The Supreme Court of South Carolina

Sentry Select Insurance Company, Plaintiff,

v.

Maybank Law Firm, LLC and Roy P. Maybank, Defendants.

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S.C. SUPREME COURT

PLAINTIFF'S BRIEF ON CERTIFIED QUESTIONS

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STATEMENT OF ISSUES ON APPEAL

On June 21st, 2016 Judge Michele Childs, United States District Court judge for the District of South Carolina, Orangeburg Division, requested this Court to Certify two Questions. On August 19th, 2016 this Court signed and on August 22nd, 2016 the order was filed Certifying the following two questions pursuant to Rule 244, SCACR:

1. May an insurer maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend?

2. May a legal malpractice claim be assigned to a third party who is responsible for payment of legal fees and any judgments incurred as a result of the litigation in which the alleged malpractice arose?

STATEMENT OF THE FACTS

The Underlying Litigation arose out of a motor vehicle accident that occurred between Wanda Rivers ("Underlying Plaintiff") and a truck being driven by Herman Shaw, a driver for Wall Street Systems, Inc., and Madison Intermodal, LLC ("Underlying Defendants"). [Plaintiff's Compl ¶¶11-12][1]. On or about August 8, 2012, Rivers filed a lawsuit against the Underlying Defendants. [Dkt. 1, Compl ¶11]. The Underlying Defendants were insured under a policy issued by Sentry Select Insurance Company ("Sentry"), who then engaged Maybank Law Firm and Roy P. Maybank ("Maybank") to defend the Underlying Defendants. [Plaintiff's Compl. ¶¶13-14].

During the Underlying Litigation, the Underlying Plaintiff served Requests to Admit upon the Underlying Defendants to the Underlying Defendants' counsel of record, Maybank, on January 25, 2013. [Plaintiff's Compl ¶19]. Maybank failed to timely submit answers to the Requests to Admit, a fact which was unbeknownst to Maybank until some five months later on or around June 25, 2013. [Plaintiff's Compl. ¶20]. Due to Maybank's failure to timely respond to the Underlying Plaintiff's Requests to Admit within 30 days of service, the Requests to Admit

[1] Paragraphs referred to in this Brief are those in the Complaint.

were deemed admitted pursuant to Rule 36 of the South Carolina Rules of Civil Procedure. [Plaintiff's Compl. ¶20]. The Requests to Admit were as follows:

> "a. Please admit that the Defendant Herman Shaw was negligent in stopping in the roadway on September 14, 2010 causing the Plaintiff to strike the tractor trailer operated by Defendant Herman Shaw.
>
> b. Please admit that the tractor trailer operated by Defendant Herman Shaw at the time of the collision did not have proper lights to warn Plaintiff that said tractor trailer was stopped in the roadway.
>
> c. Please admit that the Defendants' negligence was the proximate cause of the Plaintiff's injuries.
>
> d. Please admit that the Defendants are liable for the damages sustained by the Plaintiff in the September 14, 2010 wreck.
>
> e. Please admit that the Driver Vehicle Report Number SCT211001534, dated September 14, 2010 reflected:
>
> 1. the driver's record of duty status was not current on September 14, 2010;
>
> 2. the tractor was cited for axle 3 right side 1 of 10 wheel fasteners loose;
>
> 3. the tractor [was] cited for inoperative left side turn signals – front and rear;
>
> 4. the tractor [was] cited for inoperative hazard warning lamps left side – front and rear;
>
> 5. the tractor [was] cited for inoperable head lamp – left side;
>
> 6. the tractor [was] cited for unsecured fire extinguisher; and
>
> 7. the tractor [was] cited for inoperative stop lamp left side.

f. Please admit that on September 14, 2010, the collision took place at approximately 6:50 am.

g. Please admit that at the time of the collision on September 14, 2010, there were no vehicles in the lane of traffic directly in front of the tractor trailer operated by Herman Shaw immediately prior to the collision."

[Plaintiff's Compl. ¶20].

As a result of Maybank's failure to respond to Underlying Plaintiff's Request to Admit on behalf of the Underlying Defendants, the Underlying Defendants effectively admitted to liability for the accident and injuries suffered by Underlying Plaintiff without an opportunity to provide a meritorious defense for Underlying Defendants. [Plaintiff's Compl. ¶21]. Maybank filed a Motion for Extension of Time to respond to the Requests to Admit on September 5, 2013, nine months after the Requests to Admit were served upon them and facts therein long deemed admitted by Underlying Defendants. [Plaintiff's Compl. ¶22]. When the Motion was reached on the court's docket, the Court reserved ruling on the Motion until after mediation, and the case subsequently settled at mediation. [Plaintiff's Compl. ¶23-25].

Prior to the mediation, Defendants had recommended a reserve for potential liability in the case of $125,000.00 and had later recommended settlement in the range of $75,000.00 to $125,000.00. [Plaintiff's Compl. ¶29]. Plaintiff had a duty to the Underlying Defendants to settle the action within the policy limits if reasonable to do so. [Plaintiff's Compl. ¶29]. In the mediation which took place but ultimately failed, and being faced with a time demand from the Underlying Plaintiff (a demand that would expire on a specific date related to the mediation) and the probability of a verdict well in excess of the insurance coverage in the event that the Requests to Admit were in fact deemed admitted, Plaintiff reasonably and appropriately, albeit

reluctantly, settled the action within the policy limits, for the amount of $900,000.00, with the consent of the Underlying Defendants. [Plaintiff's Compl. ¶30].

Subsequently, the Underlying Defendants assigned their claims against Defendants to Sentry. [Plaintiff's Compl. ¶31]. The fact that the Defendants fell below the standard of care is inescapable. Rule 36 of the South Carolina Rules of Civil Procedure, as does its federal counterpart, plainly requires a written response within thirty (30) days. It is undeniable by the Defendants that the Requests were properly served and no timely response was made. Defendants did not seek relief from the default for roughly nine months and roughly four months after they were fully aware of the default and their own negligence.

ARGUMENT I – QUESTION 1.

I. Actions by Non-Client Third Parties Should be Allowed Against An Attorney for Legal Malpractice on Multiple Theories

Defendants moved in the U.S.D.C. to dismiss Plaintiff's direct causes of action against Defendants. In support of this proposition, Defendants erroneously asserted that under South Carolina law "an attorney is immune from liability to a third person arising from the performance of his professional activities as an attorney." (citing Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394 (S.C. 2010)). In Fabian v. Lindsay, 765 S.E. 2d 132 (S.C. 2014), the South Carolina Supreme Court recognized "a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent." Like the beneficiary of a will, the insurer is "an intended beneficiary of the services provided by the attorney retained to represent an insured." See Hartford Ins. Co. v. Koeppel, 629 F. Supp. 2d 1293, 1301 (M.D. Fla. 2009). See also, Government Employees Insurance Co. v. Forbes, CA No. 99-881 (E.D. Pa 06/02/1999), Fullam, Senior Judge (copy attached).

It should go without saying that when an insurance carrier retains and engages an attorney, as has occurred here, to represent their insured, and in doing so commits, among other things, to be responsible for paying the attorney's fees and costs incurred, all parties expect the insurer to be a beneficiary of the agreement for representation. The attorney is expected to utilize his or her best efforts to reduce or eliminate the exposure and liability of the insured and a direct, intended beneficiary is the insurer who is not only paying the fees and costs, but is generally expected to pay all or a portion of any settlement or verdict. To assert that the insurer is ***not*** either a direct or an intended beneficiary of the contract of representation would defy all logic.

The court in Hartford Ins. Co. v. Koeppel, supra, in a diversity action where it was called upon to predict or "guess" what the Florida Supreme Court would hold with respect to these issues, and ruled the Court "...would embrace the majority view and recognize an attorney-client relationship between an insurer and the lawyer or law firm it retained to represent the insured or find that the insurer is an intended third-party beneficiary of the relationship between the attorney or law firm and the insurer." Id at 1301.

While South Carolina Courts have not yet directly recognized a claim for legal malpractice by a lawyer for the benefit of an insurance carrier, prior to the Fabian ruling, South Carolina law had never recognized the liability of a lawyer to ***any*** party where there had not been an attorney-client relationship. However, the South Carolina Supreme Court saw fit in Fabian to reconsider this long-standing notion of non-liability to third parties in the legal malpractice context, thereby opening the door for such claims and causes of action. Therefore it is an incorrect statement of law to assert, as Defendants have done, that attorneys are absolutely immune from liability to third parties. This assertion ignores the Court's revisit of the intricacies of a duty to third-parties as presented in the recent Fabian opinion.

Defendants have argued that Plaintiff has no standing to sue for legal malpractice due to the absence of an attorney-client relationship. However, in addition to the analysis in Fabian regarding such liability, the Restatement (Third) of the Law Governing Lawyers has recognized duties of lawyers to the insurance company which retained them in particular circumstances, as apply here. In § 51(3) of the Restatement (Third) of the Law Governing Lawyers (2000), there are three factors to consider when determining whether an attorney owes a duty to a third party: "[A] lawyer owes a duty to use care . . . to a nonclient when and to the extent that: (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely."

§ 51 of the Restatement (Third) of the Law Governing Lawyers (2000) further states that "a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer. For example, if the lawyer negligently fails to oppose a motion for summary judgment against the insured and the insurer must repay the resulting adverse judgment, the insurer has a claim against the lawyer for any proximately caused loss."

Other jurisdictions, following the logic of § 51 of the Restatement, have found that insurers, although not clients, are owed a duty of care, which allows them to bring suit for legal malpractice. See, e.g., State and County Mut. Fire Ins. Co. v. Young, 490 F. Supp. 2d 741 (N.D. West Virginia, 2007); Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, 24 P.3d 593 (2001); Home Indem. Co. v. Lane Powell Moss Miller, 43 F.3d 1322 (9th Cir. 1995);

Unigard Ins. Group v. O'Flaherty Belgum, 38 Cal.App.4th 1229, 45 Cal.Rptr.2d 565 (1995); Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294 (1991), and Government Employees Insurance Co. v. Forbes, CA No. 99-881 (E.D. Pa 06/02/1999), Fallam, Senior Judge. These cases illustrate the application of the Restatement to a legal malpractice suit brought by a non-client insurance company against the attorney it hired to represent its insureds. Simply stated, regardless of its attorney-client status, "an insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by [the attorney's] professional negligence . . . because and to the extent that the insurer is directly concerned in the matter financially." Paradigm, supra, 24 P.3d at 599-600 (quoting Restatement § 14, cmt. f).

The West Virginia Court of Appeals has held that "[w]here a malpractice claim involves a matter for which the plaintiff directly hired the attorney, there is no question that a duty was owed." State and County Mut. Fire Ins. Co. v. Young, Supra, quoting Calvert v. Sharf, 217 W. Va, 684, 690, 619 S.E. 2nd e 197, 203 (2005).

Here, the inaction of Defendants in the Underlying Litigation is the exact type of inaction referenced in the duty of care accordingly owed. Like failing to respond to a motion for summary judgment and thereby resulting in an adverse judgment, Defendants failed to respond to Requests to Admit, thereby admitting liability for the damages caused in the Underlying Litigation. The proximate result of such inaction resulted in a loss that, absent the malpractice of Defendants, would not have been born by the Underlying Defendants or the Plaintiff.

Further, Defendants' anticipated assertions about the sanctity of the relationship between the insured and defense counsel hired by the insurer, the potential for a conflict of interest between insured and insurer, and the rationales behind policies protecting this relationship all

ignore the implications of an ***alignment of interest*** between the insured and insurer. Here, ***both*** parties were adversely affected by the malpractice of the Defendants. While the rules establishing an exclusive relationship between an insured and defense counsel retained by the insurer have purpose and merit, all purpose and merit is void when the only person benefitting from such protection is the defense counsel in the shadow of its own malpractice against ***both parties***.

To quote Defendants in their Motion, "simply put, the sanctity of the attorney-client relationship should not be diluted" by allowing attorneys who commit malpractice to hide behind the rules in place to protect insureds from insurers when there exists no conflict of interest. Here, the interest of the insured and insurer is aligned, and the Defendants owed a duty of care to both parties. A duty which they breached, and breaches for which they should be held accountable. Accordingly, Plaintiff's claim for direct legal malpractice on a negligence theory against Defendants Maybank should not be dismissed.

Many states recognize a "tripartite relationship" among an attorney, an insured and a primary insurer, to find that the defense attorney owes a fiduciary duty not only to the primary carrier (Sentry in the case at bar) but also to an excess carrier. Illinois provides many examples of direct liability by the retained defense counsel to the primary carrier who retained them. Since the 1970's Illinois has recognized that the defense counsel owes fiduciary duties to two clients: (1) the insured and (2) the primary insurer. See, Maryland Cas. Co. v. Peppers, 64 Ill.2d 187, 355 N.E.2d24, 30-31 (1976); Mobile Oil Corp. v. Maryland Cas. Co., 288 Ill.App.3d 743, 224 Ill.Dec.237, 246, 681 N.E.2d 552, 561(1997); Cinncinatti Co. v. West Am. Ins. Co., 287 Ill.App.3d 505, 223 Ill.Dec. 147, 152, 679 N.E.2d 91, 96 (1997). Consequently, in Illinois, either

the insured or the primary insurer can sue the retained attorney for legal malpractice. Sentry asks this Court to recognize the same duties by the retained counsel to it, as does Illinois, the Restatement and various jurisdictions cited herein, either as a direct client of the lawyer and law firm, or an entity to whom duties of due care are owed or as a third party beneficiary of the retention agreement on behalf of the insured.

II. Plaintiff Is a Foreseeable Party to Suffer Injury Due to Defendants' Legal Malpractice

Defendants have erroneously asserted that Plaintiffs are trying to fit into the narrowly tailored exception recognized by the South Carolina Supreme Court in Fabian v. Lindsay, 410 S.C. 475, 491, 765 S.E.2d 132 (2014). Such was never the case. To the contrary, Plaintiff argues that the Court in Fabian saw foreseeable harm to a third-party beneficiary sufficient to reconsider and overturn the long-standing South Carolina rule *absolutely* prohibiting a claim, either in contract or tort, by an individual or entity absent a direct attorney-client relationship. Here, as was the case in Fabian, the Plaintiff was an intended beneficiary of Defendants' representation and a foreseeable party to which great harm would occur in the event of Defendants' legal malpractice.

The notion that third parties may bring legal malpractice claims where no direct attorney-client relationship exists is not novel. There are many jurisdictions which already allow such actions and the appropriateness of such claims is recognized in the Restatement (Third) of the Law Governing Lawyers as discussed further herein. In these jurisdictions, the attorney may be liable to a third party where the third party was an intended beneficiary of the attorneys' services ***or*** where it was reasonably foreseeable that negligent service or advice to or on behalf of the client could cause harm to others. See e.g., Waggoner v. Snow, Becker, Kroll, Klaris & Krauss, 991 F.2d 1501 (9th Cir. 1993).

There are six considerations courts analyze to determine whether a duty arises absent privity of contract and not based upon the attorney-client relationship. For ease of reference by the Court, these considerations are "(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession." Goldberg v. Frye, 217 Cal. App. 3d 1258, 1268 (1990); France v. Podleski, 303 S.W.3d 615 (Mo. App. 2010); Grimes v. Saikley, 904 N.E.2d 183 (Ill. App. 2009); Chang v. Lederman, 172 Cal. App.4th 67 (2009); Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo. 1995).

In the case at hand, all the factors are weighted towards Defendants' liability. Since Plaintiff was paying for the expense of litigation, legal malpractice would greatly and foreseeably effect Plaintiff. Next, it is certain that Plaintiff Sentry suffered injury. Defendant Maybank informed Sentry he believed an adequate settlement range for the case was $75,000-$125,000. [Plaintiff's Compl. ¶29]. After the Defendants failed to respond to the Requests to Admit, the case was settled for $900,000, some $775,000 more than the Defendants' own estimated settlement range. [Plaintiff's Compl. ¶30]. The closeness to Defendants' actions and the harm is readily apparent. The public policy in preventing future harm here is great. Otherwise any insurance defense lawyer could commit legal malpractice and be insulated from liability as long as the settlement or verdict was within the insureds' policy limits. As for the impact on the profession, the lawyer's duty, to not commit malpractice in his or her representations, remains virtually unchanged. No undue burden would occur.

Defendants are attempting to craft a rule insulating themselves from liability for legal malpractice claims as long as the case subsequently settles within the insured's policy limits or a verdict does not excuse the policy limits. A defense attorney's obligation to its client is to defend the client's best interests. Failing to timely respond to Requests to Admit resulting in the case settling for $775,000 above Defendants' own opinion of the highest settlement value estimate is surely not in the client's best interest, and a rule allowing such inequity to stand is neither in the client nor public's best interest. The only beneficiary of such a rule would be the malpracticing lawyer, the party of least merit.

III. Courts have also Recognized a Right to Proceed on a Legal Malpractice Claim on the Theory that the Insurance Carrier has an Equitable Subrogation Interest

Many courts have also recognized that where no legal remedy is allowed or applied, or where the facts of a case suggest allowing direct or third party beneficiary liability would create a conflict ridden setting, an insurance carrier may nonetheless proceed on a claim based on Equitable Subrogation. Some courts allow an insurance carrier to proceed on all or a combination of these theories.

As noted in Atlanta Int'l Ins. Co. v. Bell, supra, "Equitable subrogation has been described as a "legal fiction" that permits one party to stand in the shoes of another. The doctrine is imminently applicable under the facts of this case. A rule of law expanding the parameters of the attorney-client relationship in the defense counsel-insurer context might well detract from the attorney's duty of loyalty to the client in a potentially conflict-ridden setting. Yet to completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship. Moreover, defense counsel's immunity from suit by the insurer

would place the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances." Id. at 521-522, 303-304.

The conditions generally required for equitable subrogation to apply, are (1) a special relationship must exist between the client and the third party in which the potential for conflicts of interest is eliminated because the interests of the two merged with regard to the particular issue where negligence of counsel is alleged, (2) the third party must lack any other available legal remedy, and (3) the third party must not be a "mere volunteer," i.e., the damage must have been incurred as a consequence of the third party's fulfillment of a legal or equitable duty the third party owed the client. Id. at 519-520.

South Carolina has recognized equitable subrogation claims in various settings and has generally used similar criteria as Courts have applied to insurers in the legal malpractice setting. See, e.g., Matrix Financial Serv. Corp. v. Frazer, 394 S.C. 134, 714 S.E. 2d 532 (2011). The requirements for a mortgagee to qualify for equitable subrogation, are (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; (4) no injustice will be done to the other party by the allowance of equitable subrogation; and (5) the party asserting the doctrine did not have actual notice of the prior mortgage. Citing Dedes v. Strickland, 307 S.C. 155, 158, 414 S.E. 2d 134, 136 (1992); Shumpert v. Time Ins. Co., 329 S.C. 605,608, 496 S.E. 2d 653, 656 (SC App 1998); United Carolina Bank v. Caroprop Ltd., 316 S.C. 1, 446 S.E. 2d 415 (1994).

Many Courts have followed the same or similar analysis in allowing liability under the equitable subrogation theory.

Further, some Courts have even allowed the theory to be applied in a setting involving excess carriers who had not retained the attorney, nor did they have primary liability in the underlying lawsuit. One case of particular note is Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.w.2d 480, 481 (Tex. 1992) finding that allowing equitable subrogation by an excess carrier would not result in public policy concerns as defendant lawyers and law firms often allege. The Texas Supreme Court provided this explanation of its position:

> "[T]he concerns of the excess and primary carriers and the insured generally overlap in ensuring that the merits of the defense are not precluded from being heard because of attorney malpractice. "The best interests of both insurer and insured converge in expectations of competent representation." [citation to Atlanta Int'l, supra, omitted] While in some circumstances these interests may diverge, presenting a different situation, here the excess insurers do not predicate liability on tactical decisions by trial counsel implicating conflicting interests between the insured and the insurer.
>
> ...
>
> No new or additional burdens are imposed on the attorney, who already has the duty to represent the insured...If the asserted malpractice has resulted in payment of a judgment or settlement within the excess carrier's policy limits, the insured has little incentive to enforce its right to competent representation. Refusal to permit the excess carrier to vindicate that right would burden the insurer with a loss caused by the attorney's negligence while relieving the attorney from the consequences of legal malpractice. Such an inequitable result should not arise simply because the insured has contracted for excess coverage." Id. at 484-484.

ARGUMENT II - QUESTION 2.

I. Assignments of Legal Malpractice Claims to Insurers Are Not Void As Against Public Policy When the Interests of Both the Insured and Insurer Are Aligned

The argument that assignments of legal malpractice claims by an insured to its insurance carrier are void as a matter of public policy should fail because the very public policy concerns made the basis therein are absent in the facts of this case.

No South Carolina appellate court opinions deal directly with the assignment of a legal malpractice claim by an insured to its insurance carrier. In Skipper v. ACE Property and Casualty Ins. Co., 413 S.C. 33, 35, 775 S.E. 2d 54 (2015), this Court held that "the assignment of a legal malpractice claim between ***adversaries*** in litigation in which the alleged malpractice arose is prohibited," (emphasis added) and based the holding on several policy concerns. The holding in Skipper is easily distinguishable from the facts of this case for two reasons.

First, in Skipper, the Defendant insureds attempted to assign their legal malpractice claims against the counsel hired by the insurer, not to the insurer, but to the Plaintiff. As consideration, Plaintiffs agreed not to execute judgment against the Defendant insureds. The Court agreed with the majority of courts that the assignment was void as a matter of public policy and gave several policy reasons discussed hereafter.

In the case at hand, such an adversarial relationship does not exist. The Underlying Defendants did not assign their legal malpractice claims to the opposing Underlying Plaintiff in the Underlying Litigation in exchange for an agreement that the Underlying Plaintiff not execute a judgment against the Underlying Defendants. Instead, the Underlying Defendants have assigned their interest to their insurer, a party who is not adversarial, but rather a party whose interest is aligned and a party also effected by the Defendants' malpractice as asserted herein.

Next, due to the adversarial relationship of the parties, which is not present in the case at hand, the Court in Skipper held the assignment void for several coinciding policy implications: (1) risk of collusion between an adversarial Plaintiff and Defendant, (2) undermining the relationship between the defense attorney and its clients via relief from liability, and (3) parties taking opposite positions in malpractice actions from the positions taken in the underlying action. None of the policy reasons numerated above are present in the case at hand because the two parties to the assignment, the insured and insurer, are not adversaries.

Here, there can be no risk of collusion between the insured and insurer as in Skipper because the insurer cannot relieve the insured of liability as the opposing Plaintiff attempted in Skipper. Likewise, there is no risk of undermining the relationship between defense counsel and the Underlying Defendants because the insurer cannot relieve the Underlying Defendants from liability in exchange for pursuing a claim against defense counsel. Finally, there is no risk of the Underlying Defendants changing positions from the Underlying Litigation because the position taken therein was only taken due to the Defendants' failure to answer the Requests to Admit and their duties to their insured to settle within the policy limits.

The Skipper Court emphasized the policy concerns of an assignment between adversaries, not parties whose interests are aligned. Defendants' argument that "the same public policy concerns that warrant the prohibition of assignments between adversaries in a litigation warrant the prohibition of assignments between the insured and the insurer" should fail.

II. An Assignment of the Legal Malpractice Claim Does Not Create a Conflict of Interest

Defendants have incorrectly claimed that Plaintiff's assertion that the interests of the insured and insurer are aligned is wholly speculative. There is nothing speculative whatsoever about the fact that it is in neither the insured nor insurer's interest that the insured's defense

counsel commit legal malpractice by not timely responding to the Requests to Admit. Contrary to Defendants' claims, the interest in avoiding attorney negligence that eliminates defenses and admits damages is intrinsically aligned among insured and insurer.

Defendants' prior reasoning for why conflicts of interest may exist, quoting from Rule 1.8 of Rule 407, SCACR, and case law, is a diversionary tactic ignoring the fact that this claim at its core is about legal malpractice. Rule 1.8 does acknowledge that insurers and insured "frequently have interests that differ . . . including interests in minimizing the amount spent on representation." Rule 1.8 cmt. 11. Plaintiff also agrees that ***some*** conflicts of interests can be best determined by the "perfect clarity of hindsight." However, there is no conflict here. What the Defendants' have arguments completely ignored is that this legal malpractice damaged the ability to defend the underlying case by admitting liability and damages. There is ***no*** conflict of interest between the insured and insurer when it comes to legal malpractice of the insured's defense counsel which damages the ability to defend the lawsuit. It does not take hindsight to determine that such malpractice was in neither party's best interest.

Defendants have argued that assignment creates an incurable conflict of interest – the proverbial dilemma of the attorney in the proverbial Catch-22 – having to prioritize between the insurer's interests and the insured's interests. This is once again a straw argument. There is ***no*** conflict of interest between insured and insurer when it comes to legal malpractice, such as occurred here, which damages the ability to defend the claims. The insured and the insurer have a common interest in being able to defend the lawsuit on its merits.

In sum, Defendants have previously thrown out a litany of hypothetical scenarios in which a conflict of interest exists between insurer and insured (amount of time, effort, and money to spend in litigation, defense strategy, liability limits, etc.), none of which apply to this

case. Where is the proposed conflict of interest between an insured and insurer over an insured's defense counsel's legal malpractice which damages the ability to defend the case? Assignment cannot compromise the insured's best interest because the malpractice itself is not in the insured's best interest. Prohibiting assignment is not in the insured's best interest. The only party whose best interest is being served by such a bar is the attorney facing a legal malpractice claim.

ARGUMENT III – QUESTIONS 1. AND 2.

I. There Are Many Public Policy Reasons for Allowing an Insurer to Bring Claims Against Its Hired Defense Counsel for Malpractice, Either Directly or by Assignment

In Defendants' Motion to Dismiss, they argued a litany of public policy implications designed to protect the relationship between an insured and its defense counsel from a conflict of interest and any interference that may occur on behalf of the insurer which provides payment for the defense of the underlying tort. However, the only beneficiaries of any of these policy arguments presented in this action are themselves. At the very least, it is certainly against the spirit of such policies to allow the defense counsel to utilize them as a shield to hide from its own malpractice against both the insured and the insurer.

When an attorney commits malpractice in defending an insured, the damage is often shouldered by the insurer rather than the insured. Even if the insured suffers some of the damage, the amount may not be sufficient to motivate the insured to pursue a malpractice claim against the attorney, especially after being involved in lengthy litigation. The insurer, on the other hand, likely suffers the bulk of the damage caused by the malpractice, as is the case here. This is especially true in South Carolina where the common law places a duty on the insurer to resolve the claim within the policy limits where it is reasonable to do so. See, e.g. Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933).

Other jurisdictions have addressed this concern. In Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 298 (Mich. 1991), the Court addressed this issue directly, stating that "defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner . . . would be the malpracticing attorney." It is wholly inequitable to require an insurance company to absorb the loss due to negligent defense counsel without a remedy. Likewise, many courts have found that insurers, though not always clients, are owed a duty of care which allows them to bring suit for legal malpractice.

Allowing actions by an insurer against the defense counsel "promotes enforcement of the lawyer's obligations to the insured" by holding the lawyer accountable for breaches of a duty that the insured may not have had the incentive to litigate. Restatement (Third) of the Law Governing Lawyers § 51 cmt. g (2000). In other words, if the insurer is allowed to sue the attorney for his malpractice, the attorney would be more inclined to represent the insured commensurate with the standard of care which is a benefit overall to all insured defendants who must generally accept the counsel retained by the carrier to represent them. Ensuring that the counsel retained will potentially face liability from either the insured or the insurer, in matters where there is no conflict between them, as here, helps to promote competent representation for the insured.

Therefore, contrary to Defendants' argument that public policy is strictly against allowing an insurer to bring a legal malpractice action against defense counsel, either directly or via assignment, there are ample public policy reasons in favor of allowing such claims to go forward. The South Carolina Supreme Court correctly and intentionally left the door open to recognize liability of lawyers to non-client (or alleged non-client) relationships in both Fabian and Skipper. The Court should accordingly find that in circumstances as exist here, where there

is no conflict of interest between an insured and its insurer, both direct actions by the insurer and assignment of claims by the insured to the insurer should be allowed.

CONCLUSION

For the foregoing reasons, the court should answer each Certified Question in the Affirmative.

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September 21st, 2016

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
v.
ANDREW J. FORBES, ESQ., et al.
Civil Action No. 99-881.
United States District Court, E.D. Pennsylvania.
June 2, 1999.
MEMORANDUM AND ORDER

FULLAM, Senior Judge.

This is a malpractice action brought by the Government Employees Insurance Company (GEICO) against an attorney (and his law firm) retained by the insurer to defend its insured in an underlying action arising from a motor vehicle accident. GEICO claims that attorney Forbes mishandled the defense of its insured, resulting in a multimillion-dollar jury verdict for the plaintiff. GEICO eventually settled the claim for an amount substantially in excess of the policy limits. Among other things, Forbes allegedly failed to serve expert interrogatories, failed to introduce expert testimony to rebut the underlying plaintiff's expert, failed to obtain that plaintiff's employment, educational or medical records, and failed to keep GEICO fully informed concerning the case.

Defendants have moved to dismiss counts I (negligence), III (breach of fiduciary duty) and IV (naming the law firm as defendant, based upon principles of agency). Defendants claim that they cannot be liable to GEICO for malpractice because they had no attorney-client relationship with the insurer.

There are three elements that must be shown in order to establish legal malpractice under Pennsylvania law: (1) employment of the attorney or other basis for a duty owed to the client; (2) failure of the attorney to exercise ordinary skill and knowledge; and (3) that such failure was the proximate cause of damage to the client. *See* Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 616-17 (3d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992). The general rule is that an attorney-client relationship is a condition precedent of a malpractice action. There are exceptions, such as situations involving a named beneficiary under a will. *See* Guy v. Liederbach, 459 A.2d 744 (Pa. 1983) (decided under third-party beneficiary contract principles). In Allstate Ins. Company v. LaBrum and Doak, C.A. No. 88-8448, 1989 WL 51553 (E.D.Pa. May 12, 1989), the late Judge McGlynn held that an insurance company is also a client of the law firm it hires to represent its insured, and so has a separate malpractice claim. While this decision was based on the New Jersey case of Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J. 1980), there are several reasons to believe that the Supreme Court of Pennsylvania would concur.

First, while it is true that when there is a conflict between the insured and the insurer, the attorney clearly owes his primary allegiance to the former, there is here no allegation of any such conflict. Second, the current version of the forthcoming Restatement of the Law Governing Lawyers takes the position that regardless of whether the jurisdiction regards the insurer as a co-client with the insured, "a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and the insured are not in conflict." Id. at § 73 cmt. g (Tentative Draft No. 8, 1997). Third, in a case such as this, where the insurer paid an amount in excess of the policy limits and the insured consequently suffered no pecuniary loss, the insured has no incentive incur the expense involved in bringing a malpractice action. The only person who benefits from a rule preventing the insurer from doing so is the malpracticing attorney. *See* Unigard Ins. Grp. v. O'Flaherty & Belgum, 38 Cal.App.4th 1229, 1236 (1995) (*quoting* Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 298 (Mich. 1991)).

An Order follows.

ORDER

AND NOW, this day of June, 1999, IT IS ORDERED that defendants' motion to dismiss is DENIED.

The Supreme Court of South Carolina

Sentry Select Insurance Company, Plaintiff,

v.

Maybank Law Firm, LLC and Roy P. Maybank, Defendants.

CERTIFICATE OF COMPLIANCE

Counsel for the Plaintiff certifies that the Plaintiff's Brief on Certified Questions complies with Rule 211(b).

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September 21, 2016

The Supreme Court of South Carolina

Sentry Select Insurance Company, Plaintiff,

v.

Maybank Law Firm, LLC and Roy P. Maybank, Defendants.

CERTIFICATE OF SERVICE

Counsel for the Plaintiff certifies that the Plaintiff's Brief on Certified Questions was served upon Defendant via U.S. mail on September 21, 2016.

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September 21, 2016

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