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' REPLY TO REAL PARTIES IN INTERESTS' BRIEF ON THE MERITS

Jeffrey D. Roerig
State Bar No. 17161700
Rose Conrad-Sandoval
State Bar No. 04709300
ROERIG, OLIVEIRA & FISHER, L.L.P.
10225 N. 10th Street
McAllen, Texas 78504
(956) 393-6300
(956) 386-1625 Fax

ATTORNEYS FOR RELATORS,
ALLSTATE COUNTY MUTUAL INSURANCE
COMPANY AND 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.

PARTIES	COUNSEL
Relators: Allstate County Mutual Insurance Company and David Gonzalez	Jeffrey D. Roerig State Bar No. 17161700 Rose Conrad-Sandoval State Bar No. 04709300 ROERIG, OLIVEIRA & FISHER, LLP 10225 N. 10th Street McAllen, Texas 78504 (956) 393-6300 (956) 386-1625 Fax
Defendants: Tae Sun Cho and Sang M. Cho	Esther Cortez State Bar No. 04844900 LAW OFFICE OF ESTHER CORTEZ 5415 N. McColl, Ste. 106 McAllen Texas 78504 (956) 631-7515 (956) 631-5686 Fax

Respondent

Hon. Arnoldo Cantu, Jr., County Court
Judge, County Court At Law Number 5
HIDALGO COUNTY COURTHOUSE
100 N. Closner
Edinburg, Texas 78539
(956) 318-2460
(956) 318-2463 Fax

Real Parties in Interest

Jorge Manllo Karim and
Teresita S. De Manllo

Will Hughes
State Bar No. 10240100
Scott Clark
State Bar No. 00795896
Roger W. Hughes
State Bar No. 10240100
ADAMS & GRAHAM, L.L.P.
222 E. Van Buren, West Tower
Harlingen, Texas 78551
(956) 428-7495
(956) 428-2954 Fax

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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**

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

The issue presented is whether it is appropriate to allow bad faith claims handling discovery to proceed given the legal prohibition against third parties suing liability insurance carriers. Texas is not a direct action state. Plaintiffs present no authority for the proposition that Texas allows direct actions. Plaintiffs do not dispute that *Allstate Insurance Company v. Watson, 876 S.W.2d 145 (Tex. 1994)* precludes claims by third parties for unfair settlement practices. Plaintiffs do not contend that they are somehow exempt from *Insurance Code* §§*541.060* which specifically excludes third parties from suing for unfair settlement practices. Despite the law, plaintiffs seek discovery to establish claims that are legally prohibited. They do not attempt to explain, justify or defend their requests for bad faith claims handling discovery. They downplay this Mandamus as an attempt to appeal a summary judgment. The trial courts ruling allowing bad faith claims handling discovery to proceed in the face of well settled legal principles that prohibit third parties from pursuing these claims, constitutes an abuse of discretion. Allstate and Gonzalez have no adequate remedy by appeal and are, therefore, entitled to Mandamus Relief.

A. The Motion to Compel predated the Summary Judgment

Plaintiffs obfuscate the issue by characterizing this as a complaint over being denied summary judgment. Plaintiffs are apparently of the view that any discovery goes because the trial court denied summary judgment. The Motion to Compel

predated the Summary Judgment. The summary judgment was not filed until more than a month after the Motion to Compel had been heard. Plaintiffs filed their Motion to Compel on March 13, 2006. It was heard on April 16, 2006. The Court requested proposed Orders. Proposed Orders were submitted within days of the April 16, hearing. The Order submitted by Defendants (App. Tab L to Petition for Writ of Mandamus) would have allowed the trial court to narrow the scope of discovery to some arguably relevant cause of action and/or give some needed direction to the parties.

Having no ruling on the Motion to Compel, Defendants filed their Motion for Summary Judgment on or about May 22, 2006. The Court set a hearing on Plaintiffs Response to the Motion for Summary Judgment for July 19, 2006. It was at that hearing the Court entered Orders on both the Summary Judgment and the Motion to Compel. Had the Court ruled in the same fashion prior to the Summary Judgment being filed, i.e., allowing wholesale bad faith claims handling discovery to proceed in a case by third parties against a liability carrier, Defendants would likely be in the same position – seeking mandamus relief for a clear abuse of judicial discretion

The question is not whether some relevant discovery is permissible in a case in which summary judgment has been denied. The question is whether a trial court abuses its discretion in allowing bad faith claims handling discovery to proceed despite the fact that Texas does not allow direct actions by third parties against liability carriers for unfair settlement practices. Plaintiffs do not dispute the law and make no effort to explain the relevance of their discovery requests.

B. Plaintiffs do not dispute the law

Noticeably absent in plaintiffs brief on the merits is any comment or citation to Rule 51b, the Rule of Procedure prohibiting direct actions. Noticeably absent in plaintiffs brief on the merits is any discussion of the Insurance Code §541.060. Plaintiffs do not cite to or mention the insurance code provision relative to unfair settlement practices despite the fact that they quote verbatim from the Code in their Petition. Moreover, they track the language of the Code in numerous discovery requests. Frequently plaintiffs requested documents and information regarding "settlements when liability is reasonably clear" and documents concerning "unfair settlement practices". They have made no effort to withdraw or limit their requests nor do they explain their relevance.

C. Plaintiffs do not and cannot justify their discovery requests

It is telling that no where do plaintiffs attempt to justify their entitlement to bad faith claims handling discovery. Rather, they argue strained liability theories and complain that mundane discovery, such as insurance polices and statements were not produced. Since it is and was Defendants' position that no discovery was appropriate in this case because of the legal prohibition against third parties suing liability carriers in Texas, they objected to all discovery. No doubt if Defendants had gone forward to answer any discovery, Plaintiffs would argue that they had waived their right to object to plaintiffs standing to sue or to complain about being sued for bad faith and unfair settlement practices by these third party plaintiffs.

No where in their brief do they justify their entitlement to the multitude of documents they request. Plaintiffs should examine their own conduct in even requesting this information in the first place in light of their claimed liability theories. By their own admission as to what their causes of action are, the discovery sought is not narrowly tailored to obtain relevant information. Just as the plaintiffs in *In re Graco Product, Inc. 2006 LEXIS 1073 (October 26, 2006)* sought discovery for unrelated products, here too, the plaintiffs seek discovery that has no rational relation to the plaintiffs' contention that a settlement was reached. Just as the plaintiffs request in *Dillard Dept. Stores, Inc. v. Hall, 909 S.W.2d 491 (Tex. 1995)* for documents of every civil rights incident in every store was determined to be well out of proportion to what was reasonable, here too, the plaintiffs seek discovery way beyond anything remotely necessary to establish a property damage claim. The Plaintiffs seek bad faith claims handling discovery which is barred to them as a matter of law.

Plaintiffs sue for unfair settlement practices, quote the insurance code and seek bad faith claims handling discovery yet they claim they are attempting to show that Allstate and David Gonzalez said they would pay $13,500 for property damage instead of $9604.47. While plaintiffs now try to refocus this lawsuit as one for breach of settlement, the discovery sought is simply not designed to establish such a claim. How do you establish that you have a settlement for $13,500 instead of $9604.47 by requesting the personnel file of someone named Elijah Sneed? How do you establish that your property damage claim is worth $13,500 as opposed to $9604.47 by seeking documents concerning property damage claims in unrelated suits and depositions on the

topic of insurance? There is little difference between these scenarios. They all involve requests for documents that are overbroad and unduly burdensome and not narrowly tailored to achieve a relevant purpose. To date, Plaintiffs have provided absolutely no explanation as to why these are necessary, relevant or reasonable requests.[1]

Plaintiffs reliance on *Humphreys v. Caldwell, 888 S.W.2d 469 (Tex. 1994)* is misplaced. *Humphreys* did not involve wholesale discovery of everything from the topic of insurance, to claims handling manuals, to personnel files to medical records. It was a narrow appeal of a claim of privilege relative to information contained in a claim file. The issue here is nature, extent and scope of discovery sought given the claims presented. The issue here is the propriety of engaging in bad faith claims handling discovery in a lawsuit allegedly over property damage.

Plaintiffs complain that they weren't provided the insurance policy and statements. (Real Parties in Interest's Brief on the Merits at page 1) Defendants do not dispute that these are valid reasonable requests -- **in the context of their third party action against the Chos.** The Order that they requested the trial judge to enter, specifically orders the Chos to produce statements: "it is further ordered that the defendant driver shall provide plaintiffs with their statements." (See Appendix Tab A to Petition for Writ of Mandamus). Why would they need an insurance policy of the insured driver if, as they assert, they are not suing on that "liability insurance

[1] As an aside, property damage claims are of the type of claims that are uniquely capable of being determined. Estimates, invoices and appraisals all would document a cost of repair. Discrepancies in estimates can generally be reconciled. Thus, property damage negotiations do not typically have the intangible element that is present in other negotiations.

contract"?[2] What they sought from Allstate was bad faith claims handling discovery. Since these claims are prohibited to these third party plaintiffs as a matter of law, under *Watson,* and its progeny, *Rule 51b,* and *Texas Insurance Code,* the discovery likewise should have been disallowed as a matter of law.

D. Plaintiffs ignore their own pleadings

Despite filing a lawsuit quoting the insurance code and alleging unfair settlement practices, Plaintiffs never address these claims. They somehow try to exempt themselves from the rule of law by arguing they have either a contract or a claim for negligent misrepresentation or a claim under the Administrative Code. In doing so, they ignore their own pleadings which track the language of the Insurance Code applicable to first party insureds for unfair settlement practices:

> Plaintiffs contend that defendants jointly or singularly misrepresented pertinent 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, servants 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. (App. Tab E to Petition for Writ of Mandamus)

Plaintiffs may now recognize that these claims are without merit. As such they focus their attention on establishing another cause of action. Plaintiffs do not have a contract with Allstate, they do not have a claim for negligent misrepresentation or fraud and they do not have a claim under the Administrative Code.

1. Breach of Contract

Conceding that under Watson, they may not sue Allstate on the contract between Allstate and its insured; Plaintiffs assert a strained contractual argument, contending

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[2] See discussion below at Paragraph D, subpart 1, Breach of Contract.

that a contract exists directly between the Manllos and Allstate. (Real Parties, Brief, p.16) Plaintiffs posit that a contract was created between the Manllos and Allstate/David Gonzalez by virtue of their settlement discussions. The Supreme Court has already determined that the relationship between a third party claimant and a liability insurer is not contractual in nature. *Allstate Insurance Company v. Watson, supra.* In the recent case of *Cessna Aircraft Co. v. Aircraft Network, LLC, 2006 Tex. App. Lexis 10185 (Nov. 29, 2006),* Aircraft Network sued Cessna and its insurer, AAU for damages arising out of repairs to one of its aircraft. Regarding the claims against AAU, the plaintiffs also attempted to argue that they had a separate agreement with the carrier outside the context of third party settlement negotiations. The Court determined that their claims arose out of the insurers attempts to settle on behalf of its insured. As such, the claims fell squarely within the *Watson, Faircloth* holdings. Accordingly, Aircraft Network had no standing to sue Cessna's insurer, AAU.

It is axiomatic that Allstate/Gonzalez have absolutely no reason, duty or obligation to speak with the Manllos absent the liability insurance policy issued to the Chos. Allstate/Gonzales have absolutely no reason to pay money to the Manllos absent the liability insurance policy issued to the Chos. What possible consideration would the Manllos be giving Allstate/Gonzalez for which they would pay money, absent the liability insurance policy issued to the Chos? If they are suing Allstate based on an alleged settlement "contract" over a property damage claim (apparently separate and apart from the liability policy issued to the Chos) - why then, and in the same lawsuit, do the Manllos sue the Chos for property damage? The claims plaintiffs are making

arise out of their settlement negotiations with Allstate. See, *Allstate v. Watson, supra Transport Ins. Co. v. Faircloth, 898 SW 2d. 269 (Tex. 1995) and Cessna Aircraft v. Aircraft Network, supra.* The Manllos have no standing to make these claims, much less proceed to discovery.

Enforceable contracts require an offer, acceptance and consideration. Enforceable contracts require a meeting of the minds. *Cessna Aircraft Co. v. Aircraft Network, L.L.C. 2006 Tex. App. LEXIS 10185* Plaintiffs cannot meet these elements based on aborted settlement discussions. What plaintiffs suggest is that anytime settlement negotiations are misconstrued that one of the parties involved can be held to have created a contract simply by discussing settlement. This is absurd. Where one party thinks one result occurred and the other another, you do not have a contract. A contract by definition is an agreement. Where there is disagreement, there is no contract.

2. Misrepresentation

In a further effort to give credence or legitimacy to their claims, plaintiffs cite *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999)* and *Ernst & Young, LLP v. Pacific Mut. Life Ins. Co., 51 S.W.3d 573 (Tex. 2001).* In *McCamish* the Supreme Court recognized a cause of action for negligent misrepresentation against an attorney by a non-client. *Ernst & Young* involved a fraudulent misrepresentation claim against an accounting firm. These cases do not apply in the insurance context. There is a whole body of law which discusses the duties and relationships between insurance companies and third parties. The cases plaintiffs

cite do not involve actions for negligent misrepresentation by third parties against insurance companies. The cases do not discuss Rule 51b. They do not concern the Insurance Code. The issue of whether third parties may sue liability carriers in Texas is settled:

> A third party claimant has no contract with the insurer or the insured, has not paid any premiums, has no *legal relationship* to the insurer or *special relationship of trust* with the insurer, and in short, has no basis upon which to expect or demand the benefit of the extra-contractual obligation imposed on insurers . . with regard to their insureds. *Allstate v. Watson, at 149.* (emphasis supplied)

Plaintiffs have no standing under the Insurance Code and they have no claim at common law. *Transport Ins. Co. v. Faircloth, 898 S.W.2d 269 (Tex. 1995).* As such, the cases plaintiffs cite for allowing a third party a direct action against a liability carrier are inapposite.

3. The Administrative Code

Plaintiffs are not United States citizens. Therefore, they are not claimants under the Administrative Code. *Tex. Admin. Code §21.202 (2)* defines a claim as one made by a Texas resident. In any event, the Administrative Code does not provide a private cause of action for an individual claiming injury due to unfair settlement practices. ***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.).*** This argument is meritless.

E. Discovery is overly broad and not narrowly tailored

This is purportedly a cause of action for breach of a property damage settlement agreement between Allstate / David Gonzalez and the Manllos. Despite this, the

Manllos offer no explanation for their requests for broad based far reaching bad faith claims handling discovery. Assuming that they may sue Allstate and Gonzalez directly over their property damage claim, the discovery they seek is not designed to establish these claims. As such, it is overly broad, unduly burdensome and not narrowly tailored to achieve a relevant goal. It serves no purpose other than harassment. Plaintiffs counsel admitted at the motion to compel hearing that this was a grudge against the insurance company. (App. Tab C to Petition for Writ of Mandamus) By his own admission, he was harassing the insurance company. Harassment, for the sake of harassment should not be tolerated. *In re AIU Insurance Company, 148 S.W.3d 109 (Tex. 2004).*

CONCLUSION

Texas law is clear and well settled. The plaintiffs are pursuing bad faith claims handling discovery despite the fact that Texas is not a direct action state, that Supreme Court precedent and abundant case law denies them standing, and the Insurance Code specifically forecloses a bad faith cause of action to them as a matter of law. The trial court has necessarily ignored these settled rules by its discovery order. Allstate and David Gonzalez have no adequate remedy by appeal. It is when a Court chooses to ignore the law that they abuse their discretion and correction becomes necessary. This is one of those instances.

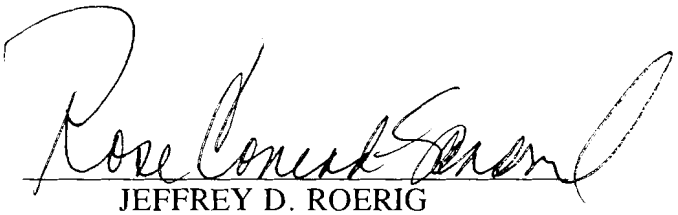
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Relators respectfully request that the Court grant this 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,

ROERIG, OLIVEIRA & FISHER, L.L.P.
10225 North Tenth St.
McAllen, Texas 78504
Tel. (956) 393-6300
Fax (956) 386-1625

BY: 
JEFFREY D. ROERIG
State Bar No. 17161700
ROSEMARY CONRAD-SANDOVAL
State Bar No. 04709300

ATTORNEYS FOR RELATORS

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 7th day of February, 2007, a true correct copy of the foregoing has been forwarded to the following counsel of record as follows:

Mr. Will Hughes
ADAMS & GRAHAM, L.L.P.
West Tower
222 E. Van Buren
Harlingen, Texas 78550
VIA CERTIFIED MAIL, RRR

Mr. Hugh P. Touchy
TOUCHY & GREEN, L.L.P.
2031 Price Road, Suite C
Brownsville, Texas 78521
VIA CERTIFIED MAIL, RRR

Ms. Esther Cortez
LAW OFFICE OF ESTHER CORTEZ
5415 N. McColl, Ste. 106
McAllen TX 78504
VIA CERTIFIED MAIL, RRR

Hon. Arnoldo Cantu, Jr., County Court
Judge, County Court at Law Number 5
HIDALGO COUNTY COURTHOUSE
100 N. Closner
Edinburg, Texas 78539
VIA CERTIFIED MAIL, RRR

Rose Conrad Sandoval
ROSEMARY CONRAD-SANDOVAL