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SUPREME COURT OF TEXAS
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No. 14-0721

In the Supreme Court of Texas

USAA TEXAS LLOYDS COMPANY,
***Petitioner*,**

v.

GAIL MENCHACA,
***Respondent*.**

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi/Edinburg, Texas
Cause No. 13-13-00046-CV

RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the case:	Following Hurricane Ike, Gail Menchaca made a claim with her homeowners' insurance company, USAA. USAA determined that Menchaca's claim was covered under the policy but that the cost to repair her damages did not exceed her deductible. DX 3; RR 4:26. Menchaca sued USAA for breach of contract and for failing to comply with the Texas Insurance Code. The jury found that USAA conducted an unreasonable investigation and that USAA failed to pay $11,350.00 it should have paid for Menchaca's Hurricane Ike damages.
Trial Court:	Hon. Fred Edwards 9th Judicial District Court, Montgomery County, Texas
Trial Court's Disposition:	The trial court rendered judgment in favor of Gail Menchaca and against USAA in accordance with the jury's favorable findings on her Insurance Code claim.
Court of Appeals:	Thirteenth Court of Appeals; opinion by Justice Garza, joined by Justices Rodriguez and Benavides. *USAA Texas Lloyd's Co. v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602 (Tex. App.—Corpus Christi July 31, 2014, pet. filed) (mem. op.).
Court of Appeals' Disposition:	The court of appeals deleted the jury's award for penalties under the Insurance Code but otherwise affirmed the trial court's judgment.
Parties on Appeal:	Petitioner/Appellant/Cross-Appellee/Defendant is USAA Texas Lloyds Company. Respondent/Appellee/Cross-Appellant/Plaintiff is Gail Menchaca.

STATEMENT OF JURISDICTION

This Court does not have jurisdiction under Government Code section 22.001(a)(2). There is no conflict between the court of appeals' opinion and prior decisions of other courts of appeals and of this Court. Specifically, this fact-bound case is distinguishable from, and does not conflict with, *Provident American Insurance Co. v. Castañeda*, 988 S.W.2d 189 (Tex. 1998) and *Republic Insurance Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). For this reason, and others, this Court should not exercise its discretionary jurisdiction here.

ISSUES PRESENTED

1. Whether the jury's findings that USAA violated the Insurance Code and failed to pay Gail Menchaca $11,350.00 it should have paid for her covered Hurricane Ike damages support the judgment in favor of Gail Menchaca?

2. Whether the trial court correctly disregarded the jury's failure to find that USAA breached the insurance contract?

3. Whether a failure to find that USAA breached the insurance policy eviscerates the jury's independent affirmative findings that USAA violated the Insurance Code by failing to conduct a reasonable investigation of Ms. Menchaca's admittedly covered Hurricane Ike claim and failing to pay Ms. Menchaca for all of her covered Hurricane Ike damage?

4. Whether Ms. Menchaca is entitled to remand for a new trial in the event the judgment of the court of appeals is not affirmed by this Court? (unbriefed)

REASONS NOT TO GRANT REVIEW

No Conflict with Precedent. Unlike the cases discussed and relied upon by USAA, this is not a case in which the insurer has "denied a claim that is in fact not covered," *Republic Ins. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995), and this is not a case in which there is no coverage under the policy. *Cf. Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189, 192 (Tex. 1998) ("The Castañedas submitted claims to Provident American, which were denied."). To the contrary, USAA conceded below that (1) Gail Menchaca suffered a covered loss, and (2) USAA never denied Menchaca's claim. RR 3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:35-36, 10:90; DX 3.

This is a critical distinction. In fact, in *Stoker*, this Court specifically distinguished a case like this one where the insurer "did not deny coverage" but disputed the amount owed (as USAA did here). *Stoker*, 903 S.W.2d at 341 n.1 (citing *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 1265 (Ariz. 1992)). For the same reason, this fact-bound case does not conflict with *Stoker* and *Castañeda*. For that reason, the Court should not exercise its discretionary jurisdiction here.

Jury Charge Waiver. The jury charge submitted the breach-of-contract claim in Question 1 and the Insurance Code claim in Question 2. USAA did not object to a failure to predicate the Insurance Code question on an affirmative answer to the contract question. RR 10:36. USAA also did not request an instruction directing the jury not to answer Question 2 if it answered "no" to Question 1. *Id*.

Further, USAA did not object to the predication instructing the jury to award damages in Question 3 if it found an Insurance Code violation but not a breach of contract. RR 10:36-37. Finally, USAA did not request an instruction directing the jury not to answer Question 3 if it answered "no" to the contract question. *Id.*

USAA has waived its right to now argue that a breach finding is a prerequisite. *See In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003) (because party did not object to jury charge, he waived complaint on appeal). Holding otherwise—that is, holding that a claimant has an *unwaivable* burden to secure a breach-of-contract finding to recover under the Insurance Code—would undo the well-established rules of jury charge preservation.

Statutory Construction. USAA would also rewrite Section 541.151 of the Texas Insurance Code by authorizing a private cause of action only if the claimant shows not only that the insurer committed an "unfair or deceptive act or practice in the business of insurance," but *also* that such an act was in breach of the insurance policy. In cases like this one, where the insurer's duty to conduct a reasonable investigation is not based on the contract, that could be an impossible burden. The judicially rewritten Section 541.151 would become a toothless, useless remedy, and insurers could shirk their statutory duties by, as here, just omitting them from the insurance policy. Such an interpretation is not reasonable. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court

must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.”).

Simply put, the issues presented in this case do not warrant the Court’s attention and the Court should not grant review. *See* TEX. R. APP. P. 56.1(a).

STATEMENT OF FACTS

Gail Menchaca suffered a covered loss during Hurricane Ike—a fact her insurer, USAA, readily conceded below. RR 4:26. USAA repeatedly and consistently told the jury that it did not deny any part of Ms. Menchaca’s claim. RR 3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:35-36; DX 3. In fact, USAA told Menchaca, “[t]his type of loss is covered under your Homeowners policy.” DX 3. USAA never wavered from that position. RR 3:81; 4:26; 7:34-35; 9:35-36, 10:90.

Even so, USAA did not pay the claim because it determined that the loss did not exceed Menchaca’s $2,020 deductible. RR 10:90; DX 3. USAA reached that conclusion after a cursory investigation that the jury found to be unreasonable—a finding that USAA has never disputed. CR 666.

USAA’s First Inspection. USAA first assigned Menchaca’s claim to adjuster Darby Hambrick. RR 4:51-52; 6:13-14, 16; 10:9-10. According to Hambrick, his inspection of Menchaca’s property lasted just 45 minutes. RR 4:59. In that 45 minutes, in addition to many other things, Hambrick claimed to have “inspected the whole roof, yes sir.” RR 4:61. Menchaca had reported billowing,

unsealed shingles, RR 6:9-10, and Hambrick knew Menchaca was concerned about the right slope of the roof by the garage. RR 4:59-60. Hambrick claimed that he inspected Menchaca's area of concern in detail and spot checked all slopes of the roof, looking for wind damage and determining if any of the seals on the shingles were loose. RR 4:59, 61; 10:19-20. According to Hambrick, he checked some 15 to 20 shingles on "[a]ll slopes, all directions," including the breezeway and the garage roof. RR 4:62. He "of course" tried to find evidence of unsealed shingles. RR 10:19.

In his 45 minute property inspection, Hambrick also inspected Menchaca's electrical panel and determined that the damage to the panel was a covered loss. RR 3:59; 10:29-30. Although concluding the damage was covered, USAA allowed only a minimal charge to have the electrical panel reattached to the exterior wall of the house. DX 4. Contrary to the minimal repair charge included in its estimate, USAA stipulated at trial to the reasonableness of Menchaca's electrician's repair estimate totaling more than $3300—an amount *itself* above Menchaca's deductible. RR 3:5; PX 16.

Hambrick also swore that he inspected Menchaca's fence during his 45 minutes on the property. RR 4:59; 10:21. According to Hambrick, he saw "one post laying this way and one post laying this way," but he concluded that was just "normal wear and tear" for a fence that was 8-to-10 years old. RR 10:21-22. USAA's letter to Menchaca made no mention of her fence and did not deny her claim as to her fence. DX 3.

Hambrick also said that he walked through the interior of Menchaca's home during his 45 minute inspection. RR 4:59; 10:23. While he did not recall going into every room, he claimed to have inspected at least the living room, kitchen area, the main hallway, and perhaps the master bedroom. RR 10:23-24. He "[o]f course" looked for evidence of damage, but he claimed to have found none. *Id.* USAA's explanation letter did not mention, and did not deny, Menchaca's claim for interior damage. DX 3.

Hambrick said that he did not recall having a conversation with Menchaca about her food loss. RR 10:25. But he said that asking somebody if they had food spoilage following a hurricane was "a standard one-on-one question." *Id.* Asked about Menchaca's testimony that Hambrick had said her food loss was below her deductible, Hambrick did not deny making the statement. RR 10:25-26. Hambrick instead acknowledged, "[t]hat would be a bad thing to say because food loss . . .

[is] a separate coverage that USAA extends to their members for general power outages." *Id*. USAA never denied Menchaca's claim for food loss. DX 3.

Following Hambrick's inspection, USAA advised Menchaca in writing:

> We received your wind claim, referenced below. *This type of loss is covered under your Homeowners policy*. However, the loss doesn't exceed your $2,020 deductible. Your policy only pays if a loss exceeds your deductible.

DX 3 (emphasis added).

USAA's Second Inspection. After Menchaca complained, USAA sent a second adjuster to inspect her property. The second USAA adjuster admitted that he found unsealed shingles, right in the area where Menchaca said she had seen shingles lifting up and down. RR 4:77-78. Even after USAA's inspector found unsealed shingles on Menchaca's roof, USAA never changed its position with respect to Menchaca's loss. RR 9:33, 35-36. USAA never advised Menchaca that any part of her claim was not covered, including her claim for unsealed shingles. RR 3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:16, 35-36; DX 3. Rather, as the second adjuster testified, "We never denied her claim. We considered it in the estimate for wind damage." RR 9:35-36.

Menchaca's Inspection. Unlike USAA's adjusters, when Menchaca's experts inspected her roof they found significant wind damage. RR 4:112-13, 115, 116-17, 130-31. They found numerous unsealed shingles. RR 5:95-96. The roof also had numerous impact damages to every slope caused by the blowing debris of

the storm. *Id*. There were torn shingles and shingles with holes in them. *Id*. Without considering unsealed shingles, the impact damage alone necessitated replacement of the roof at a cost of $22,000 to $29,000. RR 5:101-02, 106, 112-13.

Ms. Menchaca's expert inspections also found wind damage to her fence. RR 5:103. The cost of repairing that damage was estimated to be $4,700. RR 5:104. Menchaca's experts also confirmed the Hurricane Ike damage to Menchaca's electrical panel. RR 5:116; PX 16. As USAA stipulated, the cost of repairing the electrical panel was approximately $3,300.00. *Id*.

Finally, Menchaca's expert inspections found interior damage that was overlooked by USAA's cursory inspection of the home. RR 4:136-38. Menchaca's experts found cracks and water damage in the ceilings of several rooms that USAA's adjuster claimed to have inspected. *Id*. The cost of repairing this damage was estimated to be approximately $24,000. RR 5:114.

SUMMARY OF ARGUMENT

As a general rule, an insurer is not liable under the Insurance Code if it promptly denies a claim that is in fact not covered under the policy. Those are not the circumstances here. USAA never denied Menchaca's claim, or even any subpart of her claim, because—according to USAA—the claim was covered under the policy.

Having taken that position, USAA cannot succeed in its challenge to Menchaca's Insurance Code claim. As USAA has conceded, "to the extent the policy affords coverage, extra-contractual claims remain viable." Appellant's Br. at 17 (quoting *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010)). The jury accepted USAA's argument that Menchaca's claim was covered under the policy and had never been denied. The jury determined that USAA failed to conduct a reasonable investigation of Menchaca's covered claim, and the jury determined that USAA should have paid Menchaca $11,350.00 more for her Hurricane Ike damages than USAA actually paid. These findings are supported by the evidence, and they fully support the judgment rendered against USAA.

ARGUMENT

I. The Judgment Is Supported by the Jury's Verdict.

In response to Question 2, the jury found that USAA engaged in an unfair or deceptive act or practice in refusing to pay a claim without conducting a reasonable investigation with respect to the claim. CR 666. In response to Question 3, the jury found that $11,350.00 would fairly and reasonably compensate Menchaca for her damages that were caused by USAA's unfair or deceptive act. CR 667. The jury's responses to these two questions support the trial court's rendition of judgment in favor of Menchaca.

A. The jury found that USAA violated the Texas Insurance Code.

Under Chapter 541, an insurer that refuses to pay a claim without conducting a reasonable investigation with respect to the claim commits an "unfair or deceptive act or practice." TEX. INS. CODE § 541.060(a)(7). That is precisely what happened here. The jury found that USAA refused to pay Menchaca's claim without conducting a reasonable investigation with respect to the claim. CR 666. On appeal, USAA has not challenged the sufficiency of the evidence supporting the jury's finding that USAA violated the Insurance Code by failing to conduct a reasonable investigation with respect to Menchaca's covered claim. There is ample evidence that USAA failed to conduct a reasonable investigation of Menchaca's Hurricane Ike claim. USAA does not even attempt to argue otherwise.

B. The jury found covered damages caused by USAA's violation of the Insurance Code.

USAA repeatedly stated its intention and its obligation to pay for all Menchaca's Hurricane Ike damages; but, because of its unreasonable investigation, USAA undervalued those damages. In response to Question 3, the jury found that the actual damages caused by USAA's unfair or deceptive acted totaled $11,350.00. CR 667; *see* TEX. INS. CODE § 541.152 (insured entitled to recover "actual damages, plus court costs and reasonable and necessary attorney's fees").

Menchaca's damages were defined as the difference between the amount USAA should have paid Menchaca for her Hurricane Ike damages and the amount that USAA actually paid. CR 667. USAA did not object to the measure of damages. RR 10:36-37. USAA was satisfied to have the jury determine what it should have paid for covered Hurricane Ike damages. *Id*. And that is what the jury found in response to Question 3. *Id*.

The jury determined that, had USAA conducted a reasonable inspection of Menchaca's admittedly "covered loss," RR 4:26, USAA would have found thousands of dollars of additional Hurricane Ike damages that it should have paid. CR 667. That finding too is supported by the evidence. Together, the jury's liability and damage findings support the judgment against USAA.

II. The Jury's Failure to Find That USAA Breached Its Insurance Contract Was Correctly Disregarded by the Trial Court.

Without addressing the overwhelming evidence supporting the jury's Insurance Code liability, causation, and damage findings, USAA argues that the jury's failure to find that USAA breached the insurance contract precludes Ms. Menchaca's recovery under the Insurance Code as a matter of law. That argument is wrong for a host of reasons.

A. As the unobjected-to jury charge reflected, Menchaca's contract and Insurance Code claims were independent alternatives.

As USAA conceded in the court of appeals, Menchaca's Insurance Code claim is independent of her contract claim. *See* Appellant's Br. at 12. USAA's concession acknowledges the controlling law. This Court has repeatedly held that "a policy claim is independent of a bad faith claim." *Stoker,* 903 S.W.2d at 340-41. "[T]he insurer's failure to deal fairly and in good faith with its insured is a cause of action that sounds in tort, and is distinct from the contract cause of action for the breach of the terms of an underlying insurance policy." *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995). "Both the DTPA and the Insurance Code provide that the statutory remedies are cumulative of other remedies." *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988). "We do agree . . . that '[C]laims for insurance contract coverage are distinct from those in tort for bad faith; resolution of one does not determine the other.'" *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 n.8 (Tex. 1994).

The jury question asking whether USAA engaged in any unfair or deceptive act or practice in violation of the Insurance Code was not predicated on a yes answer to Question 1, the breach question. CR 666. Nothing within Question 2 required a finding of a breach of the insurance policy in order to find that USAA engaged in an unfair or deceptive act or practice. *Id.* Moreover, the jury was

instructed in Question 3 to assess damages—defined as the difference between the amount USAA should have paid for Menchaca's Hurricane Ike damages and what it actually paid—if it found *either* a breach of contract *or* an Insurance Code violation. CR 667.

USAA did not object to a failure to predicate Question 2 on an affirmative answer to Question 1. RR 10:36. USAA did not request an instruction directing the jury not to answer Question 2 if it answered "no" to the breach of contract question. *Id*. USAA did not object to the predication instructing the jury to award damages if it found an Insurance Code violation but not a breach of contract. RR 10:36-37. USAA did not request an instruction directing the jury not to answer Question 3 if it answered "no" to the breach question. *Id*.

USAA's failure to object to the unpredicated submission of Menchaca's Insurance Code claim waives its right to argue that Menchaca's recovery on her breach of contract claim is a predicate for recovery on her Insurance Code claim. *See In re A.V.*, 113 S.W.3d at 358 (failure to object waives complaint on appeal). The jury's decision not to hold USAA liable for breach of the insurance policy is immaterial, so the trial court correctly disregarded that answer. *See Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994).

B. USAA wrongly equates a "no" answer with an affirmative finding.

USAA's argument about the effect of the jury's answer to the breach-of-contract question, "is a misinterpretation of the issue and the answer." *C&R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966). The jury answered Question 1 "No." CR 665. A "no" answer to Question 1 is *not* a finding that USAA complied with its policy obligations. *E.g.*, *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Grenwelge v. Shamrock Reconstructors, Inc.*, 705 S.W.2d 693, 694 (Tex. 1986) ("The jury's failure to find that Shamrock breached the contract . . . does not mean the reverse, that Shamrock substantially performed the contract."). Much less is the jury's "no" answer to Question 1 a finding that Menchaca's claim was not covered by the policy. *See id.*

Accepting USAA's argument and holding that the jury's answer to Question 1 negated the jury's answers to Questions 2 and 3 would require this Court to find not only that USAA complied with its contract, but also that none of Menchaca's claimed damages were covered under the policy. Those findings would be improper. *See id.* The jury did not make them, they are not undisputed, and they are contrary to the verdict and judgment. *Id.*; *see also* TEX. R. CIV. P. 279 ("omitted element or elements shall be deemed found by the court in such manner to support the judgment"). The jury's decision not to hold USAA liable for breach of the insurance policy is immaterial.

C. The jury accepted USAA's evidence and argument that Menchaca's claim was covered.

While it is certainly true that "[a]s a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered," those are not the circumstances of this case. *Stoker,* 903 S.W.2d at 341. USAA's decision with regard to Menchaca's claim "was that *it was a covered loss*, but that cost to repair the damages did not exceed her deductible." RR 4:26 (emphasis added); *see also* DX 3. USAA never advised Menchaca that any part of her claim was not covered or was being denied. *Id*. Even in closing argument, USAA's lawyer insisted that "USAA didn't deny anything. We accepted the claim. Sadly, it was below the deductible." RR 10:90.

USAA did not deny Menchaca's claim for damage to her electrical panel. RR 3:59; 4:14-15, 26; 9:30. USAA's trial representative and property claims examiner was asked directly: "On the electrical panel, what is USAA's position? Is it a covered loss?" USAA's representative unequivocally answered "Yes." RR 3:59. There is no contrary evidence.

USAA also did not deny Menchaca's claim for damage to her roof. DX 3; RR 3:69-70; 4:14-15, 25-26, 32; 9:35-36. USAA acknowledged that Menchaca made a claim for damaged shingles, RR 4:14-15, 32, and USAA acknowledged that it never sent Menchaca a letter informing her that any part of her claim was not covered or was being denied for any reason. RR 3:70; 4:26; 9:35-36. To the contrary, USAA informed Menchaca that her claim was covered under the policy. DX 3; RR 4:26, 32; 9:35-36.

USAA's representative testified that "USAA's obligation [was] to adhere to the confines of the contract *and* make reasonable inspections." RR 3:96 (emphasis added). Furthermore, it is USAA's responsibility to get right both "the proper scope of damages and the proper amount for the reasonable cost of repair of those damages." *Id*. In the court of appeals USAA insisted that its duty to reasonably investigate Menchaca's claim arose only under the Insurance Code, because "[t]he insurance policy contains no such provision or condition." Appellant's Br. at 12. USAA not only admitted that its policy affords coverage for Menchaca's claim, USAA insisted that it had never denied Menchaca's claim. In the words of USAA's lawyer: "USAA didn't deny *anything*." RR 10:90 (emphasis added).

The jury accepted USAA's evidence and argument, and the jury held USAA liable under the Insurance Code for failing to conduct a reasonable inspection, failing to determine the proper scope of damages, and failing to determine the reasonable cost of repair. CR 666. The jury's decision not to hold USAA liable for breach of the insurance policy is immaterial.

D. *Castañeda* and *Stoker* do not preclude Menchaca's recovery under the Insurance Code.

Unlike the cases discussed and relied upon by USAA, this is not a case in which the insurer has denied a claim that is in fact not covered, and this is not a case in which there is no coverage under the policy. *Cf. Page,* 315 S.W.3d at 532; *Castañeda*, 988 S.W.2d at 192; *Stoker*, 903 S.W.2d at 340-41 & n.1. Instead, this

case is more akin to one that the *Stoker* Court distinguished: "The insurance company in *Deese [v. State Farm*, 838 P.2d 1265 (Ariz. 1992)] did not deny coverage. The dispute was whether portions of the medical bills were not reasonable and therefore not compensable." *Stoker*, 903 S.W.2d at 341 n.1; *see also Allstate Indem. Co. v. Hyman*, No. 06-05-00064-CV, 2006 WL 694014, at *7 (Tex. App.—Texarkana March 21, 2006, no pet.) (mem. op.) (upholding recovery under Insurance Code for insurer's failure to reasonably investigate where insurer admitted liability for covered claim but disputed proper amount of payment).

USAA seemingly recognizes the significance of this distinction—and the resulting conclusion that *Castañeda* does not apply here—because, after years of confirming Menchaca's claim was covered, USAA now suggests, for the first time, that maybe it wasn't. Pet. for Review, at 15. Despite that transparent attempt to shoehorn this case into *Castañeda*'s application, that was not USAA's position at trial or before the appellate court, and certainly not part of the evidence presented to the jury.

Moreover, *Castañeda* does not go as far as USAA would have this Court believe. First, *Castañeda* does not stand for the proposition that a jury must find a breach of contract to award extra-contractual damages; in fact, it supports the independence of these theories of recovery. In *Castañeda*, no contract claims were even submitted. *See Castañeda*, 988 S.W.2d at 196. And the absence of contract

findings was not deemed fatal to the Castañedas' extra-contractual claims. Instead, the *Castañeda* court disallowed recovery because the evidence did not support the jury's findings on the inadequate-investigation claim, and because there was no evidence of Mrs. Castañeda's lost credit reputation. *See id*. at 199. This case does not suffer the same evidentiary failings as *Castañeda*, because the jury finding that USAA did not adequately investigate Ms. Menchaca's claim is amply supported by the evidence.

Second, *Castañeda*'s discussion of recoverable damages does not affect Menchaca's recovery here. *Castañeda* provides that extra-contractual claims do not automatically give rise to damages "equivalent to policy benefits" *if the claims are not covered*; rather, the claimant still must provide proof of causation. *See Castañeda*, 988 S.W.2d at 198.[1] While such proof was lacking in *Castañeda*, here, the record affirmatively supports the jury's finding that Menchaca suffered actual benefit-of-the-bargain damages from USAA's failure to conduct a reasonable investigation into Menchaca's covered claim.

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[1] *Castañeda* cites *Stoker* for the proposition that "failure to properly investigate a claim is not a basis for obtaining policy benefits." *Castañeda*, 988 S.W.2d at 198 (citing *Stoker*, 903 S.W.2d at 341). But USAA reads that statement too broadly—all *Stoker* says is that "there can be no claim for bad faith when an insurer has promptly denied a claim *that is in fact not covered*." *Stoker*, 903 S.W.2d at 341 (emphasis added).

E. The Insurance Code authorizes Ms. Menchaca's recovery of benefit-of-the-bargain damages.

The Texas Insurance Code provides that a prevailing plaintiff is entitled to recover "the amount of actual damages" caused by the insurer's deceptive act or practice. TEX. INS. CODE § 541.152(a)(1). The Insurance Code does not define "actual damages," but this Court has. "Actual damages are those damages recoverable under common law." *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997); *accord State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 435 (Tex. 1995). And under the common law, benefit-of-the-bargain damages are one measure of direct actual damages. *Arthur Anderson*, 945 S.W.2d at 816-17. Given this well-settled understanding of the meaning of "actual damages," the Texas Pattern Jury Charges expressly recognize the appropriateness of a benefit-of-the-bargain measure of damages for Insurance Code violations. *See* TEXAS PATTERN JURY CHARGES 115.10, 115.13 (2012).

In *Vail*, this Court held that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988). The Court reaffirmed its *Vail* pronouncement seven years later in *Twin City Fire Insurance Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995), reiterating that "policy benefits wrongfully withheld were indeed actual damages under the DTPA and Insurance Code." As recently as 2002, the Court

emphasized that "*Vail* remains the law as to claims for alleged unfair claims settlement practices brought by insureds against their insurers." *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 259 (Tex. 2002) (quoting *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex. 1993)).

As the Insurance Code permits, Menchaca submitted a benefit-of-the-bargain measure of damages, asking the jury to award her the difference between the amount USAA should have paid her for her Hurricane Ike damages and the amount USAA actually paid her. CR 667. There is ample evidence that, had USAA conducted a reasonable investigation of Menchaca's admittedly covered Hurricane Ike claim, it would have paid her at least the additional $11,350.00 found by the jury. USAA does not argue otherwise. The jury's decision not to hold USAA liable for breach of contract is immaterial.

PRAYER

This case presents a host of procedural hurdles, including jury charge waiver, that USAA simply cannot overcome. USAA attempts to manufacture a conflict with this Court's previous pronouncements in *Castañeda* and *Stoker*, but there is no conflict; *Stoker* itself recognizes this case as distinct. *See Stoker*, 903 S.W.2d at 341 n.1. This unique, fact-bound case presents nothing for this Court to review.

The petition for review should be denied. Should the Court grant the petition, however, it should affirm the judgment because the facts and law support Ms. Menchaca's right to recover. Alternatively, a new trial should be granted. Gail Menchaca also asks for any additional relief to which she may be entitled.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Jennifer Bruch Hogan
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Dated: March 11, 2015

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was forwarded to all counsel of record by the Electronic Filing Service Provider, if registered; a true and correct copy of this document was forwarded to all counsel of record not registered with an Electronic Filing Service Provider and to all other parties as follows:

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