NO. 05-0272

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

ENTERGY GULF STATES, INC.,

PETITIONERS,

V.

JOHN SUMMERS,

RESPONDENT.

BRIEF OF AMICUS CURIAE THE TEXAS TRIAL LAWYERS ASSOCIATION

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amicus Curiae The Texas Trial Lawyers Association offers this brief in support of Respondent John Summers and affirmance of the judgment of the court of appeals with respect to Texas Labor Code § 406.123. Specifically, amicus argues that the statutory construction proposed by Petitioner Entergy Gulf States, Inc. ("EGSI")--shoehorning "premises owner" into the definition of "general contractor," thereby affording premises owners immunity from suit--is not supported by the plain language of the statute; contravenes the Legislature's intent in enacting the statute; and encroaches on the Legislature's prerogative to make policy determinations with respect to complex statutory and social systems.

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

The Texas Trial Lawyers Association (TTLA) is a statewide trade association organized to advance the cause of those who are damaged in person and property and who must seek redress therefor at law; to resist the constant efforts that are now being made to curtail the rights of such persons; to encourage cooperation between lawyers engaged in the furtherance of such objectives; and through such cooperation to promote justice and human welfare, and to protect the rights of the citizens of the State of Texas. TTLA is committed to the balanced and impartial administration of justice, and it seeks to ensure that the judicial system produces results that are fair to all parties, not only the plaintiffs. TTLA believes the citizens of Texas are entitled to

no less.

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

ARGUMENT AND AUTHORITY

I. By the plain meaning of the statute, buttressed by the rule of *ejusdem generis*, a premises owner is not a general contractor.

EGSI's argument is that for purposes of § 406.123, it, as the premises owner, qualifies as a "general contractor." The term "general contractor" is defined in the subchapter:

> "General contractor" means a person who undertakes to procure the performance of a work or service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor, "prime contractor," or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner-operator.

TEX. LAB. CODE § 406.121(1) (Vernon 1996). The question posed by EGSI's proposed construction of the statute is whether "premises owner" is somehow "analogous" to the listed terms.

The rules of statutory construction provide that courts (1) must presume that the Legislature intended a just and reasonable result; (2) may consider the statute's object, the circumstances under which it was enacted, common law and former statutory provisions, including laws on same or similar subjects, and the consequences of a particular statutory construction; (3) must construe all portions of a statute or statutory scheme to be effective, if possible; and (4) must not confine their

review to isolated statutory words, phrases, or clauses, but must instead examine the entire act. *See* TEX. GOV'T CODE ANN. §§ 311.011, 311.023(3), (5) (Vernon 2005); *Meritor Auto, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001); *City of Seabrook v. Port of Houston Auth.*, 199 S.W.3d 403, 430 (Tex. App.--Houston [1st Dist.] 2006, pet. filed). Most important, however, are the "plain language" rule and the rule of *ejusdem generis*. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (in ascertaining legislative intent, the most important consideration in statutory interpretation, courts begin with the plain language of the statute); *City of Seabrook*, 199 S.W.3d at 430.

Under the rule of *ejusdem generis*, when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the words is restricted to the particular designation. *See Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 189-90 & n.110 (Tex. 2004) (applying principle of *ejusdem generis* to condemner's offer and tract of land described in condemnation petition); *Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003) (applying principle to purpose for which electric cooperatives can be organized); *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701-02, 706 (Tex. 2002) (applying principle to construction of private easements); *City of Seabrook*, 199 S.W.3d at 430 (applying principle to statute granting authority certain powers of condemnation). For a term to be analogous to "general contractor," then, it must

particularly designate persons who share the specific characteristics of general contractors.

> And what characteristics do general contractors have?
>
> **General contractor.** One who contracts for the construction of an entire building or project, rather than for a portion of the work. The general contractor hires subcontractors (e.g. plumbing, electrical, etc.), coordinates all work, and is responsible for payment to subcontractors. Also called "prime" contractor.

BLACK'S LAW DICTIONARY 683 (6th ed. 1990). EGSI fails to meet the very first--and most significant--part of the definition, that it have contracted for the construction of an entire building or project. The *sine qua non* of general contractorship is that there be a "general," "principal," "original," or "prime" contract, under authority of which the general contractor contracts with subcontractors. There is no such general contract here, so there can be no general contractor, either. To fairly be considered in a class analogous to "general contractor," EGSI thus must demonstrate, through the appellate record, that it had all of the characteristics of a general contractor. All the record shows is that it had a contract with IMC to perform maintenance work--and one mere subcontract does not a general contractor make.

EGSI asserts that it *intends* to be treated as a general contractor, EGSI Br. at 7, and it clearly *wants* to be a general contractor for these purposes, but neither of those mean that it *is* a general contractor under the statute. EGSI argues that (a) it employed subcontractors, and (b) under the statutory scheme, subcontractors can only be employed by general contractors, so therefore (c) EGSI must be a general

contractor. *See* EGSI Br. at 7. But that argument is built on a false premise--that the statute is applicable in the first place. The statute can apply only if each of several requirements is met, and one of those requirements is that the entity employing the subcontractor be a general contractor in the first instance. Not a premises owner, not an independent contractor, and not some other type of entity--a *general contractor*. The hallmark of a general contractor is that it has contracted with the premises owner or operator to perform, either itself or through subcontractor, work on the premises. EGSI has not entered into such a contract.

II. By its use and subsequent ratification of the term "undertakes," the Texas Legislature evinced its intent to exclude the property owner from the class of persons that can be treated as "general contractors" under § 406.123.

A. The Legislature used the word purposefully and repeatedly.

As quoted above, the Legislature used a very peculiar locution in defining "general contractor: it is "a person who *undertakes to procure* the performance of a work or service, either separately or through the use of subcontractors." TEX. LAB. CODE § 406.121(1) (emphasis added). Why "undertakes to procure"? Why not "procures," or simply "contracts for" (which EGSI would surely prefer)? Indeed, this very issue was raised at oral argument of this cause.

This court must give effect to every word and phrase if it is reasonable to do so because it presumes the Legislature used every word or phrase intentionally, with a meaning and a purpose. *Abrams v. Jones*, 35 S.W.3d 620, 625 (Tex. 2000); *Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 776 (Tex. App.--Houston [1st Dist.]

1999, pet. dism'd w.o.j.). As noted above, it is incumbent on this court to construe the statute as a whole. To understand what the Legislature meant by "general contractor," then, this court must determine what it meant by "undertakes."

B. By using the term "undertakes," the Legislature signaled its intent that the general contractor procure services for someone else . . . like the premises owner.

1. The verb "undertake" is used in two primary senses--and one requires that the undertaking be on behalf of another person.

Generally, a court will accept the words used according to their ordinary meaning, unless given a specific statutory definition. *Cities of Austin, Dallas, Fort Worth & Hereford v. S.W. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002). Research has revealed no particular statutory definition of "undertakes," so we turn to the authoritative (though descriptive) Webster's Third International Dictionary:

> **undertake: 1**:..to take in hand : enter upon : set about : ATTEMPT
>
> **2**: to take upon oneself solemnly or expressly : put oneself under obligation to self solemnly or expressly : put oneself under obligation to perform : CONTRACT, COVENANT
>
> **3**: GUARANTEE, PROMISE
>
> **4**: to accept as a charge : engage to look after or attend to: accept the responsibility for the care of

WEBSTER'S 3D NEW INT'L DICTIONARY 2491 (Unabridged) (1993) (emphases in original) (usages omitted) (archaic or obsolete definitions omitted). The last great prescriptive dictionary, Webster's Second International, gives similar definitions:

> **undertake** . . . *Transitive*: **1.** To take upon oneself, to engage in, to enter upon; to take in hand; set about; attempt; as, to *undertake* a task, a journey.
>
> **2.** Specif., to take upon oneself solemnly or expressly; to lay oneself under obligation, or to enter into stipulations, to perform or to execute; to covenant; contract.
>
> **3.** Hence, to guarantee, be surety for; promise.
>
> **4.** To accept or take over as a charge; to accept responsibility for the care of; to engage to look after or attend to; as, to undertake a patient or guest.
>
> ----------, *Intransitive*: **1.** To enter into an engagement or contract; to pledge.

WEBSTER'S NEW INT'L DICTIONARY 2770 (2d. ed. 1940) (usages omitted) (archaic or obsolete definitions omitted).

"Undertake," then, can be used in two senses. It can mean "attempt" or "try," or it can mean to "contract" or "covenant." The second sense requires that the party "undertaking" have someone to contract with--as a general contractor can contract with a premises owner, but not, say, as a premises owner can contract with itself.

2. That the Legislature intended the general contractor's undertaking to be made on behalf of another person--such as the premises owner--is established by the prior version of the statute.

Sections 406.121 and 123's predecessor is article 8307, § 6. *See* TEX. CIV. ST. ANN. art. 8307 § 6 (repealed) (attached toEGSI Br. on the Merits as App. 3). It was amended in 1983 to include the language at issue. The 1983 definition of "prime contractor"

should seem familiar:

> (c) The term "prime contractor" 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 art of the work or services.

Id. at (c) (emphasis added). The definition of "sub-contractor," though, is enlightening:

> (b) The term "sub-contractor" means 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.**

Id. at (b) (emphasis added).

By reading the two definitions together, one can see that the Legislature originally intended the second sense of "undertake," the sense that necessarily implies a contract, or task taken on another party's behalf. As the Legislature intended it, EGSI, as a premises owner, cannot qualify as a general contractor because it has not contracted upstream, with a premises owner or operator. And if EGSI cannot be a general contractor, it cannot be deemed a statutory employer, and cannot avail itself from the immunity from suit provided by the comp bar.

The statute was codified and amended into its current form in 1993, and the phrase "which a prime contractor has contracted with another party to perform" was deleted from the definition of "sub-contractor." *See* § 406.121(5). The phrase "undertaken to procure" was left intact. As pointed out in Summers's response to the petition for review, the Legislature intended *no substantive change* to the law by its

1993 codification. *See* Resp. to Pet. Rev. at 8, and App. 7 thereof; Tex. Sess. Law Serv., ch. 269, § 1.001 (H.B. 752) (1993). In other words, not only did the plain language--"undertaken to procure"--not change, but the substantive meaning of the term "undertaken," despite the removal of the phrase "which a prime contractor has contracted with another party to perform," did not change either.

3. This court uses "undertaking" in the sense that one is made on behalf of another person.

This court has recognized an "undertaking" theory of tort liability. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837-38 (Tex. 2001); *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 396 (Tex. 1991); *Colonial Savs. Ass'n v. Taylor*, 544 S.W.2d 116, 120 (Tex. 1976). The cause of action may be maintained against "[o]ne who undertakes, gratuitously or for consideration, to render services to another . . . ." RESTATEMENT (SECOND) OF TORTS § 323 (1965), quoted in *Torrington*, 46 S.W.3d at 838; *Colonial Savs.*, 544 S.W.2d at 119. The very essence of the cause of action is that the defendant has undertaken an obligation *to another*.

This court may presume that the Legislature acted with knowledge of the common law and court decisions. *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999). Here, this court may presume that the Legislature knew how the court would construe the word "undertake"--when it first used the term, and then when it later changed portions of the statute around it. Under this court's own understanding of

the term "undertake," then, EGSI cannot be considered a "general contractor" because it assumed no obligation to another.

IV. The generic public policy concerns identified by EGSI do not justify the extension of immunity from suit to premises owners.

The public policy concerns implicated by this case were discussed, albeit briefly, during oral argument. The Legislature has weighed public policy interests in crafting the workers compensation system, and carefully determined which classes of actors should be allowed to avail themselves of the system's immunity from common-law liability. EGSI is asking this court to usurp that legislative function, blithely asserting that expanding immunity to classes of actors not enumerated in the statute will advance the public policy interests underlying the workers compensation scheme.

It is not this court's role to "pick and choose among policy options on which the Legislature has spoken. . . . [nor] 'to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, [this court's] task is to interpret the statutes in a manner that effectuates the Legislature's intent.'" *F.F.P. Operating Partners, L.P. v. Dueñez*, --S.W.3d--, 50 Tex. Sup. Ct. J. 102, 2006 WL 3110426 *8 (Tex. 2006) (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003)). And "second-guessing" the Legislature is precisely what this court would be doing by interpolating language (such as the phrase "premises owner") into an unambiguous statute. *See City of Houston v. Jackson*, 192 S.W.3d 764, 773 (Tex. 2006).

This court has historically interpreted § 406.123 strictly, and in accordance with its explicit language. *See, e.g., Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 480-81 (Tex. 2005). This court has also acknowledged that for the task of weighing fact-intensive public policy concerns--specifically, such as ones involving administration of the workers compensation system--it is "ill-equipped." *See Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001). The issue before the court now, whether comp-bar immunity should be extended to premises owners, goes beyond the mere administration of the workers compensation system. It also implicates injured employees' rights to seek redress under the Texas Constitution's open courts provision. *See* TEX. CONST. art. I, § 13 ("[a]ll courts shall be open, and every person for an injury done to him, in his land, goods, person, or reputation, shall have remedy by due course of law"). It is well understood that under the worker's compensation system, the injured employee's sole remedy against *his employer* shall be the acceptance of workers compensation benefits. TEX. LABOR CODE § 408.001 (Vernon 1996); Brief of Amicus Curiae Texas Civil Justice League at 2-3. The Legislature has created a class of actors, including general contractors, that are considered "statutory employers," protected by the "sole remedy" provision. Expanding that class, without Legislative mandate, unnecessarily and improperly constrains the injured worker's right to seek redress from other parties under the open courts guarantee.

The enactment of a statute encroaching on the open courts provision cannot be done lightly; it requires and presumes a legislative balancing of competing policy

interests. "[T]he legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress." *Owens Corning v. Carter*, 997 S.W.2d 560, 573 (Tex. 1990) (quoting *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994) (quoting, in turn, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993))). By a plain reading of the statute, as outlined above, the Legislature has already conducted this policy analysis and rejected the extension of immunity to premises owners.

The obligations, rights, and liabilities of premises owners are regulated by a thousand years of Anglo-French common law jurisprudence: trespassers, licensees, invitees, foreseeability, peculiar risks, and unreasonable risks of harm all play their roles. *See, e.g., Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654 (Tex. 1999); *Timberwalk Apts. Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998). In 1995, the Texas Legislature debated and enacted Civil Practice & Remedies Code chapter 95, which alters some of those interrelationships and economic incentives. *See* TEX. CIV. PRAC. & REM. CODE ch. 95 (Vernon 2006). That statute even specifically contemplates its effect on workers compensation claims. *Id.* at § 95.004. To find now that another statute, one that governs the relationship between employers and employees, *one that does not even mention premises owners*, injects a layer of immunity is to play pick-up sticks with the law, hoping that liberating one class of actors from liability for its actions will not disrupt the whole pile. The Legislature, with its ability to hold hearings and study

the social and economic impact of its actions, and to change the law in ways not related to a presently existing case or controversy, can make adjustments to its statutory schemes. This court, as it has acknowledged, is "ill-equipped" to do so. *See Lawrence*, 44 S.W.3d at 553.

The situation is further complicated by federal regulation of worker safety. Occupational Safety & Health Administration regulations are binding on employers and general contractors, not on premises owners. *See* 29 CFR § 1926.28 (2006) ("[t]he *employer* is responsible for requiring of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions . . . ." (emphasis added)); 29 CFR § 1926.16 (2006) ("[t]he *prime contractor and any subcontractor* may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually" (emphasis added)). It makes no sense to allow premises owners to both avoid responsibility for worker safety under the OSHA regulations, and to afford them immunity from suit. The responsibility for maintaining premises free from unreasonable hazards would be dissociated from the financial penalty for failure to do so. An owner's premises could be unreasonably dangerous, but so long as it arranged for its independent contractor's workers compensation coverage, it would have neither the financial incentive nor the risk of regulatory penalty to ensure that workers on the premises were properly protected. Presumably the Legislature has recognized that it is in the public policy interest of the State of Texas to create incentives, rather than

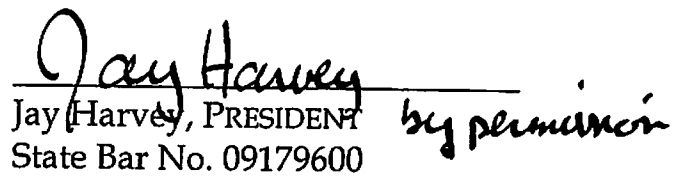
disincentives, for enhancing worker safety. EGSI's proposed construction violates that public policy interest.

CONCLUSION AND PRAYER

EGSI's proposed construction of the statute violates its letter, its spirit, its legislative intent, and it underlying public policies. Accordingly, this court should affirm the judgment of the court of appeals.

Respectfully submitted,

TEXAS TRIAL LAWYERS ASSOCIATION

By: 

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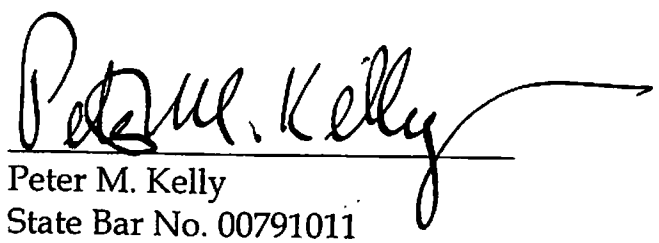

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of ~~January~~ February, 2007, I mailed a true and correct copy of *Brief of Amicus Curiae Texas Trial Lawyers Association* by first class U.S. Mail to the following counsel of record:

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