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No. 05-0558

In the
Supreme Court of Texas

RELiance NATIONAL INDEMNITY COMPANY, L&T, J.V. AND
LAMAR CONSTRUCTION, INC.,

Petitioner[s]

VS.

ADVANCE'D TEMPORARIES, INC.,

Respondent.

On Review from the Thirteenth Court of Appeals at Corpus Christi, Texas
No. 13-01-00821-CV

AMICUS BRIEF ON BEHALF OF THE TEXAS BUILDING BRANCH
OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
AS WELL AS THE HOUSTON, TEXAS CHAPTER OF
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
IN SUPPORT OF APPELLEES' PETITION FOR REVIEW

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IDENTITY OF THE AMICUS CURIAE PARTY

This *Amicus Brief* is filed on behalf of the Texas Building Branch of the Associated General Contractors of America as well as the Houston Chapter of the Associated General Contractors of America (collectively "AGC") The Texas Building Branch of the Associated General Contractors of America is a statewide, non-profit trade association comprised of thousands of individual firms involved in the general contracting business throughout the State of Texas. The Houston Chapter of AGC is one of twelve Texas chapters throughout the State which itself has over 1,000 members consisting of general contractors, subcontractors, suppliers and service firms who work in and around the Texas Gulf Coast area. AGC regularly participates in legal and legislative matters deemed critical to the construction industry in Texas.

AGC is closely involved in matters of importance to the construction industry and its members. Because its membership includes general contractors, subcontractors of various levels and disciplines as well as material suppliers, its interest is broad and encompasses all issues affecting the construction industry.

The principal issue in this case is of vital importance to the construction industry and warrants the interest and involvement of AGC. The impact of the Court of Appeals' opinion, if not overturned, will be extremely detrimental to the construction industry generally.

All fees for preparing this Amicus Brief will be paid by the Texas Building Branch of the Associated General Contractors and/or the Associated General Contractors of Texas, Houston Chapter, and not by any parties to this appeal.

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STATUTES:

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ABBREVIATIONS

1. Appellant Advance'd Temporaries, Inc. will be referred to as "Advance'd."
2. Appellee Cesar Gonzalez, individually & d/b/a Gonzalez Construction will be referred to as "Gonzalez."
3. The Texas Building Branch of the Associated General Contractors of America and the Houston Chapter of the Associated General Contractors of America will be referred to as "AGC."
4. The Clerk's Record shall be "CR".
5. The Court Reporter's Record shall be "RR".

ISSUES PRESENTED FOR REVIEW

Chapter 53 of the Texas Property Code defines the rights and remedies afforded to persons and companies against property owners by virtue of mechanic's lien rights. Specifically, §53.021 of the Texas Property Code states that "A person has a lien if the person . . . **furnishes labor . . . for construction or repair . . . under or by virtue of a contract with the owner . . . contractor, or subcontractor . . .**". §53.023(1) provides that lien rights are available to secure payment for labor done for construction or repair and, pursuant to §53.051, are subject to perfection as detailed in various provision of Subchapter C of Chapter 53 and are enforceable only to the extent they are properly perfected.

The court of appeals ruled that Advance'd furnished labor for construction as that term is defined within the meaning of §53.021 based upon a newly established seven (7) factor test it articulated. The court of appeals erred in its decision by failing to properly apply the seven (7) factor test it adopted and also failed to take into account other determinative factors which should have been included in its criteria for entitlement to mechanic's lien rights.

ISSUE 1:

The court of appeals erred in finding that Advance'd, "furnished labor for construction", as that term is defined by §53.021, and was therefore entitled to a mechanic's lien, even though it is unquestioned that it did not establish all of the factors pronounced by the court as determinative of who has lien rights.

ISSUE 2:

The court of appeals failed to provide any guidance or instruction as to how the seven (7) factor test it articulated should be interpreted and applied.

SUMMARY OF ARGUMENT

The court of appeals ruled that Advance'd, a temporary employee leasing company, had "furnished labor under a contract with a subcontractor" on a construction project in Texas. In so finding, the court set out a seven (7) factor criteria upon which it relied, which seven (7) factors were derived from opinions of courts of other jurisdictions. These seven factors represent "new law" in Texas and their utilization in this State and proper interpretation is a matter of great importance to the construction community.

AGC believes that Advance'd, under the facts of this case, did not "furnish labor under a contract with a subcontractor" and would argue that, by improperly applying the seven factor test, it was clearly error for the court of appeals to find that Advance'd did so.

Although the court of appeals did establish a seven factor criteria upon which the decision of whether or not a party has mechanic's lien rights is to be made, it went on to ignore most of those factors and failed to explain the proper use and interpretation of the newly created legal standard.

Without clarification by this Court, the decision below will lead to inconsistent results in subsequent cases involving this issue and will create uncertainty and hardship for those companies working in the construction industry in Texas.

ARGUMENT AND AUTHORITIES

In a case of "first impression", the court of appeals ruled that Advance'd was entitled to a mechanic's lien by virtue of it having "furnished labor for construction under

a contract” within the meaning of §53.021 of the Texas Property Code. On behalf of the AGC, this Amicus Brief is filed in support of Appellees’ Petition for Review to the Supreme Court. AGC would argue that Advance'd did not "furnish labor for construction under a contract" as contemplated by §53.021 and therefore does not have the lien rights afforded by the statute.

The purpose of the mechanic’s lien statute is to afford protection to those persons and entities directly involved in the performance of construction activities undertaken pursuant to a contract with the owner, a contractor or a subcontractor (i.e., contractors, subcontractors, materialmen, laborers and those who furnish labor or materials for construction or repair of a construction project) in order that they can have a means of security for the payment for the value of labor done or material furnished for the construction or repair.¹ Protection is afforded to those persons or companies who actually perform work or furnish labor or materials on the construction project as opposed to those persons or companies who merely supply credit or advance funds to pay for the actual performance of work or provision of labor or materials.² This distinction is critical in this case. Advance'd admittedly performed no actual “work” on the construction project. To the contrary, Advance'd's principal function was to be a lender to Gonzalez, the party that was the actual performing subcontractor. (3 RR 113). Specifically, the record shows that Advance'd referred individuals to Gonzales to be considered for hire by Gonzalez for the prosecution of Gonzales’s subcontract work;

¹ *Page v. Structural Wood Components*, 102 S.W.3d 720, 732 (Tex. 2003).

² *West v. First Baptist Church of Taft, et al.*, 71 S.W.2d 1090 (Tex. 1934).

several of those individuals were previously employees of Gonzalez. (4 RR 33-34). The final decision to actually hire an individual was left exclusively to Gonzales, as was the classification of the employee as laborer, carpenter, supervisor, etc. (3 RR 44-45). All training, supervision and direction of employees on the job site as well as pay scale decisions of the individuals was also the sole responsibility of Gonzalez. (4 RR 41). Most significantly, in the opinion of AGC, Advance'd had no authority to and did not direct, control, or take responsibility for the work of the individuals it referred to Gonzalez. (3 RR 81-82). To the contrary, Advance'd expressly disavowed any responsibility for damages or improper work of the individuals it referred to Gonzales.

Advance'd did not furnish labor for construction or repair as is contemplated by Sec. 53.021(a) of the Texas Property Code and as commonly understood within the construction industry because it did not contract to perform any specific portion of the work. Rather, Advance'd screened prospective employees of Gonzalez and provided Gonzalez with the financial means to pay the payroll costs for the employees used by Gonzalez and, incidental to that, it supplied and performed certain administrative functions (payroll tax reports, withholding forms, provision of insurance, verifying legal residency documentation, and advancing the payroll expenses) for the individuals referred to Gonzalez. The real purpose served by Advance'd was to provide financing of payroll, insurance and administrative services to Gonzalez; it did not furnish a labor force for the construction or repair of a construction project.

To contrast what would constitute furnishing labor for construction of a building in Texas under or by virtue of a contract with the owner, contractor or subcontractor, one

needs to only look at labor (only) subcontract. By this arrangement, often used by construction firms, a person or entity contracts to provide a labor force whose responsibility is to perform the labor functions related to a contract with the owner, contractor or subcontractor. The labor subcontractor is responsible for paying its employees and providing whatever administrative functions and insurance benefits as are required by their contract. Most importantly, the labor subcontractor is contractually responsible for the quality of the work of its employees. If, as in the Advance'd case, there are allegations of deficient or defective work by the employees, the labor subcontractor is responsible for those deficiencies, even to the extent that its right to be paid (and therefore its right to assert a lien) is, in whole or in part, reduced.

While the mechanic's lien statutes of this State are to be liberally construed³, AGC would argue that this liberal construction of the statutes does not extend to companies such as Advance'd who do not bear any of the traditional risks associated with the construction process. Mechanic's lien rights are a powerful right conferred by statute on those parties who share the risks associated with the construction process and those rights do not extend to parties who merely assume a credit risk for funds advanced. This Court long ago established that providing money or credit to enable a subcontractor to furnish labor or supply materials to a construction project does not confer lien rights on the provider.⁴ To separate, as the court of appeals did here, the right to enforce mechanic's lien rights from the risk of performance on the construction project is both unfair and

³ *Id* at 723, n. 3.

⁴ *West v. First Baptist Church of Taft*, 71 S.W.2d 1090 (Tex. 1934).

unwise. It is only those companies who legitimately meet the purpose and intent of the statute and who have lien rights in the first place who are thereafter entitled to the benefit of a liberal interpretation of the statute.

By way of example, if Gonzalez had directly hired its employees and paid their wages, Gonzalez would have had lien rights under §53.021 for the amount of those wages for which it was not paid by the general contractor, L&T. However if, as here, there were allegations of defective work and/or damage caused by those laborers, L&T (and its surety) would have a contractual defense to the obligation to pay Gonzalez its subcontract payments as well as a right of setoff against monies otherwise owed to Gonzalez.⁵ If it were ultimately determined that defective work and/or damage was, in fact, caused by Gonzalez and the damages were for an amount equal to or greater than the subcontract payment otherwise due from L&T, then Gonzalez would not be owed any money pursuant to its subcontract and therefore would have no debt against which its mechanic's lien rights would apply. Under this traditional scenario, the subcontractor responsible for performing the work (Gonzalez) remains responsible to the party for whom it was working (L&T).

If there are backcharges, offsets or deductions to the monies owed to Gonzalez by L&T, L&T can set off legitimate deductions and thereby reduce its liability to Gonzalez and commensurately reduce Gonzalez's lien claim. In this way, Gonzalez remains financially responsible for the work of its employees. Contrariwise, under the ruling of the court of appeals, because it has no contract with the temporary agency, L&T has no

⁵ *Morgan v. Singley*, 560 S.W.2d 746 (Tex. Civ. App.--Texarkana 1978, no writ).

contractual defenses against the temporary agency for damages caused or offsets available to it against Gonzalez. Since, in this case, Gonzalez was unable to respond in damages to L&T for the poor performance of its workers (it was terminated from this job due to poor performance of its workforce and thereafter became insolvent), L&T was left with no recourse. (LX 67-68). L&T was faced with the reality of having paid its subcontractor, Gonzalez, for work Gonzalez performed and thereafter having to deal with a lien claim from a party with whom it had no contract (i.e., Advance'd) and thus no contract defenses or contractual right of offset. L&T, in this scenario, has unwittingly assumed the risk of poor performance by Gonzalez and essentially guaranteed the wages paid by the temporary agency. Advance'd is in precisely the position a lender would be in, i.e. it is owed money for payroll costs it advanced but is not responsible for the acts or omissions of the employees. AGC would argue that such a result is not intended by the statute and it is exactly contrary to the intent and holding of this Court in the *West* case.⁶ All this result is particularly unfair given that L&T had no way of knowing that Gonzalez's workforce was made of Advance'd "employees", rather than Gonzalez employees.

From this example, which is based on the facts of the instant appeal, it is easy to see how a party could use the mechanic's lien statute as a sword rather than a shield. Instead of §53.021 being used to provide a means for a party to be paid for furnishing labor after it assumed the responsibility of performing its contract, the interpretation rendered by the court of appeals provides a clear means by which a party could avoid

⁶ *West v. First Baptist Church of Taft*, 71 S.W.2d 1090 (Tex. 1934).

liability for the acts and omissions of its workforce and still retain all of the benefits conferred by §§53.021 and 53.023 to collect monies for the payment for labor performed by the leased employees of a third party.

AGC would strongly argue that such a result is both unintended by the statute and extremely detrimental to the delicate matrix of risk allocation upon which the construction industry is based.

In the instant case, Advance'd did not participate in the construction project as did other subcontractors and materialmen. It was really a lender to Gonzalez. Its sole risk was one of repayment by Gonzalez and, under the court of appeals decisions, that risk was basically guaranteed by L&T due to the lien rights it was found to have. It did not assume the risks associated with performing work on the construction project and it did not supervise or direct the workforce. In fact, Advance'd has expressly denied any responsibility for damages caused by the individuals it referred to Gonzalez who actually performed the labor work on the job. Based on this fact alone, Advance'd cannot be considered to have "furnished labor for construction under a contract" as contemplated within the meaning of §53.021. Advance'd merely recruited some individuals, referred them to Gonzalez, provided funding to the employees for wages and benefits, and performed non-construction related administrative functions without assuming those traditional risks normally associated with construction projects. (4 RR 33-34). Truly, Advance'd served as a *de facto* lender to Gonzalez, not as a party which furnished labor for construction under a contract.

Other jurisdictions have addressed these issues and ruled that companies such as Advance'd have no lien rights. For example, the New York Court of Appeals, in *Tri State Employment Services*,⁷ ruled “In cases involving statutory and private bond claims, courts have further suggested that proper claimants be limited to individuals who engage in physical labor at the job site, thereby implicitly excluding most administrative services provided to the contractor.”⁸ The New York Court correctly concluded that the employment agency’s primary role as a provider of administrative services and a payroll financier gives rise to a presumption that the agency does not provide labor as contemplated by the statute.⁹ The Court went on to conclude that this issue is essentially a fact driven question that the temporary agency must rebut with evidence demonstrating that it provided something more than merely administrative functions; the employment agency should be required to demonstrate that it actually participated in the construction process in order to be entitled to the protections afforded by lien rights as is contemplated by the mechanic’s lien statute.

The court of appeals adopted a seven (7) factor test to determine whether a temporary employment agency is afforded lien rights under Chapter 53 of the Texas Property Code. Those factors include: (1) The temporary agency’s involvement in selecting and screening the workers for hire, (2) use by the agency of its own criteria for hiring workers, (3) affirmative representation by the agency to the workers that it is their

⁷ *Tri-State Employment Services, Inc. v. Mountbatten Surety Company, Inc.*, 99 N.Y.2d 476, 788 N.E.2d 1023, 758 N.Y.S.2d 595 (2003)

⁸ *Id* at 484, *See Also United States for Use & Benefit of Olson v. W.H. Cates Const. Co., Inc.*, 972 F.2d 987 (8th Cir. 1992); *Walsh v. International Fid. Ins. Co.*, 55 Misc.2d 565, 285 N.Y.S.2d 327 (Civ.Ct. 1967).

⁹ *Id* at 486.

employer, (4) nature of documentation exchanges between the workers and the agency at the start of the working relationship, (5) agency's involvement in training, supervising, and disciplining the workers and otherwise retaining control over the workers or directing their behavior, (6) whether the agency rather than the contractor determined which workers could be terminated, and (7) whether the agency withheld workers rather than services on nonpayment by the contractor. While all of these factors are clearly relevant to the determination of whether a party has the benefit of statutory lien rights, AGC believes that the one factor which must always be present and should be given the greatest weight in making such a determination is number 5. Implicit in a finding that factor number 5 exists is the conclusion that the agency is legally responsible for the acts and omissions of its employees in connection with their work on the construction project.¹⁰ A critical distinction must be made between the obligation to pay wages and benefits to persons referred to a third party to perform labor activities on a construction project as opposed to being responsible for their activities and work on the actual construction project.¹¹

The determination of whether or not a party is entitled to the benefit of lien rights is a fact determination.¹² This Court should provide guidance as to whether one or all or some other number of the factors must be found to exist as well as what weight should be given to the specific factors listed above in order for a fact finder to conclude that a particular party is entitled to lien rights. Failure to provide guidance on the proper

¹⁰ *St. Joseph Hospital v. Wolff*, 64 S.W.3d 513 (Tex. 2003).

¹¹ *AMS Construction Co., Inc. v. Warm Springs Rehab Found, Inc.*, 94 S.W.3d 152 (Tex. App.--Corpus Christi 2002, pet. dismissed).

¹² *Id.* at 152.

interpretation and application of the criteria will inevitably and certainly lead to widely inconsistent decisions by the trial and appellate courts of the State. This is particularly true where, as here, the statement of the criteria is "new law" in Texas.

Furthermore, under the facts of the instant case, the individuals referred to Gonzalez by Advance'd were the borrowed servants of Gonzalez.¹³ Gonzales hired, classified, directed the work activities, set the wages, and was responsible for the work of the employees of Advance'd. (3 RR 42, 44-45; 4 RR 32-33, 47, 129-130). Advance'd had no right of control over its employees working for Gonzalez. (3 RR 81-82). As such, the right of control again becomes paramount to the argument against allowing a temporary employment agency lien rights. Advance'd had no control over the workers it referred to Gonzalez, therefore, the individuals were actually Gonzalez's employees, each being a borrowed servant for whom Gonzalez was responsible. Thus, in the truest sense, the labor furnished for construction was provided by Gonzalez, not Advance'd.

The courts of other jurisdictions have ruled that temporary or leasing agencies, such as Advance'd, do not have lien rights. See; *Better Financial Solutions, Inc. v. Transtech Electric, Inc.*, 112 Wash.App. 697, 51 P.3d 108 (2002); *Jean Simpson Personnel Services v. G&G Concrete, LLC, et. al.*, 803 So.2d 992 (La.App. 2nd Cir. 2001); *Onsite Engineering & Management, Inc., d/b/a Onsite Environmental Staffing, a Maryland Corporation v. Illinois Tool Works, Inc., et al.*, 399 Ill.App.3d 362, 744 N.E.2d 928, 253 Ill.Dec. 195 (2001); *Skillstaff of Colorado, Inc. v. Centex Real Estate*

¹³ *St. Joseph Hospital v. Wolff*, 64 S.W.3d 513, 540-544 (Tex. 2003)

Corp., 973 P.2d 674 (Colo.App. 1998); *Tri-State Empl. Services, Inc. v. Mountbatten Surety Co. Inc.*, 99 N.Y.2d 476 (2003).

CONCLUSION

This Court should follow the direction of courts in other jurisdictions and rule that temporary agencies, staffing companies, employee leasing companies and others which merely hire and provide administrative support and payroll credit for construction companies are presumed not to have any lien rights and, to overcome that presumption, they bear the burden to show the existence of each of the seven factors described herein.

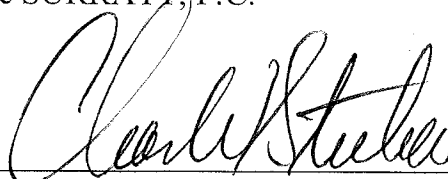
A review of the court of appeals' opinion clearly shows not all of the seven factors were present. What is not clear is exactly how the court of appeals arrived at the conclusion it did. AGC would argue that a showing of all seven factors should be a prerequisite to a finding that a company has lien claim rights. If anything less than a showing of all seven factors is sufficient, this Court should explain what will satisfy the requirement and provide specific guidance for future application of the criteria. In such case, AGC would argue that factor number five, specifically the factor relating to supervision and retaining control over the workers, should be found to be an essential element of proof in these type of cases.

Acceptance of this Petition for Review is appropriate where issues of law have such a direct and important impact on an industry and to prevent future conflicts and inconsistencies in future opinions of the courts of this State. Without clarification, parties to a construction project will not have any way to be assured that a subcontractor will be held accountable for the work of its employees. The Supreme Court should clarify and

provide interpretative instruction for the multi-factor test established by the court of appeals used for the determination of lien rights of temporary employment agencies.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Charles W. Stuber", written over a horizontal line.

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CERTIFICATE OF FILING AND SERVICE

On September 8, 2005, the original and eleven copies of this Amicus Brief were sent to the Clerk of the Texas Supreme Court via overnight courier to:

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Also, a true and correct copy of the foregoing Amicus Brief on behalf of the Texas Building Branch of the Associated General Contractors of America and the Houston Division of the Associated General Contractors of America in Support of Appellees' Petition for Review has been sent by first class, U.S. Mail to the following counsel of record on this 8th day of September, 2005.

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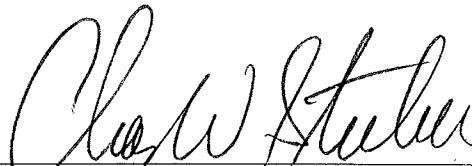
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