RECEIVED

AUG 27 2018

S.C. SUPREME COURT

**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

---

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.

---

# RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND THE CERTIFIED QUESTION or in the Alternative TO RESCIND CERTIFICATION

---

THURMOND KIRCHNER & TIMBES, P.A.
Jesse A. Kirchner, SC Bar No. 70479
Michael A. Timbes, SC Bar No. 69730
Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
843-937-8000 (office)
843-937-4200 (fax)
jesse@tktlawyers.com
michael@tktlawyers.com
thomas@tktlawyers.com
Attorneys for Respondent

COME NOW the Respondents, who, pursuant to Rules 221[1], 240, and 244, of the South Carolina Appellate Court Rules, do herein petition this Honorable Court for rehearing, or in the alternative, move this Honorable Court to reconsider, alter, or amend the Order issued August 9, 2018, accepting certification from the United States Court of Appeals for the Fourth Circuit of the following interlocutory question:

> 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?

In this insurance bad faith claim brought by Respondents (*i.e.,* the insureds) against Petitioner (hereinafter "Insurer"), this Honorable Court has misapprehended and overlooked that the question, as written and accepted, is overly broad. So much so that it fails to address the issues pending before the certifying court—*to wit,* whether South Carolina recognizes the "at issue" exception in the context of an insurance bad faith claim as set out in *City of Myrtle Beach v. United Nat. Ins. Co.,* 2010 U.S. Dist. LEXIS 89725.[2] *Contra* (**Exhibit 4,** p. 6) (Circuit Court of Appeals stating, "if South Carolina law does not support the 'at issue' exception **applied in *City of Myrtle***

---

[1] Although captioned as a motion, Respondents additionally file the instant motion as Petition for Rehearing pursuant to Rule 221, SCACR, which provides that a petition for rehearing may be had upon any order except one denying a petition for writ of certiorari, provided that the action made by the Court upon the motion or petition has the effect of finally deciding a party's appeal. Here the Fourth Circuit has—incorrectly—asserted that this Court's acceptance of the certified question will resolve the appeal pending before it. By accepting certification this Court has made a final determination on Insurer's contention that an answer to the purported question is controlling of the matter pending in Federal Court and that South Carolina law does not speak to the issue pending therein.

Therefore, and to the extent this Court shall find it proper to treat the instant motion as a petition for rehearing, the same being timely pursuant to Rule 221, this filing is accompanied by the necessary filing fee. This fee being otherwise not necessary. *See* Rule 240(d), SCACR (exempting motions made upon a matter pending on a certified question from a filing fee).

Respondents alternative relief for recession of certification is based upon Rule 244(f), SCACR, (providing this Court with the discretion to withdraw or rescind any certification).

[2] Cited also as *City of Myrtle Beach v. United Nat'l Ins. Co.*, No. 4:08-cv-1183, 2010 WL 3420044,

***Beach,*** the [D]istrict [C]ourt's order granting the motions to compel was erroneous.") (emphasis added).

## BACKGROUND

On December 22, 2014, Respondents commenced this action against Insurer, an insurance carrier, in the South Carolina Court of Common Pleas for Beaufort County, alleging, *inter alia*, bad faith stemming from Insurer's failure to defend Respondents. Insurer removed the case to the United States District Court on January 22, 2015, prior to filing an answer in state court. Upon answering in District Court, Insurer admitted both the existence of an insurance contract and that it owed a duty of good faith and fair dealing under its insurance contract. (**Exhibit 1**) (ECF No. 3, ¶ 28). Additionally, and by way of counterclaim, Insurer alleged that it "performed under the insurance contract." (**Exhibit 1**) (ECF No. 3, ¶ 171). Thus, whether to apply the "at issue" exception here turns on much more than a mere denial of liability as posited by the current phrasing of the Certified Question, which further fails to confine the analysis to a bad faith claim.

Between June 24, 2016, and July 7, 2016, Respondents filed four separate motions to compel production various documents withheld by Insurer on a claim of attorney-client privilege. A hearing was held on these motions before the United States Magistrate Judge on September 19, 2016, and the Magistrate subsequently issued a Report and Recommendation on December 12, 2016, in support of granting Respondents' motions to compel.

On March 31, 2017, the Honorable David C. Norton, United States District Judge, issued an Order concurring with the Magistrate and granting Respondents' Motion(s) to Compel, with regard to (1) communication in Insurer's claim files that Insurer claimed to be privileged; (2) the

discoverability of Insurer's reinsurance and reserves; and (3) whether Respondent had waived certain objections to Insurer's privilege logs.[3] (**Exhibit 2**) (Dkt. 143 – District Court Order).

In the section of its Order entitled "**At-Issue Waiver in the Bad Faith Context,**" the District Court addressed Insurer's waiver of attorney-client privilege by reliance on *City of Myrtle Beach v. United Nat. Ins. Co.*, No. 4:08-cv-1183, 2010 WL 3420044, which addresses the waiver of attorney-client privilege **in the context of a bad faith claim against an insurer.** *See* (**Exhibit 2** at p. 5, § "A") (emphasis added). The District Court additionally cited to a long line of District Court rulings in South Carolina, which have applied the reasoning of *City of Myrtle Beach* and reached the same conclusion. The fact that the issue arose in the context of a bad faith claim against an insurer was front and center to the District Court's analysis as well as the analysis of the authorities on which it relied. (***Id.***)

To further support the waiver of privilege **in the limited context of a bad faith claim**, the District Court also determined that Respondents had set forth a *prima facie* showing of Insurer's bad faith—although not specifically ruling this was necessary. **However, the District Court did not order the production of the allegedly privileged material, but instead required that the same be turned over for *in camera* review for determination by the Court of the material's relevance.** *See* (***Id.***) (emphasis added). This *in camera* review has yet to occur.

Thereafter, Insurer unsuccessfully moved before the District Court for reconsideration and later for certification of four separate questions to this Court. After denial of these motions, Insurer sought a *Writ of Mandamus* with the Circuit Court of Appeals and moved that court for certification of the instant question. This Court's August 9, 2018 Order followed.

---

[3] The District Court addressed additional issues not germane hereto.

## ARGUMENT

**This Court must alter or amend the wording of the certified question to be limited to the context of a bad faith claim in which the insured has made a *prima facie* showing of Insurer's bad faith, or alternatively rescind its grant of certification.**

The question, as written in this Court's Order, is *far* too broad. The clear purpose for certification here is to resolve whether South Carolina would follow application of the "at issue" exception as set out in *City of Myrtle Beach.* The Circuit Court of Appeals plainly states; "if South Carolina law does not support the 'at issue' exception applied in ***City of Myrtle Beach,*** the [D]istrict [C]ourt's order granting the motions to compel was erroneous." (**Exhibit 4** at p. 6) (emphasis added).

However, the current wording of the Certified Question overlooks that the analysis, rationale, and holding of *City of Myrtle Beach,* are all explicitly constrained to the context of an insurance bad faith claim. *See City of Myrtle Beach v. United Nat'l Ins. Co.*, 2010 U.S. Dist. LEXIS 89725, at 7-23 (conducting a survey of those jurisdictions providing for a "per se" waiver of privilege in the context of a bad faith claim, and ultimately declining this approach in favor of that set out in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)). More specifically, the *City of Myrtle Beach*, in weighing the policy implications of privilege against "the conflicting policies [that] exist in a **bad faith claim,**" found the facts, together with a *prima facie* showing of bad faith by the insured, as well as the allegations set forth in the insurer's pleadings all supported a finding of waiver. *Id.* at 12. However, this is wholly inconsistent with the present wording of the question, which fails to account for *any* of these considerations. Without amending the broad wording of the question to limit the analysis to a bad faith claim and to give consideration to Respondents' *prima facie* showing of Insurer's bad faith, the present question simply cannot compel an answer to whether South Carolina would follow *City of Myrtle Beach,* and its progeny. Nor can it address

the more fundamental question of whether the District Court's ruling is consistent with South Carolina law.

The instant question seemingly inquires whether attorney-client privilege is waived—in *toto*—by a party, in *any* type of action, who merely denies certain allegations in response to a complaint. However, this is not the scenario presented in this case. First, the "at issue" waiver in this case arises in the limited and special context of a bad faith claim. Second, the Insurer went far beyond a mere denial of liability in its Answer, affirmatively alleging it complied with all its duties, including its duties of good faith and fair dealing, under a valid contract for insurance. By failing to address these additional relevant factors that were found to be controlling by the District Court, the question here is impossibly broad. By suggesting that the mere act of answering—in *any* case as opposed to a bad faith case—would waive attorney-client privilege turns the inquiry away from whether South Carolina would follow *City of Myrtle Beach*, and onto something else entirely. This is neither what was argued (by any party) nor what was (or is to be) considered by the Federal Court. *See* (**Exhibit 4** at p. 6) (Circuit Court of Appeals stating the matter turns on whether South Carolina follows *City of Myrtle Beach*).

It cannot be disputed that South Carolina has acknowledged that privilege can be waived. *See Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526, 530 (2010); *State v. Doster*, 284 S.E.2d 218 (1981); *Floyd v. Floyd*, 615 S.E.2d 465, 483 (S.C. Ct. App. 2005) (citing *South Carolina State Highway Dep't v. Booker*, 195 S.E.2d 615, 620 (S.C. 1973)) (all confirming that attorney-client privilege is not absolute, but waivable, and the burden is on the party claiming privilege to demonstrate the absence of waiver). However, the inquiry is not constrained to the pleadings but instead one of **fact**. *See State v. Love*, 271 S.E.2d 110, 112 (S.C. 1980) ("Whether a communication is privileged is for the trial judge to decide in the light of a preliminary **inquiry**

**into all of the facts and circumstances . . . .**") (emphasis added). Thus, whether South Carolina acknowledges an "at issue" waiver—or any waiver—cannot be considered in a vacuum but must necessarily account for the facts and circumstances in which the alleged waiver arises.[4] *Id.* The question here however, allows for no such consideration.

Further, because waiver is well recognized and established in South Carolina, the presumably novel concept of the "at-issue" waiver[5] cannot therefore arise in *all* scenarios but must necessarily be limited to the specific context of a bad faith action as brought here. Yet, as written, the question fails to account for either the nature of the underlying cause of action (i.e., Insurer's bad faith) or the nature of the material that is subject to the purported claim of privilege (i.e., Insurer's claims file and information relative to the denial of this claim)[6]. Nor does it consider Insurer's allegation that it fulfilled its duties under the insurance contract—*i.e.*, acted in good faith. This is paramount because unlike other causes of action, an insurance bad faith claim directly involves what the defendant insurer knew, and when it knew it. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994) ("Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim"); *see generally, Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 947 S.C. 642, 649,

---

[4] Respondents do not concede that South Carolina has not adopted the "at-issue" waiver, a concept no different than what is often referred to as "opening the door." This State has plainly recognized that a waiver results when the facts demonstrate a party's actions have made the material relevant. *See Floyd*, 615 S.E.2d at 484 (confirming that waiver results when a party claiming privilege has made the material relevant and finding a waiver because the claiming party's testimony opened the door to admission of the privileged communications). The "at-issue" waiver is nothing more than a different name for well-established principle. For this reason, Respondents, additionally or alternatively, suggest that this Court should, in its discretion withdraw its Order granting certification. *See* Rule 244(f), SCACR (this Court has the discretion to withdraw or rescind its certification).

[5] Respondents do not concede the "at-issue" waiver is novel. *See supra* at n. 4.

[6] Respondents point out that the "privileged" nature of this material has never been established. Insurer takes this for granted and simply presumes it to be privileged. Although the District Court ordered the material be subjected to *in camera* review that review has not yet occurred.

557 S.E.2d 670, 674 (2001) (recognizing that a bad faith claim lies against an insurance carrier for the failure to make an honest and informed judgment in processing a claim, and where there is no reasonable basis supporting the coverage decision, or when it fails to settle within policy limits if settlement is the reasonable thing to do).

This is a scenario *unique* to an insurance bad faith claim and implicates considerations that simply do not exist in the context of all cases or causes of action.[7] Thus, any question this Court may be inclined to consider must necessarily account for this. However, the question here overlooks this fundamental distinction and therefore, should be rewritten.

The notion that a proper certified question must be considered in the context of a bad faith claim cannot reasonably be disputed. In fact, Insurer has acknowledged this. Although the wording of the present question was advanced by Insurer before the Circuit Court of Appeals, this is not at all how Insurer phrased its proposed certified question(s) when the issue was first broached with the District Court. Tellingly, Insurer suggested certification was necessary on two separate questions: (1) "Does an **insurance company** waive its attorney-client privilege, under South Carolina law, by answering a complaint for **bad faith** and denying liability?" and (2) "Does an **insurance company** lose its attorney-client privilege, under South Carolina law, if its **opponent can make a *prima facie* showing of 'bad faith'?**" (Exhibit 3 at p. 1) (Dkt. 144 p. 1) (emphasis added).[8]

Not only do the questions Insurer proposed to the District Court acknowledge the importance of this matter being an insurance bad faith claim, but also makes clear that the true

---

[7] The District Court likewise addressed waiver within the context of a bad faith claim—not waiver generally. *See* (Exhibit 3 at p. 5, § "A") (Titling its analysis of the issue as **"At-Issue Waiver in the Bad Faith Context."**) (bold original).

[8] Insurer suggested certification on two unrelated questions as well.

dispute here—if any—is not the effect the pleadings have on an asserted privilege, but rather the effect of the **facts**—*i.e.*, Respondents' *prima facie* showing of bad faith.

Finally, the question, as written, fails to account for the undisputed fact that Insurer went well beyond merely "denying liability" and instead separately asserted a *counterclaim* against Respondents in which it affirmatively alleges to have "performed under the insurance contract." (**Exhibit 1**) (ECF No. 3, ¶ 171). Having admitted in its answer that it owed a duty of good faith and fair dealing under the insurance contract and having affirmatively alleged it satisfied this duty, Insurer has introduced the issue into this matter, making the material relevant and discoverable. *See Floyd*, 615 S.E.2d at 484 (finding waiver because testimony opened the door to privileged communications). However, the question here ignores this, instead focusing solely on the effects of the *denials* made in the answer without considering Insurer's additional affirmative allegations or counterclaims. To preclude waiver simply based on the pleadings not only ignores the factual nature of the inquiry but likewise has the practical effect of shifting the burden of establishing privilege and lack of waiver from the Insurer to Respondent. *Contra e.g., Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d at 530 (confirming the burden of establishing privilege is on the asserting party). Thus, this Court has overlooked that the question here fails to consider the effect (if any) of the answer as a whole in light of the counterclaims and affirmative assertions made therein. By broadly hypothesizing an answer, which consists of nothing more than general denials, the Court overly generalizes the circumstances in which this certified question arises.

Therefore, Respondents respectfully request this Court amend the wording of the question by limiting it to the context of a bad faith claim against an insurance carrier in which the Insurer (i.e., defendant) has alleged in the pleadings a satisfaction of its contractual duties, and where Respondents (i.e., the insured/plaintiff) have made a *prima facie* showing of the insurer's bad faith.

Insurer concedes as much, *see* (**Exhibit 3** at p. 1) (Dkt. 144 p. 1) (acknowledging, through the certified questions proposed to the District Court that due consideration must be given to the bad faith nature of the claim and the Respondent's prima facie showing of bad faith), and the Circuit Court of Appeals has demonstrated the need for the same. *See* (**Exhibit 4** at p. 6) (stating the matter turns on whether South Carolina follows *City of Myrtle Beach*).

Alternatively, if this Court is not inclined to amend the wording of the question as set forth herein, Respondents herein request that this Court exercise its discretion pursuant to Rule 244(f), SCACR, and rescind its certification. First, the question as written cannot be determinative of the cause. *See infra.*, and (**Id.**) (Circuit Court of Appeals stating the matter turns on whether South Carolina follow *City of Myrtle Beach*); *contra* Rule 244(a), SCACR (establishing that certification should be limited to those circumstances where the question is likely to be "determinative of the cause" pending before the certifying court).

Second, the question as written presents a question of fact, not law, and therefore is not proper for certification. *See* Rule, 244, SCACR ("the Supreme Court in its discretion may answer questions of *law* certified to it by [another court]") (emphasis added). It cannot be disputed that waiver is a factual inquiry. *See Love*, 271 S.E.2d at 112 ("Whether a communication is privileged is for the trial judge to decide in the light of a preliminary **inquiry into all of the facts and circumstances** . . . .") (emphasis added).

Here, the District Court's finding of waiver is grounded in fact; *to wit* the finding that Respondents made a *prima facie* showing of Insurer's bad faith. This cannot be changed by this Court and stands as an independent sustaining basis since the question as written makes no consideration for factual finding. Thus, any answer to the question as written—no matter what that answer might be—is without consequence because whether privilege might be waived by a

denial in the answer cannot preclude waiver from being additionally found upon the **facts** as the District Court did here. *See* (**Exhibit 2**).

Therefore, if not amended, the answer to the instant question—whatever it may be—cannot be germane to, or dispositive of, the matter from which the question arises and threatens to needlessly undermine or alter the law of this State though a mere advisory opinion. *Contra e.g., 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).

## CONCLUSION

For the reasons stated herein, this Court should amend the question as set forth in its August 9, 2018 Order,[9] or in the alternative, withdraw its certification.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

Jesse A. Kirchner, SC Bar No. 70479
Michael A. Timbes, SC Bar No. 69730
Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, South Carolina 29401
843-937-8000 (office)
843-937-4200 (fax)
jesse@tktlawyers.com
michael@tktlawyers.com
thomas@tktlawyers.com
*Attorneys for Respondent*

August 23, 2018
Charleston, South Carolina.

[9] Quite simply, the question here could be rephrased to inquire whether South Carolina follows *City of Myrtle Beach* and its progeny regarding the waiver of attorney-client privilege in the context of an insurance bad faith claim, in a manner like that reflected below:

> Does South Carolina law support application of the "at issue" exception to the attorney-client privilege **in a bad faith action against an insurer, in accordance with the holding and analysis in *City of Myrtle Beach*?**