RECEIVED
FEB 12 2019
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-001170

In re Mt. Hawley Insurance Company ..... Petitioner,

In Which Contravest, Inc., Contravest Construction Company, and Plantation Pointe Horizontal Property Regime, as assignees, are ..... Respondents.

BRIEF OF AMICI CURIAE THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND THE SOUTH CAROLINA INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER MT. HAWLEY INSURANCE COMPANY

Gray T. Culbreath (S.C. Bar No. 11907)
Janice Holmes (S.C. Bar No. 75038)
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803.779.1833
Facsimile: 803.779.1767

ATTORNEYS FOR AMICI CURIAE THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION OF AMERICA AND THE SOUTH CAROLINA INSURANCE ASSOCIATION

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-001170

In re Mt. Hawley Insurance Company .....Petitioner,

In Which Contravest, Inc., Contravest Construction Company, and Plantation Pointe Horizontal Property Regime, as assignees, are .....Respondents.

BRIEF OF AMICI CURIAE THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND THE SOUTH CAROLINA INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER MT. HAWLEY INSURANCE COMPANY

Gray T. Culbreath (S.C. Bar No. 11907)
Janice Holmes (S.C. Bar No. 75038)
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803.779.1833
Facsimile: 803.779.1767

ATTORNEYS FOR AMICI CURIAE THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION OF AMERICA AND THE SOUTH CAROLINA INSURANCE ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Secondary Sources

INTEREST OF THE AMICI CURIAE

The American Property Casualty Insurance Association ("APCIA") is the preeminent national trade association representing property and casualty insurers doing business in South Carolina, nationwide, and globally. APCIA was recently formed through a merger of two longstanding trade associations, American Insurance Association and Property Casualty Insurers Association of America. APCIA's members, which range from small companies to the largest insurers with global operations, represent nearly 60% of the U.S. property and casualty marketplace. On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA's interests are in the clear, consistent, and reasoned development of law that affects their members and the policyholders they insure.

The South Carolina Insurance Association ("SCIA") represents many of the leading property and casualty insurance companies that are writing business in South Carolina. SCIA has 42 Members and Associates, collectively representing more than 60% of the State's property and casualty market.

SCIA serves as the voice for the property and casualty industry in South Carolina and promotes consumer awareness on issues of importance. SCIA focuses on coordinating the insurance industry's advocacy, communication, research, and education efforts. SCIA promotes a competitive environment while seeking to further the

understanding of the property/casualty insurance industry to regulators, lawmakers, consumers, and other interested groups.

This case is of importance to Amici because Respondents seeks to eviscerate the long-established public policy of protecting the communications between a client and its attorney. This brief urges this Court to find that South Carolina's jurisprudence and public policy does not support a waiver of the attorney-client privilege merely because the client insurer seeks to defend itself against the claims brought by its insured or third parties.

STATEMENT OF ISSUES ON APPEAL

1. 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?

STATEMENT OF THE CASE

Amici adopt and incorporate the State of the Case set forth in the Final Brief of the Petitioner, Mt. Hawley Insurance Company, which incorporates the Fourth Circuit's Certification Order.

INTRODUCTION

South Carolina courts have long recognized the importance of maintaining the sanctity of the communications between clients and their attorneys. *See State v. James*, 34 S.C. 49, 58, 12 S.E. 657, 660 (1891) ("The great object of the rule seems plainly to require that the entire professional intercourse between client and attorney whatever it may consist in, should be protected by profound secrecy."). *See also Swidler & Berlin v. U.S.*, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications.") (citing *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). Further, this Court has recognized the importance of this privilege to society. *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 813 S.E.2d 696, n. 1 (2018) (citing *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 619-620 (1973)). This Court has explained that "[t]he attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made the client within the relationship is maintained." *Wilson v. Preston*, 378 S.C. 358, 359, 662 S.E.2d 580, 585 (2008) (citing *State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981)). Therefore, given the importance of this privilege, any waiver of the privilege "must be distinct and unequivocal." *James*, 34 S.C. at 58, 12 S.E. at 661 (quotations omitted). The fact an insurer is being sued in litigation by its insured for bad faith or for any other cause of action does not override the insurer's entitlement to have its communications with its attorneys protected.

Here, Respondent seeks to eviscerate the Petitioner's right to protect such communications. The United States District Court for the District of South Carolina

("the District Court") has determined that because the insurance company has been sued for bad faith, the insurer – merely by defending itself and denying the claim -- has placed the communications of its counsel "at issue" in the lawsuit, such that the privilege has been destroyed. Without considering whether the insurer made a distinct and unequivocal waiver of its attorney-client privilege, as required under South Carolina law, the District Court determined that insurers in South Carolina are not entitled to the protection of the privilege due to a decision from the United States District Court for the Eastern District of Washington, *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). Based on the *Hearn* court's reasoning, the District Court's decision wrongfully deprives insurance companies of their right to protect sensitive communications between them and their counsel. The conclusion that an insurance company has waived such a fundamental privilege simply because it seeks to defend itself in a lawsuit is not supported by either South Carolina precedent or important public policy considerations.

A review of both state court precedent and the public policy underpinning the attorney-client privilege leads to the clear conclusion that the Fourth Circuit's question to this Court should be answered in the negative. Amici respectfully urge this Court to determine that insurance companies should not be treated in an inferior manner to other litigants, and to hold that the mere denial of an allegation that the insurer had acted in bad faith does not destroy or waive the attorney-client privilege.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE IN SOUTH CAROLINA

In South Carolina, "'[t]he attorney-client privilege protects against disclosure of confidential communications by a client to his attorney.'" *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 293, 692 S.E.2d 526, 529 (2010) (quoting *State v. Owens*, 309

S.C. 402, 407, 424 S.E.2d 473, 476 (1992)). The "'privilege is based upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor . . . .'" *Tobaccoville USA, Inc.*, 387 S.C. at 293, 692 S.E.2d at 529 (quoting *Owens*, 309 S.C. at 407, 424 S.E.2d at 476). "'Although a client may waive the attorney-client privilege, the waiver must be distinct and unequivocal." *State v. Thompson*, 329 S.C. 72, 76-77, 495 S.E.2d 437, 439 (1998) (quoting *State v. Hitopoulus*, 279 S.C. 549, 551, 309 S.E.2d 747, 749 (1983)). "'Where an implied waiver is claimed, caution must be exercised, for waiver will not be implied from doubtful acts.'" *Thompson*, 329 S.C. at 77, 495 S.E.2d at 439.

While the Fourth Circuit has posed the certified question in the context of the case currently before it, which involves allegations of bad faith against an insurer, the answer to the question is much more far-reaching. South Carolina precedent dictates that its courts do not take issues regarding waiver of the attorney-client privilege lightly, requiring distinct and unequivocal acts demonstrating that the client intends to waive the privilege.

A. There Is No Wavier of the Attorney-Client Privilege Merely By Denying Liability in the Answer.

As explained in the Petitioner's brief, South Carolina law and policy do not support the determination that merely denying liability in an answer waives the client insurer's ability to contend that communications are protected by the attorney-client privilege. In *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), Justice Pleicones of this Court was critical of the circuit court's reliance on the "at-issue" test for waiver articulated in *Hearn*. Justice Pleicones explained that "the circuit court

erred in adopting the *Hearn* at-issue waiver test because this test substantially diminishes the attorney-client privilege without regard to the important public interests that privilege is designed to advance." *Davis*, 409 S.C. at 292, 762 S.E.2d at 549. Further, he explained that "the rule in South Carolina has been that such a 'waiver must be distinct and unequivocal[,]' and we have held that a claim of implied waiver should be treated with caution." *Id.* at 292, 762 S.E.2d at 549 (quoting *Thompson*, 329 S.C. at 76-77, 495 S.E.2d at 439). In addition, Justice Pleicones recognized that "*Hearn* has been rejected by most courts and many commentators." *Id.* at 294, 495 S.E.2d at 550.

Other courts that have addressed that the so-called "at-issue exception" to the attorney-client privilege have determined that merely denying the allegations of a complaint does not constitute waiver of the privilege. For example, in *Smith v. Scottsdale Insurance Co.*, 40 F. Supp.3d 704 (N.D.W.V. 2014), the United States District Court for the Northern District of West Virginia determined that denial of the allegations of the complaint did not waive the attorney-client privilege. The plaintiffs were the co-administrators of the estate of the decedent, who was fatally shot by one of the insured's police officers. The parties attempted to mediate the matter and the settlement negotiations were unsuccessful. Eventually, the court granted summary judgment in favor of the insureds on some of the of the plaintiffs' claims and a jury returned a verdict in favor of the insured on the remaining claims. *Smith*, 40 F. Supp.3d at 711-712.

The plaintiffs brought suit against the insurer, contending that it violated the West Virginia Human Rights Act ("the Act") by discriminating against them during settlement negotiations based on the plaintiffs' race. *Id.* at 712. The plaintiffs sought the production of the insurer's entire claims file, and the insurer argued, among other things, that portions of the claim file were protected by the attorney-client privilege. The plaintiffs

contended that by denying that it violated the Act in its settlement practices, the insurer placed the advice of its attorneys at issue, which waived the attorney-client privilege regarding every document in the claim file. *Id.* at 724. In rejecting the plaintiffs' contention, the court explained that the insurer did not waive an affirmative defense of advice of counsel. Further, the court explained, "[i]f merely denying the allegations in a complaint waived the attorney-client privilege, the privilege would be moot." *Id.*

Also, the United States Court for the District of Columbia noted the criticism of *Hearn* and rejected its application in *Trustees of the Elec. Workers Local No. 26 Pension Trust Fund v. Fund Advisors, Inc.*, 266 F.R.D. 1 (D. Cir. 2010). The court explained that it believed "the court of appeals for this Circuit would agree with the decisions of the Second and Third Circuits and with the courts and academics that have criticized *Hearn* and would conclude that a party must put the advice in issue before she forfeits the privilege." *Trustees of the Elec. Workers*, 266 F.R.D. at 13. The court in determining that the plaintiffs had not asserted a claim or defense based on counsel's advice explained that "this case illustrates how much damage *Hearn* can do" because "[t]his is not a situation where a party is using a portion of privileged information for its own benefit to assert a claim or defense and withholding that which will hurt that claim or defense." *Id.* at 13. Further, the court reasoned:

> But, if *Hearn* is right and relevancy is the only criterion to consider, then in this case counsel's giving advice and his clients' relying on it would in itself constitute a waiver of the confidentiality of that advice even though plaintiffs are predicating neither a claims [sic] or a defense on that advice. *Hearn* therefore modifies the absolute attorney-client privilege the common law recognizes to one that is defeasible upon a showing of need and relevance. Doing that is not a legitimate interpretation of the attorney-client privilege but is a modification of its very essence without legislative authority.

Id.

Also, in the law review article, *The Frightening At-Issue Exception to the Attorney-Client Privilege,* 121 Penn St. L. Rev. 1 (Richmond, Douglas R.) (2016), the author also recognized that the *Hearn* test has lost favor with courts. *See, e.g.*, *Bacchi v. Mass. Mut. Life Ins. Co.*, 110 F. Supp. 3d 270, 275–76 (D. Mass. 2015) (rejecting the *Hearn* test in favor of the approach announced in *In re County of Erie,* 546 F.3d 222 (2d Cir. 2008)); *Ariz. Dream Act Coal. v. Brewer*, No. CV-12-02546-PHX-DGC, 2014 WL 171923, at *6 (D. Ariz. Jan. 15, 2014) (favoring the test announced in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994), over the *Hearn* test); *Elat v. Emandopngoubene*, No. PWG-11-2931, 2013 WL 1146205, at *4–6 (D. Md. Mar. 18, 2013) (rejecting the *Hearn* approach in favor of the test announced in *Rhone-Poulenc*); *Trustees of Elec. Workers*, 266 F.R.D. at 10–11 (rejecting the *Hearn* test based on criticisms expressed in *In re County of Erie* and *Rhone-Poulenc*); *Wardleigh v. Second Judicial Dist. Ct.*, 891 P.2d 1180, 1187 (Nev. 1995) (rejecting the *Hearn* test in favor of the *Rhone-Poulenc* test, which the court described as the "anticipatory waiver theory"); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 703 (S.D. 2011) (supplementing the *Hearn* test with a reliance element because "[a]pplication of the *Hearn* test alone provides insufficient guidance to be just and workable")); *see also Exec. Mgmt. Servs. v. Fifth Third Bank*, 309 F.R.D. 455, 462 (S.D. Ind. 2015) (explaining "a plaintiff's attorney-client privilege cannot be waived by reason of a defendant's 'own pleading of an affirmative defense.'") (quoting *Chase Manhattan Bank N.A. v. Drysdale Sec. Corp.*, 587 F. Supp. 57, 59 (S.D.N.Y. 1984); citing *Gardner v. Major Auto. Cos. Inc.*, No. 11 Civ. 1664 FB VMS, 2014 U.S. Dist. LEXIS 44877 at *7 (E.D.N.Y. Mar. 31, 2014) ("a party cannot effectively force its adversary to waive its privilege implicitly with a pleading that

brought the adversary's knowledge and good faith into issue")); *U.S. v. Ohio Edison Co.*, No. C2-99-118, 2002 U.S. Dist. LEXIS 12290, *16 (S.D. Ohio July 11, 2002) (explaining "[i]n the Court's view, [the *Hearn*] test which explores only whether attorney-client communications are relevant to an affirmative defense or counterclaim does not give due respect to the attorney-client privilege" and "merely pleading the defense of equitable estoppel in a patent case without affirmatively relying upon advice of counsel is not sufficient to imply waiver."); *Fischel & Kahn v. van Straaten Gallery*, 727 N.E.2d 240, 244 (Ill. 2000) (determining that affirmative defenses in the answer did not waive the attorney-client privilege with respect to subsequently retained counsel in connection with an attorney malpractice case because that would render the privilege illusory).

Here, South Carolina precedent, particularly as explained by Justice Pleicones, supports the same determination reached by the courts in the other jurisdictions cited above.

B. South Carolina Public Policy Does Not Support Adoption of the "At-Issue" Doctrine with Regard to Waiver of Attorney-Client Privilege.

While Respondent asserts that "public policy commands that the interest of the insurer yield to those of the insured," it is implicit that the interests of both parties must be reasonable. It is simply misguided to assert that a bad faith claim cannot be reasonably maintained without deeming the insurer to have waived its attorney-client privilege simply by contesting the claim.

Respondent, who is not even the insured but merely an assignee who has already settled with the policyholder, spends an inordinate portion of its brief continuing to quarrel over the scope and contours of the certified question. Indeed, in the face of such a significant public policy question as whether a litigant is deemed to have waived its

attorney-client privilege merely by denying liability in its answer (in other words, by not simply capitulating to the claims made against it), Respondent's default position is to simply defer to the discretion of the trial judge. That cannot be the correct approach.

Respondent also makes some fundamental observations about South Carolina law that it claims militate strongly in favor of its position. However, the scope of discovery in South Carolina is no broader than in other states, nor is the relationship between insured and insurer any more "special," "unique," or "quasi-fiduciary" here than elsewhere. None of Respondent's observations about either the nature of the insurer-insured relationship or the existence of a bad faith tort cause of action justify at-issue waiver. If they did, every state in the nation would presumably adopt the at-issue waiver, since they have all adopted identical or similar views of that relationship. However, that is manifestly – and appropriately – not the case.

Ultimately, there would be serious ramifications from the adoption of at-issue waiver: insurers will be less likely to seek the advice of counsel, diminishing their ability to defend against bad faith claims, and likely resulting in larger settlements and verdicts that will dramatically increase insured losses and unsettle the insurance marketplace. Therefore, South Carolina public policy clearly supports answering the certified question "No."

C. To the Extent This Court Adopts at the "At-Issue" Doctrine with Regard to Waiver of Attorney-Client Privilege, the Proponent of the Discovery Must Show That The Waiver Was Distinct and Unequivocal.

South Carolina law requires that a waiver of the attorney-client privilege be distinct and unequivocal. *See Davis*, 409 S.C. at 292, 762 S.E.2d at 549; *see also Hitopoulus*, 279 S.C. at 551, 309 S.E.2d at 749 ("Although a client may waive his

attorney-client privilege, the waiver must be distinct and unequivocal....Merely taking the witness stand does not constitute waiver of the privilege.") (citing *James*, 34 S.C. 49, 12 S.E. 657). There is no question that merely denying the allegations of a complaint does not demonstrate that an insurer has distinctly and unequivocally waived its right to protect the communications between it and its counsel.

In *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005), the South Carolina Court of Appeals determined that the acts of the client amounted to a distinct and unequivocal waiver of the privilege – but only under a completely inapposite fact pattern. The court determined that the client "opened the door" to the admission of the confidential communications because he made "assertions at trial that he was following the advice of counsel in administering the trust." *Floyd*, 365 S.C. at 92, 615 S.E.2d at 484. The court explained that it had previously considered the open-door doctrine in the context of criminal law, but explained that the doctrine also applied in the civil context. *Id.* at 92, 615 S.E.2d at 484 (citing *State v. Young*, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2005); *Martin v. Jennings*, 52 S.C. 371, 29 S.E. 807 (1898); *Central of Georgia Ry. v. Walker Truck Contractors*, 270 S.C. 533, 243 S.E.2d. 923 (1978); *Benton & Rhodes, Inc. v. Boden*, 310 S.C. 400, 426 S.E.2d 823 (Ct. App. 1993); *Brooks v. Kay*, 339 S.C. 479, 486, 530 S.E.2d 120, 124 (2000)). The court explained the reasoning for the doctrine as follows:

> The primary purpose for the rule is that of fairness and completeness of the information for making the decision. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder.

Floyd, 365 S.C. at 92, 615 S.E.2d at 484 (quoting Danny R. Collins, *South Carolina Evidence* § 2.9 (2d ed. 2000)).

In determining that the open-door doctrine applied, the court noted that the client "repeatedly professed that he relied on the advice of various attorneys in formulating his position regarding the expenses" of the trust. *Id.* at 92, 615 S.E.2d at 484. Further, the court noted that the client "made several general attestations that he was following the advice of counsel." *Id.*, 615 S.E.2d at 484. The court provided several examples of these attestations: "he averred his position was based on 'what counsel had told us,' and declared: 'that's the way we were so instructed by counsel.'" *Id.*, 615 S.E.2d at 484. The court determined these assertions opened the door to the admission of the letters. *Id.*, 615 S.E.2d at 484. There is no rational construction under which merely denying the allegations of a complaint constitutes a "distinct and unequivocal" waiver of the attorney-client privilege. Therefore, there is no question that an insurer's denial of the allegations that it has acted in bad faith does not place the advice of counsel "at issue" such that the attorney-client privilege has been waived. *See also Rhodes v. AIG Domestic Claims, Inc.*, Docket Number 05-1306-BLS2, 2006 Mass. Super. LEXIS 19, *1 (Mass. Super. Jan. 27, 2006) ("However, if the insurance company sought to present an advice of counsel defense, then it would need to waive its attorney-client privilege as to that advice, and the attorney could then be deposed regarding his advice.") (citations omitted).

The reasoning underpinning the open-door doctrine is similar to that forming the foundation of the in-issue waiver of the attorney-client privilege. The court in *Floyd* determined that the acts of the client clearly supported a determination that the client opened the door to the admission of the communications that would ordinarily be protected by the attorney-client privilege because the client placed the advice of counsel

at issue. The facts in *Floyd* clearly demonstrate that the waiver was distinct and unequivocal.

However, the acts at issue in this case certainly do not meet this standard. Merely denying the allegations of a complaint does not place the advice of counsel at issue. The insurer in a bad faith lawsuit is required to deny those allegations in answering the complaint or the allegations are deemed admitted. There is nothing inherent in an insurer's denial of allegations of bad faith, without more, that implicates the advice of counsel and places those communications at issue. Therefore, Amici respectfully request the Court answer the certified question "No."

II. TO THE EXTENT THE COURT REQUIRES RESPONDENT MAKE A PRIMA FACIE SHOWING OF BAD FAITH TO SUPPORT THE ALLEGED WAIVER, RESPONDENT FAILED TO MAKE SUCH A SHOWING.

In determining that the Respondent was entitled to discovery of materials protected by the attorney-client privilege, the District Court explained that it would not decide whether the plaintiff was required to present a prima facie showing of bad faith, but would focus on the factual arguments that were presented to the magistrate. *ContraVest Inc. v. Mt. Hawley Ins. Co.*, 273 F Supp.3d 607, 621 (D.S.C. 2017). The District Court then found the plaintiff presented a prima facie showing of bad faith. *ContraVest Inc.*, 273 F. Supp.3d at 621. This determination is not supported by South Carolina law.

Under South Carolina law, to make a claim for bad faith, the plaintiff is required to prove:

> (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied

> covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.

BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc., 399 S.C. 444, 453, 731 S.E.2d 902, 907 (2012) (citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396-397 (1992)). "Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim . . . An insurer acts in bad faith where there is no reasonable basis to support the insurer's decision." *Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Ass'n*, 347 S.C. 642, 557 S.E.2d 670 (2001). Generally, if there is a reasonable ground for contesting a claim, the denial of the claim does not constitute bad faith." *Hansen ex rel. Hansen v. United Services Auto. Ass'n,* 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002).

Even the ability to make a prima facie claim of bad faith should not serve as justification for what may fairly be characterized as the ultimate "fishing expedition" of piercing the attorney-client privilege simply because a party exercises the right to defend itself. Respondent goes even further, asserting that the insurer waives its right to assert the attorney-client privilege "From the moment Insurer received notice of the claim." This approach threatens to make a mockery of the attorney-client privilege in the context of insurance bad faith claims. As with other claims against insurers, plaintiffs can obtain meaningful discovery in bad faith claims without violating the attorney-client privilege.

The District Court adopted the Magistrate's Report and Recommendation determining that Respondent had made a prima facie showing of bad faith. However, a reading of the Report and Recommendation demonstrates that the Magistrate did not consider the elements for a claim of bad faith, and did not properly consider whether the evidence presented by Respondent supported a claim for bad faith at this stage of the

litigation. Selectively citing to documents and disregarding the insurer's evidence rebutting the allegations of bad faith cannot serve as a proper basis for waiving the attorney-client privilege, particularly given the important public policy considerations underlying the privilege. Therefore, this Court should answer the certified question in the negative.

CONCLUSION

For these reasons, Amici respectfully request that this court answer "No" to the Certified Question and determine that merely denying allegations of the Complaint do not constitute a distinct and unequivocal waiver or implied waiver such that the attorney-client privilege is not waived.

Respectfully submitted,

GALLIVAN WHITE & BOYD, P.A.

By: _____

Gray T. Culbreath (S.C. Bar No. 11907)
Janice Holmes (S.C. Bar No. 75038)
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803.779.1833
Facsimile: 803.779.1767

ATTORNEYS FOR AMICI CURIAE THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND THE SOUTH CAROLINA INSURANCE ASSOCIATION

RECEIVED

FEB 12 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2018-001170

In re Mt. Hawley Insurance Company .....Petitioner,

In Which Contravest, Inc., Contravest Construction Company, and Plantation Pointe Horizontal Property Regime, as assignees, are . .....Respondents.

CERTIFICATION OF COUNSEL

The undersigned certifies that the Brief of Amici Curiae The American Property Casualty Insurance Association and The South Carolina Insurance Association in Support of Petitioner Mt. Hawley Insurance Company complies with Rule 211, (b), SCACR.

Respectfully submitted,

GALLIVAN WHITE & BOYD, P.A.

By: _____

Gray T. Culbreath (S.C. Bar No. 11907)
Janice Holmes (S.C. Bar No. 75038)
Post Office Box 7368
Columbia, South Carolina 29202
Telephone: 803.779.1833
Facsimile: 803.779.1767

ATTORNEYS FOR AMICI CURIAE THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND THE SOUTH CAROLINA INSURANCE ASSOCIATION