

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

J. Michelle Childs, United States District Judge

RECEIVED

Appellate Case No. 2016-001351

JUN 14 2018

Sentry Select Insurance Company,

S.C. SUPREME COURT
Plaintiff,

v.

Maybank Law Firm, LLC and
Roy P. Maybank,

Defendants.

PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Defendants respectfully submit this Petition for Rehearing of the Court's May 30, 2018 Opinion, Opinion No. 27806. As set forth below, the Opinion misapprehended or overlooked the following points:

1. The majority misapprehended or overlooked *how* its decision threatens the attorney-client relationship.

(a) The damage to attorney-client privilege is that an insurance company can now unilaterally force a waiver of the client's privilege by suing defense counsel, which will trigger the attorney's right to disclose privileged information without the client's consent to defend the insurer's claim; this is not a mere discovery or evidentiary issue and the harm cannot be protected against or undone by the trial courts.

(b) The duty of loyalty owed by an insurance defense attorney to his client is threatened by the very existence of an insurance company's cause of action for malpractice; notwithstanding the majority's emphasis that loyalties may not be divided, the decision puts all defense counsel on notice that the insurers who send them work can now also sue them as if a client, even without the client's knowledge or consent.

2. The majority misapprehended or overlooked the Court's precedent for evaluating claims by non-clients set forth in *Fabian*.

(a) The majority misapprehended the concept of immunity by placing undue emphasis on the likelihood that a client will pursue a claim rather than whether the attorney is truly immune from liability.

(b) The majority's focus on deterrence was misplaced; in addition to liability to the client, a defense attorney's business relationship with the insurer, which predates

and is expected to continue beyond the representation of a single client, already provides more than adequate deterrence.

(c) By reducing *Fabian* to considerations of deterrence and perceived immunity, the majority's decision will be construed by some as effectively eliminating privity; limiting the scope of the opinion does not eliminate the parallels between an insurer and other non-clients who pay an attorney's bills or who have an interest in the outcome of litigation.

3. The majority misapprehended or overlooked the inconsistencies, prejudice and general confusion that will result from the practical application of its decision.

(a) The majority's decision subjects insurance defense attorneys to multiple claims and exposure for the same alleged conduct; these concerns can only be addressed by a trial court if it has contemporaneous jurisdiction over all claimants in the same or parallel pending litigation.

(b) The majority's decision creates a double standard for the same claim against the same attorney based on the same alleged breach; whether pursued together, in parallel litigation, or in separate actions years apart, the different standards of proof applicable to a client's claim versus an insurer's will create confusion and lead to inconsistent and prejudicial results.

4. The majority misapprehended or overlooked the uncertainties created by leaving the second certified question unanswered.

(a) The majority's decision leaves open the possibility of an insurer pursuing an assigned claim to take advantage of the lower standard of proof.

Based on these grounds, Defendants respectfully request rehearing and an amended opinion answering both certified questions in the negative.

ARGUMENT

1. The majority misapprehended or overlooked *how* its decision threatens the attorney-client relationship.

If the Court intended to avoid “even the slightest intrusion into the sanctity of the attorney-client relationship[.]” it should have answered both certified questions in the negative. Respectfully, the majority’s emphasis in the Opinion that the loyalties of an attorney may not be divided and that privilege may not be intruded upon by an insurer is directly at odds with its holding. The Opinion recognizes a new cause of action which, by its very nature, threatens to divide loyalties in an already delicate relationship, and which does nothing short of providing an insurer with the unilateral right to waive a client’s privilege with his attorney.

- (a) The damage to attorney-client privilege is that an insurance company can now unilaterally force a waiver of the client’s privilege by suing defense counsel, which will trigger the attorney’s right to disclose privileged information without the client’s consent to defend the insurer’s claim; this is not a mere discovery or evidentiary issue and the harm cannot be protected against or undone by the trial courts.**

In recognizing this new cause of action, the majority opinion overlooked that an insurer’s malpractice claim against defense counsel will operate to waive the client’s privilege with defense counsel. The privilege belongs to the client, and until the majority’s opinion, it could only be waived by the client. One such way that a client waives privilege is by asserting a malpractice claim, which triggers the attorney’s right to divulge privileged information to defend the claim. In allowing an insurance company to assert what amounts to the client’s malpractice claim – premised on an alleged breach of a duty owed to the client – the majority’s decision has provided insurance companies with the ability to unilaterally force a waiver of the client’s

privilege. Remarkably, the majority's decision allows an insurance company to assert a claim against defense counsel without so much as the client's knowledge, much less informed consent.

"The attorney-client privilege belongs to the client and not the attorney, and may be waived only *by the client*." *Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580 (2008) (emphasis added) (holding the trial court cannot order the production of communications covered by attorney-client privilege absent a waiver from the client). "The attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *State v. Owens*, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992). "This privilege is based upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor[.]" *Id.*

The implications of the majority's decision reach far beyond evidentiary or discovery disputes. Although the trial court is equipped to determine whether a communication is subject to attorney-client privilege, it cannot prevent the release of privileged communications when those privileged communications are evidence of a meritorious legal defense to the insurer's malpractice claim. Indeed, the majority appears to conflate privilege with confidentiality by implying that privileged material can be kept confidential pursuant to a confidentiality order.

The essence of privilege is that privileged materials are immune from use in litigation and are not eligible for disclosure to the other parties, even subject to a confidentiality order. As this Court recently re-affirmed, "privileged matter in South Carolina is matter that is not intended to be introduced into evidence and/or testified to in Court." *Hartsock v. Goodyear Dunlop Tires of North America, Ltd.*, _ S.C. _, _ S.E. _, 2018 WL 1938540 at *2 (2018) (citing *S.C. State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 620 (1973)).

The assertion of a legal malpractice claim triggers the attorney's right to disclose privileged information in self defense. Allowing a non-client to unilaterally pursue a legal malpractice claim takes attorney-client privilege away from the client and places it in the hands of the third party. The inevitable result is that clients will be less likely to speak freely with their attorneys, which is directly at odds with the unequivocal public policy reasons for protecting attorney-client privilege.

- (b) The duty of loyalty owed by an insurance defense attorney to his client is threatened by the very existence of an insurance company's cause of action for malpractice; notwithstanding the majority's emphasis that loyalties may not be divided, the decision puts all defense counsel on notice that the insurers who send them work can now also sue them as if a client, even without the client's knowledge or consent.**

The majority emphasized that its recognition of this new cause of action serves the deterrent purpose of tort law. In doing so, the majority embraced the idea that liability has a way of shaping decisions and future conduct. The majority overlooked that this is precisely why an attorney's liability to a non-client threatens the attorney's duty of loyalty to the client. The majority stresses that its decision does nothing to change the duty of loyalty, but did not consider the impact and effect of its decision on insurance defense attorneys. Defense attorneys already rely on insurance companies to send them work and pay their bills. Now, these same insurers have the right to decide whether to pursue their client's malpractice claims against them, and they can do so without even the client's knowledge or consent. The threat to the duty of loyalty begins with the very recognition of a malpractice claim by the non-client insurer.

By giving an insurer the right to enforce the duties owed by an attorney to his or her client for its own benefit, the majority opinion gives the insurer unilateral discretion to decide whether a breach of duty has occurred (regardless of the client's opinion), and to decide if a settlement or judgment was larger than it should have been (regardless of the client's opinion).

In other words, the majority opinion rejects the flow of duties between defense counsel and the insurance company in name only. In practice, the result is the same. The defense attorney is inherently divided between protecting the litigation interests of the client, while also protecting the economic interests of the insurer.

In sum and substance, the majority now requires that an attorney constantly assess the impact of his or her legal services on individuals and entities who are not the client. Although the majority outwardly rejects any duties owed to the insurer by defense counsel, the result implies that defense counsel must now consider the economic interests of the insurer. This result causes a blurring of lines between client and the insurer, and risks divided loyalty between the litigation needs of the client, and the financial interests of the insurer. These divided loyalties arise not because of any recognized legal duties, but out of the ability of an insurer to threaten defense counsel with a malpractice lawsuit.

2. The majority misapprehended or overlooked the Court's precedent for evaluating claims by non-clients set forth in *Fabian*.

Only four years ago, this Court set out the clear framework for evaluating whether and in what circumstances an attorney can be held liable for professional negligence to a non-client. *Fabian v. Lindsay*, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014). Respectfully, the majority's Opinion treats *Fabian* as more of an afterthought than controlling precedent. The majority simply checked the box on two of the considerations discussed in *Fabian* and disregarded the remaining as not applicable. The aspects of *Fabian* that were considered – deterrence and immunity – were misapprehended, and the remaining were overlooked.

(a) The majority misapprehended the concept of immunity by placing undue emphasis on the likelihood that a client will pursue a claim rather than whether the attorney is truly immune from liability.

The majority acknowledges that holding an attorney liable for tortious conduct advances the policy goal of deterring similar conduct in the future, but then bases its decision not on whether the attorney *can* be held liable, but the likelihood that the attorney *will* be held liable. It is not enough, according to the majority, that a client can sue his attorney; if the client is not incentivized to do so, the Court will place the claim in the hands of a non-client who is. This is a remarkable, unprecedented departure from the principles that underlie South Carolina tort law.

Fabian did not provide for a sliding scale of immunity from liability based upon the attorney's practice area. Rather, in *Fabian*, this Court recognized that when a client is deceased, the client is unable to bring a legal malpractice claim. "Thus imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the client's intent, and the third party is in privity with the attorney." *Id.* at 140. An insurance defense lawyer's client is likely not deceased, and therefore the client is not without recourse. Thus, the majority's reliance on this factor is misplaced.

- (b) The majority's focus on deterrence was misplaced; in addition to liability to the client, a defense attorney's business relationship with the insurer, which predates and is expected to continue beyond the representation of a single client, already provides more than adequate deterrence.**

In addition to an attorney's accountability to his client, the majority overlooked additional deterrents already in place that make recognizing the insurer's new cause of action unnecessary. Insurance defense attorneys have preexisting relationships with the insurance companies that hire them, and defense attorneys depend on those relationships enduring beyond a single case. Simply put, the risk of losing an insurer's book of business has and will continue to advance the goal of deterring malpractice without the need to recognize a new cause of action for the insurer.

The majority relies heavily on promoting the deterrent purpose of tort law. However, this factor has limited, if any, application in the context of insurance defense. Insurance defense lawyers already have multiple points of deterrence against incompetent representation. As a threshold issue, the possibility of a malpractice lawsuit *from the client* is a deterrent, just as it is in every other attorney-client relationship.

Likewise, the business realities of the practice of law also promote deterrence. While the insurance company should not be able to sue an attorney for malpractice, an insurance company is not without recourse—it can stop sending the attorney business. The prospect of lost business on its own serves as a strong deterrent to incompetent representation of an insured. Where an attorney likely has a long-standing relationship with the insurer who pays his or her bills, the attorney likely expects or desires to be sent additional cases, and will not risk the viability of his or her practice by failing to competently represent an insured.

Lastly, as the dissent points out, the threat of a civil lawsuit is not the only mechanism that operates to deter attorneys from providing incompetent representation to their client.

Attorneys are always answerable to this Court in a disciplinary proceeding.

- (c) **By reducing *Fabian* to considerations of deterrence and perceived immunity, the majority’s decision will be construed by some as effectively eliminating privity; limiting the scope of the opinion does not eliminate the parallels between an insurer and other non-clients who pay an attorney’s bills or who have an interest in the outcome of litigation.**

The decision in *Fabian* was carefully crafted to recognize a narrow exception to the privity requirement. In doing so, the Court set out a clear framework for evaluating third party claims. The majority’s slight of *Fabian* suggests, rightly or wrongly, that a non-client’s ability to bring a malpractice claim merely requires that a third party have a “unique position” to the

relationship and an interest in the underlying representation, and more of an economic incentive to bring the malpractice claim than the actual client.

Although the majority represents otherwise, the Opinion swings open the door that this Court in *Fabian* tried so carefully to keep barely cracked. It is unclear why an insurance company stands in different shoes than other third-party payers (e.g. a family member, friend, litigation funding company, or person bound by a contractual duty to defend). An insurance company has only an economic interest in the outcome of litigation involving its insured. Thus, the majority opinion's focus on the economic injury of an insurer will inevitably be invoked by other third-party payers to assert direct legal malpractice claims against attorneys whom they pay.

Further, the holding in *Fabian* was premised on the idea that the failure to properly carry out a testator's testamentary wishes was damage *to the client*, albeit, a deceased client. *Id.* at 490. Here, the alleged injury that the majority relies upon is not damage to the client, but an alleged economic injury to an insurance company. In effect, the majority opinion abrogates the law of legal malpractice in this State by no longer requiring that a breach of duty cause damage *to the client*. See e.g., *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525, 787 S.E.2d 485, 489 (2016) (“A claimant in a legal malpractice action must establish . . . damage to the *client* [and] proximate causation of the *client's* damages by the breach.”) (emphasis added). Instead, the majority opinion expands the scope of a lawyer's potential liability to a non-client with only an economic interest in the outcome of a lawsuit.

Although the majority opinion suggests that its decision is limited only to the insurance defense context, it is unclear how an insurance company differs from any other third-party payer.

The rationale of the majority opinion is equally applicable to any other non-client who is paying the attorney on behalf of a client.

3. **The majority misapprehended or overlooked the inconsistencies, prejudice and general confusion that will result from the practical application of its decision.**
 - (a) **The majority's decision subjects insurance defense attorneys to multiple claims and exposure for the same alleged conduct; these concerns can only be addressed by a trial court if it has contemporaneous jurisdiction over all claimants in the same or parallel pending litigation.**

In creating a new cause of action for the insurer without taking it away from the client, the Opinion subjects insurance defense attorneys to multiple claims and exposure for the same alleged conduct. Although the majority opinion suggests that “we are confident our trial courts can handle [the prospect of double recovery],” the majority fails to identify how a trial court is to resolve the danger of double recovery. By expressly sanctioning a direct legal malpractice claim by the insurer, the client may not even know that such a case is being prosecuted.

Given that the client, of course, maintains its right to sue their lawyer for malpractice, there are at least two parties who now possess the unlimited right to sue the same attorney for the same alleged breaches of duties owed to the same client. These claims can be pursued pre-suit, as many legal malpractice claims are, or the attorney could face the prospect of defending multiple lawsuits concurrently, consecutively, or years apart. In any case, evidentiary rules will allow both claimants to pursue the full amount of alleged damages without regard to which claimant actually paid or incurred the underlying defense and indemnity payments, deductibles, self-insured retentions, uninsured losses, or other payments from collateral sources. *See generally, Citizens and S. Natl. Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (“compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer.”); *Pustaver v. Gooden*, 350 S.C.

409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002) (citations omitted)(A tortfeasor cannot “take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is ‘an insurance company, an employer, a family member, or other source’”). A trial courts will only be in a position to address these concerns if it has contemporaneous jurisdiction over all claimants in the same or parallel pending litigation.

- (b) The majority’s decision creates a double standard for the same claim against the same attorney based on the same alleged breach; whether pursued together, in parallel litigation, or in separate actions years apart, the different standards of proof applicable to a client’s claim versus an insurer’s will create confusion and lead to inconsistent and prejudicial results.**

Presumably to balance out the clear inequity that results from subjecting insurance defense attorneys to double liability, the majority imposed a clear and convincing standard to the insurer’s new cause of action, notwithstanding that the exact same claim, when brought by the client, would be subject to the lesser preponderance of evidence standard. *Johnson v. Alexander*, 413 S.C. 196, 201, 775 S.E.2d 697, 699 (2015) (legal malpractice actions are subject to a preponderance of evidence standard). This creates a literal double standard applicable to identical malpractice claims. Whether a client’s claim is litigated together with the insurer’s or separately, the practical application of this double standard will create confusion and lead to inconsistent results.

Similarly, it is unclear how the doctrines of collateral estoppel or res judicata would apply to merits-based decisions in a first-brought legal malpractice action by an insurer or a client to a subsequent lawsuit brought by the other claimant. This is further complicated by the different burdens of proof applicable to an insurer (clear and convincing) and the client (preponderance of evidence).

These conflicts highlight the inherent confusion and litigation problems that will arise from allowing multiple parties to sue a lawyer for the same breach of duty. The limitations imposed by privity are not perfect, but the majority's admittedly awkward Opinion creates far more questions and uncertainty at the expense of the insurance defense attorney and the attorney-client relationship.

4. **The majority misapprehended or overlooked the uncertainties created by leaving the second certified question unanswered.**
 - (a) **The majority's decision leaves open the possibility of an insurer pursuing an assigned claim to take advantage of the lower standard of proof.**

In declining to answer the second certified question, the majority overlooked the ramifications of allowing an insurer to proceed on an assigned claim with or in lieu of a direct claim. Indeed, the insurer in this case, Sentry, has asserted both direct and assigned claims against Defendants.

Conceivably, the majority's decision allows Sentry to move forward under both a direct malpractice cause of action and an assigned claim from the insured. An assigned claim would be subject to a lower burden of proof, as the insured's claims would not need to be proven by clear and convincing evidence. *See, Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999) ("[T]he assignee should have all the same rights and privileges, including the right to sue . . . as the assignor."); *Johnson*, 413 S.C. at 201, 775 S.E.2d at 699 (2015) (legal malpractice actions are subject to a preponderance of evidence standard).

As a result, the decision also leaves open the possibility that Sentry and other insurers will pursue identical direct and assigned claims subject to different standards of proof. This would create clear confusion for a jury who would be forced to interpret two different burdens of proof. Or, in the alternative, Sentry and other insurers could opt to proceed only on an assigned

claim to benefit from the lower standard of proof. Either way, the majority's decision to avoid answering the second certified question causes increased confusion and leaves unanswered a question directly germane to the immediate litigation.

CONCLUSION

For the reasons set forth herein, the Court should grant rehearing and issue an amended opinion answering both certified questions in the negative.

Respectfully Submitted,



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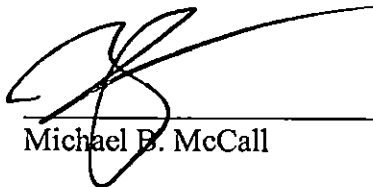
Defendants.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the enclosed *Petition for Rehearing* was served upon Plaintiff this day by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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June 13, 2018



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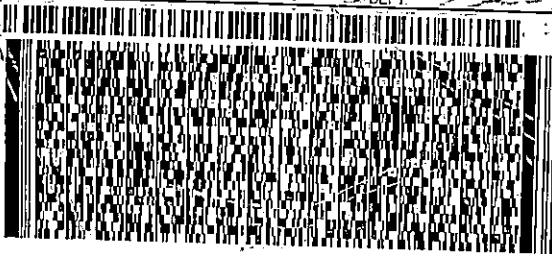
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