co.*, 426 S.E.2d 770 (S.C. 1993) *and Goldston v. State Farm Mut. Auto. Ins. Co.*, 594 S.E.2d 511 (S.C. App. 2004). Both cases involved automobile exclusions. In *Goldston*, for example, the claimants argued that the causes of action against the employer for the negligent hiring and supervision of an employee involved in an automobile accident were unrelated to the use of the auto. However, in rejecting this argument, the court noted that the negligence causes of action against the employer, a separate insured from the employee, were inextricably tied to the injuries caused by the use of the automobile. In short, without the use of the automobile, there would have been no injury. Similarly, without the intentional or criminal acts committed by Joseph Hunter there would have been no injury in this case. The *Goldston* court stated,

> Neither of these definitions limits the application of the auto exclusion only to *causes of action* that arise out of the use or entrustment of an auto. Rather, these definitions assure the parties that the auto exclusion applies to all bodily injury and property damage arising out of the use or entrustment of an auto.

Id. at 520-521. Similarly, Allstate's exclusion assures the parties that the criminal or intentional act exclusion applies to ***all*** bodily injury or property damage arising out of the criminal or intentional acts of ***any insured***. Without Joseph Hunter's intentional and criminal acts, there is no link by which Rose's alleged negligence can be independently connected to Doe's injuries. *See McPherson*, 426 S.E.2d at 772.

The cases discussed above indicate that South Carolina precedent mandates that the unambiguous language of the criminal or intentional act exclusion applies to preclude

coverage for allegations of negligence against co-insureds arising out of injuries caused by the intentional or criminal acts of another insured. Joseph Hunter is an insured under the policies, and, therefore, his criminal and intentional acts operate to preclude coverage for co-insured Rose Hunter and the claimed damages are not covered.

D. South Carolina Public Policy Does Not Operate to Alter the Application of the Terms of the Policies.

In submitting this question to this Court, the District Court noted its concern "[f]rom a public policy perspective" that the operation of the clear, unambiguous policy language would "effectively preclude victims of sexual abuse from recovering money damages against those non-abusers complicit in perpetrating abuse upon them." (Order, p. 12). The District Court also noted that "[a]llowing victims of abuse to proceed on civil damages claims against such third-parties will mean little if insurance companies do not provide coverage for the damages awards against those third parties." (*Id.*) While noting these concerns, the District Court was cognizant, however, that South Carolina courts will, in fact, follow established South Carolina law in interpreting contracts when considering whether a policy affords coverage. (*Id.*) (citing *Bell v. Progressive Direct Ins. Co.*, 757 S.E.2d 399, 406 (2014) ("South Carolina courts have a long history of formalistic interpretation with respect to all contracts" and that courts 'should not torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties.'"). South Carolina has no public policy requiring that homeowners' policies provide coverage for the alleged non-abuser in sexual molestation claims such that the Court should override the clear, unambiguous language of the policies issued to the Hunters.

"As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory inhibition." *Williams v. Gov't Employees Ins. Co.*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014) (citing *B.L.G. Enters., Inc. v First Fin. Ins. Co.*, 334 S.C. 529, 535-536, 514 S.E.2d 327, 330 (1999); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523, 377 S.E.2d 569, 570 (1989); *Cobb v. Benjamin*, 325 S.C. 573, 580-581, 482 S.E.2d 589, 593 (Ct. App. 1997)). This Court has stated, "for purposes of juridical application[,] it may be regarded as well settled that a State has no public policy, properly cognizable by the Courts, which is not derived or derivable by clear implication from the established law of the State, as found in its Constitution, statutes, and judicial decisions." *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, 227, 122 S.E. 586, 587 (1924). This Court has also stated that "[p]ublic policy considerations include not only what is expressed in state law, such as the constitution and statues, and decisions of the courts, but also a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." *Williams*, 409 S.C. at 599, 762 S.E.2d at 712 (citing *County Preferred Ins. Co. v. Whitehead*, 979 N.E.2d 35, 42 (Ill. 2012). This Court has also noted that it has "no power to legislate." *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 523 (citing *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 137 S.E.2d 608 (1964); *Creech v. S.C. Pub. Serv. Auth.*, 200 S.C. 127, 20 S.E.2d 645 (1942)). *See, e.g., Green v. U.S. Auto. Ass'n Auto & Prop. Ins. Co.*, 407 S.C. 520, 524, 756 S.E.2d 897 (2014) (rejecting the contention that the family-member exclusion contained in a policy issued in Florida offended South Carolina's public policy and explained that a change in the law regarding

such exclusion was in the prerogative of the Florida legislature); *Gladden v. Boykin*, 402 S.C. 140, 143, 739 S.E.2d 882, 883 (2012) ("[C]ourts must determine public policy by reference to legislative enactments wherever possible.") (citing *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration."); *Zerjal v. Daech & Bauer Constr., Inc.*, 939 N.E.2d 1067, 1072-1073 (Ill. App. Ct. 2010) ("Since the legislature had the opportunity to prohibit or limit exculpatory clauses in home inspection contracts but did not, we decline the opportunity as well.")).

There is no question that the South Carolina Legislature has the authority to regulate insurance policies entered into in the state and has certainly exercised that authority in a number of areas. Notably, with regard to liability insurance, the Legislature has promulgated legislation regarding automobile insurance. As this Court noted in *Williams* "[t]he purpose of the Motor Vehicle Financial Responsibility Act (MVFRA) contained in Title 56 of the South Carolina Code, is to give greater protection to those injured through the negligent operation of automobiles." *Williams*, 409 S.C. at 599, 762 S.E.2d at 712 (citing *Pa. Nat'l Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 551, 320 S.E.2d 458, 461 (Ct. App. 1984)). The Court noted that "[t]his legislation requires insurance for the benefit of the public, and an insurer may not nullify its purposes by engrafting exceptions from liability as to uses that the evident purpose of the legislation was to cover." *Id.* at 599, 762 S.E.2d at 712 (citing *id.; Lincoln Gen. Ins. Co. v. Progressive N. Ins. Co.*, 406 S.C. 534, 539-540, 753 S.E.2d 437, 440 (Ct. App. 2013)). The Court also noted that "the stated purpose of the chapter on automobile insurance in

Title 38 was to implement a complete reform of automobile insurance in order to, among other things, make sure every risk meeting certain criteria was entitled to automobile insurance and prevent the evasion of coverage provided for by that chapter." *Id.*, 762 S.E.3d at 712 (citing S.C. Code Ann. § 38-77-10) (2002)). Keeping these considerations in mind, the Court determined that the policy's exclusion as applied was contrary to South Carolina public policy.

Such is not the case here. Unlike automobile coverage, the South Carolina Legislature has not mandated that everyone be insured under a homeowners policy that affords liability coverage, and in fact, there is no doubt that a great many people are not insured under such a policy. The Legislature, which has the authority to enact legislation in this area and which certainly knows how to do so, has not mandated liability coverage in homeowners' policies and has not placed any restrictions on insurers with regard to what is allowed to be excluded thereunder. *See, e.g.,* S.C. Code Ann. § 38-61-70 (promulgating a definition of "occurrence" in the context of commercial general liability policies for construction professionals doing construction-related work). Given this fact, the Court should not elect to use an argument regarding public policy where none has been established in South Carolina to contravene the established tenants of contract interpretation and application.

In addition, this Court has routinely applied the language of exclusions in homeowners policies to determine that coverage is barred by the policies' clear and unambiguous terms. *See, e.g. B.L.G. Enters.*, 334 S.C. 529, 524 S.E.2d 327 (determining that the policy's liquor liability exclusion barred coverage for the injured party's severe physical and mental injuries); *Clinton Cotton Oil Co. v. Hartford Acc. Indem. Co.*, 180

S.C. 459, 186 S.E. 399 (1936) (determining that the policy's employer's liability exclusion operated to bar coverage under the policy for the injured party's injuries sustained when he was crushed against a brick warehouse and subsequently died). While the District Court notes that applying the unambiguous language of the policies will operate to bar coverage for Doe as an alleged victim of sexual abuse, this is no less of a consideration in other cases involving equally sympathetic individuals whose claims are not covered by the clear, unambiguous terms of insurance policies. There is no legitimate public policy consideration that prevents a court in South Carolina from applying the clear, unambiguous language of a policy to determine whether a claim is covered thereunder.

CONCLUSION

Respectfully, Allstate submits that this is not a novel issue of state law. Decisions regarding the application of policy language – whether the language in is contained in the policy's insuring agreement, like the joint obligations provision, or an exclusion, like the intentional or criminal acts exclusion – cannot be made in a vacuum. Allstate provided a long, detailed recitation of the facts of the Second Amended Complaint because those facts are necessary for this Court's consideration of the certified question. Like the *Harvey* court, South Carolina courts must consider the allegations of the complaint read in conjunction with the policy as required under South Carolina law. Therefore, *Harvey* does not dictate a different result and there is no incongruence between the Court of Appeals' reasoning in *Harvey* and a correct result of finding no coverage here. Furthermore, there is no legitimate public policy argument that would mandate

South Carolina courts rejecting long-standing precedent regarding policy interpretation and application. Therefore, the answer to the certified question should be as follows:

- How does this holding [in *Harvey*] interact with the intentional or criminal act exclusion and joint obligations provision found in Allstate's insurance policy? The holding in *Harvey* does not impact South Carolina's long-standing precedent regarding the interpretation of insurance policies and determining whether policies afford coverage – courts in South Carolina are required to read the allegations of the complaint in conjunction with the language of the policy to determine whether coverage is afforded and where the allegations are ostensibly couched in terms of negligence but really are based on intentional acts, there can be no coverage under the policy.
- Specifically, does Allstate's intentional or criminal act exclusion and the joint obligations provision operate to bar coverage for claims such as negligent supervision and breach of fiduciary duty levied against the non-abusing third party that is the other "named insured" in a policy? Yes.

{Signature on next page}

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

David C. Norton, United States District Judge

Appellate Case No. 2018-001068

Allstate Vehicle and Property Insurance Company. . . . . Plaintiff,

v.

Rose Wadford Hunter, Jane Doe, by and through
Her mother and natural Guardian ad Litem, Mary Roe,
And Mary Roe, individually, ...Defendants.

PROOF OF SERVICE

I certify that I served copies of Plaintiff's Opening Brief by United States Mail, postage prepaid, addressed to:

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