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PERSONAL INJURY ▪ FAMILY LAW ▪ CRIMINAL DEFENSE ▪ BUSINESS MATTERS

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September __, 2010

Via Certified Mail Return Receipt
No.: ________________________

Peggy H. Vasquez
Farmers Insurance
P.O. Box 268994
Oklahoma City, Oklahoma 73126-8994

Re:	Our Client	:	Jane Doe
	Date of Injury	:	**September 4, 2009**
	Your Insured	:	**Alisha Cadena**
	Claim Number	:	**1014655127**

Dear Ms. Vasquez:

In an attempt to resolve the above-referenced claim amicably, our firm hereby submits the following demand on behalf of our client:

FACTS

On September 4, 2009, at approximately 2:15 p.m. on an early Friday afternoon, our client, Ms. Jane Doe, was driving out of the Southpark Meadows plaza parking lot (at the corner of Slaughter Lane and the southbound feeder road of Interstate Highway 35) in Austin, Travis County, Texas. Ms. Doe was in a 2003 BMW 525i sedan, properly restrained, and preparing to exit the private driveway to turn right and enter onto the southbound Interstate 35 feeder road. She was intending to drive south on Interstate 35 all the way to New Braunfels, for a meeting.

As Ms. Doe was inching forward at the mouth of the private driveway, with her right turn blinker on, your insured, Ms. Alisha Cadena, was driving out of the Whataburger (Store #884) in the same Southpark Meadows plaza, near the same driveway from which Ms. Doe was trying to exit out onto Interstate 35. Ms. Cadena, driving in a distracted and careless fashion, carelessly and negligently collided with the back of Ms. Doe's vehicle.

What made matters worse for Ms. Doe was that the initial impact pushed her vehicle forward several feet, to where the nose of her car was dangerously jutting out into the southbound feeder road of Interstate 35. Because oncoming traffic was moving very fast in that area (cars routinely traveling at 55 m.p.h. and more down that highway feeder road), Ms. Doe was extremely alarmed and slammed down on the brake with her right foot in order to try and keep from rolling out any further into the feeder road and being exposed to fast-moving

oncoming traffic. She also distinctly remembers that there was more than one hit from your insured, as your insured kept rolling forward for a few moments, making continual impact with our client's rear bumper.

Ms. Doe, with her right foot still firmly and anxiously thrusting down on the brake, hit her horn repeatedly with one hand, and then sharply turned around and tried to look at your insured behind her, waving her other hand frantically to get her attention. She could also see that your insured had been on her cell phone at the time of the impact, and was hurriedly putting it down, realizing what had happened. When both cars were at a complete stop, Ms. Doe quickly got out and ran out, to a safe distance away from the Interstate 35 feeder road.

LIABILITY

Our investigation has revealed that your insured's negligence was the proximate cause of our client's injuries and damages. In particular:

a) She failed to control her speed;

b) She failed to maintain assured clear stopping distance;

c) She failed to timely apply her brakes to avoid a collision;

d) She violated traffic statutes and good driving standards by being on her cell phone at the time of the collision; and,

e) She otherwise failed to operate her motor vehicle as a reasonable driver of ordinary prudence would have done in the same or similar circumstances.

Worse still, because of her delayed reaction time due to being on her cell phone, she did not come to an immediate stop after the first collision, but continued rolling forward for a few moments, making continual impact with our client's rear bumper. This caused our client's vehicle to continue to roll dangerously forward, jutting out into the southbound feeder road of Interstate 35, a 55+ m.p.h. road.

Your insured apologized profusely to Ms. Doe at the scene, and admitted to all of the following things in her frantic but understandable attempts to converse and explain away the whole situation:

a) She was a student at Texas State University in San Marcos;

b) She had just recently gotten into town for the start of the fall semester;

c) Her family was from New Mexico, and her father had recently bought her this new Ford Focus for her to drive to school;

d) She was bringing the take-out food from Whataburger for herself and her boyfriend;

e) She was on her cell phone at the time of the collision (and to the best of Ms. Doe's recollection, it was her boyfriend with whom your insured was talking); and,

f) She was trying to get back to her apartment with the food, and her apartment complex was somewhere in the Onion Creek area of south Austin (i.e., off of Interstate 35, further south than Slaughter Lane, in the area of F.M. 1626).

Accordingly, liability is undisputed in this case. As a result of not just the collision, but Ms. Doe having to slam on her brakes to keep from being repeatedly pushed into fast oncoming Interstate 35 feeder traffic, and also jerking around to wave her arm and catch your insured's attention, she suffered serious injury to her back, as set forth in more detail below.

INJURIES

Shortly after the adrenaline of the overall incident died down, Ms. Doe felt the onset of substantial pain in the lower back. The sudden movements of slamming down and holding onto the brake with her right leg, while twisting to the right to wave her arm and catch your insured's attention, had seriously strained her mid and low back musculature. She also had very tensed feelings in the neck and shoulders, and tension headaches.

Fortunately for her, there was an urgent care clinic in that very Southpark Meadows shopping plaza, the Texas MedClinic. After exchange of information with your insured, and after her husband came to the scene to take a look at the car, Ms. Doe proceeded to Texas MedClinic and presented to Glenda Peters-Do, M.D., for evaluation of her pain and symptoms. Dr. Peters-Do noted and documented in her chart the patient's complaints of low back pain, some neck stiffness, and headaches, from a car accident that occurred that earlier afternoon. Ms. Doe truthfully volunteered information about any other neck or back issues she may have suffered in the past, including a motor vehicle accident in 2005 in which she sustained whiplash, and a 2008 incident in which she fell out of her chair at work and sustained a lower back or tailbone type injury and had X-rays taken in connection with that. She also had initial feelings of feet numbness which had now subsided (likely due to the strain and exertion of slamming down and holding onto the brakes and her other foot pushing against the floorboard of her vehicle).

Dr. Peters-Do performed physical examination and specifically documented spasm and tenderness in the lumbar spine. As you are no doubt aware, spasms are rapid, involuntary muscle contractions which are an objective sign of muscle trauma; in other words, spasms cannot be "faked." She then ordered X-ray views of the lumbar spine. Thankfully, the X-rays were negative for any fracture, dislocation, or disc space findings. Because of the nature of the rapid onset of symptoms secondary to the motor vehicle accident, and because of the headaches, persistent back pain, and especially spasms, Dr. Peters-Do gave Ms. Doe prescriptions for Hydrocodone for potent pain relief, Celebrex as an anti-inflammatory medication, and Flexeril for muscle relaxation to control the spasms. Joseph Elizondo, M.D., of the same clinic, also gave Ms. Doe handouts demonstrating some home stretching exercises that could be done to help relieve neck and back strain injuries. Dr. Elizondo also made a referral for her to visit a physical

therapy clinic, and provided a 7-day work-release note that specified she should do light lifting only (if any at all).

After doing the home stretching exercises, applying ice and/or heat as needed, and taking the pain medication, Ms. Doe's symptoms were persistent after the initial 10-day period. She therefore made the appointment and went for evaluation and plan of care to the Select Physical Therapy clinic, as recommended by Dr. Elizondo. On September 16, she presented to Jennifer Moore, P.T., a licensed physical therapist, with persisting complaints of lumbar strain/sprain. It was giving her difficulty for long periods of standing and prolonged periods of sitting, and was also causing her difficulty falling and staying asleep. The pain symptoms fluctuated between 4-8 out of 10. It is noteworthy that even at this stage, twelve (12) days after the accident, she was still noted to be suffering mild to moderate muscle spasms in the T12-L5 region. Palpation produced even more serious tenderness and spasm in the trapezius areas. Her range of motion testing in the lumbosacral spine area showed marked impairments. Most seriously, straight leg raise testing produced marked low back pain, bilaterally. As you are no doubt aware, this is a tell-tale sign of radiating pain from possible lumbar disc injury. She was set up on a reasonable and conservative regimen of eight skilled physical therapy visits (twice per week for four weeks), to resolve the pain, improve range of motion, and rebuild strength in the affected areas.

Between September 16 and October 2, Ms. Doe diligently attended five (5) of the eight scheduled visits, and put forth maximal effort toward treatment goals. However, as is clearly documented in the Select therapy notes, there were painful flare-ups of her lower back spasms subsequent to, and in between, these visits. Because of the persistence and flare-up of those symptoms, she was given a referral to see an orthopedic spine specialist, on September 25. However, it was not until October 2, the following week, that she was able to schedule it. As of October 2, her treatment was suspended with Select Physical Therapy and she was now to be in the hands of a spine specialist to assess the clearly more serious problem in her back (which was now involving intermittent radiation of pain and associated symptoms to the leg).

On October 2, she presented to Anand Joshi, M.D., an orthopedic specialist with the Spine Diagnostic & Treatment Center. Dr. Joshi made note of chief patient complaints of low back pain and right leg pain, currently at a level of 4/10, as well as history of motor vehicle collision recently. Dr. Joshi documented her to exhibit tenderness and pain to palpation along all the lumbar spinous musculature, and particularly noted symptoms of numbness (decreased sensation to touch and pain) at the right-sided S1 joint area. Because of the persistence of these findings (and because there were again noted to be positive signs of straight leg raise testing eliciting pain symptoms), Dr. Joshi ordered an MRI to be done on her lumbar spine.

Ms. Doe underwent the lumbar MRI on October 15, at the Central Park Imaging Center. There were clear and objective findings, very consistent with the patient's onset of pain symptoms, radiating pain, and the associated numbness, specifically findings of: broad-based disc bulging at L4-L5, resulting in slight contacting of the left exiting L4 nerve root; and, broad-based disc bulging at L5-S1.

Ms. Doe returned for follow-up to the Spine & Diagnostic Treatment Center on October 21, to discuss these findings and a plan of action. At that time, she was reporting symptoms at a

level of 7/10. Pain was causing her to wake up in the middle of almost every night. Again, there were positive signs of nerve root impingement upon left leg straight raise testing. Because of the persistence of symptoms since the accident, which had not been effectively resolved with medication or helped by the earlier physical therapy, and particularly in light of the objective disc bulge and nerve root contact findings on the lumbar MRI, Dr. Joshi's plan was to have her undergo an EMG / nerve conduction study, followed by possible epidural steroid injection. In the meanwhile, he also referred her to restart therapy at a new clinic, Versatile Physical Therapy.

She presented to Versatile Physical Therapy on November 2 for first evaluation by Sofia Wiltens, P.T., licensed physical therapist. Ms. Wiltens documented the patient's complaints of acute and sometimes shooting pain from the lower back, into both thighs. Ms. Wiltens also observed Ms. Doe to be exhibiting L4-5 shift and pelvic shift, among other things. She also had an opportunity to review the MRI findings, and noted the bulging discs, consistent with the patient's radicular pain symptoms. She began a plan of manual therapeutic treatment, therapy exercises, and neuro-muscular reeducation. On November 4, Ms. Doe also was documented to be suffering left buttock and thigh numbness associated with her lower back pain. On the visits of November 2, 4, and 11, Ms. Wiltens had Ms. Doe performing range of motion exercises, McKenzie exercises, and decompression techniques, with some relief.

On November 12, Ms. Doe underwent the nerve conduction study, which demonstrated no deep motor / nerve impairments. However, because of the persistence of the lower back pain and associated leg symptoms, the follow-up plan was to perform a trans-foraminal epidural steroid injection (at L4-5) and assess the relief provided. On November 30, Dr. Joshi performed that epidural injection, with fluoroscopic guidance, with the patient under conscious sedation.

December 2 was her first visit back to therapy after the injection. On that visit, it was noted that her pain levels were down to 3/10, which was a good sign; however, she still had substantial post-injection swelling, which was a bit of a setback to exercising on that visit. However, she performed her McKenzie exercises and decompression exercises, and Ms. Wiltens did note that the pelvic shift and L5 shift appeared to be slowly improving. Ms. Doe continued to diligently attend her therapy sessions throughout the month of December, reporting some slow progress and relief, but with recurrent flare-ups of the radiating pain and numbness.

On December 30, she returned for follow-up assessment to Dr. Joshi, where she was reporting present pain level of 6/10. She was reporting that the radiating leg pain had seemed to be gone after undergoing the epidural steroid injection, although there was still low back pain. For this reason, Dr. Joshi recommended that she undergo a second injection. She was also reporting that the pain medication had been causing her drowsiness. Dr. Joshi at that time recommended switching up the medication, and also ordered a TENS unit that she could use at home to relieve her symptoms without taking as much of the pain medication. She had been duly progressing with her therapy visits. He advised her to continue with both her clinical therapy visits, as well as her home therapy exercises.

On January 4, 2010, she underwent a re-evaluation at Versatile, where Ms. Wiltens assessed progress and determined what treatment plan would be required at that point. She specifically noted that the patient had made slow but steady gains in range of motion, decreased

spasms and swelling, strength, endurance, and abilities to engage in functional activities and increase activities of daily living. Her flexion and extension had moderately improved in the lumbar spine, and whereas the pain was described as "sharp" and "shooting" before, it was now at a max level of 5/10 in the lower back, 2/10 in the thigh. However, it was also noted that she was to undergo a second epidural injection, and that Ms. Wiltens believed it was medically necessary for her to continue therapy at present levels.

On January 11, 2010, she underwent the second L4-5 epidural steroid injection, again with the aid of fluoroscopy. Ms. Doe tolerated the procedure well. She waited three days and then returned to Versatile to continue with therapy. On that January 14 visit, it was again noted that she had swelled up, secondary to that steroid injection. However, she diligently performed her therapeutic exercises, as noted by Ms. Wiltens, and continued to do so throughout the remainder of January.

On January 27, she returned for follow-up assessment to the Spine & Diagnostic Center, where she reported that her pain levels were now at a much more manageable 2-3 out of 10, most of the time. She was finding the combination of in-office exercises at Versatile, and home exercise plan, to be very helpful. She had also been using the TENS unit as needed at home, and found that helpful. She reported about "80%" overall improvement since the second epidural steroid injection. Palpation of her lumbar and sacral areas produced mild pain. Sensation to light touch was normal along the T12-L5 areas, with 5/5 strength bilaterally in the quadriceps. However, it was again noted that there were positive impingement signs upon straight leg raise testing. She had dropped her frequency of pain medications and wanted to be able to return to work with no restrictions by this point. Dr. Joshi advised her to continue with Versatile therapy and use the TENS unit as needed. If symptoms flared up again, she was to call back to discuss a possible third injection. Otherwise, as far as Dr. Joshi was concerned, she was on a p.r.n. basis.

Ms. Doe continued to attend the Versatile Physical Therapy as directed. It was especially helpful, as the process of getting back into full-time work with full duties brought about temporary flare-ups of low back pain and inflammation. On February 2, Ms. Wiltens conducted another formal re-evaluation. On this date, it was noted that her lower back pain seemed to be, at worst, 4 out of 10, while thigh pain had dropped to 1 out of 10. Her strength, lumbar stabilization, and functional activities had all increased quite well. Her long shifts at work, and prolonged periods of standing, as well as bending and doing other motions required in her duties, had caused some flare-ups, and accordingly, Ms. Wiltens certified that it was medically necessary for Ms. Doe to continue in-office therapy for about four more weeks.

Ms. Doe did as she was recommended, and continued with both her home exercise plan and her in-office therapy sessions, through the second week of March. As of March 16, Ms. Wiltens documented that Ms. Doe was still experiencing intermittent back pain, but certainly doing much better. She was tolerating all her exercises well, and for the first time in all her documented therapy sessions, Ms. Wiltens noted that no sacral or lumbar mobilization exercises were necessary that day.

Ms. Doe opted to discontinue further in-office therapy visits from that point onward, and take care of herself with the home exercise plan, TENS unit, and medications as needed.

DAMAGES

As a direct and proximate result of your insured's negligence, our client has incurred the following economic damages:

Medical Expenses

1.	Texas MedClinic	$ 220.00
2.	Select Physical Therapy	$ 1,060.00
3.	Spine Diagnostic & Treatment Center	$ 4,837.36
4.	Central Park Imaging Center	$ 1,922.00
5.	Versatile Physical Therapy	$ 12,566.00

Summary

Our client has suffered serious injuries in her lumbar spine and has had to undergo a long, costly, and painful regimen of urgent care clinic treatment, physical therapy, follow-up orthopedic doctor visits, epidural steroid injections, nerve conduction studies, TENS unit for home use, and other invasive procedures such as needle therapy and substantial radiology (MRI, fluoroscopy, etc.). None of this would have been necessary but for your insured's negligence.

Furthermore, her injuries are not resolved, as is clearly indicated in the notes of Dr. Joshi and Ms. Wiltens. As you are aware, disc bulges are essentially less pronounced versions of disc herniations, and are permanent organic injuries to the spine. In other words, although the symptoms can be controlled, the disc bulging itself will not simply heal and resolve itself with time, as simple soft tissue strains and sprains will do. Ms. Doe is therefore susceptible to added injuries over time, as she must take more care with regard to exertion of her back than the average person without these acute conditions must do. She will continue to have to perform home exercises in order to keep from regressing in her gains, as well as try to prevent flare-ups of the symptoms produced by the bulging discs. Worst of all, Dr. Joshi has intimated that she may need to call back in the near future to undergo a third epidural steroid injection.

She has suffered substantial disruption to her life, loss of time and capabilities at work, physical impairment, pain and suffering, and loss of enjoyment of life and recreational activity. Her symptoms have continued to periodically flare up, and will do so, in all reasonable probability, for the foreseeable future.

Notwithstanding your denial letter of December 13, 2009, this correspondence represents one final, good-faith attempt at resolving this claim with a fair offer to compensate our client for

her tremendous ordeal. If you choose to maintain your denial position, or else make unreasonably low offers of settlement, you are no doubt aware that this firm, and the undersigned attorney, will not shy away from litigation or trial.

Furthermore, trial of this matter will be in Travis County, where we are very experienced and welcome the opportunity to try cases.

Our client is a professional woman, a nurse, with long and demanding working hours. She has spent the better part of her career helping others with injuries, illnesses, elder care, and rehabilitation. She will present as a very sympathetic and likeable plaintiff to a jury.

Your insured may be a generally nice young lady, but she clearly acted like an irresponsible young college student (driving a new car bought by her father) who believed it was appropriate to be talking on her cell phone while preparing to merge onto a 55 m.p.h. feeder road of an interstate highway.

As you are no doubt aware, cell phone usage while driving is a "hot button" issue, and recent verdicts in the area reflect that jurors are more than willing to assess larger than normal damages in such cases, as it constitutes gross negligence and recklessness (as well as negligence *per se*). The recent enactment of city ordinances regarding the banning of cell phones while driving will be very fresh in many people's minds.

We are also not at all intimidated by the "low property damage equals little to no injury" argument, and are quite experienced with handling such arguments in litigation. Any attempts to offer photographs of our client's vehicle (or property damage estimates) into evidence at trial will be disallowed. This is because property damage is not in issue and there will be no assertion of damages for costs of repair. Furthermore, in this rear-end impact, liability will not be in dispute, so there will be no probative value to showing property damage photographs for that purpose, either. We will simply serve Requests for Admission (pursuant to Texas Rule of Civil Procedure 198) along with our Original Petition to your insured, requesting that she stipulate to her liability for running into the rear end of our client's vehicle. In the alternative, if she chooses to deny liability, we can and will seek our firm's attorney's fees at trial for the time and expenses of having to prove liability and render that denial false (please see Texas Rules of Civil Procedure 198 and 215.4(b)).

In the absence of any dispute as to liability or any claim for cost of repairs, photographs of the plaintiff's vehicle as an attempt to argue "minor injury" are inadmissible because they are merely speculative and unsupported by credible expert testimony as to causation. Please see any number of long-standing Texas case citations on this issue:

(1) *Chailes v. Gentry*, 520 S.W.2d 555, 558 (Tex. App.—El Paso 1975, no writ) (holding that without skid marks and expert calculations, mere observation of photographs of a vehicle cannot support an opinion as to speed, velocity, or force of impact);

(2) *Reaves v. Brooks*, 430 S.W.2d 926, 931 (Tex. App.—Amarillo 1968, writ dism'd) (holding same);

(3) *Anderson v. Broome*, 233 S.W.2d 901, 907 (Tex. App.—El Paso 1950, writ ref'd n.r.e.) (holding same); and,

(4) *Union Bus Lines v. Moulder*, 180 S.W.2d 509, 511 (Tex. App.—San Antonio 1944, no writ) (holding same).

Therefore, neither you nor your defense counsel can rely upon mere photographs to make any argument about force of impact. You must invest in retaining a certified accident reconstructionist or other such expert to offer such opinions.

Furthermore, neither you nor your defense counsel can rely upon photographs to make the double-inferential leap from low property damage, to low force of impact, to minor injuries to the vehicle's occupant(s). Such testimony about causation of injury must come from a qualified expert. See, e.g., *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 716-19 (Tex. 1998) (holding that even an expert with numerous published articles, treatises, conference papers, and technical reports, could not opine on causation of injury or death based on his expert understanding of vehicle structural design). If an expert of this caliber is not qualified to offer injury causation opinions, then certainly your defense counsel, using mere photographs, cannot.

Vehicle damage photographs (or damage repair estimates) are simply improper and inadmissible substitutes for qualified expert opinion testimony on the subject of injury causation. You must invest in retaining a biomechanics and/or physical forces expert if you intend to pursue this line of defense (and if so, we would be delighted to cross-examine such expert as to how he or she can proffer opinions about a plaintiff's pain and injuries without actually inhabiting the plaintiff's body and experiencing the symptoms). Without doing so, we can and will strike and exclude any use of the photographs, as well as any argument by defense counsel that asks the jury to stack inference upon inference (i.e., that low property damage means low force of impact, which in turn means minor or no injury). Stacking inference upon inference is not evidence. See, e.g., *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993) (stating that, "To the contrary, we believe that some suspicion linked to other suspicion produces only more suspicion, which is not the same as evidence."). The trial court, as gatekeeper of the evidence to be admitted in front of the jury, will make the pre-trial determination that there is no scientifically valid methodology, and there is too great an analytical gap between the data (i.e., vehicle photographs) and the opinion (i.e., minor injury) being offered. *Gammill*, 972 S.W.2d at 724-26.

Plainly put, we do not intend to waste time debating the "minor impact" argument with you. We are making a reasonable settlement demand based upon the pain and injury that our client felt, and the medical treatment she was forced to undergo, all as a result of your insured's carelessness and inattentiveness that day. If your offers will not be correspondingly reasonable, we can table any further negotiations and proceed with suit in Travis County court.

Our client is prepared at this time to submit the following demand:

DEMAND

In reimbursement of Ms. Vanessa L. Doe's medical expenses and lost wages, and compensation for her physical impairment, physical pain and suffering, and mental anguish, demand is hereby made for **$50,000.00 or the policy limits**, whichever is less, in exchange for a full and final release of all claims against your insured.

As authorized by *Allstate Ins. Co. v. Kelly*, 680 S.W. 2d 595 (Tex. Civ. App.–Tyler 1984, writ ref'd n.r.e.), this offer of settlement will remain open for fifteen (15) days after your receipt of this letter. If, after the expiration of fourteen (15) days, the terms of this letter have not been accepted by tender of funds, the offer will be considered rejected and automatically withdrawn. Because of the substantial probability a verdict would exceed $50,000.00 or the policy limits, whichever is less, based upon material furnished to you in support of this demand, should we subsequently proceed to trial and obtain a judgment in excess of the policy limits, your insured will be expected either to pay the excess or promptly take action against your company for the full amount of the judgment, including pre-judgment interest, as authorized by *G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W. 2d 544 (Tex. Comm'n App. 1929, opinion adopted) and *Cavnar vs. Quality Control Parking,* 696 S.W.2d 549 (Tex. 1985).

Finally, Farmers' duty under these circumstances is detailed in *Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656 (Tex. 1987). We hope that you will give this matter serious and immediate attention, so that it may be resolved within the time limits set forth in this letter.

ENCLOSURES

In order to assist you in evaluating this demand, all of the following items have been provided on the enclosed CD-ROM:

a) A site map of the Southpark Meadows shopping plaza, indicating the location of this collision;

b) An aerial satellite photograph of the location of the collision;

c) All medical records and itemized bills for our client's injury treatment; and,

We look forward to your cooperation in resolving this matter promptly.

Sincerely yours,

Ali A. Akhtar
Attorney at Law

Austin Office

AAA/ns
Enclosure