NO. 05-0272

IN THE SUPREME COURT OF TEXAS

Entergy Gulf States, Inc.,

Petitioner

v.

John Summers,

Respondent.

Brief of Amicus Curiae
Steve Bresnen

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amicus Curiae Steve Bresnen submits this brief in support of rehearing in this cause. This Court, by its original opinion in this case, committed error in the application of its own precedent, adopted a statutory construction that would unnecessarily cause a state statute to be invalid under the Texas Constitution, created an absurdity in violation of the Court's stated principles of statutory construction and arbitrarily utilized differing analytical approaches to our State's jurisprudence (within the same seven day period), such that its Citizens can no longer ascertain the laws that govern their affairs or trust that their Legislature is the body that makes their laws.

Unless reversed, this combination of judicial error, jurisprudential inconsistency and neglect of the Constitution threatens to earn this Court a "heads I win, tails you lose" reputation that will not be easily shaken.

To avoid the consequences of its original opinion, the Court should vacate its original opinion and reverse its grant of the petition for review in this case, or, rehear this case, withdraw its judgment and render an opinion consistent with sound jurisprudence and the public interest.

Interest of Amicus Curiae And Disclosures Pursuant to Tex. R. App. P. 11

The undersigned amicus curiae is a Citizen of the State of Texas, and member of the State Bar of Texas. This Amicus is a 27-year veteran of the legislative process who is concerned about the deteriorating relationship between the Legislature and the Supreme Court and desires to do something about it by urging the Court to change its recent course by correcting its recent actions. While the undersigned is a registered lobbyist, this brief

is submitted without compensation and is not intended to speak and does not speak on behalf of any other individual or entity.

No fee was paid or promised in association with the preparation and filing of this brief. This brief is submitted in the interest of Texas solely on behalf of the undersigned, who represents no other person or organization in this matter.

Argument and Authority

I. The Court should withdraw its original opinion because its citation and discussion of *Fleming Foods v. Rylander*, 6 S.W. 3d 278 (Tex. 1999), in Section II.B.2 of the original opinion are grossly inapplicable as used in that section of the original opinion.

Justice Willet's original opinion reads as if the language being construed by the Court was first enacted in a bill passed by the Legislature in 1993. *Entergy Gulf States v. Summers,* 05-0272 (Tex. 2007) at p. 4. The 1993 bill was designated a non-substantive re-codification by the Legislature (i.e., no change in the prior law was intended by the Legislature, as declared on the face of the legislation) *Acts of the 73rd Legislature, Chapter 269 (1993); House Bill 752, 73rd Legislature, Regular Session (1993).* Justice Willet expends more than 250 words in this section essentially saying what the Court's spokesman said more briefly on December 4, 2007, even while the motion for rehearing in this case is pending: "Just because it says it's one thing doesn't mean that it is." Mr. Osler McCarthy, quoted on *Harvey Kronberg's Quorum Report*, Daily Buzz, December 3, 2007.

There are two problems with this embarrassing section of the Court's opinion:

A. The statutory language being construed in this case *was first enacted in 1989 and not in the 1993 bill* by which the non-substantive re-codification was accomplished, as suggested in the opinion.

At issue in Section II.B.2 of the original opinion is the interplay between the definitions of "general contractor" and "subcontractor." *Entergy at p.4*

The chart below documents the general contractor and subcontractor language in the relevant workers' compensation statute from first enactment in 1983 through today:

Definitions	1983 – 1989	1989 – 1993	Post – 1993
Subcontractor	"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" Tex. Civ. Stat., Art. 8307, § 6 (b)	"a person who has contracted with a general contractor to perform all or any part of the work or services that a general contractor has undertaken to perform" Tex. Civ. Stat., Art. 8308-3.05 (a)(5)	"a 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" Tex. Labor Code, Sec. 406.121(5)
General Contractor	"Prime contractor" was used which includes "principal contractor," "original contractor," or "general contractor" as those terms are commonly used and means the person who has undertaken to procure the performance of work or services. The prime contractor may engage sub-contractors to perform all or any part of the work or services."	"a person who has undertaken to procure the performance of work or services, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or an analogous term. The term does not include motor carriers that make use of owner operators in providing	"a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or an analogous term. The term does not include motor carriers that make us of owner operators in providing transportation

	Tex. Civ. Stat., Art. 8307 § 6(c)	transportation service." Tex. Civ. Stat., Art. 8308-3.05 (a)(2)	service." Tex. Labor Code, Sec. 406.121(1)
Election to provide Coverage; statutory employer	"A subcontractor and a prime contractor may make a written contract whereby the prime contractor will provide workers' compensation benefits to the sub-contractor and the employees of the sub-contractor...In any such contract the sub-contractor and his employees shall be considered employees of the prime contractor only for purposes of the workers' compensation laws of this state and for no other purpose." Tex. Civ. Stat., Art. 8307 § 6(a)	"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...In any agreement under this subsection, the subcontractor and his employees shall be considered employees of the general contractor only for the purposes of workers' compensation laws of this state and no other purpose." Tex. Civ. Stat., Art. 8308-3.05 (e)	"(a) 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." "(e) An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state." Tex. Labor Code, Sec. 406.123(a)&(e)

The 1983 language resulted from House Bill 1852, 68th Legislature, Regular Session (1983), which is attached as Exhibit 1. The "1989-1993" column documents changes made in the 1989 workers' compensation legislation, by which extensive amendments were made to the Texas workers' compensation laws. Senate Bill 1, 71st Legislature, Second Called Session (1989), the relevant portions of which are attached as Exhibit 2. The "Post-1993" column documents the language in the non-substantive re-

codification enacted in 1993, which is the language in effect. House Bill 752, 73rd Legislature, Regular Session, the relevant portions of which are attached as Exhibit 3.

The only differences the undersigned can discern between the two later versions of these virtually identical statutes are minor, such as changes in verb tense or from singular to plural, in keeping with the Texas Legislative Council style manual, the agency statutorily responsible for preparing non-substantive re-codifications for legislative consideration. *See Section 323.007, Government Code.*

B. The Court has unnecessarily announced that it will ignore the Legislature's intention in enacting statutes in violation of the principle of separation of powers and contravention of Article 3, Section 43, Texas Constitution.

Article 3, Section 43 reads:

> (a) The Legislature *shall* provide for revising, digesting and publishing the laws, civil and criminal; provided, that in the adoption of and giving effect to any such digest or revision, the Legislature shall not be limited by sections 35 and 36 of this Article.
>
> (b) In this section, "revision" includes a revision of the statutes on a particular subject and *any enactment having the purpose, declared in the enactment, of codifying without substantive change statutes that individually relate to different subjects.* [emphasis added]

This Amicus accepts that *Fleming Foods* is precedent. But, it is a precedent that is inapplicable as it was used in the original opinion and it is a precedent that flies in the face of Article 3, Section 43. If any source of law should be given the plain effect of its language, one would think it would be a clear and unambiguous provision of the Texas Constitution.

Article 3, Section 43, is a provision containing such language.

There is no purpose served by subsection (b) of Article 3, Section 43, if the highest court of this state refuses to honor the Legislature's role as expressly stated in that subsection.

As applied in Section II.B.2 of Justice Willet's original opinion in this case, *Fleming Foods* is an aberrant precedent that the Court should take the first opportunity to overturn because it arrogates power to the Court that is expressly granted to the Legislature by Article 3, Section 43, and carries with it the apparently unavoidable temptation for judicial activism, even to the extent that a unanimous Court has applied it in this case, where the slightest research would have demonstrated that the substantive/non-substantive re-codification issue was not remotely implicated. If the Court insists on following this aberrant precedent, it should at least do so when the fig leaf of relevance is present.

II. The Court's interpretation of Sections 406.121-406.123, Labor Code, reaches a result that causes these statutes to violate the Texas Constitution and presents an absurdity that violates applicable principles of statutory construction.

A Court must adopt a construction of a state statute that is constitutional, if possible. *FM Properties v. City of Austin,* 22 S.W. 3d 868, 873 (Tex. 2000), citing *Quick v. City of Austin,* 7 S.W. 3d 109, 115 (Tex. 1999) and *Proctor v. Andrews,* 972 S.W. 2d 729, 735 (Tex. 1998). "An Act that is susceptible of but one reasonable construction will be given that construction even though it renders the act unconstitutional. When, on the other hand, a statute lends itself to two interpretations, one of which is reasonable and within the constitution and one which would render the statute unconstitutional, the court must adopt the interpretation which protects the statute's constitutionality..." *Statutes, Section 86, Tex. Jur 3d, page 593.*

the time of the relevant events, subsequently a member of the Texas House of Representatives and now the Senator who replaced Senator Montford) and attorney Will Barber. *Montford, Duncan and Barber, Guide to Texas Workers' Comp Reform (1991) with relevant parts attached as Exhibit 13.*

Despite extensive discussion of the legislative history of Senate Bill 1, which at least two of the authors had just written, and a section-by-section analysis of the legislation, nowhere do the authors discuss the inclusion of premises owners to coverage under the contractor/subcontractor provisions.

Conclusion and Prayer

For the foregoing reasons, Amicus Curiae Steve Bresnen respectfully requests this Court to grant rehearing of this matter, either to reverse the grant of petition in this case and affirm the lower courts, or to revise its opinion in light of the well-documented legislative intent and constitutional infirmities presented herein.

Respectfully submitted,

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