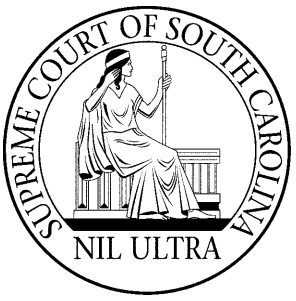

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 13, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

None

UNPUBLISHED OPINIONS

2019-UP-049-State v. Jeffrey Boyd Cooper
(Withdrawn, Substituted, and Refiled March 13, 2019)

2019-UP-103-Annalee Walsh v. Boat-N-RV Megastore

2019-UP-104-Uuno Mattias Baum v. S. C. Dep't of Corrections

PETITIONS FOR REHEARING

5608-Peter Wellin v. Keith Wellin	Pending
5612-Linda A. Gibson v. Andrew K. Epting	Pending
5614-Charleston Electrical Services, Inc. v. Wanda Rahall	Pending
5615-Rent-A-Center East v. SCDOR	Pending
5617-Maria Allwin v. Russ Cooper Associates, Inc.	Pending
5618-Jean Derrick v. Lisa Moore	Pending
5620-Bradley Sanders v. SCDMV	Pending
5621-Gary Nestler v. Joseph Fields	Pending
5622-Benjamin Gecy v. Somerset Poiint	Pending
5623-Natasha Turner v. Michael Kellett	Pending
5624-State v. Trey C. Brown	Pending

5625-Angie Keene v. CNA Holdings	Pending
5627-Georgetown County v. Davis & Floyd, Inc.	Pending
2018-UP-389-Gloria Terry v. Robert Terry, Sr.	Pending
2018-UP-432-Thomas Torrence v. SCDC	Pending
2018-UP-470-William R. Cook, III v. Benny R. Phillips	Pending
2019-UP-023-Nikolay Gui v. Kohler Company	Pending
2019-UP-034-State v. Hershel Mark Jefferson, Jr.	Pending
2019-UP-041-Hollee Gay v. Stephen Gay	Pending
2019-UP-042-State v. Ahshaad Mykiel Owens	Pending
2019-UP-047-Michael Landry v. Angela Landry	Pending
2019-UP-049-State v. Jeffrey B. Cooper	Granted 03/13/16
2019-UP-052-State v. Michael Fulwiley	Pending
2019-UP-066-U. S. Bank, N.A. v. Rhonda Lewis Meisner (2)	Pending
2019-UP-068-Shay Vitale v. Jon Vitale	Pending
2019-UP-069-Pearline Williams v. Larita Hipp	Pending
2019-UP-070-O'Shea Brown v. Steel Technologies	Pending
2019-UP-075-State v. Gerald J. Ancrum	Pending
2019-UP-078-State v. Michael T. Rencher	Pending
2019-UP-093-Carnie Norris v. SCDPPPS	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5562-Raymond Farmer v. CAGC Insurance	Pending
5564-J. Scott Kunst v. David Loree	Pending

5566-Tyrone York v. Longlands Plantation	Pending
5574-State v. Jeffrey D. Andrews	Pending
5582-Norwest Properties v. Michael Strebler	Pending
5583-Leisel Paradis v. Charleston County	Pending
5589-State v. Archie M. Hardin	Pending
5591-State v. Michael Juan Smith	Pending
5592-State v. Aaron S. Young, Jr.	Pending
5593-Lori Stoney v. Richard Stoney	Pending
5596-James B. Williams v. Merle S. Tamsberg	Pending
5600-Stoneledge v. IMK Dev. (Marick/Thoennes)	Pending
5601-Stoneledge v. IMK Dev. (Bostic Brothers)	Pending
5604-Alice Hazel v. Blitz U.S.A., Inc.	Pending
5605-State v. Marshell Hill	Pending
2017-UP-338-Clarence Winfrey v. Archway Services, Inc. (3)	Pending
2018-UP-080-Kay Paschal v. Leon Lott	Pending
2018-UP-085-Danny B. Crane v. Raber's Discount Tire Rack	Pending
2018-UP-250-Morningstar v. York County	Granted 03/06/19
2018-UP-255-Florida Citizens Bank v. Sustainable Building Solutions	Pending
2018-UP-273-State v. Maurice A. Odom	Granted 03/06/19
2018-UP-317-Levi Thomas Brown v. State Farm	Pending
2018-UP-352-Decidora Lazaro v. Burriss Electrical	Pending

2018-UP-365-In re Estate of Norman Robert Knight, Jr.	Pending
2018-UP-391-State v. Corey Andrew Brown	Denied 03/07/19
2018-UP-417-State v. Dajlia S. Torbit	Pending
2018-UP-454-State v. Timothy A. Oertel	Pending
2018-UP-461-Mark Anderko v. SLED	Pending
2018-UP-466-State v. Robert Davis Smith, Jr.	Pending

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
Refiled March 11, 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; 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.[1] 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,[2] it settled the case for $900,000, and

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[1] We originally decided this certified question in an opinion filed May 30, 2018. *Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, Op. No. 27806 (S.C. Sup. Ct. filed May 30, 2018) (Shearouse Adv. Sh. No. 22 at 31). The defendants filed a petition for rehearing, which we granted, thereby vacating the May 30, 2018 opinion. We now substitute this opinion to answer the certified question.

[2] *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"

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

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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 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.").

liability in excess of the policy limits. *Tiger River*[3] *Pine Co. v. Maryland Cas. Co.*, 163 S.C. 229, 234-35, 161 S.E. 491, 493-94 (1931).

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)

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[3] 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 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.

(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 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[4] which

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

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.

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.[5]

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[5] 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.[6] 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.

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[6] 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).

2. Negligence

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.[7] *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,[8] the

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

[8] 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.[9] 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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[9] 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.[10]

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.[11] Moreover, while an attorney may not be held liable for his negligence in some circumstances,

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[10] 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.

[11] 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).[12]

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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[12] 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.

STATE OF SOUTH CAROLINA
In The Supreme Court

Skydive Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC), Petitioner,

v.

Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal, Defendants,

of whom H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal are Respondents.

Appellate Case No. 2017-001382

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 27867
Heard November 8, 2018 – Filed March 13, 2019

REVERSED

Robert B. Varnado and Alexis M. Wimberly, both of Brown & Varnado, LLC, of Mt. Pleasant, for Petitioner.

Samuel F. Arthur, III, of Aiken, Bridges, Elliott, Tyler & Saleeby, P.A., of Florence, for Respondents.

JUSTICE FEW: Skydive Myrtle Beach, Inc. brought this lawsuit alleging Horry County, Horry County Department of Airports, and several of their individually named employees improperly attempted to remove Skydive from the space it leased at Grand Strand Airport in North Myrtle Beach, South Carolina. The circuit court dismissed Skydive's claims against the individually named employees pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, without allowing Skydive leave to amend its complaint. The court of appeals affirmed in an unpublished opinion. *Skydive Myrtle Beach, Inc. v. Horry County*, Op. No. 2017-UP-118 (S.C. Ct. App. filed March 8, 2017). We reverse the court of appeals and remand to the circuit court to allow Skydive an opportunity to file an amended complaint.

I. Rule 15(a), SCRCP

Horry County and the Department of Airports answered Skydive's complaint. The individually named employees (Respondents) filed a motion to dismiss pursuant to Rule 12(b)(6). Following a hearing on Respondents' motion, the circuit court requested proposed orders from Skydive and Respondents. Skydive submitted two proposed orders to the court. Each time, Skydive requested in writing it be allowed to amend its complaint to cure any pleading defects in the event the court decided to grant Respondents' motion. Nevertheless, the court granted Respondents' motion and dismissed Skydive's claims against Respondents without considering Skydive's request to amend its complaint. The order specifically provided the dismissal was "with prejudice."

When a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action" under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal. *See Foman v. Davis*, 371 U.S. 178, 179, 182, 83 S. Ct. 227, 228, 230, 9 L. Ed. 2d 222, 224, 226 (1962) (where a complaint is dismissed "for failure to state a claim upon which relief might be granted," leave to amend the complaint "should, as the rules require, be 'freely given'" (quoting Rule 15(a), Fed. R. Civ. P.)); *Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (holding "Dockside should have been given leave to amend

its complaint" before it was finally dismissed pursuant to Rule 12(b), SCRCP (citing *Foman*, 371 U.S. at 182, 83 S. Ct. at 230, 9 L. Ed. 2d at 226)). Rule 15(a) "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005)).

The circuit court erred by failing even to consider allowing Skydive to amend its complaint. *See Patton*, 420 S.C. at 490, 804 S.E.2d at 262 (holding the trial court's failure to exercise its discretion under Rule 15(a) is itself an abuse of discretion).

II. Rule 12(b)(6), SCRCP

Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim. *See, e.g.*, *Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) ("In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the circuit court must base its ruling solely upon the allegations set forth on the face of the complaint."); *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (". . . solely upon the allegations set forth on the face of the complaint"); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 940-41 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (internal quotations omitted); *Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) ("A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."). At the Rule 12 stage, therefore, the first decision for the trial court is to decide only whether the pleading states a claim. Skydive was—any plaintiff is—entitled to litigate the validity of its original pleading without having to convince the trial court of the merits of its underlying claim.

If the trial court rules there has been a "failure to state facts sufficient to constitute a cause of action," then the question could become whether the plaintiff wishes to challenge the ruling by filing a Rule 59(e), SCRCP, motion. Filing a Rule 59(e) motion is not an option, however, unless the plaintiff has a legitimate argument the trial court erred in finding the complaint deficient. *See* Rule 11(a), SCRCP ("The . . . signature of an attorney . . . constitutes a certificate by him that . . . there is good

ground to support [the pleading] . . . ."). Plaintiff's counsel will often decide in the course of litigating the validity of the original complaint that the complaint actually was deficient. But even if a plaintiff has an argument the complaint was valid, filing a Rule 59(e) motion is not a mandatory option. Skydive was—any plaintiff is—entitled to accept the court's ruling the original complaint was deficient, and replead in an attempt to fix the deficiency.

Ordinarily, therefore, the time for requesting leave to amend to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient. In this case, because Skydive twice asked for leave to amend before its complaint was dismissed, it had the option of renewing its requests in a formal Rule 15(a) motion. However, the circuit court's "with prejudice" order put Skydive in a difficult position because it made Skydive practically unable to litigate a motion to amend before it must file the appeal. The Rule 203(b)(1), SCACR, deadline of thirty days is stayed only if a Rule 59(e) motion is filed.[1] If Skydive—if any plaintiff—has no legitimate argument as to the merits of the Rule 12(b)(6) ruling, and therefore cannot file a Rule 59(e) motion, that plaintiff has no way of tolling the thirty day deadline for filing an appeal while the motion to amend is litigated. Similarly, a plaintiff who chooses to replead is practically prevented from doing so when the dismissal order is with prejudice because the time for appeal will not be tolled unless the plaintiff files a Rule 59(e) motion addressing the merits of the Rule 12(b)(6) ruling. If Skydive either believed it had no basis on which to file such a Rule 59(e) motion, or simply preferred to replead instead, it was unable to litigate a motion to amend.

Thus, the circuit court erred not only in refusing to consider the request to amend, but also in effectively preventing Skydive from litigating a post-ruling motion to amend by immediately dismissing the claims "with prejudice."

III. Proper Considerations under Rule 15(a)

A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion. *See* Rule 15(a) (stating "leave shall be freely given when justice so requires and does not prejudice any other party"); *Foman*, 371 U.S. at 182, 83 S. Ct. at 230, 9 L. Ed. 2d at 226 (listing valid

[1] No other tolling provision in Rule 203(b)(1) would apply in this circumstance.

reasons for denying a motion to amend); *Patton*, 420 S.C. at 490, 804 S.E.2d at 262 (stating "the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it"); 420 S.C. at 491 n.9, 804 S.E.2d at 262 n.9 (stating the burden of establishing a reason for denying the motion is on the party opposing the amendment); *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988) (stating "a proper reason" to deny a motion to amend could be "bad faith, undue delay, or prejudice"); *Id.* ("In the absence of a proper reason, . . . a denial of leave to amend is an abuse of discretion.").

A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint. *Patton*, 420 S.C. at 490-91, 804 S.E.2d at 262 (citing *Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999). In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' . . . it may be denied where the proposed amendment would be futile."),[2] *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (3d ed. 2010) ("If a proposed amendment is not clearly futile, then denial of leave to amend is improper.").

Here, the circuit court did not conduct an analysis to determine whether any amendment would be futile. The court of appeals, however—without articulating any such analysis—found the "amendment would be futile." *Skydive*, Op. No. 2017-UP-118 at 3 n.1. We have attempted to conduct the analysis to determine whether, in fact, any amendment would be futile. Even on the limited record before us, as we will explain, it is clear to us that allowing Skydive to amend its complaint would not be "clearly futile."

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[2] In *Jennings*, the court of appeals did not specifically state the amendment would "clearly" have been futile. A close examination of the court of appeals' explanation of its decision reveals, however, the proposed amendment in that case was "clearly futile." *See* 389 S.C. at 209, 697 S.E.2d at 681 (explaining the proposed new defendant was the attorney who was given printed emails, but had no direct access to the email account, and the alleged liability extended under the law only to persons who "actually engaged" in accessing the email account).

We begin by stressing the difficulty of determining whether allowing an amendment to a pleading would be futile without examining the proposed amendment. In this case, the circuit court dismissed Skydive's claims against Respondents without having seen any attempt at amending the complaint. We cannot imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like.[3] The immediate filing of a "with prejudice" dismissal order effectively prevented Skydive from preparing and presenting to the court an amended complaint before the thirty-day deadline for serving the appeal ran.

Turning to what we can discern of the futility of an amendment from the limited record before us, Skydive began operating a skydiving business out of the Grand Strand Airport in North Myrtle Beach in 2012 pursuant to a lease agreement Skydive executed with Ramp 66, LLC. At the time of the agreement, Ramp 66 managed the Grand Strand Airport as an agent of the Department of Airports and Horry County.

In August 2013, the Department resumed control of the airport from Ramp 66. Respondents Pat Apone and Tim Jackson—employees of the Department—allegedly informed Skydive a new lease agreement between the County and Skydive was necessary for Skydive to continue its operations at the airport. Apone and Jackson told Skydive a new lease required County approval. Skydive executed a six-month temporary lease with the Department until the County approved a long-term lease.

Over the next few months, Skydive continued operating its business out of the airport. Skydive alleges it relied on Apone and Jackson's assurances that a long-term lease would soon be executed. However, several disputes arose between Skydive, Respondents, and the governmental entities related to Skydive's business operations, Skydive's requests for maintenance and repair, and unauthorized entries onto Skydive's premises by agents of the Department. In February 2014, after the expiration of the temporary lease, Respondent H. Randolph Haldi—an employee of

[3] As we will discuss below, an appellate court must consider the merits of an amendment to a complaint that in fact failed to state a claim, but was improperly dismissed "with prejudice" without granting leave to amend, in determining whether to remand to permit the plaintiff to amend. *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881-82 (2006).

the County—delivered a new non-negotiable, six-month temporary lease to Skydive. Haldi also delivered to Skydive a seventy-two hour eviction notice in the event Skydive declined to execute the temporary lease. Skydive alleged this "amounted to a retaliatory eviction notice." Skydive then filed this lawsuit against Respondents and the governmental entities.

In the Rule 12(b)(6) motion, Respondents argued they were entitled to dismissal pursuant to subsection 15-78-70(a) of the South Carolina Tort Claims Act, which affords immunity to employees of governmental entities for actions taken in their official capacities.[4] The allegations recited above do not reveal any actions taken by the individual Respondents outside of their official capacities. Respondents relied on paragraph 8 of Skydive's complaint, which was reincorporated into each cause of action and provided, "At all relevant times [Respondents] were acting as agents of Defendants County and [the Department]."

The circuit court agreed and granted the motion. The court characterized paragraph 8 of Skydive's complaint as "an unequivocal allegation" that Respondents—if they acted at all—were doing so on behalf of the governmental entities within the scope of their official duties. Therefore, the court found Respondents were entitled to immunity under the Tort Claims Act and dismissed Respondents from Skydive's action.

The question before us is not whether the circuit court was correct the original complaint failed to refute Respondents' immunity defense. Rather, the question is whether the circuit court's error in refusing to allow Skydive to amend the complaint warrants a remand. As we will explain below in our discussion of *Spence*, we must remand unless we find any amendment would be clearly futile. As we will explain now, a close examination of the record indicates allowing Skydive to amend the complaint in an attempt to fix its pleading deficiencies would not be futile.

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[4] Under the Tort Claims Act, "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b)." S.C. Code Ann. § 15-78-70(a) (2005). Subsection (b) provides exceptions to this immunity "if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (2005).

Determining whether an amendment to Skydive's complaint would be futile requires us to consider the exceptions to immunity set forth in subsection 15-78-70(b). Skydive contends Respondents conspired to remove Skydive from the airport and engaged in conduct "designed to ruin or damage" Skydive's business. In furtherance of the conspiracy, Skydive contends Respondents refused to answer Skydive's correspondence, refused to refuel Skydive's aircraft, concealed Skydive's packages and mail, entered into Skydive's place of business without authorization, and interfered with Skydive's day-to-day operations. To prove civil conspiracy, a plaintiff must prove the defendant acted "for the purpose of injuring the plaintiff." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 546, 677 S.E.2d 574, 579 (2009). These allegations appear to satisfy the "intent to harm" exception. § 15-78-70(b).

Skydive claims Jackson defamed Skydive by communicating to other tenant businesses "false statements that were intended to impeach the honesty, integrity, virtue, or reputation" of Skydive. Jackson allegedly "published these statements with actual or implied malice" in an attempt "to injure [Skydive] in its office, business, or occupation," thereby exposing Skydive "to public hatred, contempt, [and] ridicule." Skydive further claims Apone and Jackson fraudulently misrepresented the county approval process for Skydive to obtain a long-term lease, which "caused . . . injury to [Skydive's] business interests . . . [and] its ability to lawfully operate." These allegations appear to satisfy the "actual fraud" or "actual malice" exceptions. *Id.*

The record on appeal also includes claims that Respondents acted outside the scope of their employment at times. Specifically, Skydive alleges Haldi and Apone,

> [I]n their individual capacities and . . . acting outside the course and scope of their employment created a plan to deprive [Skydive] of its existing long-term lease by refusing to provide a copy of the fully-executed lease to [Skydive], issuing an adhesion temporary permit under threat of eviction, and accusing [Skydive] of unpublished and non-existent rule, regulation, and ordinance violations amounting to a plan to illegally shut down and permanently remove [Skydive] from [the airport].

Skydive further alleges Haldi, Apone, Jackson, and Teal (an employee of the Department),

> [I]n their individual capacities and all acting outside the course and scope of their employment continued a plan to deprive [Skydive] of its business lease by drafting, presenting and having Illegal Regulations enacted by the County Council, reporting violations of the Illegal Regulations to FAA as grounds for federal violations, harassing [Skydive's] customers, and interfering with its customers.

In other instances, Skydive claims Respondents acted in the scope of employment but outside the scope of their official duties. For example, Skydive claims Respondents acted "under cloak of state authority" to carry out "malicious actions." Respondents' "duties" certainly did not include acting with malice toward the lessees of the Department. Further, by alleging Respondents conspired to remove Skydive's business from the airport, defamed Skydive's business, and fraudulently misrepresented the county lease approval process, Skydive suggests Respondents were acting against the interests of their employers, which certainly would be outside of their official duties.

A governmental employee is not afforded immunity under the Tort Claims Act for conduct outside the scope of his official duties, or for conduct that amounts to actual fraud, actual malice, or an intent to harm. § 15-78-70(b). Therefore, although Skydive alleged in its complaint that Respondents were acting as agents of the governmental entities, the facts and claims recited above set forth several plausible grounds upon which Skydive could successfully allege Respondents are not entitled to immunity. It is not our role to determine whether the allegations Skydive might make in an amended pleading will state a valid claim. However, we cannot definitively say it is impossible for Skydive to plead a valid claim against Respondents.

We now address two points the court of appeals listed as additional bases for affirming the circuit court's dismissal with prejudice without leave to amend. First, the court of appeals stated, "We agree with the circuit court that it would be inequitable to allow Skydive to assert conflicting theories that the individual defendants acted both inside and outside the scope of their official duties." *Skydive*,

Op. No. 2017-UP-118 at 2. Neither the circuit court nor the court of appeals cited any provision of law that supports either dismissing a complaint or refusing to allow its amendment on the basis that the pleading is unfair or inequitable. We are not aware of any provision of law that prevents a party from making "inequitable" allegations. *But see* Rule 12(f), SCRCP (providing "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter").

We find it is entirely appropriate for Skydive to allege that some of an individual's actions were within the scope of their official duties, and some were not, or even to plead alternative theories of liability depending on whether an individual's actions were within the scope of their duties. *See* Rule 8(a), SCRCP ("Relief in the alternative or of several different types may be demanded."). Pleading alternative theories of recovery based on the uncertainty of whether an employee acted within the scope of his employment or his official duties is common. *See, e.g.*, *Dickert v. Metro. Life Ins. Co.*, 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993), *as modified on reh'g* (Apr. 7, 1993) (reversing the circuit court for not permitting simultaneous causes of action against co-worker and employer based on the same conduct, stating, "Co-Employee may . . . be held individually liable for an intentional tort he may have committed while acting within the scope of employment"). While *Dickert* is out of context from this case, other courts have addressed similar alternative theories of recovery. In *United Technologies Corp. v. Mazer*, 556 F.3d 1260 (11th Cir. 2009), for example, the district court granted a motion to dismiss for failure to state a claim. 556 F.3d at 1266. "The district court was . . . disturbed by [the plaintiff's] allegation that Mazer acted both personally and on behalf of [his employer][5] West–Hem, which the court found to be irreconcilably inconsistent." 556 F.3d at 1273. The Eleventh Circuit dismissed the district court's concern,

> [W]e are not troubled by what the district court saw as inconsistent allegations. Rule 8(d) of the Federal Rules of Civil Procedure[6] expressly permits the pleading of both alternative and inconsistent claims. Thus, [the] complaint

[5] "Mazer . . . is president and part owner of West–Hem . . . ." 556 F.3d at 1267.

[6] Rule 8(d), Fed. R. Civ. P., is the federal counterpart to our Rule 8(a) "alternative" relief provision.

> is not subject to dismissal simply because it alleges that both Mazer, individually, and West–Hem committed the tortious conduct, even if it would be impossible for both to be simultaneously liable (which question of impossibility we need not, and do not, resolve).

556 F.3d at 1273-74. *See also Johnson v. State Dep't of Health & Rehab. Servs.*, 695 So. 2d 927, 930 (Fla. Dist. Ct. App. 1997) (in a tort claims case under a similar immunity provision, stating, "Johnson can therefore make claims against [the governmental entities] for acts of [their employees] committed within the scope of their employment and, in the alternative, pursue personal liability of these defendants").

Finally, we address the court of appeals' statement, "The circuit court did not abuse its discretion in dismissing the complaint with prejudice," relying on our decision in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). In this case and others, the court of appeals misinterpreted *Spence*. A circuit court does not have "discretion" to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted. As we will explain, *Spence* supports this principle.

In *Spence*, we made several observations about the dismissal of claims pursuant to Rule 12(b)(6). We stated, "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint." 368 S.C. at 129, 628 S.E.2d at 881. We then cited numerous decisions—including *Foman* and *Dockside Association*—in which the court held (1) the plaintiff should be given an opportunity to amend a complaint dismissed under Rule 12(b)(6), or (2) the trial court should not refuse the amendment on the ground of futility unless the amendment would be clearly futile. 368 S.C. at 129-31, 628 S.E.2d at 881-82. Two of the cases we cited stand out as particularly important. First, we cited *Arkansas Department of Environmental Quality v. Brighton Corp.*, 102 S.W.3d 458, 468 (Ark. 2003), for the proposition that a "complaint dismissed for failure to state facts upon which relief can be granted

should be dismissed without prejudice in order for plaintiff to decide whether to serve [an] amended complaint." *Spence*, 368 S.C. at 129, 628 S.E.2d at 881.[7] Second, we cited *Giuliani v. Chuck*, 620 P.2d 733, 737 (Haw. Ct. App. 1980), for the proposition that a "complaint is not subject to dismissal with prejudice unless it appears *to a certainty* that no relief can be granted under any set of facts that can be proved in support of its allegations." *Spence*, 368 S.C. at 129, 628 S.E.2d at 881 (emphasis added).

In *Spence*, therefore, the circuit court erred by dismissing the complaint with prejudice without granting leave to amend. *See* 368 S.C. at 130, 628 S.E.2d at 882 (explaining *Spence* falls in a category of cases where "a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint"). The bulk of the majority's discussion, however, focused on whether the circuit court committed a different error—finding the complaint failed to state a valid claim under Rule 12(b)(6). *See* 368 S.C. at 117-27, 628 S.E.2d at 874-80 (the Court's majority explaining the circuit court did not err in finding no valid claim was pled). In a divided opinion with two Justices dissenting, this Court upheld the circuit court's Rule 12(b)(6) ruling. *See id.*; 368 S.C. at 131-32, 628 S.E.2d at 882-83 (Toal, C.J., dissenting); 368 S.C. at 132-33, 628 S.E.2d at 883 (Pleicones, J., dissenting).

After its lengthy discussion of the Rule 12(b)(6) question, the majority turned to the "[the plaintiff's] conten[tion] the circuit court erred in denying her motion to amend the complaint," 368 S.C. at 128, 628 S.E.2d at 880, or—in light of the circuit court's error in refusing leave to amend—whether we should remand to allow leave to amend. We explained, "An appellate court should [find the dismissal is without prejudice] when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted." 368 S.C. at 130, 628 S.E.2d at 881-82. In other words, we held an appellate court must find the dismissal was without prejudice and remand for the filing of an amended complaint unless the court concludes any amendment would be clearly futile.

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[7] We also cited *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. Ct. App. 2003), for the proposition that "dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal." *Spence*, 368 S.C. at 129, 628 S.E.2d at 881.

The majority then considered the question of futility. 368 S.C. at 131, 628 S.E.2d at 882. The majority noted the circuit court granted the Rule 12(b)(6) motion because the complaint gave "rise to no reasonable interpretation other than that the [new landowners] were bona fide purchasers for value." 368 S.C. at 116, 628 S.E.2d at 874. The majority found a remand was not required because it determined no matter how the chain of title could be alleged, the new landowner was always going to be immune from liability as a bona fide purchaser. 368 S.C. at 122, 131, 628 S.E.2d at 877, 882. The majority stated the plaintiff "failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted against" the new landowner. 368 S.C. at 131, 628 S.E.2d at 882. Any amendment to the complaint in *Spence*, according to the majority, was clearly futile.[8]

In the course of explaining our decision, however, we made a comment that has been misunderstood, and on which the court of appeals erroneously relied in this case and others.[9] We stated,

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[8] Likewise, in *Health Promotion Specialists, LLC v. South Carolina Board of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013), this Court concluded the circuit court did not abuse its discretion in denying a party's motion to amend because the "seven-year" "delay in moving to amend the Complaint was inexplicable." 403 S.C. at 632, 743 S.E.2d at 813. This Court went on, however, to consider whether the proposed amendment would have been futile. 403 S.C. at 632-33, 743 S.E.2d at 812-13. We stated "extensive discovery had been conducted" in a similar case involving the same parties, "there were no significant factual developments that warranted the untimely amendment," and "even if the amendment had been permitted, it would not have affected the grant of summary judgment to the [defendant]." 403 S.C. at 632, 743 S.E.2d at 812-13. The proposed amendment, therefore, was clearly futile because the defendant would have been entitled to judgment as a matter of law even with the amendment.

[9] *See, e.g.*, *Paradis v. Charleston Cty. Sch. Dist.*, 424 S.C. 603, 616 n.3, 819 S.E.2d 147, 154 n.3 (Ct. App. 2018) (refusing to remand for precisely the wrong reason, that the court of appeals was "unable to determine whether the circuit court abused its discretion in denying her request to amend," relying on a grant of "discretion" from *Spence*), *reh'g denied* (Oct. 18, 2018).

> On the other hand, when a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice.

368 S.C. at 130-31, 628 S.E.2d at 882. The statement must be considered in the context of two points we already made, "When a complaint is dismissed under Rule 12(b)(6) . . . , the dismissal generally is without prejudice," and, "The plaintiff in most cases should be given an opportunity to file and serve an amended complaint." 368 S.C. at 129, 628 S.E.2d at 881. We made the statement in the context of our discussion of futility, after explaining that if the proposed amendment is not clearly futile, the case must be remanded. The quoted statement makes the contrary point, that if the court of appeals determines an amendment is clearly futile, instead of remanding, it "may in its discretion affirm the dismissal of the complaint with prejudice."

In this case, we cannot definitively say it would be impossible for Skydive to succeed with an amended pleading. Allowing leave to amend the complaint, therefore, was not clearly futile. The circuit court should not have denied—and we will not deny—Skydive the opportunity to amend its complaint.

IV. Conclusion

The circuit court should have allowed Skydive an opportunity to amend its complaint pursuant to Rule 15(a). We **REVERSE** the court of appeals and **REMAND** this case to the circuit court.

BEATTY, C.J., and JAMES, J., concur. KITTREDGE, J., concurring in result only. HEARN, J., dissenting in a separate opinion.

JUSTICE HEARN: I respectfully dissent because I believe Skydive failed to preserve the issue of whether it should be allowed to file an amended complaint.

While Rule 15(a), SCRCP (which is substantially the same as its federal counterpart) requires courts to freely grant leave to amend a complaint when justice so requires, I do not believe Skydive properly invoked it in this case. Skydive never requested leave to amend before or during the hearing on Respondents' motion to dismiss. Instead, in cover letters accompanying proposed orders, Skydive requested leave to amend its complaint if the court dismissed it in full. Skydive did not include any details about how it would so amend, nor did it attach a proposed amended complaint.[10] Accordingly, I would not criticize the circuit court judge for "failing to even consider allowing Skydive to amend its complaint" when Skydive arguably failed to request to do so in a sufficient manner. [11]

The circuit court never mentioned or specifically ruled on any request for leave to amend in its written order. Indeed, it is entirely possible the court was never even aware of the request given its informal, limited nature. In my view, this situation presented a classic case warranting a Rule 59(e) motion, not only to bring the omission to the attention of the circuit court judge, but also to preserve the issue for appeal. "A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an

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[10] However, an amended complaint dated approximately one year after the correspondence appeared in the record on appeal, despite never having been submitted to the trial court. Pursuant to Rule 210(c), SCACR, the amended complaint—upon which the majority bases a portion of its futility analysis—should not have been included in the record.

[11] *See Beydoun v. Sessions*, 871 F.3d 459 (6th Cir. 2017) (district court did not abuse its discretion in denying leave to amend where plaintiff made an oral motion to amend if the court was inclined to grant defendants' motion to dismiss and did not indicate particular grounds upon which he sought to amend); *German v. Campbell Co. School Dist. No. 1*, 630 F.3d 977 (10th Cir. 2010) (trial court properly denied leave to amend where plaintiff, in her opposition to a motion to dismiss, suggested she should be allowed to amend if her pleadings were found to be infirm); *In re 2007 Novastar Financial, Inc., Securities Litigation*, 579 F.3d 878 (8th Cir. 2009) (same).

argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Skydive filed no such motion here and thereby failed to "try to convince the lower court it has ruled wrongly" before arguing to the appellate court to reverse. *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

To be clear, I would not require a party to submit a proposed amended complaint with each request to amend. But here, where Skydive merely included its request in a cover letter to a proposed order after the hearing and then failed to file a Rule 59(e) motion when the court did not rule on it in its order, I believe Skydive failed to preserve the issue on appeal.

Moreover, I do not believe the court of appeals abused its discretion by declining to modify the dismissal to one without prejudice pursuant to *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). In *Spence*, the plaintiff filed a Rule 59(e) motion seeking leave to serve an amended complaint rather than dismissal with prejudice. Nothing in *Spence* displaced our longstanding rules of preservation. As a result, I would affirm the appellate court's determination that Skydive is not entitled to file an amended complaint.

The Supreme Court of South Carolina

Re: Amendments to Rules 408 and 504, South Carolina Appellate Court Rules; Amendments to Appendix C to Part IV, South Carolina Appellate Court Rules

Appellate Case Nos. 2017-001416 and 2018-000119

ORDER

The South Carolina Bar and the Commission on Continuing Legal Education and Specialization have filed separate petitions seeking to amend Rule 408, SCACR, and the regulations implementing that rule, which are contained in Appendix C to Part IV, SCACR.

The South Carolina Bar proposed amending Rule 408 to require that lawyers complete one hour of continuing legal education devoted exclusively to instruction in substance abuse, mental health issues or stress management and the legal profession (SA/MH) every two annual reporting years, rather than every three annual reporting years. We grant the Bar's request to increase the frequency of the requirement, but modify Rule 408 to require that credit for SA/MH count toward the general continuing legal education requirements for lawyers, rather than the legal ethics and professional responsibility requirements. We also amend Rule 504, SCACR, to include a specific requirement that judges complete the same SA/MH requirement.

The Commission on Continuing Legal Education and Specialization has proposed a separate set of amendments to Appendix C to Part IV, SCACR, which contains the regulations for Rules 408, 419, and 504, SCACR. Among other things, these amendments (1) increase the number of distance learning hours a Bar member may earn each reporting year from six hours to eight hours; (2) clarify the responsibilities of sponsors of courses or programs; and (3) incorporate provisions related to the requirement that newly admitted lawyers complete an Essentials Series Course. We grant the Commission on Continuing Legal Education and

Specialization's request to amend Appendix C, with a number of modifications.

Pursuant to Article V, Section 4 of the South Carolina Constitution, Rules 408 and 504, SCACR, and Appendix C to Part IV, SCACR, are amended as set forth in the attachment to this Order. These amendments shall be effective May 1, 2019, to permit the Commission on Continuing Legal Education and Specialization to make appropriate changes to its recording systems and notify sponsors of the SA/MH changes.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
March 13, 2019

Rule 408(a)(2), South Carolina Appellate Court Rules, is amended to provide:

(2) Continuing Legal Education Requirements for Members of the South Carolina Bar. Except as provided below, all members of the South Carolina Bar shall be required to attend at least fourteen (14) hours of approved CLE courses each reporting year. At least two (2) of the fourteen (14) hours required annually shall be devoted to legal ethics/professional responsibility (LEPR). At least once every two (2) reporting years, the member must complete one (1) hour of CLE devoted exclusively to instruction in substance abuse, mental health issues or stress management and the legal profession. Substance abuse/mental health credit shall be a part of the general CLE requirement and cannot be applied to satisfy the LEPR requirement. The following members of the South Carolina Bar shall be exempt from these requirements:

> **(A)** specialists certified pursuant to this Rule who satisfy the CLE requirements of their specialty; provided, however, that at least two (2) hours of the CLE credits completed by certified specialists shall be devoted to LEPR. At least once every two (2) reporting years, the member must complete one (1) hour of CLE devoted exclusively to instruction in substance abuse, mental health issues or stress management and the legal profession.

. . . .

Rule 408(b)(2) is amended to transfer "and" from the end of paragraph (b)(2)(E) to the end of paragraph (b)(2)(G) and add new paragraph (b)(2)(H), which provides:

(H) make a list of all fees available to the public.

Rule 504(b), South Carolina Appellate Court Rules, is amended to provide:

(b) Continuing Legal Education Requirement. A judge shall complete a minimum of 15 hours of continuing legal education approved by the Commission on Continuing Legal Education and Specialization (Commission) each year. The annual reporting period for purposes of this Rule shall run from March 1 through the last day in February. A judge may be given credit in one or more succeeding reporting periods, not exceeding three (3) such periods, for completing more than fifteen (15) hours of approved education during any one reporting period. At least once every two (2) reporting years, a judge must complete one (1) hour of approved education devoted exclusively to instruction in substance abuse, mental health issues or stress management and the legal profession.

Appendix C to Part IV, South Carolina Appellate Court Rules, is amended to provide:

APPENDIX C

REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION FOR JUDGES, MEMBERS OF THE SOUTH CAROLINA BAR, AND FOREIGN LEGAL CONSULTANTS

I. Purpose

These Regulations implement Rules 408, 419, and 504 of the South Carolina Appellate Court Rules (SCACR).

II. Requirements

A. Members of the South Carolina Bar.

1. Continuing Legal Education Requirements. Rule 408, SCACR, governs the mandatory continuing legal education (MCLE) requirements for members of the South Carolina Bar.

2. Legal Ethics/Professional Responsibility Credit. Legal ethics/professional responsibility (LEPR) credit shall include, but not be limited to, instruction focusing on the Rules of Professional Conduct as they relate to law firm management; malpractice avoidance; lawyer fees; legal ethics; and the duties of lawyers to the judicial system, the public, clients, and other lawyers. LEPR may also include, but not be limited to, instruction focusing on the elimination of bias in the legal profession. Elimination of bias instruction includes programming designed to educate lawyers on the recognition, identification, prevention, and elimination of bias in the legal setting as well as programming on diversity in the legal profession.

3. Carry-forward CLE Credit. A member may carry a maximum of fourteen (14) hours forward to the next reporting year, of which a maximum of two (2) hours may be LEPR credit. Credit for online and telephone courses in excess of the maximum eight (8) hours per reporting year cannot be carried forward. Credit for Substance Abuse Mental Health (SA/MH) courses may

not be carried forward from one two-year reporting cycle to the next.

B. Newly Admitted Members of the South Carolina Bar Admitted Pursuant to Rule 402, SCACR.

1. Rule 408, SCACR, governs the MCLE requirements for newly admitted members admitted pursuant to Rule 402, SCACR. New members are exempt from MCLE requirements during the reporting year of their admission. Except for the South Carolina Bar's Essential Series credits, CLE hours earned by new admittees during the reporting year of their admission cannot be carried forward to satisfy the MCLE requirements of their first reporting year.

2. Failure to complete the Essentials Series course as specified in Rule 408, SCACR, will result in administrative suspension pursuant to Rule 419, SCACR.

C. Newly Admitted Limited Certificate Members.

1. Limited certificate members licensed under Rule 405, SCACR (Limited Certificate of Admission to Practice Law in South Carolina), Rule 414, SCACR (Limited Certificate of Admission for Clinical Law Program Teachers), Rule 427, SCACR (Limited Certificate of Admission for Judge Advocates), and Rule 430, SCACR (Limited Certificate of Admission for Military Spouse Attorneys) are not exempt from MCLE requirements during the reporting year of their admission; however, compliance with the MCLE requirements is waived for limited certificate members admitted to practice after December 31 of that reporting year.

2. Rule 408, SCACR, exempts limited certificate members licensed under Rule 415, SCACR (Limited Certificate of Admission for the Retired and Inactive Attorney Pro Bono Participation Program) from the MCLE requirements.

D. Foreign Legal Consultants.

Rule 408, SCACR, governs the MCLE requirements for foreign legal consultants admitted to practice pursuant to Rule 424, SCACR (Licensing of Foreign Legal

Consultants).

E. Judicial Members.

1. Judicial Continuing Legal Education Requirements. Rule 504, SCACR, governs the mandatory judicial continuing legal education (JCLE) requirements for judicial members of the South Carolina Bar.

2. Carry-forward JCLE Credit. Not more than thirty (30) hours of JCLE credit may be carried forward from one reporting year to the next reporting year. If a Bar member's status changes from a judicial member to a regular member, carry-forward credit cannot exceed the maximum carry-forward credit approved for Bar members.

3. Mandatory Attendance at Designated Educational Activities. Without regard to any JCLE credit accumulated pursuant to the requirements of Regulation II(E)(1), judicial members shall attend any educational activity designated as mandatory by the Supreme Court of South Carolina. "Educational activity" means any course, seminar, program, conference, roundtable, or other activity which has been accredited for JCLE purposes and which has been designated as mandatory for judicial members. Attendance at an educational activity may be designated as mandatory for all judicial members or only for certain specified categories of judicial members (for example: mandatory for probate judges only).

III. Exemptions

A. Rule 408 SCACR, governs members who are exempt from the MCLE requirements.

B. For JCLE requirements imposed by Rule 504, SCACR, judicial members are exempt in the year in which they are sworn into office, provided they have satisfied the MCLE requirements for members of the South Carolina Bar.

IV. Hours and Accreditation

A. General.

One (1) hour of accredited CLE means sixty (60) minutes of actual instruction as teacher or student at any CLE course which has been accredited by the Commission on Continuing Legal Education and Specialization (Commission). The duration of the course accreditation extends through the last day of the calendar year in which the course is held. Except for In-House CLE courses under Regulation IV(D) and Online and Telephone courses under Regulation V(B), which must be prospectively accredited, the Commission will consider applications for retroactive and prospective accreditation of courses.

B. Accredited Sponsor Status.

The Commission may extend presumptive approval to a sponsor for all CLE courses or activities presented by that sponsor which are in compliance with the accreditation standards set forth in Regulation V. Notwithstanding a sponsor's accredited sponsor status, the Commission may deny accreditation for any course found not to meet the standards and may revoke accredited sponsor status for good cause at any time after sixty (60) days' notice to the accredited sponsor. Accredited sponsor status is not available to law firms, corporate legal departments, and similar organizations.

A sponsor seeking accredited sponsor status shall submit to the Commission:

1. An application for accredited sponsor status (forms available from the Commission);

2. Copies of written materials described in that application form;

3. An application fee as assessed by the Commission; and

4. Any further information the Commission requires.

Sponsors granted accredited sponsor status, as designated by the Commission, shall pay an annual fee as specified by the Commission. Accredited sponsor status must be renewed every five (5) years. A list of sponsors granted accredited sponsor status can be obtained from the Commission.

C. Accreditation of Courses.

1. CLE courses presented by sponsors that have not been granted accredited sponsor status will be considered for accreditation on an individual basis. A Uniform Application of Approval for an individual course may be obtained from the Commission and shall be submitted to the Commission, along with the required fee, by the sponsor or by a lawyer who desires credit for attending the course. The non-accredited sponsor or lawyer shall also submit the required attachments as found on the Uniform Application for Approval.

2. Application for approval of CLE by a sponsor granted accredited sponsor status may be made by submitting a Uniform Application of Approval. The Commission may waive the submission of any of the attachments as found on the Uniform Application for Approval.

D. In-House CLE.

1. In-house CLE, which is defined as CLE courses, training, and programs sponsored or offered by law firms (individually or collectively), corporate legal departments, and similar organizations primarily for the education of their members and employees, may be approved for credit under the rules and regulations applicable to other sponsors, subject to the following additional conditions:

(a) Courses shall be submitted for approval on a course-by-course basis.

(b) The Uniform Application for Approval, including all written material, must be received by the Commission on or before the date on which the course is to be held.

(c) The course must be attended by at least five (5) lawyers, not including the instructors.

(d) Not more than one-half of the approved credits for any annual reporting year may be earned through in-house courses.

(e) In-House courses must be submitted for accreditation on a prospective basis. Retroactive requests for the accreditation of these

courses will be denied.

2. Courses, training, and programs sponsored by public or governmental organizations and their subdivisions, agencies, etc. are not defined as in-house programming. These entities shall follow the regular procedures for submitting courses for accreditation.

E. Client Seminars.

Client seminars, which are defined as educational activities sponsored by a law firm in which the target audience is clients or potential clients of the sponsoring law firm, shall not be accredited even though the educational activities otherwise satisfy the accreditation standards specified in Regulation V. For this purpose, a law firm may be a professional corporation, professional association, partnership, sole practitioner, or any other association of lawyers engaged in the private practice of law.

F. Fees.

Fees for the processing of Uniform Applications for Approval of individual courses or applications for accredited sponsor status and fees for other applications and purposes shall be as specified by the Commission.

G. Enhanced Credit for Teaching.

Upon application to the Commission, enhanced CLE credit may be earned through teaching at an accredited CLE activity. Information regarding the enhanced credit, including qualifications for the credit, the formula for calculating the credit, and exceptions to the credit, may be obtained from the Commission. Written requests for teaching credit must be received by the Commission within sixty (60) days after the live presentation or within sixty (60) days after the sponsor's recording of the online or telephone presentation.

H. CLE Credit for Legal Writing.

Upon application to the Commission, CLE credit may be earned through authorship of articles or books concerning substantive or procedural law which are

published or accepted for publication in approved third party publications. Information about this credit may be obtained from the Commission. Written requests for writing credit must be received by the Commission within one (1) year of the publication of the article or book.

V. Accreditation Standards

A. Standards.

The following standards will be considered by the Commission in the granting, denying, or revoking of accredited sponsor status and the granting, denying, or revoking of accreditation of a course or a part of a course:

1. Courses shall have significant intellectual, educational, or practical content, and their primary objective shall be to increase Bar members' professional competence.

2. Subject matter shall deal primarily with the theory, practice, or ethics of law and the legal profession.

3. Courses shall be directed to and intended for an audience of lawyers or judges.

4. Faculty members shall be qualified by practical or academic experience to teach the subject.

5. High quality written materials shall be distributed to participants.

6. Traditional CLE courses or activities, such as live presentations and video replays, shall be conducted in a suitable classroom setting conducive to learning.

7. Ethical considerations pertaining to the subject matter should be included in the course.

8. The course must consist of not less than thirty (30) minutes of actual instruction in order to qualify for educational credit.

9. The sponsor shall keep accurate attendance records and retain them for a period of at least two (2) years. Additionally, sponsors shall maintain copies of the Uniform Application for Approval for a period of one (1) year following course accreditation.

10. The sponsor shall report attendance in a form or manner prescribed by the Commission within thirty (30) days of the end of the course. The attendance report shall include the course number assigned by the Commission and the attendees' names and South Carolina Bar numbers.

11. The sponsor shall provide attendees with an evaluation form to complete and shall retain this information for a period of two (2) years following the course. The Commission shall make available sample evaluation forms for use by sponsors.

12. The sponsor shall retain course material for a period of two (2) years following the course.

13. The sponsor shall not advertise course accreditation until the course is approved by the Commission. Course advertisement shall include a representation of the level of instruction, e.g. introductory, intermediate, advanced, or multiple levels.

14. Sponsors shall offer assistance to any attorney with a dispute regarding the administration, representation, or content of a course. Disputes are to be resolved between the attorney and the sponsor.

15. The Commission has the authority to audit, examine, inspect, and review the operations of sponsors, including instructors, classes, curricula, teaching materials, and facilities, to assure compliance with the applicable South Carolina Appellate Court Rules and these Regulations. Sponsors have the obligation to provide the Commission, upon request, with such information and documents concerning their operations.

16. Failure to comply with sponsor requirements, or other good cause shown, may result in the Commission's denial or revocation of a course accreditation, or denial of future accreditation of the sponsor's courses, or any other sanction deemed appropriate by and in the discretion of the

Commission.

B. Accreditation of Online and Telephone Courses.

1. Online and telephone courses, including teleseminars, teleconferences, webcasts, webinars, and on-demand courses are acceptable provided:

(a) A faculty member is in attendance or available by telephone or e-mail to comment and answer questions; or

(b) Other appropriate mechanisms, as determined by the Commission, are present to enable the attendee to participate or interact with the presenters and other attendees. Appropriate mechanisms include quizzes or examinations, response tracking, user prompts, and instant messaging.

2. In addition to meeting the standards of Paragraph (A), above, online and telephone courses:

(a) Shall utilize some mechanism to monitor course participation and completion in such a manner that certification of attendance is controlled by the provider. Courses shall not be susceptible to a "fast forward" finish by attendees.

(b) High quality written materials shall be available to be downloaded or otherwise furnished so that attendees have the ability to refer to such materials during and subsequent to the presentation.

(c) The Uniform Application for Approval of an online/telephone course shall be received and approved by the Commission before the start of the course.

(d) Telephone courses will be accredited for the actual time spent to a maximum of ninety (90) minutes per activity, and online courses, to include live webcasts, will be accredited for the actual time spent to a maximum of eight (8) hours per activity.

(e) Sponsors shall furnish to the Commission password and/or log-in

capabilities for accredited courses. Access will allow for review of course mechanisms, such as interactive functionality. Any such activity may be audited by one or more representatives of the Commission without charge.

(f) Online and telephone courses must be submitted for accreditation on a prospective basis. Retroactive requests for accreditation of these courses will be denied.

3. CLE credit earned through online or telephone courses and applied to the annual fourteen (14) hour minimum requirement shall not exceed eight (8) hours of credit per reporting year.

VI. Reports and Fees

A. Members of the South Carolina Bar and Foreign Legal Consultants.

On forms prepared by the Commission and available through its offices (or a reasonable facsimile), each member of the South Carolina Bar and foreign legal consultant not exempt from Regulation II(A) shall, not later than March 1 of each year, file with the Commission a sworn annual report of compliance for the preceding annual reporting year and pay an annual filing fee as specified by the Commission. Any member or foreign legal consultant submitting a report of compliance after March 1 shall pay, in addition to the annual filing fee, a late filing fee as specified by the Commission. The late filing fee shall be increased as specified by the Commission for any member or foreign legal consultant who files after the filing deadline if that member or foreign legal consultant has filed late and paid a late filing fee on any prior occasion.

B. Judicial Members.

On forms prepared by the Commission and available through its offices (or a reasonable facsimile), each judicial member specified in Rule 504(a), SCACR, shall, not later than April 15 of each year, file with the Commission an annual report of compliance for the preceding educational period and pay an annual filing fee as specified by the Commission. Any judicial member submitting a report of compliance after April 15 shall pay, in addition to the annual filing fee, a late fee as specified by the Commission.

C. Amended Reports of Compliance.

1. For the purposes of these Regulations, an amended compliance report is one that seeks to change a report of compliance previously submitted to the Commission. A report of compliance may be amended within one (1) year from the date that the original report was received by the Commission or one (1) year from the filing deadline for the original report, whichever date is later.

2. An amended report shall be executed in the same manner as the original report it is amending and shall be accompanied by an amended filing fee in the same amount as the original filing fee. A late fee may be required if appropriate. An amended filing fee is assessed for each occasion that the Bar member resubmits his or her compliance report.

D. Revenue from Filing and Other Fees.

The fees specified in these Regulations and fees paid by certified specialists shall be used only to defray operating expenses of the Commission and its staff and may be adjusted by the Commission from time to time in order to produce the actual income required for the expenditures, plus a reasonable reserve fund.

VII. Establishing Compliance; Non-Compliance

A. Members of the South Carolina Bar and Foreign Legal Consultants.

1. To establish compliance, members of the South Carolina Bar and foreign legal consultants subject to MCLE requirements shall:

(a) Complete the minimum annual CLE and LEPR requirements set forth in Rule 408, SCACR, or other applicable rule, or have obtained sufficient carry-forward hours from a previous reporting year;

(b) If required for that annual reporting period, complete the SA/MH requirement pursuant to Rule 408, SCACR;

(c) File an annual compliance report reflecting completion of the

MCLE requirements; and

(d) Pay all fees.

2. Filing Deadline; Filing Defined. The filing deadline is March 1 of each reporting year. To be timely filed, reports and fees must either be delivered to the CLE Commission no later than March 1, or if mailed, postmarked by the United States Postal Service no later than March 1 of that reporting year. Office machine postmarks are insufficient to establish compliance with the filing deadline. Reports and fees may also be sent using UPS, FedEx, and similar carriers, provided they are sent no later than March 1. Package tracking numbers will be used to determine compliance with the March 1 filing deadline.

3. Non-Compliance; Amended Reports; Amended and Late Filing Fees.

(a) Compliance reports filed without sufficient CLE hours, LEPR hours, or SA/MH hours listed in CLE Transcripts do not establish compliance with the MCLE requirements. The Commission will notify persons whose compliance reports do not reflect sufficient hours. Members and foreign legal consultants must resubmit these reports with the amended information in the CLE Transcript showing that the deficit hours were earned. An amended filing fee will be assessed for the resubmitted reports. If the resubmitted report is filed after the reporting deadline of March 1, a late filing fee will be assessed in addition to the amended filing fee.

(b) An amended filing fee will be assessed for each occasion in which the member or foreign legal consultant resubmits a report in order to establish compliance, including where an amended report is filed prior to the March 1 deadline.

(c) Reports filed March 2 or later will be assessed a late filing fee, which must accompany the report when it is submitted for filing. If a report is timely filed, but fees are not included, a late filing fee will be assessed.

4. A member of the Bar or a foreign legal consultant who fails to comply

with the MCLE requirements will be suspended as provided by Rule 419, SCACR. Provisions governing notice of failure to comply, notice of suspension, the publication of names of suspended lawyers, and reinstatement of lawyers who have failed to comply are set forth in Rule 419, SCACR.

B. Judicial Members.

Rule 504, SCACR, governs compliance and non-compliance with the mandatory JCLE requirements for judicial members, as specified in Rule 504(a), SCACR, who are not otherwise exempt.

VIII. Waivers and Extensions

A. Waivers.

In individual cases involving extraordinary hardship or extenuating circumstances, the Commission may waive or modify the requirements of Regulation II(A). When appropriate, and as a condition for any such waiver or modification, the Commission may proportionally increase the member's requirements for the succeeding annual reporting year. For example, if a member receives a waiver of six (6) hours credit for one reporting year, the requirement for the following reporting year may be increased by six (6) hours.

B. Extensions.

1. Members of the South Carolina Bar or Foreign Legal Consultants. The Commission has no authority to extend the deadlines for compliance reporting, and all requests for such extensions made to the Commission will be denied.

2. Judicial Members. Rule 504, SCACR, governs the extension of the deadline for filing annual compliance reports by judicial members.

IX. Reconsideration

Any sponsor or person subject to these regulations who is aggrieved by a decision or action of the Commission (aggrieved party) may request reconsideration. A

request for reconsideration must be submitted to the Commission in writing within thirty (30) days from the mailing of notice of the decision to the aggrieved party; or, if an action is required to be published in a South Carolina Bar publication, within thirty (30) days of the publication of notice of the action in a South Carolina Bar publication. A request for reconsideration may be accompanied by supporting evidence or documentation, including affidavits. The request for reconsideration may, but need not, include a demand for a hearing. If a hearing is demanded, the hearing will be heard by the Commission or by a committee appointed by the Commission for that purpose, and the aggrieved party may present evidence and argument in support of the request for reconsideration.

X. Appeals

Any person aggrieved by the operation of these Regulations, and who has exhausted all other remedies available hereunder, may petition the Supreme Court of South Carolina for redress; provided, however, that any appeal must be submitted to the Supreme Court, in writing, not later than thirty (30) calendar days after notice of final action by the Commission is mailed (via United States Postal Service) to the individual concerned.