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CAUSE NO. 06-0878

IN THE

SUPRME COURT OF TEXAS

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IN RE: ALLSTATE COUNTY MUTUAL INSURANCE COMPANY  
AND DAVID GONZALEZ

Relators

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ORIGINAL PROCEEDING FROM THE COUNTY COURT AT LAW NUMBER 5  
HIDALGO COUNTY, TEXAS  
CAUSE NO. CL-05-3167-E  
HON. ARNOLDO CANTU, JR.

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**REPLY TO REAL PARTIES IN INTEREST'S RESPONSE TO  
PETITION FOR WRIT OF MANDAMUS**

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**EMERGENCY RELIEF REQUESTED**

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## ISSUES PRESENTED

**DID THE TRIAL COURT ABUSE ITS DISCRETION IN ALLOWING BAD FAITH CLAIMS HANDLING DISCOVERY TO PROCEED IN A SUIT AGAINST A LIABILITY INSURANCE CARRIER EVEN THOUGH TEXAS DOES NOT ALLOW THIRD PARTY DIRECT ACTIONS AS A MATTER OF LAW**

1. Did the trial court clearly abuse its discretion in ordering Defendants to respond to overly broad, harassing and patently irrelevant discovery requests in light of well established principles that prohibit third parties from suing liability insurance companies in the State of Texas?
2. Did the **trial** court abuse its discretion in ordering Defendants to respond to **discovery** that is overly broad and not narrowly tailored to reveal relevant information?

## REPLY TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS

The issue presented to the Texas Supreme Court for review in this Petition for Writ of Mandamus *is* whether the trial court abused its discretion in allowing bad faith claims handling discovery to proceed in a third-party action against an insurance carrier **even though Texas** does not **allow** direct actions as a matter of **law**. Allstate respectfully submits that the **answer** to that question is yes.

### I. Plaintiffs claims are legally barred

Real parties **in** interest (hereinafter referred to as "real parties in interes" or "plaintiffs") **wholly** failed to address the threshold issue **presented** by this case: whether they can engage in had faith claims handling discovery when Texas prohibits direct actions against third party **liability** carriers as a matter of law. Real parties in interest present no case which stands for the proposition that Texas is a **direct** action **State**. They **present** no case which stands for the proposition that third-parties can sue insurers in Texas. They present no case which establishes that *Allstate Ins. Co. vs. Watson 876 S.W.2d 145 (Tex.1994)* does not apply. They present nu case which stands for the proposition that bad faith claims handling discovery can proceed against an insurer in an ongoing litigation against its insured. Real parties in interest have **presented** no case as to support these propositions because none exist.

## II. A trial judge abuses his discretion when he does not follow the law

A trial judge has no discretion in determining what the law is or applying the law to the facts, even where the law is unsettled. *In re Prudential 148 S.W.3d 124, 135*. A clear failure of the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992)*. The primary objection presented to the trial court was that plaintiffs were not entitled to engage in discovery in this case because their claims are prohibited as a matter of law. See Tab I, M Petition for Writ of Mandamus. By signing an order allowing discovery to proceed the trial court judge made a determination that Texas allows direct actions, that the Supreme Court's decision in *Watson* is wrong and that third parties may sue for unfair settlement practices, despite what the Texas Insurance Code specifically states. This is a clear failure on the part of the trial court to analyze and apply the law. This failure to follow the law is an abuse of discretion warranting inandamus relief.

Allstate notes that Real Parties in Interest cite several inapposite cases and the Texas Administrative Code in an effort to give validity to their claims. However, neither *McAmish, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex. 1999)*, or *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co., 51 S.W.3d 573, 580 (Tex. 2001)* concern whether a third party may directly sue an insurance carrier for unfair settlement practices. Likewise the Texas Administrative Code does not confer a private cause of action upon individuals injured by unfair settlement practices.

*See Johnson v. Essex Ins. Co., 2002 Tex. App. Lexis 588, citing Tex. Ins, Code Ann. Art. 21.21-2 (Vernon Supp. 2000); 28 Tex. Admin. Code §21.203(West 2001)(Tex. Dept. of Ins.); Allstate v. Watson, supra.*

Allstate repeatedly pointed out the law of the **State** of Texas to the trial court in its pleadings, objections to discover)', response to the motion to compel and motion for summary judgment. See Tabs G, J, M, and N, Petition for Writ of Mandamus. To the extent the trial judge felt there was some validity to the claims presented Allstate gave the trial judge the opportunity to decide what was and was not discoverable. See Tab L, **Petition** for Writ of Mandamus. Instead, the trial judge ignored established legal precedent and allowed wholesale bad faith discovery to proceed. This constitutes an abuse of discretion warranting mandamus relief.

**I . Claims that are barred as a matter of law should not proceed to discovery**

Plaintiffs complain that Allstate has cited no case for the proposition that if you have a legal defense you don't have to engage in discovery. That is not the question presented. Allstate's complaint centers on the nature, scope and breadth of the discovery sought considering that these **are** claims by third parties against a liability insurer for **unfair** settlement practices. Plaintiffs are seeking bad faith claims handling discovery. The Court cannot consider the complaint about the discovery without considering the claims plead. Allstate is not simply putting forth a legal defense – they have presented a legal bar. A legal prohibition. No amount of discovery can create a cause of action which does not exist. No amount of discovery can create standing where none exists.

First, **if** what plaintiff **poses** is **true**, any third party plaintiff who can convince a **trial** court judge to ignore the law will have a license to engage in bad **faith** claims **handling** discovery without limitation. Second, Allstate would assert that this particular situation presents a case of first impression. Because the law is so well settled, direct actions against liability carriers are simply not filed. If they are, they are thrown out because they are prohibited as a matter of law.

Interestingly, plaintiffs cite no case for the proposition that as third parties they can engage in bad faith claims handling discovery. Allstate can cite numerous cases which hold that third parties have no direct cause of action for unfair settlement practices against **liability** insurers. *See Watson supra*, and its progeny. If you can't bring the claim to begin with whether you can engage in discovery is simply a red herring.

#### **IV. Bad Faith Claims Handling Discovery is not "basic"**

Plaintiffs **complain** that "basic" discovery has been held **up** for more than a year. **See** Real Parties in Interest Response to Petition for Writ of Mandamus, **p.** 12. Basic discovery is not 300+ requests of everything from claims files **to** personnel files to settlement practices, policies and procedures. Basic discovery is not **authorizations** to obtain confidential information concerning insureds, deposition transcripts on the topic of **insurance**, and protocols for calculating property damage under UM/UIM coverages. Basic discovery is not net worth information, corporate structure documents and judgments in other cases.

The discovery sought is not basic but rather is overly broad, frivolous and



harassing **on** its face when you consider that Allstate has established that plaintiffs are legally barred from proceeding based on Supreme Court precedent. the Texas Insurance Code and the Rules of Civil Procedure.

The discovery sought is not basic but rather irrelevant and not narrowly tailored to elicit specific information when **you** consider plaintiffs contention that this is a breach of settlement "contract" **cause** of action over a property damage claim.

The discovery sought is not basic and will inject issues of insurance and prejudice the rights of the Chos when you consider that this discovery is sought in the context of the **plaintiffs'** ongoing litigation against the Chos.

## CONCLUSION

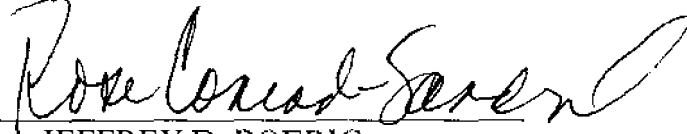
A cursory review of Plaintiffs' pleadings establishes that their complaint is that Allstate engaged in unfair claims settlement practices. Their Petition quotes language directly out of the Texas Insurance Code. See Tab E. Petition for Writ of Mandamus. The discovery sought tracks the types of things that are considered unfair settlement practices. See Tab I, Petition for Writ of Mandamus. Allstate objected to all discovery on the grounds that Plaintiffs' **had** absolutely no right to proceed with discovery for these **types** of **claims** because as third-parties' they had no standing to proceed **as a** matter of law. The trial court ignored this valid objection to the discovery presented. The trial court has no discretion when it comes to matters of law. In **failing to** follow the law, the trial court's order allowing discovery to proceed constitutes an abuse of discretion. Allstate has no adequate remedy by **appeal**. **As** such, Allstate has established that

mandamus relief is warranted.

The question presented *is* whether the trial court abused its discretion in allowing bad faith claims handling discovery to proceed even though Texas does not allow direct actions *as* a matter *of* law. Allstate respectfully submits that the answer to that question is *Yes*

WHEREFORE, PREMISES CONSIDERED, for all the reasons set out above. Relators respectfully request that the Court grant the mandamus petition and direct Judge Cantu to issue **an** order denying Plaintiffs Motion **to** Compel or in the alternative and at the very least to reconsider his ruling.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the foregoing has been mailed, Certified Mail, Return Receipt Requested, to the Attorneys of Record, as follows:

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on this 30<sup>th</sup> day of **October**, 2006.

  
**ROSEMARY CONRAD-SANDOVAL**

