NO. 05-0791

IN THE

SUPREME COURT

OF TEXAS

FORTIS BENEFITS,

Petitioner,

V.

VANESSA CANTU AND FORD MOTOR COMPANY

Respondents.

Appealed from the Tenth Court of Appeals, Waco, and the 249th Judicial District Court of Johnson County, Texas

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PETITION FOR REVIEW OF AMICUS CURIAE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS

Gary L. Wickert
Texas Bar No. 21419400
Matthiesen, Wickert & Lehrer, S.C.
1111 East Summer Street
P.O. Box 270670
Hartford, WI 52027-0670
Telephone: (262) 673-7850
Facsimile: (262) 673-3766

ATTORNEY FOR AMICUS CURIAE
NATIONAL ASSOCIATION OF
SUBROGATION PROFESSIONALS

NO. 05-0791

FORTIS BENEFITS,

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Respondents
.

IDENTITIES OF PARTIES AND COUNSEL

---

1. Petitioner - Fortis Benefits

2. Attorneys for Petitioner:

   Loren R. Smith
   Kelly, Smith & Murrah, P.C.
   4305 Yoakum Blvd.
   Houston, Texas 77006
   (713) 861-9900
   (713) 861-7100 (Fax)

3. Respondent - Vanessa Cantu

4. Attorneys for Respondent Vanessa Cantu:

   Thomas B. Cowart
   Law Offices of Windle Turley, P.C.
   1000 Turley Law Center
   6440 North Central Expressway
   Dallas, Texas 75206

5. Respondent - Ford Motor Company

6. Attorneys for Respondent Ford Motor Company:

Aldolfo Rodriguez, Jr.
Rodriguez Law Firm, P.C.
311 Oak Lawn Avenue, Suite 600
Dallas, Texas 75219

7. Amicus Curiae – National Association of Subrogation Professionals

8. Counsel for Amicus Curiae National Association of Subrogation Professionals:

Gary L. Wickert
Texas Bar No. 21419400
Matthiesen, Wickert & Lehrer, S.C.
1111 East Summer Street
P.O. Box 270670
Hartford, Wisconsin 52027-0670
(262) 673-7850
(262) 673-3766 (Fax)

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NO. 05-0791

FORTIS BENEFITS,

Petitioner,

V.

VANESSA CANTU AND FORD MOTOR COMPANY,

Respondents
.

AMICUS CURIAE PETITION FOR REVIEW

TO THE SUPREME COURT OF TEXAS:

Amicus Curiae, NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS ("NASP"), submits this Petition for Review of the opinion and order of the Tenth Court of Appeals, which ruling was against Petitioner, FORTIS BENEFITS ("Fortis") and in favor of Respondents, VANESSA CANTU ("Cantu") and FORD MOTOR COMPANY ("Ford"). This appeal is from the 249th Judicial District Court of Johnson County, Texas, Cause No. 249-87-98, Hon. Wayne Bridewell presiding, in which Cantu was the Plaintiff, Fortis was an Intervenor, and Ford was a Defendant, and the Tenth

Court of Appeals, in which Fortis was the Appellant, and Cantu and Ford were Appellees.

STATEMENT OF THE CASE

Cantu filed suit against Ford, Cleburne Motor Company, Inc. ("Cleburne") and Sundance Resources, Inc. ("Sundance"), for injuries arising out of a motor vehicle accident of April 12, 1998. Fortis intervened into Cantu's suit, asserting claims against Ford, Cleburne, and Sundance and an interest in any recovery by Cantu by virtue of its payment of medical benefits under a policy of insurance with Cantu. Cantu thereafter settled her claims against Ford, Cleburne and Sundance. Fortis was not a party to the settlement. Cantu contended she was not "made whole" by the settlement for her damages, and filed a Motion for Summary Judgment against Fortis, seeking an order that Fortis take nothing on its subrogation claims.

Cantu's motion was heard on November 24, 2003. On December 30, 2003, the trial court, the 249th Judicial District Court of Johnson County, Texas, Cause No. 249-87-98, Hon. Wayne Bridewell presiding, signed an order grating Cantu's motion, ruling that Fortis "take nothing in its intervention in this lawsuit." On January 18,

2004, Sundance filed a Motion for Entry of Partial Judgment, seeking to dispose of Fortis's intervention claims. On February 17, 2004, at the hearing on the motion, the court granted Sundance's motion. The court signed the final judgment on March 16, 2004.

Fortis timely appealed the judgment to the Tenth Court of Appeals, Waco on April 5, 2004. The parties to the appeal were Fortis, Cantu, Sundance, Ford and Cleburne. The panel consisted of Chief Justice Tom Gray, and Justices Bill Vance and Felipe Reyna. On May 25, 2005, the Tenth Court of Appeals issued a Memorandum Opinion, authored by Justice Vance, affirming the trial court's summary judgment in favor of State Farm. Chief Justice Gray dissented without opinion. Fortis timely filed a Motion for Rehearing on June 9, 2005. On July 13, 2005, the Tenth Court withdrew its prior opinion and judgment, and substituted an opinion and judgment dated July 13, 2005, also affirming the trial court's summary judgment. The opinion was authored by Justice Vance; Chief Justice Gray again dissented without opinion. On July 28, 2005, Fortis timely filed a Second Motion for

Rehearing. This motion was denied, without opinion, on August 9, 2005. Chief Justice Gray dissented to the denial. On September 22, 2005, this Court granted Fortis's motion for extension to file this Petition for Review, extending the deadline to October 3, 2005. On October 3, 2005, Fortis filed its Petition for Review with this Court.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal under:

1. Section 22.001, subsection (a)(1) of the Government Code, because justices in the Court of Appeals below disagreed on a question of law material to the decision;

2. Section 22.001, subsection (a)(2) of the Government Code, because the opinion of the decision of the Court of Appeals is in conflict with the decisions of this Court; and

3. Section 22.001, subsection (a)(6) of the Government Code because the Court of Appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected.

ISSUE PRESENTED

ISSUE 1:

Is a subrogation or reimbursement clause in an insurance policy restricted by the equitable "made whole" doctrine?

STATEMENT OF FACTS

NASP takes no position regarding whether the Court of Appeals correctly recited the facts of this case.

NASP was formed as a non-profit trade association in 1998, to serve the interests of professionals working in the field of insurance subrogation. Prior to the establishment of NASP, subrogation professionals had no formalized means of networking, sharing ideas and knowledge, or working together to enhance their abilities. NASP consists of insurance claims personnel, attorneys, experts, collection agencies and other vendors who provide valuable services to the industry. The NASP mission is to enhance the statute and effectiveness of subrogation and recovery professionals through education, training and the exchange of information. *See www.subrogation.org.*

SUMMARY OF THE ARGUMENT

The courts below erred by ignoring the contractual language in Fortis' policy, which provided a right of recovery without regard to the equitable "made whole" doctrine. This holding runs afoul of holdings of courts

from other states allowing for contractual recovery rights broader that those traditionally allowed under equitable subrogation. The holding essentially nullifies all contractual subrogation rights, by providing that insurance carriers and their insureds cannot contract to expand the carrier's equitable right of subrogation.

ARGUMENT

ISSUE 1: Is a subrogation or reimbursement clause in an insurance policy restricted by the equitable "made whole" doctrine?

The Court of Appeals held that Fortis and Cantu were not free to contract so as to disregard the equitable "made whole" doctrine. *Opinion,* at 5. By holding that equitable rights of subrogation cannot be expanded by contract, all contractual subrogation clauses are a nullity. The holding of the courts below runs afoul of well-reasoned case law from other states addressing this issue.

The **Ohio** Supreme Court has recently held:

> "We hold that a provider of health insurance and an insured who has been injured by an act of a third party may agree prior to payment of medical benefits that the insured will reimburse the insurer for any amounts later recovered from that third party, third

> party's insurer, or any other person through settlement or satisfaction of judgment upon any claims arising from the third party's act. A clear and unambiguous agreement so providing is not unenforceable as against public policy, irrespective of whether the settlement or judgment provides full compensation for the insured's total damages."
>
> We have long held that principles of equitable subrogation, including the made-whole doctrine, do not override clear and unambiguous contractual provisions. Our holding therefore does not constitute a change in our precedent but rather a reaffirmance of it.

Northern Buckeye Educational Counsel Group Health Benefits Plan v. Lawson, 814 N.E.2d 1210, 1215 (Ohio 2004). NASP also filed an Amicus Brief with the Ohio Supreme Court in that case.

In *Ex Parte State Farm Fire and Casualty Co. v. Hannig,* 764 So.2d 543, 545 (Ala. 2000), the **Alabama** Supreme Court followed its prior holding in *Int'l Underwriters/Brokers, Inc. v. Liao,* 548 So.2d 163, 166 (Ala. 1989) that "the normal equitable rules of subrogation could be modified by contract ...". Likewise, the Alabama Court of Appeals clearly delineated the inapplicability of the equitable made whole doctrine when a contract of insurance provided for subrogation:

> "Unlike the rule when subrogation is claimed on an equity basis, where ... the terms of the insured's insurance policy ... [are] clear and unambiguous in requiring the insured to hold in trust for the insurer proceeds of any recovery obtained by the insured against the third-party wrongdoer and to reimburse the insurer to the extent of its payment to the insured, the contract language giving the insurer a right of subrogation has to be enforced even though the insured's loss, including his or her costs of collection, exceed the combined benefits of his or her tort award and insurance benefit."

Wolfe v. Alfa Mutual Ins. Co., 880 So.2d 1163 (Ala. Civ. App. 2003).

Similarly, the **Minnesota** Supreme Court has held:

> "Conventional subrogation is contractual—it is a product of an agreement between the insured and the insurer. (citation omitted) Parties may grant greater subrogation rights under contract than would have been recognized in equity." *16 George J. Couch, Couch on Insurance 2d § 61:3 (rev. ed. 1983).*

Medica, Inc. v. Atlantic Mutual Ins. Co., 566 N.W.2d 74, 77 (Minn. 1997).

The **District of Columbia** Court of Appeals has held:

> "We agree with the Arizona Supreme Court and are persuaded to follow the line of cases holding that the superior equities doctrine, although applicable to equitable subrogation claims, has no application in cases of conventional subrogation and assignment. Conventional subrogation and assignment are based on contractual agreements between parties and do not derive their validity from principles of equity."

National Union Fire Ins. Co. of Pittsburgh, P.A. v. Riggs Nat'l Bank of Washington, D.C., 646 A.2d 966, 971 (D.C. 1994).

In *State Farm Fire & Cas. Co. v. Pacific Rent-all, Inc.,* 978 P.2d 753, 767 fn. 9 (Haw. 1999), the **Hawaii** Supreme Court observed: "Regarding conventional or contractual subrogation, 4 R. Long, *The Law of Liability Insurance,* § 23.03[1][a], at 23.18.1-18.2, and § 23.03[4], at 23-27 also states: 'The right to conventional subrogation, as opposed to legal subrogation, does not depend upon principles of equity. When subrogation claimed by an insurer is based on contract, the subrogation provisions of the policy constitute the sole measure of its rights.'"

In *Capitol Indemnity Corp. v. Strikezone*, 646 N.E.2d 310 (Ill. App. 1995), the **Illinois** Court of Appeals made short work of the notion that subrogation clauses should be enforced only when the insured's loss has been fully compensated, because the insurer has been paid for the risk it assumed. It went on to say:

> "The parties here were free to negotiate the terms of the contract of insurance, including the subrogation provision with its consequent effect on premiums, and the amount of liability coverage. They declined to upset the settled expectations of the parties as reflected in the policy of insurance by overlaying inapplicable equitable principles which contravene the contract terms and forge new agreement between the parties."

Capitol Indemnity Corp. v. Strikezone, 646 N.E.2d 310 (Ill. App. 1995).

The legal treatises and a majority of other states continually adhere to the principle that the made whole doctrine can be eliminated by contractual subrogation provisions. As an equitable doctrine, made whole is a gap filler only to be used in the absence of a valid contract right. The scholars in the area of insurance law all agree that the made whole doctrine was to be used only in the absence of contractual language. See *16 Couch on Insurance* 3d §233:134 pgs. 223-147,148; *22 Holmes' Appleman on Insurance* 2d §141.2[B][1] pg. 426 (copyrighted 2003); 3 *Appleman Insurance Law and Practice* §1675 pg. 497 (copyrighted 1967).

The made whole rule is defined as follows:

> **It is widely held that in the absence of contrary statutory law or valid contractual obligation to the**

> **contrary**, the general rule under the doctrine of equitable subrogation is that whether an insured is entitled to receive recovery for the same loss from more than one source, e.g., the insurer and the tortfeasor, it is only after the insured has been fully compensated for all the loss that the insurer acquires a right to subrogation.

16 Couch on Insurance 3d §233:134, pgs. 233-147,148 (emphasis added). As stated, the made whole rule is the general rule to be used only when there is no contractual obligation between the parties. In fact, Couch states that "where the right of an insurer to subrogation is expressly provided for in the policy, its rights must be measured by, and depend solely on, the terms of such provisions." See Id. §222:23 pgs. 222-51. A contractual obligation overrides the general rule and controls the obligation of the parties. Thus, the made whole rule of equity by its very creation was limited to situations where no contractual rights exist.

The United States Supreme Court has stated repeatedly over more than a century that the equitable nature of subrogation is completely independent of any contractual relationship between the parties, including contractual subrogation. *Pearlman v. Reliance Insurance*

Co., 371 U.S. 132 (1962); *Memphis L.R.R. Co. v. Dow*, 120 U.S. 287 (1887). Subrogation known to the Chancellor in the Seventeenth Century was before the development of the law of quasi-contract at common law. It is independent of any rights created under the terms of a contract. John H. Langbine, *What IRISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 Colum. L. Rev. 1317 (Oct. 2003) (citing Robert Goff & Garreth Jones, *The Law of Restitution* § 3-004 at 123 (Garreth Jones ed., 6th ed. 2002). Equity is completely independent of any contractual relationship or terms between the parties. By blurring this distinction, the courts below have hampered the ability of parties to contract in accordance with their intent and desires.

It is important to also note that a growing majority of states which have sounded off on this issue recognize that the made whole rule can be overridden by contract terms in a policy and allow contract terms to override application of the equitable doctrine. **Alabama**, *Ex Parte State Farm Fire and Casualty Co. v. Hannig*, 764 So.2d 543, 546 (Ala. 2000); *Wolfe v. Alfa Mutual Ins. Co.*, 880

So.2d 1163 (Ala. Civ. App. 2003); **California**, *Samura v. Kaiser Foundations Health Plan*, 17 Cal. App.4th 1284, 1292-1295 (Cal. App. 1993); *Travelers Indemnity Co. v. Ingebretsen*, 38 Cal. App.3d 458, 465-66 (Cal. Ct. App. 1974); **Connecticut**, *The Automobile Ins. Co. of Hartford v. Conlon*, 216 A.2d 828, 829. (Conn. 1966); **District of Columbia**, *District 1-Pacific Coast Distributors v. Travelers*, 782 A.2d 269 (D.C. 2001); **Florida**, *Florida Farm Bureau Inc., Co. v. Martin*, 377 So.2d 827, 830 (Fla. App. 1979); *Blue Cross and Blue Shield of Florida v. Matthews*, 498 So.2d 421, 422 (Fla. 1986); **Georgia**, *Duncan v. Integon General Ins. Co.*, 482 S.E.2d 325, 326 (Ga. 1997); **Illinois**, *Hardware Dealers Mutual Fire Ins. Co. v. Ross*, 262 N.E.2d 618 (Ill. 1970); **Indiana**, *Erie Ins. Co. v. George*, 681 N.E.2d 183, 188 (Ind. 1997); **Iowa**, *Ludwig v. Farm Bureau Mutual Ins. Co.*, 393 N.W.2d 143 (Iowa 1986); **Kansas**, *Unified School District No. 259 v. Sloan*, 871 P.2d 861, 865 (Kan. 1994); **Kentucky**, *Wine v. Globe American Casualty Co.*, 917 S.W.2d 558 (Ky. 1996); **Maryland**, *Stancil v. Erie Ins. Co.*, 740 A.2d 46, 49-50 (Md. Ct. of Special App. 1999); **Massachusetts**, *Morin v.*

Massachusetts Blue Cross, Inc., 3411 N.E.2d 914, 916 (Mass. 1974); **Minnesota**, *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983); *Medica, Inc. v. Atlantic Mutual Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997); *Hershey v. Physicians Health Plan of Minn., Inc.*, 498 N.W.2d 519 (Minn. App. 1993); **Nebraska**, *Ploen v. Union Ins. Co.*, 573 N.W.2d 436, 443 (Neb. 1998); **New Jersey**, *Providence Washington Ins. Co. v. Hogges*, 171 A.2d 120, 124 (N.J. 1961); *Culver v. Ins. Co. of North America*, 559 A.2d 400 (N.J. 1989); **Oklahoma**, *Williams & Miller Gin Co. v. Baker Cotton Oil Co.*, 235 P. 185, 187 (Okla. 1925); **South Dakota**, *Julson v. Federated Mutual Ins. Co.*, 562 N.W.2d 117, 121 (S.D. 1997); **Utah**, *Hill v. State Farm Mutual Auto Ins. Co.*, 765 P.2d 864, 866 (Utah 1988); *Birch v. Fire Ins. Exchange*, 2005 WL 2298130 (Utah App. 2005); **Virginia**, *Geraldine Simmons Collins v. Blue Cross & Blue Shield of Virginia*, 193 S.E.2d 782, 784-785, (Va. 1973); **Washington**, *Thiringer v. American Motorist Co.*, 588 P.2d 191, 194 (Wash. 1978); and **West Virginia**, *Kanawha Valley Radiologists, Inc. v. One Valley Bank*, 557 S.E.2d 277 (W.Va. 2001). These jurisdictions favor the made whole

rule as it fosters the ability of insurance companies, employer-sponsored health plans and other administrators to craft plans ensuring their fiscal solvency. Moreover, it places the burden of full insurance on an insured who is in a better position to insure himself fully for any loss he might sustain.

The major treatises recognize that a subrogation clause may not in every instance be enforced without any limitation. See Id. §222:23. Couch acknowledges that legislation regarding uninsured/underinsured motorist coverage, no-fault coverage and worker's compensation may limit contractual rights. See §225:126, et seq. In these situations, the contractual terms will be enforced unless doing so, would undermine legislative intent.

Joining this majority view, a few states have limited the contractual rights of parties only when the contract would violate or interfere with mandated coverage under state statute. Several states such as **Colorado**, *Marquez v. Prudential Property Casualty Ins. Co.*, 620 P.2d 29, 32 (Colo. 1980); *Kral v. American Hardware Mutual Ins.*, 784 P.2d 759 (Colo. 1989); **Maine**,

Wescott v. Allstate Ins. Co., 397 A.2d 156, 164-165 (Me. 1979); **Rhode Island**, *Lombardi v. Merchant Mutual Ins. Co.*, 429 A.2d 1290, 1293 (R.I. 1981); and **West Virginia**, *Kittle v. Icard*, 405 S.E.2d 456, 462 (W.Va. 1991), have limited subrogation rights only when the legislature's intent would be thwarted by enforcing the terms as written. These jurisdictions have employed the made whole doctrine only where legislatively mandated coverage would be reduced by subrogation rights such as uninsured motorist, Personal Injury Protection (PIP) and no-fault coverage. As noted by the **Colorado** Supreme Court, the "Act [No-Fault Act] is incorporated as part of the insurance policy, and when conflict exists between the insurance policy and the statute, the latter governs. *Marquez*, 620 P.2d at 33; see also, *James v. Michigan Mutual Ins. Co.*, 481 N.E.2d 272 (Ohio 1985) and *Berrios v. State Farm Ins. Co.*, 781 N.E.2d 149 (Ohio 2002). Thus, contractual rights generally are voided only when necessary to ensure the intent of a state legislature under mandated coverage. Such is not the case here.

A small minority of states prohibit parties from contracting away made whole. The states of **Arkansas**, *Franklin v. Healthsource of Arkansas*, 942 S.W.2d 837 (Ark. 1997); **Mississippi**, *Hare v. State of Mississippi*, 733 So.2d 277 (Miss. 1999)(opting not to follow Ohio law allowing contract to override as established in *Blue Cross Blue Shield Mutual of Ohio v. Hrenko*, 647 N.E.2d 1358 (Ohio 1995).); **Montana**, *Swanson v. Hartford Ins. Co.*, 46 P.3d 584 (Mont. 2002); **Tennessee**, *York v. Sevier County Ambulance Authority*, 8 S.W.3d 616 (Tenn. 1999); see also, *Health Cost Controls, Inc. v. Gifford*, 108 S.W.3d 227 (Tenn. 2003); and **Wisconsin**, *Petta v. ABC Ins. Co.*, 692 N.W.2d 639 (Wis. 2005) (oral argument by Gary L. Wickert) graft made whole onto all subrogation rights arising either in equity or contract. These courts view subrogation as purely equitable in origin and thus will not apply it until a double recovery can be shown.

This minority view fails to address that equity itself envisioned that a rule such as the made whole doctrine would be overridden by a contractual provision. As the treatises have noted, the made whole doctrine was

to be used only in the absence of contractual rights. See *Couch* § 233:134, pgs. 233-147,148. Made whole was not created to supplant the rights of parties to bargain or contract. This equitable principle was never intended to prohibit an insurer and insured from agreeing to different terms. Made whole, which is an equitable defense to a subrogation right which arises purely in equity (non-contract right), was never meant to apply to a contractual provision in a policy of insurance or benefit plan booklet. Equity does not support the minority view of supplanting the agreement made by the parties with something different and unintended by the parties to the contract.

Also, the minority view fails to account for the ability of the parties to insure their own risks. A health plan or property insurer cannot and should not be penalized for the insured's failure to adequately insure their person or property. See *Stancil*, 740 A.2d at 50. An individual can insure his person, automobiles and property as he possesses an insurable interest. In contrast, the health plan of an employer cannot purchase

uninsured motorist coverage, property damage coverage, or automobile medical payments coverage for the injured party who is enrolled in their plan. The minority view would essentially create a situation where a health insurer becomes responsible for paying for pain, suffering, uninsured motorist and disability benefits. In fact, the minority approach would threaten the solvency of health plans whose ratings, premiums and decisions take into account the subrogation ability of the plan or insurer.

It is important to recognize that we are dealing with health coverage as opposed to automobile or other types of insurance. The primary purpose of health coverage is not to pay for expenses caused by a third party's tortious conduct, but rather to pay for illness or injury not caused by the fault of anyone. Fortunately, only a small percentage of persons covered under a health plan will suffer a serious injury caused through the tortious conduct of another. When health plan dollars come from a limited fund, the right of subrogation is important to the financial stability of

those plans. What public policy of Texas requires the health plan and its participants to bear the financial loss when the contract provides otherwise? Texas should not force health insurers to become the uninsured motorist, disability and other loss insurers for Texas citizens who choose not to purchase sufficient insurance for their own protection. See Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337, 1355 (1997).

This Court should grant review of this case, as the holding of the courts below essentially eradicates all contractual rights of subrogation, and is contrary to the law of the vast majority of states which allow insurance companies and their insureds the freedom to contract regarding their subrogation rights and duties under the a policy.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Amicus NASP prays that this Court grant this Petition for Review, and reverse the summary judgments of the trial court.

Respectfully submitted,

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Gary L. Wickert
State Bar No. 21419400
Matthiesen, Wickert & Lehrer, S.C.
1111 East Summer Street
P.O. Box 270670
Hartford, Wisconsin 52027-0670
(262) 673-7850
(262) 673-3766 (Fax)

ATTORNEY FOR AMICUS CURIAE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS

CERTIFICATE OF SERVICE

I hereby certify that on the ______ day of ____________, 2005, a true and correct copy of the foregoing was forwarded by U.S. First Class Mail to the following counsel of record:

Counsel for Petitioner Fortis Benefits:
Loren R. Smith
Kelly, Smith & Murrah, P.C.
4305 Yoakum Blvd.
Houston, Texas 77006

Counsel for Respondent Vanessa Cantu:
Thomas B. Cowart
Law Offices of Windle Turley, P.C.
1000 Turley Law Center
6440 North Central Expressway
Dallas, Texas 75206

Counsel for Respondent Ford Motor Company:
Aldolfo Rodriguez, Jr.
Rodriguez Law Firm, P.C.
4311 Oak Lawn Avenue, Suite 600
Dallas, Texas 75219

____
Gary L. Wickert