

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

Case No. 9:17-cv-00384-DCN
Appellate Case No. 2018-001068

RECEIVED

Allstate Vehicle and Property
Insurance Company

Plaintiff,

DEC 04 2018

v.

S.C. SUPREME COURT

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

Defendants,

Petition for Rehearing

12/3, 2018

THE RICHTER FIRM, LLC

By: 

Aaron E. Edwards

Lawrence E. Richter, Jr.

622 Johnnie Dodds Blvd.

Mt. Pleasant, SC 29464

P: (843) 849-6000

*Attorneys for Defendants Jane Doe,
by and through her mother and
natural Guardian ad Litem, Mary
Roe and Mary Roe, individually*

BACKGROUND

The United States District Court for the District of South Carolina certified the following questions pursuant to Rule 244, SCACR:

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 against a non-abusing third party constitute “occurrences” and are not barred by the intentional act 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?

In the response to the certified question, this Court stated the following:

“The certified question requires us to decide: (1) whether the court of appeals’ holding in *Harvey* alters the conclusion of no duty to defend and no coverage for Rose Hunter that would otherwise follow from the district court’s reading of the Hunter policy, and (2) whether there is any South Carolina public policy that prohibits the application of the Hunter policy to deny coverage for Rose Hunter.

Item (1) restates the first part of the certified question which was “[h]ow does [Harvey] interact with the intentional or criminal act exclusion and joint obligations provision found in Allstate’s insurance policy?” Item (2) was not specifically asked nor is it a restatement of the second part of the certified question, but was discussed at some length in the certification order and the parties’ briefs. This Court then went on to answer the certified question as follows:

There is nothing in *Harvey* or in the public policy of this State that would alter the district court’s conclusion “the [Hunter] policy unambiguously denies coverage to [Rose Hunter] where [Joseph Hunter] has been barred from coverage.”

ARGUMENT

A petition for rehearing shall state with particularity the points supposed to have been overlooked or misapprehended by the court. Rule 221(a), SCACR. Here, the Court overlooked that the certified questions specifically sought interpretation of Allstate’s policy provisions as they

applied to the allegations of Roe/Doe's Second Amended Complaint. This Court's statement that the certification order "concluded" the policy unambiguously denies coverage to Rose Hunter where Joseph Hunter has been barred from coverage belies Judge Norton's stated purpose of certifying the questions at issue in the first place. In the certification order, Judge Norton says the following:

"[Q]uestions of insurance coverage are a state law issue, and 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. The court is hesitant to make an *Erie* guess on how the South Carolina Supreme Court would resolve the issue under the specific circumstances presented."¹

"South Carolina courts have not interpreted an insurance policy containing a joint obligations provision in the context of a negligence claims levied against a non-abusing third party named insured."²

"[T]he court certifies the question of whether the joint obligations provision in a policy operates to bar coverage for negligence claims against non-abusing third parties."³

"Just like the negligence claim levied against Rose Hunter, the question of whether the breach of fiduciary duty claim is barred by the joint obligations provision of the Policy is a question that the court certifies to the South Carolina Supreme Court."⁴

Nevertheless, no analysis or interpretation was made of Allstate's intentional act or joint obligations provisions as they pertain to Roe/Doe's allegations. Instead, only general statements were made such as negligence claims are not always "occurrences," intentional act exclusions are not always ineffective in the context of a sexual abuse coverage case, and the language of the policy in *Harvey* was different than Allstate's policy.⁵ These statements may be true, but they are not responsive to the certified question.

¹ Judge Norton Order, p. 11.

² *Id.*, at p. 13.

³ *Id.* at p. 17.

⁴ *Id.* at p. 16.

⁵ The language of the intentional act exclusion in *Harvey* is not contained in the reported opinion.

Moreover, these general statements, without further analysis or explanation, do not state or clarify the law governing the questions certified in accordance with Rule 244(g), SCACR, and provide no insight on how a joint obligations provision is to be applied to Roe/Doe's allegations or in future cases. Further confusion among the bench and bar, along with further litigation, is inevitable over how a joint obligations provision is to be interpreted, under what circumstances Harvey *does* stand for the proposition that a negligence claim is an "occurrence" in the context of a sexual abuse coverage case, and under what circumstances an intentional act exclusion is or isn't effective. Such a result was not intended by the certification order nor is it contemplated by Rule 244, SCACR.

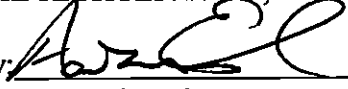
"[A]ppellate Courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Kennedy v. South Carolina Retirement System*, 349, S.C. 531, 533, 564 S.E.2d 322, 323 (2001)(quoting *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct.App.1991). By failing to interpret the policy provisions, this Court did not answer the question it was asked. The question specifically posed was "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?" This requires a statement of if, and how, the joint obligations provision applies to the coverage and exclusionary clauses of Allstate's policy in the context of Roe/Doe's allegations. Roe/Doe are entitled to have that question answered by this Court, and ask that it do so.

CONCLUSION

For the foregoing reasons, Roe/Doe request this Court grant the foregoing petition.

Signature page to follow

THE RICHTER FIRM, LLC

By: 

Aaron E. Edwards

Lawrence E. Richter, Jr.

622 Johnnie Dodds Blvd.

Mt. Pleasant, SC 29464

P: (843) 849-6000

*Attorneys for Defendants Jane Doe,
by and through her mother and
natural Guardian ad Litem, Mary
Roe and Mary Roe, individually*

December 3, 2018

P.O. Box 2473
Beaufort, SC 29901
Attorney for Defendant Rose Wadford Hunter

THE RICHTER FIRM, LLC

By  _____

Aaron E. Edwards

Lawrence E. Richter, Jr.

622 Johnnie Dodds Blvd.

Mt. Pleasant, SC 29464

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December 3, 2018
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