

No. 17-1589

IN THE
Supreme Court of the United States

DEBORAH MEEK HICKERSON,
Petitioner,

v.

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

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the *Erie* Doctrine requires a federal court sitting in diversity to ignore consistent intermediate state appellate court decisions and express language in a state statute, in favor of a policy-based approach, where the state's highest court has not done so.

CORPORATE DISCLOSURE STATEMENT

Respondent, Yamaha Motor Co., Ltd, does not have any parent corporations. Yamaha Corporation owns 12.1% of the stock of Yamaha Motor Co., Ltd. Respondent, Yamaha Motor Corporation, U.S.A., is wholly owned by Yamaha Motor Co., Ltd.

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

This case involves the South Carolina Defective Products Act (the “Act”). The Act provides the following as to liability due to product defect:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if

(a) The seller is engaged in the business of selling such a product, and

(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) shall apply although

(a) The seller has exercised all possible care in the preparation and sale of his product, and

(b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

S.C. Code § 15-73-10. Particularly at issue in this case is the section of that Act, which **explicitly** incorporates the comments to the Restatement of Torts (Second) § 402A:

“Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.”

S.C. Code § 15-73-30. Comment j to the Restatement of Torts (Second) § 402A states:

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.

Restatement (Second) of Torts § 402A, cmt. j (1965).

INTRODUCTION

This products liability case involves an issue of South Carolina state law: the application of comment j to the Restatement (Second) of Torts § 402A, which was adopted by the state of South Carolina in its “Defective Product Act,” to Petitioner’s state law, design defect claims. There is no “important federal question” regarding South Carolina’s use of comment j. There is no split among United States courts of appeal regarding South Carolina’s reliance on comment j. Petitioner brought this case in federal district court, asserting diversity jurisdiction, and the federal district court and the Fourth Circuit applied South Carolina law consistently with the decisions of multiple South Carolina Court of Appeals decisions (and federal district court decisions on the same issue).

After deciding to bring her claims in federal district court and losing,¹ she appealed to the United States Court of Appeals for the Fourth Circuit, arguing that the South Carolina Court of Appeals decisions, on

¹ As discussed, *infra*, the district court granted summary judgment in favor of Yamaha Motor Corporation, U.S.A. and Yamaha Motor Co., Ltd (collectively “Yamaha”) and denied Petitioner’s motion for reconsideration.

which the district court relied, were “wrong-headed.” After the Fourth Circuit issued a unanimous, published opinion affirming the district court’s judgment, she now (with her third set of lawyers) complains that these decisions were wrong, because they did not ignore South Carolina precedent and adopt her policy-based arguments for the abandonment of comment j. Accordingly, the district court and each of the judges from Fourth Circuit panel must have misunderstood the *Erie* doctrine. The opinions below demonstrate otherwise. The petition to this Court asserts that “this Court should direct federal courts to exercise careful consideration when ruling on unsettled areas of state law,” as if those courts had not already done so. Petitioner has fallen far short of demonstrating a “compelling reason” for review of the Fourth Circuit’s application of South Carolina law. The petition should be denied.

STATEMENT OF THE CASE

I. PETITIONER DID NOT READ OR FOLLOW WARNINGS

This case arises from Petitioner’s fall from the back of a 2011 Yamaha VXS WaveRunner personal watercraft (“PWC”) on July 4th weekend, 2012, on Lake Hartwell, South Carolina. At the time of her fall, she was riding as the rear-most, fourth passenger on a three person craft, with a ten-year-old driving, and after she had consumed alcohol. Pet. App. at 4a. The PWC had multiple on-craft warnings, repeated in the Owner’s Manual, instructing riders to wear protective clothing to avoid her exact injuries. The warning on the PWC’s front glove box stated:

WEAR PROTECTIVE CLOTHING. Severe internal injuries can occur if water is forced

into body cavities as a result of falling into water or being near jet thrust nozzle. Normal swimwear does not adequately protect against forceful water entry into rectum or vagina. All riders must wear a wet suit bottom or clothing that provides equivalent protection (See Owner's Manual).

Pet. App. 3a-4a (setting forth warnings). That warning also included a graphic depicting a rider in a PFD and wet suit bottom. *Id.* Another warning, at the rear boarding platform, also made clear that “[s]evere internal injuries can occur” and passengers must “[w]ear a wetsuit bottom or clothing that provides equivalent protection.” *Id.* at 4a. The PWC warnings further stated that only three people may ride the craft at a time, the operator should be at least sixteen years of age, and that users should not ride after alcohol consumption. *Id.*

Petitioner did not read, much less follow these warnings. Wearing a bikini (with no protective clothing or wet suit bottom), riding as the fourth passenger, after consuming alcohol, Petitioner fell from the back of the PWC and sustained the warned against internal or “orifice injury,” when the underage driver took off too fast.

II. PETITIONER BROUGHT STATE LAW PRODUCTS CLAIMS IN FEDERAL COURT

Based on these facts, Petitioner brought suit in the United States District Court for the District of South Carolina, based on diversity jurisdiction, asserting South Carolina state law claims for warning and design defect against Yamaha. She designated one expert in support of her claims, Dr. Anand Kasbekar,

a mechanical engineer. Kasbekar presented opinions regarding changes in the warnings, as well as changes in the design of the seat. Kasbekar said that the changes in the warnings and seat design were not stand-alone remedies, explaining that they all “go together.” As to the warnings, the focus was on the location rather than the wording; Kasbekar opined the warnings were inadequate, because they were in the wrong place. Kasbekar wanted yet a third warning on the PWC seat.

A. The District Court Opinions Analyzed and Applied South Carolina Precedent, and Judgement was Entered in Yamaha’s Favor

Yamaha moved to exclude Kasbekar’s opinions under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the district court held that Kasbekar’s opinions as to his alternative warning on the PWC’s seat were unreliable and, thus, inadmissible. *Hickerson v. Yamaha Motor Corp.*, 2016 WL 4123865 (D.S.C. July 29, 2016). Subsequently, the district court also found that Kasbekar’s opinion on the purported inadequacy of Yamaha’s warnings was also unreliable and inadmissible. *Hickerson v. Yamaha Motor Corp.*, 2016 WL 4367141 (D.S.C. Aug. 16, 2016); *see also* Pet. App. 53a-72a. In that opinion, the district court went on to hold that Yamaha had presented evidence that the “PWC warnings consist of uniform labels that major manufacturers of the PWC industry developed and that the United States Coast Guard approved” and that the **“plain language of the multiple warnings . . . reasonably advise anyone who rides the PWC, including a passenger, of the very types of dangers Plaintiff**

endured and moreover provides specific recommendations to prevent such injuries.” *Id.* at *4 (emphasis added). The district court, therefore, granted summary judgment to Yamaha on Petitioner’s state law, warning defect claim. *Id.*

As to the Petitioner’s design defect claim (regarding the seat), the district court reviewed South Carolina statutes, longstanding case law from the state’s intermediate appellate court, the South Carolina Court of Appeals, as well as federal district courts interpreting the same, and held that the Petitioner’s design defect claim also failed given that South Carolina authorities followed comment j to the Restatement (Second) Torts § 402A. *See id.* at *5 (“South Carolina continues to follow comment j to Section 402A of the Restatement (Second) of Torts (1965) for the conclusion that a product ‘is not unreasonably dangerous if accompanied by adequate warnings that, if followed, make the product safe for use.’”) (quoting *Curcio v. Caterpillar*, 543 S.E.2d 264, 268-69 (S.C. Ct. App. 2001)).² Before the district court, Petitioner **did not argue that South Carolina did not follow comment j**, but instead argued that **a product could be made safe by an adequate warning**, only if a manufacturer conceded the product was “dangerous.” *Id.* at *6.

Finding that South Carolina still followed comment j, and that Yamaha’s warnings were adequate as a matter of law, preventing the product from being “defective” and “unreasonably dangerous,” the district court expressly considered the fact that not all states continued to follow the Restatement (Second) Torts § 402A and its comment j, given the subsequent

² Petitioner’s expert, Kasbekar, agreed that use of the wet suit bottom would have made the product safe for use.

publication of the Restatement Third: Products Liability (1998). *See id.* at *5, n.3 (citing case law from other jurisdictions and scholarly articles that questioned whether an adequate warning should still shield a manufacturer from design defect liability). However, the court explained that “sitting in diversity and therefore **guided by South Carolina law**,” it was “**compelled**” to grant summary judgment in favor of Yamaha. *Id.* at *6 (emphasis added).

Dissatisfied with the district court’s decision, Petitioner filed a motion to alter and amend the judgment, under Rule 59. *Hickerson v. Yamaha Motor Corp.*, 2016 WL 7324684 (D.S.C. Dec. 16, 2016); *see also* Pet. App. 20a-52a. The court denied Petitioner’s motion, finding that Petitioner had made the same arguments in opposition to Yamaha’s motion for summary judgment, and that the court’s interpretation of South Carolina appellate decisions and the Restatement remained correct. *Id.* at *12.

B. The Fourth Circuit Affirmed, Holding that it Would Not “Ignore the Uniform Decisions of the South Carolina Court of Appeals”

Hiring new counsel for the appeal (Professor David G. Owen, University of South Carolina Law School), Plaintiff changed tactics. On appeal, Petitioner argued for the **first time** that the South Carolina Supreme Court would not follow the decades of case law from the South Carolina Court of Appeals, essentially making policy arguments.³ These arguments included

³ Making these arguments, Petitioner cited articles and texts by her own counsel, Professor Owen, no less than thirteen times, including David G. Owen, *Warnings Don’t Trump Design: The*

that “it should be self-evident that the South Carolina General Assembly enacted the 402A statute to *assist* persons injured by defective products,” citing no authority in support. Brief of Appellant at 11, *Hickerson v. Yamaha Motor Corp.*, 882 F.3d 476 (4th Cir. 2018), Doc. No. 26 (emphasis in original). *See also id.* at 14 (Petitioner arguing “design defect liability is vitally important to society”).

Petitioner further argued that the district court’s judgment was “mistaken,” because it relied on “a line of decisions of the South Carolina Court of Appeals” that “misinterpreted” comment j. *Id.* at 12-13 (discussing appellate decisions and federal district court opinions interpreting comment j consistently with the district court, here, and accusing those courts of “**rotely**” following a “**wrong-headed**” interpretation of comment j) (emphasis added). Petitioner recognized that the South Carolina Supreme Court had never “expressly” addressed comment j (despite many opportunities to do so and years of case law on the topic by the South Carolina Court of Appeals), but argued that the state’s high court would reject that longstanding case law. *Id.* at 13.

Petitioner further argued that the South Carolina Court of Appeals case law continuing to apply the plain language of comment j was “**wrong-headed**,” because 402A’s comment j really should have been incorporated in comment k (entitled “Unavoidably unsafe products”). *Id.* at 16-19 (emphasis added). In short, Petitioner’s (newly crafted) argument to the Fourth Circuit was that while the South Carolina Court of Appeals had applied comment j consistently

Rise and Fall of § 402A Comment j, 153 PRODUCTS LIABILITY ADVISORY 1 (Nov. 2001).

with the decision of the district court, those appellate decisions were wrong (“wrong-headed”), and the court should approach the issue as one of first impression.

Petitioner’s attempt to persuade the Fourth Circuit to hold that the South Carolina Supreme Court would abandon appellate precedent regarding comment j in favor of the Restatement (Third) Torts: Products Liability failed. Rather, the Fourth Circuit explained that “the South Carolina Court of Appeals has **consistently** applied [c]omment j in similar products liability cases.” *Hickerson v. Yamaha Motor Corp., U.S.A.*, 882 F.3d 476, 484 (4th Cir. 2018) (emphasis added); *see also* Pet. App. 1a-18a. Furthermore, the court noted that “[w]hen the highest court of a state has not indicated how it would decide an issue, **we follow the law of intermediate state courts . . .** absent persuasive data that the highest court would rule differently. *Id.* (citing *United States v. Little*, 52 F.3d 495, 498 (4th Cir. 1995)) (emphasis added). Regarding Hickerson’s allegations that the Fourth Circuit should not follow the “wrong-headed” decisions of the South Carolina Court of Appeals, the Fourth Circuit held: (1) there was no “facial ambiguity” to comment j, (2) there were “uniform decisions of the South Carolina Court of Appeals,” and (3) the court would not ignore those decisions on the basis of “her counsel’s academic theories and policy arguments.” *Id.* at 485. Accordingly, finding Petitioner presented no “persuasive data,” the court held it would not “overrule the South Carolina Court of Appeals on a question of South Carolina law.” *Id.* *See also id.* (explaining that “[f]ederal courts should not create or expand a state’s public policy”) (citing *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783 (4th Cir. 1995) (internal quotation marks omitted).

REASONS FOR DENYING THE PETITION**I. THERE IS NO FEDERAL CONCERN REGARDING A PURPORTED NEED FOR “NATIONAL UNIFORMITY” IN INTERPRETING THE RESTATEMENTS OF THE LAW**

Petitioner is not entitled to review on a writ of certiorari; it is “not a matter of right, but of judicial discretion.” Sup. Ct. R. 10. Moreover, the Supreme Court Rules make clear that the decision to grant review of a petition is not made lightly: “A petition for a writ of certiorari will be granted only for **compelling reasons**.” *Id.* (emphasis added). Among such “compelling reasons” are conflicts between United States courts of appeal on an “**important matter**,” conflicts between courts on “**an important federal question**,” state court or United States courts of appeal decisions that are inconsistent with decisions of this Court on “**an important question of federal law**,” or a **departure from the “accepted and usual course of judicial proceedings**,” requiring an exercise of the Court’s supervisory power. *Id.* None of these are present here.

Trying to mold South Carolina’s continued reliance on the Restatement (Second) Torts § 402A, comment j, into an issue fit for this Court’s review, Petitioner argues that a “lack of uniform guidance” regarding the interpretation of the Second and Third Restatements of Torts creates a “pressing federal concern.” Pet. Br. at 5. *See also id.* (asserting that “the Restatements create a relatively uniform system of law that results in some level of consistency across the nation” but that such “consistency is at risk”); *id.* at 3 (arguing that the Fourth Circuit’s “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 federal courts”).

The federal courts in this case correctly applied the Restatement in line with South Carolina precedent, and there is no danger of impermissible inconsistency across federal courts, requiring this Court’s intervention. As explained by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court abandoned the doctrine of *Swift v. Tyson*, which required a federal court to apply “general law” in absence of a state statute on point, because “[i]n attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.” *Id.* at 74 (emphasis added). States are entitled to “independence in their legislative and independence in their judicial departments,” thus, the Court held that “[s]upervision over either the legislative or judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States.” *Id.* at 78-79.

Granting review on the issue of South Carolina appellate courts’ reliance on the Second Restatement and comment j, would be an impermissible supervisory exercise, here. First, there is no constitutional authority for the Court’s supervision of the states’ use of the Restatement of Torts to interpret questions of state law. Petitioner has no legal interest in “national consistency” regarding the interpretation of the Restatements on issues of state law across federal courts. Moreover, where there are **twenty years** of South Carolina Court of Appeals precedent upholding the use of the Restatement’s comment j, a federal court holding that the state courts’ interpretation of

comment j is “wrong-headed,” does nothing more than **create inconsistency** in the state’s law and impede the judicial independence to which South Carolina courts are entitled.

In sum, the petition fails to present an issue appropriate for this Court’s consideration, and the Court should deny the petition on that ground.

II. THERE IS NO QUESTION THAT THE FOURTH CIRCUIT PROPERLY APPLIED THE *ERIE* DOCTRINE

Indulging Petitioner in her belief that there is a federal question created by the federal courts’ application of South Carolina precedent in this state law products liability case, the opinions of the Fourth Circuit and the federal district court demonstrate that the *Erie* doctrine was properly applied. As explained in *Erie*, when a plaintiff invokes jurisdiction on the ground of diversity, “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.” 304 U.S. at 78.

Petitioner argues, based upon *West v. American Telegraph & Telephone Co.*, 311 U.S. 223 (1940), that where the highest state court has not decided an issue, and there is a mere “possibility” that the highest court would rule differently, a “federal court should disregard the intermediate court’s opinion.” Pet. Br. at 6-7. *West* holds nothing of the sort. Instead, *West* holds that the decision of an intermediate appellate court “is **not to be disregarded** by a federal court unless it is **convinced by other persuasive data** that the

highest court of the state would decide otherwise.” *West*, 311 U.S. at 237 (emphasis added).⁴

Indeed, the bar for departing from the decision of an intermediate appellate court is high. “Persuasive data” warranting a departure from an intermediate appeals court decision **does not** include a federal court’s belief that “the intermediate court’s decision was wrong, bad policy, or contrary to the majority rule in other jurisdictions.” *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1004 (4th Cir. 1998) (internal citation omitted). Instead, “only if the decision of a state’s intermediate court **cannot be reconciled** with state statutes, or decisions of the state’s highest court, or both, may a federal court sitting in diversity refuse to follow it.” *Id.* at 1003. And even then, the federal court must “closely scrutinize” the “assertedly conflicting” statute or decision to determine whether they “truly do undermine an intermediate appellate court decision directly on point.” *Id.* (internal citation omitted).

The Fourth Circuit and the district court clearly followed the above principles in continuing to apply South Carolina law as set forth in “uniform” decisions from the South Carolina Court of Appeals. For instance, the district court examined the fact that there were other jurisdictions that applied comment j differently, but held the court was “compelled” to follow South Carolina law. The Fourth Circuit did the

⁴ Petitioner also cites *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967), as justification for ignoring the South Carolina Court of Appeals decisions in this case. But in *Bosch*, a tax case where the Court recognized there are “some conditions” under which federal courts may not be bound by intermediate state court rulings, the issue involved a state court’s application of a federal statute.

same, finding it could not “overrule the South Carolina Court of Appeals on a question of South Carolina law,” based upon “counsel’s academic theories and policy arguments,” *i.e.*, that in the absence of “persuasive data,” the Fourth Circuit must follow the consistently applied rule of the South Carolina courts.

III. PETITIONER FAILS TO DEMONSTRATE ANY SHORTCOMING IN THE FEDERAL COURTS’ INTERPRETATION OF SOUTH CAROLINA LAW

Petitioner asserts that there is “at least one Court of Appeals decision” and “decisions of other federal district courts in South Carolina,” and “various decisions of the South Carolina Supreme Court on principles of modern product liability law” that required the federal courts to ignore the case law from the South Carolina Court of Appeals, but Petitioner does not take the trouble to identify them. Not only does Petitioner fail to identify these myriad purportedly inconsistent decisions, she does not show how these decisions “closely scrutinized,” “truly do undermine an intermediate appellate court decision **directly on point.**” *Assicurazioni Generali, S.p.A.*, 160 F.3d at 1003.

Petitioner identifies only one case to support her argument, *Curcio v. Caterpillar*, 585 S.E.2d 272 (S.C. 2003). She claims that case supports the proposition that the South Carolina Supreme Court would have disagreed with the federal court rulings in this case regarding comment j, because there was “a direct opportunity” to decide this issue in *Curcio* and the South Carolina Supreme Court “declined” it. Pet. Br. at 7, 11, 13. In the face of many years of consistent appellate court decisions, declining to decide an issue is hardly an endorsement of Petitioner’s theories. Indeed, that the South Carolina Supreme Court felt no

need to address the intermediate appellate court's reliance on comment j, instead reversing the case on the issue of whether the trial court improperly weighed the evidence, indicates agreement with (rather than concern) over the use of comment j. Moreover, it appears that no South Carolina appellate court has relied on *Curcio* as a rejection of comment j in the fifteen years since it was handed down (and Petitioner did not rely on *Curcio* for this proposition prior to her petition).

As she did before the Fourth Circuit, Petitioner argues that the existence of both a design defect claim and a warnings claim means that an adequate warning cannot make a product safe. *See* Pet. Br. at 12-13. This argument, rejected below, is nothing more than an invitation to have this Court make determinations regarding issues of South Carolina products liability law. The same is true of her arguments regarding South Carolina law on statutory interpretation (Pet. Br. at 13-14) and "scholarly inquiries" regarding the application of comment j. *Id.* at 14.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

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