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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

J. Michelle Childs, United States District Judge

Appellate Case No. 2016-001351

Sentry Select Insurance Company,

Plaintiff,

v.

Maybank Law Firm, LLC and Roy P. Maybank,

Defendants,

PLAINTIFF'S REPLY BRIEF

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INTRODUCTION

Most, if not all of Defendants issues and points raised in the Brief of Defendants have been addressed in Plaintiff's Brief on Certified Questions (hereinafter "Plaintiff's Brief") either directly or as a policy issue, however, several points merit a response or clarification.

ARGUMENT I

I. Defendants Have Taken an Inconsistent Position with Respect to an Underlying Client's Ability to Sue a Malpracticing Lawyer for Malpractice Once a Verdict or Settlement has Been Paid before this Court from that Position Which They Took in their Motion to Dismiss Filed in the U.S. District Court.

In the Defendant's Motion to Dismiss, filed before the U.S. District Court, Defendants argued with respect to the assignment of the underlying defendants' legal malpractice claims to their insurance carrier, that because Sentry had paid the settlement in that action, those underlying defendants had suffered no damages, and accordingly their assignment was void. [Defendants' Motion to Dismiss ¶10-12. Case No.: 5:15-4984-JMC]

In the posture of the case at this time, Defendants have argued in their brief to the Court that if you do not recognize any of Plaintiff's theories to allow the insurance carrier to proceed on theories of legal malpractice or equitable subrogation, then the lawyers/defendants in this action would not have a "free ride," but would nonetheless still be subject to being sued by their clients. Accordingly, they discount Plaintiff's argument that only the insurance carrier has an incentive to proceed with the case because their own insureds have had their litigation dismissed and settlement satisfied. (Brief of Defendants, Argument II ¶30-31).

Defendants should not be allowed to take these inconsistent positions before the District Court and this Court. Rule 244 (b) SCACR, this Court "may request the original or copies of all or of any portion of the record before the certifying court to be filed with the Court, if, in the

opinion of the Supreme Court, the record or a portion thereof may be necessary in deciding to accept or in answering the questions. In the event a party believes that additional materials from the record before the certifying court are necessary, it shall notify the Supreme Court and the certifying court so that the certifying court can determine if the additional materials will be submitted." P. 20. In this instance, the Defendants request that the Court receive from the U.S. District Court, the Complaint filed in this action, the amended complaint (Plaintiff's have moved to be allowed to amend their Complaint) and the Defendants Motion to Dismiss, along with their memoranda in support of the motion.

ARGUMENT II

II. None of the Potential Conflicts of Interest which can Exist Between an Insured and an Insurer Apply to this Case.

The Defendants have argued repeatedly and provided string cites in their brief to the effect that because conflicts of interest "can" exist between insureds and their insurers, any decision to allow an insurer to sue defense counsel for the insured will erode and disrupt the attorney-client relationship. See, generally, Defendants' Brief, pp. 11-15, 19-20.

However, the Defendants can point to no conflict applicable to the facts of the case. Thus the policy considerations of the Defendants fail because they simply do not apply to the circumstance where the lawyer's injury causing malpractice is with respect to an issue on which the insured and insurer's interests are completely aligned, which do not require any client confidences to be revealed, have no detrimental impact on the profession and have no apparent basis for anticipating "the creation of a conflict of interest" or "the consequent destruction of the attorney-client relationship between respondent and his clients." Defendants' Brief at page 12.

ARGUMENT III

III. The Court Should Consider Whether or Not it Will Recognize a Claim for Equitable Subrogation, in the Context of an Insurance Carrier Seeking to Pursue a Claim Against Lawyers who Allegedly Committed Malpractice in the Representation of Their Insured, and Such Malpractice Having Been the Proximate Cause of Damage Suffered by the Insurance Carrier.

The Defendants have correctly pointed out in their brief in page 28 that the Complaint filed in this action did not include a cause of action for equitable subrogation.

Many cases involving equitable subrogation have held that equitable subrogation is only available when no other remedy is available to a Plaintiff. In this particular action Certified Question Number One is broadly stated and as stated was presumed by the Plaintiff to include whether or not this Court would recognize equitable subrogation, and if so what parameters would define it.

As the Defendants have raised, quite appropriately, that under South Carolina law, to receive the remedy of equitable subrogation, it needs to be plead in the Complaint. While the Court can answer the certified question in the abstract on this point, in an abundance of caution, the Plaintiff's first sought the permission of the Defendants to consent to an amendment of the Complaint to include the equitable subrogation cause of action, and failing to be able to obtain consent, have filed a motion which is currently pending before the U.S. District Court, to amend the Complaint for this purpose. The motion itself was not filed until December 12, 2016.

In seeking any aspect of the record that is relevant for the Court to reach its decision on these issues, the Court may wish to request from the U.S. District Court a copy of motion, any response which the Defendants may filed, and any Order issued by the District Court. See, also, 244(b), SCACR.

ARGUMENT IV

IV. Defendants Essentially Point Out in Their Arguments That There is in Fact a Split of Authority as to Whether or Not Courts Will Recognize the Rights of Third Parties to Pursue Legal Malpractice Claims Against Lawyers, and That There are Multiple Theories Upon Which Courts Have Done So, and That Other Courts Have Continued to Deny Such Claims.

The Defendants' cases can be distinguished in many ways, but the primary distinction is that some courts have held that to ever allow anyone other than the direct client of the lawyer to file a lawsuit against a lawyer for malpractice, would essentially destroy the attorney-client relationship. What is missing in all of these cases is any serious legal analysis of how and why the relationship would be hurt if the malpractice of the lawyer is, as in this case, with regard to an issue that defeats the ability to defend the underlying lawsuit, and is not an issue on which there is any conflict of interest whatsoever between the client and the insurance carrier. More importantly, these cases do not analyze why it would cause any harm to anyone (clients or the profession or the court) to allow liability to an injured party where the cause of the injury is the failure to follow the Court's own rules.

None of these cases analyze how the attorney-client relationship is harmed when the interest of both the insured and the carrier are the same and the person who suffered the injury by making payment of the judgment or settlement is also the Plaintiff seeking recovery for the malpractice.

In cases such as this one, the malpractice is simple to define and involves a lawyer utterly failing in the duty required of all lawyers in following the rules of the Court. It is the same as finding liability for a lawyer who did not timely file an Answer; or who did not timely file a response to another parties' Motion for Summary Judgment and accordingly the motion was granted; or who did not appear at a pre-trial conference where attendance was mandatory and

accordingly the Answer was stricken and the Defendant held in default; or as occurred here, a lawyer's failure to timely respond to Requests for Admission issued under the Rules of Civil Procedure. In short, when a lawyer fails to follow the Rules of the Court the malpractice does not create any sort of conflict of interest between the insured and insured's insurance carrier, nor does it place any "undue burden" on the profession.

ARGUMENT V

V. Defendants Arguments that Insurance Companies are Not Intended Beneficiaries of the Attorney-Client Relationship Between an Insured and Defense Counsel Focuses on the Wrong Issues. (Brief of Defendants, Argument A. (1) ¶ 6-11).

The question of intended beneficiary is not focused on the attorney-client relationship between an insured and defense counsel, but is on the actual contract for defense counsel to appear and defend the underlying lawsuit. As pointed out in Plaintiff's Brief on Certified Questions, Argument I - Question 1., ¶ 4-5, courts have held that the carrier is "an intended beneficiary of the services provided by the attorney retained to represent the insured." (emphasis added). Here the retention of defense counsel was exclusively by the insurer. See, Complaint, paragraph 14.

No discovery has occurred in this case because the federal rules governing it do not allow discovery until the trial court authorizes discovery in a formal scheduling order. [FRCVP 26(d) and (f)]. Accordingly there has been no exchange of documents that would reveal the exact terms of the contract of insurance and or the facts of the retention of counsel and what role, if any, the underlying defendants played in choosing counsel to defend them. While conceivable a defendant who is allowed to choose his or her own counsel may have a stronger argument regarding who they intended to benefit from the lawyers' services, it is inescapable that the history of insurance defense reveals that defense counsel often raise defenses which benefit the

insurer, even when the insured would prefer the defense not be raised. Counsel strives to be certain that frivolous claims are not paid, that absolute defenses such as the Statute of Limitations will be raised, that rules such as the economic loss rule are raised and relied upon to reduce claimed damages and other defensive maneuvers in which a defendant who only wants the case to end, or who would like to see a particular Plaintiff (such as a spouse or their child) obtain a recovery. In the setting where a spouse negligently causes a significant injury to a loved one, but the Plaintiff has allowed the applicable Statute of Limitations to run, can anyone reasonably argue that "to further the attorney-client relationship" defense counsel is going to ignore the statute? Of course not, and the duty to raise the statute as a defense includes recognizing that the insurance carrier is a beneficiary of the contract of representation or is otherwise a party to whom duties of competency are owed.

When this concept is recognized, it only then remains for a court to determine how and where to limit the nature of negligence by defense counsel that may not be actionable by the insurer. Here the Plaintiff argues that where the negligence or breach of duty causing harm, is the failure to follow the Court's own rules, liability must be allowed or else the only beneficiary is the attorney committing malpractice.

ARGUMENT VI

VI. Defendants References to Rule 1.6 at Pages 26 and 27 of Their Brief Appear to Be Misplaced.

Defendants assert on page 26 of their brief that, "to defend a proceeding related to an attorney's representation of a client, such as a malpractice action, a lawyer may be required to reveal confidential information obtained throughout his or her representation of their client, whether or not the client approves of such disclosure." South Carolina Rules of Prof. Conduct, Rule 1.6 (6) (sic).

The law of South Carolina already allows for the disclosure of such information in the setting described by the Defendants.

The proper rule citation is Rule 1.6 (b) (6). On this subject matter, subsection (7) could also be applicable.

Rule 1.6 (b) specifically allows lawyers to "reveal the information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client to establish a defense to a... civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

South Carolina already allows for lawyers to reveal confidences in a variety of settings and in such circumstances as would be present if the insurer were permitted to bring an action against the lawyers under any of the theories put forth in this case. This is not a new rule, this has been the law of South Carolina for decades.

It is also noteworthy that lawyers likewise are allowed to reveal confidences when the circumstance of subsection (7) apply:

> (7) to comply with other law or a court order;

There are many circumstances in which the facts of a case create a situation that requires revealing information that may be sensitive to or embarrassing, to a party. While those circumstances are unfortunate, they can be dealt with in the court room. Motions in limine, allow parties to discuss such issues with the Court prior to the information being utilized in the court room. The Court in its discretion can then determine whether or not the information is relevant. If it is relevant, material and competent, and there is no prejudicial effect that would outweigh

the probative value, then the information regardless of whether or not it is embarrassing to a litigant, party, or witness is allowed into evidence.

There are many circumstances where a witness, regardless of whether or not they are a client or a lawyer, are required to reveal such information or other witnesses with knowledge of the information are required to reveal it. It does not provide a substantial impediment to allowing a cause of action to go forward as is requested in this case, for the enforcement of the Court's own rules and to raise the competency level of all lawyers.

ARGUMENT VII

VII. Defendants Arguments Regarding Alternative Remedies for an Insurer Such as Entering into a Contractual Indemnity Agreement with the Retained Lawyer do Not Solve the Public Policy Issues Defendant Otherwise Raises in Their Brief.

The Defendants raise at page 31 in their brief that "...a third party payer could enter into a contractual indemnity agreement with the attorney..." as a means of protecting themselves from legal malpractice causing them damage or injury. Such an argument admits that public policy concerns they otherwise argue throughout their brief are in essence a nullity, if allowing the indemnity provision would allow all of the same "evil" that they are otherwise concerned with, then they do not in fact represent a public policy reason or reasons not to allow the liability which the Plaintiff seeks to impose in this case.

Defendants next assert that an insurer can protect itself by asserting (presumably contractually) a lien on the proceeds of a legal malpractice lawsuit. The scenario of the "lien on the proceeds" is a hollow remedy which does nothing to overcome the lack of incentive for a defendant (such as the Shaw Defendants or Underlying Defendants in this case) to pursue a claim for legal malpractice where the insurer has paid a settlement, or judgment, and thus relieved them of any further concerns regarding the case. In the routine vehicular collision, the

named defendant(s) has no personal stake in the outcome of the case. No one is ostracized by society because they were once carelessly driving their car and caused an accident. This is especially true where a trial or settlement occurs years later and receives no publicity.

The Defendants have utterly failed to provide a factual scenario where any interest of any client, with respect to their relationship to their attorney or even any confidences they may have disclosed, could be damaged by common law principle that allowed insurers to sue the insureds attorney for malpractice on the facts presented here.

ARGUMENT VIII

VIII. Cases Cited by the Defendants are Easily Distinguishable from the Case at Bar or Otherwise Inapplicable.

Many of the cases holding that an assignment would not be allowed are controlled by this Court's decision in Skipper and accordingly do not support a good argument that assignment should never be allowed. Fox v. Pollack, 181 Cal.App.3d 954, 226 Cal.Rptr. 532 (Cal.App. 1 Dist. 1986) involves a real estate transaction and has no relationship to this case. It involves an unrepresented party with interests in conflict with the attorney's client.

However, in their string cite of cases they include decisions in accord with Skipper v. Ace Property and Casualty Ins. Co., infra.

Alcman Services Corporation v. Samuel H. Bullock, P.C., 925 F. Supp. 252 (D.N.J. 1996) is cited in Defendants Table of Authorities but is not relevant and does not appear to actually be included in their brief.

Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions, 388 S.C. 394, 697 S.E.2d 551 (2010) is another case where the Plaintiff was not an insurer, but was a non-client affected by a lawyer's representation of someone else. The legal malpractice portion of this case was decided under the pre- Fabian v. Lindsay, 764 S.E.2d 132 (S.C. 2014) rule that only a client

could bring an action. The Plaintiff in Argoe did not attempt to have the Court consider the theories put forward by Sentry other than as might be asserted that she claimed she was a client of the lawyer, a matter which the Court rejected factually.

Botma v. Huser, 202 Ariz. 14, 39 P. 3d 538 (2002) is another case controlled by Skipper as the attempted assignment was from the Defendant to the Plaintiff.

Coffey v. Jefferson Cnty. Bd. Of Educ., 756 S.W.2d 155 (Ky. Ct. App. 1988) follows the Skipper holding, Plaintiff cannot assign to Defendant. Facts are totally inapplicable to the case at bar.

Continental Casualty Company v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103 (2d Cir. 1991) is a case finding an excess carrier could not pursue a claim against the insured's counsel retained by the primary insurance carrier who had $500,000 in coverage. The underlying case asserted medical malpractice in a hospital where the Plaintiff obtained a "multi-million dollar verdict" against the hospital and Continental "... paid over $10 million in satisfaction of that judgment." No recitation of allegations of negligence by the law firm are provided, thus we have no factual basis to judge the culpability of the law firm. There is no reference to any fact that the cause of the "staggering verdict" was any failure of the law firm to follow a court rule or other act of negligence where the interests of the insured and any insurer were aligned and the negligence caused the Defendants to be unable to reasonably defend the case on the merits. Accordingly, Continental is distinguishable and not reasonable precedent to be argued in this case.

The Brief of Defendants repeatedly cites cases that completely bar all non-client suits and base their decision on the perceived hearing allowing assignments of legal malpractice claims would "... relegate the legal malpractice action to the marketplace and convert it to a commodity

to be exploited...". [See, e.g. Christison v. Jones, 83 Ill. App.3d 334, 39 Ill.Dec. 560, 405 N.E.2d 8 (1980).] Sentry does not seek a holding that legal malpractice actions be freely assignable as envisaged by the courts barring all assignments. Rather, Sentry seeks a holding of assignability limited to the circumstances present in this case.

Additionally, many of the cases cited by Defendants also base their decision not to allow assignments on the notion that to do so would "promote champerty." See, e.g. Learning Curve International, Inc. v. Seyfarth Shaw, LLP, 392 Ill. App. 3d 1068, 911 N.E. 2d 1073 (Ill. App. 2009) and many others. First champerty was abolished as a defense in South Carolina in Osprey, Inc. v. Cabana Limited Partnership, 340 S.C. 367, 532 S.E.2d 269 (2000). Further, in those jurisdictions where champerty remains as a defense, it is generally defined to require that a party unrelated to the lawsuit be involved in aquiring an interest in the suit. See, Osprey, supra, and Blacks Law Dictionary, 246 (8th Ed. 2004). This issue is not applicable to the position of Sentry and the concerns of those courts simply do not apply here as public policy consideration. See also, the dissent in Law Office of Stern v. Security Nat'l Servicing Corp., 969 So.2d 962, 973-976 (2007).

ARGUMENT IX

IX. While it May be a Minority of Jurisdictions that Currently Allow Assignments of Legal Malpractice Claims, the Logic of Doing so is Well Founded and the Better View.

In cases such as Richter v. Analex Corp., 940 F.Supp. 353 (D.D.C. 1996), Thurston v. Continental Cas. Co., 567 A.2d 922 (Me.1989), New Hampshire Ins. Co. v. McCann, 429 Mass. 202, 707 N.E.2d 332 (1999), and Gregory v. Lovlien, 174 Or.App. 483, 26 P.3d 180 (2001) Courts have refused a blanket prohibition on assignments in favor of case by case decision making. They reason that the public policy concerns of the majority are not implicated in every

case. The claim that services "are personal and involve confidential attorney-client relationships does not justify preventing a client like [this one] from realizing the value of its malpractice claim... by assignment to someone else with a clear interest in the claim who also has the time, energy, and resources to bring the suit." Thurston v. Continental Cas. Co., 567 A.2d at 923.

CONCLUSION

For the foregoing reasons, and those stated in Plaintiff's Brief, the Court should answer the Certified Questions in the affirmative.

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CERTIFICATE OF COMPLIANCE

Counsel for the Plaintiff certifies that the Plaintiff's Reply Brief complies with rule 211(b).

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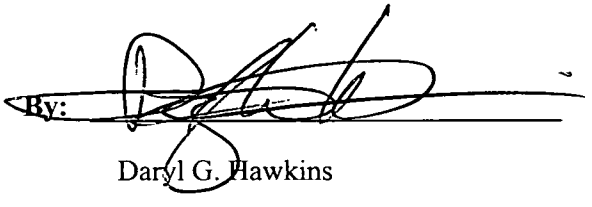
By: 

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CERTIFICATE OF SERVICE

Counsel for the Plaintiff certifies that the Plaintiff's Reply Brief was served upon the Defendants via U.S. mail on December 12th, 2016.

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