**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2009-CT-01063-SCT**

***GREAT AMERICAN E&S INSURANCE COMPANY***

***v.***

***QUINTAIROS, PRIETO, WOOD & BOYER, P.A.***

**ON WRIT OF CERTIORARI**

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| DATE OF JUDGMENT: | 05/29/2009 |
| TRIAL JUDGE: | HON. FRANK G. VOLLOR |
| COURT FROM WHICH APPEALED: | WARREN COUNTY CIRCUIT COURT |
| ATTORNEYS FOR APPELLANT: | CHRISTOPHER THOMAS GRAHAM<br>MICHAEL A. HEILMAN<br>JOHN WILLIAM NISBETT |
| ATTORNEYS FOR APPELLEE: | DAVID A. BARFIELD<br>STEVEN LLOYD LACEY<br>RICHARD D. GAMBLIN |
| NATURE OF THE CASE: | CIVIL - LEGAL MALPRACTICE |
| DISPOSITION: | THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART. THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY IS AFFIRMED IN PART, REVERSED IN PART AND REMANDED - 10/18/2012 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**DICKINSON, PRESIDING JUSTICE, FOR THE COURT:**

¶1. After the estate of a former resident sued a nursing home for negligent care, the primary insurance carrier employed lawyers to defend the suit. Because the lawyers failed to timely designate an expert witness, the settlement value of the case greatly increased,

causing the nursing home's primary carrier to pay its policy limits, and its excess insurance carrier to step in, defend the nursing home, and ultimately settle the suit. The excess carrier sued the law firm for professional negligence – both directly and under a theory of equitable subrogation. The trial court, finding the excess carrier and the lawyers had no direct attorney-client relationship, granted the law firm's motion to dismiss.

¶2. We hold that – under the facts as alleged in the complaint – the doctrine of equitable subrogation applies, and the excess carrier may, to the extent of its losses, pursue a claim against the lawyers to the same extent as the insured. We further hold that the excess carrier has failed to allege a sufficient factual basis for a direct claim of professional negligence against the law firm.

## BACKGROUND FACTS AND PROCEEDINGS

¶3. When a trial judge grants a motion to dismiss, we review questions of law reviewed de novo,[1] we take the allegations of the complaint as true, and we affirm only when it "appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim."[2] With that standard of review in mind, the essential facts[3] are these:

¶4. The estate of Huldah Chase sued Shady Lawn Nursing Home and Vicksburg Convalescent Home ("Shady Lawn"), claiming the home had provided Chase with negligent

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[1] ***King v. Bunton***, 43 So. 3d 361, 363 (Miss. 2010) (citing ***Ralph Walker, Inc. v. Gallagher***, 926 So. 2d 890, 893 (Miss. 2006)).

[2] ***Meadows v. Blake***, 36 So. 3d 1225, 1229 (quoting ***Penn Nat'l Gaming, Inc. v. Ratliff***, 954 So. 2d 427, 430-31 (Miss. 2007)).

[3] For a more comprehensive recitation of the facts, see ***Great American E. & S. Ins. Co., v. Quintairos, Prieto, Wood & Boyer***, 2012 WL 266858 (Miss. Ct. App. Jan 31, 2012).

and inadequate health care.[4] Shady Lawn's primary insurance carrier, Royal Indemnity Company, hired counsel to defend the suit.

¶5. Shady Lawn also had umbrella coverage through Great American E & S Insurance Services, Inc., the excess carrier, for claims that exceeded $1,000,000. Great American was not contractually obligated to defend Shady Lawn until the primary policy's $1,000,000 limits had been exhausted, but it requested evaluations and assessments of the claim from defense counsel.

¶6. Defense counsel provided Great American with status reports, including an evaluation and opinion that the case's settlement value was between $150,000 and $400,000. The reports also stated that counsel would need to designate experts and that a physician expert had been contacted, but not yet retained.

¶7. In November 2003, Royal reassigned the lawsuit to Quintairos, Prieto, Wood & Boyer P.A. ("Quintairos"). At that time, the deadline for designating experts was December 15, 2003. The plaintiff timely designated two expert witnesses, but Quintairos failed to designate experts before the deadline.

¶8. In January 2004, Quintairos sent Royal a status report noting it had not yet retained experts. The report further stated that "based on known facts, this case could have the value of $250,000 in compensatory damages," and a "trial value" of $500,000.

¶9. In February 2004, Quintairos attempted to designate a physician as an expert witness, but the plaintiff filed a motion to strike the witness. The trial court granted the motion and,

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[4]The lawsuit, filed in the Circuit Court of Warren County, was styled ***The Estate of Huldah Chase, et. al. v. International Healthcare Properties, et al.***, No. 02-0133CT ("Chase lawsuit").

as a result, Shady Lawn was left with no expert witness to appear at trial. This caused Quintairos to provide an "updated lawsuit evaluation," increasing the settlement value of the case from $500,000 to between $3,000,000 and $4,000,000. Because all prior settlement and trial values of the lawsuit had been set well below the $1,000,000 amount necessary to implicate the excess policy, the "updated lawsuit evaluation" was Great American's first notice that its excess coverage was in play.

¶10. Upon learning the new settlement value, and that the Quintairos law firm had no attorneys licensed in Mississippi who could represent the insureds at trial, Great American retained its own counsel to protect its interests and the interests of its insureds. Royal immediately tendered its policy limits, leaving Great American responsible for the case, and for any excess verdict at trial.

¶11. Great American paid an undisclosed sum to settle the case, and then filed suit against the Quintairos firm, claiming legal malpractice, negligence, gross negligence, negligent misrepresentation, and negligent supervision. Great American also claimed it was entitled to recover under a theory of equitable subrogation.

¶12. Quintairos filed a Rule 12(b)(6)[5] motion to dismiss, arguing that it had no attorney-client relationship with Great American. The trial court granted the motion and dismissed all of Great American's claims against Quintairos. The Court of Appeals ("COA") reversed, holding that Great American properly had alleged claims for negligence and equitable subrogation.[6] Most notably on the direct-negligence claims, the COA found that Great

[5] Miss. R. Civ. P. 12(b)(6).

[6] ***Great American v. Quintairos***, 2012 WL 266858, at *12 (Miss. Ct. App. Jan. 31, 2012).

American had sufficiently pleaded an attorney-client relationship, because Quintairos had provided Great American with an evaluation of the Chase lawsuit's settlement value; thus the law firm had provided Great American with legal services. Because the case presents an issue of first impression, we granted certiorari to review whether an attorney-client relationship is necessary for a claim of legal malpractice, and whether an excess insurer can bring a claim against a primary insurer's attorney under a theory of equitable subrogation.

**ANALYSIS**

¶13. Great American clearly pleaded a sufficient factual basis to establish that Quintairos was negligent and committed legal malpractice. Judge Griffis's opinion, speaking for the COA, clearly set forth why Great American may pursue an equitable subrogation claim against Quintairos,[7] and we adopt the COA's opinion and holding on this point.

¶14. In dissent, Justice Chandler expresses concern that a lawyer "hired by a primary insurer to defend the insured already has a duty of care toward the insured and the primary insurer," and that the "practical effect of today's decision is to impose a duty of care toward the excess insurer as well."[8] This is incorrect.

¶15. We do not expand or change the duty owed by counsel to the client. We hold only that, when lawyers breach the duty they owe to their clients, excess insurance carriers, who – on behalf of the clients – pay the damage, may pursue the same claim the client could have pursued. Holding otherwise would place negligent lawyers in a special category of protection. And we note that the path we follow today is not novel. As the Supreme Court

[7] ***Id.*** at *10-12.

[8] Dis. Op. ¶ 46.

of Texas noted in a similar case, "subrogation permits the insurer only to enforce existing duties of defense counsel to the insured."[9]

¶16. While we agree with the COA's discussion of equitable subrogation, we are unable to agree with the COA's finding that Great American may pursue direct claims of legal malpractice against Quintairis. Most of the reasons for our holding on this point are succinctly set forth in paragraphs 59, 60, and 63, of Judge Carlton's thoughtful dissent.[10]

*Legal malpractice*

¶17. To plead legal malpractice, a plaintiff must provide sufficient facts to establish three elements: (1) an attorney-client relationship; (2) the attorney's negligence in handling the client's affairs; and (3) proximate cause of the injury.[11]

¶18. The Court of Appeals held that Great American sufficiently pleaded an attorney-client relationship. We disagree. Great American's amended complaint says nothing about its relationship with Quintairos. Instead, Great American argues that Quintairos provided it with legal services when it sent Great American the case-status reports that estimated the settlement and trial values of the case. Taken as true, these case-status reports – without more – are insufficient to establish an attorney-client relationship.

¶19. Great American would have us hold that an attorney employed by a primary insurance carrier – simply by providing an excess carrier with courtesy copies of its settlement evaluations – establishes an attorney-client relationship. For us to accept Great American's

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[9] ***Am. Centennial Ins. Co. v. Canal Ins. Co.***, 843 S.W.2d 480, 484 (Tex. 1992).

[10] ***Great American v. Quintairos,*** 2012 WL 266 858, at **13, 14.

[11] ***Pierce v. Cook***, 992 So. 2d 612, 617 (Miss. 2008).

view would require us to ignore the realities of real-world litigation, which often involves several defendants with common interests. Indeed, we have recognized that the respective lawyers of two or more clients with common interests in litigation may do far more than share settlement opinions without establishing an attorney-client relationship.[12]

¶20. Great American also argues that, in ***Century 21 Deep South Properties, Ltd. v. Corson***,[13] this Court abolished the attorney-client relationship requirement in legal malpractice suits, and that an attorney is liable to all reasonably foreseeable third parties who rely on the attorney's work.[14] Great American is incorrect.

¶21. In ***Corson***, we abolished the absolute requirement of an attorney-client relationship in title-work cases, and we held that liability may be extended to "foreseeable third parties who detrimentally rely" on the attorney's negligent conduct.[15] One of our reasons was that Mississippi Code Section 11-7-20, which states that privity is not required to maintain an action for economic loss brought on account of negligence,[16] conflicts with the elements of legal malpractice to the extent that privity is required.[17] But the absence of a need of privity was not our only reason.

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[12]*See generally* Miss. R. Evid. 502(b); ***Williamson v. Edmonds***, 880 So. 2d 310 (2004).

[13]***Century 21 Deep South Properties, Ltd. v. Corson***, 612 So. 2d 359 (Miss. 1992).

[14]*See* ***id.*** at 374.

[15]***Id.***

[16]Miss. Code Ann. § 11-7-20 (Rev. 2004).

[17]***Corson***, 612 So. 2d at 373.

¶22. In limiting ***Corson*** to claims involving "title work,"[18] we recognized that lawyers who perform title work are fully aware that their work will be relied upon by subsequent purchasers and lienors of property. It is common knowledge that the client of an attorney performing a subsequent title update relies on the prior title opinion and whether that opinion revealed any deficiencies.[19] Thus, an attorney engaged to perform title work is expected by the client to protect not only the client, but those who later rely on the attorney's opinion.

¶23. This is not the case in the liability-insurance carrier context, where attorneys often provide information and strategies to others with common interests in litigation. Unlike the client in the title-work contest, a policy holder (such as Shady Lawn in this case) generally gains no benefit from its counsel sharing information with the excess insurance carrier. Such information is shared as a courtesy, with no expectation of an attorney-client relationship.

¶24. Because an attorney-client relationship is an essential element in a legal-malpractice claim, and because Great American failed to plead sufficient facts to establish an attorney-client relationship, we reverse the Court of Appeals' decision on this issue and affirm the trial court's dismissal of any direct legal-malpractice claim against Quintairos.

*Negligence, gross negligence, and negligent supervision*

¶25. Great American's claims for ordinary negligence, gross negligence, and negligent supervision all allege that Quintairos breached its duty in providing legal services to Shady Lawn. As we have said, "a legal malpractice action is a negligence action dressed in its

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[18] ***Corson***, 612 So. 2d at 374.

[19] ***Id.***

Sunday best."[20] A plaintiff, therefore, must allege something other than professional negligence to establish an ordinary negligence claim. For instance, lawyers who fail to maintain their offices in a reasonably safe manner are subject to their clients' ordinary negligence claims. But here, Great American has alleged nothing more than professional negligence. And because Great American failed to establish an attorney-client relationship, we reverse the Court of Appeals' decision on this issue and affirm the trial court's dismissal of these direct claims against Quintairos.

¶26. In his separate opinion, Justice Randolph would have us hold that a lawyer rendering legal services may be held liable for all foreseeable harm – even to nonclients. We decline to follow this unwise path for many reasons.

¶27. For instance, lawyers attempting to fulfill their ethical duty to their clients often provide advice and make decisions that clearly will cause harm to others. One example often occurs in cases involving several defendants represented by separate counsel. The defense lawyers and the various defendants often collaborate by sharing opinions and strategy. But the lawyers have an absolute duty of loyalty to their respective clients – a duty that very well could require them to make decisions and give advice that will bring foreseeable harm to the others.

¶28. Stated another way, a plaintiff's negligence claim cannot survive unless the defendant had a duty to the plaintiff. A lawyer's duty to the client must be absolute and uncompromised; and the lawyer must be free to provide advice to the client – even where that advice might bring harm to others.

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[20] ***Id.*** at 373.

¶29. In addition, Justice Randolph misapplies ***Berkline Corp. v. Bank of Mississisippi***.[21] That case did not involve an attorney-client relationship. There, we said that when a bank supplies credit information, "the bank and its officers are bound to use the skill and expertise which they *hold themselves out to the public* as possessing."[22] Thus, unlike the attorney-client relationship – which requires the attorney to act in the client's best interests, even to the detriment of others – the bank voluntarily undertook a duty to the *public*.[23] So we must reject the notion that lawyers may be sued for professional negligence by persons with whom they have no attorney-client relationship.

*Negligent misrepresentation*

¶30. Great American alleged in its complaint that Quintairos misrepresented the value of the cases. To establish this misrepresentation, Great American asserts that each case settled for amounts higher than those stated in the case-status reports.

¶31. To establish negligent misrepresentation, a plaintiff must prove "(1) a misrepresentation or omission of fact; (2) that the representation or omission is material or significant; (3) that the person/entity charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons/entities; (4)

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[21] ***Berkline Corp. v. Bank of Mississippi***, 453 So. 2d 699, 702 (Miss. 1984).

[22] ***Id.***

[23] *See* ***id.***

that the plaintiff reasonably relied upon the misrepresentation or omission; and (5) that the plaintiff suffered damages as a direct and proximate result of such reasonable reliance."[24]

¶32. Here, Quintairos's case valuations provided opinions. Stated another way, Great American has alleged no facts in its complaint that suggest that the opinions expressed by Quintairos were misrepresented. Providing bad opinions is not misrepresentation; it is negligence. Providing an opinion that one does not actually hold is misrepresentation. We therefore reverse the Court of Appeals' decision on this issue and affirm the trial court's dismissal of this claim.

## CONCLUSION

¶33. For the reasons stated, we reverse the trial court's dismissal of Great American's lawsuit with respect to its claims under equitable subrogation, and we affirm the Court of Appeals' decision on this issue. But we reverse the Court of Appeals on all other issues and reverse the trial court's grant of the motion to dismiss, remanding the case Circuit Court of Warren County so that Great American may move forward with its claim based on equitable subrogation alone.

¶34. **THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART. THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY IS AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

**WALLER, C.J., CARLSON, P.J., AND LAMAR, J., CONCUR. RANDOLPH, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND PIERCE, JJ. CHANDLER, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION. KING, J., NOT PARTICIPATING.**

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[24] ***Horace Mann Life Ins. Co. v. Nunaley***, 960 So. 2d 455, 461 (Miss. 2007) (citing ***Skrmetta v. Bayview Yacht Club Inc.***, 806 So. 2d 1120, 1124 (Miss. 2002)).

**RANDOLPH, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:**

¶35. I concur in part with my colleagues in the plurality as to their analysis of equitable subrogation and affirmation of the trial court's dismissal of Great American's claims for breach of the attorney-client relationship, *i.e.*, claims of legal malpractice. However, I must depart from the plurality's affirmance of dismissal of all negligence claims. I would hold that the claims for negligence, *et al.*, should not be dismissed on a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

¶36. Great American filed its amended complaint on March 12, 2007, asserting, among other things, several claims for negligence on the part of Quintairos. On September 2, 2008, Quintairos filed the Rule 12(b)(6) motion to dismiss that is the subject of this appeal, as well as a motion to stay proceedings pending ruling on its motion to dismiss. Great American filed a response to Quintairos's motion on September 29, 2008, arguing that it had properly pleaded viable theories of recovery and should be allowed to conduct discovery to unearth important facts to substantiate its negligence claims.

¶37. Subsequently, Great American filed a supplemental response to Quintairos's motion on February 19, 2009. Great American brought to the court's attention the recent Fifth Circuit Court of Appeals decision in ***Paul v. Landsafe Flood Determination, Inc.***, 550 F. 3d 511 (5th Cir. 2008) (Southwick, J.), which, it argued, supported its contention that viable negligence claims against Quintairos were presented. Sitting in diversity, Judge Southwick provided a well-considered analysis of Mississippi law as it regards "a defendant's duty of care in the performance of professional services." ***Id***. at 518.

¶38. ***Paul*** involved an incorrect flood-zone determination prepared at the request of a mortgage lender. ***Id***. at 512. Before providing financing to the homeowner ("Dobsa"), the mortgage lender chose Landsafe to assess whether the home was located in a flood zone. ***Id***. Landsafe reported that the home was not located in a flood zone, and, consequently, the mortgage lender financed the home without requiring Dobsa to purchase flood insurance. ***Id***. After Hurricane Katrina caused significant damage to Dobsa's home, she learned that her home actually was located in a flood zone. ***Id***. Subsequently, Dobsa sued Landsafe for negligence and negligent misrepresentation. ***Id***. at 513.

¶39. Landsafe argued that "Mississippi law imposed no duty on [it] to provide Dobsa with a correct determination" because the "[mortgage lender], not Dobsa, had selected [them] to perform the determination." ***Id***. at 515. The Fifth Circuit rejected this argument and reversed summary judgment for Landsafe. The court found that Mississippi employs a "'foreseeability approach' for analyzing a defendant's duty of care in the performance of professional services," and held that Landsafe could be liable to Dobsa regardless of the fact that the determination was made at the request of the mortgage lender. ***Id.*** at 518. The court noted that the "proper inquiry is whether it was *reasonably foreseeable* that Dobsa would receive and rely on Landsafe's report." ***Id***. at 516 (emphasis added).

¶40. In formulating its analysis of Mississippi law, the Fifth Circuit relied heavily on this Court's decisions in ***Touche Ross*** and ***Hosford***. *See* ***Touche Ross & Co. v. Commercial Union Ins. Co.***, 514 So. 2d 315 (Miss. 1987); ***Hosford v. McKissack***, 589 So. 2d 108 (Miss. 1991). In ***Touche Ross***, this Court implicitly adopted the Restatement of Torts view of professional duty and held that an independent auditor can be held liable to "reasonably

foreseeable users of the audit, who request and receive a financial statement from the audited entity for a proper business purpose, and who then detrimentally rely on the financial statement, suffering a loss, proximately caused by the auditors' negligence." ***Id***. at 322.[25]

¶41. The Court extended this rule to the preparation of a faulty termite report in ***Hosford***. Although a real estate company, and not the homeowner, had hired the termite company to prepare the report, the Court held that the termite company could be liable to the homeowner for negligent misrepresentation. ***Id***. at 110. The Court reiterated that liability is to "reasonably foreseeable users." ***Id***.; *See also* ***Strickland v. Rossini***, 589 So. 2d 1268, 1277 (Miss. 1991) (stating "[t]his rule permits parties who are foreseeable recipients of a negligently prepared professional opinion, and who detrimentally rely on that opinion in their business affairs to recover from the person offering the opinion").

¶42. A plain reading of ***Paul***, ***Touche Ross***, and ***Hosford*** makes clear that Mississippi applies the "foreseeability approach" for negligence claims involving professional services. This rule provides strong support to Great American's argument that it had standing and pleaded viable claims against Quintairos, regardless of its status as an excess insurance

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[25]The Restatement approach states, in pertinent part,

> (1) One who, in the course of his business, profession or employment, or in any other transaction which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction is subject to liability for pecuniary loss suffered by them by their justifiable reliance upon the information if he fails to exercise reasonable care or competence in obtaining or communicating information.

*Restatement (Second) of Torts*: *Misrepresentation* § 552 (1977).

carrier. The question becomes, "was it reasonably foreseeable that [Great American] would receive and rely on [Quintairos's presentation of facts]?"*See* ***Paul***, 550 F. 3d at 516.

¶43. Although not mentioned in ***Paul***, this Court's holding in ***Berkline Corp. v. Bank of Mississippi***, 453 So. 2d 699 (Miss. 1984), is consistent with both the Fifth Circuit's holding and the holdings in ***Touche Ross*** and ***Hosford***. In ***Berkline***, the Court determined that a bank could be held liable for negligence for its failure to exercise reasonable care in issuing a credit report to a third party. Despite emphasizing that the bank "was under no duty" to issue the credit report, the Court stated, "[w]here a bank, through one of its duly authorized officers or agents, *undertakes* to supply credit information, *arguably gratuitously*, the bank and its officers are bound to use the skill and expertise which they hold themselves out to the public as possessing." ***Id***. at 702 (emphasis added). Even assuming *arguendo* that Quintairos owed no duty to Great American, ***Berkline*** required that, once Quintairos "undertook" to provide case evaluations, which may include "facts," it owed a duty to Great American to do so with "reasonable care and diligence." ***Id***. Considerable and contestable questions remain to be resolved as to whether Quintairos misrepresented facts that it used in formulating opinions.

¶44. Like the Court in ***Berkline***, the plurality correctly states the elements of a claim for negligent misrepresentation, the first of which is "a plaintiff must prove '(1) a misrepresentation or omission of fact.'" Pl. Op. at ¶ 31; *see also* ***Berkline***, 453 So. 2d at 702. However, the plurality assumes that "Quintairos's case valuations provided opinions" without the misrepresentation of material fact, and, therefore, Great American failed the "fact" requirement of the first element. Pl. Op. at ¶ 32. The state of the record is simply too

sparse for this Court to make such a leap. Indeed, a summary judgment proceeding, after discovery has been conducted, may lead to such a conclusion, but the embryonic stage of this case does not allow such a conclusion.

¶45. A Rule 12(b)(6) motion to dismiss "should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of her claim." ***State v. Bayer Corp.***, 32 So. 3d 496, 502 (Miss. 2010). At this stage of the proceeding, Quintairos is on fair notice of the complaints against it, and, if not, might be entitled to a Rule 12(e) Motion for More Definite Statement. *See* Miss. R. Civ. P. 12(e). As such, it is my opinion that the trial court improvidently granted Quintairos' motion to dismiss all claims of negligence. Therefore, I would reverse and remand for further proceedings consistent with this opinion.

**KITCHENS AND PIERCE, JJ., JOIN THIS OPINION.**

**CHANDLER, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:**

¶46. I concur with the plurality's holding that, because Great American and Quintairos have no attorney-client relationship, Great American may not bring a direct action for legal malpractice against Quintairos. With respect, I dissent from the plurality's holding that Great American may bring a legal-malpractice claim against Quintairos under the doctrine of equitable subrogation. Counsel hired by a primary insurer to defend the insured already has a duty of care toward the insured and the primary insurer. ***Moeller v. Am. Guar. and Liab. Ins. Co.***, 707 So. 2d 1062, 1070 (Miss. 1996). The practical effect of today's decision is to impose a duty of care toward the excess insurer as well. This outcome has serious

implications for defense counsel's duties of loyalty and confidentiality. Further, the Court's decision encourages attempts by excess insurers to shift losses to the insured's defense counsel.

¶47. Subrogation is "the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." ***Home Ins. Co. v. Miss. Ins. Guar. Ass'n***, 904 So. 2d 95, 96 (Miss. 2004) (quoting *Black's Law Dictionary* 1158 (7th ed. 2000)). The doctrine of equitable subrogation is based upon "justice and equity, and rests upon the principle that substantial justice should be attained regardless of form." ***Oxford Prod. Credit Ass'n v. Bank of Oxford***, 196 Miss. 50, 16 So. 2d 384, 388 (1944). "It is a creature of equity, and is the mode which equity adopts to compel the ultimate payment of a debt by one who, in equity and good conscience, ought to pay it." As an equitable doctrine, subrogation is governed by equitable principles. ***Sadler***, 199 So. at 307. "Subrogation cannot be invoked where it would violate sound public policy, or result in harm to innocent third parties." ***Wells Fargo Bank, Minnesota, N.A. v. Commonwealth of Ky.***, 345 S.W. 3d 800, 807 (Ky. 2011). Further, "as an equitable doctrine, subrogation 'aids the vigilant, and not the negligent.'" ***Id.***

¶48. A majority of courts that have considered today's question have rejected the course taken by the plurality. ***St. Paul Surplus Lines Inc. v. Remley***, 2009 WL 2070779, *5 (E.D. Mo. July 13, 2009); ***State Farm Fire and Cas. Co. v. Weiss***, 194 P. 3d 1063 (Colo. Ct. App. 2008); ***Querrey & Harrow, Ltd. v. Transcont. Ins. Co.***, 861 N.E. 2d 719, 723-24 (Ind. Ct. App. 2007); ***Swiss Reinsurance Am. Corp. v. Roetzel & Andress***, 837 N.E. 2d 1215, 1224 (Ohio Ct. App. 2005); ***Capitol Indem. Corp. v. Fleming***, 58 P.3d 965, 969 (Ariz. Ct. App.

2002); ***Am. Cont'l Ins. Co. v. Weber & Rose, P.S.C.***, 997 S.W. 2d 12, 14 (Ky. Ct. App. 1999); ***Nat'l Union Fire Ins. Co. v. Salter***, 717 So. 2d 141, 143 (Fl. 1998); ***Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg***, 36 Ca. Rptr. 2d 424, 425 (Cal. Ct. App. 1994); ***St. Paul Ins. Co. of Bellaire, Texas v. AFIA Worldwide Ins. Co.***, 937 F. 2d 274, 279 (5th Cir. 1991). As aptly stated by the Court of Appeals of Kentucky:

> To [allow equitable subrogation] would in our judgment acknowledge a direct duty owed by the insured's attorney to the excess insurer and would be tantamount to saying that insurance defense attorneys do not owe their duty of loyalty and zealous representation to the insured client alone. Such a holding would contradict the personal nature of the attorney-client relationship, which permits a legal malpractice action to accrue only to the attorney's client . . . . Such a holding would also encourage excess insurers to sue defense attorneys for malpractice whenever they are disgruntled by having to pay within limits of policies to which they contracted and for which they received premiums. Were this to occur, we believe that defense attorneys would come to fear such attacks, and the attorney-client relationship would be put in jeopardy.

***Am. Cont'l Ins. Co.***, 997 S.W. 2d at 14 (quoting ***Am. Employers' Ins. Co. v. Med. Protective Co.***, 419 N.W. 2d 448-49 (Mich. Ct. App. 1987)). The court stated that "allowing excess insurers to maintain legal malpractice actions against insureds' attorneys, based upon theories of equitable subrogation, would undermine this jurisdiction's adherence to a view promoting the preservation of traditional attorney-client relationships." ***Id.***

¶49. The equities weigh against permitting an excess insurer to "step into the shoes" of the insured to instigate a legal-malpractice action against defense counsel hired by the primary carrier. Permitting equitable subrogation subverts the relationships imposed by ***Moeller*** on insureds, insurers, and defense counsel as well as defense counsel's attendant duties of loyalty and confidentiality. ***Moeller***, 707 So. 2d at 1070. Defense counsel, already representing both the insured and insurer, with a duty to remain alert to potential conflicts,

will now face the additional threat of liability to a dissatisfied third-party excess insurer. But the interests of primary and excess insurers are distinct, because the excess insurer's interest is to settle the claim within the limits of the primary policy, while the primary insurer's interest may be to risk a trial. *See* ***Hartford Accident & Indem. Co. v. Foster***, 528 So. 2d 255, 263 (Miss. 1988) ("settlement is only to the carrier's financial interest when the relationship between settlement offer and policy limits is mathematically favorable in the light of the probabilities of winning or losing the suit"). Allowing equitable subrogation will undermine the attorney's ability to act solely in the interests of the primary insurer and the insured.

¶50. Also, allowing such an action will encourage an excess insurer, dissatisfied with the outcome of a settlement, to attempt to shift the loss to defense counsel despite the fact that the insured was satisfied with the outcome of the underlying case. Confronting this danger, the Court of Appeals of Colorado stated:

> There is no question that allowing such claims will increase the number of lawsuits. This burdens both the legal profession and the justice system and would ultimately restrict the availability of competent legal services. While we recognize that insurance companies and ultimately the public will pay the cost, or the bulk of the cost, of this burden, protecting every attorney-client relationship must take precedence over allowing lawsuits against attorneys whose clients do not want to sue but their subrogees do.

***Weiss***, 194 P. 3d at 1069. The availability of equitable subrogation will encourage excess insurers to shelve pending lawsuits and then sue or threaten to sue for legal malpractice if the outcome implicates the excess policy.

¶51. The Court's recognition of equitable subrogation will undermine client confidences, because, ordinarily, a legal-malpractice plaintiff voluntarily may waive the attorney-client

privilege by placing confidential matters at issue. *See* ***Century 21 Deep South Properties, Ltd. v. Corson***, 612 So. 2d 359, 374-75 (Miss. 1992). Allowing a third-party excess insurer to "step into the shoes" of the insured client will permit a stranger to the attorney-client relationship to control the attorney-client privilege. This outcome casts uncertainty upon the attorney's statutory duty to maintain client confidences, and undermines the sanctity of the attorney-client relationship, which "is one of special trust and confidence" between attorney and client. *See* Miss. Code Ann. § 73-3-37 (Rev. 2012); ***Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay***, 42 So. 3d 474, 486 (Miss. 2010).

¶52. Courts should not apply equitable subrogation if doing so would harm innocent third parties. ***Wells Fargo Bank***, 345 S.W. 3d at 807. Because this case involves a confidential settlement, it is foreseeable that equitable subrogation could prejudice the insured, Shady Lawn. A legal-malpractice case involves a "trial-within-a-trial test" in which the plaintiff attempts to prove that, but for the attorney's negligence, the plaintiff would have succeeded in the underlying matter. ***Crist v. Loyacono***, 65 So. 3d 837, 842 (Miss. 2011). Great American's assertion of Shady Lawn's legal-malpractice claim will force Shady Lawn to endure the "trial within a trial" in which the information it had believed was protected by the confidential settlement could be divulged.

¶53. Considerations of fairness dictate against allowing equitable subrogation. *See* ***Sadler***, 199 So. at 307. Great American was on notice that its interests were at stake from the date it was notified that a lawsuit had been filed requesting damages in an amount that implicated the excess policy. Yet it chose not to protect and safeguard its interests by hiring independent counsel. Although the primary carrier controls the litigation, the excess carrier

may protect its interests by hiring its own counsel to participate in the defense by monitoring the case and making suggestions as necessary. At the hearing on the motion to dismiss, Great American admitted that excess insurers routinely employ counsel to monitor cases defended by the primary insurer. Counsel for Great American even stated that his firm had been "called in by Great American" to help with such cases. But here Great American hired counsel only after it received Quintairos's estimate of the new settlement value. Because subrogation aids the vigilant, not the negligent, equity is not served by rewarding Great American with a right of subrogation for its less-than-diligent response to the lawsuit. I would not permit Great American to proceed against Quintairos under the doctrine of equitable subrogation.