IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GREAT AMERICAN E&S INSURANCE COMPANY

Plaintiff – Appellant

Supreme Court No. 2009-CA-01063

VS.

Warren County Circuit Court No. 06-0231-CI

ROYAL INDEMNITY COMPANY, individually, and in its capacity as successor in interest to ROYAL INSURANCE COMPANY OF AMERICA, QUINTAIROS, PRIETO, WOOD & BOYER, P.A. and JOHN DOES 1-25

Defendant - Appellees

BRIEF OF GREAT AMERICAN E&S INSURANCE COMPANY PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the United States Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

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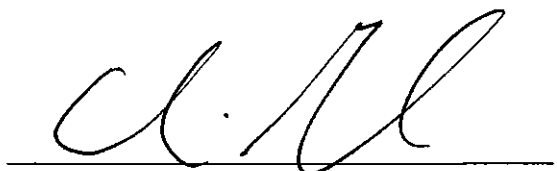

Christopher T. Graham

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I. STATEMENT OF THE ISSUES

The trial court improperly granted the Quintairos Firm's Motion to Dismiss for failure to state a claim upon which relief can be granted. Accordingly, the issues before this Court are wholly legal in nature. In particular, this Court should consider:

1. WHETHER PRIVITY OF CONTRACT IS REQUIRED FOR AN EXCESS CARRIER TO MAINTAIN A TORT SUIT AGAINST DEFENSE COUNSEL HIRED BY THE INSURED'S PRIMARY CARRIER TO DEFEND FULLY COVERED LAWSUITS.

2 WHETHER AN AGGRIEVED EXCESS INSURANCE CARRIER CAN MAINTAIN A CAUSE OF ACTION THROUGH EQUITABLE SUBROGATION AGAINST COUNSEL HIRED BY THE PRIMARY CARRIER.

II. STATEMENT OF THE CASE

A. Nature of the Case

2.1 This case involves claims by Plaintiff/Appellant Great American E&S Insurance Company ("Great American"), an excess insurance carrier, which was forced to expend significant sums of money due to the actions of attorneys in the defense of a series of nursing home liability cases filed in the Circuit Court of Warren County, Mississippi (the underlying cases are referred to herein as "the Vicksburg litigation"). This case addresses the relationships between a primary insurance carrier, an excess insurance carrier, the named insured and the attorneys hired to defend the named insured.

2.2 Royal Indemnity Company ("Royal") issued the primary policy and named as insureds the owners and/or operators of Shady Lawn Nursing Home and Vicksburg Convalescent Home (the nursing homes are hereinafter collectively referred to as the "nursing home insureds"). (R.E. 4, Amended Complaint, at ¶ 3.1).[1] Great American provided excess insurance coverage for the nursing home insureds for losses that exceeded $1 million. (Id.).

2.3 Royal, as the primary insurance carrier, retained Quintairos, Prieto, Wood & Boyer, P.A. ("the Quintairos Firm" or "Quintairos") to defend the nursing home insureds in the Vicksburg litigation cases. (Id. at ¶¶ 3.16-3.19). Royal continued to employ the Quintairos Firm to defend the Vicksburg litigation after Royal became aware the Quintairos Firm could not adequately defend the cases. (Id. at ¶ 3.19). In turn, the Quintairos Firm committed numerous errors and omissions while defending these cases (e.g., failing to timely designate experts), ultimately rendering the cases nearly untriable so that exorbitant settlements were required. (Id. at ¶¶ 3.16-3.19). The actions taken by Royal and Quintairos were either negligent or with reckless disregard of the rights of Great American and/or the nursing home insureds.

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[1] Cites to the Record Excerpts appear herein as "(R.E. ____)." Cites to paragraphs within a record excerpt are denoted with "¶ ____."

2.4 Because of their respective actions in mishandling the defense of the Vicksburg litigation, Great American has asserted claims against both Royal and the Quintairos Firm. Pertinent to this appeal, Great American has asserted direct claims against the Quintairos Firm for legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision. (Id. at ¶¶ 4.6-4.37). In addition, Great American has pleaded an alternate theory of recovery against Quintairos based on equitable subrogation. (Id. at ¶¶ 4.1-4.5).

B. Course of Proceedings and Disposition in the Court Below

2.5 Great American originally commenced this action against Royal in the Circuit Court of Warren County, Mississippi, on November 15, 2006. (R. 5, Original Complaint).[2] Thereafter, on March 12, 2007, Great American amended its Complaint to add the Quintairos Firm as a Defendant and to correct Defendant Royal's proper name. (R.E. 4, Amended Complaint). On April 12, 2007, the Quintairos Firm dilatorily removed the case to the United States District Court for the Southern District of Mississippi solely based on a scrivener's error in the Amended Complaint, which listed Great American's proper name as "Great American E&S Insurance Services, Inc." rather than "Great American E&S Services Company." (R. 69-77). After briefing by both parties was had, the federal district court remanded the case back to state court on November 16, 2007. (R. 77).

2.6 The case progressed with discovery and the filing of an Agreed Scheduling Order and Trial Setting on May 15, 2008. (R. 84). On June 13, 2008, however, the Quintairos Firm again delayed matters by filing a Motion for Recusal which primarily focused on the trial judge having also been assigned the underlying cases in the Vicksburg litigation. (R. 86-89). The Quintairos Firm argued that because the case at bar involves, in part, claims for legal malpractice which occurred in the Vicksburg litigation, the trial judge could potentially be called as a fact

[2] Cites to the Record appear herein as "(R. ____)."

witness. (Id.). Quintairos also called into question the judge's impartiality by voicing concern that the judge "may have preconceived opinions about the firm" because, in the Vicksburg litigation, the judge found a member of the Quintairos Firm who was not licensed in the state of Mississippi to have engaged in the unlawful practice of law.[3] (Id. at 89). The trial judge properly denied this Motion by Order of the Court on August 18, 2008, finding no evidence existed which would cause a reasonable person to harbor doubt concerning his impartiality. (R. 107-110).

2.7 On September 2, 2008, the Quintairos Firm filed its Motion to Dismiss for failure to state a claim upon which relief could be granted. (R.111-12). The trial court granted Quintairos's Motion to Dismiss on June 1, 2009. (R.E. 2 and 3). Great American now appeals the trial court's dismissal of the Quintairos Firm from this lawsuit.

C. Statement of the Facts

2.8 Although numerous underlying cases predicate this lawsuit, Great American specifically references four grossly mishandled cases in its Complaint.[4] (R.E. 4, Amended Complaint,[5] at ¶¶ 3.3-3.19).[6] As noted previously, these underlying lawsuits are often referenced as "Vicksburg litigation." This lawsuit against the Quintairos Firm follows its reckless mishandling of these cases. (R.E. 4 at ¶¶ 3.16-3.19). As it relates specifically to the Vicksburg litigation, the nursing home insureds, Royal and Great American were the parties with a direct

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[3] The Court referred said individual to the Disciplinary Tribunal of the Mississippi Bar on December 1, 2004. (R. 89)

[4] The four cases referenced herein are more fully explained in Plaintiff Great American's Complaint and are styled (1) The Estate of Huldah Chase, et al. v. International Healthcare Properties, et al., Civil Action Number 02-0133CI; (2) Alma Taylor, et al. v. Vicksburg Convalescent Home, et al., Civil Action No. 02-0214 CI; (3) The Estate of Nancy Jones and Brenda Jones, et al. v. International Health Care Properties 61, L.P., Civil Action No. 02-0197-CI; (4) Hilliard Berry, Sr., et al. v. International Health Care Properties 61, L.P., In the Circuit Court of Warren County, Mississippi; Civil Action No. 02-0197-CI.

[5] All citations in Great American's Statement of the Facts are made to allegations in the Amended Complaint. Since this case was dismissed on a Motion to Dismiss for failure to state a claim, all allegations must be accepted as true.

[6] Cites to the Record Excerpts appear herein as "(R.E. ____)." Cites to paragraphs within a record excerpt are denoted with "¶__."

interest in the litigation. (Id. at ¶¶ 3.1-5.1). All of these parties possessed aligned interests: prudent defense of the insureds. (Id. at ¶¶ 3.1-3.4).

2.9 The nursing home insureds possessed two layers of liability insurance which provided them coverage for the Vicksburg litigation. (Id. at ¶¶ 3.1-3.2). This coverage included primary insurance written by Royal and excess coverage written by Great American. (Id.). Royal's primary insurance policy provided the nursing home insureds with coverage in the amount of $1 million per occurrence and $3 million in the aggregate. (Id. at ¶ 3.1). Great American's excess policy provided the nursing home insureds with coverage of $8 million per occurrence and $16 million in the aggregate. (R.E. 4 at ¶ 3.2).

2.10 The excess policies issued by Great American did not attach and provide defense opportunity or obligations until after exhaustion of primary coverage. (Id. at ¶¶ 3.2, 3.4, 3.14, 3.16). In other words, as an excess policy, Great American's coverage was not implicated until the nursing home insureds faced a potential loss in excess of $1 million.[7] (Id.). As the primary insurance carrier, Royal had the duty to defend and control the Vicksburg litigation until primary coverage was exhausted. (Id.). While Great American had an interest in the litigation, it had no opportunity to control the defense until its coverage was implicated. (Id.). Accordingly, Royal hired defense counsel, the Quintairos Firm, to defend the nursing home insureds in the Vicksburg litigation. (R.E. 4 at ¶¶ 3.4, 3.6, 3.17). The Quintairos Firm defended the cases and reported to the nursing home insureds, Royal and Great American regarding the status of proceedings and projected potential exposure. (Id. at ¶¶ 3.5, 3.9, 3.14, 3.18, 4.21, 4.22, 4.26).

2.11 Soon after the first of the underlying cases commenced (Chase), the nursing home insureds began to express dissatisfaction with the Quintairos Firm's "defense." (Id. at ¶¶ 3.10-

[7] The excess coverage would also be implicated upon exhaustion of all primary coverage. Royal provided a total of $3 million in primary coverage which, at exhaustion, would implicate Great American's excess policy as to all claims.

3.11). However, neither the nursing home insureds nor Royal communicated this fact to Great American at the time. One of the primary concerns was that none of the partners and/or trial attorneys at the Quintairos Firm was licensed to practice law in Mississippi. (Id. at ¶¶ 3.10 and 3.15). Royal nonetheless ignored these warnings, adamantly maintaining that Quintairos was their choice of defense counsel. (Id. at 3.11). As the underlying cases unfolded, Quintairos's inadequacies mounted, and it became readily apparent that Quintairos could not competently handle defense of the Vicksburg litigation. (R.E. 4 at ¶¶ 3.15 and 3.19).

2.12 Great American first learned of the problems with the Quintairos Firm in a litigation report from the firm involving the Chase case. (Id. at 3.14). In that report, Quintairos unexpectedly increased the projected exposure by approximately eight times the amount previously reported by the firm.[8] (Id.). Prior to this unexpected increase, Royal's primary coverage was the only coverage implicated by the case. The Quintairos Firm's increase implicated Great American's coverage because it exceeded the $1 million primary coverage provided by Royal.

2.13 One especially egregious and damaging event caused the increase by Quintairos. In Chase, a nursing home malpractice case, the Quintairos Firm failed to timely designate medical experts. Because the designations were untimely, they were stricken by the trial court, leaving the nursing home with no defense. Immediately and directly as a result, the settlement value of the Chase case soared. The best proof of this fact is the Quintairos Firm's litigation report referenced above, wherein the projected exposure increased eight times the amount previously reported. The Mississippi Supreme Court has instructed that "[a]n attorney who fails to designate an expert by a court-mandated deadline and does not provide any reason for doing

[8] As noted in Great American's Amended Complaint, the Quintairos Firm previously opined the trial value of the case was $500,000. The unexpected increase occurred after the trial court struck the late expert designations filed by Quintairos as described below. After the trial court struck the designations, the Quintairos firm increased the value to an amount between $3 million and $4 million.

so, is negligent as a matter of law[.]" Byrd v. Bowie, 933 So. 2d 899 (Miss. 2006). Accordingly, in the Chase case alone, the Quintairos Firm was, at a minimum, negligent as a matter of law.

2.14 To make matters worse, the Quintairos Firm failed to have any partners/trial attorneys admitted *pro hac vice* to try the Chase matter. With a verdict almost assured, the plaintiff's settlement offer grew substantially. Although the terms of the Chase settlement are confidential, it is abundantly clear that the settlement was far in excess of the Quintairos Firm's estimated value of the case, and the excessive settlement number resulted solely because of the Quintairos Firm's gross negligence in mishandling the defense of the suit. Even after Chase, however, Royal refused to terminate the Quintairos Firm as defense counsel. Ultimately, due to the Quintairos firm's failure to timely designate expert witnesses and other malpractice, the nursing home insureds, Royal, and Great American were damaged in the Vicksburg litigation.

2.15 As noted above, numerous lawsuits predicate this lawsuit, several of which are discussed in detail in Great American's Amended Complaint. The allegations concerning these cases must be taken as true at this stage in the proceedings and are incorporated herein by reference. The allegations in the Amended Complaint adequately placed all defendants on notice as to the nature and substance of the claims against them in this matter. Furthermore, these allegations state a claim against all defendants, including specifically the Quintairos Firm.

III. SUMMARY OF THE ARGUMENT

3.1 Great American has properly stated several viable theories of recovery against the Quintairos Firm including claims for legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision. In addition, Great American possesses—and has stated in its Amended Complaint—an equitable right of subrogation against the Quintairos Firm. Great American's equitable subrogation claim is viable because Great American was obligated to satisfy the damages caused by the Quintairos Firm's recklessness.

3.2 Each of the aforementioned causes of action stem from the Quintairos Firm's mishandling of numerous underlying cases which predicate this lawsuit. Specifically, Great American references four grossly mishandled cases in its Amended Complaint. As noted previously, these underlying lawsuits are often referenced as the "Vicksburg litigation." As it relates specifically to the Vicksburg litigation, the nursing home insureds, Royal, and Great American were all parties with a direct interest in the litigation. Importantly, all of these parties possessed aligned interests: prudent defense of the insureds.

3.3 The Quintairos Firm's gross negligence and reckless disregard for the rights of foreseeable third parties in handling the Vicksburg litigation directly contributed to eventual settlement of the cases at amounts well in excess of the primary coverage. The Quintairos Firm repeatedly bungled expert designations in multiple cases, including a complete failure to timely designate in one case. These and other actions on the part of the Quintairos Firm, which will be unearthed and further developed through discovery, evince a level of egregiousness and wantonness as to constitute a separate, independent tort of their own.

3.4 In addition, the Quintairos Firm generated litigation reports which it sent directly to Great American. Great American justifiably and detrimentally relied upon these reports, which estimated exposure in each case at a level vastly below the primary coverage limits. Great American first learned of the Quintairos Firm's malpractice through one of the firm's reports. Great American also learned that the reports had consistently and calculatedly undervalued each of the underlying cases so as to intentionally avoid implicating Great American's excess coverage. As a result of these litigation reports, Great American was led to believe the Quintairos Firm was defending the underlying cases appropriately and that excess coverage was not implicated. Great American was justified in relying on these litigation reports, which the Quintairos Firm sent directly to Great American.

3.5 The Quintairos Firm contends that, to a certainty, Great American is entitled to no relief under any set of facts that could be proved in support of its claims. The Quintairos Firm's argument for dismissal is that each of the theories pleaded by Great American amounts to a claim for legal malpractice. While Quintairos avers that privity is a necessary element of a claim for legal malpractice, the Mississippi Legislature abolished the requirement of privity for all causes of action for personal injury or property damage or economic loss brought on account of negligence.

3.6 This Court has repeatedly made clear that professional liability extends to foreseeable third parties who detrimentally rely on the services of a professional. There is no question but that Great American was a foreseeable third-party detrimentally relying on the Quintairos Firm's professional due diligence in handling the underlying cases. Furthermore, as the real party in interest, Great American is entitled to bring suit. Where an insurance carrier pays a judgment pursuant to a policy issued to an insured tortfeasor, the carrier is the real party in interest in a subsequent legal action brought against the insured's representation to recover damages lost as a result of malpractice. Taking the facts alleged by Great American as true, the Amended Complaint states several viable causes of action against the Quintairos Firm.

IV. ARGUMENT

4.1 Great American has properly stated several viable theories of recovery against the Quintairos Firm including claims for legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision. In addition, Great American possesses—and has stated in its Amended Complaint—an equitable right of subrogation against the Quintairos Firm. The equitable subrogation claim is viable because Great American has satisfied the damages caused by the Quintairos Firm's recklessness. Accordingly, this Court should vacate the lower

court's 12(b)(6) dismissal of the Quintairos Firm from this lawsuit and remand the case for further proceedings.

A. Standard on Appeal

4.2 "A motion to dismiss under Miss. R. Civ. P. 12(b)(6) raises an issue of law. This Court conducts *de novo* review on questions of law." T.M. v. Noblitt, 650 So. 2d 1340, 1342 (Miss. 1995) (internal citations omitted); see also Penn. Nat'l Gaming, Inc. v. Ratliff, 954 So. 2d 427, 430 (Miss. 2007) ("This Court reviews de novo a trial court's grant or denial of a motion to dismiss."). "When considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." Sennett v. U.S. Fidelity and Guar. Co., 757 So. 2d 206, 209 (Miss. 2000) (citing Butler v. Board of Supervisors, 659 So. 2d 578, 581 (Miss. 1995)). Put differently, "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." Franklin County Co-op. v. MFC Services (A.A.L.), 441 So. 2d 1376, 1377 (Miss. 1983) (quoting the comment to Miss. R. Civ. P. 12(b)(6)). Unless Great American faces an "insuperable bar" to its claims for relief, the lower court's dismissal should be overturned. 5A Wright & Miller, Federal Practice and Procedure (2d ed.), Civil § 1357 (1990 & Supp. 2000).

B. Great American Can Maintain an Action Against the Quintairos Firm Regardless of Whether an Attorney-Client Relationship Existed Between the Parties: Great American Was a Foreseeable Third-Party Detrimentally Relying on the Written Representations Sent to Great American by the Quintairos Firm

4.3 Great American has asserted claims against the Quintairos Firm under several theories including legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision. The Quintairos Firm contends that, to a certainty, Great American is entitled to no relief under any set of facts that could be proved in support of its claims. The Quintairos Firm's argument for dismissal is that each of the theories pleaded by Great American

amounts to a claim for legal malpractice. Quintairos avers that privity is a necessary element of a claim for legal malpractice. Yet the Mississippi Legislature abolished the requirement of privity for "for all causes of action for personal injury or property damage or economic loss brought on account of negligence." Miss. Code Ann. § 11-7-20. In Century 21 Deep South Properties, LTD. v. Courson, this Court applied Miss. Code Ann. § 11-7-20 to a claim for legal malpractice, holding that where a direct attorney-client relationship was required prior to its enactment, the privity requirement no longer exists. 612 So. 2d 359 (Miss. 1992). The Century 21 Court instructed that "the presence or absence of an attorney-client relationship is merely one factor to consider in determining the duty owed rather than being the single factor which establishes that a duty is owed." Id. Instead, the more appropriate question "'to whom is a duty owed?' takes center stage." Id. As it relates to this case, Great American has clearly stated a claim against the Quintairos Firm and is not precluded from pleading claims for legal malpractice, negligence, gross negligence and negligent misrepresentation to claims of an excess carrier against counsel hired by the primary carrier. Taking the facts alleged by Great American as true, the Amended Complaint states several viable causes of action against the Quintairos Firm.

1. Great American was a foreseeable third-party detrimentally relying on the due diligence of the Quintairos Firm.

4.4 As the primary carrier, Royal controlled the defense in the Vicksburg litigation. Royal retained the Quintairos Firm as defense counsel for these cases. As is customary in insurance defense cases, counsel—which was the Quintairos Firm—provided status reports concerning potential exposure in the cases to the nursing home insureds as well as to Royal (the primary carrier) and Great American (the excess carrier). In furtherance of this task, the Quintairos Firm generated litigation reports which it sent directly to Great American. Great

American justifiably and detrimentally relied upon these reports, which estimated exposure in each case at a level vastly below the primary coverage limits.

4.5 As previously discussed, Great American first learned of the Quintairos Firm's malpractice in the Chase case through one of the firm's reports. Great American also learned that the reports had consistently and calculatedly undervalued each of the underlying cases so as to intentionally avoid implicating Great American's excess coverage. As a result of these litigation reports, Great American was led to believe the Quintairos Firm was defending the underlying cases appropriately and that excess coverage was not implicated. Great American was justified in relying on these litigation reports, which the Quintairos Firm sent directly to Great American. There is no question but that Great American was a foreseeable third-party detrimentally relying on the Quintairos Firm's professional due diligence in handling the underlying cases.

2. The Quintairos Firm was grossly negligent and reckless in performing its professional duties.

4.6 The Quintairos Firm's gross negligence and reckless disregard for the rights of foreseeable third parties in handling the underlying cases directly contributed to eventual settlement of the cases at amounts well in excess of the primary coverage. The Quintairos Firm repeatedly bungled expert designations in multiple cases, including a complete failure to timely designate in the Chase case. In addition, in another case, the Quintairos Firm announced its unavailability for trial due to excessive *pro hac vice* requests (which incidentally resulted in sanctions against the Firm) only days before the trial date, again causing settlement values to escalate. These and other actions on the part of the Quintairos Firm, which will be unearthed and further developed through discovery, evince a level of egregiousness and wantonness as to constitute a separate, independent tort of their own. The Quintairos Firm was well aware that Great American was reliant on its reports. Indeed, Quintairos sent Great American written

valuation reports for this purpose. Great American certainly had no authority to control the defense of these cases when excess coverage was not even remotely implicated. Only Royal had this authority, and Royal gave it to the Quintairos Firm. When Quintairos mishandled the cases with gross negligence and reckless disregard for the rights of others, liability extended to those potentially liable for any indemnity, including both the primary and excess carriers.

3. Privity is not a requirement of Great American's claims against Quintairos.

4.7 The Mississippi Legislature has abolished the requirement of privity for all actions involving economic loss: "In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action." Miss. Code Ann. § 11-7-20. This Court has instructed: "A plain reading of the statute clearly suggests that it was the legislative intent to remove the privity requirement in all cases." Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 673 (Miss. 1983). In addition, contrary to the Quintairos Firm's contention, Great American's Complaint sets forth several alternate, viable theories of recovery in addition to its claim for legal malpractice. Great American has pleaded causes of action for negligence, gross negligence, negligent misrepresentation, and negligent supervision. Because these theories of recovery likewise do not require privity, the lower court's dismissal of the Quintairos Firm from this lawsuit should be vacated.

(a) Legal Malpractice

4.8 In Century 21, this Court carefully examined whether privity was required to maintain a claim for legal malpractice. 612 So. 2d at 359. The Century 21 Court struggled to reconcile Miss. Code Ann. § 11-7-20 with the essential elements of a claim for legal malpractice: "While privity is a necessary component of the attorney-client relationship, a requirement of

privity in other cases of negligence is 'forbidden under our law.'" Century 21, 612 So. 2d at 373 (quoting Touche Ross v. Commercial Union Ins., 514 So. 2d 315, 321 (Miss. 1987)). This Court explained the immaterial difference between a legal theory premised on "garden variety" negligence as opposed to legal malpractice:

> Our case law regarding legal malpractice is, to the extent that privity is required, in conflict with Miss. Code Ann. § 11-7-20 unless there is a distinction between garden variety negligence cases and actions for legal malpractice. The elements of negligence are duty, breach, proximate cause, and damages. The elements of legal malpractice are attorney-client relationship (which imposes a duty), negligence (breach), proximate cause, and damages. At most, a legal malpractice action is a negligence action dressed in its Sunday best.

Century 21, 612 So. 2d at 373 (internal citations omitted). Accordingly, in Century 21, this Court seized the opportunity to "modify the requirements of legal malpractice actions based on an attorney's negligence in performing title work by abolishing the requirement of attorney-client relationship and extending liability to foreseeable third parties who detrimentally rely, as we have done in cases involving other professions." Id. at 374. The Century 21 case makes clear that this Court no longer requires privity for a party to pursue a claim for legal malpractice as long as the party is a foreseeable third party that detrimentally relied on an attorney's negligently rendered services.

(b) Negligence and Gross Negligence

4.9 The Century 21 Court also addressed the contrasting view that a claim for legal malpractice might be distinguishable from a claim against an attorney for simple negligence in his performance of legal services. The Century 21 Court posed a fitting question in light of the appeal before this Court today: "Even if these are viewed as two separate and distinct causes of action, does one's status as an attorney insulate him from a suit based on negligence wherein the plaintiff would be required to prove only the traditional elements of duty, breach, proximate cause, and damages?" Id. In answering this question, the Century 21 Court drew an analogy to

what was, at the time, a recent decision to abolish the doctor-patient requirement in medical malpractice suits and announced "that the same reasoning should apply to negligence actions against attorneys, to wit: the presence or absence of an attorney-client relationship is merely one factor to consider in determining the duty owed rather than being the single factor which establishes that a duty is owed." Id. Instead, the more appropriate question "'to whom is a duty owed?' takes center stage." Id.

4.10 In addition to a claim for legal malpractice, Great American has pleaded claims for negligence and gross negligence as well. Whether or not this Court determines that claims for legal malpractice are distinguishable from those for negligence, the simple fact remains that one's status as an attorney does not insulate him from suit in any and all circumstances that involve his professional conduct. The Century 21 case makes this point abundantly clear. The question of whether Great American is a foreseeable third party so that the Quintairos Firm owed Great American a duty is factual in nature, and the lower court's 12(b)(6) dismissal of Quintairos from this lawsuit was erroneous as a matter of law.

4.11 In addition, the Fifth Circuit Court of Appeals has recently opined concerning the current state of Mississippi law with regard to this expansive view of liability. In Paul v. Landsafe Flood Determination, Inc., a homeowner named Mary Dobsa brought suit against Landsafe for an erroneous report which indicated that her home was not located in a flood hazard area. Id. at *1. Pursuant to the National Flood Insurance Act, Countrywide - Dobsa's mortgage lender - contracted with Landsafe to determine whether Dobsa's home was located in a federal flood zone. Id. Because Landsafe determined that the home was not in a flood zone, Countrywide provided financing without requiring Dobsa to acquire flood insurance. Id. Unfortunately, Hurricane Katrina heavily damaged the home. Id. Subsequently, the parties determined that the home was actually located within a flood zone, and Dobsa filed a diversity

action alleging negligence and negligent representation on the part of Landsafe. The Court's decision to reverse the lower court's dismissal of Dobsa's suit eventually turned on one query: whether Landsafe owed a duty to Dobsa, the homeowner who was not a party to the contract between Countrywide and Landsafe.

4.12 The portion of the Court's opinion in Paul relevant to the issue before this court involves the Erie determination that Mississippi allows lawsuits filed by foreseeable third parties who are not in privity with the Defendant but who justifiably and detrimentally rely on the Defendant's professional opinions. Id. at *4. ("Our primary focus will be on the current landscape of Mississippi substantive law.") (internal citations omitted). After analyzing a flood case from 1986 with uncertain implications, the court reviewed other Mississippi precedents for instruction.

4.13 First, the court addressed the Defendant's reliance on the absence of privity by citing this Court's decision in Touche Ross & Co. v. Commercial Union Ins. Co., 514 So. 2d 315, 318 (Miss. 1987):

> [T]he Court finds that an independent auditor is liable to reasonably foreseeable users of the audit, who request and receive a financial statement from the audited entity for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss, proximately caused by the auditor's negligence. Such a rule protects third parties, who request, receive and rely on a financial statement, while it also protects the auditor from an unlimited number of potential users, who may otherwise read the financial statement, once published.

Paul, 2008 WL 5061629 at *4 (citing Touche Ross & Co., 514 So. 2d at 322-23).

4.14 After Touche Ross & Co., the Paul court analyzed a subsequent Mississippi Supreme Court decision, Hosford v. McKissack, 589 So. 2d 108 (Miss. 1991), which

> arguably broadened the Touche Ross rule and held that while those who "request and receive an audit report or a termite inspection report may be within the ambit of the defendant's duty, it does not follow on principle that those who do not formally request the report of and from its maker are excluded." The liability is "to reasonably foreseeable users," not just to those who request the work.

Paul, 2008 WL 5061629 at *5 (citing Hosford, 589 So. 2d at 111).

4.15 The Paul court makes clear that "Mississippi's rule is . . . expansive. Together, Touche Ross and Hosford illustrate that a relevant inquiry for purposes of Mississippi law is whether [the Defendant] could have reasonably foreseen that [the Plaintiff] would rely on the [professional service]—not whether [the Plaintiff] was a member of a limited group for whose benefit the [service] was intended." Paul, 2008 WL 5061629 at *5. Because "the erroneous flood-zone determination was the kind of professional opinion, developed in the course of a party's business and supplied for the guidance of others in a transaction, on which justifiable and detrimental reliance by a reasonably foreseeable person might be shown to have occurred[,]" the court determined that liability was not foreclosed. Paul fully supports Great American's contention that a direct action is appropriate in the instant case because, under Mississippi law, despite the absence of contractual privity, professionals owe a duty to foreseeable third parties who justifiably and detrimentally rely on their professional opinions. Id. at *7.

4.16 When applied to the facts before this Court, the Quintairos Firm created valuation reports for each of the underlying cases on which this lawsuit is predicated. The Quintairos Firm sent these reports to Great American, and Great American justifiably and detrimentally relied upon them. Great American, as the excess insurer, is clearly a reasonably foreseeable third party, and a direct action based upon the gross negligence of these reports is allowable under Mississippi law. In addition, Great American will prove that these reports were created in bad faith so that Royal could "gamble" with Great American's excess policy by moving toward trial without proper management or oversight of the litigation. As a result, the Quintairos Firm and Royal, acting in concert, prevented Great American from becoming involved or assuming control of the underlying cases for any purpose, thereby causing damage to Great American.

(c) Negligent Misrepresentation

4.17 This Court has set forth the elements of a claim for negligent misrepresentation in the following manner:

> In order to establish negligent misrepresentation, the following elements must be proven: "(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." Horace Mann Life Ins. Co. v. Nunaley, 960 So. 2d 455, 461 (Miss. 2007) (citing Skrmetta v. Bayview Yacht Club, Inc., 806 So. 2d 1120, 1124 (Miss. 2002)).

Hazlehurst Lumber Co., Inc. v. Mississippi Forestry Com'n, 983 So. 2d 309, 313 (Miss. 2008). As pleaded in Great American's Amended Complaint, the Quintairos Firm submitted litigation reports to Great American that misrepresented to the carrier that the firm was appropriately handling the cases. In addition, the reports represented the valuation of the cases at a number vastly lower than that at which they eventually settled. Because of the Quintairos Firm's representations to Great American that the cases were worth amounts vastly below an amount that would implicate excess coverage, Great American believed in good conscience that it had no reason to take action to protect itself in any way. In the Chase case, it was only *after* the deadline for expert designation that the Quintairos Firm informed Great American the case was worth approximately eight times its previous valuation. Great American certainly had no ability to retroactively protect its interests by designating experts in the case. In addition to the fact that Great American had no control of the defense, the deadline for designations had passed. Great American's complaint alleges these facts and must be taken as true for purposes of a Motion to Dismiss. Accordingly, Great American's claim for negligent misrepresentation withstands 12(b)(6) scrutiny as well.

(d) Negligent Supervision

4.18 Under a simple negligence theory, a plaintiff may seek to hold an employer directly liable for the negligent supervision of an employee. Mississippi cases do not directly distinguish between negligent supervision and general negligence. Great American's inclusion of this allegation in its Complaint, however, represents an alternative theory of the case. Proving negligence requires demonstration of a duty of care owed by the employer, the breach of that duty, foreseeability, causation and damages. This theory includes, but is distinguishable from, legal malpractice because Great American alleges damage from the negligent supervision which resulted in legal malpractice. For example, a claim for negligent entrustment in a situation involving an automobile accident is not against the operator of the automobile. The plaintiff could pursue a claim against the individual who negligently entrusted the vehicle to the eventual torfeasor rather than against the tortfeasor himself. In this case, the Quintairos Firm handed the underlying cases off to a young lawyer with no trial experience and walked away. The fall-out was disastrous.

4.19 As noted above, no partners with the Quintairos Firm were even admitted to practice law in the state of Mississippi. As a result, Quintairos failed to provide trial counsel qualified to handle the cases.[9] Because certain members of the firm who were not licensed to practice in Mississippi had been involved in handling the Vicksburg litigation, the trial judge issued an order holding that a member of the Quintairos firm engaged in the unlawful practice of law and referred the issue to the Mississippi Bar. Ultimately, the Quintairos Firm failed to adequately supervise its employees and placed inexperienced attorneys in vital roles without

[9] If allowed to proceed in discovery in this case, Great American will establish this failure was a pattern followed by the firm in numerous instances. As noted by Great American in this litigation, "The Quintairos firm has been sanctioned by other Circuit Court judges in both Warren County and other Counties in Mississippi. In addition, the Mississippi Supreme Court was set to question the Quintairos Firm regarding their excessive applications for *pro hac vice* and their application for admission to this State's Bar. The firm, however, withdrew their applications before the hearing.

adequate supervision by experienced attorneys duly licensed to practice in Mississippi. As such, Great American has stated a claim for negligent supervision which also withstands dismissal pursuant to Rule 12 (b)(6).

C. Great American Possesses an Equitable Right to "Step into the Shoes" of its Insureds and Assert Any Claims They May Have

4.20 Mississippi jurisprudence has long recognized equitable subrogation as a viable tool at the court's discretion, invoked when equity so requires. In the underlying cases, the reckless conduct of the Quintairos Firm legally damaged Great American. Great American, adhering to its duty of good faith and fair dealing to the insured, "stepped into the insureds' shoes" and satisfied the claims. As in the vast majority of all insurance cases, the insureds in the underlying cases have no incentive to exercise their rights to bring suit against their attorney because the claims against them have been satisfied by another. Great American, as the insureds' excess carrier, was obligated to satisfy insureds' debts when the same exceeded primary coverage. But the burden brought about by the reckless conduct and legal malpractice on the part of the insureds' attorney was not bargained for and should not lie with Great American. Similar to the way in which primary carriers subrogate against tortfeasors that damage their insureds, Great American has a recognized right to protect its interests through equitable subrogation. By "stepping into the shoes" of the insureds, Great American asserted their claims against Quintairos. Through this equitable mechanism, the claims never changed hands; rather, the injured person, who is the real party in interest, simply assumes the position of the insureds to the extent of the claims insured.[10]

[10] As discussed *infra*, this practice is consistent with Miss. R. Civ. P. 17, which requires that all cases shall be prosecuted by the real party in interest.

1. The Law of Subrogation in Mississippi

4.21 In addressing the law of subrogation, this Court has reiterated the following definition: "Subrogation is the substitution of one person in the place of another, whether as a creditor or as the possessor of any rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and to its rights, remedies, or securities." Ellis v. Powe, 645 So. 2d 947, 951 (Miss. 1994) (quoting St. Paul Property & Liability Insurance Company v. Nance, 577 So. 2d 1238, 1240-1241 (Miss. 1991); Indiana Lumbermen's Mutual Insurance Company v. Curtis Mathes Manufacturing Company, 456 So. 2d 750, 754 (Miss. 1984)). It is clear, therefore, that this Court considers the general concept of subrogation to mean that one party is substituted for another rather than, as the Quintairos Firm contended at the trial level, that a claim has been assigned from one party to another.

4.22 Although often contractual, subrogation rights may also arise as a matter of law so that the court may extend an equitable arm in aid of aggrieved parties. Hare, 733 So. 2d 277, 282 (Miss. 1999). This Court has repeatedly described the doctrine by noting that "[t]he principle of equitable subrogation does not arise from contract (for that is conventional subrogation), but is a creation of the court of equity, and is applied in the absence of an agreement between the parties, when otherwise there would be a manifest failure of justice." Id. (quoting Union Mortgage, Banking & Trust Co. v. Peters, 18 So. 497, 500 (Miss. 1895)). In addition, this Court has made clear that equitable subrogation is applied broadly where justice requires:

> The doctrine is one of equity and benevolence; its basis is the doing of complete and essential justice between the parties without regard to form. It rests upon principles of natural right and equity. The court should rather incline to extend than restrict the operation of the doctrine. It applies wherever any person, other than a mere volunteer, pays a debt or demand, which in equity or good conscience should have been satisfied by another, or where one person finds it necessary for his own protection to pay a debt for which he is not primarily liable[.]

Grenada Bank v. Young, 104 So. 166, 167 (Miss. 1925). The Mississippi view of equitable subrogation is also echoed by other jurisdictions: "Subrogation has been described by courts as a flexible and elastic equitable doctrine, and hence 'the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability.'" Atlanta Intern. Ins. Co. v. Bell, 475 N.W. 2d 294, 298 (Mich. 1991).

2. Equitable Subrogation of Legal Malpractice Claims

4.23 As cited above, regardless of the nature of the claim, Mississippi authority supports upholding the use of equitable subrogation when equity so requires.[11] While difficulty may arise in circumstances where an attorney owes conflicting duties to the insured and a carrier, equitable subrogation is especially useful in Mississippi because of the this Court's holding in Moeller v. American Guar. and Liability Ins. Co. that an attorney hired by an insurance company must withdraw from dual representation of the insurer and insured if a conflict arises between the interests of the insurer and insured. 707 So. 2d 1062, 1070 (Miss. 1996). In Mississippi, circumstances should never arise where an attorney faces a conflict of interest between the insurer and the insured. If a conflict developed at some point in the litigation of the underlying cases, the Quintairos Firm would have been forced to immediately withdraw as counsel for both Royal and the nursing home insured, and the insureds would be provided Moeller counsel if desired. In the case at bar, the fact that the interests of all parties aligned is evidenced by Quintairos's continued dual representation.

[11] Whether equity requires such a result should be a fact question determined after the parties have conducted full discovery rather than an issue determined by the trial judge on a motion to dismiss under Miss. R. Civ. P. 12(b)(6).

(a) Equity Dictates Applicability of Equitable Subrogation So That Damages Can Be Properly Attributed to Quintairos' Malpractice

4.25 With regard to equity, "[r]efusal to permit the excess carrier to vindicate [itself] would burden the insurer with a loss caused by the attorney's negligence while relieving the attorney from the consequences of legal malpractice." American Centennial Insurance v. Canal Insurance Company, 843 S.W. 2d 480, 485 (Tex. 1992); See also National Union Insurance Company v. Dowd & Dowd, P.C., 2 F.Supp. 2d 1013, 1024 (N.D. Illinois 1998) ("[I]t would be inequitable to place the burden of legal malpractice upon the excess insurer, allowing a negligent attorney to escape the consequences of his misconduct, merely because the insured lacks the economic incentive to sue."). In the instant case, one would be hard pressed to imagine a circumstance more ripe for application of equitable subrogation based on the facts alleged by Great American in the Amended Complaint. For example, Quintairos has acted negligently as a matter of law by, but not limited to, failing to designate expert witnesses for the Chase case. Byrd, 933 So. 2d at 905 ("An attorney who fails to designate an expert by a court-mandated deadline and does not provide any reason for doing so, is negligent as a matter of law[.]"). The question must be asked: Who should be held responsible for this conduct?

4.26 If the court fails to hold the Quintairos Firm liable for its malpractice, Quintairos would ironically benefit from the insureds' prudence in contracting for excess coverage. Such a system would constructively arm attorneys with a shield from responsibility: "Defense counsel's immunity from suit by the insurer would place the loss for the attorney's misconduct on the insurer. The only winner produced by an analysis precluding liability would be the malpracticing attorney. Equity cries out for application under such circumstances." Atlanta International Insurance Co., 475 N.W. 2d at 298; See also St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, 379 F.Supp. 2d 183, 193 (D.Mass. 2005) ("Denying

subrogation in this case [could] serve to immunize the Defendants, the alleged wrongdoers, from any liability altogether. Such a result would not advance the strong public policy . . . to hold attorneys accountable."). The Quintairos Firm cannot be allowed to manipulate its business relationships in this fashion, and this Court should allow equitable subrogation for these exact types of circumstances.

(b) Application of Equitable Subrogation Does Not Impose Any New Burdens on Attorneys in the Insurance Context Because the Excess Carrier Merely Seeks to Enforce Duties Which Already Exist

4.27 In the landmark insurance case Moeller v. American Guar. and Liability Ins. Co., the Mississippi Supreme Court acknowledged the complicated relationships that often arise between attorneys, insurers, and insureds. 707 So. 2d at 1070. "In a malpractice action against a defense counsel, however, the interests of the insurer and the insured generally merge." Atlanta International Insurance Co., 475 N.W. 2d at 298.

4.28 When faced with the exact dilemma before this court today, the Texas Supreme Court aptly described the concepts at play:

> Defense counsel must be particularly sensitive to the varying interests of the insured and the insurer which produce complex and often conflicting relationships.
>
> Recognizing an equitable subrogation action by the excess carrier against defense counsel would not, however, interfere with the relationship between the attorney and the client nor result in additional conflicts of interest. **Subrogation permits the insurer only to enforce existing duties of defense counsel to the insured.**
>
> Further, the concerns of the excess and primary carriers and the insured **generally overlap** in ensuring that the merits of the defense are not precluded from being heard because of attorney malpractice.

American Centennial Insurance, 843 S.W. 2d at 484. (emphasis added). In short, "[n]o new or additional burdens are imposed on the attorney, who already has the duty to represent the insured[.]" Id. at 484-85. Instead, "[t]he best interests of both insurer and insured converge in

expectations of competent representation." Atlanta International Insurance Co., 475 N.W. 2d at 298.

4.29 Although the Quintairos Firm, in its Brief in Support of Motion to Dismiss, set forth specific conjectural dilemmas which *may* arise to support its contention that the trial court should wholly reject subrogation's applicability within the realm of claims for legal malpractice, "the possibility of harm to [the insured] is more theoretical than real." St. Paul Fire and Marine Ins. Co., 379 F.Supp. 2d at 193. As previously explained, Mississippi requires that these interests align in order for an attorney to represent both the insurer and the client. Indeed, in this case no such dilemmas exist at all.

(c) Equitable Subrogation Serves as a Perfect Compromise Between Client-Confidence Concerns and Proper Allocation of Liability

4.30 This court, if forced to adopt a blanket rule, would undoubtedly be saddled with the undesirable task of weighing legitimate, competing interests: "To hold that an attorney-client relationship exists between [an excess] insurer and defense counsel could indeed work mischief, yet to hold that a mere commercial relationship exists would work obfuscation and injustice." Atlanta International Insurance Co., 475 N.W. 2d at 297. Instead, application of equitable subrogation strikes the perfect balance: "The gap is best bridged by resort to the doctrine of equitable subrogation to allow recovery by the insurer." Id. The Michigan Supreme Court, when faced with this dilemma, summarized the benefits of applying the doctrine of equitable subrogation to facts almost identical to those at bar:

> The doctrine is eminently applicable under the facts of this case. A rule of law expanding the parameters of the attorney-client relationship in the defense counsel-insurer context might well detract from the attorney's duty of loyalty to the client in a potentially conflict-ridden setting. Yet to completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship.

Atlanta International Insurance Co., 475 N.W. 2d at 298. Because of these reasons, the court went on to apply the "remedy of equitable subrogation-a less sweeping, less rigid solution than creation of an attorney-client relationship between the [excess] insurer and defense counsel, but a more flexible, more equitable solution than absolution from liability for professional malpractice." Id. at 299. Through this analysis, the wrongdoer is brought to justice, and the injured party may recover.

(d) Sound Policy Dictates Applicability of Subrogation So That the Public Does Not Bear the Loss for Quintairos' Malpractice

4.31 Within the context of insurance law, a central concern that reinforces insurers' rights to assert claims via subrogation is that once a claim against an insured is covered by the insurer, little (if any) incentive exists for the insured to try and recoup monies paid on his behalf because he has been absolved from any pecuniary damage. Royal Ins Co. of America v. Caliber One Indem. Co., 465 F. 3d 614, 620-21 (5th Cir. 2006); Atlanta International Insurance Co., 475 N.W. 2d at 297; American Centennial Insurance, 843 S.W. 2d at 485; St. Paul Fire and Marine Ins. Co., 379 F.Supp. 2d at 194; National Union Insurance Company, 2 F.Supp. 2d at 1023-24. This concept certainly holds true where the insured has both primary and excess coverage so that the odds of a settlement or judgment exceeding his coverage are extremely improbable.

4.32 Because the insured has no incentive to recover against a malpracticing attorney, a policy decision must be made with regard to where the costs will fall. In essence, two choices exist: the cost can be borne by either the general public or the tortfeasor himself. Atlanta International Insurance Co., 475 N.W. 2d at 297. "Equitable subrogation best vindicates the attorney-client relationship and the interests of the insured, properly imposing the social costs of malpractice where they belong." Atlanta International Insurance Co., 475 N.W. 2d at 297. "In such cases the attorney-client relationship, the interests of the client, the interest of the insurer,

and ultimately the public, which otherwise would absorb the costs of the malpractice, all benefit from exposure to suit." Id. at 299.

(e) Sound Policy Dictates Applicability of Subrogation So That the Public's Confidence in the Profession Will Not Be Diminished

4.33 As previously stated, within the context of claims for equitable subrogation, the interests of the insured and his insurers are aligned so that the court need not agonize over any potentially negative impacts with regard to the attorney-client relationship. They simply do not exist. Yet even if such concerns existed, the balance would still tip in favor of holding attorneys responsible for their conduct. In recent years, public confidence in the legal profession has dipped to an all-time low with scandals that have shaken the bedrock of the entire profession. "[P]roviding shelter for attorneys . . . would actually diminish public confidence in the profession by creating the perception that the system provides attorneys with unjustified special protection." St. Paul Fire and Marine Ins. Co., 379 F.Supp. 2d at 191. The policies of this state should favor accountability and transparency with regard to attorney malpractice.

4.34 The Quintairos Firm erroneously presupposes that applying equitable subrogation in the current context would somehow equate to a blanket allowance of the transfer of malpractice claims and the eventual undermining of the attorney-client relationship. The problem with this position is that equitable subrogation involves the Court, a well-equipped expert in the law, which reviews the particular set of circumstances to determine whether equity requires application of the doctrine. "[B]ecause equitable subrogation flows from extension of a court's equitable arm, the fear of commercial exploitation may not be as palpable in the equitable subrogation context." St. Paul Fire and Marine Ins. Co., 379 F.Supp. 2d at 195. By allowing courts the latitude to protect the public by holding malpracticing attorneys responsible for their conduct, overall confidence in the profession will be best served.

3. Great American is the Real Party in Interest in This Matter

4.35 Rule 17(a) of the Miss. R. Civ. P. requires every claim to be prosecuted in the name of the real party in interest. Importantly, Rule 17(b) specifically addresses subrogation cases and requires that actions be brought in the name of the subrogee, "regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise ...." The comments to Rule 17 provide:

> Rule 17(b) governs real parties in interest in subrogation cases. One of the most common instances of subrogation is when the insurer indemnifies its insured, at which time the former succeeds to whatever rights the latter has against the person who allegedly caused the damages .... The general rule under the federal equivalent of MRCP 17(b) is that if an insurer has paid the entire claim it is the real party in interest and must sue in its own name. This is sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit.

In Mississippi, an insurer, as subrogee and the party in interest, is called upon to take affirmative steps to protect itself by initiating a cause of action in its own name rather than depending on the insured to take action. McDonald v. Southeastern Fidelity Ins. Co., 606 So. 2d 1061, 1068 (Miss. 1992).

4.36 As the real party in interest, Great American is entitled to bring suit. Where an insurance carrier pays a judgment pursuant to a policy issued to an insured tortfeasor, the carrier is the real party in interest in a subsequent legal action brought against the insured's representation to recover damages lost as a result of malpractice. Ohio Central R.R. System v. Mason Law Firm Co., 915 N.E.2d 397, 406 (Ohio App. 2009).

4.37 Additionally, Rule 17(a) provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." If

a party had a reasonable basis for arguing that it was the real party in interest, a court should not, after determining the party not to be the party in interest, dismiss its suit but allow ratification, joinder, or substitution. IHP Industrial, Inc. v. Permalert, ESP, 178 F.R.D. 483, 486-87 (S.D. Miss. 1997).

4. Quintairos Fails to Decipher Crucial Differences Between the Authority Relied Upon in its Motion to Dismiss and the Laws of Mississippi

4.38 In arguing their Motion to Dismiss before the trial court, Quintairos relied on cases originating in states that do not allow assignment of legal malpractice claims. Quintairos argued that assignment was tantamount to subrogation and relied upon these cases to argue against Great American's right of subrogation in this matter. Mississippi law, on the other hand, allows assignment of "any chose in action." Miss. Code Ann. § 11-7-3. This Court has specifically allowed a legal malpractice claim to proceed where another assigned the plaintiff the claim. MS Comp Choice v. Clark, Scott & Streetman, 981 So. 2d 955 (Miss. 2008). Accordingly, in Mississippi, the distinction between subrogation and claim assignment is merely academic and Great American has a right to recovery against Quintairos under either theory.

4.39 Some states have chosen to prohibit assignment of legal malpractice claims (or tort claims altogether). In its Motion to Dismiss, the Quintairos Firm urged the trial court to consider adopting a new prohibition on assignment of legal malpractice claims. Even if the court had decided to prohibit such assignments, there is a distinction between assignment and equitable subrogation of legal malpractice claims. Even if Mississippi adopted a prohibition on assignments of legal malpractice claims, which clearly has not occurred,[12] the prohibition would

[12] Mississippi law distinguishes between assignment and subrogation. In Home Ins. Co. v. Mississippi Ins. Guar. Ass'n., this Court explained this distinction. 904 So. 2d 95 (2004).The well-established law of Mississippi instructs that claims (even those for legal malpractice) are assignable. Mississippi Code Sections 11-7-3 and 11-7-7 which mandate that "any chose in action" may be assigned. Recently, this Court has twice had the opportunity to determine that assignments of legal malpractice

not operate to foreclose equitable subrogation rights. Mississippi law distinguishes between assignment and equitable subrogation, resulting in allowance of equitable subrogation.

V. CONCLUSION

5.1 For the above and foregoing reasons, Plaintiff/Appellant Great American respectfully requests this Court enter an order reversing the trial court's dismissal of Quintairos Prieto Wood & Boyer, P.A. from this matter. Great American respectfully requests this Court remand this case to the Circuit Court of Warren County, Mississippi, to proceed against the defendants therein.

Respectfully submitted,

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claims violate public policy. See MS Comp Choice v. Clark, Scott & Streetman, 981 So. 2d at 956; Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440, 442-43 (Miss. 2006). Instead of seizing those opportunities, this Court has refused to diverge from the Mississippi Legislature's mandate to allow claim assignment.

CERTIFICATE OF SERVICE

I, Christopher T. Graham, do hereby certify that I have this day caused to be served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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ATTORNEYS FOR QUINTAIROS PRIETO WOOD & BOYER P.A.

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CURRIE JOHNSON GRIFFIN GAINES & MYERS
Post Office Box 750
Jackson, MS 39205-0750
ATTORNEYS FOR ROYAL INSURANCE COMPANY

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

This the 28th day of December, 2009.

Christopher T. Graham