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Supreme Court of Texas.
Reliance National Indemnity Company, L and T, J.V., and Lamar
Construction,
Inc., Petitioners,
v.
Advance'd Temporaries, Inc., Respondent.
No. 05-0558.

October 18, 2006

Appearances:

H. Victor Thomas (argued), King & Spalding LLP, Houston, TX, for petitioner.

J. Bennett White (argued), Christopher Thomas Massey, J. Bennett White, P.C., Tyler, TX, for respondent.

Before:

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

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JUSTICE: The Court is ready to hear argument in 05-0558, Reliance National Indemnity Company versus Advance'd Temporaries.

JUSTICE: May it please the Court. Mr. Thomas will present argument for the petitioner. The petitioner reserve three minutes for rebuttal.

ORAL ARGUMENT OF H. VICTOR THOMAS ON BEHALF OF THE PETITIONER

MR. THOMAS: This appeal presents a statutory interpretation question of first impression with this Court namely under what circumstances if any does a temporary employment agency furnish labor under a contract means in Section 53.021(A) of the Property Code, so that is entitled to a certain mechanic's lien.

JUSTICE: What about employed-- what about furnishing the employees to a general contractor, wasn't that enough?

MR. THOMAS: Well, you have to-- under all the courts that examined this question, you have to do what does the courts looking in [inaudible] what does it mean to provide the worker and the standards that the Court's have posit to address this question, what they look at is whether the temporary employment agency has assume a full legal responsibilities of being an employer. And what the California Court of

Appeals and New York's highest court did in the Tri-State case as the Court of Appeals followed in this case, is they adopted a seven-factor, very fact-specific test to determine whether a temporary agency or whatever you call it, whether somebody who provides workers for a fee whether they're actually the true employer, whether they're actually furnishing labor even under business, surety bond for under the mechanic's lien statute. Well, I could go with that, I mean this is an important statutory construction question to the construction industry and also to the temporary employment agency. And although I understand the Court has issued cases that say that the statute was being construed, literally, for the protection of, of laborers. First, before you're on top of that little construction, I would submit that you have to show indeed, you are a laborer or a furnisher of labor. And I think you ought to look to see what the legislature has done in this area because a mechanic's lien is a very powerful weapon. In this case ...

JUSTICE: Which I think is a good one, I mean it's a good one that it prevents someone from getting the holes done on the cost that they incur when they paid the general contractor or the general contractor didn't pay the provider of the employee, otherwise general contract could always walk if this temporary employment agency can't find a way to protect itself.

MR. THOMAS: I agree it's a very important statute and I'm not suggesting that this Court do anything to change its traditional interpretation of the statute. But it also needs to recognize that the - that it is a powerful weapon and even if a small lien is filed, that case includes an owner in [inaudible] on its co-construction financing and it subjects the trial court the risk of loss in a foreclosure proceeding and that's why I believe [inaudible]

JUSTICE: That's why you have the surety bond [inaudible] and then - and that's why a surety bond is, is filed to protect the parties from that.

MR. THOMAS: That's right. That's one of the reasons and that's why we have the mechanic's lien statute to protect the workers. But what I'm, what I'm trying to get to is for the legislature to pass the false liens we're quoting out from Chapter 12 of the Civil Practices and Remedies Code, if [inaudible] had created a new statutory accident if you file a false lien, you know, you're entitled to a cause of action and a \$10,000 penalty is imposed, even if they're not able to prove any damages. And so what I'm saying that it's so close from the statute, you need to recognize that the legislature is very concerned that mechanic's lien must be properly interpreted in a bond. But let me get to what the Court of Appeals did in this case, a lot of what it did, it was right and we agree with. The Court of Appeals rightly recognized the purposes of mechanic's lien statute, there should be a distinction between an agency that constantly provides administrative services and financing for payroll insurance and an agency to that takes upon itself the full and little responsibilities of the employer. And to determine whether an agency furnished labor, the Court of Appeals adopted the seven-factor test that was taken directly from California Court of Appeals and New York's highest court decision in Tri-State Employment Services and-- but what I would like to ask the Court to do is take a look at the hand-out I provided the Court. And with that I'm going to discuss with the Court what I see a problem-- some of the shortcomings and problems in the application of the seven-factor test. That this Court needs to step-down in clarifying [inaudible]. The first problem with the seven-factor test put down by the Court of Appeals is that the test is incomplete. And what I, I would suggest this Court to do is do

what the New York Court of Appeals did in Tri-State. What the New York Court of Appeals recognized in most cases in, in general case, the staff leasing companies are personality which really are not performing furnishing labor. What they're doing is providing payroll findings and providing human resource services. And so the New York Court said, "There ought to be presumptions that they're not furnishing labor and that they're not entitled to a claim under the bond or the lien." But it also recognize that presumption could be overcome if there was evidence that the temporary agency exercised significant direction and control over the work site and colleagues and then it [inaudible] with the seven-factor test, in order to do that, it was adopted by the Court Of Appeals in this case. And what I like this Court to do is to carefully examine-- I think that there are four of the seven factors that are not clearly defined enough. But the trial courts are going to have real difficulty in interpreting these factors in applying them in a consistent way. And the first two factors that this Court should have gather: On what involvement did the agency have in selecting and screening the workers for hire and; did the agency used some criteria for hiring the workers? Well, the test tells the trial court it needs to look at those factors but it doesn't tell the trial court what criteria does it use for hiring.

JUSTICE: Why, why are those factors -

MR. THOMAS: I mean what is-- how much is left in your screenings through the years?

JUSTICE: - why are those factors even relevant, I mean if you're asserting the control task weren't-- wouldn't those be indications of level of control as opposed to-- I mean, I-- if there's no control, do those factors have any significance?

MR. THOMAS: Well, if your Honor's suggesting that there has to be ongoing control of the temporary employment agency both at the beginning and during the relation supervision, then I agree.
[inaudible] -

JUSTICE: Well, that doesn't [inaudible]

MR. THOMAS: - you know it can get to the seven-factor test.

JUSTICE: Right.

MR. THOMAS: I mean ...

JUSTICE: But why do we -

JUSTICE: But ...

JUSTICE: I'm not clear of what-- who were-- didn't make any difference how many factors we have. We need to know what we're trying to protect. That's not what's clear with this, it's not clear to me. What we're trying to protect and what does not deserve protection.

JUSTICE: Well, and, and which is sort of where I was going with the control piece, my understanding from the briefing is that the reason you want to, to hinge it on the control is because if a contractor has a client they want to serve based on the work that's performed, you want them to be able to serve it against the lien holder. Right? Since there's no contractual relationship between the temporary employment agency here, general contractor can't sue the temporary employment agency for defective work, unless there's control sufficient to make the temporary agency liable.

MR. THOMAS: Your Honor, I'm not sure the Texas law is really clear on that. That's the point, but Justice Hecht in, in response to the mechanic's lien statute was designed honestly to conform a common work of the guy that's out there working on the job. And the statute division is also entitled to protect the subcontractors and contractors, that's clear, you know, this is a new development of the

temp agencies who want to be entitled with this powerful weapon, the mechanic's lien. Get part to at least be assuming the, the full legal responsibilities of an employer and its subcontractor would be assuming this position.

JUSTICE: And though the agency says, "It does happen sometimes. That there are labor subcontractors." You, you saw that in the amicus brief.

MR. THOMAS: Right.

JUSTICE: If you're just supplying the labor and somebody else is directing the employees what to do, how can you assume responsibility for defects in the building?

MR. THOMAS: Well, if they would be, if they would be employer, they would be [inaudible]

JUSTICE: Well, but you're not suing temp employment because he put the nails in wrong, usually you're saying, you're saying, you're saying and this is the subcontractor who crafted in bad work.

MR. THOMAS: Right. Well, I mean, that's the point of the policy on this temporary agency-- temporary employment agency isn't going to assume legal responsibility for the quality of the work.

JUSTICE: But you think there are -

MR. THOMAS: They're part of the job but they're not responsible for the [inaudible] -

JUSTICE: - if-- it seem to me odd -

MR. THOMAS: - then shouldn't be entitled for mechanic's lien.

JUSTICE: - it seems to me odd in the agency we paid for that there are labor subcontractors and they go out and all they do is provide employees but they somehow take responsibility for the work and I just want to have that work.

MR. THOMAS: I'm going right-- I can't give you anymore help on that. But what I think in trying to define these factors more fully and what I think the Court ought to provide as a guiding principle is that the-- and then some might end up, the agency should have sufficient involvement in the screening of the workers and the establishing of hiring criteria that is to ensure the workers are capable of performing competent and safe construction work. And I give you a couple of examples and what I suggest that a minimum that it ought to require. These are things that, you know, any subcontractor would do-- that this was hire-- trying to, to hire a worker, screen a worker and apply a hire [inaudible] obtain the worker's prior work experience, certifications, wage rate, job references and then it would go back to calling the employers and verify the information.

JUSTICE: Well, what if you just need a day labor and I have a day labor in camp with people there and here legally and, and you for building a house so, so I kind of need some workers. You pay me so if they give me twenty-one, I've got a hundred here. And then, they go perform the work just like this except I'm not a temporary agency and this is my job providing day labor. Something goes wrong, you pay, I don't get paid. Why can't I assert a lien against what you benefited from which would be the work performed by those laborers?

MR. THOMAS: Well, unless you're showing that, that you are accepting full responsibilities. First, to make sure that that employee is qualified and was able to do the work. And second that he proper safety training. Instruction ensures a very [inaudible] for this industry.

JUSTICE: And I have been in a construction industry, didn't take much to lift the wheelbarrow and push it down the ramp.

MR. THOMAS: Judge, but this State-- I mean in all [inaudible] it

wasn't just day labors, I mean, there were skilled position such as carpenters and there were subcontracts for, for [inaudible] and carpentry, I mean there were certain skill provisions that were being provided by this contract. And even a day laborer has to have some kind of training basic instruction on safety on what is safe and not safe if you're a construction worker. And so if you're going to be entitled with mechanic's lien, you need to be assuming a legal responsibility as an employer. And as for taking interest in that employee, you make sure that they, they have the knowledge to do the job. You make sure they have a safety time to do the job. This Court has held in Scorciv decision that an employer has responsibility to provide a safe workplace and to make sure-- to provide adequate safety time to its employees. And so what I think this Court ought to do is determine and then give some definition that these seven-factor are [inaudible] the trial court of a fact-finder to determine all they're really acting as a responsible [inaudible] an employer would in this situation. I mean facts in this case, I mean it's almost a sham, the evidence is, is undisputed, all Advance'd did in this case wasn't-- it is the recruiting [inaudible] newspaper ads, cell phone and has brought the people in, like this in general information and then set the thing with Gonzales, the contractor and left all the hiring and qualifying and interviewing to the contractor.

JUSTICE: But it pays them.

MR. THOMAS: It is, but how, how does it ...

JUSTICE: It, it-- but it, but it pays them and so if the purpose of the lien statute is to ensure that the person who works on the job gets paid, then if they get stiff by the subcontractor, the workers aren't going to get paid.

MR. THOMAS: Oh, well-- they're in question. I'm not saying that the work shall be paid, if they want to have to work on the project, they get paid. The question is, is whether the temp agency is truly in accordance assume the responsibility, then the only question here is whether the temp agency gets paid, then the workers gets paid.

JUSTICE: What I understand is that the temp agency is paying the employee.

MR. THOMAS: Right.

JUSTICE: And so temp agency don't get paid, employee doesn't get paid, presumably, I mean if there's somebody ...

MR. THOMAS: No, that's not correct. All the employees in this case were paid. There was not one employee that wasn't fully paid.

JUSTICE: I thought there was one. But there might be ...

JUSTICE: But the risk-- Okay. Yeah. I mean the risk of not getting paid is on the ...

MR. THOMAS: Well, then I agree, I'm not contending that the guy who was actually on the job but didn't work, did assert a mechanic's lien. Okay, but the question is "it's whether a temp agency is primarily providing financing human resources," you know, have I taken all ...

JUSTICE: Can the right to that lien be assigned?

MR. THOMAS: Can a lien be assigned?

JUSTICE: Can a lien be assigned? Is it a "lien" or "lean?" Professor Baron Gates of South Texas College of Law said, it's "lien," and I hear you pronounce it "lean."

MR. THOMAS: I've always called it as "lien" but I think probably both are correct.

JUSTICE: Okay, I'll check with him on that.

MR. THOMAS: Okay.

JUSTICE: But can that, can that right be assigned?

MR. THOMAS: I don't, I assume it can, I mean the contract right I don't know the rule with that based on the said issue.

JUSTICE: So Gonzales wanted to assign its lien here then a temp agency could have a thousand mechanic's lien and then the surety bond would have paid or would there be another argument?

MR. THOMAS: Well, you still have to meet statutory requirements, I mean you have to-- I mean, every court has looked to this, you have to, to look at those, it really go with the bond. Five of fact-intensive standard of test to find that few laborers ruling being furnished.

JUSTICE: But you just said, "The employee of the agency who furnishes the work, could file a lien."

MR. THOMAS: Yes.

JUSTICE: So just that cause a lien -

MR. THOMAS: Right.

JUSTICE: - and assigns it to the temporary agency, that would be okay?

MR. THOMAS: I think it will.

JUSTICE: How does he have a contract?

MR. THOMAS: How does he have a contract?

JUSTICE: We have to look [inaudible] generally to the old-- his name required?

MR. THOMAS: No, not yet. I mean, they have to assert a lien and that's, that's [inaudible] ...

JUSTICE: And the person furnishes the labor under a contract with the owner or the subcontractor?

MR. THOMAS: I'm sorry. What's the question?

JUSTICE: Chap-- Section 53.021 of the Property Code says, "the person has a lien if and one of the requirements is that the person furnishes the labor under a contract with owner's agent or subcontractor or some other people." How does the employee had that contract?

MR. THOMAS: Well, he has a, he has a contract say within typical situation with the contract-- subcontractor over the contract.

JUSTICE: Now the employee of the temporary agency.

MR. THOMAS: - temporary agency.

JUSTICE: Yeah.

JUSTICE: He'd be, he'd be providing services under the contract between the agency and himself.

MR. THOMAS: That's right. I mean, I, I think the decisions in this area say it doesn't have to be for deed of contract would be known or it has to be under a contract. I mean, that's another alternative argument that I, that I made is that basically what is this requirement under a contract of lien. And I submit that a reasonable interpretation of the statute is that you have to agree to perform some part of the owner's construction contract.

JUSTICE: So the way it arouses -

MR. THOMAS: That's another reason, you know why-- excuse me.

JUSTICE: - so the way it rounded then where the, where the temporary agency has put in their contracts with their employees. That a lien right you may have from furnishing labor on the job are hereby assigned to temporary agency, then the agency could file the lien.

MR. THOMAS: Your Honors, I'm just having [inaudible] of thought to know that workers shouldn't work in this [inaudible]. But ...

JUSTICE: Further questions? Thank you, Counsel. Your time has expired and the Court is now ready to hear argument from the respondent.

JUSTICE: May it please the Court. Mr. White will present argument for the respondent.

ORAL ARGUMENT OF J. BENNETT WHITE ON BEHALF OF THE RESPONDENT

MR. WHITE: Thank you, your Honor. May it please the Court, Counsel. I'm just [inaudible] I mean, we did this clearly form California Supreme Court. Thank you for your time and consideration this morning. To answer your, your questions first, your Honor-- as Justice Hecht pointed out for the, the employee of the temp agency to have lien rights to assign to the agency, there has to be some string of contracts to the contractor or to the owner. You have to be provided labor which is under a contract with an owner or a sub, a contractor or a sub. So the only way that labor has lien if that he's under contract with a sub, for the agency to be a sub, it has to have a contract with a general or with a sub so it did have its own lien rights by virtue of itself being a subcontractor. So if, if, if the agency does not provide labor, then it can't be a-- have a subcontractor that allows each workers to have lien rights. I'm reminded that, that the whole story about the guy whose sued then he-- goes to the title and the title says, "Well, just, just pull in our men, then stick with the other half and work with the left and so [inaudible] on street and passes a couple and the husband says, 'Man, whatever happened to that poor devil.'" And the boss said, "Well, [inaudible] Well, the petitioners want to know what the Court would say, 'well he normally had to live normal-- that are, you know, well make the [inaudible] fit and fortunately for-- and I, I will recommend the Court on the City of [inaudible] which is a big-- phenomenal opinion.'" Things are kind of comprehensive contributions charges [inaudible] them within the followers of this Court versus the legislature. And I'll ...

JUSTICE: Oh, come on.

JUSTICE: That's very true.

MR. WHITE: It use to be [inaudible]

JUSTICE: That's not ...

MR. WHITE: It's making logic out of [inaudible] and our-- and I'm grateful for that but what the Court of Appeals on this case did was almost predict was to see kind of tell them what to do. It looked at the evidence and it said, "Give him these evidence, give me undisputed evidence, give them the, the, the undisputed inferences that we've drawn for that evidence." The facts can only be read one line and that this that Advance'd Temporaries provides labor. It's not a statute, it's not what we call "staff leasing", it's not an administrative service. It's a provider of labor and so if it's a provider of labor, the plain meaning of the statute gives it lien rights.

JUSTICE: But don't, don't you have to give beyond that and get to the control issue, you had a contract and ...

MR. WHITE: Well, if we start with the statute, that statute says, "anyone who provides labor or materials." Now for purposes of the plain meaning of the statute, there's no distinction, it's whether it provides labor and whether it provides materials. I mean, look at the control question, I think by analogy, the easiest way to look at this is how would it be any different if the, if the sub had already drops out and drop off eighteen tons of bricks. He has no control over what's done with those bricks on the jobsite and the State's jurisprudence is

clear that he doesn't have to hear, he didn't have to prove that the bricks actually is not used in the project. He can't do that. He's, he's given all the control when he's left the bricks at the jobsite. Sign for timber, sign for [inaudible] but if somebody calls the material man and says, "I need supplies." And he provides supplies to the job, he's done all he has to do to have a lien claim. And, and, and there's no ...

JUSTICE: Surely, you would think that-- do you think that he does not have a lien claim if he provided those supplies to an intermediary who then provided them the jobsite.

MR. WHITE: You have to have it under a contract -

JUSTICE: With the -

MR. WHITE: - with the contractor or a subcontractor.

JUSTICE: - with respect to that ...

MR. WHITE: So if, if the contractor cause a [inaudible] sub and the [inaudible] sub goes and buys doors and the door supplier goes and gets hardware and the hardware provider can trace his hardware. The hardware provider for a contract through the doors for that job into that project, the guy who makes it harder has the lien claim and this, and this delicate majors of risk assumption that they talked about ...

JUSTICE: That statement you just made -

MR. WHITE: Yes.

JUSTICE: - is that your argument or are there cases that support that?

MR. WHITE: Well, that's the certainly cases that support that, your Honor. And the, the Court of Appeals mentioned several of them in their opinion talking about how, you know, if there's a risk of non-payment down the stream, the risk is also involved in the contract because he controls the contracting on the job. If he wants his sub to put a bond, he can make and put up bonds. If they didn't want to take the risk of Gonzales's insults in his face, they couldn't make Gonzales bond his ability with the work. They didn't do it. They could have monitored in what, what Gonzales charged in prior offense, he's got a [inaudible] says, "It all amounts if buyers have been paid." Whether they have a least set of months with that [inaudible] within the control of [inaudible] of the downstream sub, one of the questions that was asked about the, the-- to being able to contract-- to be able to make a claim against the sub downstream. If, if there's a defective workmanship resulting that he has become problematic and what happens then is a standard--a, a contract is a lot of the times the sub-- well, a fine meaning cause of action he has against his subs to the one he contracts with so if the--if I know exactly the meaning of the [inaudible] hires the door guy and the door guy goes and [inaudible] does bad doors. And the door guy says, "I'm not going to go after my supplier." Those claims would all be assigned those [inaudible] general czn lead from those impugning with but that's all under contract, that's not the only thing to do with the statutory rights to a mechanic's lien.

JUSTICE: Do we need, do we need a seven-factor test to figure this out?

MR. WHITE: I'll take it was a seven-factor test control, your Honor. We've got a traditional [inaudible] economy here that once upon a time, lien [inaudible] they loan the money out of construction said, "Hey, we're providing the ability to buy the labor and materials. We ought to have a lien claim." And the court then said, "No, you're not providing labors and materials, you're just providing funds." And so as the-- as our economy has evolved, we have this concept of staff leasing

from the [inaudible]. And it separately provided for in the, in the Labor Code so then when the Court granted the petition [inaudible] the construction law or employment law or standards of review. That-- what's happened is, is that we've got this staff leasing company. So-- and they're specifically referring to this professional employer organization in some spaces. That by a definition, they are presume to provide administrative services, they're basically just a payroll processor. And for the seven-factor test is most applicable is-- and what the Court of Appeals here said, "Is that not all PEOs or PLE are alike." So I would suggest to the Court that if you were a staff leasing company and you could show that you did more than just process payroll unto that seven-factor test, you did supervise the work or you did be actively involve in [inaudible] workforce, so you did do more than just be an off-site bookkeeper than maybe you could qualify yourself providing labors because what we're looking at as the Property Code says, provides labor. And so well the Court has said, "Okay. It-- how will we determine whether or not a temp service provides labor or just perform services." But in our case, you look at what Advance'd did and, and what our legal [inaudible] as, as the employer and we're a labor provider, there's no reason for us to, to [inaudible] seven-factor test or any other factor test because we're providing labor. Then you may have somebody that's more like a financier that would not be naturally-- it may not be measured apparently for providing labor and you make this and we're right about it, look I'll do more of these things, you know, I only have to shop to get to the lien offs which are literally construed if I can, if I can get that. But for us and it's [inaudible] because the agency agree wants to draw a test in a way that would exclude the people that there are dependent for the statute to cover and, and, you know, that there was a [inaudible] you have to have a license. Well, the only people who have licenses in Texas except leasing companies who by definition under the case law, those who provide labor. And, and so then you exclude the people who do provide labor and you would exclude the people who have licenses. So, so they're clearly trying to create a situation where providing labor and buying materials gets treated differently. And the legislature hasn't-- has not authorized that. It was, interesting that my, my colleague about a minute ago and essentially said, "The Court of Appeals in this area haven't made enough law." That we've got seven-factor test but it's not thoroughly, it start [inaudible] we need more fact, we need clarification on the fact. What we all know is that, that the court-- we know that the courts make law, we know the courts [inaudible] by the statute. The statute says, anyone who provides labor has a lien right. Did it Advance'd provide labor? Yes, it did. And the Court of Appeals did a good job by saying "Look, look, if you look at all of those evidence, you can't come to any other conclusions as a matter of law but that Advance'd provided labor."

JUSTICE: If you just print ads, would that be enough?

MR. WHITE: Sir.

JUSTICE: - if you just print to help [inaudible], would that be enough?

MR. WHITE: Well, if you, if you just print [inaudible] you-- the [inaudible] use to the jobsite. Something has to be done to get a worker to the jobsite. How did the labor-- if I would to [inaudible] ads in the newspaper, will I [inaudible] jobsite.

JUSTICE: What if you go pick up a group of day laborers in some camp that you put the guys out there and you go to some building project, you said, "I got fifty, you want ten." He takes ten, he pays

you and/or you get paid, I mean, what controls that, I mean, you're just transporting people.

MR. WHITE : Well, it, it, it back again, there will be no different if, if-- I knew that they needed some [inaudible] and I'll say, "Hey, I knew a job over here, that's got some extra material. I'm going to go over to you if I can buy some [inaudible] and bring it to your job and sell it to you." You know, I'm providing materials to the job, I'm providing labor to the job. If I'm the one that's legally obligated for the materials I provided or for the labor I provided, then I'm the one that they should rely upon. And, and that's what the, the Sielin case out of California says, "Is that we're looking at the legal relationship between the employer and the workers." Then they have the legal responsibilities of an employer and in this case they do. We're paying repairmen, we're paying the [inaudible] we're paying the procedure, we're paying-- we're processing them, we're making sure they get there [inaudible]. We're, we're taking [inaudible], we're turning [inaudible] to us and, and we're, we're keeping their time, we're running their time, we're tracking their overtime. And in this particular case, there was evidence that once these was that Mr. Gonzales was terminated. A bunch of those workers, we stop their other jobs. Mr. Gonzales then can say, "I don't want these guys on my job anymore." But he can't fire them, that's our employee, that's our employee.

JUSTICE: All the workers here were paid, is it correct?

MR. WHITE: All the workers here were paid, Judge. You know, essentially, our inventory is [inaudible] and we do it with, with construction people, we do it with nurses, we have a roster of nurses. Hospitals call up to say, "Send us some nurses." We're, we're bargaining out people just like other people in this industry, bargaining out materials.

JUSTICE: However, in this case, you disclaim responsibility for the quality of the work unlike an employer.

MR. WHITE: Well, we have to disclaim responsibility for the quality of the work and, and -

JUSTICE: Of the worker?

MR. WHITE: - of the worker if, if, if our contract with, with our product says, "And if they're dissatisfied with the worker with, you know, they send them back within two hours and they get no charge whatsoever." If, if we're sending people out that are not suitable, you don't have to keep them, just like if I deliver a load of lumber, that's-- that you want number two then I sent you number four, you can reject delivery of the goods. But once you take that lumber, if you then put it into the the job and you don't like the way it got built into the job, I can't be responsible for what your people did with my lumber just like I can't be responsible for how your supervisors directed the work of my workforce. So I'm responsible for the qualifications and the, and the capabilities of the, of the persons hired for those job. But, but, but I'm not the one who's just like and, and we've run into this-- one of the cases that just come out, the St. Joseph Hospital versus Wolf. The Hospital made an employment with the surgeon, but they can't tell him how to do the surgery, they can't direct the details of his work in that regard. They can't direct when he shift the [inaudible] it isn't. And these types of things and the court has said, "Well, you know, just because he's the borrowed surgeon, just because he's an employee for personnel purposes doesn't mean that, that the borrowed sort of doctrine would apply and, and [inaudible] before recognized that distinction which [inaudible] your

Honor decided." The, the workers once they are there and they're under the control of the client, they're then, then we can't be responsible for how their work is performed.

JUSTICE: So you're both like an employer and unlike an employer?

MR. WHITE: In certain respects not in terms of the-- and, and, and I think the Court's aware that the Department of Labor has one definition of employment. The ERISA has another definition of employment, Texas Workforce has another definition of employment, Guard Service has another definition of employment and you or may not be an employer under any one of those various definitions. In this case, but for the definition of a borrowed service, we will need the employer to test in every other fashion. The ERISA is doing this as the employer, Workforce is looking at that as an employer. We're providing them their own employment [inaudible]. Department of Labor's going to look at this as an employer, if they don't meet their time [inaudible] we're the ones who're going to have to go down and deal with [inaudible] vision. And the only [inaudible] that we're not [inaudible] remarkably, the Social Security contract that says, the only factor that don't matter is whether we control the details of their work. Which is-- which has no basis in any of the jurisprudence that exist whatsoever. And certainly, it isn't within the definition of the Property-- the statement of the Property Code and where that is opt to hear, then once again, how would you transfer that over to materials. If you said that "What was critical was controlling the details of the work to have a lien assigned for an employer, then how would you comfortably make the same transition for the provider of the materials because the statute treats them equal." For the statute makes no distinction between provider of labor and providers of labor and providers of materials.

JUSTICE: What do you-- part of counsel's declaration on your part. But what do you think cause the trial judge to, to rule that you simply provided financing and had-- didn't really provide employees?

MR. WHITE: The argument that was made at trial and it's in some of the briefing at the Court of Appeals was that implicitly the Property Code as derived from the Constitution, all it was intended to include providers of labor or materials that are in the construction industry. Basically, unless you are counted as an industry player, it was not contemplated that you could have these rights. And I think the trial judge simply accepted that argument and because you know, the next business is not construction. It's sort of what we do, we provide the labor and, and you know, we argue that that's not what the Property Code says, "But, but that was not simply what the court was-- my opinion that's what [inaudible]." Briefly, on, on the hand-out that we were given from the petitioner [inaudible] also one of the things I thought may have concerned the Court in granting the petition in this case was to see how we thought we have suggested the Appellate Court of Appeals is that-- would harmonize with other, with other states. I, I know how significant that would be so I handed out a chart this morning where I listed the case that was either in the, in the first of the brief and basically with the exception of, of, of one or two which are easily [inaudible] I mean, further the lien claims are allowed, dovetails exactly with whether or not it's a professional employer organization. The, the exceptions are, are the skills that [inaudible] Colorado which has a statutory definition that does not include what the Texas statutory definition does and the Onsite case and then in that case, they basically held that the, the providers of labor did not have the kind of contract that were required by the statute. There [inaudible] be the state from every [inaudible] contract with a

subcontractor. But also in my chart I have the new case, the Hanz's case that's earlier of this year, that-- also which held that a traditional labor provided like Advance'd didn't have a lien right in that, in that Hanz's opinion. With regard to the hand-out that we've got from the petitioner this morning, I just want to clarify that I was able to think under-- on the backside under factor six. I made a reference to pa-- or the record-- reporter's record volume 4, pages 28 to 30, and the implication from the hand-out is that that testimony is about this particular job but the testimony on pages 28 to 30 was about another construction job for another contractor. It was not about Mr. Gonzales here, also, there's a reference to page-- let's see-- 43, I think it's on-- okay, under, under statutes 3 and 4, it says, "There's no evidence that Advance'd made any affirmative representation of the workers." And it was our employer whose evidence in the record that the employees [inaudible] found that the [inaudible] Advance'd that they turned them [inaudible] to Advance'd in order to be paid. And I-- there was also another [inaudible] about this on the reference to-- let's see-- it says, "Under the fact on that factor six" which says "when the company said, 'the Temporaries back to us.'" That was the end of that. But also with the reference to different construction job, that I said earlier, "The evidence with regard to Gonzales was that once he fired from the job, some of these employees went to work for the contractor that replaced him, bringing up questions that I would have to say [inaudible] workers then sales if they keep the moment to replace the sub." And also that there are other workers that did go to work on other construction project that it had developed [inaudible] within the time. The testimony about the, the Frontier case which is referenced here was basically that when that was terminated, there wasn't any other construction work to send the people to-- at that, at that time, so they don't want to put to get to the wrong impression from what was put in [inaudible]. I think that [inaudible] my, my part, if there's any other questions, I would be happy to address them. It was indicated and supposedly [inaudible] visit with you all and then I look forward to, to [inaudible]

JUSTICE: We'll [inaudible] them. Was it worth the 21-year of wait?

MR. WHITE: Sir?

JUSTICE: Was it worth the 21-year of wait?

MR. WHITE: Yeah. The first time I went to the Fifth Circuit and they started asking questions based upon that saying, "Counsel what's this case about?" It was such a relief to just to get in and talk to people that we're prepared and so you know it's all-- I always love [inaudible] argument because it's fun and [inaudible] and I enjoyed that eventually, as of if she could find [inaudible] absolutely, Sir. I mean that was-- be thrilled to do it again.

JUSTICE: Thank you.

MR. WHITE: Thank you.

REBUTTAL ARGUMENT OF H. VICTOR THOMAS ON BEHALF OF PETITIONER

MR. THOMAS: You have a person who like to go through what he ask, why do you think the trial court made, made, made a specific finding that Advance'd could not from its laborer and that, that-- let me tell you why the trial court made that finding. I think it looked at substantial evidence in this record that basically all the recruiting

and hiring decisions and in fact, Gonzales actually set the employees wages. All Advance'd did was just act on the circle, the [inaudible] circle. They-- the, the only way that Advance'd actually had the employer in this case was that it did, it did some recruiting, it did the payroll and then some of them human resources. So but all the important things that this Court has recognized, it's important for whether someone's an employer especially, in the area of court liability and the area of contractual liability, is control and supervision, is the employer involved in disciplining the workers, is it involved in training the employees. There's another evidence in this case that Advance'd did any of these and also there's, there's proof-- the Court needs to clarify the sixth factor which is whether the temporary worker will [inaudible] the employment of the agency. Surely, they may have a contract or record signing to other jobs but the Court needs to go deeper to find out where do that actually continue the new employment of the agency. In this case, it was real clear that Advance'd didn't have any significant statutory and when the job ended, they-- basically the Advance'd person testified that was the end of that, there was a new job. And in fact it was demonstrated several of these Advance'd employees immediately went to work with the subcontractor that took over for Gonzales so I would say after he was fired.

JUSTICE: How do you -

MR. THOMAS: Well, ...

JUSTICE: - how do you treat the argument that wish to treat employees in this situation the same way you treat materials, as long as they're furnished to the job site and the form of the work is the same as he, he provided the, the wood or the door for the job site.

MR. THOMAS: Well, in that case clearly if the--if their materials is being used to improve a job site in particular, you ought to be entitled to a lien but if you're not actually furnishing labor employing the person that's providing the labor, you're just-- and you're just providing financing services and providing human resources services you ought-- you shouldn't be entitled to a lien. You ought to assume the full legal responsibilities that a, a subcontractor would assume in this situation. But now, I now understand your question and concern, we don't want to interpret this question, the statute in a way that leaves the workers that are retreated by the temporary employment agency out to pull or cancel the lien. Well, what I think the seven-factor test does if properly applied, what it does is it identifies who the true employer of the worker that's out there that's doing the test. And when properly applied to this case if there's a [inaudible] clear that the employer in this case was Gonzales, the contractor, not Advance'd Temporaries because let's assume in this case the worker haven't been paid, you know, they would be an employee of Gonzales who had a contract with the contractor. And they would be entitled to mechanic's lien in this case. So I see my time's expired, if the Court have any additional questions.

JUSTICE: No further questions. Thank you, Counsel. The cause is submitted and the Court will take a brief recess. [inaudible]

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