CAUSE NO. 2012-DCL-05523-B

LINDSAY GENERAL INSURANCE AGENCY, L.L.C., AND DRIVER'S INSURANCE COMPANY	**§**	**IN THE DISTRICT COURT OF**
V.	**§**	**CAMERON COUNTY, TEXAS**
DOANH T. NGUYEN, INDIVIDUALLY; GUILLERMO DEL BARRIO, JR., INDIVIDUALLY; AND NGUYEN & DEL BARRIO, PLLC	**§**	**138TH JUDICIAL DISTRICT**

REPLY BRIEF IN SUPPORT OF DEFENDANTS' HYBRID TRADITIONAL AND NO EVIDENCE MOTION FOR SUMMARY JUDGMENT

Defendants Doanh T. Nguyen, Guillermo Del Barrio Jr., and Nguyen & Del Barrio, PLLC (collectively "Nguyen" or "defendants") file this Reply Brief in Support of their Hybrid Traditional and No Evidence Motion for Summary Judgment and respectfully show as follows:

I. INTRODUCTION

Plaintiffs Drivers Insurance Company and Lindsay General, LLC ("plaintiffs") are insolvent insurance companies who tendered the limits of a $25,000 policy after their insured, Rosalinda Garcia, killed Christopher Chavez as he was walking on U.S. 77 in Harlington. Chavez's estate refused to accept the check, filed suit, and made demands as high as $4.5 million.

Plaintiffs hired defendants to defend the case and instructed them to prepare for trial. Defendants labored from June, 2008 until August, 2010 on this file, hired and prepared experts, deposed key witnesses, and placed the case in such a position that plaintiff's own adjuster noted on August 23, 2010, "[o]utcome is a good likelihood of a defense verdict." Plaintiff Exhibit D,

p. 20. On the eve of trial, plaintiffs abruptly abandoned their defenses, hired a new attorney, and chose to pay the Chavez family $175,000.

Plaintiffs filed suit against defendants, claiming they were "forced" to settle the case because defendants did not timely respond to a *Stowers* demand. (Plaintiff's Second Amended Petition, p. 3). However, plaintiffs' own records state **12 different times** between October 22, 2008 and August 23, 2010 that no *Stowers* demand was ever made. (Response, Exhibit D, pp. 6-21). Defendants have submitted affidavits likewise establishing that they never received any *Stowers* demand. There is no genuine issue of material fact that defendants neither received, nor had a duty to respond, to any *Stowers* demand.

Plaintiffs now claim defendants were negligent for not persuading the Chavez family to accept their $25,000 offer between June and October, 2008. Plaintiffs have no evidence that the Chavez family – who demanded $1,000,000 on October 22, 2008 – would have accepted this offer. In fact, plaintiffs directly communicated with Chavez's lawyers and failed to convince them to accept policy limits. Plaintiffs cannot identify a single "course of action" they were not advised of, any "relevant information" withheld from them, or any manner in which they were not "faithfully" represented. There is simply no evidence of negligence.

Assuming, *arguendo*, defendants had breached a duty of care, plaintiffs have no evidence that this alleged breach caused them damage. Plaintiffs' alleged causation is premised upon the absurd assumption that the Chavez case could never be settled within policy limits if it was not settled immediately after suit was initiated. There is no factual or legal basis to support this reasoning, and nothing defendants did "forced" plaintiffs to pay seven times policy limits.

Defendants filed a Hybrid Traditional and No Evidence Motion for Summary Judgment on July 24, 2014. Plaintiffs responded on September 11, 2014 and filed a supplemental response on October 17, 2014. The Motion should be granted.

II. RESPONSE TO PLAINTIFFS' OBJECTIONS TO THE AFFIDAVITS OF DONAH NGUYEN AND GUILLERMO DEL BARRIO, JR.

Plaintiff objects to defendants' affidavits on the ground that they were signed by interested witnesses. There is no prohibition against using the affidavit of an interested witness, and the *Casso* case cited by plaintiffs supports defendants' use of Donah Nguyen and Guillermo Del Barrio, Jr.'s affidavits:

> Our summary judgment rule permits the granting of a summary judgment on the basis of uncontroverted testimonial evidence of an interested witness if that evidence "is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." Tex.R.Civ.P. 166a(c).

Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989). Contrary to plaintiffs' claim, the affidavits are clear, direct, credible, and free from contradictions and inconsistencies. Each attorney's affidavit states, "[f]rom June 2008 to November 1, 2008, I never received a demand for the policy limits of $25,000 from the underlying plaintiff (Rosa Briseno), their attorneys, or other representatives in the case referenced in plaintiffs' petitions." This is perfectly clear.

Plaintiffs submitted no contrary evidence. The affidavit of Ann Greiwe does not state that a *Stowers* demand was ever received and does not contradict defendants' affidavits. In fact, plaintiffs' **own records** support defendants' statements that they never received a *Stowers* demand. If any evidence existed to contradict these affidavits, plaintiffs could have easily submitted it to the Court. Thus, defendants' affidavits "could have been readily controverted" by opposing evidence – if such evidence existed. That evidence does not exist, and there is no "credibility" to weigh.

III. RESPONSE TO PLAINTIFFS' SPECIAL EXCEPTIONS

Plaintiffs specially except to defendants' statement on page 2 of their Motion that "if there was a valid demand defendants did not have authority to accept it." Plaintiffs request that defendants plead the identity of the demand, "who made the demand, when it was made and in what context Defendants were denied the ability to accept it."

Defendants are referring to the mythical *Stowers* demand referenced in plaintiffs' petitions, which plaintiffs' own records acknowledge was never made. The sentence in question begins with the conditional "**if** there was a valid demand," which implies defendants dispute that any demand was made. Defendants alternatively argue that if such a demand had been made, they were not authorized by plaintiffs to accept.

Plaintiffs next specially except that defendants' affidavits are "conclusory and duplicitous." To remedy this alleged defect, plaintiffs request an explanation of "what steps Defendants took to settle the claim other than waiting for a demand to be made." (Response, p. 4). Defendants are not required to respond, as there is no allegation the case was lost through abandonment or because it was inadequately tried. Plaintiffs' own Exhibit D documents some of the extensive work made by defendants on the file and the regular, detailed communications they had with plaintiffs as they were preparing for trial. *See also,* discussion, *infra.*

On page 4 of its Response, plaintiffs again object to Exhibits C and D of defendants' response and claim defendants' affidavits are "conclusory" and do not address what steps were taken to advise, inform, and implement plaintiffs' request to settle Chavez's wrongful death claim. As discussed, there is no such requirement. Plaintiffs do not allege their damages arise from poor advice, but from the failure to respond to a specific, yet unidentified *Stowers* demand. Plaintiffs' special exceptions should be denied.

IV. REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Gross negligence

The parties signed a Rule 11 agreement on February 25, 2011 in which plaintiffs agreed to dismiss their gross negligence claim. On September 11, 2014, plaintiffs filed a Third Amended Petition which satisfied their obligations under the agreement. Accordingly, this issue has been resolved.

B. Defendants should be granted summary judgment as to plaintiffs' negligence claims.

To establish a legal malpractice negligence claim, a plaintiff must show that (1) the attorney owed plaintiff a duty; (2) the attorney breached that duty; (3) the breach proximately caused plaintiff's injuries, and (4) damages occurred. Generally, expert testimony is required to prove causation in a legal malpractice suit. *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 117 (Tex.2004). Plaintiffs cannot establish any of these elements.

Initially, plaintiffs claimed their damages arose from defendants' failure to respond to a *Stowers* demand, which "forced" them to settle the Chavez case above policy limits. However, plaintiffs provided no evidence that a *Stowers* demand was ever made, and they appear to have abandoned this claim in their response. Plaintiffs now allege only that defendants were somehow negligent in not forwarding a $25,000 offer to the Chavez family during the first few months of a case that lasted more than two years.[1] Plaintiffs suggest this short delay so severely

[1] Plaintiffs themselves spent more than six months – from June, 2008 until January 12, 2009 – negotiating with Enterprise Rental Car over the minimal property damage claim in this case. Yet, they claim it was negligent for plaintiffs not to settle a serious wrongful death claim in four months, at a time when the Chavez plaintiffs refused to communicate with them or provide requested documentation. *See,* plaintiffs' Exhibit D, p. 11.

eviscerated their defenses that they could not go to trial and felt compelled to pay seven times their policy limits. That theory defies all facts and logic.

Plaintiffs' arguments are completely unsupported by any facts, and summary judgment must be granted for several reasons. First, there is no evidence to dispute the fact that plaintiffs delayed the case by refusing to settle until they received Mr. Chavez's death certificate. Second, there is no evidence to dispute the fact that plaintiffs communicated directly with the Chavez family about settlement between June and October, 2008, and were always aware of the status of the case and negotiations. Third, there is no evidence to dispute the fact that the Chavez family attorneys initially refused to speak with defendants about settlement. Fourth, plaintiffs have no evidence the Chavez family would have accepted a $25,000 offer prior to October 22, 2009. Fifth, there is no evidence to connect the unsuccessful settlement negotiations in 2008 with plaintiffs' decision to forfeit their right to trial and pay $175,000. There was no *Stowers* demand and plaintiff had no legal obligation to settle at all. Sixth, there is no evidence to dispute the fact that defendants followed plaintiffs' instructions and spent two years preparing for trial, during which plaintiffs paid their fees without any known complaint or dispute.

1. Plaintiffs caused the four month delay by refusing to settle the claim until receiving Mr. Chavez's death certificate.

Plaintiffs repeatedly assert that they "informed defense counsel of carrier's intent to pay policy limits on the Chavez claim" but defendants did not convey that request until October, 2008. Response, p. 11. However, informing defendants of their "intent" to pay a claim, and actually paying the claim are not the same thing. Plaintiffs' claim file, prepared by Lindsey General employee Eula Howard, repeatedly asserts that plaintiffs would **not** pay the Chavez claim until the Chavez family provided a death certificate.

On October 22, 2008, plaintiffs' claim file notes: "ASKED MEMO TO FOLLOW-UP WITH ATTY GUERRA AND LET HIM KNOW THAT WE ARE IN A POSITION TO TENDER OUR LIMITS. **HOWEVER, HE MUST PROVUDE US WITH DEATH CERT**." [emphasis added]. Plaintiffs' Exhibit D, p. 8.

On October 29, 2008, plaintiffs' claim file notes: "FIRST OF ALL, ATTY GUERRA [Chavez family attorney] **HAS NOT PROVIDED US WITH ANYTHING TO DOCUMENT A DEMAND**, **NO DEATH CERT., NO HOSPITAL BILL, NOTHING**." [emphasis added]. *Id.* at 10. Plaintiffs made similar notations on June 12, 2009, July 24, 2009, September 10, 2009, and October 2, 2009. *Id.* at 10 – 12.

Contrary to plaintiffs' representations, there is no genuine issue of material fact that defendants followed plaintiffs' instructions, including their instruction to tender a settlement for policy limits as soon as the Chavez family provided a death certificate. Plaintiffs' own records show the Chavez family had still not complied with Lindsay General's condition by October 2, 2009. Nevertheless, both plaintiffs and defendants attempted to tender policy limits several times, but the Chavez family refused to accept. It is difficult to understand what course of action plaintiffs would have defendants take. If defendants had tendered settlement prematurely, plaintiffs would certainly have sued for malpractice. Defendants followed plaintiffs' instructions.

2. Plaintiffs directly communicated with the Chavez family's attorney during the relevant time but failed to settle the case.

While plaintiffs assert they were not apprised of the status of the case between June and October, 2008, the evidence reveals plaintiffs routinely bypassed defendants and communicated directly with the Chavez family's attorneys prior to October, 2008. *See, e.g.*, Response, p. 11 ("On August 21, 2008, Eula Howard returned a call to Chavez's attorney, Alan Price. She notes

that she spoke with him. . . ") During these communications, plaintiffs advised the Chavez attorneys that they would tender the policy limits if a death certificate was provided.[2] The Chavez family was aware of this offer and simply refused to accept it. These unsuccessful settlement efforts are well documented in the case file. [3] Defendants had no duty (or ability) to force the Chavez family to accept this offer.

3. The Chavez family refused to communicate with defendants during the relevant time.

During the relevant time, the case file establishes that the Chavez attorneys refused to communicate with defendants regarding this case and threatened them with they tried to call. Plaintiff's Exhibit D, p. 9 notes that on October 29, 2008: "ATTY GUERRA THREATENED DEF ATTY FOR MALPRACTICE. **[Chavez's attorney] TOLD DEF ATTY THAT HE REQUIRE WRITTEN AUTH FROM INS AND LINDSAY GENERAL BEFORE HE WILL DISCUSS CLAIM WITH HIM.**" [emphasis added.]

While the Chavez attorneys spoke frequently with plaintiffs, they initially refused to communicate with defendants. Plaintiffs were aware of this fact. Defendants have no duty (or ability) to force another lawyer to communicate.

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[2] Plaintiffs communicated with the Chavez family's attorneys so frequent that Chavez's lawyers claimed they made a *Stowers* demand **directly** to plaintiff employee Eula Howard, rather than to defendants. A client has a duty to keep his attorney reasonable apprised of the case, particularly when he is bypassing his lawyer and communicating directly with opposing counsel. Plaintiffs failed to satisfy **their** duties to defendants, and defendants cannot be responsible for their clients' *pro se* communications.

[3] For example, on October 23, 2008, plaintiff's case file notes, "Def atty **reiterated** the fact that we are willing to tender our $25000 PL for Christopher Chavez." Plaintiff Exhibit D, p. 10. A fact cannot be "reiterated" if it was never before stated. On March 20, 2009, the file notes the Chavez family was "still not willing to accept our limits." On August 4, 2009, the file states the Chavez family's attorney, "never made a demand, didn't have to because we verbally told PA [Chavez family's attorney] that we were in a position to tender our limits."

4. Plaintiffs have no evidence that the Chavez family would have accepted a $25,000 offer before October, 2008.

To prevail, plaintiffs must prove that the Chavez family – who submitted a $1,000,000 demand on October 22, 2008 – would have accepted a $25,000 offer within the preceding few weeks. This is no evidence of this. As noted, *supra*, plaintiffs' claim file documents defendants' many attempts to settle, and the many rejections which followed. A lawyer has no duty to force his opponent to settle.

5. The alleged settlement delay in 2008 had nothing to do with plaintiffs' decision to settle in 2010.

Assuming, *arguendo*, plaintiffs established that defendants breached a duty to them, that alleged breach did not cause their damages. The Houston First District Court of Appeals recently considered a case in which an insurance company's lawyers tendered policy limits at mediation nine days before trial. The insured agreed to pay $3 million in addition to his policy limits and then sued his former attorneys, claiming they failed to "properly investigate and develop viable defenses" and failed to work on the case "earlier than they did." *Taylor v. Alonso, Cersonsky & Garcia, P.C.*, 395 S.W.3d 178, 184 (Tex. App.—Houston [1st Dist.] 2012). The appellate court affirmed the granting of summary judgment because plaintiff failed to explain how working on the case earlier would have "yielded a better outcome." *Id.*

Likewise, plaintiffs provide no evidence of how the case outcome would have been different if the case had been settled in the first few months that the claim was brought. No valid *Stowers* demand was made, and plaintiffs were under no legal obligation to settle the case for anything. If plaintiffs had gone to trial, they likely would have won, and, even if they lost, their liability was capped at $25,000. Rather than stay the course, plaintiffs hired new counsel and

inexplicably elected to pay seven times policy limits on the eve of trial. Defendants are not responsible for plaintiffs' decision.

Plaintiffs own records establish that they hired new counsel – Rene O. Oliveira – late in the case, and that this **new counsel** advised them at mediation. In fact, it was Oliveira – not defendants – who signed the settlement where plaintiffs agreed to pay seven times their policy limits. *See*, plaintiffs' Exhibit D, Bates No. 000031.

Plaintiffs have also failed to submit an affidavit satisfying Texas's requirements for proving causation in a legal malpractice case. In *Taylor v. Alonso, Cersonsky & Garcia, P.C.*, 395 S.W.3d 178 (Tex. App. – Houston [1st Dist.] 2012), the Houston appellate court held that, to survive summary judgment, a party claiming legal malpractice must produce an expert affidavit sufficient to prove causation. The court held plaintiff's expert affidavit did "not show that the results of a trial probably would have been better" than settlement. *Id.*, 395 S.W.3d at 188. In this case, plaintiffs fail to submit any evidence establishing that they were "forced" to settle or that they would have been required to pay more than policy limits at trial. Plaintiffs made the decision to settle for more than policy limits, and defendants had nothing to do with these damages.

6. Plaintiffs instructed defendants to prepare for trial.

For most of two years, plaintiffs repeatedly instructed defendants to prepare for trial. On August 4, 2009, Eula Howard recorded in her file notes: "DEF HAVE TO PROCEED WITH TRIAL PREPARATIONS INCLUSIVE OF DEPOSING PLAINTIFF'S MOTHER, POLICE OFFER AND POSSIBLY DR WHO DID THE AUTOPSY." Plaintiff's Exhibit D, p. 12.

In 2009 and 2010, plaintiffs documented that defendants were working on the case and reaping results, such as learning that Chavez was drunk and taking sedatives at the time of the

accident. The file states on September 10, 2009, "WE HAVE TO PREPARE FOR TRIAL." *Id.* On December 21, 2009, Eula Howard noted, "TOLD ZONE [Defendant Zone Nguyen] HE WILL TRY THE CASE, SEE NO NEED FOR CONTINANCE." *Id.* at 13. Over the next eight months, defendants participated in numerous conferences with Howard, and she repeatedly instructed them to continue preparing for trial. On July 9, 2010, plaintiff specifically requested that Nguyen attend the upcoming depositions in the case. On August 23, 2010, plaintiffs' case file noted, "OUTCOME IS A GOOD LIKELIHOOD OF A DEFENSE VERDICT." *Id.* at 20.

The uncontroverted evidence establishes that plaintiffs instructed defendants to prepare for trial and anticipated a good outcome. On the eve of trial, plaintiffs changed course and denied defendants the opportunity to try a case they likely would have won.

C. Plaintiffs have presented no evidence that defendants' attorneys' fees were unreasonable.

Plaintiffs next assert that defendants' attorneys' fees were unreasonable. This argument is premised upon the mistaken belief that defendants provided negligent representation. As discussed, defendants were not negligent.

Further, there is no evidence to controvert the fact that plaintiffs employed defendants and paid their fee bills without criticism from 2008 until 2010. There is no evidence that plaintiffs disputed defendants' bills during this time – or for two years after they were paid. Plaintiffs are sophisticated insurance companies who had every opportunity to find new counsel in October, 2008, if they believed defendants had committed malpractice. Instead, they ratified defendants' work and asked them to continue working for an additional two years. Defendants are entitled to be paid for their labor.

D. Plaintiffs have had more than enough time for discovery.

A no-evidence motion for summary judgment may be filed after adequate time for discovery has passed. TEX. R. CIV. P. 166a(i). The rule does not require that discovery be completed. *See Dishner v. Huitt-Zollars, Inc.*, 162 S.W.3d 370, 376 (Tex.App.—Dallas 2005, no pet.); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex.App.—Houston [14th Dist.] 2000, pet. denied). This case has been on file for two years, and plaintiffs' own case file negates each element of plaintiffs' claim. There is nothing that could possibly be discovered that would change this outcome.

V. CONCLUSION AND PRAYER

Plaintiffs' claims fail as a matter of law. Further, plaintiffs have not provided any evidence sufficient to survive summary judgment. Defendants' traditional and no evidence motion for summary judgment should be granted.

Defendants respectfully ask this Honorable Court to grant their summary judgment motion, dismiss plaintiffs' claims of negligence, gross negligence, and negligence *per se*, and for such other and further relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served upon all counsel of record in accordance with the Texas Rules of Civil Procedure as indicated below on the 27th day of October, 2014.

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