

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KIMBERLY CUTCHALL AND
MICHAEL CUTCHALL,

Plaintiffs,

v.

CHUBB LLOYD’S INSURANCE
COMPANY OF TEXAS,

Defendant.

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Civil Action No. 4:23-cv-3745

**DEFENDANT’S RESPONSE TO “UNOPPOSED MOTION TO WITHDRAW” AND
DEFENDANT’S MOTION TO COMPEL INSPECTION AND DEPOSITION**

Defendant Chubb Lloyd’s Insurance Company of Texas (“Defendant”) files this its Response to “Unopposed Motion to Withdraw as Counsel for Plaintiffs” (Dkt. No. 20) and Defendant’s Motion to Compel Inspection and Deposition, respectfully showing the Court as follows:

Background

1. This is a first-party property insurance dispute that is well-developed. Plaintiffs allege that their home was damaged in a hail storm. Defendant has answered and asserted affirmative defenses. The parties have completed extensive written discovery, oral discovery, and expert designations.

2. Prior to Defendant’s expert designation deadline, Defendant’s counsel contacted Plaintiffs’ counsel to informally request an inspection of Plaintiffs’ home by one of Defendant’s proposed experts, Timothy Lozos. Mr. Lozos plans to conduct an inspection in aid of preparing a cost comparison to the repair estimate created by Plaintiffs’ retained expert, Brandon Allen. The

inspection by Mr. Lozos is the only inspection requested by Defendant during this litigation. Defendants made requests for the inspection on:

June 14, 2024

June 18, 2024

June 20, 2024

Exhibit A, Emails.

Despite repeated requests, Plaintiffs would not commit to a date for the inspection. *Id.* Defendant then propounded a formal request on June 28, 2024 for the inspection pursuant to Federal Rule of Civil Procedure 34. **Exhibit B**, Discovery Request. Plaintiffs' response was noncommittal and improper: "Plaintiffs intend to permit Mr. Lozos access to the subject property for inspection. Plaintiffs are in communication with Counsel regarding the specific date and time of the inspection." **Exhibit C**, Discovery Response.

3. Defendant made other informal requests for the inspection on:

July 10, 2024

July 24, 2024

July 26, 2024

Id. Plaintiffs remains noncommittal. The Motion to Withdraw inaccurately states that the inspection has been scheduled when it has not. Dkt. No. 20 at Page 1.

4. Plaintiffs' dilatory tactics are prejudicing Defendant's defense of the case. Plaintiffs have never expressed a single objection to Defendant's right to conduct the inspection, but Plaintiffs' ongoing avoidance of the inspection operates to improperly preclude Defendants' discovery of relevant evidence.

5. Similarly, Defendant timely requested the deposition of Plaintiff's retained expert, Mr. Allen. Mr. Allen's deposition was re-scheduled due to Hurricane Beryl to August 15, 2024. When Plaintiffs' counsel contacted Defendant's counsel about their proposed Motion to Withdraw, Defendant's counsel wrote as follows on August 1, 2024:

"My client is unopposed to the motion to withdraw except that it opposes the withdrawal before the completion of Mr. Allen's deposition on August 15 or anything that delays the completion of his deposition."

Exhibit D, Emails. Defendant's counsel also asked again about Mr. Lozos' inspection. *Id.* Nevertheless, in the Motion to Withdraw, Plaintiffs' counsel inaccurately wrote:

"I certify that on Monday, July 29, 2024, I conferred with counsel for Defendant Chubb Lloyds Insurance Company of Texas Karl via email, and counsel indicated that he is unopposed to *Motion to Withdraw as Counsel for Plaintiffs*, indicating they wish to take Mr. Brandon Allen's deposition. Mr. Wilson and Mr. Allen are unable to appear for a deposition due to the conflict of interest with Kimberly Cutchall."

Dkt. No. 20, Certificate of Conference. Defendant is thus unopposed to the Motion to Withdraw so long as Defendant can complete Mr. Allen's deposition and Mr. Allen's deposition is not delayed. Defendant does not simply "wish" to take Mr. Allen's deposition. Also, counsel never discussed a conflict of interest involving Mr. Allen and there was no indication that he would want to withdraw as well. No motion to quash or motion for protective order as to Mr. Allen's deposition has been filed. Defendant has other reservations about the Motion to Withdraw discussed below.

Argument

6. Defendant should not be deprived of two valid forms of discovery (inspection by Mr. Lozos and deposition of Mr. Allen) to which Plaintiffs have never objected (until the inaccurate Certificate of Conference discussed above). Defendant is concerned that Plaintiffs intend to obtain new counsel, continue this case, abandon Mr. Allen, and completely re-work their

case after an enormous amount of time and money has already been invested in the case. Plaintiffs already re-worked their case once when their current counsel replaced their prior counsel. Any new counsel in this case would be Plaintiffs' third set of counsel.

7. Defendants note that Plaintiffs have been evasive throughout this case. Plaintiffs made misleading complaint allegations about the claimed date of loss and then, in deposition, testified that they could not identify a date of loss. *See* Dkt. No. 18, Defendant's Supplemental Answer, Paragraphs 1 and 4. Plaintiffs' first public adjuster chose a date of loss completely arbitrarily based on a generic news article from the internet. Plaintiffs' second public adjuster (Mr. Allen) chose an entirely new date of loss for the alleged hail storm. Dkt. No. 14, Allen Report at page 3. Defendant's retained meteorologist expert filed a scientific report demonstrating that there was no hail at Plaintiffs' home on the date of loss alleged by the second public adjuster. Dkt. No. 16, Finrock Report. If Plaintiffs, Plaintiffs' counsel, and Mr. Allen are allowed to back out of this case and start all over with a new date of loss, years of written and oral discovery, experts, attorney work product, and attorney-client communications (no privilege waived) will be wasted at Defendant's expense. Defendant's defense of the case will be prejudiced by the expense and advocacy shift.

8. If Plaintiffs' counsel are allowed to withdraw, it should be only after the completion of Mr. Allen's deposition. Plaintiffs should not be allowed to re-plead or designate new experts. Plaintiffs should not be allowed to change their claimed date of loss from August 16, 2021. The Court should compel Plaintiffs to allow Mr. Lozos' inspection. In the alternative, the Court should strike Mr. Allen's repair estimate. Defendant intends to file a dispositive motion and perhaps a *Daubert* challenge to Mr. Allen after his deposition, so any delay will harm Defendant's ability to present these motions.

9. The Motion to Withdraw smacks of an attempt to rapidly hit “eject” and get Plaintiffs’ counsel out and Plaintiffs’ expert of this case to their benefit and the prejudice of Defendant. LR 83.2 states that “no delay will be countenanced because of a change of counsel,” therefore, the deposition of Mr. Allen and the inspection by Mr. Lozos should not be delayed. LR 83.2 also authorizes the court to impose conditions on the withdrawal of counsel, for which Defendant prays herein.

10. Indeed, this Court noted as follows in *Cooper v. Wal-Mart Transp., LLC*, 2010 U.S. Dist. LEXIS 18759, *2 (S.D. Tex. 2010) (Rosenthal, J.) (some internal citations and quotations omitted):

Attorneys normally are expected to work through the completion of a case. An attorney of record may withdraw only by leave of court on a showing of good cause and reasonable notice to the clients. Whether leave is granted is a matter within the trial court’s sound discretion. The record must generally reflect an appropriate basis for granting leave; unsubstantiated claims are insufficient.

...

Courts often require attorneys to continue representing a litigant when the attorney’s departure from the case would delay or disrupt the proceedings. *See Broughten v. Voss*, 634 F.2d 880, 882-83 (5th Cir. 1981) (“[I]t is incumbent on the court to assure that the prosecution of the lawsuit before it is not disrupted by the withdrawal of counsel.”); *Small v. Regalbutto*, No. 1:06-CV-1721, 2009 U.S. Dist. LEXIS 55033, 2009 WL 1911827, at *2 (N.D. Ohio June 29, 2009) (denying defense counsel’s motion to withdraw when the defendant had outstanding discovery obligations and had already substantially delayed discovery); *Taylor*, 20 F. Supp. 2d at 884 (denying defense counsel’s motion to withdraw before meeting upcoming discovery deadlines); *Intellipay, Inc.*, 828 F. Supp. at 33 (“This court also finds that hardship would be imposed on the trial court, plaintiff, and defendants if counsel is permitted to withdraw approximately one month before trial.”).

Because of the pending deadline in this case for Cooper to respond to Wal-Mart’s motion for judgment as a matter of law, counsel’s withdrawal at this point would undoubtedly cause extended delay. Counsel for Cooper must file a response to the motion for judgment as a matter of law by the April 9, 2010 deadline. Counsel for Cooper may refile their motion for leave to withdraw after the response is filed--at which point the risk of delay will be substantially lessened--with an appropriate showing of good cause for withdrawal.

At this point, the Court is presented with unsubstantiated claims, some inaccurate representations, and evidence that Defendant will suffer substantial prejudice if the Motion to Withdraw is granted without adequate conditions and protections for Defendant. The Court should craft appropriate relief based on the facts and circumstances of this case and its own sound analysis in *Cooper*.

WHEREFORE, PREMISES CONSIDERED, Defendant Chubb Lloyd's Insurance Company of Texas respectfully asks that the Unopposed Motion to Withdraw As Counsel for Plaintiffs be denied as presented, that Plaintiffs be compelled to complete the deposition of Brandon Allen, that Plaintiffs be compelled to complete the inspection by Timothy Lozos or that Mr. Allen's repair estimate be stricken, and that Defendant be granted any such other and further relief to which it is justly entitled.

Respectfully Submitted,

s/ Karl A. Schulz

Karl A. Schulz

State Bar No. 24057339

COZEN O'CONNOR

1221 McKinney Street, Suite 2900

Houston, Texas 77010

Telephone: (832) 214-3933

Facsimile: (713) 512-5236

kschulz@cozen.com

ATTORNEYS FOR DEFENDANT,
CHUBB LLOYD'S INSURANCE COMPANY OF
TEXAS

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1.D., I hereby aver that I conferred with Ms. Fulton on August 1, 2024 and in the emails attached hereto regarding the relief sought herein. Ms. Fulton indicated that she would cooperate with the requested inspection by Mr. Lozos but did not provide dates from Plaintiffs to complete same. We did not reach any agreement regarding the deposition of Mr. Allen.

s/ Karl A. Schulz _____
Karl A. Schulz

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record on August 1, 2024 via the Court's electronic filing system.

Amanda Fulton
Attorney at Law
Chad T. Wilson Law Firm PLLC
455 East Medical Center Blvd, Suite 555
Webster, TX 77598
afulton@cwilsonlaw.com

s/ Karl A. Schulz _____
Karl A. Schulz

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On this day, the Court considered Defendant Chubb Lloyd’s Insurance Company of Texas’ Response to “Unopposed Motion to Withdraw” (“Response”) and Defendant’s Motion to Compel Inspection and Deposition (“Motion”). The Court hereby issues the following orders:

1. The Unopposed Motion to Withdraw as Counsel for Plaintiffs (Dkt. No. 20) is denied. A motion to withdraw may be resubmitted after the inspection by Timothy Lozos is completed and the deposition of Brandon Allen is completed.
2. Plaintiffs are ORDERED to allow the inspection of their home by Mr. Lozos within 21 days of the signing of this Order. Defendants are permitted to supplement their expert designation with Mr. Lozos’ findings and report.
3. Plaintiffs are ORDERED to present Mr. Allen for deposition as scheduled on August 15, 2024.
4. Plaintiffs are prohibited from re-pleading or designating new experts. Plaintiffs are not permitted to change their allegation of the date of loss from August 16, 2021.

SIGNED on this ____ day of _____, 2024.

UNITED STATES DISTRICT JUDGE