

No. _____

**In The
Supreme Court of the United States**

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DEBORAH MEEK HICKERSON,
Petitioner,

v.

YAMAHA MOTOR CORPORATION U.S.A.;
YAMAHA MOTOR CO LTD.,
Respondents.

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**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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PETITION FOR WRIT OF CERTIORARI

————— ◆ —————

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QUESTION PRESENTED

- I. THE COURT SHOULD GRANT THIS PETITION TO CLARIFY THE PROPER APPLICATION OF THE *ERIE* DOCTRINE WHEN THE FEDERAL COURTS SIT IN DIVERSITY JURISDICTION TO CONSIDER STATE LAW CLAIMS.

PARTIES TO THE PROCEEDING

The captioned parties, Deborah Meek Hickerson, Yamaha Motor Corporation, U.S.A., and Yamaha Motor Co. Ltd., are the only parties to this proceeding.

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OPINION BELOW

The United States Court of Appeals for the Fourth Circuit rendered a published opinion in this matter. *Hickerson v. Yamaha Motor Corp., U.S.A.*, 882 F.3d 476 (4th Cir. 2018). The opinion in *Hickerson* is attached in the Appendix to this petition. This opinion sets out both the decision of the district court (App. p.20a; 53a; 2a) and the decision of the Court of Appeals (App. p.1a).

JURISDICTION

The Fourth Circuit filed its opinion in this matter on February 20, 2018. This Court may review the Fourth Circuit's decision pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

No federal statutes are directly at issue in this matter. It arises from a case brought in federal court pursuant to diversity jurisdiction. Therefore, the Court is confronted with a state law issue to be considered pursuant to the “*Erie* doctrine” which governs a federal court's application of state law. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

STATEMENT

Legal Framework

The South Carolina Defective Products Act codifies § 402A of the Restatement (Second) of Torts.

At the same time the Restatement was codified, the South Carolina legislature adopted the comments to that Restatement as its expression of legislative intent. At the heart of this case is comment j to § 402A (referred to throughout the petition as “comment j”), specifically this language: “Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.” *Restatement (Second) of Torts § 402A, cmt. j* (Am. Law Inst. 1965).

The district court recognized there was disagreement as to whether the sentence above should be read narrowly on its face or in the context of the entire comment and surrounding comments. The district court granted summary judgment to Yamaha, ruling comment j shielded a manufacturer from liability for a product that contained an adequate warning. The Fourth Circuit Court of Appeals affirmed. *Hickerson*, 882 F.3d at 484.

When a federal court sits in diversity jurisdiction, it must apply the law of the state in which the cause of action arose. South Carolina law controlled the effect of comment j on a products liability case. The Fourth Circuit recognized the Supreme Court of South Carolina has not read comment j to shield a manufacturer from liability when a warning is present. *Id.* But like the district court, it predicted the South Carolina Supreme Court, confronted with the same issue, would ultimately decide comment j allowed a warning label

to absolve a product's manufacturer from any harm caused by a defectively designed product.

This decision was error. South Carolina intermediate courts have not created precedent that would allow for such a wholesale discounting of manufacturers' liability for defective products. The decision was contrary to both the meaning of the pertinent South Carolina statute, according to conventional principles of statutory construction, and contrary to decided opinions of the South Carolina Supreme Court. It was also contrary to widely accepted principles of products liability law across the nation.

More importantly, the decision has wide-ranging national consequences and presents the type of important question that this Court should resolve to avoid inconsistent resolution of an issue that often ends up in the federal courts. The federal district courts must make a detailed inquiry into the doctrine a state's highest court would apply to decide such an issue.

Facts and Procedural History

In June of 2012, Petitioner Hickerson was a passenger on a Yamaha Waverunner on Lake Hartwell, in South Carolina. The driver of the Waverunner suddenly accelerated, causing Hickerson to fall off the craft and into the path of its jet drive. The highly pressurized jet of water caused severe injury to Hickerson. She sued Yamaha.

The case was brought in the District of South Carolina based on diversity jurisdiction. Hickerson produced an expert during discovery that intended to give opinions on both the inadequacy of the Waverunner's warnings and various ways in which its design was defective for failing to incorporate simple and inexpensive design improvements that it knew would prevent many serious injuries. The expert was qualified by the district court.

In response to a motion in limine by Yamaha, the district court excluded the expert's opinions related to warnings, finding them unreliable. The district court later excluded all opinions related to inadequate warnings. As a result, it found no genuine dispute as to any material fact and granted summary judgment for Yamaha on claims related to the warnings.

The district court ruled South Carolina follows comment j to § 402A of the Restatement (Second) of Torts and found that comment to mean an adequate warning prohibits a claim that the product contained a design defect. Because the district court found no proof of an inadequate warning, it held any design defect claims were barred. Though the thrust of the case was that the jet ski was defectively designed, the court's ruling that the warnings were adequate (not "defective") ultimately resolved the entire case in favor of Yamaha.

As to this issue, on appeal the Fourth Circuit agreed with the district court. The Fourth Circuit has essentially set precedent to unreasonably restrict product liability claims, contrary to the

logical reading of comment j in context with the rest of the Restatement.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THIS PETITION TO CLARIFY THE PROPER APPLICATION OF THE *ERIE* DOCTRINE WHEN THE FEDERAL COURTS SIT IN DIVERSITY JURISDICTION TO CONSIDER STATE LAW CLAIMS.

State Law Claims in Federal Courts

Federal district courts often sit in judgment of state law. Under diversity jurisdiction, a state law claim is decided by a district court. In the products liability arena, this is a very common occurrence. Out of state companies sued by in-state residents commonly remove those actions to federal court. Many products liability cases will involve interpretation of both the Second and Third Restatements of Torts. While state law may govern that interpretation, the lack of uniform guidance creates a pressing federal concern this Court should resolve.

Generally, the Restatements create a relatively uniform system of law that results in some level of consistency across the nation. However, that consistency is at risk without a similarly consistent interpretation of the law. While this Court does not become involved in substantively interpreting state law, it should step in to promote a uniform procedure

in interpreting state law issues in the federal courts. Such an interpretation requires the lower federal courts to properly apply the *Erie* doctrine to matters they decide.

Specifically, the district court in this case ruled on an issue to which the highest court in South Carolina has not spoken. The South Carolina Court of Appeals, an intermediate court, has ruled in a way that seemed at first glance consistent with the decision of the district court, although there is at least one other Court of Appeals decision that is inconsistent. The decisions of other federal district courts in South Carolina, and various decisions of the South Carolina Supreme Court on principles of modern products liability law and accepted principles of statutory construction dictated a very different result in this case.

Application of the *Erie* doctrine

Sitting in diversity jurisdiction, federal courts apply state substantive law. *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 (1996). While that is a straightforward legal theory, its application is often far less straightforward, especially when the highest court in a state has not spoken on an issue.

This Court has recognized the difference between an opinion from the highest court of a state and the state's lower courts. When the highest court has not spoken, an intermediate appellate court is a source of data, but is not controlling. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). When there is the possibility the state's highest court

would decide an issue differently, the federal court should disregard the intermediate court's opinion. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 238 (1940).

As discussed below, the South Carolina Supreme Court has had a direct opportunity to decide this issue consistent with the district court. It declined. In fact, its holding was a clear indication it disagreed with the underlying premise of the district court's ruling in this case.

A proper application of the *Erie* doctrine in federal courts requires a district court to carefully consider available state authority, including disregarding intermediate appellate opinions when the highest court of a state has declined to adopt those opinions when given the opportunity. This is especially true when a state's recent supreme court decisions suggest that it would rule the other way.

South Carolina products liability law

South Carolina has adopted the Restatement (Second) of Torts as the codification of its products liability law. There are three defects a plaintiff can allege in a products liability suit: (1) a manufacturing defect; (2) a warning defect; and (3) a design defect. *Watson v. Ford Motor Co.*, 699 S.E.2d 169, 174 (S.C. 2010). The South Carolina Supreme Court describes these three separate, independent theories of recovery:

“When a manufacturing defect claim is made, a plaintiff alleges that a

particular product was defectively manufactured. When a warning defect claim is made, a plaintiff alleges that he was not adequately warned of dangers inherent to a product. When a design defect claim is made, a plaintiff alleges that the product at issue was defectively designed, thus causing an entire line of products to be unreasonably dangerous.”

Id. The South Carolina Supreme Court considers these three separate theories, as opposed to three interconnected parts of one theory. This distinction is critical.

Comment j and South Carolina intermediate court’s interpretation

As discussed earlier, comment j to § 402A was adopted by the South Carolina legislature as part of the legislative intent of its products liability law. *S.C. Code Ann.* § 15-73-30. The comment reads in full:

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however,

the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product

bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

It is the final line which sets up this case: *Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.*

The Petitioner argues this comment does not warrant the result in this case, as an adequate warning does not overcome a design defect. The two theories are independent from each other. The district court and the Fourth Circuit held that comment j shields a manufacturer from liability for products' defects if the product contains an adequate warning. *Hickerson*, 882 F.3d at 484.

Recognizing the South Carolina Supreme Court has not spoken on this issue, the Fourth Circuit looked to opinions from the South Carolina Court of Appeals as authority on the matter.

In 2001, the South Carolina Court of Appeals held that even if a jury found a design defect, there would be no liability if there was an adequate warning. *Curcio v. Caterpillar*, 543 S.E.2d 264, 269-70 (S.C. 2001). The Court of Appeals found an adequate warning ultimately made a product safe, defeating any claim of design defect. *Id.* at 272. This opinion operated to intertwine the two theories.

Success on the warning claim was held to make a defect claim impossible.

The South Carolina Supreme Court held the adequacy of a warning was generally a jury question. *Curcio v. Caterpillar*, 585 S.E.2d 272, 274 (S.C. 2003). That opinion did not speak to whether such a warning would defeat a design defect claim. By leaving the matter for a jury to decide, the Supreme Court recognized the two claims were not legally dependent on one another. The opinion did not result in a warning immunizing a manufacturer from a design defect action.

Notably, the intermediate opinions relied upon by the district court and the Fourth Circuit predate the South Carolina Supreme Court's opinion in the *Curcio* case. The district court and the Fourth Circuit incorrectly predicted the position of the highest court in South Carolina, as it is axiomatic the South Carolina Supreme Court would have ruled differently.

The South Carolina Supreme Court recognized the verdict was set aside on both the warning and design theories. *Id.* at 273. Because the verdict was general, the Court held it only needed to find evidence to support either the inadequate warning theory or the design defect theory to reinstate the verdict. *Id.* The South Carolina Supreme Court in *Curcio* properly treated design and warning defect claims as entirely independent.

This is contrary to the erroneous idea that a warning automatically negates a design defect

theory. If an adequate warning automatically shields a manufacturer from liability, there can be no design defect cause of action when an adequate warning is present. This was the finding of the district court and the Fourth Circuit.

If the South Carolina Supreme Court agreed, the holding in *Curcio* would be entirely different. Evidence of a design defect could not support the verdict without evidence of an inadequate warning. Under the Fourth Circuit's holding in this case, the two would need to be considered together. The South Carolina Supreme Court considered them independently, which is a clear indication the interpretation of comment j by the district court and the Fourth Circuit in this case is at odds with the interpretation the South Carolina Supreme Court would adopt if squarely presented with the issue.

In fact, *Curcio* seems to have presented just that issue. To give comment j the immense power the Fourth Circuit did in this case, one must conceptually connect an inadequate warning cause of action with a design defect cause of action. The South Carolina Supreme Court has expressly declined to do so.

What would the South Carolina Supreme Court do?

The district court and the Fourth Circuit plainly held the South Carolina Supreme Court would follow the reasoning of the South Carolina Court of Appeals, interpreting comment j to allow an adequate warning to completely defeat a design

defect cause of action. It does not appear that is how the South Carolina Supreme Court would rule on this question.

As discussed earlier, to interpret comment j as completely shielding a manufacturer from a design defect claim when an adequate warning is present requires the courts to find the warning and design defect theories of products liability are intertwined. This is at odds with the well-settled theory of three independent bases for products liability. It is also at odds with the opinion from the South Carolina Supreme Court in which the Court could have ruled in such a way.

The *Curcio* case was a clear opportunity for the South Carolina Supreme Court to affirm the reasoning of the Court of Appeals opinions interpreting comment j as a way to avoid design defect liability with an adequate warning. In declining to do so, the Supreme Court's failure to speak is as loud as it needs to be. The Court would not link the inadequate warning cause of action with the design defect cause of action to make one reliant on the other.

In addition to this indication by opinion from the Supreme Court, the statutory construction scheme in South Carolina further supports Petitioner's position. That scheme centers around common concepts that rule the reading of a statute. The cardinal rule of statutory construction is to "ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000). Even plain and unambiguous language

must be read to honor legislative intent. *Id.* If literal reading would lead to an absurd result, the courts must reject that meaning. *Baggerly v. CSX Transp., Inc.*, 635 S.E.2d 97, 103 (S.C. 2006).

Sections of the same general statutory law must be read together and interpreted to give each one effect. *TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 503 S.E.2d 471, 476 (S.C. 1998). Judicial interpretation of statutes must keep in mind the legislature is not assumed to intend futile acts; its statutes must accomplish something. *Id.*

Scholarly inquiries into the history and meaning of comment *j* conclude that it applies only to toxic substances like food and drugs and does not apply to durable products like jet skis. See David G. Owen, *The Puzzle of Comment j*, 55 Hastings L.J. 1377 (2004); David G. Owen and Mary J. Davis, Owen & Davis on Products Liability § 6:3, at 512–30 (Thomson Reuters 4th ed. 2014); David G. Owen, Products Liability Law § 6.2, at 341–53 (West hornbook 3d ed. 2015). See also David G. Owen and Mary J. Davis, Products Liability and Safety: Cases and Materials, ch. 9, at 337–38 n.4 (Foundation Press 7th ed. 2015); David G. Owen, *Warnings Don't Trump Design: The Rise and Fall of § 402A Comment j*, 153 Products Liability Advisory 1 (Nov. 2001).

This Court has long recognized no statutory construction should lead to a futile result or a result at odds with the legislative policy. *Shapiro v. United States*, 335 U.S. 1, 31 (1948). The South Carolina legislature intended three independent bases for

product liability, which is in line with all states that base their product liability statutes on the Restatements. To interpret comment j as the district court and Fourth Circuit did creates a result at odds with the rest of the South Carolina Defective Products Act and defeats the legislative intent and purpose of the Act.

CONCLUSION

This case presents an important question for this Court to consider. Complex, high-stakes litigation often ends up in federal court through diversity jurisdiction. District courts are faced with deciding state law questions that have long-term, significant effects on state law.

Failing to recognize the direction of the highest court of a state on a specific issue leaves the federal court deciding important state law issues prematurely or incorrectly. This should be avoided at all costs. This Court should direct federal courts to exercise careful consideration when ruling on unsettled areas of state law, especially when the highest court of a state has given no indication it would rule the way the district court ultimately ruled.

Petitioner respectfully requests this Court grant the writ of certiorari and remand this case for proper application of the *Erie* doctrine to the federal courts' interpretation of South Carolina products liability law.

Respectfully submitted,

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