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NO. 05-0272

MOTION FOR REHEARING-CAUSE

IN THE SUPREME COURT OF TEXAS

JOHN SUMMERS

Respondent

VS.

ENTERGY GULF STATES, INC.

Petitioner

ON PETITION FOR REVIEW FROM THE
NINTH COURT OF APPEALS AT BEAUMONT, TEXAS

JOHN SUMMERS' SUPPLEMENTAL MOTION FOR REHEARING

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John Summers

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ISSUES PRESENTED

(1) Appellant, Entergy Gulf States, Inc. ("EGSI"), did not conclusively establish that it contracted with Appellee, John Summers', employer, International Maintenance Corporation ("IMC"), so as to come under the protection of § 406.123 of the Labor Code. This Honorable Court reversed the burden of proof. Appellee, Summers, was entitled to raise the "no written agreement" argument for the first time before the Honorable Ninth Court of Appeals.

(2) This Honorable Court made law, rather than follow the law, when it disregarded Court precedent, legislative intent, reason, customs and common notions of justice in ruling for EGSI.

ADDITIONAL ISSUES TO BE PRESENTED

(3) This Court erred when it wrongfully assumed that it was precluded from looking beyond the four-corners of TEX. LAB. CODE § 406.121(1) & (5).

(4) This Court's decision endangers Texas workers.

(5) By limiting injured workers to worker's compensation only, this Court has endangered Texas workers.

(6) This Court violated TEX. GOV'T CODE § 311.021(5) by promoting private interests over those of injured Texans and taxpayers.

(7) The Legislature never intended to extend statutory immunity to plant owners.

(8) This Court's judgment is void as unconstitutional because it violates the separation of powers doctrine by ignoring express legislative enactments.

STATEMENT OF THE CASE

Appellee, John Summers, sued Appellant, EGSI, for injuries he sustained on or about April 24, 2001. EGSI contended in its Motion for Summary Judgment that, "On or about September 2, 1997, EGSI and IMC entered into a contract through its agent, Entergy Services. Inc. whereby IMC was to perform work on EGSI's premises in Bridge City, Texas." (CR, pg. 69). In support, EGSI attached a copy of a contract between Entergy Services, Inc. and IMC. The contract does not mention Appellant, EGSI.

ARGUMENT AND AUTHORITIES

(1) In this Honorable Court's opinion in this case, it stated:

> "Our primary objective" when construing statutes "is to determine the Legislature's intent, which, when possible, we discern from the plain meaning of the words chosen." (Opinion, pg. 3).

This Court further went on to state:

> "Where the statutory text is unambiguous, we adopt a construction supported by the statute's plain language, unless that construction would lead to an absurd result. We presume that every word of a statute was used for a purpose, and likewise, that every word excluded was excluded for a purpose." (Opinion, pg. 3).

The statute involved, V.T.C.A. Labor Code § 406.123, states:

> "(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."

This Court has ruled that EGSI had the status of a general contractor and so came under the provisions of § 406.123 of the Labor Code. (Opinion, pg. 5). In so holding, this Court did not follow the plain language of § 406.123 of the Labor Code.

To come under the protection of the statute, EGSI was required to prove that it entered into a written agreement under which it, EGSI, provided workers' compensation insurance coverage to Summers' employer. It produced no such written agreement. In order to be entitled to summary judgment, EGSI had the burden to prove as a matter of law that it came under the provisions of § 406.123 of the Labor Code.

Appellee, Summers, acknowledges that he did not raise this issue before the trial court. However, this Honorable Court has long held that the non-movant has no burden to respond to a summary judgment motion, or by extension part of a summary judgment motion, unless the movant

conclusively establishes its cause of action or defense. Rhone-Poulenc, Inc. v Steel, 997 S.W.2d 217, 222 (Tex.1999). As this Honorable Court held in *Rhone-Poulenc, Inc.*, "The trial court may not grant summary judgment by default because the non-movant did not respond to the summary judgment motion when the movant's summary judgment proof is legally insufficient", *Rhone-Poulenc, Inc.*, pg. 223 citing City of Houston v Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979).

As this Court further went on to state in *Rhone-Poulenc, Inc.*, "Summary judgments must stand on their own merits. Accordingly, on appeal, the non-movant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment." (*Rhone-Poulenc, Inc.*, pg. 223 citing *City of Houston*, 589 S.W.2d at 678). This Court was in error when it found that Appellee, Summers, had waived the "no written agreement" argument because he did not raise it in the trial court as a ground for denying summary judgment. By so holding, this Honorable Court reversed the burden of proof on this issue and erroneously placed it on Appellee, John Summers.

(2) This Honorable Court made law, rather than follow the law, when it disregarded Court precedent, legislative intent, reason, customs and common notions of justice in ruling for EGSI.

On September 17, 2007, the Houston Chronicle published an editorial setting forth its beliefs concerning this Honorable Court's opinion in Summers. A copy of that editorial is attached as Exhibit "A" to this Motion. The editorialist at the Houston Chronicle set forth in much more eloquent detail Appellee, John Summers', argument on this Honorable Court's disregard of both precedent and the action and responsibility of the Texas Legislature. As the Houston Chronicle article stated:

> "The Texas Legislature in recent years has declined repeatedly to allow plant owners to be simultaneously contractors shielded from liability for workplace injuries."

Now this Honorable Court has taken it upon itself to declare that plant owners may be contractors. This Honorable Court in its opinion holds the statutory text as unambiguous, even though apparently the Legislature and others for years and years have not so interpreted it.

Attached as Exhibit "B" is a News Flash published by an associate with the law firm of Powers & Frost, L.L.P. in Houston, Texas. This recognizes that this Honorable Court has changed existing law.

This is just poor policy. Under the Texas Workers' Compensation Act, an injured employee in almost every instance, including John Summers, is limited to 401 weeks of compensation for an injury that essentially takes him out of the work place for the remainder of his life. V.T.C.A. Labor Code, § 408.083. Under this Court's opinion, a premises owner can shield itself from liability no matter how egregious its behavior simply by purchasing workers' compensation insurance for its contractors. Can this truly be the intent of the law?

(3) This Court incorrectly held that so long as the provisions of the Labor Code were not legally ambiguous, it could not look to other sources for interpretative guidance. The Texas Code Construction Act, however, expressly provides otherwise. *See* TEX. GOV'T CODE §311.023(1)-(7). Looking beyond the four-corners of the Labor Code's less-than-definitive definitions of "general contractor" and "subcontractor" and utilizing this Court's own well-established canons of statutory construction, the Legislature's actual intent in codifying these provisions becomes clear – there was no intent to change the common law by denying a traditional tort remedy by an injured worker against a premises owner.

(4) Litigation provides the most powerful incentive to make unsafe workplaces safer. By eliminating it for most large enterprises, this Court has put Texas workers at greater risk for injury and death, yet forced them into a workers' compensation system that is unable to compensate them fully when those injuries occur.

(5) By forcing Texas workers into a no-fault system, the Court's opinion actually discourages efforts to make workplaces safer by encouraging employers to adopt safety programs that onoly create incentives for workers to reduce recorded claims, not make the workplace safer, to oppose and discourage the filing of claims, or to subcontract out dangerous work to independent contractors.

(6) Legislators get to choose between competing interests and favor one side over another. Courts must be fair. Thus, Section 311.021(5) mandates that this Court interpret Section 406 of the Labor Code to promote public over private interests. In contravention of that statute, this Court's decision benefits almost exclusively large corporations because they are the only ones who are likely to have to so-called OCIP's and OPIP-type insurance schemes. By contrast, leaving injured Texans with only the inadequate remedy of workers' compensation shifts the remaining cost of workplace injuries from wrongdoers to taxpayers and the workers themselves.

(7) The Legislature considered and rejected including premises owners among those granted immunity as general contractors under the workers' compensation laws. That deletion evidence clear legislative intent not to extend them such immunity. Other recent bills presume they are not immune.

(8) The Court improperly cast aside the Legislature's statement amending the Labor Code "without substantive change." Where a court acts in express derogation of the Legislature, its judgment is void as unconstitutional.

This Honorable Court should really consider the ramifications of its opinion. First, which type of premises owner is most likely to take advantage of provisions of § 408.083? Appellee, John Summers, suggests that the average premises owner will balance out the cost of providing workers' compensation insurance for its contractors versus the anticipated cost of defending tort claims brought by employees of contractors and subcontractors. Which plant will take advantage of the provisions of § 406.123? It will be the premises owner with the poorest safety record and highest injury rate for its contractors and subcontractors. The prime example for this would be British Petroleum. Merely by purchasing workers' compensation insurance for its subcontractors, it could have avoided the consequences of its own negligence that it acknowledged caused grievous personal injury and death at its Texas City refinery.

The Court's opinion also has the affect of shifting the cost of catastrophic injuries caused by a premises owner's own negligence from the premises owner to the public as a whole through Social Security benefits. In the case of a worker who has sustained a career-ending injury, after he has collected his 401 weeks of compensation, his only remedy at that point is to go on Social Security Disability. The premises owner has succeeded in shifting the cost of injury from itself to the federal government through Social Security.

Additionally, the injured employer himself will actually absorb the majority of the costs of the premises owner's negligence. Workers' compensation does not make up for physical impairment, for psychological injury, for the difference between workers' compensation payments and actual wages earned by the employee, and all of the other economic costs associated with an injury. It is easy to say that workers' compensation should be the only remedy for a worker injured by the negligence of a premises owner. It saves money for insurance companies and corporations.

It puts the majority of the costs of an injury on the federal government, on the general public as a whole, and on the injured employee himself. Can that truly be what the Legislature intended in amending § 406.123 of the Labor Code? Should this Honorable Court not leave that decision to the Legislature which has struggled with this very issue for the past several sessions? Appellee, John Summers, would suggest that this Honorable Court should not engage in judicial activism, but instead should leave this up to the Legislature of Texas, duly elected by the citizens of the state of Texas.

In conclusion, the authors of the Book of Deuteronomy stated it best:

> "You shall appoint judges and officials throughout your tribes, in all your towns that the Lord your God is giving you, and they shall render just decisions for the people. You must not distort justice, you must not show partiality.... Justice, and only justice, you shall pursue so that you may live and occupy the land that the Lord your God has given you." Deuteronomy 16:18-20 (the New Interpreter's Study Bible, 2003).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellee, John Summers, respectfully prays that this Honorable Court **GRANT** his Motion for Rehearing, and that upon rehearing, this Honorable Court **AFFIRM** the judgment of the Honorable Ninth Court of Appeals remanding this case for trial on the merits.

Appellee further prays for general relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to the following parties on this the 19th day of November, 2007:

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