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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

**MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF
BY THE SOUTH CAROLINA ASSOCIATION FOR JUSTICE**

Pursuant to Rule 213, SCACR, the South Carolina Association of Justice (“SCAJ”) hereby moves this Honorable Court for leave to file an *amicus curiae* brief on the issues presented by the question certified to this Court by the Fourth Circuit Court of Appeals.

SCAJ is a professional organization comprised of many South Carolina lawyers who regularly represent individuals in personal injury, wrongful death, and other claims that commonly involve questions of insurance coverage. Frequently, SCAJ member attorneys represent insureds in coverage denial disputes that present the question of whether an insurer’s decision-making process was consistent with its duty of good faith and fair dealing. SCAJ is therefore interested in this matter because the Court’s answer to the certified question could have a dramatic effect on the rights, remedies, and damages available to many of the parties its members routinely and currently represent in insurance bad faith litigation; in particular, if it were to create an absolute bar to discovery of some otherwise relevant communications, the

Court's decision could drastically affect the practical ability of aggrieved insureds to litigate bad faith actions. Consequently, the development, scope, and refinement of the law as it relates to their insurance coverage and bad faith clients are of keen interest to members of SCAJ.

The Court's determination of the certified question will not only affect SCAJ members' clients in insurance coverage and bad faith litigation but will also impact the ability of SCAJ members to represent their clients in personal injury, wrongful death, and other tort actions. This is because first-party and third-party insurers' decisions related to such litigation are subject to their compliance with the duty of good faith and fair dealing and, more importantly, their insureds must have the ability to evaluate the validity of such decisions through the lens of both this long-standing duty and full factual disclosure. Resolution of the certified question could affect not only the present case and future litigation, but also pending litigation in which settlement and strategy decisions have already been implemented based upon the current state of the law.

In South Carolina, attorney-client communications are not absolutely privileged; rather, in any case where the privilege is asserted, its proponent has the burden not only of establishing the privilege but also of proving that it has not been waived. South Carolina courts have long recognized the value of having trial courts undertake *in camera* reviews of communications that are alleged to be subject to the attorney-client privilege. Similarly, this Court has often – including very recently – acknowledged its confidence in the ability of this State's trial courts to resolve disputes regarding the applicability of the attorney-client privilege.

South Carolina law also mandates that insurers' decisions be made in good faith and with their insureds' best interests in mind. Moreover, when an insurer's decision is challenged as violating these duties, its conduct is to be judged by the evidence before it at the time it made its

decision. Full and fair discovery should permit insureds to learn what that evidence was.

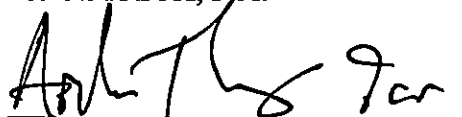
But, in the matter at hand, the Petitioner insurer (along with its allies, The American Property Casualty Insurance Association and The South Carolina Insurance Association) ask this Court to adopt a rule that will allow them to make decisions within a veil of secrecy, without the threat of their insureds discovering the extent of their thought processes, and without even a concern of having judges review *in camera* evidence relevant to their decision-making.

An *amicus* brief by SCAJ will provide the Court with the viewpoint of practitioners who regularly deal with litigation directly involving or otherwise influenced by the duty of good faith and fair dealing imposed upon insurers in this State, as well as the inevitable practical ramifications an answer in favor of the Petitioner and the insurance industry would have on such litigation and the corresponding rights of insured litigants. These are matters we respectfully submit the Court should consider and weigh in deciding this case. Consequently, we ask the Court to consider SCAJ's *amicus* brief, a copy of which it has conditionally filed with this motion.

Respectfully submitted,

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On behalf of Amici Curiae
The South Carolina Association for Justice

Charleston, South Carolina

April 12, 2019

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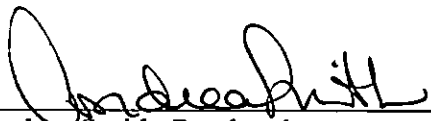
The undersigned, Andrea Smith, hereby avers that she is a Paralegal with TWENGE + TWOMBLEY LAW FIRM, Attorneys for Amici Curiae, the South Carolina Association for Justice, and that on the 12th day of April 2019 a true and accurate copy of the attached Motion for Leave to File an Amicus Curiae Brief by the South Carolina Association for Justice was placed in an envelope with first class postage thereon prepaid through the United States Postal Service and mailed to the following:

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The Honorable Daniel E. Shearouse
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