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IN THE SUPREME COURT OF FLORIDA

ARCH INSURANCE COMPANY,

Petitioner, Case No. SC19-673

v.

KUBICKI DRAPER, LLP,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL CASE NUMBER 4D17-2889

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

This matter involves a broad certified question from the Fourth District Court of Appeal, specifically: "Whether an insurer has standing to maintain a malpractice action against counsel hired to represent the insured where the insurer has a duty to defend." However, this question does not exist in a vacuum; rather, it must be considered within the context of existing law regarding privity, under the facts and documents present in this matter, and in consideration of the Rules Regulating the Florida Bar.

The reality of this matter is that Arch Insurance Company ("Arch") could have plainly and clearly established a contractual relationship which would have potentially allowed it to sue Kubicki Draper, LLP ("Kubicki") for legal malpractice, and would have raised a legitimate question before this Court. However, it did not. The Rules Regulating the Florida Bar (approved unanimously by this Court) allow for the insurer and the lawyer to create a relationship where the lawyer represents the insured and the insurer as "dual clients" where there is no disqualifying conflict and the insured gives informed consent. The Rules also allow the lawyer to represent "only the insured." Thus, the nature of the relationship is in the hands of the parties, and that has been the case in this state for nearly 20 years.

Whether the lawyer represents the insured or both the insured and the insurer is a determination to be made on a case by case basis, which is exactly what occurred here. Both the trial court and the Fourth District found that Kubicki did not represent Arch given the lack of privity between the parties. Given that reality, they found correctly that Arch lacked standing under this Court's clear precedents.

What Arch seeks is to have this Court impose a *per se* obligation from the lawyer to the insurer (even if the contractual relationship is only between the law firm and the insured and if the insured has not given informed consent) establishing the right to sue for legal malpractice by answering the broadly stated certified question in the affirmative. This Court should decline the invitation to do so, for if it does so as the question is written, law firms who undertake the sole representation of the insured (as here) would be subject to such claims despite having no explicit contractual relationship with the insurer. This is contrary to existing law and harms the interests of the insured.

It is respectfully submitted that this Court should, as it has the ability to do, rephrase the question to reflect what the trial court actually passed upon. Specifically, the question before this Court should be: "Whether an insurer has standing to maintain a malpractice action against counsel hired to represent the insured, *and only representing the insured*, where the insurer has a duty to defend." That question should be answered in the negative. Standing should only arise, if at

all, when the parties have explicitly created dual representation, and that question is not present in this case. Alternatively, if this Court does not wish to rephrase the certified question, it is respectfully submitted that this Court, as is its right, find jurisdiction was improvidently granted and take up the issue of standing in an appropriate case where dual representation was undertaken.

SUPPLEMENTAL STATEMENT OF CASE AND FACTS

Arch's Statement of Case of the Case and Facts is generally accurate, though it focuses on numerous factual matters in the long history of this case which are not relevant to this Court's determination of this matter. As noted by the Fourth District, Arch hired Kubicki to defend Spear Safer CPA's & Consultants, LLP ("Spear Safer") in a separate suit than the underlying action. *Arch Ins. Co. v. Kubicki Draper, LLP*, 266 So. 3d 1210, 1211 (Fla. 4th DCA 2019). There are actually two critical documents relating to the legal relationship between the parties. The first is the Statement of Insured Client's Rights that was "[a]ttached to the retention letter sent to [Spear Safer] by [Kubicki]." *Id*. at 1212 (R 1680-84).[1] The second was the professional insurance policy (the "Policy") issued by Arch to Spear Safer (SR 1999-2022).

[1]The form of citations used in this Brief will be the same as used by Arch in the Initial Brief. Thus, citations to the record before this Court shall be designated as (SCR __), citations to the record before the Fourth District Court of Appeal shall be designated as (R __), and references to the Supplemental Record before the Fourth District shall be designated as (SR __), all with the appropriate page numbers inserted.

As the trial court and the Fourth District noted, the Statement of Client's Rights was sent directly from Kubicki to Spear Safer. Other than the sentence noting that Kubicki was retained by Arch to defend Spear Safer, Arch is not mentioned in the retention letter (R 1680-81). The retention letter states: "[p]lease note that *we have been retained to defend you [Spear Safer]* with regards to claims that have been brought in this case" (R 1680) (emphasis added). Nothing in the retention letter discusses any duties owed by Kubicki to Arch. The retention letter contains a certificate of service which certified the Statement of Insured Client's Rights was served on Spear Safer representative Peter E. Schroeder on October 19, 2004 (R 1682).

The Statement of Insured Client's Rights, as noted by Arch, "contained the language prescribed by Rule 4-1.8(j) of the Rules Regulating the Florida Bar." Initial Brief, at 3. In its Statement of Facts, Arch makes note of several provisions in the Statement of Insured Client's Rights. Specifically, the provision entitled "Directing the Lawyer" is set forth, which states:

> If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests.

Initial Brief, at 3 (R 1683). Although Arch makes brief reference to the Policy (Initial Brief, at 2), it fails to provide a citation to where any language concerning

"directing the lawyer" appears in the Policy. The Policy contains no such language (SR 1999-1022).

Similarly, Arch notes that the Statement of Insured Client's Rights contains a provision entitled "Conflicts of Interest," which states that "[m]ost insurance policies state that the insurance company will provide a lawyer to represent your interests as well as the insurance company." Initial Brief, at 3 (R 1683). Again, Arch does not cite to the Policy pointing out where such language was present, because it was not (R 1999-1022). Arch's Policy, while lengthy and detailed, makes no mention of any obligations that a lawyer retained by Arch would owe to Arch in a given case (R 1999-1022).

Arch notes that the Statement of Insured Client's Rights contains a provision relating to "litigation guidelines," which states that "[m]any insurance companies establish guidelines governing how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken." Initial Brief, at 4 (R 1683). While Arch argues that those guidelines "imposed obligations which assisted Arch in providing Spear Safer a good faith defense," and that "Kubicki was required to report to Arch," Arch does not cite to the actual guidelines in the record (instead citing to deposition testimony from

Kubicki representatives), and never states that those guidelines in any way created a contractual relationship where Kubicki represented Arch.

As the opinion notes, Arch hired Kubicki to defend Spear Safer in a separate suit, which then settled within the policy limits. That suit was brought by a court-appointed receiver against Spear Safer in the Southern District of Florida, and alleged professional negligence on Spear Safer's part. Initial Brief, at 6. Arch claims that Spear Safer was "facing a potential verdict in excess of $68 million" (Initial Brief, at 8), though there was evidence in the record that the potential damages to Spear Safer exceeded $480 million (R 1128-38; 1275-79). The policy limits were $5 million (R 1999), and the matter settled for $3.5 million (R 1240).

As Arch notes, "[t]his case began when a separate Arch entity, Arch Specialty Insurance Company [], filed a complaint against Kubicki in Broward County Circuit Court alleging professional negligence and breach of fiduciary duty." Initial Brief, at 9. After the trial court granted summary judgment on the basis that the plaintiff in that case was not a proper party, the Fourth District "reversed and remanded with instructions that the trial court permit the complaint to be amended to substitute Arch for Arch Specialty. *Arch Specialty Ins. Co. v. Kubicki Draper, LLP*, 137 So. 3d 487 (Fla. 4th DCA 2014)." Initial Brief, at 9.

After remand, Kubicki again moved for summary judgment on Arch's Third Amended Complaint, arguing that Arch lacked standing to maintain a malpractice

action (R 310-28). That motion argued that two cases from the Supreme Court of Florida held that, "with two very limited exceptions, the plaintiff in a legal malpractice claim must have been in privity with the defendant lawyer" (R 313). Those cases are *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993) and *Angel, Cohen & Rogovin v. Oberon Investments, N.V.*, 512 So. 2d 192 (Fla. 1987). The motion further argued that "[n]o Florida case law recognizes an attorney-client duty owed by a defense counsel to an insurance carrier where the attorney is hired to defend an insured with respect to a liability claim filed under the carrier's policy" (R 313). The motion noted that the Policy gave Spear Safer the right to appoint its own legal counsel to defend any covered claim subject to Arch's "review and consent," which would "not be unreasonably withheld" (R 313, 2003).

The Fourth District's opinion quoted Kubicki's motion extensively. As set forth in the opinion:

> Further, nowhere on the face of the relevant documents . . . relating to the retention of [the law firm], such as the statement of Clients' Rights, is there any indication that with respect to the [underlying] matter, [the law firm] would be representing [the insurer] in addition to [the insured]. Very simply, for that to have been the case, there would have to have been a disclosure to [the insured] that [the law firm] was undertaking the dual representation of [the insured] and [the insurer]. There is[,] however, no such agreement to that effect . . . .

> [The law firm] was in privity of contract with [the insured] and the [insurer's] role was that of a third party paying [the law firm] to represent [the insured] . . . .
>
> [T]he undisputed facts show that during the course and scope of [the law firm's] representation of [the insured,] an opportunity arose to resolve the matter against [the insured] and it was [the law firm's] duty to ensure that the matter was resolved within the limits of the policy providing coverage so as to avoid any exposure to [the insured] in excess of those policy limits. As a net result, the insured ... has suffered no damages as a result of any alleged actions or inactions on the part of [the law firm].

Arch, 266 So. 3d at 1212.

Arch filed a response to the motion (R 415-87). The response acknowledged that "Spear Safer had a right to appoint legal counsel," but argued that Arch had the "ultimate authority as to the selection of defense counsel" (R 421). The response argued that non-binding federal district court cases as well as public policy required that Arch be determined to have standing to bring the action.

The trial court ultimately granted Kubicki's motion (R 1660-65). It noted that Arch argued it had standing because Arch "(1) retained Kubicki Draper as counsel for Spear Safer pursuant to its policy of insurance; (2) paid Kubicki Draper for the legal representation of Spear Safer; and (3) satisfied the settlement for the Underlying Litigation" (R 1661). The trial court noted the relevant precedent of this Court and recognized the "strict privity requirement" present in cases involving claims of legal malpractice (R 1662). The trial court distinguished the

non-binding federal authority cited by Arch, and noted the strong public policy reasons against allowing an insurance company to directly sue the law firm retained to defend its insured (R 1664). As the trial court stated:

> Lastly, the court determines that to allow an insurance company to directly sue the law firm it retains to defend its insured implicates grave public policy concerns, and could result in a plethora of legal malpractice actions filed by insurers against law firms retained to defend the insurance company's insured. This concern is especially true where, as in the instant action, the litigation for which the law firm was retained by the insurer to defend its insured settled within the policy limits of the subject insurance policy, which monetary amounts are clear expectations and risks known to the insurance company. If the law were to allow these types of actions, settlements might never bring closure to a dispute, and it is plausible that law firms would be reluctant to accept an insurer's appointment to defend its insured as settlements might never bring closure to a case.

(R 1664-65). The trial court ultimately found:

> After careful review, the court determines that [the insurer] lacks standing to directly pursue the claims against [the law firm] in the instant action. Attached to the retention letter sent to [the insured] by [the law firm] was a Statement of Client's Rights demonstrating that [the insured] was in privity with [the law firm] as [the law firm's] client [and not with the insurer].

Arch, 266 So. 3d at 1212 (R 1663).

Arch appealed the matter to the Fourth District. In affirming the trial court's grant of summary judgment, the Fourth District held:

> Based on our review of the record, we agree with the circuit court's conclusion that the law firm was in privity with the insured as the client. We see nothing in the record to indicate that the law firm was in privity with the insurer. We also see nothing in the record to indicate that the insurer was an intended third-party beneficiary of the relationship between the law firm and the insured. We further adopt the circuit court's well-reasoned order, distinguishing the federal cases upon which the insurer relies, as our own reasoning.
>
> * * *
>
> Based on the record before us, where nothing indicates that the law firm was in privity with the insurer, or that the insurer was an intended third-party beneficiary of the relationship between the law firm and the insured, we are unwilling to expand the field of privity exceptions to apply to this case. Thus, we affirm the circuit court's conclusion that the insurer lacked standing to pursue a professional negligence claim against the law firm in the underlying action.

Arch, 266 So. 2d at 1212, 1214.

The Fourth District ultimately certified the following question to this Court as being of great public importance: "Whether an insurer has standing to maintain a malpractice action against counsel hired to represent the insured where the insurer has a duty to defend." *Id*. at 1215.

SUMMARY OF THE ARGUMENT

Florida law holds that an attorney is liable for malpractice only with those that it shares privity of contract (subject to two exceptions which do not apply here). The trial court and the Fourth District correctly noted that Arch was not in privity with Kubicki, and therefore lacked standing to bring a legal malpractice action.

Under Florida law, Arch certainly had the ability, with the insured's consent, to enter into a contractual relationship with Kubicki which potentially could have given rise to standing to sue for malpractice, though that was not the case. Parties have the ability to enter into a relationship where the lawyer represents only the insured, or represents both the insured and the insurer. Subject to ethical constraints, the parties are free to define the nature of their relationship, and there is no need to change the law on this point. It would be inadvisable to change the Rules which have controlled how insurers and law firms have entered into contractual relationships for many years, and this Court should not adopt a rule whereby, as Arch suggests, an insurer automatically has standing to sue a law firm even when it chooses not to create a contractual relationship with that firm.

It is respectfully submitted that the question certified from the Fourth District is too broad, and does not recognize that two distinct types of tripartite relationship may be created under Florida law. As clearly set forth in the Rules

Regulating the Florida Bar, the attorney may represent only the insured, or the lawyer "may represent both as dual clients." R. Regulating Fla. Bar 4-1.7(e) cmt. The certified question should be rephrased to reflect that Kubicki was hired only to represent the insured, and then the question should be answered in the negative. Alternatively, it is respectfully suggested that this Court should decline to exercise jurisdiction and consider the issue in a matter arising out of different facts.

The doctrine of subrogation does not apply to this matter for two reasons. First, the parties stipulated that Arch would not seek recovery as a subrogee of Spear Safer, and that stipulation must control. Should this Court address the issue, it should recognize and accept the long-standing principle under Florida law that an insurer may not rely on equitable subrogation in order to state a claim for malpractice against an attorney who represented the insured.

Finally, should this Court consider the public policy implications of the certified question, it should recognize that, as the trial court did, if standing is created in this type of relationship where no privity exists, extensive additional litigation will likely occur in cases throughout the state, and the situation is particularly troubling where, as here, the matter settled within the policy limits.

ARGUMENT

As noted previously, this matter involves a determination by the trial court and the appellate court that, as a matter of law, the contractual documents at issue did not create a legal relationship between Arch and Kubicki sufficient to give Arch standing to sue Kubicki for legal malpractice due to the lack of privity. What is clear is that, under long standing principles recognized by Florida law and the Rules Regulating the Florida Bar (approved by this Court), Arch *could* have created a relationship where Arch and Spear Safer would have been "dual clients" when the original contractual relationships were entered into. However, both the trial court and the Fourth District correctly recognized that they were not.

As will be discussed further below, the certified question, as phrased, makes no distinction between the issue of standing to sue for malpractice in the context of a law firm representing only the insured, versus when a law firm assumes dual representation of the insured and the insurer. It is respectfully submitted that a legitimate question might be present for this Court to decide in the latter circumstance, but not the former. As the lower courts correctly found under this Court's clear precedent, standing to sue for malpractice will not arise when privity is lacking. As such, the certified question is too broad and should be rephrased by this Court to address the specific circumstance of standing when the law firm only represents the insured. Alternatively, this matter should be dismissed because

jurisdiction was improvidently granted.

I. AN INSURER DOES NOT HAVE STANDING TO MAINTAIN A LEGAL MALPRACTICE SUIT AGAINST A LAW FIRM HIRED TO REPRESENT AN INSURED IN THE ABSENCE OF CONTRACTUAL PRIVITY.

A. The Trial Court and the Fourth District Correctly Held, Under this Court's Precedents, that Arch was not in Privity with Kubicki and therefore Standing is Lacking.

As Arch acknowledges, and as the trial court and Fourth District correctly recognized, "[a]s a general matter, 'an attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract.'" Initial Brief, at 22-23 (quoting *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1379 (Fla. 1993)). As this Court explained, and as quoted by the trial court and the Fourth District:

> In a legal contract, the term "privity" is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract. To bring a legal malpractice action, the plaintiff most either be in privity with the attorney, wherein one party has a direct obligation to another, or, alternatively, the plaintiff must be an intended third-party beneficiary.

Arch Ins. Co., 266 So. 3d at 1211-12 (quoting *Espinosa*, 612 So. 2d at 1379-80) (internal citations omitted).

Arch correctly notes:

> To be sure, this Court to date has only twice carved out exceptions to the privity rule: (1) where a third party was an intentional beneficiary of the attorney's services, such

> as the drafting of a will, *see Espinosa*, 612 So 2d at 1379-80; and (2) the preparation of private placement memoranda, where the attorney owes a duty to those who rely on the statements published in those documents, *see Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755, 757 (Fla. 2005).

Initial Brief, at 26-27. Arch makes no attempt to argue that either exception applies here. This matter obviously did not involve a private placement, and, as the Fourth District found, there was "nothing in the record to indicate that the insurer was an intended third party beneficiary of the relationship between the law firm and the insured." *Arch*, 266 So. 3d at 1214. Arch does not suggest otherwise in its Initial Brief.

Given the state of the law, Arch avoids the term "privity" and carefully substitutes the term "tripartite relationship" throughout the Initial Brief, and impliedly argues that the tripartite relationship creates privity between the parties. It does not. Arch misconstrues the term to imply that it *always* creates a situation where counsel represents both the insured and the insurer, though that is not the case. This point is critical to the understanding the issue before this Court. When an insurance company hires a law firm to represent an insured, a tripartite relationship involving the three parties is created; yet, the precise nature and responsibilities within that relationship are determined by the contractual language

used to create the relationship.[2]

The Rules Regulating the Florida Bar will be more fully addressed below, but it must be noted that this distinction is plainly recognized in the comment to Rule 4-1.7(e), unanimously approved by this Court in 2003. *See Amendment to Rules Regulating the Florida Bar re Rules of Professional Conduct*, 838 So. 2d 1140 (Fla. 2003). The comment explains:

> The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case *the lawyer may represent only the insured*, with the insurer having the status of a non-client third-party payor of the lawyer. Alternatively, *the lawyer may represent both as dual clients*, in the absence of a disqualifying conflict of interest . . .

Id. at 1145 (emphasis added).

Thus, it has been clear for many years that the "tripartite relationship" may take two forms: one where the lawyer represents only the insured, and one where the lawyer represents both the insured and the insurer. Arch's attempt to redefine the term to always refer to a dual representation (and this create standing in this

[2]As explained in a law review article addressing the Statement of Insured Client's Rights after it was proposed, the "nature of the [tripartite] relationship is one of substantive contract law, with relevant concepts often embedded in statutes, regulations, and case law." Katherine E. Giddings & J. Stephen Zielezienski, *Insurance Defense in the Twenty-First Century: The Florida Bar's Proposed Statement of Client Rights – A Unique Approach to the Tripartite Relationship*, 28 Fla. St. U. L. Rev. 855, 856 (2001).

matter) is contrary to the plain language of the Rule and comment approved by this Court.

Florida law plainly allows *both* type of tripartite relationships, and allows the parties, by contractual agreement, to determine the nature of the relationship in a given case. Here, based on the record in this case, and specifically the Policy and Statement of Insured Client's Rights, both the trial court and the Fourth District found that Kubicki was only in privity with Spear Safer. As the Fourth District stated in plain terms:

> Based on our review of the record, we agree with the circuit court's conclusion that the law firm was in privity with the insured as the client. We see nothing in the record to indicate that the law firm was in privity with the insurer.

Arch, 266 So. 3d at 1214.

That conclusion is correct, and while Arch makes some reference to the record (which will be further examined below), it really seeks to have this Court ignore the record here, ignore the contractual relationship between parties in a given case, and find that the law firm *always* represents both the insured and the insurer when the tripartite relationship is created. It makes this clear from page one of the Initial Brief when it seeks to redefine the term "tripartite relationship" as having only one meaning. Arch states: "[u]nder the tripartite relationship, *counsel*

represents both the insurer and the insured." Initial Brief, at 1.[3] That is plainly not the case, and this Court must recognize the two different types of responsibilities that law firms assume depending if they represent only the insured, or the insured and the insurer.

Thus, the contractual relationships created here must be examined. As the trial court and the Fourth District noted, the Statement of Client's Rights was sent directly from Kubicki to Spear Safer with a retention letter. The letter notes that Kubicki was retained by Arch to defend Spear Safer, and that is the sole mention of Arch in the retention letter (R 1680-81). The retention letter states: "[p]lease note that *we have been retained to defend you [Spear Safer]* with regards to claims that have been brought in this case" (R 1680) (emphasis added). Nothing in the retention letter discusses any representation of Arch by Kubicki. The retention letter contains a certificate of service which certified the Statement of Insured Client's Rights was served by U.S. Mail on Spear Safer representative Peter E. Schroeder on October 19, 2004 (R 1682).

The Statement of Insured Client's Rights was the standard form prescribed by Rule 4-1.8(j) of the Rules Regulating the Florida Bar. What is somewhat

[3]In fact, as Arch acknowledges later in the Initial Brief, "Florida law *permits* attorneys to represent jointly insurers and their insured." Initial Brief, at 18 (emphasis added). Conversely and as recognized in the comment to Rule 4-1.7(e) noted above, Florida law permits the attorneys to represent solely an insured in the tripartite relationship based on the contractual relationship between the parties.

remarkable in Arch's Statement of Case and Facts in its Initial Brief is that while it cites two provisions in the Statement of Insured Client's Rights that make reference to what "might" be in an individual's insurance policy, it never cites to where such provisions appeared in the Policy in this case. And indeed, they did not.

Arch points out that the provision entitled "Directing the Lawyer" states:

> If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests.

Initial Brief, at 3 (R 1683). The Policy contains no such language (R 1999-1022), and Arch does not cite to the Policy in an attempt to claim otherwise.

Similarly, Arch notes that the Statement of Insured Client's Rights contains a provision entitled "Conflicts of Interest," which states that "[m]ost insurance policies state that the insurance company will provide a lawyer to represent your interests as well as the insurance company." Initial Brief, at 3 (R 1683). Once again, Arch does not cite to the Policy pointing out where such language was present, because it was not (R 1999-1022). Arch's Policy, while lengthy and detailed, makes no mention of any obligations that a lawyer retained by Arch would have to also represent Arch in a given case (R 1999-1022).

Arch notes that the Statement of Insured Client's Rights contains a provision relating to "litigation guidelines," which states that "[m]any insurance companies establish guidelines governing how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken." Initial Brief, at 4 (R 1683). While Arch argues that those guidelines "imposed obligations which assisted Arch in providing Spear Safer a good faith defense," and that "Kubicki was required to report to Arch," Arch does not cite to the actual guidelines in the record (instead citing to deposition testimony from Kubicki representatives), and never states that those guidelines in any way created a contractual relationship where Kubicki represented Arch.

Thus, the relevant contractual documents at issue in no way establish that Arch was in privity with Kubicki. As stated in *Espinosa,* "in a legal contract, the term 'privity' is a word of art derived from the common law of contract and used to describe *the relationship of persons who are parties to a contract.*" *Espinosa*, 612 So. 2d at 1379-80 (emphasis added). Arch acknowledges that the relationships "are creatures of contract," but perhaps recognizing that the contractual documents at issue in no way establish privity between Arch and Kubicki, Arch then argues that Kubicki's conduct is somehow relevant to determining the relationship between the parties. Initial Brief, at 17-18. It is not. Further, reporting to the

insurer, abiding by the insurer's guidelines, and communicating with the insurer are all common in situations where the law firm is representing solely the insured, or the insured and the insurer. Arch's focus on those points has no bearing on the outcome of this matter.

The law in this state has been clear for many years - "[a]s a general matter, 'an attorney's liability for negligence in the performance of his or her professional duties is limited to clients with whom the attorney shares privity of contract.'" Initial Brief, at 22-23 (quoting *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1379 (Fla. 1993)). This Court has recognized two exceptions, neither of which apply here, and the trial court and Fourth District both correctly applied the law of this Court in ruling as they did.

Arch argues that "this Court need not recognize a new exception to the privity rule to answer the certified question in the affirmative." Initial Brief, at 27. To the contrary, that is exactly what Arch seeks to have this Court do. Tellingly, Arch argues that "[w]hen defense counsel represents the interests of the insured and the insurer, and the record does not show that counsel affirmatively established to all concerned that the representation was exclusive to the insured, the tripartite relationship ***is*** an attorney-client relationship – one in which both the insurer and the insured are in privity with defense counsel." Initial Brief, at 27 (emphasis in original). Here, however, the record (including the Statement of Insured Client's

Rights) affirmatively established that Kubicki was only representing Spear Safer. "We see nothing in the record to indicate that the law firm was in privity with the insurer." *Arch*, 266 So. 3d at 1213. This Court should resist the invitation to create a new exception to the clearly established requirement of privity that has been the law of this state for many years.

B. The Relevance of the Florida Rules of Professional Conduct.

Arch notes that "the Rules Regulating the Florida Bar recognize and govern the tripartite relationship." Initial Brief, at 18. Kubicki agrees with this broad statement and notes that the relevant Rules clearly create two distinct types of tripartite relationships under Florida law.

In May 1999, the Insurance Practices Special Study Committee was formed "to examine several insurance related issues of concern to lawyers and members of the public." (App. 9).[4] One of that committee's tasks was to examine whether or not Florida insureds were adequately informed "of the limitations and restrictions imposed upon defense by the insurers and the ethical concerns that arise from those limitations and restrictions" (App. 10). The committee spent hundreds of hours undertaking its tasks, and the committee invited representatives of the two largest insurance company trade associations in Florida to work with the committee in a cooperative effort to gather and view materials and procure testimony from

[4]References to the Appendix filed with this Brief shall be designated as "(App. ___)", with the appropriate page number inserted.

interested parties (App. 10). The committee's work resulted in the Report of the Special Commission on Insurance Practices, issued on June 2, 2000 (App. 5-44). As the Report states:

> The cooperative relationship between the committee and the [insurance] industry proved to be very beneficial and that spirit of cooperation resulted in the committee's most important accomplishment: The statement of insureds clients' rights. This disclosure form, the first of its kind in the United States, advises persons who have been sued and who are a defended by attorneys hired by their insurance company of their rights as an insured and of many of the insurance company's regulations that previously were known only to the company and the attorney.

(App. 10-11).

The Report specifically addressed the relationship between the insurance company and counsel, and recognized that many states have expressly rejected the argument that a co-client relationship exists with the insured and the insurer despite insurance company policy language giving the insurer the right to control aspects of the litigation (App. 16). It further noted that other states recognized that a co-client relationship does exist with the insured and the insurer, though the committee ultimately took no position on the issue "of whether the insured and the insurer should be considered co-clients of the defense attorney or not. Regardless of whether the insured and the insurer are considered co-clients, however, the committee's recommendation to propose the Statement of Insured's Client's Rights

would be the same" (App. 17).

This Court ultimately adopted the committee's recommendations and amended the Rules in 2002 to include the Statement of Insured Clients' Rights. *See Amendments to Rules Regulating The Florida Bar*, 820 So. 2d 210 (Fla. 2002). As noted above, that statement informed the insured, as here, of certain rights, and also directed the insured to the actual policy to determine the nature of the relationship between the insurer, the insured and the law firm. Here, nothing in the Policy at issue (drafted by Arch) in any way noted that a law firm would be representing both Arch and Spear Safer.

In 2001, the Board of Governors of The Florida Bar approved the appointment of a Commission to study the practices "of the property and casualty underwriters of the insurance industry as they relate to using insurance company staff attorneys to represent liability insurance policy holders, and identify areas, if any, in which lawyers who represent liability insurance policy holders need guidance as to their ethical responsibilities" (App. 48). That Commission ultimately issued its Report of the Special Commission on Insurance Practices II on March 1, 2002 (App. 45-91). One of the conclusions of that Commission was that "it would be useful to have an amendment to rule 4-1.7 to explicitly set forth the duty of a lawyer to assure there is a mutual understanding regarding representation at the inception of the attorney-client relationship" (App. 51).

The Commission addressed the nature of the tripartite relationship between insurer, insured, and the law firm. The report states:

> Florida courts have consistently recognized that the existence of an attorney-client relationship is a question of fact and law. In the insurance context, Florida courts do not appear to have applied any different standards. Unlike jurisdictions that have determined that there is a single correct answer as to who is a client in the tripartite relationship, the Commission believes Florida should continue to recognize that the existence of a dual client relationship is a legal and factual question. The answer varies according to the circumstances and understanding of the parties whether in the context of an insurance defense case or any other multi-party context. A lawyer may represent both an insurer and an insured as clients where there is no conflict of interest and the lawyer complies with Rule 4-1.7 and all other rules relating to multiple party representation.
>
> The ethical complexities arising in this field are generally born of a lack of clarity and mutual understanding at the inception of the attorney-client relationship. An attorney may view the insured as the only client, but difficulties may then arise if the insurer considers itself to be a co-client. Likewise, the attorney who views insured and insurer as co-clients may be ethically compromised if the insured views himself to be the sole client.
>
> A majority of the Commission concludes it would be useful to have an amendment to Rule 4-1.7 to explicitly set forth the duty of a lawyer to assure there is a mutual understanding of who is a client at the inception of representation. A minority of the Commission views the status of Florida law to be sufficiently clear that adoption of a rule amendment is unnecessary.
>
> In making this recommendation, the Commission does not suggest that the duty of an insurance defense lawyer is different than that of every other lawyer. Rather, by

> recommending the amendment, the Commission is simply recognizing that in the unique tripartite relationship of insurer, insured and counsel, the relationships can become blurred. Clarity is needed to keep ethical dilemmas from arising.

(App. 76-77).

Ultimately, the Commission's recommendation was accepted by this Court. *See Amendment to Rules Regulating the Florida Bar Re Rules of Professional Conduct*, 838 So. 2d 1140 (Fla. 2003). This Court adopted the amendment to rule 4-1.7 as follows:

> **(e) Representation of insureds.** Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Amendment to Rules Regulating the Florida Bar 838 So. 2d at 1141–42. The comments to the amendment, adopted by this Court, are as follows:

> **Representation of Insureds**
> The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the

> inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Id. at 1145.

As the Report makes clear, this Court had the opportunity to determine the nature of the tripartite relationship, and could have held that a law firm would always represent both the insured and the insurer in a given case. However, it did not do so, and recognized that "the existence of a dual client relationship is a legal and factual question" (App. 76). Florida law has recognized that the nature of the relationship is left in the hands of the parties, and that the parties have freedom to contract and determine the nature of that relationship. Arch could have explicitly contracted with Kubicki (and could have recognized in its policy that it had the right to do so) whereby Kubicki would have explicitly represented both Arch and Spear Safer, though it did not. The nature of the relationship in this case was clear, and the trial court and the Fourth District correctly concluded that there was no direct contractual relationship whereby Kubicki was representing Arch.

That is the reality of this case, and Arch now seeks to have this Court ignore the freedom that parties have to determine the nature of their relationship, and find that a law firm and an insurer always have a relationship sufficient to confer standing on the insurer to sue a law firm for legal malpractice. That should not be

the case, and for this Court to hold in that fashion would be to undermine the Rules regulating The Florida Bar that this Court carefully considered and adopted.

C. The Authority Relied on by Arch is not Persuasive.

Arch cites a variety of cases from other jurisdictions as well as Federal cases to support its position. As a starting point, the three federal cases cited obviously are not controlling. Moreover, the trial court's order (adopted by the Fourth District) correctly distinguished the cases. Those cases are: *Hartford Insurance Company of Midwest v. Koeppel,* 629 F. Supp. 2d 1293 (M.D. Fla. 2009); *Nova Casualty Co. v. Santa Lucia*, No. 8:09-CV-1351-T-30 AED, 2010 WL 3942875 (M.D. Fla. October 5, 2010); and *U.S. Specialty Insurance Co v. Burd*, 833 F. Supp. 2d 1348 (M.D. Fla. 2011). As the Fourth District noted:

> In *Koeppel*, the federal court recognized that there is no controlling Florida precedent, requiring it to "guess" (the federal court's terminology) that "the Florida courts would extend the strict privity exception and recognize an insurer's legal malpractice claim against an attorney retained to represent its insured." *Koeppel*, 629 F. Supp. 2d at 1301 (emphasis added). In *Nova*, the federal court followed *Koeppel's* "*guess,*" and noted that it was *forced to predict* how the Florida courts would rule if they were presented with the issue." *Nova,* 2010 WL 3942875, at *2 (emphasis added) (citing *Koeppel,* 629 F.Supp.2d at 1298). Likewise, in *Burd,* the federal court relied upon *Koeppel's "guess"* and *Nova's "forced prediction"* in reaching the conclusion that an insurer may file a legal malpractice claim against the law firm it retains to represent its inured. *See Burd,* 833 F.Supp.2d at 1352-53 (emphasis added). This court will not adopt new expansive precedent that is based on "guesses" and

> "forced predictions" when the Florida Supreme Court to date has so severely limited exceptions in this area of the law. Furthermore, the court determines that *Koeppel* and *Burd* are distinguishable from the instant action. For instance, in *Koeppel* and *Burd* the attorneys were hired to defend a carrier's interest in effecting a settlement under liability policies. In the instant action, [the law firm] was retained to defend the interests of [the insured] against liability claims. Additionally, unlike the instant action, in *Koeppel* and *Burd,* the insurance companies settled the underlying claims in excess of the policy limits of the subject insurance policies. As noted above, it is undisputed in the instant action that the [u]nderlying [l]itigation was settled within the policy limits of the insurance policy issued by [the insurer].
>
> The court also determines that *Nova* is distinguishable from the instant action. In that case, the federal court determined that there was privity between the insurance carrier, Nova, and the law firm, Santa Lucia. As discussed above, however, there is no privity between [the insurer] and [the law firm], and none of the recognized exceptions to the strict privity requirement apply in [the] instant action.

Arch, 266 So. 3d at 1213. The Court's analysis was sound.

Arch also cites numerous cases from other jurisdictions to support its position. Initial Brief, at 24. However, as recognized by the district court in *Hartford Insurance Company of the Midwest v. Koeppel,* 629 F.Supp. 2d 1293 (M.D. Fla. 2009), "most of the reported cases involving such suits offer no analysis of the insurer's relationship with the law firm." *Id.* at 1299 (quoting *General Sec. Ins. Co. v. Jordan, Coyne & Savits LLP,* 357 F.Supp. 2d 951, 956 (E.D. Va. 2005)). Arch acknowledges that there are other jurisdictions which decline to allow

malpractice actions under these circumstances. Initial Brief, at 25 n.10. Further, as noted previously, this is not a question for this Court to answer in the abstract. It must be considered with the reality that this Court's precedent requires privity between the insurer and the law firm. It also has to be considered in light of the Rules approved by this Court which have controlled these relationships for many years. Finally, it must be considered in light of the record in this case, where it was clear that Kubicki was not representing Arch.

Arch then makes a brief argument that the "common interest exception to the attorney client privilege applies to the tripartite relationship among an insurer, its insured, and counsel." Initial Brief, at 21-22. This argument is not persuasive, and does not control this matter. As Arch acknowledges "it follows that counsel can – and often does – simultaneously represent the interest of *both* insurer and insured." Initial Brief, at 22. As the Rules cited above plainly state, yes, a law firm can represent an insured and an insurer in a given case. That reality does not control *every* case and does not control this matter where there was no indication in the record that Kubicki was representing Arch.

Finally, Arch argues that a "non-client beneficiary theory" allows it to bring such an action. Initial Brief, at 28-30. In doing so, Arch cites the *Restatement (Third) of Law Governing Lawyers*, section 51(3) which discusses the duty of care to a non-client in certain settings. However, the *Restatement* does not control in

Florida where privity is required, and the rules explicitly state that the law firm can explicitly form two different types of tripartite relationships. Further, the *Restatement* section relied on by Arch does not recognize or address the reality that this matter was settled within the policy limits, a critical factor in this Court's consideration of the case.

Fifty years ago, this Court in its opinion *In re Rules Governing Conduct of Attorneys in Florida*, 220 So. 2d 6 (Fla. 1969), was prophetic concerning the instant case:

> The problem occurs when a conflict develops between insurer and insured, such as when a *claim exceeds policy coverage* or when a *compromise settlement is in the making.*

Id. at 7. The potential for conflict arising by the virtue of a claim made in excess of limits was identified by the Arizona Supreme Court in *Paradigm Insurance Co. v. Langerman Law Office,* 24 P.3d 593 (Ariz. 2001), where the court noted:

> There are many cases in which the potential for conflict is strong enough to implicate [Arizona Rules] and [*Restatement (Third)*] section 121 from the very beginning. Think, for example, of a claim with questionable liability against an insured covered by limits much lower than the amount of the damages. The potential for the conflict is quite substantial unless and until the insurer has committed itself to offering or waving the policy limits. Thus we do not endorse the view that the lawyer automatically represents both insurer and insured until conflict actually arises.

Id. at 598-99. This principle is set forth in the *Restatement (Third) of the Law*

Governing Lawyers, 51, Comment (g). As the *Restatement* provision indicates:

> (g) **A liability insurer's claim for professional negligence**. Under Subsection (3), a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer . . . Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligation to the insured. However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured. *For example, if the lawyer recommends acceptance of a settlement offer just below the policy limits and the insurer accepts the offer, the insurer may not later seek to recover from the lawyer on a claim that a competent lawyer in the circumstances would have advised that the offer be rejected. Allowing recovery in such circumstances would give the lawyer an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer.*

Restatement § 51 (g) (emphasis added). Thus, if the Restatement (Third) section 51 was applicable, it would not create liability under the facts of this case where the settlement was within the policy limits in a case with substantial exposure to the insured in excess of those limits.

As previously indicated, and as Arch's Third Amended Complaint alleges, Kubicki recommended that the underlying litigation be settled for up to the policy limits, a position adopted by Arch's insured and Kubicki Draper's client - Spear Safer (R 462). As the *Restatement* comment recognizes, to permit Arch to bring a

legal malpractice claim against the insured's counsel following settlement of such a claim within the policy limits would promote the incongruous result of the retained lawyer having "an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer." *Id.*

It cannot be overemphasized that Spear Safer, the insured, is not the named Plaintiff and, as Arch concedes in the Third Amended Complaint, the underlying litigation was settled because Spear Safer's interests could not be jeopardized "by taking the case to trial." (R 465-66). Thus, the undisputed facts show that during the course and scope of its representation of Spear Safer, an opportunity arose to resolve the matter against Spear Safer and it was Kubicki's duty to ensure that the matter was resolved within the limits of the policy providing coverage so as to avoid any exposure to Spear Safer in excess of those policy limits. As a net result, the insured, Spear Safer, suffered no damages as a result of any alleged actions or inactions on the part of Kubicki.

This critical factor was addressed in the trial court's conclusion to the summary judgment order. As the court emphasized:

> Lastly, the court determines that to allow an insurance company to directly sue the law firm it retains to defend its insured implicates grave public policy concerns, and could result in a plethora of legal malpractice actions filed by insurers against law firms retained to defend the insurance company's insured. This concern is especially true where, as in the instant action, the litigation for which the law firm was retained by the insurer to defend

> its insured settled within the policy limits of the subject insurance policy, *which monetary amounts are clear expectations and risks known to the insurance company*. If the law were to allow these types of actions, settlements might never bring closure to a dispute, and it is plausible that law firms would be reluctant to accept an insurer's appointment to defend its insured as settlements might never bring closure to a case. Therefore, based on the foregoing, this Court determines that Plaintiff lacks standing to bring this action.

(R 1664-65) (emphasis added). In any event, a right to sue for legal malpractice should not be recognized by this Court under these circumstances.

D. This Court Should Rephrase the Certified Question or Determine that Jurisdiction Was Improvidently Granted.

As the above discussion makes clear, Florida law allows for two distinct types of tripartite relationships, one where the law firm represents only the insured, and one where the law firm represents "dual clients" meaning both the insurer and insured. The certified question fails to make a distinction between these types of relationships. The issue of whether the insurer has standing to sue a law firm would arise only in the context of an insurer in contractual privity with the law firm. Conversely, where, as here, no privity existed between the insurer and the law firm, standing would not be present.

Article V, section 3(v)(4) provides that the Supreme Court of Florida may review "any decision of a district court of appeal that passes upon a question certified by it to be of great public importance." This Court has discretionary

jurisdiction to answer a certified question only if the question is one that was actually decided by the district court. *See e.g.*, *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling,* 967 So. 2d 832 (Fla. 2007). The question that the district court passed upon was actually: "does an insurer have standing to bring a legal malpractice action against a law firm retained by the insurer's insured in the absence of contractual privity with the insurer?" As such, the actual question that should be before this Court is "whether an insurer has standing to maintain malpractice action against counsel hired to represent the insured, and only representing the insured, when the insurer has a duty to defend."

It is clear that this Court has the ability to "rephrase a question to reflect the broader legal issue or to state the issue more succinctly." *Philip J. Padovano,* Florida Appellate Practice § 3:11 (2019 ed.); *see e.g., Jimenez v. State,* 246 So. 3d 219 (Fla. 2018); *State v. Spencer,* 216 So. 3d 481 (Fla. 2017). If the question were rephrased as suggested, the question should be answered in the negative. Should this Court at some point be presented with a certified question where the dual representation was clearly established, it could consider if standing for a malpractice claim would arise in that context.

In the alternative, should this Court determine that the certified question is too broad and should not be rephrased, it is respectfully submitted that this Court should determine that jurisdiction was improvidently granted and decline to

exercise same. "If the Court grants review but then determines that it has exercised its discretionary jurisdiction improvidently, it may discharge the earlier order on jurisdiction and dismiss the case." *Philip J. Padovano,* Florida Appellate Practice § 3:11 (2019 ed.); *see also Florida Hematology & Oncology Specialists v. Tummala*, 969 So 2d 316 (Fla. 2007) (finding that jurisdiction was improvidently granted). Here, the question as phrased cannot be answered without recognizing the distinction between law firm taking on dual representation versus solely representing the insured.

II. THE DOCTRINE OF SUBROGATION DOES NOT PROVIDE AN INSURER STANDING TO BRING A MALPRACTICE ACTION AGAINST COUNSEL HIRED TO REPRESENT THE INSURED.

Arch has two significant hurdles, one procedural and the other substantive, to its extensive arguments that alternative theories of liability such as subrogation and third-party beneficiary support reversal of the summary judgment. First, Arch's attempts to raise the alternative theories must fail because Arch stipulated and agreed that it was not seeking recovery as "an assignee or subrogee of Spear Safer or intended third-party beneficiary of attorney-client relationship between Kubicki Draper and Spear Safer". The first complaint was dismissed (except for Arch's claims on behalf of itself) without prejudice (SR 1814).

As the Second Amended Complaint was unclear as to what was being alleged, it was stipulated at the hearing that assignment, subrogation and third-

party claims were abandoned. The order on Motion to Dismiss Second Amended Complaint so reflects:

> ALL COUNSEL APPEAR AND STATE ALL PARTIES AGREE…that said motion be and the same is hereby granted to the extent Arch seeks recovery as assignee or subrogee of Spear Safer or intended third - party beneficiary of attorney-client relationship between Kubicki Draper and Spear Safer.

(SR 1970). Counts I, II, and III allege *only* direct privity of contract (SR 1892-94).

Long ago the Florida Supreme Court announced the enduring principle concerning pretrial stipulations. "A stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the court." *Gunn Plumbing, Inc. v. Dania*, 252 So. 2d 1, 4 (Fla. 1971); see also, *Dortch v. State*, 137 So. 3d 1173, 1176 (Fla. 1st DCA 2014) (citing *Gunn* and adding that "[a] stipulation cannot be "impeached or set aside merely by the 'bald statement' of a party desiring to renege") (quoting *State ex. rel. Alfred E. Destin Co. v. Heffernan*, 47 So. 2d 15, 17 (Fla. 1950)); *Broche v. Cohn,* 987 So. 2d 124, 127 (Fla. 4th DCA 2008) (noting that a stipulation that limits the issues to be tried "amounts to a binding waiver and elimination of all issues not included.") (quoting *Esch v. Forster*, 123 Fla. 905, 168 So. 229, 231 (Fla. 1936)). The alternative theories which Arch makes the virtual centerpiece of its appeal have been abandoned and cannot be raised as a ground for reversal at this point. Indeed, this

issue was asserted by Arch in the Fourth District which apparently deemed it unworthy of discussion.

In addition to the above-referenced procedural bar to Arch's alternative theories of liability, the alternative theories are also legally insufficient. Florida follows the "substantial majority" of jurisdictions which hold that an insurer may not rely upon equitable subrogation in order to state a claim for malpractice against an attorney who represented the insured. *See National Union Fire Ins. Co. v. Salter*, 717 So. 2d 141 (Fla. 5th DCA 1998); *See generally* Dale Joseph Gilsinger, Annotation, *Right of Insurer to Assert Equitable Subrogation Claim Against Attorney for Insured on Grounds of Professional Malpractice,* 50 A.L.R. 6th 53, 63 (2009) (hereafter "*Gilsinger*"). Arch relies on three decisions from other jurisdictions which represent the distinctly minority view on this question. Initial Brief, p. 34, n. 17.

The majority view derives in large measure from the uniquely personal nature of an attorney's duty to his or her client and the confidentiality of the attorney-client relationship. *Gilsinger*, 50 A.L.R. 6th at 53. The concerns surrounding equitable subrogation in this context are deemed similar to the concerns surrounding the assignment of legal malpractice claims. *Salter*, 717 So. 2d at 143.

In Florida, the general rule is that a cause of action for legal malpractice may

not be assigned or transferred. *See Michael E. Greene, P.A. v. Leasing Assocs.,* 935 So. 2d 21, 24 (Fla. 4th DCA 2006) (citing *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755, 759-61 (Fla. 2005)). The public policy behind the rule is that "assignment of such claims could relegate the legal malpractice action to the marketplace and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty." *Kaplan*, 902 So. 2d at 760 (quoting *Goodley v. Wank & Wank, Inc.,* 62 Cal. App. 3d 389, 133 Cal Rptr. 83, 87 (1976))[5].

As stated by the Fourth District in *Michael E. Greene, P.A. v. Leasing Assocs.* 935 So. 2d 21, 24 (Fla. 4th DCA 2006) "[t]hese strong public policy considerations have led to the application of the general rule even in the absence of a formal assignment of the claim" (quoting *Weiss v. Leatherberry*, 863 So. 2d 368 at 371 (Fla. 1st DCA 2003)). Since "equitable subrogation of a legal malpractice

[5]A very narrow exception to this rule was recognized in *Cowan, Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005), which "was the first and only case in which this court permitted a limited exception to the general prohibition on legal malpractice assignments and our holding was confined to the specific facts and circumstances of that case." *Law Office of David J. Stern, P.A. v. Security Nat. Servicing Corp.*, 969 So. 2d 962, 968 (Fla. 2007). *Kaplan* involved assignment of private placement memoranda prepared by attorneys which were intended for release to third parties and thus did not implicate attorney-client confidentiality. Even in *Kaplan* the Court stressed that "the vast majority of legal malpractice claims remain unassignable because in most cases the lawyer's duty is to the client." *Kaplan*, 902 So. 2d at 757.

claim, like the assignment of a malpractice claim, effects a transfer of a malpractice claim from the client (the insured) to a non-client (the insurer), it is natural to question whether an equitable subrogation of a legal malpractice claim, like the assignment of a legal malpractice claim, should also be denied judicial recognition." *Gilsinger*, 50 A.L.R. 6th at 63.

Indeed, in *Salter,* the Fifth District relied upon these considerations in effectively rejecting the public policy argument raised by Arch and expressly holding that an insurance company cannot pursue a legal malpractice claim under the company's right of subrogation:

> We conclude that the policy reasons for prohibiting assignments are equally applicable to a subrogation action. *See Fireman's Fund Insurance Company v. McDonald, Hecht & Solberg*, 30 Cal. App. 4th 1372, 36 Cal. Rptr. 2d 424 (Cal 4th Dist. 1994) (California law prohibiting assignment of legal malpractice actions precluded insurers from proceeding as subrogees of insured's claim against law firm); *Bank IV Wichita, National Ass'n v. Arn, Mullins, Unruh, Kuhn & Wilson,* 250 Kan. 490, 827 P.2d 758 (Kan. 1992) (policy considerations prohibiting the assignment of legal malpractice claims also prohibit the subrogation of a debtor's legal malpractice claim against the debtor's attorney by a creditor where the interests of the debtor and the creditor have the potential to diverge). To establish its claim, National Union would of necessity invade the confidential relationship between Golf Company and its attorneys. In addition, the attorneys may have to reveal work product or the confidences of Golf Company to defend themselves. Golf Company may not even be interested or believe that it has a legal malpractice action against its attorneys. As the California

> court observed in *Fireman's Fund*, perhaps "differences between lawyer and client respecting malpractice should be limited to themselves." *Fireman's Fund* 36 Cal. Rptr. at 2d 430.

Id. at 143.

Arch's attempt to minimize the above concerns such as by asserting the attorney-client relationship will not be impacted by allowing subrogation is pure argument, and not reality. Acceptance of Arch's contention necessarily places an insured in an unenviable "squeeze play" between adverse parties, the insurer, with whom the insured has certain contractual rights and responsibilities, and the attorney, who is defending the insured's interests. As stated in *Salter,* as a result of this adversity, the insurer "would of necessity invade the confidential relationship between" attorney and client. *Id.* at 144.

These very same concerns relating to the intensely personal nature of an attorney's duty to his or her client and to the confidentiality of the relationship are applicable to Arch's effort to utilize conventional or contractual subrogation in this context. Florida clearly follows the majority view and rejects use of the doctrine of equitable subrogation to allow an insurer to pursue a legal malpractice claim against an attorney who represented its insured. As the operative factors apply similarly to conventional or contractual subrogation, relief under that theory is likewise unavailing.

III. THERE ARE STRONG PUBLIC POLICY CONSIDERATIONS AGAINST MALPRACTICE SUITS AGAINST COUNSEL HIRED TO REPRESENT INSUREDS.

As noted at the outset, this matter does not exist in a vacuum, and it should be decided in light of existing law regarding privity, under the facts and documents present in this matter, and in consideration of the Rules Regulating the Florida Bar. It is respectfully submitted that, given the realities of this case where Kubicki was not in privity with Arch, it would be improper for this Court to expand the relationship to allow a claim for legal malpractice.

Were this question to be considered in the abstract, there can be policy arguments made for each position. That reality was acknowledged by the Fourth District in the opinion where it quoted the public policy arguments raised by Arch below. However, there are also strong public policy arguments against allowing such suits. As the trial court explained:

> Lastly, the court determines that to allow an insurance company to directly sue the law firm it retains to defend its insured implicates grave public policy concerns, and could result in a plethora of legal malpractice actions filed by insurers against law firms retained to defend the insurance company's insured. This concern is especially true where, as in the instant action, the litigation for which the law firm was retained by the insurer to defend its insured settled within the policy limits of the subject insurance policy, which monetary amounts are clear expectations and risks known to the insurance company. If the law were to allow these types of actions, settlements might never bring closure to a dispute, and it is plausible that law firms would be reluctant to accept an

> insurer's appointment to defend its insured as settlements might never bring closure to a case.

(R 1664-65).

The trial court was correct. Adding the possibility of a malpractice suit by the insurer to a law firm's representation of an insured will discourage settlement of cases as the lawyers who recommend settlement within policy limits will still potentially be subjected to suit in the future. This principle is recognized in the *Restatement (Third) of the Law Governing Lawyers*, 51, Comment (g), cited above. Under the facts of this case, and given that it settled within policy limits, public policy requires that Arch not be allowed to maintain a malpractice action.

The practical effect of the "plethora of actions" noted by the trial court must also be considered, particularly the negative impact on the law firm as well as the insured. As a recent article concerning this case states:

> On the surface, Arch Insurance Co. and the American Property & Casualty Insurers Association have a sympathetic argument: When an insured claim is handled badly, the insurer pays the defense costs and any settlement or judgment. Therefore, the insurer should have the right to sue defense counsel to recoup those costs. Otherwise, they argue, the negligent lawyer suffers no consequences.
>
> On more considered thought, however, the insured client would suffer more harm from such suits than can be justified by theoretical consequences imposed through additional litigation. Naturally, the financial expenses of litigation against defense counsel will simply be paid by their own insurance company and have little direct effect

on the allegedly negligent defense lawyer. Regrettably, the intangible costs of such litigation are instead imposed on the original insured professional, who loses control over its privileged communications and negative information, remains entangled in litigation despite resolution, and suffers additional investigation and reporting recapping the original suit.

If an insurance carrier sues defense counsel, it might recover if it proves that there would have been a different result—not necessarily an exoneration of the insured client, but a lower cost for settlement and defense. However, the defense lawyer who previously zealously advocated for the insured and looked for every fact or argument that might exonerate the former client is now incentivized—and permitted—to demonstrate just how bad the case against the insured really was.

In defending themselves, lawyers would no longer be required to keep their communications with clients, their factual and legal research, or their assessments and thoughts about the case, the people and the client private. When the carrier sues defense counsel, relevant confidential or privileged communications can be revealed in the lawyer's defense. Any thoughts the lawyer had about the credibility of the witnesses might become part of the record in the new case the insurer pursues, if it supports an argument that the outcome of the case would have been no better. With this new suit, the carrier creates a conflict between the insured and its former defense lawyer.

The insured would also suffer continued business disruption. Generally, settling a case allows the defendant to put the distraction behind it. When the carrier sues former defense counsel, professionals and employees may be required to testify again, and they may have to talk about their communications with counsel, their worries about the suit, as well as internal matters that post-dated the incident giving rise to the suit. Information not disclosed in the original suit may be revealed,

> because the lawyers' analysis of the case and witnesses is relevant. The lawyers' conversations with managerial employees not involved in the underlying incident may be disclosed. Only the insurer benefits from returning employees to the hot seat for testimony. The former client has little ability to protect itself in the new case, but continues to be involved against its will.
>
> The insurer's suit against defense counsel is public. The errors the insured is accused of making, the quality of the insured's work, the tensions in management, the speculation about the former defendant's future … the insured's reputation is back in the press and in the public eye, even though the claims against the insured were resolved.
>
> Despite these risks and costs to its policy holders, Arch Insurance and other insurers want the right to bring such suits without considering the insured's position or interests. Because the insurer chooses counsel and has experienced claims representatives reviewing and monitoring counsel's work, it has tools to protect its self against poor representation without this proposed additional right to bring suit. In contrast, the insured often has limited ability to select or oversee counsel to protect its interests during the suit. If Arch Insurance has its way in the Florida Supreme Court, the insured will also lose control of its privileges, collateral litigation, and ongoing distraction after its claim is resolved, but receive no corresponding benefit. Is this the new and hidden price of professional liability insurance? Or will Florida protect the insured client's rights over the insurer's desire to bring more litigation?

Deborah Sampieri Corbishley, *Professional Liability Insurers Impose New Risks on Their Insureds*, Law.com Daily Business Review (September 30, 2019); Https://www.law.com/dailybusinessreview/2019/09/30/professional-liability-

insurers-impose-new-risks-on-their-insureds/). Thus, this Court should also consider the impacts on this state's insureds (all of which are negative) should it allow insurers to have the right to such additional litigation.

CONCLUSION

Arch and the Amicus argue that this Court should adopt a rule that the "tripartite" relationship *per se* establishes standing to sue by the insurer in all cases. For all the reasons set forth above, this Court should not change the existing law requiring privity in order to bring such a suit. The concern of the carriers that they may bear the loss occasioned by a negligent lawyer can be resolved by negotiating proactively in retainer agreements with counsel. The trial court's announcement of public policy, especially in a case such as this which concerns a voluntary settlement well within policy limits in the face of excessive exposure to the insured in the hundreds of millions, should be adopted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14-point type.

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