

CAUSE NO. 202402505

MISTY MORIN
Plaintiff,

VS.

DAVID PETTUS,
and DAVID PETTUS ATTORNEY
AT LAW, P.C.
Defendants.

§ **IN THE 189TH**
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§
§
§ **JUDICIAL DISTRICT COURT**
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§
§ **HARRIS COUNTY, TEXAS**

PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST
DEFENDANTS DAVID PETTUS & DAVID PETTUS ATTORNEY AT LAW, P.C.

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Plaintiff, Misty Morin, and respectfully moves this Court to enter a default judgment against Defendants David Pettus and David Pettus Attorney at Law, P.C. and for cause would show the following:

INTRODUCTION

Appendix of Exhibits

Plaintiff attaches the following Exhibits in support of her Motion for Default:

- Exhibit A Contingency Fee Agreement
- Exhibit B Settlement Check Received by Defendants
- Exhibit C Proof of Service - Citations and Returns
- Exhibit D Certificate of Last Known Addresses of Defendants
- Exhibit E Affidavit of C. Kyle Pugh Concerning Defendant David Pettus' Military Status
- Exhibit E-1 SCRA Verification
- Exhibit F Affidavit of Misty Morin
- Exhibit G Affidavit of C. Kyle Pugh
- Exhibit G-1 Billing Statement

Background Facts

On June 14, 2023 Plaintiff engaged Defendant David Pettus and Defendant David Pettus Attorney at Law, P.C., (hereafter “Defendants”) to represent her in relation to personal injuries from an automobile accident caused by a third party on May 26, 2023. Plaintiff and Defendants entered into a written attorney client contingency fee contract dated June 14, 2024. See Exhibit A, Contingency Fee Agreement. Defendants’ fee was 33 1/3% per the agreement. *Id.*

Defendant Pettus represented to Plaintiff that he would not settle her case without her consent or knowledge. See Exhibit A.

Beginning in June 2023 and continuing through October 2023, Plaintiff attempted to contact Defendant David Pettus and inquired about the progression of her case. Defendant did not return Plaintiff’s attempts at communication.

In October 2023, Plaintiff reached out to the insurance company of the other driver and learned Defendants, settled Plaintiff’s personal injury case on July 7, 2023 for \$50,000.00. Please see Exhibit “B”. Settlement Check received by Defendants. Defendants settled the case without Plaintiff’s permission and without informing Plaintiff of the settlement. Defendants forged Plaintiff’s signature on a settlement, which they had notarized. Defendant secured the settlement check and again forged Plaintiff’s signature. Defendant kept the settlement funds, did not inform Plaintiff of the settlement, did not provide an accounting of the funds, and have not responded to Plaintiff’s many requests as to the status of her injury claim. Defendants’ fee pursuant to the Contingency Fee Agreement would have been \$16,665.00 (33 1/3% of \$50,000.00).

On January 12, 2024 Plaintiff sued Defendants alleging claims of common law fraud, breach of fiduciary duty, breach of Texas Theft Liability Act, and legal malpractice/negligence

and respondeat superior arising out of Defendants' legal representation of Plaintiff in relation to an automobile accident caused by a third party on May 26, 2023.

Service on Defendants

On April 10, 2024, Defendant David Pettus was served with citation and a copy of Plaintiff's Original Petition. A copy of the Citation and Plaintiff's Original Petition was served on Defendant David Pettus Attorney at Law, P.C. by serving the Texas Secretary of State, who forwarded a copy to Defendant by certified mail on March 14, 2024. The citations and return of service, a copy of which is attached hereto, marked as Exhibit "C", have been on file with the Clerk of the Court since March 10, 2024 more than ten (10) days, excluding the day of filing and today. The Proof of Service from the Texas Secretary of State is attached hereto as Exhibit "C".

The deadline for Defendants to file an answer was June 3, 2024. Defendants have not filed an answer or any other pleading constituting an answer.

MOTION FOR DEFAULT JUDGMENT

The Court should render a default judgment against Defendants because Defendants were properly served and did not file an answer or any other pleading constituting an answer within the prescribed time period. See, Tex. R. Civ. 239.

Last Known Address

Defendant David Pettus' last known address for purposes of service of process is 425 Amanda Circle, Tiki Island, Texas 77554. Attached as Exhibit "D" is a certificate of Defendants' Last Known Address.

Defendant David Pettus Attorney at Law, P.C., last known address for purposes of service of process is that if its registered agent, Ben R. King, 5701 Woodway, Suite 300,

Houston, Texas 77057. Attached as Exhibit “D” is a certificate of Defendants’ Last Known Address.

Military Status

Defendant David Pettus is not a member of the United States military. Attached as Exhibit “E” is an affidavit regarding Defendant Pettus’ military status. Plaintiff respectfully requests that the requirement of a bond be waived.

Common Law Fraud

Defendant David Pettus is guilty of common-law fraud. Defendant David Pettus made material representations to Plaintiff regarding the status of her personal injury claim. The representations made by Defendant David Pettus were false. When Defendant David Pettus made the misrepresentations to Plaintiff, he knew the representations were false and intended for Plaintiff to act on them. Plaintiff relied on the material misrepresentations by Defendant. As a result of Defendant’s misrepresentations, Plaintiff suffered damages as further described herein.

Breach of Fiduciary Duty

Defendant David Pettus owed a fiduciary duty to Plaintiff.

Defendant David Pettus breached his fiduciary duty to Plaintiff on multiple occasions. Said breaches proximately caused injury and damages to the Plaintiff.

The fiduciary duties breached by Defendant are identified as follows:

- 1) The duty of loyalty and utmost good faith;
- 2) The duty of candor;
- 3) The duty to act with integrity of the strictest kind; and
- 4) The duty of full disclosure;

As a proximate and direct result of Defendant’s breach of his fiduciary duty to Plaintiff,

Plaintiff suffered damages as further described herein.

Breach of Texas Theft Liability Act

Defendant David Pettus unlawfully appropriated the property of Plaintiff. Defendant David Pettus intended to deprive Plaintiff of her lawful property without consent.

As a result of Defendant's theft, Plaintiff is entitled to recover reasonable attorneys' fees from Defendant pursuant to Tex. Civ. Prac. & Rem. Code §134.005(b). Plaintiff is also entitled to recover additional damages pursuant to Tex. Civ. Prac. & Rem. Code §134.005(a)(1).

Legal Malpractice/Negligence

Defendant David Pettus owed a duty of care to his client, Plaintiff. Defendant David Pettus breached his duties to Plaintiff and was negligent in the following acts and omissions, which were a producing and proximate cause of actual damages to Plaintiff:

- 1) Failing to be honest with Plaintiff;
- 2) Failing to keep Plaintiff informed of the status of her case;
- 3) Failing to secure Plaintiff's approval and consent to settle her case;
- 4) Failing to provide Plaintiff with an accounting of the settlement funds and
- 5) Failing to release funds to Plaintiff.

The above acts and omissions on the part of Defendant constituted negligence. Defendant breached his duties to Plaintiff and said breach proximately caused Plaintiff to be damaged.

Respondeat Superior

Defendant David Pettus, at all times relevant to this case, was the agent and/or employee of Defendant David Pettus Attorney at Law, P.C. In doing relevant acts alleged in this petition, Defendant David Pettus was acting within the course and scope of his agency and/or

employment with Defendant David Pettus Attorney at Law, P.C. Such relevant acts attributed to Defendant David Pettus in this petition are also intended to be attributed to Defendant David Pettus Attorney at Law, P.C. because of the legal relationship (including but not limited to the doctrine of respondent superior and principles of agency) between Defendant David Pettus and Defendant David Pettus Attorney at Law, P.C.

Equitable Forfeiture

Texas law allows courts to fashion equitable remedies and disgorge fees as a remedy to a breach of fiduciary duty. See *Johnson v. Brewer & Prichard, P.C.* 73 S.W.3d 193, 200 (Tex.2002); *Burrow v. Arce*, 997 S.W.2d 229, 237-45 (Tex.1999); *In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex.2015) and *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W. 3d 867, 872-75. The Texas Supreme Court has provided a thorough analysis for trial courts to follow when a party seeks disgorgement of fees resulting from breach of a fiduciary duty. *ERI Consulting Eng'rs, Inc.*, 318 S.W. 3d 867, 874-75. The trial court must determine whether the fiduciary's conduct was a clear and serious breach of duty to the principal, whether any fees should be forfeited, and if so, what the amount should be. *Swinnea v. ERI Consulting Eng'rs, Inc.*, 481 S.W.3d 747, 753 (Tex.App-Tyler 2016) citing *Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex.1999).

Plaintiff requests that the Court conduct an analysis of Defendants' behavior and apply the equitable remedies recited above and order that Defendants' forfeit their fees based upon their conduct and breach of their fiduciary duties to Plaintiff.¹ Defendants' fee amounts to \$16,665.00 and should be forfeited.

¹ Equitable forfeiture is distinguishable from an award of actual damages incurred as a result of a breach of fiduciary duty. See *Burrow v. Arce*, 997 S.W.2d 229, 240(Tex.1999).

DAMAGES

Plaintiff asks the Court to render a default judgment establishing Defendants' joint and severable liability and render a final judgment awarding Plaintiff's actual damages in the amount of which are comprised of the following:

- \$50,000.00
- \$1,000.00 pursuant to Civ. Prac. Rem Code. 134.005(a)(1) – Texas Theft Liability Act; and
- \$7,471.74 as reasonable and necessary attorneys fees and \$869.69 in taxable costs pursuant to Civ. Prac. Rem Code. 134.005(b). See Exhibit G, Affidavit of C. Kyle Pugh.

No hearing is necessary to establish the amount of actual damages because the damages alleged in Plaintiffs Original Petition are liquidated, are proved by a written instrument, and may be accurately calculated. See. Tex. R. Civ. P. 241. Additionally, a court can award unliquidated damages based on affidavits without holding an evidentiary hearing. *Ingram Indus., Inc. v U.S. Bolt Mfg., Inc.*, 121 S.W.3d 31, 37 (Tex. App – Houston [1st Dist.] 2003, no pet.).

CONCLUSION

Plaintiff is entitled to a default judgment against Defendants, jointly and severally, for the reasons asserted in this Motion.

PRAYER

WHEREFORE, Plaintiff respectfully requests this Court enter a default judgment against Defendants, sign a default judgment in the amount of \$59,341.43 plus prejudgment interest and grant such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

C. KYLE PUGH, P.C.

/s/ C. Kyle Pugh

C. Kyle Pugh

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Attorneys for Plaintiff

Unofficial Copy Office of Marilyn Burgess District Clerk

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Kyndal Hetmer on behalf of C. Kyle Pugh

Bar No. 00789790

kyndal@kylepugh.com

Envelope ID: 89187893

Filing Code Description: Motion (No Fee)

Filing Description: Plaintiff's Motion for Default Judgement Against

Defendants David Pettus & David Pettus Attorney at Law PC

Status as of 6/26/2024 8:13 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Kellie LMckee		kellie@kylepugh.com	6/25/2024 5:21:41 PM	SENT
C. Kyle Pugh		kyle@kylepugh.com	6/25/2024 5:21:41 PM	SENT
Kyndal Hetmer		kyndal@kylepugh.com	6/25/2024 5:21:41 PM	SENT

Unofficial Copy Office of Marilyn Pugh, District Clerk