

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**American Guarantee and Liability Insurance Company v. ACE
American Insurance Company**

No. 19-20779, United States Court of Appeals for the Fifth Circuit (March 4, 2021)

SUMMARY

The Fifth Circuit held that a primary insurer violated its **Stowers** duty to settle by rejecting a \$2 million policy-limits demand made on behalf of both adult and minor plaintiffs, even though the lump-sum offer did not specify allocation among the claimants. The court found no inherent conflict of interest between the minor children and their next friend (the mother) that would make the offer conditional, because any post-settlement court scrutiny of apportionment did not create an unacceptable risk of further liability. The court also affirmed that a second offer seeking “\$1.9MM to \$2.0MM with costs” was ambiguous and did not trigger the **Stowers** duty, and that the insurer negligently failed to reevaluate the settlement value in light of adverse trial rulings. The case clarifies Texas **Stowers** law regarding lump-sum settlement offers involving minors and the necessity of clear, unconditional demands within policy limits.

CASE DETAILS

COURT	United States Court of Appeals for the Fifth Circuit
WRITING FOR THE COURT	Edith H. Jones; E. Grady Jolly; Don R. Willett
JURISDICTION	Federal
DECIDED	March 4, 2021
DOCKET	19-20779
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from summary judgment and bench trial in the United States District Court for the Southern District of Texas.
STANDARD OF REVIEW	De novo for summary judgment and legal conclusions; clear error for factual findings.
PRECEDENTIAL VALUE	Published
PARTIES	ACE American Insurance Company v. American Guarantee and Liability Insurance Company

TOPICS

insurance bad faith

insurance coverage

summary judgment

civil procedure

appellate procedure

PRACTICE AREAS

Insurance Law

Civil Procedure

QUESTIONS PRESENTED

1. Whether the district court erred in holding that all three settlement offers triggered the Stowers duty.
2. Whether the district court erred in concluding that ACE violated its Stowers duty by rejecting the third settlement offer.

HOLDINGS

1. The third settlement offer, which was for a lump sum of \$2 million and was unconditional, generated a Stowers duty because it proposed to release the insured fully and was not conditional.
2. ACE violated its Stowers duty by rejecting the third offer because an ordinarily prudent insurer would have accepted it given the adverse trial developments.

KEY QUOTATIONS

“On behalf of Michelle Lynn Braswell, Individually, and as Next Friend of Matthew Braswell and Mary Braswell and as Independent Executrix of the Estate of William Markley Braswell, deceased, and Sandra South Bra[s]well ('Plaintiffs'), I am writing to convey an unconditional offer to settle all claims against The Brickman Group Ltd. and Guillermo Rafael Bermea ('Defendants'). . . . Please be advised that Michelle and Sandra Braswell hereby make this unconditional offer to settle within the primary policy limits represented to us to be applicable to any judgment rendered in this case to settle any and all claims that were asserted or could be asserted in the above-referenced matter for the total sum of \$2,000,000.00.” (at 6-7)

“An ordinarily prudent insurer would have reevaluated the settlement value of the case [and accepted the Braswells' third offer].” (at 11-12)

FACTUAL BACKGROUND

Mark Braswell died after his road bike collided with a stopped truck owned by Brickman Group Ltd. His survivors sued Brickman. Brickman had primary liability insurance of \$2 million from ACE American Insurance Company (ACE) and excess coverage of \$10 million from American Guarantee and Liability Insurance Company (AGLIC). ACE controlled settlement negotiations. Before and during trial, plaintiffs made three settlement offers. The jury awarded nearly \$40 million, reduced to \$28 million for comparative negligence. The parties eventually settled for nearly \$10 million, with AGLIC paying the excess of \$8 million after ACE paid its \$2 million policy limit. AGLIC then sued ACE for equitable subrogation, alleging ACE violated its Stowers duty by rejecting the settlement offers.

PROCEDURAL HISTORY

The district court granted summary judgment on the issue of whether three settlement offers triggered the Stowers duty, holding all three did. After a bench trial, the court held that ACE violated its Stowers duty by

rejecting the second and third offers but fulfilled it for the first. ACE appealed, challenging the trigger and the violation findings.

DISPOSITION

affirmed

CASES CITED

- G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929)
- Petzold v. Rostollan, 946 F.3d 242 (5th Cir. 2019)
- Colonial Penn Ins. v. Mkt. Planners Ins. Agency Inc., 157 F.3d 1032 (5th Cir. 1998)
- Wisznia Co. v. Gen. Star Indem. Co., 759 F.3d 446 (5th Cir. 2014)
- Cinel v. Connick, 15 F.3d 1338 (5th Cir. 1994)
- Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842 (Tex. 1994)
- State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38 (Tex. 1998)
- Tex. Farmers Ins. Co. v. Soriano, 881 S.W.2d 312 (Tex. 1994)
- Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburg, 77 S.W.3d 253 (Tex. 2002)
- Danner v. Iowa Mut. Ins. Co., 340 F.2d 427 (5th Cir. 1964)
- Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765 (Tex. 2007)
- RSUI Indem. Co. v. The Lynd Co., 466 S.W.3d 113 (Tex. 2015)
- Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945 (Tex. 1990)
- Wilcox v. Am. Home Assurance Co., 900 F. Supp. 850 (S.D. Tex. 1995)
- Ins. Corp. of Am. v. Webster, 906 S.W.2d 77 (Tex. App.—Houston [1st Dist.] 1995)
- Ironshore Eur. DAC v. Schiff Hardin, L.L.P., 912 F.3d 759 (5th Cir. 2019)
- Byrd v. Woodruff, 891 S.W.2d 689 (Tex. App.—Texarkana)
- Missouri-Kansas-Texas R. Co. v. Pluto, 138 Tex. 1 (Tex. Comm'n App. 1941)
- Ford Motor Co. v. Stewart, Cox, & Hatcher, P.C., 390 S.W.3d 294 (Tex. 2013)
- Howell v. Fifth Court of Appeals, 689 S.W.2d 396 (Tex. 1985)
- Jones v. Highway Ins. Underwriters, 253 S.W.2d 1018 (Tex. Civ. App. 1952)
- Gallegos v. Clegg, 417 S.W.2d 347 (Tex. Civ. App. 1967)
- Clark v. McFerrin, 760 S.W.2d 822 (Tex. App.—Texarkana)
- Coleman v. Donaho, 559 S.W.2d 860 (Tex. Civ. App. 1977)
- Estate of Duncan v. Comm'r of Internal Revenue, 890 F.3d 192 (5th Cir. 2018)
- Miraglia v. Bd. of Supervisors of La. State Museum, 901 F.3d 565 (5th Cir. 2018)
- Transcon. Gas Pipe Line Corp. v. Societe D'Exploitation du Solitaire SA, 299 F. App'x 347 (5th Cir. 2008)
- Gen. Star Indem. Co. v. Vesta Fire Ins. Corp., 173 F.3d 946 (5th Cir. 1999)

OPINION

PER CURIAM.

Case: 19-20779 Document: 00515766444 Page: 1 Date Filed: 03/04/2021 United States Court of Appeals for the Fifth Circuit United States Court of Appeals Fifth Circuit FILED March 4, 2021 No. 19-20779 Lyle W. Cayce Clerk American Guarantee and Liability Insurance Company, Plaintiff—Appellee, versus ACE American Insurance Company, Defendant—Appellant. Appeal from the United States District Court for the Southern District of Texas USDC No. 4:18-CV-382 Before Jolly, Jones, and Willett, Circuit Judges.

Edith H. Jones, Circuit Judge: Mark Braswell died after his road bike collided with a stopped truck. His survivors (the Braswells) sued the truck's owner, the Brickman Group Ltd., LLC. Brickman was primarily insured by ACE and secondarily insured by AGLIC. ACE rejected three Braswell settlement offers before and during trial, and the jury awarded the Braswells nearly \$28 million.

The Braswells and Brickman eventually settled for nearly \$10 million, of which AGLIC, the excess carrier, paid nearly \$8 million. AGLIC sued ACE, arguing that Case: 19-20779 Document: 00515766444 Page: 2 Date Filed: 03/04/2021 No. 19-20779 because ACE violated its Stowers 1 duty to accept one of the three settlement offers for the primary policy limits, ACE had to cover AGLIC's settlement contribution.

The district court agreed on both counts. We agree that ACE's Stowers duty was triggered by the Braswells' third offer, and that ACE violated this duty. The district court's judgment is affirmed. I. At trial the Braswells 2 asserted Brickman caused Mark's death under two negligence theories: (1) Brickman's driver stopped short directly in front of Mark, and (2) Brickman's truck was parked in an inherently dangerous spot.

But premised on the substantial evidence of Mark's comparative negligence, Brickman's counsel believed it had a strong case in defense. Brickman was primarily insured by ACE (up to \$2 million in liability), with excess coverage by AGLIC (up to \$10 million in liability in excess of ACE's \$2 million). ACE controlled Brickman's settlement negotiations.

The facts were disputed. There was evidence that Brickman's truck had been stopped for four or five minutes, or one to two minutes, or that it had actually stopped short in front of Mark. 3 No orange cones had been placed around the truck despite Brickman's policy of using safety cones. Significantly, Mark's helmet was cracked down the middle, indicating he was not watching where he was going.

Brickman's driver admitted it was dangerous, though legal, to park where he did. Moreover, Brickman's witnesses were far less compelling and sympathetic than members of the Braswell family. Finally, the trial judge was known to be plaintiff-friendly, and the Braswells' lawyer was

well known and highly capable. Considering these factors, Brickman's counsel mocked up the "value" of the Braswell case for settlement purpose, i.e., how much should 1 G.A.

Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929)) [hereinafter Stowers]. 2 Mark's mother (Sandra Braswell), wife (Michelle Braswell), and two children (Matthew and Mary Braswell). 3 Notably, this theory was only supported by a Brickman employee's, Renner's, statement to Michelle Braswell. 2 of 13 Case: 19-20779 Document: 00515766444 Page: 3 Date Filed: 03/04/2021 No. 19-20779 ACE agree to settle for.

Counsel estimated \$1.25 to \$2 million. ACE also conducted juror research that yielded two conclusions: it was important to prove at trial that the truck did not stop short and that the truck was legally parked. 4 After reviewing this material, AGLIC's case manager valued a "risk neutral" settlement at "no more than 500K, not primary's 2M." 5 No one on the defense side thought a verdict over \$2 million was likely.

On the eve of trial, the Braswells' counsel made the first of three settlement offers, asking for \$2 million. ACE counter-offered \$500,000. The Braswells rejected this counter, and the parties went to trial. Events quickly turned against Brickman.

The judge: excluded evidence that Brickman's truck was legally parked; allowed Michelle Braswell to testify about the "stop-short" statement of a Brickman employee; and allowed Michelle to testify about her daughter Mary's psychological trauma, self-harm, suicide attempts, and hospitalization, all caused by her father's death. Michelle was an exceptional witness.

After the plaintiffs' closing statement, AGLIC's case manager communicated that a verdict in excess of \$2 million was possible "[g]iven the adverse evidentiary... rulings." The case was submitted to the jury. Before the jury reached a verdict, the Braswells' counsel made two more settlement demands.

First, he orally offered Brickman a high/low of "\$1.9MM to \$2.0MM with costs." ACE believed this offer was outside of its settlement valuation, as the inclusion of "costs" would push the final settlement value beyond its \$2 million policy limit. Brickman rejected the offer. Then the Braswells' counsel emailed a third offer to Brickman's counsel: Plaintiffs renew their prior offer to settlement for the policy limits of \$2 million.

Such offer will expire when the jury announces that it has a verdict. Thanks much. 6 4 In these focus groups over three-fourths of the jurors found Mark more than 50% comparatively negligent. 5 This same manager was also effusive about Brickman's chances of success at trial. 6 ACE identified this offer as a renewal of the Braswell's first offer. 3 of 13 Case: 19-20779 Document: 00515766444 Page: 4 Date Filed: 03/04/2021 No. 19-20779 Brickman declined that offer and countered; the Braswells withdrew all offers.

The next day the jury returned a verdict of nearly \$40 million. After deducting 32% for Mark's comparative negligence, the trial court rendered judgment against Brickman for nearly \$28 million. The Braswells and Brickman eventually settled for nearly \$10 million (avoiding appellate litigation). ACE paid its policy limit of \$2 million, and AGLIC furnished the excess amount of nearly \$8 million.

AGLIC then sued ACE in federal court for equitable subrogation, ⁷ urging ACE had violated its Stowers duty to Brickman by rejecting the Braswells' settlement offers. Ruling on dueling summary judgment motions, the district court held that "all three demands" invoked the Stowers duty. Then, following a bench trial, the court held that the first rejection was reasonable under Stowers but the last two were not.

From the resulting judgment for the entirety of AGLIC's excess payment, ACE has appealed. II. "We review grants of summary judgment de novo," affirming "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ⁸ When reviewing a bench trial judgment, we inspect findings of fact for clear error and review legal conclusion de novo.

⁹ Sitting in diversity, we apply Texas substantive law. ¹⁰ On appeal, ACE raises two issues. First, it asserts, the court erred by holding that all three offers triggered Stowers. ¹¹ AGLIC doesn't cross-appeal ⁷ ACE doesn't contest AGLIC's ability to sue under equitable subordination. Compare *Gen. Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5th Cir.

1999). ⁸ *Petzold v. Rostollan*, 946 F.3d 242, 247 (5th Cir. 2019) (internal quotations omitted); Fed. R. Civ. P. 56(a). ⁹ *Colonial Penn Ins. v. Mkt. Planners Ins. Agency Inc.*, 157 F.3d 1032, 1037 (5th Cir. 1998). ¹⁰ *Wisznia Co. v. Gen. Star Indem. Co.*, 759 F.3d 446, 448 (5th Cir. 2014). ¹¹ And, since no Stowers duty arose, the subsequent bench trial judgment that ACE violated its Stowers duty is moot.

4 of 13 Case: 19-20779 Document: 00515766444 Page: 5 Date Filed: 03/04/2021 No. 19-20779 the court's holding that ACE fulfilled its Stowers duty for the first offer; any argument regarding this offer is forfeited and we don't address it further. ¹² Second, the court erred in determining that ACE violated Stowers by rejecting the second and third settlement offers.

¹³ We address each contention in turn. A. Under Texas law, the Stowers duty requires an insurer "to exercise ordinary care in the settlement of claims to protect its insureds against judgments in excess of policy limits." ¹⁴ But not all settlement demands give rise to a Stowers duty. ¹⁵ "The Stowers duty is not activated by a settlement demand unless: (1) the claim against the insured is within the scope of coverage, (2) there is a demand within policy limits, and (3) the terms of the demand 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." ¹⁶ Further, Stowers applies

only when “the settlement’s terms [are] clear and undisputed.” 17 The offer “must also be unconditional” and cannot “carry[] risks of further liability.” 18 For Stowers to apply in this case, the Braswells’ offers must have met the three Stowers 12 *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.

1994). 13 AGLIC doesn’t cross-appeal the court’s holding that ACE fulfilled its Stowers duty for the first offer; any argument regarding this offer is forfeited and we don’t address it further. *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994). 14 *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 843 n.2 (Tex. 1994) (citing *Stowers*, 15 S.W.2d 544). 15 *State Farm Lloyds Ins.*

Co. v. Maldonado, 963 S.W.2d 38, 41 (Tex. 1998) (“A demand above policy limits, even though reasonable, does not trigger the Stowers duty to settle.” (internal quotations omitted)). 16 *Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314 (Tex. 1994). 17 *Rocor Int’l, Inc. v. Nat’l Union Fire Ins. Co. of Pittsburg*, 77 S.W.3d 253, 263 (Tex. 2002). 18 *Danner v. Iowa Mut.*

Ins. Co., 340 F.2d 427, 429–30 (5th Cir. 1964); *Soriano*, 881 S.W.2d at 314 (stating that, for an offer to invoke Stowers, it must “propose to release the insured fully in exchange for a stated sum of money”). 5 of 13 Case: 19-20779 Document: 00515766444 Page: 6 Date Filed: 03/04/2021 No. 19-20779 prerequisites, 19 “clearly state[d] a sum certain,” 20 and been “unconditional.” 21 The district court held that all three demands were “unconditional, within policy limits, and presented an offer for a full release,” thus triggering Stowers.

We disagree regarding the second offer, but the third offer did trigger a Stowers duty. 22 The Braswells’ second offer sought “\$1.9MM to \$2.0MM with costs.” The question raised is whether that offer was ambiguous. Unless the offer “clearly state[s] the proposed settlement’s terms,” the insurer cannot transgress Stowers by rejecting it. 23 The record here indicates that the requested “costs” were ambiguous.

ACE believed “costs” included litigation expenses and court costs. In contrast, AGLIC believed “costs” were limited to court costs. AGLIC even acknowledged in its briefing that ACE was confused as to what “costs” meant, 24 and AGLIC’s case manager acknowledged that “costs” could have more than one meaning.

Accordingly, “the record reveals great confusion about that offer’s terms,” and, lacking the clear statement of a sum certain, the offer did not invoke Stowers. 25 The third offer, however, stated: On behalf of Michelle Lynn Braswell, Individually, and as Next Friend of Matthew Braswell and Mary Braswell and as Independent Executrix of the Estate of William Markley 19 *Soriano*, 881 S.W.2d at 314.

20 *Rocor Int’l, Inc.*, 77 S.W.3d at 263. 21 *Danner*, 340 F.2d at 429–30. 22 Again, the first offer is not at issue on appeal. See *supra* note 13. 23 *Rocor Int’l, Inc.*, 77 S.W.3d at 263; see also *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 776 (Tex. 2007). 24 “AGLIC alleges

ACE mistakenly believed ‘costs’ included litigation expenses and therefore the demand exceeded its policy limits.” 25 77 S.W.3d at 263.

We need not reach AGLIC’s ancillary arguments concerning this offer. 6 of 13 Case: 19-20779 Document: 00515766444 Page: 7 Date Filed: 03/04/2021 No. 19-20779 Braswell, deceased, and Sandra South Bra[s]well (“Plaintiffs”), I am writing to convey an unconditional offer to settle all claims against The Brickman Group Ltd. and Guillermo Rafael Bermea (“Defendants”)....

Please be advised that Michelle and Sandra Braswell hereby make this unconditional offer to settle within the primary policy limits represented to us to be applicable to any judgment rendered in this case to settle any and all claims that were asserted or could be asserted in the above-referenced matter for the total sum of \$2,000,000.00. ACE advances three arguments why the third offer did not generate a Stowers duty, but only one requires discussion.

26 It goes as follows: because Michelle asserted claims alongside her minor children, whom she represented as next friend, this generated adverse interests and mandated at least court and perhaps guardian ad litem approval of any settlement.

Therefore, “[t]hese requirements of third-party approval for a settlement made the plaintiffs’ demand inherently conditional.” Because no Texas court has ruled on this issue in the Stowers context, we must make an Erie guess. 27 26 Contrary to ACE’s contention, this offer is not partial and proposes to settle all claims from all plaintiffs.

The offer states it was made “[o]n behalf of Michelle Lynn Braswell,” both “Individually, and as Next Friend of Matthew Braswell and Mary Braswell.” When the second paragraph states that “Michelle and Sandra Braswell hereby make this unconditional offer to settle,” this court considers Michelle to include herself both “Individually, and as Next Friend of Matthew Braswell and Mary Braswell.” RSUI Indem.

Co. v. The Lynd Co., 466 S.W.3d 113, 118 (Tex. 2015) (citation omitted) (providing that Texas courts “give effect to all of the words and provisions so that none is rendered meaningless”). Second, the phrase “within the primary policy limits represented to us to be applicable” does not contain conditional phrasing, and again contrary to ACE’s position, is best characterized as a statement of fact, not an unmet condition precedent.

Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 948 (Tex. 1990) (“In order to make performance specifically conditional, a term such as ‘if,’ ‘provided that,’ ‘on condition that,’ or some similar phrase of conditional language must normally be included.”); cf. Wilcox v. Am. Home Assurance Co., 900 F. Supp. 850, 859 (S.D. Tex. 1995) (holding “based upon” was sufficiently conditional); Ins.

Corp. of Am. v. Webster, 906 S.W.2d 77, 80–81 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (same for “[i]n reliance upon”). 27 *Ironshore Eur. DAC v. Schiff Hardin, L.L.P.*, 912 F.3d 759, 764 (5th Cir. 2019) (“If the Texas Supreme Court has not ruled on an issue, we make an Erie guess, predicting what the Texas Supreme Court would do if faced with the same facts.” (cleaned up)).

7 of 13 Case: 19-20779 Document: 00515766444 Page: 8 Date Filed: 03/04/2021 No. 19-20779
Serving as her children’s next friend in the underlying lawsuit, Michelle asserted claims for herself and them against Brickman, but their claims were distinct from each other.

The third settlement offer covered all of these claims, but it did not specify which plaintiffs would get what percent of the \$2 million. In Texas, “[a] minor does not have the legal capacity to employ an attorney or anyone else to watch over her interests.... [Instead] Rule 44 of the rules of civil procedure authorizes appearance by a next friend.” 28 “If an adverse interest arises between the real plaintiff and next friend, the next friend is no longer competent to represent the minor.” 29 “If the court determines that a conflict exists, the court must appoint a guardian ad litem.” 30 If no guardian ad litem is appointed when required, “a judgment entered in favor of a minor... is not binding on him, and he may thereafter sue to have it set aside.” 31 And even if a guardian is properly appointed and agrees to the settlement, “a judgment ratifying the compromise cannot be rendered without a hearing and evidence that the settlement serves the minor’s best interest.” 32 The Texas courts thus hold that if a settlement offer is accepted and if the trial court perceives an adverse interest between a parent and her children, 33 the trial court must appoint a guardian ad litem who, along with the court, has to approve the settlement in order to bind the minors.

34 Texas 28 *Byrd v. Woodruff*, 891 S.W.2d 689, 704 (Tex. App.), writ denied (May 4), writ dismissed by agreement (Sept. 28), writ withdrawn (Sept. 28, 1995). 29 *Id.*; see also *Missouri-Kansas-Texas R. Co. v. Pluto*, 138 Tex. 1, 6 (Tex. Comm’n App. 1941). 30 *Byrd*, 891 S.W.2d at 705; *Ford Motor Co. v. Stewart, Cox, & Hatcher, P.C.*, 390 S.W.3d 294, 297 (Tex. 2013).

31 *Howell v. Fifth Court of Appeals*, 689 S.W.2d 396, 398 (Tex. 1985) (Gonzalez, J. dissenting). 32 *Byrd*, 891 S.W.2d at 705. 33 Tex. R. Civ. Proc. 173. 34 *Howell*, 689 S.W.2d at 398 (Gonzalez, J. dissenting). 8 of 13 Case: 19-20779 Document: 00515766444 Page: 9 Date Filed: 03/04/2021 No. 19-20779 courts have not explicitly determined whether any uncertainty about judicial and third-party approval necessarily creates an unacceptable “risk[] of further liability” that precludes a Stowers duty.

35 ACE relies on several cases to support its contention that “[a] conflict of interest between the minor and next friend often arises in a settlement situation where the parties vie for different portions of a fixed settlement amount.” 36 In *Howell*, for instance, a mother (among other parties) sued on behalf of herself and as next friend for minor children to recover for her husband’s death.

37 After a settlement was negotiated and agreed upon, the court appointed a guardian ad litem for the children because it found adverse interests between the mother and the minors. The mother immediately nonsuited the case.

The Texas Supreme Court did not rule on a mandamus order, which had become moot. But the record probably supported appointment of a guardian ad litem because “the mother, who was twenty- five years old, was given over 90% of the proposed settlement value.” 38 In *Pluto*, a mother was killed in an accident and her son injured. 39 The father, acting as his son’s next friend, quickly settled with the railroad for the father’s injuries and the son’s loss of his mother, but the settlement did not compensate the son for his personal injuries.

Later on, the son sued the railroad company to set aside the settlement. The reviewing court agreed to do so because “[t]he record shows without dispute that the father, while 35 Danner, 340 F.2d at 430; cf. *Jones v. Highway Ins. Underwriters*, 253 S.W.2d 1018, 1022 (Tex. Civ. App. 1952), writ refused n.r.e.(finding a settlement offer conditional, and not controlled by *Stowers*, because an intervenor with claim to 50% of plaintiffs’ damages had to approve settlement).

36 Byrd, 891 S.W.2d at 705 (emphasis added); Howell, 689 S.W.2d at 398 (Gonzalez, J., dissenting) (“When a parent sues on his or her own behalf and also as a representative of minor children for injuries arising out of the same occurrence a conflict of interests between the two often arises, particularly in a settlement situation where the parties vie for different portions of a fixed settlement amount.”).

37 689 S.W.2d at 396–97. 38 *Id.* at 398 (Gonzalez, J., dissenting). 39 138 Tex. at 5. 9 of 13 Case: 19-20779 Document: 00515766444 Page: 10 Date Filed: 03/04/2021 No. 19-20779 acting as next friend, was interested in the settlement agreement adversely to his children,” and the railroad had notice of the father’s adverse interests when they settled. 40 A similar result occurred in *Gallegos v. Clegg*.

41 Although Michelle asserted her own distinct claims alongside her children’s, that is where the similarities with *Howell*, *Pluto*, and *Gallegos* end. That intrafamilial conflicts may occur in such cases suggests prudent state courts will appoint guardians ad litem to represent minor plaintiffs. 42 And in fact, that is what the state court did here. Consequently, had Michelle accepted the lump sum settlement offer, the guardian ad litem would have focused on assuring the children obtained their fair share—after the \$2 million check had cleared.

ACE offered no evidence whatsoever either that Michelle would have placed maximizing her damages above her children’s claims or that it feared the possibility. Instead, the only evidence points to ACE’s having refused to settle because it was convinced it would win the case.

The factual premises underlying ACE’s inherent conflict theory utterly fail. In any event, and more generally (although without specific guidance from Texas courts), we perceive no inherent *ex ante*

conflict, and thus no “conditionality” precluding the Stowers duty, where a lump sum settlement offer is accepted on behalf of parents and children.

In such circumstances, the issue of fairly dividing the proceeds arises only after the settlement is 40 Id. (“[S]ome of the minor children (brothers and sisters of Julius) were not injured in the collision and in the judgment were awarded the same amount as was Julius, i.e., \$750.”). 41 417 S.W.2d 347, 352–53 (Tex. Civ. App. 1967), writ refused n.r.e. (Oct.

18, 1967) (finding an adverse interest because the record showed “[the father] was trying to recover as much as he could on account of his own alleged injuries and at the same time represent his minor son on account of injuries suffered by him in the same collision”); see also *Clark v. McFerrin*, 760 S.W.2d 822, 828 (Tex. App.), writ denied (Apr. 19, 1989) (holding that, because the children “and their mother... were parties in the same lawsuit,” and the children “had claims separate and distinct from their mother, their next friend,” “a conflict in interest could have arisen during settlement negotiations or the prosecution of the suit... [and the] trial court d[id] not abuse its discretion in appointing a guardian ad litem.”); *Coleman v. Donaho*, 559 S.W.2d 860, 864 (Tex.

Civ. App. 1977), writ dismissed (Mar. 22, 1978) (same). 42 See Tex. R. Civ. Proc. 173. 10 of 13 Case: 19-20779 Document: 00515766444 Page: 11 Date Filed: 03/04/2021 No. 19-20779 agreed upon, and Texas courts have the duty to scrutinize the apportionments.

Because the record is void of any specter of adverse interests between Michelle and her children had the third lump sum settlement offer been accepted, her children would have been bound by it. Accordingly, the offer generated a Stowers duty because it “proposed to release the insured fully” and it was not conditional. 43 B. ACE also contends that the district court erred in concluding that ACE violated its settlement duty as to the third offer.

Under Stowers, an insurer is required to exercise ordinary care in responding to qualifying settlement demands; when presented with a “settlement demand[] within policy limits,” an insurer cannot respond negligently. 44 Whether an insurer responds negligently hinges on whether “the terms of the demand 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.” 45 Reviewing ACE’s response to its Stowers duty, the district court reasoned in pertinent part: ACE [] breach[ed] its [Stowers] duty when it rejected the...

Third Demand[]. When [the Braswells] made th[is] demand[], ACE was aware of all of the adverse rulings and evidence presented during trial including, most importantly, the 43 Soriano, 881 S.W.2d at 314. 44 Garcia, 876 S.W.2d at 846, 848 (stating that an insurer is not negligent if it “exercise[s] [the] degree of care and diligence” of “an ordinarily prudent person” in response to a settlement offer).

We pause to note the lack of demarcation between whether the Stowers duty is triggered (i.e., was the offer reasonable) versus whether the Stowers duty, once triggered, is met (i.e., did the insurer reasonably respond to a reasonable offer). Compare *Garcia*, 876 S.W.2d at 848 (providing that Stowers is only triggered by reasonable demands), with *Soriano*, 881 S.W.2d at 316 (providing that, once Stowers is triggered, an insurer is negligent if it acts unreasonably in refusing to settle).

But we continue under Texas's framework as we understand it: whether ACE, once its Stowers duty was triggered, was negligent in rejecting the Stowers offer. 45 *Garcia*, 876 S.W.2d at 849. 11 of 13 Case: 19-20779 Document: 00515766444 Page: 12 Date Filed: 03/04/2021 No. 19-20779 extensive evidence about Mary Braswell, Michelle Braswell's testimony about the stop short theory, and [the trial judge's] decision not to allow testimony that the Brickman truck was legally parked and had not received any citations.

These rulings, which exacerbated the known weaknesses in the case, should have changed ACE's calculus.... A reasonable insurer would have reevaluated the settlement value of the case [and accepted the Braswells' offer]. ACE's challenge in this court hinges solely on whether the trial court's adverse rulings were likely to be reversed on appeal.

In other words, although the trial went poorly for ACE and its decision to reject the Braswells' final settlement offer may appear unreasonable, ACE was not actually negligent since the trial court's "errors" likely rendered the judgment reversible on appeal.

The evidence underlying the district court's factual findings cannot support its judgment, ACE argues, because the district court did not consider ACE's appellate prospects. ACE omits that the district court did not consider the possibility of appellate reversal because ACE made no such argument. ACE concededly never argued to that court as a legal matter that Stowers requires consideration of appellate prospects.

ACE cannot raise this novel legal theory for the first time on appeal, and we do not address it. 46 But even if we review the evidentiary sufficiency challenge de novo, 47 the evidence is clearly sufficient to support the bench trial verdict that "[a] reasonable insurer would have reevaluated the settlement value of the case [and accepted the 46 *Estate of Duncan v. Comm'r of Internal Revenue*, 890 F.3d 192, 202 (5th Cir.

2018) ("This court will not consider arguments first raised on appeal." (citation omitted)). ACE disagrees, urging it can assert this new legal argument on appeal because "a defendant [does not] waive[] a challenge to the sufficiency of the evidence by failing to raise it before a bench trial." *Miraglia v. Bd. of Supervisors of La. State Museum*, 901 F.3d 565, 573 (5th Cir.

2018) (citation omitted). But sufficiency of the evidence challenges do not include novel legal arguments—we only consider whether "the trial court's findings are supported by substantial evidence." *Transcon. Gas Pipe Line Corp. v. Societe D'Exploitation du Solitaire SA*, 299 F. App'x

347, 349 (5th Cir. 2008) (unpublished) (internal quotations omitted). And such trial court findings, by definition, cannot include legal arguments never even presented in the trial court.

47 Colonial Penn Ins., 157 F.3d at 1037. 12 of 13 Case: 19-20779 Document: 00515766444 Page: 13 Date Filed: 03/04/2021 No. 19-20779 Braswells' third offer].” After all, by the time that offer was made, the trial had taken a demonstrable turn against Brickman. 48 Two of the adverse rulings (disallowing evidence that the truck was legally parked and allowing the stop-short statement attributed to a Brickman employee) aggravated Brickman’s greatest known weaknesses in this case.

Considering all of the trial circumstances, an “ordinarily prudent insurer” in ACE’s position would have realized that the “likelihood and degree” of Brickman’s “potential exposure to an excess judgment” had materially worsened since the trial’s inception. When presented with the Braswells’ third offer, an ordinary, prudent insurer would have accepted it.

The evidence placed before the district court is sufficient to support that ACE violated its Stowers duty by failing to reevaluate the settlement value of the case and accept the Braswells’ reasonable offer. Conclusion The district court’s judgment is AFFIRMED. 48 By this point, the judge had excluded evidence about the Brickman truck’s legal parking. And the court had allowed Michelle to testify about Renner’s out-of-court “stop short” statement.

Finally, the judge allowed Michelle’s testimony about Mary’s psychological issues stemming from her father’s death. As the district court explained, the testimony about Mary “was pretty powerful stuff” and had a “real impact on a jury.” 13 of 13