NO. 05-0272

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

MOTION FOR REHEARING-CAUSE

ENTERGY GULF STATES, INC.,
PETITIONERS,

V.

JOHN SUMMERS,
RESPONDENT.

BRIEF OF AMICI CURIAE THE HONORABLE SENATORS RODNEY ELLIS AND JEFF WENTWORTH, AND THE HONORABLE REPRESENTATIVES CRAIG EILAND AND BRYAN HUGHES

A. Craig Eiland
State Bar No. 0650230
LAW OFFICES OF A. CRAIG EILAND
2423 Market Street
Galveston, Texas 77550
Telephone: (409) 763-3260
Telecopier: (409) 763-8154

Counsel for *Amici Curiae*

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Telephone: (409) 763-3260
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Counsel for *Amici Curiae*

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amici Curiae the Honorable Texas Senators Rodney Ellis[1] and Jeff Wentworth,[2] and the Honorable Texas Representatives Craig Eiland[3] and Bryan Hughes,[4] submit this brief in support of rehearing of this cause. This Court, by disregarding the express terms of the Legislature's enactments, has violated the separation of powers clause of the Texas Constitution, and impermissibly encroached on the powers and functions expressly reserved to the Legislature. Actions taken in derogation of that organizational principle are void as unconstitutional; to avoid such a result, we urge this Court to rehear this case, and withdraw its judgment and opinion.

INTEREST OF AMICUS CURIAE AND DISCLOSURES PURSUANT TO TEX. R. APP. P. 11

The undersigned *amici* are elected members of the Texas Legislature. We are concerned about recent actions this Court has taken in direct contravention of our express enactments, and are interested solely in seeing the separation of powers, delineated in the Texas Constitution, properly observed.

No fee was paid or promised in association with the preparation and filing of this brief.

ARGUMENT AND AUTHORITY

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[1] Senate District 13, Houston.

[2] Senate District 25, San Antonio.

[3] House District 23, Texas City.

[4] House District 5, Marshall.

I. Extending Statutory Immunity to Plant Owners Based on the Type of Insurance They Purchase Was Never the Intent of Any Legislative Action.

The Worker's Compensation Act provides immunity from liability to employers who have purchased worker's compensation insurance for their employees. This Court's holding in this case improperly extends that immunity to non-employer premises owners. The Legislature has never authorized such an extension, never intended to provide such an extension, and, in fact, has repeatedly rejected such an extension.

In 1989, we overhauled the worker's compensation system. In the draft bill considered during the regular session, immunity was extended to owners, as well as general contractors.[5] However, in the subsequent special session we removed premises owners from the list of actors granted immunity.[6] The deletion of a provision in a pending bill discloses a legislative intent to reject the proposal.[7] Just as a court assumes that every word in a statute has been used for a purpose, the court presumes that every word excluded was excluded for a purpose.[8] We excluded the word "owner" because we did not want to extend immunity to non-employer premises owners.

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[5] S.J. OF TEX., 71st Leg., 1st C.S. 90 (1989), attached as tab A.

[6] S.J. OF TEX., 71st Leg., 2d C.S. 153 (1989), attached as tab B.

[7] *See Transportation Ins. Co. v. Maksyn*, 580 S.W.2d 334, 337-38 (Tex. 1979); *Berry v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 891 (Tex. App.--Austin 2000, no pet.).

[8] *Berry*, 9 S.W.3d at 891; *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 888 S.W.2d 921, 926 (Tex. App.--Austin 1994, writ denied).

The Legislature has enacted many "tort reform" measures since 1995, and each time the idea of extending immunity to non-employer premises owners was rejected.[9]

Several of the bills we did enact presume that non-employer premises owners are not immune. In 1995, for instance, the law governing joint and several liability affecting premises owners was changed; the change would not have been needed if premises owners were immune.[10] In 2003, we changed the law regarding the submission in the jury charge of the premises owner; this change, too, would not have been necessary were premises owners immune.[11]

More importantly, the only time we limited compensation to injured persons was in the 2003 session, by the combined effects of House Bill 4 and what is known as Prop 12. This restriction of *noneconomic* damages applies only to medical malpractice cases, and a vote of a supermajority of both houses of the Legislature is required to restrict recovery in any other type of cases. This court has now improperly done what we, the Legislature, have refused to do, and that is to restrict the *economic and noneconomic* recovery that injured Texas citizens may have against non-employer premises owners.

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[9] *See, e.g.*, Tex. H.B. 2279, 74th Leg., R.S. (1995); Tex. H.B. 3024, 75th Leg., R.S. (1997); Tex. H.B. 2630, 75th Leg., R.S. (1997); Tex. H.B. 3120 & 3459, 77th Leg., R.S. (2001); Tex. H.B. 2982 & S.B. 675, 78th Leg., R.S. (2003); Tex. H.B. 1626, 79th Leg., R.S. (2005); Tex. S.B. 1404, 76th Leg., R.S. (1999).

[10] *See* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.08, 1987 Tex. Gen. Laws 80 (amended 1995) (current version at Tex. Civ. Prac. & Rem. Code Ann. § 33.012(a) (Vernon 2007)).

[11] *See* Tex. Civ. Prac. & Rem. Code § 34.001, *et seq.* (Vernon 2007).

II. This Court Has Violated the Separation of Powers Doctrine by Ignoring the Express Language of the Legislature's Enactments, and Its Judgment in This Case is Thus Void.

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[12]
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> * * * * * * * *
>
> The wisdom of the courts--however impeccably conceived--may not be, even under our system of blended law and equity, substituted for the plainly expressed intention of the Legislature.[13]

A. The Separation of Powers Doctrine Prohibits This Court from Ignoring the Express Terms of Legislative Enactments.

The separation of powers among the three branches--legislative, executive, and judicial--is the organizing principle of both our state and federal governments. Their proper functioning depends on each branch fulfilling its duties, yet not encroaching on the prerogatives accorded either other branch.[14] The separation of powers provision is violated when "one branch of government assumes, or is delegated, *to whatever degree*, a power that is more 'properly attached' to another branch."[15] It is also violated when "one branch *unduly*

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[12] TEX. CONST. art. II, § 1.

[13] *In re Dulin's Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App.--Galveston 1951, no writ).

[14] *Swayne v. Chase*, 30 Tex. 1049, 1052, 88 Tex. 218, 225 (1895).

[15] *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Cr. App. 1990) (emphasis in original).

interferes with another branch so that he other branch cannot *effectively* exercise it s constitutionally assigned powers."[16]

As a practical matter, the principle arises most frequently when one branch, usually the judicial, is called upon to interpret or apply the enactments of the legislative branch. In so doing, a court must be mindful of the

> marked distinction between liberal construction of constitution and statutes, by which courts, from the language used, the subject-matter and purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law or constitution something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by section 1, art. 2, of the constitution of the state . . . .[17]

In other words, courts cannot rewrite statutes--or simply elect to ignore the Legislature's express language--without usurping functions that pertain solely to the legislative department of the government.[18]

The principle is not some hoary relic. It is a vital and continuing part of our government, and of this court's jurisprudence. This state's highest courts, in refusing to rewrite statutes even in the recent past, have repeatedly acknowledged their obligation to carefully observe the separation of powers.[19] Perhaps Justice Brister most concisely described

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[16] *Id.* (emphasis in original).

[17] *Swayne*, 30 S.W. at 1052, 88 Tex. at 225.

[18] *Turner v. Cross*, 18 S.W. 578, 579, 83 Tex. 218, 224 (1892).

[19] *Brown v. de la Cruz*, 156 S.W.3d 560, 566 (Tex. 2004) ("it is at least theoretically possible that legislators--like judges or anyone else--may make a mistake. That does not give us the power (as the United States Supreme Court has stated) 'to legislate . . .to fill any hiatus Congress has left.'") (quoting in part *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979)); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726

the judicial interpretive function: "We must construe this statute according to what it says, not according to what we think it should have said."[20]

B. In This Case, This Court Has Impermissibly Breached the Bounds Separating the Powers Among the Branches.

When the Legislature undertook its 1993 amendments to the Labor Code, we intended to revise and recodify certain provisions without making substantive changes. To make that point clear, and to assist courts as they might be called upon to interpret or apply the 1993 amendments, we wrote into the statute the proviso that the law was revised "without substantive change."[21] This specific disclaimer was approved by a majority of the House and two-thirds of the Senate, and was signed into law by the Governor.

This nonsubstantive recodification was not a unique happening. Since 1993, as part of the ongoing recodification of the civil statutes, we have recodified seven other codes: Government Code (1993, 1995, and 1999); Transportation Code (1995); Finance Code (1997); Utilities Code (1997); Insurance Code (1999, 2001, 2003, 2005, 2007); Occupations Code (1999 and 2001); and Special Districts Local Laws (2003, 2005, and 2007).

(Tex. 1995) ("This Court's role under our Constitution's separation of powers provision should be one of restraint. We do not dictate to the Legislature how to discharge its duty."); *see Ex Parte Roemer*, 215 S.W.3d 887, 898 (Tex. Cr. App. 2007) (separation of powers prohibits court from "legislating from the bench" to correct perceived inconsistencies in statute).

[20] *City of San Antonio v. Hartman*, 201 S.W.3d 667, 673 (Tex. 2006).

[21] Tex. Labor Code § 1.001(a).

In its opinion in this case, this court elected to ignore our specific language. To be sure, the court duly recited the well-known canons of statutory construction.[22] After paying this lip service, though, the court went on to disregard our interpretive instructions.[23] The Court effectively rewrote the statute to omit, or render null, our proviso. By encroaching on our legislative function, this Court violated the letter and spirit of the Texas Constitution.

As legislators committed to upholding the Texas Constitution, we hope this does not foretell a trend with respect to all the other recodifications we have accomplished. When appropriate, we have expressly denominated them as "nonsubstantive." This Court should not assume for itself the authority to declare, retroactively and in contravention of our express writing, that the changes were substantive after all.

C. The Opinion and Judgment in This Case Are Void as Unconstitutional.

When one department has acted in derogation of this constitutional separation of powers, its acts are *void* as unconstitutional.[24] The court's judgment and opinion in this cause are thus void, and wholly without effect. Accordingly, amici support Summers's motion for rehearing, and urge the court to withdraw its judgment and opinion of August 31, and enter new ones more in keeping with the constitutional limitations on judicial power.

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[22] *See Entergy Gulf States, Inc. v. Summers*, -- S.W.3d --, 2007 WL 2458027 *2, 50 Tex. Sup. Ct. J. 1140 (Tex. 2007).

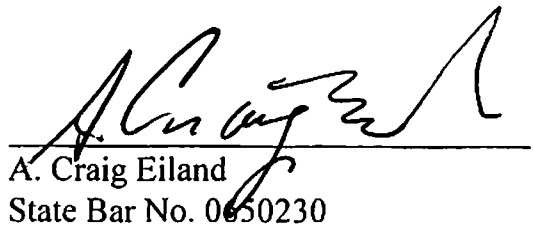
[23] *See id.* at *3.

[24] *See Meshell v. State*, 739 S.W.2d 246, 258 (Tex. Cr. App. 1987); *Ex Parte Rice*, 162 S.W. 891, 900, 72 Tex. Crim. 587 (Tex. Cr. App. 1913).

CONCLUSION AND PRAYER

For the foregoing reasons, we respectfully urge this Court to grant rehearing of this matter and issue an opinion and judgment accurately reflecting the Legislature's intent, and expressly stated, when it enacted these provisions.

Respectfully submitted,



A. Craig Eiland
State Bar No. 0650230
LAW OFFICES OF A. CRAIG EILAND
2423 Market Street
Galveston, Texas 77550
Telephone: (409) 763-3260
Telecopier: (409) 763-8154

COUNSEL FOR *AMICI CURIAE*

Senator Rodney Ellis
District 13
Houston, Texas

Representative Bryan Hughes
District 5
Marshall, Texas

Senator Jeff Wentworth
District 23
San Antonio, Texas

CERTIFICATE OF SERVICE

I certify that on this 17th day of December, 2007, I mailed a true and correct copy of *Brief of Amici Curiae* by first class U.S. Mail to the following counsel of record:

Steven C. Barkley
3560 Delaware, Suite 305
Beaumont, Texas 77706
COUNSEL FOR RESPONDENT JOHN SUMMERS

Christine S. Kibbe
Paul A. Scheurich
Entergy Services, Inc.
P.O. Box 2951
Beaumont, Texas 77704
COUNSEL FOR PETITIONER ENTERGY GULF STATES, INC.

A. Craig Eiland