

## D. Todd Smith

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**From:** Osler McCarthy [Osler.McCarthy@courts.state.tx.us]  
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**Subject:** Texas Supreme Court orders and opinions 6.29.07

## TEXAS SUPREME COURT ADVISORY

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### ORDERS AND OPINIONS ISSUED JUNE 29, 2007

Last scheduled opinions before late August

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.](#)

[JUNE 29 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from June 21 through Wednesday](#) (PDF)

### OPINIONS

04-0515

Stephen F. Austin State University v. Diane Flynn  
from Nacogdoches County and the 12th District Court of Appeals, Tyler  
For petitioner: Rance L. Craft, Austin  
For respondent: T. Stefan Allen, Nacogdoches

REVERSED AND JUDGMENT RENDERED, opinion by Justice Medina:

In this case involving a bicyclist injured when she was hit by water from a sprinkler on university property, the principal issues are (1) whether the recreational-use statute applies to a condition on state land that injures a person crossing that land on a public easement and (2) whether the university's immunity for discretionary acts applies to the sprinkler operation. Flynn sued, claiming she was injured when water from an oscillating sprinkler knocked her from her bicycle. The trial court rejected the university's jurisdictional plea. The court of appeals affirmed.

The Supreme Court HOLDS that the recreational-use statute applies to bar Flynn’s claim but that operating the sprinkler was not protected by the discretionary-powers exception to the Tort Claims Act. Even though the university dedicated a public easement over its campus for use as a recreational trail, it retained ownership of the underlying fee, and, as the owner of the property, it retained protection under the recreational use statute. The statute effectively requires for liability either gross negligence or an intent to injure. The allegations in this case fail to demonstrate either that the sprinkler presented an extreme risk, that the university was aware of the risk or that it was consciously indifferent to the sprinkler’s capacity to inflict serious injury. Flynn concedes that she was aware of the sprinkler before she encountered it. The recreational-use statute does not obligate a landowner to warn of known conditions. As for immunity under the discretionary-powers exception, tests to determine whether the exception applies turn on policy and operational decisions and on design and maintenance. The court of appeals correctly concluded that the decisions here concerning when and where the water was to spray were operational- or maintenance-level decisions, rather than policy formulation.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

Justice Hecht CONCURRING, joined by Justices Wainwright and Willett::

The discretionary-function exception, like other exceptions in the Tort Claims Act, was taken from the Federal Tort Claims Act. Texas courts should be guided by the U.S. Supreme Court’s thorough, repeated analysis of the discretionary-function exception to the federal statute, but that analysis has been entirely ignored. In this case, the federal exception would not cover the university’s actions, but not because they were taken at an operational or maintenance level. The Supreme Court has construed the discretionary function exception to the federal waiver of immunity to cover only “decisions grounded in social, economic, and political policy” and the exception in the Texas statute should be applied in the same way.

[Hecht concurrence in HTML](#)

[Hecht concurrence in PDF](#)

04-0838

C.L. Westbrook Jr. v. Peggy Lee Penley

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

For petitioner: Kelly J. Shackelford and Hiram S. Sasser III, Plano

For respondent: Darrell L. Keith, Fort Worth

REVERSED AND DISMISSED, opinion by Justice O’Neill:

The issue is whether courts have jurisdiction over professional-negligence claims against a pastor who allegedly provided negligent secular counseling to one of his congregation, then divulged her confidential information during religion-mandated discipline. In this case, Westbrook, the pastor, challenged the trial court’s jurisdiction to hear the case under the “ecclesiastical abstention” doctrine rooted in the First Amendment’s religion clauses. The trial court granted the jurisdictional plea and dismissed Penley’s negligence claim that alleged Westbrook divulged to church elders information about an extra-marital relationship she disclosed during counseling. When Westbrook told her she would be subject to church discipline and “shunning,” she resigned from the church. The court of appeals reversed the trial court’s dismissal of the negligence claim against Westbrook.

The Supreme Court HOLDS that “parsing those roles” – confidentiality as counselor, obligation as pastor -- for purposes of determining civil liability where health or safety are not at issue would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline. Even if the neutral-principles approach were expanded beyond the property-ownership context, as Penley argues, free-exercise concerns would be implicated. A church’s decision to discipline members for conduct considered outside the church’s moral code is an inherently religious function with which civil courts should not generally interfere. Penley pins Westbrook’s liability in this case, at least in part, on his breach of a secular duty by disclosing Penley’s confidential information to the church elders in the first instance. But this disclosure cannot be isolated from the church-disciplinary process in which it occurred,

nor can Westbrook’s free-exercise challenge be answered without examining what effect the imposition of damages would have on the inherently religious function of church discipline. While elements of Penley’s professional-negligence claim can be defined by neutral principles without regard to religion, the application of those principles to impose civil tort liability on Westbrook would impinge upon the church’s ability to manage its internal affairs and hinder adherence to the church disciplinary process that its constitution requires.

[Opinion in HTML](#)

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[Briefs](#)

05-0311

In re AutoNation Inc., et al.

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

For relators: Charles T. Frazier Jr., Dallas

For real parties in interest: Andrew S. Golub, Houston

MANDAMUS RELIEF CONDITIONALLY GRANTED, opinion by Justice Willett:

In this case involving a non-compete agreement, the principal issue is whether non-competition clauses in confidentiality and stock-option agreements should be construed by Texas courts applying Texas law despite forum-selection and choice-of-law clauses requiring suit elsewhere and application of another state’s law.

AutoNation sued in Florida to enforce a non-compete clause signed by an employee who resigned to work for another car dealership. Unaware of that suit, the former employee sued in Texas in part to declare that non-competition agreements were not enforceable under Texas law. The Texas trial court enjoined AutoNation from pursuing the Florida case it filed and from filing any other case outside Texas. The court of appeals rejected the company’s mandamus petition to lift the injunction and held in an interlocutory appeal that Texas public policy controls the question of enforcing a non-compete agreement in Texas.

The Supreme Court HOLDS that the forum-selection clause of the non-compete agreement controls over public-policy preference considerations favoring Texas. The Court notes that the holding in this case does not offend the reasoning in *DeSantis v. Wackenhut*, 793 S.W.2d 670 (Tex. 1990), establishing the public-policy preference for Texas law on non-compete agreements. But it declines to “superimpose” the *DeSantis* choice-of-law analysis onto forum-selection clauses. Even if *DeSantis* requires Texas courts to apply Texas law to certain employment disputes, it does not require suit to be brought in Texas when a forum-selection clause mandates venue elsewhere. No Texas precedent compels enjoining a party from asking a Florida court to honor the parties’ express agreement to litigate a non-compete agreement in Florida, the employer’s headquarters and principal place of business. This holding rests squarely on the parties’ contractual commitment, but it carries the concomitant benefit of extending comity to the Florida courts.

[Opinion in HTML](#)

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[Briefs](#)

Justice O’Neill CONCURRING:

The employee’s contention that deciding which noncompete agreements constitute reasonable restraints of trade on employees in this state is a matter of fundamental Texas public policy. What is not apparent, however, is that enforcement of the forum-selection clause in this case will result in application of the contractual forum’s law in a manner that will undermine Texas public policy. Had there been a clear showing to this effect, the court of appeals’ analysis might have been correct, or at least the trial court might have been justified had it decided to abate the Texas declaratory judgment action pending the Florida court’s decision. But a mere indication that the Florida court intends to apply Florida law does not, without more, justify a Texas court’s interference with the parties’ chosen forum.

[O’Neill concurrence in HTML](#)

[O’Neill concurrence in PDF](#)

05-0791

Fortis Benefits v. Vanessa Cantu and Ford Motor Co.  
from Johnson County and the 10th District Court of Appeals, Waco  
For petitioner: Loren R. Smith, Houston  
For respondents: Thomas B. Cowart, Dallas, and Michael W. Eady, Austin  
AFFIRMED IN PART, REVERSED IN PART AND REMANDED,  
opinion by Justice Willett:

A principal issue is whether an insurance policy's subrogation or reimbursement clause is restricted by the equitable "made whole" doctrine. In this case Fortis sought to recover past medical expenses it paid Cantu, rendered a paraplegic in an automobile accident, from her \$1.4 million settlement of the accident lawsuit. Fortis paid \$247, 534 of Cantu's \$378,500 in past medical expenses. Her lifetime policy limit was \$2 million. She presented summary-judgment evidence that estimated future medical expenses as low as \$1.7 million and as much as \$5.3 million, arguing that her settlement, together with what Fortis paid in medical expenses, did not cover all her medical needs. The trial court granted summary judgment for Cantu. The court of appeals affirmed.

The Supreme Court HOLDS that the made-whole doctrine is trumped by the insurance policy's contractual right to subrogation. Equitable and contractual subrogation rest upon common principles, but contract rights generally arise from contract language. They do not derive their validity from equitable principles 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.

[Opinion in HTML](#)

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[Briefs](#)

05-0940

Central Ready Mix Concrete Co. Inc. v. Luciano Islas  
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg  
For petitioner: Katie P. Klein, McAllen  
For respondent: Kevin M. Beiter, San Antonio  
REVERSED AND JUDGMENT RENDERED, opinion by Justice Brister:

The issue is whether a contractor owes any duty for the safety of an independent contractor's employees performing obviously dangerous work. In this case Islas sued Central Ready Mix for injuries he suffered as he cleaned the rotating mixer on one of Central's cement trucks. Islas, employed by a contractor hired by Central to clean the trucks' mixing drums, was caught as he was climbing out of the mixing drum when a co-worker started the truck and the mixer began turning. A jury determined that Central was 20 percent responsible, but the trial court granted the company's motion to disregard the verdict. The court of appeals reversed.

The Supreme Court HOLDS that Central Ready Mix did not have a duty on the premises owner that could not be delegated to warn the subcontractor of inherently dangerous repairs. Owners like Central generally have no duty to ensure that an independent contractor performs its work in a safe manner. No contract granted Central such control, and no evidence showed it exercised actual control when the contractor's employees performed their work. The duty to warn independent contractors of concealed hazards applies to premises conditions, about which an owner should know, rather than the subcontractor's own work, about which the subcontractor should know. The dangers of rolling an employee about inside a concrete mixer are so obvious they cannot constitute a concealed hazard imposing on Central a duty to warn.

[Opinion in HTML](#)

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[Briefs](#)

06-0336

Armando Ramos Sr., et al. v. Dr. Ian Richardson & Valley Baptist Medical Center, et al.

from Cameron County and the 13th District Court of Appeals, Corpus Christi/Edinburg  
REVERSED AND JUDGMENT RENDERED, per curiam opinion:

The issue is whether for purposes of the “mailbox rule” an inmate meets his filing deadline by placing appeal notices into the outgoing prison mailbox. In this case, the record indicates Ramos did everything necessary to comply with the rules by placing the notices of appeal in the outgoing prison mailbox. When prison officials placed the notices of appeal in the U.S. mail is not clear, but logic holds that because they were received by the clerk a day after the filing deadline they were placed in the mail as was required under the rules.

[Opinion in HTML](#)

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[Briefs](#)

06-0913

Patricia Wilz v. Kenneth W. and June Flournoy

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

REVERSED AND JUDGMENT RENDERED, per curiam opinion:

Wilz sought to impose a constructive trust on a farm purchased by her ex-husband and his new wife allegedly with money from a settlement for their incapacitated son. The trial court imposed a constructive trust on the entire property, but a divided court of appeals limited the trust to a 35 percent undivided interest. Given the evidence presented at trial and the jury’s findings, the court of appeals erred in limiting the constructive trust.

[Opinion in HTML](#)

[Opinion in PDF](#)

[Briefs](#)

## **ISSUES SUMMARIES FOR CASES GRANTED ORAL ARGUMENT IN TODAY’S ORDERS**

06-0034

Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338

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

The issue is whether federal law preempts the transit agency’s immunity in a suit to enforce a grievance resolution when federal money to the transit agency is conditioned on “fair and equitable arrangements” to protect transit employee interests.

[Briefs](#)

[Court of appeals opinion](#)

06-0518

Rory Lewis, M.D. v. Dewayne Funderburk

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

The principal issue is whether the court of appeals has jurisdiction over an interlocutory appeal from a trial court’s denial of dismissal because of an inadequate expert report in a health-care liability claim.

[Briefs](#)

[Court of appeals opinion](#)

[Dissent](#) (Gray)

06-0873

Canyon Regional Water Authority v. Guadalupe-Blanco River Authority

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

The issue in this condemnation challenge to Canyon Regional Water Authority’s second intake in Lake Dunlap is whether the river authority, the lake owner, offered sufficient summary-judgment evidence to shift the burden to the water agency to establish paramount public considerations to condemn property with a prior public use.

[Briefs](#)

[Court of appeals opinion](#)

06-0904

Guitar Holding Co., L.P.

v. Hudspeth County Underground Water Conservation District No. 1, et al.

from Hudspeth County and the Eighth District Court of Appeals, El Paso

10 The issues in this water-transfer permit challenge are (1) whether the conservation district's transfer rules violate state law prohibiting more restrictive conditions on new applications and (2) whether the district's transfer rules violate the landowner's equal-protection rights.

[Briefs](#)

[Court of appeals opinion](#)

**REHEARING GRANTED, PETITION REMAINS PENDING**

06-0635

Hubco Inc. v. Greg Hall

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

No briefs available online

[Court of appeals opinion](#) (on rehearing)

[Court of appeals opinion](#)