

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREAT AMERICAN E&S INSURANCE COMPANY

**APPELLANT/
RESPONDENT**

V.

**NO. 2009-CT-01063-SCT
(COA No. 2009-CA-01063)**

ES

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

**APPELLEE/
PETITIONER**

SUPPLEMENTAL BRIEF OF QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

David A. Barfield (MB [REDACTED])
Steven L. Lacey (MB [REDACTED])
BARFIELD & ASSOCIATES
Attorneys at Law, P.A.
121 Village Blvd. (39110)
P.O. Box 2749
Madison, MS 39130-2749
Telephone: (601) 856-6411
Facsimile: (601) 856-6441

COUNSEL FOR APPELLEE/PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	I
II. ARGUMENT	2
A. The Opinion Erroneously Concludes that Quintairos' Opinion as to the Settlement Value of a Case could Constitute a Claim for Negligent Misrepresentation	2
B. The Opinion, in Holding that Quintairos owed a Duty to Designate an Expert Witness to Counter the Plaintiffs Expert Witness is Erroneous as a Matter of Law	3
C. Equitable Subrogation	4
D. The Opinion Holds that Mississippi does not Prohibit the Assignment of Legal Malpractice Claims Yet This Issue has Never Been Decided by this Court	4
III. CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Baker Donelson Bearman and Caldwell, P.C. v. Muirhead</i> , 927 So.2d 440 (Miss. 2006)	5
<i>Belmont Homes, Inc. v. Stewart</i> , 792 So.2d 229, 232 (Miss.2001)	3
<i>Brown v. J.J. Ferguson Sand and Gravel Co.</i> , 858 So.2d 129, 131 (Miss.2003)	3
<i>Donald v. Amoco Prod. Co.</i> , 735 So.2d 161, 174 (Miss. 1999)	3
<i>Hartford Acc. And Indem. Co. v. Foster</i> , 528 So.2d 255 (Miss. 1988)	5
<i>Mladineo v. Schmidt</i> , 52 So.3d 1154, 1164-65(Miss. 2010)	2
<i>Spraggins v. Sunburst Bank</i> , 605 So.2d 777, 780 (Miss. 1992)	2,3
<i>State Farm Fire and Casualty Company v. Weiss</i> 194 P.3d 1063, 1066-67 (Colo. Ct. App. 2008)	4
<i>Thompson vs. Dung Thi Hoang and Nguyen</i> , 2009-CT-01147-SCT, 2012 WL 1352826 (Miss. Apr. 19, 2012)	4

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREAT AMERICAN E&S INSURANCE COMPANY

**APPELLANT/
RESPONDENT**

V.

**NO.2009-CT-01063-SCT
(COA No. 2009-CA-01063)**

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

**APPELLEE/
PETITIONER**

SUPPLEMENTAL BRIEF OF QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

Petitioner, Quintarios, Prieto, Wood & Boyer, P.A. ("Quintarios"), submits this supplemental brief pursuant to Rule 17(h) Mississippi Rules of Appellate Procedure. Quintarios has attempted to limit this supplemental brief to issues that might not have been addressed in the other briefs and has attempted not to be repetitive.

I. INTRODUCTION

The Court of Appeals' Modified Opinion (Opinion) is, in several respects, in conflict with prior decisions of this Court. The Opinion was reached in error and has adopted a policy which will have a profound negative impact on the attorney-client relationship, the attorney-client privilege and how that relationship and privilege will be governed in the future. An essential element of a legal malpractice claim is the existence of an attorney-client relationship. The Opinion has set aside the requirement of an attorney-client relationship and allowed a non-client to pursue a legal malpractice claim by substituting equitable subrogation in place of an attorney-client relationship. The Opinion of the Court of Appeals should be reversed and the decision of the trial court should be reinstated.

II. ARGUMENT

A. The Opinion Erroneously Concludes that Quintairos' Opinion as to the Settlement Value of a Case could Constitute a Claim for Negligent Misrepresentation.

While the Court of Appeals claims that Great American's Amended Complaint states each of the necessary elements of a claim for negligent misrepresentation, the court did not identify those elements. Opinion page 9 ¶ 24. This Court has repeatedly stated that the elements of a negligent misrepresentation claim are:

... (1) a misrepresentation or omission of a fact; (2) that the representation or omission is material or significant; (3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities; (4) that the plaintiff reasonably relied upon the misrepresentation or omission; and (5) that the plaintiff suffered damages as a direct and proximate result of such reasonable reliance. *Hazlehurst Lumber Co. Inc. V. Miss. Forestry Comm'n*, 983 So.2d 309, 313 (Miss. 2008) (quoting *Horace Mann Life Ins. Co. V. Nunaley*, 960 So.2d 455, 461 (Miss. 2007)).

Mladineo v. Schmidt, 52 So.3d 1154, 1164-65 (Miss. 2010), reh'g denied (Feb. 17, 2011).

The first element requires that the misrepresentation or omission be one of fact. The Court of Appeals failed to point out that Quintairos' opinion as to the settlement value of the case was simply that, an opinion. The Court of Appeals has now held that an opinion can constitute a misrepresentation of fact. An opinion is not actionable. "The first element of negligent misrepresentation, misrepresentation of a fact, must concern a *fact* rather than an *opinion*. *Bank of Shaw* 573 So.2d at 1360; *see also Shogyo*, 475 So.2d at 428. Clearly, Sunburst Bank was simply expressing its opinion that there would not be any other serious bidders." *Spraggins v. Sunburst Bank*, 605 So.2d 777, 780 (Miss. 1992). The Court of Appeals clearly understood that an attorney's estimate of the settlement value of a claim is an opinion. This is reflected in footnote 8 of the Opinion. Since the majority noted that the representation was an opinion it

cannot be a misrepresentation of a fact. *Id.*

The majority asserts that the dissenting opinion did not address the claim of negligent misrepresentation. Quintairos believes this to be an error as the dissenting opinion specifically pointed out that “ [m]oreover, the information in the litigation reports reflects an [sic] projection or opinion as to the outcome and not misrepresentation of an existing material fact or legal advice.” Opinion page 24 ¶ 59. Accordingly, the dissent recognized that there was no properly asserted claim for negligent misrepresentation.

B. The Opinion, in Holding that Quintairos owed a Duty to Designate an Expert Witness to Counter the Plaintiffs Expert Witness is Erroneous as a Matter of Law.

The Opinion seeks to impose a burden on a defendant that it does not have. The Court did correctly note that “ expert testimony is required for the plaintiff to prevail.” Opinion page 18 ¶ 46. However, the court then continued and held as follows:

Likewise the failure of the defendant to meet the testimony of the Plaintiff’s expert witness with similar expert testimony often is fatal to the defense. Certainly, the amended complaint alleges sufficient facts that Quintairos owed a duty to designate expert witnesses to counter the Plaintiff’s expert witnesses; the duty was breached when Quintairos failed to do so; and Great American was damaged as a proximate result thereof.”

Id. The fact that a duty is alleged in a complaint does not mean a duty exists. Whether or not there is a duty is a legal question not a factual question. *Brown v. J.J. Ferguson Sand and Gravel Co.*, 858 So.2d 129, 131 (Miss.2003) (quoting *Belmont Homes, Inc. v. Stewart*, 792 So.2d 229, 232 (Miss.2001)). *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 174 (Miss. 1999).

This court has recently held:

[a] Plaintiff has the burden of proof, and must offer evidence that persuades the jury. The jury is not required to believe or trust the evidence submitted by the Plaintiff, and is free to accept all, part, or none of the Plaintiff’s evidence. **A Defendant is not required to prove or rebut anything.**

Thompson vs. Dung Thi Hoang and Nguyen, 2009-CT-01147-SCT, 2012 WL 1352826 (Miss. Apr. 19, 2012) (emphasis added). Accordingly, the Court of Appeals decision is based, in part, upon a duty it has placed upon a defendant which does not exist in the law.

C. Equitable Subrogation.

While Mississippi has recognized the doctrine of equitable subrogation, it has never done so in the context of a legal malpractice claim involving the attorney-client relationship. The use of equitable subrogation has allowed “he who is substituted” to succeed “to the rights of the other in **relation to the debt or claim** and to its rights, remedies, or securities.” Opinion page 19 ¶ 49 (emphasis added). The use of equitable subrogation in the context of this case would result in something far greater than substituting one to the rights of another in relation to a debt or claim. Here, the Court is being asked to substitute a party into a relationship which involves the attorney-client privilege. While an attorney consents to and agrees to enter into that relationship with his client, the attorney never agreed to enter into such a relationship with the substituted party. The substituted party now claims the benefit of an attorney-client relationship after the fact. The substituted party then waives the privilege the attorney entered into with his client without even obtaining the consent of the client. Such an outcome is fraught with ethical, legal and practical dilemmas.

D. The Opinion Holds that Mississippi does not Prohibit the Assignment of Legal Malpractice Claims Yet This Issue has Never Been Decided by this Court

In criticizing the dissent’s citation to the case of *State Farm Fire and Casualty Company v. Weiss* 194 P.3d 1063, 1066-67 (Colo. Ct. App. 2008), the Court of Appeals states that the dissent failed to mention that the outcome of that case was based on the fact that “Colorado law prohibits the assignment of legal malpractice claims.” Opinion page 21 ¶ 53. Then, the Court

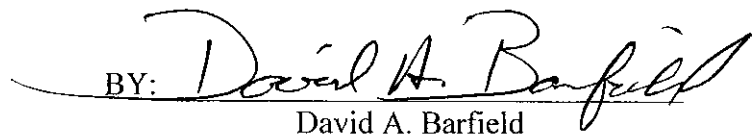
goes on to state that “ Mississippi law does not prohibit the assignment of legal malpractice claims as does Colorado. *See, e.g., Hartford Acc. And Indem. Co. v. Foster*, 528 So.2d 255 (Miss. 1988).” Opinion p. 21 ¶ 53. Counsel for Quintairos has found nothing in the *Hartford v. Foster* case that holds that Mississippi law does not prohibit the assignment of legal malpractice claims. In fact, this Court was asked to decide that question in the case of *Baker Donelson Bearman and Caldwell, P.C. v. Muirhead*, 927 So.2d 440 (Miss. 2006) but did not reach a decision on that issue finding that there was no claim of malpractice. Accordingly, it has not yet been determined whether Mississippi law allows the assignment of a legal malpractice claim or not.

III. CONCLUSION

In order to pursue a claim for legal malpractice, this Court has consistently held that an attorney client relationship must exist. Great American does not even allege such a relationship. As suggested by the dissent, this Court should follow the majority of jurisdictions which have considered this issue and prohibit equitable subrogation of professional negligence claims against attorneys. Quintairos respectfully requests that this Court reverse the Court of Appeals and affirm the trial court and dismiss the complaint against Quintairos with prejudice.

Respectfully submitted, this the 7th day of May, 2012.

QUINTAIROS PRIETO WOOD & BOYER P.A.

BY: 
David A. Barfield

BY: 
Steven L. Lacey

OF COUNSEL:

David A. Barfield (MBN [REDACTED])
Steven L. Lacey (MBN [REDACTED])
BARFIELD & ASSOCIATES
Attorneys at Law, P.A.
121 Village Blvd. (39110)
P.O. Box 2749
Madison, MS 39130-2749
Telephone: (601) 856-6411
Facsimile: (601) 856-6441

CERTIFICATE OF SERVICE

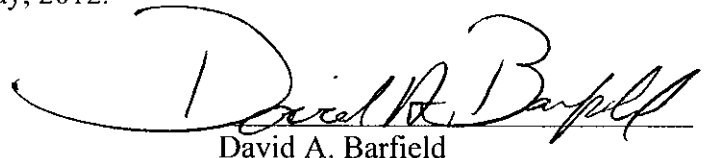
I, David A. Barfield, attorney for the Defendant, Quintairos Prieto Wood & Boyer P.a., hereby certify that we have this day caused a true and correct copy of Quintarios, Prieto, Wood & Boyer, P.A.'s Petition for Writ of Certiorari to be mailed via United States Mail to the following:

Michael A. Heilman, Esq.
Christopher T. Graham, Esq.
Courtney M. Williams, Esq.
Heilman Law Group, P.A.
Post Office Drawer 24417
Jackson, Mississippi 39225-4417
**ATTORNEYS FOR GREAT
AMERICAN E&S INSURANCE
COMPANY**

William W. McKinley, Jr., Esq.
Currie Johnson Griffin Gaines & Myers PA
Post Office Box 750
Jackson, MS 39205-0750
**ATTORNEY FOR
ROYAL INDEMNITY COMPANY**

Honorable M. James Chaney, Jr.
Circuit Judge
Courthouse
1009 Cherry Street
Vicksburg, MS 39183
TRIAL COURT JUDGE

SO CERTIFIED, this 7th day of May, 2012.


David A. Barfield