NO. 05-0272

IN THE
SUPREME COURT OF TEXAS

ENTERGY GULF STATES, INC.,
Petitioner,

V.

JOHN SUMMERS,
Respondent.

On Petition for Review from the Ninth Court of Appeals, Beaumont, Texas

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BRIEF OF AMICUS CURIAE, TEXANS FOR LAWSUIT REFORM IN OPPOSITION TO MOTION FOR REHEARING

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STATEMENT OF AMICUS CURIAE'S INTEREST

Texans for Lawsuit Reform ("TLR") is a civil justice reform advocacy organization with a long-standing interest in the administration of justice. TLR paid all fees and expenses in preparing this brief.

No. 05-0272

In the Supreme Court of Texas

Entergy Gulf States, Inc.,
Petitioner,

v.

John Summers,
Respondent.

On Petition for Review from the Ninth Court of Appeals, Beaumont, Texas

Brief of Amicus Curiae, Texans for Lawsuit Reform In Opposition to Motion for Rehearing

To the Honorable Supreme Court of Texas:

On August 31, 2007, the Court handed down an opinion in this cause, holding that Entergy Gulf States, Inc. was John Summers' statutory employer under the Texas Workers' Compensation Act and, because Entergy was Summers' statutory employer and provided workers' compensation insurance coverage to Summers, it was entitled to invoke the exclusive-remedy provision of the Act in answer to Summers' personal injury action. This

decision was compelled by the plain language of the Workers' Compensation Act and is legally correct. Texans for Lawsuit Reform, as Amicus Curiae, submit this brief in support of the Court's August 31, 2007 decision.

ARGUMENT AND AUTHORITIES

A. The Labor Code's plain language dictates the outcome.

Since handing down its decision in this cause, this Court has received a number of amicus curiae briefs filled with heated rhetoric. When the facts are stated and the law applied, it is clear, however, that the Texas Workers' Compensation Act compels the decision made by the Court.

The Facts. John Summers was injured while working at Entergy's Sabine Station plant. At the time of his injury, Summers was an employee of International Maintenance Corporation (IMC). IMC had contracted with Entergy to perform construction and maintenance services on Entergy's premises. Under the contract, IMC was an "independent contractor," not a general contractor. Entergy and IMC agreed that Entergy would provide workers' compensation insurance coverage for all of the IMC employees working at Entergy's plant, and that Entergy would be the statutory employer of IMC's employees. After his injury, Summers applied for and received workers' compensation benefits under the policy provided by Entergy. He also sued Entergy for negligence.

The Law. Four provisions of the Workers' Compensation Act constitute the universe of law governing the decision in this case.

1. Any person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors, is a "general contractor."[1]

[1] TEX. LABOR CODE §406.121(1).

2. Any person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform is a "subcontractor."[2]

3. A general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.[3] If a general contractor and a subcontractor enter into such an agreement, the general contractor is the employer of the subcontractor's employees for purposes of the workers' compensation laws of this state.[4] In other words, the general contractor is the "statutory employer" of the subcontractor's employees.

4. Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage against the employer for the death of or a work-related injury sustained by the employee.[5]

The Law Applied to the Facts. Applying the plain language of the statute, this Court correctly held that Entergy fits the definition of a "general contractor" because it undertook to procure the performance of work, either separately or through the use of subcontractors, and nothing in the Act says that Entergy, as the property owner, cannot be a "general contractor." IMC fits the definition of a "subcontractor" because it contracted with Entergy to perform all or part of the work or services that Entergy had undertaken to perform. In accordance with Labor Code §406.123(a), Entergy, as general contractor, and IMC, as subcontractor, entered into a written agreement under which Entergy would provide workers' compensation insurance coverage to IMC and its employees. Entergy thus became the employer of IMC's employees for purposes of the workers' compensation laws of this state. Because Summers was Entergy's statutory employee as provided by

[2] *Id.* §406.121(5).
[3] *Id.* §406.123(a).
[4] *Id.* §406.123(e).
[5] *Id.* §408.001(a).

§406.123(a), recovery of workers' compensation benefits was Summers' exclusive remedy against Entergy for his work-related injury, as provided by §408.001(a). Based on the Labor Code's plain language, the Court reached the conclusion that Entergy could be the general contractor and Summers' statutory employer, and, as such, was entitled to the protection from litigation provided by the Workers' Compensation Act.

Amici's Error. Several amici have attacked this Court's decision by clinging to an interpretation of the Workers' Compensation Act that is based on language that was repealed in 1989. In 1983, the 68th Legislature amended the Workers' Compensation Act to define "subcontractor" as "a person who has contracted to perform all or any part of the work or services which a prime contractor has ***contracted with another party*** to perform."[6] Four words in this prior version of the statute ("contracted with another party") suggested that in order to qualify as a "general contractor," a person must have had both an upstream contract (with the property owner) and a downstream contract (with the subcontractor). In *Wilkerson v. Monsanto Co.* , a federal district court applying the 1983 statute adopted this interpretation by holding that a property owner could not also be a general contractor under the facts presented because the property owner had contracted with a general contractor to perform certain work, and the general contractor had contracted with a subcontractor to perform that work.[7] Thus, the property owner did not have both an upstream and downstream contract and, consequently, was not the general contractor according to the court. In his briefing to

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[6] Act of May 26, 1983, 68th Leg., R.S., Ch 950, §6, 1983 Tex. Gen. Laws 5210 (emphasis added)), *amended and reenacted by* Act of December 11, 1989, 71st Leg., 2d C.S., Ch. 1, 1989 Tex. Gen. Laws 1, 15, *codified as* TEX. LABOR CODE §406.121(5).

[7] *Wilkerson v. Monsanto Co.*, 782 F.Supp. 1187, 1188-89 (E.D. Tex. 1991). Even though *Wilkerson* was handed down in 1991, the federal court was applying the pre-1989 version of the statute.

this Court, Summers relied on *Wilkerson* as his authority for arguing that a property owner could not be a general contractor.

In 1989, however, the Texas Legislature changed the definition of "subcontractor" in the statue by removing the four words that were the sole basis of the federal court's decision in *Wilkerson*.[8] Thus, Summers' reliance on *Wilkerson* is based on an interpretation of a version of the statute that no longer exists. Once the Legislature changed the language of the statute, *Wilkerson* lost any value in interpreting the new statute. The Court is now obliged to (1) construe the statute by determining the Legislature's intent by looking to the plain language used in the statute, and (2) assume that the Legislature did not do a useless thing when it omitted the four critical words.

B. Public policy requires that the Court apply the Labor Code's plain language and assume the Legislature did not do a useless thing.

As this Court has stated numerous times, the most important consideration in ascertaining legislative intent is the plain language of the statute itself.[9] If the meaning of the statutory language is unambiguous, a court should adopt the interpretation supported by the plain meaning of the provision's words and terms.[10] Otherwise, "statutory construction rests upon insecure and obscure foundations at best."[11] This rule of statutory construction both respects the Legislature and ensures that ordinary citizens are able to rely on a statute to mean what it says.[12] As this Court stated 87 years ago—

[8] *See* Act of December 11, 1989, 71st Leg., 2d C.S., Ch. 1, §3.05, 1989 Tex. Gen. Laws 1, 15-16.
[9] *See, e.g., Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864, 865 (Tex. 1999); *Liberty Mut. Ins. Co. v. Garrison Contractors*, 966 S.W.2d 482, 484 (Tex. 1998); *Monsanto Co. v. Cornerstones M.U.D.*, 865 S.W.2d 937, 939 (Tex. 1993); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex. 1990).
[10] *Fitzgerald*, 996 S.W.2d at 865.
[11] *State Bd. of Ins. v. Betts*, 315 S.W.2d 279, 281 (Tex. 1958); *see also Diversicare Gen. Partner Inc., v. Rubio*, 185 S.W.3d 842, 860 (Tex. 2005) (quoting *Betts*); *State v. Jackson*, 376 S.W.2d 341, 346 (Tex. 1964) (same).
[12] *Diversicare*, 185 S.W.3d at 860 ("Straightforward statutory construction ensures that ordinary citizens are

> Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language, and not elsewhere. They are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.[13]

It is true that when a statute is reenacted without material change, it is presumed that the Legislature knew and adopted the interpretation placed on the original act and intended the new act to receive the same construction.[14] ***But it is also true that omissions of existing provisions when new provisions are enacted are presumed intentional.***[15] ***Every word excluded from a statute is presumed to have been excluded for a purpose,***[16] ***and the Legislature should not be presumed to have done a useless thing.***[17]

Here, the Legislature made extensive changes to the Workers' Compensation Act in 1989. Among the changes was the omission of four words in the definition of "subcontractor." When deciding this case, the Court had no alternative but to apply the 1989 language as written. The members of the Legislature and the public surely do not want this Court to ignore the plain language of a statute or to ignore legislative changes to a statute. The rules of statutory construction are intended to respect the Legislature's constitutional role, and to ensure that statutes mean what they plainly say. This Court's

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able 'to rely on the plain language of a statute to mean what it says.'"); *Fitzgerald*, 996 S.W.2d at 866 (same).

[13] *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920); *see also Diversicare*, 185 S.W.3d at 860 (quoting *Simmons*); *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997) (same); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985) (same); *Tex. Highway Comm'n v. El Paso Bldg. & Constr. Trades Council*, 234 S.W.2d 857, 863 (Tex. 1950)(same).

[14] *First Employees Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983).

[15] *Matter of Ament*, 890 S.W.2d 39, 41 (Tex. 1994).

[16] *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

[17] *Garrison Contractors*, 966 S.W.2d at 485.

application of established rules of construction is deferential to the Legislature and the public and, consequently, does not warrant the heated criticism leveled by several amici.

C. The Court's reference to the codification of the Workers' Compensation Act in the Labor Code does not affect the outcome.

Amicus curiae Steve Bresnen criticizes the Court for discussing the 1993 codification of the Workers' Compensation Act in the Texas Labor Code. The criticism is not appropriate. In his briefing, Summers mistakenly states that the change in question was made in the 1993 codification. He then argues that the codification was intended to be non-substantive and, therefore, should not be regarded as having changed the law as interpreted in *Wilkerson*.[18] The Court's opinion addresses Summers' argument, stating that "[t]he general statement that a recodification is not intended to effect substantive changes does not ... override the plain wording of the statutory provisions ...."[19] While the opinion could be clearer in stating that the statutory change was made in 1989, not 1993, the opinion does not explicitly state that the change was made in the 1993 codification, as Mr. Bresnen alleges. The opinion merely addresses Summers' argument.

Furthermore, Mr. Bresnen's criticism is one without a point. There is no dispute that the statute was amended in 1989, prior to the "nonsubstantive" 1993 codification. The Court is bound by long and well-founded precedent to follow the statute's plain language.[20] The result is the same either way: the current statutory provisions are unambiguous, and the Court is obligated to give force to clear statutory language.

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[18] *See Entergy Gulf States, Inc. v. Summers*, --- S.W.3d ---, 2007 WL 2458027, *3 (Tex., Aug. 31, 2007).
[19] *Id.*
[20] *See State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *Fitzgerald*, 996 S.W.2d at 865-66; *Government Personnel Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952) (duty of courts to construe law as written and "not look for extraneous reasons to be used as a basis for reading into a law an intention not expressed").

Further, several amici have overstated the role of the Code Construction Act in this case.[21] The relevant provisions of the Code Construction Act have been in existence for decades.[22] This Court has consistently held that, short of a typographical error or an absurd result, the Code Construction Act should not be used to undermine the plain meaning of a statute.[23] Over thirty years ago in *Thiel v. Harris County Democratic Executive Committee*, this Court explained the limitations of the Code Construction Act:

> By its own terms, the general Code Construction Act is intended only as an aid or guide in the construction of legislative codes . . . . it is not designed and should not be construed to engraft substantive provisions onto subsequently enacted legislation when the language, meaning, and interpretation of such legislation are, standing alone, indisputably clear. Thus, ***the Code Construction Act provides . . . principles of construction that are necessarily subordinate to the plain intent of the Legislature as manifested in the clear language of [the statute].***[24]

By focusing first on the plain meaning of the language of Workers Compensation Act, this Court correctly interpreted the statute in this case. Where, as here, the statutory language can have but one meaning, the Code Construction Act does not allow the Court to stray from this language.

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[21] *See* TEX. GOV'T CODE §§311.001-.032.
[22] *See* TEX. REV. CIV. STAT. ANN. art. 5429b-2.
[23] *See Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 195 (Tex. 2007); *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 283-84 (Tex. 1997) (prior law and legislative history cannot be used to alter or disregard the express terms of a code provision when its meaning is clear from the code when considered in its entirety, unless there is an error such as a typographical one); *Thiel v. Harris County Democratic Executive Committee*, 534 S.W.2d 891, 894 (Tex. 1976).
[24] *Thiel*, 534 S.W.2d at 894 (emphasis added).

CONCLUSION

The Court's August 31, 2007 opinion in this cause reaches the conclusion required by the plain language of the Workers' Compensation Act. The Court did nothing more or less than apply established rules of statutory construction to an undisputed set of facts. Those rules of construction are designed to give proper deference to the Legislature and to ensure that statutes mean what they plainly say.

January 22, 2008

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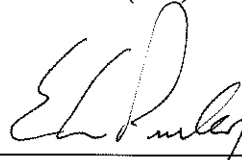

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I certify that a true and correct copy of this brief was delivered by first-class mail on this 22nd day of January, 2008 to the following parties of record and to each Amicus Curiae:

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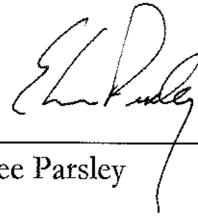

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