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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 BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	After Philadelphia Indem. Ins. Co. failed to timely pay insurance claim, insured Richardson East Baptist Church sued Philadelphia and its adjuster for, *inter alia*, breach of contract and extra-contractual duties. CR 8-16.
Trial Court:	Honorable Emily Tobolowsky presiding, in the 298th District Court, Dallas County, Texas.
Course of Proceedings:	After duly answering, defendants filed a motions for traditional and no-evidence summary judgment. CR 20, 29, 33, 196
Trial Court Disposition:	The trial court granted the motions for summary judgment, dismissing all claims against Philadelphia and Greenhaw with prejudice. CR 591-92.
Parties in Court of Appeals:	Petitioner is underlying plaintiff Richardson East Baptist Church. Respondents are underlying defendants Philaelphia Insurance Co. and James Greenhaw.
Participating Justices:	Francis, Lang-Miers, Myers, JJ. Opinion authored by Myers, J.
Citation:	*Richardson E. Baptist Church v. Philadelphia Indem. Ins. Co.*, No. 05-14-01491-CV, 2016 WL 1242480 (Tex. App.—Dallas 2016) (mem. op.) (attached as App. B).
Ct. App.'s Disposition:	Affirmed.

STATEMENT OF JURISDICTION

This Court has jurisdiction under subdivisions (6) of Texas Government Code Section 22.001(a). First, the case is important to the jurisprudence of the state because the court of appeals has perpetuated committed an error of law of such importance to the state's jurisprudence that it should be corrected. The refusal of the lower courts to countenance the proper measure of contract damages wreaks injustice on policyholders statewide.

ISSUE PRESENTED

Issue No. 1:

When an insurer satisfies its obligation to pay for covered damages (as appraised) only after the insured has incurred expenses, other losses, and attorney fees, and has filed suit, does the insurer remain liable for the insured's remaining consequential contractual damages and attorney's fees, or does the mere payment of the appraised amount confer immunity?

STATEMENT OF FACTS

Richardson East Baptist Church owns a church property with multiple buildings in Richardson, Texas. CR 238. The church buildings were insured by Philadelphia Indemnity Insurance Company ("Philadelphia"). *Id.* On April 23, 2013, the Church notified Philadelphia of hail damage to the buildings' roofs and filed a claim. CR 151-52. Philadelphia assigned Appellee James Greenhaw as the adjuster to investigate the damage claim. *Id.* at 344. At the same time, the Church submitted an estimate from Bradley Roofing Company, indicating roof replacement was necessary due to extensive hail damage, with an estimated cost exceeding $32,000. *Id.* at 353.

On May 2, after inspecting the church property, Greenhaw first adjustment report to Gary Grabauskas of Philadelphia reported hail damage to two of the buildings. CR 344-52. Greenhaw's First Report advised Philadelphia that the hail damage required complete roof replacement of only one slope of the sanctuary and only spot repairs of the shingles on the remaining areas. *Id.*. Greenhaw's initial loss estimate was of $10,441.55. *Id*. On May 30, the Church notified Philadelphia that it did not agree with Greenhaw's assessment of the damage to the church buildings or the total cost estimate. CR 308, 354. Simultaneously, Greenhaw, noting the dispute regarding the loss, advised Philadelphia that it could opt for appraisal. *Id*.

On June 18, the Baptist Church orally informed Greenhaw that it would opt for appraisal under the policy provisions. CR 414.

The engineering report Philadephia requested found even less damage to the church buildings. CR 162-64. Greenhaw's next report, in June, indicated again that the Church would opt for appraisal. CR 357. Greenhaw also reported he had requested the name of the Church's appraiser. *Id.* Greenhaw also recommended Philadelphia tender a $7,941.55 payment, based on the damage and loss findings in his initial report ($10,441.44, minus deductible). (*Id*).

On July 1, after Philadelphia made a net payment of $7,941.55, the Church was forced to hire a private insurance adjuster, Scott Friedson. CR 361.

On July 12, 2013, Philadelphia received Friedson's estimate to repair all hail damage on the church's property. CR 363, 364-393. This was the fourth independent report of hail damage received by Philadelphia.) Friedson's estimate of damage, approximately $36,000, was close to the Bradley Roofing estimate. *Id.* Grabauskas then instructed Greenhaw to contact Friedson and find a way to make the Church "go away." CR 363. On July 15, Greenhaw told Grabauskas to hold off on any payment to the Church based on his earlier report and assessment until Greenhaw could lower his estimated damage amounts to match the lower damage amounts provided in the Donan report. CR 411. Greenhaw's Fourth Report to Philadelphia, sent on July 17, reflects these changes and lowered damage amounts to $7,499.44. CR 394-401.

Greenhaw indicated these revisions were made because he wanted to "stick to that scope" in the event the claim went to appraisal. CR 384-85, 411.

On July 19, Friedson notified Philadelphia and Greenhaw that the Church was selecting Roy Vickers as its appraiser in the event the parties could not reach an agreement in the upcoming days. CR 402. Grabauskas recorded in his notes on July 22, that "no matter what, we are not going to agree to appraisal unless he [Friedson] meets us out at the loss and attempt [sic] to show us what he feels is damages that the [Donan] engineer missed." CR 405. The Church was then forced to hire an attorney on July 23 to obtain the policy benefits due it. CR 419.

After retaining counsel, the Church hired an expert litigation adjuster, Art Boutin, to inspect any and all damage to the Church's buildings. CR 423-37. During his inspection, Boutin identified water damage inside the Church's buildings that no other inspector had identified. CR 423-37. Boutin also determined that the Church's air conditioning units needed to be replaced and that repairs suggested previously by other inspectors would be insufficient to properly repair the units. CR 423-37. Boutin's estimation of damages was considerably higher than previous estimates. (Ultimately, the water damage was attributed to an air conditioning leak, which would also be covered under the Church's insurance policy, but the Church elected not to pursue those damages under the policy.) CR 423-37.

Philadelphia informed the Church of Philadelphia's wish to mediate. Mediation was unsuccessful, and the Church filed suit against Philadelphia and Greenhaw on November 21, 2013. CR 6. Four days after suit was filed, Philadelphia invoked appraisal. An appraisal award in the amount of $30,175 was agreed upon by the impartial appraisers, and Philadelphia tendered the award to the Baptist Church for the claimed loss. Philadelphia and Greenhaw then followed with motions for summary judgment, both traditional and no-evidence, to dismiss all claims based on the tendered appraisal award. CR 33, 196. The trial court granted both motions and dismissed all claims against Philadelphia and Greenhaw with prejudice. The Dallas Court of Appeals affirmed.

STANDARD OF REVIEW--DE NOVO

This is a petition for review of an intermediate appellate court's affirmance of a defendant's traditional and no-evidence motions for summary judgment. The usual standards and presumptions apply.

SUMMARY OF ARGUMENT

This Court has pointed the way to a correct resolution of this appeal in its recent opinion in *Menchaca*. In that opinion, the court restated or revivified the"entitled-to-benefits" rule, under which an award of policy benefits to which a policyholder is entitled constitutes an award of actual damages sufficient to support

and award of extracontractual damages and, by extension, attorney's fees for breach of contract.

This case asks this Court to apply the "entitled-to-benefits" rule to appraisal. The appraisal process determines the dollar cost of the physical damage sustained by an insured structure. If the insurer has not paid the policyholder the full amount as determined by appraisal (less the deductible, etc.), then the insurer has breached the contract. It may cure that breach by prompt payment of the appraisal award, but that payment does not expiate the insurer's liability for attorney's fees and expenses incurred in obtaining the award. That is especially true in a case like this in which the appraisal clause was both optional and mutual, and was not invoked by the insurer until after litigation had commenced.

ARGUMENT AND AUTHORITIES

Just last month, this Court revamped the law governing policyholders' claims against insurers for extracontractual damages. *See USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, 2017 WL 1311752, at *1 (Tex. Apr. 7, 2017). In that opinion, this Court set out five rules governing such claims, either reformulating or revivifying this Court's previous holdings on the field. This case presents an opportunity to apply one of those rules, the entitled-to-benefits rule, to a fact pattern involving appraisal.

I. Under the entitled-to-benefits rule, the Philadelphia's payment of the appraisal award constituted an award of actual damages, sufficient to support a further award of attorney's fees and extracontractual damages.

A. The trial court erred by not recognizing the policy benefits as actual damages.

In *Menchaca*, this court recognized as its second rule (as a corollary to its first rule) "that an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the statute if the insurer's statutory violation causes the loss of the benefits." *Menchaca*, at *7. "'Actual damages' under the Insurance Code 'are those damages recoverable at common law,' . . . which include 'benefit-of-the-bargain' damages representing 'the difference between the value as represented and the value received . . . .'" *Id.* at *3 (citations

omitted.) This rule is a clarification and reinvigoration of this Court's holding in *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988).

As this Court explained in *Menchaca*, the policyholders in *Vail* sued their insurer for common-law bad faith and statutory violations (but not for breach of contract), alleging a "bad faith failure to pay the claim" and seeking "the full amount" of policy benefits plus statutory damages. 754 S.W.2d at 130. The jury found that the insurer violated the statute by failing to "attempt [ ] in good faith to effectuate a prompt, fair, and equitable settlement" when "liability had become reasonably clear," and breached its common-law duty of good faith and fair dealing by failing "to exercise good faith in the investigation and processing of the claim." *Id.* at 134. Based on these findings, the trial court awarded benefits in the amount of the "full policy limit" plus treble that amount, attorney's fees, and prejudgment interest. *Id.* at 131. The insurer argued that the policyholders could not recover policy benefits as damages for statutory violations because "the amount due under the policy solely represents damages for breach of contract and does not constitute actual damages in relation to a claim of unfair claims settlement practices." *Id.* at 136. The *Vail* court rejected that argument and held that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." *Id.*

This Court explained that the policyholders "suffered a loss . . . for which they were entitled to make a claim under the insurance policy," and that loss was "transformed into a legal damage" when the insurer "wrongfully denied the claim." *Id.* "That damage," this Court held, "is, at minimum, the amount of policy proceeds wrongfully withheld by" the insurer. *Id.* Because the Insurance Code provides that the statutory remedies are cumulative of other remedies, this Court concluded that the policyholders could elect to recover the benefits under the statute even though they also could have asserted a breach-of-contract claim. *Id.*

Here, just as in *Vail*, the insurer wrongfully denied policy benefits to the policyholder. Here, just as in *Vail*, the trial court found the policy did not suffer any contract or other injury besides the nonpayment of the policy benefits. As this Court held in *Vail*, though, when an insurer wrongfully denies a valid claim, the resulting damages will necessarily include the amount of the policy benefits wrongfully withheld. *Menchaca*, at *8 (citing *Vail*, 754 S.W.3d at 136). So the rule is that a policyholder "who establishes a right to benefits under the policy can recover those benefits as actual damages resulting from a statutory violation." *Menchaca*, at*8. And, by extension, if the policy benefits can be actual damages for the purpose of determining the availability of statutory and other extracontractual damages, they can *also* be actual damages for the purpose of assessing attorney's fees in a contract action.

B. That the amount of the Church's actual damages were determined by appraisal rather than submission to the jury does not mean they cannot support an award of attorney fees.

The insurance contract between Philadelphia and the Church included an appraisal clause. The clause provides:

> Appraisal
>
> If we and you disagree on the amount of Net Income and operating expense 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. The appraisers will state separately the amount of Net Income and operating expense and 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 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 equality.
>
> If there is an appraisal:
>
> a. You will retain your right to bring legal action against us, subject to the provisions of the Legal Action Against Us Commercial Property Condition; and
>
> b. We will retain the right to deny the claim.

CR 103.

The clause is mutual–either party may invoke appraisal–but it is neither mandatory nor a condition precedent to the filing of suit. Because appraisal was not a condition precedent to suit, the parties contemplated the invocation of appraisal after the filing of a suit to collect policy benefits–which is what happened here.

As this court has repeatedly noted, an appraisal clause is not like an arbitration cluase, which can specify a different, private forum for the resolution of the parties' dispute. Rather, an appraisal clause merely "'binds the parties to have the extent or amount of the loss determined in a particular way.'" *In re Allstate Cty. Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002) (quoting *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5, 8 S.W. 630 (1888)). And under Texas law appraisal clearly can be a *parallel* proceeding, not intended to wholly replace an ongoing court proceeding. *See In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 412 n.5 ("the proceedings need not be abated while the appraisal goes forward").

What we have here, then, is a dispute between the parties about the amount of policy benefits owed the policyholder. The policyholder (the Church) filed suit. The insurer, Philadelphia, then exercised its right to have the precise amount of the policy benefits determined by appraisal, rather than submission to the jury. Philadelphia then paid the difference between its initial payment to the Church and the appraisal award, which is what Philadelphia should have paid to begin with. That payment, under the entitled-to-benefits rule, constituted compensation for the Church's actual

damages under the contract. *See Menchaca*, at *8. This Court has explained that the purpose of an appraisal is to provide a means to resolve disputes about the amount of loss for a covered claim, and to determine whether a breach of the insuring agreement has occurred. *In re Universal Underwriters*, 345 S.W.3d at 407-08, *Johnson*, 290 S.W.3d at 888; *In re Allstate*, 85 S.W.3d at 196. This Court reasoned that if the appraisal determined that the insurer had already offered compensation for the full amount of the policyholder's injury, then there could be no breach of contract. But the converse of that must also obtain: if the insurer had not offered compensation for all the injury, then the insurer is in breach of the insuring contract until such a tender is made. The insurer thus cures its breach by making full payment, just as paying a judgment based on a breach of contract would entitle the insurer to a release.

At that point, Philadelphia becaame liable to the Church for attorney's fees and costs. *See* Tex. Civ. Prac. & Rem. Code § 38.002. The trial court and the intermediate court of appeals insterad granted summary judgment on the Church's claims, with the intermediate court relying on the erroneous holding in Bresehears to support its conclusion. *See REBC*, 2016 WL 1242480, at *5 (citing *Breshears v. State*, 155 S.W.3d 340, 344 (Tex. App.–Corpus Christi 2004, pet. denied).

This Court should take this opportunity to apply the entitled-to-benefits rule to appraisal cases, and reverse the opinion and judgment of the court of appeals.

II. The Church has not been fully compensated for Philadelphia's breach of its obligation to pay covered claims.

Philadelphia, as the insurer, owed the Church, as the insured, the duty to pay on covered claims:

> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

CR 79. Appraisal is a contractual procedural device used to determine the amount of the covered claim. Philadelphia's liability is thus not solely determined by whether it breached the appraisal provision; rather, the question is also whether Philadelphia breached its duty to timely pay. Specifically, the question is whether the Church has been compensated for the damages it incurred–hiring professionals, costs of delay–by reason of Philadelphia's delay in paying the covered claim.

A. Under Texas law, the Church is entitled to recover damages beyond the mere payment of the covered claim.

The ultimate goal in measuring damages for a breach of contract claim is to prove the just compensation for any loss or damage actually sustained by the injured party as a result of the breach. *Walden v. Affiliated Computer Servs. Inc.*, 97 S.W.3d 303, 328 (Tex. App.–Houston [14th Dist.] 2003, pet. denied). Generally, the measure of damages for breach of a contract is that which restores the injured party to the economic position he would have enjoyed if the contract had been performed, which may include consequential damages. *See AZZ Inc. v. Morgan,* 462 S.W.3d 284, 289

(Tex. App.–Fort Worth 2015, no pet.); *Mood v. Kronos Prods., Inc.,* 245 S.W.3d 8, 12 (Tex. App.–Dallas 2007, pet. denied); *SAVA Gumarska in Kemijska Industria D.D. v. Advanced Polymer Scis., Inc.*, 128 S.W.3d 304, 317 n.6 (Tex. App.–Dallas 2004, no pet.). To be recoverable, consequential damages must be foreseeable and directly traceable to the wrongful act and result from it; thus, consequential damages are generally not recoverable unless the parties contemplated at the time they made the contract that such damages would be a probable result of the breach. *Stuart v. Bayless,* 964 S.W.2d 920, 921 (Tex. 1998); *AZZ Inc.,* 462 S.W.3d at 289.

The amount of the Church's direct damages–the amount of the covered claim–was fixed by the appraisal award. *See In re Universal Underwriters*, 345 S.W.3d at 406-07 (Tex. 2011) ("Appraisal clauses, commonly found in homeowners, automobile, and property policies in Texas, provide a means to resolve disputes about the amount of loss for a covered claim.") (citing *Johnson,* 290 S.W.3d at 888).

But the Church also seeks compensation for its consequential damages–the costs associated with undue hardship, delay, and professional's fees. CR 45. The summary judgment established that the Church was forced to hire two separate claims adjusters to pursue its claim. Ultimately, the Church retained only $2,053 of the $7,933 appraisal award due to the costs and fees. CR 606. The Church also pleaded that it incurred additional damage to its church buildings due to the delayed payment. CR 246. None of these elements of recoverable damages was contradicted by

Philadelphia's summary judgment motion. None of these elements of recoverable damages were included in Philadelphia's payment of the covered damages.

B. Under Texas law, the Church is entitled to recover attorney's fees.

Attorneys' fees and costs associated with the breach of contract claims are recoverable, and the Church duly pleaded for them. CR 44-45; Tex. Civ. Prac. & Rem. Code § 38.001. The affidavit of the Church's attorney (attached to the summary judgment response) established attorneys' fees and costs in the amount of $26,940.00 and $4,507.00, respectively. CR 419.

As a general rule, suits cannot be brought solely for attorney's fees; the plaintiff must gain something before attorney's fees can be awarded. *See MBM Fin. Corp. v. Woodlands Oper. Co.,* 292 S.W.3d 660, 663 (Tex. 2009); *Butler v. Arrow Mirror & Glass, Inc.,* 51 S.W.3d 787, 797 (Tex. App.–Houston [1st Dist.] 2001, no pet.) ("there must be a recovery of money, or at least something of value; otherwise, the attorney's fee award cannot be described as an 'addition' to the claimant's relief."). And here, as discussed above, the Church prevailed on its breach of contract claim when Philadelphia paid the appraisal award, triggering the Church's right to the further remedy of an award of attorney's fees.

The Church notes that Philadelphia could have avoided this result by making appraisal a condition precedent to filing suit. "'A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation.'"

Solar Applications Eng'g, Inc. v. T.A. Operating Corp., 327 S.W.3d 104, 108 (Tex. 2010) (quoting *Centex Corp. v. Dalton,* 840 S.W.2d 952, 956 (Tex. 1992)) and citing Restatement (Second) of Contracts § 224 (1981) ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.")). "'In order to make performance specifically conditional, a term such as "if", "provided that", "on condition that", or some similar phrase of conditional language must normally be included.'" *Solar Application*, 327 S.W.3d at 109 (quoting *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990)). The appraisal clause here is permissive, and contains no conditioning language. CR 102.

C. This Court should either limit or overrule the Thirteenth Court's holding in *Breshears*.

The Dallas court's opinion in this case ultimately rests on one opinion from an intermediate Texas appellate court that is contrary both to the purpose, function, and effect of insurance appraisals as explained by this Court and to the clear public policies underlying the Texas legislature's statutory bad faith scheme and PPCA. *See REBC*, 2016 WL 1242480, at *5, (citing *Breshears*, 155 S.W.3d at 344). In *Breshears*, the insured argued that because the appraisal award was greater than the initial payment made by the insurer, the insurer was in breach of the contract *as a matter of law*. 155 S.W.3d at 343. The Thirteenth Court held that the insured could

not use the fact that the appraisal award was different than the amount originally paid on the claim as the sole evidence of breach. *Id.* The court went on to hold that since full payment of the appraisal award was made, the insurer was in "full compliance" with the contract and there was no breach. *Id.*

Under *Breshears*, 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. 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 get the coverage it was owed. Under the mistaken reasoning of *Breshears* and its progeny (it is cited in over a hundred state and federal opinions), the insurer would not pay anything more than it would have paid had it properly adjusted and agreed to pay the claim promptly.

Misconstrued to absolve an insurer of contractual and bad faith liability, appraisal also provides an insurer an incentive to undervalue the loss or delay adjusting or paying the claim. At best, an insured that has suffered a catastrophic loss and cannot afford any delay or expense in proving up its covered loss may have to accept substantially less than it is owed under its policy. At worst, the insured proves up the actual value of the loss at its own expense and the insurer simply invokes the appraisal clause only after it has been sued causing the insured to incur additional

expenses and delay for which it has no remedy. The most the insurer would ever pay under the *Breshears* rule would be the amount it would have had to pay had it properly evaluated the amount of the loss in the first place. In the meantime, the insurer has been able to retain all or part of the amount owed for the covered loss until such time as the appraisal process is complete, both placing pressure on the insured to accept less than it is owed and collecting interest on policy benefits that rightfully belong to the policyholder.

In other words, under *Breshears*, an insurer has everything to gain and nothing to lose by underpaying or delaying payment of a covered loss--turning the "special relationship" meant to be protected by Texas statute and common law on its head. Indeed, as noted above, an insured would have less remedy available for an insurer's breach of its statutory duties than does a claimant who prevails in a garden-variety breach of contract claim.

One of the more perverse results of the *Breshears* rule applied by the district court in this case is that an insured, who is supposed to have a special relationship of trust with its insurer, cannot recover attorneys' fees for its insurer's breach of its contractual and statutory obligations to promptly pay for covered losses, yet any other aggrieved party who prevails in a garden-variety breach of contract dispute resolved through an alternative dispute process (such as arbitration) *would* recover attorneys' fees even in the absence of the type of special relationship specifically created for

insurers. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 171.048(c); *Tsai v. Su*, 2010 WL 3294235 (Tex. App.–Houston [1st Dist.] Aug. 19, 2010, no pet.)(mem. op.)(allowing award of attorneys' fees by arbitrator since they would have been available under Chapter 38 had the dispute been resolved in district court).

D. Public policy supports granting review of this case and directly overruling *Breshears*.

1. Insurers can shift the duty and expense of investigating claims onto the insured.

Under the reasoning of *Breshears* and its progeny, the insurer would be required to pay nothing more than it would have paid had it adjusted, investigated, and agreed to pay the claim promptly, while the insured is forced to incur unexpected investigatory and appraisal costs. Absent potential liability for attorney's fees (for breach of contract claims or violations of the insurance code), prompt pay penalties or any potential liability for bad faith, the insurer has a direct and immediate financial incentive to shift the burden and expense of investigation to the insured and underestimate loss. Insufficient, unreasonable investigations and undervaluing of claims will prevail because the insurer knows the eventual appraisal award, which will only cover the initial loss claim damages, is an absolute cap on any recovery. And while the insurer is incentivized to be less cooperative and delay full payment of claims, the insured faces additional costs to force the insurer to abide by the

provision of the policy and fully pay its claims, including hiring counsel, adjusters and paying for the ultimate appraisal process.

2. Insurers can delay payment of claims by delaying the invocation of the appraisal provisions.

Applying appraisal provisions in manner in which an insurer is ultimately absolved of all contractual liability provides an insurer an incentive to undervalue the loss and delay full payment of loss claims. A policyholder who has suffered catastrophic loss and cannot afford any delay or expense in independently proving up its covered loss may have to accept substantially less than it is owed under its insurance policy. Or, a policyholder may elect to prove up the actual value of its loss at his own expense and delay the receipt of settlement to do so, only to have the insurer then invoke the appraisal clause late in the process, pay the award (which would most likely be no more than the initial loss claim), and avoid any attorney's fees or additional cost associated with in breaches of the possibility due to his delay. Under *Breshears*, an appraisal award has no downside for an insurer because liability is completely capped by the loss and all contractual claims will be extinguished. Any breaches of the policy are immediately extinguished once the award is accepted.

3. Insurers can use appraisal to coerce the insured into agreeing to less than what is owed under the claim.

Regardless of the common law and the statutory duty to promptly pay covered losses, *Breshears* serves only to encourage insurers to under-investigate and

underestimate covered losses in an effort to encourage the policyholder to accept less than the full value of his policy benefits. There is no longer an incentive for the insurer to initially pay full value of a claim and the insured is likely to accept the lower amount paid. If the appraisal award ultimately grants the full value of the claim, the insured will still be insulated from any contractual breaches it committed in delaying full payment.

4. Insurers can force their policyholders to retain counsel or initiate suit to collect insurance benefits.

An insurer has a duty pursuant to the provisions of the insurance code not to compel an insured to initiate suit to recover the amounts due under an insurance policy. *See* Tex. Ins. Code §542.003(b)(5). The common law and the insurance code also provide penalties for an insurer's failure to promptly pay claims in full–bad faith liability, liability for attorneys' fees, prompt payment delay penalties, and interest. However, as *Breshears* and other cases mistakenly misapply appraisal provisions and treat these provisions as simply a step in the claims adjustment process, insurers now have a financial incentive to underpay, rather than promptly pay full value for a loss, making it more likely that the insured will be forced to initiate litigation to receive full value for his claim. And the insurer would have no real fear of litigation because, under *Breshears*, all other claims against the insured would be extinguished if the insurer simply invokes appraisal. The insured faces no consequence for initially

underpaying or delaying appraisal, even until after litigation ensues, as was the case here.

CONCLUSION AND PRAYER

This Court has recognized that "appraisal is intended to take place before suit is filed . . . . Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings. It would be a rare case in which appraisal could not be completed with less time and expense than it would take to file motions contesting it." *Johnson*, 290 S.W.3d at 894. There is no need for, say, Chapter 38's fee shifting because no fees are incurred. But delaying invocation of the appraisal clause until *after* suit is filed eliminates that public policy benefit, because attorney fees and litigation expenses have of necessity been incurred. Philadelphia would have this Court hold that there is no fee shifting once appraisal has been invoked; but that leaves the Church holding the bag, having had to incur fees and expenses to get to that point. Philadelphia's rule avoids fee shifting; the public policy behind appraisal is to avoid incurring the fees at all. It thus makes no sense to enforce the appraisal clause in the manner Philadelphia suggests.

This Court's opinion in *Menchaca* points the way to the proper resolution of this case–the appraisal award is the assessment of the damages incurred as a result of the injury cause by Philadelphia's breach of the insuring contract. The Church is thus the prevailing party, and is entitled to an award of attorney fees and expenses. The

Church therefore prays this Court to hold such, and to remand this cause to either the intermediate court or the trial court for further proceeding in keeping with that holding. The Church also prays for such other and further relief as to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this brief on the merits (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, issues presented, signature, proof of service, certificate of compliance, and appendix) is 5,097.

/s/ Peter M. Kelly
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CERTIFICATE OF SERVICE

A true and correct copy of this *Petitioner's Brief on the Merits* has been forwarded to all counsel of record on May 9, 2017, as follows:

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A

348M · 000634

CAUSE NO. DC-13-13868

RICHARDSON EAST BAPTIST CHURCH,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
PHILADELPHIA INDEMNITY INSURANCE COMPANY AND JAMES GREENHAW,	§	
	§	
Defendants.	§	298th JUDICIAL DISTRICT

ORDER

ON THIS DAY the Court considered Defendant James Greenhaw's Motion for Summary Judgment. Having considered said Motion, any Responses, Replies, and arguments thereto, and the pleadings and evidence on file, the Court is of the opinion that said Motion should be GRANTED in all things.

It is, therefore, ORDERED, that all of Plaintiff Richardson East Baptist Church's claims against Defendant James Greenhaw are hereby DISMISSED WITH PREJUDICE, and Plaintiff shall take nothing against Defendant James Greenhaw.

Signed this 26 day of September, 2014.

Emily A. Tobolowsky
JUDGE PRESIDING

348M 000633

CAUSE NO. DC-13-13868

RICHARDSON EAST BAPTIST CHURCH	§	**IN THE DISTRICT COURT**
VS.	§	**DALLAS COUNTY, TEXAS**
PHILADELPHIA INDEMNITY INSURANCE COMPANY and JAMES GREENHAW	§	**298TH JUDICIAL DISTRICT**

ORDER

CAME ON TO BE HEARD, in the above-entitled and numbered cause, the Traditional and No-Evidence Motion for Summary Judgment filed in this cause by Defendant Philadelphia Indemnity Insurance Company ("Defendant") against the Plaintiff, Richardson East Baptist Church ("Plaintiff"). The Court finds that Plaintiff, through its attorney of record, had timely, due, and proper notice of the hearing on Defendant's Motion. Further, the Court, after reviewing the motion, the response, arguments of counsel, if any, and the pleadings on file in this case, finds that the motion is meritorious. It is therefore

ORDERED that Defendant's Motion for Summary Judgment is GRANTED. It is further

ORDERED that Plaintiff take nothing on its claims against Philadelphia Indemnity Insurance Company.

Signed this 26 day of September, 2014.

Emily A. Tobolowsky
PRESIDING JUDGE

B

AFFIRMED; Opinion Filed March 30, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01491-CV

RICHARDSON EAST BAPTIST CHURCH, Appellant
V.
PHILADELPHIA INDEMNITY INSURANCE COMPANY AND JAMES GREENHAW, Appellees

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-13868-M

MEMORANDUM OPINION

Before Justices Francis, Lang-Miers, and Myers
Opinion by Justice Myers

Richardson East Baptist Church appeals the trial court's judgment that the Church take nothing on its claims against Philadelphia Indemnity Insurance Company and James Greenhaw. The Church brings six issues on appeal contending the trial court erred by granting appellees' motions for summary judgment on the Church's claims for breach of contract, violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and conspiracy. We affirm the trial court's judgment.

BACKGROUND

The Church owns property with multiple buildings, which are insured by Philadelphia Indemnity. On April 23, 2013, the Church notified Philadelphia Indemnity that the roofs on two of the buildings were damaged during a hailstorm. The Church submitted an estimate of

$32,713.13 from Bradley Roofing for replacing the roofs on "Admin and Chapel." Philadelphia Indemnity assigned an independent adjusting company, Property Claims Services, Inc., to investigate the claim. The adjusting company assigned James Greenhaw to be the adjustor for the claim. Greenhaw inspected the property on April 25, 2013 and reported his findings to Philadelphia Indemnity the following week. Greenhaw determined the hail damage required replacement of the west slope of the sanctuary's roof, spot repairs of the east slope of the sanctuary, and spot repairs on the roof of a second building. Greenhaw estimated the repairs would cost $10,441.55, and after deduction of the $2,500 deductible, determined the Church was entitled to payment of $7,941.55 under the policy.

The Church's pastor, Wayne Lewis, disagreed with Greenhaw's findings and estimate. Lewis told Greenhaw the Church had an expert examine the roofs who had found more extensive damage than Greenhaw had found. On May 30, 2013, Philadelphia Indemnity instructed Greenhaw to hire an engineer for an evaluation, and Greenhaw hired Donan Engineering Co. The engineer issued his report on June 18, 2013, stating the only hail damage was to the west slope of the sanctuary, which required removal and replacement of that part of the roof. Although Donan Engineering found less damage than Greenhaw had found, Philadelphia Indemnity continued to offer to pay the Church based on Greenhaw's estimate. On June 21, 2013, Greenhaw reported to Philadelphia Indemnity that Lewis disagreed with both Greenhaw's and Donan Engineering's determinations. Greenhaw also stated in his report that Lewis "said he would option for the appraisal provision in the policy" but that Lewis "was still in the process of deciding who" the Church's appraiser would be.

On June 24, 2013, Philadelphia Indemnity issued a check to the Church for $7,941.55.

On July 1, 2013, the Church hired a public adjuster, Scott Friedson. Friedson estimated the cost to repair the hail damage was $36,372.58, and that after deducting the $2,500 deductible,

Philadelphia Indemnity owed the Church $33,872.58. On Friday, July 19, 2013, Friedson e-mailed Greenhaw stating he disagreed with Greenhaw's initial estimate and proposed they settle the case the following Monday. Friedson also stated, "If we cannot reach an agreement then the insured is likely to invoke appraisal and name Loy Vickers."

On July 23, 2013, the Church hired a law firm to represent it in its dispute with Philadelphia Indemnity. The Church also retained an expert litigation adjuster, Art Boutin, to inspect the buildings and determine the amount of the loss. On August 2, 2013, Boutin estimated the damage to the Church from hail was $112,077.32.[1]

In his report to Philadelphia Indemnity dated August 12, 2013, Greenhaw stated he met with Friedson in late July but that they could not reach an agreement regarding the claim. Greenhaw stated three weeks had passed since he last spoke to Friedson, and Greenhaw considered the claim resolved based on the payment already made to the Church. Greenhaw stated he had offered to meet with Friedson "or if he wants to request the appraisal process, he should do so."

The Church filed suit against Philadelphia Indemnity and Greenhaw on November 21, 2013. On November 25, 2013, before the Church served Philadelphia Indemnity with the suit, Philadelphia Indemnity sent a written request for appraisal pursuant to the policy's provisions. On April 21, 2014, the appraisers issued their written determination that the repair cost for the damage was $30,175 and the actual cash value of the damage was $18,375. Four days later, on April 25, 2014, Philadelphia Indemnity issued a check to the Church for $7,933.45, which was the amount of the appraiser's award less the deductible and the amount Philadelphia Indemnity had previously paid.

[1] According to the Church's response to Philadelphia Indemnity's motion for summary judgment, Boutin's estimate of hail damage was substantially higher than Greenhaw's, Friedson's, and Donan Engineering's because it included interior water damage and called for replacement of air conditioning units. The Church later determined the interior water damage was caused by "an A/C leak, also covered by the policy. Under the circumstances, the Church chose not to pursue a claim for these damages."

In its suit, the Church alleged Philadelphia Indemnity breached the policy, engaged in unfair settlement practices prohibited by the Texas Insurance Code, and breached the duty of good faith and fair dealing. The Church also alleged Greenhaw did not comply with the Texas Insurance Code and that both appellees engaged in a civil conspiracy to underpay the Church's claim. Philadelphia Indemnity and Greenhaw filed motions for summary judgment asserting both traditional and no-evidence grounds. The trial court granted the motions for summary judgment and ordered the Church take nothing on its claims.

STANDARD OF REVIEW

The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 549; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

We review a no-evidence summary judgment under the same legal sufficiency standard used to review a directed verdict. *See* TEX. R. CIV. P. 166a(i); *Flood v. Katz*, 294 S.W.3d 756, 762 (Tex. App.—Dallas 2009, pet. denied). Thus, we must determine whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the material questions presented. *See Flood*, 294 at 762. When analyzing a no-evidence summary judgment,

we consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the movant. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). A no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). "Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

BREACH OF CONTRACT

In its first and third issues, the Church contends the trial court erred by granting Philadelphia Indemnity's motion for summary judgment on the Church's cause of action for breach of contract. In the first issue, the Church contends that its acceptance of the appraisal award did not bar its claim for breach of contract. In the third issue, the Church asserts it presented some evidence Philadelphia Indemnity breached the contract and that the Church suffered damages that were not addressed by the appraisal award. We conclude under the third issue that the Church presented no evidence Philadelphia Indemnity breached the contract. Accordingly, we do not address the Church's first issue.

The Church asserts Philadelphia Indemnity breached the contract by (a) refusing the Church's request for appraisal and misrepresenting the conditions precedent to the permissible invocation of appraisal, thereby unnecessarily delaying the resulting appraisal award; and (b) intentionally underestimating and undervaluing the Church's loss. Philadelphia Indemnity's

grounds for summary judgment included the assertion that the Church had no evidence that Philadelphia Indemnity breached the contract.

Demand for Appraisal

The policy provided for an appraisal procedure for determining the amount of a loss as follows:

> **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 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 legal 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.

After the Church filed suit, but before Philadelphia Indemnity was served with the suit, Philadelphia Indemnity made a written demand for appraisal. The Church asserts it had demanded appraisal before it filed suit and that Philadelphia Indemnity had refused to participate in the appraisal process at that time.

To invoke the appraisal process, the Church had to "make written demand for an appraisal of the loss." Philadelphia Indemnity asserts the Church made no "written demand for an appraisal." The Church argues it made two written demands, namely, Greenhaw's e-mail to Gary Grabauskas, a Senior Claims Examiner for Philadelphia Indemnity, stating that Lewis, the

Church's pastor, "said he would option for the appraisal provision in the policy," and the e-mail from Friedson, the Church's public adjuster, to Greenhaw stating, "If we cannot reach an agreement then the insured is likely to invoke appraisal and name Loy Vickers." Even if e-mails from an adjuster to the insurer relaying conversations held with representatives of the insured could be considered a "written demand" by the insured, the statements in the e-mails, that Lewis "would option for the appraisal provision" and that he was "likely to invoke appraisal," do not constitute a "demand" for appraisal of the loss. The statement that Lewis "would option for the appraisal provision" was evidence of Lewis's intent, plan, or desire to invoke the appraisal process or a probability that he will do so, but it does not constitute a present demand for the appraisal process. *See Would* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981). Similarly, the statement that Lewis was "likely to invoke appraisal" indicated a likelihood that Lewis would invoke the appraisal process at some point in the future. However, neither statement put Philadelphia Indemnity on notice that the Church was making a present demand that the appraisal process set forth in the policy be followed for determining the amount of the loss. We conclude the Church has not presented any evidence showing it made a demand for appraisal under the policy.

The Church asserts Philadelphia Indemnity refused the Church's request for appraisal. Because the Church never made a demand invoking the appraisal process, Philadelphia Indemnity could not have refused to participate in the appraisal process because the process was never invoked until Philadelphia Indemnity invoked it after the Church filed suit.

The Church argues Philadelphia Indemnity's refusal to participate in the appraisal process is shown by a series of e-mails between Greenhaw and Grabauskas and in Grabauskas's notes. In these e-mails and notes, Grabauskas said Philadelphia Indemnity would not agree to an appraisal until the Church provided some expert evidence pointing out the additional hail

damage not found by Philadelphia Indemnity's expert. The Church argues that the policy did not permit Philadelphia Indemnity to impose these conditions on the Church's right to invoke the appraisal process and that Philadelphia Indemnity's doing so breached the contract. However, no evidence shows Grabauskas's statements were communicated to the Church before Philadelphia Indemnity invoked the appraisal process, and no evidence shows the Church made a demand for appraisal. Therefore, Grabauskas's statements, regardless of whether they were correct or incorrect interpretations of the policy, did not impose a condition precedent to the Church's right to invoke the appraisal process.

We conclude the Church presented no evidence that Philadelphia Indemnity breached the contract by refusing the Church's request for appraisal and by misrepresenting the conditions precedent for invocation of appraisal.

Undervaluing the Church's Loss

The Church asserts Philadelphia Indemnity breached the contract by intentionally and purposefully undervaluing the Church's loss.

The Church states that Greenhaw's First Report containing the estimate of damages failed to specify which areas of the roof required "spot repairs." However, the Church presented no evidence and cited no authority stating that such specificity was required. The Church states in its brief that the Church notified Philadelphia Indemnity "it disagreed with the thoroughness of the report." In support of this statement, the Church cites to an e-mail from Greenhaw to Gary Grabauskas, a Senior Claims Examiner for Philadelphia Indemnity, stating, "I called the pastor and he believes there is more damage than I saw. He has had an expert put [sic] and is waiting on their report. Do you want to get an expert? Opt for the appraisal process?" Grabauskas replied, "I would just retain an engineer to inspect the loss and review his experts [sic] report before we went [sic] to an appraisal." This e-mail exchange shows the Church disagreed with

the conclusions in Greenhaw's report, but it does not show the Church disagreed with the thoroughness of the report.

The Church also argues this e-mail exchange shows Philadelphia Indemnity delayed payment of the claim by retaining an engineer to inspect the property instead of opting for an appraisal as Greenhaw suggested. However, the Church does not explain why Philadelphia Indemnity's hiring an engineer to inspect the buildings shows an intent to undervalue the loss, nor does the Church explain why Philadelphia Indemnity was required under the policy or other contract to invoke the appraisal process before hiring an engineer. The policy's provisions for appraisal did not prohibit the parties from seeking expert opinions before demanding appraisal, nor did the policy impose time constraints on the parties' right to demand appraisal.

The Church also argues that Greenhaw's Fourth Report to Philadelphia Indemnity dated July 15, 2013, shows Philadelphia Indemnity breached the policy. In his Fourth Report, Greenhaw revised his estimate of the loss to match the loss found by Donan Engineering and advised Philadelphia Indemnity not to send a check based on his original estimate. However, by this time, Philadelphia Indemnity had already issued its check to the Church for the higher amount based on Greenhaw's original estimate. Greenhaw's Fourth Report is not evidence of a breach of the policy.

The Church argues Philadelphia Indemnity's purposeful undervaluing of the Church's loss is also shown by the fact that the appraisal award was substantially higher than Philadelphia Indemnity's initial payment on the loss. In support of this position, the Church relies on *In re Allstate County Mutual Insurance Co.*, 85 S.W.3d 193 (Tex. 2002) (orig. proceeding). In that case, the plaintiffs' cars were totaled, and the insurance companies engaged CCC Information to determine the value of the cars. *Id.* at 194. The plaintiffs sued their insurers alleging the insurers instructed CCC to fraudulently generate low values for the cars. The plaintiffs alleged that the

insurers systematically undervalued vehicles. *Id.* at 194–95. After the plaintiffs brought suit, the insurers invoked the appraisal provision in the policies for determining the vehicles' value. *Id.* at 195. The insurers then filed a plea in abatement and a motion to invoke appraisal. *Id.* The trial court denied the motion, finding that the appraisal provision, when considered as an arbitration agreement, was unenforceable. *Id.* The insurers then brought a petition for mandamus relief. The issues before the supreme court were whether the trial court abused its discretion by determining that appraisal was a form of arbitration and whether the insurers had an adequate remedy by appeal. The court stated it had held appraisal clauses enforceable since 1888 and that appraisal clauses are not arbitration.[2] *Id.* The court concluded that the trial court abused its discretion. *Id.* at 196. In discussing whether the insurers had an adequate remedy at law by appeal, the court stated:

> As to the plaintiffs' breach of contract claim, the parties have agreed in the contracts' appraisal clause to the method by which to determine whether a breach has occurred. That is, if the appraisal determines that the vehicle's full value is what the insurance company offered, there would be no breach of contract. Accordingly, at a minimum, denying the appraisal will vitiate the defendants' ability to defend the breach of contract claim. Because the appraisals go to the heart of the plaintiffs' breach of contract claim, we need not decide here the significance of the appraisals to each of the remaining claims.

Id.

The Church argues the supreme court stated that the result of the appraisal serves as evidence of breach of contract in an insurance policy case, and if the appraisal value equals the insurer's determination of the loss, then there was no breach of contract. The Church then asserts that if an appraisal equal or less than the insurer's determination shows no breach of contract occurred, then an appraisal that is greater than the insurer's determination of the loss proves a breach of contract occurred. However, the Church misreads the opinion. The Church's

[2] The court distinguished appraisal from arbitration, stating: "while arbitration determines the rights and liabilities of the parties, appraisal merely 'binds the parties to have the extent or amount of the loss determined in a particular way.'" *Allstate*, 85 S.W.3d at 195 (quoting *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888)).

reasoning is based on an assumption that the court held that any appraisal clause in a policy proves whether a breach of contract occurred, but that is not what the court stated. Instead, the court stated that in the case before it, the parties had agreed in the appraisal clause that the appraisal would determine whether a breach of contract had occurred.[3] *See id.* The appraisal clause in this case contains no such provision. Instead, the appraisal clause states the appraisers' determination "will be binding as to the amount of loss." Unlike the appraisal clause in *Allstate*, the appraisal clause in this case does not indicate that payment by the insurer made before an appraisal that is less than a later appraisal award proves the insurer breached the contract when the insurer promptly pays the difference between the appraisal and its earlier payments. *See Breshears v. State*, 155 S.W.3d 340, 344 (Tex. App.—Corpus Christi 2004, pet. denied).

We overrule the Church's third issue. Because of our disposition of this issue, we need not address the Church's first issue.

EXTRACONTRACTUAL CLAIMS

In its second, fourth, and fifth issues, the Church contends the trial court erred by granting appellees' motions for summary judgment on the Church's claims under chapters 541 and 542 of the Texas Insurance Code and on the Church's claim for breach of the duty of good faith and fair dealing. The Church's second issue asserts that its acceptance of the appraisal award did not bar its extra-contractual claims. The Church asserts in its fourth and fifth issues that it presented some evidence of the violations of the Insurance Code and of the breach of the duty of good faith and fair dealing. The Church asserted that its damages from these violations included its fees paid to Friedson, Boutin, and its lawyers.[4]

[3] The supreme court did not quote the appraisal clause in the opinion, and there is no opinion from the appeals court that denied the writ. Thus, we have no indication of the wording of the appraisal clause other than the supreme court's description.

[4] Appellees argue that the fees the Church paid to Friedson, Boutin, and its lawyers are not recoverable as damages in its suit for breach of contract, violation of the Insurance Code, and breach of the duty of good faith and fair dealing. Because of our disposition of the Church's issues, we do not address this argument.

Philadelphia Indemnity's grounds for summary judgment included that the Church had no evidence it committed any violations of the statutory provisions or that it breached the duty of good faith and fair dealing, and no evidence that any violations or breaches resulted in the Church's damages. Greenhaw stated in his motion for summary judgment that he incorporated by reference Philadelphia Indemnity's motion for summary judgment into his motion for summary judgment.[5]

Insurance Code Claims

In its fourth issue, the Church contends the trial court erred by granting appellees' motions for summary judgment on the Church's claims that appellees violated chapter 541 and 542 of the Texas Insurance Code.

Chapter 541

The Church asserted Philadelphia Indemnity violated section 541.051(1)(A) and (B), which provides:

> It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to:
>
> > (1) make, issue, or circulate or cause to be made, issued, or circulated an estimate, illustration, circular, or statement misrepresenting with respect to a policy issued or to be issued:
> >
> > > (A) the terms of the policy;
> > >
> > > (B) the benefits or advantages promised by the policy . . . .

[5] Ordinarily, a motion for summary judgment "must expressly present the grounds upon which it is made. A motion must stand or fall on the grounds expressly presented in the motion." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993); *see* TEX. R. CIV. P. 166a(c) ("The motion for summary judgment shall state the specific grounds therefor."). Some intermediate courts of appeal have permitted a defendant to adopt by reference the summary judgment grounds, argument, and evidence of another defendant when both defendants have a community of interest and identical defenses. *Chapman v. King Ranch, Inc.*, 41 S.W.3d 693, 699–700 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 118 S.W.3d 742 (Tex. 2003); *see also Lockett v. HB Zachry Co.*, 285 S.W.3d 63, 72–73 (Tex. App.—Houston [1st Dist.], 2009, no pet.) (citing *Chapman* and permitting adoption by reference of codefendant's summary judgment grounds). This Court has not determined whether incorporation by reference of another movant's summary judgment grounds is permitted by rule 166a(c) and *McConnell*. *See Ketter v. ESC Med. Sys., Inc.*, 169 S.W.3d 791, 801–02 (Tex. App.—Dallas 2005, no pet.) (not necessary to determine whether movant could incorporate another movant's summary judgment grounds because the result would be the same). In this case, the Church has not complained at trial or on appeal about Greenhaw incorporating by reference Philadelphia Indemnity's summary judgment grounds, argument, and evidence. Any error from the trial court's consideration of the grounds Greenhaw incorporated by reference from Philadelphia Indemnity's motion for summary judgment is waived. *See* TEX. R. APP. P. 38.1(i) (parties' argument must contain argument for the contentions on appeal); *Mims-Brown v. Brown*, 428 S.W.3d 366, 377 n.6 (Tex. App.—Dallas 2014, no pet.) (issue not briefed on appeal is waived).

TEX. INS. CODE ANN. § 541.051(1)(A), (B) (West 2009). The Church also asserts Philadelphia Indemnity violated section 541.060(a)(1), (3), and (7), which provides:

> (a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:
>
> > (1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
> >
> > . . . .
> >
> > (3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;
> >
> > . . . .
> >
> > (7) refusing to pay a claim without conducting a reasonable investigation with respect to the claim . . . .

TEX. INS. CODE ANN. § 541.060 (West 2009). Philadelphia Indemnity's grounds for summary judgment included the Church's lack of any evidence of a violation of Chapter 541 and lack of any evidence of damages.

The Church contends Philadelphia Indemnity violated these provisions through Grabauskas's statements imposing conditions on participating in the appraisal process after the Church had invoked the appraisal process. However, as discussed above, the Church did not invoke the appraisal process, and no evidence shows Grabauskas's statements were communicated to the Church before Philadelphia Indemnity demanded appraisal. Therefore, the Church had no evidence that Philadelphia Indemnity made a misrepresentation to it about the appraisal process that interfered with the Church's ability to demand an appraisal.

The Church also asserts Philadelphia Indemnity violated these provisions through Greenhaw's statements that the entire roofs of the buildings did not need replacing due to hail and that spot repairs would be sufficient to repair some of the hail damage. These statements did not constitute a misrepresentation of the terms of the policy or of the benefits or advantages

promised by the policy. Accordingly, they do not violate section 541.051(1)(A), (B) or section 541.060(a)(1). Nor were these misrepresentations of a "material fact . . . relating to coverage" under section 541.060(a)(1). Philadelphia Indemnity never denied coverage for hail damage. The only dispute was whether certain parts of the roof were damaged by hail. When an insurer relies on the opinions of its experts and there is a conflict of opinions between the experts of the insurer and insured, the insurer is not subject to extra-contractual liability "unless there was also evidence that the information on which the insurance company relied in denying the claim was unreliable or not objectively prepared." *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 194 (Tex. 1998). The Church did not present any evidence that Greenhaw's or Donan Engineering's estimates of the hail damage were "unreliable or not objectively prepared."

The Church asserted Philadelphia Indemnity violated section 541.060(a)(7), "refusing to pay a claim without conducting a reasonable investigation with respect to the claim," because Greenhaw altered his determination of the damages caused by hail to match Donan Engineering's findings. The fact that Greenhaw changed his estimate to match that of Donan Engineering's lower estimate is not evidence that Philadelphia Indemnity failed to conduct a reasonable investigation. Philadelphia Indemnity sent an adjuster and an engineer to inspect the Church's buildings. The fact that the engineer and the adjuster reached differing conclusions and that their conclusions varied from the determinations of the Church's engineer and adjuster and the appraisal panel is not evidence that they did not conduct a reasonable investigation. *See id.* ("[E]vidence of coverage, standing alone, would not constitute evidence of bad faith denial. . . . [E]vidence showing only a bona fide coverage dispute does not demonstrate that there was no reasonable basis for denying a claim . . . [or] that liability under the policy had become reasonably clear.").

We conclude the Church failed to present any evidence showing Philadelphia Indemnity violated chapter 541 of the Texas Insurance Code.

The Church asserts Greenhaw violated section 541.060(a)(1) when he "advised Friedson that there was insufficient damage to the entire roofs to require complete replacement of all roofs." The Church asserts that the appraisers found Greenhaw's assessment to be inaccurate. However, a bona fide dispute over the extent of coverage does not rise to the level of a violation of section 541.060(a)(1). *See First Am. Title Ins. Co., v. Patriot Bank*, No. 01-14-00170-CV, 2015 WL 2228549, *6–7 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.) (mem. op.) (affirming summary judgment for insurer on insured's statutory and common-law bad-faith claims including section 541.060(a)(1)). The Church presented no evidence that the difference between Greenhaw's determination of the extent of the loss and the determinations of other assessors of the damage was anything other than a bona fide dispute over the extent of the loss.

The Church also asserts Greenhaw violated section 541.060(a)(1) by misrepresenting the amount of the loss in his Fourth Report. In that report Greenhaw stated he was changing his estimation of the amount of the loss to match Donan Engineering's lower determination of the damage caused by hail. Section 541.060(a)(1) prohibits misrepresentations to a claimant. *See* TEX. INS. CODE ANN. § 541.060(a)(1). No evidence in the record shows the Church saw Greenhaw's Fourth Report before it incurred any of its asserted damages of hiring Friedson, Boutin, or its lawyers.

The Church asserts there was evidence Greenhaw violated section 541.060(a)(7), which prohibits "refusing to pay a claim without conducting a reasonable investigation with respect to the claim." *Id.* § 541.060(a)(7). The Church states Greenhaw violated this provision by initially estimating the loss substantially below the amount determined by the appraisers and by changing the amount of his estimate of the loss in his Fourth Report to match the estimate of Donan

Engineering's estimate. However, the mere fact that Greenhaw's determination of the amount of the loss varied from others is not evidence that his investigation of the claim was not reasonable. Nor is his reduction of the amount of the estimate to match that determined by Donan Engineering evidence of the lack of a reasonable investigation by Greenhaw.

We conclude the Church failed to present any evidence that Greenhaw violated chapter 541 or that any violations resulted in the Church's damages.

Chapter 542

The Church asserts Philadelphia Indemnity violated section 542.003(b)(1)–(5), which provides:

> (b) Any of the following acts by an insurer constitutes unfair claim settlement practices:
>
> > (1) knowingly misrepresenting to a claimant pertinent facts or policy provisions relating to coverage at issue;
> >
> > (2) failing to acknowledge with reasonable promptness pertinent communications relating to a claim arising under the insurer's policy;
> >
> > (3) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under the insurer's policies;
> >
> > (4) not attempting in good faith to effect a prompt, fair, and equitable settlement of a claim submitted in which liability has become reasonably clear;
> >
> > (5) compelling a policyholder to institute a suit to recover an amount due under a policy by offering substantially less than the amount ultimately recovered in a suit brought by the policyholder . . . .

TEX. INS. CODE ANN. § 542.003(b)(1)–(5) (West 2009).

In this case there was no evidence of a knowing misrepresentation. Philadelphia Indemnity relied on the opinions of its experts, and the Church presented no evidence that such reliance was misplaced or in bad faith. *See Provident*, 988 S.W.2d at 194.

The Church asserts Philadelphia Indemnity violated subsection (b)(2) by not acknowledging with reasonable promptness the Church's requests for appraisal that were

communicated to Philadelphia Indemnity by Greenhaw. Even if an e-mail from Greenhaw to Grabauskas could constitute a written demand by the Church, no response was required from Philadelphia Indemnity unless the appraisal communications constituted a demand for appraisal under the policy. As discussed above, the statements communicated by Greenhaw to Philadelphia Indemnity did not constitute a demand for appraisal from the Church.

The Church asserts some evidence shows Philadelphia Indemnity violated subsection (b)(3) by failing to implement reasonable standards for the prompt investigation of claims, namely, "[1] Philadelphia's and Greenhaw's practice of delaying full payment of claims, [2] undervaluing loss, [3] demanding an engineering report to contest contradictions in loss estimates, [4] reducing an adjuster's award after a lower estimate of loss is received, and [5] refusing to acknowledge and move forward with appraisal once it receives notice of an insured's request to do so . . . ." First, there is no evidence of a "practice of delaying full payment of claims": Philadelphia Indemnity paid the Church the undisputed amount of the claim thirty-one days after the claim was filed and eight days after Donan Engineering reported that the covered loss was no greater than that determined by Greenhaw, and Philadelphia Indemnity paid the disputed portion of the claim four days after the appraisers resolved the dispute. Second, concerning Philadelphia Indemnity's undervaluing of the loss, an insurer's reliance on the opinion of its experts, absent evidence of knowledge of the unreliability of the expert's opinion, does not violate any duty. *Provident*, 988 S.W.2d at 194. Third, the record does not contain any evidence that Grabauskas's statements that Philadelphia Indemnity needed an expert opinion from the Church contradicting Donan Engineering's finding before Philadelphia Indemnity would change its position on the extent of hail damage were communicated to the Church. Furthermore, Philadelphia Indemnity's reliance on its experts does not open it to extra-contractual liability absent evidence that such reliance was improper. Fourth, the Church

does not explain, and we do not perceive, how Greenhaw's reduction of his estimate to be in line with the opinion of an independent expert violates any provision of section 542.003(b) absent evidence of the bias or unreliability of the expert. Fifth, as discussed above, the policy required a written demand for appraisal before Philadelphia Indemnity was required to move forward with the appraisal process, and the Church never made a demand for appraisal. Because there was no demand for appraisal from the Church, there was no evidence Philadelphia Indemnity refused to acknowledge a demand for appraisal and refused to move forward with appraisal.

The Church asserts Philadelphia Indemnity violated subsection (b)(4) by "[1] undervaluing Richardson's loss, [2] revising adjuster reports to lower loss estimates, [3] ignoring requests for appraisal, and [4] delaying appraisal until suit was filed." One element of a claim under subsection (b)(4) is that "liability has become reasonably clear." TEX. INS. CODE ANN. § 542.003(b)(4). First, "evidence showing only a bona fide coverage dispute does not demonstrate that there was no reasonable basis for denying a claim. By the same token, evidence of a coverage dispute is not evidence that liability under the policy had become reasonably clear." *Provident*, 988 S.W.2d at 194. In this case, the Church presented no evidence that the difference of opinion regarding the extent of the covered loss to the Church's buildings was anything other than a bona fide coverage dispute. Second, the Church does not explain how Greenhaw's reduction of his estimate to match that of Donan Engineering's constituted bad faith. Third, Philadelphia Indemnity did not ignore the Church's demands for appraisal because the Church never made a demand for appraisal. And, fourth, Philadelphia Indemnity did not delay appraisal until after suit was filed because there was no demand for appraisal until Philadelphia Indemnity demanded appraisal after suit was filed.

The Church contends Philadelphia Indemnity violated subsection (b)(5) because it "did not agree to or move forward with appraisal until 4 days after suit was filed—forcing [the

Church] to retain counsel and file suit before agreeing to pay a [sic] the full value of the loss as mandated by the appraisal process." As discussed above, Philadelphia Indemnity had no obligation to "move forward with appraisal" until the Church made a demand for appraisal, which it never did. The language of the policy, "either may make written demand for an appraisal of the loss," made the appraisal process discretionary with the parties. The evidence in this case does not show Philadelphia Indemnity had an obligation under the policy to demand appraisal before suit was filed. Moreover, an insurer does not violate subsection (b)(5) when (1) the extent of liability is not reasonably clear and there is a bona fide dispute as to coverage based on the parties' good-faith reliance on their experts, (2) the insurer pays the insured the undisputed amount of the loss, and (3) a factfinder ultimately finds a substantially higher loss than that paid by the insurer. *See Southland Lloyds Ins. Co. v. Cantu*, 399 S.W.3d 558, 574 (Tex. App.—San Antonio 2011, pet. denied) (insurer initially paid homeowner $2,036.85 for hail damage based on determination of independent adjuster; homeowner brought suit and jury found hail damage was $30,000; no violation of subsection (b)(5)). In this case, no evidence shows Philadelphia Indemnity's reliance on the determinations of its experts was not in good faith, no evidence shows Philadelphia Indemnity's liability for more than the amount it initially paid the Church was reasonably clear until the appraisers issued their award, and Philadelphia Indemnity promptly paid the difference between the appraiser's award and its earlier payments. Therefore, no evidence shows Philadelphia Indemnity violated subsection (b)(5).

We conclude the Church presented no evidence Philadelphia Indemnity violated chapter 542.

Greenhaw's motion for summary judgment asserted he did not violate section 542.003 because that section regulates the actions of insurers only and not adjusters. We agree. Section 542.003(a) states, "An *insurer* engaging in business in this state may not engage in an unfair

claim settlement practice." Section 542.003(b) states, "Any of the following acts by an *insurer* constitutes unfair claim settlement practices: . . . ." TEX. INS. CODE ANN. § 542.003(a), (b) (emphasis added). We conclude Greenhaw established as a matter of law that he did not violate chapter 542.

We conclude the trial court did not err by granting appellees' motions for summary judgment on the Church's claims that appellees violated chapters 541 and 542 of the Insurance Code. We overrule the Church's fourth issue.

Breach of the Duty of Good Faith and Fair Dealing

In its fifth issue, the Church contends the trial court erred by granting Philadelphia Indemnity's motion for summary judgment on the Church's claim that Philadelphia Indemnity breached the duty of good faith and fair dealing. Philadelphia Indemnity's motion for summary judgment included the grounds that the Church had no evidence of a breach of the duty of good faith and fair dealing and no evidence that any breach caused the Church's damages.

An insurer breaches the duty of good faith and fair dealing when "the insurer had no reasonable basis for denying or delaying payment of [a] claim, and [the insurer] knew or should have known that fact." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 50–51 (Tex. 1997) (quoting *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 (Tex. 1994)). An insurer does not breach this duty merely by denying a claim erroneously. *U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997). If there is a bona fide dispute about the insurer's liability on the contract, the insurer's denial or delay does not rise to the level of bad faith as a matter of law. *Id.*

Philadelphia Indemnity had a reasonable basis for denying payments above $7,941.55: its experts told it that was the maximum extent of the damage to the Church's roofs caused by hail. There is no evidence in the record that Philadelphia Indemnity should have known its experts' estimations were inaccurate. The fact that Greenhaw's and Donan Engineering's

estimates varied from the estimates of Bradley Engineering, Friedson, and Boutin established there was a bona fide dispute amongst these experts as to the extent of the loss covered by the policy; it is not evidence of bad faith.

The Church states "that Philadelphia breached the duty of good faith and fair dealing when it [1] refused to conduct a reasonable investigation of [the Church's] claims, [2] denied the full value of [the Church's] loss, [3] misrepresented aspects of coverage and conditions of the appraisal clause, [4] conspired . . . with its adjuster to reduce and modify earlier determinations of loss[,] and [5] refused [the Church's] efforts to move forward with appraisal to settle the claim." As discussed above, none of these assertions constitutes evidence of a breach of the duty of good faith and fair dealing: (1) no evidence shows Philadelphia Indemnity did not conduct a reasonable investigation of the Church's claims; (2) Philadelphia Indemnity's initial denial of part of the Church's claim was due to Philadelphia Indemnity's good-faith reliance on its experts, which is not bad faith; (3) the record contains no evidence that any misstatement about the appraisal clause was communicated to the Church before Philadelphia Indemnity invoked the appraisal clause; (4) as discussed below, there was no actionable civil conspiracy, and (5) Philadelphia Indemnity never refused to move forward with appraisal because there was no demand for appraisal until Philadelphia Indemnity invoked the appraisal clause.

We conclude the trial court did not err by granting Philadelphia Indemnity's motion for summary judgment on the Church's claim for breach of the duty of good faith and fair dealing. We overrule the Church's fifth issue. Because of our resolution of the Church's fourth and fifth issues, we need not address its second issue.

CIVIL CONSPIRACY

In its sixth issue, the Church contends the trial court erred by granting appellees' motions for summary judgment on the Church's claim for civil conspiracy. The elements of a civil

conspiracy are (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful overt acts, and (5) damages as a proximate result. *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005). A civil conspiracy requires that the conspirators have the specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996). Civil conspiracy is a derivative tort. "That is, a defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (orig. proceeding). Philadelphia Indemnity asserted in its motion for summary judgment that the Church had no evidence to support any of these elements, and Greenhaw incorporated by reference Philadelphia Indemnity's grounds into his motion for summary judgment.

The Church asserts Philadelphia Indemnity and Greenhaw (1) purposefully and intentionally collaborated to undervalue and underestimate the Church's claims of loss; (2) e-mail correspondence, activity diaries, Greenhaw's revision of his estimate, and their hiring Donan Engineering to contest the Church's claims are evidence of a meeting of the minds; (3) in doing so, Philadelphia Indemnity breached its contract with the Church, and Philadelphia Indemnity and Greenhaw violated duties under the Insurance Code and the common law; and (4) these actions proximately caused the Church to sustain an undue burden and monetary damages consisting of the fees paid to Friedson, Boutin, and the Church's lawyers and the additional damage the properties sustained from delay in repairing the buildings' roofs. As discussed previously in this opinion, the Church presented no evidence of a purposeful and intentional collaboration by Philadelphia Indemnity and Greenhaw to undervalue the Church's loss, and the Church presented no evidence of a breach of contract or violation of a statutory or common-law duty. Instead, the evidence showed only a bona fide dispute between the parties' experts as to

the amount of the Church's loss and that Philadelphia Indemnity promptly paid all amounts owing when the dispute was resolved, which was not a breach of contract, a violation of the Insurance Code, nor a breach of the duty of good faith and fair dealing.

We conclude the trial court did not err by granting appellees' motion for summary judgment on the Church's claim for civil conspiracy. We overrule the Church's sixth issue.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RICHARDSON EAST BAPTIST CHURCH, Appellant

No. 05-14-01491-CV V.

PHILADELPHIA INDEMNITY INSURANCE COMPANY AND JAMES GREENHAW, Appellees

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-13868-M.
Opinion delivered by Justice Myers. Justices Francis and Lang-Miers participating.

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

It is **ORDERED** that appellees PHILADELPHIA INDEMNITY INSURANCE COMPANY AND JAMES GREENHAW recover their costs of this appeal from appellant RICHARDSON EAST BAPTIST CHURCH.

Judgment entered this 30th day of March, 2016.