

NO. 07-0522

**IN THE
SUPREME COURT
OF TEXAS**

BENNY P. PHILLIPS, M.D.,

Petitioner

vs.

**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
Seventh Court of Appeals at Amarillo, Texas
No. 07-05-0456-CV**

Motion for Rehearing of Benny P. Phillips, M.D.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

BENNY P. PHILLIPS, M.D. (hereinafter “Phillips”) files this motion for rehearing requesting limited modification of the Court’s March 6, 2009 Opinion and Judgment. Phillips attacks only that part of the Opinion which, contrary to common law, creates a quasi Stowers-like action in favor of Respondents (“the Bramletts”), through which the Bramletts share part of Phillips’ Stowers action and can use that shared part to seek damages for which Phillips is not liable. This is harmful to Phillips. It deprives him of complete control of his remedy to shift his \$1.4 million in personal exposure to his insurer.

I. – GROUND FOR REHEARING

The Court erred in ruling that the Bramletts share a part of Phillips’ Stowers action to seek damages for which Phillips is not liable as: (a) such a construction of TEX. REV. CIV. STAT. ANN. ART. 4590(i) §11.02(a) (“Damage Cap”) and §11.02(c) (“Stowers-exception”) conflicts with the expressly stated Legislative intent as well as rules of construction; (b) principles of equitable subrogation have no application to allow the Bramletts to step into Phillips’ Stowers shoes; and (c) allowing the Bramletts to share Phillips’ Stowers action undermines the protections which the Stowers Doctrine should afford to Phillips.

II. – ARGUMENTS AND AUTHORITIES

Phillips naturally does not challenge the Court’s unanimous ruling that the trial court erred in failing to cap his liability to the Bramletts in accordance with the provisions

of Section 11.02(a). His Motion for Rehearing only attacks that part of the Court's Opinion which divides the five justice majority from the four justice dissent - - construing the Damage Cap and the Stowers-exception in a manner which departs from the common law moorings of the Stowers Doctrine. The departures consist of: (1) granting the Bramletts a part of Phillips' Stowers action; and (2) allowing the Bramletts to use Phillips' Stowers action to recover damages based upon hypothetical or theoretical liability.

Respectfully, Phillips posits that the Majority erred. First, it has construed Sections 11.02(a) and (c) in a manner inconsistent with the expressly stated intent of the Legislature as well as rules of statutory construction. Second, it has turned principles of equitable subrogation upside down. Finally, it has deprived Phillips of the full protections which the Stowers Doctrine should otherwise afford to him.

A. MAJORITY OPINION CONFLICTS WITH LEGISLATIVE INTENT AND VIOLATES RULES OF CONSTRUCTION.

1. Plain language expresses a Legislative intent inconsistent with Majority's construction of Damage Cap and Stowers-exception.

The most fundamental goal and objective of statutory construction requires a court to determine and then give effect to legislative intent. TEX. GOV'T CODE § 312.005; *Cont'l Cas. Co. v. Downs*, 81 S.W.3d 803, 805 (Tex. 2002).

a. Legislature expressed intent not to change common law applicable to Stowers action.

The 65th Legislature expressly stated that it had no "*intention*" to change "*any area*" of the "*Texas legal system or tort law*" except those relating to health care liability

claims. TEX. ANN. CIV. STAT. ART. 4590(i) § 1.02(b) (7). A stated “purpose” of article 4590i was to improve the system by which health care liability claims are determined in order to:

(7) make certain modifications to the liability laws as they relate to *health care liability claims only* and *with an intention of the legislature to not extend or apply such modifications of liability laws to any other area of the Texas legal system or tort law.*

TEX. REV. CIV. STAT. ANN. ART. 4590(i) § 1.02(b)(7) (*emphasis added*). A Stowers action is not a “health care liability claim” but rather is part of the “other area” of the “tort law” which the Legislature expressly stated it did not intend to change. *See id.* at § 1.03(a) (4) (definition of “health care liability claim”).

b. Majority’s construction of Section 11.02 does just what the Legislature did not intend - - it changes two fundamental moorings of Stowers.

The Majority’s construction of the Damage Cap and the Stowers-exception rests on the premise that the Legislature intended to and did change the elements of a Stowers claim.¹ The premise (i.e., the Legislature intended to change the common law) fails. Section 1.02(b) (7) contains an expressed intent not to do what the Majority Opinion does. That expressed intent cannot be ignored as “no rule of statutory construction is more universally recognized than that which compels the courts to give some effect to *every*

¹The Majority Opinion acknowledges its construction rests on the premise that the Damages Cap and Stowers-exception changed critical elements of a Stowers action. For example, the Majority: (1) construes the cap as preventing one critical element of Stowers (i.e., liability in excess of the policy either in whole or in part); *Phillips v. Bramlett*, 52 Tex. S. Ct. J. 422, 423 March 6, 2009), 2009 Tex. LEXIS 94, *6 (Tex. 2009); (2) concludes that Stowers-exception does not include a per se common law Stowers action; 52 Tex. S. Ct. J. at 425; 2009 Tex. LEXIS 94, *13; and (3) the Damage Cap introduces a new element into the Stowers equation. 52 Tex. S. Ct. J. at 425; 2009 Tex. LEXIS 94, *14.

express declaration of legislative intent.” *Texas Bank & Trust Co. v. Austin*, 115 Tex. 201, 203 (Tex. 1926); *Nelms v. Gulf Coast State Bank*, 516 S.W.2d 421, 423-424 (Tex. Civ. App.—Houston [1st Dist.] 1974), *aff’d*, 525 S.W.2d 866 (Tex. 1975); *San Antonio Indep. School Dist. v. San Antonio*, 614 S.W.2d 917, 919 (Tex. App.—Eastland 1981, writ ref’d n.r.e.) (*emphasis added*).

i. First change in common law: Granting a part of Phillips’ Stowers action to the Bramletts.

Since the inception of Stowers, courts have uniformly and steadfastly ruled that the cause of action belongs solely to the insured. *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W. 544, 547-58 (Tex. Comm’n App. 1929, holding approved); *Charles v. Tamez*, 878 S.W.2d 201 (Tex. App.—Corpus Christi 1994, writ denied); *Whatley v. City of Dallas*, 758 S.W.2d 301 (Tex. App.—Dallas 1988, writ denied); *Beck v. Allstate Ins. Co.*, 678 S.W.2d 561 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.); *Samford v. Allstate Ins. Co.*, 529 S.W.2d 84 (Tex. Civ. App.—Corpus Christi 1975, writ ref’d n.r.e.); *Curtis v. Cook*, 476 S.W.2d 363 (Tex. Civ. App.—Beaumont 1972, writ ref’d n.r.e.). Even the Bramletts have acknowledged these holdings. Their Brief on the Merits states: “the only party who can invoke the Stowers doctrine is the insured (or his assignee).” (Bramletts’ Brief on the Merits pg. 28) (citing *Stowers*, supra).²

As the Stowers action belongs solely to the insured, a judgment creditor lacks standing to assert it against a defendant’s insurer. *Whatley v. City of Dallas*, 758 S.W.2d

² The Bramletts had never argued or urged that they should become equitably subrogated to or share in Phillips’ Stowers action.

at 307; *Beck v. Allstate Ins. Co.*, 678 S.W.2d at 561-62; *Samford v. Allstate Ins. Co.*, 529 S.W.2d at 87; *Curtis v. Cook*, 476 S.W.2d at 363. Faced with a lack of standing, a judgment creditor attempted to obtain a judgment debtor's Stowers action through the turnover statute contained in TEX. CIV. PRAC. & REM. CODE §31.002. *Charles v. Tamez*, 878 S.W. 2d at 208. The court held that such an attempted use of the turnover statute violated public policy. *Id.* at 208. In conflict with this common law underpinning, which existed in 1977 when Article 4590i was enacted, the Majority allows the Bramletts share Phillips' Stowers remedy. *Phillips*, 52 Tex. S. Ct. J. at 426; 2009 Tex. LEXIS 94 at *16. Sharing deprives Phillips of complete control, which as urged below, undermines the protections which the Stowers remedy should provide to Phillips.

ii. Second change in common law: Allowing the Bramletts to use shared Stowers remedy to seek recovery of hypothetical damages.

As Dissent notes, the Majority's construction of Section 11.02(c) may allow the Bramletts to use Stowers action to seek damages on "a hypothetical judgment for which the insured is not liable." *Phillips*, 52 Tex. S. Ct. J at 427. This conflicts with another common law Stowers underpinning which existed in 1977. A "Stowers action lies to repair the harm to the insured" because the harm from an insurer's negligent failure to settle "is harmful to the insured alone." *Hernandez v. Great Am. Ins. Co. of NY*, 464 S.W.2d 91, 94 (Tex. 1971). As such, the protections afforded the insured is against real, meaningful - - not simply theoretical - - liability. *In re Davis*, 253 F.3d 807, 810 (5th Cir. 2001).

2. Legislative History of House Bill 4 conflicts with Majority’s construction.

The Stowers-exception of Section 11.02(c) was carried forward in TEX. CIV. PRAC. & REM. CODE §74.303, which states that “[t]he liability of any insurer under the common law theory of recovery commonly known in Texas as the “Stowers Doctrine” shall not exceed the liability of the insured.” TEX. CIV. PRAC. & REM. CODE §74.303(d). Without citing Legislative history or otherwise, the Majority views Section 74.303(d) as a substantive change. *Phillips*, 52 Tex. S. Ct. J at 424 n. 5, 2009 Tex. LEXIS 94, *9-10. To the contrary, the Bill Analysis of the House Research Organization³ states: “Repealing of current law stating that a damage award cap does not apply to the liability of an insurer under the “Stowers Doctrine” *would clarify the intent of the cap.*” HOUSE RESEARCH ORGANIZATION, HB 4 BILL ANALYSIS Pg. 11 (March 25, 2003) (*emphasis added*). Hence, Legislative history reflects that Section 74.303(d) did not effect a substantive change but rather is a clarification of Section 11.02(c). This later interpretation is “highly persuasive of Legislative intent.” *Texas Water Comm'n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19, 21 (Tex. 1996); *Stanford v. Butler*, 142 Tex. 692, 181 S.W.2d 269, 274 (Tex. 1944). It compels the construction reached by the Dissent and the court in *Welch v. McLean*, 191 S.W.3d 147 (Tex. App.—Fort Worth 2005, no pet.).

3. Majority improperly applies more rules of construction.

³ The House Research Organization (“HRO”) is a nonpartisan source of impartial information on legislation considered by the Texas Legislature. The HRO is an independent administrative department of the Texas House of Representatives governed by 15 members of the House. See <http://www.hro.house.state.tx.us>. An HRO Bill Analysis reflects the version of the bill as it was reported by House committee. *Id.*

The Majority concludes that the language of the Damage Cap and Stowers-exception is unclear. Under such circumstances, a court may impute an implication to a statute only when it is obvious that the Legislature intended the implication and no other interpretation can be gathered from the statute as written. *Massachusetts v. United N. & S. Dev. Co.*, 140 Tex. 417, 168 S.W.2d 226, 229 (1942); *Williams v. Anderson*, 850 S.W.2d 281, 284 (Tex. App.–Austin 1993, writ denied). First, the 65th Legislature could not have “obviously” intended the Majority’s construction because Section 1.02(b) (7) expresses intent inconsistent with that construction and the Legislature subsequently clarified that intent through House Bill 4. Second, another interpretation can be gathered from the statute - - the construction given by the Dissent and the court in *Welch v. McLean*.

B. STOWERS-EXCEPTION IS NOT LIKE EQUITABLE SUBROGATION AND AS SUCH EQUITABLE SUBROGATION IS NOT APPLICABLE.

Because a judgment creditor, absent an assignment, has no standing to assert a judgment debtor’s Stowers action, the Majority uses principles of equitable subrogation to give the Bramletts standing through shared rights in Phillips’ Stowers action. The holding in *American Centennial Insurance Co. v. Canal Insurance Co.*, 843 S.W.2d 840 (Tex. 1992), provides the basis for likening equitable subrogation to the Stowers-exception. Respectfully, the circumstances of this case do not meet any of the elements of equitable subrogation and greatly differ from those in *Canal*.

1. Majority Opinion turns equitable subrogation on its head.

As this Court has stated::

The doctrine of equitable subrogation allows a party who would otherwise lack standing to step into the shoes of and pursue the claims belonging to a party with standing. Texas courts interpret this doctrine liberally. Although the doctrine most often arises in the insurance context, equitable subrogation applies “in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter. Thus, a party seeking equitable subrogation must show it involuntarily paid a debt primarily owed by another in the situation that favors equitable relief.

Frymire Eng’g Co., Inc. v. Jomar Internat’l, Ltd., 259 S.W.3d 140, 142 (Tex. 2008).

Simply stated, one must confer a benefit to another which one is not required to confer by legal duty or contract. *Smart v. Tower Land & Inv. Co.*, 597 S.W. 2d 333, 338-339 (Tex. 1980).

a. Bramletts have not (i) paid a debt; (ii) conferred a benefit; and (iii) acted involuntarily.

The Bramletts have done just the opposite of what equitable subrogation requires. They sued Phillips. Their suit did not confer a benefit upon Phillips. Instead, the lawsuit created a liability for which Phillips has \$1.4 million in personal exposure above his insurance coverage.

b. Bramletts’ shared part of Phillips’ Stowers Action does not relate to a debt for which Phillips is primarily liable.

Another reason prevents likening the Stowers-exception to equitable subrogation. Before equitable subrogation can apply one person must have paid a debt for which another was “primarily liable.” *Frymire Eng’g Co., Inc. v. Jomar Internat’l, Ltd.*, 259

S.W.3d at 142; *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007). The Court’s Ruling limits Phillips’ liability to the Bramletts to the amount of the Damage Cap meaning that Phillips has no debt for any amount above the Damage Cap. Thus, there is no debt of Phillips to which the Bramletts can become equitably subrogated.

c. There is a complete disconnect as the Majority’s construction allows the Bramletts to assert claims that Phillips could not.

Ultimately, the Majority’s construction places the Bramletts into Phillips’ shoes and may allow them to assert Phillips’ Stowers action against his insurer for recovery of damages based on the jury verdict, not the judgment. This construction gives the Bramletts the right to use Phillips’ Stowers action to recover damages Phillips could not. Yet, it is fundamental that a subrogee (who stands in the shoes of the subrogor) can have no greater rights than those of the subrogor. *Anchor Cas. Co. v. Robertson Transp. Co.*, 389 S.W.2d 135, 139 (Tex. Civ. App.—Corpus Christi 1965, writ ref’d n.r.e.). Thus, the Bramletts’ have no ability to asset a claim for damages which Phillips could not. *National Union Fire Ins. of Pittsburgh v. John Zink Co.*, 972 S.W.2d 839, 843-44 (Tex. App.—Corpus Christi 1998, pet. denied).

2. The Majority’s reliance on *Canal* is misplaced.

The Majority says the issue in *Canal* is a “similar problem.” *Phillips v. Bramlett*, 52 Tex. S. Ct. J. at 425, 2009 Tex. LEXIS 94 at *15. To the contrary, the facts and circumstances of *Canal* are not similar, either from the standpoint of the subrogee or the

subrogor. In *Canal*, the excess carrier, which became equitably subrogated to the insured's Stowers remedy, conferred a benefit to the insured by paying the insured's obligation with the proceeds of its excess liability policy. As stated, the Bramletts have not acted involuntarily, have made no payment, and have conferred no benefit on Phillips. An even more significant fact, one that directly impacts Phillips, distinguishes this case from *Canal*. As noted by the Majority, the payment by the excess carrier in *Canal* "fully protected" the insured from "liability." *Phillips*, 52 Tex. S. Ct. J. at 426, 2009 Tex. LEXIS 94 at *15. Phillips is not fully protected from liability. He is not even partially protected. He remains personally liable for over \$1.4 million, being the excess portion of the Bramletts' judgment. Not being fully protected, Phillips, for the reasons urged below, needs full and complete control of his Stowers remedy. The Majority has taken that control from him.

C. PLACING PHILLIPS AND THE BRAMLETTS IN THE POSITION OF SHARING THE STOWERS ACTION UNDERMINES THE PROTECTIONS WHICH THE STOWERS DOCTRINE AFFORDS PHILLIPS.

The duty to settle under Stowers is a personal duty owed only to the insured. *Charles v. Tamez*, 878 S.W.2d at 208. For that reason, the Stowers remedy was created for the benefit of the insured as it affords an **insured** the remedy of attempting to shift the risk of an excess judgment to the insurer. *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994). To afford Phillips the remedy to which he is entitled under Stowers (i.e. attempting to shift the \$1.4 million excess judgment to his insurer), Phillips must have complete control over his remedy. Yet, the Majority deprives Phillips

of that **complete** control as is evident from the statement that: “When insurance coverage is below the cap, this Stowers-exception claim may be **shared** by the insured physician and the injured third party because both will potentially have excess claims when the damages finding exceeds the cap.” *Phillips*, 52 Tex. S. Ct. J. at 426, 2009 Tex. LEXIS 94 at *16 (*emphasis added*). What should be complete control of the Stowers action by Phillips has turned into shared control with the Bramletts. The loss of control of **his remedy** harms Phillips. A part of his remedy has been placed into the hands of parties with interests which conflict with and motivations which differ from how Phillips may need to use his Stowers remedy to provide him protection. This harm flowing from the loss of control has the very real potential of undermining the protections which Stowers should afford to Phillips.

1. Phillips and the Bramletts have conflicting interests with different motivations which could prevent Phillips’ from using his Stowers remedy in a manner acceptable to him.

Courts have long declined to allow equitable subrogation between parties in a relationship fraught with conflicting interests. *Excess Underwriters at Lloyds v. Franks’ Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 47 (Tex. 2008). The relationship between Phillips and the Bramletts is fraught with conflict. The conflict arises from their adversarial positions in this litigation. The conflict remains due to the Bramletts’ judgment for which Phillips has \$1.4 million in personal exposure. The court in *Charles v. Tamez*, when refusing to allow turnover of the Stowers action, noted that an unsatisfied judgment for which the defendant has personal exposure creates “a difference in the

alignment of interests which distinguishes this case from *American Centennial*.” 878 S.W.2d at 208.

A quite plausible set of circumstances underscores how this difference in alignment, with conflicting interests and differing motivations, could undermine the protections which the Stowers remedy should afford to Phillips. Assume this scenario: (1) Phillips’ carrier is willing to settle the Stowers claim for payment of the Bramletts’ judgment against Phillips and agree to continue to insure Phillips; (2) because of the Majority’s holding, Phillips’ carrier requires a release from both Phillips and the Bramletts; (3) Phillips is agreeable but the Bramletts are not; (4) no settlement is reached; (5) the Stowers case is tried and is lost; and (6) Phillips’ insurer then cancels his insurance. This potential scenario demonstrates that Phillips’ primary desire is to resolve the Stowers claim in such a way to shift his \$1.4 million in personal exposure to his insurer. The Bramletts, as evidenced by their efforts in the trial court and in the court of appeals, are motivated to recover what the jury awarded, not the amount of Phillips’ legal liability. This motivation is real. As The Medical Protective Company has noted in its Motion for Rehearing, the Bramletts have sued his insurer in Dallas County.

2. Granting the Bramletts a part of Phillips’ Stowers remedy could allow the Bramletts to gamble to the detriment of Phillips, result in the waiver of privileges, affect Phillips’ ability to keep insurance and deprive Phillips of venue rights.

The Bramletts suit against The Medical Protective Company underscores how Phillips has lost complete control of his Stowers remedy. Loss of complete control is harmful to

Phillips and given the nature of the litigation process, Phillips cannot envision all of the ways that harm may result.

a. Bramletts have ability to gamble with Stowers action.

Quoting *Canal*, the Majority Opinion notes that allowing an excess carrier to enforce the *Stowers* Doctrine served the public interest in fair and reasonable settlements of lawsuits by discouraging primary carriers from “gambling” with the excess carrier’s money. *Phillips*, 52 Tex. S. Ct. J. at 426, 2009 Tex. LEXIS 94 at *16. Allowing the Bramletts to share a part of Phillips’ *Stowers* action gives the Bramletts that same ability to gamble. Motivated by a desire to recover damages equal to the jury verdict, the Bramletts, as co-owners of Phillips’ *Stowers* action, could force a trial, which if lost would deprive Phillips of his *Stowers* remedy. Without that remedy, Phillips will have lost the ability to shift his personal liability to his insurer and be left to satisfy the excess part of the Bramletts’ judgment. The Majority Opinion has the potential to put Phillips in the proverbial “lose-lose position.” He lost when his insurer gambled in not accepting the Bramletts’ policy limit demand, and he could lose his *Stowers* remedy should the Bramletts’ shared control of the *Stowers* action force a trial which is lost.

b. Bramletts may obtain access to information which Phillips desires to keep privileged.

The insured’s decision to bring a *Stowers* action is purely a matter of personal discretion. *Samford v. Allstate Ins. Co.*, 529 S.W.2d at 87. Many factors bear on the exercise of that personal discretion by Phillips. One factor includes the potential that the

Stowers action could result in waiver of the work product and attorney-client privileges applicable to the underlying suit. By granting the Bramletts a part the Stowers action, they may have a right to materials which Phillips would want to keep privileged. This erodes well-established privileges necessary to the litigation process.

c. Phillips' ability to obtain insurance may be affected.

The above scenario demonstrates how the Bramletts' control over Phillips' Stowers remedy could affect his ability to keep and maintain professional liability insurance (i.e. a settlement of the Stowers action in a manner acceptable to Phillips which includes an agreement by his insurer to continue to provide coverage). This risk conflicts with the important stated purpose of making insurance available to physicians at reasonable, affordable rates. TEX. REV. CIV. STAT. ANN. ART. 4590(i) § 1.02(b)(4).

d. Loss of venue rights.

Phillips had the valuable right to select where to file his Stowers suit, so long as he selects a county of proper venue. *See* TEX. CIV. PRAC. & REM. CODE §§15.001-15.039; *Wilson v. Texas Park and Wildlife Dept.*, 886 S.W. 2d 259, 260 (Tex. 1994). The Bramletts, by filing suit in Dallas, have deprived Phillips of the right of selecting the venue which he believes would be most favorable to him.

D. PHILLIPS HAS NOT AND DOES NOT SEEK A WINDFALL.

The Dissent suggests that the Majority's construction of the Stowers-exception is in part based upon avoiding the untenable result of a windfall to Phillips. Phillips has not and does not seek such a windfall. He urges the construction advanced by the Dissent and

Welch. This construction prevents a windfall while preserving Phillips' Stowers remedy in and for the manner it was created.

E. ALTERNATE CONSTRUCTION DOES NOT RENDER SECTION 11.02 (C) MEANINGLESS.

The Majority believes that the construction reached by the Dissent and the *Welch* court renders the Stowers-exception meaningless. *Phillips*, 52 Tex. S. Ct. J. at 424, 2009 Tex. LEXIS 94 at *8. To the contrary, this construction insures that the Damage Cap cannot be used by insurers to escape liability for an insured's incidental and consequential damages which the common law Stowers remedy affords. *See Ranger County Mut. Ins. v. Guin*, 723 S.W.2d 656, 659-60 (Tex. 1987). This construction balances the respective interests of all parties consistent with the Legislature's purposes of decreasing the costs of health care liability claims; not unduly restricting the rights of claimants; making liability insurance affordable; and not changing any area of the law other than that relating to health care liability claims. TEX. REV. CIV. STAT. ANN. ART. 4590(i) § 1.02(b) (2), (3), (4), (7). This construction gives the Bramletts a judgment against Phillips for an amount determined by the Legislature to be within the best interest of the citizens of this State. Phillips is given the protections of the Damage Cap and fully retains his Stowers remedy to afford him the best opportunity to shift his personal liability under the Bramletts' judgment to his insurer. Phillips' insurer remains potentially liable for all damages suffered by Phillips under the common law Stowers Doctrine, an amount over many times his insurance policy limit.

III. - PRAYER

WHEREFORE, PREMISES CONSIDERED, Benny P. Phillips, M.D., respectfully prays that the Court grant this motion for rehearing, withdraw its March 6, 2009 Opinion and Judgment and upon rehearing confirm that his liability to the Bramletts is limited to the Damage Cap and withdraw that part of its decision which allows the Bramletts to share in Phillips' Stowers action to recover an amount in excess of his liability to the Bramletts and for such other and further relief to which he is entitled.

Respectfully submitted,

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By: _____

JIM HUND

STATE BAR NO. 10277800

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been served upon the following this _____ day of April, 2009.

JIM HUND

Via Certified Mail, Return Receipt Requested to:

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APPENDIX