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Supreme Court of Texas.
Energy Gulf States, Inc., Petitioner,
v.
John Summers, Respondent.
No. 05-0272.

January 24, 2007.

Appearances:

Christine S. Kibbe, Energy Services, Inc., Beaumont, TX, for petitioner.
Steven C. Barkley, Law Office of Steven C. Barkley, Beaumont, TX, for respondent.

Before:

Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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COURT MARTIAL: May it please the Court, Ms. Kibbe will be on argument to the petitioner. Petitioner has reserved 5 minutes for rebuttal.

ORAL ARGUMENT OF CHRISTINE S. KIBBE ON BEHALF OF THE PETITIONER

MS. KIBBE: May it please the Court. The Workers Comp. Statute was intended to provide it an exclusive system governing compensation to employee wherein do that work. It's a ta-- statutory scheme that was said and lieu of common law liability based on negligence and this was give and take sorry situation. The employee that's injured receives prompt fare as a compensation without holding of thing does enough to prove fault in exchange his bored from soon his employer. On the other side the employer is bore if it cannot get sue and in exchange for that benefit this sacrifice is that he can't put forth the common law defenses and he has to pay Workers Comp. regardless of fault. This is not-- Workers Compensation Statutes is not and arbitrarily abolishing the employees common law claim. It's a substitute of a prompt certain amount adequate in fair remedy-- legal remedy as supposed to common law remedy.

JUDGE #1: Well, if, if it's a statutory skimmed and the statute describes in advance "general contractors" and so forth. Why would they

have said, "Owner as well as general contractor?"

MS. KIBBE: Okay, well and that's with this case is about whether owner can be a general contractor it's specifically does not exclude and why didn't included? I'm not sure but if you look at the definition of a ...

JUDGE: So but by next rationally beginning body that's a wound is a whether weren't excluded let me ask we may can in-- we can take anybody else to said, "They where intended to be included as well."

MS. KIBBE: You could take anybody could fits to definition that's provided by the statute of a general contractor and that definition is a person who undertakes to procure the performance of work or service either separate or can be used it was subcontract.

JUDGE: Of course, this term is been a real longer than a labor code.

MS. KIBBE: That's right, that's right.

JUDGE: I mean "general contractors" been around, what, hundreds a years -

MS. KIBBE: That's ...

JUDGE: - and usually it doesn't think older.

MS. KIBBE: It-- I, I-- yes, well in ...

JUDGE #1: I mean that's one of term came in to, you know, the owner of the general in -

MS. KIBBE: Got you.

JUDGE: - and that's-- so your asking is to-- and it is defined term but your asking us to say it means up to the elements for a hundred years.

MS. KIBBE: And the reason I'm asking you to do that and does he-- and he can seem definition several different terms had been used over the years from contractor to principal contractor. The other original contractor but the reason why a prince-summer should be included as it promotes the policy behind the Workers Comp. Workers Compensation Statute guaranty a prompt payment year insuring in that an injured worker on your premises gets paid promptly and adequately without your fault and having the premise owner who provides this benefit to the employee promotes the policy behind the Workers Comp. and not including them in the protection of 406.123, the, the employees receives all the benefit at no cost whatsoever and the employer in this case Entergy provides the benefit without any, without any protection.

JUDGE: Well, this a lot-- well this a shift obviously the-- your premiums depend on how dangerous they-- how many workers I think your going to have injured -

MS. KIBBE: All right.

JUDGE: - and let's take a homeowner. Homeowners that have any mode except the kids on the block to pose the yard. So plus say they, you know, that kind of person the-frame-beyond wouldn't be high but if they would treat them as a general contractor to build an addition on the house. I did the premiums all to be hire is this going to be a weight get around, think the right premiums so the Indiana State has to pick it up through a -

MS. KIBBE: Well, in, in-- is it ...

JUDGE: - when, when carry of those in the receiver shelf.

MS. KIBBE: In the situation that you're, you're presenting in, in the situation if you do-- if you are, let say property owner and you decide to provide Workers Comp., Compensation to a contractor whose going to edgee your house. You don't have to submit this contractors, you know, how many it separate to and an insurance carrier whose going to set your premium at a certain amount work.

JUDGE: That's, that's what occur here.

MS. KIBBE: Correct. We have ...

JUDGE: That's the premiums paid by Entergy was equivalent as it to have than a general contract.

MS. KIBBE: Correct. We say this are the people that would be working on our plant and our premiums is set at that rate. If, if, if I have a contract to come in and I'm going to pro-- supply the Workers Comp. then, we have to submit every thing as if it's our employees. These are the people work in and they set the premiums at the Court.

JUDGE: See-- take a legislature just sort of this is relationship?

MS. KIBBE: I, I don't know if, if they mess it or they intended it because if we did fit the general contractor definition or they didn't think about well it may not apply to a premise owner. I, I am not sure what this purpose but I didn't know that including the premise owner does promote with the Workers Comp. Statute is out to it would as there for. In fact, look at the some of the recent case as an [inaudible].

JUDGE: Look at 40 billion rich-paid looking at there's a notice. I don't recall either E or the other party represent the legislative history on this section as anyone look at the legislative history to see if there is any intent or if there might be should the history reflect the intent if is there any insurance.

MS. KIBBE: I, I, I have looked at the history and I saw it nothing talked about the premise owner at all.

JUDGE: Well, of or about the intent of the section?

MS. KIBBE: The, the only thing and I think plaintiff's counsel brings it out almost, cases find it that the old statute-- the old burden statute in the definition of subcontractor. It had said that "A subcontractor is one who contract with someone who contracts with another party," but that had language has been taken out and the new language is the one that, that's in a force and effect from my case but some of the recent cases let say we have a premise owner party A who contracts with party B who contracts with party C who contracts with party D. The recent cases, she is the one that provided the Workers Comp. and they have been declared both the general contractor and the subcontractor and the reason they would declared the general contractor in that to the original definitions of general contractor-- the prime original contractor will this is party number C and-- or letter C and they are considered the general contractor and why, because they fit the definition in statute which is they harms the mind the duke or the robe they work-- they're worked. They are also considered the subcontractor why, because they were hired to do far about somebody work. So in that situation party C is both the general and a sub.

JUDGE: If they would be place in your situation you are then-- your position made it you could buy a Comp. and you would be statutory employer of employees A, B, C, D and E where we apply-- whoever you bought the Comp. for?

MS. KIBBE: Whoever have bought the Comp. for. Yes, your Honor.

JUDGE: How-awarded.

MS. KIBBE: Yes sir and that's the E, EDK 8 sir. In type case where you have to modify it for two down and the case said, "You have multiple employers and there're all your employees." They're can't seek a job there and yes, that, that everybody was covered by that one insurance-- Workers Compensation Insurance and therefore the person who has a Workers Compensation Insurance is an employert and therefore protected and it all those to why we have Workers Compensations in the first place, it so that this employees-- hey they get this prompt fair adequate compensation to being injured without showing any fault at all

and there're no further thing.

JUDGE: Well, a lot of it depends doesn't an adjust of realty in the situation. I mean, I might go the house and go hire a general contractor to direct the work does improvise the work in all that but I might decide to be manageable contractor in building a home and I, I can see it had they wouldn't necessarily be mutually exclusive and what happened here did Entergy act as it's own general contractor in this case as a factual manner?

MS. KIBBE: In, in fact and the good point as it's paid 117 of the record it's John-Summer deposition he described what this work was. Entergy was doing market the plant and supplement in its workforce with IMC employees. They where hired to do specific part of the job turbine and generator work and they where supplementing our workforce and that, and that's a good point.

JUDGE: But if you-- even if they work that you wouldn't-- if you don't know any work at all. Under your, your concepts to the one it is worked even if you had someone in the office whenever want out that anyone and you hired 13 contractors do all this work. You're still statutory report?

MS. KIBBE: I believe we are, I believe we fit the definition but even if you don't, even if you don't see it that way I think premise owner is not precluded from being the general contractor. I think if we take it only in the work ourselves and we hired some my supplement our workforce then we are acting as a general contractor. If you look at the plain language of the statute you hire somebody do this some work, you're general contractor then we would fit even if I don't take on that work.

JUDGE: But we need to go there in this case.

MS. KIBBE: That's right, you know ...

JUDGE: I mean, one of the purposes of the Comp. Statute is to have the person he's directing to work. Make sure that the, the work decide to say and have an interest in making that happened and so we don't need to stretch as this far as you're asking is to, that still permit that purposed?

MS. KIBBE: Correct, correct and this particular case we, we did take on them where it we hire IMC to supplement our workforce. Therefore, we we're acting as a general contractor in this particular case.

JUDGE: Ms. Kibbe, kind of get a handle on what the contract was because there's several documents that were done and then the briefing you and your opposing counsel cite different provisions that seem to contradict to the contract. I'm trying to get a handle on what the contract was what it says.

MS. KIBBE: Okay.

JUDGE: I know under the labor code that1 has to be in a written agreement -

MS. KIBBE: Right.

JUDGE: - for your position to hold -

MS. KIBBE: Right.

JUDGE: - that is for your client to be the employer and to take the benefit of the Workers Comp. Protection.

MS. KIBBE: And I, and I'll go through in my you-like. Okay, can I?

JUDGE: Well, in particular comment on respondents pointing to Section 102 of agreement that says, "The sub shall be solely responsible for payment of contractors, waivers and solely responsible for Workers Comp." I think to directly contradict the, the agreement that-- I'm, I'm not point as you cited.

MS. KIBBE: Okay, I will do that. The first contract-- contract that Entergy and IMC entered into is called "General Operations Agreement." This is an agreement that applies throughout our system. We go through several states, several different operating companies.

JUDGE: That's what you call the System White Contract?

MS. KIBBE: It's called "General Operations Agreement or the System White Contract" and in the record it starts in 86 or 138. In that contract ESI introduced services inc. cause our agent and it says that "At the beginning that acting as an agent of all the operating companies and at least enter the all state." The section you're talking about that-- your talking about 102 Section 10 talks about "independent contractors." Section 10.1 says, "nothing in this article shall be construed as precluding the owners Entergy from rising a statutory employee, defense it is applicable-- applicable to any suit filed against the owners of employee in the contract." When this was entered into, we didn't have OPIP program. Page 84 after that, that was August 97 and September 97 we entered to another contract agreement where we have an agenda to this operations agreement. It says, "ESI who acting on behalf of themselves and the operating companies and the contractor," I'm saying mutually agree that is their intention to recognize us as the "principal employer." The employer of-- the statutory employer of the contractor employees. Okay, that step two, that's our "general contractor" where all, all this work. The work that the plaintiff was doing is under that umbrella and substitute the blanket contract order which is on the record on page 78 that was entered to July of 2000. This action happens in April of 2001, this is for work being performed that's a being plan. That's our plan in Bird city that enter to go state homes and upper rights. It's in accordance with the general contract and it says, "The compensation in accordance with the mutually agreed OPIP wage rates." OPIP is a owner provided insurance program. It is a--in this three term OPIP where we provide the Workers Comp. for the reduction in re-- in exchange for the reduction of cost of, you know, the contract. So we're going to provide this in this effective date as of August 2000, August 2001. So it published this accident would be-- it's not-- it is not all written out and explain how this is all going to work. In the contract it says, "OPIP, we know that OPIP is IMC knows what OPIP is." I have Elson included the affidavit of John and Aymee who explains the situation and in that it says in July which is the term of this "Blanket contract" we agree to provide Workers Comp. Insurance. They agree to reduce their, their pricing the contract and we as an reliance to that agreement, go out, we buy the, the policy we've pay the premiums and I am see in agreement reduced its cost and in relying to the, the same agreement this Blanket Contract. Summers himself applied for and accepted the Workers Compensation.

JUDGE: Whose affidavit explained all that, you said?

MS. KIBBE: Aymee's, a-y-m-e. This on the record 121.

JUDGE: Now, explain the apparently contradictory of Section 102 which says, "Not Entergy Gulf State" but this subcontract IMC shall be solely responsible for Workers Comp.

MS. KIBBE: That was the original contract under independent contractors. This Contract Blanket Order is the one where we install and still they are OPIP program.

JUDGE: So it's proceeded?

MS. KIBBE: Yes, it is. That is the one that governs the work at a being plan.

JUDGE: Now, there's another issue with what's the contract and who

the contracting party is that, that the petitioner says that "Entergy Services Inc. with signed all the contracts that are relevant here and they've been that are relevant here." According, to petitioner, if not the same as Entergy Gulf States. So in to, to, to Entergy Gulf State didn't signed the agreement required in the statute for your position to hold. What your response to that he-- petition says, "There's at least the fact question that reserve to be trial of that."

JUDGE: And as your answering your question note that your time is expired [inaudible] to [inaudible] substantially. No, answer, answer the question that this does [inaudible].

MS. KIBBE: I know and my, and my-- Sure, the general contract that we-- the General Operation Contract of the System White Contract to explains in the very first section that ESI is an agent of all this operating companies including Entergy Gulf States Inc. is opec-- is operating on their behalf and on behalf of itself and the Blanket Contract that governs this work refers back to that contract.

JUDGE: That's Section 1.6 -

MS. KIBBE: 1. ...

JUDGE: - of the System White contract?

MS. KIBBE: Right, the very first paragraphs and it refers to 1.6.

JUDGE: Thank you, counsel. The Court is ready to hear argument from the respondent.

COURT MARTIAL: May it please the Court, Mr. Barkley will present an argument for its respondent.

ORAL ARGUMENT OF STEVEN C. BARKLEY ON BEHALF OF THE RESPONDENT

MR. BARKLEY: May it please the Court, first I would like to thank the Court and opposing counsel for graciously agreeing to reschedule this argument from it's September Saturday until today and I gave sincerely appreciate that. I see that there are three issues presented in this appeal. First, was there're contract between Entergy Gulf States Incorporated, the appellant and my clients employer International Maintenance Corporation. Second, if that contract make the requirements of Section or of article 40, 406.123 of the labor code and finally this 406.123 applied the premises owners and what I would show to the Court is this. First, can you look at any of the documents that had been presented by any of the parties and file a contract between EGS, Entergy Gulf States and International Maintenance Corporation. You will not find what-- you will find a contract governing the work.

JUDGE: But you're benefiting from a purported contract, aren't you? I mean, you're collecting Workers Compensation under a contract that you say doesn't allow this benefits?

MR. BARKLEY: I'm-- my client is collecting Workers Compensation benefits because International Maintenance Corporation was covered by Workers Compensation Insurance. That's correct.

JUDGE: With Entergy?

MR. BARKLEY: Well, Entergy may have paid for, I'm not sure which Entergy Company paid for and I'm not sure why they paid for. It maybe that Entergy got a better rate but Entergy is a large company. They have in-house counsel. They have counsel at the Warlance, Jackson Mississippi, Oman and Texas and if they have chosen to read and apply 406.123 they would have known that the Texas legislature set out,

searching specific requirements for a general contractor to come under the protection of that statute. Assuming and I will not because I want to talk about that later that the Entergy companies could be a general contractor. They are still required to follow the provision of article 406.123 of the labor code in order to come under its protections. This goes back and I've been practiced any longer than I care to admit to the old days when I was a young lawyer and talking about the application of indemnity agreement between general contractors and subcontractors and we fought a number of cases in those days as to whether a company might be protected by an indemnity agreement. Until the Supreme Court came down and said, "If you're going to have a valid indemnity agreement that it must clearly state on its face. That you were protecting a company even against the consequences of its employees on negligence." In this case first question is "Has Entergy complied with the statute and if you look at 406.123 it says, 'I have to have a written agreement by which the general contractor agrees to provide Workers Compensation Insurance.'" That agreement has to be file with the Workers Compensation Insurance Carrier not later than the fifth day after the day on which the contract is execute. The statutes sets forth what a general contractor must do to come under the protection of the statute. If you look at the EG or EGI case that this Honorable Court refused with upon. You will see that there was a contract that let those requirements. It was clear, the contract was between ...

JUDGE: Did you argue the lot of the contract in this round Court?

MR. BARKLEY: I believe so your Honor.

JUDGE: Can you point to the record and show me where that is?

MR. BARKLEY: Not of this [inaudible], your Honor.

JUDGE: In ET we do not petition not refused to bring, right?

MR. BARKLEY: I'm sorry, you're correct, your Honor.

JUDGE: I told you I looked back at old record but I, I'm not ...

MR. BARKLEY: I put up here for a while but in E type where was a contract that clearly meant the probation of the statute. Here, there is not and remember this is a summary judgment. This is not a case that has been tried but we have jury issues. This is a summary judgment case. The second question and I've going-- and I talked about that is whether the agreement complies with 406.123 as a matter of law.

JUDGE: And re, and re, and reason you say it's not an agreement between them is because of the date they argued that it was sent each, each of have a agents signed the form.

MR. BARKLEY: It's just no, -

JUDGE: Is this not good enough?

MR. BARKLY: - it's just not clearly there, your Honor. I mean, if you there are a number of contracts and agreements between the Entergy Companies.

JUDGE: You're, you're not saying the companies cant have agents signed something on behalf?

MR. BARKLEY: No, -

JUDGE: No.

MR. BARKLEY: - of course not but I am saying there should be a contract that clearly on its states sets forth the agreement plied-- applied with general contractor to provide Workers Compensation Insurance and if you look at this case this Court's decision in Universal Health Services versus Renaissance Womens Group written by Justice Olence. She talks about contractual interpretation and that basically you're not going to apply terms in a contract or very rarely would you imply terms in a contract. Now, here we have Entergy

contending with the term "OCIP" wage rates in priceless talks about Workers Compensation but you won't find that term discussed in the contract. I don't know what the OPIP means that something that Entergy knows they may take the position-- they may take position but that includes Workers Compensation but if Entergy were suing on a contract they would have to prove up what OPIP means. That's a fact issue and if you have a fact issue I would submit the fact contract is not make the requirements 406.123.

JUDGE: Let's talk a little more about the agency concepts that Ms. Kibbe pointed to Section 1.6 of the System White Contract that says, "Entergy Services Inc. which signed this contracts."

MR. BARKLEY: Correct.

JUDGE: Did you repeatedly when out in your brief?

MR. BARKLEY: Yes, sir.

JUDGE: That provision 1.6 says that "If Entergy Services Inc. is acting cloth for itself as agents for each of the other Entergy Companies and Entergy Company's as defined to include Entergy Gulf States though Ms. Kibbe represents in front of this Court." Are this in that provision provide that wherever Entergy Services Inc. signed it was signing on behalf of Entergy Gulf as agent and therefore provide the contract required on the 406.123.

MR. BARKLEY: It may file this the contract to its on meet the requirements of 406.123 and Entergy Services comply with the requirements of this statute by filing the contract or filing the-- what's you call in the contract of this insurance company and by clearly setting out in writing in the contract that they will provide Workers Compensation benefits for in subcontract case.

JUDGE: Can you, you've ask the question? How, how specifically do you think the contract did not comply with 406.123?

MR. BARKLEY: Well, I think if you look the detail, it talks about a general contractors apply Workers Compensation Policy. It says that "The Workers Compens-- it says, 'If I remember correctly that the general contractor would supply Workers Compensation Insurance for subcontractors.'" For one thing, it mention the word "Workers Compensation Insurance." You don't see that in the contract between Entergy Services and International Maintenance Corporation. It says, "OPIP" but it doesn't anything about the Workers Compensation Insurance. So you come to the point to in facts ...

JUDGE: What other, excuse me, counsel, what other specifics do you complaint were not complied with in this agreement -

MR. BARKLEY: Well, if you look at -

JUDGE: - to make it, to make it ...

MR. BARKLEY: - 406.123 subsection F it says, "A general contractor shall file a copy of an agreement entered to under this section with the general contractor workers compensation insurance carrier."

JUDGE: But that doesn't-- if you don't do that G says, "The contract are void?"

MR. BARKLEY: It doesn't but you just go to show again that Entergy was not comply with the provisions of the contract. The mean of the ...

JUDGE: But, but-- well, there's a material bridges in their bridges?

MR. BARKLEY: Yes, sir.

JUDGE: And has to be a material bridge as just the technical bridge where going to ignore it and this seems to say that if you don't file it with your carrier which addresses the problem about under paid premiums. Isn't it administrative violation but that wouldn't seem to take the out of 123, would it?

MR. BARKLEY: No.

JUDGE: I mean, why would they call it in the administrate-- and if than take it out of 123 what is it matter to you violation?

MR. BARKLEY: I think it just something that shows again that Entergy did not comply with the provision of the statute. You still get down to-- there's nothing in the writing between Entergy and then IMC any of the Entergy Company is an IMC that says that "Entergy will provide Workers Compensation Insurance for IMC for a subcontractor on this job." It does, doesn't say and I think that's what's required to come under to protection of 406.123.

JUDGE: Lets assume that the legislature intentionally excluded premise owner from the definition of "general contractor" did it for a reason. What would that reason be?

MR. BARKLEY: Well, you have a number of different protection for the premises owner that have been enacted by Texas-- by what the Texas legislature. Premises owner have always been treated differently than general contractors. The original statutes pleading to 406.123 was an active in 1917 and that was un-believe civil correct-- civil statute 8307 Section 6 and the language is not change substantially since 1917. So the Legislature has always look differently and in a premises that are acting as a premises owner and there general contractor.

JUDGE: Well, in acting as, I mean that the premises owner can act as original contractor as well, won't they?

MR. BARKLEY: I believe so your Honor but there has been no proof this is, is, this is, is summary judgment case. This been a proof in this case no file in a fact that Entergy Gulf States Incorporated active as a general contractor from the prospective of agreeing to the fairly outward to whom relate itself that some contract in the outer part of the work.

JUDGE: If that worker conclusively that you agree 123 applies?

MR. BARKLEY: That would be to this Court to decide because him the legislature has always treated to premises owner differently than they have a general conta-- a traditional general contractor. If you look at the case law since 1917 there have been no cases where a premises owner has been protected by 406.123. It's just not there even in the ET phase. The liability in the premising owner was not determined. That was strictly because the ge-- between the general contractor walked through the claim and the plaintiff.

JUDGE: Well, looki, looking at just a plain statutory definition of GC in the labor code. As well as Entergy not want to undertook to procure IMC's work. How do they fall outside without the permission?

MR. BARKLEY: If you look at the definition, General Contractor means, "A person who undertakes to procure the performance of workers or service" and then you've read that in combination with the definition of "subcontractor" that says "A person who contracting as a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform." That means to me that the general ...

JUDGE: What does undertaken mean?

MR. BARKLEY: Well, major going to actually do the work. If you look at statutory interpretation you give a braves it's common normal thing and says, "1917 when the legislature enacted Article 8307 General Contractor has never been used synom, synonymously with the term 'premises owner.'"

JUDGE: But we have a statute here. So what is, what is the common law definition of "general contractor matter?"

MR. BARKLEY: Well, because the statute, the statutes says, "A

person who undertakes to procure the performance of a worker service." Which if you look at by Exclar dictionary if you look at some of the other sources says, "Basically, that's a person it goes up to do the work."

JUDGE: What's the purpose of this-- what's the def-- purpose of this statute anyway?

MR. BARKLEY: Well, purpose I believe if you look at 19-- lets gets back to 1917 this is not a new statute. I think the purpose was exactly what it said, "If I had you raise your opinion it would be-- to make sure that they over protective our cause bound possession." If they where for subcontractors and the general contractor wanted to carry there-- wanted to make sure they will covered and re-protect the general contractor.

JUDGE: If it ...

JUDGE: That's kind of service to get recover the state-order the employees might not be recovered that for.

MR. BARKLEY: I think that it's probably clear.

JUDGE: And then the general or clear results three. Whoever has to write the contract in the-- but sure of it under the statute and, and the statute actually will give them some incentive to ensure that the comp. covered your limit?

MR. BARKLEY: Well, if we had said, "At the general contractor is to protect the general contractor against law suits by employees of subcontractors." I don't know that if it is back altruistic on the part of general contractors, it may also be that a general contractor had obtain cheaper rates and therefore, get lower prices for the subcontractor by covering the subcontractors under it's policy. You know, we don't know that in this case we don't know why Entergy chose to do this. I think that Entergy would tell you that Entergy has told you it's to insure that people are going ...

JUDGE: If we look at the legislatures intent when we talk about the purpose. There is not Entergy so if a legislature-- just wondering and again, going back to legislature history there's, there's no special this at all to [inaudible]?

MR. BARKLEY: I do not find it, your Honor but then I will acknowledge that I was not able to locate the legislature intent from 1917 which is what the statutes goes back to-- this goes back to-- again, it's Article 8307 that was an issue enacted in 1990-- in 1917.

JUDGE: I want to go back to the question that Justice O'Neill raise on his election of remedies and work on his Workers Comp. issue. Are you listener where it's been closed over here. There's Aimy-cuz that indicates that Summers has elected to pursue Workers Comp. when they wasn't have been paying the Workers Comp. benefits by-- they would understand this entity. Is that correct or is that not correct?

MR. BARKLEY: No, the Workers Comp. that it's not for paid on behalf of IMC insurance.

JUDGE: Who paid those balance?

MR. BARKLEY: My understanding is an Entergy made of paid of premiums and to be in exchange for reduction of cost by IMC but I don't know defense truth it certain and certainly may not established does a matter of law in the record but even in-- then ...

JUDGE: And they still receiving benefits?

MR. BARKLEY: I think it's now social security disability rights.

JUDGE: On this computers seem like you wants in both ways; you wants to be able to collect the benefits and then pursue this, this action and ...

MR. BARKLEY: No, it's, it's, it's really not because the Comp.

Carrier is entitled to subrogation and if there's not a building money for sure. Mr. Summers make alleged against Entergy if the fact that there's a problem. I mean, the law has never prevented an employees who go on against the general contractor of the sub for going against the general contractor. If the general contractor is negligence was a cause of the employees damages but in this case the legislatures says, "Okay, general contractor we'll going to give you an out." We're going to say if you comply with the meaning of the "statute" over the terms of the statute and it's not only that you've paid for the amount but it's also that you have to complied with the terms of the statute that's why the statute is clear and we cannot assume that the legislature get a meaning was that.

JUDGE: Can a homeowner be a GC and hold that they require a subs and ever rule pick up the hammer themselves.

MR. BARKLEY: I would like so. Let's come with the law in the statutes that said, I mean, if you give general contract to the meaning of the tur-- the meaning of that Entergy, would like to give it then a homeowner could be consider the general contract.

JUDGE: Well, let me ask you that, if the facts in this case where show the close of way and they set it up that if they could close the showed that Entergy acted as a general contractor and that on this job then is there a policy reason why if there an owner as well you will exclude then from the benefit statute.

MR. BARKLEY: Well, I have two responses to that charge. The first is that they didn't comply with the statute 406.123. The second is that the legislature has always treated.

JUDGE: I know that but I'm asking you with would there be a note they've always treated them different but if they acted as a general contractor in fact is there a policy reason why under as well they would be deprived of the benefit of statute.

MR. BARKLEY: Well, if relate to this Court to decide but I would tell you that there would be-- for one of those instance the general contractor has been-- I'm sorry, the premises owner has protective suit that the general contractor is not. Such as, Chapter 95 of the Civil Practice Remedies Code that sets out specific limitation on liabilities of the premises owner that apply only to a premises owner. They don't apply to the general contractor. Now, would you-- what argued is whether a premises owner could also could have auto protection it's given by the legislature as a premises owner and the protection that it's given by Article 406.123 and I don't think anywhere in this, in this-- in the case law or in the statutes is that presu, is that presume in summation but again, this is a summary judgment case. I would like to briefly read from the Paul-Mark Court for the opinions decision. "Entergy did not established it did undertaking the performed worker services and that subcontractor part of that work to IMC as a general contractor would have done." A fact issue was presented at the very least this case would be remanded to the Court for trial on the merits. We would submit that Entergy-- the two things the contract didn't meet the requirements of the statute and if even if they bit Entergy as the premises owner could not defend upon the statute. Thank you, your Honors.

JUDGE: Thank you, Mr. Barkley. Ms. Kibbe where can you pin point in the record the written agreements that shows Entergy committed to pay Workers Comp. Insurance?

REBUTTAL ARGUMENT OF CHRISTINE S. KIBBE ON BEHALF OF PETITIONER

MS. KIBBE: The written agreement that is Section, I think so-- I see page-- it's that's record 78 that's the Blanket Contract that represents the OPIP and John Ayme's affidavit on record 121 and there is in the record that Entergy goes stayed and paid the premiums as in John Ayme's affidavit it said, "EGSI, EGSI was Entergy Gulf States Inc. depend of top has paid and continues paid the premium on the describe insurance" and that is submission in Court if you look at the Williams versus Brown and Root case cited by both of us. They used the affidavit of Easman and Brown and Root and Tracer that Tracer provide the insurance they said, "Because it was un-contradicted" and if you look at the Trial Court's, I mean, plaintiff's responds to most motion for summary judgment at the Trial Court not anywhere do they question the contract, not anywhere do they question the Entergy Gulf States Inc. paid the insurance premiums even say that, that Entergy and they depend on Entergy Gulf States Inc. paid the premiums. When ...

JUDGE: So would say that arguments it's, it's waive?

MS. KIBBE: Yes.

JUDGE: Because it wouldn't argued in the Trial Court.

MS. KIBBE: Yes, sir. I would say this waived. Also, with regards to the agency, 1.6 additional to make it clear defines "Entergy Entities" which is the first paragraph. ES, Entergy Services Inc. as acting on behalf of its self and the Entergy entities as defined by Section 1.6 and then it listed in 1.6 just takes blank how that it works. In this case there is no doubt with the intention of the party and every contract agreement we have they've-- we've state that Entergy, Entergy Entities are the statutory employer of our contractors where we provide this insurance. We provide the insurance-- the failure to file the contract with the Workers Comp. as you have stated is the administrative violation if you look at Carrison versus Movo it does not change the status and the reason it doesn't change status is the purpose behind the Workers Comp. Statute. The purpose is to insure that Entergy will get paid if, if we're not an employer of course where going to [inaudible] a Workers Compensation payment we're paying on and we believe we have a protection with Workers Comp. Policy that's why we have the policy out here. Is for that we insure to get payment adequate fair payment promptly without showing perfect trial. In exchange to that I was on my common law rights of defenses. Which I would have assert it, if I had that right I must that right.

JUDGE: No, there wasn't-- Mr. Barkley says, "You lose because of magic word 'Worker Comp. Insurance' do not appear anywhere in the contract or rather somewhere or some acronym did you say is known throughout the industry."

MS. KIBBE: Right, It's called "OPIP." Some people called "OSIP", "Owner Provided Insurance Program" and that's why I include it in the record John Ayme's affidavit that tells you that's explains we provided the Workers Comp.; we paid the premiums; we accepted out the benefit and that, that is based on this agreement and every old parties ascent it to those agreement. Every party had relied on it; IMC has relied on it; Entergy relied on it and that Mr. Summers relied on it. The purpose of the Workers Comp. is promoted by this particular situation. "Here we are Entergy we take on this work, we supplement our workforce behind IMC, we provide their employees with Workers Comp. benefits. We bare in charm because of 406.123 should be protected since we lose our common law rights for our defenses." Do you have any other questions? I have

50 seconds.

JUDGE: You've complied, there no further questions. Ms. Kibbe, thank you, very much. They called submitted on the Court take brief recess.

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