

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

BRIEF IN REPLY

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**BRIEF IN REPLY OF PETITIONER
TEXAS HEALTH INSURANCE RISK POOL**

Texas Health Insurance Risk Pool makes this reply to the response of the Respondents.

REPLY TO STATEMENT OF FACTS

Texas Health Insurance Risk Pool (“Risk Pool”) will rely upon the statement of facts in its Petition for Review and its Appellant’s Brief.

SUMMARY OF ARGUMENT

Respondents confuse the Risk Pool’s request of an equitable allocation of the \$800,000 settlement to Thomas Sigmundik with the contractual right of subrogation of the Risk Pool to the sums allocated. The Risk Pool intervened in the action arising from the death of Thomas Sigmundik and claimed a subrogation right based on its contract with Thomas Sigmundik. The Risk Pool trial pleading specifically states, “The contract between the Pool and the Sigmundiks provides for subrogation.” CR 49. The contractual subrogation right is enforceable. *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007). The trial court found that the insurance contract between Thomas Sigmundik and the Risk Pool provided that the “right to repayment shall be a lien against any recovery by the Insured Person whether it be by judgment, **settlement, or otherwise.**” (Emphasis added.) The parties to the \$800,000 **settlement** did not divide the money. RR 4, DX 6. The trial court had evidence before it of \$336,874 in medical bills (CR 110, FOF 15)

and evidence of the horrific injuries and death of Thomas Sigmundik (CR 110, FOF 6, 7, 8). The trial court approved the settlement but did not divide the settlement proceeds—it assigned the entire \$800,000 to Mrs. Sigmundik and the two minor sons but nothing to Tom Sigmundik or to the Risk Pool. The trial court was not asked to merely approve a settlement of \$800,000 for the children but **to allocate the settlement and approve a settlement** on behalf of the minor sons. Until the settlement sum is allocated there is nothing to approve. It was an abuse of discretion to allocate the entire settlement sum to the Sigmundik family and nothing to Thomas Sigmundik and, therefore, the Risk Pool. Thomas Sigmundik is entitled to part of the settlement money, and the Risk Pool has a contractual right to the part allocated to Thomas Sigmundik. It cannot be ZERO.

I. ARGUMENT

Petitioner, The Texas Health Insurance Risk Pool (“Risk Pool”) replies to Respondent’s issues numbers 1, 2, and 3. In response to Respondent’s issue number 4, the Risk Pool does pursue any further action against respondents Otto Monecke and Virginia Monecke except to the extent that the Risk Pool claims a lien on the money paid in settlement of the lawsuit and claims.

A. Reply to Respondent Issue No. 1. The Risk Pool did not waive its subrogation right.

Respondents argue that the underlying action was tried as an equitable subrogation case rather than a contractual subrogation case controlled by *Fortis*

Benefits v. Cantu, supra. This action was tried in November 2004 before *Fortis Benefits v. Cantu* was decided and was pending before the court of appeals when *Fortis Benefits v. Cantu* was decided. Until this court's holding in *Fortis Benefits v. Cantu*, the “made whole” doctrine stated in *Ortiz v. Great Southern Fire and Cas. Ins. Co.*, 597 S.W.2d 342 (Tex. 1980) and the exception stated in *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548 (Tex. App.—Austin 1995, writ denied) essentially defined the parameters of health insurer subrogation.

Within the parameters of the existing law, the Risk Pool asserted its contractual subrogation right with the expectation that the trial court would allocate the \$800,000 settlement proceeds among the parties. The Risk Pool did not expect to recover all of its \$336,874 in medical costs paid on behalf of Thomas Sigmundik, but it always asserted its contractual subrogation right to whatever was allocated to him.

The Sigmundik family urged and the trial court found the “made whole” doctrine as the basis for their entitlement to the entire \$800,000 settlement. The trial court applied the “made whole” doctrine to the settlement (CR 112, 113; FOF 33, 37, 38; COL 2, 16, 17) and awarded the entire settlement sum to family members other than Thomas Sigmundik. The insurance policy was received into evidence. RR 4, IX 1, DX 2. The trial court acknowledged the subrogation provision in the Risk Pool insurance agreement with Thomas Sigmundik, quoted it

in its entirety, (RR 110; FOF 17) and then disregarded it. The contractual subrogation claim was before the trial court and was not waived by the Risk Pool.

B. Reply to Respondent Issue No. 2. The trial court received evidence of the medical costs and circumstances of the death of Thomas Sigmundik. That evidence established a right to a portion of the settlement funds.

The Respondents urge that the Risk Pool did not sustain its burden of showing that some of the \$800,000 settlement should be allocated to Thomas Sigmundik. The trial court found that the Sigmundik family was alleging damages “suffered by Thomas Sigmundik.” CR 110, FOF 12. The evidence supports the following findings of the trial court.

- \$336,874 in medical costs was “reasonable and necessary medical expenses on behalf of Thomas Sigmundik.” CR 109, FOF 3.
- “Thomas Sigmundik suffered 71% total surface area burns consisting of 61% second degree burns and 10% third degree burns.” CR110, FOF 6.
- Thomas Sigmundik was “treated for his burns and trauma, involving numerous surgeries and burn dressing changes.” CR 110, FOF 7.
- Thomas Sigmundik died “52 days after admission to Brooke Army Medical Center in San Antonio.” CR 110, FOF 8.
- A more graphic description of the horrible injuries to Thomas Sigmundik is found in the testimony of Sharon Sigmundik, his wife. CR 92-106.

This evidence justifies an award of damages to Thomas Sigmundik and a subrogation recovery to the Risk Pool.

A court abuses its discretion when it acts arbitrarily or unreasonably or without reference to guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1985). The trial court and the court of appeals applied the wrong law, the “made whole” doctrine, rather than *Fortis Benefit, v. Cantu*.

C. Reply to Respondent Issue No. 3. The claims of Thomas Sigmundik were settled at the mediation and some portion of the settlement should be assigned to his injuries and damages.

The Sigmundik family alleged injuries and damages suffered by Thomas Sigmundik. CR 110, FOF 13. The same attorney represented the Sigmundik family and the Estate of Thomas Sigmundik. He signed the mediated settlement agreement on behalf of all of them. RR 4, DX 6. Having settled those claims, some portion of the settlement must be allocated to Thomas Sigmundik and ultimately to the subrogation claim of the Risk Pool.

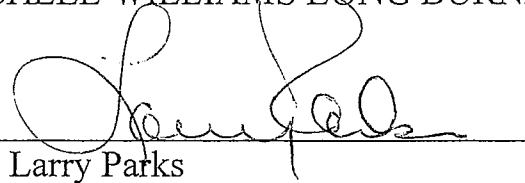
II. CONCLUSION AND PRAYER

The Risk Pool respectfully requests that this Honorable Court reverse the judgment of the court of appeals and remand this matter to the court of appeals so that it may enforce the contractual subrogation rights of the Pool established in *Fortis Benefits v. Cantu*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

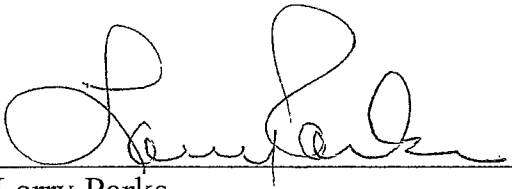
As required by Rules 6.3 and 9.5 of the Texas Rules of Appellate Procedure, I certify that I have served this document on all parties listed below on this 16th day of February, 2010, by United States Mail.

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