CAUSE NO. 2011-CCV-61850-5

	§	**IN THE COUNTY COURT**
PLAINTIFF	§	
	§	
V.	§	**AT LAW NO. 5**
	§	
	§	
	§	
DEFENDANT	§	**NUECES COUNTY, TEXAS**

PLAINTIFF'S RESPONSE TO DEFENDANT'S NO-EVIDENCE & TRADITIONAL MOTION FOR SUMMARY JUDGEMENT OF ALL OF PLAINTIFF'S CLAIMS

TO THE HONORABLE JUDGE OF SAID COURT:

Pro Se Plaintiff ("Plaintiff") files this response to Defendant's ("Defendant") No-Evidence & Traditional Motion for Summary Judgment of All of Plaintiff's Claims (the "Motion"), and in support of the same, respectfully shows the Court as follows:

EVIDENCE

Exhibit A Kitty Kat's Medical Record from Clinic.

Exhibit B ANTECH Diagnostics, Kitty's Pathology Report.

Exhibit C A true and correct copy of excerpts of the April 4 & 5, 2012, Oral Depositions of Dr. , Dr. , and Dr.

Exhibit D A true and correct copy of the April 12, 2012 letter of Ms. Karen Phillips, Director of Enforcement of the TSBVME, to Dr. .

Exhibit E A true and correct copy of TSBVME statistics as provided to Plaintiff through a FOIA request.

Exhibit F A true and correct copy of Transcript of the Testimony of Conversation between Dr., DVM and Dr., DVM.

Exhibit G A true and correct copy of email correspondence between Plaintiff and Defendant's attorneys A and B.

Exhibit H A true and correct copy of Plaintiff's retained testifying expert witness, Dr. , report.

INTRODUCTION

Defendant is a small animal veterinary practice located at , Corpus Christi, Texas.

On December 17, 2008, and on March 15, 2010, Plaintiff presented her indoor/outdoor cat known as "Kitty Kat" for veterinary care and treatment. Dr. is the treating veterinarian who rendered the veterinary care and treatment to Plaintiff's cat. As part of care and treatment of the cat, Dr. vaccinated the cat, including administering an adjuvanted feline leukemia vaccine.

On October 11, 2010, Plaintiff presented her cat to Dr. for treatment of a golf ball size mass, containing a quarter sized ulceration which was draining purulent and/or necrotic matter on its right rear leg. Dr. diagnosed the cat with an infection and prescribed the antibiotic Clavamox. Plaintiff was told to return for a follow up visit if there was no improvement. Plaintiff tried to schedule a follow up appointment but was unable to due to unavailability.

On October 16, 2010, Dr. of Clinic examined Kitty Kat and immediately diagnosed Vaccine Associated Sarcoma. On October 18, 2010, Dr. examined Kitty Kat and performed a Fine Needle Aspirate on the lesion and concurred with a diagnosis of Vaccine Associated Sarcoma. After two surgeries, one amputating the right hind limb, and chemotherapy Kitty Kat was euthanized on February 14, 2011, due to Vaccine Associated Sarcoma.

Plaintiff sues Defendant for veterinary malpractice in the following ways:

- Malpractice

- Breach of Contract
- Negligent Misrepresentation
- Vicarious Liability / Respondeat Superior

See Plaintiff's First Amended Original Complaint filed on April 18, 2012.

I. PLAINTIFF'S RESPONSE TO DEFENDANTS NO-EVIDENCE MOTION FOR SUMMARY JUDGEMENT

A. Summary Judgment Standard of Review

Under Rule 166a(i), a party may move for a no-evidence summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. Id. The respondent is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." TEX. R. CIV. P. 166a(i) cmt. In reviewing a trial court's order granting a no-evidence summary judgment, we consider the evidence in the light most favorable to the respondent and disregard all contrary evidence and inferences. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750-51 (Tex. 2003). Thus, a no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. Id. at 751; see TEX. R. CIV. P. 166a(i).

B. Arguments and Authorities

For Plaintiff to recover on her veterinary malpractice claims against Defendant, Plaintiff must prove, through a licensed practitioner of veterinary medicine:

- The actions or nonactions of Dr. did not conform to the exercise of the care and diligence as is ordinarily exercised by skilled veterinarians;

- That Dr. veterinary treatment of Plaintiff's cat deviated from the applicable standard of veterinary care; **and**
- That Dr. deviation from the applicable standard of veterinary care proximately caused Plaintiff's alleged damages and injuries.

Defendant's summary judgment is based on Plaintiff's Original Petition filed in Small Claims Court. Plaintiff filed an Amended Original Complaint on April 18, 2012. If the plaintiff amends the petition after being served with a motion for summary judgment, the defendant must file an amended or supplemental motion for summary judgment to address the newly pleaded cause of action. *See Worthy v. Collagen Corp*., 921 S.W.2d 711, 714 (Tex. App.—Dallas 1995), *aff'd*, 967 S.W.2d 360 (Tex. 1998); *Johnson v. Rollen*, 818 S.W.2d 180, 182–83 (Tex. App.—Houston [1st Dist.] 1991, no writ). Summary judgment on the entirety of the plaintiff's case will be improper, because the no-evidence motion fails to address all of the plaintiff's theories of liability. *See Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 894–95 (Tex. 1995) (per curiam); *see also Welch v. Coca-Cola Enters., Inc.*, 36 S.W.3d 532, 541–42 (Tex. App.—Tyler 2000, pet. dism'd by agr.); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 147–48 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Defendant's Motion relies on "the veterinary standard of care applicable to a veterinarian of ordinary skill and care practicing in the Corpus Christi, Nueces County, Texas under the same or substantially similar circumstances". *See Downing v. Gully,* 915 S.W.2d 181, 183 (Tex. App.—Ft. Worth 1996, writ denied) (adopting the standard applied to physicians and surgeons in medical malpractice cases to veterinary malpractice case). Texas has adopted a National Standard of Care: *See Am Transitional Care Centers of Tex Inc v Palacios*, 44 Tex Sup Ct J 720, 46 SW3d 873 (2001). The locality rule is not applicable in modern medical malpractice actions. The Texas Supreme Court's description of the standard of care refers only to physicians in the same or similar circumstances,

and does not refer to the physician's community *See Chambers v. Conway*, 883 S.W.2d 156, 158 (Tex. 1993); *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977); and *Snow v. Bond*, 438 S.W.2d 549, 550-551 (Tex. 1969). Hospital rules do not reflect the community standard of medical care, as the particular hospital might maintain higher standards that those prevailing in the community. *See Hicks v. Canessa*, 825 S.W.2d 542, 544 (Tex. App.—El Paso 1992, no writ).

Relying solely on this Court's decision in Hickson v. Martinez, 707 S.W.2d 919, 925 (Tex.App.-Dallas 1985), writ ref'd n.r.e., 716 S.W.2d 499 (Tex.1986) (per curiam), Bakhtari *(See Bakhtari v. Estate of Dumas*, 317 S.W. 3d 486, 494 (Tex. App.—Dallas 2010, no pet.) argues that "[u]nless a different standard is imposed by statute, expert testimony on the standards of care is admissible only if the expert can offer testimony on the standards of practice for the relevant or similar community." Among other distinguishing factors, however, our decision in Hickson predated the enactment of the expert witness and report sections of chapter 74 and its predecessor statute. See generally Lee v. Mitchell, 23 S.W.3d 209, 212-15 (Tex.App.-Dallas 2000, pet. denied) (tracing legislative history of predecessor to chapter 74 and noting expert witness and report sections of that statute "were not added until 1989 and 1993, respectively, and were amended in 1995"). In other words, a different standard is now imposed by statute. Texas Civil Practice & Remedies Code Chapter 74 does not require that a physician providing an expert opinion on the applicable standard of care in a suit against a physician be from the same community, or a similar community, as the defendant physician. See Springer v. Johnson, 280 S.W.3d 322, 326-31 (Tex.App.-Texarkana 2008, no pet.)

The locality rule arose in the United States in the 1880s. *See Small v Howard, 128 Mass 131 (1880).* It has been disregarded by a majority of courts, but a significant minority adhere to the rule. The locality rule was based on the premise that rural physicians might not have the same experiences or opportunities for education as their colleagues in larger cities; therefore, it would be unfair to hold

them to the same standard of care. The locality rule originated in a time when rural and urban physicians may have had vastly different experiences with respect to their education, training, and ability to obtain the latest information relating to diagnosis and treatment. These differences necessitated the development of local standards to govern medical malpractice lawsuits. Today, however, rural and urban physicians have access to the same information and have the same opportunities to stay current in their specialty. Thus, the locality rule has become an anachronism. The persistence of this rule may serve to promote the practice of substandard medicine. *See Christian v. Jeter*, 445 S.W.2d 51, 53-54 (Civ. App.--Waco 1969, ref. n.r.e.).

C. Plaintiff's Response to No Evidence of the Relevant Standard of Care Exists to Prove Plaintiff's Malpractice Claims.

Plaintiff's retained testifying expert, Dr. , is a small animal veterinarian practicing in Spring, Texas. *See Downing v. Gully,* 915 S.W.2d 181, 183 (Tex. App.—Ft. Worth 1996, writ denied) (adopting the standard applied to physicians and surgeons in medical malpractice cases to veterinary malpractice case). Texas Civil Practice & Remedies Code Chapter 74 does not require that a physician providing an expert opinion on the applicable standard of care in a suit against a physician be from the same community, or a similar community, as the defendant physician. See Springer v. Johnson, 280 S.W.3d 322, 326-31 (Tex.App.-Texarkana 2008, no pet.)

In addition to Dr.'s expert report, Defendant's Dr. , Dr. , and their retained testifying expert Dr. testified to the standard of care they themselves adhere to. The standard of care is performing a blood test to check for feline leukemia virus, informing the client of the recommended vaccines, the risks and benefits of the vaccines, and potential adverse reactions.

- See Exhibit "A", pages 36-37 & 61, Deposition of Dr., DVM

Q When you examine a new client at your clinic who brings in a cat, do you talk to them about what vaccines you will be injecting and what they're for?

A Yes.

Q So, in other words, you would -- is it true you would tell a client with a cat, "I'm going to give them this rabies, this is what it's for, I'm going to give them the panleukopenia and that's what it's for, I'm going to give them calicivirus and this is what it's for, and I'm going to give them the rhinotracheitis, and this is what it's for"?

A Yes.

Q And do you, at any time, explain to them the benefits of those vaccines?

A Yes.

Q And do you, at any time, also explain to them what risks may occur with these vaccines?

A Yes.

Q And do you, at any time, explain to them what signs and symptoms to look for as a possible adverse reaction to these vaccines?

A We advise them to observe their animals for anything that's unusual after vaccines, whether they just act like they don't feel good, they lay around, maybe vomit, whatever. Anything that seems abnormal in their animal after a vaccine, we need to know about.

Q Okay. And a cat, do you specifically tell them to look for any type of lump at the vaccine site that could be a reaction to the vaccine?

A No, but that's part of our "anything that's unusual." I would think that would cover any –That would, pretty much, cover anything. We tell them anything that doesn't seem right, you need to let us know.

Q In your practice, do you test for feline leukemia virus before you administer a feline leukemia vaccine?

A We do in kittens. We do in feral cats. We do in Humane Society cats can, although most Humane Society cats are already tested when we see them.

Q Do you in adult cats with no known vaccine history?

A Again, it depends upon the health of the cat and the history of the cat and where it came from; feral cats, stray cat, somebody gave it to them from a neighbor.

- See Exhibit "B", pages 10-11 & 13, Deposition of Dr., DVM

Q And at Clinic, is it practice that the veterinarians discuss with their clients like what types of vaccines they recommend for their felines and what possible risks or benefits they have, what they're for?

A Yes, it is.

Q So, they would tell the client, "This is the rabies vaccine, this is what it's for, these are certain things that could happen, adverse events that could happen"?

A Yes.

Q Okay. And the same with the FVRCP and the leukemia?

A Yes.

Q Okay. What type of adverse events do they warn could happen with these particular vaccines?

A Mostly more acute events, acute local swelling, fevers, lethargy, vomiting.

Q And do you test a cat for feline leukemia prior to administering the feline leukemia vaccine?

A Typically, I do.

- See Exhibit “C”, pages 40-42, Deposition of Dr., DVM

Q Okay. What was your assignment in this case?

A My assignment was to testify as to the standard of care by the local veterinarians in Corpus Christi as to -- as it applies to vaccinations, specifically of cats.

Q Yes. So, when a new client comes to your office with a cat, what is your procedures? Can you just kind of walk through that?

A On a stray cat or when they purchase --

Q Okay. Let's just say --

A It does make a difference.

Q -- an eight year adult cat --

A Okay.

Q -- that the owner has had for five years, but there's no known history of any vet visits.

A Okay. Can I ask you more specific? Is the cat indoors or outdoors?

Q Both.

A Okay. So, you know, Mrs. Jones comes to me, "I've had this cat for five years, Dr. , and we think he's about eight years of age, he's inside, outside, never been vaccinated." Is that the scope of the question?

Q Yes.

A Okay. Good. I would tell that client that -- I would say, "Well" -- I would chastise her in a nice way for waiting so long to come in. I wouldn't be rude about it. I'd say, "You are playing Russian roulette by letting your cat go outside where the exposure rate for this community is

high for strays," and I'd say, "Has your cat been healthy or sickly?" If she says, "Well, it's been a healthy cat, never been sick a day in his life, never been in a cat fight, hangs on the front porch, goes to the backyard," all those wonderful things, I would say – you know, of course, by law, you have to do the rabies. As far as the distemper/leukemia, the five way vaccination that I showed you, that you have the label of, I would tell her that, theoretically, every cat should be tested before vaccinating; however -- And I would say, "If your cat had been a sickly cat, I could not -- I would not, in good conscience, like to vaccinate." If she insisted that I do, I probably would, but I think it would not be the proper thing to do. I would tell her about the testing once again and let her make the decision. I hate to say this: A lot of it comes down to money for people.

Q And would you explain what the panleukopenia, rhinotracheitis, calicivirus -- would you mention those names and explain --

A Oh, yeah, yeah, yeah, absolutely.

Q -- what they are?

A We tell them that the vaccination we give here basically has feline distemper, and I'll say, "It's very similar to parvo in dogs," and then the other one is a respiratory. Of course, leukemia is like an analogy to human aids, you know. It suppresses the immune system.I don't go into a lot of detail, but what I just told you took 15 seconds, and that's, basically, what I tell them.

Q Okay.

A If they have more specific questions, I try my best to be as accurate as I can.

Accordingly, Plaintiff has competent, admissible evidence of the standard of veterinary care applicable to Dr. and Defendant.

II. PLAINTIFFS RESPONSE TO DEFENDANT'S TRADITIONAL MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF'S AFFIRMATIVE CLAIMS AGAINST

DEFENDANT

A. Summary Judgment Standard of Review

A nonmovant in a traditional summary judgment proceeding is not required to produce summary judgment evidence until after the movant establishes it is entitled to summary judgment as a matter of law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). In deciding whether there is a disputed issue of material fact that precludes summary judgment, the court takes as true all evidence favorable to the nonmovant. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The court must view the evidence in the light most favorable to the nonmovant and must indulge every reasonable inference and resolve all doubts in favor of the nonmovant. *Limestone Prods.*, 71 S.W.3d at 311; *Nixon*, 690 S.W.2d at 549.

B. Arguments and Authorities

To recover on her veterinary malpractice claims against Defendant, Plaintiff must prove, through a licensed practitioner of veterinary medicine:

- The actions or nonactions of Dr. did not conform to the exercise of the care and diligence as is ordinarily exercised by skilled veterinarians;
- That Dr. veterinary treatment of Plaintiff's cat deviated from the applicable standard of veterinary care; **and**
- That Dr. deviation from the applicable standard of veterinary care proximately caused Plaintiff's alleged damages and injuries.

Defendant's Motion relies on "the veterinary standard of care applicable to a veterinarian of ordinary skill and care practicing in the Corpus Christi, Nueces County, Texas under the same or substantially similar circumstances". *See Downing v. Gully,* 915 S.W.2d 181, 183 (Tex. App.—Ft. Worth 1996, writ

denied) (adopting the standard applied to physicians and surgeons in medical malpractice cases to veterinary malpractice case). Texas has adopted a National Standard of Care: *See Am Transitional Care Centers of Tex Inc v Palacios*, 44 Tex Sup Ct J 720, 46 SW3d 873 (2001). The locality rule is not applicable in modern medical malpractice actions. The Texas Supreme Court's description of the standard of care refers only to physicians in the same or similar circumstances, and does not refer to the physician's community *See Chambers v. Conway*, 883 S.W.2d 156, 158 (Tex. 1993); *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977); and *Snow v. Bond*, 438 S.W.2d 549, 550-551 (Tex. 1969). Hospital rules do not reflect the community standard of medical care, as the particular hospital might maintain higher standards that those prevailing in the community. *See Hicks v. Canessa*, 825 S.W.2d 542, 544 (Tex. App.—El Paso 1992, no writ).

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community, or a similar community, as the defendant physician. See Springer v. Johnson, 280 S.W.3d 322, 326-31 (Tex.App.-Texarkana 2008, no pet.)

The locality rule arose in the United States in the 1880s. *See Small v Howard, 128 Mass 131 (1880).* It has been disregarded by a majority of courts, but a significant minority adhere to the rule. The locality rule was based on the premise that rural physicians might not have the same experiences or opportunities for education as their colleagues in larger cities; therefore, it would be unfair to hold them to the same standard of care. The locality rule originated in a time when rural and urban physicians may have had vastly different experiences with respect to their education, training, and ability to obtain the latest information relating to diagnosis and treatment. These differences necessitated the development of local standards to govern medical malpractice lawsuits. Today, however, rural and urban physicians have access to the same information and have the same opportunities to stay current in their specialty. Thus, the locality rule has become an anachronism. The persistence of this rule may serve to promote the practice of substandard medicine. *See Christian v. Jeter*, 445 S.W.2d 51, 53-54 (Civ. App.--Waco 1969, ref. n.r.e.).

C. The Texas State Board of Veterinary Medical Examiners state, "As a regulatory agency, the primary disciplinary tools are sanctions, against the veterinarian's license. Recovery of damages to complainants is beyond the scope of the Board's authority. Complainants may seek relief through civil proceedings separate from the Board action".

A copy of the February 1, 2012, letter of Ms. Karen Phillips, Director of Enforcement of the TSBVME, to Dr. marked as Exhibit C was filed. Plaintiff objects to the document based on Rule 803(8) C, in civil cases as to any party and in criminal cases as against the state, factual findings resulting from an investigation made pursuant to authority granted by law; unless the sources of information or other circumstances indicate a lack of trustworthiness. Four nonexclusive factors that bear on trustworthiness: (1) the timeliness of the investigation; Case No. 11-174 – took 372 days to complete.

(2) the special skill or experience of the official; The "Two Board Members" are not named. Furthermore, during the course of this investigation, the lead investigator Mr. Charles Adkins retired. A new investigator, Emilio Morales completed the investigation. Investigation records and reports are confidential. (3) whether a hearing was held and the level at which it was conducted; A hearing on this case was not held and (4) possible motivation problems (such as agency bias or motivation issues) suggested by *Palmer v. Hoffman* 318 U.S. 109 (1943). Obviously, The Texas State Board of Veterinary Medical Examiners has some issues regarding bias. I was not notified of my right to appeal their decision. I do not believe the TSBVME notifies any complainants of their right to appeal so I have asked the Office of the Texas Attorney General to look into this matter. Also, according to data I obtained through the FOIA, an average only 16% of veterinarians were disciplined for years 2001-2010. Only 15 hearings were conducted before the Administrative Law Judge for the same time period. When a party opposing admissibility challenges the trustworthiness of a particular report, courts generally start their analysis with these factors. In addition, courts have supplemented these four factors with others, including whether the report in question is final and the extent to which the investigation complied with agency procedures. Often the subjects of government reports tend to rely on materials produced by nongovernmental bodies to prepare their own findings and conclusions. When an agency report relies heavily on third-party materials, however, courts have excluded them, *See Brown v. Sierra Nevada Memorial Miners Hospital* 849 F.2d 1186, 1189–90 (9th Cir. 1998). Legal conclusions contained within government reports generally fall outside the scope of the rule's exceptions. This limitation is a nod to those concerned that a jury will improperly defer to an agency's conclusions. As the court explained in *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 303 (11th Cir. 1989), "legal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of

the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."

According to the Veterinary Licensing Act, §801.207 PUBLIC RECORD; EXCEPTION:

(a) Except as provided by Subsection (b), a board record is a public record and is available for public inspection during normal business hours.

(b) An investigation record of the board, including a record relating to a complaint that is found to be groundless, is confidential.

Only one circuit court has addressed that open question at any length. In *Hines v. Brandon Steel Decks, Inc.,* 886 F.2d 299, 302 (11th Cir.1989), the Eleventh Circuit held that "Rule 803(8)(C) does not provide for the admissibility of the legal conclusions contained within an otherwise admissible public report." "Legal conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."...That court "caution[ed], however, that the amorphous line between 'factual' and 'legal' conclusions may obscure a practical analysis under this rubric."...The Fourth Circuit has agreed, albeit without analysis. *See Zeus Enters., Inc. v. Alphin Aircraft, Inc.,* 190 F.3d 238, 243 (4th Cir .1999) ("The NTSB order involved no factual determinations and was strictly a legal ruling. As such, the NTSB order was not admissible under Rule 803(8)(C).").

The Ninth Circuit decided to agree with these courts, concluding that Pure legal conclusions are not admissible as factual findings. In the context of a summary judgment motion, a conclusion of law by a third-party investigator does not, by itself, create a genuine issue of material fact for the obvious reason that a legal conclusion is not a factual statement and for the reasons explained by the Eleventh Circuit.

Defendant's Motion relies on evidence that the court cannot consider because it is "Hearsay". The TSBVME agency record contains statements that are themselves hearsay. This creates the familiar problem of having hearsay within hearsay. Although Rule 803(8)(c) provides an exception for the report itself, the party seeking admission often is required to offer a second exception to cover the individual hearsay statements in the report. *See, e.g.*, United States v. Mackey, 117 F.3d 24, 28–29 (1st Cir. 1997) ("In line with the advisory committee note to Rule 803(8), decisions in this and other circuits squarely hold that hearsay statements by third persons . . . are not admissible under [Rule 803(8)(c)] merely because they appear within public records."). In other instances, courts assess the reliability of the hearsay statements within the report as a means of determining whether the report should be admitted.

Lastly, the Plaintiff has appealed the decision rendered by the TSBVME. As a regulatory agency, the primary disciplinary tools are sanctions, against the veterinarian's license. Recovery of damages to complainants is beyond the scope of the Board's authority. Complainants may seek relief through civil proceedings separate from the Board action. Therefore, the TSBVME's finding of "no violation" letter is not competent summary judgment evidence.

D. Plaintiff's response to Defendant's allegations that Dr. faults "the industry".

The Transcript of the Testimony of Conversation between Dr., DVM and Dr, DVM has so many unintelligible and broken areas of conversation that it is hard to determine what they were talking about without taking some statements out of context.

Defendant's Motion relies on evidence that the court cannot consider because it was obtained as a violation of state law. On January 14, 2012, Plaintiff's retained testifying expert, Dr. , and Defendant's retained testifying expert, Dr. , both attended a professional conference in Orlando, Florida. Dr. used his cell phone to record a conversation with Dr. without either his knowledge or consent. Florida's

wiretapping law is a "two-party consent" law. Florida makes it a crime to intercept or record a "wire, oral, or electronic communication" in Florida, unless all parties to the communication consent. whoever violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 934.41.See Fla. Stat. ch. 934.03.

Chapter 934, Florida Statutes, was enacted by the Florida Legislature in order to assure personal rights of privacy in oral and wire communications. *See* s. 934.01, Fla. Stat., reflecting the legislative findings for enactment of Chapter 934, Fla. Stat. The legislative findings in section 934.01(4), Florida Statutes, reflect the Legislature's concern for protecting the privacy rights of the state's citizens. In enacting Chapter 934, the Legislature expressly undertook to "define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings." Section 934.01(2), Fla. Stat.

Section 934.03(1), Florida Statutes, generally makes it unlawful to willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication. *See* s. 934.03(4), Fla. Stat., prescribing penalties for violations of the statute. Any criminal action would be brought by the state attorney for the judicial circuit where the incident occurred. *And see* s. 934.10, Fla. Stat., prescribing civil remedies. *See also* s. 934.06, Fla. Stat., prohibiting the use of such intercepted wire or oral communications as evidence. *Cf. State v. Mozo*, 655 So. 2d 1115 (Fla. 1995), *citing United States v. Nelson*, 837 F.2d 1519 (11th Cir.), *cert. denied*, 488 U.S. 829, 109 S.Ct. 82, 102 L.Ed.2d 58 (1988) (actual "interception" of a communication occurs not where the call is ultimately heard or recorded but where the communication originates. "Oral communication" is defined by section 934.02(2), Florida Statutes, as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such

expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication."

The Florida Supreme Court has interpreted the test set forth in this definition as substantially the same test used in a Fourth Amendment right-to-privacy analysis. *See Mozo v. State, id.* at n.5; *Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996. Thus, for a conversation to qualify as "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication and that expectation of privacy must be recognized by society as reasonable under the circumstances *See Jackson v. State*, 18 So. 3d 1016 (Fla. 2009), *cert. denied*, 130 S.Ct. 1144 (2010). As stated by the Florida Supreme Court in *State v. Inciarrano See* 473 So. 2d 1272, 1275 (Fla. 1985). "This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize* this expectation as reasonable. *Shapiro v. State*, 390 So. 2d 344 (Fla. 1980), *cert. denied*, 450 U.S. 982, 101 S.Ct. 1519, 67 L.Ed.2d 818 (1981).

Dr. expected his conversation with Dr. to be private. The conference they were attending had signs posted stating, “no recording allowed’. Although this was mainly for the conference speakers Dr. also had an expectation that his conversation with Dr. was private and would not be recorded. Dr. intends to file criminal charges against Dr. for taping his conversation and using the transcript in this civil case.

III. PLAINTIFF’S RESPONSE TO TRADITIONAL MOTION FOR SUMMARY JUDGEMENT OF DEFENDANT’S COUNTERCLAIM

A. Summary Judgment Standard of Review

A nonmovant in a traditional summary judgment proceeding is not required to produce summary judgment evidence until after the movant establishes it is entitled to summary judgment as a matter

of law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). In deciding whether there is a disputed issue of material fact that precludes summary judgment, the court takes as true all evidence favorable to the nonmovant. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The court must view the evidence in the light most favorable to the nonmovant and must indulge every reasonable inference and resolve all doubts in favor of the nonmovant. *Limestone Prods.*, 71 S.W.3d at 311; *Nixon*, 690 S.W.2d at 549.

B. Arguments and Authorities

Rule 13 authorizes the imposition of sanctions against an attorney, a represented party, or both, who filed a pleading that is either: (1) groundless and brought in bad faith; or (2) groundless and brought to harass. TEX. R. CIV. P. 13; see also Rudisell v. Paquette, 89 S.W.3d 233, 236 (Tex. App.-Corpus Christi 2002, no pet.). The rule defines "groundless" as having "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." Tex. R. Civ. P. 13. Sanctions may only be imposed for good cause under Rule 13, the particulars of which must be stated in the order. TEX. R. CIV. P. 13; Rudisell, 89 S.W.3d at 237.8.

The standard for reviewing whether a pleading is groundless is objective: Did the party and attorneys make a reasonable inquiry into the legal and factual basis of the claim? The reasonableness of the inquiry is judged by the facts available and the circumstances present at the time the party filed the pleading. *Tarrant Cty. v. Chancey*, 942 S.W.2d 151, 155 (Tex. App.—Fort Worth 1997, no writ).

A pleading is frivolous when presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Tex. Civ. Prac. & Rem. Code §10.001(1). Defendant/Counter-Plaintiff's pleading is frivolous because the pleading is intended to harass or cause unnecessary delay or expense.

Bad faith does not exist when a party merely exercises bad judgment or is negligent; rather bad faith is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. *Elkins v. Stotts-Brown*, 103 S.W.3d 664, 669 (Tex. App.—Dallas 2003, no pet.). To "harass" means to annoy, alarm, and verbally abuse another person. Id.

Defendant/Counter-Plaintiff's attorneys A and B filed the groundless Counterclaim pleading in bad faith, purpose of harassment, and to cause unnecessary expense. Therefore, A and B are subject to sanctions. *See GTE*, 856 S.W.2d at 731. Specifically, on November 3, 2011, Plaintiff sent an email to A inquiring about "the interest that B has in this case. He is not a party to this suit nor is he listed as counsel for the defendant. Unless a joinder of additional parties is filed I request that he no longer participate as counsel for the defendant". A, in an email dated November 4, 2011, replied, "Regarding your inquiry as to B, so that we are all on the same page, I have included B as a cc: to this e-mail. You may recall that B was co-counsel for our client at the small claims trial, as well as personal counsel for both South Texas Veterinary Associates, Inc. and Dr. . He continues to be co-counsel and personal counsel for our client in this county court matter. Attached is a copy of the Notice of Appearance of Counsel of Defendant, which we filed with the court today (By certified mail, return receipt requested, you shall receive a separate copy of the Notice as a cc: to our November 4, 2011 letter to the Nueces County Court Clerk)". B response on November 3, 2011, to the email was, "Please file a Notice of Additional Counsel and have it reflect that I represent Dr. . Please amend our answer to allege this is a frivolous lawsuit brought solely for the purpose of harassment and be sure to calculate all attorney fees and other costs so, at the appropriate time, we can ask that the plaintiff be responsible for payment of same". B represented Dr. in Small Claims hearing conducted on July 22, 2011, in Precinct 2-1, Justice Court, Justice of the Peace Janice Stoner, Nueces County, Texas. B again represented Dr. at a Dismissal

For Want Of Prosecution hearing conducted on October 28, 2011, in the County Court At Law #5 with the Honorable Judge Brent Chesney presiding. B represented the Defendant on both occasions without being a designated attorney of record or notifying Plaintiff as required by Texas Rules of Civil Procedure Rule 8 and Rule 21a. On November 3, 2011, B instructed A via email to amend the Defendant's original answer to include "this is a frivolous lawsuit brought solely for the purpose of harassment". Five months passed before and amended answer was filed in order to increase their attorney fees in this case which is being paid by the Defendant/Counter-Plaintiff's malpractice insurance. Plaintiff/Counter-Defendant has also spent money on discovery fees in the last five months. If A and B truly felt this was a frivolous lawsuit in November 2011, an amended answer should have been filed at that time. During the time period October 2011 – April 13, 2012, Counsel has billed $20,403.71 for legal fees, court costs, and other litigation expenses.

PRAYER

Plaintiff requests that Defendant's combined Motion for Summary Judgment be DENIED in its entirety and ORDER that Defendant take nothing on all of his claims and causes asserted against Plaintiff.

Respectfully Submitted,

By: _____
, Pro Se Plaintiff

Corpus Christi, Texas 78411