1100 JP Morgan Chase Tower
600 Travis Street
Houston, TX 77002

713.650.8400 OFFICE
713.650.2400 FAX
winstead.com

Andrew Edelman
direct dial: 713.650.2757

September 21, 2017

VIA E-FILING

Blake A. Hawthorne, Clerk of the Court
Supreme Court of Texas
2101 W. 14th Street, Room 104
Austin, Texas 78701

Re: No. 16-0347; *Richardson East Baptist Church v. Philadelphia Indemnity Insurance Company and James Greenhaw*; In the Supreme Court of Texas, on Appeal from the Fifth Court of Appeals (05-14-01491-CV)

Dear Clerk:

Respondent James Greenhaw ("Greenhaw") submits this letter with additional recent Texas appellate decisions issued after this Court's ruling in *USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, 2017 WL 1311752 (Tex. Apr. 7, 2017) and after Greenhaw filed his Response brief. Please forward this letter and the attached opinions to the members of the Court at your earliest convenience.

These decisions further confirm that *Menchaca* does nothing to change the long-standing Texas precedent that, when a party accepts payment under an appraisal award, it is estopped from seeking extra-contractual damages absent an "extreme act" by the carrier and independent damages:

- *Cano v. State Farm Lloyds, et. al.*, No. 3:14-CV-2720-L, 2017 WL 3279139, at *6 (N.D. Tex. Aug. 2, 2017) (mem. op.) (attached as Exhibit A) ("[a]s no genuine dispute of material fact exists that Plaintiffs suffered an independent injury, Defendants are entitled to judgment as a matter of law on Plaintiffs' extra-contractual tort claims pursuant to the Insurance Code and bad faith claim under a good faith and fair dealing violation.");

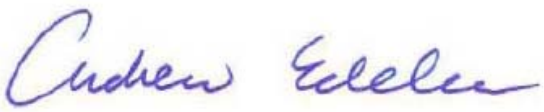
- *Floyd Circle Partners, LLC v. Republic Lloyds*, No. 05-16-00224-CV, 2017 WL 3124469, at *9 (Tex. App.—Dallas July 24, 2017, no pet. h.) (attached as Exhibit B) (holding that the take-nothing judgment was appropriate because the insured "failed to raise a fact issue regarding whether the appraisal award should be set aside" and did not "provide[] any summary judgment evidence of an independent injury.")

- *Losciale v. State Farm Lloyds*, No. 4-17-0016, 2017 WL 3008642, at *3 (S.D. Tex. July 14, 2017) (attached as Exhibit C) ("The Court finds that none [of the *Menchaca* rules] apply in this case given State Farm's full and timely payment of the appraisal award. The payment of the appraisal award satisfies Plaintiff's right to receive benefits under the Policy and, therefore, there is no 'loss of benefits.' Plaintiff has not identified nor presented evidence of an independent loss that does not flow or stem from the original denial of policy benefits. As a result, *Menchaca* does not allow Plaintiff to pursue his Texas Insurance Code claims following full and timely payment of the appraisal award."); and

- *Pounds v. Liberty Lloyds of Tex. Ins. Co.*, No. 14-16-00263-CV, 2017 WL 3270980, at *5 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017, no pet. h.) (attached as Exhibit D) ("We have already determined that Pounds had no right to receive benefits from Liberty Lloyds under the policy because the appraisers determined that the Actual Cash Value of Pounds's claim was an amount below the deductible. In addition, Pounds did not allege that he sustained an independent injury as a result of Liberty Lloyds's handling of his claim. . . . We therefore conclude that Liberty Lloyds established its entitlement to summary judgment on Pounds's extra-contractual claims.").

If you have any questions, please feel free to contact me. Thank you for your assistance in this matter.

Sincerely,



Andrew L. Edelman
Counsel for Respondent James Greenhaw

CERTIFICATE OF SERVICE

A true and correct copy of this correspondence has been forwarded to all counsel of record on September 21, 2017, as follows:

William Pilat
KANE, RUSSELL, COLEMAN & LOGAN, PC
5051 Westheimer Rd., 10th Fl.
Houston, Texas 77056
wpilat@krcl.com

Counsel for Respondent Philadelphia Indemnity Insurance Company

Peter Kelly
F. Leighton Durham III
KELLY, DURHAM & PITTARD, LLP
P. O. Box 224626
Dallas, Texas 75222
pkelly@texasappeals.com
ldurham@texasappeals.com

Counsel for Petitioner Richard East Baptist Church

Shannon E. Loyd
The Loyd Law Firm
12703 Spectrum Drive, Suite 201
San Antonio, Texas 78249
info@theloydlawfirm.com

Counsel for Petitioner Richard East Baptist Church

By: */s/ Andrew L. Edelman*
Andrew L. Edelman

EXHIBIT A

Cano v. State Farm Lloyds

United States District Court for the Northern District of Texas, Dallas Division

August 2, 2017, Decided; August 2, 2017, Filed

Civil Action No. 3:14-CV-2720-L

Reporter
2017 U.S. Dist. LEXIS 121793 *; 2017 WL 3279139

SANTIAGO CANO and MARILU CANO, Plaintiffs, v. STATE FARM LLOYDS and RICARDO ALVARADO, Defendants.

Core Terms

insured, damages, appraisal award, summary judgment, benefits, extra-contractual, breach of contract claim, material fact, matter of law, appraisal, genuine dispute, summary judgment motion, breach of contract, good faith, estoppel, fair dealing, estimate, pet, statutory violation, policy benefits, coverage, parties, nonmoving party, timely payment, replacement, estopped, storm

Counsel: **[*1]** For Santiago Cano, Marilu Cano, Plaintiffs: Gregory F Cox, LEAD ATTORNEY, Mostyn Law Firm, Beaumont, TX; Andrew Paul Taylor, Mostyn Law Firm, Houston, TX; Brian P Lauten, Deans & Lyons LLP, Dallas, TX; J Steve Mostyn, The Mostyn Law Firm, Houston, TX; Rene Michelle Sigman, Merlin Law Group, Houston, TX.

For State Farm Lloyds, Ricardo Alvarado, Defendants: W Neil Rambin, LEAD ATTORNEY, Scott Philip Brinkerhoff, Drinker Biddle & Reath, LLP, Dallas, TX; L Kimberly Steele, Sedgwick LLP, Dallas, TX; Michael C Klein, Sedgwick LLP, Austin, TX.

Judges: Sam A. Lindsay, United States District Judge.

Opinion by: Sam A. Lindsay

Opinion

MEMORANDUM OPINION AND ORDER

Before the court is Defendants State Farm Lloyds and Ricardo Alvarado's Motion for Summary Judgment (Doc. 103), filed July 1, 2016. After careful review of the motion, briefs, record, appendices, and applicable law, the court **grants** Defendants State Farm Lloyds and Ricardo Alvarado's Motion for Summary Judgment and **dismisses with prejudice** this action.

I. Factual and Procedural Background

This action arises from a dispute regarding an insurance claim filed by Plaintiffs Santiago and Marilu Cano (collectively, "Plaintiffs") to recover for hail or wind damages that occurred **[*2]** to their home, shed, and fence during a storm on June 13, 2012. On May 23, 2014, Plaintiffs sued Defendants State Farm Lloyds ("State Farm") and Ricardo Alvarado ("Alvarado") (collectively, "Defendants") in the 162nd Judicial District Court of Dallas County, Texas, for breach of contract; and claims for violations of *Chapters 541* and *542 of the Texas Insurance Code*, fraud, conspiracy to commit fraud, and breach of the common law duty of good faith and fair dealing (collectively, the "extra-contractual claims"). On July 29, 2014, Defendants removed this action to the district court for the Northern District of Texas on grounds that complete diversity of citizenship exists between the parties and that the amount in controversy exceeds $75,000, exclusive of interest and costs.

The court now sets forth the undisputed facts in accordance with the standard in Section II of this opinion. On June 13, 2012, a storm hit Plaintiffs' home and caused their home, shed, and fence, to suffer wind or hail damage. At that time, Plaintiffs' home was insured for approximately $98,000 under a State Farm Homeowners Policy (the "Policy"). Plaintiffs reported a claim to State Farm for damages resulting from **[*3]** the June 13, 2012 storm on June 28, 2012. Subsequently, State Farm adjuster Alvarado inspected Plaintiffs' home on July 1, 2012, and found storm damages of $2,562.59, on a replacement cost value basis. After subtracting the Policy's $1,000 deductible and $256.67 for depreciation, State Farm issued an actual cash value payment of $1,305.62 to Santiago Cano (the named insured) that day.

Alvarado explained his findings and the estimate to Plaintiffs. State Farm did not hear from Plaintiffs or their representative regarding the claim until May 23, 2014, when the present suit was filed.

State Farm invoked the Policy's Loss Settlement appraisal provision on May 13, 2015, and appointed Bryan Scanlan as an appraiser. Plaintiffs objected to an appraisal and refused to participate in the appraisal process. State Farm filed a Motion to Compel Appraisal (Doc. 46), which this court granted on February 22, 2016 (Doc. 91). Plaintiffs designated Shannon Cook as an appraiser on February 23, 2016, and the appraisers subsequently agreed to select Mike Fried to serve as umpire. On April 29, 2016, State Farm received an appraisal award signed by appraiser Scanlan and umpire Fried, setting the amount of **[*4]** loss to Plaintiffs' home at $9,827.95, on a replacement cost basis, and $9,040.37 on an actual cash value basis. On May 4, 2016, State Farm tendered to Plaintiff Santiago Cano, through his counsel, payment of the award (minus prior payments, depreciation, and the aforementioned deductible) in the amount of $6,725.11. Defendants filed the present motion for summary judgment on July 1, 2016.

Defendants contend that they are entitled to summary judgment because, as a matter of law, their timely payment of the appraisal award estops Plaintiffs from bringing other extra-contractual claims. Plaintiffs counter that Defendants are not entitled to summary judgment because Plaintiffs' breach of contract claim is not based solely on the underpayment of damages. Instead, Plaintiffs contend that their breach of contract claim arises from State Farm's failure to include all covered damages in its estimate and payment, and for its specific denial of coverage for damages that were covered by the Policy.

II. Motion for Summary Judgment Standard

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment **[*5]** as a matter of law. *Fed. R. Civ. P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998)*. A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. When ruling on a motion for summary judgment, the court is required to view all facts and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *Boudreaux v. Swift Transp. Co., Inc., 402 F.3d 536, 540 (5th Cir. 2005)*. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*; *Anderson, 477 U.S. at 254-55*.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine dispute of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. On the other hand, "if the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986)* (emphasis in original). "[When] the record taken as a whole could not lead a rational trier of fact to find for the nonmoving **[*6]** party, there is no 'genuine [dispute] for trial.'" *Matsushita, 475 U.S. at 587*. (citation omitted). Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996)*. Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir. 1994)*.

The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim. *Ragas, 136 F.3d at 458*. *Rule 56* does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*; *see also Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992)*. "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson, 477 U.S. at 248*. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. **[*7]** *Celotex, 477 U.S. at 322-23*.

III. Analysis

A. Summary of the Parties' Contentions

Defendants contend that when an insurer pays an appraisal

award in compliance with the parties' contractual agreement, as a matter of law, the insured is estopped from bringing a breach of contract claim against the insurer. According to Defendants, "it is well settled that '[a]n insurer does not breach the insurance contract where, as here, it pays all damages determined by the appraisal.'" Br. in Supp. of Defs.' Mot. for Summ. J. 9, 5 (hereinafter, "Defs.' Br.") (quoting *Scalise v. Allstate Texas Lloyds, No. 7:13-CV-178, 2013 U.S. Dist. LEXIS 179692, 13 WL 6835248, at *4 (S.D. Tex. Dec. 20, 2013))*. Defendants, therefore, contend that Plaintiffs are estopped from bringing their breach of contract claim. Further, Defendants contend that absent a breach of contract, Plaintiffs cannot maintain their extra-contractual claims without proof of an independent injury.

Moreover, Defendants contend that there are no factual issues precluding summary judgment because Plaintiffs can recover their replacement cost benefits by repairing the damages to their property. The Policy states, "'until actual repair or replacement is completed, [State Farm] will pay only the actual cash value at the time of the loss' and 'when the repair **[*8]** is *actually completed*, [State Farm] will pay the covered additional amount [the insured] actually and necessarily spend to repair or replace the damaged part of [their] property.'" Defs.' Br. 11-12 (quoting App. in Supp. of Defs.' Mot. for Summ. J. 20 (hereinafter, "Defs.' App.")). Defendants contend Plaintiffs cannot sue for damages under *Chapter 542 of the Texas Insurance* Code because "full and timely payment of the appraisal award 'precludes an award of penalties under the Insurance Code's prompt payment provisions as a matter of law.'" *Id.* (quoting *In re Slavonic Mut. Fire Ins. Ass'n, 308 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2010, no pet.))*. As the amount of loss has been determined by appraisal and paid by State Farm, and Plaintiffs have not alleged any facts that would give rise to an independent injury claim, Defendants contend Plaintiffs can no longer, as a matter of law, maintain their breach of contract or any of their extra-contractual claims.

In response, Plaintiffs counter that their breach of contract claim is not based solely on the underpayment of damages and, as such, should not be dismissed. Rather, Plaintiffs contend their breach of contract claim is for State Farm's "failure to include in its estimate and payment all covered damages and for its specific **[*9]** denial of coverage for damages that, as the appraisal award later showed, were indeed covered by Plaintiff[s'] Policy." Pls.' Santiago Cano and Marilu Cano's Br. in Supp. of Their Resp. to Defs. State Farm Lloyds[] and Ricardo Alvarado's Mot. for Summ. J. 8-9, 15 (Hereinafter, "Pls.' Br."). Further, Plaintiffs contend that Defendants misinterpret the applicable case law. According to Plaintiffs, even if the breach of contract claim is dismissed, they can still maintain their extra-contractual claims. Plaintiffs contend that proof of an independent injury is necessary to prove bad faith only when a denied claim is not covered under an insurance policy, which they contend is not the case here.

Moreover, Plaintiffs contend that they are not precluded from maintaining their claim for violations of *Chapter 542 of the Texas Insurance Code* because "State Farm failed to pay the full amount of Plaintiff[s'] claim before closing the claim, and it took an appraisal award to get State Farm to comply with its duty to issue proper and adequate payment and pay at least the actual value of Plaintiff[s'] loss." *Id.* 20, 37. Thus, even after payment of the appraisal award, Plaintiffs contend they can proceed, and **[*10]** prevail, on all of their extra-contractual claims.

Defendants counter that "Plaintiffs attempt to eschew long-established case law regarding the effect of payment of an appraisal award by asserting that State Farm had 'denied coverage' for certain items in the appraisal award that were not contained in State Farm's estimate." Defs.' Reply Br. in Supp. of Mot. for Summ. J. 2 (hereinafter, "Defs.' Reply"). Further, Defendants argue that Plaintiffs rely on non-appraisal award cases in support of their argument "that they are not required to show an independent injury because their claim was covered and the claims in other cases dealing with this issue were not covered." *Id.* 4. Defendants also contend that "Texas courts have constantly held that full and timely payment of an appraisal award under the policy precludes an award of penalties under the Insurance Code's prompt payment provisions [(*Chapter 542*)] as a matter of law." *Id.* 7 (citation and internal quotation marks omitted). Additionally, Defendants contend Plaintiffs rely on an "outlier" case in support of their prompt payment claim. *Id.* 8, 10. Finally, Defendants argue that Plaintiffs do not contest dismissal of, and have not raised a fact issue on, **[*11]** their fraud claims and, thus, at a minimum, these claims should be dismissed. *Id.* 10, 13.

B. Discussion

1. Breach of Contract

Under Texas law, "when an insurer makes timely payment of a binding and enforceable appraisal award, and the insured accepts the payment, the insured is 'estopped by the appraisal award from maintaining a breach of contract claim against [the insurer].'" *Blum's Furniture Co. v. Certain Underwriters at Lloyds London, 459 F. App'x 366, 368 (5th Cir. 2012)* (per curiam) (quoting *Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 787 (Tex. App.—Houston [14th Dist.] 2004, no pet.))*. Estoppel is an affirmative defense that applies to a contract claim when a party "accepts a benefit voluntarily and with knowledge of all material facts." *Richardson v. Allstate*

Texas Lloyd's, 235 S.W.3d 863, 865 (Tex. App.—Dallas 2007, no pet.). As such, to establish estoppel, Defendants, as the summary judgment movants, must establish: (1) the existence of a binding and enforceable appraisal award; (2) State Farm's payment of the award in a timely manner; and (3) Plaintiffs' acceptance of the payment. Blum's Furniture Co., 459 F. App'x at 368 (citing Franco, 154 S.W.3d at 787).

Plaintiffs devote little time, if any, briefing the issue of whether Defendants met their burden with regard to their estoppel defense. The undisputed facts support that Defendants have established each element of their estoppel defense. The parties agree to the following facts: (1) on April 29, 2016, an appraisal award was issued; (2) on May 4, 2016, within in four business **[*12]** days, State Farm paid the award; and (3) Plaintiffs accepted the payment. These facts show that the elements for estoppel have been established, and Plaintiffs present no evidence to refute Defendants' affirmative defense of estoppel.

Instead of addressing whether Plaintiffs have satisfied the requirements for estoppel, Plaintiffs contend as follows:

> While the payment of the appraisal award may estop Plaintiffs from contesting the issue of the amount of the damages for which State Farm admitted liability initially, it also shows that during the settlement of the claim Defendants denied coverage for damages that were clearly caused by the storm and thus, should have been covered. Therefore, Plaintiffs' breach of contract claim is based on both the failure to properly estimate and pay the amount of the damages Defendants admit were covered but also the denial of coverage when coverage for the other damages clearly should have been extended.

Pls.' Br. 9 (footnote omitted). Plaintiffs are incorrect. That an appraisal award is greater than the initial estimate payment may not be used as evidence of a breach of contract, especially where the underlying contract provides for resolution through **[*13]** appraisal. *See* Blum's Furniture Co., 459 F. App'x at 368-69 (citing Breshears v. State Farm Lloyds, 155 S.W.3d 340, 343 (Tex. App.—Corpus Christi—Edinburg 2004, no pet.) (mem. op.)); *see also* Garcia v. Lloyds, 514 S.W.3d 257, 273 (Tex. App.—San Antonio 2016, no pet. h.) ("The reason for this defense is to prevent the insured from taking advantage of the binding appraisal process to determine the value of its claim and then, after the insurer fully pays the appraisal award, suing the insurer for its initial failure to pay."). Thus, under Texas law, that Defendants' initial estimate did not contain items included in the appraisal cannot serve as the basis for a breach of contract claim.

As Defendants have established each of the elements of their estoppel defense, there is no genuine dispute of material fact regarding this affirmative defense, and Defendants are entitled to judgment as a matter of law. Accordingly, the court will grant summary judgment in favor of Defendants on Plaintiffs' breach of contract claim.

2. Extra-Contractual Claims

Under Texas law, "[a]n insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims." Graber v. State Farm Lloyds, 2015 U.S. Dist. LEXIS 77361, 2015 WL 3755030, at *8 (N.D. Tex. June 15, 2015) (Boyle, J.) (citing Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 340 (Tex. 1995)); *see also* Med. Care Am., Inc. v. Nat'l Union Fire Ins. Co., 341 F.3d 415, 425 (5th Cir. 2003). "An insurer breaches its duty of good faith and fair dealing 'if the insurer knew or should have known that it was reasonably clear that the claim was covered,' but nevertheless denied or unreasonably delayed **[*14]** paying it. Graber, 2015 U.S. Dist. LEXIS 77361, 2015 WL 3755030, at *8 (quoting Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 55-56 (Tex. 1997)). "[E]xtra-contractual tort claims pursuant to the Insurance Code [] require the same predicate for recovery as a bad faith claim under a good faith and fair dealing violation." National Sec. Fire & Cas. Co. v. Hurst, 2017 Tex. App. LEXIS 4664, 2017 WL 2258243, at *6 (Tex. App.—Houston [14th Dist.] May 23, 2017) (quoting Broxterman v. State Farm Lloyds, No. 4:14-CV-661, 2016 U.S. Dist. LEXIS 13305, 2016 WL 482882, at *2 (E.D. Tex. Feb. 4, 2016)). "When an insured joins claims under the Texas Insurance Code [] with a bad faith claim, all asserting a wrongful denial of policy benefits, if there is no merit to the bad faith claim, there can be no liability on either statutory claim." *Id.* (*quoting* O'Quinn v. Gen. Star Indem. Co., No. 1:13-CV-471, 2014 U.S. Dist. LEXIS 107484, 2014 WL 3974315, at *8 (E.D. Tex. Aug. 5, 2014)). The court, therefore, examines Plaintiffs' extra-contractual claims for violation of Chapter 541 of the Texas Insurance Code and breach of the common law duty of good faith and fair dealing simultaneously.

Plaintiffs' and Defendants' positions on the ability to maintain extra-contractual claims if the related breach of contract claim fails are based on a misunderstanding of Texas law. While Plaintiffs cite several cases in support of their position, these cases are not on point and are easily distinguishable.[1]

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[1] Church on the Rock N. v. Church Mut. Ins., Co., No. 3:10-CV-0975-L, 2013 U.S. Dist. LEXIS 17849, 2013 WL 497879, at *9 (N.D. Tex. Feb. 11, 2013) (Lindsay, J.) (This case is distinguishable because a fact issue existed on the breach of contract and extra-contractual claims.); USAA Texas Lloyd's Co. v. Menchaca, No. 13-13-00046-CV, 2014 Tex. App. LEXIS 8250, 2014 WL 3804602, at *5-6 (Tex. App. July 31, 2014), *rev'd sub nom.* USAA Texas Lloyds Co. v. Menchaca, No. 14-0721, 2017 Tex. LEXIS 361, 2017 WL

Conversely, Defendants read Texas law too narrowly. Regardless, the parties misunderstanding **[*15]** may in part be due to the "confusing nature of [Texas Supreme Court] precedent." *USAA Tex. Lloyds Co. v. Menchaca, No. 14-0721, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *3 (Tex. Apr. 7, 2017)*.

In *Menchaca*, the Texas Supreme Court cleaned up the confusion caused by two of its decisions: *Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 191 (Tex. 1998)*; and *Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988)*. Rather than engage in a detailed explanation concerning this confusion, the court simply quotes the summary of Texas Supreme Court in *Menchaca*:

> We clarify today that an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits. An insured who establishes a right to receive benefits under the policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits. And an insured can recover benefits as actual damages under the Insurance Code even if the insured has no contractual right to those benefits if the insurer's conduct caused the insured to lose that right. If an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the insured is not entitled to receive **[*16]** benefits under the policy. But if the policy does entitle the insured to benefits, the insurer's statutory violation does not permit the insured to recover any actual damages beyond those policy benefits unless the violation causes an injury that is independent from the loss of the benefits. Finally, an insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.

*Menchaca, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *12*.

It is undisputed that Plaintiffs had a right to receive benefits under the insurance policy, as Defendants conceded this point and paid the appraisal award. Recovery of extra-contractual damages that exceed policy benefits requires that the statutory violation or bad faith cause an injury that is independent from the loss of benefits. *Hurst, 2017 Tex. App. LEXIS 4664, 2017 WL 2258243, at *6* (citing *Menchaca, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *11-12)*. Although *USAA Texas Lloyds Co. v. Menchaca* is not a case involving payment of an appraisal award, the Texas Supreme Court used it to "provide clarity regarding the relationship between claims for an insurance policy breach and Insurance Code violations." *Menchaca, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *3*. In *Menchaca*, the court stated that "a successful independent-injury claim would be rare, **[*17]** and we in fact have yet to encounter one." *2017 Tex. LEXIS 361, [WL] at *12* (citing *Mid—Continent Cas. Co. v. Eland Energy, Inc., 709 F.3d 515, 521 (5th Cir. 2013)*). The *Menchaca* court, however, recognized that "[t]his is likely because the Insurance Code offers procedural protections against misconduct likely to lead to an improper denial of benefits and little else." *Id.* "The [*Menchaca*] court acknowledged that it has further limited the natural range of injury by insisting that an "independent injury" *may not* "flow" or "stem" from denial of policy benefits." *Hurst, 2017 Tex. App. LEXIS 4664, 2017 WL 2258243, at *6* (citing *Menchaca, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *12*) (emphasis added).

Plaintiffs have not alleged, or even raised a genuine dispute of material fact, that any independent damages exist. The only "extreme act" Plaintiffs reference is that "Defendants' conduct during the investigation of the loss was extremely unreasonable and egregious." Pls.' Brief 18, 34.[2]

Plaintiffs' statement, however, does not constitute competent summary judgment. Thus, Plaintiffs have not set forth summary judgment evidence to raise a genuine dispute of material fact that they suffered an independent injury sufficient to support their claim of bad faith. As no genuine dispute of material fact exists that Plaintiffs suffered an independent injury, Defendants are entitled to judgment as a matter of law on Plaintiffs' **[*18]** extra-contractual tort claims pursuant to the Insurance Code and bad faith claim under a good faith and fair dealing violation. The court will grant summary judgment in favor of Defendants on Plaintiffs' extra-contractual claims for violation of *Chapter 541 of the Texas Insurance Code* and breach of the common law duty of good faith and fair dealing.

3. Chapter 542 of the Texas Insurance Code

The *Texas Prompt Payment of Claims Act ("TPPCA")* requires insurers to pay claims within 60 days of receiving necessary documents from the insured. *Tex. Ins. Code §*

1311752 (Tex. Apr. 7, 2017); *United Nat'l Co. v. AMJ Ins., LLC, 447 S.W.3d 1, 11-12 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd)* (This case did not involve an appraisal, and the insured pled and proved breach of contract by the insurer.).

[2] The court notes that Plaintiffs' Original Petition uses more subdued language to describe Defendants' conduct. It alleges that "Defendant Alvarado was improperly trained to handle claims of this nature and performed an unreasonable investigation of Plaintiffs' damages." Pls.' Original Pet. ¶ 33.

542.058. Plaintiffs argue under that they are entitled to damages under the TPPCA for Defendants' delay in payment between the initial payments and the payment of the appraisal award. Plaintiffs' TPPCA claim fails as a matter of law because "[a] plaintiff may not seek *Chapter 542* damages for any delay in payment between an initial payment and the insurer's timely payment of an appraisal award." *Quibodeaux v. Nautilus Ins. Co., 655 F. App'x 984, 988 (5th Cir. 2016)*; *see also In re Slavonic Mut. Fire Ins. Ass'n, 308 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding)*. As no genuine dispute of material fact exists that Plaintiffs cannot bring a claim against Defendants under the TPPCA for a delay between the initial payment and the payment of an appraisal award, Defendants are entitled to judgment **[*19]** as a matter of law on Plaintiffs' TPPCA claim. The court, therefore, will grant summary judgment in favor of Defendants on Plaintiffs' TPPCA claim.

4. Fraud and Conspiracy to Commit Fraud

Plaintiffs fail to respond to Defendants' motion regarding their fraud and conspiracy to commit fraud claims. As Plaintiffs have failed to respond and brief these claims, the court treats their fraud and conspiracy-to-commit-fraud claims as abandoned or waived, and they are no longer before the court. *Delaval v. PTech Drilling Tubulars, L.L.C., 824 F.3d 476, 479 n.1 (5th Cir. 2016)*

IV. Conclusion

For the reasons stated herein, the court determines that Plaintiffs raise no genuine disputes of material fact as to their breach of contract; violations of *Chapters 541* and *542 of the Texas Insurance Code*; and breach of the common law duty of good faith and fair dealing. As no genuine disputes of material fact exist with respect to these claims, Defendants are entitled to summary judgment as a matter of law. Additionally, the court determines that Plaintiffs' have abandoned or waived their fraud and conspiracy-to-commit-fraud claims, as they failed to brief these claims. Accordingly, the court **grants** Defendants State Farm Lloyds and Ricardo Alvarado's Motion for Summary Judgment and **dismisses [*20] with prejudice** this action. The court will issue a judgment by separate document in accordance with *Federal Rule of Civil Procedure 58*.

It is so ordered this 2nd day of August, 2017.

/s/ Sam A. Lindsay

Sam A. Lindsay

United States District Judge

JUDGMENT

This court issues this judgment pursuant to its Memorandum Opinion and Order issued earlier today. It is therefore **ordered, adjudged**, and **decreed** that Plaintiffs Santiago Cano and Marilu Cano ("Plaintiffs") take nothing against Defendants State Farm Lloyds and Ricardo Alvarado ("Defendants"); that this action against Defendants is hereby **dismissed with prejudice**; that all relief requested by Plaintiffs is **denied**; and that all allowable and reasonable costs of court are taxed against Plaintiffs.

Signed this 2nd day of August, 2017.

/s/ Sam A. Lindsay

Sam A. Lindsay

United States District Judge

EXHIBIT B

Neutral
As of: August 28, 2017 4:54 PM Z

Floyd Circle Partners, LLC v. Republic Lloyds

Court of Appeals of Texas, Fifth District, Dallas

July 24, 2017, Opinion Filed

No. 05-16-00224-CV

Reporter
2017 Tex. App. LEXIS 6906 *; 2017 WL 3124469

FLOYD CIRCLE PARTNERS, LLC, Appellant v. REPUBLIC LLOYDS, Appellee

Prior History: **[*1]** On Appeal from the County Court at Law No. 5, Dallas County, Texas. Trial Court Cause No. CC-16-00806-E.

In re Floyd Circle Partners, LLC, 2015 Tex. App. LEXIS 8994 (Tex. App. Dallas, Aug. 26, 2015)

Core Terms

appraisal, appraisal award, trial court, summary judgment, summary judgment motion, discovery, depositions, continuance, amount of loss, insured, pet, hail, protective order, contends, issue of fact, damages, days, granting summary judgment, asserts, umpire, roof, conduct discovery, properties, buildings, notice, repair, corporate representative, contract claim, no evidence, nonmovant

Case Summary

Overview
HOLDINGS: [1]-The insured's motion for continuance of the insurer's amended motion for summary judgment was not verified and even if it was properly verified or supported by affidavit, the denial of the second continuance was proper because the insured's assertion that the trial court refused the insurer all discovery was unsupported by the record; [2]-For purposes of reviewing the merits of the summary judgment, the appellate court considered all of the insurer's summary judgment evidence; [3]-The insurer showed that the appraisal process was invoked regarding the insured's claim, two appraisers agreed on the amount of loss, and the insurer timely tendered payment of the award; [4]-The insured made no mention of its insurance code claims and did not provide any summary judgment evidence of an independent injury.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN1[] **Standards of Review, Abuse of Discretion**

The appellate court reviews a trial court's decision to deny a motion for continuance of a summary judgment hearing seeking additional time to conduct discovery for an abuse of discretion. When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. The affidavit must describe the evidence sought, explain its materiality, and set forth facts showing the due diligence used to obtain the evidence prior to the hearing. In considering whether the trial court abused its discretion, the appellate court considers various factors, including the length of time the case had been on file before the hearing, the materiality of the discovery sought, whether the party seeking the continuance exercised due diligence in obtaining the discovery, and what the party expected to prove.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

Civil Procedure > Pretrial Matters > Continuances

HN2[] Standards of Review, Abuse of Discretion

The affidavit does not describe the evidence sought, explain its materiality, or set forth facts showing the due diligence used to obtain the evidence prior to the hearing. If a motion for continuance is not verified or supported by affidavit, we will presume the trial court did not abuse its discretion in denying the motion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN3[] Standards of Review, Abuse of Discretion

A trial court has broad discretion in matters of discovery.

Civil Procedure > Judgments > Summary Judgment > Motions for Summary Judgment

HN4[] Summary Judgment, Motions for Summary Judgment

The granting of a motion for summary judgment does not necessarily provide an implicit ruling that either sustains or overrules objections to the summary judgment evidence. For there to be an implicit ruling, there must be some indication that the trial court ruled on the objections in the record or in the summary judgment itself, other than the mere granting of summary judgment.

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN5[] Evidentiary Considerations, Absence of Essential Element

The appellate court applies well-known standards in its review of traditional summary judgment motions. The movant has the burden to demonstrate that no genuine issue of fact exists and that it is entitled to judgment as a matter of law. The appellate court considers the evidence in the light most favorable to the nonmovant. It credits evidence favorable to the nonmovant if a reasonable factfinder could, and it disregards evidence contrary to the nonmovant unless a reasonable factfinder could not. A defendant may obtain summary judgment by negating one of the elements of the plaintiff's cause of action or by conclusively proving all of the elements of an affirmative defense. If the defendant produces evidence demonstrating summary judgment is proper, the burden shifts to the plaintiff to present evidence creating a fact issue. Within this framework, the appellate court reviews the trial court's summary judgment de novo.

Insurance Law > Claim, Contract & Practice Issues > Appraisals

HN6[] Claim, Contract & Practice Issues, Appraisals

Because courts seek to implement the intention of the parties as expressed in the language of a contract, it has long been the rule in Texas that an appraisal award made pursuant to the provisions of an insurance contract is binding and enforceable. The contractual appraisal process settles the issue of damages, leaving only the question of liability for the court. Tender of the full amount owed under the award estops the insured from bringing a breach of contract claim against the insurer. By paying the full amount, the insurer complies with every requirement of the contract and cannot be found to be in breach.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Insurance Law > Claim, Contract & Practice Issues > Appraisals

HN7[] **Burdens of Proof, Nonmovant Persuasion & Proof**

An appraisal award is binding and enforceable unless the insured proves that the award should be set aside. Texas courts recognize three situations in which an appraisal award may be disregarded: (1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract. Every reasonable presumption will be indulged to sustain an appraisal award, and the burden of proof is on the party seeking to avoid the award. When reviewing a summary judgment, however, this rule must yield to the degree its application conflicts with the presumptions required to be made in favor of the summary judgment nonmovant.

Insurance Law > Claim, Contract & Practice Issues > Appraisals

HN8[] **Claim, Contract & Practice Issues, Appraisals**

Every reasonable presumption will be indulged to sustain an appraisal award.

Insurance Law > Claim, Contract & Practice Issues > Appraisals

HN9[] **Claim, Contract & Practice Issues, Appraisals**

An appraisal is for damages caused by a specific occurrence, not every repair a home might need. Any appraisal necessarily includes some causation element, because setting the amount of loss requires appraisers to separate damages for which coverage is claimed from damages caused by everything else.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Elements of Bad Faith

HN10[] **Bad Faith & Extracontractual Liability, Elements of Bad Faith**

Where a plaintiff's claim for breach of an insurance contract fails, to prevail on an action for violations of chapter 541 of the insurance code, the plaintiff must show either that the insured failed to timely investigate the claim or that the insurer committed an extreme act that caused an injury independent of the policy claim.

Counsel: For Floyd Circle Partners, LLC, Appellant: Evan Lane (Van) Shaw, Jennifer Weber Johnson, Retained Attorneys, Mark A. Ticer, Lead Counsel.

For Republic Lloyds, Appellee: Daniel Buechler, Travis Brown, Retained Attorneys, Michael A. Yanof, Lead Counsel.

Judges: Before Justices Bridges, Myers, and Stoddart. Opinion by Justice Stoddart.

Opinion by: Craig Stoddart

Opinion

MEMORANDUM OPINION

Opinion by Justice Stoddart

In this case involving an appraisal award under an insurance policy, plaintiff Floyd Circle Partners, LLC (FCP) appeals a summary judgment in favor of defendant Republic Lloyds. In two issues, FCP contends the trial court (1) erred in granting summary judgment, and (2) abused its discretion in denying FCP a continuance to allow it to obtain discovery to respond to the Republic's amended summary judgment motion. We affirm the trial court's judgment.

BACKGROUND

FCP owns four commercial buildings on Floyd Circle in Dallas. The property was insured under a policy issued by Republic effective from June 1, 2012 to June 1, 2013. In June 2012, FCP made a claim for damage to the properties caused by a storm.[1]

In September 2012, Retha Welch, a claims representative for Republic, informed FCP in writing that Republic completed its investigation of the claim. Welch's letter stated that an adjustor inspected the property and prepared an estimate, and the letter specified **[*2]** the amount of the loss. The letter further informed FCP that no payment would be made because the amount of the loss was less than the deductible. In response, Stephen Brooks, a representative of FCP, sent Welch written demand for $362,521.22 for hail damage to the

[1] There is no written documentation of the claim in the record.

properties. Brooks's letter stated that, in the event Republic did not make the payment within fourteen days, the letter was to be considered a formal demand to exercise the appraisal clause in the insurance contract. Brooks provided the name and contact information for FCP's chosen appraiser.

The policy contained the following provision regarding appraisal:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser and notify the other of the appraiser selected within 20 days of such demand. The two appraisers will select an umpire. If they cannot agree within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction. Each appraiser will state the amount of loss. If they fail to agree, they will submit their differences to **[*3]** the umpire. A decision agreed to by any two will be binding as to the amount of loss. Each party will:
> a Pay its chosen appraiser; and
> b. Bear the other expenses of the appraisal and umpire equally.
> If there is an appraisal:
> a You will still retain your right to bring a leg action against us, subject to the provisions of the Legal Action Against Us Commercial Property Condition; and
> b. We will still retain our right to deny the claim.

The policy further provided that Republic would pay for covered loss or damage within five business days after an appraisal award was made.

Republic did not meet FCP's demand for payment and selected its own appraiser. The two appraisers were unable to agree on an umpire, so in early June 2014, the judge of the 134th District Court appointed one at Republic's request.

FCP filed this lawsuit three days after an umpire was appointed. In its live pleading, FCP brought claims against Republic for breach of contract, negligence, negligent misrepresentation, and violations of chapter 541 of the Texas Insurance Code. Republic answered with a general denial. It later filed a motion to compel appraisal and plea in abatement, asserting that the appraisal process was a **[*4]** condition precedent to filing suit. FCP opposed the motion to compel appraisal for various reasons.

On September 10, 2014, the trial court granted Republic's motion to compel appraisal and abated the case for sixty days in order for the appraisal to be carried out. The order noted the parties agreed in open court to restart the appraisal process by appointing new appraisers and selecting an umpire.

Republic appointed Justin Whedbee as its new appraiser, and FCP appointed Jim Koontz. On February 25, 2015, Whedbee and Koontz signed an appraisal award. Although the award names an umpire, Whedbee and Koontz agreed on the amount of loss, so the umpire was not needed and did not sign the award. The award references the addresses of the properties involved and a claim number. It states, "We, the appraisers in the above captioned matter having carefully reviewed all information, have determined the award for all measurement issues submitted in this matter pursuant to the terms and conditions of the Appraisal Protocol." It describes the award as "The Actual Cash Value of any such hail damage to the roof that resulted from the Hail Storm occurring during the period of coverage provided by the **[*5]** Policy. This is a roof repair of all damaged areas." A total of $73,000 was awarded for two of the four properties: $30,535.95 for 13438 Floyd Circle and $42,464.05 for 13535 Floyd Circle. The award indicates the other two insured properties did not sustain damage.

After Republic sent payment of the award to FCP, it filed a traditional motion for summary judgment. Republic asserted that it was entitled to judgment as a matter of law because its payment of the appraisal award precludes FCP's breach of contract claim. Republic also sought summary judgment on FCP's extra-contractual claims. Republic attached as summary judgment evidence various documents, including the insurance policy, the appraisal award, a letter from Chuck Street to FCP's attorney, and copies of two checks payable to FCP. In Street's letter, dated March 4, 2015, Street, Republic's senior claims representative, informed counsel that Republic was enclosing two checks totaling $59,314.50 in payment of the appraisal award less the deductible for each location. Republic also relied on Street's affidavit, which included a statement that on March 24, 2015, he sent a letter to FCP's counsel enclosing full payment of the appraisal **[*6]** award.

Thereafter, FCP served notice of its intention to depose Welch, Street, and "Person or Persons with REPUBLIC LLOYDS with the most knowledge of the claims made the basis of this suit" on April 21, 2015. Republic filed a "motion to quash depositions and motion for protective order." At the same time, FCP moved for continuance of Republic's motion for summary judgment until such time as FCP has an adequate time to conduct discovery.

The record reflects that the trial court held a hearing on May 1, 2015, but we do not have a record of it. In letter to the court following the hearing, FCP argued Republic's summary judgment motion must be denied due to Street's statement in his affidavit that he paid the appraisal award on March 24, 2015, more than five days after the appraisal award. Republic responded with a letter informing the court that March 24,

2015, was a typographical error in the affidavit. The correct date was March 4, 2015, the date on the letter itself and on the checks tendered to FCP. The trial court notified the parties that the matters heard in the May 1 hearing remained under advisement. A few days later, the trial court granted FCP's motion for continuance. Its order **[*7]** stated that Republic could reset its motion for summary judgment after July 9, 2015.

The trial court later ruled on Republic's motion to quash depositions and motion for protective order in a "Discovery/Protective Order." In its order, the court found that Republic's motion objected to FCP's request to "conduct depositions of Retha Welch, Chuck Street, and Republic's corporate representative." The court granted Republic's motion, subject to an exception giving FCP permission to conduct discovery related to the issue of when Republic made its payment for the appraisal award, "[t]o the extent [FCP] has a good faith basis for questioning when Republic Lloyds made payment for the appraisal award."

In June, FCP again noticed its intent to depose Street and also "Person or Persons with REPUBLIC LLOYDS with the most knowledge of Republic Lloyd's defenses raised in its latest summary judgment motion and the 'appraisal' that Republic relies upon." Republic moved to quash the depositions. It asserted the notices exceeded the permissible scope of discovery set out in the court's protective order prohibiting FCP from deposing Street or Republic's corporate representative on any issue except when payment **[*8]** of the appraisal award was made. Republic also objected to the time and place of the depositions. Thus, the depositions were automatically quashed pending a hearing. *See* Tex. R. Civ. P. 199.4. On July 13, 2015, the trial court granted Republic's motion to quash the deposition notices for Street and Republic's corporate representative.

At the expiration of the time granted for continuance, Republic filed an amended no evidence and traditional motion for summary judgment. As traditional grounds for summary judgment, Republic asserted the evidence conclusively established that the appraisal award is enforceable as a matter of law and that Republic's payment of the award satisfies its contractual payment obligations as a matter of law. Republic also moved for summary judgment on FCP's extra-contractual claims on both traditional and no-evidence grounds. Republic attached various documents to its amended motion, including a new affidavit from Street and one from its appraiser Whedbee. This time, Street's affidavit stated he sent the letter to FCP's counsel with payment of the award on March 4, 2015.

On August 7, 2015, FCP moved to continue Republic's amended motion for summary judgment to allow FCP adequate time **[*9]** to conduct discovery. FCP asserted it was precluded from any discovery following the appraisal award. FCP also filed a response to the amended motion for summary judgment.

One week later, the trial court held a hearing on FCP's motion for continuance and Republic's amended summary judgment motion.[2]

The trial court took the motions under advisement. On August 20, 2015, the trial court granted Republic's amended no evidence and traditional motion for summary judgment and dismissed FCP's causes of action against Republic with prejudice. The trial court granted the motion without specifying the grounds on which it was granted. Republic later moved to sever FCP's claims against it from claims FCP brought against its insurance agent. After the court severed FCP's claims against Republic into a separate cause, this appeal followed.

DISCUSSION

1. Denial of Motion for Continuance of Amended Motion for Summary Judgment

We begin with FCP's second issue, in which it contends the trial court abused its discretion in refusing to grant a continuance on Republic's amended motion for summary judgment. FCP asserts that because the court did not allow the continuance, FCP could not obtain meaningful and material **[*10]** discovery to defeat the summary judgment motion. FCP maintains the court's actions prevented it from obtaining discovery that would allow it to attack the appraisal award. FCP complains it was not allowed to depose Street and Whedbee for that purpose.

HN1[] We review a trial court's decision to deny a motion for continuance of a summary judgment hearing seeking additional time to conduct discovery for an abuse of discretion. *Hill v. Hill, 460 S.W.3d 751, 761 (Tex. App.—Dallas 2015, pet. denied)*. When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *Tenneco Inc. v. Enter. Prods. Co., 925*

[2] Two days before the summary judgment hearing, FCP filed a petition for writ of mandamus in this Court asking us to vacate the trial court's Discovery/Protective Order and order quashing the depositions of Street and Republic's corporate representative. We denied the petition because FCP failed to establish its right to mandamus relief. *In re Floyd Circle Partners, No. 05-15-00968-CV, 2015 Tex. App. LEXIS 8994, 2015 WL 5029248 (Tex. App.—Dallas Aug. 26, 2015, orig. proceeding)* (mem. op.).

S.W.2d 640, 647 (Tex. 1996); Cooper v. Circle Ten Council Boy Scouts of Am., 254 S.W.3d 689, 696 (Tex. App.—Dallas 2008, no pet.); *see* Tex. R. Civ. P. 166a(g), 251, 252. The affidavit must describe the evidence sought, explain its materiality, and set forth facts showing the due diligence used to obtain the evidence prior to the hearing. Cooper, 254 S.W.3d at 696. In considering whether the trial court abused its discretion, we consider various factors, including the length of time the case had been on file before the hearing, the materiality of the discovery sought, whether the party seeking the continuance exercised due diligence in obtaining the discovery, and what the party expected to prove. Hill, 460 S.W.3d at 761; Cooper, 254 S.W.3d at 696.

FCP's motion for continuance **[*11]** of Republic's amended motion for summary judgment was not verified. Although the motion was supported by the April 24, 2015 affidavit of FCP's counsel, that affidavit — made prior to Republic's amended summary judgment motion and identical to the affidavit supporting FCP's response to Republic's first motion for summary judgment — does not provide information relevant to FCP's need for a continuance. Instead, the affidavit primarily provides information about an evaluation of the insured properties and a report prepared by the roofing consultant hired by FCP's counsel.HN2[] The affidavit does not describe the evidence sought, explain its materiality, or set forth facts showing the due diligence used to obtain the evidence prior to the hearing. *See* Cooper, 254 S.W.3d at 696. If a motion for continuance is not verified or supported by affidavit, we will presume the trial court did not abuse its discretion in denying the motion. Moreno v. Silva, 316 S.W.3d 815, 818 (Tex. App.—Dallas 2010, pet. denied). We can overrule FCP's second issue on this basis alone.

Even if FCP's motion was properly verified or supported by affidavit, we still find no abuse of discretion in the trial court's denial of a second continuance. FCP's assertion that the trial court ref used FCP all discovery is unsupported **[*12]** by the record. After Republic filed its first motion for summary judgment, the trial court granted FCP a continuance of almost two months, from mid-May to at least July 9, 2015. During that time, the trial court issued its Discovery/Protective Order in which it quashed the depositions of Welch, Street, and Republic's corporate representative, with an exception giving FCP permission to conduct discovery related to when Republic made its payment for the appraisal award. The only discovery FCP sought during this time period was the depositions of Street and "Person and Persons . . . with the most knowledge of Republic Lloyd's defenses raised in its latest summary judgment motion and the 'appraisal' that Republic relies upon." The trial court did not allow these depositions because the notice did not limit discovery of these individuals to the narrow issue set out in its earlier order.

After Republic filed its amended motion for summary judgment, FCP moved for another continuance in early August, asserting it needed adequate time to conduct discovery. At the hearing on FCP's second motion for continuance, FCP's attorney discussed emails from Republic's attorney. Some months earlier, when **[*13]** FCP's attorney requested a deposition date for Street and the corporate representative, Republic's attorney answered, "We will be asking the court to consider our summary judgment before allowing any discovery." In July 2015, FCP's attorney informed Republic's attorney he planned to notice the deposition of Republic's appraiser, Whedbee, and asked if Republic's attorney was going to move to quash that deposition. Republic's attorney responded, "I don't control Whedbee." The court noted it put limitations on discovery from Republic, but said "the protective order I signed didn't go to Mr. Whedbee." Republic's attorney referenced his May 27, 2015 letter to FCP's counsel. In that letter, which included a proposed order on Republic's motion to quash and motion for protective order (identical to the order the court signed), counsel stated, "As you will note, the proposed Order does not pertain to discovery from the parties' appraisers." The trial judge stated it had not occurred to him that FCP took his order to mean FCP could not "do discovery of people who aren't parties to this lawsuit." The judge agreed to review his protective order to make sure it was not broader than intended. The **[*14]** judge explained that his order permitted deposition of Street on the issue of when the payment on the appraisal award was made and that "[a]ll the rest was not relevant" because Street was not there at the appraisal. The court took the request for a continuance under advisement and later denied it.

To show that it was denied all discovery, FCP relies on communications from Republic rather than actions of the trial court. FCP asserts Republic stated that its intention was to preclude all discovery and cites the above-mentioned emails between its attorney and Republic's attorney. In determining whether the trial court abused its discretion, we consider only the decisions of the trial court, not the actions or intent of counsel.

To the extent FCP complains about the trial court's two discovery orders, we find no abuse of discretion. HN3[] A trial court has broad discretion in matters of discovery. Cruz v. Schell, Beene & Vaughn, L.L.P., No. 05-01-00565-CV, 2012 Tex. App. LEXIS 6480, 2012 WL 3194074, at *5 (Tex. App.—Dallas Aug. 7, 2012, pet. denied) (mem. op.). The court's Discovery/Protective Order did not preclude FCP from all discovery. Rather, it limited the depositions of Republic's representatives to the issue of the timeliness of Republic's payment of the award. The trial court was within its discretion **[*15]** to place such limits on discovery.

During the continuance, FCP sought to take the depositions of Street and the corporate representative, but did not limit its notice to the issue set out in the protective order. FCP never noticed the deposition of Republic's appraiser Whedbee and did not take the deposition of its own appraiser, Koontz. FCP asserts that when the trial court learned at the hearing that FCP was under the apparent misapprehension that FCP could not take the appraisers' depositions, the court could have granted a brief continuance to allow Whedbee's deposition to be taken. But at the hearing FCP did not ask the judge to take this specific action based on a misunderstanding of the protective order. Under these circumstances, FCP did not exercise due diligence in obtaining the desired discovery. We cannot conclude the trial court abused its discretion in denying FCP a second continuance. We overrule FCP's second issue.

2. Granting of Summary Judgment for Republic

We now turn to FCP's first issue, in which it contends the trial court erred in granting summary judgment for Republic. As part of this issue, FCP contends the trial court should have excluded affidavits from Street **[*16]** and Whedbee because Republic did not identify them as persons with knowledge of relevant facts or as experts. Further, FCP complains of Republic's reliance on documents not produced in response to written discovery.

FCP raised these objections in its response to Republic's amended motion for summary judgment and at the hearing on the motion. The trial court did not expressly rule on FCP's objections. FCP contends that, by granting summary judgment for Republic and denying FCP a continuance, the trial court implicitly overruled the objections to the summary judgment evidence.

HN4[] The granting of a motion for summary judgment does not necessarily provide an implicit ruling that either sustains or overrules objections to the summary judgment evidence. *Bastida v. Aznaran, 444 S.W.3d 98, 104 (Tex. App.—Dallas 2014, no pet.)*; *Ennis, Inc. v. Dunbrooke Apparel Corp., 427 S.W.3d 527, 532 (Tex. App.—Dallas 2014, no pet.)*. For there to be an implicit ruling, there must be some indication that the trial court ruled on the objections in the record or in the summary judgment itself, other than the mere granting of summary judgment. *Ennis, Inc., 427 S.W.3d at 532*; *see Duncan-Hubert v. Mitchell, 310 S.W.3d 92, 100-01 (Tex. App.—Dallas 2010, pet. denied)*. Here, there is nothing in the summary judgment order, or elsewhere in the record, to indicate that the trial court overruled FCP's objections to the summary judgment evidence.

As support for the proposition that the trial court **[*17]** impliedly overruled its objections by granting summary judgment and denying the continuance, FCP relies solely on this Court's opinion in *Clement v. City of Plano, 26 S.W.3d 544 (Tex. App.—Dallas 2000, no pet.)*, *disapproved of on other grounds by Telthorster v. Tennell, 92 S.W.3d 457 (Tex. 2002)*. But *Clement* involved special exceptions, rather than objections to summary judgment evidence. In *Clement*, this Court determined that the trial court implicitly overruled the nonmovant's special exceptions to a motion for summary judgment, in which the nonmovant claimed the motion did not set out the specific grounds for summary judgment, by granting the summary judgment. *Id. at 550 n.5*. On this record, we decline to conclude that the trial court impliedly ruled on FCP's objections. *See Hewitt v. Biscaro, 353 S.W.3d 304, 307 (Tex. App.—Dallas 2011, no pet.)*. Accordingly, for purposes of reviewing the merits of the summary judgment, we consider all of Republic's summary judgment evidence.

a. Breach of Contract Claim

We first consider the merits of Republic's traditional motion for summary judgment on FCP's claim for breach of the insurance contract. ***HN5***[] We apply well-known standards in our review of traditional summary judgment motions. *See J&K Tile Co. v. Aramsco Inc., No. 05-15-01065-CV, 2016 Tex. App. LEXIS 11942, 2016 WL 6835717, at *1 (Tex. App.—Dallas Nov. 3, 2016, no pet.)* (mem. op.) (citing *Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548 (Tex. 1985)*); *see also Tex. R. Civ. P. 166a* The movant has the burden to demonstrate that no genuine issue of fact exists and that it **[*18]** is entitled to judgment as a matter of law. *J & K Tile, 2016 Tex. App. LEXIS 11942, 2016 WL 6835717, at *1*. We consider the evidence in the light most favorable to the nonmovant. *Id.* We credit evidence favorable to the nonmovant if a reasonable factfinder could, and we disregard evidence contrary to the nonmovant unless a reasonable factfinder could not. *Id.* A defendant may obtain summary judgment by negating one of the elements of the plaintiff's cause of action or by conclusively proving all of the elements of an affirmative defense. *Stanfield v. Neubaum, 494 S.W.3d 90, 96 (Tex. 2016)*. If the defendant produces evidence demonstrating summary judgment is proper, the burden shifts to the plaintiff to present evidence creating a fact issue. *Id. at 97*. Within this framework, we review the trial court's summary judgment de novo. *J & K Tile, 2016 Tex. App. LEXIS 11942, 2016 WL 6835717, at *1*.

HN6[] Because courts seek to implement the intention of the parties as expressed in the language of a contract, it has long been the rule in Texas that an appraisal award made pursuant to the provisions of an insurance contract is binding and enforceable. *Richardson v. Allstate Tex. Lloyd's No. 05-06-00100-CV, 2007 Tex. App. LEXIS 5384, 2007 WL*

*1990387, at *3 (Tex. App.—Dallas July 11, 2007, no pet.)* (mem. op.); *see Garcia v. State Farm Lloyds, 514 S.W.3d 257, 264 (Tex. App.—San Antonio 2016, pet. denied)*; *Wells v. Am. States Preferred Ins. Co., 919 S.W.2d 679, 683 (Tex. App.—Dallas 1996, writ denied)*. The contractual appraisal process settles the issue of damages, leaving only the question of liability for the court. *National Sec. Fire & Cas. Co. v. Hurst, No. 14-15-00714-CV, 2017 Tex. App. LEXIS 4664, 2017 WL 2258243, at *3 (Tex. App.—Houston [14th Dist.] May 23, 2017, no pet. h.)*; *Garcia, 514 S.W.3d at 264*. Tender of the full amount owed under the award estops **[*19]** the insured from bringing a breach of contract claim against the insurer. *Hurst, 2017 Tex. App. LEXIS 4664, 2017 WL 2258243, at *3*. By paying the full amount, the insurer complies with every requirement of the contract and cannot be found to be in breach. *Id.*

HN7[] An appraisal award is binding and enforceable unless the insured proves that the award should be set aside. *Garcia, 514 S.W.3d at 264-65*. Texas courts recognize three situations in which an appraisal award may be disregarded: (1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract. *Wells, 919 S.W.2d at 683*. Every reasonable presumption will be indulged to sustain an appraisal award, and the burden of proof is on the party seeking to avoid the award. *Garcia, 514 S.W.3d at 265*. When reviewing a summary judgment, however, this rule must yield to the degree its application conflicts with the presumptions required to be made in favor of the summary judgment nonmovant. *Id.; Wells, 919 S.W.2d at 683*. We are required to view the summary judgment evidence in the light most favorable to FCP, the nonmovant, and to resolve against Republic any doubt as to the existence of a genuine issue of material fact on its estoppel defense. *See Garcia, 514 S.W.3d at 265*.

Republic asserted **[*20]** it was entitled to summary judgment on FCP's contract claim because it paid the appraisal award. FCP contends Republic failed to show a valid and enforceable appraisal award was issued and paid in accordance with the policy. To its amended motion for summary judgment, Republic attached a copy of the policy in question, FCP's letter invoking the appraisal clause in the policy, the appraisal award, the letter from Republic to FCP dated March 4, 2015, checks payable to FCP dated March 4, 2015, and a copy of an email from FCP's attorney confirming receipt of the checks.

Republic also relied on the affidavit of its appraiser Whedbee. In his affidavit, Whedbee stated he was retained by Republic to conduct an appraisal of the amount of wind and hail damage to the four buildings on Floyd Circle. Whedbee and FCP's appraiser Koontz inspected the buildings and reached an agreement on the amount of damages. Koontz prepared the award document, and they both signed it on February 25, 2015. According to Whedbee, the two appraisers agreed that all damages could be repaired and the dollar amounts specified in the award are based on the full cost of repairs to the buildings. Further, Whedbee and Koontz **[*21]** agreed to list the amount of loss as "Actual Cash Value" because the award represents the actual cash value of the full cost of repairs, and they did not deduct any amount for depreciation.

Republic also provided a new affidavit from senior claims representative Street. He stated that FCP submitted a claim under the policy for hail and wind damage, which allegedly occurred on June 13, 2012. He set out the history regarding how the claim was handled, eventually resulting in the appraisal award. Street concluded by stating that he sent a letter on March 4, 2015, to FCP's counsel enclosing full payment of the appraisal award, less the applicable deductibles.

One of FCP's arguments is that Republic did not prove it paid the appraisal award in compliance with the policy. There are three affidavits from Street in the record. The first two affidavits were made in connection with Republic's first motion for summary judgment and state that Street sent the payment to FCP on March 24, 2015. The third one, attached to Republic's amended motion for summary judgment — the one the trial court granted — states he sent payment to FCP on March 4, 2015. FCP asserts that Republic was not entitled to summary **[*22]** judgment on this inconsistent evidence. But in connection with its amended motion, Republic presented evidence that FCP's attorney received the payment of the award on March 6. On that date, counsel for FCP sent an email to Republic's counsel informing him he received a March 4 letter from him with enclosures. Attached to that email were copies of the checks from Republic stamped "Received" on March 6 by FCP's attorney.[3]

Thus, Republic's evidence in support of its amended summary judgment motion shows payment was sent on March 4 rather than March 24.

FCP provides several other reasons why Republic did not conclusively establish the appraisal award was binding and enforceable and thus cannot be used as a defense to FCP's contract claim First, FCP complains of the award's failure to

[3] FCP acknowledge this evidence in its brief, but argue without any citation to authority that it was inadmissible because Republic failed to authenticate the attachments to its summary judgment motion. FCP has failed to adequately brief this contention. *See Tex. R. App. P. 38.1(i)*.

identify a date of loss or the peril involved.[4]

Next, although the award mentions only hail, Republic's summary judgment evidence references both hail and wind. FCP also contends the appraisal award was required to include replacement cost values (RCV), and it includes only actual cash values (ACV). According to FCP, omission of RCV means the award is not compliant with the policy. Further, while the award **[*23]** specifies it is for "roof repair of all damaged areas," FCP asserts that the award did not include all damage to the property. FCP maintains the record shows there was interior damage as well. FCP also notes that the award references "all measurement issues" and "Appraisal Protocol" without explanation of these terms. FCP further contends Republic was required to demonstrate the two appraisers were competent and impartial.

HN8[] Every reasonable presumption will be indulged to sustain an appraisal award. *Garcia, 514 S.W.3d at 265*. We conclude the evidence Republic submitted in support of its amended motion for summary judgment was sufficient to establish that it paid an award made under the appraisal clause in the insurance policy. FCP made written demand for an appraisal under the policy. FCP and Republic each appointed an appraiser. The two appraisers agreed on the amount of loss and signed the appraisal award on February, 26, 2015. The appraisal award includes the claim number and the addresses of the property and states it was for hail damage to the roof resulting from a hail storm during the coverage period. Republic presented evidence showing it paid the amount **[*24]** of loss, less the deductibles, within five business days after the award, on March 4, 2015. *See Garcia, 514 S.W.3d at 265* (holding that similar evidence showed insurer entitled to summary judgment on estoppel defense unless insured raised fact issue as to ground for setting award aside); *Anderson v. Am. Risk Ins. Co., No. 01-15-00257-CV, 2016 Tex. App. LEXIS 6538, 2016 WL 3438243, at *4 (Tex. App.—Houston [1st Dist.] June 21, 2016, no pet.)* (mem. op.) (holding that similar evidence conclusively established insurer fulfilled its obligations under contract); *Toonen v. United Servs. Auto. Ass'n 935 S.W.2d 937, 940 (Tex. App.—San Antonio 1996)* (similar evidence sufficient to show claim appraised pursuant to policy and insurer tendered amount awarded), *abrogated on other grounds by USAA Tex. Lloyds Co. v. Menchaca, No. 14-0721, 2017 Tex. LEXIS 361, 2017 WL 1311752 (Tex. Apr. 7, 2017)*; *cf. Richardson, 2007 Tex. App. LEXIS 5384, 2007 WL 1990387, at *3-4* (award should be set aside where policy required each appraiser to make list stating actual cash value and loss as to each item and summary judgment evidence did not show they did this).

Once Republic showed that the appraisal process was invoked regarding FCP's claim, two appraisers agreed on the amount of loss and signed an appraisal award for the claim, and that Republic timely tendered payment of the award, the burden shifted to FCP, who seeks to avoid the award, to raise a fact issue on whether the award should be disregarded. *See Garcia, 514 S.W.3d at 264-65*; *see also Wells, 919 S.W.2d at 683*. FCP contends it raised genuine issues of material fact regarding whether the award should be disregarded for mistake, **[*25]** not being made in substantial compliance with the policy, and being made without authority. In its response to Republic's amended summary judgment motion, FCP relied in part on the affidavit of Brooks, who described himself as the authorized representative and manager of FCP. Brooks stated the storm caused damage to the interior of the buildings and neither appraiser inspected the interior of any FCP property. Brooks further stated FCP hired a roofing consultant, Scott Franklin, to evaluate the damages and prepare a report. Franklin's report was furnished to FCP's appraiser Koontz. FCP also relied on Franklin's declaration, in which he stated he inspected the properties and observed failure of the roofing system and "its inability to prevent moisture entry with the interiors" of two properties. Franklin attached to his affidavit a copy of the report he prepared which describes "moisture intrusion" at several locations in two of the buildings.

To show that fact issues exist regarding whether the award was made in substantial compliance with the policy, FCP contends the award does not identify a specific occurrence, it does not specify the amount of loss in terms of RCV, and Street described **[*26]** payment of the award as a compromise in his letter enclosing payment. FCP also asserts fact issues exist regarding whether the award was timely paid in compliance with the policy. FCP has failed to raise a fact issue on the timeliness of payment. The trial court permitted FCP to conduct discovery related to when Republic made its payment to the Went FCP had a good faith basis for questioning when payment was made. FCP did not seek to conduct discovery on this limited issue. On this record, there is no genuine issue of material fact regarding when payment was sent.

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[4] FCP cites *State Farm Lloyds v. Johnson* in support of its assertion that the appraisal award is invalid because it does not specify a specific occurrence, i.e., a date of loss. *290 S.W.3d 886 (Tex. 2009)*. FCP relies on the Supreme Court's statement in *Johnson* that "An appraisal is for damages caused by a specific occurrence." *Id. at 893*. But *Johnson* did not involve the sufficiency of an appraisal award. The appraisal had yet to take place, and the issue was whether an appraisal was needed because appraises cannot decide causation. *Id. at 890*. *Johnson* does not support FCP's assertion that the appraisal award at issue is invalid on its face for failing to include a date of loss.

We find the *Garcia* case to be instructive on the other issues of substantial compliance. In that case, Garcia submitted a claim to her insurer for storm damage to her house. *Garcia, 514 S.W.3d at 262*. Garcia hired a private adjustor. Both Garcia's adjustor and the insurer's adjustor prepared estimates that included costs to repair certain items, such as the interior kitchen ceiling. *Id. at 265-66*. The appraisers, however, did not include these items in their appraisal award. *Id. at 266*. Garcia argued this evidence raised a fact issue on whether the appraisers exceeded their authority. The court of appeals noted that nothing in the appraisal clause specified the manner in **[*27]** which the appraisers were to determine the amount of loss, nor were they required to refer to any prior damage estimates. *Id. at 267*. The court of appeals concluded that the fact the appraisers' findings differed from the adjustors' findings was not, standing alone, evidence that the appraisars acted outside the scope of their authority. *Id. at 268*. The court noted that Garcia provided no summary judgment evidence regarding why both appraisers omitted the items. *Id.*

Similarly, in this case, there was nothing in the appraisal clause that specified the manner in which to determine the amount of loss. Nothing in the policy's appraisal provision required the appraisal award to identify the date of loss or the peril involved. Nor did it require the amount of loss to be described in terms of RCV. Further, Whedbee's affidavit stated he and Koontz did not deduct any amount for depreciation when calculating the amount of loss. Thus, the ACV and the RCV would be the same. Finally, Street's mention of a compromise in his letter is not evidence that the award was not made in compliance with the policy. FCP has failed to raise a fact issue regarding whether the award was not made in substantial compliance with the **[*28]** policy.

FCP also maintains it offered the following evidence of mistake: (1) the award only mentions hail, not wind, and (2) the appraisers examined only the roofs and not the interiors of the buildings. A court may set aside an award on the ground of mistake only upon a showing that the award does not speak the intention of the appraisers. *Garcia, 514 S.W.3d at 269*. "Mistake" in this context has a narrowly defined meaning; an actionable mistake is one that caused an award to operate in a way the appraisers did not intend. *Id.* Whedbee's affidavit indicates the award reflects the intention of both appraisal's. FCP presented no evidence to the contrary. There is no evidence to explain why the award did not include any interior repair or to show why the award mentioned hail, but not wind damage. *See id. at 270* (other than prior damage estimates, Garcia provided no evidence to explain why certain items were included in adjustors' estimates but omitted from appraisal award and therefore did not raise fact issue on mistake). FCP has not raised a fact issue on mistake.

FCP also asserts there is evidence the appraisers acted without authority by determining coverage. It argues that because the award includes the ACV that resulted **[*29]** from "the hail storm," the appraisers improperly determined coverage. Causation relates to both liability and damages because it is the connection between them. *State Farm Lloyds v. Johnson, 290 S.W.3d 886, 891-92 (Tex. 2009)*. Appraisers must always consider causation, at least as an initial matter. *Id. at 893*. ***HN9***[↑] An appraisal is for damages caused by a specific occurrence, not every repair a home might need. *Id.* Any appraisal necessarily includes some causation element, because setting the amount of loss requires appraisers to separate damages for which coverage is claimed from damages caused by everything else. *Id.* We find nothing improper about the fact that the award states it is for hail damage to the roof. FCP has failed to raise a fact issue regarding whether the appraisal award should beset aside. Accordingly, the trial court did not err in granting summary judgment for Republic on FCP's contract claim.

b. Extra-Contractual Claims

Turning to FCP's remaining claims, Republic asserted as no-evidence grounds that because FCP's breach of contract claim fails, FCP cannot recover for its chapter 541 claims because FCP had no evidence of an independent injury or an untimely investigation. ***HN10***[↑] Where a plaintiff's claim for breach of an insurance contract fails, to **[*30]** prevail on an action for violations of chapter 541 of the insurance code, the plaintiff must show either that the insured failed to timely investigate the claim or that the insurer committed an extreme act that caused an injury independent of the policy claim. *Bernstien v. Safeco Ins. Co., No. 05-13-01533-CV, 2015 Tex. App. LEXIS 6699, 2015 WL 3958282, at *2 (Tex. App.—Dallas June 30, 2015, no pet.)* (mem. op.); *see USAA Tex. Lloyds Co. v. Menchaca, No. 14-0721, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *11-12 (Tex. Apr. 7, 2017)*. Republic asserted that FCP provided no evidence that either of these exceptions apply in this case. In its appellate brief, FCP contends the summary judgment evidence shows it sustained an independent injury, namely, having to give its tenants rent discounts and concessions because of the damage to the buildings. FCP's response to Republic's motion for summary judgment, however, makes no mention at all of FCP's insurance code claims. It thus cannot be said to have provided any summary judgment evidence of an independent injury. As such, the trial court properly granted summary judgment on the chapter 541 claims.

FCP's brief does not mention its claims for negligence and negligent misrepresentation. Thus, it has not challenged the trial court's granting of summary judgment as to these claims. *See Tex. R. App. P. 38.1*. We overrule FCP's first issue.

Accordingly, we affirm the trial court's **[*31]** summary judgment.

/s/ Craig Stoddart

CRAIG STODDART

JUSTICE

JUDGMENT

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED.

It is ORDERED that appellee REPUBLIC LLOYDS recover its costs of this appeal from appellant FLOYD CIRCLE PARTNERS, LLC.

Judgment entered this 24th day of July, 2017.

EXHIBIT C

Losciale v. State Farm Lloyds

United States District Court for the Southern District of Texas, Houston Division

July 14, 2017, Decided; July 14, 2017, Filed, Entered

CIVIL ACTION NO. 4-17-0016

Reporter
2017 U.S. Dist. LEXIS 109389 *; 2017 WL 3008642

LEE LOSCIALE, Plaintiff, v. STATE FARM LLOYDS, Defendant.

Core Terms

insured, appraisal award, benefits, policy benefits, summary judgment, timely payment, extra-contractual, statutory violation, actual damage, precludes, damages

Counsel: **[*1]** For Lee Losciale, Plaintiff: Sean McCarthy, LEAD ATTORNEY, Williams Kherkher Hart Boundas LLP, Houston, TX.

For State Farm Lloyds, Defendant: Dale Marett Holidy, Germer LLP, Houston, TX.

Judges: NANCY F. ATLAS, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: NANCY F. ATLAS

Opinion

MEMORANDUM AND ORDER

This insurance case is before the Court on the Motion for Summary Judgment ("Motion") [Doc. # 9] filed by Defendant State Farm Lloyds ("State Farm"), to which Plaintiff Lee Losciale filed a Response and Cross-Motion for Summary Judgment [Doc. # 15], State Farm filed a Combined Response to Plaintiff's Cross-Motion and Reply in support of its own Motion [Doc. # 16], and Plaintiff filed a Reply [Doc. # 17]. Having reviewed the full record and the applicable legal authorities, the Court **grants** Defendant's Motion and **denies** Plaintiff's Cross-Motion.

I. BACKGROUND

The material facts in this case are undisputed. Plaintiff's property (the "Property") was insured under a State Farm Homeowners Policy (the "Policy") for approximately $221,500.00. Plaintiff filed an insurance claim on April 6, 2016, reporting that the covered Property was damaged during a storm on April 19, 2015. State Farm conducted an initial inspection of the Property **[*2]** on April 15, 2016 and, at Plaintiff's request, conducted a second inspection on May 17, 2016, and a third inspection on November 2, 2016. Based on the inspector's report that the storm damage to the Property was below the Policy's deductible amount, State Farm denied Plaintiff's claim on November 7, 2016.

On November 29, 2016, Plaintiff sued State Farm in Texas state court. Plaintiff asserted claims for breach of contract[1] and violations of the Texas Insurance Code. Defendant filed a timely Notice of Removal on January 5, 2017.

At the joint request of the parties, the case was abated pending completion of the appraisal process. On April 10, 2017, the appraisers issued an award establishing the amount of Plaintiff's loss on an actual cash value basis at $22,239.43. The appraisal award established the amount of loss of $25,129.92 on a replacement cost basis. To date, Plaintiff has not submitted any repairs/replacement documentation.

On April 17, 2017, State Farm notified Plaintiff that it would pay the appraisal award loss amount based on the actual cash value award. Simultaneously, State Farm tendered to Plaintiff through her counsel the appraisal award (less depreciation and deductible) **[*3]** of $17,809.43.

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides for the entry of summary judgment against a party who fails to make a sufficient showing of the existence of an element

[1] Plaintiff has withdrawn his breach of contract claim. *See* Response [Doc. # 15], p. 2 n.1.

essential to the party's case, and on which that party will bear the burden at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (*en banc*); *see also Curtis v. Anthony, 710 F.3d 587, 594 (5th Cir. 2013)*. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *FED. R.CIV. P. 56(a)*; *see Celotex, 477 U.S. at 322-23*; *Curtis, 710 F.3d at 594*.

III. ANALYSIS

State Farm seeks summary judgment in this case based on its full and timely payment of the appraisal award. Plaintiff does not dispute that State Farm paid the appraisal award fully, and there is no dispute that State Farm timely paid the award within five business days after giving Plaintiff notice that it would pay the appraisal award. *See TEX. INS. CODE § 542.057*; Policy, ¶ 8, Exh. to Motion [Doc. # 9-1], ECF p. 28.

Under long-standing Texas law, "if the appraisal award has been reached in accordance with the terms of the insurance policy and the insurer has timely tendered the full amount awarded by the appraisers, that conduct is legally sufficient to entitle **[*4]** the insurer to summary judgment on the breach-of-contract claim against it." *See United Neurology, P.A. v. Hartford Lloyd's Ins. Co., 101 F. Supp. 3d 584, 619 (S.D. Tex.)*, *aff'd*, *624 F. App'x 225 (5th Cir. 2015)*, and cases cited therein. Similarly, because timely and full payment of an appraisal award precludes a breach of contract claim, extra-contractual claims for fraud, bad faith, and violations of the DTPA and the Texas Insurance Code also fail. *See id. at 620*; *McEntyre v. State Farm Lloyds, Inc., 2016 U.S. Dist. LEXIS 142964, 2016 WL 6071598, *6 (E.D. Tex. Oct. 17, 2016)*.

Plaintiff argues that a recent decision from the Texas Supreme Court "overruled" the vast legal authority regarding the effect of full and timely payment of an appraisal award. In *USAA Tex. Lloyds Co. v. Menchaca*, a case not involving payment of an appraisal award, the Texas Supreme Court attempted to clarify prior rulings regarding the relationship between breach of contract claims under an insurance policy and extra-contractual claims such as those arising under the Texas Insurance Code. *See Menchaca, S.W.3d , 2017 Tex. LEXIS 361, 2017 WL 1311752, *1 (Tex. Apr. 7, 2017)*. In *Menchaca*, the jury found that the insurance company complied with the terms of the policy, but found also that the insurer engaged in unfair business practices. The Texas Supreme Court clarified:

> that [1] an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive **[*5]** those benefits. [2] An insured who establishes a right to receive benefits under the policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits. [3] And an insured can recover benefits as actual damages under the Insurance Code even if the insured has no contractual right to those benefits if the insurer's conduct caused the insured to lose that right. [4] If an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the insured is not entitled to receive benefits under the policy. But if the policy does entitle the insured to benefits, the insurer's statutory violation does not permit the insured to recover any actual damages beyond those policy benefits unless the violation causes an injury that is independent from the loss of the benefits. [5] Finally, an insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.

Menchaca, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *12. Plaintiff does not identify on **[*6]** which of these "rules" he relies as support for his Insurance Code claims against State Farm. The Court finds that none apply in this case given State Farm's full and timely payment of the appraisal award. The payment of the appraisal award satisfies Plaintiff's right to receive benefits under the Policy and, therefore, there is no "loss of benefits." Plaintiff has not identified nor presented evidence of an independent loss that does not flow or stem from the original denial of policy benefits. As a result, *Menchaca* does not allow Plaintiff to pursue his Texas Insurance Code claims following full and timely payment of the appraisal award.

Additionally, *Menchaca* does not purport to alter the long-standing case law regarding the effect of full and timely payment of an appraisal award. Post-*Menchaca*, only one Texas Court of Appeals has considered the issue, and it held that prior case law applied in the appraisal context, explaining again that full and timely payment of an appraisal award generally precludes both breach of contract and extra-contractual claims. *See, e.g., Nat'l Security Fire & Cas. Co. v. Hurst, 2017 Tex. App. LEXIS 4664, 2017 WL 2258243 (Tex. App. — Houston [14th Dist.] May 23, 2017)*.

The *Hurst* court explained that where, as here, the appraisal award **[*7]** has not been set aside, "full and timely payment of an appraisal award under the policy precludes an award of

penalties under the Insurance Code's prompt payment provisions as a matter of law." *2017 Tex. App. LEXIS 4664, [WL] at *5*. The full and timely payment likewise precludes extra-contractual claims under the DTPA, the Texas Insurance Code, and for a breach of the duty of good faith and fair dealing. *See 2017 Tex. App. LEXIS 4664, [WL] at *5-*6*. "In order to recover any damages beyond policy benefits, the statutory violation or bad faith must cause an injury that is independent from the loss of benefits." *2017 Tex. App. LEXIS 4664, [WL] at *6* (citing *Menchaca*, 2017 Tex. LEXIS 361, 2017 WL 1311752 at *11-*12). In order to allow an extra-contractual claim to proceed, the "independent injury" must be one that does not "'flow' or 'stem' from the denial of policy benefits." *Id.* As recognized by the courts in both *Menchaca* and *Hurst*, "a successful independent-injury claim would be rare, and we in fact have yet to encounter one." *Id.* (citing *Menchaca*, 2017 Tex. LEXIS 361, 2017 WL 1311752 at *12). In this case, Plaintiff has neither alleged nor presented evidence of any independent injury that does not "flow" or "stem" from the initial denial of policy benefits. As a result, the full and timely payment of the appraisal award precludes Plaintiff's extra-contractual claims in this case.

Plaintiff argues, correctly, **[*8]** that the Texas Supreme Court in *Menchaca* clarified that its decision in *Vail v. Texas Farm Bureau Mutual Insurance Co., 754 S.W.2d 129 (Tex. 1988)*, remains intact. In *Vail*, the issue was whether policy benefits improperly withheld were actual damages in relation to a claim of unfair claims settlement practices. *See Menchaca*, 2017 Tex. LEXIS 361, 2017 WL 1311752 at *8 (citing *Vail, 754 S.W.2d at 136*). The Texas Supreme Court in *Vail* held that the policy benefits were actual damages under the Texas Insurance Code. *See id.* In Plaintiff's case, however, there are no "improperly withheld policy benefits" because the policy benefits were paid in full by Defendant's payment of the appraisal award. As a result, Plaintiff's reliance on the *Vail* decision is misplaced.

IV. CONCLUSION AND ORDER

On April 17, 2017, State Farm made full and timely payment of the appraisal award. As a result, based on clearly-established Texas law which has not been changed by the Texas Supreme Court's *Menchaca* decision, Plaintiff's breach of contract and extra-contractual claims are precluded as a matter of law. It is, therefore, hereby

ORDERED that Plaintiff's Motion for Summary Judgment [Doc. # 15] is **DENIED**, Defendant's Motion for Summary Judgment [Doc. # 11] is **GRANTED**, and this case is **DISMISSED WITH PREJUDICE**. The Court will issue a separate final judgment. **[*9]**

SIGNED at Houston, Texas, this **14th** day of **July, 2017**.

/s/ Nancy F. Atlas

NANCY F. ATLAS

SENIOR UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

For the reasons stated in the accompanying Memorandum and Order, it is hereby

ORDERED that Defendant State Farm Lloyds' Motion for Summary Judgment [Doc. # 9] is **GRANTED** and Plaintiff Lee Losciale's Cross-Motion for Summary Judgment [Doc # 15] is **DENIED** This case is **DISMISSED WITH PREJUDICE**, with taxable costs assessed against Plaintiff.

This is a final, appealable order.

SIGNED at Houston, Texas, this **14th** day of **July, 2017**.

/s/ Nancy F. Atlas

NANCY F. ATLAS

SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT D

Pounds v. Liberty Lloyds of Tex. Ins. Co.

Court of Appeals of Texas, Fourteenth District, Houston

August 1, 2017, Opinion Filed

NO. 14-16-00263-CV

Reporter
2017 Tex. App. LEXIS 7172 *; 2017 WL 3270980

RON POUNDS, Appellant v. LIBERTY LLOYDS OF TEXAS INSURANCE COMPANY, Appellee

Prior History: **[*1]** On Appeal from the 215th District Court, Harris County, Texas. Trial Court Cause No. 2014-53921.

Core Terms

appraisal, insurer, trial court, waived, amount of loss, invoke, summary judgment, policy's, summary judgment motion, actual cash value, appraisal award, extra-contractual, deductible, repairs, issues, rights, orig, insurance contract, damages, storm, overrule, parties, hail, wind

Case Summary

Overview

HOLDINGS: [1]-An insured failed to show that his homeowner's insurer waived its right to an appraisal of damages under the policy; the policy guarded against implied waiver by providing that a waiver was required to be in writing to be valid, and the denial letter itself did not mention appraisal; [2]-Even if an intent to forgo appraisal under the policy could be implied from the denial letter, the insured was also required to show prejudice to establish waiver; because the insured filed suit after the denial of the claim, the insured failed to show prejudice; [3]-Summary judgment for the insurer was proper because the actual cash value of the appraisal award was below the policy's deductible amount; [4]-The insured failed to show an independent injury arising out of the handling of the claim pursuant to the Prompt Payment of Claims Act, *Tex. Ins. Code Ann. § 542.058 (2009)*.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

Insurance Law > Claim, Contract & Practice Issues > Appraisals

Evidence > Burdens of Proof > Allocation

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Burdens of Proof

HN1[] **Contract Conditions & Provisions, Waivers**

The party challenging an insurance appraisal bears the burden to establish waiver by the other party. An appellate court reviews a trial court's ruling on a motion to compel an appraisal for an abuse of discretion.

Insurance Law > Claim, Contract & Practice Issues > Appraisals

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver

HN2[] **Claim, Contract & Practice Issues, Appraisals**

Appraisal clauses are commonly found in homeowners, automobile, and property policies, and they provide a means to resolve disputes about the amount of loss for a covered claim. Appraisal clauses are generally enforceable, barring illegality or waiver. This remains true even when an insurer

denies coverage, as the appraisers can still set the amount of loss in case the insurer turns out to be wrong.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

Insurance Law > Claim, Contract & Practice Issues > Appraisals

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver

HN3 **Contract Conditions & Provisions, Waivers**

Waiver of a contractual right may be express or implied from conduct. To waive rights under an appraisal clause, a party must intend to relinquish a known right or engage in intentional conduct inconsistent with claiming that right.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

Insurance Law > Claim, Contract & Practice Issues > Appraisals

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver

HN4 **Contract Conditions & Provisions, Waivers**

Denial of an insured's claim does not, by itself and in all circumstances, always constitute an intentional relinquishment of the insurer's rights under the policy's appraisal provision; nor does it constitute intentional conduct inconsistent with claiming these appraisal rights. In deciding whether an insurer waived its right to invoke an appraisal clause, a court must consider not only the denial but also the policy's language and the surrounding circumstances to determine whether the insurer intentionally relinquished its appraisal rights or engaged in intentional conduct inconsistent with claiming these rights.

Insurance Law > Claim, Contract & Practice Issues > Appraisals

HN5 **Claim, Contract & Practice Issues, Appraisals**

An insurer's right to appraisal must be invoked within a reasonable time after impasse is reached, defined as the point at which the parties have a mutual understanding that neither will negotiate further.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Waivers

Insurance Law > Claim, Contract & Practice Issues > Appraisals

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver

HN6 **Contract Conditions & Provisions, Waivers**

Denial of a claim on an insurance policy and the insurer's delay in invoking appraisal are simply circumstances to consider in determining whether the insurer impliedly waived its appraisal right through inconsistent conduct, not distinct types of waiver.

Insurance Law > Claim, Contract & Practice Issues > Appraisals

HN7 **Claim, Contract & Practice Issues, Appraisals**

It is difficult to see how prejudice to an insured could ever be shown when the policy gives both sides the same opportunity to demand appraisal. If a party senses that impasse has been reached, it can avoid prejudice by demanding an appraisal itself.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN8 **Summary Judgment Review, Standards of Review**

An appellate court reviews a trial court's order granting a traditional summary judgment de novo.

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN9 **Evidentiary Considerations, Absence of Essential Element**

To prevail on a traditional motion for summary judgment, a movant must prove entitlement to judgment as a matter of law on the issues set out in the motion. *Tex. R. Civ. P. 166a(c)*. When the movant is a defendant, a trial court should grant summary judgment only if the defendant (1) negates at least one element of each of the plaintiff's causes of action, or (2) conclusively establishes each element of an affirmative defense.

Insurance Law > Claim, Contract & Practice Issues > Appraisals

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver

HN10 **Claim, Contract & Practice Issues, Appraisals**

An appraisal award made under the terms of an insurance policy is binding and enforceable, and every reasonable presumption will be indulged to sustain it. The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on an insurance contract.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Payment Delays & Denials

HN11 **Bad Faith & Extracontractual Liability, Payment Delays & Denials**

An insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.

Counsel: For Appellants: Melissa Waden Wray, Richard D. Daly, Houston, TX.

For Appellees: Richard A. Sheehy, John Mark Kressenberg, Houston, TX.

For Appellee: Travis Armstrong, Houston TX.

Judges: Panel consists of Justices Boyce, Busby, and Wise.

Opinion by: J. Brett Busby

Opinion

This case concerns whether an insurer waived appraisal of a homeowner's insurance claim by denying it and, if not, whether an appraisal award supported summary judgment against the owner's contractual and extra-contractual claims. Appellant Ron Pounds purchased a home insurance policy from appellee Liberty Lloyds of Texas Insurance Company. Pounds submitted a claim for storm damage, which Liberty Lloyds denied on the ground that "no storm related damages were found." Pounds then sued Liberty Lloyds. When the parties were unable to resolve their dispute at mediation, Liberty Lloyds invoked its right to an appraisal under the policy. Pounds resisted appraisal, and the trial court granted Liberty Lloyds's motion to compel. The appraisers eventually agreed that Pounds's home had experienced covered damage as a result of the storm and agreed on the amount of the loss. Liberty Lloyds moved for summary judgment on Pounds's claims, which the trial court granted.

Pounds raises three issues on appeal. In his first issue, he argues that **[*2]** the trial court erred in compelling appraisal because Liberty Lloyds waived its right to appraisal by initially denying his claim. We overrule this issue because (a) Pounds failed to establish that Liberty Lloyds's denial, standing alone, was a knowing waiver of the right to an appraisal; and (b) Pounds failed to establish that he was prejudiced as a result of Liberty Lloyds' initial denial of his claim.

Pounds argues in his second and third issues that the trial court erred in granting Liberty Lloyds's motion for summary judgment on his breach-of-contract claim and extra-contractual claims. We overrule both issues because Liberty Lloyds established as a matter of law that it did not breach the insurance contract, which, under the facts of this case, also defeats Pounds's extra-contractual claims. We therefore affirm the trial court's final judgment.

BACKGROUND

The facts in this case are undisputed. Pounds purchased a home insurance policy from Liberty Lloyds. The policy covered damage to property caused by wind and/or hail. The policy provided that Liberty Lloyds would "pay no more than the actual cash value of the damage until actual repair or replacement is complete." The policy also **[*3]** set the deductible for damage caused by wind or hail at $9,620.00.

The policy included an appraisal provision:

> E. Appraisal
>
> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss. . . .

The policy did not set a time limit for invoking appraisal. The policy also provided that "a waiver or change of a provision of this policy must be in writing by [Liberty Lloyds] to be valid."

On August 8, 2014, Pounds made a claim under the policy, alleging that a wind and hail storm had caused damage to his **[*4]** property. An adjuster inspected the property on August 14, 2014, and determined that there was no storm-related damage. Liberty Lloyds sent a letter to Pounds two days later denying the claim because "no storm related damages were found." The letter concluded by informing Pounds that if he had any questions or concerns about his claim, he could contact Liberty Lloyds's claims representative by phone or email.

Pounds responded to the denial letter by suing Liberty Lloyds. Pounds asserted claims for breach of contract and violations of the Prompt Payment of Claims statute, the Texas Insurance Code, and the Deceptive Trade Practices Act. Liberty Lloyds answered, stating (among other things) that it did not waive, and expressly reserved, its right under the policy to demand an appraisal to determine the actual cash value of Pounds's property damage claims. In a November 17, 2014 letter, Liberty Lloyds informed Pounds that "nothing herein should be considered a waiver of Liberty Lloyds's right to invoke appraisal in this matter." The parties unsuccessfully mediated the case in March 2015.

After the unsuccessful mediation, Liberty Lloyds invoked the policy's appraisal clause to determine the **[*5]** amount of the loss. When Pounds refused to designate his appraiser, Liberty Lloyds filed a motion to compel appraisal. In response, Pounds argued that Liberty Lloyds had waived appraisal solely as a result of the initial denial of his claim. The trial court granted Liberty Lloyds's motion and ordered an appraisal of the property.

Following an inspection of Pounds's property, the appraisers agreed on the amount of the loss. The appraisers determined that the Replacement Cost Value was $15,161.73. They then applied $5,642.73 to depreciation and determined that the Actual Cash Value of Pounds's loss was $9,519.00. Because the appraisers determined that the Actual Cash Value of Pounds's loss was below the $9,620 policy deductible for wind and hail damage, Liberty Lloyds moved for summary judgment on all of Pounds's claims. The trial court granted the motion and signed a final judgment in favor of Liberty Lloyds. This appeal followed.

ANALYSIS

I. The trial court did not abuse its discretion when it compelled appraisal.

Pounds contends in his first issue that the trial court abused its discretion by granting Liberty Lloyds's motion to compel appraisal, arguing that Liberty Lloyds waived appraisal **[*6]** by denying his claim. ***HN1***[↑] As the party challenging appraisal, Pounds bore the burden to establish waiver by Liberty Lloyds. *In re State Farm Lloyds, 170 S.W.3d 629, 634 (Tex. App.—El Paso 2005, orig. proceeding)*. We review a trial court's ruling on a motion to compel an appraisal for an abuse of discretion. *See In re Slavonic Mut. Fire Ins. Ass'n, 308 S.W.3d 556, 559 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding)*.

HN2[↑] Appraisal clauses are "commonly found in homeowners, automobile, and property policies," and they "provide a means to resolve disputes about the amount of loss for a covered claim." *In re Universal Underwriters of Tex. Ins. Co., 345 S.W.3d 404, 406-07 (Tex. 2011)* (citing *State Farm Lloyds v. Johnson, 290 S.W.3d 886, 888 (Tex. 2009)*). Appraisal clauses are generally enforceable, barring illegality or waiver. *Id. at 407*. This remains true even when an insurer denies coverage, as the "appraisers can still set the amount of loss in case the insurer turns out to be wrong." *Johnson, 290 S.W.3d at 894*.

HN3[↑] Waiver of a contractual right may be express or implied from conduct. *G.T. Leach Builders, Inc. v. Sapphire V.P., LP, 458 S.W.3d 502, 511 (Tex. 2015)*. To waive rights under an appraisal clause, a party "must intend to relinquish a known right or engage in intentional conduct inconsistent with claiming that right." *In re State Farm Lloyds, 514 S.W.3d 789, 793 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding)* (citing *In re Universal Underwriters, 345 S.W.3d at 407*).

A different panel of this Court recently addressed a similar waiver argument. *See id. at 793-95*. After reviewing cases

from the Supreme Court of Texas and courts of appeals addressing waiver of insurance appraisals, including many of the same cases cited by Pounds, we concluded that ***HN4***[↑] "[d]enial of an insured's claim does not, by **[*7]** itself and in all circumstances, always constitute an 'intentional relinquishment' of the insurer's rights under the policy's appraisal provision; nor does it constitute 'intentional conduct inconsistent with claiming' these appraisal rights." *Id. at 794*. We explained that, "in deciding whether an insurer waived its right to invoke an appraisal clause, [a court] . . . must consider [not only the denial but also] the policy's language and the surrounding circumstances to determine whether the insurer intentionally relinquished its appraisal rights or engaged in intentional conduct inconsistent with claiming these rights." *Id.*

Applying this test, we hold Pounds has not demonstrated that Liberty Lloyds waived its right to invoke appraisal. The policy guards against implied waiver by providing that "a waiver or change of a provision of this policy must be in writing by [Liberty Lloyds] to be valid." The denial letter itself does not mention appraisal, and Pounds has not pointed to any other indication in the record that Liberty Lloyds expressly waived the appraisal provision in writing.[1]

Further, although Liberty Lloyds explained in the letter that it was denying Pounds's claim because "no storm related **[*8]** damages were found," it also invited Pounds to contact the claims representative if he had any questions or concerns about his claim. This indicates an impasse had not been reached, as Liberty Lloyds was not foreclosing further negotiation on Pounds's claim.[2]

Finally, when Pounds filed suit, Liberty Lloyds reserved its appraisal rights in its answer and also in correspondence sent during the course of the litigation.[3]

Yet even if an intent to forgo appraisal under the policy could be implied from the denial letter, Pounds must also show prejudice to establish waiver. *See In re Universal Underwriters, 345 S.W.3d at 411-12*. Pounds argues he is not required to show prejudice because *In re Universal Underwriters* involved allegations of waiver by delay, not waiver as a result of the denial of a claim. *See id.* But ***HN6***[↑] denial of a claim and delay in invoking appraisal are simply circumstances to consider in determining whether the insurer impliedly waived its appraisal right through inconsistent conduct, not distinct types of waiver. *Trelltex, Inc. v. Intecx, L.L.C., 494 S.W.3d 781, 790 (Tex. App.—Houston [14th Dist.] 2016, no pet.)* ("Waiver is largely a matter of intent, and for implied waiver to be found through a party's conduct, intent must be clearly demonstrated by the surrounding facts and circumstances."). Accordingly, the **[*9]** distinction proposed by Pounds does not provide a legal basis to excuse him from showing prejudice. *See In re Universal Underwriters, 345 S.W.3d at 412* ("Our failure to explicitly require prejudice is more a function of the paucity of cases in which we have addressed waiver of appraisal than its applicability to the doctrine.").[4]

The Supreme Court of Texas has observed that ***HN7***[↑] "it is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal. If a party senses that impasse has been reached, it can avoid prejudice by demanding an appraisal itself." *Id. at 412*. As in *Universal Underwriters*, the policy here gave both parties the ability to invoke appraisal to resolve a dispute over the amount of loss. Once Liberty Lloyds denied Pounds's claim, rather than invoke appraisal, he filed suit. We conclude Pounds has not

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[1] *See In re State Farm Lloyds, 514 S.W.3d at 794-95* (considering lack of evidence of written waiver of appraisal in waiver analysis); *In re Liberty Ins. Corp., 496 S.W.3d 229, 235 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding)* (same); *In re Slavonic, 308 S.W.3d at 561* (considering policy's anti-waiver provision in waiver analysis).

[2] *See In re Universal Underwriters, 345 S.W.3d at 408-10* (stating ***HN5***[↑] appraisal must be invoked within reasonable time after impasse reached, defined as point at which parties have mutual understanding neither will negotiate further); *In re Public Service Mut. Ins. Co., No. 03-13-0003-CV, 2013 Tex. App. LEXIS 1757, 2013 WL 692441, at *6 (Tex. App.—Austin Feb. 21, 2013, orig. proceeding)* (mem. op.) (considering invitation to insured to submit further information on denied claim in waiver analysis).

[3] *See In re Liberty Ins. Corp., 496 S.W.3d at 234* (considering reservation of appraisal rights in answer and correspondence in determining that insurer did not waive appraisal); *In re Ooida Risk Retention Grp., Inc., 475 S.W.3d 905, 912 (Tex. App.—Fort Worth 2015, orig. proceeding)* (rejecting waiver argument based in part on contention that insured filing suit signaled impasse in negotiations between insured and insurer); *In re Public Service Mut. Ins. Co., 2013 Tex. App. LEXIS 1757, 2013 WL 692441, at *5* (considering ongoing negotiations regarding claim in rejecting waiver by delay argument).

[4] *See also In re Ooida Risk Retention Grp., 475 S.W.3d at 912* (requiring prejudice showing in automobile insurance case alleging waiver of appraisal resulting from insurance company's destruction of insured vehicle); *In re Cypress Tex. Lloyds, 419 S.W.3d 443, 445 (Tex. App.—Beaumont 2012, mand. denied)* ("Where the insurance policy provides for an appraisal process, compliance is excused only if the party resisting the appraisal can show prejudice."); *cf. In re Universal Underwriters, 345 S.W.3d at 411* (noting other similar contexts in which supreme court has required a showing of prejudice to establish waiver).

established that he was prejudiced by Liberty Lloyds's demand for appraisal. *In re Century Surety Co., No. 07-15-00386-CV, 2015 Tex. App. LEXIS 11272, 2015 WL 6689532, at *4 (Tex. App.—Amarillo Nov. 2, 2015, orig. proceeding)* (mem. op.); *In re Cypress Tex. Lloyds, 419 S.W.3d at 445*.

For these reasons, the trial court did not abuse its discretion when it compelled appraisal. We overrule Pounds's first issue on appeal.

II. The trial court did not err in granting Liberty Lloyds's [*10] motion for summary judgment.

In his second and third issues, Pounds challenges the trial court's granting of Liberty Lloyds's motion for summary judgment on his claim for breach of contract and his extra-contractual claims. We address these issues together.

A. Standard of review

HN8[] We review a trial court's order granting a traditional summary judgment de novo. *Mid-Century Ins. Co. v. Ademaj, 243 S.W.3d 618, 621 (Tex. 2007)*. ***HN9***[] To prevail on a traditional motion for summary judgment, a movant must prove entitlement to judgment as a matter of law on the issues set out in the motion. *Tex. R. Civ. P. 166a(c)*. When the movant is a defendant, a trial court should grant summary judgment only if the defendant (1) negates at least one element of each of the plaintiff's causes of action, or (2) conclusively establishes each element of an affirmative defense. *Clark v. ConocoPhillips Co., 465 S.W.3d 720, 724 (Tex. App.—Houston [14th Dist.] 2015, no pet.)*.

B. Liberty Lloyds established as a matter of law that it did not breach the insurance contract.

Liberty Lloyds attached the following evidence to its motion for summary judgment: (1) Pounds's insurance policy; and (2) the appraisal award finding that the Actual Cash Value of Pounds's loss was $9,519.00. Liberty Lloyds argued that because it was undisputed the appraisal award was less than the policy's deductible for wind and hail **[*11]** damage, it did not presently owe Pounds anything and therefore had not breached the insurance contract. In response, Pounds did not argue that the appraisal award was wrong, nor did he present any evidence that he had repaired the damage. He instead argued that the motion was premature because, if he did make the repairs in the future, the full replacement cost would exceed the deductible and he would, at that time, be entitled to a payment from Liberty Lloyds. The trial court granted the motion.

On appeal, Pounds does not challenge the appraisal award. Nor does he point to evidence in the record establishing that he had completed, or even initiated, repairs on his damaged property. Pounds instead repeats his trial court argument that Liberty Lloyds's motion for summary judgment was premature because he might be entitled to a future payment in the event he completes the repairs to his property.

HN10[] An appraisal award made under the terms of an insurance policy is binding and enforceable, and every reasonable presumption will be indulged to sustain it. *Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2004, no pet.)*. The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on an insurance contract. *Id.* **[*12]** Because the Actual Cash Value of the appraisal award was below the policy's deductible amount, Liberty Lloyds does not presently owe Pounds any payment under the terms of the policy and has not breached the insurance contract. We conclude that Liberty Lloyds established its right to summary judgment on Pounds's claim for breach of contract.[5]

We overrule Pounds's second issue on appeal.

C. Because Liberty Lloyds did not breach the insurance contract, it was entitled to summary judgment on Pounds's extra-contractual claims.

In addition to his claim for breach of contract, Pounds alleged that Liberty Lloyds violated several statutes in handling his claim. Pounds asserted that Liberty Lloyds violated the Prompt Payment of Claims Act by failing "to pay for the losses and/or to follow the statutory time guidelines for accepting or denying coverage." *See Tex. Ins. Code Ann. § 542.058* (West 2009). Pounds also alleged that Liberty Lloyds violated various provisions of the Texas Insurance Code and the Deceptive Trade Practices Act because, prior to denying the claim, it did not (1) make a reasonable investigation, and (2) cover all damage such an investigation would have revealed. We conclude neither argument establishes that **[*13]** the trial court erred when it granted Liberty Lloyds's motion for summary judgment on Pounds's extra-contractual claims.

In *USAA Texas Lloyds Co. v. Menchaca, No. 14-0721, 2017 Tex. LEXIS 361, 2017 WL 1311752, at *12 (Tex. April 7, 2017)*, the Supreme Court of Texas concluded that ***HN11***[] "an insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent

[5] During oral argument, Liberty Lloyds represented to the Court that it would not assert defenses such as res judicata or collateral estoppel if, within any time limits provided by the policy, Pounds completed his repairs and presented evidence to Liberty Lloyds that the cost of the repairs was greater than the policy's deductible and within the Replacement Cost Value found by the appraisers.

of a right to benefits." We have already determined that Pounds had no right to receive benefits from Liberty Lloyds under the policy because the appraisers determined that the Actual Cash Value of Pounds's claim was an amount below the deductible. In addition, Pounds did not allege that he sustained an independent injury as a result of Liberty Lloyds's handling of his claim. Pounds instead argued that the independent injury rule did not apply. As a result, Pounds did not produce summary judgment evidence creating a genuine issue of material fact that he had sustained an injury independent of a right to benefits under the insurance policy. We therefore conclude that Liberty Lloyds established its entitlement to summary judgment on Pounds's extra-contractual claims. We overrule Pounds's third issue on appeal.

CONCLUSION

Having overruled each **[*14]** of the issues Pounds raised in this appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby

Justice

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