IN THE SUPREME COURT OF TEXAS

NO. 05-0272

ENTERGY GULF STATES, INC., PETITIONER,

v.

JOHN SUMMERS, RESPONDENT

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

Argued October 16, 2008

JUSTICE O'NEILL, dissenting, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA.

The Court today concludes that premises owners who pay (and recoup) their subcontractors' workers' compensation premiums are, *and have always been*, entitled to the Workers' Compensation Act's exclusive-remedy defense against their subcontractors' injured employees. The Court pins its analysis on a 1917 provision that was designed to prevent "subscribers" from creating sham subcontractor relationships in order to avoid covering their own injured employees. Remarkably, neither the parties nor the dozens of amici curiae in this case have proffered such an interpretation. Although the Court concludes that the law in this regard has remained essentially the same since 1917, the Legislature first afforded a general contractor that "ha[d] contracted with another party to

perform" work the right to voluntarily assume statutory employer status in 1983. Had all "subscribers" always been statutory employers of subcontractors' employees, this statutory revision and its 1989 iteration would make no sense.

The parties and amici appear to agree, as do I and Justice Willett, that before 1989 premises owners were not "general contractors" under the Act. The appropriate inquiry, then, is not whether the 1989 "general contractor" definition *excludes* premises owners, as the Court posits, but whether the Legislature intended to change prior law by expanding the definition to *include* premises owners when it rewrote the Act in 1989 and expressly tethered the term to others commonly understood to mean a person who has contracted with an owner. Had the Legislature intended to change the law in 1989 and for the first time afford premises owners the exclusive-remedy defense against subcontractors and their employees, it would surely have been simpler to say so by using the broader term "subscriber," or by including the term "owner contractor" in the description of analogous terms that define a general contractor.

A few points bear noting at the outset. First, whether workers' potential recovery is greater under the common law or the Workers' Compensation Act, and whether one scheme promotes workplace safety over the other, is a legislative call, not ours. Second, one cannot contract into the Act's protections if the Legislature did not intend to allow it; accordingly, that Entergy reserved any right it might have to assert a statutory-employer defense against IMC's employees, or that Summers accepted workers' compensation benefits paid for by Entergy (and deducted from the contract price), does not inform the statutory analysis. And finally, whether premises owners *should* be afforded the

Act's protections by paying their general contractor's workers' compensation premiums, as general contractors are by paying the premiums of their subcontractors, is a policy choice we are not at liberty to make.

As the Court notes, this case has drawn much attention since our initial opinion, and numerous amici have weighed in. When this case was first presented, Summers' emphasis was on Entergy's proof regarding the existence of a written agreement and mistaken reliance on the Legislature's 1993 nonsubstantive recodification of the Labor Code. On rehearing, a more focused analysis of the applicable statutory text convinces me that the Legislature, in rewriting the Act in 1989, did not intend to change the general-contractor definition to include premises owners; to the contrary, it tied the definition to terms commonly understood to mean a person who has contracted with an owner. It might well represent sound policy to allow premises owners to become statutory employers of their contractors' employees by providing workers' compensation coverage, potentially expanding the number of employees eligible to receive benefits under the Act.[1] Whether such an expansion would require an adjustment to premiums, benefits, or other provisions of the Act is something only policymakers can decide. Our job is to discern what the Legislature intended. And that body has restricted the option to parties analogous to "principal contractor[s]," "original contractor[s]," and "prime contractor[s]," entities that contract to perform work for third parties and

[1] Interestingly, Entergy's agreement to provide coverage for IMC's employees swept no additional employees into the workers' compensation system in this case. Before it was amended, the contract between Entergy and IMC required IMC to provide workers' compensation coverage for IMC employees. The availability of this type of contractual arrangement, coupled with contractual indemnity provisions, may explain the dearth of case law arising under section 406.123(a).

who face no premises liability in the absence of control of the premises. Based on the statute's language and appropriate statutory construction principles, I do not agree that the Legislature intended the term "general contractor" to encompass premises owners within the Act's protections. Accordingly, I respectfully dissent.

I.

A. The Statutory Text

Under section 406.123 of the Act, "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." TEX. LAB. CODE § 406.123(a). If such an agreement is reached and properly filed, the general contractor may deduct premiums from the amount owed the subcontractor without incurring penalties under section 415.006 of the Act, which prohibits employers from collecting premiums or benefits from their employees.[2] *Id.* § 406.123(d), (f). More importantly, the agreement makes the general contractor the statutory employer[3] of the subcontractor and the subcontractor's employees, shielded from tort liability by the Act's exclusive-remedy provision. *Id.* §§ 406.123(e), 408.001(a). The Act defines a general contractor as

[2] The Court insists that Entergy "paid for" workers' compensation insurance covering IMC's employees. ___ S.W.3d at ___. It may be technically true that Entergy directly paid the insurance premiums, but it is undisputed that Entergy procured the insurance in exchange for a reduction in the cost of its contract. Thus, under the Court's construct, Entergy bought immunity from suit at no additional cost to itself.

[3] The Act does not use that term, but I use it for ease of reference. Under the Act, "[a]n agreement under [section 406.123] 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. LAB. CODE § 406.123(e).

> 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 other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.

Id. § 406.121(1). A subcontractor, in turn, is "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." *Id.* § 406.121(5). A close analysis of these definitions, particularly viewed in light of controlling statutory construction principles, compels the conclusion that the Legislature did not intend to allow a premises owner to assume general-contractor status and assert the Act's exclusive-remedy defense against subcontractors and their employees at no additional cost to itself.

In construing a statute, our overarching purpose is to determine and effectuate the Legislature's intent. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) (citing *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)). The surest guide to that intent is, of course, the plain and common meaning of the language the Legislature has employed. *City of Houston v. Clark*, 197 S.W.3d 314, 318 (Tex. 2006) (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)). Treating premises owners who provide workers' compensation coverage to subcontractors and their employees as "general contractors" is inconsistent with the common meaning associated with the terms to which the definition is tied.

Throughout Texas statutory and common law, a contractor is generally understood to be a person or entity that enters into a contract with another for compensation. In interpreting the Act and its predecessors, we have for decades defined a contractor as "'any person who, in the pursuit of an

independent business, undertakes to do a specific piece of work *for other persons* . . . .'" *Indus. Indem. Exch. v. Southard*, 160 S.W.2d 905, 907 (Tex. 1942) (quoting *Shannon v. W. Indem. Co.*, 257 S.W. 522, 524 (Tex. Comm'n App. 1924, judgm't adopted)) (emphasis added).[4] While the precise issue before us in *Shannon* was whether a party seeking workers' compensation benefits was an *independent* contractor as opposed to an employee, we articulated a broader principle, *i.e.*, that a contractor is someone who performs work for someone else. Our Legislature has repeatedly echoed that understanding. *See, e.g.*, TEX. PROP. CODE § 28.001(1) ("'Contractor' means a person who contracts with an owner . . . ."); TEX. PROP. CODE § 53.001(7) ("'Original contractor' means a person contracting with an owner . . . ."); TEX. ELEC. CODE § 274.022(d) ("'[C]ontractor' means a newspaper or statewide association with which the secretary of state contracts under this section."); TEX. EDUC. CODE § 51.776(3) ("'[C]ontractor' in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means . . . [a] legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the facility at the contracted price."); TEX. GOV'T CODE § 2166.2511(2) ("'Contractor' in the context of a contract for a project means a . . . legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the project at the contracted price.").

[4] Both the Court and Justice Willett recite the principle that we do not apply the ordinary meaning of a term if the Legislature has adopted a specialized definition, then promptly cast it aside by looking to the ordinary meaning of the words the Legislature used within the "general contractor" definition. This is necessary, of course, because we cannot determine whether a premises owner is "analogous" to the types of contractors listed in section 406.121(1) or what "undertakes to procure" means without examining how those terms are commonly understood.

The illustrative language the Legislature included in the Workers' Compensation Act's "general contractor" definition is consistent with that general understanding: "principal contractor," "original contractor," and "prime contractor" are all terms that envision a tripartite relationship in which one entity enters into a contract to perform work for another and then retains subcontractors or independent contractors to do all or part of the work. *See, e.g.*, TEX. PROP. CODE § 53.001(7), (13) ("'Original contractor' means a person contracting with an owner either directly or through the owner's agent," and "'[s]ubcontractor' means a person who has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor to perform all or part of the work required by an original contract."); *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 611–12 (Tex. 2004) (using the term "prime contractor" interchangeably with "general contractor" in discussing pass-through claims); *Page v. Structural Wood Components, Inc.*, 102 S.W.3d 720, 721–22 (Tex. 2003) (using the term "general contractor" interchangeably with "original contractor" in interpreting chapter 53 of the Property Code);[5] *see also* Op. Tex. Att'y Gen. No. DM-300 (1994) (ruling that university that hired independent contractors to provide work such as carpet installation and window repair did not act as a "hiring contractor" under section 406.141 of the Act because it did "not act even as a 'contractor' as that term is commonly understood," relying in part on section 406.121(1)'s general-contractor definition). While I acknowledge that the categories listed in the

[5] While attaching some significance to a string of inapposite out-of-state cases, Justice Willett gives these examples no weight because some of them discuss a party's status as a "contractor" or an "independent contractor," rather than a "general contractor." But the person or entity at issue must first be a contractor before being further classified as an independent contractor, a subcontractor, or a general contractor. Moreover, several of these examples define terms that the Legislature has expressly deemed analogous to "general contractor" in section 406.121(1), including "original contractor" and "prime contractor."

second sentence of section 406.121(1)'s "general contractor" definition are not exhaustive, the Legislature did make clear that *only* analogous entities are to be treated as general contractors. *See* TEX. LAB. CODE § 406.121(1). A premises owner is simply not analogous.[6]

The Court insists that the statutory definition controls over what it tacitly acknowledges is the commonly understood meaning of the term "general contractor." But the Legislature itself has mandated that "[w]ords and phrases shall be . . . construed according to . . . common usage," and that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." TEX. GOV'T CODE § 311.011(a), (b). In this instance, common usage, the common law, and a host of legislative pronouncements are contrary to the meaning the Court attaches to the term. More importantly, the statutory language itself comports with, and is tied to, the general understanding of the term's meaning. When the Legislature enacted section 406.121, we had long defined a contractor as one who "'undertakes to do a specific piece of work *for other persons* . . . .'" *Southard*, 160 S.W.2d at 907 (quoting Shannon, 257 S.W. at 524 (emphasis added). And Black's Law Dictionary, at the time the Legislature adopted the general-contractor definition, similarly defined a contractor as "a person who, in the pursuit of any independent business, undertakes to do a specific piece of work *for other persons* . . . ." BLACK'S LAW DICTIONARY 295 (5th ed. 1979). It also stated that "[t]his term is strictly applicable to any

[6] The commonly understood difference between general contractors and premises owners may explain why Entergy failed to raise the statutory-employer defense until nearly two years after the suit was initially filed. Even then, the defense was the last of the ten defenses Entergy raised, after contributory negligence, failure to mitigate damages, and several others.

person who enters into a contract, but is commonly reserved to designate *one who, for a fixed price . . . undertakes to procure the performance of works or services* . . . for the public or a company or individual." *Id*. (emphasis added). In other words, a contractor is someone who receives payment for performing work for another. Section 406.121(1) precisely tracks these definitions by describing a general contractor as one who "undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." TEX. LAB. CODE § 406.121(1). In light of this longstanding commonly understood usage, the Legislature could easily have defined "general contractor" to include premises owners if that was its intent, but it did not. Had the Legislature intended the term to be as conceptually broad as the Court and Justice Hecht today say it is, it could simply have written that "a subscriber and a subcontractor may enter into an agreement," but again, it did not.

The Court attaches a similarly strained meaning to the term "separately" within the general-contractor definition. ("'General contractor' means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors.") *Id.* That is, the Court says that a premises owner acts "separately" when it engages subcontractors directly rather than through a general contractor. ___ S.W.3d at ___. But "separately" far likelier alludes to independent contractors, as opposed to subcontractors, terms which the Legislature defined differently in the same bill that introduced the "separately" language. *See* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05, 1989 Tex. Gen. Laws 1, 15 (codified at TEX. LAB. CODE § 406.121(2)).

B. The Statutory Revision

Significantly, the Legislature used almost identical "undertake to procure" language in the prior version of the statute when conferring statutory-employer status on prime contractors who provided workers' compensation coverage to their subcontractors. Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, 1983 Tex. Gen. Laws 5210, 5210, *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(5), 1989 Tex. Gen. Laws 1, 15. The prior statute equated the term "prime contractor" with "general contractor," and defined it to mean "the person who has undertaken to procure the performance of work or services." *Id.* The definition of "subcontractor" in the same legislation left no doubt that the language embraced the commonly understood meaning of a contractor as one who has agreed with another to perform work or services in exchange for compensation. "[S]ub-contractor" was defined as a person who has contracted to perform all or part of work or services that "a prime contractor *has contracted with another party to perform*." *Id.* (emphasis added). Despite the clarity of that language, the Court and Justice Hecht conclude that the 1983 general-contractor definition could be read to encompass premises owners who have not contracted with other persons to perform work. Apparently, they believe only third-party language within the general-contractor definition itself would demonstrate legislative intent to exclude premises owners.

Justice Willett, and the Court to some extent, make much of the Legislature's omission in 1989 of the third-party language, concluding that the Legislature meant to abolish the "'upstream contract' condition." It is hard to fathom that such a sweeping and deliberate change in the law

would be so subtly effected. But if that had been the Legislature's intent, it would not have substituted "undertaken to perform" language that had long been recognized in the general-contractor definition as imposing a third-party obligation. The Legislature's use of the same language in the old and new general-contractor definitions strongly indicates it intended the same meaning in each version.

Reliance on omission of the third-party language in the subcontractor definition is misplaced for yet another reason. It is true that the Legislature is presumed to act with knowledge of existing laws, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990), and that deletions in existing laws are presumed to be intentional. *In re Ament*, 890 S.W.2d 39, 42 (Tex. 1994). But the 321-page workers' compensation bill enacted in 1989 did not merely amend prior laws, it massively overhauled the entire workers' compensation scheme. While portions of the bill amending the Insurance Code, the Government Code, and other measures related to workers' compensation indicated deletions with bracketed strikeouts, articles 1 through 11 of the bill comprising the Workers' Compensation Act itself contained no such indications of omissions. *See* Tex. S.B. 1, art. 1-11, 71st Leg., 2d C.S. (1989) (codified as amended at TEX. LAB. CODE, Title 5, Subtitle A); *see also Tex. Legislative Council Drafting Manual* 35–36 (2008), *available at* http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf. Thus, omission of the third-party language from the subcontractor definition does not merit the weight the Court and Justice Willett afford it. Because "contract[ing] with another party" is inherent in the nature of general contractors and analogous terms, and because the concept had been subsumed in the definition of "prime contractor"

and "general contractor" as "the person who has undertaken to procure the performance of work or services," the third-party language in the subcontractor definition was most likely not included in the new Act to conform the two definitions.

Giving virtually no effect to the Legislature's restriction of "general contractor" to terms analogous to "principal contractor," "original contractor," and "prime contractor," the Court and Justice Willett attach great significance to the sentence excluding motor carriers that provide transportation services through the use of owner-operators. But when that exclusion is viewed in the context of the entire statutory scheme and other law applicable to motor carriers, the reason for the exclusion becomes clear: in the 1989 rewrite of the Act, the Legislature made some, but not all, of section 406.123 applicable to motor carriers. Like general contractors and subcontractors, motor carriers and owner-operators (which are deemed independent contractors under section 406.121(4)) may enter into an agreement under which the motor carrier provides workers' compensation coverage to an owner-operator and its employees. TEX. LAB. CODE § 406.123(c). And like a general contractor, a motor carrier that provides workers' compensation coverage to its independent contractor may deduct the premium from the contract price without incurring penalties under section 415.006 of the Act. *Id.* § 406.123(d). But unlike general contractors, a motor carrier that provides coverage to its independent-contractor owner-operator does not become the statutory employer of the owner-operator or the owner-operator's employees — there is no provision equivalent to section 406.123(d) that applies to motor carriers. This differing treatment of motor carriers is consistent with section 5.001(a)(2) of the Transportation Code, which restricts the ability of common carriers

to limit their common law liability. It may also be attributable to the heightened standard of care imposed upon common carriers in light of their potential impact on public safety and their highly regulated status. *See Speed Boat Leasing, Inc. v. Elmer*, 124 S.W.3d 210, 212 (Tex. 2003); *S. States Transp., Inc. v. State*, 774 S.W.2d 639, 642 (Tex. 1989) (GONZALEZ, J., dissenting). One could argue that motor carriers are analogous to general contractors, in that they frequently contract with third parties to provide transportation services and then subcontract with owner-operators to actually perform those services. Thus, the Legislature likely expressly excluded motor carriers from the general-contractor definition to make it clear that, even though they might otherwise fit the general-contractor construct, they are to be treated differently.

C. Justice Hecht's Policy-Based Interpretation

Noting that a property owner *may* act as its own general contractor, but acknowledging that the term is more generally understood to mean one who contracts with a property owner and then subcontracts parts of the job to others, Justice Hecht concludes that we just can't tell from the statutory language what the Legislature meant. Finding the text elusive, Justice Hecht discerns "policies embedded in the Act" which he believes tip the scales in favor of treating a premises owner as a general contractor. There are several problems with this approach. First, while the definition of a "general contractor" as one who "undertakes to procure the performance of work" may in isolation appear open-ended, the definition's second sentence ties the term to its commonly understood meaning. Second, if indeed the text is ambiguous as Justice Hecht claims, we have clearly said that statutes in derogation of common law rights should not be "'applied to cases not

clearly within [their] purview.'" *See Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 n.17 (Tex. 2007) (quoting *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969)). And third, the "policies" that Justice Hecht identifies and perceives would be thwarted if premises owners are not treated as general contractors have never been applied in this context and beg a question that is exclusively within the Legislature's realm, not ours.

The first policy that Justice Hecht believes sweeps premises owners into the general-contractor definition is the Act's "decided bias" for coverage. *See Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 140 (Tex. 2003). But the Act's bias is in favor of employers electing to provide coverage for their employees; we have never read a bias into the Act that would confer its protections on third parties absent clear statutory authorization or any indicia of an employer/employee relationship. The Act's general policy that favors employers covering employees cannot expand the category of persons considered "general contractors" beyond the statutory definition; invoking that policy here is particularly unwarranted when the Legislature could so easily have defined the term as expansively as the Court and Justice Hecht do today.

The second policy Justice Hecht cites is the sham-subcontractor provision. *See* TEX. LAB. CODE § 406.124. If the Act prohibits subscribers from utilizing subcontractors to avoid coverage, he posits, it surely would not discourage coverage by denying subscribers the exclusive-remedy defense. But the sham-contractor provision was never intended to impute coverage to true third parties as Justice Hecht seems to imply; it simply prohibits a person who has workers' compensation coverage from subcontracting the work with the intent and purpose of avoiding liability as an

employer. *See id.* In other words, an employer cannot designate its employee a subcontractor in order to avoid paying benefits under the Act. No one claims that IMC was hired by Entergy as a sham to avoid paying its own employees workers compensation benefits; the provision is simply irrelevant to analysis of the general-contractor definition.

Justice Hecht next charges that my reading of the statute would have "perverse" results because the contractual indemnity allowed under section 417.004 and provided for in Entergy's contract with IMC would permit Summers to recover common law damages from Entergy, which Entergy could in turn recoup from IMC. Justice Hecht suggests that in such a scenario, "the workers' compensation system provides nothing to any employer." Of course the pre-1989 Act, at least according to my reading (and that of the litigants, amici and Justice Willett), had the same effect, which is a policy choice the Legislature made. The question is whether in 1989 the Legislature intended to change that policy. In addition, several factors undermine Justice Hecht's point. One, while Entergy paid IMC's premiums for Summers' benefits under its owner-provided insurance plan (OPIP), that cost was deducted from the contract price paid to IMC, so Entergy effectively paid nothing for the additional protection Justice Hecht's reading would afford Entergy. Two, owners receive significant economic benefits from OPIPs like Entergy's apart from tort immunity. OPIPs allow owners to secure coverage for all their contractors at a lower overall price than the cost of workers' compensation insurance that subcontractors would normally incorporate into their contract prices, thereby lowering owners' overall costs. Howrey LLP, *Owner Controlled Insurance Programs (OCIPs): Why Owners Like Them and Why Contractors May Not*,

CONSTRUCTION WEB LINKS, July 14, 2003, http://www.constructionweblinks.com/Resources/Industry_Reports__Newsletters/July_14_2003/ocip.htm. In turn, the cost of the premium deducted from IMC's contract price was likely lower than the premium IMC would have otherwise paid. Consequently, both Entergy and IMC benefitted from the insurance arrangement in this instance irrespective of tort immunity. Three, that indemnity agreements like that between Entergy and IMC are widespread in the industry is some indication that premises owners do not perceive the Act's statutory-employer provision to protect them from common law claims, else there would be no need for such agreements. And four, any tort damages that Summers might recover would likely be paid from the commercial general liability policy that Entergy required IMC to obtain as a condition under the parties' contract, and the workers' compensation carrier would be subrogated to Summers' recovery under section 417.001 of the Act. The "perverse result" that Justice Hecht envisions simply does not exist.

The fourth policy reason Justice Hecht cites is that the Act was intended to be comprehensive. But again, it can only be comprehensive to the extent that the Legislature intended, and there is nothing in the 1989 revision that would indicate the Legislature's intent suddenly changed. Underlying Justice Hecht's analysis is an apparent assumption that Summers might recover a windfall against Entergy on his common law claims. But if Entergy is not Summers' employer under the Act, it retains the full panoply of defenses available to it under the common law, and Summers shoulders the burden of establishing the company's negligence with the consequent uncertainties of litigation. Should Summers prevail on his common law claims, which is far from

certain, he would forfeit any benefits that he has received under the Act. Irrespective of the workers' compensation system's relative merits, which is not ours to decide, it has operated this way at least until the statutory revision in 1989; there is nothing to indicate the Legislature's revision was intended to effect a change.

D. Statutory Construction Principles

As I read the statutory language, it seems clear that the Legislature did not intend to transform premises owners who contract for third-party services into general contractors entitled to assert the Act's exclusive-remedy defense. But even if the language were less than clear, well-established statutory construction principles lead to the same conclusion. In a decision issued a week before the Court's original opinion in this case, we considered whether an indemnification agreement between a subscribing employer and another party could be enforced by that party's contractor even though the contractor had not executed the agreement. *Superior Snubbing*, 236 S.W.3d 190. The statute had formerly required only that such an agreement be "'executed by the subscriber'" to be enforceable, but in 1989 the Legislature changed the statutory language to require a written agreement "'executed . . . with the third party.'" *Id.* at 191 (quoting TEX. LAB. CODE § 417.004). Although the revision appeared to require the signature of both parties, we concluded that the Legislature intended no change in the law and that the nonsignatory contractor could seek indemnification as an intended beneficiary of the agreement. *Id.* at 195. In concluding that the Legislature intended no substantive change in the law, despite the change in the statute's language, we relied largely on two statutory construction principles. First, we noted that the common law

allows the intended beneficiary of a contract to enforce it, and that statutes in derogation of common law rights "'will not be extended beyond [their] plain meaning or applied to cases not clearly within [their] purview.'" *Id.* at 194 n.17 (quoting *Satterfield*, 448 S.W.2d at 459). Second, we applied the Legislature's directive that in interpreting a statute, courts must "'consider at all times the old law, the evil, and the remedy.'" *Id.* (quoting TEX. GOV'T CODE § 312.005). Because we could identify no practical motivation for a change, or any extra-textual indication that the Legislature's amendment of the statute was intended to be substantive, we concluded that the third-party beneficiary could seek indemnity. *Id.* at 195.

The application of those same principles in this case demonstrates that the Legislature did not intend to expand the class of contractors entitled to claim statutory-employer status to include premises owners when it rewrote the Act in 1989. Nothing in the Act's legislative history suggests that the Legislature perceived an "evil" in the then-existing requirement that a person must have contracted to perform services for another to be a general or prime contractor. *See* Joint Select Committee on Workers' Compensation Insurance, *A Report to the 71st Legislature* (1988); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 512– 13 (Tex. 1995) (discussing report). And to the extent the statute's language does not plainly entitle premises owners to assume statutory-employer status under these circumstances, *Superior Snubbing* counsels against that construction, as it would be in derogation of Summers' common law rights. 236 S.W.3d at 194 n.17; *see also Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000) ("[I]t would be injudicious to construe the statute in a manner that supplies by implication restrictions on an employee's rights that are not

found in section 406.033's plain language.") (citing *Miears v. Indus. Accident Bd.*, 232 S.W.2d 671, 675 (Tex. 1950)).

The Court may perceive that it has managed to blur the inconsistency between its decision today and *Superior Snubbing* by proclaiming that the law has remained unchanged since 1917. ___ S.W.3d at ___. But its own analysis shows how hollow that statement is. The Court acknowledges that an entirely new provision was introduced in 1983, and then amended in 1989. And the Court attaches some significance to the omission of the phrase "with another party" from the subcontractor definition in 1989. ___ S.W.3d at ___. In *Superior Snubbing*, the Court concluded that the Legislature's *insertion* of a phrase failed to demonstrate legislative intent to change the law absent a showing of any specific motivation. Here, the record is similarly devoid of any showing of an "evil" in need of remedy, yet the Court concludes that the *omission* of the "with another party" language effected a sweeping change in the law.

Justice Hecht recognizes the tension between today's decision and *Superior Snubbing*, but brushes it aside because "it has never been clear when a person is considered the statutory employer of a subcontractor or his employees . . . ."[7] He reaches that conclusion by focusing on a series of

[7] The sham contractor provision, now codified as section 406.124 of the Labor Code, the only source of statutory -employer status prior to 1983, appears to have been the subject of only eight cases since its enactment in 1917. *See Hatfield v. Anthony Forest Prods. Co.*, 642 F.2d 175 (5th Cir. 1981); *Turnbough v. United Pac. Ins. Co.*, 666 S.W.2d 489 (Tex. 1984); *All-Tex Roofing, Inc. v. Greenwood Ins. Group, Inc.*, 73 S.W.3d 412 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Commercial Standard Ins. Co. v. White*, 423 S.W.2d 427 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.); *Houston Fire & Cas. Ins. Co. v. Farm Air Serv., Inc.*, 325 S.W.2d 860 (Tex. Civ. App.—Austin 1959, writ ref'd n.r.e.); *Tex. Employers' Ins. Ass'n v. Harper*, 249 S.W.2d 677 (Tex. Civ. App.—Dallas 1952, writ ref'd n.r.e.); *U.S. Fid. & Guar. Co. v. Hall*, 224 S.W.2d 268 (Tex. Civ. App.—Austin 1949, writ dism'd); *Fort Worth Lloyds v. Mills*, 213 S.W.2d 565 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.).

failed bills — all of which ultimately made clear that a general or prime contractor is someone who has agreed to perform work for a third party — and the fact that the 1983 legislative forerunner to the sections at issue today originated in a bill that would have eliminated the sham-subcontractor provision of the Act. Following this circuitous route, Justice Hecht concludes that "the definition of 'prime contractor' finally enacted could reasonably be read to include a premises owner acting as his own general contractor." ___ S.W.3d at ___. That view (voiced by none of the litigants or amici) is simply contrary to the statute's terms; before 1989, the subcontractor definition made it unmistakably clear that a general contractor was someone who had "contracted with another party to perform work." Act of May 28, 1983, 68th Leg., R.S., ch. 950, § 1, 1983 Tex. Gen. Laws 5210, 5210, *amended by* Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(a)(5), 1989 Tex. Gen. Laws 1, 15. Moreover, to the extent Justice Hecht's interpretation of the Act is informed bills that were never adopted by both houses of the Legislature, it is worth noting that the House committee substitute for Senate Bill 1, the source of sections 406.121 and 406.123, would have specifically allowed premises owners to secure statutory-employer status, but that version of the bill was rejected in its entirety by the Senate. *See* H.J. of Tex., 71st Leg., 1st C.S. 76 (1989). In any event, I agree with Justice Willett that failed legislation is an unsound guide to legislative intent.

The Court's conclusion that premises owners are subsumed within the general-contractor definition is also inconsistent with another statutory construction principle we have frequently employed. Just four months ago, we analyzed section 101.022(b) of the Texas Civil Practice and Remedies Code to determine whether loose gravel on a road amounted to a special defect. *Tex.*

Dep't of Transp. v. York, ____ S.W.3d ____ (Tex. 2008). The statute we evaluated imposed a heightened duty on governmental units to warn of special defects "such as excavations or obstructions on highways, roads, or streets" of which they should have been aware. TEX. CIV. PRAC. & REM. CODE § 101.022(b). We explained that while the statute did not define "special defect," it did give examples:

> Thus, "[u]nder the ejusdem generis rule, we are to construe 'special defect' to include those defects of the same kind or class as [excavations or obstructions]." . . . While these specific examples "are not exclusive and do not exhaust the class," the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction.

York, ___ S.W.3d at ___. Because loose gravel did not share the characteristics of an obstruction or excavation, we held that it was not a special defect. *Id.* at ___. The application of *York*'s principles in this case demonstrates that the Legislature did not intend to include premises owners within the Act's general-contractor definition. As already explained, a premises owner who is not performing work for another does not share the characteristics of a general contractor, a principal contractor, an original contractor, or a prime contractor. *See also U.S. Fid. & Guar. Co. v. Goudeau*, ___ S.W.3d ___, ___ (Tex. 2008) ("Under the traditional canon of construction *noscitur a sociis* ('a word is known by the company it keeps'), each of the words here must be construed in context.").

In support of its construction, the Court posits two workers injured in the same industrial accident receiving different compensation. The Court apparently considers it anomalous that a worker employed by the premises owner working side-by-side with a subcontractor's employee might be limited to workers' compensation benefits, while another employed by an independent

contractor would be able to seek the full range of damages under the common law. First, to the extent such an anomaly exists under my reading of the statute, it is the result of policy choices made by the Legislature that long pre-existed the 1989 revision. Moreover, in implying that the result is somehow unfair to the premises owner's injured employee, the Court overlooks the option the Act provides employees of subscribing employers to elect not to be covered by workers' compensation. TEX. LAB. CODE § 406.034. It also overlooks the quid pro quo, being the relinquishment of uncertain common law recovery in exchange for the prompt receipt of defined benefits, that has insulated the Act from constitutional challenge under the Open Courts provision of the Texas Constitution. *Garcia*, 893 S.W.2d at 521.

II.

Because I do not believe that the Legislature in the 1989 Act intended to change prior law and confer statutory-employers status on premises owners, I respectfully dissent.

_____

Harriet O'Neill
Justice

OPINION DELIVERED: April 3, 2009