

No. SC19-673

In the Supreme Court of Florida

ARCH INSURANCE COMPANY,

Petitioner,

v.

KUBICKI DRAPER, LLP,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
CASE NO. 4D17-2889

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INTRODUCTION

This case presents the Court with the opportunity to ensure that lawyers and law firms hired to defend insured persons and businesses can be held accountable for their professional negligence.

Under the ordinary insurance policy, an insurer's duty to provide a good faith defense to claims against its insured requires it to retain counsel to represent the insured in connection with such a claim. This relationship among insurer, insured, and defense counsel is referred to in Florida as a tripartite relationship. Under the tripartite relationship, counsel represents both the insurer and the insured. In every such case, defense counsel owes a duty of competent representation to insurer and insured alike. When counsel fails to meet that duty, however, and the claim is resolved within policy limits, it is the insurer, not the insured, that ends up footing the bill. Consequently, it is the insurer, not the insured, that suffers a loss and has the incentive to bring a malpractice suit against defense counsel. Absent the insurer's ability to assert a malpractice claim against defense counsel, the only beneficiary is the negligent attorney, who ends up immune from accountability for his or her negligence.

It is this lack of accountability that respondent, Kubicki Draper, LLP ("Kubicki"), will be asking this Court to condone. Petitioner, Arch Insurance Company ("Arch"), alleges that Kubicki negligently represented Arch and its insured. Kubicki, however, insists that Arch, which bore the financial cost of Kubicki's malpractice, cannot seek to hold it accountable in court. Kubicki's

proposed rule, adopted below by the Fourth District Court of Appeal, immunizes lawyers and law firms representing insured parties from the consequences of their malpractice. It denies insurance companies any remedy for the losses they sustain from defense counsel’s negligence, and it leaves lawyers and law firms appointed to represent insured parties undeterred from engaging in future misconduct. The Court should reject such a rule and quash the Fourth District’s decision.

STATEMENT OF THE CASE AND FACTS

This case arises against the background of nearly 15 years of litigation in federal and state court involving multiple parties. The instant appeal is the latest chapter in this saga.¹

I. FACTUAL BACKGROUND

In August 2003, Arch issued a professional insurance policy (the “Policy”) to Spear Safer CPAs & Consultants, L.P. (“Spear Safer”), an accounting firm. R. 1999-2022. From 1996 to 2004, Spear Safer served as an independent auditor for Mutual Benefits Corporation (“MBC”). R. 895 at 43:24 to 44:20, 909 at 97:13-18. MBC was a viatical settlement provider. *SEC v. Mut. Benefits Corp.*, 408 F.3d 737, 738 (11th Cir. 2005).

Between 1994 and 2004, MBC ran a fraudulent scheme whereby nearly 29,000 investors nationwide invested over \$1 billion in viatical settlements offered by MBC. *See id.* at 738-41. That scheme came to an end in May 2004 when the

¹ Citations to the record before this Court will be designated SCR. _____. Citations to the record before the Fourth District will be designated R. _____. Citations to the supplemental record before the Fourth District will be designated SR. _____.

Securities and Exchange Commission (“SEC”) filed suit against MBC in the U.S. District Court for the Southern District of Florida. *SEC v. Mut. Benefits Corp.*, 323 F. Supp. 2d 1337 (S.D. Fla. 2004), *aff’d*, 408 F.3d 737 (11th Cir. 2005). The court enjoined MBC and its affiliated entities from doing business and appointed a receiver (the “Receiver”). *Id.* at 1338-39.

Around the same time, the SEC served Spear Safer with a subpoena. R. 1612. Consistent with its obligations under the Policy, Arch retained Kubicki to represent Spear Safer with respect to the subpoenas. SR. 2063-64. Kubicki informed Spear Safer of its retention through an engagement letter dated October 19, 2004. R. 1680-81. Enclosed with the letter was a document entitled Statement of Insured Client’s Rights, which all lawyers representing an insured at the expense of an insurer must provide to their new clients. R. 1683-84; *see* R. Regulating Fla. Bar 4-1.8(j). Spear Safer acknowledged receipt of the letter and Statement of Insured Client’s Rights. R. 1682.

The letter’s first sentence informed Spear Safer that Kubicki “ha[d] been retained by Arch . . . to represent and defend [Spear Safer].” R. 1680. And the Statement of Insured Client’s Rights contained the language prescribed by Rule 4-1.8(j) of the Rules Regulating the Florida Bar, which read in part:

Directing the Lawyer. 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.

* * *

Litigation Guidelines. Many 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.

* * *

Confidentiality. Lawyers have a general duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have a duty to share with the insurance company information relating to the defense or settlement of the claim.

* * *

Conflicts of Interest. Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company.

R. 1683-84. Nothing in the letter or the Statement of Insured Client’s Rights indicated that Kubicki would not also be representing Arch’s interests in the matter.

On the contrary, during the course of Kubicki’s representation, it informed others—including the expert it retained—that its client was Arch, not Spear Safer.

R. 102. The retainer agreement from the retained expert to Kubicki began: “This letter is to confirm our understanding regarding the engagement of Kyle T. Haugh, CPA, P.A. by Kubicki Draper to assist you and *your client, Arch Insurance Group*, in connection with the above referenced matter.” *Id.* (emphasis added). That same letter further stated: “The obligation for the payment of our fees is the direct responsibility of *Arch* . . . and we agree that you and your law firm are not liable for our fees on this engagement unless you receive payment of any part thereof *from your client*. You agree that you will make every effort to assist us in collecting our

fees *from your client.*” R. 104 (emphasis added). Finally, the expert required the “client,” Arch, to execute the retainer agreement, which Arch did. R. 105-06. Conspicuously, the letter never once mentioned Spear Safer, except in identifying the case style of the litigation. There is nothing in the record reflecting that Kubicki responded to its expert to correct any misunderstanding in the identification of Kubicki’s client.

The relationship between Kubicki and Arch was further acknowledged by Peter Murphy, a Kubicki partner and corporate representative, during his deposition:

I do not disagree with anything [another Kubicki attorney previously testified to] with regard to our [Kubicki’s] duty to the client [Spear Safer] in recognizing there is a tripartite relationship with the carrier [Arch] There is a relationship. You need to report for the carrier. You need to keep them in the loop, because that’s the only way they can abide with the case properly to do whatever they need to do in the best—to best defend the interests of their insured.

R. 960-61 at 23:18 to 24:11 (paragraph breaks deleted).²

In January 2006, Kubicki, via partner Lloyd R. Schwed, informed Arch the Receiver requested Spear Safer enter into a tolling agreement to prevent the statute of limitations from running with respect to any claims he might bring against Spear Safer. R. 1009. When recommending to Arch and Spear Safer that a tolling agreement be entered into, Kubicki erroneously advised that the statute of limitations for professional malpractice actions was four years when, in fact, it was only two. *Id.*; see § 95.11(4)(a), Fla. Stat. (2005). Arch and Spear Safer followed Kubicki’s

² Regrettably, the copy of the transcript included in the record is difficult to read. While neither party disputes the authenticity of Mr. Murphy’s deposition testimony, should the Court require a better copy of the transcript, Arch will file one.

recommendation and agreed to the tolling agreement. R. 152-54. On April 9, 2006, Kubicki provided Arch with a detailed summary for the basis of the Receiver's potential action against Spear Safer. R. 1246-52.

On May 24, 2006, the Receiver filed suit against Spear Safer in the Southern District of Florida, alleging a single count of professional malpractice (the "Underlying Matter"). R. 1011-48. Kubicki provided Arch with an initial report, litigation plan, and case budget. R. 1253-59. From the outset, and for a considerable period of time thereafter, Kubicki assessed Spear Safer's defense to be strong, based almost entirely on an erroneous invocation of the *in pari delicto* doctrine. R. 1255-58.

On October 3, 2006, the district court entered an order denying Kubicki's motion to dismiss based on *in pari delicto*. R. 1157-60. In denying the motion, the district court cast doubt on the applicability of the defense, opining: "the Court tends to agree with [the Receiver] that the defense of 'in Pari Delicto' [sic] loses its sting when the offending parties are replaced by a receiver." R. 1159. On October 13, 2006, Kubicki informed Arch that the district court denied the motion to dismiss because "it is more of an issue to raise by summary judgment motion. In other words he [the district court] wants us [Kubicki]—he wants to allow some discovery before making any decisions." R. 749 at 82:21 to 84:7.

Several months later, on March 20, 2007, Kubicki, via partner Peter Murphy, reiterated to Arch that he felt "strong about [the *in pari delicto*] defense." R. 751 at 93:24 to 94:1. Despite the district court having highlighted the inherent weakness of the *in pari delicto* defense in the Underlying Matter, Kubicki continued to

maintain that the *in pari delicto* defense was strong and, accordingly, valued the Underlying Matter as cost of defense. R. 1253-1259; R. 1308; R. 753 at 99:15-23.

On March 23, 2007, the Receiver made a second policy limits and/or remaining policy limits demand. R. 1308-09. Kubicki reported the Receiver's offer to settle for policy limits and/or remaining policy limits to Arch the same day. R. 750 at 88:17-25. On March 29, 2007, Kubicki again advised Arch that "[o]ur argument is that the receiver stands in the shoes of MBC and is therefore the party guilty of fraud. This argument allows us to seek dismissal of this lawsuit by virtue of the fact that the party that committed the fraud has no standing to re-file the lawsuit claiming that the fraud was not revealed." R. 750 at 89:15-22. Arch noted that Kubicki had indicated "that [the] case against [the] insured is very weak and at this point cost of defense is the value. We do not have [an] amended budget but Counsel has agreed that 150,000 [is a] fair value and we agree." R. 753 at 99:15-23. At the June 5, 2007, mediation, for the first time, Kubicki changed its valuation of the Receiver's claims from "cost of defense" to one "within policy limits." R. 753 at 99:15-23; R. 1273-74. No settlement was reached at the mediation. R. 1273-74.

Thereafter, on June 7, 12, 18, and 19, 2007, Kubicki authored reports to Arch that, for the first time, addressed concerns with Spear Safer's defense. R. 1275-89; R. 1295-99. Kubicki's inability to provide a plausible explanation for the abrupt and stark change in its evaluation prompted Arch to retain Butler Pappas Weihmuller, Katz Craig, LLP ("Butler Pappas") and Traub Lieberman Straus & Shrewsberry

LLP (“Traub Lieberman”) to provide a second opinion.³ R. 992 at 150:24 to 151:20; R. 1613. On June 25, 2007, Butler Pappas moved for leave to amend Spear Safer’s affirmative defenses to add statute of limitations, which had never been raised by any of the Kubicki attorneys who handled the file. R. 1228-38.

The next day, the second mediation occurred. R. 1301-02. While the parties were at the mediation, the district court denied the summary judgment motion filed by Kubicki based on the related causation-in-fact and proximate cause defenses and the *in pari delicto* defense. R. 1217-26.

On June 27, 2007, less than two weeks before the Underlying Matter was scheduled for trial, the Receiver made another policy limits and/or remaining policy limits demand. Alarmed by the turn of events, the district court’s rulings, the rapidly approaching trial date, the lack of what would have otherwise been a viable defense, and facing a potential verdict in excess of \$68 million, Spear Safer demanded Arch settle the case “within policy limits.” R. 1614; R. 1308-09. As such, the next day, Arch made an offer to settle the Underlying Matter for \$2 million, based on Kubicki’s June 13, 2007 recommendation. R. 1613; R. 1291. The Receiver rejected Arch’s offer to settle that same day. R. 998 at 173:14-20.

On July 5, 2007, a mere two business days before trial and after the pre-trial deadlines had expired, the district court denied Butler Pappas’ motion for a continuance and Arch had no choice but to increase its settlement offer. R. 1627;

³ Arch engaged Butler Pappas to protect Spear Safer’s interest, and Traub Lieberman was retained as Arch’s monitoring counsel. R. 965 at 42:14 to 43:1; R. 1613.

R. 962 at 30:14-21. That same day at 1:48 p.m., the Receiver accepted Arch's offer to settle for the remaining policy limits of \$3.5 million. R. 1240. As of that moment, the district court had not ruled on Butler Pappas' motion for leave to assert the statute of limitations defense.

Arch alleges that Kubicki's handling of the Underlying Matter adversely affected Arch and Spear Safer's legal position and severely compromised their bargaining power, causing Arch to settle the Underlying Matter for the unreasonable and grossly inflated amount of \$3.5 million. R. 1240.

II. PROCEDURAL HISTORY

This case began in February 2008 when a separate Arch entity, Arch Specialty Insurance Company ("Arch Specialty"), filed a complaint against Kubicki in Broward County Circuit Court alleging professional malpractice and breach of fiduciary duty. SR. 1721-50. The complaint asserted that, by failing to properly raise a statute of limitations defense, Kubicki caused Arch and Spear Safer to settle with the Receiver at a significantly higher amount than necessary. R. 1748-49 ¶ 53. The trial court initially granted summary judgment for Kubicki on the ground that Arch Specialty was not a proper party. R. 2076-77. But 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), *rev. denied*, 163 So. 3d 510 (Fla. 2015); *see* R. 430-72.

On remand, Kubicki again moved for summary judgment, this time on the basis that Arch lacked standing to maintain a malpractice action. R. 310-18. The trial court agreed and granted Kubicki's motion. SCR. 8-13. At the outset, the trial court observed that Kubicki's standing argument presented "a question of first impression in the State of Florida." SCR. 10. The trial court concluded, however, that Arch lacked standing because it was not in privity with Kubicki. SCR. 11. The trial court held, instead, that only Spear Safer was Kubicki's client, and so only Spear Safer was in privity with Kubicki. *Id.*

The Fourth District affirmed. *Arch Ins. Co. v. Kubicki Draper, LLP*, 266 So. 3d 1210 (Fla. 4th DCA 2019). Like the trial court, the Fourth District concluded that Arch lacked standing because it was not in privity with Kubicki. *Id.* at 1214, 1215. The Fourth District also held that Arch was not an intended third-party beneficiary of the relationship between Spear Safer and Kubicki. *Id.* at 1214, 1215. The court acknowledged the public policy concerns, but rejected them. *See id.* at 1214 ("We understand the insurer's public policy argument. However, we are bound to follow the law as it exists, not as the insurer argues it ought to be."). According to the Fourth District, permitting insurers like Arch to sue negligent defense counsel would recognize a new exception to the rule that only those in privity with counsel can assert claims for legal malpractice. *Id.* at 1214-15

Arch then moved for certification to this Court. SCR. 524-36. The Fourth District granted Arch's motion in part and certified the following question 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.

Arch, 266 So. 3d 1215.⁴ This Court accepted jurisdiction. SCR. 560.

STANDARD OF REVIEW

The determination whether a party has standing to sue is a pure question of law to be reviewed *de novo*. *Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 282 (Fla. 2013) (citing *Sanchez v. Century Everglades, LLC*, 946 So. 2d 563, 564 (Fla. 3d DCA 2006)).

SUMMARY OF ARGUMENT

An insurer has standing to maintain a malpractice action against counsel hired to represent the insured where the insurer has a duty to defend. The certified question should be answered in the affirmative and the decision below should be quashed.

I. When an insurer has a duty to defend its insured against a claim, the insurer’s retention of counsel to represent the insured forms a tripartite relationship among the insurer, its insured, and counsel. This relationship consists of mutual duties and obligations shared between insurer and defense counsel, insurer and insured, and insured and defense counsel. And through it, these three parties work together to defend (and represent) the interests of the insurer and the insured.

⁴ The Fourth District denied *Arch*’s request to certify the following additional question: “Whether the unique tripartite relationship between the insurer, insured, and law firm is a limited exception to the strict privity rule.” *Arch*, 266 So. 3d at 1215. In the Fourth District’s view, certification of the additional question was “subsumed within the first proposed certified question.” *Id.*

Given the duties that counsel owes to both insurer and insured, counsel must provide competent representation to both. Consequently, when counsel neglects its duty, the insurer has standing to hold counsel accountable through a malpractice action. This arrangement is no novelty; rather, it has been acknowledged and adopted by virtually all state appellate courts confronted with the issue before the Court here.

Arch, Spear Safer, and Kubicki formed a tripartite relationship under which Kubicki jointly represented Arch's and Spear Safer's interests. Kubicki's own conduct throughout its representation reflects that it understood that it shared a tripartite relationship with Arch and Spear Safer, that it had obligations to both clients, and that it shared an attorney-client privilege with both through which confidential information was shared. Arch was in privity with Kubicki and, accordingly, has standing to bring a malpractice action against the firm.

While the Fourth District expressed reluctance to create another "exception" to the rule that only those in privity with an attorney can sue for malpractice, there was, in fact, no need for any exception. Where, as here, defense counsel represents the interests of both insurer and insured, the tripartite relationship is an attorney-client relationship—one in which both the insurer and the insured are in privity with defense counsel.

II. Arch also has standing to maintain a malpractice action under principles of equitable and conventional subrogation. Whether based in equity or contract, an insurer is subrogated to the claims and rights of its insured—one of those rights being the ability to bring a malpractice action against defense counsel. The Policy expressly contemplates subrogation of Spear Safer's claims.

Moreover, this case—and cases like it—call out for application of equitable subrogation. A rule of law endowing defense counsel with immunity from suit by the insurer places the loss for the attorney’s negligence on the insurer and ultimately the public, which absorbs the costs of the malpractice. In the end, the only winner is the negligent attorney. Equitable subrogation exists to do justice without regard to form. Only rigid formalism would absolve negligent lawyers and law firms of their wrongdoing, leaving insurers and the public to foot the bill.

The traditional public policy concerns associated with the assignment of legal malpractice claims do not foreclose application of equitable subrogation. The two major policy issues this Court has identified—protection of the attorney-client relationship and preventing a market for legal malpractice claims—are alleviated by the distinct qualities of the tripartite relationship of insurer, insured, and defense counsel.

III. Allowing insurers to bring malpractice suits against retained defense counsel is also sound public policy. Insurer-driven malpractice suits foster accountability within the tripartite relationship by promoting enforcement of counsel’s obligations to the insurer, which shares a common interest with its insured. Malpractice suits also further fundamental principles of tort law by compensating insurers for attorney wrongdoing, incentivizing attorneys to represent their clients competently, and deterring future attorney negligence. In so doing, the social and economic costs of attorney malpractice are properly imposed where they belong—with negligent attorneys and not with insurers, insureds, and the public at large.

ARGUMENT

I. AN INSURER HAS STANDING TO MAINTAIN A MALPRACTICE CLAIM AGAINST COUNSEL HIRED TO REPRESENT THE INSURED WHERE COUNSEL REPRESENTS THE INTERESTS OF THE INSURER AND INSURED.

A. Introduction

A tripartite relationship existed among Arch, Spear Safer, and Kubicki in which Kubicki jointly represented Arch's and Spear Safer's interests. Kubicki's conduct throughout its representation reflects it understood that it shared a tripartite relationship with Arch and Spear Safer, that it had obligations to both, and that it shared an attorney-client privilege with both through which confidential information was shared. Arch was in privity with Kubicki and, accordingly, has standing to bring a malpractice action against the firm.

The tripartite relationship was formed when Arch retained Kubicki to defend Spear Safer's interests. The tripartite relationship involves three parties: (1) the insurance company that issues the liability insurance policy; (2) the insured against whom a covered claim and/or act under the policy is asserted; and (3) counsel retained by the insurer to defend the aligned interests of the insurer and the insured. These relationships are creatures of contract. The relationship between the insurer and defense counsel arises from two separate, but interrelated, contractual relationships—the insurance policy and the retainer agreement. Thus, when the insurer retains the law firm to defend the interests of the insured a tripartite relationship is formed.

B. A tripartite relationship among Arch, Spear Safer, and Kubicki was formed as a result of a set of reciprocal contracts.

The Policy imposed reciprocal obligations on Arch and Spear Safer. The Policy obligated it to furnish Spear Safer with a good faith defense for any covered claim and/or act asserted against it. *See Doe ex. rel. Doe v. Allstate Ins. Co.*, 653 So.2d 371, 373-74 (Fla. 1995). In exchange for Arch's defense obligations, Spear Safer was required to surrender its defense to Arch. *See generally Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Tr.*, 591 So. 2d 174, 176 (Fla. 1992). When Arch took control of Spear Safer's defense, it had a duty to provide a good faith defense protecting Spear Safer's interest against any covered claim and/or act made against it at the same degree of care and quality that Arch manages its own litigation. *Allstate Ins. Co.*, 653 So. 2d at 372 (holding an insurer is required, when handling an insured's defense, to use the same degree of care and diligence as a person of ordinary care and prudence should managing his or her own business). As a result of this reciprocal relationship between Arch and Spear Safer, Arch protects its interests and the insured's interests simultaneously. Consequently, they have a common interest to obtain quality legal representation. In short, for an insurer to comply with its duty, it must protect the insured's rights (and thus, effectively, protect itself). Arch did just that when it retained Kubicki.

Here, the tripartite relationship was born when Arch retained Kubicki to defend Spear Safer against subpoenas. R. 1612. As a result of Kubicki's retention, it was obligated to comply with Arch's litigation guidelines. Arch's litigation guidelines imposed obligations on Kubicki which assisted Arch in providing Spear

Safer a good faith defense. Mr. Murphy explained that Kubicki was required to “report” to Arch and advise Arch in order to “best defend the interests of [Spear Safer]” and to “make determinations” about how to defend the claim. R. 960 at 24; R. 986 at 126:11-20. The record contains appreciable evidence indicating that Kubicki gave frequent reports so that Arch could fulfill its obligation to provide a good faith defense to its insured. *See, e.g.*, R. 747 at 75:13 to 77:5, 748-49 at 79:25 to 84:4, 750 at 88:3 to 89:24, 990 at 143:1-8, 990-92 at 144:15 to 150:7, 994 at 157:1-12, 994-95 at 160:13 to 162:3-12, 996-97 at 168:23-25 to 169:1-13, 1245-1302, 1371.

A significant factor of Kubicki’s contractual obligations to Arch and Spear Safer is the dual nature of its representation. Rule 4-1.7(e) of the Rules Regulating the Florida Bar recognizes the tripartite relationship and permits an insured and insurer to be clients of the law firm at the same time. *See Progressive Exp. Ins. Co. v. Scoma*, 975 So. 2d 461, 466 (Fla 2d DCA 2007) (“[T]he same attorney may often ethically represent both the insured and the insurer in the tort action. That is, the insured and insurer’s interests may be aligned, or at least may not be adverse. In many tort actions, then, the lawyer for the named defendant is also the lawyer for the defendant’s insurance company, even though the insurance company is not a party to the lawsuit.” (citing R. Regulating Fla. Bar 4-1.7(e))).

Both Arch and Spear Safer were Kubicki’s clients. Arch retained Kubicki in a manner indicating that Arch was to control the litigation. Kubicki’s own records show that it was retained by Arch and was bound by Arch’s litigation guidelines, which governed the representation of the insured. R. 766 at 153:11-17, 960-61 at

24:25-26:4, 1612; SR. 2063-64. And when Kubicki notified Spear Safer of the representation, the very first sentence of Kubicki's letter to Spear Safer stated that "[o]ur firm has been *retained by Arch Insurance Group* to represent and defend you in the above-captioned case." R. 1615 (emphasis added).

Moreover, Kubicki's conduct demonstrates it was aware the tripartite relationship existed with Arch and Spear Safer and that Arch, too, was its client. In fact, Kubicki communicated to the expert it retained in the Underlying Matter that its client was Arch and that Arch would be responsible for all expert fees. Additionally, Kubicki partner, Peter Murphy, acknowledged that, pursuant to the Rules of Regulating the Florida Bar, his firm was engaged in a tripartite relationship with Arch and Spear Safer under which Kubicki had responsibilities to both insurer and insured:

A. . . . I don't disagree with anything [another Kubicki attorney previous testified to] with regard to our duty to the client in recognizing there is a tripartite relationship with the carrier

Q. Would you agree that your firm had some type of responsibilities to Arch, as well as to Spear Safer?

A. I don't think I would disagree with that. There is a relationship.

R. 960 at 23:20-24:2. Mr. Murphy understood that, by virtue of Kubicki's attorney client relationship with Arch, its communications with Arch were entitled to the protections of the attorney-client privilege. R. 961 at 25:9-15 ("In terms of your communications that you had with Arch, did you consider those to be protected from disclosure by the attorney-client privilege? . . . A: Yeah, of course.") (paragraph

breaks deleted)). And as part of that relationship, Mr. Murphy explained, Kubicki was required to “report” to Arch under the litigation guidelines in order to “best defend the interests of [Spear Safer]” and to “make determinations” about how to defend the claim. *Id.* at 24:4-13.

C. The Rules Regulating the Florida Bar recognize and govern the tripartite relationship.

The tripartite relationship is so fundamental that the rules regulating lawyers’ conduct already recognize and govern it. Florida law permits attorneys to represent jointly insurers and their insured and places the burden on retained counsel to establish clearly to both parties the parameters of the representation.

This Court amended Rules 4-1.7 and 4-1.8 of the Rules Regulating the Florida Bar to ensure that an attorney can jointly represent an insurer and its insured free from any conflicts of interest. *See Amendments to Rules Regulating the Fla. Bar re Rules of Prof’l Conduct*, 838 So. 2d 1140, 1141-44 (Fla. 2003) (amending Rule 4-1.7); *Amendments to Rules Regulating the Fla. Bar*, 820 So. 2d 210, 251-56 (Fla. 2002) (amending Rule 4-1.8). Rule 4-1.7(e) and its corresponding comments instruct:

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.*

R. Regulating Fla. Bar 4-1.7(e) (emphasis added).⁵

The comment to Rule 4-1.7(e) emphasizes the importance of establishing a conflict-free relationship between the lawyer and his two clients:

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.

R. Regulating Fla. Bar 4-1.7(e) cmt. (emphasis added). And when such a conflict of interest between insurer and insured does arise, the comment instructs that, should the insurance agreement require the insurer to provide special counsel in that scenario, the insurer should “assure the special counsel’s independence.” *Id.*

Rule 4-1.8(j) sets forth the comprehensive Statement of Insured Client’s Rights that a lawyer must provide when he or she “undertakes the defense of an

⁵ In contrast, the Fourth District *seemed* to place the burden on Arch to define the parameters of Kubicki’s representation by quoting directly from Kubicki’s motion for summary judgment. *See Arch*, 266 So. 3d at 1212 (“[N]owhere on the face of the relevant documents . . . relating to the retention of [Kubicki], such as the statement of Clients’ Rights, is there any indication that with respect to the [Underlying] matter, [Kubicki] would be representing [Arch] in addition to [Spear Safer]. Very simply, for that to have been the case, there would have to have been a disclosure to [Spear Safer] that [Kubicki] was undertaking the dual representation of [Spear Safer] and [Arch].” (some alterations in original)).

insured . . . at the expense of an insurance company.” R. Regulating Fla. Bar 4-1.8(j). The comment to this rule proceeds to underscore the need for clarity in determining whether counsel is representing both the insurer and insured. The comment reads in pertinent part:

As with any representation of a client when another person or client is paying for the representation, the representation of an insured client at the request of the insurer creates a special need for the lawyer to be cognizant of the potential for ethical risks. The nature of the relationship between a lawyer and a client can lead to the insured or the insurer having expectations inconsistent with the duty of the lawyer to maintain confidences, avoid conflicts of interest, and otherwise comply with professional standards. *When a lawyer undertakes the representation of an insured client at the expense of the insurer, the lawyer should ascertain whether the lawyer will be representing both the insured and the insurer, or only the insured.* Communication with both the insured and the insurer promotes their mutual understanding of the role of the lawyer in the particular representation.

R. Regulating Fla. Bar 4-1.8(j) cmt. (emphasis added).

The tripartite relationship—and the corresponding ability of attorneys to represent both insurer and insured concurrently—is no novelty to Florida law. This Court and members of the Florida Bar have given the issue studied consideration. As a result, this Court has instructed attorneys how to navigate the tripartite relationship in an ethical manner. Those attorneys owe their clients a duty of competent representation. Through the Rules Regulating the Florida Bar, this Court has acknowledged this common-sense proposition applies as well to attorneys that jointly represent insurers and their insured.

D. Florida courts have recognized that the common-interest exception to the attorney-client privilege applies to the tripartite relationship among an insurer, its insured, and counsel.

Florida courts have often addressed the tripartite relationship in the context of the common-interest exception to the attorney-client privilege. Contained in section 90.502 of the Evidence Code, the common-interest exception provides that a client and her attorney cannot claim a privilege to refuse to disclose to third parties “[a] communication [that] is relevant to a matter of common interest between two or more clients, . . . if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients” § 90.502(4)(e), Fla. Stat. (2018). Because “the lawyer for the [insured] is also the lawyer for the [insurer], [t]he attorney-client privilege does not generally attach as to communications between an insurer, the insured, and the attorney hired to represent the insured in a third-party claim because these parties agreed to a representation of common interests.” *Scoma*, 975 So. 2d at 466-67 (citing R. Regulating Fla. Bar 4-1.7(e) & § 90.502(4)(e), Fla. Stat.); *see also Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 908 (Fla. 3d DCA 2004) (“[W]hen an insurer accepts the defense obligations of its insured, certain interests of the insured and the insurer essentially merge. Such common interests bar, among other things, the attorney-client privilege from attaching to communications among the attorney, the insurer, and the insured.”).⁶

⁶ In this case, the record is replete with evidence that information as to litigation strategy and communications among Arch, Spear Safer, and Kubicki was freely shared within the tripartite relationship.

Moreover, under the common-interest doctrine, certain information shared among the insurer, its insured, and defense counsel can also be protected from disclosure. “[I]t is well settled that communications between an insurer and the lawyer hired by the insurer to protect the insured’s interests are protected by the attorney-client privilege because the insurer and insured share a common interest in the outcome of the case.” *United Servs. Auto. Ass’n v. Law Offices of Herssein & Herssein, P.A.*, 233 So. 3d 1224, 1231-32 (Fla. 3d DCA 2017); *see also Cone v. Culverhouse*, 687 So. 2d 888, 893 (Fla. 2d DCA 1997) (“[T]he clients’ interests must be sufficiently compatible that a reasonable client would expect his or her communications concerning the matter to be accessible to the other client.”).

Thus, given Florida courts’ application of the common-interest exception to the attorney-client privilege, it follows that counsel can—and often does—simultaneously represent the interests of *both* insurer and insured. Indeed, it demonstrates that the tripartite relationship is deeply woven into the fabric of Florida law.

E. The tripartite relationship provides the insurer with standing to bring a malpractice action against counsel hired to represent the insured.

The ability of an insurer to maintain a malpractice action against counsel hired to represent the insured follows directly from counsel’s dual representation of the interests of both the insurer and insured under the tripartite relationship.

As a general matter, “[a]n 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.” *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1379 (Fla. 1993) (citing *Angel, Cohen & Rogovin v. Oberon Invs., N.V.*, 512 So. 2d 192 (Fla. 1987)). The term “privity” is a term of art that derives from the common law of contracts and is most often used to describe the relationship of persons *who are parties to a contract*. *Baskerville-Donovan Eng’rs, Inc. v. Pensacola Exec. House Condo. Ass’n, Inc.*, 581 So. 2d 1301, 1303 (Fla. 1991).

As noted, counsel is retained by the insurer to defend the insured and jointly represent the interests of the insurer and the insured which creates the tripartite relationship. And, again as noted above, Kubicki was panel counsel for Arch, was retained by Arch, and was required to comply with Arch’s litigation guidelines.⁷ R. 995 at 161:12-18, 1612, 1615-26; SR. 2063-64. Through that contractual relationship, Kubicki assisted Arch to fulfill its obligation to provide legal representation to Spear Safer under the Policy. Because the insurer is a client of, and has a contractual relationship with, defense counsel, the insurer is owed a duty of competent representation, just like any client represented by counsel. Moreover, as the party that retained defense counsel, the insurer also employs that attorney. Thus,

⁷ Panel counsel is a law firm chosen by an insurance company to represent its policyholders in defending liability claims. When a policy is written on a duty to defend basis, either the insurer selects or the insured is allowed to select defense counsel from one of the firms contained within the panel. To be panel counsel, law firms agree to comply with the guidelines and obligations of the insurance carrier when retained to defend an insured. Kubicki was a panel counsel law firm at the time Arch engaged them to represent Spear Safer. *See* SR. 2103-06.

under these circumstances, an insurer has standing to maintain a malpractice action against counsel retained to defend the insured.

Supporting this conclusion, all states that have addressed the question whether an insurer has standing to bring a legal malpractice claim against counsel retained to defend an insured have provided a pathway to recourse. A leading treatise on attorney malpractice lists 25 states with judicial decisions allowing such direct actions. *See* 4 Ronald E. Mallen, *Legal Malpractice* § 30:39 (3d ed.). Even though courts in other jurisdictions overwhelmingly recognize standing for insurers to bring direct actions, “most of the reported cases involving such suits offer no analysis of the insurer’s relationship with the law firm.” *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 956 (E.D. Va. 2005). Those that do, though, “reflect the view that a ‘tripartite relationship’ exists among insurer, insured, and counsel, with both insurer and insured as co-clients of the firm in the absence of a conflict of interest.”⁸ *Id.* A smaller number of courts “recognize an additional or

⁸ *See, e.g., Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1330-31 (9th Cir. 1995) (Alaska law); *Carolina Cas. Ins. Co. v. Sharp*, 940 F. Supp. 2d 569, 573-75 (N.D. Ohio 2013) (Ohio law); *ACE Am. Ins. Co. v. Sandberg, Phoenix & Von Gontard, PC.*, 900 F. Supp. 2d 887, 902-03 (S.D. Ill. 2012) (Illinois law); *Nat’l Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1017-18 (N.D. Ill. 1998) (same); *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 152 P.3d 737, 741-42 (Nev. 2007); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 607 (Utah 2003); *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 452 (Minn. 2002); *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 79 Cal. App. 4th 114, 127-29 (2000); *Unigard Ins. Grp. v. O’Flaherty & Belgum*, 38 Cal. App. 4th 1229, 1235-37 (1995); *cf. Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 826 S.E.2d 270, 271-73 (S.C. 2019) (permitting direct cause of action without relying on dual-

substitute cause of action by the insurer as a non-client beneficiary of the firm’s legal services.”⁹ *Id.* Both theories of liability “depend on the existence of a duty of care running from the firm to the retaining insurer and acknowledge that such a duty disappears when a conflict of interest threatens the firm’s ability to represent the insured.”¹⁰ *Id.*

This Court should expressly join those states that have recognized that the tripartite relationship among insurer, insured, and counsel permits a direct cause of action for malpractice. As discussed, the tripartite relationship has deep roots in Florida law. And this Court, through the Rules Regulating the Florida Bar, has

client theory; insurer may recover for breach of duty to insured that proximately causes damage to insurer).

⁹ See, e.g., *State & Cty. Mut. Fire Ins. Co. v. Young*, 490 F. Supp. 2d 741, 746-47 (N.D. W. Va. 2007) (West Virginia law); *Gen. Sec. Ins. Co.*, 357 F. Supp. 2d at 957 (Virginia law); *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 602 (Ariz. 2001); see also *Restatement (Third) of Law Governing Lawyers* § 51 cmt. g (2000) (“*Restatement*”).

¹⁰ To date, only three state appellate courts—in Michigan, Texas, and Washington—have issued precedents declining to permit insurers to bring *direct* legal malpractice actions against counsel appointed to defended claims against insureds. See *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 311 P.3d 1 (Wash. 2013); *Safeway Managing Gen. Agency, Inc. v. Clark & Gamble*, 985 S.W.2d 166 (Tex. Ct. App. 1998); *Atlanta Int’l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991). But none of those decisions altogether foreclosed avenues of relief for the insurer. The Michigan court permitted insurers to bring claims based on equitable subrogation, *id.* at 297-99, while the Texas court allowed the insurer to bring claims for negligent misrepresentation, fraud, conspiracy, breach of contract, and breach of warranty, *Safeway*, 985 S.W.2d at 168-70. The Washington court did not address the questions involving equitable subrogation; the case involved only a non-client beneficiary theory. See *Stewart Title*, 311 P.3d at 5 & n.4.

already established a framework for lawyers to avoid conflicts of interest when engaging in such a dual-client relationship and places the onus on retained counsel to clearly articulate the scope of the representation. The natural next step is to hold that an insurer *can* bring a direct cause of action against retained counsel in such circumstances.¹¹

The Fourth District erred when it concluded that “the law as it exists” required it to hold that an insurer cannot have standing to sue counsel retained to defend a claim against the insured. *Arch*, 266 So. 3d at 1214. Indeed, the Fourth District’s analysis failed to fully engage with the law as it exists in this state, as its opinion does not mention, much less explore, the concept of the “tripartite relationship.”

The court instead viewed this case as requiring the recognition of a new exception to the rule that only those in privity with an attorney can sue for malpractice. 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

¹¹ Notably, three judges of the U.S. District Court for the Middle District of Florida have predicted that this Court will do so. *See U.S. Specialty Ins. Co. v. Burd*, 833 F. Supp. 2d 1348, 1352-53 (M.D. Fla. 2011); *Nova Cas. Co. v. Santa Lucia*, No. 8:09-cv-1351-T-30AEP, 2010 WL 3942875, at *2 (M.D. Fla. Oct. 5, 2010); *Hartford Ins. Co. of Midwest v. Koepfel*, 629 F. Supp. 2d 1293, 1301 (M.D. Fla. 2009).

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).¹²

But this Court need not recognize a new exception to the privity rule to answer the certified question in the affirmative. When defense counsel jointly represents the interests of the insurer and insured, 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.

There is no dispute that Arch, Spear Safer, and Kubicki shared a tripartite relationship. Under that relationship, as discussed, Arch has standing to sue Kubicki for malpractice based on Kubicki’s joint representation of the interests of Arch and Spear Safer.

¹² To the extent the Fourth District read *Espinosa* as mandating its conclusion that standing does not exist in this case, the Fourth District read too much into this Court’s precedent. Certainly, *Espinosa* did not address the tripartite relationship at issue here. On the contrary, the plaintiff in that case had no relationship at all with the lawyer sued for malpractice, and she certainly did not hire counsel. Moreover, the Court’s definition of “privity” in that case—a term “used to describe the relationship of persons who are parties to a contract”—and its observation that a claim for malpractice will lie where “one party has a direct obligation to another,” align with the facts of this case. *Espinosa*, 612 So. 2d at 1380. Arch had a contractual relationship with Kubicki, and Kubicki owed a duty to Arch, namely, to provide the best possible defense to Arch’s client and to minimize financial exposure from the claim for both Spear Safer and Arch.

F. The tripartite relationship provides the insurer with standing to bring a malpractice action against counsel hired to represent the insured based on a non-client beneficiary theory.

In the event this Court concludes that Kubicki did not jointly represent the interests of Arch and Spear Safer, Arch nonetheless has standing based on its status as a non-client beneficiary of Kubicki's representation of Spear Safer.

When counsel represents only the insured within the tripartite relationship, the insurer can nonetheless be a non-client beneficiary of counsel's defense. Because the insurer is directly benefiting from counsel's services in that scenario, it is appropriate to "recognize an additional or substitute cause of action by the insurer as a non-client beneficiary of the firm's legal services." *Gen. Sec. Ins. Co.*, 357 F. Supp. 2d at 956. Thus, "when an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide." *Paradigm Ins. Co.*, 24 P.3d at 602. This rule proceeds from the premise that "[w]hen the interests of insurer and insured coincide, as they often do, it makes neither economic nor practical sense for an insurer to hire another attorney to monitor the actions and decisions of the attorney assigned to an insured."¹³ *Id.* at 601.

The duty owed by counsel to the insurer in these circumstances finds support in the *Restatement (Third) of Law Governing Lawyers*, which recognizes that an insurer can have standing to sue defense counsel based on a non-client beneficiary

¹³ In this case, outside counsel was retained by Arch only *after* Kubicki had committed the malpractice and materially (and adversely) affected both Arch's and Spear Safer's interests in the litigation.

theory. According to Section 51(3) of the *Restatement*, a lawyer owes an actionable duty of care to a non-client when:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient; (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely

Restatement § 51(3)(a). Comment g to Section 51 goes on to explain the applicability of this rule to the insurance-defense context: “[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.*” *Id.* § 51 cmt. g (emphasis added; citing *Restatement* § 134 cmt. f). A further provision of the *Restatement* advises: “Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer.” *Id.* § 134 cmt. f.

The *Restatement* rule fits comfortably within Florida law on non-client beneficiaries, especially in the context of the tripartite relationship. A non-client beneficiary claim arises when there is: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach of the contract; and (4) resulting damages to the third party. *Dingle v. Dellinger*, 134 So. 3d 484, 488 (Fla. 5th DCA 2014). When this Court adopted Rule 4-1.7(e) to the Rules Regulating the Florida Bar, it recognized that, in certain cases involving the tripartite relationship,

an attorney “may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer’s fees.” R. Regulating Fla. Bar 4-1.7(e) cmt. In this circumstance, “a special relationship exists between the insurer and the counsel it assigns to represent its insured,” a relationship in which “[t]he insurer is in some way dependent upon the lawyer it hires on behalf of its insureds.” *Paradigm Ins. Co.*, 24 P.3d at 601 (internal quotation marks omitted). And given the insurer’s direct financial interest in counsel’s defense of a claim, it necessarily follows that counsel will owe a duty of care to the insurer, even though the insurer may not technically be a client.

Because it was Arch, not Spear Safer, that would bear the financial responsibility for paying out any claim against Spear Safer, Arch was the primary beneficiary of Kubicki’s defense.¹⁴ As a result, Arch is a non-client beneficiary of Kubicki’s representation of Spear Safer and has standing to assert a malpractice claim against Kubicki.¹⁵

¹⁴ The harm to Spear Safer, after all, was predominantly the damages it would suffer as a result of its alleged malpractice. By virtue of the insurance policy, though, that harm was “transferred” to Arch.

¹⁵ Although the existing record is sufficient to establish Arch’s standing pursuant to the tripartite relationship, this Court need not resolve the factual issue in order to answer the certified question in the affirmative and quash the Fourth District’s decision. Should this Court conclude that further factual development is necessary to determine whether Arch has standing, the question can be left open for the lower courts to consider on remand in light of the correct rule of law. *See Byrom v. Gallagher*, 609 So. 2d 24, 27 (Fla. 1992) (answering standing-related certified question in the affirmative and remanding for determination whether petitioner had standing under facts of the case).

II. THE DOCTRINE OF SUBROGATION PROVIDES AN INSURER STANDING TO BRING A MALPRACTICE ACTION AGAINST COUNSEL HIRED TO REPRESENT THE INSURED.

A. Introduction.

The doctrine of subrogation offers an independent basis under which an insurer has standing to assert a malpractice claim against counsel hired to represent its insured. Whether based in contract or equity, a subrogated party succeeds to the rights of its subrogor. One of those rights includes asserting claims that could otherwise be made by the subrogor. Thus, when an insurer is subrogated to the rights of its insured, the insurer can bring a malpractice action on behalf of its insured.

In this case, Arch is both equitably and contractually subrogated to Spear Safer's rights under the Policy. Arch, therefore, has standing to assert claims belonging to Spear Safer that arise under the Policy. And because Kubicki does not dispute that Spear Safer would have standing to bring a malpractice claim, it necessarily follows that Arch can bring that claim in its capacity as Spear Safer's subrogee.¹⁶

¹⁶ While the Fourth District did not address subrogation in its opinion, the issue was fully briefed below and was discussed at oral argument. The issue is therefore properly preserved for this Court's consideration. *See D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 881 (Fla. 2018) ("Once this Court has jurisdiction of a cause, it has jurisdiction to consider all issues appropriately raised in the appellate process when these other issues have been properly briefed and argued and are dispositive of the case." (brackets, ellipsis, and internal quotation marks omitted)).

B. An insurer that is subrogated to the rights and obligations of its insured has standing to sue defense counsel for malpractice.

Subrogation is “an act of law growing out of the relation of the parties to the original contract of insurance, where one entity pays the debt or discharges the obligations of another.” *Cont’l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008) (citations and internal quotation marks omitted). Florida law recognizes two types of subrogation: equitable and conventional. *Id.* An insurer can have standing to sue retained defense counsel on either basis.

(1) An insurer can be equitably subrogated to its insured’s right to bring a malpractice action against defense counsel.

Equitable subrogation “is not created by a contract, but by the legal consequences of the acts and relationships of the parties.” *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999). It allows the party discharging a debt to “stand in the shoes” of the person whose claims have been discharged and succeed to the rights and priorities of the original creditor. *Id.* Because equitable subrogation’s aim “is to prevent injustice, [it] is governed by principles of equity.” *Cont’l Cas. Co.*, 974 So. 2d at 377 (internal quotation marks omitted). This Court has long been “committed to a liberal application of the rule of equitable subrogation.” *Dantzler Lumber & Export Co. v. Columbia Cas. Co.*, 156 So. 116, 120 (Fla. 1934).

In this case—and cases like it—“[e]quity cries out for application” of equitable subrogation. *Bell*, 475 N.W.2d at 298. A rule of law endowing defense counsel with “immunity from suit by the insurer would place the loss for the

attorney’s misconduct on the insurer.” *Id.* Absent a malpractice cause of action against defense counsel, the insurer is stuck paying the bill for counsel’s negligence—a bill that, depending on the scope of an insurance policy, could amount to millions of dollars. In the end, “[t]he only winner . . . [is] the malpracticing attorney.” *Id.*; see *Paradigm Ins. Co.*, 24 P.3d at 599 (“[I]f that lawyer’s negligence damages the insurer only, the negligent lawyer fortuitously escapes liability. Or if the lawyer’s negligence injures both insurer and insured in a case in which the insured is the only client but refuses to proceed against the lawyer, the insurer is helpless and has no remedy.”).

That is exactly what Kubicki convinced the Fourth District to condone. At oral argument before the Fourth District, Kubicki’s counsel was posed with a simple hypothetical: What would be the insurer’s remedy in a case of egregious attorney malpractice? Counsel’s only answer: Cut your losses, stop the bleeding, and hire a new attorney. Video of Oral Arg. at 33:20 to 35:15, *Arch*, 266 So. 3d 1210 (No. 4D17-2889), <https://youtu.be/gjoMOgRwKXw>. Kubicki’s proposed remedy, then, is “a ‘remedy’ that . . . provides no remedy at all.” *Holmes Reg’l Med. Ctr., Inc. v. Allstate Ins. Co.*, 225 So. 3d 780, 798 (Fla. 2017) (Lawson, J., dissenting). Equitable subrogation is “founded on the proposition of doing justice without regard to form.” *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702, 704 (Fla. 1980) (internal quotation marks omitted). Only rigid formalism would subject an insurer to such an inequitable result. Other courts have seen that equity and justice require

this result and, accordingly, have afforded insurers a cause of action under the doctrine of equitable subrogation.¹⁷ This Court should do so as well.

(2) An insurer can be contractually subrogated to its insured's right to bring a malpractice action against counsel.

Even if the insurer is not equitably subrogated to the rights of its insured, the insurer can nonetheless be contractually subrogated to its insured's rights under the doctrine of conventional subrogation. Conventional subrogation is created "from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor." *Radio Station WQBA*, 731 So. 2d at 646; *see also Boley v. Daniel*, 72 So. 644, 645 (Fla. 1916). "Essentially, it is an agreement that the party paying the debt will be subrogated to the rights of the original creditor." *Cont'l Cas. Co.*, 974 So. 2d at 376 (internal quotation marks omitted). An insurer's subrogation right may be expressly provided for by a clause that is included either in the applicable insurance policy or in a settlement agreement with an insured. *Nat'l Union Fire Ins. Co. of Pittsburgh v. KPMG Peat Marwick*, 742 So. 2d 328, 332 (Fla. 3d DCA 1999), *approved*, 765 So. 2d 36 (Fla. 2000).

The payment of a loss does not extinguish an insurer's conventional subrogation rights. *See id.* Rather, even after payment, "insurers have the opportunity to recover some of the payments made to their insured by asserting

¹⁷ *See, e.g., Bell*, 475 N.W.2d at 297-99 (Michigan law); *Atkinson v. Oceanus Ins. Co.*, Case No. 13-CV-762-JED-PJC, 2016 WL 5746210, at *5-6 (N.D. Okla. Sept 30, 2016) (Oklahoma law); *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 379 F. Supp. 2d 183, 189-96 (D. Mass. 2005) (Massachusetts law).

subrogation rights against the entity responsible for the activity.” *Fayad v. Clarendon Nat’l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005). So, even after an insurer may be forced to cover the losses caused by counsel’s malpractice, the insurer can seek to recover from counsel the losses its insured—and, by extension, the insurer—has sustained.

Thus, depending on the contractual relationship between an insurer and its insured, the insurer can be subrogated to the insured’s legal malpractice claim against counsel. Here, the Policy between Arch and Spear Safer provides: “To the extent of any payment under this Policy, we shall be subrogated to all your rights of recovery therefor against any person, organization, or entity and you shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. You shall do nothing after any loss to prejudice such rights.” R. 2019; (boldface deleted).

- (3) The public policy concerns associated with the assignment of legal malpractice claims do not apply to the subrogation of claims in the context of the tripartite relationship shared by the insurer, its insured, and counsel.**

Application of the doctrine of subrogation in this case is not foreclosed by Florida’s general policy against the assignment of legal malpractice claims. While some courts have concluded that the policy reasons for prohibiting the assignment of legal malpractice claims are equally applicable to the subrogation of such

claims,¹⁸ those concerns are not implicated here, and there is no persuasive reason to prevent the invocation of subrogation in this context.

The two major policy concerns justifying a general prohibition against the assignment of legal malpractice claims are: (1) protecting attorney-client confidences and (2) preventing a market for legal malpractice claims. *Law Office of David J. Stern, P.A. v. Sec. Nat'l Servicing Corp.*, 969 So. 2d 962, 969 (Fla. 2007). With respect to protecting attorney-client confidences, under the tripartite relationship communications among insurer, insured, and counsel can be shielded by the privilege under the common-interest doctrine¹⁹—at least until the relationship between the parties becomes adverse. So, subrogation of malpractice claims within the tripartite relationship will not affect the attorney-client relationship in the least; any confidences relating to the litigation have already been shared among the parties.

The tripartite relationship also alleviates any concerns regarding a market for legal malpractice claims. This Court has expressed apprehension as to the “merchandizing [of malpractice] causes of action [into a] lucrative business” that would, among other things, “force attorneys to defend themselves against strangers.” *Kaplan*, 902 So. 2d at 760 (emphasis added; quoting *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 397 (1976)). But no such commercialization of malpractice claims exists within the tripartite relationship. Unlike an assignee of a

¹⁸ See, e.g., *Nat'l Union Fire Ins. Co. v. Salter*, 717 So. 2d 141, 143 (Fla. 5th DCA 1998); *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg*, 30 Cal. App. 4th 1373, 1380-84 (1994).

¹⁹ Indeed, Kubicki has conceded that such an arrangement existed among Arch, Spear Safer, and Kubicki.

malpractice claim, an insurer is not a “stranger”; it already has a preexisting relationship with defense counsel—one that often pre-dates counsel’s appointment (as was the case here, where Kubicki was appointed from Arch’s list of panel counsel). Nor would the insurer *profit* from malpractice claims against counsel. Instead, the insurer seeks simply to recoup any losses that were caused by counsel’s negligence—a remedy that, absent a cause of action against defense counsel, would be unavailable to the insurer.

C. Arch has standing to bring a malpractice action against Kubicki as Spear Safer’s subrogee.

Arch has standing to assert a cause of action for legal malpractice against Kubicki under principles of equitable and conventional subrogation.

(1) Arch is equitably subrogated to Spear Safer’s right to bring a malpractice action against Kubicki.

Equitable subrogation is generally appropriate where: (1) the subrogee made the payment to protect his or her own interest; (2) the subrogee did not act as a volunteer; (3) the subrogee was not primarily liable for the debt; (4) the subrogee paid off the entire debt; and (5) subrogation would not work any injustice to the rights of a third party. *Radio Station WQBA*, 731 So. 2d at 646. Each of these elements is easily satisfied.

Arch settled the Receiver’s claim against Spear Safer to protect its own interest, and did not do so merely as a volunteer. Rather, pursuant to the Policy, Arch had a fiduciary duty to provide a good faith defense to the Receiver’s claim and to pay out all damages within the Policy limits. R. 2002-03. Arch’s payment was not

only to cover Spear Safer's liability that Spear Safer acceded to under the settlement, but also to fulfill Arch's contractual obligations to Spear Safer. And because the claim was settled within the Policy's limits, Arch made the entire payment.

Finally, for reasons already discussed, it is implausible that any third party would be prejudiced by application of equitable subrogation. Immunizing Kubicki and other negligent defense counsel from liability shifts the social costs of such wrongdoing onto the public. *See Bell*, 475 N.W.2d at 298-99. If anything, it is Arch and the public at large that will be harmed by the failure to apply equitable subrogation.²⁰

The doctrine of equitable subrogation exists "to prevent unjust enrichment by assuring that the person who in equity and good conscience is responsible for the debt is ultimately answerable for its discharge." *Columbia Bank v. Turbeville*, 143 So. 3d 964, 968 (Fla. 1st DCA 2014) (internal quotation marks omitted). Kubicki should, if the allegations of malpractice are proven on remand, be held to account—not receive a windfall—for its malpractice. Allowing such a claim would "properly impos[e] the social costs of [Kubicki's] malpractice where they belong." *Bell*, 475 N.W.2d at 297.

²⁰ It is not unreasonable to conclude that the increased costs associated with retained counsel malpractice would be passed along to policyholders through increased premiums.

(2) Arch is conventionally subrogated to Spear Safer's right to bring a malpractice action against Kubicki.

Arch is also conventionally subrogated to Spear Safer's right to bring a malpractice action against Kubicki. As previously noted, Section 9.7 of the Policy contains the following subrogation clause:

To the extent of any payment under this Policy, we shall be subrogated to all your rights of recovery therefor against any person, organization, or entity and you shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights, you shall do nothing after any loss to prejudice such rights.

R. 2019 (boldface deleted); *see also* R. 2103-06 (Spear Safer assignment of claim). Arch's right to conventional subrogation is straightforward. Under the Policy, Spear Safer's right to recover against Kubicki for its malpractice would be subrogated to Arch. The Policy's subrogation clause obligated Spear Safer to subrogate that right to Arch, and Arch having paid the settlement, can now assert that right to bring a malpractice claim against Kubicki.²¹

III. FORECLOSING MALPRACTICE SUITS AGAINST COUNSEL HIRED TO REPRESENT INSUREDS PRESENTS SUBSTANTIAL PUBLIC POLICY CONCERNS.

Permitting insurers to bring a cause of action for malpractice against counsel retained to defend insureds is sound public policy.

²¹ While the existing summary judgment record before the Court establishes Arch's standing to bring suit against Kubicki for malpractice under the doctrine of subrogation, this Court need not resolve the issue in order to answer the certified question in the affirmative and quash the Fourth District's decision. Should this Court conclude that further factual development is necessary to determine whether Arch has standing under the doctrine of subrogation, the question can be left open for the lower courts to consider on remand under the correct rule of law. *Byrom*, 609 So. 2d at 27.

First, insurer-driven malpractice suits promote accountability within the tripartite relationship. “Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer’s obligations to the insured,” *Restatement* § 51 cmt. g, because “both insurer and insured often share a common interest in developing and presenting a strong defense to a claim that they believe to be unfounded as to liability, damages, or both.” *Paradigm Ins. Co.*, 24 P.3d at 598. But it is unrealistic to expect true accountability absent malpractice suits. After all, since the insurer, not the insured, is ultimately the party that is required to satisfy a judgment brought about by counsel’s malpractice, the insured “has no real incentive to sue defense counsel.” *Bell*, 475 N.W.2d at 297. So, in the end, “[t]he failure to permit a cause of action by the insurer . . . serves the interests of no one except the attorney who committed the malpractice.” *Gen. Sec. Ins. Co.*, 357 F. Supp. 2d at 957.

Second, malpractice suits against defense counsel serve “the primary purpose of tort law,” namely, “that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct.” *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1105 (Fla. 2008) (internal quotation marks omitted). Immunizing insurance defense counsel from liability contradicts that most basic principle. Instead of “encourag[ing] socially beneficial conduct and deter[ring] wrongful conduct,” Kubicki’s proposed rule of law discourages socially beneficial conduct and does nothing to deter wrongful conduct by defense counsel. *Id.* (quoting *Denver Publ’g Co. v. Bueno*, 54 P.3d 893, 898 (Colo. 2002)).

Third, affording insurers a meaningful remedy benefits not only the insurer but also the insured and the public at large. As the Michigan Supreme Court has explained, holding defense counsel accountable “properly impos[es] the social costs of malpractice where they belong.” *Bell*, 475 N.W.2d at 297. And as a consequence, “the attorney-client relationship, the interests of the client, the interest of the insurer, and ultimately the public, which otherwise would absorb the costs of the malpractice, all benefit from [defense counsel’s] exposure to suit.” *Id.* at 299.

Lawyers and law firms should be held accountable for their wrongdoing, if proven. If the decision of the Fourth District is approved, attorneys appointed by insurance companies to defend insureds would be given a green light to commit malpractice when the outcome is within policy limits without being held to account. Insured persons and businesses should receive competent defense counsel, while insurers should be made whole from loss occasioned by counsel’s negligence. Lastly, and not insignificantly, the public at large should be free from bearing the costs imposed by counsel’s malpractice. The Fourth District’s decision, which rejects all of this, should be disapproved.

CONCLUSION

For the foregoing reasons, the certified question should be answered in the affirmative, the decision of the Fourth District Court of Appeal should be quashed, and the case remanded for further proceedings.

Respectfully submitted,

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I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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