

THOUGHT LEADERSHIP

News

## FACT ISSUE PRECLUDES SUMMARY JUDGMENT ON STOWERS CLAIM DESPITE ABSENCE OF REQUIRED EXPERT REPORT AT TIME OF DEMAND

Newsbrief

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Last Tuesday, a federal district court rejected an insurer's motion for summary judgment on a *Stowers* claim against a liability insurer after the insurer rejected settlement offers within policy limits and an excess judgment was entered against their insured. In *Bramlett v. Medical Protective Co. of Fort Wayne, Indiana*, 2013 WL 796725 (N.D. Tex. March 5, 2013), following surgery, the treating physician suspected internal bleeding and ordered related tests, but then left the hospital before checking the results to work out with his personal trainer. By the time he returned and checked the test results, it was too late and the patient later died from post-operative bleeding. Almost one year later, after the death but before presenting a required expert's report indicating the doctor was negligent, the decedent's family presented a demand for the \$200,000 policy limit but the offer was rejected. A second offer was made and the expert's report was provided, but that offer was allowed to expire. The trial court entered judgment in excess of \$12,000,000 and the decedent's family pursued the insurer for the excess judgment.

There was no dispute that the first two *Stowers* elements; a claim within the scope of the liability coverage and, a demand within policy limits, were met. But the insurer moved for summary judgment asserting that the third element of *Stowers* – that the offer was such that a reasonable and prudent insurer would accept it considering the insured's potential exposure – was not met as a matter of law. As to the first demand, the insurer asserted that plaintiffs failed to provide the statutorily-required expert report expressing a medical opinion that the treating physician was negligent. The court rejected this argument observing that a jury could find based solely the facts as known to the insurer at the time of the demand, that a reasonably prudent insurer should have accepted it. As to the second demand, the insurer argued that its actions were reasonable because the 17 day time period allowed to accept the offer was insufficient. The court noted that there are some instances that the time allowed to accept the offer can be unreasonable, but under the facts of this case, the question is one of fact and the jury should be allowed to apply the "reasonably prudent insurer standard." Accordingly, summary judgment was denied.