UNITED STATES V. DAVID JONES

Attorney Jones' plea of *nolo contendere* to possession of wiretapped communications in his capacity as an attorney

DEFENDANT: DAVID JONES
CASE NUMBER: 6:97CR00009-001



## FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

| Count | Assessment | Fine | Restitution |
|---|---|---|---|
| 1 | $5.00 | $1,000.00 | |
| Totals: | $5.00 | $1,000.00 | |

## FINE

## RESTITUTION

Restitution has not been ordered in this case.

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

[X] in full immediately.
[ ] in full not later than _____.
[ ] in _____ installments of $_____ over a period of _____ months to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration.
[ ] in installments to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation or supervised release supervision, payment of any unpaid balance shall be a condition of supervision and the U.S. probation officer shall establish and may periodically modify the payment schedule, provided that the entire financial penalty is paid no later than the termination of supervision but in no event later than 5 years after release from incarceration.

[ ] The defendant shall pay the costs of prosecution.
[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

All financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

United States District Court
Financial Section
P.O. Box 1541
Victoria, Texas 77902

APPROVED:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

VICTORIA DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | § | |
| vs. | § | CRIMINAL NO. V-97-9 |
| DAVID JONES | § | |

**CRIMINAL INFORMATION**

THE UNITED STATES ATTORNEY CHARGES THAT:

On or about March 7, 1995, in the Southern District of Texas and within the jurisdiction of this Court, Defendant,

**DAVID JONES**

did intentionally disclose to Theresa Gutierrez, the contents of a wire communication, that is, a non-consensually intercepted and recorded telephone conversation between Mark Rains and Paul Kornfuerer, having reason to know that the information was obtained through the interception of a wire communication in violation of Title 18, United States Code, Section 2511(1)(a), all in violation of Title 18, United States Code, Section 2511(1)(c) & 4(b)(ii).

GAYNELLE GRIFFIN JONES
UNITED STATES ATTORNEY

By: Don J. DeGabrielle
Don J. DeGabrielle
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

VICTORIA DIVISION



| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | Criminal Action No. V-97-9 |
| v. | Victoria, Texas |
| DAVID JONES, Defendant. | May 20, 1997 |

**TRANSCRIPT OF INITIAL APPEARANCE/ARRAIGNEMENT**
**BEFORE THE HONORABLE JOHN D. RAINEY**
**UNITED STATES DISTRICT JUDGE**

APPEARANCES:

For the Government: DON DeGABRIELLE, ESQ.
United States Attorney's Office
606 N. Carancahua, Suite 1400
Corpus Christi, Texas 78476

For the Defendant: DON CONVERY, ESQ.
1908 N. Laurent, Suite 520
Victoria, Texas 77901

Court Reporter: SHARINA A. FOWLER, CSR
Certified Shorthand Reporter
218 Mizell
Duncanville, Texas 75116

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Computerized Transcription of Stenomask Dictation

P R O C E E D I N G S

(Defendant present)

**THE COURT:** The Court will now call Criminal Number V-97-9, United States of America versus David Jones. If you would, please, make announcements as to who you are and who you represent.

**MR. DeGABRIELLE:** Don DeGabrielle for the United States, Your Honor.

**MR. CONVERY:** Good afternoon, Your Honor. John Convery for David Jones and we're ready for a rearraignment on a plea.

**THE COURT:** All right. Yes, I was advised earlier that Mr. Jones desired to enter a plea. This will be his initial appearance and then of course we'd want to go ahead and enter a plea pursuant to -- subject to the Court's approval pursuant, I believe, in discussions with parties to an oral plea agreement of some sort that he's entered into with the Government.

I would like if you would, then, counsel, Mr. Jones, if you would just come forward and stand here in front of the bench and we'll proceed from there. First of all, I want to ask you to be sworn because I'll be asking you some questions in the course of this proceeding. Mildred, would you go ahead and swear Mr. Jones?

**DAVID JONES, DEFENDANT, SWORN**

**THE COURT:** Would you on the record, Mr. Jones, state your full name and your age?

**THE DEFENDANT:** Yes, sir, Your Honor. My name is David V. Jones, I'm 46 years old.

**THE COURT:** Are you under the care at present of a physician, or have you ever been hospitalized or treated for narcotics addiction?

**THE DEFENDANT:** No, sir.

**THE COURT:** Are you on any type of medication or under the influence of anything this morning --

**THE DEFENDANT:** No, sir, I'm not.

**THE COURT:** -- this afternoon, rather?

**THE DEFENDANT:** No, I'm not.

**THE COURT:** I understand based upon the announcement made awhile ago, that you are represented by an attorney standing beside you this afternoon?

**THE DEFENDANT:** Correct, Your Honor.

**THE COURT:** You have been charged by information. Have you received a copy of that information?

**THE DEFENDANT:** Yes, sir, I have.

**THE COURT:** Have you had time to consult with your attorney concerning those charges?

**THE DEFENDANT:** Yes, I have.

**THE COURT:** Did you read the information?

**THE DEFENDANT:** I did, Your Honor.

**THE COURT:** Did you understand the charges?

**THE DEFENDANT:** Yes, sir, I did.

**THE COURT:** Do you want me to have the information read, or would you waive the reading of it at this time?

**THE DEFENDANT:** I'll waive the reading, Your Honor.

**THE COURT:** Concerning the charges contained in this criminal information, I want to advise you of the penalty range and subject to Mr. DeGabrielle's representation and so forth to me later, it appears in the information that you've been charged under 18, United States Code Section 2511, Subsections (1)(c) and 4(b) (ii). That section provides for a fine only and it's my understanding that the penalty range will be up to $5,000. Do you understand that to be the penalty range for the offense with which you have been charged?

**THE DEFENDANT:** Yes, sir, Your Honor, I do.

**THE COURT:** I'm going to further advise you and also there will be -- correct me if I'm wrong, Mr. DeGabrielle -- I believe a $10 special assessment, or is it 5?

**MR. DeGABRIELLE:** It's $5.

**THE COURT:** It's $5 because of infraction. Okay. All right. Very well, then. You would also be subject to a $5 special assessment; do you understand that?

**THE DEFENDANT:** Yes, Your Honor, I do.

**THE COURT:** Of course, you have the right to remain silent and that any statement made by you may be used against you; do you understand that?

**THE DEFENDANT:** I do, Your Honor.

**THE COURT:** I want to advise you of another right that you have at this time and that is, of course, the right to trial, judgement and sentencing by a District Judge. If you consent, you may be tried before a Magistrate. Do you understand that you have that right?

**THE DEFENDANT:** I do, Your Honor.

**THE COURT:** How do you intend to plead to these charges?

**THE DEFENDANT:** I intend to plead no contest, Your Honor.

**THE COURT:** All right. I mentioned earlier that you would be entering that plea, as I understand, pursuant to some sort of an agreement that you've reached with the government, an oral agreement; is that correct?

**THE DEFENDANT:** That's correct, Your Honor.

**THE COURT:** And you've discussed this agreement with your attorney?

**THE DEFENDANT:** I have, sir.

**THE COURT:** Fully understand it?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** Mr. DeGabrielle, if you would, would you advise me at this time of the essential terms of any agreement that the Government has reached with this Defendant.

**MR. DeGABRIELLE:** Yes, sir. In exchange for Mr. Jones' plea of nolo contendere to the criminal information for which he has currently been charged, the United States will recommend to this Court at sentencing a fine of $1,000. Further, we would not prosecute Mr. Jones any further for his involvement surrounding the circumstances which are contained within the basis of this criminal information, which I will tell the Court momentarily.

Further, we had indicated that in exchange for his plea and with the permission of the Court, we would have no objection to his being sentenced today on this infraction. Further, I indicated orally to Mr. Jones and counsel that I would not oppose his withdrawal of his plea of nolo contendere in the event the Court were inclined to impose a different sentence in excess of what the United States had recommended.

**THE COURT:** Okay.

**MR. DeGABRIELLE:** That's the nature of our plea agreement, Your Honor.

**THE COURT:** All right. Mr. Jones, do you understand -- Let me put it differently. What he has just said, is that the entire agreement that you've reached with the Government?

THE DEFENDANT: Yes, sir, it is.

THE COURT: Has anyone promised you anything else to get you to plead to these charges?

THE DEFENDANT: No, sir, they have not.

THE COURT: Has anyone done anything to force you to plead to these charges?

THE DEFENDANT: No, sir.

THE COURT: You want to go ahead and proceed -- for me to enter that plea today and for me to consider whether to accept it --

THE DEFENDANT: Yes, sir.

THE COURT: -- and then proceed the sentencing all today?

THE DEFENDANT: Yes, your Honor.

THE COURT: You feel like you understand all the possible consequences of entering a plea to these charges?

THE DEFENDANT: I do, Your Honor.

THE COURT: A plea of nolo contendere?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Very well. Let me cover a couple of other rights with you to make sure. Before I even consider accepting your plea, I want to cover some other things with you on the record.

You do not have to plead nolo to these charges or plead guilty. You have the right to plead not guilty and as

I mentioned before, by doing so, you would then have certain rights, the right to a trial, not a jury trial in this case, but a trial to the Court.

At the trial, you'd be entitled to be represented by an attorney as you have here. When the government called the witnesses to come in and testify, you'd have the right to confront those witnesses and have them cross-examined in your defense. You'd have the right to testify if you wanted to, but you could decline to testify and that could not be used against you in determining your guilt or innocence. You'd have the right to have subpoenas issued to compel witnesses to come into court and testify on your behalf. Do you understand that you have all of these rights?

**THE DEFENDANT:** I understand those rights, Your Honor.

**THE COURT:** All right. Understanding that, if you enter this plea, of course even being a nolo plea, the effect of that is if I accept that plea, you'll be found guilty of this offense; do you understand that?

**THE DEFENDANT:** I do.

**THE COURT:** You understand you'll be giving up that right to a trial as well as these other rights that I've gone over with you?

**THE DEFENDANT:** I understand, Your Honor.

**THE COURT:** All right. If we had a trial,

however, the Government would have to prove what we call the essential elements of this offense. There are three basic elements and I want to go over them with you at this time.

Being that you're entering a nolo plea, I'm not going to ask you to assent to the fact that you've committed these elements or that you agree with the factual recitation later made by Mr. DeGabrielle. If we had a trial, they would have to prove that a person who intentionally discloses or endeavors to disclose the contents of any oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication. Those are the elements of the offense.

I want to cover with you the definitions of what some of these terms mean for clarification. Interception is an oral or other acquisition of the contents of any oral communication through the use of any electronic, mechanical, or other device. Oral communication is any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception and circumstances justifying such expectation.

Do you understand that those are the elements of this offense?

**THE DEFENDANT**: I understand that, Your Honor.

**THE COURT**: Mr. DeGabrielle, I would like at this time for you to make a factual recitation of what you'd be

prepared to prove if we did try this case.

**MR. DeGABRIELLE**: Yes, Your Honor. If we were to try this matter before the Court, the United States would show that approximately in the early part of March of 1995, Mr. Jones received a copy of an audio cassette from a man by the name of David Charbula who was a former police officer with the Victoria Police Department and at the time was a client of Mr. Jones.

Mr. Charbula provided a tape to Mr. Jones, several copies of this tape were subsequently made. Mr. Jones undertook what the United States submits amounted to three disclosures of these -- of the contents of this tape in the following fashion. He delivered a copy of the tape to Ms. Theresa Gutierrez on March the 7th. On March the 9th, he faxed a letter to a law firm of Cullen, Carsner, Seerden & Cullen, affirming which an individual by the name of Mark Rains was a member of the firm. Mark Rains, as you will soon learn, was one of the conversants in the communication that had been intercepted.

In addition to the communication that he sent to the law firm, he provided a copy of the same tape. Also, on March 9th, he provided a correspondence to and subsequently physical delivery of this same cassette tape to the District Attorney here, Mr. George Filley. In the correspondence, Mr. Jones indicated that he thought that Mr. Filley ought to

look at what might be a potential abuse of Mr. Filley's office involving an action that was currently being considered by the Victoria Independent School District school board.

The United States will show through playing this tape, that it appeared to have portions of several different telephone communications. In fact, in a couple of places on the tape, the one conversation is immediately interrupted and another conversation begins. The United States would prove that this particular cassette was a recording of several cordless telephone communications that had been intercepted with a radio scanning device.

The United States would show that the portion of the communication as it relates to this case involved a conversation, a telephone conversation, between Mark Rains and Michael Shillings, also of Victoria, as well as a portion of a conversation between Mark Rains and Paul Cornfurer, also of the Victoria area.

One of the comments that is made during this conversation, the United States will show that a reasonable person listening to it would surmise that this was a telephone communication, is a statement by Mr. Rains that when the conversations started getting weak and kind of blacking out -- blanking out -- made the comment that the battery is going out and he needs to change telephones.

The United States will show that indeed this

conversation that was recorded and the portion which was submitted to Ms. Gutierrez was a conversation between Mr. Cornfurer and Mr. Rains over the cordless telephone, which phone call was taking place while Mr. Rains was actually in his home.

The United States will further prove that neither Mr. Cornfurer nor Mr. Rains gave consent to anybody, and specifically to Mr. Jones or anybody operating on his behalf, to either obtain a copy of that communication or conversation. More particularly, he was not given permission to disclose the contents of that conversation to anybody else.

Now, as I mentioned earlier, we said that the United States would show that there were actually three disclosures. The disclosure that was made both to the law firm and to Mr. Filley's office are not disclosures that would tantamount to a violation of this statute, inasmuch, the United States feels that it would not be able to overcome the intentional aspect of the disclosure as it related to those two disclosures. Nevertheless, we would show that the disclosure that was made to Ms. Gutierrez was done for no lawful purpose, whereas the other two arguably could have been for lawful purposes.

Nevertheless, this particular disclosure was made when she was given contents of the conversation, wherein she had been discussed by the participants in the

communication. That was, I guess, the relative interest that Mr. Jones assumed that she would have in hearing about the tape. She was also a member at that time of the Victoria Independent School District school board as well.

Further, Your Honor, the United States would show that the -- that this conduct was, first of all, a first such conduct by Mr. Jones that he had not been previously convicted with or charged with an offense under Title 18, Section 2511. Further, the United States would not be able to prove and consequently believes that this conduct was neither fortuitous or other illegal purposes, nor was it for direct or indirect commercial gain on the part of Mr. Jones.

Further, the United States would show that this radio portion of this communication which was intercepted was indeed that of the cellular telephone communication which related to the transmission between a cordless hand held telephone unit and the base of the telephone unit which communication had originally -- originated over a land base telephone communication line.

**THE COURT:** Of course, that would bring it under 4(b) (ii).

**MR. DeGABRIELLE:** Yes, sir, that's correct. Inasmuch as the maximum sentence for that particular infraction is a fine of $5,000. The United States would show that these actions occurred here in the Victoria area, the Southern

District of Texas.

**THE COURT**: It occurred back in -- Was it March of '95?

**MR. DeGABRIELLE**: Yes, sir.

**THE COURT**: Over two years ago.

**MR. DeGABRIELLE**: Yes, sir.

**THE COURT**: Do you have the tape?

**MR. DeGABRIELLE**: Yes, I do.

**THE COURT**: Did I understand earlier that you indicated that you'd be playing it today?

**MR. DeGABRIELLE**: I don't think there's any need to play it. If the Court wishes to, I will. I've summarized the tape --

**THE COURT**: Okay.

**MR. DeGABRIELLE**: -- but we have it if the Court has any questions about it.

**MR. CONVERY**: Can I add to that factual basis a little bit?

**THE COURT**: Sure.

**MR. CONVERY**: In two areas -- three, let's say. Number one is I think the Government has always agreed that Mr. Jones didn't -- he disclosed the tape for reasons that -- for reasons that have really yet to be brought out. He had nothing to do with intercepting any communication. In other words, I think that the evidence that was available to the

Government shows that the person who provided him the tape, conversations came to Mr. Jones and basically said, here, you need to listen to this. So that there's not any kind of activity involved in either through any kind of mechanical device or other device of Mr. Jones taping conversations or of anybody doing it on behalf of Mr. Jones.

The other aspect of it is that with respect to the nature of the communication as to what a reasonable person would know, and I'm indicating to the Court that we realize that the Government described at one time a technical violation of statute. A year prior to this activity, we wouldn't be in front of the Court, because from the handset to the base, a cordless phone had no expectation of privacy. Until Congress changed the law in 1994, what occurred herein would not have been covered by Title 3.

So one year after the act of the statue, you have an attorney who ought to know better, who's following a memorandum that was provided by a law firm that indicates that that part of the conversation between the hand held phone and the base is not covered by Title 3, but it is and lack of knowledge of the laws is not enough.

Finally, with respect to the tape, I think that all of the parties would agree that what's on the tape is a potential crime. What is on -- the conversations that -- In other words, what we're saying is this is not for some tortuous

purpose or civil purpose or something. Mr. Jones gets a tape that indicates that the participants are about to commit or discussing committing, perhaps conspiring to commit an offense by setting up the school board where an Open Meetings Act violation, wherein then one of the participants in the phone call will have the opportunity to defend him for that and thereby make a fair amount of fee in doing that in the process.

So Mr. Jones, the attorney, takes that tape to the -- one, to the disciplinary committee, two, to the District Attorney and, three, to the person who's on the school board at the time who's the subject of the conversation about if this official can be convinced, if you will, or push towards creating what would be perceived as an open meetings violation, then that would create legal work for the people who were involved -- one of the persons, at least, who --

**THE COURT**: You say he took it to the disciplinary committee or the state bar? Is that what you're -- I didn't hear that --

**MR. CONVERY**: The law firm that the person who's one of the participants in the conversation --

**THE COURT**: Mark Rains' firm.

**MR. CONVERY**: Mark Rains' firm, right. The District Attorney and the party who is -- as counsel has adequately stated, is the subject of the conversation for this conspiracy to potentially commit a crime. Having said all

that, I'm not trying to say that it's not a technical infraction, it's not an infraction. It is, I just want the record to be clear as to what the Court is dealing with.

Because some of the factors have to do with sentencing, I wanted to give you an idea of why we're before you at such a low level, if you will, in nature of the -- in light of the privacy interest that are protected by Title 3.

**THE COURT:** Of course one of my concerns and whether or not I will accept a nolo plea is considering the -- of course the views of the parties and the interest of the public. It's been some two years and two months, I guess, when all this occurred. Someone made the tape and I guess one of my questions would be, what other prosecutions, if any, resulted from this matter and/or is there an investigation going on. If so, you're not at liberty to divulge and I understand that.

I'm wondering based upon this factual representation that was made to me that Mr. Jones received a cassette and now he stands before me charged with a crime. Anyone else suffer any consequences as a result of this activity?

**MR. DeGABRIELLE:** Well, Your Honor, I would rather not disclose all of the details of the investigation which is still --

**THE COURT:** Very well.

**MR. DeGABRIELLE:** I will do so incamera if the

Court would want to at a later date. We agree that Mr. Jones did not direct this unlawful interception, but, nevertheless, did make disclosure of it. There has been no other charge against anybody as of this date. Of course, as the Court may be aware, there is certainly a potential, maybe an attorney/client issue between Mr. Charbula and Mr. Jones that has been somewhat problematic. I can tell the Court that Mr. Jones has cooperated fully with the United States. In fact, he gave me what I guess is the most original tape that he had despite letter of request. I didn't have to do it through search warrant or through a subpoena.

He actually met with me and another agent from the FBI at his law office in San Antonio over a year ago in discussing this case. It may be that there will be other subjects that the United States will be attempting to address in this matter, but right now Mr. Jones is the only one whose conduct has risen to the level that we've brought it to the attention of the Court and that we could prove various things we have alleged here before.

**THE COURT:** Of course it is important to me that you are in fact cooperative, because as I mentioned before, I am considering not only your interest, the interest of the Government and the interest of the public and how this matter is being resolved in your submitting a nolo plea which typically is not encouraged in Federal Court, typically not

accepted except under certain circumstances.

**MR. CONVERY:** Judge, could I point out --

**THE COURT:** Yes, you may.

**MR. CONVERY:** I want to point out one other thing with respect to the Court's decision involving the nolo plea. Farther along in the statue, the Government had the option in this case, for instance, to bring a suit to enjoin Mr. Jones. Because of the one time nature of this activity, that wouldn't assert any real useful purpose. The statue in basically the next subsection, and with respect to the subsections before you today gives the Government the option of either proceeding as an infraction or proceeding as a civil injunction-type suit.

Once this Court were to enter the injunction, if the Respondent went out and violated your injunction and just didn't pay any attention to the Court's order, a fine of $500 is what's specified in the statute. Furthermore, on down to Title 3, the people whose privacy interest were affected are also given the ability to sue on their own behalf and damage provisions are included. They're empowered, if you will, as individuals, Mr. Rains and Paul Corrfurer, to come forward if they want and to sue Mr. Jones.

I think that in this particular case under these unique facts and circumstances, because of what Mr. Jones basically did was report a crime or a crime that was about to

be committed, that if those people want to do that, he shouldn't be put in a position of having, if you will, given up what may be civil defenses to the elements of their lawsuit. That's not -- We don't really anticipate that happening, Judge. I don't think so, but in terms of the public's interest and what's at stake here, I think that's one of the reasons for the unique nature of the plea that's before the Court.

I know that counsel has had to get permission to permit a nolo plea from the Department of Justice just before we could even get in front of the bench and put it to Your Honor. For those reasons, I think that that's a defense prospective about why it's appropriate in this particular case.

**MR. DeGABRIELLE:** May I respond, Your Honor?

**THE COURT:** You may.

**MR. DeGABRIELLE:** Or add to it perhaps. This is a rather unusual factual circumstance inasmuch as at the same time Mr. Jones is doing what, as far as the Government is concerned, is a clear violation of the statue, mainly giving this tape and disclosing it to Ms. Gutierrez who was not a participant in the communication, he has given a copy of the tape to the District Attorney.

This violation that we're talking about, I don't concede that. There is some argument that maybe a Texas Open Records Act violation could have been construed from the conversation at the time. Nevertheless, the United States

wouldn't have the power to take that information absent some very stringent guidelines that are set up in Title 3 for having intercepted that communication.

Certainly a citizen should not have the authority to disclose something just because they think it may be a violation of the law or whatever. Had he gone just to the District Attorney and perhaps maybe even to a law firm to get legal advice about it, then I don't think we're here before the Court. But because at the same time he's doing these things, he's also doing this other behavior which is a violation and we feel has to be addressed, so that's the reason for the understanding of the agreement that we've arranged here before you today -- that we are attempting to arrange here before you today.

**THE COURT**: Okay. Very well. Mr. Jones?

**THE DEFENDANT**: Yes, sir.

**THE COURT**: How do you now plead to these charges?

**THE DEFENDANT**: Nolo contendere, Your Honor.

**THE COURT**: Very well. I'll make certain findings.

At this time I'm going to find, of course, that you're competent and capable of entering an inform plea. I further find that you are aware of the nature of the charges and the consequences of entering the plea and that your plea of

nolo contendere is a knowing and voluntary plea supported by an independent basis, in fact, containing each of the essential elements of the offense. After due consideration of the views of the parties to the case and of the interest of the public and the effect of Administration of Justice, I will accept your plea. Of course you understand by doing so, you are now adjudicated guilty --

**THE DEFENDANT:** Yes, sir.

**THE COURT:** -- of the charges contained in the information.

**THE DEFENDANT:** I understand.

**THE COURT:** Based upon the request that you and the Government made prior to this hearing, I will go ahead and proceed to sentencing at this time.

I would recognize you, first, or your counsel to address me on an appropriate sentence, understanding as I have mentioned to you earlier, the range is up to $5,000 for an infraction of this type. You entered into an agreement with the Government wherein the Government is going to recommend a fine of $1,000. Is there anything else that you would like to say in this regard?

**MR. CONVERY:** I would simply ask you to follow the Government's recommendations for the reason I stated a few moments ago with respect to the statue and it's outline, that the violation of the injunction is set by Congress as being

worth $500. There's no guidelines that we can put before the Court in this case that we can indicate to you what the fine should be established as. I think we arrived at that figure based as most parties do in a plea agreement situation on the fact that the person you have before you is a well respected attorney with an unblemished record who thought he was doing the right thing. Based on all those things, we think the Government's recommendations are entirely appropriate.

**THE COURT**: Mr. Jones, would you like to say anything?

**THE DEFENDANT**: No, Your Honor.

**THE COURT**: All right. Mr. DeGabrielle?

**MR. DeGABRIELLE**: No, sir.

**THE COURT**: Mr. Jones has appeared before me going way back when I was a state judge in Brazoria County. That's the first time I saw him as a lawyer and many years have gone past since then, and of course it pains me to have you stand before me. I think -- Hopefully I understand all of the, I guess reasons that you did whatever you did. I certainly probably didn't have any better understanding of the law in this regard in 1995 than you did at that time and can understand why you may have made the error that you did.

Knowing what I know and the representations made to me by the Government, I have no reason to disagree with the arrangement that you've entered into with the Government. I

think under the circumstances that that is an appropriate sentence and I will go along with the agreement and I will set your punishment at a fine of $1,000 and a $5 special assessment.

**THE DEFENDANT:** Thank you, Your Honor.

**THE COURT:** I guess the important thing about any sentencing is that you learn from it. You know, that -- They give us reasons why we sentence someone; to deter others, to properly punish the person who committed the crime and to protect the public.

In this electronic world we live in with cell phones and so forth, I'm sure we'll -- again you'll probably come across a situation where you may overhear a conversation or whatever. As I understand, it can happen inadvertently just driving down the road using your own cell phone that you may all of a sudden hear someone else's conversationing. Point being, we just all have to be careful.

**THE DEFENDANT:** Your Honor, let me say, if I may. I apologize to the Court for this whole proceeding here. I also want to say the U.S. Attorney's Office has treated me honorably and I assure you it won't happen again.

**THE COURT:** I take that as a sincere statement to the Court. As I said, I've always had a great deal of respect for you and still do. Not that I -- this has changed anything. I just want us all to be careful and I am certainly

influenced by your willingness to cooperate. I think that's important.

What I see from this side of the bench and I see law enforcement people in this courtroom today that -- and they've heard me say this many times, it's still the best tool they have to solve infractions and crimes is the cooperation of people that happen to be involved in it. That's the best law enforcement tool probably that we have. I would encourage you to continue to do that and I wish you the best of luck. I think under Rule 58, I believe you have the right to appeal this sentence. Is that not correct, Mr. DeGabrielle, or limited rights? I will advise you that you do have the right to appeal the sentence that I've just imposed upon you. Do you understand you have that right?

**THE DEFENDANT:** Yes, sir.

**THE COURT:** Mr. DeGabrielle, is there anything else that needs to come before the Court on this matter?

**MR. DeGABRIELLE:** No, Your Honor.

**MR. CONVERY:** Nothing further from the Defendant, Your Honor.

**THE COURT:** Very well. Good luck to you and I'll look forward to seeing you in court under other circumstances. Thank you.

(Whereupon, at 1:24 p.m., hearing in the above-entitled matter was adjourned.)

THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

VICTORIA DIVISION

I, SHARINA A. FOWLER, CSR, Contract Court Reporter, United States District Court, Southern District of Texas, do hereby certify that I reported the proceedings had in the above-styled-and-numbered cause on the 5th day of June, 1997; that a transcript of said proceedings was later reduced to typewriting by me or under my personal supervision, and the above-and-foregoing 26 pages constitute a true and correct transcript thereof.

Given Under My Official Hand, this the _____ day of _____ 1997.

Sharina A. Fowler
Certified Shorthand Reporter
218 Mizell
Duncanville, Texas 75116
(972) 283-0243
CSR No. 6132

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

VICTORIA DIVISION

I, SHARINA A. FOWLER, CSR, Contract Court Reporter, United States District Court, Southern District of Texas, do hereby certify that I reported the proceedings had in the above-styled-and-numbered cause on the 20th day of May, 1997; that a transcript of said proceedings was later reduced to typewriting by me or under my personal supervision, and the above-and-foregoing 22 pages constitute a true and correct transcript thereof.

Given Under My Official Hand, this the 31st day of December, 1997.

Sharina A. Fowler

Sharina A. Fowler
Certified Shorthand Reporter
218 Mizell
Duncanville, Texas 75116
(972) 283-0243

WATKINS V. STATE FARM
(Oklahoma tornado litigation)
Order sustaining contempt and sanctions against State Farm, in part, because David Jones and other State Farm counsel "repeatedly and in bad faith engaged in litigation misconduct"

DONALD E. WATKINS, Jr. and BRIDGET WATKINS, Individually and as representatives of a class of similarly situated individuals,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY and DANNY WALKER, and other similarly situated agents of State Farm Fire & Casualty Company,

Defendants.

Case No. CJ-2000-305

**ORDER SUSTAINING PLAINTIFFS' MOTION FOR CONTEMPT AND FOR SANCTIONS AGAINST DEFENDANT, STATE FARM FIRE & CASUALTY COMPANY**

On the 21st day of December, 2006, the above-styled and numbered cause came on for hearing before the undersigned Judge on Plaintiffs' Motion for Contempt and for Sanctions Against Defendant, State Farm Fire & Casualty Company. Defendant, State Farm, appeared by and through its counsel of record, Tom Cordell, Anton Rupert, Rustin Strubhar, David Jones and LeAnne Burnett. Plaintiffs appear by and through Jeff D. Marr, Attorney at Law. Upon review of the written briefs filed by the parties, after hearing oral arguments, viewing excerpts from videotaped depositions, and being otherwise fully advised in the premises, this Court sustains Plaintiffs' Motion for Contempt and for Sanctions Against Defendant, State Farm Fire & Casualty. In making its ruling, this Court finds the conduct displayed by State Farm and its counsel to be obstructive, contemptuous, and in bad faith. In sustaining Plaintiffs' Motion for Contempt and for Sanctions, this Court hereby imposes the following sanctions upon Defendant, State Farm,

[illegible]

Therefore, IT IS SO ORDERED that:

1. Defendant, State Farm, intentionally violated this Court's Order dated November 6, 2006, and that State Farm is in contempt of the Court's Order;

2. That Defendant's violation of the Court's Order dated November 6, 2006, was willful, deliberate and in bad faith;

3. Plaintiffs are hereby awarded the costs and attorneys' fees incurred in bringing this Motion and the underlying Motion to Compel and For Sanctions. Plaintiffs' counsel shall submit their bill of costs to this Court within five (5) days of this order;

4. Defendant, State Farm shall immediately and unconditionally comply with this Court's November 6, 2006, Order sustaining Plaintiffs' Motion to Compel by producing to this Court no later than the end of business on January 19, 2007, the following: a) all documents requested by Plaintiffs in their first set of post-verdict requests for production, without redactions or omissions. In addition, complete and unredacted copies of all documents withheld on a claim of privilege shall also be presented to the Court for in-camera inspection by the end of business on January 19, 2007, so that this Court can make a determination whether these documents are in fact privileged; and b) full, complete and verified answers, to all of Plaintiffs' first set of post-verdict interrogatories numbered 2, 3, 4, 5, 6, 7, 9, 10 and 11, without objection or claim of privilege. As further sanction for its contemptuous behavior, State Farm shall pay the sum of $1,000.00 per day for each day of non-compliance after the end of business on January 19, 2007

on a mutually agreed upon date and time, but before January 15, 2007. The Ct. further orders all costs associated with these depositions, including court reporter and videographer fees, shall be paid by State Farm, and that defense counsel are prohibited from making any objection other than "objection to the form" during said depositions;

6. State Farm's 3230(C)(5) corporate designees Michael Carroll and Daniel Carrigan, are to obey their trial subpoenas served upon them during their respective depositions or State Farm and its counsel risk further sanctions the morning of trial;

7. Defendant, State Farm, and its counsel repeatedly and in bad faith engaged in litigation misconduct during the following court ordered depositions: Susan Hood I; Susan Hood II; Michael Carroll; Daniel Carrigan; Deborah Traskell; and Jack North. At the time of these depositions, State Farm had the right to control and is therefore responsible for the actions and positions taken by its witnesses and selected counsel who are attorneys retained on a regular basis by State Farm. Plaintiffs are awarded their expenses, costs and attorneys' fees incurred for each of the aforementioned depositions so as to sanction State Farm for its obstructionist behavior and to deter future abuses. Plaintiffs shall submit a bill of costs within five (5) days from the date of this Order;

8. State Farm shall reimburse Plaintiffs for all costs and attorney fees incurred by Plaintiffs in attempting to secure the deposition of Michael Traynor. Plaintiffs shall submit a bill of costs within five (5) days from the date of this Order;

10. State Farm shall be prohibited at trial from referencing in any manner its "investigation" results relating to Haag Engineering, or independent adjusters as being somehow exculpatory;

11. Pursuant to 12 O.S. §3237(B)(2)(a), matters regarding the November 6, 2006, Order sustaining Plaintiffs' Motion to Compel and for Sanctions or any other designated facts shall be taken to be established for the purposes of this action in accordance with the claims made by Plaintiffs in obtaining the Order sustaining Plaintiffs' Motion to Compel;

12. Plaintiffs' proposed jury instruction attached as hereto as Exhibit "A", which is specifically supported by the Oklahoma Supreme Court in *Payne v. Dewitt*, 995 P.2d 1088 (Okla. 1999), and which advises defendant has been found guilty of litigation misconduct in obstructing or refusing to answer appropriate deposition questions and that had answers been forthcoming, the jury may presume they would be detrimental to State Farm's interests, is hereby adopted by this Court.

13. State Farm shall be denied the opportunity to present defense evidence concerning any matter which it declined to disclose during discovery under a claim of attorney-client privilege, specifically including evidence concerning Gulf Coast claim

handling and an alleged investigation of Hang Engineering through Michael Tramel, the State Farm's utilization of independent adjusters;

14. Defendant shall be prohibited from conducting any further discovery in this matter other than that which is specifically outlined in this Order or any other Order which may be issued by this Court hereinafter.

15. All other relief requested by Plaintiffs not specifically referenced herein is denied.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Plaintiffs' Motion for Contempt and for Sanctions Against State Farm Fire & Casualty is **SUSTAINED** and the Court hereby imposes the sanctions referenced above.

**IT IS SO ORDERED!**

Dated this 12th day of January, 2007.

Richard G. Van Dyck
District Judge

Court Clerk,
**Please send a copy to**
all counsel of record

STATE FARM V. RODRIGUEZ and MANOKOUNE V. STATE FARM

(Texas and Oklahoma cases)

Cases in which Jones was lead counsel wherein State Farm was sanctioned (*Rodriguez*) and Jones' firm's litigation conduct was called into question (*Manakoune*)

HState Farm Fire and Cas. Co. v. Rodriguez
Tex.App.-San Antonio,2002.

Court of Appeals of Texas,San Antonio.
STATE FARM FIRE AND CASUALTY COMPANY, Appellant,
v.
Robert RODRIGUEZ and Wife, Beth Rodriguez, Appellees.
**No. 04-01-00268-CV.**

July 24, 2002.

Homeowners sued insurer for damages to home allegedly caused by plumbing leak. The 224th Judicial District Court, Bexar County, David Peeples, J., entered judgment on jury finding that plumbing leak caused 25% of damage to foundation. Insurer appealed. The Court of Appeals, Phil Hardberger, C.J., held that: (1) expert's testimony that damage to foundation was caused by a plumbing leak was reliable; (2) expert's testimony that plumbing leak caused 100% of damage to foundation provided a reasonable basis for the jury's finding of insurer's liability under the homeowners policy; (3) jury's finding that 25% of the foundation damage was due to the plumbing leak was within limits of the testimony; (4) evidence was sufficient to support conclusion that loss occurred in year in which policy was in effect; (5) trial court did not abuse its discretion in striking testimony of insurer's expert witness as a discovery sanction.

Affirmed.

West Headnotes

[1] **Appeal and Error 30 970(2)**

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
Whether the trial court properly admitted expert testimony is subject to an abuse of discretion standard of review.

[2] **Appeal and Error 30 840(4)**

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k840 Review of Specific Questions and Particular Decisions
30k840(4) k. Review of Questions of Pleading and Practice. Most Cited Cases
In reviewing whether a trial court properly ruled on admitting expert testimony, the Court of Appeals examines the entire substance of the expert's testimony to determine if the opinion is based on demonstrable fact and does not rely solely on assumptions, possibility, speculation, and surmise.

[3] **Evidence 157 508**

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

**Evidence 157 555.2**

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
In demonstrating that an expert is qualified to testify, the proponent of the evidence has the burden to demonstrate that the expert's testimony is both relevant to the issues and based on a reliable foundation. Rules of Evid., Rule 702.

[4] **Evidence 157 555.2**

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases

**Evidence 157 555.4(2)**

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.4 Sources of Data
157k555.4(2) k. Speculation, Guess, or Conjecture. Most Cited Cases
To be reliable, the scientific evidence must be grounded in scientific method and procedure such that it amounts to more than subjective belief or unsupported speculation. Rules of Evid., Rule 702.

[5] **Evidence 157 555.2**

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible. Rules of Evid., Rule 702.

[6] **Evidence 157 555.2**

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
In determining whether an expert's testimony is reliable for purposes of admissibility, the court must consider whether there is too great of an "analytical gap" between the data and the expert's opinion. Rules of Evid., Rule 702.

[7] **Evidence 157 555.2**

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.2 k. Necessity and Sufficiency. Most Cited Cases
In determining whether an expert's testimony is reliable for purposes of admissibility, the trial court's duty is not to determine whether the expert's conclusions are correct, but only whether the analysis used to reach them is reliable. Rules of Evid., Rule 702.

[8] **Evidence 157 555.5**

157 Evidence
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Basis of Opinion
157k555.5 k. Cause and Effect. Most Cited Cases
Opinion of homeowner's expert witness that damage to foundation of house was caused by plumbing leak was reliable, and thus, admissible in suit against insurer for damages resulting from foundation damage, where insurer did not dispute expert's qualifications, methodology, or data, expert consistently said that sub-foundation leak caused the damage to the foundation, and expert's inability to assign percentages to hypothetical contributory factors, which expert qualified as only if they existed, did not render his opinion unreliable. Rules of Evid., Rule 702.

[9] **Insurance 217 2103(2)**

217 Insurance
217XV Coverage--in General
217k2096 Risks Covered and Exclusions
217k2103 Proximate Cause
217k2103(2) k. Combined or Concurrent Causes. Most Cited Cases
Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered perils.

[10] **Insurance 217 2117**

217 Insurance
217XV Coverage--in General
217k2114 Evidence
217k2117 k. Burden of Proof. Most Cited Cases
Because an insured can recover only for covered events, in a case where both covered and non-covered perils combined to create a loss, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof, and to this end,

the insured must present some evidence upon which the jury can allocate the damage attributable to the covered peril.

[11] **Insurance 217 ⚿2119**

217 Insurance
217XV Coverage--in General
217k2114 Evidence
217k2119 k. Weight and Sufficiency. Most Cited Cases
Although an insured, who must present evidence upon which e jury can allocate the damage attributable to the covered peril, is not required to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests.

[12] **Evidence 157 ⚿571(9)**

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(9) k. Cause and Effect. Most Cited Cases
Testimony by expert witness that 100% of damage to foundation of house was caused by sub-foundation plumbing leaks provided a reasonable basis for the jury's finding of damages for which homeowner's insurer was liable.

[13] **Evidence 157 ⚿571(9)**

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(9) k. Cause and Effect. Most Cited Cases

**Insurance 217 ⚿2201**

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2201 k. Weight and Sufficiency. Most Cited Cases
Jury's finding that 25% of damage to house foundation was due to a plumbing leak, which was a covered cause in homeowner's insurance policy, was within the limits of testimony of the parties, where homeowner's expert testified that 100% of the damages were due to a plumbing leak, and insurer introduced evidence that none of the damages were due to the plumbing leak.

[14] **Evidence 157 ⚿588**

157 Evidence
157XIV Weight and Sufficiency
157k588 k. Credibility of Witnesses in General. Most Cited Cases
It is fundamental that a jury may blend the evidence admitted before it and believe all, some or none of a witness's testimony.

[15] **Evidence 157 ⚿588**

157 Evidence
157XIV Weight and Sufficiency
157k588 k. Credibility of Witnesses in General. Most Cited Cases

**Evidence 157 ⚿594**

157 Evidence
157XIV Weight and Sufficiency
157k594 k. Uncontroverted Evidence. Most Cited Cases
Juries may disbelieve any witness even though he is neither impeached nor contradicted, they may believe one witness and not others, and they are not required to depend on evidence from a single source.

[16] **Appeal and Error 30 ⚿1004(1)**

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(1) k. In General. Most Cited Cases
In resolving damages issues, a jury's finding will be upheld if it is within the range of the testimony regarding the amount of damages incurred.

[17] **Insurance 217 ⚿2120**

217 Insurance
217XV Coverage--in General
217k2120 k. Questions of Law or Fact. Most Cited Cases
With regard to the segregation of damages attributable to a covered cause, so long as the jury's finding is within the range of testimony presented, the jury's finding will be upheld.

[18] **Insurance 217 ⚿2117**

217 Insurance
217XV Coverage--in General
217k2114 Evidence
217k2117 k. Burden of Proof. Most Cited Cases

**Insurance 217 ⚿3571**

217 Insurance
217XXXI Civil Practice and Procedure
217k3571 k. Pleading. Most Cited Cases
An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy.

[19] **Insurance 217 ⚿2127**

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2127 k. Commencement or Trigger of Coverage. Most Cited Cases
For purposes of determining when property loss occurs for which an insurer may be liable, property damage manifests itself when it becomes "apparent."

[20] **Appeal and Error 30 ⚿930(1)**

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k930 Verdict
30k930(1) k. In General. Most Cited Cases
In considering the legal sufficiency of evidence, the Court of Appeals considers only the evidence favorable to the trial court's decision and disregards all evidence and inferences to the contrary.

[21] **Appeal and Error 30 ⚿1001(1)**

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1001 Sufficiency of Evidence in Support
30k1001(1) k. In General. Most Cited Cases
If there is any evidence of probative force to support the trial court's finding, the legal sufficiency issue must be overruled and the finding upheld.

[22] **Insurance 217 ⚿2202**

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2202 k. Questions of Law or Fact. Most Cited Cases
Record in insureds' action against homeowners' insurer contained probative evidence from which jury could determine that foundation damage to insureds' home manifested itself during period when policy that was introduced into evidence was in effect; although property loss did not manifest itself when cracks in walls were noticed in prior years, there was testimony that cracks in foundation manifesting property loss were noticed in year when policy was in effect.

[23] **Insurance 217 ⚿2201**

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2196 Evidence
217k2201 k. Weight and Sufficiency. Most Cited Cases
Even if foundation damage to insured's home manifested itself during years prior to effective date of homeowners' policy that was introduced into evidence, there was probative evidence indicating that the home was covered by insurer during the years of the manifestation; evidence included check from insured made out to insurer, with notation referring to those years and to address of residence, and with electronic marking indicating same policy number as policy introduced into evidence.

[24] **Pretrial Procedure 307A** 434

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)6 Failure to Comply; Sanctions
307Ak434 k. In General. Most Cited Cases

Trial court did not abuse its discretion in striking testimony of insurer's expert at trial for coverage of damage to foundation of homeowners' house, even though insurer claimed that objection to testimony was untimely made, where insurer's expert's computer presentation used at trial was not provided during discovery after it was requested, and expert never disclosed that he relied on two reductions in assessed value that occurred before insureds bought the house in rendering his conclusions.

[25] **Appeal and Error 30** 969

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k969 k. Conduct of Trial or Hearing in General. Most Cited Cases

**Trial 388** 18

388 Trial
388III Course and Conduct of Trial in General
388k18 k. Regulation in General. Most Cited Cases

Trial judges have wide discretion in making whatever decisions are necessary to insure a fair trial to both parties, and their decisions fall within an abuse of discretion standard of review.

[26] **Attorney and Client 45** 36(2)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(2) k. Power of Judge at Chambers. Most Cited Cases

Trial courts possess inherent powers to discipline attorney behavior through the imposition of sanctions sua sponte in appropriate cases.

[27] **Trial 388** 105(6)

388 Trial
388IV Reception of Evidence
388IV(C) Objections, Motions to Strike Out, and Exceptions
388k105 Effect of Failure to Object or Except
388k105(6) k. Excluding or Striking Out on Court's Own Motion. Most Cited Cases

A trial judge on his own motion may exclude improper testimony.

[28] **Pretrial Procedure 307A** 434

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)6 Failure to Comply; Sanctions
307Ak434 k. In General. Most Cited Cases

Sanction of excluding insurer's expert testimony regarding cause of foundation cracks in coverage dispute trial on grounds that insurer failed to disclose during discovery the computer presentation used by expert during trial was not abuse of discretion, where jury's finding that foundation damage was 25% attributable to plumbing leak was actually closer to insurer's 0% causation than insured's 100% causation that defied conclusion that trial court imposed death penalty sanction, insurer was capable of putting on a defense and was not restricted from rebutting insured's expert's testimony, and even death penalty sanction for insurer's callous disregard of discovery rules was justifiable.

[29] **Pretrial Procedure 307A** 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases

Sanctions for discovery abuse must be "just."

[30] **Pretrial Procedure 307A** 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General

307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
Whether sanctions for discovery abuse are just must meet a two-part test: (1) there must be a direct relationship between the offensive conduct and the sanction imposed, and (2) the sanction must not be excessive.

[31] **Appeal and Error 30 ⚿984(1)**

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(1) k. In General. Most Cited Cases

**Costs 102 ⚿2**

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In General. Most Cited Cases
A trial court has broad discretion in entering sanctions, and the standard of review on appeal is whether the trial court abused its discretion.

[32] **Pretrial Procedure 307A ⚿45**

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases
Whether the exclusion of evidence constitutes a death penalty sanction for discovery violations must be determined on a case-by-case basis.

[33] **Pretrial Procedure 307A ⚿45**

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak45 k. Facts Taken as Established or Denial Precluded; Preclusion of Evidence or Witness. Most Cited Cases
Where the exclusion of expert testimony for discovery violations is only an inconvenience that impairs the presentation of a party's case but does preclude a trial on the merits, the exclusion of evidence is not a death penalty sanction.

[34] **Pretrial Procedure 307A ⚿44.1**

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
A death penalty sanction is justified when counsel callously disregards the responsibilities of discovery under the rules.

***317**http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0224651201&FindType=hDavidV. Jones,Noe Reyna, Jones Kurth, Andrews & Ortiz, P.C., San Antonio, Edward J. Batis, Jr., Alamo Heights, Edward F. Kaye, J. Hampton Skelton, Skelton, Woody & Arnold, Austin, for Appellant.
Richard A. Bentley, Law Offices of Richard A. Bentley, San Antonio, for Appellees.

Sitting: PHIL HARDBERGER, Chief Justice, ALMA L. LÓPEZ, Justice, PAUL W. GREEN, Justice.
Opinion by PHIL HARDBERGER, Chief Justice.
Appellant's motion for rehearing en banc is denied. This court's opinion and judgment dated March 6, 2002 are withdrawn, and this opinion and judgment are substituted. We substitute this opinion to correct a factual misstatement in our original opinion regarding the objection to the testimony of Ramon Carrasquillo and to clarify our opinion in other regards.

This case presents the interesting question of whether a trial court abuses its discretion in granting a motion to strike testimony for discovery abuse when the objection to the testimony is untimely. We hold that the trial court's discretion is not curtailed by the failure of a party to make a timely objection.

In this plumbing leak case, a jury found that the foundation of the involved home sustained damage resulting from a plumbing leak, and that 25% of the damage was attributable to the leak as opposed to

other causes. State Farm Fire and Casualty Company ("State Farm") raises four issues on appeal, arguing: (1) the causation testimony of Rodriguezes' expert, Eugene Dabney, should be stricken as unreliable and therefore constitutes no evidence of causation; (2) the evidence offered by the Rodriguezes did not segregate any damages caused solely by the plumbing leak, therefore the Rodriguezes did not prove causation under *Wallis v. USAA;* (3) the evidence proved as a matter of law that the damage to the Rodriguezes' house manifested itself prior to the effective dates of the only policy in evidence; and (4) the trial court abused its discretion in striking the testimony of State Farm's expert, Ramon Carrasquillo, which caused the rendition of an erroneous verdict. We affirm the trial court's judgment.

## BACKGROUND

In 1994, the Rodriguezes purchased a home in San Antonio. The house was 35 years old. At the time the Rodriguezes purchased the home, they received a structural evaluation report from a consulting geotechnical engineer, John W. Dougherty ("Dougherty"). In his report, Dougherty noted cracks in the walls in several different areas of the house. Dougherty concluded, however, that the house and its foundation were structurally sound and in good condition. Dougherty said that considering the age of the structure, limited foundation movement, and favorable soil conditions, it would be unlikely that there would be any significant foundation movements in the future.

Both in 1995 and 1996, the Rodriguezes noticed new cracks in the walls of the home. In 1997, Beth Rodriguez noticed a crack in the foundation which was visible through the linoleum on the floor of the dinette. As a result of this foundation crack, the Rodriguezes filed a claim with the insurer of the home, State Farm. The home was insured under a standard Texas Dwelling Policy.

State Farm's adjuster suspected that the home had a plumbing leak underneath the foundation. State Farm hired an independent contractor, Preferred Plumbing, ***318** to determine whether a plumbing leak existed. Preferred Plumbing conducted a static test on the home and confirmed that there was indeed a leak under the home. Next, State Farm hired CH & A Corporation ("CH & A"), an engineering firm, to conduct an investigation of the plumbing leak's role in damaging the foundation. CH & A conducted a structural evaluation of the home which included visual observations and elevation measurements. CH & A concluded that the damage to the Rodriguezes' residence was caused by the settlement of the left side of the house, not the plumbing leak. Citing this report, State Farm denied the Rodriguezes' claim.

The Rodriguezes then filed suit against State Farm alleging causes of action for breach of contract, breach of the duty of good faith and fair dealing, violation of the Deceptive Trade Practices Act, and violation of the Insurance Code. The Rodriguezes also joined CH & A as a defendant in an action for civil conspiracy. The trial court granted summary judgment in favor of the defendants on the Rodriguezes' extra-contractual claims. The breach of contract claim was tried to a jury.

Each side produced one expert witness to support their respective positions. The Rodriguezes' expert was Eugene Dabney ("Dabney"), and State Farm's expert was Ramon Carrasquillo ("Carrasquillo"). State Farm complains about the admission of Dabney's testimony and the striking of Carrasquillo's testimony. Dabney testified that 100% of the damage to the foundation was caused by a plumbing leak. Carrasquillo's position was much to the contrary. He testified that 0% of the damage was caused by a plumbing leak. Although Carrasquillo's testimony was later stricken, the jury's view was more in keeping with Carrasquillo's position. The jury found the plumbing leak caused only 25% of the damage. State Farm alleges that the trial court committed reversible error with its rulings on both experts, so we will examine each expert's testimony separately.

## DISCUSSION

### ADMISSIBILITY OF EUGENE DABNEY'S TESTIMONY

State Farm challenged Dabney's testimony as being unreliable before the trial began. The trial court held a *Daubert/Robinson* hearing but denied State Farm's motion.

[1][2] Whether the trial court properly admitted expert testimony is subject to an abuse of discretion standard of review. *Helena Chem. Co. v. Wilkins,* 18 S.W.3d 744, 752 (Tex.App.-San Antonio 2000, no pet.). "We examine the entire substance of the

expert's testimony 'to determine if the opinion is based on demonstrable fact and does not rely solely on assumptions, possibility, speculation, and surmise.' " *Id.* An abuse of discretion exists when the court fails to analyze or apply the law correctly. *Id.*

[3][4][5] In demonstrating that an expert is qualified to testify under Texas Rule of Evidence 702, the proponent of the evidence has the burden to demonstrate that the expert's testimony is both relevant to the issues and based on a reliable foundation. *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex.1995). To be reliable, the scientific evidence must be grounded in scientific method and procedure such that it amounts to more than subjective belief or unsupported speculation. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex.1998). "Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702." *Id.*

[6][7] In *Robinson*, the Texas Supreme Court enumerated a list of factors to determine*319 the reliability of expert testimony, including: (1) the extent to which the theory has or can be tested; (2) the extent to which the technique relies upon subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the nonjudicial uses that have been made of the theory or technique. *Robinson*, 923 S.W.2d at 556. However, in *Gammill*, the Court held that the *Robinson* factors do not always apply to expert testimony because they do not always fit. *Gammill*, 972 S.W.2d at 726. Regardless of whether the *Robinson* factors are applied, the proponent of the expert testimony must still prove that the testimony is reliable. *Id.* In such a case, the court must consider whether there is too great of an "analytical gap" between the data and the expert's opinion. *Id.* The trial court's duty is not to determine whether the expert's conclusions are correct, but only whether the analysis used to reach them is reliable. *Id.*

[8] State Farm argues that Dabney's testimony is so unreliable that even Dabney himself refers to his opinions as a "wild ass guess." A "wild ass guess" does not sound very reliable. Nevertheless, we must look at the context in which this term was used to make our determination of reliability, as no doubt the trial court did.

Both at the pre-trial *Daubert/Robinson* hearing and during Dabney's testimony at trial, State Farm introduced excerpts from Dabney's deposition testimony taken during discovery. State Farm bases its argument on answers Dabney gave during the deposition. The relevant portions of the testimony are as follows:

Q: Now, Mr. Dabney, as we sit here today, we have identified seven ***potential*** contributing causes to the damage to this house that include, and you affirm or deny these as we go along, number one, plumbing leaks, correct?
A: That's correct.
Q: Number two, climatic conditions, correct?
A: Correct.
Q: Number three, poor drainage, correct?
A: That's correct.
Q: Number four, watering patterns, correct?
A: Correct.
Q: Number five, the railroad or the choo-choo, correct?
A: Correct.
Q: Number six, the bowling ball plant explosion, correct?
A: Correct.
Q: And number seven, the dynamite or other bomb explosion, correct?
A: Correct, ***if they exist***, yes.
Q: All right. Now, as we sit here today, Mr. Dabney, can you allocate, to a percentage, the cause, the damage to this house and attribute a hundred percent of this house allocated to these seven causes?
A: Absolutely not. That would be a wild-ass guess.

Dabney testified that no credible engineer could allocate 100% of the damage to the seven potential causes in this particular case. State Farm argues that Dabney's inability to allocate 100% of the damage to the various potential contributing causes makes his opinion unreliable. State Farm did not attack Dabney's qualifications, data, or methodology. Because State Farm raises the issue as a "no evidence" point, we must consider all of the *320 evidence in the record in the light most favorable to the Rodriguezes, indulging every possible inference in their favor. *See Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997).

At the *Daubert/Robinson* hearing, the Rodriguezes presented Dabney's structural evaluation report to the trial court. In preparing his report, Dabney used the

same data that CH & A collected with respect to the Rodriguezes' home. After analyzing the data, Dabney said that the ***only*** possible causes of foundation movement were the influence of a sub-foundation plumbing leak and the influence of climatic conditions. He concluded that the subfoundation plumbing leak was the ***only*** cause of movement that resulted in damage to the foundation.

Dabney gave the same testimony at trial. He testified that 100% of the damage to the foundation damage was attributable to the plumbing leak. He said there were no other causes of the damage. On cross-examination, State Farm introduced Dabney's deposition testimony to show his inability to segregate 100% of the damage to various ***potential*** contributing causes. The record also contains an affidavit from Dabney, which the Rodriguezes attached in a response to State Farm's motion for summary judgment. In the affidavit, Dabney reiterates his belief that while there were possible contributing causes to the foundation movement, i.e. plumbing leaks and climatic conditions, the damage to the foundation in this case was caused solely by the leak.

We find Dabney's opinion reliable. There is no dispute that a plumbing leak existed underneath the foundation of the Rodriguezes' home. Dabney's opinions are based on the same data State Farm used: the CH & A report. In his initial report, his affidavit, and his testimony during direct examination at trial, Dabney consistently stated that the plumbing leak caused 100% of the damage to the foundation. The seven contributing causes referenced by State Farm's attorney were merely hypothetical. When asking the question, State Farm's attorney used the phrase "potential contributing causes." Indeed, after acknowledging the seventh and final potential contributing cause, Dabney stated "***if they exist.***" Both in his testimony on direct examination and his affidavit, Dabney made it clear that from the data provided to him, the only possible causes of foundation damage were the plumbing leak and climatic conditions.

While Dabney's use of the phrase "wild-ass guess" is not a term of art that can be deemed helpful to the Rodriguezes' case, it does not make the opinion unreliable. He was not required to assign precise percentages to potential contributing causes that he did not believe were even relevant in this case. We look at the substance of the entire testimony, not merely one phrase. Dabney's inability to apportion damage among seven possible contributing causes goes to the weight of his testimony, not its admissibility. The record as a whole shows that Dabney's opinions are grounded in scientific method and procedure and amount to more than subjective belief or unsupported speculation. *See* Gammill, at 720. Examining the entire substance of Dabney's testimony, his opinion "is based on demonstrable fact and does not rely solely on assumptions, possibility, speculation, and surmise." *See* Wilkins, 18 S.W.3d at 752. The trial court did not abuse its discretion in admitting Dabney's expert testimony.

## FAILURE TO PROVE CAUSATION

[9][10][11] Under the doctrine of concurrent causes, when "covered and non-covered perils combine to create a loss, the insured is entitled to recover only that ***321** portion of the damage caused solely by the covered peril(s)." *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 302-03 (Tex.App.-San Antonio 1999, pet. denied). "Because an insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof." *Id.* at 303. "To this end, the insured must present some evidence upon which the jury can allocate the damage attributable to the covered peril." *Id.* "Although a plaintiff is not required to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests." *Id.* at 304.

[12] State Farm argues that Dabney failed to allocate 100% of the foundation damage to the various potential contributing causes; therefore, the Rodriguezes did not prove causation under *Wallis*. But, in *Wallis*, "[t]he jury heard ***no*** testimony regarding how much damage was caused by the plumbing leaks." *See* Wallis, 2 S.W.3d at 304 (emphasis added). Here, Dabney testified that 100% of the damage was caused by the plumbing leaks. Dabney's testimony provided "some reasonable basis upon which the jury's finding [of damage attributable to the plumbing leaks] rests." *See id.*

[13][14][15] The next issue is whether the evidence supported the jury's finding that 25% of the damage was attributable to the plumbing leaks. The Rodriguezes' testimony was that 100% of the damage was caused by plumbing leaks. State Farm said that 0% of the damage was caused by plumbing leaks. It

is fundamental that a jury may blend the evidence admitted before it and believe all, some or none of a witness's testimony. *See e.g.,* *Abound v. Schlichtemeier*, 6 S.W.3d 742, 749 (Tex.App.-Corpus Christi 1999, pet. denied); *E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d 149, 154 (Tex.App.-Houston [1st Dist.] 1993, writ denied); *Chrysler-Plymouth City, Inc. v. Guerrero*, 620 S.W.2d 700, 704 (Tex.Civ.App.-San Antonio 1981, no writ). "Juries may disbelieve any witness even though he is neither impeached nor contradicted, they may believe one witness and not others, and they are not required to depend on evidence from a single source." *Mills v. Jackson*, 711 S.W.2d 427, 434 (Tex.App.-Fort Worth 1986, no writ).

[16][17] In reaching its holding in *Wallis*, this court relied on *Oyster Creek Financial Corp. v. Richwood Investments II, Inc.*, 957 S.W.2d 640 (Tex.App.-Amarillo 1997, pet. denied), to support the assertion that "[A]lthough a plaintiff is not required to establish the amount of his damages with mathematical precision, there must be some reasonable basis upon which the jury's finding rests." *Wallis*, 2 S.W.3d at 304. In *Oyster Creek Financial Corp.*, the court was considering whether the evidence was factually sufficient to support a jury's award of zero dollars for lost profits. 957 S.W.2d at 649. It is well-established that in resolving damage issues, a jury's finding will be upheld if it is *within* the range of the testimony regarding the amount of damages incurred. *See e.g.,* *Abound v. Schlichtemeier*, 6 S.W.3d 742 at 748-49; *E.P. Operating Co. v. Sonora Exploration Corp.*, 862 S.W.2d at 154-55; *Chrysler-Plymouth City, Inc. v. Guerrero*, 620 S.W.2d at 704. The same is true regarding the amount of attorneys' fees awarded by a jury. *See Mandell v. Hamman Oil and Refining Co.*, 822 S.W.2d 153, 166 (Tex.App.-Houston [1st Dist.] 1991, writ denied). Accordingly, with regard to the segregation of damages attributable to a covered cause, so long as the jury's finding is within the range of testimony presented, the jury's finding will be ***322** upheld. To hold otherwise would force a jury to accept only the exact percentage proffered by one side or the other. The jury can blend the evidence rather than relying on a single source.

In this case, the testimony regarding the percent of damage attributable to the plumbing leaks ranged from 0% to 100%. The jury's finding of 25% was within this range. The Rodriguezes satisfied the requirements of *Wallis*.

## DAMAGE DURING POLICY PERIOD

[18][19] "An insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy." *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex.1988), *overruled on other grounds*, *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex.1996). "Texas courts have held that property loss occurs when the injury of damages is manifested." *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905, 910 (Tex.App.-Austin 1997, writ denied). Property damage manifests itself when it becomes "apparent." *Dorchester Dev. Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380, 383 (Tex.App.-Dallas 1987, no writ).

[20][21] In considering a legal sufficiency point, we consider only the evidence favorable to the trial court's decision and disregard all evidence and inferences to the contrary. *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex.1996). If there is any evidence of probative force to support the finding, the issue must be overruled and the finding upheld. *ICS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex.1997).

[22] State Farm argues that the only policy presented into evidence by the Rodriguezes covered a one year period from February 9, 1997 to February 9, 1998. State Farm contends that the damage to the Rodriguezes' home manifested itself as early as 1995. The Rodriguezes argue that their insurance policy was in existence since 1995, and that State Farm judicially admitted such in a request for admission. In the alternative, they contend that the damage to the home did not manifest itself until 1997.

[23] The only policy in the record covered the Rodriguezes' home from February 1997 to February 1998. There is, however, evidence in the record indicating that the Rodriguezes were covered by the same policy as early as 1995, renewing the policy annually until 1999. The record contains a check from Beth Rodriguez made out to State Farm in the amount of $263.00. The check has a notation which states "2010 Arroya Vista Ins.-2/9/95-2/9/96." The check also contains an electronic marking at the top "83-BV 4911 9." This is the same policy number of the policy in evidence covering February 1997 to February 1998. The record also contains State Farm's

claims file regarding the Rodriguezes' home. Within the file, on a paper entitled "Coverage Information," a notation appears that the policy was first issued in 1995.

State Farm cites an unpublished opinion, *Vanguard Underwriters Ins. Co. v. Forist*, 1999 WL 498200 (Tex.App.-San Antonio 1999, pet. denied) (not designated for publication), for the proposition that an insured must present the actual policy into evidence in order to prove coverage during the policy period. Even if this opinion was citable authority, it is factually distinct from the present case. In *Vanguard*, as in the present case, there was only one actual policy in evidence. *Vanguard*, 1999 WL 498200 at *2. The only other evidence presented by the insured was her oral testimony that she had been covered by an earlier policy. *Id.* There was no other ***323** physical evidence indicating any other policy or its terms. In the present case, there is physical evidence of a policy covering the Rodriguezes' home since 1995.

Both of the Rodriguezes testified that they began noticing cracks in the walls in 1995 and 1996. However, Beth Rodriguez testified that she noticed the foundation crack in 1997. As a result, the damage to the foundation did not become apparent until 1997, when the foundation crack was first noticed. *See Dorchester Dev. Corp.*, 737 S.W.2d at 383. Although cracks in the walls are signs of some foundational problems, such cracks do not indicate foundational damage resulting from a plumbing leak. The record contains probative evidence from which the jury could determine that the foundation damage manifested itself in 1997. *See McLaughlin*, 943 S.W.2d at 430. Even if the damage manifested itself as early as 1995 or 1996, probative evidence exists indicating that the home was covered by a State Farm policy since 1995. *See id.*

## ADMISSIBILITY OF RAMON CARRASQUILLO'S TESTIMONY

State Farm complains that the trial court abused its discretion in striking the testimony of their expert, Carrasquillo. State Farm argues that the Rodriguezes' objection was not timely: therefore, the trial court did not have the discretion to strike the testimony. In addition, State Farm denies any discovery abuse and contends that the punishment was excessive and amounted to a death penalty sanction.

[24] Carrasquillo testified in his direct testimony, without objection, that any problems in the foundation were unrelated to a plumbing leak. This testimony was in stark contrast to the testimony of the Rodriguezes' expert, Dabney. Dabney had testified that 100% of the damage to the foundation was caused by a plumbing leak. In explaining his opinion that 0% of the damages were caused by a plumbing leak, Carrasquillo used a PowerPoint presentation. Cross-examination of Carrasquillo began at 4:20 p.m. Within five minutes, the parties were before the bench arguing about whether there had been discovery abuse concerning the PowerPoint presentation. The Rodriguezes' attorney complained that he never had an opportunity to view the PowerPoint presentation even though it had been requested. State Farm's response was that it was available "before it was presented." State Farm stated that it had letters documenting its offer to make the presentation available. The Rodriguezes' attorney challenged State Farm to show the letters to the trial judge, which the judge then requested. State Farm said they would find the letters, but when State Farm was unable to quickly produce the letters, the trial court ordered the parties to "move on to something else." The parties did so until the court went into recess at 5:00 p.m.

The next morning, before the cross-examination resumed, the Rodriguezes filed a "Plaintiff's Motion to Strike, for Sanctions and for Mistrial." State Farm produced two letters intending to prove to the trial court that the PowerPoint presentation was available to the Rodriguezes. The experienced trial judge read the correspondence and then had a lengthy dialogue with the attorneys, outside the presence of the jury, to determine whether there had been discovery abuse. The trial court focused both on the allegation that the PowerPoint presentation had been withheld by State Farm and on the allegation that new information was contained in the PowerPoint presentation that had not been earlier disclosed in the two depositions that had been taken of Carrasquillo. The Rodriguezes asserted that Carrasquillo had never disclosed that he was going to ***324** rely on prior reductions in the value of the property by the Bexar County Appraisal District. These reductions occurred before the Rodriguezes owned the property and were used by State Farm to imply that preexisting structural problems existed, bolstering Carrasquillo's theory that the plumbing leaks were not the source of the problem. The Rodriguezes complained that they heard about the

prior reductions for the first time during Carrasquillo's testimony. Therefore, there was no opportunity to research the appraisals and determine the reason for the reductions. State Farm admitted that there was no mention of the Bexar Appraisal District appraisals in Carrasquillo's depositions, but State Farm pointed out that the appraisals were not a part of the PowerPoint presentation. Instead, the appraisals were mentioned in another portion of Carrasquillo's testimony. In either case, however, Carrasquillo's reliance on the appraisals and the two reductions in value before the Rodriguezes ever purchased the property was a surprise. Given the stage of the trial, it was also impossible for the Rodriguezes to explain the reason the property's value had been reduced before the Rodriguezes even owned the property.

After hearing more complaints about State Farm's failure to disclose Carrasquillo's "analysis process," the trial court questioned the State Farm attorneys as to why they had not produced at least printed pages of the PowerPoint presentation. State Farm raised the issue of compensation and stated that the printout was not complete until trial. Finally, at the end of the lengthy hearing, the following dialogue took place:
The Court: Tell me again, Mr. Batis, why you didn't just either turn over those copies to him or say, "Come take a look at these and-"
Mr. Batis: The printout wasn't finished until January 2nd or 3rd when it was finalized, and that's what this is, and that's the day that it was produced at trial.

The trial court pointed out a letter from State Farm dated December 12, 2000, stating, "We do not agree to provide you a copy of it, nor will any explanation, questioning, or examination be done during the review." State Farm explained that was "during the deposition." The trial court then noted that the Rodriguezes' attorney had made one last attempt as late as December 18, 2000, to see a copy of the presentation, stating in a letter: "Accordingly, I request again a copy thereof be tendered to this office as soon as possible." For whatever reason, this never happened. The Rodriguezes first saw the PowerPoint presentation when it was shown to the jury. After hearing arguments from both sides about whether there had been discovery abuse and, if so, the extent of the abuse, the trial court struck Carrasquillo's testimony.

[25] State Farm takes the position that the trial court could not strike the testimony because the objection was made too late. We do not believe the trial court is so restricted. Trial judges have wide discretion in making whatever decisions are necessary to insure a fair trial to both parties. Their decisions fall within an abuse of discretion standard of review.

State Farm cites several cases in which a trial court has been affirmed in refusing to strike testimony absent a timely objection. *See, e.g.,* *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 647-48 (Tex.1989); *Aluminum Chemicals (Bolivia) v. Bechtel Corp.*, 28 S.W.3d 64, 69 (Tex.App.-Texarkana 2000, no pet.); *Lubbock County v. Strube*, 953 S.W.2d 847, 855 (Tex.App.-Austin 1997, pet. denied); ***325***Miles v. Ford Motor Co.*, 922 S.W.2d 572, 591 (Tex.App.-Texarkana 1996), *rev'd on other grounds*, 967 S.W.2d 377 (Tex.1998); *Gifford Hill American, Inc. v. Whittington*, 899 S.W.2d 760, 765 (Tex.App.-Amarillo 1995, no writ); *Roling v. Alamo Group (USA), Inc.*, 840 S.W.2d 107, 111 (Tex.App.-Eastland 1992, writ denied); *Wenco of El Paso/Las Cruces, Inc. v. Nazario*, 783 S.W.2d 663, 665 (Tex.App.-El Paso 1989, no writ); *Hix v. Wirt*, 220 S.W.2d 530, 532 (Tex.Civ.App.-Waco 1949, writ ref'd n.r.e.). There is no question that a party who does not make a timely objection may well find that the trial court will not grant relief because the objection comes too late, and appellate courts routinely affirm the trial court's denial of relief in the absence of a timely objection. This is not the situation presented in this case. The trial court granted the relief. No doubt, had the trial court chosen to, it could have denied relief without fear of reversal, but the fact that the trial court had the option to deny relief does not mean that the trial court erred in granting relief. It means the trial court had the discretion to rule either way.

Among other things, the trial court learned that Carrasquillo was relying on appraisals to bolster his opinion when he had never indicated that he intended to rely on the appraisals. These appraisals implied, by showing that there had been two devaluations of the property before the Rodriguezes ever owned the property, that something was already amiss with the property that had nothing to do with the Rodriguezes' claim of a plumbing leak. The Rodriguezes had no meaningful way to reply to the appraisals as they were already in the last day of testimony in the trial. The trial court also learned that the PowerPoint presentation was never shown to the Rodriguezes despite repeated requests for it. The Rodriguezes saw the presentation at the same time the jury did. While

there were various reasons given as to how this came to be, the trial court had the ability to make its own determination as to whether there had been discovery abuse. We will not disturb these findings in view of the record that is before this court.

[26][27] State Farm's position is that the trial court does not have the authority to strike Carrasquillo's testimony because the Rodriguezes' objection to the testimony was too late. We agree that the initiative in excluding improper evidence rests with the opposing party that wishes to keep the testimony from the jury, and by not making a timely objection, the opposing party may lose the right to complain. But that does not mean that the trial court has lost discretion to take proper action to insure a fair trial. Trial courts possess inherent powers to discipline attorney behavior through the imposition of sanctions sua sponte in appropriate cases. *Roberts v. Rose*, 37 S.W.3d 31, 33 (Tex.App.-San Antonio 2000, no pet. h.). A trial judge on his own motion may exclude improper testimony. *Schafer v. Stevens*, 352 S.W.2d 471, 482 (Tex.Civ.App.-Dallas 1961, no writ). A trial judge's power cannot be fatally debilitated simply by a lawyer's tardy objection.

A similar situation was discussed in *Heye Farms v. Nebraska*, 251 Neb. 639, 558 N.W.2d 306 (1997). In that case, there was a belated motion to strike testimony, and no objection was previously made. *Heye Farms*, 558 N.W.2d at 312. The issue raised on appeal was the same as in the instant case, i.e., whether evidence was improperly stricken because a party's objection was untimely. *Id.* The Supreme Court of Nebraska held:

[W]e think the proper rule is: The entertainment of a belated motion to strike testimony, no objection having been previously made thereto, is discretionary with the trial court.

*326*Id.* The Nebraska court held that the trial court did not abuse its discretion. *Id.* We agree that in the instant case the trial court had the discretion to grant the motion to strike.

## EXCESSIVENESS OF THE SANCTIONS

[28] We now turn to State Farm's point of error alleging that the striking of Carrasquillo's testimony in its entirety as a discovery sanction was excessive as a matter of law.

[29][30] Sanctions for discovery abuse must be "just." *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex.1991). Whether sanctions are just must meet a two-part test: (1) there must be a direct relationship between the offensive conduct and the sanction imposed, and (2) the sanction must not be excessive. *Id.* In other words, the "punishment should fit the crime." *Id.*

[31] "A trial court has broad discretion in entering sanctions." *Hawkins v. Estate of Volkmann*, 898 S.W.2d 334, 346 (Tex.App.-San Antonio 1994, writ denied). "The standard of review on appeal is whether the trial court abused its discretion." *Id.*

State Farm contends that striking Carrasquillo's testimony amounted "to imposing a death penalty sanction" and violates the rules set forth in *TransAmerican*. State Farm argues that the trial court prevented State Farm from rebutting Dabney's testimony and presenting the merits of its own defense.

[32][33] Whether the exclusion of evidence constitutes a death penalty sanction must be determined on a case-by-case basis. *See Revco D.S., Inc. v. Cooper*, 873 S.W.2d 391, 396 (Tex.App.-El Paso 1994, no writ). Where the exclusion of expert testimony is only an inconvenience that impairs the presentation of a party's case but does preclude a trial on the merits, the exclusion of evidence is not a death penalty sanction. *See id.*; *see also Estate of Riggins*, 937 S.W.2d 11, 20 (Tex.App.-Amarillo 1996, writ denied) (noting exclusion of evidence not a death penalty sanction if it "inhibits" rather than "terminates" the presentation of the case); *Soeffe v. Stewart*, 847 S.W.2d 311, 314, 315 (Tex.App.-San Antonio 1992, writ denied) (questioning whether exclusion of evidence is a death penalty sanction), *abrogated on other grounds*, *State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616 (Tex.1998).

While State Farm's case would have undoubtedly been stronger with Carrasquillo's testimony, we cannot agree that the striking of his testimony was a death penalty sanction. The jury agreed more with State Farm's position than with the Rodriguezes' claim. State Farm contended that 0% of the damages were caused by the covered plumbing leaks, while the Rodriguezes claimed 100% of the damages were caused by the plumbing leaks. The jury found only 25% of the damages were caused by plumbing leaks. A true death penalty sanction would have insured that

the Rodriguez's received a 100% finding, not a 25% finding. Therefore, State Farm's contention that the striking of Carrasquillo's testimony amounted to a death penalty sanction is not accurate. State Farm did not have the burden of proof. Striking Carrasquillo's testimony did not prevent State Farm from presenting the merits of its defense, and it, in fact, did so with some success. The case was not tried on sanctions but on its merits. The striking of Carrasquillo's testimony was not a death penalty sanction, and the trial court did not abuse its discretion in granting the motion to strike based on State Farm's discovery abuse.

[34] Even if we were to assume that State Farm is correct that striking Carrasquillo's*327 testimony is a death penalty sanction, we would not find that the trial court abused its discretion in striking the testimony. A death penalty sanction is justified when counsel callously disregards the responsibilities of discovery under the rules. *TransAmerican*, 811 S.W.2d at 918. The trial court determined that State Farm had engaged in abusive practices by withholding the PowerPoint presentation. The trial court noted that State Farm ignored repeated requests for the presentation, and State Farm's only response was that the presentation was not finished until trial. It was within the trial court's discretion to disbelieve this excuse and to find that State Farm's counsel had deliberately decided not to disclose the PowerPoint presentation or Carrasquillo's intent to rely on the Bexar County Appraisal District's appraisals. It was within the trial court's discretion to determine that State Farm callously disregarded the responsibilities of discovery under the rules in order to engage in trial by ambush, which the discovery rules were designed to prevent. *See Smith v. Southwest Feed Yards*, 835 S.W.2d 89, 91 (Tex.1992).

## CONCLUSION

The judgment of the trial court is affirmed.

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**Manokoune v. StateFarm** Mut. Auto. Ins. Co. Okla.,2006.

Supreme Court of Oklahoma.
Sarah MANOKOUNE, Individually, and as Mother and Next Friend of Vichai Chansombatt, a minor, Plaintiff/Appellant,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Diron Ahlquist, Belinda Lunsford, and Equity Insurance Company, Defendants/Appellees,
andStephen D. Richardson, Defendant.
**No. 101,241.**

Oct. 10, 2006.

**Background:** Mother of injured minor passenger filed an action to enforce settlement agreement with insurance company over second insurance company's assertion of subrogation interest. The District Court, Oklahoma County, Vicki Robertson, J., granted insurance companies summary judgment. Mother appealed. The Court of Civil Appeals affirmed. Mother filed a petition for a writ of certiorari.

Holding: The Supreme Court, Colbert, J., held that genuine issue of material fact existed as to whether second insurance company had a right of subrogation enforceable against the settlement mother reached with insurance company.

Court of Civil Appeals judgment vacated; District Court judgment reversed and remanded.

West Headnotes

[1] **Judgment 228 181(23)**

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(23) k. Insurance Cases. Most Cited Cases
A genuine issue of material fact existed as to whether second insurance company had a right of subrogation enforceable against settlement that mother of injured minor passenger reached with insurance company, precluding summary judgment in mother's action to enforce settlement agreement with insurance company.

[2] **Subrogation 366 41(2)**

366 Subrogation
366k41 Actions and Other Proceedings for Enforcement
366k41(2) k. Conditions Precedent. Most Cited Cases
Notice is an essential element to a successful subrogation claim.

[3] **Notice 277 6**

277 Notice
277k4 Constructive Notice
277k6 k. Facts Putting on Inquiry. Most Cited Cases
For constructive notice to be imputed as a matter of law, there must first be a finding that there are facts sufficient to put a prudent man upon inquiry. 25 Okl.St.Ann. § 12, 13.

[4] **Subrogation 366 27**

366 Subrogation
366k27 k. Agreements for Subrogation. Most Cited Cases
Generally speaking, if the compensation a beneficiary has received from a third party represents less than full compensation and the contract giving rise to a subrogation interest does not stipulate that it has priority over any other funds the beneficiary might receive, the subrogation contract is not enforceable.

[5] **Insurance 217 3514(2)**

217 Insurance
217XXX Recovery of Payments by Insurer
217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement
217k3514 Payment to Insured
217k3514(2) k. Adequate

Compensation of Insured; "Made Whole" Doctrine.
Most Cited Cases
An insurance contract stands subject to the make-whole rule unless it contains an unequivocal, express statement that the insured does not have to be made whole before the insurer is entitled to recoup its payments.

[6] **Fraud 184** 6

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k6 k. In General. Most Cited Cases
While actual fraud is the intentional misrepresentation or concealment of a material fact which substantially affects another person, constructive fraud involves the breach of either a legal or equitable duty.

[7] **Fraud 184** 6

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k6 k. In General. Most Cited Cases
Constructive fraud does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose and may be defined as any breach of a duty which gains an advantage for the actor by misleading another to his prejudice.

***1082Certiorari to Court of Civil Appeals Division III.**

¶ 0 The mother of an injured minor passenger brought this action to enforce their settlement agreement with one insurance company over another insurance company's assertion of a subrogation interest. The District Court of Oklahoma County, Honorable Vicki Robertson, granted summary judgment in favor of the insurance companies. We conclude that the district court erred because there are disputed material facts regarding the enforceability of the subrogation interest.

**CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S JUDGMENT REVERSED; AND MATTER REMANDED FOR FURTHER PROCEEDINGS.**

Robert T. Keel, Oklahoma City, OK, for Plaintiff/Appellant.

David V. Jones and Bruce A. Robertson, Jones, Andrews & Ortiz, P.C., Oklahoma City, OK, for Defendants/Appellees, State Farm Mutual Automobile Insurance Company and Diron Ahlquist.

Robert W. Hayden, Speck & Hayden, Oklahoma City, OK, for Defendants/Appellees, Belinda Lunsford and Equity Insurance Company.

COLBERT, J.

¶ 1 Plaintiff Sarah **Manokoune**, individually and in her capacity as the mother of the ***1083** minor Vichai Chansombatt,[FN1] has petitioned for this Court's review of an opinion by the Court of Civil Appeals affirming a summary judgment granted by the district court in favor of Defendants, **StateFarm** Mutual Automobile Insurance Company and Diron Ahlquist (jointly, **StateFarm**) and Equity Insurance Company and Belinda Lunsford (jointly, Equity).[FN2] The dispositive issue in this action arising out of Equity's assertion of a right of subrogation in a settlement paid by State Farm to Vichai is whether there are material facts in dispute such that the district court erred in granting summary judgment. We conclude that there are, vacate the Court of Civil Appeals' opinion, reverse the district court's summary judgment, and remand for further proceedings.

FN1. Sarah Manokoune is also known as Ampawn Chansombatt. Although the record reveals occasional confusion about the spelling of the parties' names, we have adopted the spelling in the district court's case style as taken from Plaintiff's petition.

FN2. In her Petition, Plaintiff described Defendant Diron Ahlquist as Defendant State Farm's "agent, servant and employee" and Defendant Belinda Lunsford as Defendant Equity's "agent, servant and employee." While Ahlquist's and Lunsford's exact status is not clear in the summary judgment record, all Defendants have proceeded as if Plaintiff's descriptions are accurate. Further, any distinction is not relevant to our analysis today.

## BACKGROUND AND PROCEDURAL HISTORY

¶ 2 On April 30, 2002, 15-year-old Vichai was

injured when the vehicle in which he was riding was involved in an accident with a vehicle driven by Stephen D. Richardson. Richardson, whose vehicle was insured by State Farm, was at fault. The vehicle in which Vichai was riding was insured by Equity, but neither Vichai nor Plaintiff were members of the policyholder's household or had seen the Equity policy.

¶ 3 Plaintiff incurred expenses of $3,891 for Vichai's medical treatment and sought reimbursement from Equity. In a letter dated August 2, 2002, Equity informed Plaintiff of the coverage available under the policy. Although the letter specified several conditions Equity would impose on any payment made under the policy, it did not mention that the policy reserved Equity's right to be subrogated to any recovery Plaintiff or Vichai might have against Richardson or State Farm. On August 12, 2002, Equity issued a draft for $3,891 payable to Plaintiff. Again, there was no mention that Equity would assert a subrogation interest.

¶ 4 In a letter dated September 3, 2002, Equity notified State Farm that it had determined that Richardson was at fault for the accident and requested that State Farm reimburse Equity for the payment it had made for Vichai's medical expenses. In a second letter dated September 9, 2002, Equity again notified State Farm of its subrogation claim and stated that no one could release this interest except Equity's representative. A third letter on October 8, 2002, reiterated Equity's subrogation claim and clarified that Vichai was not Equity's policy-holder.

¶ 5 In the meantime, State Farm sent a letter on September 18, 2002, to Plaintiff's attorney to confirm its settlement offer of $6,891. The letter did not disclose the right of subrogation Equity had already asserted. Plaintiff accepted the offer on Vichai's behalf.

¶ 6 Because Vichai was a minor, the parties filed a friendly suit in the District Court of Oklahoma County, Case No. CJ-2002-8499, to obtain court approval of the settlement. The petition, prepared by State Farm, confirmed that the parties had agreed to settle Vichai's claim against State Farm for $6,891. The petition noted that Plaintiff was "obligated to pay medical expenses incurred to date by the minor plaintiff and [would] incur additional medical expenses in the future." At the hearing, the judge questioned the medical expenses and both parties confirmed that no medical expenses would be paid out of the settlement. State Farm did not disclose Equity's subrogation claim to Plaintiff or to the court. The court approved the settlement and entered an order to disburse the settlement proceeds which reflected the parties' representations: $0 for medical expenses; $966 for Vichai's use; $1,852.45 for attorney fees and expenses; and $4,072.55 to be placed in a trust account ***1084** until Vichai's 18th birthday. The order also directed Plaintiff's and Vichai's attorney to deliver a certified copy of the order to the banking institution where the trust account was placed.

¶ 7 The draft issued by State Farm and given to Plaintiff at the conclusion of the hearing was made payable to Plaintiff, Vichai, their attorney, and *Equity*. Neither Plaintiff nor her attorney noticed Equity's name until the attorney unsuccessfully attempted to deposit the draft in compliance with the court's order. When the attorney contacted Equity and State Farm, he was informed for the first time about Equity's subrogation claim. Also for the first time, Equity produced a copy of the policy language addressing subrogation. Equity refused to endorse the draft or release its subrogation claim and State Farm refused to reissue the draft without Equity's name.

¶ 8 Plaintiff filed this lawsuit on December 13, 2002, against Richardson, State Farm, and Equity based on the following theories of recovery: specific performance as to Richardson; conspiracy to tortiously interfere with a settlement agreement as to Equity; conversion as to State Farm and Equity; and fraud and deceit as to State Farm. Equity filed a counterclaim for its subrogation interest. Following Richardson's dismissal for lack of service, State Farm and Equity both filed motions for summary judgment. The trial court granted both motions, resulting in a judgment in Equity's favor for $3,891.

¶ 9 Plaintiff appealed and the Court of Civil Appeals affirmed. After the Court of Civil Appeals denied her motion for rehearing, Plaintiff filed a petition for certiorari with this Court. We have previously granted certiorari and proceed now to the merits of Plaintiff's petition.

## STANDARD OF REVIEW

¶ 10 Summary judgment is proper only when the moving party presents evidentiary materials establishing that all of the uncontroverted facts and all of the inferences that can be drawn from those uncontroverted facts support only one conclusion: that the party seeking judgment is entitled to it as a matter of law under all of the legal theories raised by the uncontroverted facts and inferences. *See Wathor v. Mut. Assurance Adm'rs, Inc.*, 2004 OK 2, ¶ 4, 87 P.3d 559, 561; *Hadnot v. Shaw*, 1992 OK 21, ¶ 25, 826 P.2d 978, 987.

## DISCUSSION

[1] ¶ 11 In her petition for certiorari, Plaintiff contends that the Court of Civil Appeals erred in its analysis of several issues. Equity and State Farm have both argued that some of Plaintiff's arguments are foreclosed because she failed to raise them until she sought rehearing from the Court of Civil Appeals. Plaintiff, however, has consistently argued that Equity wrongfully asserted, with State Farm's assistance, a right of subrogation against the settlement she entered on Vichai's behalf with State Farm. Because there are disputed material facts regarding the existence and/or enforceability of Equity's subrogation right, summary judgment was in error. Any issues Plaintiff should have raised at an earlier point in the proceedings are merely ancillary to this central issue.

¶ 12 Equity's policy language was clearly intended to reserve Equity's right to be subrogated to any recovery by Plaintiff or Vichai from State Farm.

> OUR RIGHT TO RECOVER PAYMENT
>
> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another, we shall be subrogated to that right. That person shall do:
>
> 1. Whatever is necessary to enable us to exercise our rights; and
>
> 2. Nothing after loss to prejudice them.
>
> * * *
>
> B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:
>
> 1. Hold in trust for us the proceeds of the recovery, and
>
> 2. Reimburse us to the extent of our payment.

***1085** This form of subrogation is permitted by statute. 36 O.S.2001 § 6092.

¶ 13 The dispositive issue, however, is not whether Equity intended to or could establish a right of subrogation, but whether the undisputed facts lead to the inescapable conclusion that it actually did establish such a right as a matter of law. Only if that threshold issue was established could the court have properly considered either party's motion for summary judgment. The evidentiary material submitted by the parties creates a dispute as to whether Equity had a right of subrogation enforceable against the settlement Plaintiff reached with State Farm. Because that material fact is disputed, the trial court should not have granted summary judgment.

¶ 14 At a minimum, Equity did not establish that Plaintiff had notice of the claimed subrogation right. There is no dispute that Plaintiff had no actual notice of Equity's subrogation claim. Although neither of the lower courts considered the issue of notice to any great degree, an exhaustive review of our case law has led us to conclude that it is and has always been of primary importance. Whenever this Court has addressed the issue, the existence of a party's actual notice of the subrogation interest has either been expressly addressed or can be assumed from the facts. For example, we have held that an insurance policy's subrogation clause was enforceable against the policy-holder because he was both a party to the contract *and* was given direct notice of the subrogation clause before he settled with the third-party tortfeasor. *State Farm Fire & Cas. Ins. Co. v. Farmers Ins. Exch.*, 1971 OK 120, 489 P.2d 480. We have also upheld a subrogation claim against a passenger/non-policy holder who signed a separate subrogation agreement when he recovered from the driver's insurance carrier. *King v. Woodward*, 1972 OK 46, ¶¶ 5-6, 496 P.2d 801, 802.

[2] ¶ 15 To settle this area of the law, we hold that notice is an essential element to a successful subrogation claim. Equity can enforce a right of subrogation in the settlement Plaintiff and Vichai received from State Farm only if it first establishes that Plaintiff had notice when Equity paid the benefits that it was reserving a subrogation interest. Notice can be actual or constructive, but it must exist at the time the party against whom a subrogation claim is made received the funds that form the basis of the claim. *See generally* *King*, 1972 OK 46, ¶¶ 5-6, 496 P.2d at 802; *State Farm v. Farmers*, 1971 OK 120, ¶ 8, 489 P.2d at 482.

¶ 16 State Farm and Equity assert without citation to authority that Plaintiff had constructive notice of the policy's subrogation clause and all of the other terms of the policy because she accepted benefits. The Court of Civil Appeals accepted this assertion when it observed, also without citation to authority, that "Plaintiff and her counsel demanded benefits under the provisions of Equity's policy. Thus, they are likewise charged with knowledge of the conditions imposed upon such payment by the policy's provisions." We disagree. Constructive notice cannot simply be inferred in all situations.

¶ 17 Certainly, this Court has pronounced the general truism that "[i]n accepting the benefits of the policy they are bound by the terms thereof." *State Farm v. Farmers*, 1971 OK 120, ¶ 8, 489 P.2d at 482. The pronoun "they" in that statement, however, refers to "policy-holders," who are charged with knowledge of the terms of the policy they have purchased. *See also* *Aetna Cas. & Sur. Co. v. Assocs. Transps., Inc.*, 1973 OK 62, 512 P.2d 137; *Blocker v. Nat'l Disc. Ins. Co.*, 1972 OK 16, 493 P.2d 825. The statement has never been directed to those receiving benefits under policies to which they were not parties.

[3] ¶ 18 Constructive notice "is notice imputed by the law to a person not having actual notice." 25 O.S.2001 § 12. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." 25 O.S.2001 § 13. For constructive notice to be imputed as a matter of law, there must first be a finding that there are facts sufficient to "put a prudent man upon inquiry." The existence of facts or circumstances sufficient to put one on inquiry **1086** presents a question of fact inappropriate for summary disposition. *See* *McCathern v. City of Okla. City*, 2004 OK 61, ¶ 20, 95 P.3d 1090, 1098 ("Where the defect is of such character that careful or prudent persons might reasonably differ ..., the question ... is one of fact."); *Phelps v. Hotel Mgmt., Inc.*, 1996 OK 114, ¶¶ 8-10, 925 P.2d 891, 894 (whether a condition was "open and obvious" is a question of fact); *Terry v. Edgin*, 1977 OK 35, ¶¶ 28-31, 561 P.2d 60, 66-67 (circumstances giving rise to actual or constructive notice always present a question of fact). The finding that Plaintiff had constructive notice of Equity's subrogation interest was inappropriate for purposes of summary judgment.

[4][5] ¶ 19 Not only did Equity and State Farm fail to establish the existence of Equity's subrogation claim, they also failed to establish that Equity was entitled to enforce that subrogation claim against the settlement paid by State Farm. Oklahoma has adopted the "make whole" rule in regard to subrogation interests.[FN3] *Reeds v. Walker*, 2006 OK 43, ¶¶ 26-32, ---P.3d ----, ----, 2006 WL 1686739; *Equity Fire & Cas. Co. v. Youngblood*, 1996 OK 123, ¶ 15, 927 P.2d 572, 576-77. Generally speaking, if the compensation a beneficiary has received from a third party represents less than full compensation and the contract giving rise to a subrogation interest does not stipulate that it has priority over any other funds the beneficiary might receive, the subrogation contract is not enforceable. *Youngblood*, 1996 OK 123, ¶ 15, 927 P.2d at 576-77. "[An] insurance contract stands subject to the make-whole rule unless it contains an unequivocal, express statement that the insured does not have to be made whole before the insurer is entitled to recoup its payments." *Reeds*, 2006 OK 43, ¶ 31, --- P.3d at ----. For the purposes of summary judgment, the insurance company bears the burden of proving that the insured has been fully compensated; it cannot obtain summary judgment on the issue without establishing that undisputed fact. *Id.*

FN3. Plaintiff did not make this argument until she filed her petition for rehearing in the Court of Civil Appeals. Normally, the failure to raise an issue before the trial court and in the initial appeal results in a waiver of that issue. *See generally* *Markwell v. Whitney's Real Estate, Inc.*, 1994 OK 21, ¶

8, 869 P.2d 840, 843. This issue, however, is not dispositive because of the holding we have already reached on the issue of notice. Further, the "make whole" rule is an indispensable part of an insurance company's right to be subrogated. *Equity Fire & Cas. Co. v. Youngblood*, 1996 OK 123, ¶ 15, 927 P.2d 572, 576-77. Plaintiff's attorney's failure to raise the issue does not excuse Equity's and State Farm's attorneys from informing the court of legal authority directly adverse to their clients. *See*Rule 3.3(a)(3) of the Rules of Professional Conduct, 5 O.S.2001, ch. 1, app. 3-A.

¶ 20 Further, while State Farm has protested, again without citation to authority, that it was compelled to place Equity's name on the settlement check once it received notice from Equity, that fact is far from clear. Certainly, Equity had protected its subrogation interest as to State Farm, but, without more, we cannot say as a matter of law that State Farm was compelled to enforce the subrogation claim against the settlement it reached with Plaintiff.

¶ 21 This brings us to Plaintiff's claims against State Farm. State Farm has asserted that it had no duty to inform Plaintiff of Equity's subrogation interest because it was not in a fiduciary relationship with Plaintiff. The lower courts accepted this argument with little or no discussion, apparently based on their assumption that the enforceability of Equity's subrogation claim was a given. Regardless of the enforceability of Equity's subrogation interest, however, we cannot accept State Farm's assertion that it had no duty to speak as a matter of law.

[6][7] ¶ 22 Fraud is "a generic term with multiple meanings" and can be applied in either legal or equitable causes of action. *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶ 34, 987 P.2d 1185, 1199. State Farm has focused on the nature and elements of actual fraud, but Plaintiff's claim is more in the nature of constructive fraud. While actual fraud is "the intentional misrepresentation or concealment of a material fact which substantially affects another person," constructive fraud involves the "breach of either a legal or equitable duty." *Id.* Constructive fraud "does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of ***1087** purpose [and] may be defined as any breach of a duty which ... gains an advantage for the actor by misleading another to his prejudice." *Id.*

¶ 23 State Farm obtained a settlement agreement from Plaintiff without once mentioning the fact that the settlement amount they had agreed upon would not actually represent the amount received by Vichai. State Farm's attorney stood in a court of law and represented to a judge that the settlement agreement described in the friendly suit pleadings represented the parties' agreement and agreed in form to an order declaring the mandatory split of that settlement amount between Vichai, a trust account for Vichai, and his attorney. In fact, that order did not represent the split of funds contemplated by State Farm because it failed to account for Equity's claim of more than half of the proceeds. State Farm and its attorney were aware that Plaintiff's attorney could not, therefore, comply with the court's order because State Farm had already issued the draft that included Equity's name. We cannot accede to or condone that conduct and will not say that it does not, as a matter of law, amount to at least constructive fraud.[FN4] While State Farm may have assumed that Plaintiff was aware of Equity's claim, the reasonableness of that assumption, particularly given Plaintiff's manifested intent regarding the planned split of the settlement funds, is a question of fact inappropriate for summary judgment.

FN4. At a minimum, the facts alleged by Plaintiff support consideration of the theory of "estoppel by silence," where "the one who is estopped has in effect stood by and, in violation of his duty in equity and good conscience to warn another of the real facts, has permitted the other to take some action detrimental to that other's interest, [remaining] silent on some occasion when he should have spoken." *Strahm v. Bd. of Trustees of the Benevolent & Protective Order of Elks*, 1950 OK 295, ¶ 0, 225 P.2d 159, 160 (syl. no. 1 by the Court).

¶ 24 State Farm has attempted to shift the focus by emphasizing the failures of Plaintiff's counsel, asserting that he should have 1) instructed his client regarding the likely fact that Equity would seek subrogation; 2) inspected the settlement check immediately; 3) filed a motion for new trial in the friendly suit; and 4) appealed from the final order in

the friendly suit. We cannot accept these as reasons to conclude that Plaintiff's claim cannot succeed as a matter of law. First, "the likely fact that Equity would seek subrogation" is a question of fact inappropriate for summary judgment. Second, we decline to state a rule of law that an attorney cannot rely on the representations of another attorney before a judge and must inspect every portion of a document before leaving the judge's presence to confirm that it comports with the other attorney's representations. Third and fourth, Plaintiff had no need to seek a new judgment in the friendly suit, since it conformed to the settlement agreement reached by the parties. There was no alteration necessary to achieve Plaintiff's objective. It was State Farm's fulfillment of the judgment and settlement agreement that was arguably lacking.

## CONCLUSION

¶ 25 We take no position on the likelihood of Plaintiff's ultimate success in her claims against Equity and State Farm. We conclude, however, that the undisputed facts and the permissible inferences from those undisputed facts do not relieve Equity and State Farm of liability as a matter of law for failing to disclose Equity's subrogation interest to Plaintiff.

**CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S JUDGMENT REVERSED; AND MATTER REMANDED FOR FURTHER PROCEEDINGS.**

CONCUR: WATT, C.J., LAVENDER, HARGRAVE, EDMONDSON, COLBERT, JJ.
CONCUR IN RESULT: OPALA, KAUGER, JJ.
DISSENT: WINCHESTER, V.C.J., TAYLOR, J.
Okla.,2006.
Manokoune v. State Farm Mut. Auto. Ins. Co.
145 P.3d 1081, 2006 OK 74

END OF DOCUMENT

U.S.D.C., E.D. of LA. Local Rule 83.2.6E
on "Visiting Attorneys"
requires the applicant to identify disciplinary proceedings
or criminal charges and to "disclose full information . . .
and the results thereof."

## LR83.2.6E Visiting Attorneys

Any member in good standing of the bar of any court of the United States or of the highest court of any state and who is ineligible to become a member of the bar of this court, may, upon written motion of counsel of record who is a member of the bar of this court, by ex parte order, be permitted to appear and participate as co-counsel in a particular case.

The motion must have attached to it a certificate by the presiding judge or clerk of the highest court of the state, or court of the United States, where he or she has been so admitted to practice, showing that the applicant attorney has been so admitted in such court, and that he or she is in good standing therein.

The applicant attorney shall state under oath whether any disciplinary proceedings or criminal charges have been instituted against him or her, and if so, shall disclose full information about the proceeding or charges and the results thereof.

An attorney thus permitted to appear may participate in a particular action or proceeding in all respects, except that all documents requiring signature of counsel for a party may not be signed solely by such attorney, but must bear the signature also of local counsel with whom he is associated.

Local counsel shall be responsible to the court at all stages of the proceedings.

Designation of the visiting attorney as "Trial Attorney" pursuant to LR11.2 herein shall not relieve the local counsel of the responsibilities imposed by this rule.

LOUQUE V. STATE FARM

Jones' first *pro hac vice* into Katrina litigation. This affidavit makes no mention of his Federal conviction, nor does it make mention of any disciplinary sanctions, in violation of the Eastern District's rule on visiting attorneys.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | | |
|---|---|---|
| **CRAIG LOQUE, ET AL** | § | |
| | § | **CIVIL ACTION NO.: 06-2881** |
| **Plaintiff,** | § | |
| | § | **SECTION: "D" 3** |
| **v.** | § | |
| | § | **JUDGE: A.J. McNAMARA** |
| **STATE FARM FIRE AND CASUALTY COMPANY** | § | |
| | § | **MAG. JUDGE: DANIEL E. KNOWLES, III** |
| | § | |
| **Defendant.** | § | |

**AFFIDAVIT OF DAVID V. JONES**

| | | |
|---|---|---|
| STATE OF TEXAS | § | |
| | § | |
| COUNTY OF BEXAR | § | |

On this day, the undersigned affiant appeared before me, a notary public, who knows the affiant to be the person whose signature is hereinbelow set forth. After being by me duly sworn, the affiant stated under oath:

1. My name is David V. Jones. I am over twenty-one (21) years of age and am competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and such facts are true and correct.

2. I am an attorney licensed to practice in the State of Texas in good standing; and am a shareholder in the law firm of Jones, Andrews & Ortiz, P.C. located at 10100 Reunion Place, Suite 600, San Antonio, Bexar County, Texas 78216. My Texas Bar Number is 10869825.



EXHIBIT
tabbies
2

3. State Farm Fire and Casualty Company ("State Farm") retained the law firm of Jones, Andrews & Ortiz, P.C. to represent it in the above-numbered and entitled lawsuit.

4. I hereby state under oath that I am qualified to practice before this Court, am of good moral character, am not subject to any pending disbarment or professional discipline proceeding in any court, and have never been charged or convicted of a felony, or any other crime involving moral turpitude.

5. Further affiant saith not.

IN WITNESS WHEREOF, this affidavit is executed by the undersigned affiant as of the date hereinafter referenced.

**AFFIANT:**

David V. Jones
Jones, Andrews & Ortiz, P.C.

STATE OF TEXAS §
§
COUNTY OF BEXAR §

SUBSCRIBED AND SWORN TO before me on the 30 day of December, 2007.

Notary Public in and for the State of Texas

DEBRA L. PAULEY
MY COMMISSION EXPIRES
January 5, 2011

Printed or Stamped Name of Notary Public

1-5-2007
Date of Expiration of Notary's Commission

MARGIOTTA V. STATE FARM

Jones' second *pro hac vice* into Katrina litigation. This affidavit makes no mention of his Federal conviction, nor does it make mention of any disciplinary sanctions, in violation of the Eastern District's rule on visiting attorneys.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | | |
|---|---|---|
| **ANNA MARGIOTTA** | § | **DOCKET NO.: 06-4272** |
| | § | |
| | § | **SECTION: "S" 1** |
| **v.** | § | |
| | § | **JUDGE: ENGELHARDT** |
| **STATE FARM FIRE AND CASUALTY** | § | |
| **COMPANY** | § | **MAG. JUDGE: SUSHAN** |
| | § | |

**AFFIDAVIT OF DAVID V. JONES**

STATE OF TEXAS §
§
COUNTY OF BEXAR §

On this day, the undersigned affiant appeared before me, a notary public, who knows the affiant to be the person whose signature is hereinbelow set forth. After being by me duly sworn, the affiant stated under oath:

1. My name is David V. Jones. I am over twenty-one (21) years of age and am competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and such facts are true and correct.

2. I am an attorney licensed to practice in the State of Texas in good standing; and am a shareholder in the law firm of Jones, Andrews & Ortiz, P.C. located at 10100 Reunion Place, Suite 600, San Antonio, Bexar County, Texas 78216. My Texas Bar Number is 10869825.

3. State Farm Fire and Casualty Company ("State Farm") retained the law firm of Jones, Andrews & Ortiz, P.C. to represent it in the above-numbered and entitled lawsuit.



EXHIBIT
2

4. I hereby state under oath that I am qualified to practice before this Court, am of good moral character, am not subject to any pending disbarment or professional discipline proceeding in any court, and have never been charged or convicted of a felony, or any other crime involving moral turpitude.

5. Further affiant saith not.

IN WITNESS WHEREOF, this affidavit is executed by the undersigned affiant as of the date hereinafter referenced.

**AFFIANT:**

David V. Jones
Jones, Andrews & Ortiz, P.C.

STATE OF TEXAS §
§
COUNTY OF BEXAR §

SUBSCRIBED AND SWORN TO before me on the 25th day of January 2008.

Debra L Pauley
Notary Public in and for the State of Texas

DEBRA L. PAULEY
MY COMMISSION EXPIRES
January 5, 2011

Printed or Stamped Name of Notary Public

1-5-2011
Date of Expiration of Notary's Commission

MARGIOTTA V. STATE FARM

Judge Engelhardt's Order that Jones file a more specific affidavit relative to disciplinary proceedings and criminal charges.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| ANNA MARGIOTTA | CIVIL ACTION |
| VERSUS | NO. 06-4272 |
| STATE FARM FIRE AND CASUALTY COMPANY | SECTION "N" (1) |

**ORDER**

**IT IS ORDERED** that Defendant's motion seeking pro hac vice admission of attorney David V. Jones (Rec. Doc. No. 34) shall be considered upon submission of a supplemental affidavit satisfying the requirements of Local Rule 83.2.6E regarding disciplinary proceedings. The relevant provision does not limit the disclosure obligation to *pending* disciplinary proceedings. To the contrary, the rule states, in pertinent part:

> The applicant attorney shall state under oath whether any disciplinary proceedings or criminal charges have been instituted against him or her, and if so, shall disclose full information about the proceeding or charges and the results thereof.

*See* Local Rule 83.2.6E.

If a supplemental affidavit is not filed in accordance with this Order within five (5) working days from its entry, the motion may be stricken in its entirety by the Court without further notice.

New Orleans, Louisiana, this 28th day of January 2008.

KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

MARGIOTTA V. STATE FARM

Jones' Supplemental Affidavit, which adds the language in paragraph 5. He does not even identify the statute, nor does he make mention of any disciplinary sanctions.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

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| **ANNA MARGIOTTA** | § | **DOCKET NO.: 06-4272** |
| | § | |
| | § | **SECTION: N** |
| **v.** | § | |
| | § | **JUDGE: ENGELHARDT** |
| **STATE FARM FIRE AND CASUALTY** | § | |
| **COMPANY** | § | **MAG. JUDGE: SUSHAN** |
| | § | |

**SUPPLEMENTAL AFFIDAVIT OF DAVID V. JONES**

| | | |
|---|---|---|
| STATE OF TEXAS | § | |
| | § | |
| COUNTY OF BEXAR | § | |

On this day, the undersigned affiant appeared before me, a notary public, who knows the affiant to be the person whose signature is hereinbelow set forth. After being by me duly sworn, the affiant stated under oath:

1. My name is David V. Jones. I am over twenty-one (21) years of age and am competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and such facts are true and correct.

2. On January 28, 2008, I received the Order of the Court directing me to file a supplemental affidavit. Although the Order limited my supplementation to the area of "pending" professional disciplinary proceedings, I have carefully reviewed both the express and implied instructions in the Order, and make this supplement in what I believe is full compliance therewith.

3. I have never been subject to any disbarment or professional disciplinary proceeding in any court.

4. I have never been charged or convicted of a felony or any other crime involving moral turpitude.

5. In or around March, 1995, I was notified of an alleged statutory infraction concerning a non-privileged wire communication. While representing the City of Victoria, Texas, in a civil matter, I had been provided with a tape recording by a former police officer of the city which had been recorded by an unknown third person. Because the tape recording contained a conversation regarding the potential imminent commission of a criminal act, I disclosed the tape recording to the intended victim of the crime, as well as to the appropriate public authorities. Upon learning that disclosure to the victim may have been considered inappropriate as the result of a statutory change the prior October, I fully cooperated with the United States Attorneys' office, which after investigating the matter noted that my action "was neither fortuitous [nor for] other illegal purposes, nor for direct or indirect commercial gain," and that I had "cooperated fully with the United States." Accordingly, I did not contest the matter, and in April, 1997, concluded the matter by payment of a fine for an infraction. At the matter's conclusion, the Honorable John D. Rainey, United States District Judge, stated "I certainly probably didn't have any better understanding of the law in this regard in 1995 than you did at that time and can understand why you may have made the error that you did."

6. Other than this one incident, I have never had a single encounter with the criminal justice system in my entire life.

Further, affiant sayeth not.

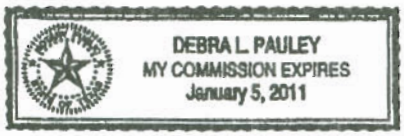
IN WITNESS WHEREOF, this affidavit is executed by the undersigned affiant as of the date hereinafter referenced.

**AFFIANT:**

David V. Jones
Jones, Andrews & Ortiz, P.C.

STATE OF TEXAS §
§
COUNTY OF BEXAR §

SUBSCRIBED AND SWORN TO before me on the 31st day of January 2008.




Debra L Pauley
Notary Public in and for the State of Texas

Printed or Stamped Name of Notary Public

1-5-2011
Date of Expiration of Notary's Commission

MARALDO V. STATE FARM
Jones' Affidavit with the same wording as his supplemental affidavit in *Margiotta v. State Farm.*

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

| | | |
|---|---|---|
| **KATHY MARALDO WIFE OF/ AND CLAUDE MARALDO** | § | **DOCKET NO.: 07-2828** |
| **v.** | § | **JUDGE: ENGELHARDT** |
| | § | **SECTION: S** |
| **STATE FARM FIRE AND CASUALTY COMPANY** | § | **MAGISTRATE: WILKINSON** |

**AFFIDAVIT OF DAVID V. JONES**

STATE OF TEXAS §
§
COUNTY OF BEXAR §

On this day, the undersigned affiant appeared before me, a notary public, who knows the affiant to be the person whose signature is hereinbelow set forth. After being by me duly sworn, the affiant stated under oath:

1. My name is David V. Jones. I am over twenty-one (21) years of age and am competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and such facts are true and correct.

2. I am an attorney licensed to practice in the State of Texas in good standing; and am a shareholder in the law firm of Jones, Andrews & Ortiz, P.C. located at 10100 Reunion Place, Suite 600, San Antonio, Bexar County, Texas 78216. My Texas Bar Number is 10869825.



3. State Farm Fire and Casualty Company ("State Farm") retained the law firm of Jones, Andrews & Ortiz, P.C. to represent it in the above-numbered and entitled lawsuit.

4. I have never been subject to any disbarment or professional disciplinary proceeding in any court.

5. I have never been charged or convicted of a felony or any other crime involving moral turpitude.

6. In or around March, 1995, I was notified of an alleged statutory infraction concerning a non-privileged wire communication. While representing the City of Victoria, Texas, in a civil matter, I had been provided with a tape recording by a former police officer of the city which had been recorded by an unknown third person. Because the tape recording contained a conversation regarding the potential imminent commission of a criminal act, I disclosed the tape recording to the intended victim of the crime, as well as to the appropriate public authorities. Upon learning that disclosure to the victim may have been considered inappropriate as the result of a statutory change the prior October, I fully cooperated with the United States Attorneys' office, which after investigating the matter noted that my action "was neither fortuitous [nor for] other illegal purposes, nor for direct or indirect commercial gain," and that I had "cooperated fully with the United States." Accordingly, I did not contest the matter, and in April, 1997, concluded the matter by payment of a fine for an infraction. At the matter's conclusion, the Honorable John D. Rainey, United States District Judge, stated "I certainly probably didn't have any better understanding of the law in this regard in 1995 than you did at that time and can understand why you may have made the error that you did."

7. Other than this one incident, I have never had a single encounter with the criminal justice system in my entire life.

Further, affiant sayeth not.

IN WITNESS WHEREOF, this affidavit is executed by the undersigned affiant as of the date hereinafter referenced.

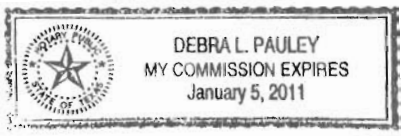
**AFFIANT:**

David V. Jones
Jones, Andrews & Ortiz, P.C.

STATE OF TEXAS §
§
COUNTY OF BEXAR §

SUBSCRIBED AND SWORN TO before me on the 20 day of March, 2008.

Debra L Pauley
Notary Public in and for the State of Texas




Printed or Stamped Name of Notary Public

1-5-2011
Date of Expiration of Notary's Commission

MARALDO V. STATE FARM

Judge Engelhardt's Order and Reasons denying Plaintiffs' Motion to Disqualify Jones. Judge Engelhardt essentially scolds plaintiffs' counsel for filing the motion, but before doing so, writes: "Mr. Jones could have chosen different, and perhaps more specific, words to describe his 1995 criminal proceeding."

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| KATHY MARALDO AND<br>CLAUDE MARALDO | CIVIL ACTION |
| VERSUS | NO. 07-2828 |
| STATE FARM FIRE AND CASUALTY COMPANY | SECTION "N" (2) |

**ORDER AND REASONS**

Presently before the Court is Plaintiffs' Motion to Disqualify Attorney (Rec. Doc. No. 24). Having carefully reviewed the parties' submissions, the Court recognizes that Mr. Jones could have chosen different, and perhaps more specific, words to describe his 1995 criminal proceeding. Nevertheless, the undersigned, who regularly presides over federal criminal proceedings, was sufficiently informed regarding the matter, and does not find the disclosure to have been inaccurate or misleading. Additionally, given Mr. Jones's explanation of, and lack of personal involvement in, the attorney misconduct addressed in *Rodriguez v. State Farm*, 88 S.W.3d 313 (Tex. App. 2002), and *Manokoune v. State Farm*, 145 P.3d 1081, 1087 (Okla. 2006), the Court finds those events to have little, if any, bearing on the propriety of Mr. Jones's continued representation of State Farm in this matter. Moreover, though they state as much, *see* Memorandum in Support at page 9, Plaintiffs fail to demonstrate any prejudice or "taint" hindering the assertion of their claims in these proceedings.

Accordingly, for these reasons, **IT IS ORDERED** that Plaintiffs' motion is **DENIED**. It is further hoped and expected that the parties and their counsel will hereinafter dedicate their and the Court's resources to resolving the claims asserted in this action, whether amicably or through continued litigation, rather than casting exiguous stones at opposing counsel.

New Orleans, Louisiana, this 9th day of July 2008.

**KURT D. ENGELHARDT**
**United States District Judge**

ARCENEAUX V. STATE FARM

Despite Judge Engelhardt's Order stating: "Mr. Jones could have chosen different, and perhaps more specific, words to describe his 1995 criminal proceeding," Jones files the same affidavit, verbatim, that he filed into *Maraldo v. State Farm.*

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF LOUISIANA**

| | | |
|---|---|---|
| **ADRIEL GRAHAM ARCENEUX** | * | **CIVIL ACTION NO.: 06-3855** |
| **versus** | * | **SECTION: R** |
| **STATE FARM FIRE AND CASUALTY COMPANY** | * | **MAG. 2** |

**AFFIDAVIT OF DAVID V. JONES**

STATE OF TEXAS
COUNTY OF BEXAR

On this day, the undersigned affiant appeared before me, a notary public, who knows the affiant to be the person whose signature is hereinbelow set forth. After being by me duly sworn, the affiant stated under oath:

1. My name is David V. Jones. I am over twenty-one (21) years of age and am competent to make this affidavit. I have personal knowledge of the facts stated in this affidavit and such facts are true and correct.

2. I am an attorney licensed to practice in the State of Texas in good standing; and am a shareholder in the law firm of Jones, Andrews & Ortiz, P.C. located at 10100 Reunion Place, Suite 600, San Antonio, Bexar County, Texas 78216. My Texas Bar Number is 10869825.

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Further, affiant sayeth not.

IN WITNESS WHEREOF, this affidavit is executed by the undersigned affiant as of the Date hereinafter referenced.

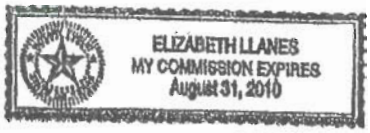
AFFIANT:

David V. Jones
Jones, Andrews & Ortiz, P.C.

STATE OF TEXAS
COUNTY OF BEXAR

SUBSCRIBED AND SWORN TO before me on the 27th day of January, 2009

Elizabeth Llanes
Notary Public in and for the State of Texas




Printed or Stamped Name of Notary Public

08/31/2010
Date of Expiration of Notary's Commission