IN THE SUPREME COURT OF TEXAS

NO. 07-0522

BENNY P. PHILLIPS, M.D., PETITIONER,

v.

DALE BRAMLETT, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF VICKI BRAMLETT, DECEASED, SHANE FULLER AND MICHAEL FULLER, RESPONDENTS

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

Argued April 22, 2008

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, and JUSTICE GREEN, dissenting.

I agree with the Court that section 11.02(a) of the Medical Liability Act plainly caps the physician's liability in this case, and that section 11.02(c), in denying insurers the Act's liability limitations in a *Stowers* action, does not operate to abolish that protection. *See* Act of June 16, 1977, 65th Leg., R.S., ch. 817, §§ 11.02(a), (c), 11.04, 1977 Tex. Gen. Laws 2039, 2052, *repealed by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 [hereinafter TEX. REV. CIV. STAT. art. 4590i]. To this extent, I join the Court's opinion. The Court's analysis, however, ventures further and extends *Stowers* well beyond its common law mooring. The *Stowers*

doctrine was crafted to afford the insured a safe harbor should its insurer unreasonably refuse to settle a claim within policy limits and the insured thereafter suffer an excess judgment. By extending *Stowers* protection beyond the actual peril to which the insured is exposed, the Court ventures into uncharted waters with no footing in the statutory text or the common law. In my view, section 11.02(c) merely clarifies that section 11.02(a) does not cap the amount an insured may recover from its insurer in a future *Stowers* action; it does not pin that potential recovery on a hypothetical judgment for which the insured is not liable. It may be true, although not in this case, that nonsettling insurers whose policy limits reach or exceed the statutory cap face minimal *Stowers* exposure when a jury awards damages exceeding the cap. But there is nothing to indicate the Legislature intended section 11.02(c) to afford insureds a windfall beyond the damages actually suffered. The Court avoids such an untenable result by construing the statute to grant the plaintiff in the underlying malpractice suit a claim for equitable subrogation against the insurer who is negligent in refusing to settle. But the plaintiff cannot be equitably subrogated to a cause of action that does not exist, and what exists is a *Stowers* claim for the amount by which the judgment exceeds policy limits. Because the Court's interpretation subjects insurers to liability beyond that which *Stowers* would allow, I respectfully dissent. Rather than remand the case for further proceedings, I would render judgment for the plaintiff pursuant to the statute.

In construing a statute, our goal is to give effect to the Legislature's intent. TEX. GOV'T CODE § 312.005; *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000). To discern that intent, we look first to the statute's plain language. *Cont'l Cas. Co. v. Downs*, 81 S.W.3d 803, 805 (Tex. 2002). We must consider the statute as a whole, and not its provisions in isolation. *Id.* Section

11.02(a) limits physicians' liability for noneconomic damages to $500,000, as adjusted by the Consumer Price Index. TEX. REV. CIV. STAT. art. 4590i, §§ 11.02(a), 11.04. Section 11.02(c) provides that the statute's limitation of liability does not extend to an insurer when facts exist that would support a *Stowers* claim. *Id*. at § 11.02(c). In crafting subsection (c), the Legislature clearly indicated it did not intend the subsection (a) damage cap for physicians to limit the liability of an insurer who negligently rejects a reasonable settlement demand within policy limits. But that does not mean the Legislature intended to extend insurers' potential liability beyond the limits of the *Stowers* doctrine itself. *See G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). To the contrary, subsection (c) only applies "where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the 'Stowers Doctrine.'" TEX. REV. CIV. STAT. art. 4590i, § 11.02(c). We must begin, then, with the parameters of the *Stowers* doctrine and the recovery it affords, for subsection (c) lifts the statutory cap only to the extent that damages would be available under *Stowers*.

Stowers liability is designed to compensate *the insured* for damages suffered as a result of its insurer's unreasonable refusal to settle. *See Hernandez v. Great Am. Ins. Co. of N.Y.*, 464 S.W.2d 91, 94 (Tex. 1971) ("[T]he Stowers action lies to repair the harm to the insured. The tort of the insurer in mismanaging the defense of the insured in the first case is harmful to the insured alone."). For the *Stowers* duty to arise, there must be policy coverage for the claim, a settlement demand within policy limits, and the demand must be reasonable "such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to *an excess judgment*." *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994) (emphasis

added). When the *Stowers* duty is breached, the insured is afforded "the *Stowers* remedy of shifting the risk of *an excess judgment* onto the insurer." *Id.* (emphasis added). Accordingly, a *judgment* against the insured that exceeds policy limits is the *sine qua non* of a *Stowers* claim.

The Court goes astray in presuming, incorrectly, that the section 11.02(a) damage cap "prevents one critical element of *Stowers*, excess liability, from arising in whole or in part," and from that premise concludes the Legislature must have intended to tie *Stowers* liability against physicians' insurers to the jury's verdict rather than the court's judgment. The Court's premise is flawed in a number of respects. First, the Court presupposes that nearly all physicians will insure themselves to the full extent of the statutory cap, which would substantially diminish the potential for excess liability. However, one need look no further than this case to see the fallacy of the Court's supposition. Taking into account the statutory adjustment for fluctuations in the Consumer Price Index, and excluding economic damages which are not subject to the cap, section 11.02(a) operated in this case to reduce the jury's $9,196,364.50 award against Dr. Phillips to $1,585,365.85. 258 S.W.3d 158, 176–77; TEX. REV. CIV. STAT. art. 4590i, §§ 11.02(a), (b), 11.04. Dr. Phillips, however, was insured under his professional liability insurance policy for only $200,000. Accordingly, Dr. Phillips faces nearly $1.4 million in personal exposure on the capped judgment in excess of his policy limits, for which he may pursue a *Stowers* claim against his insurer. It is simply not true, as the Court posits, that the statutory cap eliminates the possibility of liability in excess of $500,000 against insurers who unreasonably refuse to settle.

Second, the Court concludes that my view, which comports with that of the court's in *Welch v. McLean*, 191 S.W.3d 147, 166–71 (Tex. App.—Fort Worth 2005, no pet.), deprives section

11.02(c) of any meaning because it extends the cap to insurers when *Stowers* would not. However, it is not the statutory cap that operates to limit an insurer's excess liability but the *Stowers* doctrine itself, which ties that liability to the judgment against the insured. The Court apparently believes the damage cap's potential to cabin insurers' *Stowers* exposure is undesirable, as reasonable and timely settlements will thereby be discouraged. But the Court's approach of pinning *Stowers* liability under section 11.02(c) to a hypothetical judgment based on the jury's verdict exposes insurers to liability far exceeding that which *Stowers* would allow and, more importantly, undermines the Medical Liability Act's overarching purpose to reduce the cost of insurance in order to alleviate what the Legislature determined to be a health care liability crisis in Texas. *See* TEX. REV. CIV. STAT. art. 4590i, § 1.02(a)(4). Finally, even if it were true, as the Court presumes, that nearly all physicians are fully insured in every case up to the statutory cap (which is not as easy as it sounds considering the cap's variability), insurers remain subject to liability for special and consequential damages that their negligent failure to settle caused their insureds, which section 11.02(c) makes clear is not subject to the section 11.02(a) damage cap. *See Ranger County Mut. Ins. Co. v. Guin*, 723 S.W.2d 656, 660 (Tex. 1987) (noting that in a *Stowers* action, the insurer is alleged to have breached its agency relationship, so tort damages will be available). And even if the Court's fears are true that the statutory cap makes insurers more likely to unreasonably refuse settlement offers because little is at risk in a subsequent *Stowers* action (which I consider unlikely considering the costs involved in protracted litigation), this is a function of the cap itself and not of the insurer-insured relationship, as physicians who might be uninsured would presumably have the same predilection. Removing the cap only when an *insurer* refuses to settle for more creates a kind of reverse-*Stowers* problem

whereby insurers are encouraged to settle for more than an uninsured physician would. In my view, the Legislature's intent in enacting 11.02(c) was likely much less complicated than what the Court imagines.

To the extent the Court's interpretation of section 11.02(c) exposes insurers to liability in excess of that which *Stowers* would permit, I respectfully dissent. I would render judgment based on what the parties seem to agree the cap allows: $1,585,365.85 in favor of the plaintiff.

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Harriet O'Neill
Justice

OPINION DELIVERED: March 6, 2009