No. 08-0272

IN THE

SUPREME COURT OF TEXAS

AUSTIN, TEXAS

DEALERS ELECTRICAL SUPPLY CO.,

Petitioner,

V.

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

Respondent.

**BRIEF OF AMICUS CURIAE
THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
IN SUPPORT OF PETITIONER**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The American Subcontractors Association, Inc. ("ASA") submits this amicus brief in support of Petitioner Dealers Electrical Supply Co.'s Petition for Review. ASA respectfully urges this Court to grant the petition and reverse the court of appeals' judgment, which is contrary to the text of the McGregor and Trust Fund Acts, inconsistent with the Legislature's purpose in passing those acts, and inconsistent with federal courts' interpretation of similar federal laws.

INTEREST OF AMICUS CURIAE

ASA is a national organization of construction trade contractors. Founded in 1966, ASA leads and amplifies the voice of trade contractors to improve the business environment in the construction industry and to serve as a steward for the community. ASA is dedicated to improving the business environment in the construction industry. The ideals and beliefs of ASA are ethical and equitable business practices, quality construction, membership diversity, integrity, and a safe and healthy work environment.

ASA has 5,000 members nationwide, including 520 members from six Texas Chapters in Houston, North Texas, San Antonio, Austin, El Paso, and the Rio Grande Valley.

ASA submits this brief because its Texas members have a strong interest in ensuring that courts interpret laws regarding payment bonds in a manner that faithfully adheres to their text and implements their purpose. A primary purpose of payment bond statutes like the McGregor Act is to provide an *additional* remedy to subcontractors and suppliers seeking payment for work they perform on public construction projects, thereby

holding down the cost of such projects. That purpose is undermined by the court of appeals' decision in this case, which holds that the McGregor Act—contrary to its plain text—is a supplier's *exclusive* remedy for non-payment on a public project. Granting this petition is therefore of vital importance to thousands of trade contractors and individuals who provide labor and materials to public construction projects in Texas.

The fee for preparing this brief has been paid by ASA.

ARGUMENT

In this case, Dealers Electrical Supply provided nearly $80,000 in electrical parts for a public school construction project.[1] Both the general contractor, Scoggins Construction Company, and the electrical subcontractor refused to pay. Dealers sued Scoggins for payment under the Texas Construction Trust Fund Act, TEX. PROP. CODE ANN. §§ 162.001 et seq. (Vernon 2007), and for breach of a joint check agreement. Originally, Dealers also pleaded claims against the payment bond that Scoggins had posted under the McGregor Act, TEX. GOV'T CODE ANN. §§ 2253.001 et seq. (Vernon 2000), and the bond sureties were named as defendants. These bond-related claims and defendants were later dropped, however, due to missed statutory notice deadlines.

Following a bench trial, the trial court entered judgment for Dealers. Yet the Thirteenth Court of Appeals reversed and rendered judgment for Scoggins, holding that: (1) both of Dealers' claims were barred because the McGregor Act is "the exclusive means to establish the existence of a cause of action by laborers or suppliers on a public

[1] This summary of the facts is drawn from the court of appeals' opinion and the petition for review.

project"; and (2) Dealers' Trust Fund Act claim failed because that Act does not apply to contracts covered by payment bonds. *Scoggins Constr. Co. v. Dealers Elec. Supply Co.*, No. 13-06-368-CV, 2007 WL 4442544, at *4, *7 (Tex. App.—Corpus Christi Dec. 20, 2007, pet. filed) (mem. op.). These holdings are incorrect and will have harmful consequences not only for the construction industry but also for public entities, which will face higher construction costs as a result of their suppliers' decreased ability to compel payment for materials actually delivered, used, and incorporated into public projects.

I. The Court Of Appeals' Holding That The McGregor Act Provides The Exclusive Remedy Is Contrary To The Text And Purpose Of The Act And Conflicts With Federal Courts' Interpretation Of A Similar Law.

As the court of appeals explained, the Legislature passed the McGregor Act "to provide subcontractors and suppliers involved in public work contracts a basis for recovery because [they] may not place a lien against a public building." *Scoggins*, at *3. The Act requires a prime contractor on a public work contract to post a payment bond "*solely* for the *protection* and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply public work labor or material." TEX. GOV'T CODE ANN. § 2253.021(c) (emphasis added). If a beneficiary provides proper notice of a claim for material delivered or work performed and does not receive payment, the Act provides that the "payment bond beneficiary . . . *may sue* the principal or surety, jointly or severally, *on the payment bond* . . . ." *Id.* § 2253.073(a) (emphasis added).

Nothing in the text of this permissive ("may") provision purports to bar a supplier from suing a prime contractor to recover payment on a theory wholly independent from the payment bond. That is precisely what Dealers did here, pleading claims against Scoggins for breach of contract and for recovery under the Trust Fund Act.

Because there is no clear statutory directive excluding these alternative claims, the court of appeals erred in treating the McGregor Act as an exclusive remedy. This Court has held that abrogating common-law claims such as breach of contract "'is disfavored and requires a clear repugnance between the common law and statutory causes of action.'" *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (quoting *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied)). Thus, "a statute may be interpreted as abrogating a common-law principle only when its express terms or necessary implications clearly indicate the Legislature's intent to do so." *Id.* (citing *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121, 122-23 (Tex. App.—San Antonio 1997, writ denied)).

Here, the court of appeals cited no statutory text that makes the McGregor Act exclusive, and ASA has found none. Moreover, as quoted above, the Legislature's express intent in passing the McGregor Act was solely to "protect[]" those who supply labor or material to public construction projects. *See also Scoggins*, at *3 (noting that McGregor Act "is highly remedial and should receive the most comprehensive and liberal construction possible to achieve its purposes"), *7. Interpreting the McGregor Act to bar recovery by the very suppliers that the Legislature was trying to protect is flatly inconsistent with this intent.

The court of appeals cited two cases (*Scoggins, at* *4) in holding that the McGregor Act provides the exclusive remedy for suppliers, but neither case supports that holding here. In *Bunch Electric Co. v. Tex-Craft Builders, Inc.*, 480 S.W.2d 42 (Tex. Civ. App.—Tyler 1972, no writ), the court merely held that the McGregor Act "provides the procedure and remedy for presenting a claim *against the bond*. It has been held that the statute is mandatory as well as exclusive; that it must be complied with in all respects or a cause of action *under it* is not maintainable." *Id.* at 45 (emphasis added). This principle has no application here because Dealers is not pursuing a cause of action under the McGregor Act against the bond.

In *Commercial Union Insurance Co. v. Spaw-Glass Corp.*, 877 S.W.2d 538, 540 (Tex. App.—Austin 1994, writ denied), the court mis-cited *Bunch Electric* for the proposition that "the [McGregor] Act provides the exclusive remedy for laborers or suppliers on a public project." Moreover, the court's primary concern in *Commercial Union* was to avoid having the prime contractor pay the same debt twice. *Id.* That concern is not present here, as the petition for review explains (at 7-8). Finally, even if *Commercial Union* were on all fours with this case, its exclusivity holding is simply wrong for the reasons given above. Thus, the court of appeals below erred in following it.

In an effort to bolster the court of appeals' exclusivity holding, Scoggins' response to the petition (at 7-8) points to an old line of cases from this Court and the Commission of Appeals. But those cases—like *Bunch Electric*—merely held that a supplier could not avoid the requirements of the McGregor Act by bringing a common-law suit *on a bond*.

Indemnity Ins. Co. v. S. Tex. Lumber Co., 29 S.W.2d 1009, 1011 (Tex. Comm'n. App. 1930, judgm't adopted) (holding that McGregor Act "clearly impl[ies] that the remedy there accorded to the materialman, to enforce his cause of action *arising under a bond* such as the one here involved, whether the bond be regarded as a statutory bond or not, is exclusive, and that his action *on the bond* is to be subject to the provisions of these statutes" (emphases added)); *see also Fid. & Deposit Co. of Md. v. Big Three Welding Equip. Co.*, 249 S.W.2d 183, 184-85 (Tex. 1952); *Employers' Liab. Assurance Corp. v. Young County Lumber Co.*, 64 S.W.2d 339, 346-47 (Tex. 1933). As explained above, that principle does not apply here because Dealers is not pursuing a cause of action against the bond.

The court of appeals' view that the McGregor Act establishes an exclusive remedy for suppliers should also be rejected because it is contrary to federal courts' interpretation of the Miller Act, on which Texas's McGregor Act is based. *See generally Johnson Serv. Co. v. Climate Control Contractors, Inc.*, 478 S.W.2d 643, 645-46 (Tex. Civ. App.—Austin 1972, no writ) (following federal court construction of Miller Act in interpreting McGregor Act). Using similar permissive language, the federal Miller Act provides that a person that furnished labor or material for a federal construction project and that has not been paid after providing notice of the claim "may bring a civil action on the payment bond." 40 U.S.C. § 3133(b)(1); *cf.* TEX. GOV'T CODE ANN. § 2253.073(a) ("may sue the principal or surety . . . on the payment bond").

Applying this provision to facts like those at issue here, the Tenth Circuit held that "[r]ecovery under the Miller Act is not a supplier's exclusive remedy against a general

contractor." *United States ex rel. Sunworks Div. of Sun Collector Corp. v. Ins. Co. of N. Am.*, 695 F.2d 455, 457 (10th Cir. 1982). It observed that "the Miller Act was designed to provide *an alternative remedy* to the mechanics' liens ordinarily available on private construction projects . . . [b]ecause a lien cannot attach to Government property." *Id.* (quoting *J.W. Bateson Co. v. Board of Trustees*, 434 U.S. 586, 589 (1978)) (some emphases and internal quotation marks omitted). Noting that "[a] mechanic's lien is a statutorily created remedy *supplemental* to other statutory or common law remedies," the court reasoned that the Miller Act was likewise not intended to be exclusive. *Id.* at 458 (emphasis added). Applying these principles, the court held that because the supplier "d[id] not seek recovery from the Miller Act payment bond," it could pursue a common-law quantum meruit claim against the general contractor "regardless of the availability of a Miller Act remedy." *Id.*

The Tenth Circuit's reasoning is persuasive, and other federal courts agree that the Miller Act is not an exclusive remedy. *E.g., United States ex rel. Varco Pruden Bldgs. v. Reid & Gary Strickland Co.*, 161 F.3d 915, 918-19 (5th Cir. 1998) (holding that subcontractor could recover attorneys' fees on state-law claims prosecuted simultaneously with Miller Act claim and citing cases for proposition that Miller Act is "an alternative means of recovery, not a replacement of state law causes of action"); *Wright v. United States Postal Serv.*, 29 F.3d 1426, 1430-31 (9th Cir. 1994) (following *Active Fire Sprinkler Corp. v. United States Postal Serv.*, 811 F.2d 747, 754 (2d Cir. 1987), in holding that "the Miller Act is not an exclusive remedy"); *Wright*, 29 F.3d at 1431 ("Nothing in the Miller Act evinces a legislative intent to limit remedies available to

subcontractors. To the contrary, the Act *expands* upon the remedies previously available to government subcontractors."); *K-W Indus. v. Nat'l Sur. Corp.*, 855 F.2d 640, 643 (9th Cir. 1988).

This Court should agree with the federal courts and reverse the judgment below, holding that the McGregor Act is not an exclusive remedy and therefore Dealers can pursue its alternative claims for breach of contract and for recovery under the Trust Fund Act.

II. The Court Of Appeals' Refusal To Apply The Trust Fund Act Rests On Statutory Language That No Longer Exists.

Solely with respect to Dealers' claim under the Trust Fund Act, the court of appeals held that it failed for a second reason as well. According to the court, "a subcontractor or supplier in a public work contract [cannot] recover under the Trust Fund Act where the full contract amount [is] covered by a payment bond." *Scoggins*, at *5. To support that proposition, the court cited two cases applying a prior version of the Act, which provided that "[t]his chapter does not apply to ... receipts under a construction contract if the full contract amount is covered by a corporate surety payment bond." Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 1, sec. 162.004(a)(3), 1983 Tex. Gen. Laws 3475, 3721 (amended 1987).[2]

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[2] *See Scoggins*, at *5; *Economy Forms Corp. v. Williams Bros. Constr. Co.*, 754 S.W.2d 451, 457 (Tex. App.—Houston [14th Dist.] 1988, no writ) (citing text of prior version in holding that Trust Fund Act "is inapplicable where the full contract amount is covered by a corporate surety payment bond"); *Trucker's, Inc. v. S. Tex. Constr. Co.*, 561 S.W.2d 855, 859 (Tex. Civ. App.—Corpus Christi 1977, no writ) (stating that prior version of Act "is not applicable ... where the full contract account [sic] is covered by a payment bond"). Scoggins' response to the petition suggests (at 7) that these cases interpreted the McGregor Act, holding that it was an

The Legislature deleted this language effective August 31, 1987, however, and replaced it with the following provision: "This chapter does not apply to ... *a corporate surety* who issues a payment bond covering the contract for the construction or repair of the improvement." TEX. PROP. CODE ANN. § 162.004(a)(3) (emphasis added). According to the plain language of this new provision, the Trust Fund Act remains applicable to Dealers' claims against Scoggins because Scoggins is not the surety on the bond.

The court of appeals' principal argument against that conclusion—apart from its mistaken idea (repeated at *7-8) that the McGregor Act is an exclusive remedy—was that the Legislature codified the Trust Fund Act in 1983 "'without substantive change.'" *Scoggins*, at *7 (quoting TEX. PROP. CODE ANN. § 1.001(a)) (emphasis deleted).[3] But that observation is not relevant to the Legislature's intent in *1987* in altering the scope of the Trust Fund Act. In fact, the legislative history shows that as part of a bill to extend and improve the effectiveness of the Trust Fund Act, the Legislature in 1987 fully intended to "*remove as an exception* receipts . . . if the full contract amount is covered by a . . . payment bond," replacing it with an exception only for "a corporate surety" who issues such a bond. House Comm. on Judicial Affairs, Bill Analysis, Tex. H.B. 1160,

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exclusive remedy. Not so. As a brief look at the cases shows, their holdings were based on the subsequently-deleted language of the Trust Fund Act.

[3] The court of appeals also maintained that when a payment bond is posted for a private construction project, subcontractors and suppliers may only recover against the bond. As the petition explains in detail (at 9-12), however, that is incorrect.

70th Leg., R.S. (1987) (emphasis added). The court of appeals erred in failing to give effect to the plain language of the current Trust Fund Act as amended over 20 years ago.

CONCLUSION

Because (1) the court of appeals' holding that the McGregor Act is an exclusive remedy is contrary to the Act's text and purpose, and (2) the court's refusal to apply the Trust Fund Act rests on statutory language that no longer exists, amicus curiae The American Subcontractors Association, Inc. respectfully urges this Court to grant Petitioner Dealers Electrical Supply Co.'s Petition for Review and reverse the court of appeals' judgment.

Respectfully submitted,

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May 13, 2008

CERTIFICATE OF SERVICE

I certify that a copy of the Brief Of Amicus Curiae The American Subcontractors Association, Inc. In Support Of Petitioner was served on counsel of record by United States certified mail, return receipt requested, on the 13th day of May 2008, addressed as follows:

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