The Supreme Court of South Carolina

In the Matter of Daniel L. Blake, Petitioner.

Appellate Case No. 2019-000170

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 13, 1995, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is a regular member of the Bar in good standing.

Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/Daniel E. Shearouse
CLERK

Columbia, South Carolina

February 26, 2019

The Supreme Court of South Carolina

In the Matter of Robert W. Mills, deceased.

Appellate Case No. 2019-000291

ORDER

The Office of Disciplinary Counsel (ODC) has filed a petition advising the Court that Robert W. Mills, Esquire, died on February 16, 2019, and requesting the appointment of the Receiver, Peyre T. Lumpkin, Esquire, to protect the interests of Mr. Mills' clients pursuant to Rule 31, RLDE, Rule 413, SCACR. The petition is granted.

IT IS ORDERED that Peyre T. Lumpkin, Esquire, is hereby appointed to assume responsibility for Mr. Mills' client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Mills maintained. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Mills' clients. Mr. Lumpkin may make disbursements from Mr. Mills' trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Mills maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining any trust, escrow, and/or operating accounts of Mr. Mills, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Mills' mail and the authority to direct that Mr. Mills' mail be delivered to Mr. Lumpkin's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

February 27, 2019

The Supreme Court of South Carolina

In the Matter of Mei Kam Nq Shih, Petitioner

Appellate Case No. 2019-000342

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 21, 2015, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is a regular member of the Bar in good standing.

Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

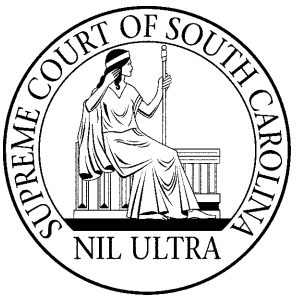
Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

BY s/Daniel E. Shearouse
CLERK

Columbia, South Carolina

March 5, 2019



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 10
March 6, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sentry Select Insurance Company, Plaintiff,

v.

Maybank Law Firm, LLC, and Roy P. Maybank,
Defendants.

Appellate Case No. 2016-001351

CERTIFIED QUESTIONS

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

J. Michelle Childs, United States District Court Judge

Opinion No. 27806
Heard December 13, 2018 – Filed March 6, 2019

FIRST QUESTION ANSWERED

Daryl G. Hawkins, of Law Office of Daryl G. Hawkins, LLC, of Columbia, for Plaintiff.

David W. Overstreet, Michael B. McCall, and Steven R. Kropski; all of Earhart Overstreet, LLC; all of Charleston; for Defendants.

JUSTICE FEW: Sentry Select Insurance Company brought a legal malpractice lawsuit in federal district court against the lawyer it hired to defend its insured in an automobile accident case. The district court requested we answer the following questions:

> (1) Whether an insurer may maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend?
>
> (2) Whether a legal malpractice claim may be assigned to a third-party who is responsible for payment of legal fees and any judgment incurred as a result of the litigation in which the alleged malpractice arose?

The answer to question one is "yes," under the limitations we will describe below. We decline to answer question two.

I. Background

Sentry Select hired Roy P. Maybank of the Maybank Law Firm to defend a trucking company Sentry Select insured in a personal injury lawsuit in state court. Maybank failed to timely answer requests to admit served by the plaintiff pursuant to Rule 36(a) of the South Carolina Rules of Civil Procedure. Seven months later, Maybank filed a motion seeking additional time to answer the requests, which the circuit court held under advisement until the parties completed mediation. Sentry Select claims that because of Maybank's failure to timely answer the requests, and the likelihood the circuit court would deem them admitted,[1] it settled the case for $900,000, and

[1] *See Scott v. Greenville Housing Authority*, 353 S.C. 639, 646, 579 S.E.2d 151, 154 (Ct. App. 2003) (stating "our courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial"); *but see* 353 S.C. at 652, 579 S.E.2d at 158 (finding the specific error to be the trial court abused its discretion "in failing to address the prejudice that would be suffered by" the party seeking relief from his failure to answer); 8B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2257 (3d ed. 2010 & Supp. 2018) ("The court has power to allow additional time for a response to a

claims Maybank previously represented to Sentry Select it could settle in a range of $75,000 to $125,000.

Sentry Select then filed this lawsuit in federal district court against Roy Maybank and Maybank Law Firm alleging a variety of theories, including negligence. The district court certified these two questions to us pursuant to Rule 244 of the South Carolina Appellate Court Rules.

II. Analysis—Question One

When an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured—his client. Pursuant to that relationship, the attorney owes the client—not the insurer—a fiduciary duty. *See Spence v. Wingate*, 395 S.C. 148, 158-59, 716 S.E.2d 920, 926 (2011) (stating "an attorney-client relationship is, by its very nature, a fiduciary relationship"). Nothing we say in this opinion should be construed as permitting even the slightest intrusion into the sanctity of the attorney-client relationship, nor to diminish to any degree the fiduciary responsibilities the attorney owes his client.

However, an insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship. Pursuant to the insurance contract, the insurer has a duty to defend its insured, and must compensate the attorney for his time in defense of his client. If the insured settles or has judgment imposed against him, the insurance contract ordinarily requires the insurer to pay the settlement or judgment. Many insurance contracts provide the insurer has a right to investigate and settle claims as a representative of its insured. Finally, the insurer's right to settle must be exercised in good faith, and that duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits. *Tiger River*[2] *Pine Co. v. Maryland Cas. Co.*, 163 S.C. 229, 234-35, 161 S.E. 491, 493-94 (1931).

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request for admissions even after the time fixed by the rule has expired. Thus the court can, in its discretion, permit what would otherwise be an untimely answer.").

[2] Three tributaries of the Tyger River flow from the feet of the mountains of Greenville and Spartanburg Counties before coming together in lower Spartanburg County east of Woodruff. From there the Tyger River flows through Union County, forming the border of Union and Newberry Counties for a short distance before

Because of the insurance company's unique position, we hold the answer to question one is yes, an insurer may bring a direct malpractice action against counsel hired to represent its insured. However, we will not place an attorney in a conflict between his client's interests and the interests of the insurer. Thus, the insurer may recover only for the attorney's breach of his duty to his client, when the insurer proves the breach is the proximate cause of damages to the insurer. If the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer, for we will not permit the attorney's duty to the client to be affected by the interests of the insurance company. Whether there is any inconsistency between the client's and the insurer's interests in the circumstances of an individual case is a question of law to be answered by the trial court.

Our decision is consistent with established policy. In *Fabian v. Lindsay*, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014), analyzing the individual circumstances of that case, we held an attorney can be liable for breach of duty resulting in damages to a third party. We relied in part on our conclusion that not recognizing such liability "would . . . improperly immunize this particular subset of attorneys from liability for their professional negligence." 410 S.C. at 490, 765 S.E.2d at 140; *see also* 410 S.C. at 493, 765 S.E.2d at 142 (Pleicones, J., concurring in part and dissenting in part) (relying on "public policy considerations" to support his concurrence in the imposition of liability).

The deterrent purpose of tort law is also served by our decision.

> One reason for making a defendant liable in tort for injuries resulting from a breach of his duty is to prevent such injuries from occurring. Underlying this justification

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entering the Broad River. In 1928, Erwin Chesser injured his arm at his job with Tyger River Pine Co. in Union County. A series of lawsuits arising from that injury and a jury verdict in Chesser's favor in excess of the limits of Tyger River Pine's liability policy with Maryland Casualty Co. made it to this Court three times, as a result of which there became the "Tyger River Doctrine." *See, e.g.*, *Williams v. Riedman*, 339 S.C. 251, 269, 529 S.E.2d 28, 37 (Ct. App. 2000). Unfortunately, this Court spelled the name of the river incorrectly in the caption of one of those three—the cited opinion. After all these years, we officially apologize for our error.

> is the assumption that potential wrongdoers will avoid wrongful behavior if the benefits of that behavior are outweighed by the costs imposed by the payment of damages . . . .

F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts* 7 (4th ed. 2011); *see also* Rule 1.8 cmt. 14, RPC, Rule 407, SCACR, (stating the reason an attorney cannot prospectively limit his liability to a client is because doing so is "likely to undermine competent and diligent representation").

Our decision is also consistent with the rule adopted by the majority of states that have considered the issue. *See generally* Ronald E. Mallen, 4 *Legal Malpractice* § 30.39 (2019 ed.) (listing twenty-four states in which such an action is allowed under appropriate circumstances, and two states in which it is not allowed); William H. Black Jr. & Sean O. Mahoney, *Legal Bases for Claims by Liability Insurers Against Defense Counsel for Malpractice*, 35 The Brief 33, 33 (Winter 2006) ("Although the issue is relatively new to American jurisprudence, the majority of states permit a liability insurer to sue defense counsel for negligent representation in an underlying action."); *General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 955-56 (E.D. Va. 2005) (stating "courts of other jurisdictions generally recognize such a cause of action"); *see also* 7A C.J.S. *Attorney & Client* § 386 (2015) ("When, pursuant to insurance policy obligations, an insurer hires and compensates counsel to defend an insured, provided that the interests of the insurer and insured are not in conflict, the retained attorney owes a duty of care to the insurer[3] which will support its independent right to bring a legal malpractice action against the attorney for negligent acts committed in the representation of the insured.").

Maybank argues our decision will destroy the sanctity and integrity of the attorney-client relationship by: (1) dividing the loyalty of the attorney between the client and the insurer; (2) threatening the attorney-client privilege; (3) allowing the insurer to direct the litigation even though the insured is the client; and (4) opening the door to other non-clients to sue attorneys for legal malpractice. We have the additional concern of ensuring there can be no double-recovery against an attorney.

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[3] To be clear, the cause of action we recognize today is based on the attorney's duty to the client, not to the insurer.

In response to these concerns, we emphasize that the loyalties of the attorney may not be divided. *See Fabian*, 410 S.C. at 490, 765 S.E.2d at 140 ("It is the breach of the attorney's duty to the client that is the actionable conduct in these cases."). The duties an attorney owes his client are well-established according to law, and this opinion does nothing to change that. *See generally* Rule 407, SCACR (South Carolina Rules of Professional Conduct). The attorney owes no separate duty to the insurer. We do not recognize what the dissent calls the "dual attorney-client relationship."

As to Maybank's second concern, we emphasize the insurer may not intrude upon the privilege between the attorney it hires and the attorney's client—the insured. We are confident the trial courts of this State are well-equipped to protect the attorney-client privilege according to law if any dispute over it arises.

As to Maybank's third concern, the attorney's control of litigation involving an insured client is also governed by established law. *See, e.g.*, Rule 1.8(f), RPC, Rule 407, SCACR ("A lawyer shall not accept compensation for representing a client from one other than the client unless: . . . (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; . . . ."); Rule 5.4(c), RPC, Rule 407, SCACR ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). Our opinion does nothing to change these principles.

As to Maybank's "opening the door" concern, we expressly limit the scope of this opinion so that it does nothing beyond what it expressly states. Next, there may be no double recovery. If a danger of double recovery arises, we are confident our trial courts can handle it. *See* Rule 17(a), SCRCP ("Every action shall be prosecuted in the name of the real party in interest.").

As a final limitation on an insurer's right to bring an action against the lawyer it hires to represent its insured, the insurer must prove its case by clear and convincing evidence. The clear and convincing standard is consistent with the result of *Fabian*. *See* 410 S.C. at 493, 765 S.E.2d at 142 (Kittredge, J., concurring) (stating "the burden of proof should be the clear and convincing standard"); 410 S.C. at 494, 765 S.E.2d at 142 (Pleicones, J., concurring in part and dissenting in part) (stating "I would

require a beneficiary asserting such a legal malpractice claim to prove by clear and convincing evidence that the attorney breached the duty," joined by Toal, C.J.).

In this case, there appears to be no risk our decision will place the attorney in a conflict position or create any divided loyalty. The attorney's duty to his client includes the obligation to timely respond to requests to admit. The fact that an insurance company may suffer financial loss from an attorney's negligence in failing to timely respond to the requests, and our recognition that the insurer may sue the attorney to recover this loss after settling the underlying case to protect the interests of the insured, do not in any way affect the attorney's duty to his client. We stress, however, the district court should independently make this determination based on all the facts and circumstances of the case. As to the other concerns, we see no basis on the limited record before us to find that any of the limitations we impose will be violated in this factual scenario. If some other fact or circumstance in the record before the district court raises such a concern, the district court is fully capable of addressing it.

The dissent offers several points of criticism we feel we should address. First, the fact that we do not specifically identify a theory of recovery—such as third party beneficiary theory or equitable subrogation—is fair criticism. This is a deliberate choice, however, designed to preserve the attorney's fiduciary allegiance to his client with no interference from the insurer. If permitting liability against the attorney on the basis of a duty to the client—not a duty to the plaintiff insurer—appears awkward, we accept that awkwardness as adequately counterbalanced by the benefit of preserving the sanctity of the attorney-client relationship.

Second, the dissent argues we have ignored the *Fabian* "factors." However, we specifically rely on the fifth factor—the policy of preventing future harm—in our discussion of the deterrent purpose of tort law, and with our citation to the admonition in *Fabian* that we should not "improperly immunize [a] particular subset of attorneys from liability for their professional negligence." 410 S.C. at 490, 765 S.E.2d at 140. We also specifically discuss the sixth factor—the need to avoid an undue burden on the profession—by putting so much emphasis on not creating divided loyalties. The third factor warrants no discussion because its applicability in this category of case is obvious. When an attorney's breach of his duty to his client proximately causes a larger settlement or judgment in a case in which the

insurer must pay, the harm to the plaintiff insurer is not merely "foreseeable"; it is inevitable.

The other *Fabian* factors are less applicable here, which brings up the reason we do not dwell on them as the dissent suggests we should. In *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), the decision we primarily relied on in *Fabian* for the use of the factors, the Supreme Court of California explained the purpose for their use. The court stated "the determination whether *in a specific case* the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors." 364 P.2d at 687 (emphasis added); *see also Beacon Residential Cmty. Ass'n v. Skidmore, Owings & Merrill LLP*, 327 P.3d 850, 857 (Cal. 2014) (stating "the application of these factors necessarily depends on the circumstances of each case," relying on *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958), which we indicated in *Fabian* was the decision the California Supreme Court relied on in deciding *Lucas*, 410 S.C. at 484, 765 S.E.2d at 137). In *Fickett v. Superior Court of Pima County*, 558 P.2d 988 (Ariz. Ct. App. 1976), another case we relied on in *Fabian*, the court similarly recognized the factors are for use in a specific case-by-case analysis, 558 P.2d at 990, and in particular in cases in which a person's liability to the beneficiary of an estate is in question, 558 P.2d at 989-90. In fact, only one of the many cases cited by the dissent regarding the importance of the *Fabian*/*Lucas* factors involves the liability of an attorney to an insurer. *See supra* notes 6 and 7. That case, *Atlanta International Insurance Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991), does not even mention the *Fabian*/*Lucas* factors, but does impose liability against retained counsel—as we do—when the "case does not present a conflict between the interests of the insurer and the public policy of ensuring undiluted loyalty by counsel to the insured." 475 N.W.2d at 297.

III. Question Two

As to question two—whether a legal malpractice claim may be assigned to a third party—we decline to answer the question. We are satisfied that our answer to question one renders the second question not "determinative of the cause then pending in the certifying court," Rule 244(a), SCACR, and thus it is not necessary for us to answer question two, *see* Rule 244(f), SCACR (providing we "may rescind [our] agreement to answer a certified question"); *see also Thomas v. Grayson*, 318 S.C. 82, 89, 456 S.E.2d 377, 381 (1995) (declining to answer a certified question because the Court's analysis of the other certified questions was dispositive).

KITTREDGE and JAMES, JJ., concur. BEATTY, C.J., dissenting in a separate opinion in which HEARN, J., concurs.

CHIEF JUSTICE BEATTY: I respectfully dissent. I would answer both questions in the negative and hold that an insurer may not maintain a direct legal malpractice claim against an insured's hired counsel and that a legal malpractice claim may not be assigned to a third party responsible for any judgment and legal fees. In deciding otherwise, the majority provides the insurer a windfall at the cost of preserving the attorney-client relationship, which is a decision I cannot support.

I. May an insurer maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend?

Over a century ago, the United States Supreme Court held that, absent fraud, collusion, or similar circumstances, only those in privity with an attorney may pursue a legal malpractice claim. *Nat'l Sav. Bank v. Ward*, 100 U.S. 195, 205-07 (1879). South Carolina followed suit and required the plaintiff to prove the existence of an attorney-client relationship in order to establish privity. *Fabian v. Lindsay*, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014) ("Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship."); *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) ("Before a claim for malpractice may be asserted, there must exist an attorney-client relationship.").

The purpose of the attorney-client relationship requirement is "to ensure the inviolability of the attorney's duty of loyalty to the client." *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 296 (Mich. 1991); *see McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008) ("If an attorney were to owe a duty to a nonclient, it could result in potential ethical conflicts for the attorney and compromise the attorney-client relationship, with its attendant duties of confidentiality, loyalty, and care."); *Bovee v. Gravel*, 811 A.2d 137, 140 (Vt. 2002) ("The requirement of attorney-client privity to maintain a malpractice action 'ensure[s] that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.'" (quoting *Barcelo v. Elliot*, 923 S.W.2d 575, 578-79 (Tex. 1996))). Thus, by limiting the potential plaintiffs in a legal malpractice action to the attorney's clients, courts have, in effect, determined the concerns surrounding the preservation of the attorney-client relationship outweigh the collateral or peripheral interest of third parties.

In *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014), however, we created an exception to this longstanding requirement when we recognized causes of action in tort and contract for third-party beneficiaries of an existing estate planning document against an attorney whose drafting error defeats or diminishes the client's intent. In doing so, we explained:

> Recognizing a cause of action is not a radical departure from the existing law of legal malpractice that requires a lawyer-client relationship, which is equated with privity and standing. Where a client hires an attorney to carry out his intent for estate planning and to provide for his beneficiaries, there *is* an attorney-client relationship that forms the basis for the attorney's duty to carry out the client's intent. This intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries. Thus, imposing an avenue for recourse in the beneficiary, where the client is deceased, is effectively enforcing the *client's intent*, and the third party is in privity with the attorney.

Id. at 490, 765 S.E.2d at 140. The Court also acknowledged that "[i]n these circumstances, retaining strict privity in a legal malpractice action for negligence committed in preparing will or estate documents would serve to improperly immunize this particular subset of attorneys from liability for their professional negligence." *Id*.

Today, the majority creates another exception to the attorney-client relationship requirement to allow an insurer to pursue a cause of action against counsel hired to represent the insured. In doing so, the majority asserts its decision is "consistent with the rule adopted by the majority of states that have considered the issue." This is somewhat misleading. While a majority of jurisdictions *may* permit an insurer to pursue a legal malpractice action against hired counsel, it is important to note that most of those jurisdictions appear to do so on the belief that a dual attorney-client relationship exists between the insurer, insured, and counsel, which is a belief the majority does not share.[4]

---

[4] Under the "dual attorney-client relationship," the attorney has two clients, in this context, the insured and the insurer. Consequently, in those jurisdictions that recognize this type of relationship, no exception to the privity requirement need be created for an insurer to bring a direct legal malpractice claim against hired counsel

Those jurisdictions that allow an insurer to pursue a claim against hired counsel under a premise other than the dual attorney-client relationship have done so using a number of approaches grounded in contract, equity, and tort law. *See, e.g.*, *Paradigm Ins. Co. v. Lagerman Law Offices, P.A.*, 24 P.3d 593, 601-02 (Ariz. 2001) (holding an insurer may pursue a legal malpractice claim against hired counsel because counsel "has a duty to the insurer arising from the understanding that [his] services are ordinarily intended to benefit both insurer and insured when their interests coincide"); *Hartford Ins. Co. v. Koeppel*, 629 F.Supp.2d 1293 (M.D. Fla. 2009) (granting insurer standing to sue under a third-party beneficiary theory); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991) (declining to recognize the insurer as a client, but nevertheless allowing the insurer to pursue an action against hired counsel under the doctrine of equitable subrogation).

The majority opinion is devoid of any reference to these approaches. It simply holds that, because of the insurer's "unique position," the insurer "may recover . . . for the attorney's breach of his *duty to* [*the insured*]." I take issue with the majority's holding. First, I do not agree with the majority that being contractually obligated to pay litigation costs places the insurer in a position sufficient to waive the privity requirement. Second, I am concerned about the manner in which an insurer can pursue a legal malpractice action against hired counsel after today's decision.

According to the majority, an insurer's cause of action against hired counsel is predicated on a breach of the duty owed *to the insured*, not on a breach of a duty owed *to the insurer*. At first blush, the cause of action available to the insurer sounds in tort. However, unlike other jurisdictions that have recognized a cause of action in tort for insurers against hired counsel, the majority declines to recognize a separate duty of care owed to the insurer. Thus, by limiting the insurer's recovery to the

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under certain circumstances because the insurer, as a client, is already in privity with the attorney. However, that is not the rule in this state. Moreover, as at least one commentator has recognized, some states that have initially recognized such a rule have moved away from doing so in light of the conflicts it poses to the insured. *See* Amber Czarnecki, *Ethical Considerations Within the Tripartite Relationship of Insurance Law - Who Is the Real Client?,* 74 Def. Couns. J. 172, 176 (2007) (recognizing that "the judicial trend" is moving toward recognizing the insured as the sole client out of concern that recognizing the insurer as a client would weaken the attorney's loyalty to the insured).

extent hired counsel breached its duty to the insured and prohibiting double recovery, the action is more akin to equitable subrogation or an assignment of an insured's legal malpractice claim. As will be discussed, I would find such an action, under either theory, contrary to the public policy of this state.

I turn now to address Sentry's specific arguments in support of recognizing a direct action against hired counsel.

1. Third-Party Beneficiary of Contract Theory

First, Sentry argues this Court should allow insurers to bring claims against hired counsel under a third-party beneficiary of contract theory.[5] I disagree.

The contract at issue here is the contract of representation between the insured and hired counsel. Therefore, to pursue a third-party beneficiary claim, an insurer must show the insured and hired counsel intended, by virtue of the contract, "to create a direct, rather than an incidental or consequential, benefit to" the insurer. *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). That, however, is not the case.

There is no question that when an insured purchases an insurance policy that gives rise to the contract of representation, the insured is doing so with the understanding that his interests, not those of the insurer, will be represented should an issue arise requiring legal representation. Although the insurer pays for the legal representation and may share similar interests with the insured, any benefit to the insurer derived therefrom is incidental to the contract of representation. In sum, the insurer is merely performing its contractual duty to the insured. Consequently, I would find that an insurer cannot bring a breach of contract action as a third-party beneficiary because it is not the intended beneficiary of the contract of representation between the insured and hired counsel.

2. Negligence

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[5] A third-party beneficiary is someone "who is not a party to a contract but who would benefit from its performance." Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1359 (1992).

Next, Sentry asserts an insurer should be able to proceed against hired counsel under a theory of negligence. I disagree.

In *Fabian*, this Court explained the determination of whether an attorney may be liable in tort to a plaintiff not in privity "is a matter of policy and involves the balancing of" the following factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether the recognition of liability would impose an undue burden on the profession.[6] *Id*. at 485, 765 S.E.2d at 137-38 (citing *Lucas v. Hamm*, 364 P.2d 685, 687-88 (Cal. 1961) (*en banc*)). After careful consideration, I find none of these factors weigh in the insurer's favor.

Given the significance of the purpose of the representation, I believe the first factor, the extent to which the transaction was intended to affect, or benefit,[7] the

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[6] Interestingly, although the majority recognizes a cause of action in tort, the majority makes no reference to these factors in doing so.

[7] I interpret this factor as requiring the representation do more than simply affect the plaintiff. Similar to other states that have adopted the *Lucas* test or something similar, I believe this factor weighs in favor of the plaintiff only if the client intended for the lawyer's services to benefit that plaintiff. *See Blair v. Ing*, 21 P.3d 452, 466 (Haw. 2001) (interpreting the first *Lucas* factor as requiring the principal purpose of the representation to be for the benefit of the plaintiff); *Donahue v. Shughart, Thomson & Kilroy*, *P.C.*, 900 S.W.2d 624, 628 (Mo. 1995) (*en banc*) (determining the first factor "weighs in favor of a legal duty by an attorney where the client ***specifically intended*** to benefit the plaintiffs"). It has also been observed that, since deciding *Lucas*, California has imposed a duty on an attorney to a plaintiff only where, *inter alia*, the attorney and client intended the representation directly benefit the plaintiff. *Templeton v. Catlin Specialty Ins. Co.*, 612 F. App'x 940, 967-68 (10th Cir. 2015). Thus, with respect to the first factor, the question is not whether the plaintiff was affected by the representation, but whether the client intended for the representation to be for the plaintiff's benefit.

plaintiff, should be weighed more heavily than the others.[8] As discussed, the purpose of the representation between counsel and the insured is not intended to benefit the insurer.

Moreover, to be applicable, factors two, three, and four each necessitate the plaintiff suffer some type of harm or injury. However, I am unable to identify any harm suffered by an insurer when the case settles within the agreed-upon policy limits. In those cases, the insurer is merely fulfilling an agreed-upon promise between it and the insured. The insurer established a price to cover the risk and the insured paid it. Understandably, the insurer is unhappy when it pays more than it wanted to, but that is the risk that it took and it is the nature of the business.

As to the fifth factor, the policy concerns in preventing future harm are not as great as they are in the will-drafting context. In *Fabian*, we acknowledged that but for an exception to the privity requirement, an attorney would not be held accountable for the negligence in the preparation of a will or estate planning document. *Fabian*, 410 S.C. at 490, 765 S.E.2d at 140. However, here, the insured maintains the option of bringing a malpractice claim, which upholds the policy goals of preventing future harm by maintaining accountability and deterring further negligence.

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[8] Indeed, some states have gone so far as to make this factor a threshold requirement for a plaintiff pursing a claim against counsel in tort. *See McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 547 (Minn. 2008) (finding "that in order for a third party to proceed in a legal malpractice action, that party must be a direct and intended beneficiary of the attorney's services"); *Trask v. Butler*, 872 P.2d 1080, 1084 (Wash. 1994) (*en banc*) (holding "under the modified multi-factor balancing test, the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained"). Additionally, at least one state, which has not adopted the *Lucas* test, has nevertheless made this a requirement for allowing a third party to pursue a legal malpractice claim in tort. *See Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) (concluding "for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party").

Regarding the final factor, recognizing a cause of action in tort for an insurer against the insured's hired counsel may pose an undue burden to the profession by allowing multiple parties to pursue legal malpractice claims against hired counsel. More significantly, for reasons that will be discussed, such a cause of action could pose an undue burden to the attorney-client relationship by negatively affecting the duty of loyalty owed to the client, which is precisely what the privity requirement was intended to prevent. *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 296 ("The essential purpose of the general rule against malpractice liability from third-parties is . . . to prevent conflicts from derailing the attorney's unswerving duty of loyalty of representation to the client.").

The principal concern in allowing third parties to pursue legal malpractice claims against an attorney is that, when a conflict arises between the client and third party, the attorney may carry out the representation in a manner inconsistent with the best interests of the client. *See id*. ("Allowing third-party liability generally would detract from the attorney's duty to represent the client diligently and without reservation."); Restatement (Third) of the Law Governing Lawyers § 51 cmt. b (2000) ("Making lawyers liable to nonclients . . . could tend to discourage lawyers from vigorous representation."). This is of special concern in the context here given the heightened risk of conflict due to the often diverging interests between the insured and insurer and the employment relationship between insurer and hired counsel.

Unlike the situation in *Fabian*, the purpose of the representation here is not for the benefit of the third party pursuing the legal malpractice claim. Here, the third party's purpose and interests routinely diverge from those of the client. As one court stated:

> [t]here can be no doubt that actual conflicts between insured and insurer are quite common and that the potential for conflict is present in every case. Conflicts may arise over the existence of coverage, the manner in which the case is to be defended, the information to be shared, the desirability of settling at a particular figure or the need to settle at all, and an array of other factors applicable to the circumstances of a particular case.

Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 597 (Ariz. 2001) (*en banc*).

In addition to the increased risk of conflict, the employment relationship between the insurer and insured's hired counsel heightens the concern that the attorney may make decisions in a manner more preferable to the third party than the client. *See Atlanta Int'l Ins. Co.*, 475 N.W.2d at 298 (acknowledging "[t]he possibility of conflict unquestionably runs against the insured, considering that defense counsel and the insurer frequently have a longstanding, if not collegial, relationship"); 4 Ronald E. Mallen, *Legal Malpractice* § 30:53, at 333 (2017 ed.) ("A risk is that the attorney may not recognize [a] conflict or may favor the interests of the insurer. The lawyer may be tempted to help the [insurer], who pays the bills, who will send further business, and with whom long-standing personal relationships have developed."); Mallen, *supra*, § 30:57, at 346-47 ("During litigation, issues may arise that could influence the attorney to choose sides. When abuses have occurred, most reported decisions have involved an attorney, who has favored . . . the insurer."); Robert M. Wilcox & Nathan M. Crystal, *Annotated South Carolina Rules of Professional Conduct*, at 136 (2013 ed.) ("Whenever a person other than the client pays the lawyer, there exists a risk that the interests of the person paying the fees may interfere with the lawyer's duty to exercise independent professional judgment on behalf of the client.").

Sentry contends these concerns are not present in this case because it undoubtedly shared a mutual interest with the insured in counsel timely filing answers to the requests to admit. Although that may be true, certified questions are not based on the narrow facts of the case from which the questions arise. While there may be no conflict in allowing Sentry to bring a legal malpractice action *in this case*, the same may not be true in later cases involving challenges to other decisions made in an attorney-client relationship of which the insurer was not in privity. *See* 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 7:8, at 802-03 (2014 ed.) (noting "even if an implied duty does not interfere with fiduciary obligations in a given case, it may do so in other cases under different facts. For that reason, policy considerations are not developed on an *ad hoc* basis, but from a broader perspective concerning the potential adverse effects on future relationships").

Therefore, for the reasons stated, I would find the *Fabian* balancing test weighs against allowing an insurer to bring a cause of action in tort for legal malpractice against counsel hired to represent its insured.[9]

Based on the foregoing, I would answer the first certified question in the negative and hold an insurer may not maintain a direct claim against an insured's hired counsel. I acknowledge that, under this approach, the insurer would have to assume the risk concomitant with the attorney it hires to represent its insured. I also recognize that, in those cases in which a negligent attorney resolves a claim within the policy limits, it is unlikely the insured will bring a legal malpractice action. As a result, the attorney may avoid liability for his negligence. Although troubling, I believe my concerns in expanding the privity exception to permit an insurer to pursue an action against hired counsel outweigh a holding to the contrary.[10] Moreover, while an attorney may not be held liable for his negligence in some circumstances,

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[9] Sentry also asks this Court to find hired counsel owes a duty of care to the insurer. However, such a duty of care would necessarily sound in negligence. As discussed, I would hold Sentry and other similarly situated entities do not meet *Fabian*'s balancing test. Nevertheless, even if the recognition of such a duty of care could exist harmoniously with *Fabian*'s balancing test, I believe the previously discussed concerns in allowing an insurer to bring a direct legal malpractice claim would prohibit this Court from recognizing a duty.

[10] Other courts also favor the preservation of the sanctity of the attorney-client relationship over the economic interests of the insurer. *See, e.g.*, *State Farm Fire & Cas. Co. v. Weiss*, 194 P.3d 1063, 1069 (Colo. App. 2008) (precluding an insurer from pursuing an equitable subrogation claim against counsel, recognizing that while "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"); *Querrey & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719, 724 (Ind. Ct. App. 2007) (declining to allow an insurer to bring a legal malpractice claim against hired counsel and dismissing those jurisdictions holding to the contrary; stating, "we do not agree with those jurisdictions that hold the possibility of the attorney garnering a windfall by not having to defend against his or her malpractice outweighs the sanctity of the attorney-client relationship").

the attorney could still be held accountable for his conduct in a disciplinary proceeding before this Court.

II. May a legal malpractice claim be assigned to a third party who is responsible for payment of legal fees and any judgments incurred as a result of the litigation in which the alleged malpractice arose?

Sentry contends this Court should answer the second certified question "yes" and hold a legal malpractice claim may be assigned to a third party responsible for the payment of legal fees and any judgment incurred. I disagree.

In *Skipper v. ACE Property and Casualty Insurance Company*, 413 S.C. 33, 38, 775 S.E.2d 37, 39 (2015), this Court held a legal malpractice claim could not be assigned between adversaries in litigation in which the alleged legal malpractice arose. The Court based its holding, in part, on the potential threat to the attorney-client relationship. *Id*. at 37, 775 S.E.2d at 38-39. The relationship in *Skipper* is different than that here because the insurer and insured are presumably not adversaries. However, as discussed in the previous section, the threat to the attorney-client relationship still remains in allowing a third party responsible for the payment of legal fees to pursue a cause of action challenging the decisions made in an attorney-client relationship to which he was not in privity.

To be sure, in denying the assignment of legal malpractice claims outright, the majority of courts base their holding on the same policy considerations that form the basis of my position to deny an insurer the right to bring a direct legal malpractice claim. *See, e.g.*, *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976) ("It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment."); *Christison v. Jones*, 405 N.E.2d 8, 11 (Ill. App. Ct. 1980) (prohibiting the assignment of legal malpractice claims, holding "the decision as to whether a malpractice action should be instituted should be a decision peculiarly for the client to make" given, in part, "the personal nature of the duty owed by an attorney to his client"); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 342 (Ind. 1991) (concluding legal malpractice claims cannot be assigned based on, *inter alia*, the need to preserve the sanctity of the attorney-client relationship, including the duty of loyalty and the duty of confidentiality, which would be weakened under the policy of assigning legal malpractice claims). *See generally* Tom W. Bell, *Limits*

on the Privity and Assignment of Legal Malpractice Claims, 59 U. Chi. L. Rev. 1533, 1544-45 (1992) (recognizing that "relaxing the privity requirement and allowing assignability stand or fall by the same arguments" because the policy concerns underlying the decision to prohibit a third party from asserting a direct malpractice claim also underlie the decision to prohibit the assignment of a legal malpractice claim to a third party).[11]

Consequently, I would also answer the second question in the negative and hold a legal malpractice claim may not be assigned to a third party responsible for any judgment and legal fees.

HEARN, J., concurs.

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[11] Sentry further submits this Court should allow insurers to pursue a claim against hired counsel under the doctrine of equitable subrogation. I disagree. "In the context of the insured-insurer relationship, the doctrine of equitable subrogation provides that an insurer who pays a loss is thereby placed by operation of law in the position of its insured so that the insurer may recover from a third-party tortfeasor whose negligence or wrongful act caused the loss." Dale Joseph Gilsinger, Annotation, *Right of Insurer to Assert Equitable Subrogation Claim Against Attorney for Insured on Grounds of Professional Malpractice*, 50 A.L.R. 6th 53, 63 (2009). The concerns surrounding equitable subrogation in this context are similar to the concerns surrounding the assignment of legal malpractice claims. *See Nat'l Union Fire Ins. Co. v. Salter*, 717 So. 2d 141, 142 (Fla. Dist. Ct. App. 1998) (recognizing the same public policy reasons advanced for prohibiting the assignment of legal malpractice claims "apply and prohibit the subrogation of a legal malpractice claim"). Therefore, for the abovementioned reasons, I would also conclude that an insurer may not bring a claim against hired counsel under equitable subrogation.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Osbey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-001038

ON WRIT OF CERTIORARI

Appeal from Spartanburg County
J. Derham Cole, Plea Court Judge
Edward W. Miller, Post-Conviction Relief Judge

Opinion No. 27866
Submitted November 15, 2018 – Filed March 6, 2019

REVERSED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, and Assistant Attorney General Jordan Adraine Cox, both of Columbia, for Respondent.

JUSTICE FEW: Robert Osbey pled guilty to criminal charges without counsel. He later applied for post-conviction relief (PCR) on the ground he did not waive his

right to counsel. We reverse the denial of his PCR claim because the record does not reflect a valid waiver of Osbey's right to counsel. In particular, the plea court did not ensure Osbey was aware of the dangers of self-representation. We remand to the court of general sessions for a new trial.

I. Facts and Procedural History

The State charged Osbey with two counts of trafficking in cocaine base and one count of possession with intent to distribute cocaine base. The charges stem from two incidents in which Osbey allegedly sold crack cocaine to a confidential informant. Osbey pled guilty almost a year after his arrest, without counsel. The plea court informed him of his right to counsel, and noted Osbey had previously been informed by a court official on three separate occasions that if he wanted to have a public defender appointed he would have to contact the public defender's office and submit an application. The plea court then asked, "Did you knowingly and intelligently make the decision not to have a lawyer assist you?" Osbey responded, "No, sir. I was trying to get one." Osbey explained he went to the public defender's office the week before but was told it was too late.

The plea court ruled,

> I find . . . that you have knowingly waived your right to counsel by your conduct, having known and been advised that you could have an appointed lawyer but you needed to contact the public defender's office so that they could accept your application. And in a year's time . . . you failed to do that. So, you have waived your right to counsel.

Osbey pled guilty to his charges, and the plea court sentenced him to eight years in prison, followed by three years of probation. Osbey did not appeal.

Osbey filed a PCR application on the ground he "did not knowingly and voluntarily waive his right to counsel." At the PCR hearing, Osbey's PCR counsel stated, "This was a pro se plea . . . , but there was nothing on the record that Mr. Osbey was warned about the dangers of self-representation . . . . There is no evidence he had sufficient understanding for his actions to amount to a knowing and voluntary waiver of

counsel." The PCR court found "the plea judge was correct in finding [Osbey] knowingly and voluntarily waived his right to counsel." We granted Osbey's petition for a writ of certiorari.

II. Analysis

A defendant in a criminal case "has the right to the assistance of counsel." *State v. Justus*, 392 S.C. 416, 419, 709 S.E.2d 668, 670 (2011) (citing U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 340-41, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799, 802-03 (1963)). The defendant may waive his right to counsel, but he must do so knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1975). For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581-82). A defendant may waive counsel "by an affirmative, verbal request," or a defendant's actions may constitute a "waiver by conduct." *State v. Roberson*, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009).

The plea court found Osbey waived his right to counsel "by [his] conduct" because Osbey did not seek counsel after being told three separate times he needed to contact the public defender's office.[1] By definition, "A waiver is a voluntary and intentional

[1] We understand the plea court's frustration with Osbey's dilatory conduct in failing to obtain counsel. In numerous cases, we have recognized a defendant may be found to have waived his right to counsel when it is clear to the court the defendant knew his unreasonable delays could result in a waiver. In *State v. Jacobs*, 271 S.C. 126, 245 S.E.2d 606 (1978), for example, we stated the trial court "had done all it could do to urge [the defendant] to" retain counsel, but the defendant refused. 271 S.C. at 127, 245 S.E.2d at 607. After examining the defendant's actions, we "conclude[d] that, by his conduct, appellant waived his right to counsel." 271 S.C. at 127-28, 245 S.E.2d at 607-08 (citing *United States v. Arlen*, 252 F.2d 491, 494 (2d Cir. 1958)). Relying on *Arlen*, we found the defendant knew the consequences of his actions—that if he did not obtain counsel in a timely manner he would lose his right to counsel—and we found he chose to forego counsel. 271 S.C. at 128, 245 S.E.2d at 608 (for clarification of our finding, *see Arlen*, 252 F.2d at 494 (holding "where a defendant . . . has been advised by the court that he must retain counsel by a certain

abandonment or relinquishment of a known right." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (citing *Eason v. Eason,* 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009)), *opinion clarified on other grounds*, 386 S.C. 274, 688 S.E.2d 120 (2009). "Waiver requires a party to have known of a right and known that right was being abandoned." 385 S.C. at 496-97, 685 S.E.2d at 607. Any waiver, therefore, including a waiver of counsel "by conduct," must be knowing and intelligent. For a waiver to be "knowing and intelligent," the defendant "should be made aware of the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 581-82; *Prince*, 301 S.C. at 423-24, 392 S.E.2d at 463. The *Faretta* and *Prince* requirement applies to any waiver, whether the waiver is alleged to be by "affirmative, verbal request" or "by conduct." *See Goldberg*, 67 F.3d at 1100, 1101 (requiring *Faretta* warnings for a valid waiver by conduct); *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) ("The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct." (citing *Goldberg*, 67 F.3d at 1100)).

In *Gardner v. State*, 351 S.C. 407, 570 S.E.2d 184 (2002), this Court held the *Faretta* and *Prince* requirement of warning the defendant of the dangers of self-representation applies to waiver by conduct. The PCR court found the petitioner's conduct amounted to a waiver of his right to counsel. 351 S.C. at 410, 570 S.E.2d at 185. We explained the petitioner knew he might lose his right to counsel if he failed to obtain counsel prior to his guilty plea. 351 S.C. at 410-11, 570 S.E.2d at 185-86. We reversed, however, finding, "Petitioner was not adequately apprised of the dangers of self-representation." 351 S.C. at 412, 570 S.E.2d at 186.

In this case, the plea court did not mention to Osbey the dangers of self-representation. When this happens, we look to the record to determine if it shows

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reasonable time . . . the court may treat his failure to provide for his own defense as a waiver of his right to counsel")); *see also United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995) (discussing "waiver by conduct," and stating, "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel."); *Com. v. Means*, 907 N.E.2d 646, 658 (Mass. 2009) ("The key to waiver by conduct is misconduct occurring *after an express warning has been given* to the defendant about the defendant's behavior and the consequences of proceeding without counsel.").

the factual basis for the waiver. *See, e.g.*, *Gardner*, 351 S.C. at 412, 570 S.E.2d at 186 ("In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se, with 'eyes open,' then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial."); *Prince*, 301 S.C. at 424, 392 S.E.2d at 463 (finding no valid waiver because the record "[did] not demonstrate petitioner was sufficiently aware of the dangers of self-representation"). Osbey has two prior convictions for possession with intent to distribute cocaine base. He also violated his probation in 2004 and violated parole in 2007. There is nothing else in the record to indicate Osbey was aware of the dangers of representing himself. We find this is an insufficient basis on which to find Osbey actually understood the dangers of self-representation.

The State argues, relying on *Roberson*, a defendant need not be warned of the dangers of self-representation in a waiver by conduct case, only when the defendant expressly asserts his right to self-representation. In *Roberson*, this Court held the defendant waived his right to counsel by his conduct even though he was not warned of the dangers of self-representation. 382 S.C. at 188, 675 S.E.2d at 734. We found "both *Prince* and *Faretta* inapplicable" because those cases "addressed defendants who elected self-representation." 382 S.C. at 188, 675 S.E.2d at 733. Today, we cannot reconcile our statement in *Roberson* that *Faretta* and *Prince* are inapplicable to a waiver by conduct case with the clear and unmistakable authority discussed above—including *Gardner*—that they are applicable. Perhaps the result of *Roberson* can be justified on the basis of forfeiture.[2] However, to the extent *Roberson* is in conflict with the requirement that the defendant's knowledge and understanding of the dangers of self-representation is a necessary predicate to any waiver of counsel, we overrule it.

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[2] *See State v. Thompson*, 355 S.C. 255, 267, 584 S.E.2d 131, 137 (Ct. App. 2003) ("A defendant can forfeit his right to counsel irrespective of his knowledge of . . . the dangers of self-representation." (citing *Goldberg*, 67 F.3d at 1100)); *but see United States v. Ductan*, 800 F.3d 642, 651 (4th Cir. 2015) ("a defendant may forfeit his right to counsel . . . only in truly egregious circumstances"); *State v. Roberson*, 371 S.C. 334, 338, 638 S.E.2d 93, 95 (Ct. App. 2006) ("The record is devoid of any egregious misconduct on the part of Roberson to warrant the drastic sanction of forfeiture of the right to counsel."), *rev'd*, 382 S.C. 185, 675 S.E.2d 732.

III. Conclusion

Osbey did not waive his right to counsel by conduct because Osbey was not warned of the dangers of self-representation. The decision of the PCR court is **REVERSED** and the case is remanded to the court of general sessions for a new trial.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. JAMES, J., concurring in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE JAMES: I concur with the reasoning of the majority, but I write separately to point out practical issues facing the circuit court when the unrepresented defendant appears for plea or trial.

The deeper problem facing the circuit court in any given case is that there is typically no clear way to verify whether *Faretta* warnings have ever been given to the unrepresented defendant. Perhaps the ideal time for giving *Faretta* warnings to the unrepresented defendant would be during either the defendant's first appearance or second appearance. However, first appearances are typically conducted with neither a judge nor a court reporter being present; therefore, even if the warnings were then given, there would be no record they were then given or by whom they were given. Second appearances are usually conducted in the presence of a circuit judge, but more often than not, a court reporter is not present. Therefore, there is typically no record of the warnings being given during a second appearance. Even if a court reporter was present during a first appearance, a second appearance, or during some other transcribed proceeding, there would be no occasion for a transcript to be requested or typed until the time for appeal or the commencement of a PCR application. That is of no help to the circuit judge before whom the defendant appears for an imminent trial or plea. If, immediately prior to trial or plea, the unrepresented defendant claims he was not given *Faretta* warnings or does not recall if he was given the warnings, it would likely not be appropriate for the trial or plea judge to receive testimony of the solicitor on the point.

In *Wroten v. State*, we observed, "While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. . . . If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986)). Consequently, the trial judge (or plea judge) has the ultimate responsibility of warning the unrepresented defendant of the dangers of self-representation immediately before the trial or plea is to begin. That paves the way for the dilatory defendant to manipulate the process for further delay, because the trial judge or the plea judge does not become involved until the tail end of the prosecution. Perhaps the most efficient way for this problem to be avoided is for the solicitor, when it becomes apparent a plea or trial is imminent, to bring the

unrepresented defendant before the circuit court for the stated purpose of curing any *Faretta* ills. Even that approach would invite further dilatory conduct by the defendant.

There are obvious practical barriers to ascertaining whether an unrepresented defendant has been warned of the dangers of self-representation. However, the law requires the defendant to be so warned, and the majority correctly concludes there is no proof Osbey was so warned. The majority also correctly concludes there is no proof of waiver by conduct. Here, we have no choice but to reward Osbey with post-conviction relief, even though he, an experienced criminal defendant, was advised he could apply for a public defender several times, beginning almost one year before he pled guilty. I reluctantly concur.

KITTREDGE, J., concurs.

The Supreme Court of South Carolina

In the Matter of Christi Anne Misocky, Respondent.

Appellate Case No. 2019-000310

ORDER

Respondent was administratively suspended for failing to pay her license fees and failing to comply with her CLE requirements on February 26, 2018 and April 18, 2018, respectively. On February 15, 2019, respondent was arrested and charged with two counts of forgery, value $10,000 or more. Based on her arrest and her failure to cooperate with an Office of Disciplinary Counsel (ODC) investigation, ODC asks this Court to place respondent on interim suspension pursuant to Rules 17(a) and (c), RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

March 1, 2019

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Abbeville County. Effective March 26, 2019, all filings in all common pleas cases commenced or pending in Abbeville County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Berkeley	Calhoun
Cherokee	Chester	Chesterfield	Clarendon
Colleton	Darlington	Dillon	Dorchester
Edgefield	Fairfield	Florence	Georgetown
Greenville	Greenwood	Hampton	Horry
Jasper	Kershaw	Lancaster	Laurens
Lee	Lexington	Marion	Marlboro
McCormick	Newberry	Oconee	Orangeburg
Pickens	Richland	Saluda	Spartanburg
Sumter	Union	Williamsburg	York

Abbeville-Effective March 26, 2019

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
March 6, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mildred Ann Kinghorn, as Trustee for the Mildred Ann Kinghorn Trust, dated 28 April 2004, Respondent,

v.

George Sakakini, Appellant.

Appellate Case No. 2016-001278

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5632
Heard November 6, 2018 – Filed March 6, 2019

AFFIRMED

Melvin Richardson Hyman, Jr., of Law Firm of M. Richardson Hyman, Jr., of Charleston, for Appellant.

C. Scott Graber, of Graber Law Firm, of Beaufort, for Respondent.

LOCKEMY, C.J.: George Sakakini appeals the circuit court's order granting Mildred Kinghorn's motion to enforce the parties' settlement agreement. We affirm.

FACTS/PROCEDURAL BACKGROUND

Sakakini and Kinghorn are neighbors in the Pickett Fences subdivision in Beaufort County. Following a dispute over the boundary between their properties, the

parties entered into mediation and reached a settlement agreement on February 5, 2016. The settlement agreement provided (1) Kinghorn would convey a one-foot-wide strip of land to Sakakini and build a fence along the new property line, and (2) Sakakini would extinguish his rights to any easements over Kinghorn's property. The agreement further provided it was "contingent and subject to approval by the governing boards of the Picket Fences POA or Board of Review or any other appropriate authority" that may be required to approve the terms of the settlement.

On February 17, 2016, Sakakini emailed the POA and stated he did not want the POA to approve the settlement agreement. Sakakini noted he had consulted with an attorney who told Sakakini he did not have the legal authority to enter into any agreement that waives or modifies the POA rules without the express consent of the POA. In addition, Sakakini stated he was told he did not have the legal authority to waive or modify any easements without the express consent of the lien holder, Bank of America. Sakakini again emailed the POA on February 23, 2016, asking the POA's lawyers to opine on the legality of the settlement agreement.

On February 22, 2016, Kinghorn filed a motion to enforce the settlement agreement. In his memorandum in opposition to Kinghorn's motion and at the motion hearing, Sakakini argued (1) there was no meeting of the minds on February 5, 2016, (2) Bank of America was a necessary party to the action, and (3) the matter was not ripe for adjudication due to various unresolved contingencies.

On March 18, 2016, the circuit court granted Kinghorn's motion in a Form 4 order. Sakakini subsequently filed a Rule 59(e), SCRCP, motion to reconsider, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). "An action to construe a contract is an action at law." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). "In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." *Id.* "However, this court is free to decide questions of law with no particular deference to the trial court." *Id.*

LAW/ANALYSIS

I. Form 4 order

Sakakini argues the circuit court erred in issuing a Form 4 order which failed to include detailed findings of fact and conclusions of law and violated due process.[1] We disagree.

Pursuant to Rule 52(a), SCRCP,

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Thus, pursuant to Rule 52(a), SCRCP, the circuit court is not required to state its findings of fact and conclusions of law in decisions on motions to dismiss, summary judgment motions, or any other motion except those dealing with involuntary dismissal. Accordingly, we find the circuit court did not err in omitting findings of fact and conclusions of law from its order granting Kinghorn's motion to enforce the settlement agreement.

Sakakini also argues the circuit court's Form 4 order granting Kinghorn's motion to enforce the settlement agreement is vague and violates due process. Sakakini maintains that if the circuit court is compelling his performance, he is entitled to specific instructions as to what performance is expected. We disagree with Sakakini. We find the court did not violate due process by granting the motion to enforce without specific instructions to the parties. The motion sought to enforce the settlement agreement Sakakini signed after mediation. Sakakini never raised any concerns about ambiguity or vagueness in the agreement prior to this appeal.

Sakakini further asserts the Form 4 order is vague regarding attorney's fees and costs. Kinghorn's motion to enforce requested an award of attorney's fees and costs. While the circuit court granted the motion to enforce, it did not mention fees and costs in its order. Furthermore, it does not appear from the record that Kinghorn filed an affidavit outlining the specific fees requested, and there was no

[1] Due process requires that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.

finding by the court as to the reasonableness of any fees. Accordingly, we find the circuit court did not award fees and costs to Kinghorn.

II. Settlement Agreement

Sakakini argues the circuit court erred in enforcing the settlement agreement because the agreement was not ripe for enforcement. Specifically, Sakakini contends (1) not all of the contingencies had been met in order for the agreement to be enforceable, and (2) Kinghorn failed to meet her burden of proof. We disagree.

"It has long been the policy of the court to encourage settlement in lieu of litigation, and courts have usually enforced settlement agreements. There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court." *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992).

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

Rule 43(k), SCRCP. Rule 43(k) applies to settlement agreements. *Ashfort Corp. v. Palmetto Constr. Grp., Inc*., 318 S.C. 492, 494, 458 S.E.2d 533, 534 (1995). This rule "is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation" and "to relieve the court of the necessity of determining such disputes." *Id.* at 493-95, 458 S.E.2d at 534-35 (quoting 83 C.J.S. *Stipulations* § 4 (1953)).

We find the circuit court did not err in granting Kinghorn's motion to enforce the settlement agreement. The agreement complies with the requirements of Rule 43(k), SCRCP, because it was in writing and signed by the parties, their counsel, and the mediator; therefore, it was a valid settlement that could be enforced by the circuit court. We note the circuit court order does not remove any of the contingencies which must be met for the settlement to be completed.

CONCLUSION

The circuit court's order granting Kinghorn's motion to enforce the settlement agreement is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.