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 RESPONSE TO PETITION FOR REVIEW

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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. (CR 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 (CR 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:	No. 05-14-01491-CV, 2016 WL 1242480 (Tex. App.—Dallas Mar. 30, 2016, pet. filed) (mem. op.)
Court of Appeals Disposition:	Affirmed the decision of the Trial Court

STATEMENT OF JURISDICTION

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 contends, because the 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 and relatedly, the Supreme Court 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 decline to exercise its discretionary jurisdiction in this case.

RESPONDENT'S ISSUE

Reply to Issue No. 1:

The Court of Appeals correctly affirmed Respondent Philadelphia Indemnity Insurance Company's Traditional and No-Evidence Motion for Summary Judgment in holding that Respondent's timely payment of an appraisal award, agreed upon by the appraisers for the two parties to the insuring agreement, disposed of Petitioner's breach-of-contract claim and extra-contractual claims as a matter of law.

REASON TO NOT GRANT REVIEW

No Conflict with Precedent for the Public Policy Reasons Urged by Petitioner. Petitioner asks the Supreme Court of Texas to grant review so it may "either limit or overrule the Thirteenth Court's holding in *Breshears*," referring to *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 344 (Tex. App.—Corpus Christi 2004, pet. denied). *See* Br. at 10. *Breshears*, on which this Court has previously declined to grant review, does not stand, as Petitioner argues, as the "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 [Prompt Payment of Claims Act]." *See id.*

The San Antonio Court of Appeals and the Fourteenth Court of Appeals each applied its own analysis to reach the same holding as the Corpus Christi Court of Appeals did in *Breshears* in 2004. *See Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 875-77 (Tex. App.—San Antonio 1994, no writ); *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 787 (Tex. App.—Houston [14th

Dist.] 2004, no pet.). More recently, the First Court of Appeals did so, as well. *See Anderson v. American Risk Ins. Co.*, No. 01-15-00257-CV, 2016 WL 3438243, *1, *8 (Houston [1st Dist.] June 21, 2016, no pet. h.) (affirming summary judgment dismissing all claims based on insurer's payment of appraisal award).

The federal district courts for the Southern, Northern and Western Districts of Texas have also followed *Breshears*. *See Blum's Furniture Co., Inc. v. Certain Underwriters at Lloyds*, No. Civ. A. H-09-3479, 2011 WL 819491, at *3 (S.D. Tex. Mar. 2, 2011), *aff'd*, 459 Fed. Appx. 366 (5th Cir. Jan. 24, 2012); *Church on the Rock N. v. Church Mut. Ins. Co.*, No. 3:10-CV-0975-L, 2013 WL 497879, at *6 (N.D. Tex. Feb. 11, 2013) (holding that estoppel applies when there is a binding and enforceable appraisal award, the insurer timely paid the award, and the insured accepts the payment); *Michels v. Safeco Ins. Co. of Ind.*, No. A-12-CA-511-SS, slip op. at 9 (W.D. Tex. Mar. 13, 2013), *aff'd*, 544 Fed. Appx. 535, 542-43 (5th Cir. 2013) (per curiam).

Each of these cases was correctly decided. For this reason, the Supreme Court should not exercise its discretionary jurisdiction with this case.

STATEMENT OF FACTS

The Court of Appeals' opinion concisely and accurately sets forth the facts in the case. That factual recitation contradicts several misstatements of the record in the Petition for Review and other, unattributed statements, including the following:

- "Even though there was no dispute that the hail damage was covered, Philadelphia declined Greenhaw's suggestion of appraisal and instructed Greenhaw to hire an engineer to investigate the damage and delay payment on the claim before Philadelphia would even consider appraisal. *Id.*" (Br. at 1-2) (citing CR 308, 354).

  The citation to CR 308 is to an argument section in Petitioner's response to Philadelphia's Motion for Summary Judgment, not to any evidence. (*See* CR 308). The citation to CR 354 is to an email exchange between Greenhaw and Philadelphia. Greenhaw wrote, "I called the pastor and he believes there is more damage than I saw. He has an expert put and is waiting on their report. Do you want to get an expert? Opt for the appraisal

process?" Philadelphia replied, "I would just retain an engineer to inspect the loss and review his expert's report before we went to an appraisal." The record does not support Petitioner's recurrent argument, as repeated here, that Philadelphia sought to "*delay payment on the claim* before Philadelphia would even consider appraisal."

- "On June 18, the Baptist Church specifically informed Greenhaw that it would opt for appraisal under the policy provisions. CR 414." (Br. at 2).

  The citation to CR 414 is to a timekeeping entry by Greenhaw, as follows: "Called Wayne. Does not agree. Will option for appraisal & name appraiser later." (CR 414). Mr. Greenhaw's report to Philadelphia, three days later, amplified this 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 communi-

cate with insured." (CR 359). The record shows that Plaintiff never invoked the appraisal process in accordance with the terms of the insurance policy, by making "written demand for an appraisal of the loss." (*See* CR 102). *See Int'l Serv. Ins. Co. v. Brodie*, 337 S.W.2d 414, 415 (Tex. Civ. App.—Fort Worth 1960, writ ref'd n.r.e.) (finding waiver of appraisal when the demand was not made "in accordance with the terms and conditions of the policy").

- "Philadelphia continued to refuse to proceed with appraisal, but continued to demand documentation to refute the engineering report (though[] the appraisal contains no such requirement). CR 360." (Br. at 2).

  Neither the citation to CR 360 nor anything else cited in the Petition for Review supports the contention that Philadelphia refused to proceed with appraisal — or that Petitioner ever invoked appraisal in accordance with the terms of the insurance policy.

- "On July 1, with Philadelphia's offer standing at approximately $7,900, the Baptist Church was forced to hire a private insurance adjuster, Scott Friedson. CR 361. (Br. at 2.)"

  The record shows that on June 24, 2013, a week earlier, Philadelphia *paid* Petitioner the undisputed amount of the loss reflected in Greenhaw's estimate: $10,441.55, less the $2,500.00 policy deductible, for a net payment of $7,941.55. (CR 61-62, ¶¶ 7, 10, 14; *see* CR 182 (check)).

- "On July 19, Friedson notified Philadelphia and Greenhaw that the Baptist Church was selecting Roy Vickers as its appraiser in the event the parties could not reach an agreement in the upcoming days. CR 402. Philadelphia continued to resist appraisal." (Br. at 3).

  Again, Petitioner has not cited anything in the record as support for the assertion that Philadelphia resisted, or "continued to resist," appraisal. The citations to the record Petitioner provided, reproduced above, show merely that Petitioner stated an intent to *possibly* seek appraisal, which Petitioner never did.

- "Subsequently, Philadelphia and Greenhaw refused to work with Friedson or engage in appraisal." (Br. at 3).

  Petitioner does not cite to any support in the record for this allegation.

SUMMARY OF ARGUMENT

This Court should deny the petition for review because the Court of Appeals properly affirmed the district court's grant of Philadelphia's Traditional and No-Evidence Motion for Summary Judgment.

First, the Court should deny review of a case premised, in significant part, on what Petitioner has erroneously referred to as Philadelphia's "dilatory tactics," "endless delays [in] not engaging in appraisal until suit had already been filed, and apparently purposefully seeking out lowball estimates of the covered losses," which Petitioner argues "demonstrate, at the very least, genuine issues of material fact with respect to [its] extracontractual causes of action." (Br. at 5-6).

Second, the Court should deny review because Texas courts, including this Court, have recognized that an insurer that timely pays the amount of an appraisal award could still be liable on an insured's extra-contractual claims — but only if the insured produces evidence it sustained damages independent of those available under the insurance policy. The district court correctly determined that Petitioner did not present any summary judgment evidence raising a genuine issue of

material fact on this issue, and the Court of Appeals properly affirmed that aspect of the lower court's judgment.

ARGUMENT AND AUTHORITIES

A. The Court should deny review on the claimed reasoning that Philadelphia's timely payment of the appraisal award rewards it for "purposeful delays."

Petitioner premises its principal argument to the Court on the notion it erroneously refers to as Philadelphia's "dilatory tactics, "endless delays [in] not engaging in appraisal until suit had already been filed, and apparently purposefully seeking out lowball estimates of the covered losses." (Br. at 5-6). Petitioner then argues that these purported delays "demonstrate, at the very least, genuine issues of material fact with respect to [its] extracontractual causes of action." (Br. at 5-6).

The record shows, however, that Petitioner reported the property loss in question more than 10 months after the date of loss (CR 151), Greenhaw inspected the property two days later (CR 414), and Greenhaw sent Philadelphia a report of his findings and an estimate just 12 days after the loss was reported. (CR 344-352). Greenhaw also reported that he provided his estimate and proposed Statement of Loss

to the insured's representative for review and agreement. (CR 345). When the insured responded that it disagreed, Philadelphia decided to retain a professional engineer to inspect the loss. (CR 354; CR 62, ¶ 8).

The engineer completed that inspection and issued a report to Philadelphia on June 18, 2013. (CR 162-178). The engineer found even less storm-related damage than Greenhaw had. (CR 356, 180). Three days later, Greenhaw sent the engineer's report to the insured and wrote, "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. I will call you regarding this afternoon." (CR 180). Three days later, Philadelphia sent payment on the amount set out in Greenhaw's estimate: $7,941.55. (CR 62, ¶ 10). That satisfied the terms of the insurance policy, which specifies that Philadelphia must pay "the actual cash value at the time of the loss or damage." (CR 88). Further, the policy provides that the insured cannot receive additional payment on a replacement cost basis until the lost or damaged property is actually repaired or replaced, and then only if "the repairs or replacement are made as soon as reasonably possible after the loss or damage." (CR 90-91).

The insured continued to dispute the valuation of the loss. In July 2013, it hired a public adjuster, on a contingent-fee basis, to assist it with the claim. (CR 361). When Philadelphia learned of this development, it emailed Greenhaw:

> 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. (CR 401).

Greenhaw and the insured's adjuster could not agree on a compromise (*see* CR 270-271) and suit followed. The activities over the preceding months demonstrate investigation into the scope of the loss and efforts at finding a compromise, not "dilatory tactics." For example, on July 19, 2013, the insured's adjuster wrote, "With all due respect, we disagree with your estimate. I'm reasonable. I propose we settle this Monday." (CR 403). The two men simply could not reach an agreement, however. (*See* CR 270) ("Ultimately we did not reach agreement on any of these discussions…. I consider the claim resolved based on the payments already issued. If the public adjuster wants to pursue the

matter, I have already offered to meet with him or if he wants to request the appraisal process, he should do so.")

B. The Court should deny review because an insured is not entitled to recover damages beyond the amount recoverable under a contract of insurance when an insurer timely pays an appraisal award, unless the insured demonstrates damages independent of those available under the insuring agreement.

Petitioner asserts that it "prevailed on its breach of contract claim when Philadelphia paid the appraisal award, triggering the Baptist Church's right to the further remedy of an award of attorney's fees." (Br. at 9). This faulty premise underlies the remainder of the Petition for Review.

The undisputed evidence shows that Philadelphia invoked the appraisal process, as provided for under the insurance policy, to determine the value of the claim. (CR 62, ¶ 12). In this regard, the insurance policy specifies that appraisal determines the value of the claim:

> 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. (CR 102).

On April 21, 2014, the appraisal award was set. (CR 188). 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." The insurance policy likewise specifies that Philadelphia "will pay for covered loss or damage within five business days after . . . b. An appraisal award has been made." (CR 103, ¶ E.2).

Philadelphia sent payment on the appraisal award on the fourth business day after it was issued. (CR 62, ¶ 14). Appellant's counsel timely received that payment the following Monday, the fifth business day after the date of the award. (*Id*.; CR 62, ¶ 8; CR 184). The record therefore conclusively shows that Philadelphia fulfilled its obligations under the contract of insurance. *See Scalise v. Allstate Tex. Lloyds*, No. 7:13-CV-178, 2013 WL 6835248, at *4 (S.D. Tex. Dec. 20, 2013) ("[A]n insurer does not breach the insurance contract where, as here, it pays all damages determined by the appraisal."); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 344 (Tex. App.—Corpus Christi 2004, pet. denied) (finding that the insurer satisfied its contractual obligations by

participating in the appraisal process and timely paying the amount set by an appraisal award).

"Under Texas law, when an insurer makes timely payment of a binding and enforceable appraisal award, and the insured accepts the payment, the insured is 'estopped by the appraisal award from maintaining a breach of contract claim against [the insurer].'" *Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, No. 11-20221, 2012 WL 181413, at *2 (5th Cir. Jan. 24, 2012) (quoting *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 787 (Tex. App.—Houston [14th Dist.] 2004, no pet.)); *accord 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.); *Scalise*, 2013 WL 6835248, at * 5 ("[W]here the parties disagree on the amount of loss and submit to the contractual appraisal process to resolve that dispute, and the insurer pays all covered damages determined by the award, the insured may not then argue that the initial failure to pay those damages equates to a breach of contract.").

When Philadelphia paid the full amount of an appraisal award, it "complied with every requirement of the contract, [and] it cannot be

found to be in breach." *Breshears*, 155 S.W.3d at 344; *Anderson*, 2016 WL 3438243, at *4; *Amine v. Liberty Lloyds of Tex. Ins. Co.*, No. 01-06-00396-CV, 2007 WL 2264477, at *4-6 (Tex. App.—Houston [1st Dist.] Aug. 9, 2007, no pet.); *see also Blum's Furniture Co., Inc. v. Certain Underwriters at Lloyds*, No. Civ. A. 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.*, Civ. A. 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).

This Court has carved out two exceptions to the general rule that absent a breach of contract, an insured cannot maintain a common law bad faith claim in Texas: (1) if the carrier commits an egregious act so extreme to cause injury independent of the policy claim, or (2) if the carrier does not timely investigate the claim. *Republic Ins. Co. v. Stoker*,

903 S.W.2d 338, 341 (Tex. 1995). In *Castaneda*, this Court explained that an insured could not recover for bad faith in the absence of a breach of contract because none of the insurer's actions or inactions was the producing cause of any damage separate and apart from those that would have resulted from a wrongful denial of the claim. *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 201 (Tex. 1998). The holdings in *Stoker* and *Castaneda* support the proposition that because a bad faith claim is separate from a breach-of-contract claim, an insured must incur and demonstrate damages separate and apart from those arising through the breach of contract to sustain a bad faith claim. *See Stoker*, 903 S.W.2d at 341; *Castaneda*, 988 S.W.2d at 201. As this Court has also held, "Evidence establishing only a bona fide coverage dispute does not demonstrate bad faith." *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998).

For the reasons and under the authorities set forth above, Philadelphia's payment of all covered damages extinguished any breach-of-contract claim arising from its handling of Petitioner's insurance claim. To avoid summary judgment on its claim for breach of the duty of good faith and fair dealing, Petitioner had the burden of

raising a genuine issue of material fact that Philadelphia "commit[ed] some act, so extreme, that would cause injury independent of the policy claim" or failed to timely investigate her claim. *Stoker*, 903 S.W.2d at 341; *Castaneda*, 988 S.W.2d at 201. Petitioner did not submit any evidence on this issue, and the Petition for Review does not even offer this as a basis for the Court's review.

Without such evidence, the ruling of the Court of Appeals should stand. *See, e.g.*, *Scalise*, 2013 WL 6835248, at *7 (finding no independent injury where 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 Mid-Continent Cas. Ins. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 521-22 (5th Cir. 2013) (noting that "in seventeen years since [*Stoker*] appeared, no Texas court has yet held that recovery is available for an insurer's extreme act"). Instead, the summary judgment 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 Petitioner for storm-related

damage. *See Simmons*, 963 S.W.2d at 44 ("Evidence establishing only a bona fide coverage dispute does not demonstrate bad faith.").

Petitioner nonetheless argues that it is entitled to recover its attorneys' fees and costs associated with the breach of contract claims, pursuant to Tex. Civ. Prac. & Rem. Code § 38.001. (Br. at 8). However, a party may recover reasonable attorney's fees under section 38.001 of the Civil Practice and Remedies Code, only if the party (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). Petitioner did not satisfy either of these requirements.

C. The Court should deny review based on Petitioner's arguments that appraisal, as applied in *Breshears* and its progeny, improperly requires the insurer "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."

Petitioner argues that unless an insurer faces potential liability for attorney's fees, violation of the Texas Prompt Payment of Claims Act, or any potential liability for extra-contractual liability, the insurer has an

economic incentive to underestimate the value of a property claim and "shift the burden and expense of investigation to the insured." *See* Br. at 11, 13-15. As a part of this public policy argument, Petitioner asserts that insurers "can delay payment of claims by delaying the invocation of the appraisal provisions." Br. at 14.

These arguments ignore the fact that the standard appraisal clause published by the Insurance Services Office and widely used in the insurance industry – and in the subject policy – allows either party to the policy to invoke appraisal, at any stage of a claim: "If we and you disagree on the amount of loss, either may make a written demand for an appraisal of the amount of loss." (CR 102).

Texas courts have repeatedly and consistently affirmed the enforceability of appraisal clauses in first-party insurance contracts. *See, e.g.*, *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888 (Tex. 2009) ("In the absence of fraud, accident, or mistake, the parties having agreed that the amount of loss shall be determined in a particular way, we are constrained to hold that such stipulation is valid.") (quoting *Scottish Union & Nat'l Ins. Co. v. Clancy*, 8 S.W. 630, 631 (Tex. 1888)); *Amine v. Liberty Lloyds of Tex. Ins. Co.*, 2007 WL 2264477, at *3

("Appraisal awards made under the provisions of an insurance contract are binding and enforceable . . . ."). One Court of Appeals has explained that appraisal provisions are intended "to afford a simple, speedy, inexpensive and fair method of determining the loss or damage resulting from the happening of a contingency insured against." *See Fire Ass'n of Philadelphia v. Ballard*, 112 S.W.2d 532, 534 (Tex. Civ. App.—Waco 1938, no writ). "Appraisals can provide a less expensive, more efficient alternative to litigation . . ." *In re Universal Underwriters of Tex.*, 345 S.W.3d 404, 407 (Tex. 2011).

Having responded to Petitioner's arguments which ignore the fact that an insured can demand appraisal, simply by "mak[ing] a written demand for an appraisal," Philadelphia addresses the ancillary argument that an insurer can unreasonably delay invoking appraisal itself. It must be noted, however, that Petitioner never argued at the trial court level, or even to the Fifth Court of Appeals, that Philadelphia waived its right to seek appraisal.

Texas courts have found that a demand for appraisal must be made within a reasonable time, but they also examine the conduct of the parties. *See In re Universal Underwriters*, 345 S.W.3d at 407-08 (citing

three cases finding waiver after various delays, but noting that those decisions "were not based solely on the length of delay, but rather on the parties' conduct, as indications of waiver"). "In other words, while the time period may be instructive in interpreting the parties' intentions, it alone is not the standard by which courts determine the reasonableness of a delay." *Id.* at 408 (citing *Equitable Life Assurance Soc. v. Ellis*, 105 Tex. 526, 152 S.W. 625, 629 (1913); *Scottish Union*, 8 S.W. at 632). Hence, even if an insured does not invoke appraisal and the insurer engages in conduct comprising an unreasonable delay in demanding appraisal, the insured can litigate its insurance claim – and recover its attorney's fees and additional damages under Tex. Civ. Prac. & Rem. Code § 38.001 or Tex. Ins. Code §§ 542.051-.061. Texas courts have therefore crafted safeguards against an insurer that seeks to delay the process of resolving a claim, which could force an insured to incur onerous expenses and ultimately accept less than the amount necessary to compensate for the loss.

Texas courts have also found that an insurer "will not be permitted to use this [appraisal] clause oppressively, or in bad faith." *Int'l Serv. Ins. Co. v. Brodie*, 337 S.W.2d 414, 417 (Tex. Civ. App.—Fort Worth

1960, writ ref'd n.r.e.) (citing *Cont'l Ins. Co. v. Vallandingham & Gentry*, 76 S.W. 22, 24 (Ky. Ct. App. 1903)). Rather, the insurer "must proceed promptly to take the necessary steps to have the amount of the loss adjusted as provided in the policy . . . ." *Id.* (quoting *Schouweiler v. Merchants' Mut. Ins. Ass'n*, 78 N.W. 356, 357 (S.D. 1899)).

Moreover, the record shows that Philadelphia did not use the appraisal clause in bad faith by failing to "proceed promptly to take the necessary steps to have the amount of the loss adjusted as provided in the policy." *See id.* The record shows that Philadelphia invoked appraisal, in writing as required by the policy, on November 25, 2013. (CR 62). The appraisers appointed by each of the parties reached agreement on value of loss and executed Appraisal Award on April 21, 2014. (CR 188). Philadelphia promptly issued payment on the amount of the award, (CR 62, ¶ 14, CR 182, 184), less the amount of the deductible. (CR 76).

PRAYER

For these reasons, Respondent Philadelphia Indemnity Insurance Company prays that the Court deny the Petition for Review.

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 conventional typeface of no smaller than 14-point except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitation of Tex. R. App. P. 9.4(i)(2)(D), because it contains 4,200 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ William R. Pilat
William R. Pilat

CERTIFICATE OF SERVICE

I certify that on November 16, 2016, this Response to the Petition for Review 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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