No. 04-18-00452-CV

In the Fourth Court of Appeals
San Antonio, Texas

MGR, INC. and MIRACLE BODY AND PAINT, INCORPORATED
d/b/a MIRACLE BODY AND PAINT,
Appellants

v.

GEICO CASUALTY COMPANY,
Appellee

Appeal from Cause No. 2015-CI-18092
45th Judicial District Court of Bexar County, Texas
Hon. Barbara Hanson Nellermoe, Judge Presiding

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, GEICO Casualty Company, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal:

FOR THE APPELLANTS (MGR, Inc. and Miracle Body and Paint, Incorporated d/b/a Miracle Body and Paint):

1. MGR, Inc. and Miracle Body and Paint, Incorporated d/b/a Miracle Body and Paint, Appellants.

2. Lynda S. Ladymon, Attorney at Law, Appellate and Trial Counsel for Appellant.

FOR THE APPELLEE (GEICO Casualty Company)

1. GEICO Casualty Company, Appellee.

2. Scott P. Jones and Christopher M. Blanton, Brock Guerra Strandmo Dimaline Jones, Appellate and Trial Counsel for Appellee.

STATEMENT ON ORAL ARGUMENT

The factual and legal issues raised in this appeal are not complex and have been adequately addressed by the written briefs filed by MGR, Inc., Miracle Body and Paint, Incorporated d/b/a Miracle Body and Paint, and GEICO Casualty Company. Counsel for GEICO Casualty Company believes that oral argument would not benefit the Court and respectfully requests that oral argument be denied.

Christopher M. Blanton

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The Parties

This Brief may refer to the following:

GEICO Casualty Company	"GEICO"
MGR, Inc. and Miracle Body and Paint, Incorporated d/b/a Miracle Body and Paint	"Miracle"

The Orders

This Brief may refer to the two Orders that are the subject of Miracle's appeal as follows:

Judge Canales' June 28, 2017 Order Granting Defendant's Motion for Traditional and No-Evidence Summary Judgment	"the June 28, 2017 Order"
Judge Nellermoe's April 16, 2018 Order Granting Defendant's Motion to Strike Plaintiffs' Sworn Account" Claim and Defendant's Second Motion for Traditional and No-Evidence Summary Judgment With Respect to Plaintiffs' Tort-Based Claims	"the April 16, 2018 Order"

The Record on Appeal

This Brief will refer to the record as follows:

Brief of Appellants	"A'ant Br. At __"
Clerk's Record	"CR __"

STATEMENT OF JURISDICTION

GEICO Casualty Company acknowledges that this Court has jurisdiction over this appeal. Jurisdiction is not contested in this matter.

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BRIEF OF APPELLEE

TO THE HONORABLE COURT OF APPEALS:

Appellee GEICO Casualty Company ("GEICO") respectfully files this Brief in support of the (A) Order on Defendant's Motion for Traditional and No-Evidence Summary Judgment (CR 290) entered August 25, 2017 by the Honorable David A. Canales and the (B) Order Granting Defendant's Motion to Strike Plaintiff's "Sworn Account" Claim and Defendant's Second Motion for Traditional and No-Evidence

Summary Judgment With Respect to Plaintiff's Tort-Based Claims (CR 529-30) entered April 16, 2018 by the Honorable Barbara H. Nellermoe, and in support of those Orders, respectfully shows the following:

STATEMENT OF THE CASE

Nature of the Case: Miracle sued GEICO to recover money Miracle claimed it was owed for repairs it performed and parts it supplied to repair automobiles insured by GEICO and automobiles damaged by GEICO insureds. Miracle asserted claims for (a) breach of contract; (b) breach of implied contract; (c) and quantum meruit. GEICO moved for summary judgment under both Rule 166a(c) and Rule 166a(i) of the Texas Rules of Civil Procedure. (CR 57). The hearing on GEICO's Motion for Traditional and No-Evidence Summary Judgment was set for June 28, 2017 before the Hon. David A. Canales . Miracle filed its Response to GEICO's Motion for Traditional and No-Evidence Summary Judgment on June 21, 2017.

Judge Canales granted GEICO's Motion for Traditional and No-Evidence Summary Judgment by Order entered August 25, 2017. (CR 290).

Prior to the June 28, 2017 summary judgment hearing, Miracle amended its petition to assert additional claims for (a) a suit on a sworn account; (b) common law fraud; (c) fraud by non-disclosure; and (d) negligent misrepresentation. (CR 174). GEICO filed its Motion to Strike Plaintiffs' "Sworn Account" Claim and Defendant's Second Motion for Traditional and No-Evidence Summary Judgment With Respect to Plaintiffs' Tort-Based Claims under both Rule 166a(c) and Rule 166a(i) of the Texas Rules of Civil Procedure with respect to the new claims. (CR 296). Miracle filed its Response to GEICO's second motion. The hearing on the second motion occurred on March 15, 2018 before the Hon. Richard Price. Judge Price granted GEICO's Motion to Strike Plaintiffs' "Sworn Account" Claim and Defendant's Second Motion for Traditional and No-

Evidence Summary Judgment With Respect to Plaintiffs' Tort-Based Claims on March 27, 2018. Judge Nellermoe entered the Order Granting Defendant's Motion to Strike Plaintiffs' "Sworn Account" Claim and Defendant's Second Motion for Traditional and No-Evidence Summary Judgment with Respect to Plaintiff's Tort-Based Claims on April 16, 2018. (CR 529-30).

ISSUES PRESENTED FOR REVIEW

Issue 1: The trial court was correct in granting GEICO's first traditional motion for summary judgment with respect to Miracle's breach of contract claim.

Issue 2: The trial court was correct in granting GEICO's first no-evidence motion for summary judgment with respect to Miracle's breach of contract claim.

Issue 3: The trial court was correct in granting GEICO's first traditional motion for summary judgment with respect to Miracle's breach of implied contract claim.

Issue 4: The trial court was correct in granting GEICO's first no-evidence motion for summary judgment with respect to Miracle's breach of implied contract claim.

Issue 5: The trial court was correct in granting GEICO's first traditional motion for summary judgment with respect to Miracle's quantum meruit claim.

Issue 6: The trial court was correct in granting GEICO's first no-evidence motion for summary judgment with respect to Miracle's quantum meruit claim.

Issue 7: The trial court was correct in granting GEICO's second traditional motion for summary judgment with respect to Miracle's sworn account claim.

Issue 8: The trial court was correct in granting GEICO's second no-evidence motion for summary judgment with respect to Miracle's sworn account claim.

Issue 9: The trial court was correct in granting GEICO's second traditional motion for summary judgment with respect to Miracle's common law fraud claim.

Issue 10: The trial court was correct in granting GEICO's second no-evidence motion for summary judgment with respect to Miracle's common law fraud claim.

Issue 11: The trial court was correct in granting GEICO's second traditional motion for summary judgment with respect to Miracle's fraud by non-disclosure claim.

Issue 12: The trial court was correct in granting GEICO's second no-evidence motion for summary judgment with respect to Miracle's fraud by non-disclosure claim.

Issue 13: The trial court was correct in granting GEICO's second traditional motion for summary judgment with respect to Miracle's negligent misrepresentation claim.

Issue 14: The trial court was correct in granting GEICO's second no-evidence motion for summary judgment with respect to Miracle's negligent misrepresentation claim.

STATEMENT OF FACTS

GEICO is an insurance company licensed by and in good standing with the Texas Department of Insurance. (CR 316). GEICO's activities in Texas are regulated by the Texas Department of Insurance and GEICO is authorized by the State of Texas to provide a broad range of insurance products and services, including but not limited to automobile policies to Texas residents. (Id.).

When GEICO issues an automobile policy to a Texas resident, that policy constitutes a "contract of insurance" by and between GEICO and its insured. (CR 318). Miracle is not a party to any "contract of insurance" between GEICO and its insureds. (CR 315-19). Under each individual automobile insurance policy, GEICO agrees to pay in the event of a covered loss the prevailing market labor rates for covered repairs/losses to covered vehicles. (Id.).

Upon receipt of a vehicle damage claim, the vehicle is inspected by GEICO and an estimate is prepared by or on behalf of GEICO for the proposed repair work and replacement parts for the damage. (Id.). Each GEICO estimate clearly and unambiguously identifies the applicable labor rate that will be paid by GEICO, including labor rates for body labor, paint labor and mechanical labor. (Id.). The amount of the hourly rates is determined based on prevailing market labor rates. The estimates likewise identify anticipated replacement parts and the amounts GEICO will pay for each part. (Id.; CR 320-411). The disclosed applicable rates are the

rates GEICO agrees to pay with respect to the identified repairs. (CR 315-319).

Once in possession of a GEICO estimate, each GEICO insured or GEICO claimant can take his or her vehicle to whatever body shop they wish to utilize. (Id.). GEICO does not restrict any insureds and/or covered third party claimants from utilizing any specific body shop for covered repairs. (Id.). GEICO is not involved in the selection process. (Id.). GEICO simply prepares an estimate that clearly sets forth the rates GEICO will pay for repair work and the amount it will pay for parts. (Id.; CR 320-411).

Miracle performed work on GEICO insured vehicles. (CR 315-319). GEICO paid Miracle in accordance with the market labor rates disclosed in each estimate. GEICO likewise paid Miracle in accordance with the part costs disclosed in each estimate. (CR 315-319). However, after completing each repair, Miracle now claims that GEICO is responsible for paying for repairs at a higher hourly rate than the labor rates clearly identified in each GEICO estimate. (CR 174). In addition, Miracle seeks to compel GEICO to pay higher prices for repair parts than the rates clearly disclosed by GEICO in its estimates. (Id.).

At no time did GEICO agree to pay labor rates for work performed by Miracle at rates in excess of the prevailing market labor rates clearly set forth and disclosed in each estimate. (CR 319).

SUMMARY OF ARGUMENT

As to the first summary judgment with respect to Miracle's breach of contract and breach of implied contract claims, the trial court properly granted traditional summary judgment on those claims as the competent summary judgment evidence established (1) that there was no contract between Miracle and GEICO and (2) the estimates clearly and unambiguously identified the rates that would be paid by GEICO on behalf of its insureds. In addition, the trial court properly granted no-evidence summary judgment as Miracle could produce no more than a scintilla of competent evidence establishing the existence of any valid contract between Miracle and GEICO, that Miracle and GEICO had a "meeting of the minds" by which GEICO agreed to pay Miracle at rates in excess of the prevailing market rates clearly disclosed in each estimate, or that GEICO agreed to compensate Miracle at rates higher than the disclosed rates in each GEICO estimate.

As to the first summary judgment with respect to Miracle's quantum meruit claim, the trial court properly granted traditional summary judgment as the competent summary judgment evidence established that GEICO did not benefit, use or enjoy the services and materials forming the basis of Miracle's claim. In addition, the trial court properly granted no-evidence summary judgment as to the quantum meruit claim as Miracle could not produce more than a scintilla of evidence that (a) the work and materials furnished by Miracle was for the benefit of GEICO as

opposed to the benefit of each vehicle owner whose car was allegedly repaired by Miracle or (b) that the work and materials furnished by Miracle was for the use and enjoyment of GEICO as opposed to the use and enjoyment of each vehicle owner whose car was allegedly repaired by Miracle.

As to the second summary judgment with respect to Miracle's sworn account claim, the trial court properly struck the sworn account claim based on the earlier summary judgment dismissing Miracle's breach of express and implied claims. It is well-settled that a 'suit on a sworn account' is not an independent cause of action but merely a procedural rule regarding proof in certain types of contract actions. TEX. R. CIV. P. 185; *Rizk v. Fin. Guardian Ins. Agency, Inc.*, 584 S.W.2d 860, 862 (Tex. 1979).

With respect to Miracle's tort-based claims of fraud and negligent misrepresentation, the trial court properly granted both traditional and no-evidence summary judgment based on the earlier dismissal of Miracle's contract actions. Specifically, Miracle alleges that GEICO made various misrepresentations about the labor rates GEICO would pay for work performed on covered vehicles. Miracle's tort-based theory, therefore, is that GEICO represented to Miracle that GEICO would pay higher rates, Miracle relied upon those representations and performed the work, but upon completion of the work, GEICO refused to honor the agreed rates. This very same argument was rejected by Judge Canales when he entered summary

judgment with respect to Miracle's breach of express and implied contract claims. Specifically, Miracle argued in support of its contract claims that GEICO made verbal representations to Miracle about the labor rates GEICO would pay which Miracle relied upon "as an express and implied contract" in proceeding with work. Judge Canales' ruling on GEICO's First MSJ rejected Miracle's argument that GEICO made any such representations beyond the express prevailing market labor rate quoted in each GEICO estimate prepared for each GEICO insured. The Court previously found that there was no genuine issue of material fact that GEICO did not agree to pay Miracle at rates in excess of the prevailing market labor rates disclosed in each estimate; stated differently, the Court rejected the argument that GEICO made any representations to Miracle different than the statements made by GEICO in estimates prepared on behalf of its own insureds that GEICO would pay the prevailing market labor rates identified in each estimate. Based on this finding, therefore, Miracle's fraud and negligent misrepresentation claims fail as a matter of law and fact. The core issue germane to each "new" cause of action – to-wit, whether GEICO agreed or represented that it would pay Miracle at rates in excess of the clearly disclosed prevailing market labor rates – has been resolved and adjudicated in favor of GEICO. For these reasons – and the reasons set forth below – summary judgment is proper with respect to the "new" fraud and negligent misrepresentation claims.

Finally, traditional summary judgment was proper with respect to Miracle's fraud by nondisclosure claim as the competent summary judgment evidence established as a matter of fact that at all times, GEICO expressly disclosed the prevailing market labor rates and part/material costs it would pay in each GEICO estimate. In addition, no-evidence summary judgment was proper as Miracle could produce no more than a scintilla of evidence establishing that GEICO withheld any material information from Miracle.

ARGUMENT

A. Standards for Review of Summary Judgment.

Appellate courts review de novo a grant of summary judgment. *E.g., Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 175 (Tex.App.—Dallas 2000, pet. denied). This Court may uphold each summary judgment on any ground supported by the pleadings and evidence. *E.g., Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). That is, if the trial courts' orders do not specify the grounds on which the courts granted the summary judgments, this Court may affirm n any ground that is meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

1. Traditional Summary Judgment.

A party moving for a traditional summary judgment under rule 166a(c) of the Texas Rules of Civil Procedure must establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P.

166a(c); *Southwest Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). In other words, the defendant must conclusively prove that the plaintiff has no cause of action against him as a matter of law. *See Citizens First Nat'l Bank v. Cinco Expl*., 540 S.W.2d 292, 294 (Tex. 1976). In addition, a defendant is entitled to summary judgment if it conclusively negates an essential element of the plaintiff's claim. *E.g.*, *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). A matter is conclusively established if ordinary minds cannot differ as to the conclusion to be drawn from the evidence. *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982).

Once the movant satisfies its summary judgment burden by proving he is entitled to judgment as a matter of law and that no material fact issue precludes judgment, the burden shifts to the non-movant to raise a fact issue. *Phan Son Van v. Pena*, 990 S.W.2d 751, 753 (Tex. 1999). If the non-movant fails to satisfy its burden, the summary judgment must be granted. In reviewing a summary judgment granted under rule 166a(c), this Court must accept as true all evidence favorable to the non-movant, must indulge all reasonable inferences in favor of the non-movant, and must resolve any doubts in favor of the non-movant. *E.g., Nixon v. Mr. Property Management Co., Inc*., 690 S.W.2d 546, 548-49 (Tex. 1985).

2. No-Evidence Summary Judgment.

Under rule 166a(i), after adequate time for discovery, a party may move for summary judgment on grounds that the non-movant has no evidence of one or more elements of a claim or defense on which the non-movant would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the non-movant produces summary judgment evidence raising a genuine issue of material fact on the challenged elements. Id. The non-movant need not marshal its proof but must present evidence that raises a fact issue on the challenged elements. *See, e.g., Ching v. Methodist Children's Hosp*., 134 S.W.3d 235, 240 (Tex.App.—Amarillo 2003, pet, denied).

B. The Record Establishes the Trial Court Was Correct in Granting GEICO's First Traditional Motion for Summary Judgment with Respect to Miracle's Breach of Contract Claim.

The competent summary judgment evidence attached hereto establishes the following:

a. Under GEICO's insurance contracts with its insureds, GEICO agreed to pay for covered repairs to covered vehicles at prevailing market labor rates. (CR 77-81; 315-319).

b. GEICO prepared estimates with respect to each claim tendered under GEICO's insurance contracts with its insureds. Those estimates set forth the prevailing market labor rates that GEICO agreed to pay. (Id; CR 77-81; see, e.g. CR 320-411).

c. GEICO had no interest in whether or not a GEICO insured or claimant went to any specific body shop – GEICO's estimate identified the prevailing market labor rate GEICO agreed to pay so the identification of the body shop was not a relevant consideration to GEICO. (CR 77-81; 315-319).

d. Because the GEICO estimates identified the prevailing market rates that GEICO agreed to pay, Miracle could have declined the estimated work. However, Miracle performed the work in accordance with each estimate (and the disclosed prevailing market labor rate). (Id.; CR 77-81).

e. GEICO did not enter any separate agreement or contract with Miracle whereby GEICO agreed to pay for repair services and/or materials furnished by Plaintiffs to covered vehicles at rates in excess of GEICO's prevailing market labor rates. (Id.).

The foregoing evidence is incontrovertible and establishes as both a matter of law and fact that there are no genuine issues of material fact regarding whether GEICO was party to any contract with Plaintiffs whereby GEICO agreed to pay labor rates in excess of the prevailing market labor rates that were disclosed on each GEICO estimate. As Miracle bears the burden of proof as to the existence of a binding agreement with GEICO, and in light of the competent summary judgment evidence within the record which establishes no such contract existed, the trial court properly granted GEICO traditional summary judgment with respect to Miracle's breach of contract claim under TEX. R. CIV. P. 166a.

C. The Record Establishes that the Trial Court was Correct in Granting GEICO's First No-Evidence Motion for Summary Judgment with Respect to Miracle's Breach of Contract Claim.

To prevail on its breach of contract claim, Miracle bore the burden of proof of establishing the existence of one or more valid agreements or contracts between

GEICO and Miracle pursuant to which GEICO agreed to pay the labor rates in the amounts forming the basis of Miracle's claims against GEICO.

As set forth in the record before the Court, Miracle failed to produce more than a scintilla of evidence as to multiple elements upon which Miracle had the burden of proof at trial regarding the existence of any such agreement or contract; Miracle could not do so because no such agreements or contracts exist. For this reason, the trial court properly granted no-evidence summary judgment to GEICO under TEX. R. CIV. P. 166a(i) as there are no genuine issues of material fact that GEICO did not enter any contract with Miracle whereby GEICO became bound to pay Miracle at rates in excess of the rates set forth in each GEICO estimate..

In order to prove the existence of a binding and valid contract between GEICO and Miracle, Miracle had to establish the following elements at trial by a preponderance of the evidence: (a) an offer; (b) an acceptance; (c) a meeting of the minds; (d) a communication that each party has consented to the terms of the agreement; and (e) execution and delivery of the contract with an intent that it become mutual and binding on both parties. *Hallmark v. Hand*, 885 S.W.2d 471, 476 (Tex.App.—El Paso 1994, writ denied). The trial court properly granted summary judgment as Miracle could not produce more than a scintilla of evidence to support each of the following elements:

a. Any acceptance by GEICO to pay any rate directly to Miracle in an amount in excess of the rate disclosed by GEICO in its

estimates;

b. Any meeting of the minds whereby GEICO agreed to pay any labor rate directly to Miracle in an amount in excess of the prevailing market labor rate as determined by GEICO;

c. Any communication from GEICO expressing GEICO's consent to the terms of any agreement (a) between Miracle and GEICO or (b) superseding GEICO's insurance contracts with its policy holders obligating GEICO to pay any labor rate directly to Miracle in an amount in excess of the prevailing market labor rate as determined by GEICO; or

d. Any execution and delivery of any contract by GEICO the terms of which obligated GEICO to pay directly to Miracle any amount in excess of the prevailing market labor rate as determined by GEICO.

As Miracle had the burden of proof as to each of the foregoing elements, Miracle's failure to produce more than a scintilla of evidence to support its breach of contract claim entitled GEICO to summary judgment with respect to Miracle's breach of contract claim under TEX. R. CIV. P. 166a(i).

D. The Trial Court was Correct in Granting GEICO's First Traditional Motion for Summary Judgment with Respect to Miracle's Breach of Implied Contract Claim.

As noted above, in order to prevail on its "implied contract" claim, Miracle must establish at trial that by a preponderance of the evidence, GEICO engaged in acts or conduct that indicated that GEICO intended to become bound to Miracle to pay Plaintiffs labor rates in excess of the prevailing market labor rates. *Haws v. Garrett*, 480 S.W.2d at 609. As evidenced by the competent summary judgment

evidence before the Court, Miracle failed to meet that burden. Specifically, the competent summary judgment evidence in the Court's record establishes the following:

a. GEICO did not issue payments to Miracle at labor rates that exceeded the prevailing market labor rates. (CR 77-81; 315-319).

b. GEICO did not issue payments to Miracle at rates that exceeded the market labor rates identified in each GEICO estimate. (Id.).

.

c. GEICO did not modify its operating procedure with respect to the manner in which GEICO calculated payments in response to any request or demand by Miracle – to the contrary, GEICO consistently made payments to all body shops in Bexar County utilizing the same prevailing market labor rates. (Id.).

d. Under GEICO's insurance contracts with its insureds, GEICO agreed to pay for covered repairs to covered vehicles at prevailing market labor rates. (Id.)

e. GEICO's payment of the prevailing market labor rates did not vary between body shop to body shop. The prevailing market labor rate was consistently applied regardless of the body shop selected by any specific GEICO insured or third party claimant. (Id.).

f. GEICO prepared estimates with respect to each claim tendered under GEICO's insurance contracts with its insureds. Those estimates set forth the prevailing market labor rates that GEICO agreed to pay. (Id.).

g. Because the GEICO estimates identified the prevailing market rates that GEICO agreed to pay, Miracle could have declined the estimated work. However, Miracle performed the work in accordance with each estimate (and the disclosed prevailing market labor rate). (Id.; see, e.g., CR 320-411).

h. GEICO did not enter any separate agreement or contract with

> Miracle whereby GEICO agreed to pay for repair services and/or materials furnished by Miracle to covered vehicles at rates in excess of GEICO's prevailing market labor rates. (CR 77-81; 315-319).

The foregoing evidence is incontrovertible and establishes as both a matter of law and fact that the trial court properly granted summary judgment as there were no genuine issues of material fact regarding whether GEICO engaged in any act or conduct that expressed an intent by GEICO to pay labor rates to Miracle in excess of the prevailing market labor rate. As Miracle would bear the burden of proof as to the existence of an implied contract with GEICO, and in light of the competent summary judgment evidence within the Court's record which establishes no such implied contract existed, the trial court properly granted GEICO summary judgment with respect to Miracle's breach of implied contract claim under TEX. R. CIV. P. 166a.

E. The Trial Court was Correct in Granting GEICO's First No-Evidence Motion for Summary Judgment with Respect to Miracle's Breach of Implied Contract Claim.

Miracle alleged that GEICO breached one or more "implied contracts." (CR 174). Under Texas law, a contract may be "implied in fact" when its terms arise from the acts and conduct of the parties. *See Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex.1972). In other words, a contract is implied from the actual facts and circumstances indicating that the parties had a mutual intention to form a contract. *Id.* at 609. In the present case, Miracle had

the burden, therefore, of proving that GEICO, through its actions and conduct, expressed the intent to enter into a contract with Miracle the terms of which obligated GEICO to pay labor rates in excess of the prevailing market labor rates. The trial court properly found that Miracle failed to produce more than a scintilla of evidence to establish any act or conduct by GEICO which expressed any intent by GEICO that it would become obligated to pay labor rates in excess of the prevailing market labor rates GEICO clearly set forth on each of its estimates. For example, Miracle failed to provide more than a scintilla of evidence that:

a. GEICO ever paid Miracle at labor rates in excess of the prevailing market labor rates;

b. GEICO ever agreed to pay Miracle at labor rates in excess of the prevailing market labor rates;

c. That Miracle paid any sort of consideration whatsoever to GEICO for any "implied contract";

d. GEICO ever interlineated or otherwise withdrew or modified the prevailing market labor rates identified by GEICO an any estimate in response to any request by Miracle to do so; and

e. That GEICO advised its insureds that GEICO would pay any labor rate charged by Miracle regardless of the amount of such rate.

Of equal importance is the fact that Miracle failed to produce any more than a scintilla of evidence to support the conclusion that GEICO agreed to enter into separate contract with Miracle when GEICO's contracts were all formed between GEICO and GEICO's insureds, to-wit, the insurance contracts. As Miracle had the

burden of proof as to each of the foregoing elements, Miracle's inability to produce more than a scintilla of evidence to support their "implied contract" claim entitled GEICO to summary judgment under TEX. R. CIV. P. 166a(i).

F. The Trial Court was Correct in Granting GEICO's First Traditional Motion for Summary Judgment with Respect to Miracle's Quantum Meruit Claim.

In order to prevail on its *quantum meruit* claim, it is clear that Miracle had to establish by a preponderance of the evidence that Miracle furnished its services and materials for the benefit, use and enjoyment of GEICO. However, the legal authority cited herein clearly establishes that services provided for the benefit of insureds do not constitute benefits furnished for an insurer. *See, e.g., Encompass Office Solutions v. Ingenix, Inc*., 775 F.Supp.2d 938 (E.D. Tex. March 31, 2011). As noted by the *Encompass* court, in a *quantum meruit* case, "the evidence must show that the efforts were undertaken for the person to be charged and not just that the efforts benefitted that person." *Encompass*, 775 F.Supp.2d at 966 (citing *KUV Partners, LLC v. Fares*, No. 02-09-00246-CV, 2011 WL 944453, at *16 (Tex.App.—Fort Worth March 7, 2011, no pet.) (citing *McFarland v. Sanders*, 932 S.W.2d 640, 643 (Tex.App.—Tyler 1996, no pet.)) The rationale applicable in the *Encompass* case – and authority to which it cited, including but not limited to *Travelers Indem. of Conn. V. Losco Group*, 150 F.Supp.2d 556, 563 (S.D.N.Y. 2001) (It is counterintuitive to say that services provided to an insured are also provided to its insurer. The insurance

company derives no benefit from those services; indeed, what the insurer gets is a ripened obligation to pay money to the insured – which hardly can be called a benefit), establishes that Miracle's argument that GEICO bears liability under *quantum meruit* is improper. The competent summary judgment evidence before this Court establishes that Miracle's services and materials were furnished for the benefit, use and enjoyment of each motor vehicle owner and not by GEICO. Thus, the trial court properly granted summary judgment as to Miracle's *quantum meruit* action pursuant to TEX. R. CIV. P. 166a.

G. The Trial Court was Correct in Granting GEICO's First No-Evidence Motion for Summary Judgment with Respect to Miracle's Quantum Meruit Claim.

In order for Miracle to prevail on a *quantum meruit* claim against GEICO, Miracle had to establish by a preponderance of the evidence the following elements:

> (1) Miracle rendered valuable services or furnished valuable materials;
>
> (2) **The services or materials were furnished "for the person sought to be charged"**;
>
> **(3) The services or and materials were accepted "by the person sought to be charged, used and enjoyed by him"**; and
>
> (4) The services or materials were furnished under such circumstances that the person sought to be charged was notified that Miracle was expecting to be paid by the person sought to be charged.

Bashara v. Baptist Memorial Hosp. Sys., 685 S.W.2d 307 (Tex. 1985) (emphasis

added). Here, the trial court properly found that Miracle could not produce more than a scintilla of evidence to support Element (2) and Element (3) above. Specifically, Miracle had no evidence that the services and materials furnished by Miracle were furnished for the benefit of GEICO – the party "sought to be charged." In addition, Miracle can produce no more than a scintilla of evidence that the services and materials furnished by Miracle were "accepted by GEICO and used and enjoyed by GEICO." There is no genuine issue of material fact that the services forming the basis of Miracle's *quantum meruit* claim were provided "**for the owner of each specific vehicle**" and not "**for GEICO**." For these reasons, the trial court properly granted summary judgment with respect to Miracle's *quantum meruit* action.

H. The Trial Court was Correct in Granting GEICO's Second Traditional Motion for Summary Judgment with Respect to Miracle's Sworn Account Claim.

A suit on sworn account cannot be asserted in the absence of an enforceable contract. As cited above, a "suit on a sworn account" is not an independent cause of action separate and apart from a breach of contract action. To the contrary, a "suit on a sworn account" is nothing more than a procedural rule applicable to proof with respect to certain types of contract claims. *Sanders*, 248 S.W.3d at 914 ("A suit on sworn account is not an independent cause of action; it is a procedural rule for proof of certain types of contractual (account) claims."); *Smith*, 310 S.W.3d at 566 ("A suit on a sworn account is not an independent cause of action; it is a procedural rule

with regard to evidence necessary to establish a prima facie right of recovery of certain types of contractual (account) claims."). Here, Miracle has no breach of express or implied contract claim as Judge Canales previously rejected and dismissed Miracle's contract actions in response to GEICO's First MSJ. Thus, Rule 185's "sworn account" procedure is inapplicable and the trial court properly dismissed Miracle's suit on a sworn account.

I. The Trial Court was Correct in Granting GEICO's Second Traditional Motion for Summary Judgment with Respect to Miracle's Common Law Fraud Claim.

The competent summary judgment evidence before the Court establishes that in each instance when a GEICO insured vehicle or a third party vehicle asserting a covered GEICO claim was presented to Miracle, GEICO would prepare an estimate – and where necessary, supplemental estimates – on which GEICO clearly and unambiguously identified the prevailing market labor rates GEICO would pay for the identified scope of work. (CR 77-81; 315-319; 320-411). There is no other competent summary judgment evidence before the Court that challenges the conclusion that GEICO at all times fairly, truthfully and openly identified the market labor rates it would pay for each designated scope of work. (see, e.g., CR 320-411; 77-81; 315-319) In addition, the competent summary judgment evidence establishes that GEICO paid each invoice in accordance with the prevailing market labor rates as disclosed in each GEICO estimate. (CR 77-81; 315-319) Thus, there exists no

genuine issue of material fact that at all times, GEICO made no misrepresentations as to the amounts it would pay Miracle for work performed in accordance with each GEICO estimate. Thus, the trial court properly granted GEICO summary judgment with respect to Miracle's fraudulent misrepresentation claim.

J. The Trial Court was Correct in Granting GEICO's Second No-Evidence Motion for Summary Judgment with Respect to Miracle's Common Law Fraud Claim.

In order to prevail on their fraud claim, Miracle had the burden to establish the following:

a. That GEICO made one or more material representations to Miracle;

b. That those representations were false;

c. That when each misrepresentation was made, GEICO knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;

d. That GEICO made each false representation with the intent that Miracle should rely upon it;

e. That Miracle acted on each representation; and

f. Miracle thereby sustained injury.

Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983).

The trial court properly found that GEICO was entitled to no-evidence summary judgment as to Miracle's fraud claim as Miracle failed to produce no more than a scintilla of evidence that (a) GEICO made any false representations to Miracle (elements a and b); that (b) GEICO made any representation that GEICO knew was

false or, at the time of each alleged representation, GEICO made such representation recklessly without any knowledge of the truth as a positive assertion (element c); that (c) GEICO made any false representation with the intent that Miracle should rely upon it (element d); (d) that Miracle relied upon any alleged misrepresentation by GEICO (element e); and (e) that Miracle suffered any injury due to any alleged misrepresentation by GEICO (element f).

K. The Trial Court was Correct in Granting GEICO's Second Traditional Motion for Summary Judgment with Respect to Miracle's Fraud by Non-Disclosure Claim.

The competent summary judgment evidence before the Court established that each estimate provided by GEICO on behalf of its insureds pursuant to each contract between GEICO and its insureds clearly and unambiguously identified the labor rates GEICO agreed to pay for the scope of work identified in each GEICO estimate. (CR 315-319; see, e.g., 320-411). Miracle failed to produce any competent controverting summary judgment evidence to challenge the fact that GEICO at all times disclosed the rates it would pay for each scope of work outlined in each GEICO estimate. Therefore, the trial court properly granted GEICO summary judgment with respect to Miracle's fraud by nondisclosure claim.

L. The Trial Court was Correct in Granting GEICO's Second No-Evidence Motion for Summary Judgment with Respect to Miracle's Fraud by Non-Disclosure Claim.

In order to prevail on their fraud by nondisclosure claim, Miracle had the burden to establish the following:

a. That GEICO failed to disclose facts to Miracle;

b. That GEICO had a duty to disclose the facts to Miracle;

c. That the facts were material;

d. That GEICO knew Miracle was ignorant of the facts and that Miracle did not have an equal opportunity to discover the facts;

e. That GEICO was deliberately silent in the face of the duty to speak;

f. That by failing to disclose the facts, GEICO induced Miracle into taking some action or refrain from acting;

g. That Miracle relied on the nondisclosure(s); and

h. That Miracle was injured as a result of acting without that knowledge.

Bazon v. Munoz, 444 S.W.3d 110, 119 (Tex. App.–San Antonio 2014, no pet.).

The trial court properly found that GEICO was entitled to no-evidence summary judgment as to Miracle's fraud by nondisclosure claim as Miracle failed to produce more than a scintilla of evidence that (a) GEICO failed to disclose material facts to Miracle (elements a and c); that (b) GEICO knew Miracle was ignorant of any material facts and that Miracle did not have an equal opportunity to discover the alleged material facts (element d); that (c) GEICO was deliberately

silent in the face of a duty to speak (element e); (d) that GEICO failed to disclose facts and as a result, Miracle was induced into acting or to refrain from acting (element f); that (e) Miracle relied upon any alleged nondisclosure by GEICO (element g); and (e) that Miracle suffered any injury due to any alleged nondisclosure by GEICO (element h).

M. The Trial Court was Correct in Granting GEICO's Second Traditional Motion for Summary Judgment with Respect to Miracle's Negligent Misrepresentation Claim.

The competent summary judgment evidence before the Court established that in each instance when a GEICO insured vehicle or a third party vehicle asserting a covered GEICO claim was presented to Miracle, GEICO would prepare an estimate – and where necessary, supplemental estimates – on which GEICO clearly and unambiguously identified the prevailing market labor rates GEICO would pay for the identified scope of work. (CR 315-319; 320-411)**.** There is no other competent summary judgment evidence before the Court that challenges the conclusion that GEICO at all times fairly, truthfully and openly identified the market labor rates it would pay for each designated scope of work. *Id.* In addition, the competent summary judgment evidence established that GEICO paid each invoice in accordance with the prevailing market labor rates ad disclosed in each GEICO estimate. (CR 315-319). Thus, there exists no genuine issue of material fact that at all times, GEICO made no misrepresentations as to the amounts it would pay Miracle

for work performed in accordance with each GEICO estimate. The trial court therefore properly granted GEICO summary judgment with respect to Miracle's negligent misrepresentation claim.

N. The Trial Court was Correct in Granting GEICO's Second No-Evidence Motion for Summary Judgment with Respect to Miracle's Negligent Misrepresentation Claim.

In order to prevail on their negligent misrepresentation claim, Miracle had the burden to establish the following:

a. That GEICO made one or more representations in the course of its business, or in a transaction in which it has a pecuniary interest;

b. GEICO supplied "false information" for the guidance of Miracle in its business;

c. That GEICO did not exercise reasonable care or competence in obtaining or communicating the information; and

d. Miracle suffered a pecuniary loss by justifiably relying on the representation.

Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 686 n. 24 (Tex. 2002) (*citing Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

GEICO was properly entitled to no-evidence summary judgment as to Miracle's negligent misrepresentation claim as Miracle failed to produce more than a scintilla of evidence that (a) GEICO made any false representations (elements a and b); that (b) GEICO failed to exercise reasonable care or competence in obtaining or communicating information to Miracle (element c); and (c) that Miracle's

suffered any injury by justifiably relying on any alleged material misrepresentation by GEICO (element d).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee GEICO Casualty Company respectfully requests its (a) Defendant's Motion for Traditional and No-Evidence Summary Judgment filed April 18, 2017 and (b) its Motion to Strike Plaintiffs' "Sworn Account" Claim and Second Motion for Traditional and No-Evidence Summary Judgment with Respect to Plaintiffs' Tort-Based Claims filed February 9, 2018 be in all things affirmed, that Appellants take nothing against Appellee, and that Appellee recover its costs and go hence without day, and for such other and further relief, both general and special, at law and in equity, to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on October 29, 2018, a true and correct copy of the foregoing has been served in accordance with the TEXAS RULES OF CIVIL PROCEDURE, to:

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