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Supreme Court of Texas.
Benny P. Phillips, M.D., Respondent,
v.
Dale Bramlett, Individually and as Independent Administrator of the Estate of
Vicki Bramlett, Deceased, Shane Fuller and Michael Fuller, Appellant.
No. 07-0522.

April 22, 2008.

Appearances:
Jim Hund, Hund, Krier, Wilkerson & Wright, P.C., Lubbock, Texas, for petitioner.
John Smithee, Templeton, Smithee, Hayes, Heinrich & Russell, LLP, Amarillo, Texas, for respondent.

Before:

Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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JUDGE: The Court is now ready to hear argument in 070522, Benny Phillips, M.D. versus Dale Bramlett, Individually and as Independent Administrator of the Estate of Vicki Bramlett, Deceased, Shane Fuller and Michael Fuller.
COURT ATTENDANT: May it please the Court. Mr. Hund to the part of petitioner, wishes to replied.

ORAL ARGUMENT OF JIM HUND ON BEHALF OF THE PETITIONER

MR. HUND: May it please the Court. Dr. Phillips is petitioned brings forth two points. One which deals with the statutory construction issue following the application of the damages cap of a medical malpractice statute and other which deals with jury argument.
JUDGE: May you want to speak out just a tab exactly.
MR. HUND: Sure. In terms of the jury arguments issue I intend to focus primarily my argument on the issue preservation of the err which I think is where the Court of Appeals erred in terms of finding the err that have not been preserved.
JUDGE: I want to hear your petition in light that was improper argument.
MR. HUND: Why it was improper. Sure, your Honor. The jury argument in this case was one that I would submit to the Court was improper

because essentially what he did is it used it's common theme getting in from verdicts that other jurors and other medical malpractice cases had entered here unlike it although we're talking about those specifically. The argument is essentially was this, jurors and other cases had been gobbled with doctors and other verdicts by either not giving enough money or not finding that doctors were fault and in turned which telling this jury undo the wrong that had been done by these other verdicts and then played upon notes for the evidence was text is were conservative or try to being conservative and then played upon the conservative nature of the lot of jurors and told them, "Hey, do you this other jurors that had been leveled up with doctors. They been level you need to be conservative." What does is, here's the problem with the argument.

It's like Wesch, this Court in 19-- or 1893 in Wesch case said, "When your dealing with jury argument by getting in to what other juries have done, you did two things that undermined the whole process of jury argument."

One is, you based the argument upon what is not in the evidence something that's now embodied on Rule 269(e) the Texas rules as a civil procedure but even worse and I think this is the worst part of. You're asking the jury, you're given the jury the opportunity or asking them to violate the duty that their or sworn to take when they've sworn to open the case in any instruction in the charge and then this Court adapted instruction in 226(a) to tell the jury, "Well, look at the evidence use your emotion. Go out your take this motion."

JUDGE: Well, but there, but there's sufficient evidence, evidence-- overwhelming evidence as it's appears to me that there was sufficient evidence from the jury to run the verdict and it did. So how we determine whether not that those comments read to the rendition of an improper verdict?

MR. HUND: Take this into the enormous err analysis. We've raised those issue in the case that incurable err in this Court in the Livingstone Centers case as noted you got an incurable erred. The harmless error analysis that come into play but it doesn't come into play if it's not incurable and we believe that we have a preserved point on this.

The reason why this err was harmful what are the factors that the Court is look back determining; what is harmful err, the extent of the argument, was it repeated. Look at the argument in this case, its start there. He get's up and says, "Everybody is watching." That's-- that-- that's counsel's argument and when we've seen the reason they watching is because they want to know if there going to be the doctors are going to be treated liberally like they were about other juries that's what answer comes to ...

JUDGE: Counsel, let's, let's break your analysis into two parts.

MR. HUND: Sure.

JUDGE: If the arguments about actual damages they were maybe one set of criteria if the argues about punitive damages then maybe a separate set. Punitive damages one factor there to consider is appropriately the amount of an award of exemplary damages that will punished the wrong doer and deter conduct by others. Why is it if the argument is about punitive damages not material to the, to the point that we need to de-- deter this kind of conduct.

MR. HUND: This was a buck treatment trial, your Honor. The issue of the amount of punitive damages wasn't to be litigated or argue until lighter. This argument occurred in the first stage of the trial were that perhaps if it could be argued was not an issue for the jury not at

all and-

JUDGE: Is this ...

MR. HUND: - also, your Honor, the point is remember the Court of Appeals in this case which the parameter is not brought to this Court were reversed and rendered the finding of gross negligence, finding of juries, finding of gross negligence was unsupported by the evidence. Punitive damages rather this case and the parameter is not brought forth the point on the rendition of the punitive.

JUDGE O'NEILL: But we have very rarely held something to be incurable jury argument. I mean it has to be-- you know, surely the, the defense lawyers were, were big voice hearing can go in there and say, "Well, send the message and the message is do not bring home frivolous lawsuit here in West Texas." I mean it-- it's hard to get real work up ever something like that, that we don't seem to have gotten work up on and other areas of incurable of jury argument.

JUDGE: Is it because Lubbock County was that what was incurable jury argument?

MR. HUND: No, your Honor. The think that makes it-- I want to make this point ...

JUDGE: I mean everybody argues. Ladies and gentlemen our own place turned his argue-- ladies and gentlemen I know there's a tendency not to order. You know, what a bunch of damages against somebody and that's just the same it seems to me it's just not limit to the Lubbock County. Why is that harm?

MR. HUND: This isn't to send the message that is what the nature of the incurable argument is. It's getting into what other err, other juries did. I think we've run a slippery. We run a risk. We run and down to slippery slope if we open the door to tell lawyers, "Hey, you can get in there in jury argument and go talk to the jury about a controversy of verdict that some people agree with and some people don't and then used that verdict as a means to tell this jury what they got along use your opportunity."

JUDGE: Is what that, is what that specific?

MR. HUND: It wasn't that specific.

JUDGE: Do you think the jury would have disregarded an instruction from the trial court disregard that argument?

MR. HUND: We've never got that opportunity because ...

JUDGE: You'd never asked and that's another point on preservation of error. Shouldn't in, in conjunction with objecting to proper jury argument shouldn't you request the trial court to instruct the jury to disregard?

MR. HUND: At the point in time where the judge has sustained the objection. Yes, but in this case and this is what we urge about kind of giving you a hand that ...

JUDGE: Whether the judge actually rule on your objection?

MR. HUND: I believe it did.

JUDGE: It seems like he just made a comment.

MR. HUND: He made the ruling but implicit this Court.

JUDGE: Did it has a specific ruling?

MR. HUND: You don't have specific ruling anymore over 52 the rules of appellate procedure in, in September 1997 which was rewritten to what's now 33.1 and 33.1 now clearly says the ruling can be implicit.

JUDGE: So we look at it and say, what's close enough or what's not close enough.

MR. HUND: Absolutely. And, and ...

JUDGE: And why you want to take that chance? Why would you not just get a specific objection the ruling on this simple, simple

objection?

MR. HUND: I think that the, the Counsel felt that he had a ruling were the judge basically said, "This is argument, Counsel. It's got more latitude and in fact the Counsel understood that the objection was overruled" and in terms of the implicit nature in, in something that I really do want to focus on the preservation of erred issue and can giving your handout. We believe that this error was preserved. There's no question as to timely objection.

JUDGE O'NEILL: Oh what-- do you mind if I change the subject?

MR. HUND: Sure.

JUDGE O'NEILL: Because we're running out of time and we got the records so we can, we can tell what was preserved or not, 459(i)1102(c).

MR. HUND: Yes, Ma'am.

JUDGE O'NEILL: What's the purpose of that provision?

MR. HUND: The purpose of that provision is one that says what? We've done that tort performed package in 1977 and as part of that package we feel the need to cap damage is asked to a physician. We want to make sure that the insurer ...

JUDGE O'NEILL: I cannot see.

MR. HUND: We want to make sure that the insurer by, by coming in, you know what the 1102(c) can't come in and say, "Well, your absolutely cap in the Stowers action for whatever the amount of the damages were in the, in the underlying case of the amount of judgment." It's preserving the rights and making clear that ...

JUDGE O'NEILL: But what's left? I'm having a hard time in saying, "If the statutory cap applies, what's left on the Stowers' claim against the insurer?"-

MR. HUND: I understand.

JUDGE O'NEILL: - and I understand you say consequential damages. Is that all?

MR. HUND: Damages is their reputation. In this case for example Dr. Phillips is looking at the judgment nine to $10 million in value now. He's got issues with his credit, he's got issue with this professional reputation. This was a verdict that I ...

JUDGE O'NEILL: What is his incentive to bring that claim if, if the damages were capped to 500,000?

MR. HUND: He's incentive to bring that claim is dependent very much upon how a particular verdict depicted his practices. It turns out that judgment affected his practice and essentially run in many town or run in many business. He can have very significant consequential damages of flowing from the fact that the damages had not been capped as it should have been.

The, the other point I want to make is this though and this is in the legislative history issue, we've laid out in our brief our position as to why the plain language of statute when you read it.

JUDGE O'NEILL: I understand the plain language argument, I-- I'm just trying to get out. There was some indication that this was intended to be a leverage against the insurer and then negotiate in good faith and I don't see how it could operate as a, as a-- that sort of leverage if, if in fact your view prevails.

MR. HUND: I think a lot of that leverage that you find and what's before the Court is leverage that you trying to get through a letter of several sworn that he wrote about 10 to 12 years after Article 459(i) was entered in 1977 and this Court sets single statements from one legislature about what that leverage was all about. It's not an indication to legislature proceeding.

JUDGE O'NEILL: I mean, I mean I think we should look at statute and, and infer that it was intended to be some sort of were ...

MR. HUND: Absolutely.

JUDGE O'NEILL: So I mean I don't need the letter outside reference issue itself. Most have some purposes of that effect.

MR. HUND: But to infer that it is to say that one can no longer cap damages against the position with the back draft of the fact that position in health care provider and health care liability claim or not mentioned in subsection (c) gets way abound that the plain meaning rule and also emasculates the legislative history. Here's the point, the legislative history, House Bill 1048 had physician and health care provider in it.

JUDGE O'NEILL: Now, you want to talk that legislate history.

MR. HUND: And ...

JUDGE O'NEILL: But let, let me just, let me go back from it. Was there any desire to allow a doctor to assign as Stowers' claim and a settlement perhaps?

MR. HUND: If there was. It's unstated in the legislative history that we have available to us at the time there was the issue about one's ability to do an assignment covenant not the execute that this Court held. Since then that void is against public policy until the underline litigation has been fully, fully litigate. The problem ...

JUDGE O'NEILL: Which, which she contemplates?

MR. HUND: Which seems it could contemplate that but, but the issue is this, what happens if Dr. Phillips then those in pursues of Stowers cause of actions and it losses hasn't done one of these assignments. And he then, has this excess judgment that he bears the final burden of having dissatisfy even know the legislatures is the one that gave him the right to have his damages cap under 1102(a).

JUDGE: That's a legislature gives it? Can't the legislature take it away?

MR. HUND: It can't. If there's what? Clear legislative intent that their intent was to give it away in 1102(c) and the problem is this, the plain language. Chief Justice Jefferson wrote what I think underscore the plain meaning rule in his descending in concurring opinion in diverse secure. When he talks about straight forward statutory construction, one of the cases he cite it's juror.

Another case is Laidlaw where this Court has said, were terms used in one part of the statute in excluded in another. The Court can imply or it's been excluded and that's exactly what we're dealing here. The Court of Appeals below as by implication, put the word "physician" and "health care liability" or "health care provider" and "health care liability claim" right back into 1102(c) were it's not there. How can you imply into 1102(c) terms have been excluded in the Ruling 1102(a)? Laidlaw says, "You can't do that." Then, with the legislative history that we have, a legislative history that have those terms in it and that's the point.

The exclusion of health care provider and physician from 1102(c) wasn't by accident, it wasn't by coincidence, it wasn't by mistake, it was there. It was there when this bill started in the House in 1048 and it was there and it got out there by Conference Committee.

And this Court on five different occasions and it all goes back to it really interesting case from the history takes it's politics. The Love versus Wilcox case. It all goes back there. This Court of five different occasions has had to deal with legislative history or term in a statute has been excluded and then, the party comes back in later and wants to adapt the construction that would put those words right back

in it and this Court every time starting with the Grasso case, Smith versus Baldwin and the Maskyn case. Every time this Court says it gives beyond our duty under the separation of powers to interpret statute when we start basically putting back into a statute what the legislature has expressly reject.

JUDGE O'NEILL: Let's look at the statute, this is were I get, I get a little confuse. She says, "This section shall not limit a liability of any insurer with that excess were enable the party to invoke common-laws Stowers theory of recovery." As our read your brief, it would only be as to the $500,000 cap, is there a way to read (c) to mean that the doctor could assert a common-law Stowers' claim against the insurer up to the excess amount of the judgment? That's why I get, I get confuse.

MR. HUND: Your Honor, your Honor, we've, we've-- it's in our brief and it's actually construction. Here's the point, I believe that the, that the problem you end up with under 1102(c) ends up with this element. I mean I going to come right here to your question.

JUDGE O'NEILL: I guess the premises of my question is even if you presume no, no ultimate liability on the position but this is not expressly in statute. What is the ultimate liability on the insurer under Stowers?

MR. HUND: Insurer. I think it's going to-- it's going two fold and the real question I would say that the Court is actual determination of which of those two apply is going to happen if and when there is a Stowers' cause of action. You're in your dealing with the potential rights of an insurance carrier who were plugged in this case. Stowers' cause of action were institute in the case when there was a health care liability claim. I think there's one of two constructions.

One is that in the Stowers' cause of action, the cap amount of the damages plus those consequential damages that we talked about earlier is that the recovery against the insurer or that the amount of the verdict can be used as a damages element against the insurer.

Here's that, here's that-- I've guess the problem that I struggle with in terms of, of procedurally. Do you think this thing all the way through where, where the problem is? What we end up doing if you accept the constructions below is we start litigating a Stowers' cause of action in a underlying health care liability claim and start to setting up the insurance cap whose not a party to that case and having they weren't there and we are now trying to say, "Well, we have to established these facts in the underlying health care liability case where the insurer is not even a party." As we thought ...

JUDGE O'NEILL: Isn't that true in every Stowers case? Isn't that true when every Stowers case?

MR. HUND: It is but-

JUDGE O'NEILL: How's, how's that different?

MR. HUND: - the litigi-- but the litigation of a facts over the application of the ability to assert Stowers' cause of action occurs in the Stowers case where the insurer is a party case.

JUDGE O'NEILL: That's happens in every case.

MR. HUND: The facts are developed but in this case you got the Court making findings in a judgment about the application of the Stowers' Doctrine. It's beyond simply the evidentiary facts upon which the Stowers' claim might harass.

JUDGE: Is there any another questions? Thank you very much, Counsel. The Court is now ready to hear argument from the respondents.

COURT ATTENDANT: May it please the Court. Mr. John Smithee, the party of the respondent.

ORAL ARGUMENT OF JOHN SMITHEE ON BEHALF OF THE RESPONDENT

MR. SMITHEE: May it please the Court. I have wanted to have the statute available as a visual aid because I, I believe that the clear wording that the legislature deliberately used in the statute is, is very tiling here and, and we are certainly relying on a clear wording of the statute. The issue under this point is very narrow and that is the statutory construction primarily subsection (c) and of-- but you have to read in context.

This Court is made very clear. It reads and the government prone to demands that the Court read statute in context. The context is critical here because Section (a)-- subsection (a) says, "In an action on a health care liability claim. This section, Section 11 refers to nothing else, can't refer to nothing else then, a health care liability claim of by definition it can only refer to health care liability claim."

A Stowers case can never be a health care liability claim. You always have different defense by definition, by statutory definition a health care liability claim always has to be against a medical provider. A Stowers case by common-law definition always has to be against an insurer.

So a Stowers action can never be a health care liability claim but it says in actual health care liability can claim and it goes off.

Now section, subsection(c) says this section which has to refer under the government code to Section 11 entitled says, "This section shall not." Now that by definition is an exception if you do a West law search, a words search of, of "This section shall not" or "this section shall not be construe" or whatever. You will find, I can't find one answer of it or every time of those words are ever used.

When they ever or anything but in exception to remove a subclass of either person or cases or situations from the class of person, situations or cases that are included in the section as a whole. It is by, by the definition, by nature in exception. You cannot except something out of the statute that is not here to begin with and that's the fundamental flow with the insurer with ...

JUDGE: But the exception is only applies to insurer? That's what it says.

MR. SMITHEE: Well, what it says and that's why I think the plain wording. It, it makes as clear it says, "This is section shall not do something in a certain type of case." Now, what shall not it do? It shall not limit the liability of an insurer. It shall not be used to limit the liability for that purpose to limit the liability of an insurer. You know, ...

JUDGE: In your argument shouldn't be use to limit the liability of a doctor? That's different from an insurer.

MR. SMITHEE: Well, the reason in the original file bill and I've got-- I mean this bill was file-- was in 1977. It, it would followed the Keaton Commission and it was to follow the Keaton report. It was probably one of the mo-- most important, the most character profile bill in 1977 Legislative Session. The specific language that they were talking about here's not just some incidental language. It was heavily debated that the briefs contain the legislative history of the transcript.

The word "medical providers" doctors and medical providers was in the original version of the bill and, and survived for short time-- for time. It was-- it is very apparent that the removable of those words was for specific purpose and the specific purpose that is detailed in legislative history is that Mr. Fekins were obvious with the Texas Medical Association said, "I think you maybe, to the legislature, you maybe unwillingly creating a statutory Stowers action against the physician." That's always been a sort of-- against the insurers so we would ready you leave things the way they are. That the Stowers action is then asserted against as a common-law action against the insurer.

It was right after that testimony that the next version of a bill took out the words, "physician" or "health care provider" and, and remain in but it is also clear from the legislative history that the authors when they presented the bill still intended and, and this is, this is the paramount legislative intent that is, that is available from the record. They wanted to preserve the Stowers' Doctrine and the powerful incentives that the doctrine provides to all parties. Not only to the-- but the plaintiff, but to the defendant and also to the insurance company to settle the case to get the case resolve reasonably and properly through to conserve judicial resources.

JUDGE: Mr. Smithee-

MR. SMITHEE: Yes.

JUDGE: - why doesn't the petitioner's position on interpreting the statute further exactly what your talking about? The limitation as you and I agree call on exception 11.02(c) says, "The section shall not limit the liability of any insurer" and as you've pointed out the House version of the bills said, "Shall not limit the liability of any insurer, physician or health care provider." "Physician" and "health care provider" were taken out of the exception.

So now the exception to the limit of liability in the explicit wording is just referable to an insurer. Why does not operate to just to do that? So if there is a actual damages of word against the physician and the physician insurer did not treat the physician properly, breach some duties. The physician can still sue insurer for damages that exceed the actual damages against the in-- the physician because as the exception and I agree you hardly says, says the Stowers' Doctrine can continue to be applied in those cases and not limit the liability of any insurer. So it seems to operate properly in the petitioner's view. Why is that not right?

MR. SMITHEE: Two reasons, Judge, very clearly. One, as if you look at the enactment itself in, in House Bill 1048 and, and it is-- it was in the statute and still this is repel now. It was replaced in 2003 and 30 years or so there-- I only, I only want this one and other reported case that we could find under, under this provision and I don't know of anymore in the pop lines. So it's really a dead issue after this case leave this Court.

JUDGE: There's still a, there's still a provision on that point in 303. Right?

MR. SMITHEE: There, there is but, but, your Honor, it was, it was, of course, we qualify before the House Bill 4 before 2003 but it was subsequently amended at that point and clearly in that legislative history in 2003, the legislature pass a different provision to yield a different result to which is assumed exactly what they want now.

JUDGE: Your view that, your view that change is that it would not support your position here?

MR. SMITHEE: The new language and I don't think it's particular relevant here but, but, but no. I think it was subsequently amended

late-- later on.

JUDGE: So, so again my question Subsection(c) if you'd say just applies to the word "insurer" to the entity insurers that their liability is not limited in the Stowers context. And that seems to be entirely consistent with the language because the physician with an actual damages award can still sue its-- his or her insurer or her insurer, if the insurer breach duties and cause damages.

MR. SMITHEE: Let me tell you two reason why, why I, I disagree with that statement, your Honor.

First of all is the enactment itself if you look at Section 1.02(b)(7) of Article 4590(i) that's now repeal. If you look at that what you will see is the legislature stated in, in very explicit terms that if by the enactment of House Bill 1048 and the, the, the effectiveness of Article 4590(a), you see very specific languages it says, "We do not intent to impact any other area of Court law by this Bill." So the legislature said that-- I mean the legislature specifically said, we're not impacting anything other than a medical health care liability suit. So first saw it's the Court that hold that way it would be basically doing what the legislature said, "We're not doing it."

But secondly, in an, in an traditional Stowers action you got three parties, two or three groups of parties anyway. Two of them were negligence. The tort features was negligent in, in committing the tort and the insurer was negligence for not settling the case. You've got one victim who has very luckily no negligence at all. Now why would you want to reward the tort feature here, particularly in a case were either committed or order.

JUDGE: That, that, that goes to all caps. Why would you ever want over?

MR. SMITHEE: Well, ...

JUDGE: Your legislature said so is why?

MR. SMITHEE: In the legislature, there is no general right to have your damages is limit and just because your a doctor doesn't mean your entitled to limit the damaging anymore than a lawyer or an architect. The justification ...

JUDGE: Now the case helped you with the legislature though.

MR. SMITHEE: Pardon.

JUDGE: It seems like to help to the legislature.

MR. SMITHEE: Well, in a that's first -

JUDGE: They have capped damages from lawyers, have they?

MR. SMITHEE: - they done very well. They've done-- doctors have done very well in the legislature. But the justification for that at least the justification, the legislature states in the statute when it does that. It says in 1977, "We got health care insurance process, doctors can get insurance." So we've got a public policy of where we either go to police powers or something very similar to police power and so we're going to override the base report.

JUDGE: May I interrupt you. Your, your first argument was why would you-- what a held a tort feature? And the answer to that is because that's what caps do.

MR. SMITHEE: Well, caps do reward -

JUDGE: That's a second argument.

MR. SMITHEE: - caps do were reward some extent. What you are rewarding the tort feature not only with the absence or limit of liability through the wording with the windfall when this is all over because he, he actually, he asserts that the tort features, assert the Stowers' damages receives $10 or $11 million if you based it on the

jury verdict and, and not gets public place.

JUDGE O'NEILL: And that's, that's my question, that's where I hung up.

MR. SMITHEE: Yes.

JUDGE O'NEILL: Is what you can Stowers' liability on in light of the cap? Is it-- I mean why would insurer ever ensure a physician from more than $500,000?

MR. SMITHEE: Well, they would.

JUDGE O'NEILL: Okay.

MR. SMITHEE: It would.

JUDGE O'NEILL: So, so, it seems to me that the Stowers' liability would be very, very limited. It would only be if the insurer did not accept an offer, let's say $300,000 and the verdict comes back at 10 million but it's cap at five the most insures every reliable force $200,000 in Stowers' claim.

MR. SMITHEE: Exactly. It's going-- it further very, very case where, where you have a verdict between the offer and the cap. It will be very well.

JUDGE O'NEILL: So, so no one arguing then that the cap wouldn't a plans Stowers contexts that, that if there's a verdict of $10 million somehow the insurers going to be liable for the difference between the cap and the public. No one is going arguing that.

MR. SMITHEE: No, I mean the-- there were-- there could potentially based on liability in that, that situation.

JUDGE: What other liability? Are we talking about damages to the-- that positions practice or what? And, and addition to that limited amount of 200,000 that they've saw in the amount.

MR. SMITHEE: That's all. It just that those basic special elements of a-- of damage to the caps.

JUDGE: So the cap is always applies in the most the insurer will ever be liable for under the Stowers' Doctrine would be 500,000.

MR. SMITHEE: Yes, I mean that, that would be going to be the most in several cases. I'm sorry.

JUDGE: No, what the-- what, what about the, the other damages, damages to reputation of the doctor claims like that even it's capped. Don't you still have those out there?

MR. SMITHEE: He would either with or without the statute and that's, that's-

JUDGE: That's the ...

MR. SMITHEE: - the other argument. Is that if you take that, that approach in it's bill back to the argument on a subsequent Stowers action. I mean the-- that's the damages are established and this Court as well as the Court of Appeals settings in United State versus Kelly and this Court is in Aghande case and also in a low court in one and Justice Bakers incurring opinion. The Court basically said that damages in Stowers case or in the amount the excess judgment is a matter of law. So anyway that, that would be a subsequent change when you say, "No" instead of the judgment, you, you can, can use the jury verdict.

JUDGE: However, in, in bad faith insurance action like Stowers actions there's punitive damages available. There's statutory penalties and interest and there's attorney's fees-

MR. SMITHEE: Yes.

JUDGE: - the damages will very often to exceed the difference between the settlement that should have been accepted and wasn't.

MR. SMITHEE: Well, and that maybe true, and it just refers to Stowers. It is all-- this, this he talks about. And, and once again, I mean this-- if that would written the construction you give them to

see, it would be absolutely meaningless.

JUDGE: And let me ask this how-- if you have the damages capped and their $500,000 and you have a $10 million verdict, what's the judgment written for?

MR. SMITHEE: It's written for $10 million.

JUDGE: Then, how do you limit the doctor's liability when you start executing the judgment?

MR. SMITHEE: Well, you don't and that's, that's what the legislature said here is that, that we're going to accept from this general class of cases to which caps apply.

JUDGE: No, I'm not talking about this case. Let's just talked about the case were, were not talking to see.

MR. SMITHEE: Okay.

JUDGE: You have a cases cap, any case were you have a cap.

MR. SMITHEE: Yes.

JUDGE: Five hundred thousand dollars, $10 million verdict from jury. What judgment is entered? Doesn't to defendant moves, say Judge, you going to cap this judgment at $500,000, that's all, that's all they can get on to the caps.

MR. SMITHEE: That's right.

JUDGE: So judgment were 500,000? That, that's why usually works.

MR. SMITHEE: That's why it normally works it.

JUDGE: Okay. Now, in this case we have-- we this says, this section shall not limit the liability of an insurer, all right. So if we have the cap of judgment of $500,000 if, if that's the judgment. How can we ever having Stowers' liability but if we don't have-- it seems to me like it's going to be hard arrive judgment. When you got the Stowers' liability still hanging out there. Can we even have a judgment if we're reading this case until you litigate the Stowers case?

MR. SMITHEE: Well, yes and I think that's why it's worded this way, your Honor, because it doesn't say that the statute doesn't say that the, that the Court has to find that the plaintiff going to win the substance of the insurer is going to win the subsequent Stowers case. But if you really carefully says that it would be enable a party to invoke the common-law of recovery, common-law of Stowers' Doctrines. So the trial court does exactly what in this case. It conducts a post verdict hearing outside or after the jury already turned it's verdict way, it finds the basic elements. First of all is there coverage? Secondly, was there an offer, unconditional offer within policy limits? Third, there's the verdict exceed the, the coverage in the offer? And, and, and those facts are present you can assert a Stowers case. Now you may not win the Stowers case but the facts that this is ...

JUDGE: But then, in that case the judgment for $10 million against the doctor.

MR. SMITHEE: That's exactly right.

JUDGE: But does not what this section says, that's what I'm want it seems like what you're doing you're put the doctrine in the middle and you letting the insurance company very possibly off which it seems like the intent of the section if we talked about intent. Maybe not to punish the doctor but to-

MR. SMITHEE: Well, ...

JUDGE: - make the insurance company lapped.

MR. SMITHEE: Well, first of all your problem not punishing the doctor when you just say, he's going have to pay the amount of damages that the jury awarded just like any other professional without-

JUDGE: Right.

MR. SMITHEE: - doing that situation. That's not an absurd result

but what the legislature said, the overriding in there is trying to keep the Stowers' Doctrine liable and I mean liable as it sent to settlement is worth this situation that may developed in some cases. Ultimately, if the doctor get's stock for the $10 million judgment it is because of his insurer and what they, what they did.

So yes, that is a consequence of this but it, is a less absurd consequence that then to adapt the defense approach here which is that the-- that in basically would eliminates Stowers cases altogether and would eliminate any insurers ...

JUDGE O'NEILL: Well, it would eliminated upon encourage of signing the Stowers' claim and settlement?

MR. SMITHEE: Well, ...

JUDGE O'NEILL: Because it says, when enable a party-

MR. SMITHEE: Yes.

JUDGE O'NEILL: - to invoke the common-law theory and the doctor could-- let's say $200,000 settlement offer was made that the insurance company rejected and the defendant could say, "I'm going to-- I want to settle for extra amount of signing of the Stowers' claim."

MR. SMITHEE: He can't do that for one damage though. You see if he doesn't a pre-judgment assignment then, it's, it's not going to be result to any kind of a Stowers case.

JUDGE: I don't, I don't understand why the doctor, you know, if you get this $10 million verdict, judgment verdict and the Court enters a $500,000 cap judgment. The doctors says, "Well, I'm done."

MR. SMITHEE: I'm sorry.

JUDGE: The doctors done.

MR. SMITHEE: Yes.

JUDGE: As well, you know, I mean I don't have anymore liability as the doctor and into this statute. The damages recapped even though the verdict was for $10 million. I don't anything further do as well. He chooses not to invoke the common-law remedy of Stowers because he had nothing. What then?

MR. SMITHEE: I'm sorry. I was in a hard time hearing.

JUDGE: I mean he chooses at, at that point the judgment against him is 500 is covered by the insurance. Why should he do anything further?

MR. SMITHEE: Well, the doctor were. I mean if he's fully insurer.

JUDGE: That so ...

MR. SMITHEE: He knows the Stowers action. He hates the Stowers.

JUDGE: So, so the plaintiff has to invoke the doctor's cause of action on this Stowers?

MR. SMITHEE: No. That-- that's situation will not arise. I mean it just won't. If you look at the Stowers situation, this, this will only come up when, when you get a big verdict that, that exceed insurance coverage and the only comes up when you have a facts that were enable a party to invoke the Stowers action and, and that situation once, once the judgment becomes final the-- of the doctor has a cause of action against the Stowers action that-- that's begins the insurance.

JUDGE: But, but, but-- so that's my question. Why he should do anything if his liability has capped? Sure, his, his got the potential because if his, if his expose to any further-

MR. SMITHEE: But he's ...

JUDGE: - liability he would certainly he chose this insurance-

MR. SMITHEE: But ...

JUDGE: - coming from damages.

MR. SMITHEE: Well, the only reasons that, like in this case, it wasn't capped because it fell under the section--subsection (c). Now

if, if-

JUDGE: But the ...

MR. SMITHEE: - you take the insurance company's view of this, you're exactly right.

JUDGE: But the doctor's liability is capped, right?

MR. SMITHEE: I'm sorry?

JUDGE: The doctor's liability is capped.

MR. SMITHEE: No, no it's not because, because (c) is an exception to the general caps that written in (a).

JUDGE: Also, exception for the insurer, liability of any insurer but ...

MR. SMITHEE: Well, no, no it that-- if, if you follow that what it says, "It shall not limit the liability. It shall not be use for a specific purposes."

JUDGE: You thinks the statute compels the doctor to invoke the Stowers' Doctrine because it says enable a party to invoke. In other word, what the doctor just said, "Five hundred thousand, my liabilities cap, I'm not going against my insurer even though they unreasonably denied the settlement-- you know on settlement could have been done." Would your saying is doesn't matter to doctor wouldn't pursued that because the statute said it would enable a party to invoke a party?

MR. SMITHEE: A party, a party not just-- yes.

JUDGE: In that, in that-- therefore, eliminates really the $500,000 cap and it entitled to this case.

MR. SMITHEE: Most cases-- yes, your Honor. It eliminates the cap on those cases and I think that language "a party" is very significant. Now, it is also very significant but the legislature just preside ...

JUDGE: Counsel on -

MR. SMITHEE: I'm sorry.

JUDGE: - makes you understand you so then, the cap for the doctors actual damages can be removed based on conduct of third parties. I mean the insurer's conduct could caused the doctor to loss the benefit of the damages capped?

MR. SMITHEE: Yes, your Honor.

JUDGE O'NEILL: And so if, if a doctor wants to protect himself from catastrophic recovery like this, they just don't insured.

MR. SMITHEE: No, that's not true. I think that they, they ensure because very, very seldom that the verdicts come in over the caps. It's, it's a were, were intances.

JUDGE O'NEILL: That is my point. I mean you've just say, "Well, I just can self-ensure because if that can re-open up my liability to $9 million then, you know, if I really want to protect myself against catastrophic sort of judgment and I just going to self-ensure and I won't run that risk."

MR. SMITHEE: Well, I, I think that your, your to, to reach that view, you have to assume that the insurance company is going to breach it's obligation. But the insurance company is going to negligently deal with and, and that's a very well instances in today's world. It happens but it happens very rarely.

The more reasonable expectations is that the insurance company is going to settle or if the insurance company doesn't settle you preserve a Stowers action against the insurer. It's a balancing that occurs in an import-- the statute maybe written for a perfect world but we leave in an imperfect world and this is the balancing that the legislature chose, but first of all, try to cap liability in most situations. But to preserved an exception so they can preserve the Stowers' Doctrine.

JUDGE: Other questions. Thank you, Counsel.

MR. SMITHEE: I don't get the jury argument but-- that wasn't, wasn't intentional. Thank you.

JUDGE: That was well brief and the, the Court will consider that on the brief. The Court is ready to hear argument on rebuttal.

REBUTTAL ARGUMENT OF JIM HUND ON BEHALF OF PETITIONER

MR. HUND: May it please the Court. Couple points.

JUDGE: Counsel back to jury argument. You believe that the argument was incurable and it was inappropriate to say, lets it's in the message the doctors because a lot of jurors had not done it the past in their verdicts. And you said that, that might have been appropriate argument if he were in the caps affiliated second phase for only punitive damages were at issue. The argument apparently was made in the first phase when actual damages were being considered. Of course, the jury didn't know there's going be an application.

As I've recall from the briefing, the argument was made about sending a message in the context of it, overall argument about damages that should be awarded. As I've recall, the brief said, Counsel said, "A worth $14 million and send the message." That $14 million included actual and punitive, didn't it?

MR. HUND: It did.

JUDGE: So why couldn't Counsel argued my why-- my appropriate argument one that would be appropriate maybe and maybe not and then with actual but yes and then done with the punitive. Is it appropriate when I'm talking about both of a total amount that I want the jury to recovered-- to return rather?

MR. HUND: The problem isn't in sending of a message. The problem is as I've, as I've said earlier I think we start getting ourselves on slippery slope that we start allowing folks to use jury, verdicts and other cases as a means by which to tell the jury, "This is why you have to do, what you have to do in this case."

JUDGE: Such you, such you take the reference to other juries out then, sending a message you think is okay?

MR. HUND: No problem with that. I think that, that in add itself is problem play within the confines of appropriate argument. The problem is, is that this case was much beyond to send the message. It was the thing that was raised, was undo the wrong, right the wrong by what these other verdicts said anything.

JUDGE: So when the defense attorney like you argued to the jury about his previous cases about McDonald's copied caps $2 million when it put the stop to at hears that's incurable too.

MR. HUND: I think you run the risk and I've never made the McDonald's argument if he's interest and I thought ...

JUDGE: Every other defense attorney that ...

MR. HUND: I thought about that. But I thought about in this sense. How do we know what the facts were in the McDonald's case? How do we what the liability facts were? How do we know what the damages were that the plaintiff's sustained? How can one say, "I gave this much money in that case?"

JUDGE: The answer, the answer that is because the McDonald's cap of case is common knowledge and the argument would be hear that a defense jury, verdicts and love of county is a common knowledge. How do we know that's not the case?

MR. HUND: Well, there had been verdicts, argue, related state doctors and they will awarded plaintiff's a lot of money every cases based upon it's own said a facts, that's my point.

JUDGE: What was that?

MR. HUND: And my point is it that you start really looking a town jury. "Hey, look what they did in this other case and you are the base your verdict and send the message not based upon the evidence in this case what the jury did in other case."

JUDGE: We assumed the judge basically instruct him as all judges do during closing argument. This is just lawyers relying to you and closing argument pay note is not evidence, pay not attention to it.

MR. HUND: You've got pretty close to that and, and obviously that was in the instruction ...

JUDGE: But it looks like to me.

MR. HUND: It was an instruction given to the jury to get recap the argument that the judge then condone won't let it happened after the judgment had been made.

JUDGE: But Mr. Hund, the reference was made in several more times in closing and no objection was made. Did the defense counsel obtain a running objection to the comment? Why were not subsequent objection is made?

MR. HUND: He didn't get to learn an objections but I feel like that the objections once made early on the first time it was urged. There was no need to object because it is obvious the Court was going to overrule it from that point forward.

JUDGE: To back to the statute really quickly, will you go way down here. You make of the statute-- any rebuttal to Mr. Smithee's construction? Do you hear that?

MR. HUND: I did and that's why I wanted to start my rebuttal.

JUDGE: I have a feeling.

MR. HUND: The point I want to make is this. This hasn't been said but it's very obvious. Number one, I think it's important, I think it's important for our legal system, our system of justice by this Court to decide this case. What's not been stated and we all know because it's in the brief says, "The issue that's all involved in this statutory construction is one as we've set here today, we got the Court forward on the McLean case. We got the Court below that it come to two diametrically different views of what those 32 words mean in 1102 (c)." This Court in a leading centers and it's another reason I think the Court needs to decide the case pointed out and although that was incurable argument case.

One of the things the Court talked about was how consistency is needed in order to ensure that the ordinary citizens of our state can have confidence in our system and we, we don't have that consistency likely we have right now with two inconsistent opinions that are irreconcilable of leading conflict with one another that consistencies eroded.

The second point I want to make is this I want to tie together two points that were made or two questions. One was first urges by Justice Johnson.

JUDGE: Counsel if you can do that briefly as your time have expired.

MR. HUND: I can, I can very quickly. The point was this the doctors didn't point in the middle of all this. They've got again the doctors can put in the middle of all this as results of something that he didn't do, and so this issue of the exerted of the result of a doctor potentially not getting the benefit of a cap or conduct that his

insurer is something the Court should also considered something that the Court in McLean and the Fourth Court noted was an absurd result that's close from the construction of the Court below.

JUDGE: Thank you, Counsel. The cause this submitted I conclude oral arguments for this morning and this is start courtroom. The Court, again, as appreciated the hospitality of all those present. We hope that these arguments have been beneficial to the students and, and to the faculty and to Lubbock, generally and we will always enjoy coming back in visiting Texas time. And I could say that on behalf not only on the whole Court but of one it's outstanding alumni, Justice Phil Johnson. The Court is now in recess, the Marshall will adjourn the Court.

COURT ATTENDANT: All rise. Oyez! Oyez! Oyez! The Honorable Supreme Court of Texas now stand as adjourned.

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