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TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED APRIL 27, 2007
Seven petitions 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.](#)

[APRIL 27 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from April 19 through Wednesday](#) (PDF)

OPINIONS

04-0914

In re Christus Spohn Hospital Kleberg, et al.
from Kleberg County and the 13th District Court of Appeals, Corpus Christi/Edinburg
For relators: Deborah R. Sundermann, Corpus Christi
For real parties in interest: G. Todd Taylor, Sugar Land
MANDAMUS RELIEF DENIED, opinion by Justice O'Neill:

The issues are whether the trial court abused its discretion (1) by refusing to order return of the hospital internal investigator's otherwise privileged work product inadvertently provided to the hospital's expert witness and (2) by denying the hospital's motion to quash the investigator's deposition. In this case a paralegal for the hospital's attorney inadvertently delivered the investigator's report to the expert witness. After deposing the expert, the plaintiff's attorneys got the investigator's report by a subpoena for documents she reviewed. The hospital relied on the "snap-back" provision of Texas Rule of Civil Procedure 193.3(d) to assert its privilege. But the plaintiff argues that the privilege was waived under Rule 192.3(e)(6), making all documents available to an expert discoverable. The trial court denied the hospital's motion. The court of appeals denied the hospital's mandamus petition.

The Supreme Court HOLDS that Rule 192's plain language precludes the snap-back provision so long as the hospital relies on that testifying expert and the trial court did not abuse its discretion by denying the motion to quash the investigator's deposition. Under Rule 192.3(e) discovery is available of "all documents ... provided to, reviewed by, or prepared by or for" the testifying expert. The hospital's argument that the investigator's documents were prepared by or for the hospital and that the expert at most glanced at them erroneously ignores the rule's disjunctive language – a feature that makes the Texas rule apparently broader than its federal counterpart. Under Rule 192.3 such documents lose their work-product status when provided to the testifying expert. Once privileged documents are disclosed to the expert and the expert continues to be designated for trial, the documents may not be retrieved even if inadvertently produced.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Online briefs](#)

05-0169

Farmers Group Inc. et al. v. Jan Lubin et al.
from Travis County and the Third District Court of Appeals, Austin
For petitioners: Marcy Hogan Greer and David C. Mattax, Austin
For respondents: Russell S. Post, Houston
Justice Willett did not participate

REVERSED AND REMANDED, opinion by Justice Brister:

In this case involving an insurance settlement that transformed the suit into a class action, the issues are (1) whether the Texas Insurance Code (section 541.251(a)) authorizes the attorney general to bring a class action under the *parens patriae* doctrine without satisfying private class requirements and (2) whether the attorney general met those requirements. This case resulted from a \$117 million settlement the state reached with Farmers in a suit by the attorney general alleging deceptive and discriminatory insurance practices. Under the agreement the attorney general amended the pleadings to transform the suit into a class action that would include all claims, past and future, by individual policyholders. Lubin and others then sued to intervene, objecting to the settlement and to the certified class. In a hearing the trial court certified the class without a class representative. The court of appeals reversed, holding that the class must meet requirements imposed on private class litigants, including that the core claim must be shared by all class members and that the class be adequately represented.

The Supreme Court HOLDS that class-action prerequisites apply to the damage claims in a class suit brought by the attorney, but the Insurance Code permitting the attorney general to bring a class action does not require that the attorney general meet those prerequisites personally. The *parens patriae* doctrine does not exempt the attorney general from class-action requirements but does not limit the attorney general to acting solely as class counsel. The Insurance Code's introductory reference to the four class-action prerequisites applies to all parties, not just some, and the code's provision permitting a class suit if those four prerequisites are satisfied shows the Legislature hardly intended them to be inapplicable when the attorney general brought the action. These prerequisites define a class action. But in an official capacity, the attorney general is never a policyholder and cannot be a class representative in the traditional sense.

[Opinion in HTML](#)

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Justice Hecht CONCURRING AND DISSENTING:

Under the Insurance Code, the four prerequisites to a class action apply when a class member is suing or being sued as a class representative. When the attorney general sues at the behest of the Department of Insurance, the attorney general files the suit not as a class member or representative party but as a state officer. By the plain statutory text, the four prerequisites do not apply to a class action brought by the attorney general. By the Court's opinion, the trial court must find that the attorney general's claims affect numerous persons and share common issues of law or fact. But how can the trial court determine that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" when there are no representative parties? And since the attorney general does not act as a representative party or counsel for the class or any person, but rather as "the chief legal officer of the State" with broad discretionary power to represent the state, determining that "the representative parties will fairly and adequately protect the interests of the class" is impossible.

[Hecht concurrence/dissent in HTML](#)

[Hecht concurrence/dissent in PDF](#)

05-0855

South Texas Water Authority v. Romeo L. Lomas, et al.
from Kleberg County and the 13th District Court of Appeals, Corpus Christi/Edinburg

REVERSED AND DISMISSED, per curiam opinion:

The issue is whether a municipal water ratepayer and ratepayer association have standing to challenge a water authority's operating expenses in a supply contract with a city. The Supreme Court HOLDS neither does. To qualify as one for whose benefit a contract was made, the third party must benefit more than incidentally; he must be either a donee or creditor beneficiary. In this case the contract provides that the South Texas Water Authority agrees to sell and Kingsville agrees to purchase water under the contract's terms and conditions. The contract does not mention Lomas, WATER, or Kingsville residents in general other than to specify the water's intended use for sale to municipal and industrial customers. The mere description of a product's intended use cannot confer third-party-beneficiary status on intended users, and nothing more exists in the contract itself upon which third-party-beneficiary status might be based. The Legislature, in creating the water authority as a conservation and reclamation district, intended generally to benefit the people of the state, as presumably it intends with all legislation. But general beneficence does not create third-party rights, else every Texan could challenge or seek to enforce any government contract and the presumption against third-party-beneficiary agreements would disappear.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

05-0956

James VanDevender v. Honorable G. Mitch Woods, Sheriff, and Jefferson County
from Jefferson County and the Ninth District Court of Appeals, Beaumont

For petitioner: Philip Durst, Austin

For respondents: Thomas F. Rugg, Beaumont

VACATED AND REMANDED, opinion by Justice Willett:

The issue is whether the constitutional provision (article III, section 52e) for paying a deputy sheriff's full salary during a job-related incapacity requires continued payment for a deputy injured in one term of office but declared incapacitated for the injury while serving under a subsequent appointment. Section 52e provides "that said payment of salary shall cease on the expiration of the term of office to which the officer was elected or appointed." In this case the deputy, VanDevender, was injured in April 2000 while supervising athletics as part of a school drug-education and -avoidance program. Unable to return to work until August 2000, VanDevender was paid his full salary during his incapacity. His term as deputy ended December 31 of that year, but he was deputized for another three years on January 1, 2001. Then in March, he left work again on his doctor's advice, allegedly because of the injury he suffered in April 2000, and was paid from March 2001 until the county stopped his salary in February 2002. VanDevender sued for a declaratory judgment to reinstate his pay until his disability was removed, or until his term ended. The trial court granted a take-nothing judgment in the county's favor. The court of appeals affirmed.

The Supreme Court HOLDS that the court of appeals improperly reached the ultimate constitutional issue without first reviewing whether VanDevender's incapacity resulted from a requisite job-related injury.

[Opinion in HTML](#)

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[Briefs](#)

ISSUES SUMMARIES FOR CASES GRANTED ORAL ARGUMENT IN TODAY'S ORDERS

06-0089

City of Waco v. Robert Lopez

from Limestone County and the 10th District Court of Appeals, Waco

Oral argument date pending

In this employment-discrimination case, the principal issues are (1) whether the Commission on Human Rights Act is the exclusive remedy for a retaliation claim; (2) whether the city's equal-employment opportunity policy is a "law" under the state Whistleblower Act; (3) whether the act only applies to reporting law violations detrimental to the public good; and (4) whether the report of an alleged violation of the equal-employment policy was in good faith to an appropriate law-enforcement agency. Lopez was fired after alleged misuse of a city vehicle and claims the firing was in response to his age- and race-discrimination complaint filed months earlier with the city's equal-employment opportunity officer.

[Briefs](#)

[Court of appeals opinion](#)

[Dissent](#) (Gray)

06-0127

William Chu v. Chong Hui Hong

from Tarrant County and the Second District Court of Appeals, Fort Worth

Oral argument date pending

A principal issue in this divorce proceeding is whether Texas recognizes an independent tort claim under the Uniform Fraudulent Transfer Act when alleged misconduct was fraud on the marital community. This case involves sale of a doughnut store by a husband without his wife's consent and transfer of the proceeds to Korean relatives before he then filed for divorce.

[Briefs](#)

[Court of appeals opinion](#)

06-0178

Forest Oil Corp. and Daniel B. Worden v. James Argyle McAllen, et al.

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

Oral argument date pending

The principal issues are (1) whether a disclaimer in a contract bars a claim that an arbitration clause was fraudulently induced; (2) whether reliance on a representation contrary to the contracts was justified; and (3) whether reliance on a representation during settlement negotiations was justified. This case involves personal-injury allegations and death of an endangered rhinoceros that allegedly resulted from radioactive pipe.

[Briefs](#)

[Court of appeals opinion](#)

06-0243

Solar Applications Engineering Inc. v. T.A. Operating Corp.

from Bexar County and the Fourth District Court of Appeals, San Antonio

Oral argument date pending

The issue is whether a provision in a construction contract that liens would be released by the contractor and subcontractors before final payment constituted a condition that must be satisfied before a suit for contract breach.

[Briefs](#)

[Court of appeals opinion](#)

06-0550

New Texas Auto Auction Services, L.P. v. Graciela Gomez de Hernandez, et al.

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

Oral argument date pending

The overriding issue is whether the court of appeals erred by holding that auctioneers as "sellers"

– subject to strict liability – constituted in this case a genuine material fact question.

[Briefs](#)

[Court of appeals opinion](#)

06-0566

City of Seabrook v. Port of Houston Authority

from Harris County and the First District Court of Appeals, Houston

Oral argument date pending

In this challenge to the Port Authority's right-of-way condemnation, the principal issues are (1) whether the Water Code's requirement that such a condemnation have a city's consent is jurisdictional and (2) whether ostensibly broader condemnation power in the Water Code overrides the city's consent requirement.

[Briefs](#)

[Court of appeals opinion](#)

[Dissent on en banc consideration](#) (Keyes, joined by Hanks)

06-0611

Mauricio Martinez-Partido v. Methodist Specialty and Transplant Hospital, et al.

from Bexar County and the Fourth District Court of Appeals, San Antonio

On rehearing

No oral argument date noted, remains pending

A principal issue in this medical-malpractice case is the statutory 30-day grace period to remedy a deficient expert report should have been granted by an appellate court after holding that an expert report was deficient.

[Briefs](#)

[Court of appeals opinion](#)