

OTTO L. MONECKE AND
VIRGINIA L. MONECKE

VS.

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

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IN THE DISTRICT COURT OF

FAYETTE COUNTY, TEXAS

155th JUDICIAL DISTRICT

J U D G M E N T

Whereas, the Plaintiffs/Counter-Defendants Otto L. Monecke and Virginia L. Monecke and the Defendants/Counter-Plaintiffs entered into a written settlement of their claims in this lawsuit at mediation on September 8, 2004; and

Whereas, on October 22, 2004, this Court entered an Order Granting Plaintiffs Otto L. Monecke and Virginia L. Monecke's Nonsuit with Prejudice as to their claims against all Defendants; and

Whereas on November 18, 2004, this Court held a bench trial on Intervenor Texas Health Insurance.Risk Pool's claims in its Petition in Intervention, after which, based upon the evidence presented the Court (i) found that the Counter-Plaintiffs, Sharon B. Sigmundik, Individually and as Next Friend for her Minor Children, Benjamin J. Sigmundik and Zachary P. Sigmundik, and as the sole and legal heirs and beneficiaries of Thomas M. Sigmundik, Deceased, and/or of the Estate of Thomas M. Sigmundik, Deceased, have not been made whole by the above settlement, and (ii) held that Intervenor is entitled to take nothing of and from Defendants/Counter-Plaintiffs and from Counter-Defendants.

On this date, a regular day in the term of this Court, came on for hearing the remaining claims in the above entitled and numbered cause. The following parties appeared: (i) the adult Counter-Plaintiff, Sharon B. Sigmundik, Individually and as Next Friend for her Minor Children, Benjamin J. Sigmundik and Zachary P. Sigmundik, and as the sole and legal heirs and beneficiaries of Thomas M. Sigmundik, Deceased, and/or of the Estate of Thomas M. Sigmundik, Deceased, individually and through her attorney of record, (ii) the Minor Children, Counter-Plaintiffs Benjamin J. Sigmundik and Zachary P. Sigmundik, individually and by and through Peggy Supak, their court-appointed guardian ad litem, and their next friend, Sharon B. Sigmundik, (iii) the Counter-Defendants, Otto L. Monecke and Virginia L. Monecke, by and through their attorney of record, and (iv) Intervenor, Texas Health Insurance Risk Pool, by and through its attorney of record.

The parties thereupon announced ready for trial. The parties, having waived a jury, thereupon announced to the Court that an agreement of settlement had been reached by and between the Counter-Plaintiffs and the Counter-Defendants, subject to the approval of the Court, under the terms of which, in lieu of all other recovery herein, the Counter-Defendants are to pay to the Counter-Plaintiffs and their attorney the total sum of \$800,000, in cash and future periodic payments, all as set out in the settlement agreement and release attached hereto and incorporated by reference herein which is executed by (i) the adult Counter-Plaintiff, Sharon B. Sigmundik, Individually and as Next Friend for Benjamin J. Sigmundik and Zachary P. Sigmundik, and as the sole and legal heirs and beneficiaries of Thomas M. Sigmundik, Deceased, and/or of the Estate of Thomas M. Sigmundik, Deceased and (ii) Peggy Supak, Benjamin J. Sigmundik's and Zachary P. Sigmundik's court-appointed guardian ad litem, in full settlement of all causes of action asserted by

Counter-Plaintiffs herein against the Counter-Defendants herein, and any and all other persons, firms or corporations who might be liable.

The settlement agreement having been made known to the Court and the Court having considered the pleadings and evidence and being fully apprised from the evidence of the manner in which the accident made the basis of this suit occurred, the nature and extent of the damages sustained by the Counter-Plaintiffs and particularly by the minor Counter-Plaintiffs, and the relationship between and interest of the parties herein, the Court finds from such evidence (i) that Sharon B. Sigmundik is a proper person to represent the Minor Children as their Next Friend, and (ii) that Peggy Supak, the court-appointed guardian ad litem, has negotiated and approved the settlement agreement, and (iii) that the settlement agreement is in the best interests of Benjamin J. Sigmundik and Zachary P. Sigmundik, the Minor Children Counter-Plaintiffs.

The parties also apprised the Court that the Intervenor still claims an interest in the sum of \$336,874.71, out of the above-mentioned settlement proceeds, and that this interest is disputed by the Counter-Plaintiffs. Based upon the above evidence and representations made in open court, the Court here and now enters a Judgment as follows:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that Intervenor take nothing of and from Defendants/Counter-Plaintiffs and Plaintiffs/Counter-Defendants;

It is further ORDERED, ADJUDGED and DECREED by the Court that the Counter-Plaintiffs do have and recover of and from the Counter-Defendants, the following:

1. To Benjamin J. Sigmundik, minor Counter-Plaintiff, the Court apportions the following: \$109,839.73, free and clear of any attorney's fees or other expenses. Of this sum, \$9,839.73 is to be paid into the Registry of the Court until he reaches the age of eighteen (18) years of age. The remaining \$100,000 is to be used to purchase an annuity from Metropolitan Life Insurance Company in his name.
2. To Zachary P. Sigmundik, minor Counter-Plaintiff, the Court apportions the following: \$109,839.73, free and clear of any attorney's fees or other expenses. Of this sum, \$9,839.73

is to be paid into the Registry of the Court until he reaches the age of eighteen (18) years of age. The remaining \$100,000 is to be used to purchase an annuity from Metropolitan Life Insurance Company in his name.

3. To Sharon B. Sigmundik and her attorney, Jeff R. Steinhauser, the Court apportions the sum of \$243,445.83. Out of this sum, attorney's fees and expenses in the amount of \$110,337.54 are awarded to Jeff R. Steinhauser, and the remaining \$133,108.29 is awarded to Sharon B. Sigmundik and is to be used to purchase an annuity from Metropolitan Life Insurance Company in her name.
4. The \$336,874.71 remaining out of the \$800,000 settlement is to be paid into the Registry of the Court, pending resolution of the Intervenor's subrogation claim.

Once the Intervenor's subrogation claim is resolved, whether by agreement or by final judgment on appeal, the \$336,874.71 placed in the Registry of the Court shall be distributed as set out below, except to the extent that these amounts are modified proportionately by interest earned or amounts recovered by the Intervenor, if any: (i) to Sharon B. Sigmundik the Court apportions the sum of \$125,292.07, (ii) to Jeff R. Steinhauser, the Court apportions the sum of \$139,634.56, (iii) to Benjamin J. Sigmundik, the Court apportions the sum of \$35,974.04, and (iv) to Zachary P. Sigmundik, the court apportions the sum of \$35,974.04. Once the Intervenor's subrogation claim is resolved, whether by agreement or by final judgment on appeal, out of the amounts apportioned to the Minor Children, \$25,000 for each child, if available, will be used to purchase a separate structured settlement plan, with any amount over \$25,000 to remain in the registry of the District Clerk for each child until he reaches the age of eighteen (18) years of age. Should the amount apportioned to each child be less than \$25,000 for each child, then the amount to be allocated to the structured settlement shall be the amount remaining after the proportionate reductions based upon the amounts set forth above.

The Counter-Plaintiffs and the guardian ad litem having apprised the court that the Counter-Defendants have paid all the amounts awarded as set forth in paragraphs 1 through 4 above, this Judgment is declared to be fully and finally satisfied, paid off and discharged and no execution shall

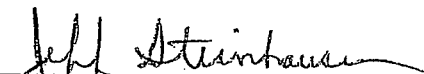
ever issue thereon, and court costs are here and now by agreement of the parties taxed against the party incurring same.

All relief not specifically granted herein is hereby denied. This judgment is final, disposes of all claims and parties, and is appealable.

SIGNED this 11 day of Jan, 2005.


JUDGE PRESIDING

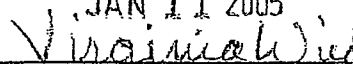
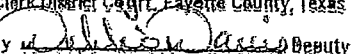
APPROVED AS TO SUBSTANCE
AND FORM:

BY: 

Jeff R. Steinhauser
TBA No. 19136300
107 East North Main
P.O. Drawer D
Flatonia, TX 78941
(361) 865-2540
(361) 865-3934 (FAX)

ATTORNEYS FOR COUNTER-PLAINTIFFS

FILED
At 10:15 o'clock A M

JAN 11 2005

Clark District Court, Fayette County, Texas
By  Deputy

BY: 

Peggy Supak
TBA No. 19515500
151 North Washington
LaGrange, Texas 78945-2657
(979) 968-8402
(979) 968 8404 (FAX)

GUARDIAN AD LITEM

BY: Gordon A. Holloway, *by permission*
Jeff Anderson

Gordon A. Holloway
TBA No. 09885000
George Caffisch
TBA No. 03588720
Holloway & Rowley, P.C.
1415 Louisiana, Suite 2550
Houston, Texas 77002
(713) 751-0055
(713) 751-0057 FAX

ATTORNEYS FOR COUNTER-DEFENDANTS

APPROVED AS TO FORM ONLY:

BY: _____

Larry Parks
TBA No. 15524800
P.O. Box 2212
515 Congress Avenue, Suite 1500
Austin, TX 78768-2212
(512) 474-1587
(512) 322-0301 (FAX)

ATTORNEYS FOR INTERVENOR

4. Thomas Sigmundik and Sharon Sigmundik have two minor sons, those being Benjamin Sigmundik who was 13 and Zachary Sigmundik who was 12 at the time of Thomas Sigmundik's death.
5. Thomas Sigmundik was married to Sharon Sigmundik who was 40 years old at the time of Thomas Sigmundik's death.
6. Thomas Sigmundik suffered 71% total surface area burns consisting of 61% second degree burns and 10% third degree burns.
7. Thomas Sigmundik was life-flighted after the explosion to Brooke Army Medical Center in San Antonio and treated for his burns and trauma, involving numerous surgeries and burn dressing changes.
8. Thomas Sigmundik died on November 11, 2001, 52 days after admission to Brooke Army Medical Center in San Antonio.
9. Thomas Sigmundik at the time of his death was 46 years old.
10. At the time of his death, Thomas Sigmundik had a life expectancy of 30+ years.
11. At the time of his death, Thomas Sigmundik was earning approximately \$30,000.00 per year.
12. The Sigmundik family alleged that Otto Monecke and Virginia Monecke were responsible for the injuries and damages suffered by Thomas Sigmundik, Sharon Sigmundik, Benjamin Sigmundik and Zachary Sigmundik, which the Monecke parties denied.
13. On September 8, 2004, the parties attended a mediation conference with Nancy Huston, at which time the claims of the Sigmundik family against Otto and Virginia Monecke were settled for \$800,000.00 by written settlement agreement dated September 8, 2004.
14. The total amount of insurance coverage for the claims against Otto and Virginia Monecke was \$1 million.
15. The Texas Health Insurance Risk Pool asserted its written subrogation rights in its contract with Thomas Sigmundik to \$336,874.71 of the \$800,000.00 settlement.
16. On November 18, 2004, the Intervenor's subrogation claims were heard by bench trial in the absence of any jury trial request or other objection to the proceeding.
17. The policy between the Texas Health Insurance Risk Pool and Thomas Sigmundik contained a subrogation clause, as follows in its entirety:

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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.

18. Neither Sharon Sigmundik, Benjamin Sigmundik or Zachary Sigmundik were insured under, or parties to, Thomas Sigmundik's policy with the Texas Health Insurance Risk Pool.
19. The settlement for less than the policy limits was not an attempt to prejudice, impair or harm the Texas Health Insurance Risk Pool's subrogation rights.
20. Sharon Sigmundik evaluated various factors in deciding to accept or reject the \$800,000.00 settlement offer which included the risks of loss at trial, delays, and the emotional upset to herself and her sons that a lengthy trial would cause.
21. No specific allocation of any portion of the \$800,000.00 settlement proceeds was made to any Estate of Thomas Sigmundik or timely requested by Intervenor.
22. No specific allocation of any portion of the \$800,000.00 settlement proceeds was made for the \$336,874.71 in medical expenses.
23. Thomas Sigmundik died intestate and no estate was ever opened.
24. Sharon Sigmundik suffered damages in excess of \$1 million.
25. Benjamin Sigmundik suffered damages in excess of \$1 million.
26. Zachary Sigmundik suffered damages in excess of \$1 million.
27. The Texas Health Insurance Risk Pool did intervene in this lawsuit on September 30, 2002, but did not actively pursue the litigation on the liability and damages or its claim to subrogation rights as to any recovery made by any Estate of Thomas Sigmundik.
28. All of the meaningful litigation work on behalf of the Sigmundik family was undertaken by Mike Johanson, the defense attorney, and Jeff R. Steinhauser, the Sigmundik family plaintiff attorney.

29. The Texas Health Insurance Risk Pool did not create or assist in creating the \$800,000.00 settlement fund.
30. The attorney's fees paid to Jeff R. Steinhauser were less than the contracted for amount.
31. Peggy Supak was appointed the Attorney Ad Litem for Benjamin and Zachary Sigmundik.
32. Peggy Supak investigated, evaluated and recommended the \$800,000.00 settlement amount and the allocation set forth in the judgment as in the best interests of Benjamin and Zachary Sigmundik.
33. The \$800,000.00 settlement for less than the \$1 million policy limit is not determinative or an implied agreement that the Sigmundik family was made whole.
34. The Texas Health Insurance Risk Pool had over \$30 million in cash or cash equivalents in 2002.
35. The Texas Health Insurance Risk Pool had over \$30 million in cash or cash equivalents in 2003.
36. The Texas Health Insurance Risk Pool had over \$30 million in cash or cash equivalents in 2004.
37. The disallowance of the subrogation claim would not work a financial hardship upon the Texas Health Insurance Texas Health Insurance Risk Pool.
38. The allowance of the subrogation claim would work a financial hardship upon Sharon Sigmundik, Benjamin Sigmundik and Zachary Sigmundik.
39. The Texas Health Insurance Risk Pool policy was issued to Thomas Sigmundik only.
40. Sharon Sigmundik had her own policy with the Texas Health Insurance Risk Pool.
41. Benjamin Sigmundik had his own policy with the Texas Health Insurance Risk Pool.
42. Zachary Sigmundik had his own policy with the Texas Health Insurance Risk Pool.

II.

Conclusions of Law

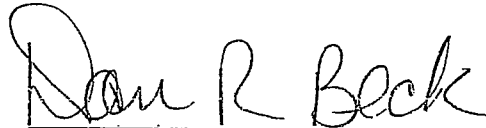
1. Sharon Sigmundik, Benjamin Sigmundik and Zachary Sigmundik were not made whole by the \$800,000.00 settlement amount. Ortiz v. Great Southern Fire and Casualty Insurance Co., 597 S.W. 2d 342 (Tex. 1980)

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2. Sharon Sigmundik, Benjamin Sigmundik and Zachary Sigmundik would not be made whole by a \$1 million policy limit settlement. Ortiz v. Great Southern Fire and Casualty Insurance Co., 597 S.W. 2d 342, (Tex. 1980)
3. The Texas Health Insurance Risk Pool has the burden of proof to prove its subrogation interest. Bradley v. Freeman, 163 S.W. 2d 693, 695 (Tex. Civ. App. – Amarillo 1942, no writ)
4. A subrogation plaintiff must plead and prove facts as would warrant subrogation. Bradley v. Freeman, 163 S.W. 2d 693, 695 (Tex. Civ. App. – Amarillo 1942, no writ)
5. The Texas Health Insurance Risk Pool has the burden of proof to show what amount, if any, of the settlement proceeds was allocated to the \$336,874.71 in medical expenses covered by the insurance policy on Thomas Sigmundik. Ortiz v. Great Southern Fire and Casualty Insurance Co., 597 S.W. 2d 342, 344 (Tex. 1980)
6. The Texas Health Insurance Risk Pool failed to carry its burden of proof on its subrogation interest, specifically including the Texas Health Insurance Risk Pool's failure to prove, that any amount of the settlement proceeds were allocated to the \$336,874.71 in medical expenses covered by the insurance policy of Thomas Sigmundik. Ortiz v. Great Southern Fire and Casualty Insurance Co., 597 S.W. 2d 342, (Tex. 1980)
7. Equitable principles apply to the Texas Health Insurance Risk Pool subrogation interest. Tex. Ass'n of School Boards v. Ward, 18 S.W. 3rd (Tex. App. – Waco 2000, writ denied).
8. An insurance contract expressly providing for subrogation may remove from the realm of equity the question of whether the insurer has a right of subrogation, but it cannot answer the question of when the insurer is actually entitled to subrogation or how much it should receive. To avoid injustice, the equities must be balanced in deciding what amount, if any, the subrogee is entitled to receive in a given case. Esparza vs. Scott & White Health Plan, 909 S.W. 2d 548, 551 (Tex. App. Austin 1995, writ denied).
9. In the event a subrogation claims works an injustice, it shall not be allowed. Associated Indemnity Co. v. Hartford Accident & Indemnity Co., 524 S.W. 2d 373, 376 (Tex. Civ. App. – Dallas 1975, no writ).
10. The Texas Health Insurance Risk Pool is not entitled to and shall take nothing as to any amount of its asserted subrogation interest.
11. The express subrogation language in the health insurance policy creates a derivative claim for the Texas Health Insurance Risk Pool by and through its insured, Thomas Sigmundik, in whose shoes it stands.

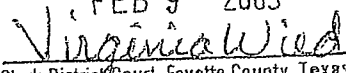
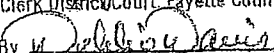
12. By operation of the judgment and release of parties, the Texas Health Insurance Risk Pool has no standing to pursue Otto and Virginia Monecke.
13. By operation of the judgment and release of parties, the Texas Health Insurance Risk Pool has no standing to pursue Otto and Virginia Monecke for any amount above the \$800,000.00 settlement.
14. The judgment and allocated settlement proceeds set forth therein are in the best interest of the minors.
15. The Texas Health Insurance Risk Pool is not entitled to any attorney's fees or court costs in asserting its subrogation rights.
16. The Texas Health Insurance Risk Pool is not entitled to subrogation since the individual loss of Sharon Sigmundik, Benjamin Sigmundik and Zachary Sigmundik is each in excess of the \$800,000.00 amount recovered.
17. The Texas Health Insurance Risk Pool is not entitled to subrogation since the individual loss of Sharon Sigmundik, Benjamin Sigmundik and Zachary Sigmundik is each in excess of the \$1 million policy amount.
18. Sharon Sigmundik, Benjamin Sigmundik, and Zachary Sigmundik each suffered damages, including pecuniary loss, loss of inheritance, mental anguish and a loss of society and companionship, recoverable under Chapter 71 of the Texas Civil Practice & Remedies Code.
19. Any conclusion of law that is a finding of fact shall be deemed as a conclusion of fact.

Dated: February 8, 2005



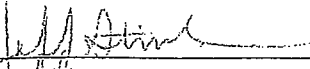
JUDGE DAN R. BECK

FILED
At 10:00 o'clock A M

FEB 9 2005

Clerk District Court, Fayette County, Texas
By  Deputy

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Respectfully Submitted,



JEFF R. STEINHAUSER
State Bar No. 19136300
107 E. North Main
Post Office Drawer D
Flatonina, Texas 78941
(361) 865-2540 – Telephone
(361) 865-3934 – Facsimile

Certificate of Service

I, Jeff R. Steinhauser, hereby certify that I have on this the 4th day of February 2005, mailed a true and correct copy of the Findings of Fact and Conclusions of Law to the following:

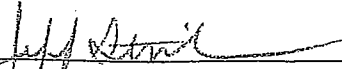
Gordon Holloway
George Caffisch
Holloway & Rowley, P.C.
1415 Louisiana, Ste. 2550
Houston, Texas 77002

Peggy Supak
151 N. Washington
La Grange, Texas 78945

Larry Parks
LONG, BURNER, PARKS & DELARGY
Post Office Box 2212
Austin, Texas 78768-2212

[Via Fax Only]

Max Roesch
Coastal Banc Bldg.
708 E. Austin, Ste. 100
Post Office Box 925
Giddings, Texas 78942



JEFF R. STEINHAUSER

Not Reported in S.W.3d, 2009 WL 2341837 (Tex.App.-Austin)
(Cite as: 2009 WL 2341837 (Tex.App.-Austin))

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION
AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Austin.

TEXAS HEALTH INSURANCE RISK POOL, Ap-
pellant
v.

Sharon B. SIGMUNDIK, Benjamin J. Sigmundik,
Zachary P. Sigmundik, as the Sole and Legal Heirs
and Beneficiaries of Thomas M. Sigmundik, De-
ceased and/or the Estate of Thomas M. Sigmundik,
Deceased; Otto L. Monecke; and Virginia L. Mo-
necke, Appellees.

No. 03-05-00057-CV.

July 31, 2009.

From the District Court of Fayette County, 155th
Judicial District, No.2002V-159; Dan R. Beck,
Judge Presiding.

Larry Parks, Mitchell Williams Long Burner, Aus-
tin, for appellant.

Jeff R. Steinhauser, Law Offices of Jeff R. Stein-
hauser, Flatonia, TX, Peggy S. Supak, County and
Dist. Atty., La Grange, TX, Giorgio Caflisch, Gor-
don A. Holloway, Holloway & Rowley, PC, Hous-
ton, TX, for appellee.

Before Justices PATTERSON, PURYEAR and
HENSON.^{FN*}

FN* Because former Chief Justice Law
was originally assigned to author this opin-
ion, the panel was reassigned as of March
3, 2009.

MEMORANDUM OPINION

DIANE M. HENSON, Justice.

*1 The Texas Health Insurance Risk Pool (“the Risk Pool”) appeals from the trial court’s judgment that the Risk Pool take nothing on its health insurance subrogation claim against Sharon, Benjamin, and Zachary Sigmundik, as the sole heirs and beneficiaries of Thomas Sigmundik, and the estate of Thomas Sigmundik (collectively, “the Sigmundiks”), and Otto and Virginia Monecke. The Risk Pool brought its subrogation claim in a petition for intervention in a wrongful death and survival action brought by the Sigmundiks against the Moneckes. The Sigmundiks ultimately settled with the Moneckes for \$800,000 and the Risk Pool asserted a subrogation interest in the settlement proceeds. After a bench trial on the subrogation claim and a hearing on the allocation of the settlement proceeds, the trial court issued a final judgment ruling that the Risk Pool take nothing. We affirm the trial court’s judgment.

BACKGROUND

The underlying dispute arose from an oil field explosion that occurred on September 20, 2001. At the time of the incident, Otto Monecke was performing perforation services on a plugged oil well operated by Sigmundik. At some point during the perforation process, while both Monecke and Sigmundik were standing in the vicinity of the well, an explosive device unexpectedly detonated inside the well, causing an explosion that severely injured both men. Because Sigmundik was standing over the oil well at the time of the accident, he sustained extensive injuries from shrapnel that was propelled out of the well during the explosion, as well as second-degree burns over 61% of his body and third-degree burns over 10% of his body. Sigmun-

Not Reported in S.W.3d, 2009 WL 2341837 (Tex.App.-Austin)
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dik survived for 52 days at Brooke Army Medical Center, undergoing numerous surgeries before ultimately dying from his injuries. The Risk Pool paid all of Sigmundik's medical expenses resulting from the accident, a sum of \$336,874.71.^{FN1}

FN1. The Risk Pool provides access to health insurance coverage to otherwise un-insurable Texans and their immediate families. *See* Tex. Ins.Code Ann. §§ 1506.101, .152 (West 2009). Sharon Sigmundik testified that the Sigmundik family obtained insurance from the Risk Pool as a result of her rheumatoid arthritis and resulting difficulty obtaining health insurance elsewhere.

On June 18, 2002, Otto Monecke and his wife, Virginia Monecke, brought suit against the Sigmundiks, alleging that Thomas Sigmundik negligently caused the explosion. The Sigmundiks then counterclaimed, alleging that Otto Monecke negligently caused the explosion. On September 30, 2002, the Risk Pool filed a petition in intervention, asserting a subrogation interest against any settlement proceeds paid to the estate of Thomas Sigmundik, based on a subrogation provision in the health insurance policy covering Thomas Sigmundik. In September 2004, almost three years after the accident, the parties participated in mediation. The Sigmundiks agreed to settle their counterclaim against the Moneckes for \$800,000, and the Moneckes agreed to non-suit their claim against the Sigmundiks, subject to the court's approval.

In November 2004, the trial court held a bench trial on the Risk Pool's asserted subrogation interest and ruled that the Risk Pool take nothing because the Sigmundiks had not been made whole by the settlement amount.^{FN2} In December 2004, the trial court held another hearing in which it approved the settlement and allocated the settlement sum among Sharon, Benjamin, and Zachary Sigmundik. The trial court then signed a judgment approving the settlement agreement and incorporating its previous

order ruling that the Risk Pool take nothing on its subrogation claim. The Risk Pool appeals from the trial court's judgment.

FN2. At the bench trial, the parties presented extensive documentary evidence and called a number of witnesses, including the executive director of the Risk Pool, Sharon Sigmundik and her two minor sons, and the parties' counsel. The court also heard argument from the children's guardian ad litem.

DISCUSSION

*2 In its first point of error, the Risk Pool argues that it was improperly deprived of a trial on the merits of its subrogation claim against the Moneckes and that the trial court erred by issuing a final judgment before allowing the Risk Pool to litigate the negligence claim. In support of this argument, the Risk Pool cites the rule that an insurance company's subrogation claim cannot be destroyed by a settlement and release of liability between the third-party tortfeasor and the insured if the third-party tortfeasor is aware of the subrogation claim. *See Wichita City Lines v. Puckett*, 156 Tex. 456, 295 S.W.2d 894, 899-900 (Tex.1956); *Landsdowne-Moody v. St. Clair*, 613 S.W.2d 792, 793 (Tex.Civ.App.-Houston [14th Dist.] 1981, no writ). However, this argument was not properly preserved for appeal and is therefore waived.

The trial court, in its findings of fact and conclusions of law, found that the Risk Pool's "subrogation claims were heard by bench trial in the absence of any jury trial request or other objection to the proceeding." This finding of fact is supported by the transcript of the bench trial, which reflects that the Risk Pool presented argument and evidence in support of its subrogation interest in the settlement proceeds without indicating any intention to alternatively pursue its subrogation claim

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(Cite as: 2009 WL 2341837 (Tex.App.-Austin))

against the Moneckes directly through litigation on the merits of the negligence claim.^{FN3} In addition, the trial court's final judgment, signed after the December 2004 settlement hearing, expressly states that the Risk Pool "is entitled to take nothing of and from Defendants/Counter-Plaintiffs and from Counter-Defendants," referring to both the Sigmundiks and the Moneckes, and that "[t]his judgment is final, disposes of all claims and parties, and is appealable." After the final judgment was issued, the Risk Pool did not file a motion for new trial or otherwise assert that it sought a trial on the merits of its subrogation claim against the Moneckes. While the Risk Pool argues on appeal that it preserved the issue by requesting findings of fact relevant to a negligence claim against the Moneckes, our review reveals that the findings of fact requested by the Risk Pool pertain to the issue of whether settlement proceeds should have been allocated to the estate of Thomas Sigmundik, rather than a potential negligence claim against the Moneckes.^{FN4}

FN3. The notice of setting sent by the Sigmundiks' counsel to all parties stated, "This letter will confirm that a bench trial on the [Risk Pool's] subrogation claim has been set for November 18, 2004 at 9:00 a.m. at the Auxiliary Courthouse...." There is nothing in the record to indicate that the Risk Pool objected to the setting or requested a bifurcated trial.

FN4. The findings requested by the Risk Pool are as follows:

43. Tom Sigmundik suffered damages in excess of \$1 million.
44. The estate of Tom Sigmundik suffered damages in excess of \$1 million.
45. Tom Sigmundik was conscious for approximately one hour immediately fol-

lowing the explosion and remained in a state of semi-consciousness much of the time until his death 52 days later.

46. Tom Sigmundik knew that he was horribly injured.

47. Tom Sigmundik knew that he was likely to die of his injuries.

48. Tom Sigmundik knew that he would probably not see his children again.

49. Tom Sigmundik experienced unimaginably great physical pain from the time of the explosion until his death at Brooke Army Burn Unit 52 days later.

50. Tom Sigmundik experienced unimaginably great mental anguish from the time of the explosion until the time of his death 52 days later.

The trial court declined to issue the requested findings.

Because the Risk Pool failed to present any complaint to the trial court regarding its claim that it was entitled to a trial on the merits against the Moneckes before a final judgment could be issued, we hold that this argument was not preserved for appellate review. *See* Tex.R.App. P. 33.1 (record must reflect that complaint was made to trial court in order to be preserved for appellate review). The Risk Pool's first issue on appeal is overruled.

The Risk Pool's second, third, and fourth issues on appeal can be summarized as a single argument that the trial court erred in ruling that the Risk Pool take nothing on its subrogation claim to a portion of the settlement proceeds.^{FN5} The parties' briefs focus primarily on the equitable subrogation principles described in *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548, 551-53 (Tex.App.-Austin 1995, writ denied), particularly the "made whole" doc-

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trine. Under the “made whole” doctrine, an insurer is not entitled to an equitable right of subrogation until the insured is “made whole,” or fully compensated, for his loss. *See id.* at 552. However, the Texas Supreme Court has since held that the “made whole” doctrine must yield to contractual subrogation provisions when applicable. *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649-50 (Tex.2007).^{FN6}

FN5. The Risk Pool's second issue on appeal presents the argument that the trial court erred in denying the Pool a share of the settlement proceeds, while its third and fourth issues challenge a number of findings of fact and conclusions of law that support the trial court's take-nothing judgment. These issues are combined into a single discussion in the Risk Pool's brief.

FN6. *Fortis Benefits* was addressed in supplemental briefing by the parties.

*3 In the present case, Thomas Sigmundik's health insurance policy with the Risk Pool included the following provision:

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 Person 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.

It is undisputed that Thomas Sigmundik was the

sole insured under his policy with the Risk Pool. The Risk Pool concedes that it has a subrogation right only in the amount of the proceeds allocated to the estate of Thomas Sigmundik, stating in its brief, “The Pool does not claim that it is entitled to the first dollar of the settlement, but it does claim to be entitled to the first dollar of any settlement sum *allocated to the estate.*” (Emphasis in original.) The trial court's final judgment, however, does not allocate any amount of the settlement sum to the estate, thus precluding the Risk Pool from recovering on its subrogation claim.

The trial court approved an allocation of the entire settlement sum between Thomas Sigmundik's widow, Sharon Sigmundik, and his two minor sons, Benjamin and Zachary Sigmundik. On appeal, the Risk Pool argues that the trial court erred in failing to require that a portion of the settlement funds be allocated to the estate of Thomas Sigmundik.

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. *Cf. Ortiz v. Great S. Fire & Cas. Ins. Co.*, 597 S.W.2d 342, 344 (Tex.1980) (insurer bears burden of showing what amount, if any, of settlement funds was allocated to covered loss). In finding of fact number 21, the trial court found that “[n]o specific allocation of any portion of the \$800,000.00 settlement proceeds was made to any Estate of Thomas Sigmundik *or timely requested by Intervenor.*” (Emphasis added.) 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.” Despite this objection, the 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. While the Risk Pool requested certain findings of fact related to the damages suffered by Thomas Sigmundik before his death, *see supra* note 4, it did not re-

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quest that any conclusions regarding allocation of the settlement funds be drawn from those facts or otherwise seek to connect the requested findings to the issue of settlement allocation. Therefore, we hold that the Risk Pool failed to carry its burden of establishing that settlement funds should be allocated to the estate.

*4 Furthermore, we review the trial court's determination of the proper allocation of settlement funds for an abuse of discretion. *See Garcia v. Elizondo*, No. 04-00-00077-CV, 2001 Tex.App. LEXIS 790, at *5-6 (Tex.App.-San Antonio Feb.7, 2001, no pet.) (not designated for publication) (trial court did not abuse its discretion in denying motion to allocate portion of settlement funds to estate of decedent). Thomas Sigmundik, who was 46 years old at the time of his death, died intestate, so that no estate was ever actually opened and no representative ever made an appearance on behalf of an estate of Thomas Sigmundik. The trial court heard extensive testimony regarding the mental anguish experienced by Sharon Sigmundik and her two sons, Zachary and Benjamin, ages 12 and 13, respectively, at the time of their father's death, as well as the financial concerns related to the loss of the family's primary breadwinner. ^{FN7} When asked why the entire settlement amount was allocated to herself and her two minor sons with no amount allocated to the estate, Sharon Sigmundik answered, "[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]." Under these circumstances, we cannot conclude that the trial court abused its discretion in approving the allocation of the settlement funds to Sharon, Benjamin, and Zachary Sigmundik, without allocating any amount to an estate of Thomas Sigmundik. As a result, there are no settlement funds subject to the Risk Pool's subrogation interest, which the Risk Pool concedes is limited to the amount of any recovery by the estate of the insured. The Risk Pool's second, third, and fourth issues on appeal are over-

ruled and the trial court's judgment is affirmed in its entirety.

FN7. Sharon Sigmundik testified at length regarding the family-owned business, Market Street Energy, a small oil and gas operating company that Thomas Sigmundik had been running almost entirely on his own, and the detrimental impact on the business from the loss of Thomas's expertise.

CONCLUSION

We affirm the trial court's judgment.

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(Cite as: 234 S.W.3d 642)

H

Supreme Court of Texas.
FORTIS BENEFITS, Petitioner,
v.
Vanessa CANTU and Ford Motor Company, Re-
spondents.
No. 05-0791.

Argued Nov. 16, 2006.
Decided June 29, 2007.
Rehearing Denied Nov. 2, 2007.

Background: Automobile accident victim's health insurer sought reimbursement or subrogation following victim's settlement of tort claims. The 249th District Court, Johnson County, D. Wayne Bridewell, J., entered summary judgment in favor of victim. Insurer appealed. The Waco Court of Appeals, Bill Vance, J., 170 S.W.3d 755, affirmed. Review was granted.

Holdings: The Supreme Court, Willett, J., held that:

- (1) made-whole doctrine did not apply to insurer's claim based on contractual right to subrogation, abrogating *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548, and
- (2) insurer relinquished any subrogation claim against automobile manufacturer by entering written pretrial agreement.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Insurance 217 ↪3502

217 Insurance
217XXX Recovery of Payments by Insurer
217k3501 Reimbursement of Payments
217k3502 k. In General. Most Cited Cases

Insurance 217 ↪3514(2)

217 Insurance
217XXX Recovery of Payments by Insurer
217k3511 Subrogation Against Third Parties;
Right to Proceeds of Action or Settlement
217k3514 Payment to Insured or Injured
Person

217k3514(2) k. Adequate Compensation of Insured; "Made Whole" Doctrine. Most Cited Cases

Made-whole doctrine did not apply to medical insurer's claim based on contractual right to reimbursement or subrogation; policy gave to insurer an unfettered right to recover the proceeds from insured's settlement of the underlying tort suit; abrogating *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548.

[2] Subrogation 366 ↪1

366 Subrogation
366k1 k. Nature and Theory of Right. Most Cited Cases

Subrogation 366 ↪27

366 Subrogation
366k27 k. Agreements for Subrogation. Most Cited Cases
Contractual subrogation rights generally arise from contract language; they do not derive their validity from principles of equity.

[3] Subrogation 366 ↪27

366 Subrogation
366k27 k. Agreements for Subrogation. Most Cited Cases
Contractual subrogation clauses express the parties' intent that reimbursement should be controlled by agreed contract terms rather than external rules imposed by the courts.

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[4] Subrogation 366 ↪1

366 Subrogation

366k1 k. Nature and Theory of Right. Most Cited Cases

Subrogation 366 ↪27

366 Subrogation

366k27 k. Agreements for Subrogation. Most Cited Cases

The three varieties of subrogation-equitable, contractual, and statutory-represent three separate and distinct rights that, while related, are independent of each other.

[5] Equity 150 ↪62

150 Equity

150I Jurisdiction, Principles, and Maxims

150I(C) Principles and Maxims of Equity

150k62 k. Equity Follows the Law. Most Cited Cases

Courts generally adhere to the maxim that equity follows the law, and this requires equitable doctrines to conform to contractual and statutory mandates, not the other way around.

[6] Contracts 95 ↪103

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k103 k. Contravention of Law in General. Most Cited Cases

Contracts 95 ↪108(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k108 Public Policy in General
95k108(1) k. In General. Most Cited

Cases

Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy.

[7] Payment 294 ↪80

294 Payment

294V Recovery of Payments

294k80 k. Nature and Grounds of Right. Most Cited Cases

Subrogation 366 ↪27

366 Subrogation

366k27 k. Agreements for Subrogation. Most Cited Cases

Neither subrogation nor reimbursement clauses in contracts violate public policy.

[8] Statutes 361 ↪2

361 Statutes

361I Enactment, Requisites, and Validity in General

361k2 k. Nature and Essentials of Legislative Acts in General. Most Cited Cases
State's public policy is reflected in its statutes.

[9] Insurance 217 ↪3514(2)

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement

217k3514 Payment to Insured or Injured Person

217k3514(2) k. Adequate Compensation of Insured; "Made Whole" Doctrine. Most Cited Cases

Parties are free to negate the made-whole doctrine contractually and to do so before an event occurs that triggers medical benefits under the policy.

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[10] Subrogation 366 ↪ 27

366 Subrogation

366k27 k. Agreements for Subrogation. Most Cited Cases

Contract-based subrogation rights should be governed by the parties' express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement.

[11] Insurance 217 ↪ 1721

217 Insurance

217XIII Contracts and Policies

217XIII(A) In General

217k1720 Validity and Enforceability

217k1721 k. In General. Most Cited

Cases

Insurance 217 ↪ 1725

217 Insurance

217XIII Contracts and Policies

217XIII(A) In General

217k1720 Validity and Enforceability

217k1725 k. Public Policy. Most Cited

Cases

Adhesion contracts such as insurance policies are not automatically unconscionable or void.

[12] Insurance 217 ↪ 3502

217 Insurance

217XXX Recovery of Payments by Insurer

217k3501 Reimbursement of Payments

217k3502 k. In General. Most Cited Cases

Insurance 217 ↪ 3512

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties;

Right to Proceeds of Action or Settlement

217k3512 k. In General. Most Cited Cases

It is not per se unconscionable that an insurer

would seek to reduce its risk and boost its solvency by including a subrogation and/or reimbursement clause.

[13] Insurance 217 ↪ 3514(2)

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement

217k3514 Payment to Insured or Injured

Person

217k3514(2) k. Adequate Compensation of Insured; "Made Whole" Doctrine. Most Cited Cases

Insurance 217 ↪ 3519(2)

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement

217k3519 Health and Accident Insurance

217k3519(2) k. Medical Insurance.

Most Cited Cases

Subrogation clause entitled health insurer to recover from insured's settlement of tort claim, even if the insured was not made whole and even though the clause did not refer to "first money"; the policy entitled insurer to the proceeds of any settlement or judgment limited to the amount of benefits paid.

[14] Insurance 217 ↪ 3519(2)

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement

217k3519 Health and Accident Insurance

217k3519(2) k. Medical Insurance.

Most Cited Cases

Subrogation clause entitling health insurer to proceeds of any settlement or judgment limited to the amount of benefits paid gave a subrogation right only on recoveries for claims that related to benefits

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available under the contract; the clause did not allow subrogation of claims unrelated to the policy.

[15] Insurance 217 ↪3522

217 Insurance

217XXX Recovery of Payments by Insurer

217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement

217k3522 k. Waiver or Loss of Subrogation Rights. Most Cited Cases
Health insurer relinquished any subrogation claim against automobile manufacturer by entering written pretrial agreement and stipulations that insured would pursue case against manufacturer and other defendants independently of insurer and that insurer would then look only to insured. Vernon's Ann.Texas Rules Civ.Proc., Rule 11.

[16] Stipulations 363 ↪6

363 Stipulations

363k6 k. Necessity for Writing in General. Most Cited Cases
Rule making pretrial agreement between attorneys or parties enforceable only if in writing aims to remove misunderstandings and controversies that accompany verbal assurances, and the written agreements speak for themselves. Vernon's Ann.Texas Rules Civ.Proc., Rule 11.

[17] Stipulations 363 ↪19

363 Stipulations

363k19 k. Use and Enforcement in General. Most Cited Cases
Trial court has duty to enforce terms of valid pretrial agreement. Vernon's Ann.Texas Rules Civ.Proc., Rule 11.

[18] Subrogation 366 ↪27

366 Subrogation

366k27 k. Agreements for Subrogation. Most Cited Cases

The equitable made-whole doctrine is inapplicable when the parties' agreed contract provides a clear and specific right of subrogation.

*643 Loren R. Smith, Kelly, Smith & Murrah, P.C., Thomas A. Laucius, Laucius & Associates, Houston, TX, for Petitioner.

Thomas B. Cowart, Law Offices of Thomas B. Cowart, P.C., Adolfo Ruiz Rodriguez, Basheer Youssef Ghorayeb, Rodriguez Law Firm, P.C., Dallas, TX, Michael W. Eady, Thompson, Coe, Cousins & Irons, L.L.P., Austin, TX, for Respondents.

Kevin J. Cook, Payne & Blanchard, Dallas, TX, E.L. Caraway III, Watson Caraway Harrington Nelson Midkiff & Lunningham, Fort Worth, TX, for Other Interested Parties.

Gary L. Wickert, Matthiesen, Wickert & Lehrer, S.C., Hartford, WI, Brent M. Rosenthal, Baron & Budd, P.C., Dallas, TX, for Amicus Curiae.

*644 Justice WILLETT delivered the opinion of the Court.

The issue in this insurance subrogation case is whether the equitable "made whole" doctrine—the rule that an insurer is not entitled to subrogation of medical benefits unless the insured has been "made whole"—trumps an insurer's contract-based subrogation right.

After respondent Vanessa Cantu sued multiple parties for severe injuries she sustained in an auto accident, her medical insurer, petitioner Fortis Benefits, intervened, claiming a subrogation right under the policy. The various defendants settled with Cantu, and Fortis looked only to Cantu for its recovery. A divided court of appeals upheld a trial court finding that because Cantu's medical expenses exceeded the settlement amount plus the benefits Fortis had paid, Fortis's subrogation claim was barred by the equitable "made whole" doctrine. We hold that the "made whole" doctrine must yield to

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Fortis's right to contractual subrogation under the plain terms of the insurance policy.

I. Background

Cantu suffered severe injuries in a car wreck and later sued the driver of the vehicle in which she was riding, his employer, the vehicle seller, and the vehicle manufacturer (Ford). Fortis intervened and asserted contractual subrogation and reimbursement rights to recoup from Cantu's tort recovery the amount of medical benefits it had paid under the policy. At a pretrial conference, Fortis agreed with all parties on the record that Fortis was excused from participating in the pretrial and trial proceedings and that Fortis at the post-verdict phase would look only to Cantu to resolve its subrogation and reimbursement claims.

Cantu settled her claims with the defendants before trial for \$1.445 million. Cantu and Fortis disputed what portion of the settlement proceeds, if any, should go to Fortis, and Cantu moved for summary judgment, arguing she had not been "made whole" by the settlement. Cantu's past medical expenses totaled \$378,500 (of which Fortis claimed to have paid \$247,534.14), and her summary judgment evidence included two "life care plans" estimating her future medical expenses at roughly \$1.7 million and \$5.3 million. She argued that her past and future medical expenses, exclusive of other amounts like pain and suffering, exceeded the amount of the settlement plus what Fortis had already paid. Cantu argued that the "made whole" doctrine precluded Fortis's contractual claims of subrogation and reimbursement. The trial court granted summary judgment in favor of Cantu, and a divided court of appeals affirmed.^{FN1}

FN1. 170 S.W.3d 755.

II. Subrogation and the "Made Whole" Doctrine

This Court recognized the "made whole" doctrine twenty-seven years ago in *Ortiz v. Great Southern Fire & Casualty Insurance Co.*^{FN2} The Ortiz family had a fire insurance policy from Great Southern on their home, but not the contents.^{FN3} A fire caused damages of \$4,000 to the home and \$11,614 to personal property, and Great Southern paid \$4,000 for home repairs.^{FN4} The Ortizes then sued Stacy-Mason, Inc., alleging that one of its employees negligently started the fire. Great Southern intervened, claiming a right of equitable subrogation.^{FN5} After the Ortizes settled with Stacy-Mason for \$10,000, the trial court awarded, and the court of appeals affirmed, \$4,000 of that settlement to Great Southern.^{FN6}

FN2. 597 S.W.2d 342 (Tex.1980).

FN3. *Id.* at 343.

FN4. *Id.*

FN5. *Id.*

FN6. *Id.*

We reversed, holding, "An insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the insurer and the third party causing the loss."^{FN7} We reasoned that one justification for equitable subrogation is to prevent the insured from receiving a double recovery, first from the insurer, then from the third party.^{FN8} We also recognized, however, that if the insured's total recovery is less than his or her losses, equity cuts the other way: "when 'either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.'"^{FN9} Because the settlement in *Ortiz* encompassed both covered and noncovered items, we remanded for a determination of how much of the \$10,000 related to house damage.^{FN10}

FN7. *Id.*

FN8. *Id.*

FN9. *Id.* at 344 (quoting *Garrity v. Rural Mut. Ins. Co.*, 77 Wis.2d 537, 253 N.W.2d 512, 514 (1977)).

FN10. *Id.*

[1] *Ortiz* would govern if Fortis were merely asserting a claim for equitable subrogation. But Fortis is not citing principles of equity to recover its money; its policy with Cantu conferred on Fortis two separate contractual rights of recovery, one styled “subrogation” and one styled “reimbursement.”^{FN11} Fortis argues that these provisions authorize recovery from Cantu’s \$1.445 million settlement with the defendants, and that neither provision is displaced by the “made whole” doctrine. We agree.

FN11. The policy states:

Subrogation Right. Upon payment of benefits, *We will be subrogated to all rights of recovery a Covered Person may have against any person or organization.* This includes but is not limited to recoveries against such third party, against any liability coverage for such third party or against automobile insurance in the event a claim is made under the uninsured or underinsured motorist coverages. Such right extends to the proceeds of any settlement or judgment; but is limited to the amount of benefits We have paid. You must 1) do nothing to prejudice any right of recovery; 2) execute and deliver any required instruments or papers; and 3) do whatever else is necessary to secure such rights.

If We are precluded from exercising Our Subrogation Right, We may exercise Our Right of Reimbursement.

Right of Reimbursement. If benefits

are paid under this plan, and any Covered Person recovers against any person or organization by settlement, judgment or otherwise, *We have a right to recover from that Covered Person an amount equal to the amount We have paid.* This includes but is not limited to recoveries against such third party, against any liability coverage for such third party or against automobile insurance in the event a claim is made under the uninsured or underinsured motorist coverages.

(emphases added).

A. Equitable Subrogation v. Contractual Subrogation

Our *Ortiz* decision addressed the “made whole” doctrine in the context of equitable subrogation, but it did not discuss how the doctrine applies, if at all, to contractual subrogation. Other courts, however, have discussed whether the doctrine applies in the face of a contract that grants the insurer greater subrogation rights. For example, in **646Oss v. United Services Automobile Ass’n*,^{FN12} the Fifth Circuit, applying Texas law in a diversity case, was confronted with facts similar to those in this case. The insured was not made whole by the settlement following a car wreck, yet insurer USAA sought enforcement of its contractual subrogation rights under the policy.^{FN13} Like Fortis, USAA urged the Fifth Circuit to reject the “made whole” doctrine by distinguishing *Ortiz* as involving equitable rather than contractual subrogation.^{FN14} The Fifth Circuit, relying on the El Paso Court of Appeals’ decision in *Means v. United Fidelity Life Insurance Co.*, refused because it believed that, in Texas, “the same principles govern both equitable and contractual subrogation.”^{FN15}

FN12. 807 F.2d 457 (5th Cir.1987).

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FN13. *Id.* at 458-59.

FN14. *Id.* at 460.

FN15. *Id.* (citing 550 S.W.2d 302, 309 (Tex.Civ.App.-El Paso 1977, writ ref'd n.r.e.)).

In *Means*, the insureds had challenged the validity of United Fidelity's contractual subrogation right to foreclose on their 200-acre property.^{FN16} The court noted, "Whether we have a purely equitable subrogation or, as here, a purely contractual one where both Mr. and Mrs. Means agreed to the subrogation, the principles are the same, and the rights of United Fidelity Life Insurance Company after the payment were superior to the homestead rights of Mr. and Mrs. Means."^{FN17} Read in context, the court's discussion in *Means* does little more than affirm a subrogee's basic rights, whether they arise via contract or equity. Moreover, *Means* nowhere addressed the "made whole" doctrine that we first articulated in *Ortiz*, nor could it have, since *Ortiz* was decided three years later. When the El Paso Court of Appeals declared in *Means* that "the principles are the same" in contractual and equitable subrogation, it did so against a legal landscape that did not yet include the "made whole" doctrine.^{FN18} For this reason, *Means* is not particularly instructive, nor is *Oss*, which relies predominantly on *Means*.

FN16. 550 S.W.2d at 308.

FN17. *Id.* at 309.

FN18. *Id.*

Other Texas courts of appeals have addressed the difference between equitable and contractual subrogation. For example, the Austin Court of Appeals in *Lexington Insurance Co. v. Gray* recognized the distinction between "legal" and "conventional" subrogation.^{FN19} The former is governed by equity; the latter by contract.^{FN20} The court (1) observed

that Texas courts have given "substance to the distinction," (2) noted the "unusually 'hospitable' treatment that the right of subrogation has historically received in Texas," especially express subrogation agreements, which are given "considerable weight" and are governed by general contract law principles,^{FN21} and (3) cited several cases holding that a subrogee invoking contractual subrogation can "recover without regard to the relative equities of the parties."^{FN22} *Lexington* did not specifically *647 involve the "made whole" doctrine we had adopted a decade earlier in *Ortiz*, but it suggested that this equitable defense would not apply in the face of an express agreement whereby the parties agree in advance that the matter will be governed by contract principles rather than equitable principles. Where the policy's terms govern subrogation, the court added, "there is no reason for the equitable principles usually found in subrogation cases to come into play."^{FN23}

FN19. 775 S.W.2d 679, 683 (Tex.App.-Austin 1989, writ denied).

FN20. *Id.*

FN21. *Id.* at 683-84.

FN22. *Id.* (citing *Girard Fire & Marine Ins. Co. v. Farmer*, 53 S.W.2d 1016 (Tex.Com.App.1932, judgm't adopted); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627 (Tex.App.-Amarillo 1983, writ ref'd n.r.e.); *Quincy Mut. Fire Ins. Co. v. Jones*, 486 S.W.2d 126 (Tex.Civ.App.-Dallas 1972, no writ); *F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co.*, 108 S.W.2d 947 (Tex.Civ.App.-San Antonio 1937, writ dism'd w.o.j.)).

FN23. *Id.* at 684.

A few years later, however, in *Esparza v. Scott & White Health Plan*,^{FN24} the Austin Court of Appeals backed away from this interpretation. The Es-

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parzas settled for an amount that did not make them whole, and Scott and White sought subrogation under an express provision in the parties' insurance contract, citing *Lexington* as holding that the "made whole" doctrine should apply only to equitable subrogation and not to contractual subrogation.^{FN25} The court of appeals disagreed, stating:

FN24. 909 S.W.2d 548 (Tex.App.-Austin 1995, writ denied).

FN25. *Id.* at 551 (citing 775 S.W.2d 679).

The distinction we drew between legal and conventional subrogation in *Lexington* simply means that under conventional subrogation no balancing of equities is necessary to determine whether the subrogee has a right to recover at all. While an insurance contract providing expressly for subrogation may remove from the realm of equity the question of *whether* the insurer has a right to subrogation, it cannot answer the question of *when* the insurer is actually entitled to subrogation or *how much* it should receive....

... To avoid injustice, the equities must still be balanced in deciding what amount, if any, the subrogee is entitled to receive in a given case.^{FN26}

FN26. *Id.* at 552-52 (emphasis in original).

The court adopted the reasoning from *Oss* that a boiler-plate subrogation provision does not automatically negate an insurance policy's fundamental purpose, which is to protect the insured by shifting the risk of loss to the insurer.^{FN27} If anyone is to go unpaid, the court reasoned, it should be the insurance company. The court concluded that contracts " 'confirm, but [do] not expand, the equitable subrogation rights of insurers,' " and the equities must still be balanced to achieve justice.^{FN28}

FN27. *Id.*

FN28. *Id.* at 552 (quoting *Oss*, 807 F.2d at 460).

[2] We do not disagree that equitable and contractual subrogation rest upon common principles, but contract rights generally arise from contract language; they do not derive their validity from principles of equity but directly from the parties' agreement. The policy declares the parties' rights and obligations, which are not generally supplanted by court-fashioned equitable rules that might apply, as a default gap-filler, in the absence of a valid contract. If subrogation arises independent of any contract, then an express subrogation agreement would be superfluous and serve only to acknowledge this preexisting right, a position we reject.^{FN29}

FN29. Even if the "Subrogation Right" provision merely confirmed the preexisting right of equitable subrogation and nothing more, the policy's separate and broader "Right of Reimbursement" provision affords Fortis an alternative basis to recover from Cantu the medical benefits it paid.

[3] Contractual subrogation clauses express the parties' intent that reimbursement should be controlled by agreed contract*648 terms rather than external rules imposed by the courts. The United States Supreme Court addressed this very point in a subrogation case decided shortly after we granted the instant case. In *Sereboff v. Mid Atlantic Medical Services, Inc.*,^{FN30} insurer Mid Atlantic was an ERISA plan fiduciary for the Sereboffs. When the Sereboffs were injured in an auto accident, Mid Atlantic paid the couple's expenses pursuant to the plan.^{FN31} When the Sereboffs settled the tort claims that arose from the accident, Mid Atlantic filed suit under ERISA to collect the medical expenses it had paid.^{FN32} Mid Atlantic sought reimbursement under an "Acts of Third Parties" provision in the plan.^{FN33} The Sereboffs argued that the equitable defense of the "made whole" doctrine should apply, even though language in the plan

document was to the contrary.^{FN34} The Court disagreed, comparing an action under the “Acts of Third Parties” provision to an action to enforce an equitable lien established by agreement.^{FN35} The Court refused to apply the “made whole” doctrine, deeming the Sereboffs' equitable defenses “beside the point” because Mid Atlantic's subrogation claims arose by written agreement.^{FN36}

FN30. 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed.2d 612 (2006).

FN31. *Id.* at 1872.

FN32. *Id.* at 1873.

FN33. *Id.* at 1872-73.

FN34. *Id.* at 1877.

FN35. *Id.*

FN36. *Id.* Cantu would have us distinguish *Sereboff* because it arises under the ERISA statute and “has no application to this non-ERISA case.” However, “ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content.” *Ryan v. Fed. Express Corp.*, 78 F.3d 123, 127 (3d Cir.1996). Accordingly, a contractual subrogation provision, whether in an ERISA plan or in a private insurance policy, must be enforced as written. *See id.* at 128.

This position was earlier adopted by the Fifth Circuit in another ERISA case, *Walker v. Wal-Mart Stores, Inc.*^{FN37} That case, like today's case, concerned a subrogation clause that granted a right of recovery against “any and all” third-party settlements. Walker brought a malpractice action against her dentist, alleging he propped open her mouth excessively, resulting in three jaw surgeries and medical expenses of over \$41,000.^{FN38} Walker settled for \$12,500, and the trial court awarded the insurer

the entire settlement amount as first-money reimbursement for the medical benefits it paid.^{FN39} The Fifth Circuit held that “the Plan's language is unambiguous.... We agree with the district court in holding that the ‘any and all’ language plainly means the first dollar of recovery (any) and 100% recovery (all) of the funds received by the plaintiff in the settlement, up to the full amount of the benefits paid.”^{FN40}

FN37. 159 F.3d 938 (5th Cir.1998) (per curiam).

FN38. *Id.* at 939.

FN39. *Id.*

FN40. *Id.* at 940.

[4][5][6][7][8] The three varieties of subrogation—equitable, contractual, and statutory—represent three separate and distinct rights that, while related, are independent of each other. Independent, however, does not mean co-equal. We generally adhere to the maxim that “equity follows the law,” which requires equitable doctrines to conform to contractual and statutory mandates, not the other way around. Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy. This Court has “long recognized a strong public policy in favor of preserving the freedom of contract.”^{FN41} And in *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County*, we emphasized that insurers are well equipped to evaluate and reduce risk by, for example, “drafting policies to specifically provide for reimbursement.”^{FN42} Fortis did exactly that, drafting two separate recovery provisions that replaced equitable rights with specific contractual rights. Neither subrogation nor reimbursement clauses violate Texas public policy.^{FN43} As we have stated, “the State's public policy is reflected in its statutes,”^{FN44} and Texas

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workers' compensation law specifically embraces an insurer's first-money right of subrogation, thus indicating no blanket legislative disfavor of such provisions.^{FN45} It is indeed difficult to declare something contrary to public policy when state law, both statutory and regulatory, actually suggests approval.^{FN46} In a subrogation case arising under the Labor Code, the Amarillo Court of Appeals distinguished statutory subrogation from equitable and contractual subrogation.^{FN47} The court looked only at the statute's plain language in affirming the trial court's refusal to invoke its equitable powers to deny subrogation.^{FN48} We agree with this modest, text-based approach.

FN41. *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex.2001) (citing *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181, 185 (1951)). As a rule, a court should not by judicial fiat insert non-existent language into statutes or into parties' agreed-to contracts, or delete existent language from them either. Our confined duty is to construe the contract as is, and holding that equitable considerations trump contrary contract terms would render contractual subrogation a nullity.

FN42. 52 S.W.3d 128, 136 (Tex.2000). As we noted, "the presence of absence of a reimbursement clause in the insurance contract could affect the premium charged," so such provisions cannot be deemed illusory. *Id.* at 131 n. 4.

FN43. *See id.*; *Ortiz*, 597 S.W.2d at 343.

FN44. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex.2004) (quoting *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex.2002)).

FN45. *See* TEX. LABOR CODE §§

417.001-.004 (authorizing subrogation in Texas workers' compensation law).

FN46. *See Lawrence*, 44 S.W.3d at 553 ("Public policy, some courts have said, is a term of vague and uncertain meaning, which it pertains to the law-making power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law.").

FN47. *Tex. Workers' Comp. Ins. Fund v. Knight*, 61 S.W.3d 91, 93 (Tex.App.-Amarillo 2001, no pet.).

FN48. *Id.*

[9] Given this insurance policy's plain language, we are loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards that neither the Legislature nor the Texas Department of Insurance has thus far decided to promulgate. As we have said before, balancing dueling policy concerns is generally for non-judicial bodies, and it remains the "better policy for the contracts of insurance to be changed by the public body charged with their supervision, the State Board of Insurance, or by the Legislature, rather than for this Court" to contravene the express language of insurance contracts with equitable arguments.^{FN49} The *650 contrary, however-replacing equitable protections with specific contract language-is not unknown in Texas law.^{FN50} Parties are thus free to negate the "made whole" doctrine contractually, and to do so before an event occurs that triggers medical benefits under the policy.^{FN51}

FN49. *Members Mut. Ins. Co. v. Cutaita*, 476 S.W.2d 278, 281 (Tex.1972).

FN50. *See, e.g., Zapata v. Torres*, 464

S.W.2d 926, 930 (Tex.Civ.App.-Dallas 1971, no writ) (stating it is “reasonable to suppose” that the parties’ express agreement was intended to replace implied equitable rights) (citations omitted).

FN51. Of course, if the Legislature and/or TDI believes that the contract’s terms, though clear, work an unfair result, they can take action to prescribe or proscribe whatever principles they believe strike the best balance. The Insurance Code requires insurers to submit their insurance forms to TDI for approval, TEX. INS.CODE § § 1701.051, 1701.054, and while TDI can disapprove forms it deems unjust, *id.* § 1701.055(a)(2), it did not do so here.

[10][11][12] Leading insurance law treatises likewise recognize that specific policy terms can override equitable principles and that many jurisdictions, though not all, apply the “made whole” doctrine only in the absence of contrary reimbursement language in the contract.^{FN52} We agree with those courts holding that contract-based subrogation rights should be governed by the parties’ express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement.^{FN53}

FN52. 16 COUCH ON INSURANCE 3d §§ 223:134, 223:147; 22 HOLMES APPLEMAN ON INSURANCE 2d § 141.2[B][1]; 3 APPLEMAN INSURANCE LAW & PRACTICE § 1675.

FN53. Cantu attempts to avoid the policy’s express language by arguing that insurance contracts “are contracts of adhesion in which the insured has little, if any, negotiating room,” and that contractual abrogation of the “made whole” doctrine is thus unconscionable and unenforceable. Even taking as true the contention that insurance

contracts are contracts of adhesion that reflect unequal bargaining power, “adhesion contracts are not automatically unconscionable or void.” *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex.1999). Nor is it per se unconscionable that an insurer would seek to reduce its risk and boost its solvency by including a subrogation and/or reimbursement clause. In any event, Cantu has produced no evidence of duress or unconscionability.

B. Subrogation Under Cantu’s Insurance Contract With Fortis

[13][14] We turn now to the specific language of the policy in issue, which defines the parties’ rights and obligations. It contains a section called “Recovery,” which includes a “Subrogation Right” provision and a separate (and broader) “Right of Reimbursement” provision. The former establishes a right of subrogation: “Upon payment of benefits, We [Fortis] will be subrogated to *all* rights of recovery a Covered Person [Cantu] may have against *any* person or organization.”^{FN54} The provision continues: “Such right extends to the proceeds of *any* settlement or judgment; but is limited to the amount of benefits We have paid.”^{FN55} Fortis thus retained an unfettered right to recover the proceeds from *651 the settlement of the underlying suit, the only limitation being the *amount* of recovery—what Fortis had paid under the contract. Nowhere does this provision suggest that Cantu must first be “made whole” for Fortis to recover. This provision does not use the modifier “first money,” but its meaning is not imprecise or ambiguous. The contract’s specific language controls Fortis’s right to subrogation, and the equitable defense of the “made whole” doctrine must give way.

FN54. Emphasis added. Although Cantu argues that this language is so open-ended it allows for subrogation of claims unre-

lated to the policy, we must construe this provision in relation to the entire instrument, *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983), to avoid an interpretation that renders the contract “unreasonable, inequitable, and oppressive,” *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex.1987). This contract is a “Major Medical Policy” that “describes the benefits available to You and covered Family Members from Fortis Insurance Company.” The provision therefore gives Fortis a subrogation right only on recoveries for claims that relate to benefits available under the contract.

FN55. Emphasis added.

Accordingly, we hold that Fortis is contractually entitled to recover from the \$1.445 million settlement the total amount of benefits it paid to Cantu.
FN56

FN56. Because we enforce the contract’s “all rights of recovery” subrogation provision, we need not reach the separate “Right of Reimbursement” provision, which by its terms only applies if Fortis is denied subrogation. Nor need we consider whether the trial court erred in computing past and future medical expenses in relation to Cantu’s total damages.

III. Fortis’s Claims Against Ford

[15][16][17] Fortis also asserts that the court of appeals erred in not considering the validity of a pretrial agreement regarding its claims against defendant Ford. At a pretrial conference convened under Texas Rule of Civil Procedure 11, Fortis agreed to divide the proceeding into two phases: first Cantu would litigate the case with the defendants completely independent from Fortis, and then Fortis would look only to Cantu to resolve its claim for

subrogation. The Rule 11 agreement and stipulations in the record, which narrowed the issues presented to the trial court, make clear that Fortis has unequivocally relinquished any claims against Ford. Just as Cantu entered into and is bound by the specific language in the insurance agreement, Fortis entered into and is bound by the specific language in the Rule 11 agreement. Rule 11 aims to remove misunderstandings and controversies that accompany verbal assurances, and the written agreements “speak for themselves.”^{FN57} As this is a valid pretrial agreement under Rule 11, the trial court had a duty to enforce its terms.^{FN58} Hence, the trial court did not err in dismissing Fortis’s claims against Ford, and the court of appeals did not err in affirming that portion of the judgment.

FN57. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex.1995) (citing *Birdwell v. Cox*, 18 Tex. 535, 537 (1857)).

FN58. See *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex.1996) (orig. proceeding) (noting that trial courts cannot consider evidence outside the bounds of the Rule 11 agreement); *Scott-Richter v. Tafarella*, 186 S.W.3d 182, 189 (Tex.App.-Fort Worth 2006, pet. denied) (“A trial court has a ministerial duty to enforce a valid Rule 11 agreement.”).

IV. Conclusion

[18] The equitable “made whole” doctrine is inapplicable when the parties’ agreed contract provides a clear and specific right of subrogation. Accordingly, while we affirm that part of the court of appeals’ judgment regarding respondent Ford, we reverse and remand to the trial court for further proceedings consistent with this decision.

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