IN THE SUPREME COURT OF TEXAS

No. 17-0719

OZIER HURST, PETITIONER,

v.

NATIONAL SECURITY FIRE & CASUALTY COMPANY, ACTION CLAIM SERVICE, INC., AND AARON TIMMINS, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUSTICE BOYD, joined by Justice LEHRMANN, dissenting to the denial of the petition for review.

We held last term that an insurer that invokes an agreed-to appraisal process and then pays the appraisal award (1) can still be liable under the Texas Prompt Payment of Claims Act for statutory interest and attorney's fees if the insurer is adjudicated to have been liable for policy benefits or voluntarily accepts that liability; (2) cannot be liable for breaching the contract by failing to pay the amount of the covered loss; and (3) cannot be liable for common-law or statutory bad-faith "to the extent" the insured seeks only policy benefits, attorney's fees, or treble damages.[1]

Here, the insurer tendered payment of an appraisal award, but it conditioned the tender on the insured's agreement to release all claims, including claims against a third-party adjuster. The

[1] *Ortiz v. State Farm Lloyds*, — S.W.3d —, No. 17-1048, 2019 WL 2710032, at *1, *5 (Tex. June 28, 2019); *Barbara Techs. Corp. v. State Farm Lloyds*, — S.W.3d —, No. 17-0640, 2019 WL 2710089, at *17 (Tex. June 28, 2019).

insured rejected the tender, and the parties proceeded to trial. The jury found that the insurer breached the policy and violated the Prompt Payment Act and that all defendants acted in bad faith. Without the benefit of our opinions in last term's cases, the court of appeals reversed and rendered judgment for the insurer, holding that the insurer's tender of the appraisal amount foreclosed all of the insured's claims.[2]

Through our decisions last term and the term before,[3] we have provided much-needed clarity regarding the relationships between contract, statutory, and common-law claims in the insurance context. But as this case demonstrates, many questions remain. Do last term's holdings apply when the insurer *conditionally* tenders payment? What if the insurer conditions the tender on the release of claims that remain viable despite the insurer's payment of the appraisal award, or on the release of claims against third parties? Does the jury's finding of contractual liability in this case constitute an "adjudication of liability" under *Barbara Technologies*, triggering liability under the Prompt Payment Act? Does the jury's apparent finding of damages beyond policy limits, attorney's fees, and treble damages trigger liability for a bad-faith claim under *Ortiz*? And if the prompt-pay or bad-faith claims survive under our decisions last term, does the insurer's tender of payment conditioned on the insured's release of those claims constitute a payment at all?

These issues arise naturally and necessarily from our recent decisions, and the parties have fully briefed them in this case. By denying this petition for review, the Court neither affirms nor rejects the court of appeals' reasoning or holdings. But neither does it relieve the ongoing

[2] *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 844–45 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

[3] *See USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 484 (Tex. 2018).

confusion on these recurring[4] and important issues. I would grant the petition for review and decide the case. Because the Court does not, I respectfully dissent.

Jeffrey S. Boyd
Justice

Opinion delivered: December 20, 2019

[4] *Hurst* was just one of twenty-five cases in the Multi-District Litigation (MDL) Court. *In re Nat'l Sec. Fire & Cas. Co. Hurricane Litig.*, No. 12-0271 (Tex. M.D.L. Panel May 22, 2012). Since the creation of that MDL court, at least sixteen other MDL courts have been created to handle some 3,000 cases of insurance coverage for hurricanes, hail, and other storm damage.

2018 WL 5414666 (Tex.) (Appellate Brief)
Supreme Court of Texas.

Ozier HURST, Petitioner,
v.
NATIONAL SECURITY FIRE & CASUALTY COMPANY,
Action Claim Service, Inc., & Aaron Timmons, Respondents.

No. 17-0719.
October 22, 2018.

On Petition for review from the Fourteenth Court of Appeals of Texas Cause No. 14-15-00714-CV

Respondents' Brief On the Merits

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*ii IDENTITY OF PARTIES AND COUNSEL

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Trial Judge:

The Honorable, Lonnie Cox Presiding Judge 56th Judicial District Court Galveston County, Texas 600 59th Street, Suite 3302 Galveston, Texas 77551

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Nature of the Case

Dissatisfied with the initial estimate and payment, homeowner Ozier Hurst sued his insurer, National Security Fire & Casualty Company, the adjusting firm, Action Claim Services, Inc., and independent adjuster, Aaron Timmins, for contractual and extra-contractual damages purportedly sustained by his home during Hurricane Ike. Subsequently Hurst invoked appraisal. Dissatisfied with his appraisal award, Hurst returned to litigation.

Trial Judge:

The Honorable, Lonnie Cox

Trial Court:

56th Judicial District Court Galveston County, Texas

Disposition:

The trial court denied all post-trial motions and signed a Final Judgment totaling $176,456.04 plus 5% post judgment interest and attorney's fees of $75,000.00 for trial, $50,000.00 for any appeal, and $35,000.00 for any appeal to the Texas Supreme Court. The trial court allowed the motion for new trial to be overruled by operation of law. Defendants' appealed with the result(s) noted below. Hurst then applied to this Court for relief.

Parties in the Cour of Appeals:

Defendants National Security Fire & Casualty Company, Action Claim Service, Inc., and Aaron Timmons were the appellants. Plaintiff Ozier Hurst was the appellee.

District of the Court of Appeals:

Fourteenth District at Houston.

Justices Participating:

Justice Donovan wrote the opinion of the court, joined by Busby and Wise, JJ.

***vii Citation of Court of Appeals Decision:**

National Sec. & Fire Cas. Co., et al v. Hurst, 523 S.W.3d 840 (Tex.App.-Houston [14th Dist.] 2017).

Disposition by Court of Appeals:

On May 23, 2017, the court of appeals issued an opinion and judgment reversing the jury's award and rendered a take nothing judgment against Hurst. On July 7, 2017, Hurst timely filed a motion for rehearing which the court of appeals denied on July 25, 2017. No further motions for rehearing or for reconsideration en-banc were filed, and none remain pending.

***viii STATEMENT OF ISSUES PRESENTED**

Issue 1: The Court of Appeals correctly held that National's timely payment of the appraisal award fulfilled its obligation(s) notwithstanding that the payment was accompanied by a standard release.

Issue 2: The Court of Appeals correctly held National did not violate the prompt payment provisions of the Insurance Code. [1]

Issue 3: The Court of Appeals correctly held Hurst could not recover on his claims for bad faith and unfair settlement practices.

*1 STATEMENT OF FACTS

Six hundred and seventy ("670") days after Hurricane Ike, Ozzie Hurst ("Hurst") filed a claim with National Security Fire & Casualty Company ("National") for property losses allegedly due to that storm. Hurst first reported his loss on July 15, 2010. [2] National assigned the claim to Action Claim Services, Inc. ("Action"), an independent adjusting company. [3] Action in turn dispatched Aaron Timmins ("Timmins"), a licensed adjuster, to evaluate Hurst's property. [4] Timmins then prepared a written estimate of the loss and provided his estimate to both National and Hurst. Timmins estimated the loss to be $4,524.56. [5]

***2** Applying the $1,000 policy deductible, National issued Hurst a check for $3,524.56 on August 19, 2010. [6] Hurst accepted and cashed the check but did not use any of this money to repair his property. [7] Hurst never communicated any dissatisfaction or disagreement with the estimated amount of the loss to National, Action, or Timmins. Hurst also did not request re-inspection of his property. [8] Rather, National, Action and Timmons first notice of any dissatisfaction was Hurst's lawsuit.

Hurst sued National, Action, and Timmins on September 7, 2010. [9] His attorneys invoked the Policy's appraisal clause on Hurst's behalf *three (3) years five (5) months later on February 19, 2014.* [10]

Hurst's Policy contains the following provision concerning binding appraisals of disputed amounts:

If you and we fail to agree on the actual cash value, amount of loss, or the cost of repair, either can make a written demand for appraisal. Each will then select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a district court of a judicial district where the loss occurred. The two appraisers will then set the amount of loss, stating separately the actual cash value and loss to each item.

If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these three and filed with us will set the amount of the loss. **Such award shall be binding on you and us.** ("Emphasis Added")

Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally. [11]

***3** In accordance with the Policy's provision(s), Hurst specifically agreed that any "award shall be binding on you and us." Both parties retained appraisers. [12] National hired Mark West and Hurst hired Shannon Cook. The appraisers each inspected the property, prepared separate estimates, but could not agree on the amount of the loss. [13] The parties asked the Court to appoint an umpire. [14] The MDL Court appointed The Honorable Mark Davidson. [15] On September 25, 2014, Judge Davidson issued an award of $7,166.36 representing the full amount of the loss. [16] Hurst never sought to set aside this award.

On October 25, 2014, National issued a check to Hurst and his attorneys for $3,641.80 representing the difference between the amount of the umpire's award and the amount Hurst was originally paid for his claim. [17] The check, (payment in full), was tendered to Hurst's attorneys with a standard release of all claims. [18] Hurst never raised any issue(s) concerning the release, never returned the check, refused to accept the umpire's award, and continued to pursue the underlying litigation. [19]

***4** Despite the binding appraisal award, the Trial Court called this case for trial. National claimed the payment of the appraisal award disposed of all matters. The Trial Court disagreed and over objection(s), allowed Hurst to proceed to trial. [20] At trial, Hurst contended National breached the Policy by initially undervaluing his claim; which he contended was demonstrated by the higher umpire's award. Hurst also claimed National essentially held him hostage ("even though he invoked appraisal and was represented by counsel") by demanding a release of all claims before negotiating the final payment of the umpire's award. [21]

Despite National's repeated and consistent overruled objections, the Trial Court allowed Hurst's counsel to present evidence and make arguments concerning the appraisal process in support of his claims. [22] The Trial Court also allowed Hurst's counsel to present testimony and evidence from his appraiser regarding his inflated estimate provided to the umpire, Judge Davidson, who expressly rejected it. [23] Hurst presented no other evidence of any damages. [24]

***5** The jury returned a verdict for Hurst on December 8, 2014. The Trial Court denied National's motion for a directed verdict [25] and motion for judgment notwithstanding the verdict. [26] The Trial Court then entered judgment awarding Hurst $55,993.60 from National, $22,731.22 from Action, $22,731.22 from Timmins, prejudgment interest, post judgment interest, 18% penalty interest, court costs, $75,000.00 in attorney's fees for trial, $50,000.00 in conditional appellate fees, and $35,000.00 in conditional fees for any appeal to the Texas Supreme Court. [27]

National, Action, and Timmins appealed this judgment. The Court of Appeals reversed the trial court, and rendered judgment that Hurst take nothing on his claims. National Sec. & Fire Cas. Co., et al v. Hurst, 523 S.W.3d 840 (Tex.App.-Houston [14th Dist.] 2017). In reaching its decision, the Court of Appeals held National paid the full amount owed to Hurst, as determined by the appraisal process he had invoked, and that Hurst failed to demonstrate any independent injuries entitling him to extra-contractual damages under the Texas Insurance Code. For these reasons, the Court of Appeals found that the trial court erred in refusing to grant the Defendants' Motion for Directed Verdict. Id at 849.

*6 SUMMARY OF ARGUMENT

Hurst demanded the parties resolve a disputed insurance claim in accordance with a binding appraisal provision in the insurance policy at issue. After participating in the appraisal process, Hurst refused the timely payment of the appraisal award by not cashing the tendered check. Hurst made no complaints whatsoever to National concerning the tender and accompanying release. The Court of Appeals correctly determined that by invoking appraisal and receiving timely payment of the full umpire's award, Hurst was estopped from pursuing any breach of contract action Hurst asserted against National.

National's payment of the appraisal award to Hurst being conditioned on his executing a full release of his claims does not change this finding. Since the payment was made in full, National requested a full release of claims against National, Action and Timmons.

The Court of Appeals also correctly determined that Hurst should not have been able to pursue/prevail on: 1) claims for violations of the prompt payment provisions of the Texas Insurance Code, because National's timely payment of the appraisal award brought it into compliance with the payment terms of National's insurance policy, or 2) any claims for extra-contractual damages, as Hurst failed to demonstrate that he suffered any independent injuries.

*7 ARGUMENT

1. The Court of Appeals correctly held that National's timely payment of the appraisal award fulfilled all its obligation(s) notwithstanding that the payment was accompanied by a standard release.

Pursuant to Texas law insurance contracts are generally interpreted as a matter of law, with a court's primary concern being, "to give effect to the intentions of the parties as expressed by the policy language". *American Nat'l Gen. Ins. Co. v. Ryan,* 274 F.3d 319, 323 (5th Cir. 2001) Courts must endeavor to construe an insurance contract to avoid rendering any terms meaningless. *National Union Fire Ins. Co. v. Ryan,* 274 F. 3d 319, 323 (5th Cir. 2001) When a contract is clear and unambiguous, the court enforces it as written. *Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v CBI Indus., Inc.,* 907 S.W. 2d 517, 520 (Tex. 1995) Finally, the court must afford the words written in their plain meaning when they contain no ambiguity. *Puckett v. U.S. Fire Ins. Co.,* 678 S.W. 2d 936, 938 (Tex. 1993).

"Under Texas law, appraisal awards made pursuant to the provisions of an insurance contract are binding and enforceable, and every presumption will be indulged to sustain an appraisal award". *JM Walker LLC v. Acadia Ins. Co., 356 Fed. Appx. 744, 746 (5th Cir. 2009) (per curiam).* The effect of an appraisal award is to, "estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court. ***8** State Farm Lloyds v Johnson, 290 S.W.3d 886, 895 (Tex. 2009). The reason for the estoppel defense is to prevent precisely what Hurst did here: take advantage of the binding appraisal process to determine the value of his claim and then, after the insurer paid the award in full, sue the insurer for its initial failure to do so. *Breshears v State farm Lloyds, 155 S.W. 3d 340 (Tex. App.-Corpus Christ. 2004, pet. denied)* This is contrary to public policy and would render appraisal meaningless at best and a trap for the insurer at worst.

Despite the presumption in favor of enforcing appraisal awards, "[t]he results of an otherwise binding appraisal may be disregarded in only three instances: (1) when the award was made without authority; (2) when the award was made as a result of fraud, accident or mistake; or (3) when the award was not in compliance with the requirements of the policy". *JW Walker, 356 Fed. Appx. at 746.* Hurst's arguments fall outside the ambit of any of these three situations.

Nonetheless, Hurst contends that the court of appeals erred in its finding that he was estopped from asserting a post-appraisal payment contractual claim based on three arguments: 1) National's payment of the appraisal award was conditioned on his execution of a release; 2) this condition made the payment untimely; and 3) the application of estoppel theory by the Court of Appeals ("and other courts") is contrary to existing law.

***9** Hurst is merely attempting to manufacture *a post facto* justification to void the appraisal process he invoked; National adhered to the policy and was in compliance with all existing relevant Texas statutes and jurisprudence.

Hurst does not suggest that forwarding the payment with a release is in and of itself improper. Nor could he, because the right to require a release with the payment of an appraisal award is recognized in the insurance code and by courts. Tex. Ins. C. § 541.060(a)(6); *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.,* 150 S.W.3d 423, 426 (Tex. 2004). Instead, Hurst only insists that an insurer cannot "leverage" its payment of an appraisal award to force an insured to release noncontractual claims against the insurer and others. Hurst claims that the release National provided required him to give up non-contractual claims, and as a result, the payment did not effectuate estoppel.

Tender of the full amount owed pursuant to the conditions of the appraisal provision in a policy generally is all that is required to estop an insured from raising a breach of contract claim. Toonen v United Servs. Auto Ass'n, 935 S.W.2d 937,940 (Tex. App.-San Antonio 1996, no writ). And, when an insurer tenders the full and timely payment of the appraisal award, as was done here, an insured's rejection of this payment does not prevent estoppel. *United Neurology, P.A. v Hartford Lloyd's Ins. Co., 101 F.Supp. 3d 584, 595 (S.D. Tex.), aff'd 624 F.* ***10** *App'x225 (5th Cir. 2015*). Hurst fails to address the United Neurology, P.A. decision anywhere in his brief.

Hurst's refusal to sign the release after the umpire's appraisal award and continuation of the suit, which he de facto abated by filing for appraisal, was nothing more than gamesmanship secondary to his dissatisfaction with his minimal appraisal award. Hurst never complained about the standard release, including bringing his purported dissatisfaction to National attention or returning the appraisal check. Such standard releases are used in all cases and subject to back and forth revisions and deletions by all parties involved. Again, the policy clearly and unambiguously states, ***"such award shall be binding on you and us*** ". ("Emphasis Added")

Hurst cannot demonstrate that his extra-contractual claims survived National's payment of the appraisal award rendering his argument(s) on the point invalid. With limited exceptions, an insured is precluded from maintaining extra-contractual claims for common law bad faith and violations of the Texas Insurance Code where his breach of contract claim fails or is otherwise not viable. Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 341 (Tex. 1995); Toonen v, USAA, 935 S.W. 2d 937, 941-42 (Tex. App. - San Antonio 1996, no writ). The only two exceptions to this rule are: (1) where an insurer commits some extreme act that causes an ***11** injury independent of the policy claim; and (2) where an insurer fails to timely investigate an insured's claim. *Stoker,* 903 S.W.2d at 341.

As noted by the court of appeals, Hurst failed to prove either of these two exceptions. Since his extra-contractual claims did not survive after payment of the appraisal award, the release provided with the payment did not and could not have required Hurst to give up any viable claim(s). He produced no evidence he had any claims left to assert.

Hurst's second argument in challenging the application of estoppel is that as applied it is contrary to existing law. His assertion that the Court of Appeals incorrectly relied on the principal(s) of estoppel is simply inaccurate. It is well established that quasi-estoppel applies "when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." *Sampson Exploration, LLC v. T.S. Reed Properties, Inc.,* 521 S.W.3d 766, 778 (Tex. 2017); *Steubner Realty 19, Ltd. v. Cravens Rd.* 88, Ltd., 817 S.W.2d 160, 164 (Tex. App. - Houston [14th Dist.] 1991, no writ).

After acknowledging this principal, Hurst agrees that insureds who accept payment in full of an appraisal award are estopped from maintaining a breach of contract claim. *E.g.,* ***12** *Franco v. Slavonic Mut. Fire Ins. Ass'n,* 154 S.W.3d 777, 787 (Tex. App. - Houston [14th Dist.] 2004, no pet.); *Blum 's Furniture Co. v. Certain Underwriters at Lloyds London,* 459 Fed. Appx. 366, 369 (5th Cir. 2012).

Hurst then concludes, **without citing any relevant authority,** that for estoppel to apply, the insured must "accept" the benefits. Hurst explains that because he did not accept National's payment in full of the appraisal award, he cannot be estopped from asserting his claims because he did not "accept" the benefits of the award.

Hurst's claim that estoppel is inapplicable because he did not accept the benefits is incorrect. It is crystal clear that the doctrine is implicated when it would be unconscionable to allow a person to either maintain a position that is: 1) inconsistent with one to which he acquiesced; or 2) from which he accepted a benefit.

Here, Hurst demanded that the parties submit their dispute to the appraisal process. By doing so, Hurst acquiesced to the propriety of resolving the disputed claim through appraisal. Allowing him subsequently to proceed with a breach of contract claim after invoking the contractual provision that the dispute be submitted to the binding appraisal process would be unconscionable and against public policy.

Additionally, Hurst incorrectly assumes that the only benefit that he could receive because of engaging in the appraisal process is the additional payment that ***13** he refused. The appraisal process itself is a benefit to parties of an insurance contract by allowing each of them to resolve a disputed claim expeditiously and non-judicially. When Hurst submitted the disputed claim to the appraisal process as demanded, he received a benefit. To allow him post facto to ignore that benefit and proceed with his lawsuit for a "second bite at the apple" would be unconscionable.

Notwithstanding the lack of authority to support his position, Hurst's claim that he must accept payment to be estopped from asserting a breach of contract claim is wrong. To hold otherwise would mean any insured could first request appraisal, but refuse payment made and continue with judicial proceedings if dissatisfied with the monetary award. Appraisal provisions in insurance contracts in this state would become meaningless as a method of alternative dispute resolution.

The Court of Appeals correctly concluded that the acceptance of the payment was not a necessary condition for estoppel. United Neurology, P.A. v Hartford Lloyd's Ins. Co., 101 F.Supp. 3d 584, 595 (S.D. Tex.), aff'd 624 F. App'x 225 (5th Cir. 2015) (rejecting insured's argument that breach of contract claim was not estopped because it did not accept the payment of the appraisal award tendered to it by the insurer).

***14** Despite United Neurology, P.A., Hurst insists somehow that by never cashing the check, he consistently objected to the payment and estoppel therefore did not occur. This insistence is not only legally incorrect, but it also misstates the Court of Appeals regarding the fact that Hurst never ever informed National of any objection he had regarding the payment or release.

Hurst next claims that the release National provided required him to give up (viable) non-contractual claims, and as a result, the payment was ineffective.

Hurst cites only a fifty ("50") year old decision in support of this issue-Ins. Co. of N. Am. v. Davis, 398 F.2d 418 (5th Cir. 1968). The Davis decision, which is factually inapposite to this matter, involved a helicopter crash with multiple parties. The insured was the charterer of the aircraft and the insurer offered to provide Plaintiff full payment under the policy but required that Plaintiff sign a release that released the insurer from claims asserted against its insured, and other potential Defendants that were apparently insured under different insurance policies. Id. at 420-21.

The Plaintiff refused to sign the release and filed suit against the insurer seeking full payment under the policy of $100,000.00, penalties under the Texas Insurance Code ("although it was unclear whether Texas law applied"), and attorneys' fees. The Trial Court granted all requested relief on summary judgment, and the insurer appealed. Id. at 419.

***15** The United States Fifth Circuit Court of Appeals found that the release the insurer requested as a condition of payment was too broad and affirmed the trial court's award of the full payment owed under the policy of $100,000.00. However, the Fifth Circuit reversed the trial court's award of statutory penalties and attorneys' fees. It did so, because Plaintiff had waived the right to those statutory penalties by comments made in correspondence, and by filing suit against the insurer within the statutory payment period. Id. at 422-23.

Hurst's reliance on the Davis decision is certainly tenuous, as not one appellate court in this state has relied on it in addressing Texas insurance issues The Davis decision is also notably distinguishable from this matter in several important respects.

First, Davis did not involve a first party insurance claim. The policy was primarily a liability policy insuring the named insured(s) against liability for personal injury or death arising out of the ownership, maintenance or use of the aircraft covered by the policy. The Plaintiff who sued because of the death of her husband, was presumably proceeding directly against the insurer under Louisiana's "direct action" statute.

Second, and most important, the other potential claims included in the release encompassed Plaintiff's claims against certain other parties ("presumably with liability independent from the charterer"), and the insurer's liability for all ***16** claims arising out of the incident regardless of whom the insurer was insuring. In this instance, the only parties included in the release in addition to National were Action and Timmins - the parties that handled the adjustment of Hurst's insurance claim and whose only liability to Hurst was inextricably linked, and directly connected, to National's liability, if any.

Third, the decision did not involve appraisal or the payment of an appraisal award, the central issue in this case. Instead, the Fifth Circuit's holding rests simply on the finding that the release submitted was too broad considering the language of the insurance policy, which only provided the insurer with the right to obtain a release of all claims against the insured. Id. at 419 (emphasis added).

The release was too broad, because it required the Plaintiff to release claims against third-parties that were presumably in addition to (separate from) the named insureds, and all claims against the insurer arising out of the subject accident. Id.at 420. The release was, therefore, simply too broad considering the language of the policy.

Finally, the insurer in Davis did not make the payment owed under the policy with the release as National did. Instead, the insurer advised that it would make the payment owed under the policy only after receipt of a returned executed release.

***17** Notwithstanding Hurst's misplaced reliance on *Davis* decision, he must show that his extra contractual claims would survive National's payment of the appraisal award for his argument to be meritorious.

In Barry *v. Allstate Lloyds,* 2015 U.S. Dist. LEXIS 40953 (S.D. Tex. Mar. 31, 2015), Allstate (like National) initially made payments to the insured for a claimed storm loss. The insured (like Hurst) disputed the amounts paid were sufficient, and Allstate invoked the appraisal process. Allstate (like National) tendered a check for the full amount of the appraisal award together with a liability release and requested that the check be held in trust until the release was negotiated. The insured (like Hurst) refused to sign the release and sued for breach of contract and extra-contractual causes of action claiming Allstate had undervalued his claim. On these almost identical facts, the Barry Court citing several Texas decisions on estoppel ruled that Allstate ***did not breach the insurance policy as a matter of law.*** Additionally, because there was no breach of contract, the insured could not maintain any of his extra-contractual claims. Barry, 2015 U.S. Dist. LEXIS 40953 (S.D. Tex. Mar. 31, 2015).

The fact that the insured in Barry cashed the check received from the insurer was simply a recitation of fact, not the basis for the insured's estoppel from pursuing the breach of contract claim. *The Barry* insured was estopped from pursuing the contract

claim because he acquiesced to the formal and binding ***18** appraisal process and did not offer any evidence to challenge the sufficiency of the appraisal award. To allow an insured, to proceed with a breach of contract claim after participating in the contractually mandated binding appraisal process of the insured's claim without a legitimate basis for challenging the appraisal process itself would be unconscionable. It would render the policy's appraisal provision meaningless in all homeowner insurance policies throughout the state.

Here, the Court of Appeals, addressing the tender of the full appraisal amount stated, *inter alia:*

> Like *Barry,* the tender here was for the entire "set" amount of loss under the policy in accordance with the appraisal award. That award is a result of Hurst's invocation of the insurance policy's extra-judicial means of resolving the amount of loss, in which Hurst participated. National tendered the full amount of loss as determined by the appraisal process. The release of the extra-contractual claims did not render that tender less than the "set" amount. We therefore conclude that under the facts of this case Hurst's claim for breach of contract is precluded as a matter of law. *National Security Fire & Casualty Company v. Hurst,* 523 S.W. 3d 840 (Tex. App.-Houston [14th Dist.] 2017), *citing to Barry v. Allstate Lloyds,* 2015 U.S. Dist. LEXIS 40953 (S.D. Tex. Mar. 31, 2015)

Despite the aforementioned and contrary to Texas caselaw, Hurst still contends, in the face of the case law that, "the appraisal process and award in this case, later confirmed by the jury findings, conclusively established that National breached the policy when it initially evaluated the claim and paid inadequate compensation". Hurst is advocating to this court that by obtaining additional ***19** money through the appraisal process, consciously refusing to "accept" the full tender payment from National and fabricating an excuse to not engage whatsoever in the confection of a release, (all of which he introduced at the subsequent trial), it is conclusively established that National breached the policy. All are in direct contravention of all established law on this subject. As stated at the outset, the burden is on Hurst to establish an ambiguity in the policy and any breach committed by National and he has failed to do so.

Contrary to Hurst's musing regarding releases (and the "demands" which can be made in them by insurance companies), Hurst never had to sign the proposed release as he now suggests. He cannot use the release as an excuse to invalidate the full tender payment made by National. As the court of appeals noted, absent some genuine issue of fact to support setting the appraisal award aside, the Plaintiff (like Hurst) was estopped from pursuing a breach of contract claim against the insurer, and that there was no act so extreme as to cause injury independent of the policy claim. Barry citing to Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 341 (Tex. 1995). Specifically, and importantly, Barry concluded that conditioning the payment of the appraisal award on the execution of a release did not constitute a breach of contract or render the appraisal award payment deficient.

The suggestion that the Court of Appeals opinion in this matter "blurs those lines" between appraisal and arbitration is simply specious. As the appellate ***20** decision in this matter noted, appraisal clauses estop a party from contesting the issue of damages in a lawsuit based on an insurance contract, leaving only the question of liability for the court. *National Security Fire & Casualty Company v. Hurst 523 S. W. 3d 840 (Tex. App. - Houston 14th Dist.] 2011) Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 786 (Tex. App.-Houston 14th Dist.] 2004, no pet.).* The Federal Arbitration Act and Texas Arbitration Act, dispose of matters in their entirety; not just damages like appraisal in homeowner's insurance policies.

Hurst has failed to successfully raise an issue of fact on some distinct contractual provision or raise an issue of fact as to the validity of the appraisal process. *Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 786-87 (Tex. App.-Houston [14th Dist.] 2004, no pet.)* As a result, his request for a writ should be rejected.

In summary, Hurst, is ignoring that the appraisal award delineated the full amount he was legally entitled to receive for his claimed loss under the policy. This has been the law in Texas for over 125 years. *Scottish Union & Nat'l Ins. Co. v. Clancy,* 8 S.W. 630, 631 (Tex. 1888). Until Judge Davidson handed down the appraisal award, all that existed was a dispute as to the full amount of Hurst's claimed loss. Hurst wanted more than what National had already paid. But, at that point, Hurst was not legally entitled to anything more than what he had already been paid. ***21** *Laas v. State Farm Mut. Auto. Ins. Co.,* 2000 Tex. App. LEXIS 5332, at *36-37 (Tex. App.Houston [14th Dist.] August 10, 2000, pet. denied) (mem. opinion). When the award was handed down, National timely made payment of the final disputed portion making up Hurst's entire loss. Consequently, since the appraisal resolved the dispute as to the full amount of Hurst's claimed loss and he was not legally entitled to receive anything more, National's sending the final payment for the full amount of what was a disputed claim with a settlement agreement and release was proper under the express terms of the Insurance Code and case law. Tex. Ins. C. § 541,060(a)(6). Hurst's claim that there should be an exception to well-settled law is legally and factually unsupportable and specious.

2. The Court of Appeals correctly held National did not violate the prompt payment provisions of the Insurance Code.

***22** Under the Insurance Code, an insurer has 60 days from the date in which it receives all items necessary to secure a final proof of loss in which to make final payment before 18 interest begins to accrue. Tex. Ins. C. § 542.058(a)("formerly known as Art. 21.55 of the Texas Insurance Code"); AMJ Investments, 447 S.W.3d at 14. However, for claims involving weather related disasters, such as Hurricane Ike, this period is extended for an additional 15 days. Id. Thus, in this case, National had a total of 75 days to make any payment before interest could start to accrue. AMJ Investment, 447 S.W.3d at 14. National's payment of Hurst's entire loss under the Policy, as determined through the appraisal process, was timely. Id. Regardless of the aforementioned the purpose of jury Question No. 3 at the trial, after the binding appraisal, was to establish a date when the calculation of statutory interest began to run on the claim. [28] In response to Question No. 3, the jury found that September 25, 2014, was the date National received all items, statements, and forms reasonably requested and required during the investigation in order to secure the final proof of loss. [29] It was undisputed that National timely issued a check in payment of the binding appraisal award on October 25, 2014-well within the timeliness requirement section 542.058. See Bernstien v Safeco Ins. Co. of Ill., 2015 WL 3958282, at *1 (Tex. App.-Dallas June 30, 2015, no pet.)

Since there was no evidence National failed to timely pay any claim to Hurst or that National was liable on any claim, See Amine, 2007 Tex. App. LEXIS at *12, there is no Chapter 542 violation in this case for any late payment of claims as a matter of law. United National Ins. Co. v. AMJ Investment, L.L.C., 447 S.W.3d at 14.

Consequently, Hurst now argues that because the payment award was accompanied by a release, it was not a timely payment. Hurst claims *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.* 150 S. W. 3d 423, 426 (Tex. 2004) is ***23** dispositive of this issue. Seemingly, Hurst has forgotten that in footnote 5 of his Appellee's brief to the Court of Appeals, he distinguished *Republic* from the facts of this case, including the purported late payment issue:

In *Republic Underwriters,* the Texas Supreme Court noted that an insurer cannot **tender partial payment** of undisputed aspects of a claim on the condition that the insured provide a liability release "to **which it is not ultimately entitled."** *Id.* at 426. "Otherwise, an insurer's insistence on a release to which it is not ultimately entitled delays payment, again impairing the [prompt-payment] statute's purpose." *Id.* "Central to [the] Supreme Court's analysis was the idea that an insurance company could not

force an insured to settle for less than he was legally entitled to receive by conditioning prompt payment to a release of the insurer's liability for further payment." *DeLaGarza v. State Farm Mut. Auto. Ins. Co.,* 181 S.W.3d 755, 756 (Tex. App. Dallas 2005, pet. denied). (Emphasis added)

Republic Underwriters is factually inapposite to the facts underlying in this matter. In *Republic Underwriters,* the claim was not paid, and appraisal was not invoked. In fact, Republic never paid the claim. The court never addressed the issue of full settlement via a partial payment. *Id.*

What is factually similar is Dizdar v. State Farm Lloyds, 2016 U.S. Dist. LEXIS 49839 (S.D. Tex. April 13, 2016).

In Dizdar, the plaintiffs in a windstorm related case filed suit alleging that the initial payments from State Farm on the loss were insufficient ("like Hurst"). There were no discussions between the plaintiffs and State Farm from the time of the initial payments until suit was filed ("again like Hurst"). Plaintiffs, after filing ***24** suit, invoked the appraisal clause in the policy ("again like Hurst"). Once the appraisal award was rendered, State Farm timely paid the full amount of the award and demanded that Plaintiffs dismiss their suit. Plaintiffs refused to dismiss the case ("refusing to dismiss is like Hurst refusing to sign the settlement agreement and release").

The federal district court, applying Texas law, decided the matter in the context of a summary judgment proceeding brought by State Farm when the plaintiffs refused the demand to dismiss the case. In concluding that the plaintiffs were wrong for failing to dismiss the case, the court first looked at Texas law concerning the payment of the appraisal award. In rejecting the very same arguments that Hurst makes here, the court determined that the plaintiffs were precluded from maintaining a breach of contract claim as a matter of law because the full amount of the appraisal award was paid and plaintiffs were only asserting that the discrepancy between the initial payments and the appraisal award was a breach of contract:
Indeed, in Texas, "[t]he effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court." In breach of contract cases where liability derives from an allegation that the insurer wrongfully underpaid a claim, Texas law dictates that the insured is estopped from maintaining a breach of contract claim when the insurer makes a proper payment pursuant to the appraisal clause. Accordingly, in the instant case, Plaintiffs are effectively foreclosed from bringing a breach of contract claim due to Defendants' timely payment at each step of the claim process, unless Plaintiffs ***25** successfully raise an issue of fact on some distinct contractual provision, or if Plaintiffs effectively raise an issue of fact as to the validity of the appraisal process. Here, Plaintiffs do not cite to any contractual provision they claim was breached. Indeed, it is undisputed that State Farm timely responded to, and paid, the initial claim; and that State Farm also timely responded to, and paid, the claim for supplemental damages. Furthermore, State Farm was given no notice whatsoever of any dissatisfaction with the claim handling process until suit was filed. Dizdar, 2016 U.S. Dist. LEXIS 49839, at * 10-11 (citations omitted).

The release sent to Hurst, in effect, does the exact same thing as State Farm's demand to dismiss in Dizdar. It is a demand to dismiss claims that are now immaterial as a result of the appraisal award. Dizdar, 2016 U.S. Dist. LEXIS 49839, at * 12-13. Further, since the plaintiffs could not show breach of contract as a matter of law, they also could not prevail on any of the extra-contractual claims. The case was dismissed, as this one should have been. [30]

Since Hurst elected to invoke the appraisal process in this matter years after initiating litigation and because it is "binding", no claims survive unless there is evidence of an "injury independent of the policy claim", which there is not. To ***26** allow otherwise would be to invalidate the public policy purpose of appraisal and void the plain English meaning of "binding' in the policy. As this court has previously noted, a contract as written "obligates us to give those words their plain, grammatical

meaning unless doing so would clearly defeat the intentions of the parties". Republic Underwriters Ins. Co. v. Mex-Tex, Inc. 150 S.W. 3d 423, 426 (Tex. 2004) citing to Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550. 554 (Tex.2002).

3. The Court of Appeals correctly held Hurst could not recover on his claims for bad faith and unfair settlement practices.

As previously referenced, with very limited exceptions, an insured is precluded from maintaining extra-contractual claims for common law bad faith and violations of the Texas Insurance Code where his breach of contract claim fails. Toonen v, USAA, 935 S.W. 2d 937, 941-42 (Tex. App. - San Antonio 1996, no writ); Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 341 (Tex. 1995).The only two exceptions to this rule are: (1) where an insurer commits some extreme act that causes an injury independent of the policy claim; and (2) where an insurer fails to timely investigate an insured's claim. Stoker, 903 S.W.2d at 341.

Hurst failed to prove either of these two exceptions at trial. Castaneda further clarified that, under either the common law or the Insurance Code, to recover extra-contractual damages, an insured must also show that liability was ***27** reasonably clear. Provident Amer. Ins. Co. v. Castaneda, 988 S.W.2d 189, 198 (Tex. 2008); Hennessey v. Vanguard Ins. Co., 895 S.W. 2d 794, 800 (Tex. App. - Amarillo 1995, pet. denied). Hurst failed to do this because, as previously recognized by this Court in Laas and Franco, as well as Breshears, liability for the amount of the claim is not reasonably clear until after the appraisal award sets the amount. Laas, 2000 Tex. App. LEXIS 5332, at *36; Franco, 154 S.W. 3d at 787; Breshears, 155 S.W. 3d at 343. National timely tendered payment of the final amount to Hurst after Judge Davidson rendered the appraisal award. Consequently, Hurst's claims for extra-contractual damages also fail as a matter of law. In re Slavonic, 308 S.W.3d 556, 563-64 (Tex. App. - Houston [14th Dist] 2010) (orig. proceeding); Amine, 2007 Tex. App. LEXIS at *12; Franco, 155 S.W.3d at 787-88; Breshears, 155 S.W.3d at 344.

All the evidence demonstrates that this was simply a bona fide dispute as to the amount of loss Hurst's counsel admitted regarding the amount of the claim in his letter invoking appraisal:

> After thorough review of the facts of this dispute, we believe the parties are at an impasse with regard to the damages claimed by Plaintiff. Due to the complicated nature of this case, we believe it is in our client's best interest to invoke the appraisal provision within the policy at this time.

Castaneeda clarified that, under either the common law or the Insurance Code, to recover extra-contractual damages, an insured must also show that ***28** liability was reasonably clear. Castaneda, 988 S.W.2d at 198; Hennessey v. Vanguard Ins. Co., 895 S.W. 2d 794, 800 (Tex. App. - Amarillo 1995, pet. den.) (hiring an appraiser and participating in the appraisal process sufficient to show reasonable basis to deny claim above the appraisal award). Hurst failed to do this because, as previously recognized by this Court in Laas and Franco, as well as Breshears, liability for the amount of the claim is not reasonably clear until after the appraisal award sets the amount. Laas, 200 Tex. App. LEXIS 5332, at *36; Franco, 154 S.W. 3d at 787; Breshears, 155 S.W.3d at 343.

There is no evidence that liability for Plaintiff's claimed damages under the Policy was reasonably clear at any time until the subsequent appraisal award. And the full and timely payment of the award by National precluded any extra-contractual liability as a matter of law. Slavonic, 308 S.W.3d at 563-64; Amine, 2007 Tex. App. LEXIS at *12; Franco, 155 S.W.3d at 787-88; Breshears, 155 S.W.3d at 344.

This Court should affirm the Court of Appeals that Hurst take nothing.

CONCLUSION

Appraisal is an expeditious and cost-effective way of resolving first party insurance disputes - especially homeowner's policies. However, both its expedition and cost-effectiveness are dependent on the process terminating ***29** disputes. Should this Court put its imprimatur on Hurst's arguments, appraisal would more likely ferment litigation than terminate it. A disaffected insured would be able to demand appraisal and, if unhappy with his/her award, refuse to accept it and continue litigation with the added "bonus" of being permitted to argue that any appraisal award in excess of the insurer's original tender was/is evidence of bad faith, In other words, no appraisal award unsatisfactory to the insured would be final and likely a prelude to bad faith litigation.

The extremely limited exceptions to the general rule that there can be no extra-contractual claims without a breach of contract is fully consistent with and complimentary to the long history of enforcement of appraisal awards and an explicit and implicit rejection of Hurst's position.

There was/is no basis for Hurst's refusal to accept National's check. The Release that was tendered deprived him of no rights - he had none left on receipt of the appraisal payment. It ineluctably follows that a jury award in Hurst's favor could not stand and it did not. This Court should accordingly affirm the Court of Appeals decision as rendered.

PRAYER

For these reasons, and in the interest of justice and fairness, Respondents, National Security Fire & Casualty Company, Action Claim Service, Inc., and ***30** Aaron Timmins, ask the Court to affirm the court of appeals that Petitioner, Ozier Hurst, take nothing.

Footnotes

1 In his Petition for Review, Hurst raised the following issue: The Court of Appeals erred in holding Hurst that there was no violation of the prompt payment provisions of the Insurance Code. This issue is supported by a single paragraph. In his brief on the merits, this has morphed into issues 2 and 3 and pages 32 through 43. As stated in Tx. R. App. P. 55.2(f) : The phrasing of the issues or points need not be identical to the statement of issues or points in the petition for review, *but the brief may not raise additional issues or points or change the substance of the issues or points presented in the petition.*

2 D2; PX 2. Hurst's Proof of Loss was submitted 22 months and 2 days after Hurricane Ike.

3 DX4 and 5 PX5

4 DX4 and 5; PX5; RR3:93:3-10.

5 DX5; PX5.

6 DX6; PX10.

7 RR3:67:4-75:20.

8 RR3:67:3-70:19; 4:114:3-115.

9 CR1:19-36.

10 DX7.

11 DX1; PX1.

12 DX7.

13 RR5: 230:6-21

14 RR5:230:22-231:6.

15 DX9; PX13.

16 DX9; PX13; RR5:235:21-236:15.

17 DX10; PX15.

18 PX16.

19 PX16.

20 RR3:12:10-13:6.

21 RR3:18:14-25:16.

22 RR7:18:6-40:19; 7:76:10-84:15.

23 RR4:225:8-246:17

24 RR4:220:10-18; 5:10:6-13:5; 5:131:9-132:1.

25 SRR3:1-15.

26 RR6:103:4-110:11.

27 CR3:2733-2738; Tab 1. Although the Judgment specifically references the jury's affirmative answer the Question No. 1 (concerning breach of contract), the amount from the jury's answer the Question No. 2 (concerning breach of contract damages) is included in the judgment.

28 Tex. Ins. Code § 542.060(a). A "claim" is defined as "a first party claim made by an insured or a policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract that must be paid by the insurer directly to the insured." Tex. Ins. Code § 542.051(2); TIG Ins. Co. v. Dallas Basketball, Ltd., 129 S.W.3d 232, 239 (Tex. App.-Dallas 2004, pet. denied).

29 Tab 2, page 5.

30 The Dizdar court also had this to say about the law firm representing the plaintiffs in that case:
The Court notes that this case, like many storm related insurance breach of contract cases filed by the Mostyn Law firm, is factually unsupported. In particular, it appears that between August 2012 and April 2014, no factual issues developed that support the claims which made the basis of the action. The Court has previously reminded counsel of their obligations pursuant to Rule 11 of the Federal Rules of Civil Procedure that by presenting a pleading they certify that the factual contentions have evidentiary support. The Mostyn Law Firm appears to be wholly disregarding this obligation.

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