

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF TEXAS

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**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.**

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

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**PETITION FOR REVIEW**

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## STATEMENT OF THE CASE

- Nature of the Case:* This is a health insurance subrogation case based on a written contract.
- Trial Court:* 155<sup>th</sup> Judicial District Court, Fayette County, Texas.
- Judgment* The judgment from which appeal is taken was signed by the Honorable Don Beck, District Judge.
- Trial Court Disposition:* The final judgment awarded 100% of an \$800,000 settlement with the third party to the surviving wife and children of the Texas Health Insurance Risk Pool's ("THIRP's") insured and nothing to the estate of Thomas Sigmundik and, consequently, nothing to the Risk Pool.
- District of Court of Appeals:* Third District, Austin, Texas
- Justices of Court of Appeals:* Before Justices Patterson, Puryear and Henson; Opinion by Justice Henson
- Citation of Court of Appeals Opinion:* The opinion may be found at 2009 WL 2341837.
- Disposition at Court of Appeals:* Judgment of the trial court was affirmed.
- Statement of Jurisdiction:* This court has jurisdiction pursuant to Texas Government Code § 22.001(a)(2) and (a)(6).

## ISSUES PRESENTED

1. The Texas Health Insurance Risk Pool<sup>1</sup> paid \$336, 874.71 for the medical care of its insured. Can a trial court ignore the Risk Pool's contractual

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<sup>1</sup> The Texas Health Insurance Risk Pool is a quasi-governmental agency and is the health insurer of last resort in Texas. *See*, Tex. Ins. Code Sec. 1506.001 *et. seq.*

subrogation rights and award 100% of an \$800,000 settlement to the surviving spouse and children of the insured?

2. Did the trial court abuse its discretion when it allocated 100% of the \$800,000 settlement proceeds to the surviving family and nothing to the estate of Thomas Sigmundik—thus avoiding the contractual subrogation claims by the Risk Pool?

## STATEMENT OF FACTS

This case is mostly about trial procedure and subrogation law. The accident facts are mostly background for this appeal. Therefore, this statement of facts will be broken into two parts— first the accident facts and then the trial procedure.

### Accident Facts

On September 20, 2001, Thomas Sigmundik was severely burned as a result of an explosion. RR 2: 91-101. Mr. Sigmundik died as a result of his injuries fifty-two (52) days later in the Brooke Army Burn Center in San Antonio. RR 2: 92. The Pool paid \$336,874.71 for the medical care of Mr. Sigmundik from the date of the explosion until he died. RR 2: 24-25; CR 109<sup>2</sup>; FOF 15,<sup>3</sup> Appendix B.<sup>4</sup> The health insurance policy covering Mr. Sigmundik contained a subrogation provision. RR 4: Exh. D-1 and D-2.

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<sup>2</sup> Citation to the Clerk's Record will be referenced as "CR."

<sup>3</sup> Thomas Sigmundik suffered serious burns and trauma in an explosion on September 20, 2001.

<sup>4</sup> The Findings of Fact and Conclusions of Law are located in CR 109 and Appendix, Tab B. Future references to the Findings of Fact and Conclusions of Law will be cited as "FOF" or "COL."

## **Procedure Facts**

The Sigmundik family, including the Estate of Thomas M. Sigmundik, Deceased, sued to recover damages for the injury and death of Thomas Sigmundik resulting from an oilfield explosion. CR 9-12. The Texas Health Insurance Risk Pool intervened in the action claiming, “The Pool is subrogated to the rights of Mr. Sigmundik and his estate” for \$336,874.71 in medical costs paid for the care of Mr. Sigmundik. CR18-20. The Sigmundik family answered the intervention by the Pool asserting that they had not been “made whole” and any subrogation would be unfair to them. CR 40-42. A settlement was reached between the counter-defendant and the Sigmundik parties, including the Estate of Thomas Sigmundik, for \$800,000. RR 4, DX 6. The Pool amended its intervention petition asserting a claim for contractual subrogation. CR 49. A bench trial was conducted on November 18, 2004. CR 75-80. Judgment was signed on January 11, 2005 awarding the entire \$800,000 settlement to the spouse and children of Thomas Sigmundik and nothing to the estate of Thomas Sigmundik or to the Risk Pool. CR 75-80. Notice of appeal by the Pool was given on January 19, 2005. CR 94-96. Findings of fact and conclusions of law were requested by the Pool. CR 98-99. The trial court filed findings of fact and conclusions of law. CR 110-116. Additional findings of fact and conclusions of law were requested. CR 118-120. The trial court did not make any additional findings.

## SUMMARY OF THE ARGUMENT

This case was tried before this court decided *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007). If it were tried again today, the word “contract” might be used more but the evidence would probably be the same.

The Sigmundik plaintiffs, including the estate of the husband and father, Thomas Sigmundik, settled claims related to the death of Thomas Sigmundik, for \$800,000. The Texas Health Insurance Risk Pool (“Risk Pool”) has a contractual subrogation right and a lien against any recovery by the Estate of Thomas Sigmundik. RR 4, DX 1; FOF 17.<sup>5</sup> In allocating all of the \$800,000 settlement to the wife and children and none to the estate of Thomas Sigmundik, the trial court circumvented the contractual subrogation rights of the Pool. The Pool’s contractual subrogation rights are enforceable. *Fortis Benefits v. Cantu, supra*. The trial court erroneously based its judgment on the conclusion that the Sigmundik family and the estate of Thomas Sigmundik had not been “made whole.” COL 2, 16, 17.

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<sup>5</sup> The policy between the Texas Health Insurance Risk Pool and Thomas Sigmundik contained a subrogation clause, as follows in its entirety:

“Subrogation: We will be subrogated to all rights of recovery which any person may have against another party for all benefits paid by the Pool which were incurred by the Insured Persons as a result of the negligence or misconduct of another party. Our right to repayment shall be a lien against any recovery by the Insured Person whether it be by judgment, settlement, or otherwise. The amount of any repayment will be no more than the total amount of benefits paid by Us. Reasonable attorney fees may be deducted if prior written approval is obtained from us. The Insured Person agrees to give the Administrator all necessary information and complete all documents required by Us to assist the Administrator in the enforcement of Our right of subrogation.” CA 111.

Whether measured by an abuse of discretion standard or any other standard, a trial court should not be able to strip a party of its contract rights by making sure that the contractual subrogation bucket is empty. The trial court found that the evidence justified the award of substantial damages to the estate of Thomas Sigmundik. FOF 4-11. Any discretionary review of the injury and suffering of Thomas Sigmundik and the intense course of his medical treatment would have to result in allocation of something to his estate. The trial court abused its discretion. It cannot be ZERO.

## **I. ARGUMENT**

### **A. ISSUES RESTATED**

1. The Texas Health Insurance Risk Pool paid \$336,874.71 for the medical care of its insured. Can a trial court ignore the Texas Health Insurance Risk Pool's contractual subrogation rights and award 100% of an \$800,000 settlement to the surviving spouse and children of the insured?
2. Did the trial court abuse its discretion when it allocated 100% of the \$800,000 settlement proceeds to the surviving family and nothing to the estate of Thomas Sigmundik—thus avoiding the contractual subrogation claims by the Risk Pool?

Because the issues presented rely upon the same facts and arguments, they will be argued together.

## **B. CONTRACTUAL SUBROGATION—NOT “MADE WHOLE”**

The findings of fact illustrate the reasoning of the court for its allocation of nothing to the estate of Thomas Sigmundik. It is difficult to reach any conclusion other than that the trial court decided that the Sigmundik family needed the money more than the Risk Pool. The Sigmundik family had not been “made whole.” This is illustrated by the following findings of fact: (paraphrasing)

- Finding of Fact No. 13. A mediation on September 8, 2004 resulted in a total settlement of \$800,000;
- Finding of Fact No. 15. The Risk Pool asserted written subrogation rights to \$336,874.71;
- Finding of Fact No. 33. The Sigmundik family was not “made whole;”
- Finding of Fact Nos. 34-36. The Risk Pool had over \$30 million in cash and cash equivalents in 2002, 2003, and 2004;<sup>6</sup>
- Finding of Fact No. 37. Disallowing the subrogation claim would not work a hardship on the Risk Pool;

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<sup>6</sup> The Risk Pool’s purpose is to provide access to health insurance for the uninsurable population of Texas. Tex. Ins. Code Sec. 1506.101. The Texas Health Insurance Risk Pool is a quasi-governmental agency that reports annually to the governor, lieutenant governor, speaker of the house, and commissioner of insurance its administration expenses and paid and incurred losses. Tex. Ins. Code Sec. 1506.057. It pays for medical services through premiums paid by the insureds, Tex. Ins. Code Sec. 1506.105, and assessments of health benefit plan issuers to cover net losses, Tex. Ins. Code Sec. 1506.251, 1506.253. If the assessments exceed the Risk Pool’s actual losses and administration expenses, the Risk Pool uses that money to offset future losses or to reduce future assessments. Tex. Ins. Code Sec. 1506.256.

- Finding of Fact No. 38. Allowing the subrogation claim of the Risk Pool would work a financial hardship on the Sigmundik family.

Add to this the statement in the judgment that the family and “The Estate of Thomas M. Sigmundik, Deceased, have not been made whole by the above settlement” and the Intervenor (the Risk Pool) is entitled to take nothing. CR 75. Viewing the case in its entirety, it seems clear that the trial judge decided that the family had not been “made whole,” there was not enough settlement money to take care of everyone, the Risk Pool had \$30 million cash in the bank, and it would be fair to let the Sigmundik family have all of the settlement money.

The case was tried before this court’s opinion in *Fortis Benefits v. Cantu*. In *Cantu* this court decided that the “made whole” doctrine was inapplicable where, such as here, “the agreed contract provides a clear and specific right of subrogation.” *Cantu* at 651. The Risk Pool pleaded for contractual subrogation. CR 49. The amount, \$336,874.71, was not disputed and the trial court found that amount as a matter of fact. FOF 15. According to the contract, the Risk Pool’s “right to repayment shall be a lien against any recovery by the Insured Person whether it be by judgment, settlement, or otherwise.” FOF 17. Applying this court’s holding in *Cantu*, the Risk Pool has a right to repayment and a lien on the settlement. Here is the trap—*if there is no settlement money, there is no recovery*.

Because the settlement agreement did not allocate any specific sum to each of the parties, they submitted the allocation to the trial court. Although the Risk Pool's claim is for subrogation, the allocation of the \$800,000 settlement is properly between the Sigmundik family and the Risk Pool as subrogee of the estate of Thomas Sigmundik. The parties to the settlement are the Sigmundik family and Thomas Sigmundik's estate. The allocation, therefore, must be between the Sigmundik family and Thomas Sigmundik, the husband and father who died as a result of the oilfield explosion. It must have been obvious to the trial court that any allocation to Thomas Sigmundik would not go to the family but would instead go to the Pool. Therefore, the trial court has avoided the contractual right of subrogation by the Risk Pool by placing all of the settlement money in the family bucket and none in the estate/subrogation bucket.

When the case went to trial, the only issues before the court were approval of the settlement, allocation of the settlement, and enforcement (or not) of the subrogation rights of the Risk Pool. A settlement had been reached and the amount of the settlement was fixed at \$800,000 (unless the court chose not to approve the settlement on behalf of the minors). RR 4, DX 6. The settlement agreement did not allocate the \$800,000 among the settling parties. That was left to the trial court.

The trial court approved the \$800,000 settlement. The Risk Pool is not complaining of the approval of the total of the settlement. The Risk Pool complains of the allocation of nothing to Thomas Sigmundik (and consequently nothing to Risk Pool) and the resulting avoidance of the Risk Pool's contractual subrogation right.

The trial court appears to have mixed notions of the "allocation" and "subrogation." Based on this court's holding in *Cantu*, the amount of the recovery cannot be reduced by the "made whole" doctrine. Nevertheless, this was part of the trial court's thinking. FOF 33; Judgment, Appendix A; CR 75. The Risk Pool does not contend that the family has been made whole but asserts instead that the "made whole" discussion does not play any part in the analysis. Correctly stated, the issue is whether or not some part of the settlement should be allocated to Thomas Sigmundik—through whom the Risk Pool has a right of subrogation.

### **C. THE TRIAL COURT'S ABUSE OF DISCRETION**

A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985). Sympathy is not a guiding rule. Applying the "made whole" doctrine rather than *Cantu* is failing to follow the correct guiding principle.

The parties submitted the allocation of the settlement proceeds to the court. Having submitted the allocation to the trial court, the trial court must discharge that responsibility in an appropriate manner. The court of appeals reviewed the allocation on an abuse of discretion standard. CA Opinion P. 8, Appendix C. When comparing the allocation of the trial court to its view of the standard, the court of appeals focused on the sympathetic testimony regarding the loss of the father and husband. Then, notably, the court of appeals quoted the testimony of Mrs. Sigmundik as justification of the allocation of none of the \$800,000 to the estate of the father, “[I]f you compensate the two boys for their loss and me for my loss out of the amount that was available, there is nothing left for [the estate].” CA Opinion p. 8. That was sufficient reason for the court of appeals to find no abuse of discretion. The Risk Pool asserts that this is not the correct abuse of discretion analysis. In fact, it slips back into the “made whole” analysis that has been discredited by this court in *Cantu*.

The correct comparison should be with the general abuse of discretion standard described in *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 934 (Tex. App.—Austin 1987, no writ). The *Landon* opinion offers four questions:

- “1. *Was the determination complained of on appeal a matter committed by law to the trial court’s discretion?...*
2. *Did the trial court, in making the determination complained of on appeal, recognize and purport to act in an exercise of the discretion committed to it by law?...*

3. *Does the appellate record reveal sufficient facts upon which the trial court could act rationally in an exercise of its discretion?...*
4. *Did the trial court exercise erroneously the discretion committed to it by law?...*

The answer to the first three questions is “yes.” The fourth question is the more troublesome. It is clear from the findings of fact and conclusions of law that the trial court (and apparently the court of appeals) were working off the inapplicable *Esparza v. Scott & White Health Plan* standard rather than applying the law stated in *Cantu*. Cf *COL 8 referencing Esparza*. The trial court went even further and states that where “a subrogation claim works an injustice, it shall not be allowed.” *COL 9*. Thus, it appears that the trial court exercised “erroneously the discretion committed to it by law.” The answer to question no. 4 must be “yes” and the consequence is an abuse of discretion.

#### **D. RESPONSE TO SOME COURT OF APPEALS DISCUSSION**

The court of appeals states that the Risk Pool failed to carry its burden of establishing that it was entitled to be subrogated to any particular amount of the \$800,000 settlement fund. The court of appeals bases its opinion on these propositions:

1. The Risk Pool, as the insurer seeking subrogation, has the burden of establishing what settlement funds, if any, should be allocated to

an entity against whom it could assert its subrogation interest.” *Citing Ortiz v. Great S. Fire & Cas. Co.*, 597 S.W.2d 342, 344 (Tex. 1980).

Response: The record contains evidence of the injury and death of Mr. Sigmundik. The damages to his estate are substantial. Counsel for the estate argued that the damages to Mr. Sigmundik exceeded the amount of the \$800,000 settlement. RR 2: 158.

2. “No specific allocation of any portion of the \$800,000 settlements was made to any Estate of Thomas Sigmundik *or timely requested by Intervenor.*”

Response by the Risk Pool: This action was tried prior to this court’s opinion in *Cantu*. At the November 18, 2004 trial, the Risk Pool made a request for an “equitable distribution” of the settlement. RR 2: 12.

3. “The Risk Pool raised the issue of allocation to the estate for the first time at the settlement hearing stating, ‘[T]he estate is being allocated nothing, and we object to that.’”

Response of the Risk Pool: The Risk Pool’s First Amended Petition in Intervention at paragraph 4.0 states: “The Pool is subrogated to the rights of Mr. Sigmundik and his estate to recover the medical costs paid on behalf of Mr. Sigmundik.” CR 47. The trial court was thus

informed that the issue to be decided was whether or not anything should be allocated to the estate of Thomas Sigmundik.

4. “[T]he Risk Pool did not make any specific request that a particular amount be allocated to the estate or provide any evidence regarding the proper allocation of the settlement funds.”

Response of the Risk Pool: What difference would it make if the Risk Pool requested \$800,000 or \$1? The trial court had a responsibility to properly allocate the settlement amount among the parties based on the evidence—not based on the “made whole” doctrine. In its First Amended Petition in Intervention, the Risk Pool alleged that it “paid \$336,874.71 in reasonable and necessary medical costs for the care of Mr. Sigmundik.” CR 47. The Risk Pool also raised the existence of the contract: “The contract provides for subrogation.” CR 49

The subrogation interest was the subject of the intervention by the Risk Pool; the Risk Pool specifically informed the court of the amount of the medical bills and lien; the evidence of injury and damage to Thomas Sigmundik was large. CR 47-50. It was the responsibility of the trial court to allocate a substantial portion of the \$800,000 undivided recovery to Thomas Sigmundik. It is not possible to know the facts of Thomas Sigmundik’s injury, conscious pain, and

agonizing death and then allocate nothing of the settlement to him. *See Findings of Fact Nos. 2, 3, 5-10.* While in the Brooke Army Burn Center in San Antonio, Mr. Sigmundik was able to respond to Mrs. Sigmundik as he was partly conscious. CR 92, 99. Mr. Sigmundik experienced conscious pain. RR 2: 158. According to the argument of counsel for the estate of Mr. Sigmundik, “His damages alone would have exceeded the \$800,000.” RR 2: 158.

The proper application of discretion should take out of play the heartfelt desire of the judge to help the children and surviving spouse of Thomas Sigmundik. Otherwise, the trial court would slip back into the reasons for the “made whole” doctrine. Any analysis by the trial court should give careful consideration (and attribute value) to the horrible injury to Thomas Sigmundik, the 52 days that he lived, the knowledge that he was probably not going to live, and, without embarrassment, the more than \$336,000 paid for necessary and reasonable cost of medical care. It seems likely that a trial court looking at this from the correct point of view—that of Thomas Sigmundik—would allocate some of the \$800,000 to Thomas Sigmundik.

Finally, it seems that if the judgment and decision of the court of appeals in this case are allowed to stand, it will be a template for mischief and a new way to circumvent contractual subrogation rights—just make sure that there is no money in the subrogation bucket.

## II. PRAYER

The Risk Pool respectfully requests that the Honorable Court grant this petition for review, and upon review, reverse and remand to the lower court for application of the law stated 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 \_\_\_\_\_  
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**APPENDIX**

<b>EXHIBIT</b>	<b>DESCRIPTION</b>
A	Judgment(s) of the Trial Court
B	Trial Court Findings of Fact and Conclusions of Law
C	Opinion and Judgment of Court of Appeals
D	<i>Fortis Benefits v. Cantu</i> , 234 S.W.3d 642 (Tex. 2007)