

No. 08-0272

IN THE
SUPREME COURT
OF TEXAS

DEALERS ELECTRICAL SUPPLY CO.,

Petitioner,

V.

SCOGGINS CONSTRUCTION COMPANY, INC. AND
BILL R. SCOGGINS,

Respondents.

BRIEF ON THE MERITS SUPPORTING
PETITION FOR REVIEW

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1 *Construction Law Journal*, F.D. Wilshusen, “Texas Construction Trust Fund” 43,
(2003) State Bar of Texas Construction Law Section 5, 6

6 *Construction Law Journal*, Charles W. Getman, “Send the Claim Notice. Payment
Bond Held Exclusive Remedy” No. 1 (2008) State Bar of Texas Construction Law Section
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STATEMENT OF THE CASE

Nature of the case: This is a construction case. Petitioner, Dealers Electrical Supply Co., (“Dealers”) sued Scoggins Construction Company, Inc., (“SCC”) and Bill R. Scoggins, president and sole shareholder of SCC (“Respondents”) under the Texas Construction Trust Fund Statute and on a joint check agreement between Dealers and SCC.¹

Trial Court: Judge Aida Salinas Flores of the 398th District Court of Hidalgo County, Texas (the “trial court”).

Trial Court’s Disposition: After a bench trial, the Court rendered judgment for Dealers against Respondents for \$135,910.08 (principal, pre-judgment interest, and attorney fees).

Parties in the Court of Appeals: Appellants: SCC. Appellee: Dealers.

Court of Appeals²: The Thirteenth Court of Appeals (hereafter “the Court of Appeals”) denied rehearing.

Court of Appeals’ Disposition: The Court of Appeals reversed the trial court’s judgment and rendered judgment for Appellants. The Court of Appeals in an unpublished opinion³ (Justice Dori Contreras Garza joined by Justices Gina M. Benavides and Justice Nelda V. Rodriguez) held that Dealers’ claims pursuant to the Texas Construction Trust Fund Statute and the joint check agreement were precluded if a payment bond was provided under the McGregor Act. The Court of Appeals denied Dealers’ Motion for Rehearing on February 28, 2008.

¹ Cause No. C-1404-03-I; *Dealers Electrical Supply Co. v. Diamond Industries, et al.*

² No. 13-06-00368-CV; *Scoggins Construction Company, Inc., et al. v. Dealers Electrical Supply Co.*

³ *Scoggins Construction Company, Inc., et al. v. Dealers Electrical Supply Co.*, 2007 WL 4442544 (Tex.App.–Corpus Christi, December 20, 2007) (Not Reported in S.W.3d.)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to TEX. CONST. ART. V § 3; TEX. GOV'T CODE § 22.001(a)(2), (a)(3), and (a)(6); and TEX. R. APP. P. § 56.1(a)(2),(3)(6). By holding that both Texas Construction Trust Fund Statute claims and claims on a joint check agreement are precluded by a McGregor Act bond, the Thirteenth Court of Appeals has misconstrued the applicable statutes. The Court has eliminated coverage of the Trust Fund Statute from all bonded jobs in Texas. This constitutes a serious error that is of such significance to the state's jurisprudence that correction is required. In addition, the Court of Appeals' misconstruction of the Trust Fund Statute conflicts with the decisions of all other courts.

ISSUES PRESENTED

1. The Thirteenth Court of Appeals held that a claim on a statutory payment bond provided under the McGregor Act constitutes the exclusive remedy of Dealers as a subcontractor and Dealers has no rights under the Trust Fund Statute or its joint check agreement with SCC. Has the Court misconstrued the Trust Fund Statute?

2. For the proposition that the Trust Fund Statute is not applicable when a payment bond is issued on a public project or any construction project, the Thirteenth Court relied entirely on two cases which had been decided under the Trust Fund Statute as it existed *prior* to the 1987 amendments. The Statute, as it existed for these two cases, in Sections 164.004(a)(3) excluded from prosecution "receipts under a construction contract if the full

contract amount is covered by a corporate surety payment bond.” That exclusion was a significant deletion by the Legislature. Has the Court erroneously relied on repealed statutory provisions and caselaw?

3. The Thirteenth Court has eliminated from all public projects in Texas any other means of securing payment to a subcontractor by its holding that a McGregor payment bond is a subcontractor’s exclusive remedy. Has the Thirteenth Court upset public policy favoring laborers and materialmen by its striking down all other means of securing payment when a payment bond is issued under the McGregor Act in direct conflict with all other Texas courts?

4. By precluding the Joint Check Agreement and all other non-payment-bond causes of action, the Thirteenth Court has eliminated a subcontractor’s right to contract for other means of payment on a public project. Has the Thirteenth Court violated the United States and Texas Constitution’s due process and contracts clauses in direct conflict with all other Texas courts by eliminating the breach of contract cause of action on the joint check agreement?

5. Respondents did not preserve their newly raised issue that the Joint Check Agreement was precluded by the McGregor Act. Has the Thirteenth Court erred in considering an issue not preserved by Respondents?

STATEMENT OF FACTS

SCC was the general contractor under a construction contract with the Mercedes Independent School District, (“MISD”) to build the Hinojosa Elementary School in Mercedes, Hidalgo County, Texas.⁴ SCC hired Arturo Bujanos d/b/a Diamond Industries, (“Diamond”) to be the electrical subcontractor on this project. 3RR P's Ex 9.

Diamond, Dealers, and SCC entered into a joint check agreement (the “Joint Check Agreement”). 3RR P's Ex 11. 2RR 149:22-25. SCC agreed that “..... to induce Dealers to continue extending credit to Diamond Industries for the purchase of materials which will be furnished in the future for Mile 2 East Project... the General Contractor agrees to make all payments for all materials furnished by (Dealers) to the Project by check made jointly” 3RR Plaintiff's Exhibit 11. Thus, Diamond was enabled to purchase electrical materials on credit from Dealers. 6RR P's Ex 68.

Dealers was not paid for all the materials it furnished for the project. CR 10-127. Dealers filed suit against Bill Scoggins⁵, SCC, Diamond, and SCC’s bonding company. CR 10 et. seq. Dealers subsequently non-suited the bonding company because of missed statutory notice deadlines. CR 218, 220. Dealers took an Interlocutory Agreed Judgment against Diamond in the amount of \$78,123.59, the account balance. CR 202. Dealers urged

⁴ 3RR P's Ex 7. The contract between SCC and MISD on the Hinojosa Elementary School was a public works contract as defined under §2253.001(4), Texas Government Code. Under this McGregor Act, SCC was required to post a payment bond. SCC posted a bond on the project with MISD. 3RR P's Ex 1.

⁵ Bill Scoggins is the President and sole shareholder of Scoggins Construction Company, Inc.; 2RR 111:24-112:9.

two claims against Respondents: a claim under the Trust Fund Statute; and a breach of contract claim under the Joint Check Agreement. 2RR 4:10-25; CR 204.

The case was tried to the court. CR 7. On April 4, 2006, the court signed a final judgment against Diamond and Respondents. CR 257; *See* Appendix Tab 1.⁶ Respondents appealed this judgment. On December 20, 2007, the Court of Appeals reversed the trial court's judgment and rendered judgment for Respondents. *See* Memorandum Opinion, Appendix Tab 3. On February 28, 2008, the Court of Appeals denied Dealers' Motion for Rehearing. This Court denied Dealers' Petition for Review, but, following Dealers' Motion for Rehearing and a number of Amicus briefs, this Court requested briefs on the merits.

SUMMARY OF THE ARGUMENT

INTRODUCTION

The Thirteenth Court's opinion will destroy many years of certain well-established commercial construction practices and the supporting law and inflict unnecessary losses upon businesses. A subcontractor, whether he be carpenter or painter or electrician, is dependent on the good will of a general contractor to pay him, and, if the general is paid by the owner but walks away with the funds, the tradesman and his supplier will *no longer* have a right to enforce payment from construction trust funds - if the Thirteenth Court's decision stands.

Likewise, these subcontractors often lack good credit and use joint check agreements as a credit facility to ensure credit and the flow of construction funds from owner to supplier.

⁶ The trial court signed and issued its Findings of Fact and Conclusions of Law on April 3, 2006. CR 246; *See* Appendix Tab 2.

Both of these fundamental rights and practices have been utterly destroyed by the Thirteenth Court.

The Texas Construction Trust Fund Statute provides subcontractors with an independent claim against any contractor who diverts or misapplies construction funds intended for the subcontractor. This right is in addition to a claim for payment against a McGregor payment bond.

The Court of Appeals incorrectly held that no rights under the Trust Fund Statute apply to any project if there is a payment bond issued. The plain words of the Trust Fund Statute applies to all construction projects in Texas whether there is a bond or not.

The Court of Appeals relied on a repealed provision of the Trust Fund Statute. While the old statute did exclude trust funds when the project was covered by a corporate surety bond, that provision was repealed by the 1987 amendments. The new provision only excludes corporate *sureties* from a trust fund suit, as opposed to excluding the trust fund remedy when there is a corporate surety payment bond. Consequently, the Trust Fund Statute has for at least twenty years applied to all construction funds in Texas whether or not there is a corporate surety payment bond.

The Thirteenth Court's erroneous holding is inconsistent with and subverts long standing Texas public policy favoring laborers and materialmen. Texas courts have explicitly ruled that a trust fund claim is allowed in *addition* to the remedies provided by the lien and bond statutes. Texas courts since the 1987 amendments have upheld this principle.

The Court of Appeals is also in error with respect to the Joint Check Agreement. The

Joint Check Agreement is not based on a payment bond but is a contractual assurance of payment by the general contractor for what is sold by the supplier to the general contractor's subcontractor for use in the general's project. The Court of Appeals has essentially removed from all public projects the supplier's right to contract for additional payment methods. This violates the United States and Texas Constitution as to both procedural and substantive due process, and constitutes a denial of valuable property rights. Further, the Respondent failed to preserve this point below and has waived it.

ARGUMENT

Issue 1: Has the Thirteenth Court Misconstrued the Trust Fund Statute?

A. Background.

The Trust Fund Statute recites that it applies to materialmen who furnish materials for the improvement of real property in Texas. *See* TEX. PROP. CODE. § 162.003. The statute lists three situations to which it does not apply, none of which are relevant here. *Id.* 162.004. *Id.* § 162.001-.003; *In re HLW Enterprises of Texas, Inc.*, 157 B.R. 592, 597 (Bankr. W.D. Tex. 1993) (“[p]ayment gives rise to a trust for all parties in the subcontract chain.”) The trustee of these trust funds is “a contractor, ...*who receives trust funds or who has control or direction of trust funds.*” TEX. PROP. CODE § 162.002 (emphasis added). The beneficiary of these trust funds is defined as any materialman who furnishes material for the construction of real property in this state. *Id.* § 162.003.

SCC as general contractor, and Bill R. Scoggins as the President and sole shareholder of SCC, received and controlled trust funds earmarked to pay for the electrical supplies

Dealers provided. 2RR 97:24- 98; 2RR 111:24 -112:18. CR 205-06; RR Def's. Ex. 1-4g; 2RR 110:2 -21, 128:2, 135:1 -5. They both are trustees under the statute. *See* TEX. PROP. CODE § 162.002. Dealers was a material supplier on this project and thus a beneficiary under the statute. *See* TEX. PROP. CODE § 162.003; 6RR P's Ex 68. The trial court found that SCC and Scoggins violated the Trust Fund Statute and entered judgment against them. CR at 257.

B. The Prior and Current Trust Fund Statute.

Before the 1987 amendments, the Trust Fund Statute excluded from prosecution “receipts under a construction contract if the full contract amount is covered by a corporate surety bond.”⁷ The 1987 amendments deleted that provision. The Court of Appeals relied on this deleted provision to hold that the statute does not apply when a payment bond is issued. *See* Memorandum Opinion, Appendix Tab 3 at 10.

Issue 2: Has the Thirteenth Court Erroneously Relied on Repealed Statutory Provisions and Caselaw?

The 1987 amendments broadened the scope of the Trust Fund Statute.⁸ The Thirteenth Court glossed over those amendments by stating that the 1983 codification of 5472e was “without substantive change.” However, the Legislature in 1987 radically amended § 162, not only by deleting the receipts exclusion from § 162.004, but it amended

⁷ This provision was originally in Article 5472E and then 162 of the Texas Property Code upon codification. Acts 1983, 68th Leg., p. 3721, ch. 576, § 1, eff. Jan. 1, 1984. *Amended* by Acts 1987, 70th Leg., ch. 578, § 2, eff. Aug. 31, 1987.

⁸ *See In Re Nicholas, Coburn v. Nicholas*, 956 F2d 110, 113 (5th Cir. 1992) (“[w]e agree that the [Construction Trust Fund Statute’s] amendments have expanded the realm of debts that are nondischargeable under the Bankruptcy Code.”); *In re Cook*, 2006 WL 470586, *4 (S.D.Tex. 2006) (“[t]he 1987 amendment to the statute broadened the scienter element of a trustee's misapplication” of trust funds.); F.D. Wilshusen, *Texas Construction Trust Fund Act and Bankruptcy Preferences*, 1 Construction Law Journal 43, 48-49 (2003) (the amendments broadened the scienter requirement and shifted the burden of proof). *See* Appendix 8 Legislative History.

§ 162.031 to delete “intent to defraud” to make the burden of proof easier on a subcontractor asserting a trust fund violation. Further, the 1987 amendments shifted the burden of proof to the trustee to show affirmative defenses as to use of the funds. 1 *Construction Law Journal*, F.D. Wilshusen, “Texas Construction Trust Fund” 43, 48-49 (2003). While the Legislature had earlier exempted **funds**, that exemption provision was amended to exempt only the bond company. TEX. PROP. CODE § 162.004(a)(3) (eff. August 31, 1987). Moreover, the Legislature strengthened the provisions concerning **conduct** - that is, diversion of funds from the beneficiaries. As Professor Allensworth points out, the characterization of the 1983 codification that it was without substantive change, just does not sensibly apply to the 1987 Amendments.⁹ Indeed, the Fifth Circuit declared that the 1987 Amendments broadened the scope of the Statute. In *Re Nicholas*, 956 F2d at 114 (“the scope of such wrongful conduct has been broadened by the legislature’s amendments to the [Trust Fund Act]”). “[The Trust Fund Act] is a remedial statute, [thus] courts must give it a broad construction to effectuate its protective purposes.” *C & G Inc. v. Jones*, 165 S.W.3d 450, 454 (Tex.App.–Dallas 2005, pet. denied).

The Court of Appeals cites two cases to support its holding. *Id.* (citing *Truckers, Inc. v. South Texas Construction Co.*, 561 S.W.2d 855, 859 (Tex. App.–Corpus Christi 1977, no writ); *Econ. Forms Corp. v. Williams Bros. Constr. Co.*, 754 S.W.2d 451, 457 (Tex.App.–Houston [14th Dist.] 1988, no writ)). Both of these cases were founded on the old provision in the statute. *Truckers*, 561 S.W.2d at 859; *Econ. Forms Corp.*, 754 S.W.2d at

⁹ See Professor Allensworth brief, Part III at page 13

457. Indeed, this deleted provision is the *sole* reason given by these two courts to support their holding that a trust fund claim is excluded when the project is covered by a corporate surety bond. *See Id.* at 859; *Id.* at 457. The Court’s unsupported construction of the Trust Fund Statute is inconsistent with all other Texas courts’ construction of the current statute. *See infra* cases cited in footnotes 10, 11 and 18.

Issue 3: Has the Thirteenth Court Upset Public Policy Favoring Laborers and Materialmen by its Striking Down all Other Means of Securing Payment When a Payment Bond is Issued Under the McGregor Act in Direct Conflict With All Other Texas Courts?

A. The Court of Appeals Misconstrued the McGregor Act.

The Court’s holding is apparently founded on the misguided notion that a payment bond issued under the McGregor Act is the sole and exclusive remedy for a subcontractor on a public project as well as any other bonded construction job. Memorandum Opinion, Appendix Tab 3 at 8, 10, 18. As Professor Allensworth also underscores, the right to pursue a payment bond under Section 2253.073(a) of the McGregor Act is founded on a permissive “may” rather than a mandatory “shall” or “must” remedy. The Legislature’s selection of permissive wording compels one to the conclusion that Section 2253.073 merely *enables* a course of action against a prime contractor and its surety. That this is an optional remedy, rather than an exclusive remedy is made more clear when one understands that a trust fund claim often arises well *after* the bond notice deadlines have all run. That is to say, as the construction project nears an end and the prime is paid its final draw but the prime then walks away with the funds without paying the subs or their suppliers. The bond claim and the trust

fund claim are optional and complementary remedies for which no exclusivity was intended by the Legislature and no court has so held, save the Thirteenth Court. This is in conflict with court holdings such as the one concerning construction of Central Plains General Hospital by Hale County in which the court held that the Trust Fund Statute is a remedy in addition to those under TEX. PROP. CODE § 53.001 et. seq. and TEX. GOV'T CODE § 2253 et seq.¹⁰

The Thirteenth Court's erroneous view comes from a misreading of *Commercial Union v. Spaw Glass*, 877 SW2d 538 (Tex. App. - Austin 1994, writ denied). The Thirteenth Court's quote on page 8 of the Austin Court's "very evil" statement to support the Thirteenth Court's opinion, is simply and entirely off the mark. Memorandum Opinion, Appendix Tab 3 at 8 (citing *Commercial Union* 877 SW2d at 540).

In *Commercial Union*, the prime contractor was Spaw Glass, the subcontractor was Kleck and the subcontractor's surety was Commercial Union. 877 SW2d at 539. The subcontractor's surety (Commercial Union) sued the prime contractor (Spaw Glass) because Commercial Union had paid the subcontractor's (Kleck) suppliers even though none of them

¹⁰ Article 5472e (now 162.001 TEX. PROP. CODE) gives protection to materialmen in addition to Article 5452 (now 53.001 TEX. PROP. CODE) and Article 5160 (now 2253.001 TEX. GOV'T CODE) *Panhandle Bank & Trust v. Graybar*, 492 SW2d 76, 82 (Tex. Civ. App.-Amarillo 1973, writ refused n.r.e.). *Fidelity & Guaranty v. Wells Fargo*, 2006 WL 870683 (at *8) (S.D. Tex. 2006) (Trust Fund Statute defense allowed for bonded public paving project); *In Re Diamond K*, 2007 WL 2229727, *3 (Bankr. E.D. Tex. 2007) (contractor held trust funds on H.I.S.D. project but assets not diminished by joint check payment). *In re ML & Associates*, 301 B.R. 195 (N.D. Tex. 2003) Even though subcontractor made claim on prime's McGregor bond issued by Hartford, funds received from City of McKinney by prime were trust funds to which sub has rights. *Id.* at 199. In *Allice Trading Inc. v. Shaw Environmental*, 2007 WL 2873375 (S.D. Tex. 2007) The Court denied Defendant's Motion for Summary Judgment even though Plaintiff sought alternate causes of action on McGregor payment bond (issued by The Insurance Company) and the Construction Trust Fund Act for work done on a public project for the Harris County Flood Control District. *Id.* at *2.

had given the required McGregor notices of nonpayment to the prime contractor. *Id.* at 539-40. The Court correctly observed that the McGregor act had been amended in 1959 so that if a prime contractor got no notice of a supplier's unpaid claims, it had no duty to pay them or to reimburse anyone who did. *Id.* at 541. The Court also correctly stated that *before* the 1959 amendment, prime contractors sometimes paid subcontractors and then later discovered the subcontractor had not paid its suppliers and so had to pay the same debt twice. *Id.* at 540. A subcontractor's bill to the prime contractor contains the subcontractor's invoices from its suppliers plus the subcontractor's mark-up. Thus, if the prime pays the subcontractor and then has to pay the supplier also, it has in effect paid the same debt (the supplier's invoices) twice.

The Austin Court correctly held that since Commercial Union's claim was for its payment of suppliers' unnoticed claims, the prime should not have to pay it twice – that being the “very evil [that] notice requirements [of the McGregor act] were enacted to eliminate.” *Id.* at 540.

In the case at bar, Respondents were sued for misdirecting construction funds by *not* paying the subcontractor *or* the supplier. The remedial purposes of the McGregor Act and the Trust Fund Statute are meant to protect suppliers (such as Petitioner) in two differing aspects of a construction project: providing a payment bond up front and granting a cause of action after the construction project is over if the contractor diverts construction funds from beneficiaries. *See* the Amicus Brief of William R. Allensworth, Professor of Construction Law at the University of Texas Law School, Part II.A. at page 11.

The Thirteenth Court's citing of *Bunch v. Tex-Craft Builders*, 480 SW2d 42 (Tx. App. - Tyler 1972, no writ.) as authority for the McGregor Act being a supplier's exclusive remedy is also a misreading of that case. Memorandum Opinion, Appendix Tab 3 at 8. *Bunch*, the electrical subcontractor, failed to give the required notice of its claim to the prime's surety. *Bunch*, 480 SW2d at 44-46. Thus, while *Bunch* recovered against the prime, the court denied the claim by *Bunch*, the subcontractor, against the prime's surety (Continental) because the subcontractor failed to give the mandatory McGregor statutory notice. *Id.* at 43-46. Petitioner has no dispute that a subcontractor must always give timely notice to the surety to recover on the bond. That is well established. But a subcontractor may sue on the independent trust fund ground because (1) the Trust Fund Statute does not limit itself to bonded jobs, whether they are public or private projects, and (2) the prime contractor is liable if it misdirects construction funds by not paying the subcontractor or its supplier.

Likewise, the Thirteenth Court misreads *Fidelity and Deposit Co. of Maryland v. Felker*, 469 SW2d 389 (Tex. 1971). There, *Felker* (a prime contractor) sued to foreclose its mechanic's lien and also sued *another* prime contractor's surety. *Id.* at 390. This Court simply held that one must be in the supplier-sub-prime-owner chain of contract to recover on a payment bond issued in that chain. *Id.* at 393-94. *Felker* had its own prime contract with the owner and so was not in the other prime's chain of contract. *Id.* at 391-94.

B. Subcontractor's Optional Remedies.

The Thirteenth Court, on page 15 of its Opinion, states there are no cases applying the Trust Fund Statute on a private project for which a payment bond was issued. Yet, the Court

cited *Perry v. Galvan*, 2003 WL 21705248 (Tex. App. - Austin 2003, petition dismissed). Galvan sued on the payment bond issued by Insurance Company of the West, sued to foreclose its mechanic's lien, and sued on the Trust Fund Statute. *Id.* at *2. The Austin Court did not stumble over applying the Trust Fund Statute on a private project for which a payment bond was issued. *See Id.* at *4-7.

The Fifth Circuit has explained the dual purpose of the Hardeman and McGregor Acts on the one hand and the Trust Fund Statute on the other.

“Although both Chapter 53 and Chapter 162 (and their respective antecedents) are designed to protect mechanics and materialmen, the focus of each chapter is different. Chapter 53 controls procedures for perfecting mechanics' and materialmen's liens, steps required to trap money (for the benefit of derivative claimants) in the hands of the owner, procedures to alert an owner that it should retain funds for the benefit of a derivative claimant, and procedures for foreclosing a lien. In contrast, Chapter 162 addresses the fiduciary duties of persons holding funds in trust for the benefit of derivative claimants. The chapters address different situations.” *In re Waterpoint Int'l*, 330 F. 3d. 339, 348 (5th Cir. 2003).

“In contrast to the notice and filing requirements found in Chapter 53 of the Code, Chapter 162 of the Code, ... provides that construction payments made to a contractor... are deemed to be trust funds ... *without regard* to the laborer's compliance with the procedural requirements under Chapter 53.” At p. 345. *In Re*

Waterpoint International, 330 F3d 339 (5th Cir. 2003) (emphasis not added). *In Re HLW Enterprises*, 157 BR 592, 597 (Bankr. W.D. Tex. 1993).

Texas case law demonstrates that litigants for many years have asserted non-bond causes of action in addition to or instead of bond claims arising from projects covered by a bond on both private and public construction.¹¹ This Court's decision in *City of Waco v. Lopez*, 51 Tex. Sup. Ct. J. 1129 (July 11, 2008) confirms that courts should not interpret one statutory claim to override another, rather that they "be construed, if possible, so that effect is given to both." *Id.* at 1132.

Since at least 1933, the Texas Supreme Court described a private project concerning which the subcontractor sued to enforce its lien **and** sued on a payment bond. No election whatsoever was required. *Southern Surety Co. v. Weaver Bros.*, 56 SW2d 634 (Tex. Com. App. 1933). In *Lively v. Carpet Services*, 904 S.W.2d 868 (Tex. Civ. App.–Houston [1st Dist.] 1995, writ denied), the supplier "chose to sue under the [Texas Trust Fund] statute (rather than perfect a materialman's lien...)." *Id.* at 871. The supplier sued the sole shareholder and officer of the corporate general contractor for individual liability as a trustee

¹¹ See e.g., *Fid. & Deposit Co.*, 469 S.W.2d at 390-91, 394 (one prime contractor could not sue **another** prime contractor's payment bond, but original contractor may enforce lien); *Perry & Perry Builders, Inc.*, 2003 WL 21705248 (where supplier had asserted quantum meruit, trust fund and bond claims against the general contractor, the court held that quantum meruit claim had sufficient evidence, trust fund statute applied but the claim had insufficient evidence, and bond claim was barred because supplier did not provide proper notice); *Panhandle Bank & Trust v. Graybar Electric Co.*, 492 SW2d 76, 82 (Tex. Civ. App.–Amar 1973, n.r.e.); *Taylor Pipeline v. Directional Road Boring*, 438 F Supp 2d 696, 715 (E.D.Tex. 2006) (general contractor held funds in trust for the subcontractor on public improvements to George Bush Intercontinental Airport by City of Houston sub under Trust Fund Statute but contractor allowed affirmative defense under the Statute); *C&G Inc.*, 165 SW3d 450; *Electro Associates, Inc. v. Harrop Construction Co., Inc.*, 908 S.W.2d 21 (Tex.App.–Houston [1st Dist.] 1995, writ denied) (subcontractor sued general contractor for breach of contract, misapplication of trust funds and other non-bond theories on public project). *Varela v. Sommers*, 2006 WL 3173674 *2 (S.D. Tex. 2006) (where subcontractor had an interest in trust funds on public job).

of construction funds. *Id.* at 870. The general contractor argued that the penal provision of the Trust Fund Statute was an exclusive remedy and the supplier's civil suit for misapplication of trust funds was invalid. *Id.* at 871. The First Court stated: "We...specifically hold that the Act subjects litigants to civil liability if (1) they breach the duty imposed by the Act, and (2) the requisite plaintiffs are within the class of people the Act was designed to protect and have asserted the type of injury the Act was intended to prohibit." *Id.* at 873.

Chief Justice Brister described a subcontractor's "civil remedy" under the Trust Fund Statute without any reference whatsoever to whether a payment bond or mechanic's lien was involved or whether there was any compliance with Chapter 53 of the Property Code or Chapter 2253 of the Government Code. *Park Environmental v. Texas Capital Funding*, 102 SW3d 243 (Tex. App.–Hou. 14th 2003, pet. denied). The Corpus Court agreed in *Holladay v. CW&A, Inc.* 60 SW3d 243 (Tex. App.–Corpus Christi 2001, pet. denied).

The usual remedy for an unpaid subcontractor is to enforce its lien right on private (Hardeman Act) construction and its bond right on public (McGregor Act) construction. A bond claim under the McGregor Act provides subcontractors with a substitute for filing a lien since liens may not be filed against public property.¹² Texas courts have expressly declared

¹² *Suretec Ins. Co. v. Myrex Industries*, 232 S.W.3d 811, 813 (Tex. App. Beaumont 2007, pet. denied) ("[t]he legislature enacted the McGregor Act, which requires contractors to secure a bond to ensure payment, because a subcontractor or supplier may not place a lien against a public building.") *Capital Indem. Corp. v. Kirby Rest. Equip. & Chem. Supply Co.*, 170 S.W.3d 144, 147 (Tex.App.–San Antonio 2005, pet. denied) ("[t]he purpose of the payment bond is to protect claimants who provide labor or materials in the construction of public works, because public property is protected from forced sale and therefore may not be made the subject of a mechanic's lien.")

that a Trust Fund claim may be asserted *in addition to filing a lien*.¹³ A subcontractor's right to file a lien does not exclude his rights under the Trust Fund Statute. Logic and prudent public policy demand that a Trust Fund claim must also be allowed *in addition to a bond claim* on public construction. The Trust Fund Statute and the McGregor Act do not negate, but complement each other by providing different remedies.

C. The Court of Appeals' Error Will Cause an Upheaval in Construction Law.

The Thirteenth Court's decision will produce disastrous results for tradesmen and suppliers in the construction industry without advancing any competing good. The Thirteenth Court invalidated all joint check agreements that help small business, especially minority tradesmen, to get credit on bonded construction jobs. Most painters, electricians, brick masons and other tradesmen often do not have good credit and a joint check agreement makes it possible for these trades to get credit and jobs. Because the Thirteenth Court held that a bond negates all other remedies, both common law and statutory, no tradesman or supplier will have this valuable credit facility available any longer on construction projects.

D. The Thirteenth Court's Decision Fabricates a New Legal Rule Never Before Advanced by Any Other Court and In Conflict With Existing Authority Which this Court Must Resolve.

¹³ *C & G, Inc.*, 165 S.W.3d at 454 (“Chapter 162 was enacted to give protection to materialmen *in addition* to that provided by the materialman's liens statutes.”) (emphasis added); *McCoy v. Nelson Utils. Servs., Inc.*, 736 S.W.2d 160, 164 (Tex.App.–Tyler 1987, writ ref'd n.r.e.) *In re N.A. Flash Foundation*, SA-05-CA-0814-WWJ at p. 9 US W.D. Tex. June 4, 2007

No other Court has held that a payment bond is a contractor's or supplier's exclusive remedy. No statute recites or even hints at any such exclusivity rule. The Thirteenth Court has simply made up its exclusivity rule.

The construction industry has a right to rely on this great Court to correct the clearly erroneous holding of the Thirteenth Court for which there is no countervailing competing good. While the Thirteenth Court's action is so destructive to tradesmen and suppliers in the construction industry, no good is advanced by the Court's holding.

The Thirteenth Court's holding takes from all subcontractors any trust fund claim on all public and private construction projects having any kind of bond. Few judges and still fewer subcontractors will understand the Thirteenth Court's inspecific and clumsy use of the word "bond" because there are so many kinds of construction bonds; for example, bond to indemnify (TEX. PROP. CODE § 53.171), lien release bond (*Id.* 53.236), and statutory payment bond (*Id.* 53.201) as well as the common law bond. As a consequence, the Court of Appeals has effectively eliminated trust fund rights in all public construction projects in Texas and caused confusion in the law on private projects.

E. The Thirteenth Court's Holding is Contrary to the Federal Rule.

The American Subcontractors Association's brief requested this Court to follow the federal rule which the Association ably set out in full at page six of its Amicus Brief. Petitioner agrees.

As referenced on page eleven, *supra*, our Fifth Circuit has explained the *dual* purpose of the Hardeman and McGregor Acts on the one hand and the Trust Fund Statute on the other

in *In Re Waterpoint International*, 330 F3d 339, 345 (5th Cir. 2003) (emphasis not added).
In Re HLW Enterprises, 157 BR 592, 597 (Bankr. W.D. Tex. 1993).

Recently, the Fifth Circuit confirmed the federal rule on trust funds: *viz.*, the construction trust fund is self executing as “there are no procedures with which a subcontractor must comply before the contractor is obligated to hold the funds in trust”; and this is so “without regard to the subcontractor’s compliance with any lien procedures.” *In the Matter of NA Flash Foundation*; No. 07-50803 Fifth Circuit August 18, 2008 (at page 7 paragraph III.B). Thus, the Fifth Circuit confirmed that Texas allows *dual* lien rights and trust fund rights to subcontractors.

In that case, the sub had an M&M lien (see page 5 paragraph III of opinion), the equivalent to a bond claim on a public job. *See* Petitioner’s discussion on the duality of remedies in its Petition at paragraph I.A. at page 9.

Recently, the Bankruptcy Court for the Southern District of Texas held that the Thirteenth Court’s opinion “does not correctly approach the analysis of the meaning of §162.004...”. And, ... “the Court respectfully disagrees with *Scoggins* and holds that the McGregor Act is not the exclusive remedy for an unpaid supplier on a public works project in Texas.” (at page 6 of its opinion dated September 17, 2008).¹⁴ Judge Isgur concluded that the rationales for *Scoggins*’ exclusivity rule “make little sense.” (at page 8 of the opinion)

F. The Court of Appeals’ Error Creates a Conflict With All Other Texas Courts Which Must Be Resolved By This Court.

¹⁴ *In Re: Contractor Technology, Ltd.* No. 07-3224 In the U.S. Bankruptcy Court for the Southern District of Texas, Houston Division (Document number 592).

The Thirteenth Court creates a conflict with all other Texas courts writing on the subject. This holding stands alone. See cases cited in footnotes 10, 11, and 18. Indeed, counsel cannot locate another case where one of the litigants has ever raised this argument despite counsel's thirty years of practice in construction law. See *Schein v. Stromboe*, 102 S.W.3d 675, 689 (Tex.2002).("outspoken disagreement is not necessary to invoke our conflicts jurisdiction.") TEX. GOV. CODE § 22.001(a)(2), (e) ("For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.") Consequently, the Court of Appeals has created great uncertainty in the law making it exceedingly difficult to protect the rights of unpaid subcontractors.

G. Decision Impacts Commercial Interests in Bankruptcy and in IRS Contests.

The Trust Fund Doctrine is an essential aid to a business when the general contractor's assets are attached by the IRS or held by a trustee in bankruptcy. Oftentimes, the Trust Fund Doctrine is the *only* remedy left for the workers and their suppliers on construction projects. Thus, in *Contractor Technology/Sommers v. 3D Fabricators*, No. 05-37623-H1-7; Adv. No. 07-3224 in the Bankruptcy Court of the Southern District of Texas *millions* of dollars are riding on this Court's action. See also No. 01-16034 *In Re: Enron Corp., et al.*, Adv. Pro. No. 03-93246 *Enron Corp. et al., Plaintiff v. Rexel Southern Electrical Supply, Defendant*, In the United States Bankruptcy Court for the Southern District of New York. Case No. 01-15288 (BRL) *In Re: Bethlehem Steel Corporation, et al.*, Adv. Proc. No. 03-90737 In the

United States Bankruptcy Court for the Southern District of New York. No. 05-51436 *In Re Martin Wright Electric Company* Adv. Proc. No. 07-05041 *Jose C. Rodriguez, Trustee v. Summers Group, Inc., et al.*, In the United States Bankruptcy Court for the Western District of Texas.

H. Universal Condemnation of Thirteenth Court Opinion.

The Appendix to Petitioner's Motion For Rehearing contains letter pleas to this Court by twenty-seven¹⁵ businesses statewide, small ones as well as Fortune 500 contractors, who are unified in seeking swift reversal of the Thirteenth Court's decision.

Four Amici briefs ask this Court to reverse the Thirteenth Court. In its August 2008 issue, the leading authority in Texas construction law, *The Construction Law Journal* published by the State Bar of Texas condemns the Thirteenth Court's Opinion as an illogical aberration¹⁶.

Issue 4: Has the Thirteenth Court Violated the United States and Texas Constitution's Due Process and Contracts Clauses by Eliminating the Breach of Contract Cause of Action on the Joint Check Agreement?

A. Violation of Constitutional Right to Contract. The Court of Appeals held that a joint check agreement cannot be enforced if there is a payment bond because the bond is a supplier's sole and exclusive remedy. Memorandum Opinion, Appendix Tab 3 at 17-19. By precluding the Joint Check Agreement as a common law remedy, and all other non-bond

¹⁵ Petitioner has discovered that still other businesses such as Westinghouse filed letters directly with this Court.

¹⁶ *6 Construction Law Journal*, Charles W. Getman, "Send the Claim Notice. Payment Bond Held Exclusive Remedy" No. 1 (2008) State Bar of Texas Construction Law Section.

causes of action, the Thirteenth Court has eliminated a subcontractor's right to contract for other means of payment on a construction project. The Thirteenth Court violated the United States and Texas Constitutions' due process and contracts clauses by eliminating the breach of contract cause of action on the joint check agreement. TEX.CONST. ARTICLE I §19; U.S. CONSTITUTION AMEND XIV.

This holding is based on the notion that the McGregor Act is the exclusive remedy available to a subcontractor on a public project. In direct conflict, numerous cases allow non-bond causes of action. Texas courts have specifically allowed recovery on a "joint check agreement" where the project is covered by a McGregor bond.¹⁷ This constitutes a conflict of authority with severe impact on the industry.

Texas case law demonstrates that litigants for many years have asserted non-bond causes of action in addition to or instead of bond claims arising from projects covered by a bond on both private and public construction.¹⁸ See also page twelve, *supra*. Consequently,

¹⁷ *F&C Engineering v. Moore*, 300 S.W. 2d 323, 327 (Tex.Civ.App.–San Antonio 1957, writ ref, n.r.e.) (Opinion by Justice Barrow holding that in the instance of a public project – the Navy's Chase Field in Beeville – for which Aetna provided a payment bond, a joint check agreement was enforceable.); *Nuclear Corp. v. Hale*, 355 F. Supp. 193 (N. D. Tex. 1973) (joint check agreement was enforceable on a public project – the Sheppard Air Force Base in Wichita Falls); *U.S. v. Fed. Ins. Co.*, 483 F2d 153, 158 (5th Cir. 1973) (the Fifth Circuit allowed the supplier to recover against the contractor on the joint check agreement on public project with payment bond); *U.S. v. Forrester*, 441 F2d 779, 782 (5th Cir. 1971) (a supplier on a public project sued the prime contractor and the payment bond surety, and the court allowed the supplier to recover on a joint check agreement... against prime contractor and surety on public project.)

¹⁸ See *Fid. & Deposit Co.*, 469 S.W.2d at 390-91, 394 (one prime contractor could not sue **another** prime contractor's payment bond, but original contractor may enforce lien); *Perry & Perry Builders, Inc*, 2003 WL 21705248 (where supplier had asserted quantum meruit, trust fund and bond claims against the general contractor, the court held that quantum meruit claim had sufficient evidence, trust fund statute applied but the claim had insufficient evidence, and bond claim was barred because supplier did not provide proper notice); *Panhandle Bank & Trust v. Graybar Electric Co.*, 492 SW2d 76, 82 (Tex. Civ. App.-Amar 1973, n.r.e.); *Taylor Pipeline v. Directional Road Boring*, 438 F Supp 2d 696, 715 (E.D.Tex. 2006) (general contractor held funds in trust for the subcontractor on public improvements to George Bush Intercontinental Airport by City of Houston sub under Trust Fund Statute but contractor allowed affirmative defense under the Statute); *C&G Inc.*, 165 SW3d 450; *Electro*

this error must be corrected to once again provide clarity and uniformity to Texas construction law jurisprudence.

B. Respondent Contractually Agreed That the Bond Would Not Be Petitioner’s Exclusive Remedy.

In the Joint Check Agreement (RR Vol. 3 Plaintiff’s Ex. 11 and Scoggins Deposition Ex.1) Respondent agreed that Petitioner (Dealers) “expressly reserved” any and all rights under the Property Code (Trust Fund Act) and rights under the McGregor Act (chapter 2253 of the Government Code providing bond rights).

The trial court below resolved any doubt on that point in favor of Petitioner in its Findings of Fact No. 4 and 16. Appendix Tab 2.

Issue 5. Has the Thirteenth Court Erred in Considering an Issue Not Preserved by Respondent?

Respondent did not preserve and did not assert below or brief the proposition that Dealers cannot sue on the Joint Check Agreement because there was a payment bond on the public project. Because Respondents failed to preserve this point, Respondents have waived it. *See* TEX. R. APP. P. 38.1(h).

PRAYER

Dealers prays that this Court to grant this petition for review, reverse the Thirteenth District Court of Appeals’ judgment, affirm the trial court’s judgment and award Dealers relief to which it may be entitled.

Associates, Inc. v. Harrop Construction Co., Inc., 908 S.W.2d 21 (Tex.App.–Houston [1st Dist.] 1995, writ denied) (subcontractor sued general contractor for breach of contract, misapplication of trust funds and other non-bond theories on public project). *Varela v. Sommers*, 2006 WL 3173674 *2 (S.D. Tex. 2006) (where subcontractor had an interest in trust funds on public job).

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APPENDIX

Dealers Electrical Supply, Inc. files this Appendix in support of its Petition for Review.

- Tab 1** **Final Judgment, April 4, 2006**
- Tab 2** **Findings of Fact and Conclusions of Law, April 3, 2006**
- Tab 3** **Memorandum Opinion, December 20, 2007**
- Tab 4** **Legislative History for 1987 Amendments to § 162 - History of HB 1160 Excerpts of May 19, 1987 Public Hearing in Senate Committee on Criminal Justice for HB 1160**
- Tab 5** **Legislative History for 1987 Amendments to § 162 - Transcript of May 19, 1987 Public Hearing in Senate Committee on Criminal Justice for HB 1160**