

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA S.C. SUPREME COURT

SEP 10 2018

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.

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Court Rules

Rule 244(a), SCACR1

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ARGUMENT

In reply to the Brief of 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”) and in further support of the Brief of Plaintiff Allstate Vehicle and Property Insurance Company (“Allstate”), Allstate offers the following arguments, incorporating by reference the background facts and arguments stated and raised in its prior Brief.

I. The Certified Question Is Limited and the Federal District Court Has Decided the Relevant Language in the Policies Is Not Ambiguous.

As an initial matter, this Court agreed to consider a very limited question in accepting the certified question from Judge Norton – how the South Carolina Court of Appeals’ holding in *Manufacturers & Merchants Insurance Company v. Harvey*, 330 S.C. 152, 468 S.E.2d 222 (Ct. App. 1998) interacts with the intentional or criminal act exclusion and the Joint Obligations provision found in Allstate’s policies. In submitting this question to this Court and in compliance with Rule 244(a), SCACR, Judge Norton’s Order clearly sets forth the questions of law to be answered, all findings of fact relevant to the questions certified; and a statement showing fully the nature of the controversy in which the questions arise.

Plaintiffs contend that the relevant policy language is ambiguous and as such the Court should resort to the use of rules of construction to construe the language in their favor. Plaintiffs’ Final Brief, pp. 16-20. However, this issue is not before this Court in answering the certified question. In the Federal District Court’s Order, Judge Norton clearly states “[t]he court agrees with Allstate that the language of the joint obligations provision is unambiguous” and that “[t]o find otherwise would be to torture the language

of the Policy.” *See* Order, p. 6. Further, Judge Norton rejected Plaintiffs’ arguments regarding the use and application of the reasonable expectations doctrine in connection with unambiguous policy language and held as follows:

A review of the joint obligations provision in the policy at hand demonstrates that the policy unambiguously denies coverage to one named insured where the other named insured has been barred from coverage. 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.

See Order, p. 7. Judge Norton also determined that South Carolina law “operate[s] to bar all coverage for Joseph Hunter as his sexual abuse of Doe was not an ‘occurrence’ under the Policy.” *See* Order, p. 9.

After making these relevant findings, Judge Norton stated the issue for certification centered solely around the fact “no South Carolina court has yet specified the precise boundaries of Harvey’s holding as it applies to a policy that contains a joint obligations provision.” *See* Order, p. 11. Further, in certifying this question to this Court, Judge Norton also raised whether South Carolina has any public policy considerations at issue in this situation. *See* Order, p. 12. These are the only issues before the Court, and Plaintiffs’ arguments that seek to overturn the rulings, findings, and holdings of the Federal District Court should be disregarded.¹

¹ While Plaintiffs did file a Motion to Alter or Amend with regard to the Federal District Court’s determination about whether the policies afforded coverage for Plaintiffs’ claim for defamation, Plaintiffs did not request reconsideration of the Court’s findings, rulings, and holdings noted above.

II. The Joint Obligations Provision Is A Part of The Policies' Insuring Agreement and Is Not an Exclusion.

The joint obligations provision is not a policy exclusion.² While Plaintiffs contend the “clause’s purpose and application to the Policy’s actual coverage is puzzling,” the provision is clearly included in the policies’ Insuring Agreement, which is widely understood to be the initial grant of coverage under a policy. This is not a mysterious or puzzling issue.

An insuring agreement in an insurance policy provides the general grant of coverage. Deciding whether a claim falls within the policy’s insuring agreement is the first step to determining whether the policy affords coverage. *See, e.g. Harleysville Group Ins. v. Heritage Cmty., Inc.*, 420 S.C. 321, 333, 803 S.E.2d 288, 295 (2017) (“The threshold question in determining coverage . . . is whether the claim at issue is . . . within the general grant of coverage in the CGL insuring agreement.”). Contrary to Plaintiffs’ assertion that the joint obligations provision only applies to the obligation to pay premiums and provide accurate and updated information regarding the property is not supported by South Carolina law or the “plain reading” of the provision. Further, as stated above, Judge Norton has determined that the joint obligations provision does not merely apply in the manner suggested by Plaintiffs.³

² Plaintiffs erroneously contend that “Allstate urges this Court to interpret the joint obligations clause as if it were an exclusion to coverage for damages arising from Roses’ negligence.” *See* Plaintiffs’ Final Brief, p. 16. Reading and considering the arguments raised in Allstate’s Opening Brief clearly demonstrates that Allstate has consistently stated the joint obligations provision is a part of the policies’ insuring agreement, not an exclusion.

³ Judge Norton also noted that Judge Childs reached the same determination under South Carolina law in an earlier decision, *Allstate Indemnity Company v. Tilmon*, Civil Action No. 1:13-00690-JMC, 2014 U.S. Dist. LEXIS 37160 (D.S.C. Mar. 21, 2014).

Rather, the joint obligations provision is included in a separate paragraph of the Insuring Agreement and is in no way limited to obligations to pay premiums and provide updated information regarding the property. As decided by the Federal District Court, the provision clearly provides that the coverage afforded under the policies impose joint obligations on both Joseph Hunter and Rose Hunter such that the acts of one is binding upon the other. This language is clear and unambiguous and establishes the initial grant of coverage. There is no coverage for the acts of Rose Hunter if there is no coverage for the acts of Joseph Hunter, and likewise, if there is no coverage for the acts of Joseph Hunter there is no coverage for the acts of Rose Hunter. This provision is not an exclusion that should be construed narrowly against Allstate, but is rather a part of the grant of the coverages identified in the policies Declarations, including Family Liability Coverage, and Rose Hunter has the burden of demonstrating that the Underlying Lawsuit falls within the grant of coverage, which she cannot. See *Auto-Owners Ins. Co. v. Madison at Park West Prop. Owners Ass'n*, 834 F. Supp. 2d 437, 443 (D.S.C. 2011) (citing *Sunex Int'l Inc. v. Travelers Indem. Co.*, 185 F. Supp. 2d 614, 617 (D.S.C. 2001); *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 160 S.E.2d 523, 525 (S.C. 1968)) (“The insured bears the burden of proving that a claim is covered by a policy . . .”).

III. The Underlying Lawsuit Seeks Only One Set of Damages and Those Damages Are Excluded Under the Policies.

Plaintiffs spend a great deal of time discussing causation and whether Rose Hunter’s alleged acts were a proximate cause or an efficient cause of the damages for which Plaintiffs seek recovery in the Underlying Lawsuit.⁴ This discussion is not germane to determining whether there is some reason that established South Carolina law

⁴ Plaintiffs also cite to several cases in support of their argument that Rose Hunter’s alleged negligence independently caused Doe harm.

would not allow for the application of the language of the policies in the context of this case to preclude coverage for the claimed damages.

As decided by the Federal District Court, the policies clearly and unambiguously state that coverage will not be afforded for “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.**” The language of the exclusion clearly demonstrates that the focus of this exclusion is on the *damages*, here, the bodily injury, and despite Plaintiffs’ efforts to demonstrate that the complained of damages somehow happened separate and apart from Joseph Hunter’s sexual molestation of Doe, logic dictates that is not the case.

Plaintiffs contend they have included allegations of “negligence” in the Second Amended Complaint and this alleged “negligence” caused Doe’s damages, which include “great shame, guilt, self-blame, fear, withdrawal, embarrassment, helplessness, mistrust, loss of innocence, emotional trauma, PTSD, and depression, as well as physical manifestations of harm in the form of headaches, nausea, and other physical discomfort.” Second Amended Complaint ¶ 68. Specifically, Plaintiffs allege Rose Hunter was “negligent” in the following respects:

- Failing to shield Doe from dangerous conditions, situations, and individuals, including child predators like Joseph Hunter;
- Failing to exercise due care for the safety and well-being of Doe;
- Failing to monitor Joseph Hunter’s behavior while knowing of his affinity and propensities toward young girls;
- Failing to address Joseph Hunter’s past conduct in a manner to prevent future similar conduct towards young girls;
- Ignoring Joseph Hunter’s predilection towards young girls;

- Allowing Joseph Hunter to spend time with young girls alone and unsupervised;
- Failing to warn Plaintiffs about Joseph Hunter's deviant sexual proclivities; and
- Failing to supervise Joseph Hunter in a manner so as to eliminate his chances to sexually abuse children.

(Second Amended Complaint ¶ 80). Clearly, all of the damages for which Plaintiffs seek to recover in the Underlying Lawsuit are damages that were caused by the intentional and criminal acts of Joseph Hunter such that the Policies do not afford coverage.

Plaintiffs also cite to several cases in support of their argument that Rose Hunter's alleged negligence independently caused Doe harm in a footnote. *See* Plaintiffs' Final Brief, p. 11. Those cases are inapposite and are clearly distinguishable. For example, the court in *St. Paul Fire & Marine Insurance Co. v. Schrum*, 149 F.2d 878 (8th Cir. 1998) was addressing the application of a policy exclusion with very different language than the Allstate policies at issue here. The "sexual act exclusion" provided that "Medical Payments to others do not apply to bodily injury or property damage: (j) arising out of any sexual act, including but not limited to molestation, incest or rape." The court in determining that the exclusion did not apply explained that under Missouri law, for a claim of negligent supervision in this context, the focus of such claim is on the defendant's obligation and ability to supervise and control the child, not the instrumentality controlling the harm. In so determining this issue, the court's focus was on the act and who was performing the act. Here, however, the intentional or criminal acts exclusion's focus is on the damages caused by an intentional or criminal act regardless of which insured caused those damages, and therefore, the *Schrum* court's reasoning is not applicable.

Likewise, the court's analysis in *New London County Mutual Insurance Co. v. Lyon*, CV095012978, 2011 Conn. Super. LEXIS 783 (Conn. Super. Mar. 25, 2011) does not support Plaintiffs' argument and instead, offers support that the language of the Allstate policy illustrates that coverage is excluded for the damages alleged in the Underlying Lawsuit. In *New London*, the insurer filed suit seeking a declaration that the policy's sexual molestation exclusion precluded coverage for the claims that the insureds negligently provided alcohol to the claimant who was sexually assaulted by another person attending the party at the insureds' home. In addressing the application of the exclusion, which stated that the policy "do[es] not apply to 'bodily injury' or 'property damage' . . . k. arising out of sexual molestation, corporal punishment or physical or mental abuse," the court analyzed case law that was distinguishable because the language of those policies was different. The court explained:

A line of Connecticut cases with more analogous fact patterns, involving "innocent" insureds are also inapposite because they all involved business insurance with much more precise exclusion language. See e.g. *Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co.*, *supra*, 254 Conn. 400 (exclusion language read "arising out of . . . the actual or threatened abuse or molestation *by anyone* of any person while in the care, custody or control of any insured") (italics added); *Clinch v. Generali-US Branch*, 110 Conn. App. 29, 36, 954 A.2d 223 (2008), *aff'd*, 293 Conn. 774, 980 A.2d 313 (2009) (applying exclusion language which read "this insurance does not apply to bodily injury, or property damage arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or *any other person*") (italics added). The language in these cases expresses the intent of the parties to limit coverage to exclude any injuries from sexual molestation regardless of who commits it or who is involved in any way

New London, 2011 Conn. Super. LEXIS 783 at *20.

Here, the language of the Allstate policies' intentional or criminal acts exclusion is precise and excludes coverage for damages that are intended by, or which may

reasonably be expected to result from the intentional or criminal acts or omissions of *any* insured person. As previously stated, the Federal District Court has determined the language of this exclusion to be unambiguous and this issue has not been presented to this Court for consideration in connection with this certified question. There is no ambiguity in this exclusion and unlike the policy in *New London*, the Allstate policies do not use “arising out of” language and therefore the ambiguity that court there found does not exist here. Therefore, Plaintiffs’ reliance on this case is misplaced.

Further, Plaintiffs’ citation to the Supreme Court of Ohio’s decision in *Safeco Insurance Co. of America v. White*, 91 N.E.2d 426 (Ohio 2009), which addressed the operation of an exclusion with different language, does not provide support for their argument. In fact, in recognizing the limitations of the court’s reasoning in *Safeco Insurance*, the Court of Appeals of Ohio in *Doe v. Sherwin*, Case No. 2013-P-0058, 2015 Ohio App. LEXIS 2390, *14 (Ohio App. June 22, 2015) explained that “[t]he Ohio Supreme Court has not held that every insurance policy must provide coverage for the negligence of an insured non-molester.” The court in *Westfield Insurance Co. v. Porchervina*, CASE No. 2008-L-025, 2008 Ohio App. LEXIS 5466, *6 (Ohio App. Dec. 12, 2008) has also explained that “[i]t is important to note that the Supreme Court of Ohio only held that it did not violate public policy to provide insurance coverage for negligence relating to sexual molestation. It did not hold that every insurance policy necessarily provided such coverage.”

Further, the Ohio Court of Appeals considered the policy’s intentional or criminal acts exclusion in the policy at issue in *Allstate Ins. Co. v. Dolman*, No. L-05-1281, et al., 2006 Ohio App. LEXIS 4079, *2, 8 (Ohio App. Aug. 11, 2006) and explained “[t]he trial

court properly found that, while public policy does not preclude [the insured] from being covered under the insurance policy [for negligently failing to supervise her husband while the underlying plaintiffs' daughter was in the insureds' home and the husband sexually molested the daughter], the specific language in the [insured]'s contract precluded her from coverage." The case was remanded to the trial court to consider other issues and the trial court, again, granted summary judgment in favor of Allstate and the underlying plaintiffs again appealed.

The policy at issue in *Dolman* contained a joint obligations provision and an intentional or criminal acts exclusion. In considering the language of that policy, the court rejected the underlying plaintiffs' contention that there can be more than one cause of injury and that the exclusion should be read to exclude coverage only for that damage attributable to the molester husband's conduct, not the negligent conduct of the wife. The court explained:

Damage from tortious conduct may have multiple causations. See Restatement of the Law 2d, Torts (1977) 324, Section 879, Comment a. The exclusions, however, go not to causation, but to damages. By the plain language of the exclusions, if bodily injury or property damages result from the intentional or criminal acts of anyone insured under the policy, there is no coverage. Since June Doe's injury is undisputedly the result of the criminal acts of an insured, Alan Dolman, there is no coverage under this policy. Accordingly, appellants' remaining assignments of error are not well-taken.

Dolman, 2007 Ohio App. LEXIS 5590, *15.

The same result should be reached here with regard to the operation and application of the policies' intentional or criminal acts exclusion. As previously explained, the language of the exclusion goes to damages, not causation. Therefore, because the damages that resulted from the intentional and criminal acts of Joseph Hunter

are excluded, there is no coverage afforded to Rose Hunter in connection with the Underlying Lawsuit.⁵

Logically, Plaintiffs argument that the damages were somehow caused only by Rose Hunter's actions are untenable. If Rose Hunter did fail to shield Doe from dangerous conditions, situations, and individuals, including child predators, like her husband, Joseph Hunter, and if Joseph Hunter did not molest Doe, what damages did Doe suffer? The same is true if Rose Hunter failed to exercise due care for the safety and well-being of Doe, and if Joseph Hunter did not molest Doe, what damages did Doe suffer? Also, if Rose Hunter did fail to monitor Joseph Hunter's behavior while knowing of his affinity and propensities toward young girls, and if Joseph Hunter did not molest Doe, what damages did Doe suffer? If Rose Hunter did fail to address Joseph Hunter's past conduct in a manner to prevent future similar conduct towards young girls, and if Joseph Hunter did not molest Doe, what damages did Doe suffer? Further, if Rose Hunter did ignore Joseph Hunter's predilection towards young girls, and if Joseph Hunter did not molest Doe, what damages did Doe suffer? If Rose Hunter did allow Joseph Hunter to spend time with young girls alone and unsupervised, and if Joseph Hunter did not molest Doe, what damages did Doe suffer? Finally, if Rose Hunter did fail to warn Plaintiffs about Joseph Hunter's deviant sexual proclivities and failed to supervise Joseph

⁵ Plaintiffs also rely on the Supreme Court of Indiana's decision in *Frankenmuth Mutual Insurance Co. v. Williams*, 690 N.E.2d 675, 678 (Ind. 1997) wherein the court addressed the application of a policy exclusion that provided that the "policy exclude[d] coverage for personal injuries that are 'caused intentionally by or at the direction of any insured.'" The language of this exclusion is very different from the language of the intentional or criminal acts exclusion in the policies that were issued to the Hunters such that the court's reasoning in *Frankenmuth Mutual* provides no guidance regarding the language at issue here and should be disregarded.

Hunter in a manner so as to eliminate his chances to sexually abuse children, and if Joseph Hunter did not molest Doe, what damages did Doe suffer?⁶

It is clear that absent Joseph Hunter's sexual assault of Doe, there would be no damages. Allstate's intentional or criminal acts exclusion operates to bar coverage and the Court of Appeals' determination in *Harvey* does not preclude operation of the exclusion. Because the damages sought by Plaintiffs in the Underlying Lawsuit were intended by or were reasonably expected to result from Joseph Hunter's intentional or criminal acts or omissions, there is no argument of law or public policy argument that prevents a South Carolina court from applying the clear, unambiguous language of the policies at issue to determine that coverage does not exist for Rose Hunter.

IV. Plaintiffs' Reliance Upon the Court of Appeals' Decision in *Allstate Insurance Co. v. Mangum* Is Misplaced.

Plaintiffs argue that the "exclusionary language of a policy is generally restricted in its application to each insured party individually and not collectively against all parties insured" and cited *Allstate Insurance Co. v. Mangum*, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989). Again, this issue is not currently before this Court in connection with the question that has been certified. Notwithstanding this fact, Plaintiffs have misread the decision in *Mangum*.

The *Mangum* court addressed whether the policy's exclusion for injury to an insured person would apply to bar coverage for claims against the father's estate for the daughter's death. The husband and the daughter went on a family boating trip and both

⁶ Notably, in *Harvey*, for the one complaint that the Court of Appeals determined there to be the potential of coverage, the court noted that the complaint sought damages just for the mother of the children, not the children themselves. The fact the court noted this difference in the policies logically suggests that this factual distinction was important to the court's ultimate determination.

the father and daughter drowned. The wife, as administrator of the daughter's estate, brought suit against the father's estate contending that the husband's negligence caused the daughter's death. *Mangum*, 299 S.C. at 228, 383 S.E.2d at 465 (1989).

The policy provided that coverage would not be provided for "bodily injury to an insured person" and "insured person" was defined to mean "you and, if a resident of your household, any relative and any dependent person in your care." The policy further provided that "[t]his insurance applies separately to each insured person." *Id.* at 228, 383 S.E.2d at 465.

The *Mangum* court explained that the trial court held that the policy's exclusion excluded liability coverage for the daughter's death. The wife appealed arguing that the policy's separability clause operated such that "insured person" meant "only such person who is an alleged tortfeasor, i.e., such person who is at fault and against whom the action is brought for negligence." *Id.* at 229, 383 S.E.2d at 465. On appeal, the court rejected the argument and held that the doctrine of separability did not apply to the policy. *Id.*, 383 S.E.2d at 465. Specifically, the court explained "[t]his doctrine is not applicable to the policy before us because the obligation set forth in the insuring clause limits coverage to 'damages because of bodily injury . . . covered by this part of the policy.'" *Id.*, 383 S.E.2d at 466 (emphasis added by court). Further, the court explained that "[t]he policy then clearly states that it does not cover bodily injury to an insured person and, under the terms of the policy, [the daughter] is clearly an insured person." *Id.* at 229-230, 383 S.E.2d at 466.

Here, there is no question that the doctrine of separability does not apply to the policies issued to the Hunters. Not only do Allstate's policies not contain separability

clauses, they contain the exact opposite of a separability clause. The policies contain a joint obligations provision that clearly demonstrates that Allstate did not intend to create a “separate” policy for each insured. The language of the intentional or criminal acts exclusion does the same. *See, e.g., Am. Nat’l Prop. & Cas. Co. v. Clendenen*, 793 S.E.2d 899, 908 (W. Va. 2016) (“The majority of courts have held that unlike the phrase, ‘the insured,’ the phrase ‘any insured’ unambiguously expresses a contractual intent to create joint obligations and to prohibit recovery by an innocent co-insured.”). Rather, the policies’ clear and unambiguous language demonstrates that the acts of one insured affects the coverage that is afforded under the policy for other insureds. In this case, the acts of Joseph Hunter preclude coverage for Rose Hunter. Plaintiffs arguments lack merit and should be disregarded.

V. No South Carolina Public Policy Exists to Justify Nullification of Allstate’s Clear and Unambiguous Policy Provisions that Preclude Coverage for Rose Hunter in Connection with the Underlying Lawsuit.

Plaintiffs have failed to present any cogent arguments supporting a determination that South Carolina public policy would override the clear, unambiguous language contained in a voluntary policy of insurance. Rather, Plaintiffs state that “there is no public policy prohibiting insurance for negligence related to sexual molestation.” *See* Plaintiffs’ Final Brief, p. 20. That is not the issue before this Court on this certified question. Rather, the issue is whether there is any South Carolina public policy that prohibits applying the plain, unambiguous language of the policies such that, despite the policies’ terms, coverage would be afforded to Rose Hunter. As explained in Allstate’s Opening Brief, there is no such public policy.

As an initial matter, the Federal District Court certified this issue to this Court seeking clarification regarding whether the Court of Appeals' decision in *Harvey* created an issue with applying the plain and unambiguous language of the policies to preclude coverage for the claims of negligence against Rose Hunter. However, as previously stated the decision in *Harvey* does not mandate that South Carolina courts depart from clear, established precedent that the language of policies should be applied to determine what coverage is afforded thereunder. The exclusion at issue in *Harvey* stated that coverage does "not apply to bodily injury or property damage: a. which is expected or intended by the insured."⁷ The language of that policy is very different from the language of the policies issued to the Hunters, which contain language that bars coverage for damages that are "intended by or reasonably expected to result from the intentional or criminal acts or omissions of any insured person" and contain a joint obligations provision. Therefore, given that the language of the policies is very different, *Harvey* does not establish a broad rule or public policy that insurance policies cannot bar coverage for Rose Hunter's alleged negligence.

Plaintiffs contend that because the fact "an insured receives the benefit of any ambiguity or when the Policy is capable of two reasonable interpretations evidence a public policy in favor of coverage for the negligence of insureds." See Plaintiffs' Final Brief, p. 21. Plaintiffs' contentions lack merit because the policies at issue are voluntary policies and South Carolina courts have determined that where coverage is not mandated, there is no public policy to protect. See, e.g., *Cothran v. State Farm Mut. Auto. Ins. Co.*,

⁷ The policy at issue in *Harvey* also included a severability provision that provided "[t]his insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence." The policy also did not include a joint obligations provision.

421 S.C. 562, 573, 808 S.E.2d 824, 830 (Ct. App. 2017) (“We cannot read into an insurance contract, under the guise of public policy, provisions which are not required by law and which the parties thereto clearly and plainly have failed to include.”) (quoting *Smith v. Liberty Mut. Ins. Co.*, 313 S.C. 236, 239, 473 S.E.2d 142, 144 (Ct. App. 1993) (per curiam) (quoting *Barkley v. Int’l Mut. Ins. Co.*, 227 S.C. 38, 45, 86 S.E.2d 602, 605 (1955))).

For example, the Court of Appeals when considering voluntary Personal Injury Protection (“PIP”) coverage explained:

Public policy in this state does not prohibit a reduction of PIP benefits by the amount an insured receives in workers’ compensation benefits. Our legislature has determined PIP coverage in this state Because the legislature has deemed PIP coverage voluntary and not required for the public good, there is no prohibition on the parties’ ability to limit the recovery of PIP benefits to certain situations.

...If our public policy was such that payment of PIP benefits was needed or desired for the benefit of workers’ compensation carriers, the legislature could have mandated that PIP coverage be included with all automobile policies Accordingly, we reverse the circuit court on the issue and find public policy does not prohibit a policy exclusion that reduces PIP benefits by the amount the insured recovers under workers’ compensation law.

Cothran, 421 S.C. at 574, 808 S.E.2d at 830-831.

The Federal District Court, applying South Carolina law, also determined that in the context of voluntary coverage, South Carolina public policy did not prohibit the application of the terms of the policy:

“It is the public policy of [South Carolina] to provide married persons with the same legal rights and remedies possessed by unmarried persons.” *See Boone v. Boone*, 345 S.C. 8, 15, 546 S.E.2d 191, 194 (2001). However, while spouses may maintain negligence actions against each other, there is no public policy in South Carolina prohibiting voluntary insurance policies from excluding coverage to the spouse of an insured. *See South*

Carolina Ins. Co. v. Barlow, 301 S.C. 502, 508, 392 S.E.2d 795, 798 (1990) (finding that parties have a right to make their own insurance contract); *American Liberty Ins. Co. v. DeWitte*, 236 F. Supp. 636, 640 (E.D.S.C. 1964) (finding that voluntary insurance contract excluding liability for injury to spouse, parents, and children of insured valid). Under South Carolina law, Angela Smith may maintain a lawsuit against George Smith for her injuries. However, the insurance policy issued to George Smith does not provide her any coverage.

Smith v. Travelers Cas. Co., C.A. No.: 6:09-cv-02662-JMC, 2011 U.S. Dist. LEXIS 32673, *13-14 (D.S.C. Mar. 28, 2011).

The homeowners' policies that were issued to the Hunters do not provide mandatory liability coverage. South Carolina law allows Allstate to limit its liability and to impose conditions on its obligations to the Hunters under the policies. *See B.L.G. Enters. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-536, 514 S.E.2d 327, 330 (1999) (“[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.”) (citing *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 377 S.E.2d 569 (1989); *Rhame v. Nat’l Grange Mut. Ins. Co.*, 238 S.C. 539, 121 S.E.2d 94 (1961)). There is no South Carolina public policy that prohibits the operation of the joint obligations provision per its clear, unambiguous terms. Further, there is no South Carolina public policy that prohibits the operation of the intentional or criminal acts exclusion per its clear, unambiguous terms. *See S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 327, 330 (1999) (explaining that “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 a statutory prohibition” and determining that the policy’s intentional acts exclusion applied to preclude coverage); *see also Clendenen*, 793 S.E.2d at 913 (“Because the claims for wrongful death damages in the

Complaint are all inextricably tied to the intentional criminal conduct of [the] insureds under the [relevant] policies, and because public policy favors application of unambiguous intentional/criminal acts exclusions as written, we conclude that the first certified question must be answered in the affirmative.”)⁸. Therefore, the certified question submitted to this Court should be answered “yes.”

CONCLUSION

For the reasons stated herein and in Allstate’s Opening Brief, Allstate respectfully requests that the Court answer the certified question “yes,” because *Harvey* does not stand for the proposition that an insurance carrier can never draft a policy that precludes coverage for negligent supervision type claims where another insured commits sexual assault. Further, no South Carolina public policy prohibits the application of the policies’ joint obligations provision and intentional or criminal acts exclusion to bar coverage for Rose Hunter.

{Signature on following page}

⁸ The first certified question stated:

1. Applying West Virginia public policy and rules of contract construction, do the unambiguous exclusions in American National’s policy for bodily injury or property damage “which is expected or intended by any insured even if the actual injury or damage is different than expected or intended,” and “arising out of any criminal act committed by or at the direction of any insured,” and the unambiguous exclusion in Erie’s policy for “bodily injury, property damage, or personal injury expected or intended by ‘anyone we protect’ . . . ,” preclude liability coverage for insureds who did not commit any intentional or criminal act?

Clendenen, 793 S.E.2d at, 902.

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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 Reply Brief by United States Mail, postage
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