

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

REPLY BRIEF OF PETITIONER

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RECEIVED, 11/27/2019 02:03:29 PM, Clerk, Supreme Court

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
NOTE REGARDING ABBREVIATIONS.....	iii
INTRODUCTION	1
ARGUMENT	2
I. KUBICKI CANNOT SHIFT TO ARCH COUNSEL’S ETHICAL OBLIGATION TO CLARIFY THE NATURE AND SCOPE OF ITS REPRESENTATION IN A TRIPARTITE RELATIONSHIP.....	2
II. THE TRADITIONAL JUSTIFICATIONS FOR DENYING ASSIGNMENT OR SUBROGATION OF LEGAL MALPRACTICE CLAIMS DO NOT APPLY TO AN INSURER’S CLAIM AGAINST RETAINED COUNSEL.....	7
A. Arch did not abandon its subrogation claims.....	7
B. No Florida court has ever barred a subrogation claim involving an insurer’s claim for malpractice against counsel retained to defend the insurer’s and insured’s interests.....	8
III. PUBLIC POLICY CONSIDERATIONS WEIGH IN FAVOR OF ARCH’S STANDING TO SUE.....	11
CONCLUSION.....	15
CERTIFICATE OF SERVICE	17
CERTIFICATE OF COMPLIANCE.....	18

TABLE OF CITATIONS

	<u>Page(s)</u>
Cases	
<i>Cowan Liebowitz & Latman, P.C. v. Kaplan</i> , 902 So. 2d 755 (Fla. 2005).....	9
<i>Gonzalez ex rel. Colonial Bank v. Chillura</i> , 892 So. 2d 1075 (Fla. 2d DCA 2004)	4
<i>Liberty Mut. Fire Ins. Co. v. Kaufman</i> , 885 So. 2d 905 (Fla. 3d DCA 2004)	10
<i>Major League Baseball v. Morsani</i> , 790 So. 2d 1071 (Fla. 2001)	8
<i>National Union Fire Ins. Co. v. Salter</i> , 717 So. 2d 141 (Fla. 5th DCA 1998)	9, 10, 11
<i>Progressive Exp. Ins. Co. v. Scoma</i> , 975 So. 2d 461 (Fla. 2d DCA 2007)	10
<i>The Fla. Bar v. Beach</i> , 675 So. 2d 106 (Fla. 1996)	4
Other Authorities	
<i>Restatement (Third) of the Law Governing Lawyers</i>	11, 12
Rules	
R. Regulating Fla. Bar 4-1.7(e).....	3

NOTE REGARDING ABBREVIATIONS

Abbreviations and defined terms used in Arch's initial brief will also be used in this brief. Because the record and supplemental record are continuously paginated, references to both in this brief will appear as "R." followed by the page number.

References to Arch's initial brief will appear as "IB" followed by the page number. References to Kubicki's answer brief will appear as "AB" followed by the page number.

INTRODUCTION

Establishing a rule of law requires something more than the mantra-like repetition of a legal position. And yet, that is essentially the approach Kubicki has adopted in its answer brief, repeatedly asserting as “fact” that it was retained to represent *only* Spear Safer. Kubicki goes so far as to try to pretermitt these proceedings by asking the Court to rephrase the certified question to *assume* the position Kubicki advocates in this appeal. AB 2 (“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.” (emphasis in original)), 12 (“question should be rephrased to reflect that Kubicki was hired only to represent the insured”). Respectfully, Arch is not arguing that, where a law firm represents *only* the insured and owes *no duty* to the insurer that hired the firm, the insurer has standing to sue. But those facts do not describe this case.

Arch’s position is (i) that a tripartite relationship existed at all times among Arch, Kubicki, and Spear Safer, was acknowledged by Kubicki’s corporate representative, and existed regardless of the acknowledgement; (ii) that it was incumbent upon Kubicki (and not Arch) to clarify the scope of the representation to both Arch and Spear Safer; (iii) that Kubicki provided no such clarification; and (iv) that, in fact, Kubicki acted in a manner consistent with representing the interests of both Arch and Spear Safer, with Arch actively engaged in directing the litigation, being privy to privileged and confidential attorney-client information, and being described by Kubicki as the client. Under these circumstances, not only is Arch in privity with

Kubicki, it is also subrogated to Spear Safer's interests as a client represented by Kubicki.

ARGUMENT

I. KUBICKI CANNOT SHIFT TO ARCH COUNSEL'S ETHICAL OBLIGATION TO CLARIFY THE NATURE AND SCOPE OF ITS REPRESENTATION IN A TRIPARTITE RELATIONSHIP.

Kubicki repeated refers to and criticizes Arch's supposed failure to document a clear contractual relationship that would have unequivocally established Kubicki's obligation to represent the interests of both Spear Safer and Arch. These criticisms ring hollow and place the burden of clarifying the relationship where it does not belong.

Kubicki ignores that there is no contract in the record expressly establishing the parameters of an attorney-client relationship between Kubicki and anyone. There is the Policy between Arch and Spear Safer providing for the latter's coverage (R. 1999–2022); and there is a *letter*—not a contract—from Kubicki to Spear Safer *announcing* that Arch had hired Kubicki to represent Spear Safer (R. 1680–81).

Kubicki did not ask Spear Safer in the letter to acknowledge its agreement to that arrangement. The letter similarly offered no assurances to Spear Safer that Kubicki's duty of representation extended *only* to Spear Safer, though it readily could have. And it was Kubicki, not Arch, that drafted the contents of that letter. So, if the letter lacks for clarity or fails to document with certainty the parameters of Kubicki's obligations in the tripartite relationship, the fault lies with Kubicki and not Arch. This is all the more apparent when one considers that the letter was accompanied by

the mandated Statement of Insured Client’s Rights (the “Statement”), which explained at length the various ways in which Kubicki’s representation *would* extend to Arch. In fact, Kubicki’s own letter instructs Spear Safer to “carefully review” the Statement, because the Statement “discusses our firm’s representation in this matter.”¹ R. 1680.

As Arch has already argued (IB 18–20), Rule 4-1.7 squarely placed the burden on Kubicki to define the parameters of the tripartite relationship: “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). Kubicki does not even attempt to explain how it complied with this obligation, and the record reflects that it did nothing to clarify to both Arch and Spear Safer that Kubicki’s obligations flowed only to Spear Safer.

Instead, Kubicki deflects the inquiry into its failed obligations by arguing that this Court, in adopting the rule, could have held (but did not) “that a law firm would always represent both the insured and the insurer in a given case.” AB 27. This is merely a contrived attempt at misdirection—Arch is not insisting that dual representation arises *every* time an insurer hires a lawyer to represent an insured. Rather, dual representation is always *possible* in a tripartite relationship, and if the lawyer does

¹ While Kubicki in its brief frequently downplays the significance of the Statement (AB 4–6), it is hoisted on its own petard by its characterization of the Statement to Spear Safer in the letter it sent.

not fulfill his or her obligation to inform all parties as to a narrowed scope of the representation, then a presumption arises, and both entities correctly may conclude they are clients (absent a conflict of interest).

In this case, there are abundant indicia that Kubicki represented both Arch and Spear Safer and owed professional obligations to both. Kubicki tries to minimize the significance of the sworn testimony of its corporate representative; and odd tactic when the existence of the attorney-client relationship depends on what the parties understood as to the relationship among themselves. *See, e.g., The Fla. Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996); *Gonzalez ex rel. Colonial Bank v. Chillura*, 892 So. 2d 1075, 1077 (Fla. 2d DCA 2004). As Peter Murphy testified:

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 at 23:18 to 24:11 (emphasis added). Additionally, Kubicki plainly described Arch as the client to the expert when retaining his services for the underlying litigation—a point Kubicki entirely ignores in its brief. R. 102. And Arch, as the client, complied with the request to execute the expert's retainer agreement. R. 105–06

The record further reflects that Kubicki repeatedly reported to and sought direction from Arch in making litigation decisions throughout the underlying case.

IB 16 (collecting record citations). In Mr. Murphy’s view, Kubicki “of course” considered its communications with Arch to be encompassed within the attorney-client privilege. R. 961 at 25:9–15.

Kubicki nonetheless chastises Arch for not pointing to provisions in the Policy that establish that Kubicki would be retained to represent Arch. *See, e.g.*, AB 19. This, too, seems an odd observation. The Policy is a contract between Arch, as insurer, and Spear Safer, as its insured. Its focus, therefore, is on the obligations owed between Arch and Spear Safer. The Policy’s purpose is to outline the general duties and responsibilities of each party in exchange for Arch receiving the premium payment. The Policy does not describe in detail how the parties will perform their obligations, including, for example, what law firm or experts will be retained in the event of a claim against the insured that gives rise to litigation. What matters for purposes of this appeal is whether the Policy gives any indication that Arch, rather than Spear Safer as the purported sole “client,” would exercise control over the litigation for which counsel was retained. On this point, the Policy clearly does.²

Section 2.1 of the Policy conspicuously states that Arch has “the *right* ... to defend any Claim made against” Spear Safer. R. 2003 (emphasis added). It further requires Arch’s consent for Spear Safer to retain counsel of choice and reserves to Arch unqualifiedly “the right to remove and replace selected counsel if it is deemed

² Additionally, nowhere in its brief does Kubicki dispute that it had a contractual relationship with Arch, that it was panel counsel, or that it was bound by Arch’s litigation guidelines. Instead, Kubicki faults Arch because the guidelines are not part of the record (AB 5–6), and disparages its own corporate representative’s acknowledgment of the guidelines.

by [Arch] that such action is warranted.” *Id.* Section 8.7 reserves to Arch the right to determine the reasonableness of defense expenses, which determination is binding on Spear Safer. R. 2017. Under section 9.4, in order to retain coverage, Spear Safer was expressly prohibited from making any payments, admitting liability, settling any claim, assuming any obligation, agreeing to alternative forms of dispute resolution, waiving any rights, or incurring any defense expenses without Arch’s prior written approval. R. 2019. Absent such approval, Spear Safer was required to bear the cost of such actions. *Id.* Moreover, section 9.5 expressly states: “You shall cooperate with us [Arch] and upon our request submit to examination and interrogation by our representative, under oath if required, and shall attend hearings and trials and assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of the defense of Claims.” *Id.* (boldface deleted). Notably, the Policy does not require the insured to cooperate with retained counsel, but rather with Arch, and to take direction from Arch. And the Policy indicates that Arch, not retained counsel, would not settle any claim without Spear Safer’s consent. R. 2011.

To be clear, it is *not* Arch’s position that an insurer *always* has standing to sue retained counsel for malpractice. Rather, it is Arch’s position that where, as here, a tripartite relationship has arisen among insurer, insured, and retained counsel, because retained counsel did not circumscribe the tripartite relationship and the parties’ conduct was consistent therewith, an insurer has standing to sue when (as alleged) counsel commits malpractice. In this case, the Court need not rely purely on the foregoing hypothetical scenario, because the conduct and admissions of Kubicki

demonstrate that it owed obligations to Arch in the course of litigation, protected Arch's interests, and treated Arch as a client as well.

II. THE TRADITIONAL JUSTIFICATIONS FOR DENYING ASSIGNMENT OR SUBROGATION OF LEGAL MALPRACTICE CLAIMS DO NOT APPLY TO AN INSURER'S CLAIM AGAINST RETAINED COUNSEL.

A. Arch did not abandon its subrogation claims.

Kubicki mischaracterizes the import of the trial court's order on Kubicki's motion to dismiss. AB 36–38. Arch never agreed to abandon its subrogation claim; it merely agreed that the order reflected the trial court's prior dismissal ruling. In fact, the operative third amended complaint continued to include assertions based on subrogation. R. 425, 466, 467, 468. Kubicki cannot point to anything in the record, other than the order (which was entered despite Arch's opposition to dismissal), to evidence Arch's purported abandonment. And the order *does not* state that Arch agreed or stipulated to the abandonment of the subrogation claim; it merely acknowledged the procedural posture—namely, that the parties agreed the second amended complaint was dismissed to the extent it asserted a subrogation claim. Context matters.

Kubicki's first motion to dismiss argued that the assignment, subrogation, and third-party beneficiary claims failed to state a cause of action. R. 1810–13. The trial court granted the motion “[without] prejudice as to the claims except [Plaintiff]-Arch's claims on behalf of itself. [Plaintiff] shall have 10 days to amend.” R. 1814. Arch then timely filed its second amended complaint. R. 1856–1904.

As Kubicki acknowledges (AB 36–37), there was confusion as to what claims remained pending. Kubicki filed another motion to dismiss the second amended complaint, arguing that “[f]or the same reasons set forth in the Motion to Dismiss the Amended Complaint[,] the Second Amended Complaint should also be dismissed to the extent[] ARCH SPECIALTY seeks recovery as an assignee, subrogee[, or] the third-party beneficiary.” R. 1895–96. In response, Arch indicated it had taken out the assignment, equitable subrogation, and/or third-party beneficiary *claims* to comply with the trial court’s earlier ruling. R. 1901–03. The trial court then granted the motion to dismiss “to the extent Arch seeks recovery as assignee or subrogee of Spear Safer or intended third party beneficiary” theories, but also directed Kubicki to answer the second amended complaint. R. 1970.

The fact that Arch complied with the trial court’s ruling and continued to litigate does not mean that Arch abandoned its right to challenge on appeal the correctness of the trial court’s initial rejection of the claims on legal grounds. While a stipulation of waiver in litigation *may* be enforceable, the stipulation must be clear; and there is no clear indication here that Arch abandoned its claims. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n.12 (Fla. 2001) (“Waiver is the voluntary and intentional relinquishment of a known right....”).

B. No Florida court has ever barred a subrogation claim involving an insurer’s claim for malpractice against counsel retained to defend the insurer’s and insured’s interests.

While Kubicki cites decisions upholding the general rule that a legal malpractice claim cannot be assigned or based on subrogation, none of those cases involves

a claim similar to that presented here. Those precedents do not control a legal malpractice claim asserted by an insurer against counsel retained to represent and protect the interests of insurer and insured in the same litigation.³ The policy reasons for precluding assignment of legal malpractice claims are simply not in play in this case.

This Court has previously carved out an exception to the general rule against assignment of malpractice under circumstances where the policy reasons underlying the general rule did not apply. Thus, in *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755 (Fla. 2005), Justice Cantero, writing for the Court, noted that the legitimate public policy concerns precluding assignment—concerns that continue to “prevent the assignment of *most* legal malpractice claims”—do not arise where the attorney’s communications to the client would be exposed to third parties. *Id.* at 761 (emphasis added). The Court similarly eschewed the idea that allowing assignment of the claim would create a market for such claims. *Id.* at 760–61.

This reasoning applies with equal force here. The services Kubicki rendered to Spear Safer were done with the full understanding that all communications relating to the representation would be shared with Arch. Communications from Kubicki—including the alleged bad legal advice—were often simultaneously delivered to both Arch and Spear Safer (and sometimes only to Arch).

³ For example, while the Fifth District’s decision in *National Union Fire Ins. Co. v. Salter*, 717 So. 2d 141 (Fla. 5th DCA 1998), involved a legal malpractice claim by an insurer against counsel for the insured, the insurer did not retain counsel to represent the insured, as Arch did here. Instead, the insurer sued “attorneys who had previously represented one of National Union’s insureds” in connection with “the purchase of the golf course” for which the insurer later paid a claim. *Id.* at 142.

Florida law recognizes that, in such a scenario, the attorney-client privilege can subsequently be waived as to disputes arising among the entities that were originally privy to the communications. *See, e.g., Progressive Exp. Ins. Co. v. Scoma*, 975 So. 2d 461, 466–67 (Fla. 2d DCA 2007); *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 908 (Fla. 3d DCA 2004). It follows, then, that concerns about protecting the attorney-client privilege do not arise in this case. IB 21, 35–37. Thus, the Fifth District’s concern in *Salter* that a subrogation claim would “invade the confidential relationship” between the client and its attorneys, 717 So. 2d at 143, is not manifested where the insurer already has full access to the confidential communications pertaining to the subject of the claim.

Kubicki dismisses Arch’s position by claiming that it is merely “argument, and not reality.” AB 41. Kubicki suggests, in conclusory fashion, that a subrogation claim would put the client in a “squeeze play.”⁴ *Id.* It is Kubicki’s position, though, that ignores “reality.” Arch has alleged that Kubicki’s malpractice was directed to *both* Arch and Spear Safer, that the bad advice as to applicable defenses was delivered to *both*, and that the failure to timely assert a statute of limitations defense adversely affected *both*. Arch’s and Spear Safer’s interests in the underlying litigation never diverged, and Kubicki has not identified with any specificity how Spear Safer would be caught in any “squeeze play.”⁵

⁴ Of course, Kubicki assumes (as it does throughout the answer brief) that the “client” necessarily is only Spear Safer.

⁵ Kubicki relies extensively on *Salter* in support of its argument, but the facts in that case demonstrate why it is inapposite. The insurer in *Salter* sought to sue its

III. PUBLIC POLICY CONSIDERATIONS WEIGH IN FAVOR OF ARCH'S STANDING TO SUE.

In discussing public policy issues, Kubicki ignores that the vast majority of jurisdictions that have examined the issue of an insurer's standing have concluded such claims are appropriate because doing so allocates risk where it belongs: on the attorney who commits malpractice. *See* IB 24–25 & nn.8–9 (collecting cases). Those jurisdictions are not wrong. Few professions are as regulated and overseen as the legal profession. This Court frequently finds itself in the unenviable position of having to discipline lawyers for conduct that does not meet professional and ethical standards. And yet, Kubicki advocates here for a scenario where a lawyer or law firm may commit the most egregious malpractice imaginable and yet be immune from financial consequences so long as the millions of dollars in damages fell within the policy limits.

In support of this inherently untenable position, Kubicki cites three things: (i) the concerns of the trial court; (ii) a passing observation in the *Restatement (Third) of the Law Governing Lawyers*; and (iii) a newspaper column about this case written by a malpractice defense lawyer.⁶ None of these justifies denying Arch standing.

insured's counsel, who had *earlier* represented the insured in the acquisition of property. 717 So. 2d at 142. Unlike Arch here, the insurer had no involvement in the original transaction that created the relationship between the insured and the counsel being sued. While the insured in *Salter* might have been entirely satisfied with its prior counsel's representation in acquiring the property, *id.* at 143, the same cannot be said here. Spear Safer felt pressured into settling on the eve of trial because Kubicki failed to timely assert a potentially dispositive affirmative defense.

⁶ The author, Deborah Sampieri Corbishley, "represent[s] local and national law firms and attorneys in connection with complex malpractice claims, third party complaints, disqualification or sanctions motions, and grievances." *See*

In fact, Kubicki’s reliance on the *Restatement* is surprising, given that the *Restatement* concludes that an insurer *should* have standing to sue counsel retained to represent the insured. 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). Each of those elements is unequivocally met in this case. IB 28–30.

Comment g to Section 51 goes on to explain the applicability of this rule expressly 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 (emphasis added).

With respect to the trial court’s concerns, they are unwarranted. Underlying the trial court’s concerns is a belief that Arch somehow plans for the malpractice of

<https://www.knpa.com/attorneys/deborah-sampieri-corbishley/>, last accessed November 27, 2019.

lawyers hired to represent its insured and presumably factors that into premiums charged to the public. AB 42–43 (citing R. 1664–65). Kubicki echoes those ideas in its brief, but neither Kubicki nor the trial court cites to *any* authority for this sweeping assumption. The record is devoid of any study or research confirming this remarkable conclusion. That a particular case might settle for the policy limits does not mean the insurer factored in the negligence of counsel when setting premiums for the insured or across a class of risk. If anything, that risk is better anticipated and factored into the premium charged by *Kubicki's* malpractice carrier, which insures the firm for malpractice in *every* piece of litigation it handles.

With respect to the trial court's concern that "settlements might never bring closure to a case," R. 1665, that concern is simply not well founded. Settlements bring closure to litigation between parties, as it did here between Spear Safer and the Receiver that sued the firm. Nothing that is happening in connection with Arch's efforts to recover for Kubicki's malpractice changes the finality of the settlement between Spear Safer and the Receiver. To the extent Kubicki seeks to shelter itself behind the shield of "finality" as a way of avoiding the consequences of malpractice, the Court should reject such an effort.

Finally, with respect to the *Daily Business Review* column (AB 43–45), the author posits several criticisms of allowing an insurer to sue retained counsel. But her criticisms proceed from a false premise. The author assumes the retained counsel "previously zealously advocated for the insured and looked for every fact or argument that might exonerate the former client." AB 44. This assumption is contrary to the fundamental premise of Arch's lawsuit. Arch contends Kubicki did not "look[]

for every fact or argument”; on the contrary, the allegation is that Kubicki gave bad advice and pursued a failed strategy—despite warning signals from the federal district judge on key motions (IB 6–8)—and overlooked a critical statute of limitations defense that very well could have resulted in a defense verdict.

The author’s concerns about disclosure of privileged communications has already been addressed in the initial brief and this brief, and need not be belabored. Arch was entitled to be (and actually was) privy to all communications between Kubicki and Spear Safer regarding litigation strategy, research, and defenses.

Finally, the author’s “concern” about the “well being” of the insured, while ostensibly admirable, ignores the insured’s dissatisfaction *in this case* with the services Kubicki provided. As alleged in the lawsuit, Spear Safer felt pressured to settle a claim it was repeatedly told by Kubicki would not survive dispositive motions because (i) those motions, which were based on the wrong defense, failed; (ii) Kubicki failed to timely raise the correct defense; and (iii) Kubicki abruptly “came around” to the idea that Spear Safer (and Arch) had better settle the claim for the policy limits.

The author’s concern for the insured also ignores that, pursuant to the terms of the Policy, Arch was subrogated to Spear Safer’s rights with respect to any payments Arch would make on Spear Safer’s behalf. As a result, Spear Safer would not be surprised by or “involved against its will” in subsequent litigation, because the possibility of additional litigation was contracted for and always existed under the Policy.

At the close of the article, the author betrays her bias in favor of the clients she normally defends against claims of malpractice: “[W]ill Florida protect the insured client’s rights over the insurer’s desire to bring more litigation?” AB 45. As the subrogation provision in the policy reveals, Spear Safer never had a “right” to be free from involvement in further litigation relating to the paid claim. Moreover, Arch’s litigation against Kubicki is not driven by some over-simplified “desire to bring more litigation.” As alleged, Arch was required unnecessarily to expend several million dollars on a claim that should have been resolved in favor of Spear Safer. Arch should be entitled to shift the burden for that expense where it belongs—on the negligent attorneys—rather than on other policyholders who would indirectly be required to absorb that loss through increased premiums.

CONCLUSION

Kubicki’s brief is premised on assumptions about the tripartite relationship that simply are not applicable. Arch is *not* asking this Court to establish a rule that the tripartite relationship *always* gives rise to standing. Rather, this Court should conclude that the insurer has standing to sue for malpractice where, as here, a tripartite relationship is formed and retained counsel fails in its ethical obligation to narrow the scope of the relationship, represents the interests of both insurer and insured, and actively seeks direction from the insurer in the defense of the case. Accordingly, Arch respectfully requests that the Court quash the decision of the Fourth District Court of Appeal and remand the case for further trial court proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby 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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