IN THE SUPREME COURT OF TEXAS

NO. 05-0202

ENERGY SERVICE COMPANY OF BOWIE, INC., PETITIONER,

v.

SUPERIOR SNUBBING SERVICES, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued December 1, 2005

JUSTICE JOHNSON, joined by JUSTICE WAINWRIGHT, JUSTICE GREEN, and JUSTICE WILLETT, dissenting.

Daryll Faulk was injured while working in the course of his employment for Superior Snubbing Services, Inc. (Superior), who carried workers' compensation insurance and thus was a "subscribing employer." Faulk did not sue Superior for his injuries.[1] But he was working at a well site along with employees of Mitchell Energy Corporation (Mitchell), Energy Service Company of Bowie, Inc. (Energy), and others when he was injured. He sued them.

Energy and Superior were contractors for Mitchell. They did not execute agreements with each other, but both executed agreements with Mitchell. Their agreements with Mitchell contained indemnity provisions. As relevant to this appeal, Energy settled with Faulk and sued Superior for

[1] The Workers' Compensation Act provides that employees of subscribing employers waive their common law claims against their employer unless the employees elect otherwise. *See* TEX. LAB. CODE § 406.034(a).

indemnity. Energy claimed that it was entitled to indemnity because Superior's contract with Mitchell provided that Superior "shall protect, defend, indemnify and hold [Mitchell], its employees, partners, agents, representatives, invitees, contractors and their employees . . . harmless from and against all claims, demands, causes of action, suits or other litigation of every kind and character for injury to . . . [Superior], its employees, partners, agents, . . . which is incident to, arising out of, within the scope of, or in connection with the work to be performed."

Superior denied that it owed indemnity to Energy, in part, on the basis of Texas Labor Code section 417.004 and the fact that Energy had not executed an indemnity agreement with Superior. Section 417.004 provides:

> In an action for damages brought by an injured employee, a legal beneficiary, or an insurance carrier against a third party liable to pay damages for the injury or death under this Chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement *unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability.* (emphasis added)

I agree with the court of appeals that section 417.004 does not permit Energy to recover indemnity from Superior.

In construing a statute our objective is to determine and give effect to the Legislature's intent, which, when possible, we discern from the words used. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003); *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *see also* TEX. GOV'T CODE § 312.005. We look first to the "plain and common meaning of the statute's words." *Gonzalez*, 82 S.W.3d at 327. If the statute is clear and unambiguous, we must apply its words according to their plain and common

meaning without resort to rules of construction or extrinsic aids. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999); *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). The statute's words are to be read according to their ordinary meaning unless they are defined otherwise in the statute or a contrary intention is apparent from the context. *See Taylor v. Firemen's and Policemen's Civil Serv. Comm'n of Lubbock*, 616 S.W.2d 187, 189 (Tex. 1981). In construing statutes there are instances where courts may disregard the literal meaning of a statute, but that is only when it is perfectly plain that the literal sense works an absurdity or manifest injustice. *Gilmore v. Waples*, 188 S.W. 1037, 1039 (Tex. 1916). It is inappropriate for courts to enlarge the meaning of any word in a statute beyond its plain and ordinary meaning by implication when legislative intent may be gathered from a reasonable interpretation of the statute as it is written. *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994). We must not give the words used by the Legislature an exaggerated, forced, or constrained meaning. *See City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002). Every word of a statute must be presumed to have been used for a purpose. *Eddins-Walcher Butane Co. v. Calvert*, 298 S.W.2d 93, 96 (Tex. 1957). Likewise, every word excluded from a statute must also be presumed to have been excluded for a purpose. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

In my view, the plain meaning of the words used in section 417.004, "the employer is not liable *to the third party* for reimbursement or damages based on the judgment or settlement unless the employer *executed*, before the injury or death occurred, a written agreement *with the third party* to assume the liability" (emphasis added), is clear and unambiguous. The phrase "the third party" is used twice in the same sentence and clearly refers to the same third party in each instance—the

third party seeking indemnity. Because the words "executed . . . with the third party" in the statute are clear and unambiguous, we apply the words according to their plain and common meaning without resort to rules of construction or extrinsic aids. *Fitzgerald*, 996 S.W.2d at 865-66; *Agbor*, 952 S.W.2d at 505. We should not read the statute's words other than according to their ordinary meaning, because a contrary intention is not apparent from the context. *See Taylor*, 616 S.W.2d at 189. So read, the language precludes indemnity unless the third party was a signatory to the written agreement executed by the subscriber.

Further, we presume all the words in the statute were used purposely by the Legislature. *See Eddins-Walcher Butane Co.*, 298 S.W.2d at 96. For example, the statutory provision in question formerly provided, in relevant part, that if a party other than the subscribing employer made a settlement with the injured employee, then the subscribing employer had no liability to indemnify the third party "in the absence of a written agreement expressly assuming such liability, executed by the subscriber prior to such injury or death." *See* former TEX. REV. CIV. STAT. ANN. art. 8306 §3. The same relevant part of the current statute provides that the subscribing employer has no liability to indemnify the third party "unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability." TEX. LAB. CODE § 417.004. If the words "with the third party" are omitted when reading the current language of section 417.004, then the section effectively provides the same as did the former statute: in order to be liable for indemnity to a settling third party, the subscribing employer must have executed a written agreement assuming the indemnity obligation before the injury, but the agreement was not required to have been with the third party seeking indemnity. Direct comparison of the two statutory provisions makes it clear that

for the phrase "executed . . . with the third party" to have meaning, section 417.004 limits the subscribing employer's indemnity obligation to parties who are signatories to the agreement executed by the subscriber.

In a similar vein, because the words "third-party beneficiaries" do not appear in the statute, we presume they were excluded for a purpose. *Cameron*, 618 S.W.2d at 540. Only when it is necessary to give effect to clear legislative intent can we insert, by interpretation, additional words or requirements into a statutory provision. *Id*. And as the Court's opinion demonstrates, even if we look for legislative intent beyond the statutory language itself, we find no clear legislative intent that the words "*executed . . . a written agreement with the third party*" were intended to encompass parties not signatories to an agreement.

Nor is it "perfectly plain" that giving the statutory language its literal, plain, and common meaning works an absurdity or manifest injustice. *See Gilmore*, 188 S.W. at 1039. First, the statute effectively provides that parties such as Mitchell who require indemnity agreements from subscribing employers may contract only for their own right to indemnity. That concept is not absurd. It does not offend established contract presumptions. *See MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999) ("[T]here is a presumption against, not in favor of, third-party beneficiary agreements."); *Corpus Christi Bank & Trust v. Smith*, 525 S.W.2d 501, 503-04 (Tex. 1975) (noting the presumption that parties contract for themselves and not for third-party beneficiaries). And reading the statute according to its plain language, which limits a subscribing employer's indemnity obligation, furthers the main inducement for employers to provide workers' compensation insurance: limited exposure to common-law damage claims of an employee injured

in the course of employment. *See* TEX. LAB. CODE § 406.034; *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 510-11 (Tex. 1995); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 933 (Tex. 1983) (noting that the Workers' Compensation Act bars an employee's common law action for negligence against his employer). The benefit of a subscribing employer's immunity from claims by an injured employee is diminished whenever the employer is made subject to indemnity claims for common-law damages recovered by the injured employee from third parties. Narrowing the exception to immunity to those parties with whom the employer executed a written agreement is wholly consistent with the overarching theory of workers' compensation: immediate benefits to injured workers in exchange for employer immunity from claims. The former statute did not require the employer to have a pre-injury agreement "executed . . . with the third party" before the employer could be called on for indemnity. And the 1989 amendments were not a mere recodification of prior law such as Texas statutes have been undergoing for some years. *See Fleming Foods of Tex., Inc., v. Rylander*, 6 S.W.3d 278, 283 (Tex. 1999) ("In 1963, the Legislature charged the Texas Legislative Council with the task of planning and executing a permanent statutory revision program to 'clarify and simplify the statutes and to make the statutes more accessible, understandable, and usable.' TEX. GOV'T CODE § 323.007(a). The Legislature directed, however, that 'the council may not alter the sense, meaning, or effect of [a] statute.' *Id.* § 323.007(b)."). The 1989 changes to the workers' compensation statute were extensive and controversial. The driving force behind the 1989 changes was the system's increasing cost to employers which had pushed the system to a crisis point. *Garcia*, 893 S.W.2d at 512. Business groups claimed that the increasing cost of compensation insurance forced large businesses to locate operations elsewhere and forced small businesses to cease

operations or opt out of coverage. *Id*. The parties and *amicus* Texas Oil and Gas Association naturally focus their arguments on the statute's effects on the oil and gas industry. But the crisis which generated the 1989 changes encompassed all Texas employers. *See id*. Indemnity agreements such as the Mitchell agreement attempt to, in effect, circumvent some of the financial inducement provided by the 1989 changes for employers to become and remain subscribers. One effect of enforcing such broad indemnity agreements is that the subscribing employer pays premiums for workers compensation insurance, yet remains liable for common-law damages to an employee by reason of having to indemnify numerous third parties for judgments or settlements in the employee's common-law damages suit. This case was disposed of in the trial court by summary judgment. The record contains no evidence of how either interpretation of the statute contended for by the parties might affect the economics of the state's workers' compensation system and its cost to Texas employers. But Superior's workers' compensation policy was part of the summary judgment record. The employer's liability part of the policy excludes coverage for contractually assumed liabilities, which would presumably include liabilities such as the indemnity agreement. Even assuming subscribing employers purchase separate liability insurance to cover contractually assumed indemnity agreements (as was required by Superior's contract with Mitchell) so as to minimize their personal liability for indemnity, the indemnity agreements result in employers paying for both compensation insurance and liability insurance for injuries to its own employees. Intuitively, the broader the indemnity agreement and the greater the exposure to claims, the greater the cost of liability insurance will be to subscribing employers.

The plain language of section 417.004 respects the freedom of subscribing employers to contract away their statutory immunity from liability, yet protects them from economic pressures to enter broad indemnity agreements contracting away their immunity as to third parties with whom the employers do not have direct contractual agreements. The effect of interpreting section 417.004 to include persons or entities who are not signatories and direct parties to the agreements means that subscribing employers signing such indemnity agreements remain in the position they were in before the 1989 amendments: having no control over whom they may be called upon to indemnify because the owner or other actual contracting party with whom the employers executed the agreements remain able to contract with any third-party contractor they desire.

Energy asserts that reading the statute to apply only to direct parties to the agreement will be in derogation of the Texas Oilfield Anti-Indemnity Act (TOAIA)[2] and disruptive to the oil and gas industry. But a significant reason for passage of the TOAIA was to protect certain contractors who could not effectively protect themselves from being economically pressured into executing broad indemnity contracts in order to get oilfield work. *See* TEX. CIV. PRAC. & REM. CODE § 127.002(a),(b); *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 802-03 (Tex. 1992). The primary thrust of the TOAIA is to generally make certain oilfield indemnification agreements void and unenforceable and to *limit* the enforceability of other such agreements, not to *enhance* enforceability of broad oilfield indemnity agreements. The TOAIA allows enforcement of certain specified types of indemnity agreements subject to its provisions by excluding those types of

[2] TEX. CIV. PRAC. & REM. CODE §§ 127.001-.007.

agreements from the operation of its general language. *See* TEX. CIV. PRAC. & REM. CODE §§ 127.003-.005. The TOAIA does not, however, specifically address the anti-indemnity provision of the workers' compensation statutes, much less provide that the TOAIA negates such provision. The closest the TOAIA comes to addressing the workers' compensation anti-indemnity provision is section 127.006, which provides that the TOAIA is *not* intended to affect the validity of an insurance contract or a benefit conferred by the workers' compensation statutes.[3]

In my view, the Court's construction of section 417.004: (1) does not comport with the literal, plain meaning of the statute; (2) dilutes subscribing employers' immunity from common-law damages claims of the employers' injured employees which is a key concept underlying the workers' compensation statutes; and (3) does not square with one of the main reasons for the 1989 revision of the workers' compensation statutes—reducing costs to subscribing employers. I would hold that language in Superior's contract with Mitchell, which requires Superior to indemnify Energy, a nonsignatory to the contract, conflicts with section 417.004 and that, to the extent of the conflict, the contractual language is invalid. I would affirm the judgment of the court of appeals.

Phil Johnson
Justice

OPINION DELIVERED: August 24, 2007

[3] This case does not require us to interpret the language of section 127.006. Superior responds to Energy's argument by positing that statutory abrogation of certain common-law claims an employee might otherwise have against a subscribing employer is a benefit to the employer. Energy points to the definition of "benefit" in the Workers' Compensation Act to argue that it is not.