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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 and JAMES GREENHAW,

Respondents.

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

RESPONDENT PHILADELPHIA INDEMNITY INSURANCE COMPANY'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	First-party breach of contract and extra-contractual claims arising from property damage from hail and/or wind, which Respondent Philadelphia Indemnity Insurance Company resolved by timely paying the amount set out in an appraisal award. (R. 33-34)
Trial Court:	Hon. Emily G. Tobolowsky 298th Judicial District Court, Dallas County, Texas
Trial Court's Disposition:	Granted Philadelphia Indemnity Insurance Company's Traditional and No-Evidence Motion for Summary Judgment (R. 592)
Parties in the Court of Appeals:	Appellant: Richardson East Baptist Church Appellee: Philadelphia Indemnity Insurance Company Appellee: James Greenhaw
Court of Appeals:	Fifth Court of Appeals, Dallas, Texas. Opinion signed by Justice Lana Myers, joined by Justices Francis and Lang-Miers.
Citation for Court of Appeals' Decision:	*Richardson East Baptist Church v. Philadelphia Indemnity Insurance Co., et al.*, No. 05-14-01491-CV, 2016 WL 1242480 (Tex. App.—Dallas Mar. 30, 2016, pet. granted) (mem. op.)
Court of Appeals Disposition:	Affirmed the decision of the Trial Court (3-0)

STATEMENT OF JURISDICTION

Respondent Philadelphia Indemnity Insurance Company ("Philadelphia") respectfully asserts that the Supreme Court of Texas does not have jurisdiction over this appeal under section 22.001(a)(6) of the Texas Government Code, as Petitioner Richardson East Baptist Church ("Richardson") alleges. First, the Fifth Court of Appeals did not commit any error of law, let alone one of such importance to the jurisprudence of the state that it requires correction by this Court.

Second, the Supreme Court of Texas does not have jurisdiction over this appeal because no court of appeals holds differently from earlier decisions of other courts of appeals, or this Court, on a question of law material to a decision of the case. Tex. Gov't Code § 22.001(a)(2). For these reasons, the Supreme Court of Texas should dismiss the previously granted Petition for Review in this case.

RESPONDENT'S RESPONSE TO PETITIONER'S ISSUES

Response to Issue No. 1:

Although the Court's recently enunciated "entitled-to-benefits" rule applies "if the insurer's statutory violation causes the loss of the benefits," Richardson has shown neither a statutory violation nor the loss of any benefits that would trigger application of that rule. Philadelphia's timely payment of the appraisal award therefore fully compensated Richardson for the benefits to which it is entitled under the policy.

STATEMENT OF FACTS

The Court of Appeals' opinion concisely and accurately sets forth the facts in the case, based on the record. That factual summary differs in several material respects from the Statement of Facts in Richardson's Brief on the Merits. Philadelphia provides this Statement of Facts:

A. Richardson's delayed reporting of the claim.

On April 23, 2013, Philadelphia received a Property Loss Notice from Richardson's insurance broker. The notice described the loss as follows:

> Found roof damage during inspection. Estimate attached.

(R. 151-152.) The reported date of loss was June 13, 2012 — a date ten months earlier. (R. 151.)

Philadelphia immediately forwarded the notice of the claim to an independent adjusting company, Property Claims Services, Inc., which assigned licensed general adjuster James Greenhaw to assist with the investigation and adjustment of the claim. (R. 61, ¶ 6; R. 154-156, 158.) Philadelphia promptly acknowledged Appellant's notice of the loss in a letter on April 24, 2013. (R. 160.)

B. Philadelphia's inspection of Richardson's property.

Greenhaw scheduled an inspection of the property with Richardson's representative for the very next day, April 25, 2013. (R. 61, ¶ 7.) Greenhaw issued a report presenting his inspection findings a week later. (*Id.*; R. 266-68.)

Greenhaw noted in his report that he observed hail damage to roofs, paint and air conditioning units. He attached an estimate of the costs to replace the west slope of the roof of the sanctuary building, and to perform spot repairs or replacement of portions of the east slope of the sanctuary building roof, and of the roof of the classroom building. (R. 266-268.) Greenhaw estimated the cost of these repairs at $10,441.55. Applying the $2,500.00 policy deductible, Greenhaw obtained a net estimated claim amount of $7,941.55. (R. 268.)

Greenhaw relayed his findings and estimate to Richardson, which then disputed the scope of repairs. (R. 62, ¶ 8.) Philadelphia therefore directed Greenhaw to retain an engineer to evaluate the property damage. (*Id.*) Greenhaw hired Donan Engineering Company. (*Id.*) Jordan Beckner, P.E., a licensed engineer, inspected the property on June 12, 2013. (R. 163.)

Donan Engineering issued its report (R. 162-178) on June 18, 2013. (R. 162, 163.) The report recommended replacing the shingles on the west slope of the sanctuary, as Greenhaw had recommended. (R. 167.) The engineer did not find any damage attributable to hail on any of the other roof slopes, however. (R. 165) ("*The other slopes do not exhibit hail damage*.") The engineer also concluded that the roof did not sustain any damage from wind, writing, "*No missing, torn or creased shingles were found. The roof shingles were not damaged by wind*." (R. 167.)

Even though Jordan Beckner, a professional engineer, observed less hail damage than Greenhaw had, Philadelphia issued payment to Richardson based upon Greenhaw's estimate. (R. 62, ¶ 10; *see* R. 180.) On June 24, 2013, just two months after the loss was reported, Philadelphia sent Richardson a check for $7,941.55: the full amount of Greenhaw's estimate. (*Id.*)

Richardson continued to dispute the scope and amount of damages. Indeed, Richardson submitted an estimate, prepared by a public adjuster it had hired, for $112,077.32. (R. 62, ¶ 11.)

C. Philadelphia's supplemental payment on the claim following appraisal.

In light of the continued dispute over the amount of the loss, Philadelphia invoked the right of appraisal in the parties' insurance policy. (R. 62, ¶ 12.) Philadelphia did this in compliance with the terms of the appraisal clause in the policy: By making "written demand for an appraisal of the loss." (R. 102.)

Richardson intimated several times that it might demand appraisal, but the record demonstrates that Richardson never did so as the policy required. For example, Greenhaw made this time-keeping entry: "Called Wayne. Does not agree. Will option for appraisal & name appraiser later." (R. 414.) A report Greenhaw sent Philadelphia a few days later appears to reference that same conversation: "Pastor Lewis won't agree on the loss. Said he will option for the appraisal process. He has not chosen an appraiser yet but will let me know. I am reporting today and recommend paying the undisputed per my SOL [Statement of Loss] in 1st report. I will keep file open and continue to communicate with insured." (R. 359.) A month later, after Richardson hired public adjuster Scott Friedson to handle its claim, Friedson sent an email relayed his intention to *possibly* seek appraisal: "I'm reasonable. I

propose we settle this Monday…. If we cannot reach an agreement then the insured is likely to invoke appraisal and name Loy Vickers." (R. 402.)

Mere days after Philadelphia's invoked appraisal, it was served with Richardson's lawsuit. (R. 62, ¶ 12); *see also* Pet. Br. at 4 ("Four days after suit was filed, Philadelphia invoked appraisal.") As litigation escalated, appraisal nevertheless proceeded. (*Id.*) The two appraisers, one designated by Philadelphia and the other by Richardson, reached an agreement on the amount of the loss without the need to appoint an umpire to resolve their differences. (R. 188.) The appraisers agreed in a written award specifying $30,175.00 as the replacement cost value of the loss and $18,375.00 as the actual cash value. (R. 62, ¶ 13; R. 188.) The appraisers executed the award on April 21, 2014. (R. 188.) It states that the amount of the award should be reduced by any advanced payments, deductibles or co-insurance contributions. (*Id.*)

Section 542.057(a) of the Texas Insurance Code provides that "if an insurer notifies a claimant . . . that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made." Within five business days of

the appraisal award, Philadelphia sent payment to Richardson for $7,933.45. (R. 62, ¶ 14.) That amount, which Richardson has never disputed, represented the actual cash value of the award ($18,375.00) less Philadelphia's previous payment ($7,941.55) and the policy deductible ($2,500.00). Richardson received that payment on April 28, 2014. (R. 62, ¶ 14; R. 184.) That was the fifth business day after the date of the appraisal award on April 21, 2014.

Richardson's Brief states that it "was forced to hire an attorney on July 23 to obtain the policy benefits due it." Pet. Br. at 3. The sole support in the record cited for this proposition is to the fee agreement Petitioner entered into with its attorney. (R. 419.) The record shows, however, that (a) as of June 18 and 21, Petitioner itself knew it could seek to resolve the dispute through appraisal (R. 414, 359), and (b) as of July 19, Petitioner's public adjuster knew he could seek to resolve the dispute through appraisal (R. 402). Petitioner therefore has not shown that it was "forced to hire an attorney on July 23," or at any time.

Richardson's Statement of Facts also states, "On July 1, after Philadelphia made a net payment of $7,941.55, [Richardson] was forced to hire a private insurance adjuster, Scott Friedson. R. 361." *See* Pet.

Br. at 2. There is no evidence in the record that Richardson was *forced* to hire a public adjuster. The record citation is to a document showing only that Richardson retained Friedson.

Finally, the statement that "Grabauskas [Philadelphia's claims examiner] then instructed Greenhaw to contact Friedson and find a way to make [Richardson] 'go away'," (Pet. Br. at 2) (citing R. 363) is an incomplete citation to the record. Friedson emailed Grabauskas, on July 12, 2013, to introduce himself as a public insurance adjuster retained by Richardson. (R. 363). Friedson wrote, "I'm reasonable. Let's settle this today. What do we need to do?" Grabauskas then forwarded the email to Greenhaw and asked, "Want to call this guy to discuss and *see if we can't find some sort of compromise to get them to go away?*" (R. 364) (emphasis added).

SUMMARY OF THE ARGUMENT

The "entitled-to-benefits" rule this Court articulated in *USAA Texas Lloyds Co. v. Menchaca* applies "if the insurer's statutory violation causes the loss of the benefits." *USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, 2017 WL 1311752, *7 (Tex. Apr. 7, 2017). Yet Richardson has not shown either that Philadelphia committed a

statutory violation or that Richardson lost any benefits to which it was entitled under the parties' insuring agreement. The district court therefore correctly granted Philadelphia's Traditional and No-Evidence Motion for Summary Judgment in holding that Philadelphia's timely payment of the appraisal award disposed of Richardson's breach-of-contract claim and extra-contractual claims as a matter of law.

Appraisal of an insurance claim constitutes a contractually agreed-upon mechanism for parties to resolve disputes about the value of a loss, without any related determination of fault or liability. *In re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002) ("[L]ong ago, this Court rejected the position that an appraisal's outcome establishes liability when we held that, unlike an arbitration provision, an appraisal provision 'only binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts.'") (quoting *Scottish Union Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888)). Unlike *Menchaca*, however, no factfinder ever determined that Philadelphia violated the Insurance Code – by denying Richardson's claim without conducting a reasonable investigation or by any other act

or omission. The parties went forward with appraisal because it "provides[s] a means to resolve disputes about the amount of loss for a covered claim." *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 406-07 (Tex. 2011) (citing *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888 (Tex. 2009)).

This Court should deny the Petition for Review and allow the judgment of the trial court to stand: Texas courts have repeatedly and consistently recognized that an insurer that timely pays an appraisal award can only be liable on an insured's extra-contractual claims if the insured produces evidence it sustained damages independent of those available under the insurance policy. The district court correctly determined that Richardson did not present any summary judgment evidence raising a genuine issue of material fact on this issue.

ARGUMENT AND AUTHORITIES

I. Although the Court's recently enunciated "entitled-to-benefits" rule applies "if the insurer's statutory violation causes the loss of the benefits," Richardson has shown neither a statutory violation nor the loss of any benefits that would trigger application of that rule.

A. The Fourteenth Court of Appeals recently applied this Court's opinion in *Menchaca* to find that the mere evidence of underpayment on a claim resolved through appraisal, on which the insurer timely paid the award, provided the insured "the benefits to which he was entitled under the policy" and did not demonstrate an "act so extreme as to cause independent injury."

In *National Security Fire & Casualty Co. v. Hurst*, No. 14-15-00714-CV, 2017 WL 2258243 (Tex. App.—Houston [14th Dist.] May 23, 2017, no pet. h.), the court cogently and correctly addressed the very argument Richardson now presents. In *Hurst*, an insured sued his property insurance carrier, the adjusting firm and its independent adjuster after receiving what he regarded as an insufficient payment and an inadequate payment on his claim for wind-related damages to his home. *Id.* at *1. The insured retained counsel, who invoked the appraisal clause more than three years after filing suit. *Id.* The record shows that Philadelphia invoked appraisal before it was even served. (R. 62, ¶ 12.)

The umpire issued an award and National Security issued payment on the award, but the insured continued prosecuting his lawsuit. *Hurst* at *1. When Richardson continued to prosecute its lawsuit, Philadelphia filed a motion for summary judgment – which the trial court granted. In *Hurst*, however, the case proceeded to trial and a verdict. The jury found in favor of the insured on his breach-of-contract claim and awarded economic damages. *Id.* at *2. The jury also found all three defendants – National Security, its adjusting firm and the independent adjuster – liable for violating various provisions of the Texas Insurance Code. *See id.* Finding that wrongful conduct was committed "knowingly," the jury awarded additional damages against the insurer and the adjusting firm. *See id.* Finally, the jury found that National Security breached its duty of good faith and fair dealing and awarded separate damages for that breach. *Id.* The trial court denied all post-trial motions and entered a Final Judgment consistent with the jury's verdict. *Id.*

On appeal, National Security argued that the trial court erred in failing to grant a directed verdict on the grounds that "the full and timely payment of the appraisal award precludes as a matter of law any

award for breach of contract, penalty interest, or any statutory or common-law bad faith violations." *Id.* The court of appeals reversed the trial court's denial of the motion for directed verdict and rendered judgment that the insured take nothing on his claims. *Id.* at *7. The court explained "that an insured cannot defeat an otherwise valid and binding appraisal award . . . by asserting extra-contractual claims that are derivative of the policy claim." *Id.* Holding otherwise, the court added, "would obviate the very purpose of the binding appraisal process." *Id.*

The *Hurst* court reconciled its analysis and holding with this Court's opinion in *Menchaca*. The court explained:

> It is undisputed that Hurst had a right to receive benefits under the insurance policy, and we have held that he received those benefits in the form of National's initial payment and subsequent tender of the appraisal award. In order to recover any damages beyond policy benefits, the statutory violation or bad faith must cause an injury that is independent from the loss of benefits. *USAA Tex. Lloyds Co. v. Menchaca*, No. 14-0721, ––– S.W.3d ———, ––– – –––, 2017 WL 1311752, at *11-12 (Tex. Apr. 7, 2017). The *Menchaca* court recognized that "a successful independent-injury claim would be rare, and we in fact have yet to encounter one." *Id.* at *12 (citing *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 521 (5th Cir. 2013)) (observing "[t]he *Stoker* language has frequently been discussed, but in seventeen years since the decision appeared, no Texas Court has yet held that recovery is available for an insurer's extreme act, causing injury independent of the

> policy claim.") The *Menchaca* court explained that "[t]his is likely because the Insurance Code offers procedural protections against misconduct likely to lead to an improper denial of benefits and little else." *Id.* The court acknowledged that it has further limited the natural range of injury by insisting that an "independent injury" may not "flow" or "stem" from denial of policy benefits. *Id.* (citing *Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189, 198 (Tex. 1998)). And the court recognized that "although we reiterate our statement in *Stoker* that such a claim could exist, we have no occasion to speculate what would constitute a recoverable independent injury." *Id.*

Hurst at *6.

The court then examined the appraisal proceeding in the context of *Menchaca*:

> According to Hurst's own testimony, his only quarrel with the initial payment was that it was too low. Hurst subsequently filed suit and eventually invoked the appraisal clause. National participated in the appraisal process and, following the umpire's award, timely tendered the full amount of the loss.
>
> Hurst has received the benefits to which he was entitled under the policy and has not alleged any act so extreme as to cause independent injury. *See Menchaca,* ––– S.W.3d at ––––– – –––––, 2017 WL 1311752, at *11-12; *see also Progressive Cty. Mut. Ins. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (holding any error in granting summary judgment on bad-faith claims harmless where insured made no allegations that he suffered any damages unrelated to or independent of the policy claim); *see generally Cantu v. State Farm Lloyds*, No. 7:14-CV-456, 2016 WL 5372542, at *8 (S.D. Tex. Sept. 26, 2016) (holding extra-contractual claims failed where insured did not allege an action constituting an independent injury); *Alvarado v. State Farm Lloyds*, No. 7:14-CV-166, 2016 WL 6905865, at *4-5 (S.D. Tex. June

> 15, 2016) (same). . . . The amount of damage to certain items, and which items were covered at all, speaks to the issue of damages and were therefore estopped by the appraisal award. *See Montoya v. State Farm Lloyds*, No. 7:14-CV-00182, 2016 WL 7734650, at *3-4 (S.D. Tex. Sept. 12, 2016). The claim of underpayment is not one that is independent of the issue of damages under the policy. *Id.* (holding insurers were entitled to summary judgment on extra-contractual claims where there was no evidence of an injury independent of underpayment or failure to timely investigate). Accordingly, the trial court erred in denying appellants' motion for directed verdict on Hurst's extra-contractual claims.

Id. (emphasis added).

Here, Richardson never alleged that Philadelphia "commit[ted] some act, so extreme, that would cause injury independent of the policy claim," or anything to that effect. *See Hurst* at *6, n.8 (citing *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995)). (*See* R. 237-249.) Richardson did allege that Philadelphia "misrepresented the appraisal provision in the Policy" (R. 240) (Plaintiff's First Amended Petition). The claimed support for this proposition, however, was apparently an email Philadelphia's claims examiner Grabauskas sent Greenhaw – an email never published to Richardson. (*See* R. 362.) This, therefore, was neither a representation to Richardson, nor a false representation, for the guidance of Richardson in its business, upon which Richardson

relied to its detriment. *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

In *Menchaca*, this Court declined "to speculate what would constitute a recoverable independent injury." 2017 WL 1311752, at *12. Richardson has not directed the Court to anything in the record evidencing an independent injury or warranting such speculation.

The insured in *Hurst* prosecuted his lawsuit for years before invoking the appraisal clause. 2017 WL 2258243, at *1. By comparison, Richardson filed suit just days before Philadelphia sent its written demand for appraisal. (R. 62, ¶ 12; *see* R. 1.)

B. Attorney's fees and public adjuster's fees are not "damages."

Philadelphia moved for summary judgment roughly six months later. Yet Richardson argues that the fees for the public adjuster and the attorney it was purportedly "forced to hire" constitute evidence of an independent injury. First, this argument fails, under *Menchaca*, because Richardson claims it incurred those fees "to obtain the policy benefits due it." Pet. Br. at 3. This, therefore, is not a claim of for "damages *beyond* policy benefits." *Menchaca* at *11-12 (emphasis added).

Second, the policy specifically provides that public adjuster expenses are not compensable under the policy:

> **II. Elite Enhancement Endorsement Conditions**
>
> * * *
>
> **C. Adjuster's Fees**
>
> Coverages provided herein are not applicable to the generation of fees you may incur by retaining a public adjuster or appraiser.

(R. 132.)

Richardson nonetheless contends that the fees it incurred and disbursed out of Philadelphia's payment on the appraisal award[1] claim are "consequential damages" beyond those benefits to which it was entitled under the policy. Pet. Br. at 13-14. Under this argument, the fees an insured pays its appraiser or an umpire in an appraisal proceeding constitute consequential damages because they diminish the insured's net recovery. This argument, without more – as with Richardson's attorney's fees argument – does not allege "actual damages caused by the insurer's bad-faith conduct [that] are separate from and . . . differ from benefits under the contract." *Menchaca* at *11

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[1] Petitioner did not retain its public adjuster or attorney until after Philadelphia made its pre-suit payment in June 2013. (*See* R. 419, 361) (adjuster and attorney fee agreements). This argument therefore concerns fees paid on the $7,933.45 payment on the appraisal award.

(citing *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995) (identifying mental anguish damages as an example of such separate damages)); *see also Parkans Int'l LLC v. Zurich Ins. Co.*, 299 F.3d 514, 519 (5th Cir. 2002) (applying Texas law) ("There can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions or omissions caused injury independent of those that would have resulted from wrongful denial of policy benefits."); *Admiral Ins. Co. v. Petron Energy, Inc.*, 1 F.Supp.3d 501, 504 (N.D. Tex. 2014) (holding that attorney fees incurred in a declaratory judgment coverage action do not constitute an independent injury required to create liability under chapter 541 of the Insurance Code).

This distinction is even more pronounced involving an insurance claim on which one of the parties to the policy invokes appraisal, because that process is intended "to provide a binding, extra-judicial 'remedy for any disagreement regarding the amount of the loss.'" *Amine v. Liberty Lloyds of Tex. Ins. Co.*, No. 01-06-00396-CV, 2007 WL 2264477, at *3 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007, no pet.) (mem. op.) (quoting *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 344 (Tex. App.—Corpus Christi 2004, pet. denied)); accord *Hurst*, 2017

WL 2258243, at *3. As previously discussed, the record demonstrates that Richardson knew (R. 414, 359), and later, its retained public adjuster knew (R. 402), of the availability of appraisal before Richardson ever retained counsel. Richardson could have pursued appraisal then but it failed to do so.

C. The record shows that Philadelphia did not commit an extreme act causing injury independent of Richardson's policy claim.

In sum, the record shows that Philadelphia did not commit some act, so extreme, that would cause injury independent of Richardson's claim on the policy. Here, again, to avoid a no-evidence summary judgment, Richardson was required to "produce[] summary judgment evidence raising a genuine issue of material fact." TEX. R. CIV. P. 166a(i). Richardson did not meet this burden of production.

Richardson did not even report its property loss until more than 10 months after the claimed date of loss. (R. 151.) Greenhaw inspected the property within two days. (R. 414). He sent Philadelphia a report of his findings and an estimate ten days later. (R. 344-352.) Greenhaw sent Richardson a copy of the estimate, along with a proposed Statement of Loss. (R. 345). Richardson informed Greenhaw that it

disagreed with his estimate; Philadelphia then retained an engineer to obtain another damage assessment. (R. 354; R. 62, ¶ 8.)

Within four weeks of the date Richardson reported the loss, the engineer had issued a report presenting his findings and opinions. (R. 162-178.) That report presented findings of even less storm-related damage than Greenhaw had found. (R. 356, 180.) Greenhaw sent the engineer's report to Richardson three days later and noted, "It looks like he found less damage than I. I have an OK from Philadelphia to still offer the same claim figures as earlier proposed." (R. 180.) Three days afterwards, Philadelphia paid Richardson the net actual cash value amount set out in Greenhaw's estimate, less the $2,500.00 deductible. (R. 61, ¶ 7; R. 62, ¶ 10; *see* R. 76 (policy form specifying deductible).)

When Philadelphia learned that Richardson retained a public adjuster, Philadelphia's claims examiner wrote Greenhaw as follows:

> Let's at least talk with this guy and advise him that as far as we are concerned, we have already overpaid the loss. Advise him we have already had an engineer look – and see if the insured has provided him a copy. If he wants to meet for another inspection, we will accommodate him and give him the opportunity to show us where we and the engineer are mistaken. (R. 401.)

After the claim went to appraisal, Philadelphia timely paid the additional amount called for in the award. Philadelphia "complied with every requirement of the contract, [and] it cannot be found to be in breach." *Breshears*, 155 S.W.3d at 344; *Anderson v. Am. Risk Ins. Co.*, No. 01-15-00257-CV, 2016 WL 3438243, at *4 (Houston [1st Dist.] June 21, 2016, no pet. h.); *Amine*, 2007 WL 2264477, at *4-6; *see also Blum's Furniture Co., Inc. v. Certain Underwriters at Lloyds*, No. H-09-3479, 2011 WL 819491, at *3 (S.D. Tex. Mar. 2, 2011) ("Under Texas law, when an insurer makes timely payment of a binding and enforceable appraisal award and the insured accepts that payment, the insured is estopped by the appraisal award from maintaining a breach of contract claim against" the insurer), *aff'd*, 459 Fed. Appx. 366 (5th Cir. Jan. 24, 2012); *Waterhill Cos. Ltd. v. Great Am. Assurance Co.*, No. 05-4080, 2006 WL 696577, at *2 (S.D. Tex. Mar. 16, 2006) (once appraisal process is invoked, a delay in payment pursuant to the appraisal process does not constitute a violation of the Texas Insurance Code).

Philadelphia's motion for summary judgment, on which Richardson's Petition for Review is based, was presented as a traditional and a no-evidence motion. (*See* R. 33, 53-57.) Philadelphia

asserted in that motion that Richardson "has not presented any evidence that Philadelphia breached its contract and that such breach caused [Richardson] damages." (R. 53, ¶ 48.) Richardson's response to that motion argued that "Philadelphia breached the contract by refusing to engage in the appraisal process with [Richardson]." (R. 310; *see* R. 315.) This contention is belied by the record: Although Richardson informed Greenhaw it might seek appraisal (*see* R. 414, 359, 402), Richardson never did so – and it indisputably never demanded appraisal in writing, as the policy required. (R. 102) ("If we and you disagree on the amount of loss, either may make a written demand for an appraisal of the loss.")

Philadelphia's handling of Richardson's claim, as summarized above, more closely resemble an insurer acting with the utmost good faith. Conversely, they do not reflect the acts of an insurer committing an act so extreme that it would cause injury independent of its insured's claim on a policy.

D. The entitled-to-benefits rule does not apply because Richardson never showed a right to receive benefits, under the policy, as "actual damages" for any violation of the Texas Insurance Code.

Richardson refers the Court to that portion of the opinion in *Vail* stating 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." *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988). In *Menchaca*, the Court explained that the "entitled-to-benefits" rule enunciated there was actually recognized in *Vail*, in "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*, 2017 WL 1311752, at *7 (citing *Vail*, 754 S.W.2d at 130).

In *Menchaca*, this Court noted that "the rule [ ] announced in *Vail* was premised on the fact that the policy undisputedly covered the loss in that case, and the insurer therefore '*wrongfully* denied' a '*valid* claim.'" *Id.* at *8 (quoting *Vail* at 136-37) (emphases added in *Menchaca*; footnote omitted). *Menchaca* therefore found that "[i]f an

insurer's 'wrongful' denial of a 'valid' claim for benefits results from or constitutes a statutory violation, the resulting damages will necessarily include 'at least the amount of the policy benefits wrongfully withheld.'" *Id.* (quoting *Vail* at 136). The opinion in *Menchaca* observes that the majority opinion in *Vail* noted that the insureds "offered evidence that [the insurer] had wrongfully denied the claim, resulting in a failure to pay [the policy benefits] when due." *Id.* at *8, n.18 (quoting *Vail* at 137). This led the Court to conclude that the majority in *Vail* "thus concluded that the insureds sustained the policy limits 'as actual damages as a result of [the insurer's] unfair claims settlement practices.'" *Id.*

Here, Richardson has never shown a right to receive benefits, under the insurance policy, as "actual damages" under the Insurance Code: there was no finding (or evidence) of Philadelphia's violation of the Code. The trial court had no basis for bootstrapping an award of attorney's fees onto a claim for which the amount due under the policy was decided through appraisal and – unlike *Vail*, *Menchaca* and, more recently, *Hurst* – no finding of a statutory violation.

Richardson cites a footnote, in a mandamus proceeding this Court heard on a motion to compel appraisal, for the further proposition that

under Texas law, "appraisal clearly can be a parallel proceeding, not intended to wholly replace an ongoing court proceeding." Pet. Br. at 10 (citing *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 412 n.5 (Tex. 2011)). In the same opinion, however, the Court explained that "[a]ppraisals can provide a less expensive, more efficient *alternative* to litigation. . . ." *In re Universal Underwriters*, 345 S.W.3d at 407 (Tex. 2011) (citing *Scottish Union Nat'l Ins. Co. v. Clancy*, 71 Tex. 5, 8 S.W. 630, 631 (1888)).

Richardson proceeded with appraisal – a process the record shows Richardson itself contemplated but never invoked. In the absence of any argument or evidence Richardson sought to set aside the award, Richardson is not now entitled to the proverbial second bite of the apple.

E. Richardson is not entitled to recover its attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code.

Richardson also argues that under Tex. Civ. Prac. & Rem. Code § 38.001, it is entitled to recover its attorney's fees and costs associated with its breach of contract claims. *See* Pet. Br. at 11, 14. However, a party may recover reasonable attorney's fees under section 38.001 only

if it (1) prevails on a cause of action for which attorney's fees are recoverable and (2) recovers damages. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex.1995). Richardson did not satisfy either of these requirements.

This circumstance can be distinguished from when an insurer refuses to participate in appraisal and a court compels appraisal on the insured's motion. Such a refusal to comply with an appraisal clause constitutes a breach of that very policy term. An insured can therefore recover attorney's fees, pursuant to section 38.001, that it incurs in forcing its insurer to appraise a claim. *See, e.g.*, *Standard Fire Ins. Co. v. Fraiman*, 588 S.W.2d 681, 683 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) ("[T]he appraisal clause of the policy was designed to expedite claims settlement and to prevent litigation. To not allow damages would allow insurance companies to breach this provision without fear of any consequences and force insureds to bring suit to enforce the appraisal provision.").

Moreover, as discussed above, "when an insurer makes timely payment of a binding and enforceable appraisal award, and the insured

accepts that payment, the insured is 'estopped by the appraisal award from pursuing a breach of contract claim the [insurer].'" *Blum's Furniture Co., Inc. v. Certain Underwriters at Lloyds*, 459 F. App'x 366, 368 (5th Cir. 2012) (citing *Blum's Furniture Co. v. Certain Underwriters at Lloyds*, 2011 WL 819491, *1, *3 (S.D. Tex. Mar. 2, 2011) (quoting *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 787 (Tex. App.—Houston [14th Dist.] 2004)).

F. The Court should also deny the Petition for Review because evidence establishing only a bona fide coverage dispute does not demonstrate bad faith.

The Court should also deny the Petition for Review because evidence establishing only a bona fide coverage dispute does not demonstrate bad faith. This Court has repeatedly found that an insurer does not breach its duty of good faith and fair dealing, or violate the analogous unfair claims handling provisions in chapter 541 of the Insurance Code, if the insurer reasonably relied on the report of its expert and in good faith denies a claim because it feels the damage is not covered under the policy. *See, e.g.*, *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993) ("[T]he issue in bad faith focuses not on whether the claim was valid, but on the reasonableness of the insurer's

conduct in rejecting the claim."). A simple disagreement among experts about whether the cause of the loss is one covered by the policy will not support a judgment for bad faith. *Id.*; *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994). Instead, the evidence presented to the district court and reviewed by the Court of Appeals shows only a bona fide dispute about the amount necessary to compensate Richardson for storm-related damage. *See State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) ("Evidence establishing only a bona fide coverage dispute does not demonstrate bad faith.").

The record shows that, at Philadelphia's request, Greenhaw retained an engineer to inspect Richardson's buildings and assess what damage, if any, resulted from hail or winds. Philadelphia then relied upon the more conservative damage assessment Greenhaw had provided and promptly paid Richardson for the costs to repair that damage. This evidence precludes a finding that Philadelphia "improperly withheld" policy benefits, which then prevents the necessary ensuing finding that it "*wrongfully withheld* any policy benefits that "'were indeed actual damages' under the statute."

Menchaca, 2017 WL 1311752, at *7 (citing *Vail*, 754 S.W.2d at 129, 130).

With a record establishing that Philadelphia did not breach the insuring agreement and did not breach its common-law or statutory duty of good faith and fair dealing, Richardson's arguments all fail. Philadelphia's payment of all covered damages extinguished any breach-of-contract claim arising from its handling of the claim. The record does not contain evidence that Philadelphia "commit[ed] some act, so extreme, that would cause injury independent of the policy claim" or failed to timely investigate her claim. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995); *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 201 (Tex. 1998). Absent such evidence, Richardson's Petition for Review should be denied. *See, e.g.*, *Scalise v. Allstate Tex. Lloyds*, No. 7:13-CV-178, 2013 WL 6835248, *7 (S.D. Tex. Dec. 20, 2013) (finding no independent injury when the insured "made only those fairly routine allegations of a substandard (albeit timely) investigation and initial undervaluation of his covered claim, the entirety of which was timely paid upon issuance of the appraisal award"); *see also Menchaca* at *12 ("noting that 'in seventeen years

since [*Stoker*] appeared, no Texas court has yet held that recovery is available for an insurer's extreme act'") (quoting *Mid-Continent Cas. Ins. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 521-22 (5th Cir. 2013).

PRAYER

For these reasons, Respondent Philadelphia Indemnity Insurance Company prays that the Court affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. Proc. 9.4(i)(3), Respondent certifies that the foregoing response complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been produced on a computer and printed in a 14-point conventional typeface (Century Schoolbook), and the footnote 13 point in the same type font. This document also complies with the word-count limitation of Tex. R. App. P. 9.4(i)(2)(B), because it contains 5,785 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ William R. Pilat
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CERTIFICATE OF SERVICE

I certify that on June 30, 2017, *Respondent Philadelphia Indemnity Insurance Company's Brief on the Merits* was electronically filed with the Clerk of the Court by filing it through www.efileTexas.gov, which will send notification of such filing to all counsel of record, including the following:

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