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Supreme Court of Texas.
Dealers Electrical Supply Co., Petitioner,
v.
Scoggins Construction Company, Inc. and Bill R. Scoggins, Respondents.
No. 08-0272.

February 3, 2009.

Appearances:
Ben L. Aderholt, Looper Reed & McGraw, P.C., Houston, TX, for petitioner.
J. Brett Busby, Bracewell & Giuliani LLP, Houston, TX, for amicus curiae, The American Subcontractors Association, Inc., for petitioner.
William Kimball, Law Offices of William F. Kimball, Harlingen, Texas, for respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0272, Dealers Electric Supply v. Scoggins Construction Company.
MARSHALL: May it please the Court, Mr. Aderholt will present argument for the Petitioner. Mr. Busby will present argument for the Amici. Mr. Aderholt will open with the first 10 minutes. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF BEN L. ADERHOLT ON BEHALF OF THE PETITIONER

ATTORNEY BEN L. ADERHOLT: May it please the Court, I hope you have the timeline that I submitted yesterday, which I think will aid this Court in understanding the flow of the cash and the facts in this, in this construction case. I'm pleased to represent the supply house, that is the company that supplied the electrical parts that went into this elementary school.
MALE: Do we know they all went in?
ATTORNEY BEN L. ADERHOLT: Yes, sir, we do and the proof of that is on April 30th, which is in the center of your timeline, the electrical supply project manager, the salesman, the architects, the representative of the owner, all made the traditional walk-through of the project to see if everything was right, turn on the lights, go

through the kitchen, go through the office and the walk-through showed that everything was there and on and working and the next day, the general contractor, under oath, submitted a pay application 14 certifying the job was substantially complete and that the electrical was substantially complete. Not only did the GCs tell the owner that in order to get that next draw, the architect certified on that pay application that it was substantially complete. So this idea that the electrical subcontractor had absconded with materials is just false.

JUSTICE HARRIET O'NEILL: Well the trial court made a specific finding didn't she that all of the materials had been incorporated on to the project?

ATTORNEY BEN L. ADERHOLT: They did and here you have the prime contract started in February 1st, '01 and it went for a year. The last pay application from the electrical subcontractor was in February, '02. They had been working this project for a year and then they did the walk-through because they were trying to finish this job in June and the Dealers was, in the meantime, supplying these last bit of materials and it's those materials that were not paid after notice to the general contractor to pay these funds out.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, I'm sorry, go ahead.

JUSTICE HARRIET O'NEILL: One of the things I was a little bit confused about was the discrepancy between that finding of fact and the language in the Court of Appeals about materials being missing. Was that finding of fact challenged?

ATTORNEY BEN L. ADERHOLT: I don't believe that it was. The general contractor here made no requested, you're talking at the trial court level?

JUSTICE HARRIET O'NEILL: Yes.

ATTORNEY BEN L. ADERHOLT: The general contractor made no request of findings of fact or conclusions of law. It was a bare request, just a letter please do it, which submitted no issues, submitted no findings, proposed findings for the trial court to bring it to the notice to the trial court to find on their affirmity of defenses or any of the other defenses.

JUSTICE HARRIET O'NEILL: So I guess my question is is there anything that would prevent us from being bound to the trial court's findings of facts and not getting into whether materials were absconded or anything like that?

ATTORNEY BEN L. ADERHOLT: I think this Court is bound by the trial court's findings because they were never challenged and the facts are conclusive here as to what transpired. I think that the basis for the trust fund doctrine is exemplified by this. Here you have an electrical subcontractor who in February of '02 submits its 12th pay application and 65,000 of the 88,000 is not paid. That's what happened in February, '02. Then April, March, May, the subcontractor gets nothing. Now what's to keep, what's to keep an electrician on a job if you don't pay them for three months. These people are day or month-to-month, they live hand and mouth and that's why the electrical subcontractor did not do the punch list, hadn't been paid.

CHIEF JUSTICE WALLACE B. JEFFERSON: And just in general and you're, Mr. Aderholt, an expert on these contract claims and I'm sure your opposing Counsel is as well, but the Respondent says that in these sorts of cases, the general contractor waits the McGregor Act's 90 days and at that point should feel comforted that all claims have been submitted, all outstanding materials accounted for and they can safely pay the subcontractors and not worry about a claim coming four years later and I'm not talking about this case in particular, but just in

whether the McGregor Act is the exclusive remedy or not for these sorts of claims. Now is that, is there a danger in letting subs go through either the Trust Fund Act or the McGregor Act in having these stale claims?

ATTORNEY BEN L. ADERHOLT: Your Honor, I've done this for 20 years. I've never heard of this fictional exclusivity rule.

CHIEF JUSTICE WALLACE B. JEFFERSON: But I'm asking about the danger that they, that they're saying in general under the McGregor Act, the general believes after 90 days and the claims period has expired that they can conclude matters, pay everyone off and walk away and not worry about a claim coming four years down the road. Does this, does your approach expose that threat, that possibility?

ATTORNEY BEN L. ADERHOLT: No because there's not a chance of paying twice.

JUSTICE NATHAN L. HECHT: But that doesn't answer the question. The question is you want to know sooner rather than later that everything's paid.

ATTORNEY BEN L. ADERHOLT: Well, that's the purpose of the McGregor Act notices is what you're talking about. Notice that we haven't been paid is to the surety primarily under the general contractor, but this is primarily on the surety's liability. The surety wants to know that their principal is paying these down. The, the Trust Fund Doctrine is to assure fairness here and it's a retrospective look. In other words, at the end of the project, every contractor knows that the Trust Fund Doctrine holds that if you get paid by the owner and you don't pass those on to the electrical subcontractors and the suppliers, you're liable, if you don't pay those out on direct and actual expenses of the job.

JUSTICE NATHAN L. HECHT: But under your view, is it true that the prime contractor could wait the period for the McGregor Act notice, pay the retainage, pay everything out and wake up four years later and face a Trust Act claim from some supplier that he never realized was out there.

ATTORNEY BEN L. ADERHOLT: Well, they do know they're out there, but yes, I guess theoretically that happens.

JUSTICE NATHAN L. HECHT: How did he know that it was out there?

ATTORNEY BEN L. ADERHOLT: Because the subcontractor always tells the general who their suppliers are in their bid process.

JUSTICE NATHAN L. HECHT: He didn't know that there's a claim that they haven't been paid.

ATTORNEY BEN L. ADERHOLT: Well, but in this case, we did tell them. We didn't get it within the 45 day, it's a tight, it's a tight fuse in Texas to give the surety notice that you haven't been paid, but there's plenty of notice that the materials are being supplied. The general contractor logs these materials in, makes application to the owner for payment. They know it's coming from somewhere and a simple phone call could solve the question to the supply house. They know who the materials come from. We were the sole supplier for this elementary school.

JUSTICE NATHAN L. HECHT: Well, but the same thing is true of the surety. He could make a call too, but the legislature has said in the McGregor Act he doesn't have to after 45 days, right?

ATTORNEY BEN L. ADERHOLT: That's correct, but you have to give, if you're going to sue on the bond, the payment bond, you have to give notice within a very short period of time. Now with this economic downturn, they're cyclical, as we know, that people just simply don't react within 45 days to not being paid. I mean, a lot of general

contractors are holding payments back now and what's the sub supposed to do? These subs don't have a way to give these notices out anyway. They always miss them and so we're always relying on the Trust Fund Act to make sure that the supplier and subs get paid at the end of the job. It is a typical problem that we're faced with that these electrical subs just simply don't have the manpower to give these notices on time.

JUSTICE HARRIET O'NEILL: But before 1987, that's the way this world worked.

ATTORNEY BEN L. ADERHOLT: Not entirely because the receipts were excluded from coverage in the instance of a corporate surety bond. There was still liability under the Trust Fund Act for noncorporate surety bonds. So the.

JUSTICE HARRIET O'NEILL: I thought before there was an exclusivity provision that said the McGregor Act was the exclusive remedy.

ATTORNEY BEN L. ADERHOLT: No, ma'am, the word exclusive is not used anywhere. What it says is that the receipts, that is the construction funds the general contractor receives from the owner is subject to the Trust Fund Act unless there is a corporate surety bond and if there was a noncorporate surety bond, there would still be liability. So the legislature in '87 took that out and said wait, this doesn't make any sense, that we want the Trust Fund Act to apply to everybody. The reason they took the surety out is because the surety doesn't get the construction funds. The surety is liable on their own profit and loss statement. It's the construction funds that we're talking about in the Trust Fund Act. The owners pay the GC, GC pays the sub and suppliers. That's the flow of these trust funds. The surety doesn't get the trust fund, the construction trust fund. So the surety was taken out in '87, 20 years ago, by the legislature and said well we're not going to let you attack the surety. We're going to let you attack the funds that the general contractor received. I see my time is up. Did you have a question?

JUSTICE DALE WAINWRIGHT: Counsel, the bankruptcy opinion that you submitted to us, Summers v. 3D Fabricators, the Judge there writes that it cannot be seriously questioned, that the McGregor Act once provided and exclusive remedy.

ATTORNEY BEN L. ADERHOLT: I know. He said that.

JUSTICE DALE WAINWRIGHT: Justice O'Neill just asked you that and you said no.

ATTORNEY BEN L. ADERHOLT: Judge asked if there is such.

JUSTICE DALE WAINWRIGHT: Do you like the opinion you sent us?

ATTORNEY BEN L. ADERHOLT: I love, loved his opinion. I did, but I've probably had the advantage in looking at this many more times than Judge [inaudible], who's a bankruptcy judge, but he's right on the main issue and whether or not it was exclusive beforehand, I think is irrelevant to this case because we know for 20 years it hasn't been.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

ATTORNEY BEN L. ADERHOLT: Thank you.

ORAL ARGUMENT OF J. BRETT BUSBY ON BEHALF OF THE PETITIONER

J. BRETT BUSBY: May it please the Court, the Court of Appeals held that the exclusive remedy for subcontractors and suppliers of building materials who have not been paid is a statutory claim against a construction bond and that the statute precludes both the common law claim for breach of contract and a statutory claim under the later-enacted construction trust fund statute, but what this Court has held

is that exclusivity is disfavored and is proper only when a statute's expressed terms are necessary implications, purely indicating the legislature's intent to abrogate other remedies. Here, the language of the State Bonding Statute, the McGregor Act, is permissive, not exclusive and Federal Courts interpreting the similar language in the Federal Bonding Statute have held that it does not create an exclusive remedy.

JUSTICE NATHAN L. HECHT: What's the interest of Houston Hispanic Chamber of Commerce?

J. BRETT BUSBY: Your Honor, they have a lot of subcontractors who are members and contacted us and asked to sign on to the second Amicus Brief that we submitted because they were concerned about their members who were subcontractors and small business people not getting paid. As I, the McGregor Act is the State Bonding Statute and what it says is that if a payment bond beneficiary does not receive payment for labor and materials and provides proper notice, it may sue the principal or surety on the payment bond. The Federal Bonding Statute, the Biller Act is similar. It talks about may bring a civil action on the payment bond. That language is not exclusive. May is a permissive term and, in addition, the statute only addresses bringing a suit against the bond, which is not what we have here. The contract and trust fund acts that we have are against, are common law and statutory claims against the general contractor. They are not a suit on the bond. They are not a suit against the surety. The leading federal case that we cite is the US ex rel. Sunworks case from the Tenth Circuit that's at page 7 of our first Amicus Brief and what the reasoning in Sunworks is as follows. That the statutory bond was designed to be an alternative remedy to the statutory lien that you have in most cases because you can't place a lien against a public building. So they needed some sort of other remedy and what the Court said is a lien merely supplements other statutory and common law remedies. There are lots of both State and Federal cases holding that liens are not an exclusive remedy. You can still have a Trust Fund Act claim. You can still have a claim on any sort of a contract and so the Court said a bond is just a substitute for a lien so it should similarly be treated as not exclusive and, thus, a subcontractor or supplier can pursue alternative remedies as long as they don't seek recovery from the bond, which they aren't here. Finally, to Chief Justice Jefferson's question regarding the text here, the purpose of the McGregor Act, if you look at the text of it, is to protect the government entity who's building the project because they're liable, the statute says, if they don't post a bond and also to protect the suppliers and subcontractors who are the beneficiaries of the bond. There's nothing in there about protecting general contractors that fail to pay suppliers. The focus of it is on the surety. The notice deadlines are in there so that the surety will know very quickly if the subcontractors are not getting paid so that it can step in and take over the project if it needs to so they don't walk off the job and the surety can mitigate its losses in that way. But if you don't comply with those notice deadlines, it just destroys the claim against the surety. It doesn't destroy any claim against the general contractor and, Justice O'Neill, to your point, the Trust Fund Act confirms that because prior to '87, there was an exclusion that said the Trust Fund Act doesn't apply when you have a corporate surety who issues a payment bond, but the legislature changed that language and now it only says that the Trust Fund Act is not applicable, I'm sorry. Now it says that there's a, that it's not applicable when there's a corporate surety who issues a payment bond. Formerly, it applied to all receipts under a

contract covered by a payment bond. So the language post '87 focusing on the surety confirms that that's what the legislature intended to be exclusive here. That the only way you can recover against the surety is if you comply with the McGregor Act.

CHIEF JUSTICE WALLACE B. JEFFERSON: A joint checking account arrangement, that's usual and what's its purpose, I mean, what does that do, protect all three parties or?

J. BRETT BUSBY: It is usual, Your Honor, and the purpose of it here was to and this is recited in the Joint Check Agreement itself, Plaintiff's Exhibit 11, is to induce Dealers, the vendor, to extend credit to Diamond, the subcontractor, the general contractor said I agree to make all payments for all materials furnished by the supplier to the project.

CHIEF JUSTICE WALLACE B. JEFFERSON: By joint check?

J. BRETT BUSBY: He agreed to do that by joint check. Yes, Your Honor.

JUSTICE NATHAN L. HECHT: But not, is it usually taken as a guarantee or just a joint check agreement?

J. BRETT BUSBY: Well, the language of this particular one says that he's agreeing to make all payments and to do so by joint check and so the fact that he's agreeing to make all payments means all payments.

JUSTICE NATHAN L. HECHT: What's usual in the industry?

J. BRETT BUSBY: Well, the, I'm not familiar with, with what all of these agreements look like. My understanding is that this is fairly typical language for one of these agreements, but there is evidence in the record here that they did not pay by joint check and that's cited in the Petitioner's Brief and also at Defendant's Exhibit 18, where there are some checks that were not made jointly, so that's the basis of their claim for breach of contract.

JUSTICE NATHAN L. HECHT: No further questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Kimball will present argument for the Respondent.

ORAL ARGUMENT OF WILLIAM KIMBALL ON BEHALF OF THE RESPONDENT

ATTORNEY WILLIAM KIMBALL: May it please the Court, today we're here to talk about the breadth and scope of both the McGregor Act and the Texas Construction Trust Fund Act. It's been our position since the initial appeal with the 13th Court of Appeals that the two Acts in the area of public construction are irreconcilable. You have the 90-day deadline in the McGregor Act that is imposed upon suppliers and subcontractors of subcontractors to give notice of their claim to the general contractor. When you don't give notice to the general contractor, most of these contracts are under strict time deadlines. Most of these contracts have liquidated damage clauses. The general contractor is a money manager nowadays more than he is a builder. They pay and they move on and they keep the project moving. I know that Mr. Scoggins, my client, or his company, right now presently probably has seven schools in in the process of construction and each one of them has a very large liquidated damage clause in it. He has to finish these projects. To have a claims brought after the project is completed, after the school is occupied, after the school district has already gone through the punch list.

JUSTICE HARRIET O'NEILL: Well let me, let me just ask you, not in

this case, but hypothetically, what would be wrong if a claim came up four years later if it wasn't paid and the contractor unlawfully benefitted from not paying because the supplier missed a deadline.

ATTORNEY WILLIAM KIMBALL: Well.

JUSTICE HARRIET O'NEILL: Where, where's the harm?

ATTORNEY WILLIAM KIMBALL: Well, let me. I'll get to the answer to that. The McGregor Act was enacted over 75 years ago to protect people who didn't have direct contracts with the, with the contractor. It was enacted.

JUSTICE HARRIET O'NEILL: And it was enacted to protect whom?

ATTORNEY WILLIAM KIMBALL: It was to protect the suppliers and subcontractors of subcontractors who had no direct link to the general contractor and so.

JUSTICE HARRIET O'NEILL: Wasn't it more designed to protect the owner? Where's the evidence that it was, because I just ask you real quick, on the surety, if the surety has to pay the supplier, the surety can then recoup that from the contractor.

ATTORNEY WILLIAM KIMBALL: Right.

JUSTICE HARRIET O'NEILL: So where is it designed to protect the contractor?

ATTORNEY WILLIAM KIMBALL: Well, the way the surety works is the general contractor pays and only if the general contractor goes belly up does the surety actually come forward and actually have to pay. Every one of the surety bonds read that and so they even, the general contractor even has to pay for defense costs, but in answer to that is that is that the what the legislature did 75 years ago and has this and as this McGregor Act has evolved, we've given a remedy for the people who have no contract whatsoever and if you look at the Spa Glass Case, which was decided by the Austin Court of Appeals in 1994.

JUSTICE HARRIET O'NEILL: But the Trust Fund Act does the same thing.

ATTORNEY WILLIAM KIMBALL: Well, the Trust Fund Act actually refers that under the definitions of misapplication of funds, that the trustee or the general contractor should have incurred the debt. In other words, there should probably be a contract between the supplier and the general contractor if you can hold him as a trustee under that portion of the Texas Trust Fund Act. So if we're going back to the McGregor Act on this, the McGregor Act gives an adequate remedy to people who don't have contracts with the general contractor.

JUSTICE HARRIET O'NEILL: Again, so does the Trust Fund Act.

ATTORNEY WILLIAM KIMBALL: Well, the Trust Fund Act, we don't believe is applicable to public construction because of the fact that the two deadlines that you have the four-year limitations deadline under the Trust Fund Act and you have the 90-day deadline, we call it a limitations period, under the McGregor Act, which is there for a purpose, for a solid purpose, to keep the construction project moving and moving along efficiently and if.

JUSTICE NATHAN L. HECHT: Do you agree that the Miller Act is not exclusive?

ATTORNEY WILLIAM KIMBALL: Pardon me?

JUSTICE NATHAN L. HECHT: Do you agree that the Miller Act is not exclusive, the Federal Act?

ATTORNEY WILLIAM KIMBALL: Yes I do. I do agree and I think there's a.

JUSTICE NATHAN L. HECHT: Why should this one be different?

ATTORNEY WILLIAM KIMBALL: Well, because the cases, every case that was cited by the other side dealt with the Federal Court saying the

Miller Act did not bar state claims. That's different. They're not cases that say that the Miller Act bars Federal claims. I think these claims deal with issues of Federalism.

JUSTICE NATHAN L. HECHT: What Federal claims could there be?

ATTORNEY WILLIAM KIMBALL: Well, Rico, you know, f you're saying there's racketeering here going on. Maybe it could be under a RICO claim, but what I think is significant there is I don't believe that they could have decided any other way because we work under a system of Federalism and under a system of Federalism, the states have their own remedies and the Federal government has their own remedies and in this particular case, as cited in the Barco case, the Fifth Circuit case, they cite the supplemental jurisdiction statute there that says under Congress has passed a supplemental jurisdiction to assert state claims. So I think they're different here. I think if the Federal cases that were cited said we are barring other Federal remedies, they have a good point, but they don't.

JUSTICE NATHAN L. HECHT: If the claim against the general contractor was for breach of contract with the subcontract, not the joint check contract, would that be precluded by the McGregor Act?

ATTORNEY WILLIAM KIMBALL: I don't believe so.

JUSTICE NATHAN L. HECHT: Why not?

ATTORNEY WILLIAM KIMBALL: Because there's a contract. I think there's another cause of action.

JUSTICE NATHAN L. HECHT: Why does the McGregor Act preclude the Trust Fund Act, but not a common law cause of action?

ATTORNEY WILLIAM KIMBALL: Well because that's what the Court of Appeals from Austin said in the Spa Glass case in 1994 and that was a case.

JUSTICE SCOTT A. BRISTER: Give us a better reason than that.

ATTORNEY WILLIAM KIMBALL: Pardon me?

JUSTICE SCOTT A. BRISTER: Give us a better reason than that. We're not usually bound what the Austin court said 15 years ago.

ATTORNEY WILLIAM KIMBALL: Well, I understand.

JUSTICE SCOTT A. BRISTER: So but they're frequently right.

ATTORNEY WILLIAM KIMBALL: Judge, I think if you have a contract, the whole purpose of the McGregor Act back enacted 75 years ago was to protect suppliers and subcontractors of subcontractors who had no contractual relationship with the general contractor. I think if you go back and read the history of it.

JUSTICE NATHAN L. HECHT: Yeah, but if you were a subcontractor with a contract with the general contractor, you'd, if you didn't comply with the McGregor Act, you'd be foregoing your claim against the surety perhaps.

ATTORNEY WILLIAM KIMBALL: Right.

JUSTICE NATHAN L. HECHT: But you could still sue the general contractor if you wanted to.

ATTORNEY WILLIAM KIMBALL: Well I think there's a difference when you have a contract. I really do.

JUSTICE NATHAN L. HECHT: We're trying to find out why.

ATTORNEY WILLIAM KIMBALL: And this may be a personal opinion of mine. It may just be just personal, but I think when you have a contract, you have a contract and that raises the cause of action there. When we're talking.

JUSTICE SCOTT A. BRISTER: The McGregor Act says that you may sue the principal or the surety. Aren't, you're asking us, in fact the Court of Appeals construed it to be you have to [inaudible], you must.

ATTORNEY WILLIAM KIMBALL: Right.

JUSTICE SCOTT A. BRISTER: And that's not what it says.

ATTORNEY WILLIAM KIMBALL: Well, we believe that it is an exclusive remedy and we've argued this before.

JUSTICE SCOTT A. BRISTER: I know, but, you know, I don't know that much about the construction business. It doesn't matter to me how this works out, but I'm looking at the statutes that says you may and a Court of Appeals opinion says you must and those seem inconsistent.

ATTORNEY WILLIAM KIMBALL: Well, again, I think the Court of Appeals relied upon three other prior Court of Appeals decisions on this topic and I think the one that's the most relevant is the Spa Glass case in 1994.

JUSTICE HARRIET O'NEILL: But those prior opinions dealt with a different statute. They were the pre-amended statute and it seems rather telling that once the statute was amended, there was a deliberate effort to remove any sort of exclusivity provision. I mean, if we just start with the '87 Act, it's hard to see that those prior opinions have any relevance.

ATTORNEY WILLIAM KIMBALL: Well, that may be true for the Truckers, Inc., case and the Econoforms case out of Houston, which was decided in 1988, but based its decision on 1987 statute, the pre-amendment statute, but I think when you go and you move over to the Spa Glass case that that was decided in 1994 and in that case, the Austin Court of Appeals specifically stated that the McGregor Act was exclusive and mandatory for any supplier suing a general contractor and so I think there's authorities that go through case law interpretation that would give us support for our interpretation of the statute.

JUSTICE HARRIET O'NEILL: But in Spa Glass, wasn't the supplier going against the bond?

ATTORNEY WILLIAM KIMBALL: No, what happened in that case was that a Commercial Union was insurance company was actually the bonding company for a subcontractor. There were claims made and, in fact, the suppliers in that case did not make the McGregor Act deadlines, but Commercial Union turned around and paid the suppliers of the subcontractor that defaulted. Then what Commercial Union did is filed suit against the general contractor, stepping in the shoes of those suppliers and taking their legal cause after they've already paid and the Court of Appeals said they could not do that without strict compliance of McGregor Act.

JUSTICE HARRIET O'NEILL: Because they were trying to recover on the surety.

ATTORNEY WILLIAM KIMBALL: They were suing under a third-party beneficiary contract and several other common law causes of action and the Austin Court of Appeals said you can't do that.

JUSTICE HARRIET O'NEILL: But again, my point though is they were trying to use common law theories to get at the surety.

ATTORNEY WILLIAM KIMBALL: They were, no, they were trying to sue the general contractor in Spa Glass. That was a suit by Commercial Union against the general contractor. Spa Glass was the general contractor in that case.

JUSTICE PAUL W. GREEN: What about the Joint Check Agreement?

ATTORNEY WILLIAM KIMBALL: Joint Check Agreement, we've maintained through the Court of Appeals in this case that it was just a joint check agreement. In other words, we were not required to pay under the Joint Check Agreement unless we actually owed money to the subcontractor. In this case, the evidence before the trial court and I think it's, I don't think there's any evidence to the contrary, was at the time that we became aware that Dealers Electric had amounts that

were past due, that there was no money owed to the subcontractor, Diamond. In fact, he had walked off the job. We've had to hire another contractor to come in and finish the work and we took, if you break down the evidence that we present at trial, if you break down the amounts that we presented to the trial court, we lost money on the electrical portion of the contract.

JUSTICE SCOTT A. BRISTER: Did you write all the checks jointly?

ATTORNEY WILLIAM KIMBALL: The undisputed evidence in this case is that when Stacey Scoggins, our bookkeeper, testified is that they always paid by joint check. There was no evidence to the contrary. None in the record.

JUSTICE HARRIET O'NEILL: Well let's talk about evidence. On the findings of fact, the trial court found that all the supplies were put, incorporated into the project and aren't we bound by that finding of fact?

ATTORNEY WILLIAM KIMBALL: I believe that the actual evidence, if you go beyond the finding of fact and conclusion of law.

JUSTICE HARRIET O'NEILL: Well, I mean, my whole point is we can't go beyond that finding can we if it wasn't disputed or contested here for it's [inaudible].

ATTORNEY WILLIAM KIMBALL: It was disputed and it was contested and, in fact, I was, it was our side that made the request for the finding of fact and conclusions of law. It was the opposing counsel who drafted it and the judge signed it, but what we, on our points of error presented to the Court of Appeals that have never been addressed is we've always claimed no evidence or insufficient evidence and certainly if there is a ruling by this court to say that the Texas Trust Fund Act does apply to this case, we want those points of error heard and we'd ask for a remand to the Court of Appeals to have these insufficient evidence points heard because we believe there was no evidence to support the findings that we even violated the Texas Trust Fund Act or that we ever breached the Joint Check Agreement. So. What I would like to address though is just shortly is the cases that were cited concerning the Miller Act and that was in Amicus Curiae Briefs. The Varco case does state in it and cites the supplemental jurisdiction statute passed by Congress and I think it's very important in looking at those cases that those cases are saying that state court remedies are still available and that Miller Act is supplemental to the state court remedies against the general contractor. We believe that that was decided simply because this is a Federalism, we have a Federalism system and under our system the Federal courts generally don't interfere with states' rights concerning contracts, concerning construction issues and allows the states to have their own issues. We think it would be a lot different if those cases would have said that the RICO Act is inapplicable because the Miller Act or name some other Federal cause of action that it was barring and so I'd like to stress that in this and when you're comparing the Miller Act cases, I don't think we're looking at the same thing. I think we're looking more at a Federalism issue than we are looking at it being a supplemental remedy similar to the McGregor Act.

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm sure we could find in the Texas statutes many cases where the legislature says this is the exclusive remedy, this Act, you know, is the Alcohol and Beverage Code has something on dram shop, etc. This doesn't have that sort of language. Why wouldn't we simply say without language of exclusivity or it's not exclusive. It's a permissive statute.

ATTORNEY WILLIAM KIMBALL: Well, Judge, you're right. It doesn't

say that in the statute and we feel that the two limitations periods of the two statutes just cannot be reconciled and when you're talking about public construction, we're on deadlines. We're on deadlines to get the school built. There's usually swift and severe penalties if you don't get them built on time and we're dealing with people that don't have any contractual relationship with the suppliers, subcontractors of subcontractors and sometimes three-tier subcontractors going out and we don't know when we paid the people that we were supposed to pay. We were supposed to pay our subcontractor. A lot of times we don't know whether they paid the supplier. We don't know whether they paid their subcontractors.

CHIEF JUSTICE WALLACE B. JEFFERSON: But all of what, in response to my question that you've just said, could be said to a committee in the legislature and say would you please make this exclusive because the, you're harming the general contractor in business.

ATTORNEY WILLIAM KIMBALL: I can't say I disagree with that, but what I'm saying is that we do have a body of case law and I think that there is sound reasoning behind a Spa Glass case to say that this Act is exclusive. I think if you allow the Texas Construction Trust Fund Act to be anointed here, to be involved into public construction cases that's there going to be a flood of litigation [inaudible].

JUSTICE HARRIET O'NEILL: Well, the Court of Appeals went beyond that. The Court of Appeals said if there's a bond even on a private construction project, then the bond is the exclusive remedy. Do you agree with that?

ATTORNEY WILLIAM KIMBALL: I agree with it if the bond is, if there's actually a bond posted.

JUSTICE HARRIET O'NEILL: Well, but I mean you'd agree.

ATTORNEY WILLIAM KIMBALL: That's off the case log going back years.

JUSTICE HARRIET O'NEILL: You'd agree there's no support for that in the Trust Fund Act.

ATTORNEY WILLIAM KIMBALL: No, I don't believe the Trust Fund Act should at all be allowed in public construction.

JUSTICE HARRIET O'NEILL: I'm talking about private construction. The Court of Appeals went beyond and said if there's a bond period.

ATTORNEY WILLIAM KIMBALL: That's a good question. I think that based on the case law I read, if there is a bond that's posted in a private construction matter, then, yes, I think the McGregor Act would be, would be superior to any kind of a.

JUSTICE HARRIET O'NEILL: Wait, wait, but in private contract, the McGregor Act wouldn't apply.

ATTORNEY WILLIAM KIMBALL: Right, right.

JUSTICE HARRIET O'NEILL: Okay, so you got a private, private situation, private project and the Court of Appeals said there's a bond, no Trust Fund Act. Pretty much made that up out of [inaudible].

ATTORNEY WILLIAM KIMBALL: Well, I saw the case law before. There is a line of case law and I can't cite the cases right now about bonds in private construction cases and in that particular case.

JUSTICE HARRIET O'NEILL: But you'd agree, there's nothing in the Trust Fund Act to support that proposition.

ATTORNEY WILLIAM KIMBALL: No.

JUSTICE HARRIET O'NEILL: And that the Court of Appeals appeared to use that same rationale to make the McGregor Act exclusive.

ATTORNEY WILLIAM KIMBALL: Well, I think they relied heavily on Spa Glass case. They quoted Spa Glass about being exclusive remedy once the bonds posted.

JUSTICE HARRIET O'NEILL: Does your case live or die on Spa Glass?

ATTORNEY WILLIAM KIMBALL: It probably lives and dies on this Court's rulings of whether it's going to keep Spa Glass as law. So that's true. Yes.

JUSTICE NATHAN L. HECHT: With respect to exclusivity, is there any difference in the language of the McGregor Act and the Hardiman Act?

ATTORNEY WILLIAM KIMBALL: Not that I know of, no. Not that I know of, but I believe that there is a public, there's a public need here to look at this because I think that what might happen if this Court rules that the Texas Constructive Trust Fund Act is applicable to public school construction that there's going to be a flood of litigation. I believe, I've already received my first demand letter, in fact, someone was saying well your case at Corpus Christi's on review by the Texas Supreme Court so now we're giving you notice that we're going to invoke the Texas Construction Trust Fund Act and so it's already happening and the problem is just the gross unfairness it is to the general contractor who works on very slim margins. I believe in this case, he had a margin of 5%.

JUSTICE SCOTT A. BRISTER: Well but if as you say the evidence is that they spent everything and more, you win the Trust Fund Act case.

ATTORNEY WILLIAM KIMBALL: Right, right. And I believe that's what our evidence in this case shows, but we never got to that issue because the Court of Appeals did rule that the McGregor Act was exclusive and, again, if this Court rules otherwise, we'd like to have those issues heard.

CHIEF JUSTICE WALLACE B. JEFFERSON: But the opponent says there's, I mean a lot of people in this industry, there are no contracts for a reason. Some are illiterate. They're tradesmen.

ATTORNEY WILLIAM KIMBALL: Right.

CHIEF JUSTICE WALLACE B. JEFFERSON: And so there's an unfairness on the other side to expect them to gather all their materials and submit their claim within 45 or 90 days whatever that is.

ATTORNEY WILLIAM KIMBALL: Right.

CHIEF JUSTICE WALLACE B. JEFFERSON: Under the McGregor Act.

ATTORNEY WILLIAM KIMBALL: Well, I think the legislature gave them some remedy because what happens if someone goes belly up and it's usually one of the subcontractors or a subcontractor of a subcontractor, someone becomes insolvent, it's usually those people and, of course, that's an issue in this case because Diamond went insolvent and they got a large judgment against Diamond, but it's never going to be collected.

JUSTICE SCOTT A. BRISTER: They should say generals if they're money managers. It's going to be easy to prove.

ATTORNEY WILLIAM KIMBALL: Right.

JUSTICE SCOTT A. BRISTER: You're going to have the paper to show we spent it on the project.

ATTORNEY WILLIAM KIMBALL: Correct and I think that's what we showed in this case. Showed in this case. Well is there any other questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: There seem to be none. Thank you very much.

ATTORNEY WILLIAM KIMBALL: Thank you very much. Thrilled to be here. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Rebuttal, we'll [inaudible] rebuttal.

REBUTTAL ARGUMENT OF CHARLES OLSON ON BEHALF OF PETITIONER

ATTORNEY CHARLES OLSON: Justice Hecht asked about the joint check and the purpose of the joint check in the industry is to assure payment when a.

JUSTICE NATHAN L. HECHT: Checks isn't it, I mean, it's not a.

ATTORNEY CHARLES OLSON: I'm sorry.

JUSTICE NATHAN L. HECHT: By joint checks.

ATTORNEY CHARLES OLSON: By joint checks.

JUSTICE NATHAN L. HECHT: It's like if it was a guaranty agreement, you'd call it guaranty agreement, not joint check agreement.

ATTORNEY CHARLES OLSON: Well these are written not by lawyers in this case.

JUSTICE SCOTT A. BRISTER: Well of course, that's why we have a statute of frauds. So just because you're not, so say I'm not a lawyer, I want to transfer real estate, that's not going to be a good excuse because the statute of fraud says real estate contracts have to meet certain requirements as it does with guarantees.

ATTORNEY CHARLES OLSON: And this is a not a guarantee of payment. This is a direct obligation. That is, we, this electrical subcontractor had no credit and would not have gotten this job unless they had a Joint Check Agreement upfront on this job and they came to us and they said, if you will extend credit.

JUSTICE HARRIET O'NEILL: But you'd agree that we can't just decide generically that Joint Check Agreements are guaranties. We've got to look at the specific language of this particular agreement.

ATTORNEY CHARLES OLSON: I agree. This is a.

JUSTICE HARRIET O'NEILL: And what specific language says that the general, that the, that the general contractor will pay the, guarantee payment or pay the supplier director other than by joint check?

ATTORNEY CHARLES OLSON: Well it says that in consideration for the granting of credit and selling of materials on this particular job that the general contractor will make payment by joint check because it doesn't have a, the contract that they have is with the electrical subcontractor.

JUSTICE SCOTT A. BRISTER: So if you write it by joint check and the sub forges the vendor's name.

ATTORNEY CHARLES OLSON: We have that.

JUSTICE SCOTT A. BRISTER: You're not.

ATTORNEY CHARLES OLSON: We have a problem with that.

JUSTICE SCOTT A. BRISTER: Well, but I mean, the general doesn't have to pay twice.

ATTORNEY CHARLES OLSON: That's correct. I think we lose in that case. I think we have a fraud claim and that's all against the sub, but in this case, it's a credit facility with the.

JUSTICE NATHAN L. HECHT: The agreement is not a guaranty if it's just simply an agreement to pay by joint check.

ATTORNEY CHARLES OLSON: Right.

JUSTICE NATHAN L. HECHT: Was it breached?

ATTORNEY CHARLES OLSON: Yes, it was because contrary to what Counsel represented to you, they cut two checks, that is the general contractor cut two single paychecks to this electrical subcontractor after, even after we gave them notice that we were not being paid. So it was a direct breach of this Joint Check Agreement. Furthermore, Your Honor, the general contractor got payment for the materials that were supplied on this project and they held the money. The exhibit.

JUSTICE: General contractor?

ATTORNEY CHARLES OLSON: The general contractor got the money from the owner and did not pass it on and I want to make particular emphasis that in volume 8 of the record at Exhibit 8B, there's a record of the general contractor's receivables and project ledger and this is dated November, ' 04, showing he still has $167,000 unpaid on the electrical subcontract.

JUSTICE PHIL JOHNSON: Counsel, under the Trust Fund theory, if you sue the general, if we'd owed the McGregor [inaudible] then you sue the general. The general files an affidavit saying here's what I contracted for on the electrical and here's what I paid and here are the checks. Disregard the Joint Check Agreement, what happens? Do you lose?

ATTORNEY CHARLES OLSON: He loses unless he can.

JUSTICE PHIL JOHNSON: You lose, I mean does the electrical claimant lose if the general can prove that he paid all of the electrical subcontract money out to the electrical sub? Independent of the joint payment, just under the Trust Fund Act.

ATTORNEY CHARLES OLSON: I understand, I understand. The Trust Fund Act says that the general contractor has affirmative defenses to show that he paid all the money on the contract, not just the electrical, the whole contract out on actual incurred expenses, directly related to the construction and if he does that and proves those affirmative defenses which he failed to do in this case, then he would walk. He would not have any more liability, but the fact in this case is that we showed that he had $300,000 unpaid that he retained and walked on this job and did not pay the suppliers and the subs.

JUSTICE NATHAN L. HECHT: If we agree with you on the statutes, do the factual sufficiency issues have to go back to the Court of Appeals?

ATTORNEY CHARLES OLSON: I think you could do it on legal sufficiency that the general contractor's not shown slam dunk, on their evidence, that they prevailed on their [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will adjourn the Court.

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