



To: TCJL Board of Directors

From: George Christian

Date: June 13, 2018

Re: *Texas Windstorm Insurance Association v. Dickinson Independent School District* (No. 14-16-00474-CV; decided May 31, 2018)

In an important case in which TCJL participated as an *amicus*, the Fourteenth Court of Appeals [Houston] has reversed a \$10 million judgment against the Texas Windstorm Insurance Association (TWIA) and remanded the case to a Galveston district court for retrial.

TCJL joined the case because of extreme irregularities involving the court-appointed third-party appraiser, the appraisal process in general, and the trial court's evident disinterest in giving TWIA a fair trial. The court of appeals' opinion deals specifically with the issue of whether the trial court erred in granting partial summary judgment for the school district on the basis that the appraisal award *conclusively* established TWIA's liability. This ruling foreclosed TWIA's affirmative defenses, causation evidence, and evidence of non-coverage, leaving for trial only one issue: whether TWIA failed to comply with the policy (an issue on which TWIA, by virtue of the trial court's evidentiary and summary judgment rulings, could not defend itself). It is also important to note that TWIA also objected at trial to the jury charge because it failed to seek jury determinations of the whether the appraisal award actually complied with the policy and whether the school district had provided prompt written notice of loss for each insured structure in accordance with the policy.

The primary question of law in the court of appeals' decision is whether an appraisal award, which determines the amount of damages, also determines that an event covered by the policy *caused* the damages. In this case, the school district notified TWIA of windstorm damage to several buildings three days after Hurricane Ike hit Galveston in September, 2008. The TWIA adjuster inspected the buildings and verified the damage. Consequently, in December 2009 TWIA paid the district a little more than \$220,000 to settle the claim (for which the district signed a proof of loss). Nearly two years later, in September 2011, the district contacted TWIA claiming damages to the roof of another building, which it had replaced at a cost of about \$1.5 million. TWIA likewise settled this supplemental claim, paying about \$1 million in October 2011. But in September 2012, four years after the storm, the district (represented by Galveston County plaintiff's lawyer Tony Buzbee) sued TWIA for an additional \$829,000, including \$225,000 in attorney's and expert fees. Needless to say, this lawsuit is one of thousands filed years after the storm and well after most claims had been settled, a flood of litigation that compelled the Legislature to intervene and eventually pass both TWIA and hailstorm insurance reform.

Both sides designated appraisers, and the trial court picked the third appraiser, a former Galveston County district judge *with no background in construction and not on the county's standing list of qualified appraisers*. When the three met to compare notes, the TWIA appraiser found that the other two had cooked up an appraisal award of more than \$10 million, more than \$6 million *in excess* of the

district's claim. Moreover, the new appraisal took place more than five years after the storm, which, as the court of appeals points out, raises "genuine issues of material fact about the cause of the damage to DISD's buildings." Nevertheless, this deeply flawed appraisal award ultimately became the only evidence the jury had to go on, given the trial court's alacrity to exclude all other evidence of causation.

As TCJL's brief detailed, this case presents the classic pattern of abuse in windstorm and hail cases: storm blows through; insured makes claim; claim adjusted and apparently amicably settled; supplemental claim made, adjusted, and settled; lawsuit filed years after the fact claiming substantial damages "caused" by the original storm (not to mention hefty attorney's fees); friendly trial judge appoints friendly "umpire" to determine appraisal award; appraisal award becomes basis for massive settlements and/or jury awards that transfer wealth from Texans who pay property and casualty insurance premiums to a small group of plaintiff's attorneys who promise entities such as the school district a budget windfall simply for filing suit. Cases like this one are exactly what the Legislature had in mind when it enacted the reforms. Unfortunately, though, cases like this one had to happen first.

Citing the landmark Texas Supreme Court opinion in *State Farm Lloyds v. Johnson* and a number of lower court decisions, the court of appeals correctly found that the appraisal award determines the cost of repairs, but *the courts* determine liability. Thus whether the hurricane actually caused the damages cited in the appraisal award in this case should have been considered by the trier of fact, necessitating a new trial. The court of appeals declined TWIA's request to reverse and render judgment on its behalf, reasoning that because the trial court relieved the district of its obligation to present evidence of causation and cut off TWIA's defenses, it should "restore the parties to the status quo at the time of the summary judgment rulings and begin anew." The case now returns to the trial court for new trial, which we hope will be handled better than the first one. Otherwise, we are likely to see it back in the court of appeals for review in the future.

The case underscores the importance of appealing questionable and perhaps abusive conduct at the trial court level to enforce basic principles of fairness and equity in our court system. To deprive a defendant of the opportunity to make its case, as occurred here, not only debases the judiciary, but disrespects the jury system and discourages citizens wanting to participate in the first place. As TCJL stated in its brief in this case, our courts should be better than this. We applaud the court of appeals for recognizing what happened and vindicating the process.

