

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

ON CERTIFICATION FROM THE FOURTH CIRCUIT COURT OF APPEALS
Upon *Writ of Mandamus* being held in Abeyance to
The United States District Court
for
The District of South Carolina

The Honorable David C. Norton, District Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2018-001170
Fourth Circuit Court of Appeals Case No. 18-1401
District Court Case No. 9:15-cv-00304-DNC

In re: MT. HAWLEY INSURANCE COMPANY.....Petitioner,

in which

CONTRAVEST, INC., CONTRAVEST CONSTRUCTION COMPANY
AND PLANTATION POINT HORIZONTAL PROPERTY REGIME OWNERS
ASSOCIATION, INC., as assignees are.....Respondents.

**RESPONDENTS' REPLY TO PETITIONER'S RETURN TO
RESPONDENTS' MOTION TO RECONSIDER, ALTER, OR AMEND
THE CERTIFIED QUESTION
or in the Alternative
RESCIND CERTIFICATION**

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In its Return, Petitioner (hereinafter “Insurer”) incorrectly maintains the instant motion is procedurally barred and lacks merit. However, Insurer ignores the glaring discrepancy between the broad wording of the instant certified question and the actual conclusion by the Fourth Circuit Court of Appeals in its Order requesting certification that the controlling inquiry in the context of an insurance bad faith action is whether South Carolina law supports the “at issue” exception as applied in *City of Myrtle Beach*.¹ Respondents request this Court answer the question that the Fourth Circuit, and Insurer, plainly stated to be the determinative inquiry—nothing more. Otherwise, certification should be rescinded pursuant to Rule 244, SCACR.

ARGUMENT

The instant motion is not procedurally barred, and this Court should either amend the certified question or alternatively rescind its grant of certification.

In the context of a certified question this Court has a duty to limit certification to only those questions of law which may be determinative of the cause pending before the certifying court. Rule 244(a), SCACR. To this end, this Court is afforded broad discretion to assure the propriety of the certified question and avoid advisory opinions, including the ability to rescind its certification at any time. *See* Rule 244(f), SCACR (this Court may rescind certification at any time); *see also Sangamo Weston v. Nat’l Sur. Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992) (when answering certified questions, this court will not issue advisory opinions nor alter precedent based on questions presented in the abstract).

Here, there exists a clear inconsistency between the phrasing of the certified question as written and the actual issue the Fourth Circuit found to be controlling. The Fourth Circuit clearly

¹ The Fourth Circuit Court of Appeals wrote: “Mt. Hawley contends, and we agree, that if South Carolina law does not support the ‘at issue’ exception **applied in *City of Myrtle Beach***, the district court’s order granting the motions to compel was erroneous.” (Exhibit 4, p. 6) (Emphasis added); *see also City of Myrtle Beach v. United Nat. Ins. Co.*, 2010 U.S. Dist. LEXIS 89725; also cited as *City of Myrtle Beach v. United Nat’l Ins. Co.*, No. 4:08-cv-1183, 2010 WL 3420044.

stated: “if South Carolina law does not support the ‘at issue’ exception applied in *City of Myrtle Beach*, the district court’s order granting the motions to compel was erroneous” (Exhibit 4, p. 6). However, a different and incompatible question was actually certified: “Does South Carolina law support application of the “at issue” exception to the attorney-client privilege such that a party may waive the privilege by denying liability in its answer?” (Exhibit 4, p. 1). Quite simply, the question, as certified, does not turn on the applicability of *City of Myrtle Beach* and the analysis articulated therein for insurance bad faith claims, which is precisely what the Fourth Circuit found to be the controlling question.

Because Rule 244 requires a certified question to resolve the determinative issue pending before the certifying court, the discrepancy that exists here compels the rescission of certification unless the conflict can be reconciled. *See* Rule 244(a), SCACR. This is to say that the conflict between the controlling inquiry and the actual certified question, as written, demonstrates the answer to one does not resolve the other. This is improper. *Id.* Thus, the certified question—if it is to be considered—must be amended in a manner to resolve whether South Carolina law supports the at issue exception applied in *City of Myrtle Beach*. Such a rephrasing would neither be error nor cause prejudice in light of the Fourth Circuit’s stated belief that the applicability of *City of Myrtle Beach* is determinative. Considering the question in this context is necessary to give effect to the clear intention of the Fourth Circuit, as well as the Insurers’ concession, that the true inquiry is whether this Court would follow *City of Myrtle Beach*. *See* (Exhibit 4, p. 6) (“[Insurer] contends, and we agree, that [whether] South Carolina support[s] the ‘at issue’ exception applied in *City of Myrtle Beach*,” is controlling.) (emphasis added).

Insurer contends this Court has neither the authority nor the need to amend the certified question to limit it to the scope of *City of Myrtle Beach*.² However this misses the mark. In fact, this Court recognized the possibility of reframing a question to avoid confusion caused by the improper wording of a certified question in *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, wherein the dissent “reframed” the question to avoid its perceived confusion. 422 S.C. 643, 653, 813 S.E.2d 696, 702 at n. 5 (2018) (Few, J., dissenting). The majority did not find error in the practice of reframing the question; instead, it simply disagreed with the dissent’s conclusion that the wording of the question caused confusion. *Id.*

As commentators have noted, “the ‘at issue’ exception comes into play by virtue of a party’s reliance on a privileged communication as an essential part of its claim or defense.” *Preserving the Confidentiality of Investigations by In-House and Outside Counsel*, in ATTORNEY CLIENT PRIVILEGE IN CIVIL LITIGATION, 223, 233 (Vincent S. Walkowiak ed., 3d ed. 2004). Therefore, inquiry into whether to adopt the “at issue” exception unavoidably requires consideration of the nature of the claim at issue—here an insurance bad faith action—as well as Insurer’s counterclaims. The inquiry cannot be broadly couched in a manner that applies to all actions and all contexts as the current certified question is written. The Fourth Circuit clearly recognized this by finding the determinative issue is whether South Carolina would follow *City of*

² Insurer additionally notes that Respondents improperly submitted materials not provided by the certifying court. However, Rule, 240(c)(3) specifically provides for the submission of documents outside the record. Respondents concede Rule 244(b) directs this Court should not consider materials beyond those provided by the certifying court, however, this Court has the discretion to seek any additional documents it may desire. Focusing on the manner the documents were obtained elevates form beyond function. Whether to consider these—or any—documents is within the discretion of this Court. Moreover, this Court need not look beyond the Fourth Circuits Order to see that Insurer has conceded the true issue here is whether South Carolina would follow *City of Myrtle Beach*. See (Exhibit 4, p. 6) (“[Insurer] contends, and we agree, that [whether] South Carolina law . . . support[s] the ‘at issue’ exception applied in *City of Myrtle Beach*,” is controlling.) (emphasis added).

Myrtle Beach, which turns on the consideration of the ‘at issue’ waiver in the specific context of an insurance bad faith claim. This lends further support to both this Court’s authority and need to amend the certified question to give effect to the Fourth Circuit’s clear intent if it is to proceed.

Finally, rephrasing the question is consistent with bounds of this Court’s wide discretion and the policy considerations inherent in granting certification. When considering whether and how it might answer a certified question, this Court is to safeguard the public interest, the policies of this state, and this “Court’s sense of law, justice and right.” *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006); accord *Reynolds v. Ryland Group, Inc.*, 340 S.C. 331, 332, 531 S.E.2d 917, 918 (2000) (demonstrating that certification of a question is a matter within the original jurisdiction of the Supreme Court); and Rule 245(a), SCACR (the exercise of original jurisdiction should serve the public interest). To this end, this Court should avoid needless alteration of the law of this state through advisory opinion. *Sangamo*, 307 S.C. 143, 414 S.E.2d 127. The Court’s paramount concern is addressing the determinative issue. See Rule 244(a). Thus, where the certified question, as written, conflicts with this objective, these policy interests are well served by addressing the controlling issue. This is particularly true when the certifying court has made the dispositive issue clear—as is the case here.³

Ultimately, however, even if this Court lacks the authority to amend the question, this simply means rescission of certification is required. The simple fact remains that the certified question, as written, cannot resolve the controlling issue of whether “South Carolina law [supports] the ‘at issue’ exception applied in *City of Myrtle Beach*.” This is clear from the Fourth Circuit’s analysis and conceded by Insurer. (See Exhibit 4, p. 6) (*supra*)

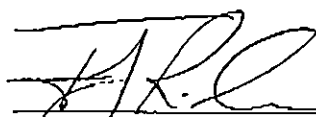
³ Additionally, Respondents note that judicial economy supports resolution of the conflict created by the certified question now to avoid wasting resources or court time debating the question rather than the answer.

CONCLUSION

For these reasons this Court should either amend the certified question, or in the alternative, rescind its certification.

Respectfully submitted,

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September 6th, 2018
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as assignees areRespondents

AFFIDAVIT OF SERVICE

I, Moira K. McIntire, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have on this date, served a true and correct copy of the Respondents' Reply to Petitioner's Return to Motion to Reconsider, Alter, or Amend or in the alternative to Rescind Certification via US Mail and electronic mail to the following counselors of record:

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September 6, 2018
Charleston, South Carolina