Case No. SC85889

IN THE SUPREME COURT OF MISSOURI

AMERISTAR JET CHARTER, INC. and
SIERRA AMERICAN CORPORATION,
APPELLANTS AND RESPONDENTS/CROSS-APPELLANTS,

v.

DODSON INTERNATIONAL PARTS, INC.,
APPELLANT AND RESPONDENT,

HOUSTON CASUALTY COMPANY
RESPONDENT

and

HOWE ASSOCIATES, INC.
DEFENDANT.

Appeal from the Circuit Court of Jackson County, Missouri at Kansas City
Appeal from the Missouri Court of Appeals at Kansas City

SUBSTITUTE BRIEF OF RESPONDENT HOUSTON CASUALTY COMPANY

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STATEMENT OF FACTS

Appellants, Ameristar Jet Charter, Inc. (“Ameristar) and Sierra American Corporation (“Sierra”) appeal from the trial court’s entry of summary judgment in favor of Respondent Houston Casualty Company (“HCC”) based on an affirmative defense of release. The undisputed facts upon which the summary judgment was entered are set forth below.

1. Plaintiffs, Ameristar Jet Charter, Inc. ("Ameristar") and Sierra American Corporation ("Sierra"), are in the jet charter business. Sierra owns various jet aircraft which it leases to Ameristar for the charter operation. L.F. 268, ¶ 1, 8.

2. On or about April 9, 1998, one of the plaintiffs' jet aircraft, a Falcon 20, N216TW (the "aircraft"), was damaged in an off-airport landing in Jackson County, Missouri. L.F. 268, ¶ 1, 9.

3. Through a broker, Ameristar had earlier acquired hull insurance for the aircraft from Houston Casualty.

4. Ameristar notified Houston Casualty of the off-airport landing. L.F. 268, ¶ 10.

5. Plaintiffs allege that Houston Casualty hired Howe Associates, Inc. ("Howe") to adjust the claim and that Howe, on behalf of Houston Casualty and

plaintiffs, hired Dodson International Parts, Inc. ("Dodson") to retrieve and transport the aircraft. L.F. 268, ¶ 10.

6. Pursuant to Howe's request, Dodson retrieved and transported the aircraft from the off-airport landing site to Executive Beechcraft at Kansas City Downtown Airport. L.F. 268, ¶ 10.

7. Houston Casualty declared the aircraft a "constructive total loss" and paid Ameristar $1,500,000, the full amount of the policy. L.F. 268, ¶ 14.

8. Plaintiffs allege that Houston Casualty prematurely declared the aircraft a constructive total loss when the aircraft could have quickly and cheaply been repaired. L.F. 268, ¶ 15.

9. Plaintiffs allege that even though they received the insurance proceeds they were damaged because the insurance proceeds were insufficient to replace the aircraft and that they suffered and continue to suffer lost profits from loss of use of the aircraft. L.F. 268, ¶ 16.

10. Plaintiffs allege that defendants proximately caused plaintiffs' damages; that Dodson was negligent in the disassembly and transportation of the aircraft; that Howe negligently misrepresented the condition of the aircraft and the cost to repair it; and that Houston Casualty was negligent based on Howe’s misrepresentation, and acted in bad faith by prematurely declaring the aircraft a constructive total loss when the

aircraft could have been easily and quickly repaired, and negligently represented that Houston Casualty had the absolute right to total the aircraft. L.F. 268, ¶ 17.

11. Plaintiffs have asserted negligence claims against each of the defendants. L.F. 268, Counts I, II, III and IV and a bad faith claim against Houston Casualty, Count V.

12. Tom Wachendorfer ("Wachendorfer") is president of both Ameristar and Sierra. L.F. 236 (Wachendorfer Deposition), p. 5.

13. Sierra is in the business of leasing aircraft and has one employee. L.F. 236, p. 6.

14. Ameristar has 150 employees and had estimated revenues of $65,000,000 in 1999. L.F. 236, pp. 6-7.

15. At the time of Wachendorfer's deposition, Ameristar operated approximately 30 aircraft. 26 to 28 of those aircraft are turbine powered. L.F. 268, p. 8.

16. Wachendorfer was personally involved in the acquisition of the subject aircraft, N216TW, on behalf of Sierra. The purchase price was a little more than $1.4 Million. L.F. 237-38, pp. 12-13.

17. Based upon his knowledge of the market, Wachendorfer believed that he acquired the aircraft for less than its market value. L.F. 238, pp. 13-14.

18. He believed its actual value at the time he purchased it was between $1.75 and $1.8 Million. L.F. 238, p. 14.

19. At the time of the purchase, Wachendorfer obtained insurance for the aircraft for the amount of $1.5 Million. L.F. 238, p. 14.

20. Wachendorfer, as president of Sierra and Ameristar, made a conscious decision to insure the aircraft for $1.5 Million rather than a greater amount. The companies assumed the risk for the extra value. L.F. 238, pp. 14-15.

21. Concerning the subject off-airport landing and subsequent events, Wachendorfer and Lindon Frazier were the only people within plaintiffs' organization who were involved in handling the loss. L.F. 239, pp. 17-19.

22. According to Wachendorfer, the events that occurred between the time of the loss and the time that Houston Casualty paid the claim were 1) the aircraft was moved from the off-airport site to Executive Beechcraft at the Downtown Airport, 2) plaintiffs sent Bizjet, JetCorp, and K.C. Aviation to look at the aircraft, 3) each of those companies gave plaintiffs a written estimate, 4) Houston Casualty declared the aircraft a total loss and 5) Houston Casualty paid the claim. L.F. 239-40, pp. 20-21.

23. Also, Wachendorfer testified that just prior to the time Houston Casualty declared the aircraft a total loss, Sierra submitted a salvage bid of $400,000 to purchase its own aircraft back. L.F. 241-42, pp. 34-37 (actual bid was $410,000).

24. On May 1, 1998, Wachendorfer, on behalf of plaintiffs, signed a proof of loss form to submit to Houston Casualty, representing that the amount of the insured loss

was $1.5 Million, the face amount of plaintiffs' insurance policy. L.F. 233 (Sworn Statement In Proof of Loss).

25. The proof of loss form also included the following section. L.F. 233:

RELEASE, SUBROGATION AND AUTHORIZATION

(to be filled in and executed in every case)

In full settlement and satisfaction for all loss and damage set forth in the foregoing proof of loss, is hereby requested, authorized and empowered to pay, as follows:

To Ameristar Jet Charter, Inc., Tom Wachendorfer Aviation, Inc., Tom Wachendorfer, Jr. Sierra America Corporation and Compass Bank of Dallas, Texas

(Write "insured" or name of third party to be paid)

the sum of $ 1,500,000.00 (One Million Five Hundred Thousand and 00/100) Dollars

In consideration of such payment said Company is hereby discharged and forever released from any and all further claim, demand or liability whatsoever for said loss and damage, under the Policy herein referred to, repairs and/or replacements having been made to my entire satisfaction.

Now, therefore, in consideration of the aforesaid payment, I/we hereby assign, transfer and subrogate to the said Insurance Company, all right, interest, or

things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss, and I/we empower the said Insurance Company to sue, compromise or settle in my/our name(s), to the extent of the money aforesaid.

26. Wachendorfer signed the release, which also assigns all rights to Houston Casualty. L.F. 233-34.

27. At the time he signed the release, Wachendorfer understood that he was releasing his companies' claims against Houston Casualty. L.F. 244, p. 86.

28. Plaintiffs' attorney wrote a letter dated June 25, 1998, which stated that within a few weeks, after minimal repairs, Dodson offered to sell the aircraft to Ameristar for $1,500,000, the exact amount that plaintiffs had already received from Houston Casualty, L.F. 246, p. 298-299.

29. Wachendorfer admitted that plaintiffs contracted with Houston Casualty to insure the aircraft for $1.5 Million and that by receiving the $1.5 Million he got everything he was entitled to under the insurance policy contract. L.F. 247-48, p. 320-321.

ARGUMENT AND AUTHORITIES

I. The trial court was correct in granting Houston Casualty Corporation's Motion for Summary Judgment based on a Release contained in the Proof of Loss Ameristar signed as there were no genuine issues of material fact on the following issues, making summary judgment in HCC's favor proper.

Statement of the Case

Plaintiffs purchased a policy of hull insurance from Houston Casualty for the Falcon 20 Jet Aircraft, which is the basis of this suit. Plaintiffs, through their president, Tom Wachendorfer, made the voluntary, conscious decision to insure the aircraft for $1.5 million rather than its alleged market value of between $1.75 and $1.8 million. On April 9, 1998, the aircraft was damaged. On May 1, 1998, Plaintiffs executed a proof of loss representing to Houston Casualty that the amount of the loss was $1.5 million, the policy limits. Plaintiffs also executed a release of any and all claims against Houston Casualty in exchange for immediate payment of the $1.5 million insurance proceeds. Plaintiffs' president understood that he was releasing his companies' claims against Houston Casualty by signing the release. On May 5, 1998, 26 days after the accident, Houston Casualty paid Plaintiffs $1.5 million in exchange for the full and final release of all claims arising out of this incident. The release also assigns all rights to Houston Casualty.

The release signed by Plaintiffs states:

> RELEASE, SUBROGATION AND AUTHORIZATION
>
> (to be filled in and executed in every case)
>
> In full settlement and satisfaction for all loss and damage set forth in the foregoing proof of loss, is hereby requested, authorized and empowered to pay, as follows:

To Ameristar Jet Charter, Inc., Tom Wachendorfer Aviation, Inc., Tom Wachendorfer, Jr. Sierra America Corporation and Compass Bank of Dallas, Texas

(Write "insured" or name of third party to be paid)

the sum of $1,5000,000.00 (One Million Five Hundred Thousand and 00/100) Dollars

In consideration of such payment said Company is hereby discharged and forever released from any and all further claim, demand or liability whatsoever for said loss and damage, under the Policy herein referred to, repairs and/or replacements having been made to my entire satisfaction.

Now, therefore, in consideration of the aforesaid payment, I/we hereby assign, transfer and subrogate to the said Insurance Company, all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss, and I/we empower the said Insurance Company to sue, compromise or settle in my/our name(s), to the extent of the money aforesaid.

(L.F. 233-34).

In breach of their release contract, plaintiffs sued Houston Casualty claiming it negligently handled the claim. They contend that they were damaged because the insurance proceeds were not sufficient to replace the aircraft. Plaintiffs also apparently claim that because they did not replace the aircraft, they are entitled to damages for lost profits from a loss of use of the aircraft.

Plaintiffs are in a difficult position. On the one hand, they acknowledge that Houston Casualty complied with all of its obligations under the contract by paying the $1.5 million policy limits. On the other hand, they assert that Houston Casualty was negligent and acted in bad faith in handling plaintiff's claims under the insurance policy. The release here clearly encompassed the claims that plaintiffs assert against Houston Casualty in this lawsuit.

Summary Judgment Standards

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Daffron v. McDonnell Douglas Corp.*, 874 S.W.2d 482, 483 (Mo. App. 1994); Rule 74.04, M.R.C.P. All evidence is viewed in the light most favorable to the non-moving party and the facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving

party's response to the summary judgment motion. *ITT Commercial Finance Corp. v. Mid-Am Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

When the movant is a "defending party," it is not necessary to controvert each element of the non-movant's claim to establish a right to summary judgment. *Id.* It is sufficient if a movant shows either: (1) facts negating any one of the claimant's elements, or (2) that the party opposing the motion has presented insufficient evidence to allow the finding of the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support a properly pleaded affirmative defense. *Id.* Once the movant has established a right to judgment as a matter of law, the non-movant must show a genuine dispute as to the material facts. *Id.*

Under the Applicable Law, the Release Plaintiffs signed is valid and enforceable

The undisputed facts show that Plaintiffs' claims against Houston Casualty are barred because they contractually agreed to release all claims against Houston Casualty arising out of this incident. The parties agree that Texas law applies to the validity and scope of the release.

Under Texas law, a release operates to extinguish a party's claim or claims as effectively as would a prior judgment between the parties and is a bar to any right of action on the released matters. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). A release is a contract that must satisfy the elements of a contract. See *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Vera v. North Star Dodge*

Sales, Inc., 989 S.W.2d 13 (Tex.App.--San Antonio 1998, no pet.); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of North Am.*, 955 S.W.2d 120, 127 (Tex. App. - Houston [14th Dist.] 1997, pet. denied). To constitute a valid contract, there must be: (1) an offer and acceptance; (2) a meeting of the minds; (3) a communication that each party has consented to the terms of the agreement; (4) consideration; (5) an execution; and (6) delivery with the intention that the contract shall become binding. See *Williams*, 789 S.W.2d at 264; *Garcia v. Villarreal*, 478 S.W.2d 830, 832 (Tex.Civ.App. – Corpus Christi 1971, no writ).

In Texas there is a strong public policy favoring settlements as a means of amicably resolving disputes and preventing lawsuits. *Bocanegra v. Aetna Life Insurance Co.*, 605 S.W.2d 848, 855 (Tex. 1980). Further, Texas has a strong commitment to the principal of contractual freedom. *Churchill Forge, Inc. v. Brown*, 61 S.W. 3d 368, 371 (Tex. 2001).

It is undisputed that the release in this case is a contract. (L.F. 233-34). First, Houston Casualty offered the full policy limits to Plaintiffs to fully and finally resolve this claim. (L.F. 258, p. 73, *l.* 5-22; p. 74, *l*. 9-17). Second, Plaintiffs accepted the offer. (L.F. 233-34; L.F. 244, p. 87, *l.* 11-14). Third, there was a "meeting of the minds" between Houston Casualty and Plaintiffs based on the fact that both parties wanted to resolve the insurance claim. (L.F. 244, p. 86, *l.* 19-22 - p. 87, *l.* 1-14; L.F. 249, p. 228, *l.* 7-15). If Plaintiffs had any questions or concerns about the document, they were free to

consult their attorney or refuse to sign it. (L.F. 250, p. 235, *l.* 2-8; L.F. 262, p. 175-76). Fourth, by accepting the offer, Plaintiffs displayed their consent to the terms of the contract. (L.F. 244, pp. 86-88). Fifth, Houston Casualty paid $1.5 million in consideration. (L.F. 233-34; L.F. 244, p. 87, *l.* 11-14; L.F. 249, p. 226, *l.* 8-11; L.F. 264). Sixth, the release was executed by Tom Wachendorfer on behalf of Plaintiffs. (L.F. 233-34; L.F. 242, p. 38, *l.* 5-7, p. 84, *l.* 14-18; p. 85, *l.* 15-18; L.F. 249, pp. 225-26; p. 227, *l.* 13-21; p. 228, *l.* 2-3). It was also witnessed and notarized. (L.F. 233-34; L.F.249, p. 226, *l.* 3-7). Lastly, upon delivery of the $1.5 million in settlement funds, it became binding. (L.F. 244, pp. 87-88; L.F. 251, pp. 265-66; L.F. 264). Thus, the release constitutes a valid, binding contract under Texas law.

A release should specifically identify the parties giving the release and those parties being released. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 419-20 (Tex. 1984) (holding that the mere naming of a general class of tortfeasors in a release does not discharge the liability of each member of that class). Here, the release clearly identifies Houston Casualty, the "Insurance Company," as the party being released. (L.F. 233-34; L.F. 244, p. 85, *l.* 15-18). The releasors, Ameristar Jet Charter, Inc., Tom Wachendorfer Aviation, Inc., Tom Wachendorfer, Jr., Sierra America Corporation, and Compass Bank of Dallas, Texas,[1] are also clearly listed. (L.F. 233-34). Accordingly, the undisputed facts establish that the release meets the Texas requirements of specificity.

[1] Compass Bank held the mortgage to the aircraft.

Generally, a release must be conspicuous or it is invalid. See *Littlefield v. Schaefer*, 955 S.W.2d 272 (Tex. 1997) (pre-injury release). However, if a release is executed after an accident occurs, Texas law does not require that it be conspicuous. See *Lexington Ins. v. Kellogg*, 976 S.W.2d 807 (Tex.App.-Houston [1st Dist.] 1998, pet. denied) (holding that conspicuousness requirement does not apply to post-injury release).

In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, the Texas Supreme Court adopted the standards for conspicuousness set out in the Texas Uniform Commercial Code ("UCC"). *Dresser Industries*, 853 S.W.2d 505, 511 (Tex. 1993); see also *Littlefield*, 955 S.W.2d at 274-75 (adopting the conspicuousness requirement for a release; and finding that a six-paragraph release for motorcycle racing printed in minuscule typeface on the front of a one-page form did not satisfy the conspicuous requirement because "the language in the body of this release is smaller than other language in the forms and has no contrasting type or color"). Section 1.201(10) of UCC provides, in pertinent part, with respect to conspicuousness as follows:

> A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. The language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color.

TEX. BUS. & COMM. CODE § 1.201(10). Comment 10 to this Section explains "the test is whether attention can reasonably be expected to be called to [the provision]." TEX. BUS. & COMM. CODE § 1.201 Cmt. 10.

Because the release in this case was signed after the accident occurred, it does not need to be conspicuous. The release, nevertheless, is conspicuous for the following reasons. First, it is contained in a document comprising only one sheet, with the terms laid out on the front and back of the document. (L.F. 233; L.F. 244, p. 85, *l.* 17-18). Second, the release provisions constitute a majority of the back page. (L.F. 233; L.F. 244, p. 87, *l.* 4-7). Third, the section is entitled "RELEASE, SUBROGATION, AND AUTHORIZATION PAY" and is set out in capital letters in a large size font. (L.F. 233; L.F. 244, pp. 86-87). Fourth, the release was signed in the presence of a witness, Karen Woodson, and was notarized. (L.F. 249, p. 226, *l.* 3-7). Fifth, Tom Wachendorfer, the Plaintiffs' representative, admitted in his deposition that he knew the document was a release when he signed it. (L.F. 244, p. 86, *l*. 2-14; L.F. 249, p. 228). Thus, the undisputed summary judgment facts prove that the release was conspicuous when executed by the insured. See, e.g., *Vera*, 989 S.W.2d at 16 (holding that a release found on the back of a check directly above the endorsement line and surrounded by no other language was conspicuous).

The Texas Supreme Court liberally construes the scope of a release and requires only that a release "mention" the claim. See *Memorial Medical Center of East Texas v.*

Keszler, 943 S.W.2d 433, 434-35 (Tex. 1997). For example, in *Keszler*, the Court held that language in a doctor's release of a hospital, which was executed in connection with the settlement of the doctor's suit against the hospital based on disciplinary action taken against the doctor by the hospital, was held to release the hospital from the doctor's subsequent claim based on exposure to ethylene dioxide. *Id.* The release contained the following language:

> [Doctor] . . . does hereby RELEASE, ACQUIT and FOREVER DISCHARGE [hospital] . . . from any and all claims, demands, actions, and causes of action of any kind whatsoever . . . which [doctor] has or might have, known or unknown, now existing or that might arise hereafter or which have not yet accrued, directly or indirectly attributable to or in any way arising out of corrective action taken by [hospital] against [doctor] and any other matter relating to [doctor's] relationship with [hospital], including but not limited to his relationship as a member of the staff or as a physician having clinical privileges, it being the intent of [doctor] to release all claims of any kind or character which he might have against [hospital]. . . .

Id. (emphasis in original). The Texas Supreme Court concluded that the exposure claim was "mentioned" in the release because it was related to the doctor's relationship with the hospital. *Id.*; see also *Franks v. Brookshire Bros., Inc.*, 986 S.W.2d 375 (Tex.App.--Beaumont 1999, no pet.) (although release only mentioned an accident sustained by plaintiff on April 11, 1994, it also released claims for accidents occurring March 30, 1994 or April 5, 1994, because the evidence indicated that plaintiff had actually been injured on the two prior dates and not on April 11, 1994); *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 716 (Tex.App.--San Antonio 1994, writ denied) (holding that release of "liability whatsoever for personal injury, property damage or wrongful death caused by negligence" also released claims of gross negligence); *Pecorino v. Raymark Industries, Inc.*, 763 S.W.2d 561, 572-574 (Tex. App.--Beaumont 1988, no writ) (finding that release of all existing and future claims arising out of any illness releasor might incur from exposure to defendants' asbestos products included asbestos-related disease not manifest when release was executed).

The release executed by Plaintiffs provides that Houston Casualty is "discharged and forever released from <u>any and all further claim, demand, or liability whatsoever</u> for said loss and damage, under the [Houston Casualty] Policy herein referred to, repairs and/or replacements having been made to my entire satisfaction." (L.F. 233-34) (emphasis added). The "loss and damage" referred to in the release was the accident that occurred on April 9, 1998, approximately one-quarter mile south of the Kansas City

Downtown Airport in Kansas City, Missouri, involving the Falcon 20 Jet owned or controlled by Plaintiffs. (L.F. 233-34). By executing the release and accepting the $1.5 million in settlement funds, Plaintiffs voluntarily relinquished "any further claim, demand or liability whatsoever for said loss and damage." (L.F. 233-34 & L.F. 264). Houston Casualty Company respectfully submits that this is a broad statement meaning exactly what it says: Plaintiffs may bring no claim against Houston Casualty arising out of, related to, or involving the accident involving the Falcon 20 that occurred on April 9, 1998. Compare *Vera*, 989 S.W.2d at 16-17 (holding that a "release of [defendant] from any and all liability regarding the purchase of a 1993 Mazda Protege . . . ." included claims based on an unlawful debt collection claim).

Against Houston Casualty, Plaintiffs have asserted claims of negligence, negligent misrepresentation, and bad faith. These claims, however, all stem from the incident involving Plaintiffs' Falcon 20 Jet aircraft. *Id.* As a matter of law, therefore, the undisputed facts establish that Plaintiffs voluntarily released these claims against Houston Casualty. Thus, Houston Casualty is entitled to summary judgment.

The undisputed facts also prove that Plaintiffs knowingly and voluntarily entered into the release. Plaintiffs are sophisticated parties who operate multi-million dollar aircraft businesses. (L.F. 236, p. 5, *l.* 9-16; p. 7, *l.* 2-5). This is not, therefore, a situation where an insurer attempted to a coerce an unsophisticated party in to settling its claim. Further, at the time the release was signed, there is no evidence that Plaintiffs were under

duress or forced to sign it. (L.F. 252, L.F. 250, L.F. 253, p. 229, *l.* 4-9; p. 235, *l.* 2-8; pp. 263-65). Plaintiffs could have chosen not to sign the proof of loss and not accept the $1.5 million in policy proceeds. Alternatively, Plaintiffs could have contested the decision to declare the aircraft a constructive total loss by requesting that an appraisal be initiated. (L.F. 230-31, L.F. 254, L.F. 249, L.F. 152, p. 224-25; p. 265). Plaintiffs did not. (*Id*.) Instead, Plaintiffs willingly signed the release and accepted payment from Houston Casualty. (L.F. 233-34; L.F. 264, L.F. 249, p. 225-26). Signing the proof of loss (which contained the release), Plaintiffs made the "solemn oath" that "no material fact is withheld that [Houston Casualty] should be advised of." (L.F. 233-34). If Plaintiffs did not agree with Houston Casualty's decision that the aircraft was a constructive total loss, they should have advised Houston Casualty of that "material fact" before they signed the proof of loss and release. Based on the foregoing, the summary judgment evidence establishes that Plaintiffs voluntarily signed the release and Houston Casualty is entitled to judgment in its favor, as a matter of law.

Houston Casualty has set forth above the facts and argument presented to the trial court and which entitled it to summary judgment. Houston Casualty will now address the several points raised by plaintiffs in their brief to argue for the reversal of the summary judgment.

A. There were no genuine issues of material fact as to whether the POL released Ameristar's extra contractual claims in that the POL, under the governing Texas law, does apply to Ameristar's tort-based claims against HCC.

Plaintiffs couch their first sub-point in terms of whether material issues of fact existed which should have precluded the entry of summary judgment. However, the trial court was dealing with the construction and application of a contractual release. The validity and scope of a non-liability clause, such as the release at issue in this case, is a question of law for the court. *Warren v. Paragon Technologies Group*, 950 S.W.2d 844, 845 (Mo.banc 1997). Accordingly, the construction, application and the determination as to the validity and scope of the release in this case is a question of law for the Court to decide and not a question of fact. Accordingly, plaintiffs' claims concerning the existence of issues of material fact are not pertinent here. In any event, HCC will address plaintiffs' claims that the release does not apply to the tort claims asserted.

Plaintiffs argue that the clear and unambiguous release it signed does not apply to bar its tort claims against HCC for negligence in handling the subject property loss claim. It reasons that its release of HCC "from any and all further claim, demand or liability whatsoever for said loss and damage, under the Policy herein referred to, repairs and/or replacements having been made to my entire satisfaction" applies only to contract claims it may have under the policy.

Plaintiffs misconstrue the scope of their release. Under Texas law, if a claim is "mentioned" in a release, it is released. See *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433, 434-35 (Tex. 1997). In the Texas Supreme Court's most recent discussion of the scope of release issue, the Court explained that although a release does not refer specifically to a particular cause of action, the release may nevertheless effectively encompass such a claim. *Keszler*, 943 S.W.2d at 434.35. In *Keszler*, an employment situation, the parties reached a compromise settlement agreement relating to a disciplinary action and signed a mutual release. *Id.* The parties in *Keszler* agreed to release all claims relating to Keszler's "relationship" with the defendant. *Id*. In a later suit, Keszler sued the defendant for personal injuries allegedly arising out of his exposure to chemicals at work. *Id.* Keszler's personal injury cause of action was nowhere enumerated in the release, but the Supreme Court determined that the injury claim for chemical exposure at the hospital grew out of his "work relationship" with the defendant, and so held that the claim had been "mentioned" in the releasing document. *Id.* at 435. Thus, regardless of whether Keszler's subsequent claims were based on tort or contract, they were barred by the release.

Contrary to Plaintiffs' contention, the present release is nowhere limited to contract claims. The release, instead, clearly and unequivocally absolves HCC from all responsibility for "any and all further claim, demand, or liability whatsoever for said loss and damage, under the Policy herein referred to, repairs and/or replacement having been

made to my entire satisfaction." (L.F. 233-34). The referenced Policy is the insurance policy issued by HCC to Plaintiffs.

Further, if, at the time they signed the release, Plaintiffs believed their damages were in excess of $1.5 million, they should not have agreed to "assign, transfer, and subrogate to . . . [HCC] all right, interest, or things in action against any person or corporation, who may be liable or hereafter adjudged liable for this loss." (L.F. 233-34) (emphasis added). Stated in other words, if Plaintiffs believed they were not made whole by accepting $1.5 million, they should have limited HCC's subrogation interest to that amount and retained their legal right to proceed against other potentially liable parties. By not doing so, Plaintiffs implicitly admitted that the $1.5 million payment satisfied any and all obligations HCC owed Plaintiffs with respect to the insurance policy and arising out of the accident.

All of HCC's actions in this case stem from its responsibilities under the Policy. The "said loss and damage" refers to the off-airport landing of Plaintiffs' aircraft that occurred on April 9, 1998. (L.F. 233-34). The released "claim, demand, or liability whatsoever" includes, but is not limited to HCC's conduct in investigating, adjusting, evaluating, and settling the claim. The error in Plaintiffs' reasoning is their failure to acknowledge that without the insurance policy there is no relationship between Plaintiffs and HCC. Thus, a release of "any and all further claim, demand, or liability whatsoever for said loss and damage, under the Policy" is as broad a release as might be had between

these parties. Accordingly, the release "mentions" all of Plaintiffs' present claims, whether based on tort or contract.

B. There was no genuine issue of material fact as to whether the POL released Ameristar's claim for uninsured losses in that the summary judgment record demonstrates that the release drafted by HCC applied to "said loss" and claims "under the policy" and did unambiguously prohibit claims for uninsured losses.

Plaintiffs next attempt to circumvent the clear meaning of their release of HCC by claiming that the release does not apply to their claims for uninsured loss. This is essentially a restatement of their contention that because they do not seek relief under the policy, the release does not apply. As indicated above, the broad scope of the release which plaintiffs' signed covers all claims they may have against HCC whether based upon contract under the policy or upon tort for uninsured losses.

C. There was no genuine issue of material fact as to whether the release was induced by HCC's misrepresentations and may be avoided.

Plaintiffs claim that there remains a genuine issue of material fact as to whether they can avoid the effect of the release on account of alleged misrepresentations by HCC or its agents. HCC contends that this is not an issue properly before this Court. At the time HCC filed its Summary Judgment Motion, plaintiffs had not raised fraud as a matter of avoidance in response to HCC's assertion of release as an affirmative defense.

Plaintiffs' Second Amended Petition is at L.F. 268. HCC's Answer is at L.F. 310; the affirmative defense of release is asserted at L.F. 324, ¶ 21. Plaintiffs did not file any responsive pleading to HCC's Answer and affirmative defenses. Accordingly, at the time HCC filed its Summary Judgment Motion, it had no opportunity to address plaintiffs' fraud claim and could not have reasonably anticipated that being an issue in the case.

To avoid an affirmative defense alleged in an answer, plaintiff must plead specifically matters of affirmative avoidance. *Estate of Phillips v. Phillips*, 917 S.W.2d 211 (Mo.App.W.D. 1996). Rules 55.01 and 55.08 require that an affirmative avoidance or defense be pleaded in response to a preceding pleading. *Id.* Plaintiff's reply should distinctly allege the grounds of avoidance. *Id.* Matters of avoidance are not available to a party who does not plead them specifically. *Id.* An affirmative avoidance is waived if the party raising it has neglected to plead it. *Id*.

Under Missouri law, plaintiffs should not be allowed to avoid summary judgment based upon a matter of avoidance which they never pleaded. This is so especially in light of the fact that under Missouri law, HCC, as the party moving for summary judgment was not allowed to file any evidentiary reply to plaintiffs' response and, thus, could not offer evidence to rebut plaintiffs' claims of misrepresentation. *Cross v. Drury Inns, Inc.*, 32 S.W.3d 632,636 (Mo.App. 2000). Further, if plaintiffs are allowed to avoid summary judgment based on an unpleaded matter of avoidance, defending parties moving for summary judgment would have to anticipate and rebut all potential or theoretical matters

of avoidance in order to obtain summary judgment. This is clearly impracticable. Because plaintiffs never pleaded fraud as a matter of avoidance to HCC's affirmative defense of release, it should not be able to avoid summary judgment based on its fraud claim.

Turning to the merits, plaintiffs claim that the release should not be enforced because it was induced by misrepresentation. HCC disputes that it or its agents made any misrepresentations to plaintiffs. In fact, as the undisputed facts show, plaintiffs hired three different aircraft experts to examine the wreckage. (L.F. 239-40). Presumably, these hired consultants provided plaintiffs with sufficient information to make decisions with respect to its insurance claim. After receiving the information from its hired consultants, plaintiffs made the conscious decision to submit the Proof of Loss requesting HCC to pay $1.5 million for the insured aircraft. The claim of fraud is not available where the material facts are equally available to both parties. A complaining party must not have failed to exercise reasonable care to protect himself and cannot shut his eyes and ears to matters equally open and available to him upon reasonable inquiry and investigation. *Campbell v. Booth*, 526 S.W.2d 167 (Tex. Civ. App. 1975). That is certainly the case in this instance both with respect to the condition of the aircraft and the ability of plaintiffs to reject HCC's decision to declare the aircraft a total loss. Plaintiffs point to no evidence indicating that HCC or its agents concealed information. In fact,

plaintiffs were provided with all information concerning the condition of the aircraft to which HCC and its agents were privy.

Plaintiffs next claim that Ameristar signed the release because of statements to the effect that HCC had the right to declare the aircraft a total loss. This statement was allegedly made by Larry Galizi, plaintiffs' insurance broker. Galizi denied, however, that plaintiffs were obligated to accept that decision. (L.F. 398). Further, plaintiffs have no evidence that Galizi was HCC's agent as opposed to an independent insurance broker. Accordingly, any claim of misrepresentation the part of Galizi would have no effect on the validity of the release.

D. There was no genuine issue of material fact as to whether the release was supported by consideration.

Again, plaintiffs attempted to avoid summary judgment by relying on a matter of avoidance that it never pleaded, namely, failure of consideration. Failure of consideration is a matter of avoidance which under Rule 55.08 must be specifically pleaded. As with its fraud claim, plaintiffs failed to plead failure of consideration as a matter of avoidance to HCC's affirmative defense of release. Accordingly, plaintiffs should not be allowed to avoid summary judgment based on this matter of avoidance. In any event, the facts and law establish that the release was supported by adequate consideration.

Consideration is a present exchange bargained for in return for a promise. *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991); *Connell v. Provident Life & Accident Ins. Co.*, 148 Tex. 311, 314-315, 224 S.W.2d 194, 196 (1949). Consideration may consist of a right, interest, profit, or benefit that accrues to one party. See, e.g., *Crockett v. Bell*, 909 S.W.2d 70, 74 (Tex.App.—Hous. [14 Dist.] 1995, no writ). Alternatively, it may consist of a forbearance, loss, or responsibility that is undertaken or incurred by the other party. *Champlin Petroleum Co. v. Pruitt*, 539 S.W.2d 356, 361 (Tex.Civ.App.—Fort Worth 1976, writ ref'd n.r.e.); *Lassiter v. Boxwell Brothers, Inc.*, 362 S.W.2d 884, 886 (Tex.Civ.App.—Amarillo 1962, no writ); see also RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981) (surrendering one's right to a claim or defense is a valid consideration). Simply stated, it consists of either a "benefit" to the promisor or a loss or "detriment" to the promisee. *Northern Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998); *Roark*, 813 S.W.2d at 496; *Receiver for Citizen's Nat'l Assurance Co. v. Hatley*, 852 S.W.2d 68, 71 (Tex.App.—Austin 1993, no writ) (citations and quotation omitted).

Plaintiffs' statement that a release must be supported by valid consideration is correct. Although a release must be supported by valid consideration, any consideration, however slight in amount, is sufficient if accepted by the person giving the release. *Texarkana Nat'l Bank v. Hubbard*, 114 S.W.2d 389, 392 (Tex.Civ.App.—Beaumont 1938, writ dism'd). Mere inadequacy of consideration is not a sufficient ground to set

aside a release. *McClellan v. Boehmer*, 700 S.W.2d 687, 694 (Tex.App.—Corpus Christi 1985, no writ). Further, one consideration can support the release of more than one claim. *McClellan*, 700 S.W.2d at 693; *Williams v. Glash*, 769 S.W.2d 684 (Tex.App.—Houston [1st Dist.] 1989), *rev'd on other grounds*, 789 S.W.2d 261 (Tex. 1990).

Ameristar filed a claim and proof of loss under its insurance policy with HCC. As this lawsuit reveals, the value of that claim was in dispute. At the time Plaintiffs signed the release, Plaintiffs disputed the extent of damage to the aircraft and the estimated cost of repair. To settle the disputed claim, HCC paid Plaintiffs $1.5 million dollars, the full policy limits. (L.F. 233-34). The payment of $1.5 million dollars, the policy limits, constitutes adequate consideration to support the release of the claim. See *Torchia v. Aetna Cas. & Sur. Co.*, 804 S.W.2d 219, 222-23 (Tex.App.—El Paso 1991, writ denied) (finding amount paid by workers' compensation insurer to settle claim was adequate consideration for release of both compensation and bad faith claims against the insurer); *Washington Nat'l Ins. Co. v. Cook*, 80 S.W.2d 327, 328 (Tex.Civ.App.—Eastland 1935, writ ref'd) (concluding insured released his claims against insurer under an accident policy with a $3,000 policy limit when he accepted $50 in settlement of his claim and executed a release of the insurer from any further liability under the policy). Plaintiffs' consideration consisted of relinquishing "any and all further claim, demand or liability whatsoever for said loss and damage" and by assigning their right to bring suit against

potentially liable parties to HCC. (L.F. 233-34). As a matter of law, therefore, the release was supported by valid consideration.

E. Court of Appeals' Opinion

HCC has set forth above the arguments it advanced in the Court of Appeals in response to plaintiffs' appeal. This section of the Substitute Brief addresses issues raised by the Court of Appeals in its opinion below.

Plaintiffs asserted three claims against HCC, Count III – Negligent Misrepresentation, Count IV – Negligence and Count V – Bad Faith. The pertinent allegations contained in the Second Amended Petition are set forth below verbatim:

Count III – Negligent Misrepresentation.

> 23. Handling the Plaintiffs insurance claim, including evaluating the condition of the Aircraft and the cost to repair the Aircraft, was a transaction in which HCC had a pecuniary interest. Howe, HCC's agent, represented that the Aircraft had severe structural damage and that the cost to repair the Aircraft was prohibitively high…The negligent misrepresentations proximately caused damages to (plaintiffs)…
>
> 24. Furthermore, Galizi was HCC's agent. When Galizi represented that HCC had the absolute right to total the Aircraft and that (plaintiff) had to sign the proof of loss, Galizi made these statements in a

transaction in which HCC had a pecuniary interest. The statements were untrue at the time they were made. The statements constitute negligent misrepresentations by HCC which proximately damaged (plaintiffs)…

Count IV – Negligence

25. HCC owed (plaintiffs) a duty to carefully and accurately assess and the condition of the Aircraft and the cost to repair same. HCC declared the Aircraft a "total constructive loss" when the Aircraft was capable of being repaired relatively quickly and inexpensively. HCC's agent -- Howe--hired Dodson. HCC owed Plaintiffs a duty to supervise Dodson's handling of the Aircraft. HCC failed to adequately supervise Dodson, allowing Dodson to change the Aircraft. HCC failed to exercise reasonable care in assessing and handling the insurance claim. HCC failed to exercise reasonable care in supervising Dodson's handling of the Aircraft…

Count V – Bad Faith

28. HCC failed to conduct a reasonable investigation into the cost to repair the Aircraft. HCC's failure to conduct a reasonable investigation proximately caused damage to the Plaintiffs…

(L.F. 274-75)

HCC filed a summary judgment motion arguing that plaintiffs' claims were barred by the release set forth above and that it was entitled to judgment as a matter of law on the bad faith claim. The trial court granted HCC's motion on the release issue and entered judgment accordingly. Plaintiffs appealed.

1. Discussion

The parties agreed that the scope and effect of the release in this case is governed by Texas law. Further, as respects HCC's summary judgment motion, the material facts are not in dispute and the parties, the trial court and the Court of Appeals are in general agreement about the general state of the law on the validity of the releases under Texas law.

Pertinent to the Court of Appeals' decision reversing the trial court's summary judgment is the proposition that to release a claim under Texas law, the release must "mention" the claim to be released. Slip Opinion at p. 7; See also *Memorial Medical Center of East Texas v. Keszler*, 943 S.W.2d 433, 434-35 (Tex. 1997). The Court of Appeals determined that the release that plaintiffs signed did not mention plaintiffs' claims because plaintiffs denominated their claims as tort claims rather than contract claims under the Policy. Slip Opinion at 9, 11.

The primary authority for the Court of Appeals' decision was *Vaughan v. Hartford Cas. Ins. Co.*, 277 F.Supp.2d 682 (N.D.Tex. 2003). In that case, after a lengthy ordeal, Vaughan settled a UM/UIM claim with Hartford. Vaughan then sued Hartford for unfair

claims settlement practices in violation of article 21.21, § 4(10), Texas Insurance Code and § 17.46(b), Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA"), breach of the duty of good faith and fair dealing, and failure to comply with the prompt payment statute, article 21.55, Texas Insurance Code. Hartford argued that a release Vaughan signed at the time of the settlement barred Vaughan's claims.

The release at issue released Hartford "from any and all claims, demands, and causes of action, of whatsoever nature whether in contract or tort…for and on account of the incident/auto accident …" and discharged "all claims and demands…under the Uninsured/Underinsured Motorist Endorsement…" The District Court held that the release did not preclude the claim for breach of the duty of good faith and fair dealing stating:

> The duty on the part of an insurer to deal fairly and in good faith with its insureds does not emanate from the terms of the insurance contract, but from an obligation imposed in law as a result of a special relationship between the parties governed or created by a contract. *Id*. at 689.

Accordingly, the District Court concluded that the release was not broad enough to embrace the common law claim of bad faith. *Id*. at 689.

The Court of Appeals relied almost exclusively on the District Court's discussion of Vaughan's claim for breach of the duty of good faith and fair dealing in holding that plaintiffs' release was not broad enough to have embraced plaintiffs' claims in the

present case stating, "[i]f the release in *Vaughan* was not broad enough to encompass a tort claim for bad faith, neither is the release in this case broad enough to encompass Ameristar's tort claims." Slip Opinion at 9. The Court of Appeals, however, made no distinction between the bad faith claim and the two negligence claims asserted by plaintiffs in this case.

2. Bad Faith

. As recited above, the sum and substance of the bad faith claim is that HCC failed to conduct a reasonable investigation. However, under Texas law, a cause of action for breach of the duty of good faith and fair dealing is established only when an insurer has no reasonable basis for denying or delaying payment of a claim, and the insurer knew or should have known of that fact. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997). Both *Vaughan* and the only other case cited by the Court of appeals in support of its conclusion, *Eastham v. Nationwide Mut. Ins. Co.*, 586 N.E.2d 1131, 1135 (Ohio Ct.App. 1990), involved true bad faith claims for unreasonable delay or denial of payment under an insurance policy. That is not what plaintiffs have alleged in this case and the undisputed facts support a conclusion that plaintiffs have no bad faith claim.

At the summary judgment stage, HCC argued for summary judgment on the bad faith claim based both upon the release and the fact that it was not recognized under Texas law under the undisputed facts of this case where there was prompt payment of the

policy limits within 26 days of the loss. L.F. 193-198. Unlike the plaintiff in *Vaughan*, plaintiffs here have never alleged that HCC unreasonably denied or delayed payment of the entire policy limits; they argue instead that HCC prematurely declared the Aircraft a constructive total loss and paid them their $1.5 Million policy limits. L.F. p. 272. In fact, in response to HCC's summary judgment motion on the issue of the viability of the bad faith claim, plaintiffs conceded that they had no cases or authorities to support their claim for bad faith. L.F. 348. While they stated this was a case first impression, the vast authority cited by HCC demonstrates otherwise. The tort of bad faith is a narrowly proscribed tort in Texas with well-defined limits. Plaintiffs' bad faith claim was simply an attempt to skirt the effect of the release to which they agreed, but which is wholly unsupported.

The trial court granted HCC's motion based upon the release. Thus, while the issue was briefed and a record made before the trial court, the issue of the viability of the bad faith claim was not briefed in the Court of Appeals prior to argument. However, an appellate court is to affirm on any basis that is supported by the summary judgment record made. *In re Estate of Blodgett*, 95 S.W.3d 79, 81 (Mo. Banc 2003).

There is no Texas case or statute that recognizes an insured's right to bring a bad faith claim against an insurer who promptly investigates a claim, timely accepts the claim, and then pays the insured the entire policy limits. *See*, *e.g.*, TEX. INS. CODE. ANN. art. 21.21 § 4(10) (Vernon 1981 & Supp.2000) (providing that "unfair settlement

practice" includes: (1) "*failing* to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear"; (2) "*failing* to provide promptly to a policyholder a reasonable explanation of the basis in the policy . . . for the insurer's denial of a claim or for the offer of a compromise settlement of a claim"; (3) "*failing* within a reasonable time to affirm or deny coverage of a claim to a policyholder"; (4) "*refusing, failing, or unreasonably delaying* an offer of settlement under applicable first-policy coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered . . ."; or (5) "*refusing* to pay a claim without conducting a reasonable investigation with respect to the claim." (emphasis added); see also *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997) (adopting Section 4 of Article 21.21 of the Texas Insurance Code as the standard for common law bad faith). Rather, an insurer breaches its duty of good faith and fair dealing when the insurer *fails* to attempt to effectuate a settlement when its liability has become reasonably clear. *See* 950 S.W.2d at 55. The insurer may also breach its duty of good faith and fair dealing when it *fails* to reasonably investigate a claim in order to determine whether *its liability* is reasonably clear. *Id*. at 56 n. 5. Even an erroneous denial of a claim will not constitute bad faith. *See, e.g., Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340-341 (Tex. 1995) (finding that if facts existed that would have supported valid *denial of claim*, insurer is not guilty of bad faith in denying claim, even if insurer actually did so for invalid reason); *National*

Union Fire Ins. Co. v. Hudson Energy Co., 780 S.W.2d 417, 420, 427 (Tex. App. -- Texarkana 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1992) (no evidence of bad faith when legitimate question of policy construction existed). These cases prove that an insurer acts in bad faith when it wrongfully denies a claim, not when it accepts a claim.

Plaintiffs want to have their cake and eat it too. The error in their reasoning is clear: having been offered payment in full under the policy and then accepting the payment and signing the release, it is manifestly unfair for them to argue that when Houston Casualty accepted this claim and promptly paid its policy limits to Plaintiffs, that Houston Casualty Company acted in bad faith. No court should countenance such twisted reasoning. Accordingly, as a matter of law, Houston Casualty cannot be liable for bad faith.

As stated earlier, Texas law does not recognize a bad faith claim for promptly investigating, accepting and paying a claim. Even if it did, Houston Casualty's conduct does not constitute bad faith.

Texas legal principles recognize that an insurer's liability under an insurance contract is separate and distinct from its liability for the tort of bad faith. *Lyons v. Millers Casualty Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993). Even an erroneous denial of a claim is often found to have been done in good faith**.** *See Beaumont Rice Mill, Inc. v. Mid-American Indemnity Ins. Co.*, 948 F.2d 950, 952 (5th Cir. 1991) ("A carrier maintains the right to deny an invalid or questionable claim without becoming subject to

liability for bad faith denial of the claim."); *Aranda v. Ins. Co. of N. Amer.*, 748 S.W.2d 210, 213 (Tex. 1995) (insurer may deny questionable claims without being subject to a bad faith allegation); *Saunders v. Commonwealth Lloyd's Ins. Co.*, 928 S.W.2d 322, 324 (Tex. App.--San Antonio 1996, no writ) ("Under Texas law, an insurer who can prove that it possessed a reasonable basis for denying or delaying payment of a claim, even if that basis is eventually determined by the fact finder to be erroneous, enjoys immunity from statutory bad faith under the Texas Deceptive Trade Practices Act and the Texas Insurance Code."); *Pioneer Chlor Alkali Co. v. Royal Indem. Co.*, 879 S.W.2d 920,929 (Tex. App.–Houston [14th Dist.] 1994, no writ) ("[t]he denial [of an insurer] may be erroneous and still be in good faith if it is based upon the information which was available to the insurer at the time of the denial and which supported the denial of the claim. When there is a bona fide controversy, the insurer has a right to have its day in court without facing a bad faith claim."); *St. Paul Lloyd's Ins. Co. v. Fong Chun Huang*, 808 S.W.2d 524, 526 (Tex. App.--Houston [14th Dist.] 1991, writ denied) (insurer need only show that it had a reasonable basis for believing the insured was at fault to defeat a bad faith allegation); *National Union Fire Ins. Co. v. Hudson Energy Co.*, 780 S.W.2d 417, 420, 427 (Tex. App.–Texarkana 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1992) (no evidence of bad faith when legitimate question of policy construction existed). Logically, therefore, an allegedly erroneous decision to accept Plaintiffs' Sworn Statement in Proof of Loss would not constitute bad faith.

Now, after Houston Casualty has done everything it is required to do under its insurance contract, Plaintiffs want more from Houston Casualty and allege, without a legal basis, that Houston Casualty acted in bad faith. If Plaintiffs had their way, an insurer would always be liable for bad faith on every claim. No release would ever be valid, and all litigation settlement would grind to a halt. Texas law does not recognize plaintiffs' novel claim. As a matter of law, Houston Casualty's conduct does not rise to the level of bad faith, and Plaintiffs' claims based on bad faith must be denied.

The foregoing shows that judgment should be entered in favor of HCC on plaintiffs' bad faith claim because it is not recognized under Texas law in these circumstances. It further demonstrates that the basis of plaintiffs' bad faith claim that HCC did not conduct a reasonable investigation is nothing more than a claim that HCC breached its duties under the policy to investigate the claim. Because in substance, the bad faith claim is for an alleged breach of HCC's duty under the policy to investigate the claim not a duty independent of the contract, the reasoning of *Vaughan* does not apply to it and it should be deemed to have been "mentioned" in the release plaintiffs signed and to which they agreed.

3. Negligence Claims

The discussion of plaintiffs' bad faith claim above is especially important when analyzing whether plaintiffs' negligence claims are "mentioned" in the release. The Court of Appeals did not distinguish between the bad faith claim and the negligence

claims, but the holding of *Vaughan*, suggests that under Texas law a court must look past the name given by a plaintiff to a particular claim to the substance of the allegations to determine whether that claim is embraced by the release language. True, the *Vaughan* court held that Hartford's release was not broad enough to encompass the recognized bad faith claim asserted there. However, Vaughan also asserted a claim seemingly independent of the UM/UIM policy endorsement by alleging a violation of the statutory duty to promptly pay a claim under 21.55 Texas Insurance Code. With regard to this claim the District Court stated:

> But an entirely different picture is presented by Vaughan's claim under article 21.55 Texas Insurance Code. That claim is based on a statutory provision that is intimately related to Hartford's obligations to perform under the insurance contract…The obligations imposed on an insurance company under article 21.55 are of the kind that are deemed by law to become a part of the contractual obligations assumed by an insurance company when it issues a policy subject to the statute… Thus, the article 21.55 claim is clearly within the scope of the Release….(emphasis added)
>
> Id. at 689.

The *Vaughan* court recognized that where a claim would be intimately related to an insurers' obligations to perform under the insurance contract, those claims too, even though they are tort claims and not denominated claims under the

policy/endorsement/contract, are "mentioned" within the release so as to be barred. Texas does not forbid a broad form release such as that the release at issue in this case, and, moreover, it "does not require that the parties anticipate and identify each potential cause of action relating to the release's subject matter." *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 698 (Tex. 2000).

An examination of the Second Amended Petition as a whole, and the particular allegations in the negligence claims of Count III and Count IV, demonstrate that the main complaint addressed by the negligence claims against HCC is that HCC prematurely declared the aircraft a constructive total loss based upon incorrect information about the condition of the aircraft. HCC strongly disagrees with plaintiffs' and the Court of Appeals' conclusion that because the negligence claims (and, in fact, the bad faith claim) concern HCC's alleged improper handling of the claim as opposed to "said loss and damage, under the Policy" this renders the release ineffective against the negligence claims. At the very heart, and the essence of the negligence claims is HCC's determination to pay plaintiffs the $1.5 million policy limits for the "loss and damage, under the Policy." Through their negligence claims, plaintiffs seek to second guess this determination, in effect arguing that they were entitled to something different for their "loss and damage, under the Policy." There is no other way to view the negligence claims. Plaintiffs claim the Aircraft should have been repaired (in essence arguing that HCC paid too much under the Policy) rather than be declared a total loss. This is nothing

more than an argument that plaintiffs did not receive what they were entitled "under the Policy." If any claim should be deemed to be released under the release language at issue, it is a claim that Plaintiffs did not receive what they were owed under the policy. Plaintiffs, through their negligence claims, are seeking to challenge what HCC determined was owed under the policy even though they released such claims and, in fact, recited that they were satisfied with HCC's handling of the claim. Similar to Vaughan's claim under Texas' prompt payment statute, the challenged actions of HCC in the negligence claims (i.e., HCC's determination about what plaintiffs were owed under the policy) are intimately related to HCC's obligations under the Policy. The duty upon which the negligence claims are based do not arise independently of the policy, but derive from the primary obligation of HCC as an insurer to determine what is owed under the policy (through its investigation and handling of the claim) and to pay what is owed under the policy. As such, the negligence claims are clearly "mentioned" in the release and are embraced by the broad language of the release. Notwithstanding plaintiffs' characterization of their claims as tort claims or the fact that they seek extra-contractual damages, the duties implicated by the negligence claims stem directly from the policy. As such, the claims are released and this conclusion is fully consistent with and supported by the holding in *Vaughan*. The proper inquiry, as demonstrated by the *Vaughan* case, is whether the duty upon which the claim is based arises independently from the policy. If it does not, then the claim is deemed released. The attempt by

plaintiffs to distinguish its claims for mishandling the insurance claim from "loss and damage, under the Policy" simply does not stand up to close scrutiny.

4. Conclusion

The Court of Appeals determined that the release at issue did not mention plaintiffs' tort claims as a matter of law. The holding is based primarily on the discussion in *Vaughan* that a claim of bad faith, because it arises out of a duty independent from the policy, is not embraced by a general release of claims under the policy. This case is easily distinguished from *Vaughan*. First, plaintiffs do not have a claim for bad faith under Texas law. As demonstrated in HCC's summary judgment motion below, HCC is entitled to judgment as a matter of law on the bad faith claim. Plaintiffs offered no contrary Texas authority on this issue. The bad faith claim asserted is, in actuality, a claim that HCC breached duties owed under the Policy and not duties owed independently of the Policy. As such, in addition to the fact that plaintiffs do not have a bad faith claim, the claim as pleaded is embraced by the release and should be barred.

Critical to HCC's position on appeal is its request that this Court reexamine the negligence claims asserted by plaintiffs. The *Vaughan* case teaches that claims that implicate an insurer's obligations which are intimately associated with its duties under the policy are "mentioned" and are, thus, released under the release language at issue. Further, the *Vaughan* case shows that a court should look past the form of the pleadings to the substance of the alleged claims to determine whether the claims implicate a duty

arising under the policy. Because plaintiffs' negligence claims here implicate duties stemming directly from the policy and which do not arise independently from the policy, they should be deemed released.

The Court of Appeals' opinion, if not modified, will create significant problems in the industry for insureds and insurers alike. Insurers will be reluctant to pay just and valid claims if they cannot rely on the standard release language at issue in this case. Again, affirming the trial court's summary judgment based upon the release would in no way impair an insured's ability to assert proper bad faith claims where warranted. This case, however, does not involve such a claim.

CONCLUSION

WHEREFORE, for the foregoing reasons, HCC respectfully requests that this Court affirm the trial's courts entry of summary judgment based on the release, and the fact that Plaintiffs' bad faith claim is not supported by any legal authority and for such other and further relief and the court deems just.

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CERTIFICATE OF SERVICE

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RULE 84.06(c) AND RULE 84.06(g) CERTIFICATION

I certify that this Brief complies with the limitations contained in Rule 84.06(b) and contains 11,124 words. I rely on the Word Count in the word processing software, which was Microsoft® Word 2003, used to create this Brief.

In addition, I certify that the disk has been scanned and is virus-free.

Dated this 3rd day of June, 2004.

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APPENDIX