
IN THE SUPREME COURT OF TEXAS

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

**BRAMLETT'S' RESPONSE TO AMICUS BRIEFS OF TEXAS
ALLIANCE FOR PATIENT ACCESS/TEXAS MEDICAL ASSOCIATION
AND TEXAS MEDICAL LIABILITY TRUST**

John Smithee
State Bar No. 18768800
**TEMPLETON, SMITHEE,
HAYES, HEINRICH &
RUSSELL, L.L.P.**
320 S. Polk, Ste 1000
P. O. Box 15010
Amarillo, Texas 79105
806-324-0324 – Telephone
806-379-8568 – Facsimile

Alexander B. Klein III
State Bar No. 11556250
J. Todd Trombley
State Bar No. 24004192
THE KLEIN LAW FIRM
2000 The Lyric Centre
4400 Louisiana Street
Houston, Texas 77002
713-650-1111- Telephone
713-227-1121 – Facsimile

Thomas J. Turner
State Bar No. 20331300
TURNER & JORDAN, P.C.
2017 Broadway
P. O. Box 10104
Lubbock, Texas 79408
806-763-3661-Telephone
806-741-1396 - Facsimile

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. WHAT THE COURT DID 1

II. WHAT DR. PHILLIPS AND AMICI ASK
THE COURT TO DO ON REHEARING 2

III. WHY THE COURT CANNOT PROPERLY DO
WHAT DR. PHILLIPS AND AMICI ASK THE
COURT TO DO ON REHEARING 3

 Rule One: The Court may not adopt a construction
 that renders a statutory provision meaningless or without effect 3

 Rule Two: When construing statutory language, the Court must
 determine and give effect to the Legislature’s intent as expressed
 in the language of the statute 5

 Rule Three: The Court may not permissibly construe a statute in a
 manner inconsistent with statutory language unless the Court makes
 an express finding that such a construction would lead to an absurd result 8

IV. THE COURT IS LEFT WITH ONLY TWO
PERMISSIBLE OPTIONS: OVERRULE THE
MOTION FOR REHEARING, OR MERELY AFFIRM
THE COURT OF APPEALS’ JUDGMENT 10

CONCLUSION AND PRAYER 14

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

CASES	PAGE
<i>City of Marshall v. City of Uncertain</i> , 206 S.W.3d 97 (Tex. 2006)	4
<i>City of Rockwall v. Hughes</i> , 246 S.W.3d 621 (Tex. 2008)	9
<i>City of San Antonio v. City of Boerne</i> , 111 S.W.3d 22 (Tex. 2003)	1
<i>Columbia Med. Center of Las Colinas, Inc. v. Hogue</i> , 271 S.W.3d 238 (Tex. 2008)	4
<i>Fitzgerald v. Advanced Spine Fixation Sys., Inc.</i> , 996 S.W.2d 864 (Tex. 1999)	1
<i>Lee v. City of Houston</i> , 807 S.W.2d 290 (Tex. 1991)	9
<i>Lucas v. United States</i> , 757 S.W.2d 687 (Tex. 1988)	8
<i>McGhee v. Helsel</i> , 686 N.W.2d 6 (Mich. App. 2004)	9
<i>National Fire & Liability Ins. Co. v. Allen</i> , 15 S.W.3d 525 (Tex. 2000)	7
<i>Phillips v. Bramlett</i> , 2009 WL 567889 (Tex. 2009)	2, 3, 4, 5, 6, 7, 8, 12
<i>State Farm Fire & Cas. Co. v. Gandy</i> , 925 S.W.2d 696 (Tex. 1996)	13, 14
<i>Welch v. McLean</i> , 191 S.W.3d 147 (Tex. App.–Fort Worth 2005, no pet.)	3

STATUTES	PAGE
TEX. ANN. CIV. STAT. Art. 4590i, § 1.02(a)(3)	8
TEX. REV. CIV. STAT. art. 4590i (Act of June 16, 1977, 65 th Leg., R.S., ch. 817, § 11.02, 1977 Gen. Laws 2039, 2052)	1
TEX. ANN. CIV. STAT. article 4590i, § 11.02	2, 9
TEX. ANN. CIV. STAT. article 4590i, § 11.02(a)	1, 2, 4, 5, 6, 9
TEX. ANN. CIV. STAT. article 4590i, § 11.02(c)	1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13
 OTHER	
1 JAMES B. SALES AND HADLEY EDGAR, <i>Texas Torts and Remedies</i> § 71.09[b] (2008)	7
1977 MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT	8
RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1977)	9

TO THE SUPREME COURT OF TEXAS:

Texas Alliance for Patient Access/Texas Medical Association (“TAPA/TMA”), and Texas Medical Liability Trust (“TMLT”) both argue, by their respective amicus curiae briefs, that the Court’s construction of section 11.02(c)¹ will raise a multitude of perceived problems and issues. Amici, therefore, join Dr. Phillips in asking the Court to abandon its principled construction of section 11.02(c), and adopt Dissent’s construction of the section, which the Court has already correctly refused to do.

I. WHAT THE COURT DID

In its opinion, the Court followed its long-established rules of statutory construction. The Court has repeatedly stood upon the “cardinal” standard by which it construes statutory language: “Our primary objective is to determine the Legislature’s intent which, when possible, we discern from the plain language of the words chosen.” *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). This is so, the Court has often explained, because “the words [the Legislature] chooses should be the surest guide to legislative intent.” *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999).

Here, the Legislature carefully chose its words, and the Court understands the intent of those words. After examining the language chosen by the Legislature in section 11.02(c),

¹ All references to “section 11.02(a)” or “section 11.02 (c)” refer to those sections of TEX. REV. CIV. STAT. art. 4590i (Act of June 16, 1977, 65th Leg., R.S., ch. 817, § 11.02, 1977 Gen. Laws 2039, 2052).

the Court found the legislative intent as expressed in the statutory language to be not just plain—but “unmistakable:”

From section 11.02's language, the Legislature's intention to do two things is unmistakable. First, it intended to cap the liability of a physician or other health care provider according to the statutory formula. . . . Second, it intended that the cap should not benefit any insurer when Stowers facts exist.

Opinion, at * 4 (underlining added).² The Court then construed section 11.02(c) in a manner that follows unmistakable legislative intent to the letter:

Thus, we conclude that both the statutory cap and its exception can be applied as written by conforming the judgment against the physician to section 11.02(a)'s cap and reserving for another case any suit against the insurer under section 11.02(c)'s Stowers exception.

Opinion, at * 5.

II. WHAT DR. PHILLIPS AND AMICI ASK THE COURT TO DO ON REHEARING

Amici TAPA/TMA and TMLT join with Dr. Phillips in asking the Court to retreat from its principled construction of section 11.02(c), and adopt the contrary construction articulated by Dissent. But, the Court has already correctly rejected Dissent's construction because the construction seriously violates at least three cardinal rules of statutory construction.

² All cites to “Opinion” refer to the Westlaw version of the Court's opinion, *Phillips v. Bramlett*, No. 07-0522, 2009 WL 567889 (Tex. Mar. 6, 2009)(attached as Tab 1).

III. WHY THE COURT CANNOT PROPERLY DO WHAT DR. PHILLIPS AND AMICI ASK THE COURT TO DO ON REHEARING

If the Court were to adopt Dissent's construction of section 11.02(c), it would seriously violate at least three foundational rules of statutory construction.

Rule One: The Court may not adopt a construction that renders a statutory provision meaningless or without effect.

Petitioner and Amici urge the Court to adopt Dissent's approval of the *Welch*³ construction of section 11.02(c), which concludes "that the section 11.02(c) Stowers exception to the cap was meant only to clarify the continued, but limited, application of the Stowers Doctrine to claims governed by article 4590i." Opinion, at * 3 (underlining added). However, as pointed out by the Court, there was nothing in the statute to suggest that the Stowers Doctrine would not continue to be applicable to article 4590i claims even if, under Dissent's interpretation, section 11.02(c) did not "clarify" its continuation. Therefore, Dissent would have section 11.02(c) clarify something that requires no conceivable clarification. As the Court correctly found, this construction renders section 11.02(c) impermissibly meaningless and of no effect:

Thus, the Dissent would limit the exception in section 11.02(c) to cases involving insurance policies falling below the cap and would not apply it to other policies. But, a Stowers claim, as limited by the cap, would be available to the injured physician, even if section 11.02(c) were not part of the statute, and the Dissent, like Welch, attributes no meaning to the Stowers exception. . . . this interpretation renders the provision meaningless.

³ See *Welch v. McLean*, 191 S.W.3d 147, 166-71 (Tex. App.–Fort Worth 2005, no pet.).

Opinion, at * 3 (underlining added). The Court’s logic is indisputable, and is subject to neither argument nor criticism. The simple and indisputable fact is that the *Welch*/Dissent construction does render section 11.02(c) absolutely meaningless. Dissent’s construction would construe section 11.02(c) to exclude Stowers actions from the section 11.02(a) damage cap, even though, by definition, the cap could never, ever apply to a Stowers claim.

Neither Dr. Phillips nor Amici dispute the cardinal proposition that the Court must not construe a statutory provision so as to render it meaningless. That bedrock principle is subject to neither argument nor dispute. “The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.” *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008), *citing City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006). However, neither Dr. Phillips nor any of the Amici can offer even one meaningful effect of section 11.02(c) under Dissent’s proposed construction.

Amicus TMLT speculates that the effect of Dissent’s construction is “that in the [subsequent] Stowers action, the insurer’s liability is not limited by the amount of the 11.02(a) cap. Instead, in that circumstance, the insured may continue to seek relief for all tort damages proximately caused by insurer’s negligence in rejecting a reasonable settlement demand within policy limits, just as would the insured in any other Stowers action.” TMLT Amicus Brief, at 6-7. But, as observed by the Court, that would be the law even if section 11.02(c) were not part of the statute. Opinion, at * 3.

Dr. Phillips suggested effect is slightly different. He argues that Dissent's construction "insures that the [section 11.02(a)] 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." Phillips Motion for Rehearing, at 14-15. But because the language of section 11.02(a), by its plain terms, does not even remotely suggest that the cap can be used by an insurer to "escape liability for an insured's incidental and consequential damages," in a subsequent Stowers action, no meaningful effect arises from merely "insuring" against an event that could absolutely never occur. Once again, under either view, the entire provision is rendered meaningless.

The imagined "effects" that both Dr. Phillips and Amici attempt to assign to section 11.02(c) vividly illustrate the "circular" nature of Dissent's construction. The Court correctly analyzed the meaningless effect:

The Dissent instead opts for a more circular interpretation: that the cap does not limit the liability of any insurer except when it does. And it does, according to the Dissent, whenever the cap applies to limit the liability of the insured. As aforesaid, this interpretation renders the provision meaningless.

Opinion, at * 3. The Court cannot properly adopt Dissent's construction, because the construction renders the entirety of section 11.02(c) absolutely meaningless and of no effect.

Rule Two: When construing statutory language, the Court must determine and give effect to the Legislature's intent as expressed in the language of the statute.

The effect of Dissent's meaningless construction of section 11.02(c) accomplishes the exact opposite result from what the Legislature intended. From the language of the statute

itself, the Court discerned the “unmistakable” intent of the Legislature in enacting section 11.02(c):

From section 11.02's language, the Legislature's intention to do two things is unmistakable. First, it intended to cap the liability of a physician or other health care provider according to the statutory formula. . . . Second, it intended that the cap should not benefit any insurer when Stowers facts exist.

Opinion, at * 4 (underlining added). But, Dissent’s meaningless construction accomplishes just the opposite result. This opposite result is neither hypothetical or theoretical; in this case it would be real. Here it is undisputed, as specifically found by the trial court, that Stowers facts do exist. Under both the trial court and court of appeals judgments, insurer would have been exposed to potential Stowers liability for the entire uncapped judgment of almost \$10 million. Amicus Med Pro asks the Court to construe section 11.02(c) so as to expressly limit its potential Stowers liability to—coincidentally—the exact amount of damages permitted under the section 11.02(a) damage cap. Thus, under Dissent’s construction, Med Pro—or any other bad-acting insurer in a similar situation—benefits from the damage cap, even though Stowers facts exist. In fact, the negligent insurer benefits every time the physician’s damages are capped. Under Dissent’s construction, negligent insurers are treated no differently than non-negligent insurers. The plain and principal purpose of section 11.02(c) of not benefitting bad-acting insurers is ignored and thwarted. The Court keenly analyzes the real effect of Dissent’s meaningless construction:

The analysis in Welch deprives section 11.02(c) of any meaning, extending the cap to insurers when Stowers facts exist. . . . Dissent, like Welch, attributes no meaning to the Stowers exception. By doing this, the Dissent is able to

disregard section 11.02(c)'s principal purpose: that the cap does "not limit the liability of any insurer" when Stowers facts exist. . . .

Opinion, at * 3. Thus, Dissent's construction violates the Court's primary objective when reviewing a statute: "to determine and give effect to the Legislature's intent." *See National Fire & Liability Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). Dissent's construction accomplishes just the opposite. Moreover, legislative history and dialogue support the notion that the Legislature, by enacting the specific language of section 11.02(c), fully intended to preserve the Stowers doctrine as an incentive to settlement. Opinion, at * 5 ("debate surrounding the Stowers exception included concerns about how the cap might adversely impact settlement negotiations."). The Court explained the public-policy importance and benefit of preserving the Stowers incentive to settlement:

Indeed, the common-law Stowers Doctrine encourages prompt and reasonable settlements by eliminating a potential for conflict between insurer and insured in cases involving damage claims exceeding policy limits. In such cases, when the insured's liability is reasonably certain, an insurer motivated by self-interest, may be tempted to resist reasonable settlement offers, assuming that any adverse judgment will exhaust policy limits and that proceeding to trial will put only the insured's money at risk. Stowers penalizes this type of self-interest by raising the stakes for the insurer should it act unreasonably when presented with an opportunity to settle within policy limits.

Opinion, at * 4, *citing* 1 JAMES B. SALES AND HADLEY EDGAR, *Texas Torts and Remedies* § 71.09[b] (2008).

But, once again, as observed by the Court, Dissent's construction renders section 11.02(c) meaningless and frustrates Legislative intent by accomplishing the exact opposite result by emasculating the Stowers incentive:

Capping the insured physician's liability at a fixed amount eliminates any potential for conflict between insurer and insured above that amount, but does nothing to encourage settlement. In fact, it may have the opposite effect in the most serious cases, that is, in cases where liability is reasonably certain to exceed the cap. The statutory Stowers exception, however, ameliorates that potential effect.

Opinion, at * 5 (underlining added). Amici argue that the “broad intent” of the 1977 MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT was to “reduce health care liability costs.” But, reducing insurance companies’ costs at all costs was not Legislature’s purpose. The Legislature had some regard for injured patients. *See Lucas v. United States*, 757 S.W.2d 687, 720 (Tex. 1988) (Phillips, C.J. dissenting) (“[T]he exclusion of Stowers claims from the limits [indicates] a legislative solicitude for injured claimants.”). The Legislature made plain its desire that any changes to the health care liability system be done “in a manner that will not unduly restrict a claimant’s rights any more than necessary to deal with the crisis.” Art. 4590i, sec. 1.02(a)(3). By its plain language in section 11.02(c), the Legislature made clear its intent that the damage cap not be used in a manner that would abrogate the Stowers doctrine, or would reward bad-acting insurance companies. Dr. Phillips and Amici urge the Court, on rehearing, to simply ignore and frustrate “unmistakable” legislative intent, which it cannot, in good faith, do.

Rule Three: The Court may not permissibly construe a statute in a manner inconsistent with statutory language unless the Court makes an express finding that such a construction would lead to an absurd result.

The third reason that the Court cannot properly adopt Dissent’s interpretation of section 11.02(c) is because neither Dr. Phillips or Amici have suggested, or can suggest, that

the Court’s construction would lead to an “absurd” result. Because the Court has carefully analyzed the language in section 11.02 and has discerned the Legislature’s “unmistakable” intent from the statutory language, the Court cannot properly ignore or circumvent that intent absent an express finding that following the Legislature’s language leads to an “absurd” result. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008). In the past, the Court has meticulously declined to measure or question the logic or wisdom of an enactment, so long as the ultimate result of the plain meaning is not absurd. *Id.*, at 629, *citing Lee v. City of Houston*, 807 S.W.2d 290, 293 (Tex. 1991). “Absurd” has been judicially defined to mean “utterly or obviously senseless, illogical, or untrue; contrary to all reason or common sense; laughably foolish or false.” *McGhee v. Helsel*, 686 N.W.2d 6, 8 (Mich. App. 2004), *citing* RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1977).

The result intended by the unmistakable statutory language is not “absurd” as to any of the affected parties. Under the Court’s construction, while the Stowers-compliant insurer receives the benefit of the damage cap, in certain cases, the Stowers-violating insurer does not. The Stowers-negligent insurer is treated no differently than if the section 11.02(a) caps did not exist in the first place. This result offers incentive for the insurer to comply with its Stowers duties, but does not unfairly penalize the insurer beyond the fair amount of damages found by the jury and approved by the court. There is no absurd or unfair result to the insurer.

The physician may lose control of his Stowers claim above the level of his personal exposure, but his personal exposure is still capped at the level of the damage cap. Moreover, the physician receives the benefit of the Stowers incentive being placed upon his insurer to negotiate for settlement in good faith so as to avoid a needless and costly trial. There is no absurd or unfair result to the physician.

The injured patient not only receives the benefit of the Stowers incentive on the insurer to settle the claim, but the patient also retains his Stowers-based incentive to make a reasonable settlement demand within coverage limits so as to be able to invoke a Stowers situation. The patient receives no windfall, but only the amount of actual damages found by the jury, and approved by the court. There is no absurd or unfair result to the injured patient.

IV. THE COURT IS LEFT WITH ONLY TWO PERMISSIBLE OPTIONS: OVERRULE THE MOTION FOR REHEARING, OR MERELY AFFIRM THE COURT OF APPEALS' JUDGMENT

Having correctly concluded, as it did, that Dissent's construction renders section 11.02(c) impermissibly meaningless, and creates a result contrary to Legislative intent, the Court is left to choose between the construction it has adopted, or merely opt for the alternative construction articulated by the court of appeals. The endless objections and complaints raised by Dr. Phillips and Amici to the Court's opinion are mostly imagined and without merit. However, each objection raised by Dr. Phillips and Amici would be easily resolved if the Court, upon rehearing, merely affirmed the court of appeals' judgment. Ironically, Dr. Phillips and Amici appear to suggest that, because of the myriad of the

problems they forecast will be caused by the Court's opinion, they prefer the judgment of the court of appeals. A brief review of the complaints raised by Dr. Phillips and Amici reveals that each, though without merit, could be resolved by affirming the court of appeals' judgment.

No unfair surprise to insurers— Amici insurers profess shock and surprise that the Court would issue an opinion (in a case to which they were not a party) that might involve indirect potential harm to them in a subsequent and different case, without first consulting them. But the plain truth is that the malpractice insurance carrier in this case (or other insurers in other cases) is affected no better or worse in the Court's opinion than it was in the court of appeals' opinion below. The result to the insurer is the same. Under both the logic of this Court and the court of appeals, and in pure harmony with stated Legislative intent, the bad-acting insurer would not be permitted to benefit from the damage cap. Both courts would allow, upon a finding of Stowers negligence in a subsequent suit, recovery from the negligent insurer of the full amount of the medical malpractice judgment without caps. The court of appeals opinion would permit the insured physician (or his assignee) to prosecute the Stowers action. This Court would permit the physician to assert the portion of his Stowers claim for which he had personal liability, and then allow the injured victim to be placed "in the shoes" of the physician to prosecute the balance of the Stowers claim. Amici insurers never complained about the court of appeals judgment, by amicus brief or otherwise. If, upon rehearing, the Court is convinced that its opinion renders an unfair hardship or

surprise upon insurers, it may avoid that problem by affirming the court of appeals' judgment.

No “new cause of action”– Dr. Phillips and Amici complain that the Court has created a “new cause of action.” But, the Court did nothing of the sort. The Court simply did its level best to construe section 11.02(c) in accord with accepted rules of statutory construction. No new “cause of action” was created by the Court or the Legislature. Rather, the Court made plain that the “Stowers exception to the cap is like [the] right of equitable subrogation. It puts the injured third party in the shoes of the insured to the extent the cap eliminates the insured’s incentive to enforce the insurer’s duty to settle with reasonable care.” Opinion, at *5 (underlining added). Nonetheless, if the Court is convinced, upon rehearing, that it has improperly created a new “cause of action,” it may avoid that result simply by affirming the judgment of the court of appeals.

No unfair “loss of control” of Dr. Phillips’ Stowers action– Dr. Phillips complains that the Court’s opinion causes him to “lose control” over the portion of the Stowers claim for which he has no underlying personal liability. This is an interesting position for Dr. Phillips to take, because it would appear that most physicians would be delighted to trade several millions of dollars in personal liability for the “loss of control” of a portion of their Stowers claim for which they had no personal exposure. Even so, if the Court determines that this “loss of control” is patently unfair to Dr. Phillips, the issue can be resolved by

affirming the court of appeals' judgment, under which Dr. Phillips would maintain complete control of his Stowers action.

No potential promotion of collusion and fraud in other cases— First, there is no evidence to establish even a hint of collusion or fraud in this case. However, certain of the Amici suggest that the Court's opinion could foster collusion and fraud in future cases. Their rationale is that a physician being sued for medical malpractice might be tempted to collude with his injured patient to defraud the insurance company by assigning the physician's Stowers action to the patient before the malpractice trial occurs, and then lay-down for an excessive judgment. There are, however, two fatal flaws to this reasoning. First, as pointed out by amicus TMLT (TMLT Amicus Brief, at 12), medical malpractice cases are the least likely cases in which an insured might have incentive to collude with the victim. This is so because there are other serious consequences to the defendant physician responsible for a large judgment, such as reporting the judgment to the Texas Board of Medical Examiners and the National Practitioners Data Bank. The insured retains every incentive to contest any judgment that might be rendered against him. Second, this Court developed adequate safeguards to prevent collusion the plaintiff and insured in Stowers situations in *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996). There is no reason that the *Gandy* safeguards of a fully adversarial trial would not apply to a situation under section 11.02(c). However, if the Court is convinced, upon rehearing, that its opinion creates new

and unprecedented potential for insurance fraud that *Gandy* will not prevent, the Court may avoid that danger by simply affirming the judgment of the court of appeals.

No new duty between insurer and injured patient– Amicus TMLT professes fear that the Court’s opinion comes “dangerously close to creating unprecedented duties owed by insurer to third-party claimants.” TMLT Amicus Brief, at 11. Not true. The liability insurer’s duty would remain the same as it always has been—to the insured alone. Only if the insurance company breached its duty to its insured could it be liable under a Stowers claim. The Court’s opinion merely places the injured patient “in the shoes” of the insured physician to assert the physician’s Stowers claim. If the physician refuses to consent to settlement in the underlying trial, it would be difficult to imagine how that physician could, as a matter of law, assert a Stowers negligence claim against his insurer for failing to settle the claim over his objection. However, once again, if the Court is convinced that it has created some undesirable “new” duty, it can avoid that problem by affirming the court of appeals’ judgment.

CONCLUSION AND PRAYER

Because of the reasons presented herein, the Bramlett’s respectfully request that the motion for rehearing be overruled, or alternatively, that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

John Smithee
State Bar No. 18768800
**TEMPLETON, SMITHEE, HAYES,
HEINRICH & RUSSELL, L.L.P.**
320 S. Polk, Suite 1000, Lobby Box 5 (79101)
P. O. Box 15010 (79105)
Amarillo, Texas
806-324-0324 – Telephone
806-379-8568 – Facsimile

Alexander B. Klein III
State Bar No. 11556250
J. Todd Trombley
State Bar No. 24004192
THE KLEIN LAW FIRM
2000 The Lyric Centre
4400 Louisiana Street
Houston, Texas 77002
713-650-1111 – Telephone
713-227-1121 – Facsimile

Thomas J. Turner
State Bar No. 20331300
TURNER & JORDAN, P.C.
2017 Broadway
P. O. Box 10104
Lubbock, Texas 79408-0104
806-763-3661 – Telephone
806-741-1396 – Facsimile

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of June, 2009, a true and correct copy was delivered as follows:

<p>Mr. Jim Hund HUND & HARRIGER, LLP 4021 84th Street P. O. Box 54390 Lubbock, Texas 79453-4390 <i>Attorneys for Benny P. Phillips, M.D.</i></p>	<p>Certified Mail, Return Receipt Requested <input type="checkbox"/> United States Regular Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Hand-Delivery <input type="checkbox"/></p>
<p>Ms. Sarah B. Duncan Ms. Susan A. Kidwell Mr. John H. Marks, Jr. Locke Lord Bissell & Liddell, LLP 100 Congress Avenue, Suite 300 Austin, Texas 78701 <i>Attorneys for The Medical Protective Company</i></p>	<p>Certified Mail, Return Receipt Requested <input type="checkbox"/> United States Regular Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Hand-Delivery <input type="checkbox"/></p>
<p>Mr. Thomas F. Nye Mr. Robert W. Clore Vidaurri, Lyde, Gault & Quintana, LLP 717 Everhart Road, Suite A Corpus Christi, Texas 78411 <i>Attorneys for Texas Medical Association and Texas Alliance for Patient Access</i></p>	<p>Certified Mail, Return Receipt Requested <input type="checkbox"/> United States Regular Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Hand-Delivery <input type="checkbox"/></p>
<p>Mr. R. Brent Cooper Ms. Diana L. Faust Cooper & Scully, PC 900 Jackson Street, Suite100 Dallas, Texas 75202 <i>Attorneys for Texas Medical Liability Trust</i></p>	<p>Certified Mail, Return Receipt Requested <input type="checkbox"/> United States Regular Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Via Facsimile Transmission <input type="checkbox"/> Via Hand-Delivery <input type="checkbox"/></p>

John Smithee