

D. Todd Smith

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Subject: Texas Supreme Court orders and opinions 5.4.07

TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED MAY 4, 2007**One petition granted review in today's orders**

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.

NOTE: *Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.* Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). [Click here to download a free Adobe Reader.](#)

MAY 4 ORDERS (in HTML)

[Decisions in cases \(motions, requests, etc.\) from April 26 through Wednesday](#) (PDF)

OPINIONS

03-0364

Seagull Energy E&P Inc. v. Railroad Commission of Texas
 from Travis County and the Third District Court of Appeals, Austin

For petitioner: Michael E. McElroy, Austin

For respondent: Priscilla M. Hubenak, Austin

AFFIRMED, opinion by Justice Medina:

The principal issues in this challenge to the Railroad Commission's order denying an exception to spacing and density regulations for drilling a gas well are (1) whether the commission has statutory authority to regulate drilling as well as production in commingled mineral deposits; if so, whether those commingled deposits may be considered one reservoir for regulating drilling and production in the field; and (3) whether the order preventing production from a lease's only completed well in a particular reservoir constitutes an unconstitutional deprivation of vested property rights. In this case Seagull sued after the Railroad Commission denied Seagull two wells under one lease that produced from separate gas accumulations. Seagull had shut its Davis Well No. 1, which produced only from one accumulation, to drill Davis Well No. 4 in an attempt to produce from all three gas accumulations to meet spacing and density regulations. When that failed – the No. 4 well produced from only two of the gas accumulations – Seagull asked the commission for an exception that would allow it to produce from the Davis Well No. 1. The trial court affirmed the Railroad Commission's denial of Seagull's request. The court of appeals affirmed.

The Supreme Court HOLDS that the commission's authority to regulate production in a commingled field includes denying the drilling permit here and that the commission did not act arbitrarily to deprive Seagull of an interest. Texas' Natural Resources Code grants the commission broad authority over gas production is broad over commingled deposits. Any doubt about such authority was resolved by the Legislature in 2005. And commingling resulted by request and with notice and hearing.

Field rules were adopted 20 years ago and apply equally to all operators.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Online briefs](#)

04-0121

Equistar Chemicals LP v. Dresser-Rand Co.

from Harris County and the 14th District Court of Appeals, Houston

For petitioner: Claudia Wilson Frost, Houston

For respondent: Thomas C. Wright, Houston

Justices O'Neill and Brister did not participate

REVERSED AND REMANDED, opinion by Justice Johnson:

The principal issue is whether a no-evidence objection preserved error to raise the economic-loss rule. In this case Equistar sued over an impeller (rotor blade) failure that damaged a compressor at its petrochemical plant. Dresser installed the impeller after minor failures of larger blades that Dresser used in an earlier compressor upgrade. At trial the court denied Dresser's motions for summary judgment and a judgment notwithstanding the verdict, based on the statute of limitations under contract law, and awarded Equistar repair costs and other damages. The court of appeals reversed and rendered a take-nothing judgment on damage claims for the compressor, reasoning that those were contract claims barred by limitations.

The Supreme Court HOLDS that Dresser failed to preserve a challenge to the jury charge on measuring damages. Because the existence and amount of damages were part of Equistar's cause of action, Dresser was not required to assert the economic loss rule as an affirmative defense. The rule is a consideration in measuring damages in a case such as this. But the jury was asked to find only one damages amount. Jurors were instructed to consider only the cost of repairs "to restore the Equistar Chemicals' ethylene plant to the condition it was in immediately prior to the occurrence(s) in question." Assuming, without deciding, that Dresser's no-evidence points in the trial court "necessarily encompassed" the contention that it owed no tort duty under the facts as the court of appeals held, the no-evidence complaints did not clearly and distinctly make the trial court aware of a contention that the economic loss rule applied to bar Equistar from recovering tort damages for injuries to the compressor. Dresser's no-evidence objections and motions for judgment despite the verdict, without more, did not preserve error as to the economic loss rule.

[Opinion in HTML](#)

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04-0180

State of Texas v. Fidelity and Deposit Co. of Maryland, et al.

from Williamson County and the Third District Court of Appeals, Austin

VACATED AND REMANDED, per curiam opinion:

In this case involving a counterclaim in a suit by the Texas Department of Transportation to enforce a performance bond for construction of a building, the Supreme Court HOLDS that the court of appeals failed to specify Fidelity's claims sufficiently related to TxDOT's original suit for which the state would lose immunity and be limited in its recovery to an offset, citing *Reata Construction v. Dallas*, 197 S.W.3d 371 (Tex. 2006).

[Opinion in HTML](#)

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05-0613

In re Bexar County Criminal District Attorney's Office
from Bexar County and the Fourth District Court of Appeals, San Antonio
For relators: Clarkson F. Brown, San Antonio
For real party in interest: Robert W. Wilson and Christopher J. Gale, San Antonio
Justice Green did not participate

MANDAMUS RELIEF CONDITIONALLY GRANTED, opinion by Justice Willett:

The issue is whether a work-product privilege protects prosecutors from testifying in a malicious-prosecution case when the prosecution file has been released. This case arises from a "terroristic threat" charge initiated by one neighbor against another. Crudup, who was charged, sued his neighbor after the prosecutor dropped the charge when the principal witnesses would not testify. To pursue his malicious-prosecution claim, Crudup subpoenaed prosecutors and an investigator. The trial court quashed the subpoenas. The court of appeals held that the prosecutors did not have a work-product privilege because the case file had already been released.

The Supreme Court HOLDS the work-product privilege bars compelled testimony by prosecutors. The privilege continues indefinitely beyond the litigation for which the materials were originally prepared, covers more than just documents and is broader than the attorney-client privilege because it includes all communications made in preparation for trial, including an attorney's interviews with parties and non-party witnesses. For purposes of this civil case, conversations made in the course of the criminal investigation, information learned during that investigation and the prosecutor's decision to drop the case all constitute work product. Producing the prosecution file unquestionably waived protection of the documents themselves, but that selective disclosure does not oblige prosecution staff to provide deposition and trial testimony interpreting, explaining or otherwise elaborating on matters contained in the file.

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Justice Willett CONCURRING:

Mandating testimony from the prosecutor's personnel on these facts would impose an unwarranted burden on the state's finite prosecutorial resources and impede the vigorous deployment of such resources.

[Willett concurrence in HTML](#)

[Willett concurrence in PDF](#)

Justice Johnson DISSENTING, joined by Chief Justice Jefferson and Justice Medina:

The trial court quashed trial subpoenas and granted a protective order shortly before trial was scheduled to start, effectively excluding all testimony from current and former prosecutors and staff. The trial court's action was based on an unsworn motion to quash and for a protective order argued by the parties without testimony or evidence. On this record the trial court abused its discretion in quashing the subpoenas. The district attorney's office does not cite a provision of Article V of the evidence rules, any rule, or a constitutional or statutory provision that allows its attorneys and employees to be completely exempted from attending court or testifying as to facts or relevant matters within their knowledge. At a minimum the trial court should have required the district attorney's office to show what particular knowledge and information possessed by its employees was work product for which the privilege had not been waived. It then could have limited the Crudups' inquiries pending further development of a record.

[Johnson dissent in HTML](#)

[Johnson dissent in PDF](#)

05-0991

City of San Antonio v. Dolores Ytuarte

from Bexar County and the Fourth District Court of Appeals, San Antonio
REVERSED AND JUDGMENT RENDERED, per curiam opinion:

The issue is whether summary-judgment evidence effectively demonstrated the good-faith element to support immunity in a police-pursuit case. Ytuarte sued over injuries when a driver of a stolen vehicle crashed. The Supreme Court HOLDS the court of appeals failed to analyze or apply the good-faith standard and that summary-judgment evidence indicates, without contradiction, that officers met it.

[Opinion in HTML](#)

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05-1091

Vernon R. Young Jr. v. Lewis Qualls

from Angelina County and the Seventh District Court of Appeals, Amarillo

Justice Johnson did not participate

REVERSED AND REMANDED, per curiam opinion:

In this case the Supreme Court remands for reconsideration of attorneys fees that should be awarded when damages were reduced by remittitur, citing *Barker v. Eckman*, 213 S.W.3d 306 (Tex. 2006).

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

**ISSUES SUMMARY FOR CASE GRANTED
ORAL ARGUMENT IN TODAY'S ORDERS**

06-0660

Medical Center Dallas Ltd. v. Carlisle Corp.

from Dallas County and the Fifth District Court of Appeals, Dallas

Oral argument date pending

The issue is whether attorneys fees may be recovered in a warranty-breach action.

[Briefs](#)

[Court of appeals opinion](#)