2009-CA-01063 TS

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 Supreme Court may evaluate possible disqualification or recusal.

1. Great American E & S Insurance Company, Respondent/Appellant

2. Michael A. Heilman, Christopher T. Graham, John W. Nisbett, Heilman Law Group, P. A., ATTORNEYS FOR GREAT AMERICAN E&S INSURANCE COMPANY

3. Quintairos, Prieto, Wood & Boyer, P. A., Petitioner/Appellee

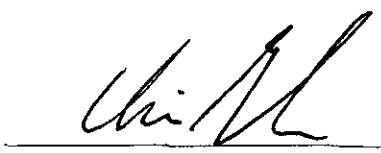
4. David Barfield, Steven L. Lacey, Barfield & Associates, ATTORNEYS FOR QUINTAIROS PRIETO WOOD & BOYER, P. A.

5. Honorable M. James Chaney, Jr., Circuit Court Judge, Warren County, Mississippi

6. Mississippi Defense Lawyers' Association

7. Wilton V. Byars, III, Michael J. Wolf, MISSISSIPPI DEFENSE LAWYERS' ASSOCIATION

8. Louis G. Baine, III, T.L. Boykin, III, PAGE, KRUGER, HOLLAND, P.A., Counsel for Respondent/Appellant



Christopher T. Graham

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I. STATEMENT OF THE CASE

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.

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.).

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 "¶ ____."

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). Great American pleaded an alternate theory of recovery against Quintairos based on equitable subrogation. (Id. at ¶¶ 4.1-4.5).

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 appealed the trial court's dismissal of the Quintairos Firm from this lawsuit, and the Court of Appeals reversed the trial court. This Court granted certiorari. Both parties filed Supplemental Briefing with the Court. After briefing was complete in the appeal, the Mississippi Defense Lawyer's Association ("MDLA") filed its amicus brief in support of Quintarios.

II. SUMMARY OF THE ARGUMENT

At the eleventh hour, MDLA has filed its amicus brief, exclaiming that it has the "simple answer" to the issues before this Court and arguing that the Court of Appeals' opinion will have horrific effects. MDLA Brief, at 5.

Contrary to MDLA's allegations, this appeal is not about the inadequate valuation of a case; rather, this appeal concerns an excess insurer's right to seek redress against malpracticing attorneys who failed to designate experts and secure local counsel for an upcoming trial. The reports shared by Quintarios with Great American show that Great American was relying on Quintarios to complete these most fundamental of tasks, which undoubtedly Royal, Great American, and the insured agreed had to occur to successfully defend the case. This appeal is

about the fundamental failure to provide basic legal services, and Quintarios knew that Great American, who could not control the defense, was relying on them for this obvious service.

MDLA misconstrues Great American's Amended Complaint and argues that Great American's claims amount to a single cause of action: legal malpractice. This argument ignores the clear language of the Amended Complaint. MDLA also makes factual allegations that misapprehend the application of equitable subrogation, which permits the trial court to determine whether equitable subrogation is appropriate after having reviewed evidence. Finally, MDLA argues facts outside of the record and ignores the threshold issue before this Court: whether under Mississippi Rule of Civil Procedure 12(b)(6), Great American has stated claims against Quintairos.

III. FACTS

Although Great American has presented its recitation of the facts to this Court in its principal brief, Great American has included a shortened version of the facts for purposes of completeness.

Although numerous underlying cases predicate this lawsuit, Great American specifically references four grossly mishandled cases in its Complaint.[2] (R.E. 4, Amended Complaint,[3] at ¶¶ 3.3-3.19).[4] As noted previously in Great American's briefs to this Court, 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). In the Vicksburg

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[2] 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.

[3] 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.

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

litigation, the nursing home insureds, Royal and Great American were the parties with a direct 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).

A. Background Facts Concerning Insurance Policies

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).

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.[5] (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 or obligation 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

[5] 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.

status of proceedings and projected potential exposure. (Id. at ¶¶ 3.5, 3.9, 3.14, 3.18, 4.21, 4.22, 4.26).

B. Pertinent Allegations Concerning Quintarios Failure in the Vicksburg Litigation

On Quintarios's briefing before the Court, MDLA largely ignores the factual allegations against Quintarios. This is understandable given the seriousness of Quintarios's failures.

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 ¶¶ 3.10-3.11). 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).

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.[6] (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.

[6] 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.

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 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.

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. 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.

IV. ARGUMENT

MDLA has filed its amicus brief, misconstruing Great American's Amended Complaint, making factual allegations that misapprehend the application of equitable subrogation, and ignoring the issue before this Court: whether under Mississippi Rule of Civil Procedure 12(b)(6), Great American has stated claims against Quintairos.

A. Great American Has Stated Several Claims for Relief

In Great American's Amended Complaint, Great American alleged not only legal malpractice but claims for negligence, gross negligence, negligent misrepresentation, and negligent supervision against Quintarios. See Great American v. Quintarios, Prieto, Wood, & Boyer, P.A., No. 2009-CA-01063, __So. 3d____, 2012 WL 266858, at *4 (Miss. Ct. App. Jan. 31, 2012). Notwithstanding the language of the Amended Complaint, MDLA contends that Great American has only asserted a single claim of legal malpractice. In support of this position, MDLA cites Singleton v. Stegall, 580 So. 2d 1242, 1243 (Miss. 1991). In Singleton, a pro se litigant filed an "inartful" complaint against his lawyer alleging fraud, breach of trust, breach of contract, misrepresentation, negligence, and "pseudo-statements to the plaintiff." Id. at 1243. In interpreting Singleton's "inartful" complaint and the facts alleged therein, the Court generally characterized his entire pleading as one for legal malpractice. Id. at 1246. Contrary to MDLA's suggestion, Singleton does not stand for the proposition that all claims against attorneys are the equivalent of legal malpractice claims. As recognized by the Court of Appeals, Great American's Amended Complaint clearly pleads facts sufficient to state claims not only for legal malpractice but also negligence, gross negligence, negligent misrepresentation, and negligent supervision against Quintarios. Great American, 2012 WL 266858, at *4.

B. Great American Has Stated a Claim for Legal Malpractice

MDLA's brief fails to examine this case through the lens upon which it has been appealed to this Court. "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)).

1. Great American Has Pleaded Sufficient Facts to Establish an Attorney-Client Relationship

The elements of a legal-malpractice claim require: (1) an attorney-client relationship, (2) "negligence on the part of the lawyer in handling his client's affairs entrusted to him," and (3) "proximate cause of the injury." Byrd, 933 So. 2d at 904.

MDLA argues that the Court of Appeals erred by finding that Great American pleaded legally sufficient facts to state a claim for attorney malpractice. Specifically, disregarding that this case is before the Court on a Motion to Dismiss, MDLA argues that the Court of Appeals erred in holding that the sharing of confidential information creates an attorney client relationship. While MDLA's argument might merit consideration in a summary judgment setting after full discovery has taken place, MDLA ignores the lengths the Court of Appeals took to limit its holding to the 12(b)(6) context:

> "The amended complaint claims that Quintarios, or the prior defense counsel, provided status reports or 'evaluations' of 'the settlement value' of the Chase lawsuit. If, indeed, the evidence at trial establishes that defense counsel, hired by Royal to represent a mutual insured, gave information to Great American that was confidential information and was protected from disclosure by the attorney-client privilege or the statute, then such may be considered to be legally sufficient evidence to establish an attorney-client relationship, at least to pass *Rule 12(b)(6)* muster.

See Great American, 2012 WL 266858, at *6. Ignoring the context in which this case comes before this Court, MDLA would have this Court adopt a blanket rule that an attorney client relationship can **never** develop from the sharing of confidential information, even though MDLA has no knowledge of the extent and content of the communications shared by Quintarios. MDLA improperly seeks to test these "facts" on a Motion to Dismiss.

In support of this blanket rule, MDLA cites an Indiana case, Querrey v. Harrow, Ltd. v. Transcont. Ins. Co., 861 N.E.2d 719, 724-25 (Ind. Ct. App. 2007), aff'd, 885 N.E.2d 1235 (Ind. 2008), which actually supports the Mississippi Court of Appeals' ruling that discovery should proceed. In Querrey, after reviewing the communications and the specific timing of the communications, the Court held that the plaintiff could not survive the defendant's **motion for summary judgment**. Id. at 725 ("Nowhere in the correspondence with CNA, which was dated more than a year after the alleged legal malpractice and came from ICON, are there any indicia of dual representation at the time of the alleged malpractice or anytime thereafter."). On motion for summary judgment, Querrey is both factually and legally distinguishable.[7]

The Court of Appeals correctly determined that Great American pleaded legally sufficient facts to state a claim. As the primary carrier, Royal controlled the defense in the Vicksburg litigation. Royal retained the Quintairos Firm as defense counsel for these cases. Quintarios agreed to handle the day-to-day activities related to the litigation. 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). The Quintairos Firm generated litigation reports that it sent directly to Great American.

As a result of Quintarios's actions and representations, Great American was led to believe the Quintairos Firm was handling the day-to-day defense of the underlying cases. Quintarios never disclosed the fact that they would fail to designate experts or retain trial counsel. In fact reports indicated otherwise. Great American was justified in relying on Quintarios's representations, which the Quintairos Firm sent directly to Great American.

2. Strict Privity Is Not Required in an Attorney Malpractice Case

[7] MDLA also cites Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 107-08 (2d. Cir. 1991). Continental is distinguished in that the Second Circuit was not applying Mississippi law. In the Court of Appeals' correct analysis, the Court of Appeals cited to this Court. See Great American, 2012 WL 266858, at *5 (¶30) (discussing when an attorney-client relationship exists under Mississippi law) (citing Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474, 485 (¶30) (Miss. 2010)).

Even without a direct attorney-client relationship between Great American and Quintarios, Great American can still state a claim for legal malpractice against Quintarios because Great American was a foreseeable third party who detrimentally relied on Quintarios's representations. Defending the insured, Quintarios represented to Great American that it would provide the most basic professional services (about which no reasonable attorney could disagree): (1) designating experts in a medical malpractice case and (2) securing trial counsel for a pending trial.

Contrary to MDLA's allegations, this appeal is not about the inadequate valuation of a case. This appeal concerns an excess insurer's right to seek redress against attorneys who failed to designate experts and secure trial counsel for an upcoming trial. Even MDLA would agree that defense counsel should designate experts and have trial lawyers for trial. Great American alleges it was relying on Quintarios to complete the most fundamental tasks. Royal, Great American, and the insured's nursing home did not have any conflicts of interest regarding the need to appoint experts. Royal, Great American, and the nursing home did not have any conflicts regarding the need to have trial counsel for the trial. Quintarios knew that Great American, who could not control the defense,[8] was relying on them for this obvious service. In this sense, Century 21 is not distinguishable from the instant case.

Nonetheless, MDLA argues that no basis exists to create an exception to the attorney-client relationship requirement in an attorney malpractice case. Recognizing that strict privity of contract is not required, the Court of Appeals did not have to extend Century 21 because Mississippi Code Annotated § 11-7-20 does not require strict privity of contract. Great American is not asking this Court to carve out an exception; rather, Great American requests this Court to simply apply Mississippi Code Annotated § 11-7-20 as written.

[8] R.E. 4, Amended Complaint, at ¶ 3.5.

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)). Ultimately, 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.

There is no question but that under the facts alleged in the Amended Complaint, Great American relied on the Quintairos Firm's professional acts in handling the day-to-day defense of the underlying cases. Century 21, 612 So. 2d 359 (instructing 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.").

Contrary to the MDLA's arguments, the Court of Appeals applied the correct standard of review for under Mississippi Rule of Civil Procedure 12(b)(6) and correctly determined that Great American had stated a claim for legal malpractice.

3. Great American's Amended Complaint & Settlement Do Not Negate a Finding that the Insured Would Have Won at Trial.

Great American's Amended Complaint and settlement on behalf of the insured do not negate that Quintarios proximately caused Great American damages. No party to this litigation has argued that Great American has not pleaded sufficient facts to state a claim for attorney malpractice. Nonetheless, MDLA improperly argues that Great American failed to state a claim for attorney malpractice because Great American has failed to allege sufficient facts that Quintarios proximately caused Great American's damages. Specifically, MDLA states, "Great American cannot succeed with an Amended Complaint that negates a finding that the insured would have won at trial absent the alleged malpractice." MDLA Brief, at 15. Notably, Great American is not aware of any requirement of having to specifically plead that it could win "the trial within the trial."

Nonetheless, MDLA puts great emphasis on the fact that in the Amended Complaint, Great American explained that Quintarios's malpractice in failing to designate experts "almost assured" the Plaintiff's victory against the insured. The Amended Complaint states,

> **Once the defense's experts were stricken**, the settlement offer from the plaintiff soared. Knowing that a verdict in favor of the plaintiff was almost assured, **the Royal defendants** immediately tendered their underlying policy limits and Great American stepped in to negotiate a settlement in order to protect the insured from a potentially disastrous situation.

Amended Complaint, at p. 6. (Emphasis added.) In its brief, MDLA misrepresents the Amended Complaint by stating that Great American conceded "the potential for victory at trial." However,

Great American specifically used the term "almost assured" to allege why Royal rendered its policy limits and that Great American had not paid as a volunteer. See Guidant Mut. Ins. Co. v. Indemnity Ins. Co. of North America, 13 So. 3d 1270, 1279 (Miss. 2009) (citing State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co., 255 So. 2d 667, 669 (Miss. 1971) (defining a volunteer as "[a] stranger or intermeddler who has no interest to protect and is under no legal or moral obligation to pay.")). When viewed in its correct context, this phrase shows Great American was under "legal compulsion" to settle the case on behalf of its client due to Quintarios's malpractice, and this settlement in no way undercuts Great American's case against Quintarios. Several courts have permitted legal malpractice suits to ensue after settlement.[9] The Texas Supreme Court, for instance, permitted an excess insurer – who had settled a personal injury case for $3.7 million as a result of the lawyers' mishandling of the underlying litigation – to bring a malpractice suit against the lawyers. American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992).

Great American has nowhere conceded that with proper counsel it would not have successfully defended the underlying suit or would not have achieved a better result. Clearly, Great American has alleged that Quintarios's negligence per se actually caused and impacted the defense. The MDLA's position ignores Mississippi Rule of Civil Procedure 8, which only requires Great American to set forth a short and plain statement of its claim. The Amended Complaint states all the elements necessary to each of the claims asserted by Great American.

Under Mississippi Rule of Civil Procedure 12(b)(6), "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

[9] Other Courts have permitted excess insurers to seek malpractice claims, despite settlement. See Allstate Ins. Co. v. American Transit Ins. Co., 977 F. Supp. 197 (E.D. N.Y. 1997) (applying New York law); Stonewall Surplus Lines Ins. Co. v. Drabek, 835 S.W.2d 708 (Tex. App. Corpus Christi 1992), writ denied, (Dec. 16, 1992) and (rejected on other grounds by Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App. Houston 14th Dist. 1997)); Great Atlantic Ins. Co. v. Weinstein, 125 A.D.2d 214, 509 N.Y.S.2d 325 (1st Dep't 1986).

claim." Franklin County Co-op, 441 So. 2d at 1377 (quoting the comment to Miss. R. Civ. P. 12(b)(6)). Great American's Amended Complaint does not negate that with properly designated experts, the insured "would probably have prevailed" at trial. Singleton, 580 So. 2d at 1246. Great American has alleged that "but for" Quintarios's negligence, Great American would not have suffered its injury. Rogers v. Eaves, 812 So. 2d 208, 211 (Miss. 2002).

C. Mississippi Law Permits Assignment of Claims

MDLA submits that equitable subrogation should not be utilized since there is no authority specifically allowing for assignment of attorney malpractice cases. MDLA Brief, at 14. This argument lacks merit. First, Mississippi law allows assignment of "any chose in action." Miss. Code Ann. § 11-7-3. Second, this Court has permitted 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); and Baker Donelson Bearman & Caldwell, P.C. v. Muirhead, 920 So. 2d 440 (Miss. 2006). This Court has refused to diverge from the Mississippi Legislature's mandate to allow claim assignment. Moreover, as discussed below, MDLA's assignment argument is a red herring that need not be addressed by the Court.

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).

As the real party in interest, Great American is entitled to bring suit.[10] 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).

D. MDLA Misapprehends the Nature of Equitable Subrogation

MDLA argues that this case is not proper for application of equitable subrogation because Quintairos's malpractice did not cause the underlying litigation and client confidences could be compromised. First, MDLA cites zero case law to support the contention that equitable subrogation should not apply because Quintarios did not cause the underlying suit. Second, this reasoning ignores the nature of *equitable* subrogation. Equitable subrogation involves the trial court, a well-equipped expert in the law, which reviews the evidence produced in discovery 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 is served. If this Court permits Great American to subrogate to the insured's rights against Quintairos, then the

[10] Rule 17 gives the Defendants the right to bring in the nursing home insureds as parties to the case, which they have declined to do. Furthermore, Rule 17 allows the nursing home insureds to intervene in the case where they have sustained damages not covered by insurance. Again, they have not.

trial court, having reviewed the evidence, can determine whether under these facts equitable subrogation is appropriate.

Addressing the potential for client embarrassment (amid its parade of horribles), even MDLA admits that "[c]ertainly, there may be occasions where no prejudice or injury will result from this type of action." MDLA Brief, at p. 14. Notably, the Court can take judicial notice that Royal has obtained leave of the trial court to file a third party claim against Quintarios, thereby alleviating any concerns about client confidences as relates to Great American. See Royal Indemnity Co. v. Great American E&S Ins. Co., 2011-M-001870-SCT, Motion # 2011-303 (Combined Petition and Memorandum Brief Requesting Interlocutory Appeal and Stay of Lower Court Proceedings); Bramlett v. Burgin, 382 So. 2d 284, 286 (Miss. 1993) (taking judicial notice of filing). Additionally, not a party to this litigation, MDLA does not have any knowledge or evidence of the contents of the Settlement Agreements and MDLA's argument exceeds the scope of the record on appeal.[11]

MDLA also asserts that Great American is seeking its own pecuniary gain in promoting this litigation. MDLA Brief, at p. 10, n. 43. It should not be lost on the Court that Great American has fully paid the insured[12] and is seeking to be made whole against malpracticing attorneys who failed to designate experts and have trial counsel in a nursing home case. While Great American appreciates the sanctity of the attorney client relationship, to create a blanket rule in which an excess insurer can never state a claim against attorneys would not serve the

[11] For example, MDLA does not know the agreements may be disclosed under court order or other specified conditions. MDLA also does not know that confidentiality arguably only applies to the Plaintiffs in the underlying litigation.

[12] 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. Even assuming such concerns did exist, the balance would favor holding attorneys responsible for their conduct. "[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.

policy interests of Mississippians. See Atlanta International Insurance Co., 475 N.W. 2d at 297. Application of equitable subrogation strikes the perfect balance. 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.

V. CONCLUSION

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 all the defendants therein.

Respectfully submitted,

GREAT AMERICAN E&S INSURANCE COMPANY

By: _____

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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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