CAUSE NO. 06-0878

IN THE

SUPREME COURT OF TEXAS

_____

IN RE: ALLSTATE COUNTY MUTUAL INSURANCE COMPANY
AND DAVID GONZALEZ

Relators

_____

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

RELATORS' BRIEF ON THE MERITS

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DAVID GONZALEZ

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IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all parties to the trial court's Order, as well as the names and addresses of all trial and appellate counsel.

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CASES

STATUTES & CODES

STATEMENT OF THE CASE

This case arises out of an automobile accident that Jorge Manllos Karim and Terisita De Mannlo ("Real Parties in Interest" or "Plaintiffs") were involved in on February 6, 2004 with Defendants Tae Sun Cho and Sang M. Cho (the "Cho's"). The Plaintiffs sued both the adverse driver and the vehicle owner (the Cho's) as well as the Cho's insurance carrier, Allstate County Mutual Insurance Company ("Allstate" or "Relator") and its adjuster David Gonzalez ("Gonzalez" or "Relator"). The order challenged in this petition was issued by the trial court on July 19, 2006. In that order, the trial court granted Plaintiffs' Motion to Compel Defendants, Allstate County Mutual Insurance Company and its adjuster David Gonzalez to respond to numerous voluminous discovery requests despite the fact that Texas is not a direct action state and therefore, the Plaintiffs have no standing to sue Allstate and its adjuster as a matter of law. In conjunction with the order granting Plaintiffs Motion to Compel, the trial court also denied Defendants' Motion to Dismiss and/or for Summary Judgment.

An Original Petition for Writ of Mandamus was filed in the 13th Court of Appeals at Corpus Christi on August 18, 2006. Without explanation, Justices Yanez, Rodriguez and Garza issued a per curiam opinion denying the relief requested on September 28, 2006. Relators thereafter sought relief from the Texas Supreme Court on October 9, 2006.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a Writ of Mandamus. Tex. Const. art 5, §3; Tex. Gov't Code § 22.002(a).

This Petition for Writ of Mandamus was first filed in the 13th Court of Appeals, which denied the relief requested. A copy of the Order denying the Petition is included in Tab P, in the Appendix to the Petition for Writ of Mandamus.

ISSUE PRESENTED

1. 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

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

TO THE HONORABLE SUPREME COURT:

Relators, Allstate County Mutual Insurance Company and David Gonzalez submit this Petition for a Writ of Mandamus complaining of the order of the Honorable Arnoldo Cantu, Jr., Presiding Judge of County Court at Law Number Five (5) for Hidalgo County, Texas. This lawsuit concerns Plaintiffs' claim for property damage arising out of an automobile accident they were involved in with Tae Sun Cho. However, this is no ordinary automobile accident case. In addition to suing the adverse driver, the Plaintiffs have brought suit against the adverse driver's insurance carrier in direct contravention of Texas law. This Court should grant this Petition because requiring Allstate and its adjuster to be subjected to the overbroad, burdensome, harassing and irrelevant discovery in this type of case is clearly erroneous and constitutes an abuse of discretion.

This lawsuit was filed on December 13, 2005. *See* App. to Petition for Writ of Mandamus Tabs E & F. Plaintiffs sued Tae Sun Cho and San M. Cho as well as Allstate and Gonzalez. *Id.* Plaintiffs' complaints against Allstate and Gonzalez center on failed settlement negotiations. *Id.* Plaintiffs allege that Allstate engaged in unfair claims settlement practices. *Id.* Specifically, Plaintiffs pleadings complain that:

> Defendants jointly or singularly misrepresented facts or policy provisions relating to coverages and failed to attempt in good faith to effectuate a prompt, fair and equitable settlement of the claim submitted when liability became reasonably clear. Plaintiffs contend Allstate and its agents and employees did not attempt to settle in good faith the property damage claims in order to influence settlement under the bodily injury portions of the Cho policy. *See* App. to Petition for Writ of Mandamus Tab E pp. 5-6.

In conjunction with filing the lawsuit, Plaintiffs served thirty-two (32) interrogatories, eighty-nine (89) requests for production, and thirty (30) requests for admissions to Relator, Allstate. Additionally, Plaintiffs served twenty-seven (27) interrogatories, eighty-nine (89) requests for production and thirty-five (35) requests for admissions to Relator, Gonzalez. *See* App. Tab I to Petition for Writ of Mandamus. Relators filed an answer to the Petition objecting to the standing of Plaintiffs to pursue these claims because the claims were barred as a matter of law. *See* App. Tabs G & H to Petition to Writ of Mandamus. Relators objected to all of the discovery pointing out that Plaintiffs' discovery requests were overly broad and unduly burdensome, frivolous and harassing in light of well established principles that prohibit direct actions by third parties against insurance companies. *Id.*

Plaintiffs filed a Motion to Compel. *See* App. Tab K to Petition for Writ of Mandamus. A hearing was held on the motion on April 17, 2006. *See* App. Tab C to Petition for Writ of Mandamus. The trial judge took the matter under advisement. Both parties filed proposed orders. *See* App. Tabs A & L to Petition for Writ of Mandamus. Allstate and Gonzalez subsequently filed Motions to Dismiss and/or for Summary Judgment asserting the same arguments they did in response to Plaintiffs' discovery requests and their motion to compel. *See* App. Tabs M & N. Another hearing was held on July 19, 2006. *See* App. Tab D to Petition for Writ of Mandamus. At that time, the judge denied the summary judgment and ordered Relators to respond to Plaintiffs' discovery requests in total. *See* App. Tabs A & B to Petition for Writ of Mandamus.

Petitioners sought Mandamus Relief in the 13th Court of Appeals on August 18, 2006. Without explanation, that Petition was denied in a per curiam order entered on September 28, 2006. Petitioners thereafter sought relief from the Supreme Court on October 9, 2006.

SUMMARY OF THE ARGUMENT

Mandamus is necessary in this case to correct the Trial Court's clear abuse of discretion and because Relators do not have an adequate remedy by appeal. Plaintiffs are third parties suing Allstate and David Gonzalez for unfair settlement practices in the handling of their property damage claim. Without question, Texas is not a direct action state. Well established case law, statutes and procedural rules prohibit third parties from directly suing insurance carriers. It is within this context that the Trial Court allowed bad faith claims handling discovery to proceed.

The Trial Court clearly abused its discretion when it ordered Relators to respond to irrelevant, over broad, discovery requests because the claims presented by Plaintiffs against the insurance company and its adjuster are invalid as a matter of law. The discovery requests are so broad and far reaching as to require discovery into every aspect of insurance claims handling, information on Relators' insureds and it's employees and testimony on insurance and property damage claims, without limitation. Given the overwhelming authority demonstrating that the claims against Relators have no basis under Texas law, this is one of those cases in which the proper remedy for the trial court would have been to deny Plaintiffs' Motion to Compel and to dismiss their claims against the insurance company and its adjuster. Alternatively, the Trial Court failed to consider what discovery might be narrowly tailored to support a claim which has a valid legal basis.

Allstate and David Gonzalez have no adequate remedy by appeal. The discovery sought bears no reasonable or rational relationship to any cause of action that Plaintiffs may

conceivably be able to present. The discovery sought goes to causes of action that Plaintiffs have no standing to bring as a matter of law. The discovery is sought in the context of ongoing litigation with the Allstate insureds involved in the automobile accident with the Plaintiffs. Discovery in this instance creates conflicts in the duties Allstate owes to its insureds and the duties Plaintiffs seek to have extended to them. Of course, the Supreme Court has already determined that such duties do not exist as a matter of law.

The Trial Court clearly abused its discretion when it ignored controlling law and allowed discovery as to these claims to proceed and as such, mandamus is necessary to correct this injustice.

ARGUMENT

ISSUE 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

I. MANDAMUS STANDARD

There are two requirements for the issuance of a writ of mandamus. "One is to show that the trial court clearly abused its discretion," and the other "is to show there is no adequate remedy by appeal." *In Re Prudential Ins. Co. of America,* 148 S. W. 3d 124, 135-36 (Tex. 2004). The first requirement is satisfied by an error of law or an error in applying law to facts, because "a trial court has no discretion in determining what the law is or applying the law to the facts, even where the law is unsettled." *Id.* at 135. Mandamus relief is appropriate if the trial court could reasonably have reached only one decision and it's finding to the contrary is arbitrary and unreasonable. *Walker v. Packer,* 827 S.W.2d 833 (Tex. 1992). A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Johnson v. Fourth Court of Appeals,* 700 S.W.2d, 916 (Texas, 1985) (holding mandamus is warranted when the facts and law permit but one decision); *See also, In Re Dillards Department Stores, Inc.* 198 S.W.3d 778 (Tex. 2006) (holding trial court abused its' discretion in failing to compel arbitration).

The second requirement is lack of an adequate appellate remedy. Whether an appellate remedy is adequate depends heavily on the circumstances presented and is

guided by general principles, not simple rules. *In Re Prudential, supra*. Although mandamus is not an equitable remedy its issuance is largely controlled by equitable principles. *Id.* Rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue.

This is a mandamus proceeding in which Allstate and David Gonzalez contend that the Trial Judge abused its discretion in allowing bad faith claims handling discovery to proceed in a direct action by a third party against a liability insurer. The discovery is irrelevant, overbroad and unreasonable for two reasons:

(1) it seeks information and documents relative to a cause of action that is foreclosed as a matter of law; and

(2) even if there were some arguable basis for Plaintiffs as third party claimants to sue a liability insurer directly because they believe they have a "settlement contract," the discovery is not narrowly tailored to achieve information relevant to that alleged cause of action.

As such, the Trial Court has abused its discretion in allowing this discovery to proceed.

While the Trial Courts rulings concerning issues of fact are entitled to deference, review of a Trial Court's determination of the legal principles controlling its ruling is much less deferential. *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). When a court acts without reference to any guiding rules and principles of law, it has abused its discretion and mandamus is appropriate. Allstate and David Gonzalez submit that the

Trial Court has ignored legal precedent, thereby abusing its discretion, warranting mandamus relief.

Plaintiffs seek to impose duties on Allstate and David Gonzalez in the handling of third party claims. In general, the existence of a duty is a question of law. *Tri v. J.T.T.*, 162 S.W.3d 552, 563 (Tex. 2005); *accord Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33 (Tex. 2002) (whether a duty exists is a question of law)*; Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837-38 (Tex. 2000) (Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances). Similarly, the existence of standing is question of law. *See e.g., Brunson v. Woolsey* 653 S.W3d 583, 587 (Tex. App. – Ft. Worth 2001, no pet.) (standing is a question of law subject to de novo review). The question of whether insurance carriers owe duties to third parties claimants such that they have standing to sue the carrier directly is a settled issue of law. The Trial Court abused its discretion in failing to apply that law in this case.

The primary objection to all the discovery requests was the legal principle that prohibits third parties from directly suing liability carriers. This objection was raised to every discovery request, regardless of its nature, breadth or scope. It was raised as a general objection and as to each specific discovery request. *See* Tab J, App. to Petition for Writ of Mandamus. This legal principle was raised in response to the Motion to Compel. *See* Tab M, App. to Petition for Writ of Mandamus. It was subsequently raised by Summary Judgment. *See* Tab N, App. to Petition for Writ of Mandamus. Despite

being fully, adequately and consistently presented with the law, the Trial Court chose to ignore it and allow bad faith claims handling discovery to proceed. The Trial Court's failure to apply these sound legal principles on the facts of this case constitutes an abuse of discretion.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ANALYZING AND APPLYING THE LAW

A. The Trial Court ignored Supreme Court precedent

Texas is not a direct action state. Texas law prohibits third parties from directly suing insurance carriers. Texas law prohibits third parties from suing liability carriers for unfair settlement practices. These are not new or novel concepts. These are not disputed issues. This is and has been the law in the State of Texas for many years. Despite this, Plaintiffs filed this lawsuit directly against a third party liability carrier and asserted causes of action against Allstate and David Gonzalez for unfair settlement practices. The Original Petition tracks the language directly out of the Insurance Code which is applicable to first party claims by insureds against their own insurance carrier. However, Plaintiffs are not first party insureds. There is no special relationship between Allstate and Plaintiffs which would give rise to any duty to Plaintiffs. They therefore, lack standing to sue Allstate directly.

The seminal case on the issue of whether third parties have standing to sue liability insurance carriers is *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145 (Tex. 1994). *Watson* involved a fact situation remarkably similar to the one presented here. Kathleen Watson

was involved in an automobile accident with an Allstate insured, W.D. Townley. Watson filed suit against Townley and Allstate. She claimed that Allstate engaged in unfair settlement practices and failed to effectuate a prompt settlement of her claims when liability had become reasonably clear. The Supreme Court held that a third party claimant cannot sue an insurer for unfair settlement practices. *Id. at 149.* Giving a third party standing would undermine the duties insurers owe to their insureds. For policy reasons, insurance companies are not required to perform duties for third party claimants that are "coextensive and conflicting" with the duties they owe their insureds. *Id.* Accordingly, the Court declined to afford the same duties and obligations insurers owe their insureds to a party adverse to the insured.

The Supreme Court revisited the standing issue again in *Transport Ins. Co. v. Faircloth,* 898 S.W.2d 269 (Tex. 1995). *Faircloth* was a wrongful death case arising out of an automobile accident between an Allied Van Lines tractor trailer and a pick up truck. Allied's insurer engaged in settlement negotiations with representatives of the decedents minor child. When the minor child became an adult she sued the insurance company and others contending she was misled about the value of her claim. The Court determined that Faircloth had no standing under either the Insurance Code or DTPA to pursue her claims against Transport, based on *Watson.* Additionally, the Supreme Court extended the *Watson* holding by determining that an insurer does not owe third party claimants the common law duty of good faith and fair dealing. *Id. at 279-280.* The duty of good faith and fair dealing arises from the special relationship between the insured and the insurer.

This "special relationship" does not exist between a third party claimant and the insurer. *Id.*

Similarly, the Plaintiffs herein have no special, legal or other relationship with Allstate and its adjustor that would afford them a cause of action in Texas. This holding and rule of law has been upheld on numerous occasions by the Supreme Court as well as the courts of appeal. *See e.g, Maryland Ins. Co. v. Head Industries Coatings & Services, Inc.,* 938 S.W.2d 27 (Tex. 1996): (third party tort claimant has no direct cause of action for extra-contractual liability against a liability insurer at common law); *Texas Farmers Ins. v. Soriano,* 881 S.W.2d 312 (Tex. 1994) (third party tort claimant has no direct cause of action for extra-contractual liability against a liability insurer at common law); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 384 (Tex. 2000) (noting that amended clause of insurance code did not create a direct cause of action by third parties against liability carriers); *Atlantic Lloyds Ins. Co. v Butler,* 137 S.W.3d 199 (Tex. App. – Houston [1st Dist.] 2004, pet. denied) (plaintiffs lacked standing to sue insurance company directly for breach of settlement agreement); *Casseroti v. State Farm*, 791 S.W.2d 561, 565 (Tex. App. Dallas, 1990, writ denied) (insurers do not owe third party claimants first party duties even where same insurance company insurers both third party claimant and insured); *Jones vs. C.G.U. Insurance Co.,* 78 S.W.3d, 626 (Tex. App. Austin 2002, no pet.); (a third party tort claimant has no direct cause of action for extra contractual liability against a liability insurer at common law); *Sun Oil Company vs. Employers Casualty Co,* 550 S.W.2d 348, (Tex. Civ. App. Dallas 1977, no writ.) (a tort plaintiff has

no standing to sue a tortfeasor's liability insurer directly in a lawsuit); *Pool v. Durish,* 848 S.W.2d 722, (Tex. App. Austin 1992, writ. den'd); (a tort claimant cannot sue a tortfeasor's carrier unless the insured tortfeasor is liable to the claimant); *Morris v. Allstate,* 523 S.W. 299 (Tex. Civ. App. Texarkana 1975, no writ) (tort claimant has no direct cause of action against the tortfeasors liability carrier unless the tortfeasor is liable to the claimant); *Lowe v. Safeco Ins. Co*., 2003 Tex. App. LEXIS 648 Tex. App. Dallas, (third party cannot sue an insurance company in Texas) ; *Becker v. Allstate, 678 S.W.2d 561* (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.) (third party who recovered excess judgment against insured still could not sue carrier directly).

Perhaps the only time third party plaintiffs could conceivably sue an insurer directly is when they have obtained a judgment and assignment from the insured. *See, Chaffin v. Transamerica Ins. Co.,* 731 S.W.2d 728, 732 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.). That circumstance is not presented here.

B. The Trial Court ignored statutes and rules of procedure

Not only does the case law preclude the type of action Plaintiffs are pursuing here, so too, does the Insurance Code and the Rules of Civil Procedure. Rule 51b of the Texas Rules of Civil Procedure provides as follows:

> Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. **This rule shall not be applied in tort cases so as to permit the joiner of a liability**

> **or indemnity insurance company, unless such company is by statute or contract directly liable to the person injured or damaged.** *See* Tex.R.Civ.P. §51(b).

This has been the rule of law in Texas for more than 50 years. *See*, e.g., *Penny vs. Powell*, 347 S.W.2d 601 (Tex. 1961) (Texas is not a direct action state); *Utilities Ins. Co. v. Montgomery*, 138 S.W.2d 1062 (Tex. 1940) (Texas is not a direct action state); *Russell vs. Hartford*, 548 S.W.2d 737 (Tex. Civ. App. – Austin 1977, writ ref'd n.r.e) (third party claimants not permitted to sue insurance carrier, with or without joinder of insured party). Similarly, the Insurance Code itself codifies the rule set forth in *Watson supra* and **specifically precludes** persons such as the Plaintiffs from suing for unfair settlement practices:

> **Subsection (a) [defining unfair settlement practices] does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.** *See Tex. Ins. Code* §541.060(b).

First party insureds have a cause of action for unfair claims settlement practices because of the special relationship between the two. *Allstate v. Watson, supra.* A suit by a third party to the contract lacks this special relationship. *Transportation Ins. Co. v. Faircloth* supra. The case law, statutes, rules of civil procedure, indeed the overwhelming weight of authority is that third parties do not have standing to bring direct actions against liability carriers. No matter how Plaintiffs claims are couched or characterized they fall squarely within the scope of the legal precedent recited above. The Trial Courts clear failure to recognize and follow the law in the State of Texas is an abuse of discretion.

III. ALLOWING THIRD PARTIES TO ENGAGE IN BAD FAITH CLAIMS HANDLING DISCOVERY AGAINST A LIABILITY INSURANCE CARRIER CONSITUTES AN ABUSE OF DISCRETION

A. Discovery goes to causes of action unavailable to Plaintiffs as a matter of law

The law as it relates to the claims presented is important because Plaintiffs are seeking discovery of documents and information clearly targeted to establish bad faith and/or unfair settlement practices on the part of the carrier. The law clearly forecloses Plaintiffs from bringing a direct action against an insurance company defendant. The Supreme Court, abundant case law, the Texas Rules of Civil Procedure and an Insurance Code provisions specifically prohibit these Plaintiffs from suing Allstate and its adjustor for unfair settlement practices. They simply lack standing to do so. Plaintiffs have presented no authority to the contrary.

In direct contravention of the overwhelming legal authority in the State of Texas, the Trial Court entered an Order allowing discovery to proceed against Allstate and David Gonzalez. And, the discovery is not just any discovery. It is far reaching bad faith claims handling discovery. It is overbroad and irrelevant on its face.

In a discovery context, to determine whether mandamus is appropriate, a reviewing court must carefully consider all relevant circumstances, such as claims and defenses asserted, type of discovery sought, what the discovery is intended to prove and the presence of lack of other discovery. *Walker v. Packer,* 827 S.W.2d 833 (Tex. 1992). While the scope of discovery is within the trial court's discretion, "the trial court must

make an effort to impose reasonable discovery limits." *In Re CSX Corp.,* 124 S.W.3d 149 (Tex. 2003).

The relevant circumstances presented here are that the Plaintiffs are asserting claims directly against a liability carrier despite the fact that Texas is not a direct action state. They are claiming unfair settlement practices despite the fact that third parties are precluded from making these types of claims as a matter of law.

In their lawsuit, Plaintiffs complain that:

> Relators jointly or singularly misrepresented facts or policy provisions relating to coverages and failed to attempt in good faith to effectuate a prompt, fair and equitable settlement of the claim submitted when liability became reasonably clear." Plaintiffs contend Allstate and its agents and employees did not attempt to settle in good faith the property damage claims in order to influence settlement under the bodily injury portions of the Cho policy. *See* App. Tab E & F, App. to Petition for Writ of Mandamus, pp. 5 -6.

A cursory review of the discovery sought reveals that plaintiffs are seeking discovery that tracks the language of the Insurance Code applicable to first party claimants making claims for unfair settlement practices. The discovery seeks to establish claims that are foreclosed to Plaintiffs as a matter of law. Plaintiffs request documents that seek:

> All documentation from Allstate County Mutual Insurance Company directing its agents, servants and employees *not to misrepresent to claimants pertinent facts or policy provisions relating to coverage. See* App. Tab I, App. to Petition for Writ of Mandamus, Request for Production No. 30. (emphasis supplied).

> All policies procedures directives and documentation to Allstate County Mutual Insurance Company's adjusters requiring that they *attempt in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear. See* App. Tab I, App. to Petition for Writ of Mandamus, Request for Production No. 31. (emphasis supplied).

> All documentation from Allstate County Insurance Company directing its agents, servants and employees including its adjusters *not to use one portion of an insurance policy to influence settlement on another portion of an insurance policy*. *See* App. Tab I, App. to Petition for Writ of Mandamus, Request for Production Nos. 34. (emphasis supplied).
>
> Documentation in the file of Allstate County Mutual Insurance Company for the accident in question supporting a determination that the *liability of Allstate's insured's liability was not reasonably clear*. *See* App. Tab I, App. to Petition for Writ of Mandamus, Request for Production No. 37. (emphasis supplied).

The above sampling of document requests goes to establishing bad faith claims which are invalid as a matter of law in this context. Similarly in request for admissions and interrogatories, Plaintiffs seek information relative to bad faith claims handling. Plaintiffs requested Allstate to "admit that Allstate benefits from the prompt efficient payment of claims by third parties" *See,* Tab I, App. to Petition for Writ of Mandamus, Request for Admission No. 11 and to "admit that Allstate is obligated to reasonably settle claims." *See,* App. Tab I, App. to Petition for Writ of Mandamus, Request for Admission No. 12. Additionally, in Interrogatories plaintiffs asked Allstate to "describe and identify all policies and procedures, protocols, guidelines, and written documentation provided by Allstate County Mutual to its adjustors . . . . . that would ensure that these insurance agents *do not engage in unfair claims settlement practices."* *See* Tab I, to Appendix to Petition for Writ of Mandamus, Interrogatory No. 1. (emphasis supplied). This is discovery relative to claims that these Plaintiffs have absolutely no standing to make as a matter of law. Allowing discovery to proceed in flagrant disregard for the well settled law is an abuse of discretion.

B. Discovery is overbroad and not narrowly tailored to discover information relevant to a particular claim.

Clearly, it is Allstate and David Gonzalez' position that discovery should not proceed at all. Barring that, the trial court made no effort to impose reasonable limits on discovery. In discovery situations there is always the potential for abuse. As such the Rules of Civil Procedure and the courts have set forth guidelines to curb discovery abuse. The discovery requests must be reasonably tailored to include only matters relevant to the case. *In Re American Optical Corp.,* 988 S.W.2d 711, 713 (Tex. 1998); *Texaco v. Sanderson*, 898 S.W.2d 813, 814 (Tex. 1995). The new discovery rules explicitly encourage trial courts to limit discovery when the "burden and expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. *Tex. R. Civ. P. 192.4(b); In Re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180-81 (Tex. 1998). Although a trial court has broad discretion to schedule and define the scope of discovery, it can abuse its discretion by acting unreasonably. *See, In Re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998).

Relators, recognizing that the Trial Court may have found some basis upon which the Plaintiffs could proceed, separate and apart from the invalid claims for breach of the duty of good faith and fair dealing, unfair settlement practices and Insurance Code violations, asserted in Plaintiffs Petition, submitted an Order on the discovery, allowing

the Judge to narrow the scope of the discovery to what documents might conceivably be relevant to a valid cause of action. See Tab L, App. to Petition for Writ of Mandamus. When later faced with a Motion for Summary Judgment on the legal principles set forth above, the trial court allowed wholesale discovery to proceed. *See* Tab A, App. to Petition for Writ of Mandamus. Although the Trial Court was presented with the overwhelming weight of authority which precludes the Plaintiffs from proceeding, the trial court nonetheless refused to narrow the scope of discovery. A discovery order that compels overly broad discovery well outside the bounds of reason is an abuse of discretion for which mandamus is the proper remedy. *See e.g., General Motors Corp. v. Lawrence,* 651, S.W.2d 732 (Tex. 1983) (discovery requests concerning fuel filler necks in every vehicle ever made by General Motors were too broad); *Loftin v. Martin*, 776 S.W.2d 145 (Tex. 1989) (A discovery request for 'all notes, records memoranda, documents and communications made that plaintiff contends support allegations' was so vague and ambiguous and overbroad as to amount to 'a request that defendant be allowed to generally peruse all evidence plaintiff might have.'); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813 (Tex. 1995) (request for all documents written by defendant's safety director concerning 'safety, toxicology, and industrial hygiene, epidemiology, fire protection and training' was too broad.); *Dillard Dept. Stores, Inc. v. Hall,* 909 S.W.2d 491, (Tex. 1995) (document request for every claims file or incident report over a five-year period involving false arrest, civil rights violations, or excessive use of force was too broad.); *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, (Tex. 1996) (request for a description of all

criminal conduct occurring at the location during preceding seven years was too broad.); *In Re American Optical Corp*., 988 S.W.2d 711 (Tex. 1998) (a request for virtually every document which Defendant generated regarding its equipment without tying discovery to the particular products the plaintiffs claimed to have used or the time periods of such use was considered too broad); *In Re Graco Children's Products, 2006 Tex. LEXIS 1073 (2006)* (requests for thousands of documents concerning product defects not at issue in the lawsuit).

Plaintiffs are seeking discovery concerning claims reserved to first party insureds for unfair settlement practices. Plaintiffs are not first party insureds. They are third parties making a claim against an Allstate insured. As Allstate understands it, Plaintiffs basic premise is that a settlement was reached as a result of their negotiations with an Allstate adjustor, David Gonzalez. It is disingenuous to suggest that they are simply trying to show that they have a breach of a settlement agreement while at the same time seeking the multitude of documents and information sought in over 300 discovery requests. The requests are not narrowly tailored to discover relevant information. If Plaintiffs are attempting to show the existence of and/or breach of a settlement contract, why do they require personal information concerning the Allstate insureds and co-defendants the Chos[1] as well as Allstate employees[2]? If the cause of action is breach of a

[1] The medical records of the driver of the white BMW 3301 Sand M. Cho a/k/a Sang M. Cho concerning any mental or physical problem which would impact her ability to operate a motor vehicle. *See* App. Tab I, App. to Petition for Writ of Mandamus, Request for Production No. 36. The Cho's driving histories and drivers licenses. *See* App. Tab I, App. to Petition for Writ of Mandamus, Request for Production Nos. 25 and 26.

settlement agreement, why do they require depositions on the topic of insurance and judgments in other litigations[3]? Why do the discovery requests track the language of the Insurance Code as it relates to unfair settlement practices?

A trial court abuses it discretion by compelling the production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment or imposes a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party. *Walker v. Packer, supra* at 843. The discovery sought is way beyond anything remotely necessary in any litigation. Requesting discovery on such a broad scale and the trial court sanctioning it is nothing but harassment which should not be tolerated. *See* e.g., *In Re AIU Insurance Company*, 148 S.W.3d 109 (Tex. 2004).

An authorization to obtain confidential information from all law enforcement authorities and governmental agencies for Tae Sun Cho a/k/a Sang M. Cho. *See* App. Tab I, App. To Petition for Writ of Mandamus, Request for Production No. 47.
Copies of medical records and/or reports from all physicians including any medical facilities and health care entities who treated and/or provided services to anyone involved in this accident. *See* App. Tab I, App. To Petition for Writ of Mandamus, Request for Production No. 55.

[2] Job descriptions and personnel files for David Gonzalez, Elijah Sneed, Terry Weaver Munoz. *See* App. Tab I, App. To Petition for Writ of Mandamus, Request for Production Nos. 39-41.
Personnel files and curriculum vitas and resumes of all Allstate employees that any Texas Court determined wrongfully assessed the value of any physically damaged vehicle. *See* App. Tab I, App. To Petition for Writ of Mandamus, Request for Production No. 71.

[3] Transcripts of any testimony that you, your agents, servants and employees have given in any case as witnesses on the topic of insurance. *See* App. Tab I, Request for Production No. 80.
Transcripts of testimony, whether by deposition or in court, given by you in any case in which you were a defendant regarding any of the issues pertinent to this case to include property damage claims. *See* App. Tab I, Request for Production No. 83

IV. ALLSTATE AND DAVID GONZALEZ HAVE NO ADEQUATE REMEDY BY APPEAL

The above scenario shows a clear abuse of discretion in understanding and applying the law in Texas. It is true that "incidental" pretrial rulings as they relate to discovery issues should not be the subject of mandamus review. *In Re Prudential*, 148 S.W.3d 124 (Tex. 2004). However, mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss. *Id*. Mandamus is necessary to spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. *Id*. It makes little sense to subject Allstate and David Gonzalez to far reaching discovery in a proceeding that is certain to be "little more than fiction."

A party seeking review of a discovery order by mandamus must demonstrate that the remedy offered by an ordinary appeal is inadequate. *Walker v. Packer, supra.* There are instances when appellate courts cannot await the outcome of a trial on the merits, and an appeal to remedy a trial courts abuse of discretion as it relates to discovery is necessary. Mandamus is therefore appropriate when a trial court compels production of patently irrelevant or duplicative documents, such that it clearly constitutes harassment to no legitimate end. Accordingly, Mandamus was held appropriate in the context of product liability cases allowing discovery concerning products the plaintiff never used. See *e.g., In Re American Optical Corp., 988 S.W.2d 711 (Tex. 1988)* (discovery of respiratory equipment plaintiff never used); *Texaco v. Sanderson*, 898 S.W.2d 813, 814

(Tex. 1995) (discovery of toxic substances to which plaintiffs weren't exposed); *In Re Graco, supra* (discovery concerning products not involved in litigation). Similarly, the Plaintiffs here seek discovery concerning unfair settlement practices. This discovery goes to claims they have no standing to make as a matter of law. They seek bad faith claims handling discovery in direct contravention of the law. They allegedly seek to establish a "contract" but request discovery regarding claims handling policies, personnel files, judgments and depositions in unrelated cases. There is little difference between the two scenarios. There is no legitimate purpose to be served by the discovery sought. It is nothing more than harassment.

Packer holds that mandamus should issue if a party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error . . . . so that the trial would be a waste of judicial resources. *Id. at 843.* There is no adequate remedy by appeal when Allstate and David Gonzalez must engage in bad faith claims handling discovery while at the same time and in the same lawsuit providing a defense to its insured. The discovery order necessarily assumes that Allstate and David Gonzalez have duties to the Manllos. Such a conclusion defies Supreme Court precedent.

The Allstate insureds, the Chos, remain party litigants and Allstate is faced with conflicting duties and obligations to defend itself and its insured. Allowing discovery and indeed the litigation to proceed against Allstate in the context of the ongoing litigation against the Chos creates a conflict in the duties Allstate owes its insureds and the duties Plaintiffs seek to have Allstate extend to them. *Allstate v. Watson*, 876 S.W.2d

145 (Tex. 1994), made clear that there is no duty between and insurer and third party claimant because of the potential for irreconcilable conflicts. An insurance company owes its insured a duty to defend against claims asserted by a third party. Recognizing concomitant and coextensive duties to third party claimants, parties, adverse to the insured, necessarily compromises the duties the insurer owes its insured. *Id.* Such a result will necessarily occur here and any appellate remedy is inadequate.

An appeal will not correct the trial courts discovery error when Allstate is faced with the prospect of disclosing private and confidential information on its insureds and employees. An appeal will not correct the trial courts discovery order which allows discovery of patently irrelevant documents that are harassing on their face and impose a burden on the producing party far out of proportion to any benefit to be gained by the Plaintiffs in the context of their property damage claims. There is no adequate remedy by appeal because Allstate will be forced to litigate claims that are foreclosed to these plaintiffs as a matter of law. Allowing this case to proceed to trial and allowing the far reaching discovery reflected above only to have it later determined that Plaintiffs did not have a valid cause of action to begin with, and could not sue Allstate directly for unfair settlement practices will be a meaningless waste of judicial resources.

Walker v. Packer, In Re Prudential and the case law defining mandamus do not require that the Court turn a blind eye to blatant injustice. Mandamus is warranted in this case because the trial courts determination was "with such disregard for guiding principles of law that the harm to the defendant" will be irreparable. *See, Nat'l Industrial*

Sand Ass'n v. Gibson, 897 S.W.2d 769 (Tex. 1995). The Trial Court has abused its discretion in analyzing and applying the law. Allstate and David Gonzalez have no adequate remedy by appeal. Mandamus is necessary in this case.

CONCLUSION

Relators have met the burden of establishing a clear abuse of discretion on the part of the trial court. There is no question of the applicability of the rules of law and legal principles that prohibit direct actions against insurance companies to the present case. Plaintiffs' claims are fundamentally untenable based on Texas law. The Trial Court's failure to recognize or accept the law constitutes an abuse of discretion. The discovery sought and ordered is overly broad and not narrowly tailored to achieve any purpose which could even conceivably support a viable claim. There is no adequate remedy by appeal. Allowing this far reaching bad faith claims handling discovery to occur only to have it ultimately determined that plaintiffs as third party claimants have no right to sue for bad faith in the first place will cause irreparable harm. The Trial Court clearly abused its discretion when it failed to apply clear law, consider valid objections and deny Plaintiff's Motion to Compel and Allstate has no adequate remedy by appeal.

PRAYER FOR RELIEF

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

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