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THE STATE OF SOUTH CAROLINA
In The Supreme Court

SEP 04 2018

CERTIFIED QUESTION FROM THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

S.C. SUPREME COURT

Appellate Case No. 2018-001170

In re: Mt. Hawley Insurance Company Petitioner.

v.

Contravest, Inc., Contravest Construction Company, and
Plantation Point Horizontal Property Regime, Respondents,

**RESPONSE IN OPPOSITION TO MOTION TO RECONSIDER, ALTER, OR AMEND
THE CERTIFIED QUESTION OR IN THE ALTERNATIVE RESCIND
CERTIFICATION**

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ARGUMENT

Respondents' motion is both procedurally improper and incorrect on the merits. Hence, it should be denied.

I. Respondents' motion is procedurally improper.

The parties previously submitted a full round of briefing to the Fourth Circuit on Mt. Hawley's motion to certify the question presented. After considering the parties' respective arguments, the Fourth Circuit issued its Order certifying the question to this Court. The Fourth Circuit agreed with Mt. Hawley that the question presented is an issue of first impression of South Carolina law and that it would be dispositive of Mt. Hawley's appeal. The Fourth Circuit issued its Order on June 19, 2018. The Fourth Circuit issued an amended Order on June 28, 2018. Respondents, however, did not take any action in response to this Order. Pursuant to the Federal Rules of Civil Procedure, if Respondents desired a change to the certification Order, they should have filed a petition for rehearing within 14 days of June 28. Fed. R. App. P. 40. Respondents did nothing.

This Court issued its Order on August 8, 2018, stating that it will answer the question. Now Respondents seek to have this Court reformulate the question. But the question was formulated by the Fourth Circuit, and the Respondents did not seek to modify the question there. Respondents' failure to request that the Fourth Circuit amend or rescind its order alone warrants denial of their Motion.

Furthermore, and respectfully with regard to this Court's authority, the South Carolina Appellate Court Rules do not contemplate motions to reconsider a certified question. Rule 244 of the Appellate Court Rules provides only that the Supreme Court has discretion regarding whether to answer a certified question of law, and that in taking action it "shall notify the certifying court

and the parties of its *decision to answer or refuse to answer* the questions certified.” Rule 244(c), SCACR (emphasis added). The parties then proceed to the briefing phase. *See* Rule 244(e), SCACR. This rule does not provide any mechanism for the Court to alter or amend the Certified Question. Rather, the only other action permitted aside from addressing the certified question and ruling on the merits is rescission of certification. Rule 244(f), SCACR.

This is logical, because the appeal—Mt. Hawley’s Petition for a Writ of Mandamus—is pending before the Fourth Circuit, not this court. The Fourth Circuit is best equipped to determine if the certified question will resolve the appeal before it and how that question should be framed. Moreover, the Fourth Circuit is the Court that actually issued the Order. Therefore, any motion to reconsider, amend, or withdraw the certified question is properly made to that court.¹ This Court is being improperly requested to “reconsider” or “rehear” the formulation of the question which it did not formulate.

Finally, Respondents also contend that their motion is made pursuant to Rule 221, SCACR. However, Rule 221(c) states that the court “will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party’s appeal.” *Id.* Here, the Court’s order agreeing to answer the certified question was not a final decision and did not dismiss the appeal. Therefore, Rule 221 is inapplicable.

Respondents’ motion is thus procedurally improper² and should be denied.

¹ The undersigned was only able to find one case, state or federal, applying South Carolina law that addressed amendment of a certified question. *See Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, No. 2:04-CV-00531-DCN, 2007 WL 9710994, at *1 (D.S.C. Apr. 11, 2007). In *Colleton Preparatory*, the District Court denied a motion to amend its prior order certifying two questions to this Court. *Id.* at *3.

² In addition to the issues noted above, Respondents also improperly attached materials to their Motion which are not a part of the Record. Under Rule 244(b), the Supreme Court “will not

II. Respondents' motion fails on the merits.

Further, Respondents' motion mischaracterizes the question presented and the argument that Mt. Hawley made to the Fourth Circuit. Ultimately, Respondents motion mostly represents an attempt to argue the merits of the certified question prior to briefing the issue. Nevertheless, Mt. Hawley will briefly address Respondents' arguments, which are without merit.

Respondents' primary argument is that the question should be confined to whether South Carolina law recognizes the "at-issue" waiver in the insurance bad faith context. This narrow point, however, ignores that South Carolina law has never recognized the doctrine *at all*. See *Davis v. Parkview Apartments*, 409 S.C. 266, 293-94, 762 S.E.2d 535, 550 (2012) (Pleicones, J., concurring in part and dissenting in part) (urging against recognition of the doctrine). Therefore, the question presented necessarily requires a broader analysis. The certified question tasks the court with determining whether South Carolina law recognizes the "at issue" waiver of the attorney-client privilege and whether it can be waived via a denial of liability in a pleading. That is the precise issue in Mt. Hawley's petition for a writ of mandamus and, as the Fourth Circuit explained, will resolve that appeal. Respondents' argument that different rules should apply in the bad faith context are properly made in their brief, not here. The Court may take such arguments that into consideration in answering the certified question, since it is a fact that this case is a bad faith insurance action.

consider any documents or other evidentiary materials *unless the certifying court has submitted those materials.*" Rule 244(b), SCACR (emphasis added). The Rule explains that if a party believes that additional materials from the record before the certifying court are necessary, it "shall notify the Supreme Court and the certifying court so that the *certifying court* can determine if the additional materials will be submitted." *Id.* (emphasis added). Respondents did not follow this procedure. Instead, they attached documentation that is not a part of the record before this Court and assert that it should be considered. The Court should decline to do so unless and until Respondents follow the proper procedure, and only if the Court agrees that the additional materials are necessary.

Respondents also argue no certified question should issue because regardless of the answer, the district court considered “facts” in determining waiver to exist respecting the attorney-client privilege. This argument too should be rejected. In considering whether South Carolina follows the “at issue” waiver rule, this Court will necessarily consider the variants of the same—namely, whether the waiver could exist through a mere denial that the defendant’s conduct breached a contract in responsive pleadings, or whether such could exist through the converse (an assertion in the responsive pleadings that the conduct of the defendant complied with the contract). Further, a District Court pointing to the existence of a statement in a pleading is hardly the kind of “fact finding” which is deserving of any deference. As the Fourth Circuit has already made clear, the question here is a legal question, the answer to which controls whether the District Court has committed error.

Respondents’ motion should be denied. They are free to make all of their arguments concerning nuances encompassed by the certified question in their responsive briefing. As recognized by the Fourth Circuit’s Order, which Respondents failed to challenge via a petition for rehearing, the certified question relates to subject matter which is of tremendous importance to the practice of law in South Carolina and the correlating privileges related thereto. This Court should, as it has agreed to do, consider and answer the certified question. As it does so, of course, this Court will consider all of the arguments, sub-issues, points and concerns raised by all parties.

Respectfully submitted,

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August
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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioner, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **Response in Opposition to Motion to Reconsider, Alter, or Amend the Certified Question or in the Alternative Rescind Certification**

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