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SUPREME COURT OF TEXAS
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NO. 16-0347

IN THE SUPREME COURT OF TEXAS

RICHARDSON EAST BAPTIST CHURCH,
Petitioner,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY
JAMES GREENHAW,
Respondents.

On Petition for Review from the
Fifth Court of Appeals, Dallas County, Texas
NO. 05-14-01491-CV

PETITIONER'S REPLY BRIEF ON THE MERITS

Peter M. Kelly
State Bar No. 00791011
F. Leighton Durham, III
State Bar No. 24012569
KELLY, DURHAM & PITTARD, LLP
1005 Heights Boulevard
Houston, Texas 77008
Telephone: 713.529.0048
Facsimile: 713.529.2498
pkelly@texasappeals.com

Shannon E. Loyd
State Bar No. 24045706
THE LOYD LAW FIRM, PLLC
12703 Spectrum Drive, Suite 201
San Antonio, Texas 78249
Telephone: 210.775.1424
Facsimile: 210.775.1410
Shannon@theloydlawfirm.com

ATTORNEYS FOR PETITIONER

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ARGUMENT AND AUTHORITIES

As the Court is aware, the availability of extracontractual damages for improper handling of insurance claims–even the limited extracontractual damages contemplated by chapter 542–has been hotly contested in this state. Recently, this Court delivered a landmark ruling in the *Menchaca* case, and now litigants and lower courts are working through the application of *Menchaca* to different factual scenarios. *See USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, 2017 WL 1311752, at *1 (Tex. Apr. 7, 2017). This particular case is important to the jurisprudence of the state because it invites the Court to explain how the *Menchaca* principles apply when the insurer has invoked appraisal after the onset of litigation–an increasingly common phenomenon.

I. Greenhaw has explained why this Court should grant review of this case.

In his brief on the merits, Greenhaw observes of the *Menchaca* opinion:

> In its detailed recitation of the entitled-to-benefits rule, this Court makes absolutely no mention of appraisal. Indeed, the entire *Menchaca* opinion mentions the word appraisal only once, in a footnote, to state that neither party invoked the appraisal provision of the policy.

Greenhaw Br. at 27. That's precisely why the Church petitioned this court for review. Given that the vast majority of homeowner and commercial property policies contain appraisal clauses, lower courts will need guidance on how to apply

the *Menchaca* rules when the appraisal clause has been invoked. As the Church explained in its brief on the merits, "[t]his case asks this Court to apply the 'entitled-to-benefits' rule to appraisal." REBC BOM at 5.

II. Neither Greenhaw nor Philadelphia explain why this Court should treat *Breshears* as good law.

Philadelphia's brief is premised almost entirely on the Fourteenth Court of Appeals's opinion in *Nat'l Sec. Fire & Cas. Co. v. Hurst*, No. 14-15-00714-CV, – S.W.3d –, 2017 WL 2258243, at *5 (Tex. App.—Houston [14th Dist.] May 23, 2017, n.p.h.) (designated, but not released, for publication). *See* Philadelphia BOM at v (giving "*passim*" as the page reference for citations to *Hurst*). The relevant portion of *Hurst*, in turn, is a recapitulation of the *Breshears* and *Blum's Furniture* line of cases. *See, e.g., Hurst*, 2017 WL 2258243, at *2 (citing *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 344 (Tex. App.—Corpus Christi 2004, pet. denied) & *3 (citing *Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, 459 Fed. Appx. 366, 368 (5th Cir. 2012)). Greenhaw does not discuss *Hurst*, but cites *Breshears passim*. *See* Greenhaw BOM at vi.

As the Church explained in its brief on the merits, under the *Breshears* line of cases, if an insurer does not adequately investigate and pay for a covered loss, it can rely on the appraisal clause to avoid any responsibility for the delay and expense it

would otherwise be liable for in the civil justice system and by statute.[1/] The insured would have to perform its own investigation–at its own expense–and navigate through the appraisal process (with its attendant costs and delays) in order to obtain the policy benefits it was owed. Under the mistaken reasoning of the *Breshears* line of cases (it is cited in over a hundred state and federal opinions, *but never by this Court*), the insurer would not pay anything more than it would have paid had it properly adjusted and agreed to pay the claim promptly.

Breshears and its progeny allow an insurer to dither, delay, and obstruct payment of a claim, and then once sued, invoke appraisal, pay the appraisal award, and avoid any penalty for its dilatory tactics. These misguided rulings encourage insurer mis- and mal- feasance by making policyholders bear the entire cost of

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[1/] At least one federal court has noted that *Breshears*–as opposed to the cases misapplying *Breshears*, such as *Hurst*–is a quite limited holding:

> In *Breshears*, the court noted that an appraisal decisions merely estops "one party from contesting the issue of the value of damages in a suit on the insurance contract." . . . The court says nothing about an appraisal decision estopping an insured from asserting extra-contractual claims. Rather, the court held merely: "As there was no breach of contract by State Farm, and consequently no judgment against it on which to base interest calculations, prejudgment interest cannot be awarded against State Farm."

Church on the Rock N. v. Church Mut. Ins. Co., No. 3:10-CV-0975-L, 2013 WL 497879, at *10 (N.D. Tex. Feb. 11, 2013) (citations omitted).

delay. These rulings are called directly into question by *Menchaca*'s "entitled-to-benefits" rule, which should supplant the *Breshears* "breach-of-contract" rule. This case presents this court with an opportunity to apply *Menchaca* to a situation in which the insurer has waited until after the filing of suit to invoke appraisal.

CONCLUSION AND PRAYER

Philadelphia and Greenhaw's argument that any and every extra-contractual claim automatically fails absent further liability under an insurance policy after the payment of an appraisal award has been implicitly rejected by this Court in *Menchaca*. This Court should now make that rejection explicit.

On remand, the jury might find that Philadelphia and Greenhaw did not act in bad faith, or that they did promptly pay the Church's claim. But under the Menchaca principles and in consonance with the policy provisions, the Church has the right to ask the jury those questions; Philadelphia's belated invocation of appraisal and subsequent payment of the appraisal award should not as a matter of law absolve Philadelphia or its agent for their misconduct prior to the triggering of the appraisal clause.

The Church therefore prays this Court to grant review and to remand this cause to either the intermediate court or the trial court for further proceedings in keeping with *Menchaca*. The Church also prays for such other and further relief as to which it may be entitled.

Respectfully submitted,

KELLY, DURHAM & PITTARD, LLP

/s/ Peter M. Kelly

Peter M. Kelly (Lead Counsel)
State Bar No. 00791011
F. Leighton Durham, III
State Bar No. 24012569
1005 Heights Boulevard
Houston, Texas 77008
Telephone: 713.529.0048
Facsimile: 713.529.2498
pkelly@texasappeals.com
ldurham@texasappeals.com

and

Shannon E. Loyd
State Bar No. 24045706
THE LOYD LAW FIRM, PLLC
12703 Spectrum Drive, Suite 201
San Antonio, Texas 78249
Telephone: 210.775.1424
Facsimile: 210.775.1410
Shannon@theloydlawfirm.com

Counsel for Petitioner
Richard East Baptist Church

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/s/ Peter M. Kelly
Peter M. Kelly

CERTIFICATE OF SERVICE

A true and correct copy of this *Petitioner's Reply Brief on the Merits* has been forwarded to all counsel of record on August 16, 2017, as follows:

William Pilat
KANE RUSSELL COLEMAN & LOGAN PC
5051 Westheimer Road, 10th Floor
Houston, Texas 77056
Facsimile: 713.425.7700
wpilat@krcl.com

Counsel for Respondent
Philadelphia Indemnity Insurance Company

Andrew L. Edelman
Jay W. Brown
WINSTEAD PC
1100 JPMorgan Chase Tower
600 Travis Street
Houston, Texas 77002
Facsimile: 713.650.2400
aedelman@winstead.com
jbrown@winstead.com

Counsel for Respondent
James Greenhaw

/s/ Peter M. Kelly
Peter M. Kelly