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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,

RETURN TO PETITION FOR REHEARING

LAW OFFICE OF DARYL G. HAWKINS, LLC

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Pursuant to Rule 221(a), SCACR, Defendants have submitted to the Court a Petition for Rehearing of the Court's May 30, 2018 opinion, Opinion No. 27806 in this matter. For the reasons discussed below, the Defendants' Petition should be denied.

It is worthwhile to note initially that this is a case where the interests of the insurer and the insured on the basis of liability are identical. Both wished to maintain the ability to defend the case on the merits. The lawyer's failure to timely respond to Requests for Admission and to unreasonably delay (seven months) in taking any action to cure the default seriously crippled the ability to defend on the merits. Neither the insured nor the insurer benefitted in any way from this failure to meet the standard of care in the lawyer's representation of the insured. It is the breach of that duty to follow the Court's Rules of Civil Procedure that has brought us to this point.

UBI JUS, IBI REMEDIUM

The Court's well-reasoned opinion supports the legal maxim that "where there is a wrong, there is a remedy." See, e.g., Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U.S. 1, 21, 14, S.Ct. 240, 247, 38 L.Ed. 55 (1894) and Landman v. Royster, 354 F.Supp. 1292, 1301 (E.D. Va. 1973).

I. The decision of the Court in this case does not threaten the attorney-client relationship, attorney-client privilege or an attorney's duty of loyalty to her client as argued by Defendants.

The Defendants have raised in their first argument that the Court misapprehended or overlooked how its decision threatens the attorney-client relationship. The Defendants then rehash in this argument essentially the same matters that they raised when they filed their Brief of Defendants in this Certified Questions case. See, Brief of Defendants, Argument I.A.(2), pp. 11-15. Accordingly, the Plaintiff, Sentry Select Insurance Company, incorporates herein in opposition to those arguments, the arguments made in matters raised in Plaintiff's Brief on Certified Questions on the same subject matter. See, Plaintiff's Reply Brief, Argument II, p. 2.

Courts throughout the United States[1] have allowed causes of action to be recognized wherein an insurance carrier is allowed to bring a lawsuit against the counsel whom it retained to represent its insured. The theories vary and were discussed in both parties' briefs in the previous argument. They include theories based on the "dual attorney-client relationship", contract, equity and tort law. Regardless of the basis, these states which have permitted the suits do not report a negative impact on the attorney-client relationship. Allowing third parties to recover from negligent attorneys started in 1961 in California. See, Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).

The Defendants again argue that allowing any cause of action by an insurance carrier against an attorney in this context causes or will cause the attorney-client relationship to be irreparably damaged or diminished and whereas prior law held that only the client can waive the attorney-client privilege (See, e.g. Wilson v. Preston, 378 S.C. 348, 359, 662 S.E.2d 580 (2008)) allowing this cause of action may create situations where the attorney will want to use privileged information to defend herself. This same potential issue exists in all of the states which have recognized a cause of action wherein an insurance carrier, or other third party such as a beneficiary in a trust or will negligence/breach of contract case, can sue the lawyer retained to represent a carrier's insured or a testator. There has been no clamor of "the sky is falling" in these other states that have recognized claims by non-clients. Again, California has allowed such causes of action since as early as 1958[2]. This is a "chicken little" argument that has been made many times and has failed many times.

(a) The attorney's right to use privileged information to defend herself is not unlimited and has its own procedural safeguards.

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[1] See, also, citations in the opinion regarding a majority of states permitting such suits. At least 24 states have recognized a carrier's right to sue the defense attorney per Ronald E. Mallen, 4 Legal Malpractice § 30.39 (2018 ed.).

[2] In Biakanja v. Irving, 320 P.2d 16 (Cal. 1958), the court held that where the defendant negligently prepared an invalid will, the beneficiary could recover for her loss in tort even though she was not in priority with the defendant. Although the defendant in that case was a notary public and not an attorney, the court also overruled prior cases involving attorneys. Fabian at 410 S.C. 475, 484, 765 S.E. 2d 132 (S.C. 2014).

The Defendants are incorrect in saying that only the client can waive attorney-client privilege. The Law Governing Lawyers recognizes settings where someone other than the client alleges wrongdoing by the attorney in representation of a client, triggering the attorney's right to reveal privileged information in defense of himself.

In response to the Defendants' assertion in their Petition for Rehearing, Subheading 1(a), that "[t]he 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. . . and the harm cannot be protected against or undone by the trial courts", Plaintiff Sentry Select Insurance Company refers the Court to the American Law Institute's Restatement of the Law (Third): The Law Governing Lawyers, Section 83, which is provided below.

> The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding:
>
> (1) To resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or
>
> (2) To defend the lawyer or the lawyer's associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client.

Restatement (Third) of the Law Governing Lawyers §83 (Am. Law Inst. 2000). Comment d to this section, *The exception for a lawyer's defense against a charge of wrongdoing*, provides that a "lawyer may use confidential client information in defending against a charge of wrongdoing brought by either a client or a third person. For similar reasons the attorney-client privilege does not apply to the lawyer's self-protective use of reasonably relevant but otherwise privileged communications concerning disputed circumstances of a representation." Restatement (Third) of the Law Governing Lawyers §83 comment d (Am. Law Inst. 2000). Moreover, comment e to

Section 83, *Appropriate use of otherwise privileged communications in self-protection*, maintains that

> [t]he lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence. A court might find it appropriate to issue a protective order restraining use of the communications beyond the immediate proceeding. (emphasis added).

Restatement (Third) of the Law Governing Lawyers §83 Comment e (Am. Law Inst. 2000). Thus, the Defendants' contention that this harm cannot be protected against or undone by the trial courts is misguided. See also, Rule 407, SCACR, Rules of Prof. Conduct, Rule 1.6(b)(6) and Comment 11 (disclosure should only be to the extent the lawyer reasonably believes necessary to establish a defense. . .) and Comment 17 (where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.).

Clearly, there exist safeguards such as the one described in Section 83 and its comments above that ensure that a client's privilege is only waived under very limited circumstances. In fact, the safeguard described in Section 83 expressly protects a client from the danger of an attorney revealing otherwise privileged information pursuant to the attorney-client relationship, because it bars any dubiously relevant communication or communications merely cumulative of other evidence. Furthermore, Comment d of Section 83 stands for the proposition that a third party may unilaterally waive a client's privilege without the client's consent, by allowing an attorney who is "defending against a charge of wrongdoing brought by either a client *or a third person*" to divulge

"reasonably relevant but otherwise privileged communications concerning disputed circumstances of a representation." Restatement (Third) of the Law Governing Lawyers §83 Comment d (Am. Law Inst. 2000). These procedural standards are but just one example of safeguards employed by the courts to sufficiently protect the attorney-client privilege from the concerns raised in the Defendants' first argument. The notion that an attorney may reveal otherwise privileged information to defend themselves is not new.

The Court properly noted in its opinion that, ". . . the insurer may not intrude upon the privilege between the attorney it hires and the attorney's client – the insured." Op., p. 5. There is no articulated reason here by the Defendants to doubt that "the trial courts of this State are well-equipped to protect the attorney-client privilege according to law . . ." See, Opinion at p. 5.

(b) The trial court is the gatekeeper on whether or not the interests of the insured and the insurer are aligned to allow a case to move forward

In this case, the Court has taken great care to protect the attorney-client relationship. At page 3 of the opinion the Court holds "If the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer, for we will not permit the attorney's duty to the client to be affected by the interests of the insurance company." As a further safeguard to the sanctity of the attorney-client relationship, the Court has made the trial court the gatekeeper on questions of whether or not "there is any inconsistency between the client's and the insurer's interests" and holds that the determination of such "is a question of law to be answered by the trial court."

The Court's opinion strongly defends the sanctity of the attorney-client relationship and the fiduciary duties of lawyers to their clients. "Nothing we say in this opinion should be construed as permitting even the slightest intrusion into the sanctity of the attorney-client relationship, nor to diminish to any degree the fiduciary responsibility the attorney owes his client." Op. p. 3.

II. The Court has properly addressed the concepts of immunity and deterrence in the context of attorney liability. The Defendants completely overlook the fact that their economic interest in pleasing the insurance carrier did not act as a deterrent in the facts of this case. Insurers stand in a unique position from friends, family and other third-party payors of attorney's fees

In their second argument, the Defendants have asserted that the majority misapprehended or overlooked the Court's precedent for evaluating claims by non-clients set forth in Fabian. The Court's well-reasoned opinion has dealt directly with the Fabian decision and the arguments made by the Defendants are not dramatically different from those arguments they raised earlier in Defendant's Brief. See, Defendants' Brief, Argument I., pp. 4-5. Accordingly, the Plaintiff incorporates herein in response to Defendants' second argument regarding evaluation of claims by non-clients as set forth in Fabian, Argument I, pp. 4-6 and Argument II, pp. 9-11 from Plaintiff's Brief on Certified Questions.

The Defendants' arguments under its Section 2(a) fail to recognize that in Fabian, the decision of the Court does not preclude the estate from suing an attorney who committed malpractice in representing the decedent – the same harm the Defendants protest in this case. The issues in the present case and in Fabian from that standpoint, are the same. It is not that either the client insured, or the decedent/estate cannot bring the claim that gives rise to allow a third party to bring that claim, it is the unlikelihood of that claim being pursued by either an estate or an insured as has been discussed in both settings. Courts have consistently recognized that in these scenarios the personal representative of an estate on behalf of the decedent, and the insured whose lawsuit is now ended at the expense of the carrier, the lawyer who was negligent was in essence immune from suit.

Considering whether or not other third-party payors, such as family members, friends, or persons bounds by a contractual duty to defend, should have this theory of liability extended to

them, that should be determined on a case-by-case basis, and the Court has wisely allowed themselves the opportunity to consider that issue the same as they have wisely allowed to leave to the future the particulars of preventing double recoveries. Whether or not assignments of legal causes of action should be recognized should depend on the parties to the assignment and the facts of the case. The Court has already determined that an assignment by a defendant in a lawsuit to a plaintiff of a legal malpractice action against the defendant's counsel, is not allowed. See, Skipper v. ACE Property and Casualty Ins. Co.,413 S.C. 33, 775 S.E.2d 37 (S.C. 2015). The Skipper decision is based on sound reasoning, and the Court has left itself the opportunity to apply that same sound reasoning to other scenarios in the future.

III. The Defendants wrongfully claim the opinion creates inconsistencies, prejudice and general confusion

In the Defendants' third argument, they assert that the majority misapprehended or overlooked the inconsistencies, prejudice and general confusion that would result from practical application of this decision.

First, they assert a prospect of double recovery.

In this section, the Defendants assert their disagreement with the majority's statement that ". . . our trial courts can handle [the prospect of double recovery]." See, Defendants' Petition at p. 11, Argument 3(a).

Once again, the Defendants ignore the fact that the same issues of two potential plaintiffs suing a negligent attorney for the same conduct is already the law in roughly 24 states yet those states have not reported a need to reverse their holding creating the liability for insurance defense counsel. It is a smokescreen to harken back to a de facto immunity for negligence under the guise of claiming problems too difficult to overcome even though they are unlikely to ever arise. Both our trial courts and our appellate courts are equipped to deal with the issues that may arise.

Defendants also argue that the lawyer's client in the underlying litigation may be unaware that the carrier is pursuing a claim. No factual example is provided by the Defendants as to when, where or how this circumstance would develop where the client "may not even know" that a case is being prosecuted against the attorney. It is difficult to imagine in what lawsuit counsel for the insurance carrier, or the carrier itself, would not want to consult with the insured about the issues presented in the malpractice case and no example is provided by Defendants. There is no apparent or practical reason why the carrier would not be discussing its intent to pursue a claim against the lawyer with their insured upon discovery of the lawyer's breach of duty owed to a client for which the carrier has or will suffer any injury proximately caused by the breach.

If we consider what happened in the underlying case before the Court, we see a straightforward example of how a claim can arise. The lawyer fails to respond timely to Requests for Admission and the case goes to mediation, where a representative of the carrier is required to be present. In determining what offers to make and whether or not to settle the case or face trial it is naïve to believe that the lawyer's negligence in failing to timely respond to the Requests for Admission and its potential ramifications (such as a verdict in excess of coverage) would not be openly discussed with the client or clients.

As occurred in this case, the prudent insurance carrier would also likely want to get an assignment of the client(s) malpractice claim, not to seek a lower burden of proof in that case, but because it would want control of the lawsuit they would file and to avoid competing with a client over management of the suit and recovery of their damages. Regardless of the above, if counsel for the insurance defense lawyer in a suit by the carrier is concerned over what the insured knows, they can advise them of the existence of the suit.

The Defendants also allege that the majority's decision subjects insurance defense attorneys to multiple claims and exposure for the same alleged conduct and that 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.

The Court has identified a direct cause of action for an insurance carrier only in the limited circumstance where a breach of duty by the attorney for the insured, has proximately caused an injury to the insurance carrier. In that light, the carrier has a direct claim, and the client potentially also has its own direct legal malpractice claim.

This contention of the Defendants is subject to how the case law will develop on this subject matter. This Court has directed the attention of the parties to Rule 17, SCRCP and competent defense counsel in a legal malpractice action have the suggestion of this Court to be sure they raise any issue of potential double recovery to the trial court. Again, the main basis for a majority of states to recognize this liability is the lack of incentive for insureds to pursue claims (as well as the estates of testators whose desires and instructions were not followed by a negligent drafter of a will or trust).

The second argument of Defendants under this section asserts that the majority's decision creates a double standard for the same claim against the same attorney based on the same alleged breach and whether pursued together in parallel litigation or in a separate action years apart, the different standards of proof applicable to a client's claim versus an insurer's claim will create confusion and lead to inconsistent and prejudicial results. This is another spin on the same argument of Defendants both at this stage, and in their initial pleadings, that allowing any claims against an attorney will somehow destroy the attorney-client privilege, the attorney-client relationship, and the ability of defense lawyers to function in the future when they have been

retained by an insurance carrier to represent an insured for fear that they will be sued if they are negligent. The same fallacies apply to this notion generally, also apply to this claim specifically. In reality, these fears have not come to fruition in the multiple jurisdictions (at least 24, and now 25, if we include South Carolina) recognizing liability by counsel to the carrier for breaches of duty to the insured and thus only support a weak theoretical reason to provide negligent insurance defense counsel with a cloak of immunity.

As a further protection of insurance defense counsel, the Court placed an additional limitation on the insurer's right to bring an action, the Court has required the insurer to prove its case by clear and convincing evidence. By their claims that two different burdens of proof is "confusing", and unfair to insurance defense counsel, their argument advocates that the burden of proof should be lowered to a preponderance of the evidence so that there will be no confusion, however the Defendants' analysis is flawed because it overlooks the intelligence of jurors and the situations that jurors are asked to consider and render verdicts in.

Nonetheless, the simplest and most expedient cure for this perceived problem is to also make the burden of proof for carriers by a preponderance of the evidence. However, the basis for the Court's choice of a clear and convincing standard rests on sound principles and need not be changed. Juries in South Carolina already hear and decide cases with different burdens of proof. Compare the burdens for negligence (preponderance) and fraud/punitive damages requiring clear and convincing evidence.

IV. The issues are not too complex for juries and judges in South Carolina to render fair verdicts.

The Defendants assert in their Petition for Rehearing, Subheading 3(b), that "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." *Defendants' Petition for Rehearing* Subheading 3(b), pgs.

12-13. South Carolina courts and their respective juries have demonstrated that they are well-equipped to contend with such issues. For instance, it is well-settled that juries are more than capable of deliberating multiple causes of action against a single defendant where the various causes of action each carry a separate burden of proof. See, Brown v. Stewart, 348 S.C. 33, 55, 557 S.E.2d 676, 687 (Ct. App. 2001) (judge in the court below advised the jury that "the burden of proof for fraud was clear and convincing evidence" while negligent misrepresentation and breach of fiduciary duty must be proved by a preponderance of the evidence). An award of punitive damages must be supported by clear and convincing evidence.

Similarly, in the context of a criminal trial involving multiple codefendants, courts have addressed the concern announced in Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) of "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence," by employing multiple juries to try individual codefendants in the same courtroom, during the same trial. *Supra*, 391 U.S. at 123-4, 88 S.Ct. at 1621. Commenting on the use of multiple juries to combat the Bruton problem, the Florida District Court of Appeals held that "Although the use of dual juries is innovative and requires great diligence by the trial court, it is a useful exercise in judicial economy. The multiple jury procedure was designed to avoid Bruton problems and other general problems of prejudice that arise from joint trials." Velez v. State, 596 So.2d 1197, 1199, 17 Fla. Weekly D901 (Fla. Dist. Ct. App. 1992) (citing David C. Minneman, Annotation, *Propriety of Use of Multiple Juries at Joint Trial of Multiple Defendants in State Criminal Prosecution*, 41 A.L.R.4th 1189 (1985 and Supp. 1997)). While South Carolina courts have not expressly ruled on this issue, "'no court, state or federal, has held the procedure to be inherently prejudicial, nor has any court to date found specific prejudice

warranting reversal in the matter before it." Id., (citing People v. Harris, 47 Cal.3d 1047, 255 Cal.Rptr. 352, 767 P.2d 619, 635 (1989). Nevertheless, the dual-jury procedure illustrates that courts and juries are well-equipped to consider complex litigation issues in a manner that forecloses the possibility for confusing and inconsistent results.

We trust juries in the federal courts in South Carolina to hear the evidence against two criminal defendants, tried at the same time, in the same courtroom, with two different juries to obey the instructions of the trial court and render decisions which may send a defendant to prison. We also trust jurors to render verdicts on multiples of causes of action with different burdens of proof. Can we not in these circumstances trust the same jurors to hear the evidence where both the carrier and the insured are parties pressing claims in the same courtroom to make the distinction between the burdens of proof applicable to each plaintiff?

While it is true that the majority's decision requires clear and convincing evidence for a carrier to prevail, and that a client who pursued the same lawyer for the same claim, would only have to meet a standard of preponderance of the evidence, there is no reason to believe at this time that such potential inconsistencies would in fact occur in the future or that the two burdens of proof cannot be reconciled or understood by jurors. The Defendants further assert in their fourth argument that the decision leaves open the possibility of an insurer pursuing an assigned claim to take advantage of the lower standard of proof available to a client. The Defendants cite Johnson v. Alexander, 413 S.C. 196, 201, 775 S.E.2d 697, 699 (2015), for the proposition that a preponderance of the evidence standard applies to legal malpractice cases but provides no authority that the assignee of a civil action is always entitled to the same burden of proof as the assignor to prevail on the assigned claim. The question presented is whether the assignee has all of the same rights of the assignor, including the burden of proof at trial. There does not appear to be any South

Carolina case on point. In the current setting this Court has made clear that an insurance carrier pursuing a claim against the lawyer must prove its case by clear and convincing evidence. There is nothing in the Court's opinion to suggest that if the same carrier were to acquire a cause of action by assignment against the attorney, assuming that the other requirements recognized in the Court's opinion are met (a breach of duty owed to the client, which has proximately caused an injury to the carrier) that the carrier would not still be required to prove its case by clear and convincing evidence. If South Carolina courts follow this analysis of the Sentry opinion, then the Defendants' concern is eliminated.

The Defendants seem to unintentionally argue that the burden of proof for the carrier should be a preponderance of the evidence rather than "clear and convincing." Even so, there is no strong reason to alter the burden of proof as addressed above. Both courts and juries can be trusted to understand these issues and for the court to insure a fair trial, and juries to render fair verdicts in compliance with the instructions they receive from the court and the evidence presented to them.

Assuming arguendo, that the breach by the lawyer has given rise to a cause of action to the client, that did **NOT** proximately cause an injury to the carrier, then allowing the assignment would not mandate that the carrier must now prove its case by clear and convincing evidence, and rather, should be allowed to pursue that claim with a burden of proof of preponderance of the evidence as would any other assignee.

V. Defendants' argument that their reliance on the insurance carrier for current and future business is a sufficient deterrent for them to remain vigilant to their duties not to breach the standard of care was not sufficient to preclude the breach in the case at bar.

The Defendants' argument under Section 2(b), asserts that the defendant's (defense attorney's) desire for a continued economic relationship with the carrier is sufficient deterrence

for failing to meet the standard of care, and that accordingly the Court need not recognize this cause of action as a deterrent in keeping with one of the purposes of tort law. This argument overlooks the fact that even with this "economic deterrent" in this case, defense counsel failed to meet the standard of care thus proving it is not a sufficient deterrent.

However, this argument by the Defendants seems to indicate that there is a real conflict of interest existing in the defense lawyer relationship between their insured client, and their financial benefactor, the carrier, which should cause concern and be disclosed to the client. Nonetheless, without delving into the intricacies of that matter which is not before the Court, that particular deterrent was not sufficient to prevent the breach in the case at bar.

It is disturbing that the Defendants argue that their zeal for more business from a carrier would outweigh concern by the same lawyer that she may be held liable to the carrier to pay over $700,000 in damages.

The Defendants' arguments in Section 2(b) are multiple. Initially the Defendants assert that the Fabian decision was "carefully crafted to recognize a narrow exception to the privity requirement" then indicates that the majority's decision in this case is a "slight of Fabian" and continues on to criticize that they believe the opinion would equally apply to friends and family who pay legal fees. This is a naïve view of the relationships.

The notion that in order to have a cause of action against the attorney, any third party must have a "unique position" is a part of the majority's decision, but it is not all of it.

When Defendants reference the unique position of the insurance carrier to the insured, Defendants overlook the differences between an insurance carrier and ". . . other third-party payors (e.g. a family member, friend, litigation funding company, or person bound by a contractual duty to defend)." None of the third-party payors identified by the Defendants have ever been held to

have the duties owed to the insured defendants as those our Court has recognized as being owed to the insured by the insurance carrier.

The carrier owes a duty not only to defend its insured, but ordinarily must pay any settlement or judgment imposed against the insured. Family members, friends, litigation funding companies and non-insurance carriers with a contractual duty to defend do not ordinarily have a duty to pay settlements or judgments.

More distinctly, the insurance carrier has common law exposure to the defendant under Tyger River Pine Co. v. Maryland Cas. Co., 163 S.C. 229, 234-35, 161 S.E. 491, 493-94 (1931) (where insurer has right to settle, it must be exercised in good faith and that duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits). The Court and statutes recognize many duties of insurers which do not apply to the classes of people Defendants suggest may try to use Sentry liability. See, e.g., Nichols v. State Farm, 305 S.E.2d 616, 279 S.C. 336 (1983) (bad faith refusal to settle with the first party insured) and their progeny. The insurance industry, and its relationship to insureds, is highly regulated. See, generally Title 38, S.C. Code. These statutes do not general apply to the third-party payors Defendants refer to.

While Defendants assert "[it] is unclear why an insurance company stands in different shoes than other third-party payors" (Defendants Petition, p. 10) the differences are both obvious and numerous.

It may well be true that other persons who stand in a similar position as an insurance carrier to an insured will in the future make an argument that their situation is comparable enough to that of the insurance carrier, that they should be allowed the same access to the courts to pursue a claim against the lawyer representing a client who likewise stands in the analogous position of an insured.

If a proper showing can be made, the Court may recognize such a cause of action, however, such cases and claims should be determined on a case-by-case basis related to their specific facts.

Whatever unique set of facts that may be, the Court may choose for reasons such as those enumerated in the Skipper decision, not to allow the cause of action to exist or to be assigned. The Defendants argue a theoretical situation but without providing all of the facts necessary to provide a proper analysis to the case. The Plaintiff has described the unique position of a carrier to an insured that is not recognized in the examples of the Defendants (friends, family, etc.).

It is an important factor in the present case, as it was in the Fabian decision that once the situation painful to the insured has been resolved by the insurance carrier, the insured has very little incentive to pursue a claim; and that a similar relationship was true and found in the Fabian decision that while the breach of duty was to testator, the injury was more greatly suffered by the person who would have received the bounty of the testator rather than the testator himself. However, that does not mean that the testator suffered no injury, nor does it mean that the client suffers no injury in the present circumstances where these Defendants are arguing that privity has been somehow eliminated by this decision, and that no damage to the client exists.

The majority has very strongly indicated that for the carrier to have a claim, there must have been a breach of a duty to the client which proximately caused injury to the carrier. There is an argument that any breach of duty to the client causes some injury to the client. The degree of that injury is the question in all circumstances. If the injury is so slight so as to not exist, then perhaps the carrier has no claim as well.

The Defendants attempt to assert that the Opinion ". . . abrogates the law of legal malpractice in this State by no longer requiring that a breach of duty cause damage to the client" (Defendants' Petition, p. 10).

The notion of an "injury to a client" is as much present in this case as was the case in Fabian and more so. Sentry stepping in and settling the underlying case within the policy limits (and with the insured's consent) prevented the insured from potentially suffering the injury of a verdict in excess of Sentry's policy, prior to the settlement, and such a result was a very real possibility under the facts of this case. Without splitting hairs over the extent of an injury the client may have suffered in this case, the Court has established a clear rule which defines the precise elements of the cause of action and preserves the sanctity of both the attorney-client relationship and privilege.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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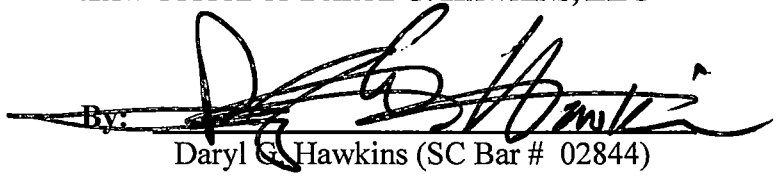
By: 

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Defendants,

PROOF OF SERVICE

I, the undersigned, with the Law Office of Daryl G. Hawkins, LLC, do hereby certify that I have this date caused a copy of *Return to Petition for Rehearing* to be served on counsel of record in the above-referenced matter, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated, as follows:

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