

NO. 09-0772

IN THE
SUPREME COURT OF TEXAS

TEXAS HEALTH INSURANCE RISK POOL,
Petitioner

v.

SHARON B. SIGMUNDIK, BENJAMIN J. SIGMUNDIK,
AND ZACHARY P. SIGMUNDIK, as the Sole and Legal
Heirs and Beneficiaries of THOMAS M. SIGMUNDIK,
DECEASED, and/or OF THE ESTATE OF THOMAS M.
SIGMUNDIK, DECEASED; OTTO L. MONECKE and
VIRGINIA L. MONECKE,
Respondents

On Petition for Review from the
Third Court of Appeals
Austin, Texas
Cause No. 03-05-00057-CV

RESPONSE TO PETITION FOR REVIEW

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SIGMUNDIK, as the Sole and Legal Heirs and
Beneficiaries, of Thomas M. Sigmundik, Deceased
and/or the Estate of Thomas M. Sigmundik,
Deceased

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CASES

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5. Price v. Estate of Anderson, 522 S.W.2d 690, 691 (Tex. 1975).....5

STATEMENT OF JURISDICTION

Respondents deny that this Court has jurisdiction pursuant to Texas Government Code § 22.001(a)(2) or (a)(6), as asserted by Petitioner.

Petitioner presents no citations showing a conflict of authority on a question of law material to a decision in this case (i) between any of the Courts of Appeals, or (ii) any of the Courts of Appeals and the Supreme Court. Thus, no basis for jurisdiction exists under § 22.001 (a)(2).

Further, Petitioner has not shown that the Third Court of Appeals committed an error of law, or that any such error was of such importance to the jurisprudence of the state that it requires correction. Thus, no basis for jurisdiction exists under § 22.001 (a)(6).

ISSUES IN RESPONSE

1. Did the Third Court of Appeals abuse its discretion when, after analyzing Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007) and the Risk Pool's contractual subrogation clause, the court found that the Risk Pool failed to sustain its burden of establishing what settlement funds, if any, should be allocated to the Risk Pool's only insured, the Estate of Thomas Sigmundik?
2. Did the trial court abuse its discretion in denying the Risk Pool any recovery under its contractual subrogation claim where the Estate of Thomas M. Sigmundik, the only entity against which the Risk Pool could have asserted such a claim, was not a party because no duly appointed representative of said estate ever appeared before the trial court?

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Respondents generally agree with Petitioner's Statement of Facts, except that Respondents wish to clarify the extent of any involvement by the Estate of Thomas M. Sigmundik, Deceased, in the underlying case.

Otto Monecke, who was also burned in the accident in question, and his wife, Virginia Monecke, filed a negligence lawsuit on June 18, 2002 against "Sharon Sigmundik, Benjamin J. Sigmundik, and Zachary P. Sigmundik, as the sole and legal heirs and beneficiaries of Thomas M. Sigmundik, Deceased and/or the Estate of Thomas M. Sigmundik, Deceased." CR 2. The Sigmundik family in turn filed a counter claim against Monecke alleging negligence. CR 9. However, Thomas Sigmundik died intestate and no estate was ever opened for him. CR 112 at Par. 23. The record does not reflect that any representative of the estate was ever appointed, named in the lawsuit and or ever made an appearance in the case. Further, the record does not reflect that the Risk Pool ever objected to the lack of a representative of the estate, or ever requested that such a representative be appointed or joined in the case. RR4: Exh. D-4.

SUMMARY OF THE ARGUMENT

First, the Supreme Court does not have jurisdiction over this appeal because Petitioner has failed to meet the requirements of Texas Government Code § 22.001(a)(2) or (a)(6), as discussed above.

Second, contrary to Petitioner's assertions, the Third Court of Appeals correctly analyzed Petitioner's claims in light of Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007) and the Risk Pool's contractual subrogation clause. The

court of appeals correctly found that the Risk Pool failed to sustain its burden of establishing what settlement funds, if any, should have been allocated by the trial court to the Risk Pool's only insured, the Estate of Thomas Sigmundik.

Third, it is undisputed that the only person that the Risk Pool's subrogation claim would extend to was Thomas M. Sigmundik, or the duly appointed representative of the Estate of Thomas M. Sigmundik. Yet, no Estate of Thomas M. Sigmundik was ever opened. No personal representative of the Estate of Thomas M. Sigmundik was ever named or appeared in the litigation. There was no person or entity before the trial court over whom the contractual subrogation claim could have extended.

The Risk Pool would have this Court believe that the Third Court of Appeals trampled its subrogation rights, whereas a review of its opinion shows that the Risk Pool failed to properly preserve error, failed to present evidence, failed to sustain its burden of proof on its subrogation claims, and failed to show an abuse of discretion. Accordingly, the Petition for Review should be denied.

ARGUMENT

A. THE RISK POOL DID NOT SUSTAIN ITS BURDEN OF PROOF ON ITS SUBROGATION CLAIM.

The Risk Pool failed to plead a valid claim against a properly-joined party, failed to submit necessary evidence and failed to request rulings, findings of fact or conclusions of law in support of its subrogation claim. The Risk Pool cannot credibly recast its failures as an alleged attempt by the Third Court of Appeals to

avoid the written subrogation clause between the Risk Pool and Thomas M. Sigmundik.

This Supreme Court recently held that an express, unambiguous and precise subrogation provision in an insurance contract will control over equitable considerations, generally referred to as the “made whole doctrine.” Fortis Benefits v. Cantu, 234 S.W. 3d 642, 650-651 (Tex. 2007). The Third Court of Appeals did not ignore Fortis or attempt to circumvent its authority. Rather, The Third Court of Appeals properly analyzed Fortis and the Risk Pool’s contractual subrogation clause and recognized the Risk Pool’s failure to: 1) preserve error and present evidence for appellate review, 2) sustain its burden of proof, and 3) show an abuse of discretion.

In reviewing the decision of the Third Court of Appeals, it is important to recognize the following undisputed facts:

1. The Risk Pool has the burden of proof in seeking an allocation of the settlement funds to a person or entity against whom it could assert its subrogation rights. Ortiz v. Great Southern Fire and Casualty Ins. Co., 597 S.W. 2d 342, 344 (Tex. 1980). Ct. App. Op. at p. 3.
2. The Risk Pool’s contractual subrogation claim only extends to its insured, Thomas M. Sigmundik. The Risk Pool’s policy provides that: “Our right to repayment shall be a lien against any recovery by the Insured Person whether it be by judgment, settlement or otherwise.” RR4, D-1 and D-2. It is undisputed that Thomas M. Sigmundik was the only Insured Person under the Policy. FOF 17; RR4, Intervenor’s Exhibit 1, D-2 at pp. 7, 21; Ct. App. Op. at p. 3.

3. The Risk Pool has no subrogation claim against Sharon B. Sigmundik, Benjamin J. Sigmundik and/or Zachary P. Sigmundik, or any of the settlement funds awarded to them for their individual wrongful death claims. FOF 18, RR2:25.
4. There was no evidence offered that any portion of the \$800,000.00 was for the \$336,874.71 paid by the Risk Pool for medical bills incurred on behalf of Thomas M. Sigmundik. Ct. App. Op. at p. 3.
5. Thomas M. Sigmundik died intestate, no estate was ever opened, and no representative of Mr. Sigmundik ever made any appearance in this case. FOF 23. Ct. App. Op. at p.4.
6. The Risk Pool did not request a specific allocation of a portion of the settlement to the Estate of Thomas M. Sigmundik, the only person or entity against whom it had subrogation claim. The Risk Pool failed to offer proof of its claim and failed to request any findings of fact or conclusions of law on the issue of the proper allocation of the settlement funds. Ct. App. Op. at p. 3.

The Risk Pool's Petition glosses over the fact that no personal representative of the Estate of Thomas M. Sigmundik was ever named as a Plaintiff or Defendant and that no such person ever made an appearance in the case. This is significant because, since an estate is not a legal entity and cannot sue or be sued as such, any claim brought by or against an estate must be instituted through the personal representative of the estate. Henson v. Estate of Crow, 737 S.W. 2d 648, 649 (Tex. 1987); Price v. Estate of Anderson, 522 S.W. 2d 690, 691 (Tex. 1975). Since no

appointed representative was ever joined in the case, there was no party before the trial court against whom the Risk Pool could assert its contractual subrogation interest. Accordingly, the Third Court of Appeals was correct in finding no abuse of discretion with regard to the trial court's allocation of the settlement funds. Ct. App. Op. at p. 4.

B. THE RISK POOL DID NOT SHOW ANY ABUSE OF DISCRETION.

The panel of the Third Court of Appeals which decided this case, Justices Patterson, Puryear and Henson, is probably more aware of Fortis and contractual subrogation than any other intermediate court because all of these Justices were also involved in Osborne v. Jauregui, Inc., 252 S.W. 3d 70 (Tex. App.-Austin 2008, writ denied). Although based on a significantly different factual scenario, Osborne supports Respondent's position because Osborne correctly recognizes that, pursuant to Fortis, an insurance contract's express subrogation clause will control over equitable considerations. Osborne, 252 S.W. 3d at 80. However, absent an applicable contractual subrogation provision, the determination of subrogation rights must be based on the trial court's balancing of the equities. Osborne, 252 S.W. 3d at 78. Since there was no written subrogation clause with the Sigmundik family, the Third Court of Appeals correctly recognized that the trial court properly allocated all of the settlement proceeds to Sigmundik family.

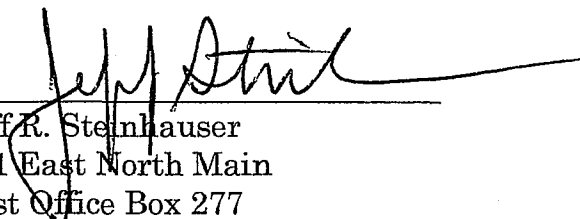
The Risk Pool does not have the benefit of express and unambiguous contractual language entitling it to subrogation from a party that was properly before the trial court, as was the case in Fortis and Osborne, because the Estate of Thomas M. Sigmundik was never a party before the Court. The trial court's

balancing of the equities should not be disturbed on appeal unless "it would be inequitable to allow the judgment to stand." Osborne, 252 S.W.3d at 78. The Risk Pool has not established any abuse of discretion by the trial court or the Third Court of Appeals, and this Court should therefore affirm the trial court's judgment and deny this Petition of Review.

II. CONCLUSION AND PRAYER

Tom Sigmundik died on September 20, 2001. This appeal is now more than four years old. The old saying, "Justice delayed is justice denied" fits here. It is time for the Sigmundik Family to have justice. Therefore, Respondent prays that the Petition For Review be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on by certified mail, return receipt requested on the following counsel of record on this the 5th day of October , 2009.

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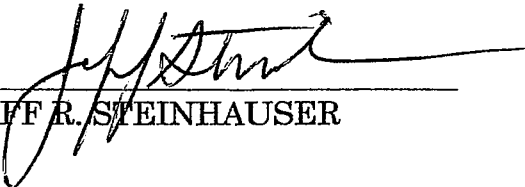
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