

Does anyone see anything wrong with this interpretation? I do, and I dissent.

I. APPLICABLE LAW

A. STATUTORY DUTY TO ATTEMPT TO SETTLE

Article 21.21 defines insurer conduct that constitutes unfair competition methods or unfair or deceptive acts or practices. TEX. INS. CODE art. 21.21. Before the Legislature last amended section 16 of article 21.21, the provision read:

Any person who has sustained actual damages as a result of another's engaging in an act or practice declared in Section 4 of this Article *or in rules or regulations lawfully adopted by the Board under this Article* to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance . . . may maintain an action against the person or persons engaging in such acts or practices.

TEX. INS. CODE art. 21.21, § 16 (emphasis added) (amended by Act of June 8, 1995, 74th Leg., ch. 414, § 13, 1995 Tex. Gen. Law 3000-01).

State Board of Insurance Order No. 18663, adopted under article 21.21, prohibits unfair or deceptive practices “as defined by the provisions of the Insurance Code.” Tex. Bd. of Ins., Bd. Order No. 18663 (codified at 28 TEX. ADMIN. CODE § 21.3). The Insurance Code, in article 21.21-2, defines an unfair practice as “[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear.” TEX. INS. CODE art. 21.21-2, § 2(b)(4).

Notably, the 1995 amendments to article 21.21 section 16 eliminated the language “or in rules or regulations lawfully adopted by the Board under this Article” and added a detrimental reliance requirement for certain claims. TEX. INS. CODE art. 21.21, § 16. Moreover, as shown above, the Legislature amended article 21.21 in 1995 to define an insurer's unfair practice to include “failing to attempt in good faith to

effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." TEX. INS. CODE art. 21.21, § 4(10)(a)(ii). Accordingly, article 21.21 now expressly incorporates the unfair settlement practice defined in article 21.21-2, with some limiting language, rather than incorporating that practice through the Insurance Board order and article 21.21-2.

B. STATUTORY CONSTRUCTION

In construing a statute, our objective is to determine and give effect to the Legislature's intent. *National Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998). We must first look at the statute's plain and common meaning. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). This is because we presume the Legislature intended the plain meaning of its words. *Allen*, 15 S.W.3d at 527. If the statute is unambiguous, we typically adopt the interpretation the plain meaning of the statute's words and terms support. *Fitzgerald*, 996 S.W.2d at 865. Consequently, when a statute's language unambiguously establishes the Legislature's intent, we do not use extrinsic aids to find an intent the statute does not express. *See Allen*, 15 S.W.3d at 527; *Fitzgerald*, 996 S.W.2d at 865. Statutory construction issues are legal questions we review *de novo*. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989).

Courts must determine a statute's intent to give full effect to all its terms. *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984). However, "[courts] are not the law-making body. They are not responsible for omissions in legislation." *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920); *see also RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985). Courts must enforce the laws as the

Legislature enacts them, because, “when [courts] stray from the plain language of a statute, we risk encroaching on the Legislature’s function to decide what the law should be.” *Fitzgerald*, 996 S.W.2d at 866.

C. JNOV STANDARD

A trial court may grant a motion for judgment notwithstanding the verdict if there is no evidence upon which the jury could have made the findings relied upon. *Exxon Corp. v. Quinn*, 726 S.W.2d 17, 19 (Tex. 1987); *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 728 (Tex. 1982); *Dodd v. Texas Farm Prods. Co.*, 576 S.W.2d 812, 814 (Tex. 1979). In reviewing a trial court’s judgment notwithstanding the verdict, we view all the evidence in a light most favorable to the party against whom the trial court entered the judgment, and we indulge “every reasonable intendment deducible from the evidence . . . in that party’s favor.” *Dowling*, 631 S.W.2d at 728; *see also Exxon Corp.*, 726 S.W.2d at 19; *Dodd*, 576 S.W.2d at 814. When more than a scintilla of competent evidence exists to support the jury’s findings, the reviewing court should reverse a judgment notwithstanding the verdict. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990).

II. ANALYSIS

A. THE STATUTORY LIABILITY STANDARD

The pre-1995 version of articles 21.21 and 21.21-2 apply in this case. Under those provisions, the Court correctly concludes that an insured, such as Rocor, has a cognizable claim under article 21.21 against National Union, Rocor’s insurer, for unfair settlement practices. *See* __ S.W.3d at __ (discussing

Allstate Ins. Co. v. Watson, 876 S.W.2d 145, 147-50 (Tex. 1994); *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 317 (Tex. 1994); *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 847 (Tex. 1994)).

However, the Court's holding about the elements necessary to prove an insurer's unfair settlement practice is clearly wrong. *See* ___ S.W.3d at ___. In determining the statutory liability standard, the Court impermissibly leaps into the legislative realm and completely eliminates a duty and claim the Legislature expressly created. *See Simmons*, 220 S.W. at 70; *RepublicBank Dallas*, 691 S.W.2d at 607.

National Union contends that, because article 21.21 does not define the liability standard, the Legislature intended that courts apply the common-law *Stowers* standard. *See* TEX. INS. CODE art. 21.21, §§ 4(1)(a)(ii), 16; art. 21.21-2, § 2(b)(4). *Stowers* provides that an insured may sue its insurer for negligently failing to settle a third party's claim against the insured. *See G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved). However, an insurer's common-law *Stowers* duty is triggered only when: (1) the claim against the insured is within the scope of the policy's coverage; (2) the suing third party makes a settlement demand within the policy limits; and (3) the demand's terms are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Garcia*, 876 S.W.2d at 849 (discussing *Stowers*, 15 S.W.2d at 547).

Remarkably, the Court embraces National Union's position that the *Stowers* standard applies to the statutory claim raised here. Specifically, the Court holds that:

[A]n insurer's liability is not reasonably clear, and liability may not be imposed under article 21.21, unless the insured shows that (1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the

demand's terms are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's exposure to an excess judgment.

See ___ S.W.3d at ___. Thus, the Court engrafts onto the statutory liability standard the *Stowers* liability standard as necessary elements to prove that the insured's liability is reasonably clear and that liability may be imposed.

I agree that article 21.21 implies that the policy must cover the claim and that the insured's liability to the third party must be reasonably clear to trigger the statutory duty. However, the Court's basis for determining that the other *Stowers* factors apply is not persuasive and exceeds the statute's boundaries. The Court should apply our well-established statutory construction rules to ascertain the Legislature's intent and to interpret and apply article 21.21. See *Allen*, 15 S.W.3d at 527; *Fitzgerald*, 996 S.W.2d at 865; *Liberty Mut. Ins.*, 966 S.W.2d at 484. And, if the statute unambiguously demonstrates the Legislature's intent and thus the statute's meaning, the Court must not resort to extrinsic aids to hypothesize about an intent the statute does not express. See *Allen*, 15 S.W.3d at 527; *Fitzgerald*, 996 S.W.2d at 865.

When Rocor sued National Union, article 21.21-2 prohibited insurers from "*not attempting* in good faith" to effectuate settlement when "liability has become reasonably clear." TEX. INS. CODE art. 21.21-2, § 2(b)(4) (emphasis added). The statute's plain and common language evidences the Legislature's intent to impose a duty on insurers to take good faith action when liability becomes reasonably clear. See TEX. INS. CODE art. 21.21-2, § 2(b)(4); *Allen*, 15 S.W.3d at 527; *Fitzgerald*, 996 S.W.2d at 865. In other words, the statute requires insurers to take good faith affirmative steps to effectuate a settlement once liability becomes reasonably clear. I believe the statute's plain language limits the statutory liability standard to these elements.

In contrast, the common-law *Stowers* duty requires insurers to accept reasonable settlement demands within policy limits that an ordinarily prudent insurer would accept, considering the insured's potential exposure to a judgment exceeding the policy limits. *Garcia*, 876 S.W.2d at 848-49. Thus, the *Stowers* standard does not impose an affirmative duty on insurers until the suing party makes a settlement demand that an ordinarily prudent insurer would accept. *See Garcia*, 876 S.W.2d at 849. Moreover, under *Stowers*, the insurer only has a duty to accept a settlement demand if an ordinarily prudent insurer would do so under the circumstances. This purely objective standard differs significantly from the good faith standard that expressly applies to the insurer's statutory duty. Indeed, this Court has defined "good faith" differently in other contexts after recognizing that a good faith standard differs from a negligence standard. *See, e.g., Wichita County, Texas v. Hart*, 917 S.W.2d 779, 784 (Tex. 1996) (holding that "good faith" in the Whistleblower Act context encompasses subjective and objective components); *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 285-86 (Tex. 1998) (discussing "good faith" definitions in various contexts); *see also* TEX. BUS. & COM. CODE § 2.103 (defining a merchant's "good faith" in the sales context as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade").

Despite the obvious distinctions between an insurer's common-law *Stowers* duty and article 21.21's statutory duty, the Court holds that the *Stowers* liability standard applies regardless of which duty the insurer allegedly breached. Thus, the Court flagrantly disregards our rule that, when a statute unambiguously expresses the Legislature's intent, as it does here, we must not use extrinsic aids, such as the common law, to find an intent the statute does not express. *See Allen*, 15 S.W.3d at 527; *Fitzgerald*, 996 S.W.2d at 865. Under the Court's holding, when liability is reasonably clear, as the jury concluded

in this case, the insurer does not risk statutory liability if it fails or refuses to solicit a settlement (read: fails or refuses to attempt in good faith to effectuate settlement). Rather, the insurer need only wait until the suing party makes a settlement demand within policy limits that an ordinarily prudent insurer would accept under the circumstances. The Court's holding thus renders the statutory duty meaningless.

The Court explains that applying the *Stowers* liability standard to the statutory duty “promotes uniformity and prevents insurers from facing conflicting liability standards.” *See* __ S.W.3d at __. But the Court's rationale lacks a firm foundation and instead rests on “sinking sand.” This is because the Court's rationale ignores the separate and distinguishable duties an insurer has under the statute and *Stowers*. And it fails to acknowledge that the statutory duty and *Stowers* duty clearly serve different purposes.

On one hand, the statutory duty prohibits insurers from sitting back, prolonging a dispute's resolution, and causing an insured to sustain actual damages — such as the additional defense costs Rocror incurred here — once liability becomes reasonably clear. The statutory standard also protects an insured from suffering substantial reputation, business, and personal damages that pending litigation may cause.

On the other hand, the *Stowers* duty mandates that insurers accept a reasonable settlement demand that an ordinarily prudent insurer would accept. *Garcia*, 876 S.W.2d at 848-49. Whether liability became reasonably clear is of no moment for triggering the *Stowers* duty. Thus, the *Stowers* standard protects an insured from litigating a claim that may or may not have merit, but, because of the circumstances, could expose the insured to significant liability that exceeds the policy limits. Indeed, an insured who establishes that an insurer breached the *Stowers* duty may recover, as a matter of law, the amount in the judgment rendered against the insured that exceeds the applicable policy limits. *See, e.g., Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 606 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

Furthermore, the Court's holding that the *Stowers* liability standard applies to the statutory duty flies in the face of this Court's statement in *Garcia* that "breach of the *Stowers* duty does not constitute a violation of article 21.21 or the DTPA." *Garcia*, 876 S.W.2d at 847. The Court attempts to negate this statement's importance. But the Court does so only when discussing *Garcia's* impact on whether an insured has an article 21.21 claim for damages it incurred, because its insurer engaged in unfair settlement practice regarding a third party-claim. *See* __ S.W.3d at __. The Court does not, and cannot, explain why this statement from *Garcia* does not preclude the Court from now conflating the distinguishable *Stowers* and statutory duties.

Additionally, the Court mischaracterizes my position when it states that, under my view, liability is reasonably clear within the statute's meaning if the insured "clearly caused the third party's injuries." *See* __ S.W.3d at __. The Court explains that, under my view, "an insurer could be held liable for failing to settle even if the amount of the injured third party's damages were unknown or unclear." *See* __ S.W.3d at __. This is absolutely incorrect. First, the Court's analysis fails to appreciate the distinct difference between liability and damages. No language in the statute suggests that the exact amount of damages due must be reasonably clear before the insured has a duty to attempt in good faith to effectuate settlement. Second, as discussed above, the statute expressly imposes a duty on the insured to take affirmative steps when "liability has become reasonably clear," while the *Stowers* duty only requires insurers to accept reasonable settlement demands. The Court claims that its holding that the *Stowers* liability standard applies to the statutory standard "is consistent with the statutory purpose the dissent identifies, because it is expressly intended to encourage swifter dispute resolution." *See* __ S.W.3d at __ (citing *Garcia*, 876 S.W.2d at 851 & n.18). But this statement wholly disregards that my position encourages dispute

resolution even more than the Court's holding, because the Court entirely eliminates a separate and distinct statutory settlement duty on the insurer.

In sum, despite the statute's unambiguous, plain language, the Court assumes it can *carte blanche* reinvent the liability standard for violating the statutory duty. Courts must enforce laws as the Legislature enacts them. *See Fitzgerald*, 996 S.W.2d at 866; *Simmons*, 220 S.W. at 70. To do otherwise, as the Court does here, is to encroach on the constitutional provisions endowing the Legislature with the sole authority to create our law. *See* TEX. CONST. art. 2, § 1; art. 3, § 1; *Fitzgerald*, 996 S.W.2d at 866; *Simmons*, 220 S.W. at 70. I would hold that an insured establishes liability under the statute if, under the statute's plain language, the insurer did not attempt in good faith to effectuate a prompt, fair, and equitable settlement once liability became reasonably clear.

B. JNOV REVIEW

There is more than a scintilla of evidence to support the jury's conclusion that National Union failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement once liability became reasonably clear. *See Exxon Corp.*, 726 S.W.2d at 19; *Dowling*, 631 S.W.2d at 728; *Dodd*, 576 S.W.2d at 814. There is evidence that the attorneys for Rocor and National Union agreed, from very beginning, that the suit exposed Rocor to significant liability. Further, in January 1990, National Union advised Rocor that liability would likely reach the excess insurance coverage it provided. From that time, National Union decided it would take over the settlement efforts. And there is evidence that one year before the settlement, National Union's attorney assessed liability at almost exactly the amount for which the case eventually settled. Consequently, there is evidence to support the jury's finding that liability became

reasonably clear as the statute requires to establish an insurer's liability.

Furthermore, though National Union took over settlement negotiations once it acknowledged Rocor's liability would trigger the excess policy coverage, National Union halted mediation efforts after it assumed settlement authority. And, then, National Union made settlement offers in amounts significantly below the assessed liability. In fact, National Union's first settlement offer reflected that National Union would not have to pay any money, because Rocor's other insurers would have covered the smaller amounts National Union offered. Moreover, there is evidence that Rocor's defense attorney advised Rocor and National Union that detrimental evidence existed, and thus, National Union should quickly settle to avoid defense costs. National Union's attorney acknowledged that National Union benefitted from the delayed settlement because it continued to earn interest on investments. Assuming the good faith standard encompasses both an objective and subjective element, this evidence supports a jury finding that National Union lacked both. And, though no ideal time period in which parties must reach settlement exists, there is evidence that Rocor incurred legal expenses to prepare for trial because National Union delayed settling long after liability became reasonably clear. Therefore, viewing all the evidence in a light most favorable to Rocor, the jury could conclude that National Union failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement. *See Mancorp*, 802 S.W.2d at 228.

There is more than a scintilla of evidence to support the jury's conclusion that National Union violated the statutory duty article 21.21 clearly establishes. Consequently, the trial court erred in granting the judgment notwithstanding the verdict. *See Mancorp*, 802 S.W.2d at 228; *Exxon Corp.*, 726 S.W.2d at 19; *Dowling*, 631 S.W.2d at 728; *Dodd*, 576 S.W.2d at 814.

C. OTHER ISSUES AND DISPOSITION

1. ELECTION OF REMEDIES

Rocor pleaded more than one recovery theory. But under the election-of-remedies doctrine, Rocor could elect to recover the greatest relief under any theory that the verdict supports. *See Bradley's Elec., Inc. v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999). Here, Rocor has elected to recover under article 21.21, which affords greater recovery than ordinary negligence. Consequently, the trial court's judgment notwithstanding the verdict may be reversed on this basis, and the Court need not consider National Union's argument that the court of appeals erred in rendering judgment on the jury's negligence finding.

2. CHARGE ERROR

National Union argues that, even if the Court concludes that Rocor has a statutory claim, it should remand the case for a new trial based on the alleged erroneous jury charge. National Union contends that the broad-form liability question submitted two unfair deceptive act theories — misrepresentation and unfair settlement practice — and the misrepresentation theory is legally invalid.

But National Union did not object to the charge on the basis that it included an invalid legal theory. Instead, National Union argued only that Rocor lacked standing to maintain a claim under article 21.21 for unfair settlement practices. A party's objection to the charge must be timely and specific. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388-89 (Tex. 2000). Accordingly, National Union did not preserve its argument that the broad-form liability question improperly submitted an invalid legal theory. *See* TEX. R. APP. P. 33.1(a).

However, National Union did object to the trial court's submitting the misrepresentation theory because it lacked an evidentiary basis. Applying a traditional harm analysis, I conclude that the record — including the pleadings, the evidence, and the entire charge — does not demonstrate that the unsupported misrepresentation theory probably caused rendition of an improper judgment or prevented National Union from properly presenting the case on appeal. TEX. R. APP. P. 61.1; *see also Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995) (A charge with an erroneous instruction was not harmful because nothing in the record showed the jury based its verdict on the instruction.); *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986) (In determining if an alleged charge error is reversible, the reviewing court must determine if, under the entire case's circumstances, the error was reasonably calculated and probably did cause an improper judgment.).

3. ATTORNEY'S FEES

When Rocor sued National Union, article 21.21 section 16 permitted, as it does today, a plaintiff to recover reasonable and necessary attorney's fees. *See* TEX. INS. CODE art. 21.21, § 16. The jury awarded Rocor reasonable and necessary attorney's fees on a percentage basis — forty percent.

While Rocor's appeal was pending in the court of appeals, we decided *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997). In that case, we held that a plaintiff seeking attorney's fees under the DTPA must prove the attorney's fees were reasonable and necessary to the case's prosecution and must ask the jury to award the fees in a specific dollar amount, not as a percentage of the judgment. *Arthur Andersen Co.*, 945 S.W.2d at 818-19. Consequently, National Union argued in the court of appeals that *Arthur Andersen* applied to preclude Rocor's recovering the percentage

attorney's fees awarded.

To preserve a complaint for appellate review, an appellant must object and obtain a ruling from the trial court. TEX. R. CIV. P. 274; TEX. R. APP. P. 33.1(a). Here, National Union did not object to the form of the attorney's fees question or to an award of attorney's fees on a percentage basis. Accordingly, National Union waived any objection to the percentage attorney's fee question, and thus, Rocor may recover the attorney's fees awarded.

4. DISPOSITION

Rocor has a cognizable claim under article 21.21 section 16 for unfair settlement practices, and the evidence supports the jury's liability finding on this claim. Additionally, Rocor has elected to recover under this theory, which affords greater relief than the negligence theory the court of appeals upheld. Thus, the Court should reverse the court of appeals' judgment and remand the case to the trial court to enter judgment consistent with the jury's verdict and the applicable statute.

III. CONCLUSION

Today, the Court combines two distinct duties for insurers — one from the common law and the other from a statute — to create a cause of action that exists neither in the common law nor in the statute. In doing so, the Court ignores the statute's plain meaning, engrafts language into the statute that does not exist, and refuses to give effect to the Legislature's intent. Well over one hundred years ago, this Court recognized the long-standing rule: "It is the duty of a court to administer the law as it is written, and not to make the law." *Turner v. Cross*, 18 S.W. 578, 579 (Tex. 1892). This legislative act from the bench

eviscerates the statutory claim. Accordingly, I dissent.

James A. Baker,
Justice

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