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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 22-0817

IN THE SUPREME COURT OF TEXAS

Roland and Karen Garcia,

Petitioners,

v.

Hartwig Moss Insurance Agency, Ltd.

Respondent.

On Petition for Review from the First Court of Appeals, Houston, Texas, Cause No. 01-20-00420-CV

PETITIONERS' MOTION FOR REHEARING

The Petitioners request an oral argument

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & AUGHTRY, P.C.

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TERMS AND PARTY REFERENCES

Op.	The Court of Appeals' Slip Opinion issued on April 28, 2022. App. D to Petition for Review
Karen Garcia or Karen or Roland Garcia or Roland or Garcias	Roland and Karen Garcia, Petitioners
Hartwig or the Agent	Hartwig Moss Insurance Agency, Ltd., Respondent
Josh Golding or Josh or Mr. Golding	Josh Golding, the employee for Respondent, and the actual agent who procured insurance for Roland and Karen Garcia, Petitioners

ISSUES ON REHEARING

1. When an insurance agent is asked by a homeowner to procure flood insurance, and the agent sells a policy but fails to procure the requested flood insurance, does the agent satisfy his duty to inform the client promptly that he is unable to procure flood insurance by giving ***false*** information to the homeowner? This is an issue of immense importance to all businesses, property owners, and homeowners in Texas who request and pay for what they were told by their agent was flood insurance, only to learn they were not covered for the flood damage. The Court of Appeals erroneously applied the meaning and contours of the duty owed by agents as discussed by this Court in *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992). The Court should address and correct this error.

2. Will this Court allow the Court of Appeals to change the law on the presumption applied by Tex. R. App. P. 34.6(c) that a missing item from the record supports the jury's verdict when the missing item was an offer of proof? The Court of Appeals' holding is directly contrary to this Court's rulings in *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 782 (Tex. 2005) and *Accord Crawford v. XTO Energy, Inc.*, 59 S.W.3d 906, 910 (Tex. 2017), which make clear that a reporter's record is not required for non-evidentiary hearings. The Court of Appeals committed harmful error by overruling legal and factual sufficiency points of error based only on an erroneous presumption that the missing offer of proof supported the jury's findings. If allowed to stand, the Court of Appeals' erroneous decision will confuse the law in every case where a non-evidentiary portion of the trial was not ordered as part of the reporter's record.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Roland and Karen Garcia (collectively "Petitioners" or the "Garcias") file this their motion for rehearing on the denial of their petition for review.

The Court of Appeals has erroneously changed the law in Texas in two significant respects. First, the Court of Appeals erroneously applied this Court's decision in *May v. United Servs. Ass'n of Am*., 844 S.W.2d 666, 669 (Tex. 1992), essentially impacting all businesses, property owners and homeowners' who purchase insurance, and are provided false information as to why the agent failed to procure the requested insurance, leaving the client uncovered for flood events, such as happened to so many Texans following Hurricane Harvey's devastation.

Second, the Court of Appeals erroneously failed to address the factual and legal sufficiency of the evidence under the guise that it was to "presume" a missing portion of the record would "support the jury's finding." Op. at 16. But here, it is undisputed that the missing record was an offer of proof, *see* Appendix B to Appellants' Reply Brief; 5 RR 88:9-21, and it is an impossibility for an offer of proof to support a jury's verdict. The Court of Appeals' decision is directly contrary to this Court's rulings in *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 782 (Tex. 2005) and *Accord Crawford v. XTO Energy, Inc*., 59 S.W.3d 906, 910 (Tex. 2017), which make clear that a reporter's record is not required for non-evidentiary hearings.

It is both important and easy for this Court to correct these two errors to prevent the inevitable negative impact the Court of Appeals' decision will have on the jurisprudence of the state.

I. THE COURT OF APPEALS CHANGED THE LAW ON THE DUTY OWED BY AN INSURANCE AGENT

For decades, this Court's decision in *May v. United Servs. Ass'n of Am*., 844 S.W.2d 666, 669 (Tex. 1992) articulated that an insurance agent owed a duty to his client to procure the requested insurance and "to use reasonable diligence in attempting to place the requested insurance; and to inform the client promptly if he is unable to do so." *Id.* But is this duty satisfied when the agent provides false information to the client, and when the agent does so after the policy has been procured? The Court of Appeals decision erroneously applied this Court's decision in *May*, essentially impacting all businesses, property owners, and homeowners who purchase insurance, and are falsely told by their agent, after the policy is sold, that they needed more information, which the agent later admitted was not true and acknowledged that the agent's failure to procure the requested flood coverage was a "mistake." *See* 4 RR 94:20-24 ("we learn from our mistakes").

So how could this possibly satisfy the duty this Court articulated in *May*? As counsel for the agent argued at trial:

> It doesn't matter what conditions [the agent] Mr. Golding has placed on whether he can get it [the flood policy] or not. It doesn't matter if he's

> laboring under a misunderstanding. It doesn't matter if he's flat wrong about what he heard [petitioner] Karen say. It doesn't matter.

4 RR 226:3-14. That is not the law under this Court's decision in *May*, and certainly should not be the law, and the Court of Appeals' opinion creates confusion, uncertainty, and incentivizes dishonest and unethical behavior by agents. The Court of Appeals' opinion allows an agent to provide false information to the insured (here, that the agent said he needed the Garcias' flood declarations page to procure a flood policy, which is not true, and the agent admitted is not true, 3 RR 104:1-3; 3 RR 105:7-106:3), and to argue that such false information satisfies the duty in *May* owed to the Garcias in order to escape liability for the agent's admitted mistake. The Court of Appeals erroneous decision turns *May* on its head, rendering it meaningless and confusing to all businesses, property owners and homeowners.

The fully developed record in this case presents the opportunity for this Court to discuss the meaning and contours of this Court's decision in *May* regarding the duty owed by an insurance agent, which another court described as an "ambiguity" in Texas law. *Webb v. UnumProvident Corp*., 507 F.Supp.2d 668, 684 (W.D. Tex. 2005) (referring to the status of the common law duty owed by an agent as an "ambiguity" in Texas law).

With ever more frequent flooding events and hurricanes, businesses, property owners and homeowners are at the mercy of their agents whom they rely upon to provide accurate information and procure the requested insurance. The Court of

Appeals' erroneous decision will impact all businesses, property owners and homeowners and should be addressed and corrected.

II. THE COURT OF APPEALS CHANGED THE LAW ON THE PRESUMPTION OF A MISSING PORTION OF THE RECORD.

The Court of Appeals compounded its error by failing to address the factual and legal sufficiency of the evidence under the guise that it was to "presume" a missing portion of the record would "support the jury's finding." Op. at 16. But here, it is undisputed that the missing portion of the record was an offer of proof, *see* Appendix B to Appellants' Reply Brief; 5 RR 88:9-21, and it is an impossibility for an offer of proof to support a jury's verdict.

The Court of Appeals' decision is directly contrary to this Court's rulings in *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 782 (Tex. 2005) and *Accord Crawford v. XTO Energy, Inc*., 59 S.W.3d 906, 910 (Tex. 2017), which make clear that a reporter's record is not required for non-evidentiary hearings. In fact, the Court of Appeals' decision is inconsistent with every case that has addressed this issue under Tex. R. App. P. 34.6. *See, e.g., Gen. Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 673 n.3 (Tex. 1961) (bill of exceptions is not considered by court of appeals regarding an evidentiary challenge to a jury's finding because "it was not heard by the jury"); *Giles v. Cardenas*, 697 S.W.2d 422, 426 (Tex. App.—San Antonio 1985, writ ref'd n.r.e) ("bill of exceptions is not evidence . . . . We do not consider the bill of exceptions in resolving the issues presented in this appeal.").

The Court of Appeals decision is also contrary to this Court's admonishment "to ensuring that courts do not unfairly apply the rules of appellate procedure to avoid addressing a party's meritorious claim." *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2003). *See Holten*, 168 S.W.3d 784 ("appellate rules are designed to resolve appeals on the merits, and we must interpret and apply them whenever possible to achieve that aim").

The Court of Appeals committed harmful error by overruling legal and factual sufficiency points of error based only on an erroneous presumption that the missing offer of proof supported the jury's findings. If allowed to stand, the Court of Appeals' erroneous decision will confuse the law in every case where a non-evidentiary portion of the trial was not ordered be transcribed as part of the reporter's record.

This Court should make clear that the presumption in Tex. R. App. P. 34.6(c)(4) does not apply to non-evidentiary portions of the record, including an offer of proof.

CONCLUSION AND PRAYER

This Court can and should correct these significant errors, which are contrary to sound precedent from this Court and which change the law in Texas on two important areas. Texas jurisprudence needs clarity and certainty when it comes to procurement of flood insurance coverage and the contours of this Court's decision in *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992) as to an agent's duty to promptly inform his client if he is unable to procure the requested coverage, and whether the presumption of Tex. R. App. P. Rule 34(c) applies to an offer of proof, consistent with this Court's decisions in *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 782 (Tex. 2005) and *Accord Crawford v. XTO Energy, Inc.*, 59 S.W.3d 906, 910 (Tex. 2017). Petitioners respectfully request that this Court grant rehearing, grant the petition for review, and address these important issues on the merits. Petitioners pray for such further relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(3) because this brief consists of 1377 words as determined by Microsoft Word Count, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

I certify that a copy of this Motion for Rehearing was served on counsel of record by using the Court's electronic filing system on the 4th day of January 2023, addressed as follows:

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