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Supreme Court of Texas
In Re: Scoggins Construction Company, Inc., Relator; Mercedes Independent
School District, Real Party in Interest
No. 08-0544

October 8, 2009

Appearances:
Craig A. Morgan, Law Office of Craig A. Morgan, Austin, TX, for Relator.
Lee H. Shidlofsky, Visser Shidlofsky LLP, Austin, TX, for real party in interest.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnsonand Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in 08-0544 In Re: Scoggins Construction Company, Inc.
MARSHALL: May it please the Court, Mr. Morgan will present argument for the Relator. Relators have reserved five minutes for rebuttal.

ORAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF THE PETITIONER

ATTORNEY CRAIG A. MORGAN: May it please the Court, I am Craig Morgan representing Relator and Defendant, Scoggins Construction Company. The fundamental question in this mandamus proceeding is whether the interests of this defendant in having its contractual rights and liabilities determined in a fair and timely fashion, is entitled to the same weight and dignity as the interests of this plaintiff in having its contractual claim decided in a fair and timely manner. If the answer to that question is no, that the interests of the plaintiff in pursuing its contractual claim against Scoggins outweighs the interests of Scoggins pursuing its contractual claims against the subcontractor, the subcontractors arising out of the same construction project, if the answer to that is no, then the Trial Court's order was possibly correct and should be permitted to stand. If the answer, however, is yes, the interests of Scoggins, the defendant, in preserving its contractual rights arising out of this project is

entitled to the same dignity and respect as the interests of plaintiff, the School District, the owner of the project, then the order is wrong and must be corrected.

JUSTICE DALE WAINWRIGHT: Mr. Morgan, there is a question about whether the parties were agreeable to the motion that the Trial Court rendered the order on, about which we are here today. Is there an agreement among the parties that addresses the dispute we're here about today?

ATTORNEY CRAIG A. MORGAN: You're talking about agreement about joinder?

JUSTICE DALE WAINWRIGHT: Uh-huh.

ATTORNEY CRAIG A. MORGAN: Well, if the plaintiffs are willing to agree to a joinder, that's fine with us, but it's not the plaintiffs, it's not the plaintiffs, it's not the School District that entered the order that's the subject of this mandamus proceeding. The time for the plaintiffs to have -- not the plaintiff, excuse me -- the School District to have not opposed that motion was some two years ago when it was originally filed. The order that's at issue in this proceeding was entered on the 2nd of April, 2008, and by which the Trial Court denied Scoggins' motion to join these subcontractors as third party defendants so all the claims could be resolved in one proceeding. That order is still in full force and effect and has not been modified. The School District's willingness to withdraw its opposition is simply irrelevant at this point. Furthermore, even if the order had been withdrawn and changed, that would not necessarily deny this Court of jurisdiction to address the issue.

JUSTICE DALE WAINWRIGHT: Well, then, if there is no opposition now to your motion, it was I guess the motion for leave to join third party defendants and to designate responsible third parties, I think you were seeking to add about 20 subcontractors.

ATTORNEY CRAIG A. MORGAN: Twenty subcontractors, that's correct.

JUSTICE DALE WAINWRIGHT: There is no opposition to it, and I understand that there is an order pending at the Trial Court denying that motion. If, if the parties --

ATTORNEY CRAIG A. MORGAN: Excuse me, Your Honor, the motion has been denied.

JUSTICE DALE WAINWRIGHT: Okay, the order had been signed by the Trial Court --

ATTORNEY CRAIG A. MORGAN: Right.

JUSTICE DALE WAINWRIGHT: -- denying your motion?

ATTORNEY CRAIG A. MORGAN: The order that is the subject of this --

JUSTICE DALE WAINWRIGHT: It's existing at the Trial Court, put it that way.

ATTORNEY CRAIG A. MORGAN: That's correct. This is not a pending motion.

JUSTICE DALE WAINWRIGHT: If -- yeah, I said a pending order, I meant existing order.

ATTORNEY CRAIG A. MORGAN: Okay, right.

JUSTICE DALE WAINWRIGHT: If the parties are agreeable to that and the Trial Court hearing that withdrawal of opposition is willing to change its order, then that moots your issue here, doesn't it?

ATTORNEY CRAIG A. MORGAN: No, it does not, Your Honor. First of all because as I mentioned, the School District's willingness to not oppose the motion that's already been denied doesn't mean a Trial Court is going to change the order.

JUSTICE DALE WAINWRIGHT: Assume that after argument --

ATTORNEY CRAIG A. MORGAN: Right.

JUSTICE DALE WAINWRIGHT: -- while we're cogitating on your dispute, that you address the Trial Court about this, and the Trial Court changes its order and grants your motion, then the issue you're disputing here today goes away.

ATTORNEY CRAIG A. MORGAN: Not necessarily under the In re Allied Chemical Corporation decision, because this issue is, this is simply a matter that would evade review on a matter that is capable of repetition, and in fact, is being repeated as we speak. Right now there are, is a case in front of this Court to be heard this morning involving essentially the same issue that dealt with a Trial Court's sui sponte severance of subcontractors.

JUSTICE DALE WAINWRIGHT: That's the Satterfield [Ph.] case --

ATTORNEY CRAIG A. MORGAN: That's correct.

JUSTICE DALE WAINWRIGHT: -- that we're arguing third today.

ATTORNEY CRAIG A. MORGAN: That's correct -- there is another case --

JUSTICE DALE WAINWRIGHT: If our Court reverses its order on your motion in this case, you're saying we still need, we would still need to answer that question that you're raising here?

ATTORNEY CRAIG A. MORGAN: The question, the question is still capable of being repeated, not only in this case as in Satterfield, for example, the Court could, the District could reverse its position again, the Trial Court could sui sponte determine to sever the subcontractors, and furthermore, there are other pending cases in which the same issue is, has arisen. There are in fact arising out of this same disputes, involving initially germinating from the same lawsuit, there are five other cases against Scoggins brought by the School District concerning five other School -- constructions of five other projects in which Scoggins has also sought to join the subcontractors in that lawsuit. All five of those actions that were severed from this one are pending in front of the Trial Court right now with those motions abated while the Trial Court waits for this Court's decision in this mandamus proceeding to determine whether its refusal to join the subcontractors was proper here, so they can repeat that decision in the other five pending cases. The point, the School District has not consented to the joinder in those five other cases.

JUSTICE HARRIET O'NEILL: How much does your argument depend on the docket control order deadline?

ATTORNEY CRAIG A. MORGAN: Not -- well, some. Not significantly, not critically certainly, because although the joinder motion was filed two days, a day or two before the docket control order said the joinder motions had to be filed, it was filed only six months after the counterclaim was initially filed, and --

JUSTICE HARRIET O'NEILL: But it was within the Trial Court's discretionary period whether to, to allow joinder?

ATTORNEY CRAIG A. MORGAN: It was, it was -- right. It was not -- the joinder motion was not filed within the first 30 days --

JUSTICE HARRIET O'NEILL: Right.

ATTORNEY CRAIG A. MORGAN: -- of Scoggins' answer and could not have been realistically speaking.

JUSTICE HARRIET O'NEILL: Well, I'm just trying to figure out, is your position that because the docket control order had a date for joinder that there was an unfettered right to join people by the docket control order date, or are we talking just more about the parameters of the Trial Court's discretion?

ATTORNEY CRAIG A. MORGAN: Well, the existence of the docket control order and the fact that we complied with it should at least

create a presumption that there was no problem with, there was no problem with untimeliness of the motion.

JUSTICE HARRIET O'NEILL: But what is the -- well, how broad is the Trial Court's discretion when four months before trial 20 subcontractors are brought in? It is significant that this is a contract claim rather than a tort claim, it seems to me. I can see an argument being made that the way to streamline this litigation is pinpointing the contract action, the scope of the alleged defects, and then in a more streamline proceeding allow the general contractor to go against its subcontractors pursuant to the contracts that are found liable in the first case. In other words, this case is going to be pretty long and drawn out if you've got 20 subs in there --

ATTORNEY CRAIG A. MORGAN: Well --

JUSTICE HARRIET O'NEILL: -- and the issues aren't really related to the nearer contract question before the Court.

ATTORNEY CRAIG A. MORGAN: Well, the problem here is, Your Honor, that doing this in two proceedings will not streamline it at all, because --

JUSTICE HARRIET O'NEILL: Well, that's arguable.

ATTORNEY CRAIG A. MORGAN: No, it's not, Your Honor. It's quite frankly not arguable, because in the first case, the only question the jury is going to be asked to resolve is whether there were any defects -- well, in the construction of this school building, whether it will be asked whether Scoggins Construction breached its contract to produce this school building in a manner, you know, in a good and workmanlike fashion, and if not, if it did breach that contract, how much the School District's damages are. If it says, if the jury determines that there were any deficiencies in the construction of this school project, which could range anywhere from the allegations of the defects in the roof, to the parking lot, to the windows, to the plumbing, all of which the plaintiffs' experts now contend are defective, the jury will simply return a finding that yes, Scoggins breached the contract and X amount of damages. In the second proceeding, Scoggins will then be suing the subcontractors to recover its contractual damages. Its contractual damages will be the amount, will include at least as a minimum, the amount by which it was held liable in the first proceeding. After all, Scoggins is not the owner of the building. It's not actually directly damaged by any defects in its construction. Its liability -- I mean, excuse me -- its damages for the subcontractors' breach of contract will include the amount by which it was held liable for that breach in the first proceeding. But it will be proceeding against 20 subcontractors.

JUSTICE PAUL W. GREEN: Well, not all of them.

ATTORNEY CRAIG A. MORGAN: It won't know. That's the point, Your Honor.

JUSTICE PAUL W. GREEN: Well --

ATTORNEY CRAIG A. MORGAN: It will have no idea what the first jury found. There will be ultimately -- well, try to conceptualize how that second proceeding is going to go.

JUSTICE PAUL W. GREEN: Well, I would think that a defendant would try to pin down on the plaintiff what the defect is. Was it the roof? Was it the HVAC? Was it concrete? Or whatever it might be, drywall, and so you're going to know because the plaintiff is going to have to point to that when it's taking it to the jury as to what the alleged defects are, aren't you?

ATTORNEY CRAIG A. MORGAN: No, they're not, Your Honor. Their experts have already claimed defects in all those areas in which the

work was done by 20 separate subcontractors. There is no reason to believe that they can't or won't present evidence of all those defects in the Trial Court in the first proceeding of a breach of contract claim. The second jury in the second proceeding neither the subcontractors nor that jury will be bound by the finding in the first proceeding, even if they knew why the defects were found. In the second proceeding, Scoggins will have the burden of showing that its liability in the first lawsuit was a result of the following defects by these subcontractors. There is simply no way that that will ever be knowable. In fact, the public policy of this state is that you can't know it because you can't bring the jurors in the first proceeding to the, as witnesses in the second trial and ask them, "Well, what was it that caused you to determine this building was defective, and in what amounts?" One can easily foresee wildly inconsistent verdicts from the second proceeding as in the first, and you can foresee an appeal by any subcontractor in that second proceeding claiming that Scoggins didn't prove causation, because Scoggins will be unable to present any convincing, perhaps persuasive, perhaps any evidence at all to show the basis for the liability found in the first proceeding. It will simply say, "Well, I have a judgment for $10 million against me based upon the jury's finding in the first proceeding that this building was defectively constructed," and then following with all the evidence that the plaintiff presented in that first proceeding to prove that these subcontractors did their work improperly. "Now here, jury in the second proceeding, you guess at why the first jury found me liable for this defective construction, and you determine which subcontractors did it wrong."

JUSTICE PAUL W. GREEN: Well, how would you foresee it would be submitted in a combined trial? You'd have issues related to Scoggins and then you'd have separate issues related to each of the subcontractors?

ATTORNEY CRAIG A. MORGAN: That would be one way to do it. Perhaps you could have, you know, depending upon how the evidence unfolded at the trial, you could have it find, was there a defect in the construction of the roof? And if so, X amount. Was there a construction in the defect of the parking lot, and if so, what are the damages? Was there a defect in the construction of the plumbing?

JUSTICE PAUL W. GREEN: How would craft a judgment if you don't tie it to any particular subcontractor?

ATTORNEY CRAIG A. MORGAN: Well, you, presumably the evidence would tie that to subcontractors. Do you find any defect in the plumbing work done by subcontractor X? Do you find a defect in the roofing work done by subcontractor Y? I mean this is not unworkable. The problem is that doing it in two trials, as the Trial Court's order would currently require, is utterly unworkable as to Scoggins.

JUSTICE DALE WAINWRIGHT: Do you foresee needing a, in Justice Greene's hypothetical, a proportionate responsibility question for each subcontractor as well?

ATTORNEY CRAIG A. MORGAN: That depends upon whether there is a tort claim. I mean, you know, the plaintiffs argue that this is simply, it's a breach of contract claim --

JUSTICE DALE WAINWRIGHT: The real parties have offered if this agreement carries through to add a negligence claim --

ATTORNEY CRAIG A. MORGAN: Well --

JUSTICE DALE WAINWRIGHT: -- in addition to withdrawing the motion, their opposition to your motion.

ATTORNEY CRAIG A. MORGAN: Well, if there is a tort claim, then I

presume that there would be a proportionate responsibility allocation question under Chapter 33, as in any other tort. If it remains a straight -- if, as the District insists, their claim is a straightforward contract action, then there would simply be a question about who breached which contracts.

JUSTICE HARRIET O'NEILL: But isn't that the very purpose of entering into these contracts, to streamline any sort of proceedings afterwards? The District, if there are problems, doesn't have to bring in all the subcontractors and have a long protracted trial, they try it against you and then you can proceed against the subs. I mean isn't that the purpose of this type of contract?

ATTORNEY CRAIG A. MORGAN: No, it's not to stream -- it's not to permit multiple litigation. It's to give the owner one party --

JUSTICE HARRIET O'NEILL: Right.

ATTORNEY CRAIG A. MORGAN: -- to whom to look for recovery. That doesn't mean that the owner is entitled to prevent the general contractor from preserving its contractual rights against the subcontractors by bringing them into the same litigation so that the same jury that determines Scoggins' liability to the District can determine the subcontractors' liability to Scoggins. After all, these are exactly the same facts. These are not intertwined facts. These are precisely the same facts.

JUSTICE HARRIET O'NEILL: What if this had been attempted two weeks before trial?

ATTORNEY CRAIG A. MORGAN: Well then, that would be different, but it wasn't.

JUSTICE HARRIET O'NEILL: Why?

ATTORNEY CRAIG A. MORGAN: If, the two -- if there would have been an reasonable delay, it depends on the circumstances. If, for example, as in -- if the pleadings had, were as they were here, which is just global, nonspecific, saying the building was not properly constructed, and it was only through the course of discovery of the District's experts that the defendant was able to determine who, what the precise defects were, and it was not until two weeks before the trial that that was possible, then I think the defendant would be in good position to contend that they didn't know which subcontractors to bring in, and it would be egregiously bad public policy to require them to simply bring them in, all in.

JUSTICE HARRIET O'NEILL: But that's what happened here, right?

ATTORNEY CRAIG A. MORGAN: No, it's not. There were 50 to 60 subcontractors that worked on this project. Now, the District's position is that Scoggins should have simply brought them all in within 30 days, without having any reasonable basis for believing that the work of any of them was actually at issue. Scoggins' instead took the far more reasonable approach, the one that this Court should encourage, which is to conduct the discovery and find out exactly what it was the School District was really claiming was wrong with the building, and once it did that it identified the subcontractors who did that work and brought only them in. That's perfectly reasonable and it couldn't be done within 30 days. I see my time has expired.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counselor. The Court is ready to hear argument now from the Real Parties in Interest.

MARSHALL: May it please the Court, Mr. Shidlofsky will present argument for the Real Party in Interest.

ORAL ARGUMENT OF LEE H. SHIDLOFSKY ON BEHALF OF THE RESPONDENT

ATTORNEY LEE H. SHIDLOFSKY: May it please the Court, the question for this Court is whether the Trial Court clearly abused its discretion in refusing to allow 20 subcontractors a few months before trial in a contract case. Nobody disputes here that it's a contract case.

JUSTICE NATHAN L. HECHT: Let me ask you about the same questions we asked Petitioner earlier. Has your agreement not to oppose the joinder of the parties resolved the controversy, or what's your position on that?

ATTORNEY LEE H. SHIDLOFSKY: We have offered, we have offered to Scoggins basically all the relief that they seek in this Court. We have said you can join them in, we will add a negligence claim. Mind you, we don't think a negligence claim is even viable because of the economic -- but we'll add it so you can add responsible third parties. We'll give you everything that you have asked for, and they said no. And the reason why they said no, presumably, was because they're not mandamusing us, they're mandamusing the Trial Court. We even said we'll join in, they said no.

JUSTICE PHIL JOHNSON: And have you presented an agreed order to the Trial Court?

ATTORNEY LEE H. SHIDLOFSKY: We can't, Your Honor, because this Court stayed all proceedings in the --

JUSTICE DALE WAINWRIGHT: If after argument, we stay the proceedings for that opportunity, would you still stand behind your offer of all the relief that they're asking for?

ATTORNEY LEE H. SHIDLOFSKY: Absolutely, Your Honor, and let me just make clear that --

JUSTICE DALE WAINWRIGHT: And then take that to the Trial Court?

ATTORNEY LEE H. SHIDLOFSKY: We will, Your Honor, and the reason is simple. We don't, we are waving the white flag here, so to speak, and but it has nothing to do with the merits of this. We think we're absolutely right, we think the judge was absolutely right and there's clear discretion, and that we should prevail on the merits. Simply put, we decided to go this route because we're 17 months into appellate litigation here and the School hasn't gone one step closer to being fixed. And the School Board just made a decision, "We give up."

JUSTICE DALE WAINWRIGHT: Are there five other cases pending where this issue is T'ed up before the trial judges or judge in Hidalgo County?

ATTORNEY LEE H. SHIDLOFSKY: There are five other cases. It's being handled by different underlying lawyers. I am not aware, it's certainly not on the record, I am not aware that this issue is T'ed up. I was under the impression that they had sued the subcontractors in the same case, but I do not know for sure whether this issue is T'ed up or not in those other five cases. There are five other pending cases though. Certainly we do have the Met [Ph.] case which is pending in this Court, and we do have the Satterfield and Ponticas [Ph.] case, but I believe in Satterfield and Ponticas, the same, the same issue, they've waved the white flag, so to speak, and agreed to all the relief that the other side has requested.

JUSTICE PHIL JOHNSON: Let's talk about the merit system because he says it's capable of repetition. How would you submit this case? I mean how could the contractor protect themselves from simply inability to show causation as to any subcontractor in a second suit if you simply, your contract says you guarantee the construction, and under our broad

form, you would, the Trial Court may well just submit a single issue with one damages number in there, and the defendant could object, but then you're back into the Appellate system and we just have all this stuff cycling through our system over and over again.

ATTORNEY LEE H. SHIDLOFSKY: Well, I think the problem there, Justice Johnson, is that it's based on a false premise that there is going to be inevitably inconsistent results. In the first trial --

JUSTICE PHIL JOHNSON: Well, there's not, he's not saying inconsistence, he's just saying he can't prove causation as to any particular subcontractor if he takes a $10 million judgment based upon one finding of liability and one damage finding, and he tries to sue those subs, and it seems like he has a pretty valid complaint. How am I ever going to show which sub is responsible for which part of it in the subsequent litigation?

ATTORNEY LEE H. SHIDLOFSKY: It happens every day in contractual indemnity cases where somebody gets sued, doesn't bring in the other person, and then after a judgment is awarded or after a settlement, they then go try to pursue their --

JUSTICE PHIL JOHNSON: Okay, it happens all the time. Would you explain to me how he can show causation as to the roofing contractor in the second case if in the first case he, the finding is there is, yes, the contractor breached the contract, and $10 million of damages goes to the School District. How does he go sue the roofing contractor and show the roofing contractor is responsible for $376,000 of that? How can he do that?

ATTORNEY LEE H. SHIDLOFSKY: How he allocates those damages is his burden. Now I can understand that that is a tough issue how he allocates the exact amount --

JUSTICE PHIL JOHNSON: Tough? How does he do it at all?

ATTORNEY LEE H. SHIDLOFSKY: Well, because there is going to be -- I mean in defending themselves at the first trial, they're going to have to say this wasn't wrong, this wasn't wrong, this wasn't wrong. Now the jury is going to come back, and he's correct, with one answer, $5 million. He then takes that and he goes after the particular subs where the evidence came in, whether, how the money damages --

JUSTICE PHIL JOHNSON: And he has to take the evidence from the first trial and read it into the second trial? Or does he have somebody testify about what the evidence was in the first trial and take that? How does he, how does he do it?

ATTORNEY LEE H. SHIDLOFSKY: Well, it's presumably on the, I mean there is going to be expert reports presented in the first trial, expert testimony presented in the first trial --

JUSTICE PHIL JOHNSON: But the jury could ignore completely the roof and find it all on the HVAC, and I mean and we don't know, and that's what his complaint is.

ATTORNEY LEE H. SHIDLOFSKY: That's correct. But again, what he's trying to do, what Scoggins is trying to do there is take, take the burden, shift it from them and put it onto the School District. We have a contract with them --

JUSTICE PHIL JOHNSON: No, he's not trying to put the burden on you, as I understand, he just wants to bring the others in so, so when this first trial is over, I mean it may take a long time but at least everybody knows you can submit the individual parts so everybody will know what the result is, and then you can go up on appeal one time, it seems like.

ATTORNEY LEE H. SHIDLOFSKY: Well, again, I think that decision of whether or not to bring in those is in the wide discretion of the trial

judge, and this trial judge decided, using her wide discretion, that this won't, that she didn't want to allow the 20.

JUSTICE PHIL JOHNSON: So that means the Trial Court can use its discretion to make one trial and then the subsequent trials and we appeal the first trial while, where they're appealing the $10 million verdict you obtained from them on some evidentiary, or the others are waiting, or we try those others, or I mean it, it, that's within the Trial Court's discretion to just kind of spread it all out into the system and do that?

ATTORNEY LEE H. SHIDLOFSKY: There is no doubt that this creates two lawsuits. We're not disputing that. One --

JUSTICE PHIL JOHNSON: Or 20. He says he's going to sue 20 subs.

ATTORNEY LEE H. SHIDLOFSKY: In one lawsuit. He's not going to sue 20 subs in 20 different lawsuits.

JUSTICE PHIL JOHNSON: Well, maybe yes, maybe no, we don't know that, do we?

ATTORNEY LEE H. SHIDLOFSKY: Well, he sought to bring them all in in one lawsuit in this case.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY LEE H. SHIDLOFSKY: So I mean I think that in the natural course of things, he's going to sue -- and he may not even sue the 20 after our lawsuit because after the initial lawsuit, we may only put on evidence of five defects, or may put on evidence of four defects, or their evidence against us in the first may be so good as to some that they decide they're only going to go after three or four of the subcontractors. I think Justice O'Neill's point was right. I think this is a way to streamline it. Yes, there's going to be two trials, but you've got to remember in the contract that we signed with the general contractor, they agreed to be responsible, so we sued just them. The contract says we can look to just them to remedy our problems, and then it's up to them to go out -- and nobody is disputing here, they're not disputing that they have a right to go after them in a subsequent lawsuit. They just want to create in essence a proportional responsibility standard for a breach of contract case, and right or wrong, it doesn't exist in Texas. There is no proportionate responsibility for contracts, but that is in essence what they're trying to do here.

JUSTICE DALE WAINWRIGHT: Well, the Amicus shed some light on how this industry operates, at least in the main under AIA contracts, and the Amicus says that for the indemnity provisions that the subcontractors have in their contracts, and owe to the general contractor, they have to get a percentage of responsibility in order to assert those, the indemnities. And those indemnity disputes will be based on the exact same facts that will be litigated and determined in your, in this trial if it's only between you and, and the Relator, right?

ATTORNEY LEE H. SHIDLOFSKY: Well, I agree that there's two main contractual risk transfer tools in a, in a contract like this. There's additional insured status and there is contractual indemnity. For additional insured status, it's never been the law in the State of Texas or any of the other states that the subcontractor has to be a party to the litigation in order for the general contractor to be an additional insured, and --

JUSTICE DALE WAINWRIGHT: Yeah, and he hasn't argued that.

ATTORNEY LEE H. SHIDLOFSKY: And as to contractual indemnity, nobody disputes -- in fact it's happened for a hundred years in this state that that lawsuit can be brought afterwards. In fact, the Statute

of Limitations doesn't even begin to run until after the judgment is issued against Scoggins in the first place.

JUSTICE NATHAN L. HECHT: But the problem is though when there are multiple contracts. I mean if it were just one, obviously that would be correct, and maybe if there were two, but if there is a number, can you take us through the steps of how the second case would be tried so that the allocation problem could, what you say is a tough issue, could be overcome?

ATTORNEY LEE H. SHIDLOFSKY: I mean I think what happens is we take the judgment in the first case, say it's $5 million Then they go, they pick the subs that they are going to sue and they put on their evidence of what they think the damages were. And the indemnity agreement that you mention says that the contractors are responsible for their own acts [inaudible] --

CHIEF JUSTICE WALLACE B. JEFFERSON: I'd like to be, I'd like to be one of those subs in that second trial because I would go, I'd go back and look at what the contractor said. If the contractor in the first trial said< "There is no defect, there is no defect here whatsoever. We shouldn't be liable, the school is perfect." And then you go to the second trial and the sub is going to say, "See what they said back there?"

ATTORNEY LEE H. SHIDLOFSKY: Well, so -- then let's go back to the first trial for a second. So what is the sub, what is Scoggins going to do in the first trial? Is he going to go in there and say everything is perfect, but if it's not, it's him, it's him, it's him, it's him? I mean it puts, it puts Scoggins actually in an odd position in the first trial itself too. They say their fear of inconsistent results, but in the first trial, to get the jury submission that they want, that you were, that they were talking about, they essentially have to talk out of both sides of their mouth. They have to say the school is perfect, but if it's not, it's the mason's fault, it's the exterior cladding's fault, it's the -- you know, that seemingly undercuts their defenses in the first trial.

JUSTICE PAUL W. GREEN: Isn't that a strategic decision that the contractor has to make in these kind of cases?

ATTORNEY LEE H. SHIDLOFSKY: It absolutely is a strategic decision, and sometimes the general contractors bring them in and sometimes they don't. The question though, the question is whose decision is it? Are we going to take that decision out of the Trial Court's hand and give it to the general contractor so we decide in all construction defect cases it's the, based on breach of contract, that it's the general contractor's decision whether to join everybody in, or do we allow the trial judge to decide whether or not judicial economy plays a role and whether or not it's better to streamline it in one lawsuit or in two lawsuits.

JUSTICE NATHAN L. HECHT: Do you have a case on appeal from the second lawsuit that says this was a good idea?

ATTORNEY LEE H. SHIDLOFSKY: I'm sorry?

JUSTICE NATHAN L. HECHT: Is there any case from an appeal of a second lawsuit like this, like in this situation, that the Appellate Court said this is a good idea to try it twice?

ATTORNEY LEE H. SHIDLOFSKY: I'm not aware of any case either way. And we haven't found, and I think both sides in there, that we haven't found a case directly on point on this issue. Most of the cases, mostly, in fact all of the cases that they cited were tort cases where the Courts have said because of proportionate responsibility, we should try it all at one time. I can understand those decisions in the

proportionate responsibility setting, but this is a breach of contract setting.

JUSTICE NATHAN L. HECHT: But how is that, how is it any different? The ultimate problem, practical problem, it's a different legal problem, but the practical problem looks to me like it's exactly the same.

ATTORNEY LEE H. SHIDLOFSKY: Well again, it's something though that's been faced for years in contractual indemnity claims, and in --

JUSTICE NATHAN L. HECHT: I know, but take me back though. Why isn't it exactly the same? Because if you had a trial that you didn't allocate responsibility and you just had a, is there a liability and how much are the damages, and then you had a second trial to allocate that responsibility, I don't see how it could possibly occur, because you, you would never be sure that what the second jury thought was what the first jury thought.

ATTORNEY LEE H. SHIDLOFSKY: Well, that, that's true, but it's also based, they base it on the premise that an inconsistent result is one that says $5 million in the first trial, and then let's say in the second trial they only award Scoggins $3 million. What they argue and what Amicus argues is that is absolutely an inconsistent result, and that, that can't be right. But that presupposes, that presupposes that the general contractor doesn't have any of its own liability. The very expert reports that they point to point to inadequate oversight, poor coordination of trades. Those are things that are not the subcontractor's fault. Those are things that would go directly against the general contractor, so just because the judgment is different between the first lawsuit and the second lawsuit doesn't mean they are inherently inconsistent results.

JUSTICE PHIL JOHNSON: But what if, what if he tries 10 lawsuits and 10 second lawsuits and gets $15 million and he only has to pay you five, is that a problem?

ATTORNEY LEE H. SHIDLOFSKY: I'm not sure that that's possible. I think they, there would be equitable problems.

JUSTICE PHIL JOHNSON: Well, but I mean if he spreads them out into 10 lawsuits and each one gets $3 million from each one, it's possible it seems like, because they're not going to, you know, it's -- each jury is going to be individually judging what that independent subcontractor did. It seems like that is a possibility just as much as getting $3 million instead of $5 million when you spread them out like that.

ATTORNEY LEE H. SHIDLOFSKY: Well, I think there would be a double recovery problem in that, in that sense if he recovered more than he had to pay out.

JUSTICE PHIL JOHNSON: The first one pays out $3 million, so the last one doesn't have to pay any. Does that -- now that doesn't seem like that's very fair though.

ATTORNEY LEE H. SHIDLOFSKY: But again, you mean if he brings two separate lawsuits?

JUSTICE PHIL JOHNSON: Let's say he brings 10, against 10 subs.

ATTORNEY LEE H. SHIDLOFSKY: Uh-hm.

JUSTICE PHIL JOHNSON: You get 5 million from him and the first sub gets hit for 3 million, the second sub gets hit for 3 million, the third sub gets hit for 3 million. The first sub pays his 3 million, what do these other -- I mean you know, and the others get off completely scot-free it seems like, or they have to -- it seems like we're just asking -- I mean you could get more, you could get less, and you really have no equitable or right way of figuring out what is

right, it seems like.

ATTORNEY LEE H. SHIDLOFSKY: Well again, I come back -- I mean I understand that there, that this is going to cause a second lawsuit, nobody disputes that. Again, the question comes back to though, whether or not that becomes the School District's problem. The School District tried to streamline this by bringing it against the single general contractor -- which it had, was entitled to do by its contract, and whether or not the trial judge had a discretion to keep it that way. The, if they would have brought them in within the first 30 days, the trial judge has no discretion. That's what Rule 38 says. Afterwards, they have to move for leave.

JUSTICE PHIL JOHNSON: Is there any, is it any part of your position that they unreasonably delayed discovery in finding out what your allegations were and what parts of the construction you were complaining about?

ATTORNEY LEE H. SHIDLOFSKY: Well, they did move for special exceptions earlier on, but they never sent them for hearing.

JUSTICE PHIL JOHNSON: Okay. But my question was is, did they delay in doing discovery and taking depositions, and have you alleged that they unreasonably delayed these several months?

ATTORNEY LEE H. SHIDLOFSKY: The only thing we say, Your Honor, is that they could have moved for special exceptions or they could have set a hearing to figure out which particular subs, and then they did wait to the day before the docket control order to bring their motion for leave. But again, whether they waited the day before or they waited a week before, I don't think that's the pivotal factor. I think the pivotal factor is whether the introduction of 20 subs four months or five months before trial is going to unreasonably delay the trial, and we think it unquestionable that it's going to unreasonably delay the trial.

JUSTICE DALE WAINWRIGHT: We have said that in determining consolidation or deconsolidation, the dominant consideration in every case is whether the trial will be fair and impartial to all parties. That's in the Inven Waters vs. Rogers Ph.] case, in which we ordered deconsolidation, and it was a personal injury mass tort case from either side's cites, but isn't that principle the controlling principle here, fairness and impartiality to all the parties?

ATTORNEY LEE H. SHIDLOFSKY: I think fair and impartiality to all parties is a dominant consideration in these cases.

JUSTICE DALE WAINWRIGHT: Keeping, keeping only Scoggins as the defendant makes it certainly more straightforward for your client. What about all the parties?

ATTORNEY LEE H. SHIDLOFSKY: I still say that again, they don't lose any of their rights after we get a judgment. They are not claiming that they can't bring that subsequent lawsuit to try to recover what they were damaged by.

JUSTICE DAVID MEDINA: Aren't you entitled to rely on the contract, the contract allows you to just sue the general contractor and let the general contractor go after the subs if there are subs that are responsible?

ATTORNEY LEE H. SHIDLOFSKY: Absolutely.

JUSTICE DAVID MEDINA: The burden is on the other side, right?

ATTORNEY LEE H. SHIDLOFSKY: Right, they are absolutely entitled to. No one claims anything different that they can't go back after, they just want to bring it, they just want to force it all into the first trial and say the trial judge has no discretion essentially as long as they brought it timely to keep them out.

JUSTICE DAVID MEDINA: This seems like an end around to all of that.

ATTORNEY LEE H. SHIDLOFSKY: Yeah, that's right. And one other, one other issue that we bring up in the briefing, and I understand that it's a point that, that is an issue that may be in a state of flux is we think that the previous cases decided, for the most part under 37 and 38 which are the rules that they brought, the Courts have decided that on traditional appeal and not mandamus, because of the adequate remedy of appeal. There are several cases where the failure to join was brought, or the failure to consolidate, or the failure to sever was brought up by traditional appeals under 37 and 38 under the same abuse in discretion, so I'm not sure that this case even fits within the categories of cases that this Court has held is ripe for mandamus review.

JUSTICE PHIL JOHNSON: Is it your position that the School District wants to try a case, appeal it, and then have us say if we should decide that way that it is completely unfair to the defendant because these parties were not joined, and then send it back and retry it again?

ATTORNEY LEE H. SHIDLOFSKY: No. I mean that, that's not my view.

JUSTICE PHIL JOHNSON: That doesn't seem to be very efficient or good for anybody involved in this.

ATTORNEY LEE H. SHIDLOFSKY: That's not our position.

JUSTICE HARRIET O'NEILL: But at this point we don't know how the case will be submitted. The parties could agree and the Trial Court could decide to submit it with separate liability questions, or even it sounds like you've agreed to submit responsible third party, so if the charge were submitted in that manner, the problem would be remedied?

ATTORNEY LEE H. SHIDLOFSKY: We have agreed to everything that they seek in this case, so yes, if we went back, if the stay was lifted, we would go back --

JUSTICE HARRIET O'NEILL: But even if that didn't happen, if the case went to trial as is without the addition of the parties, you could agree to a charge that included the responsible third party who's in it that would facilitate the second lawsuit?

ATTORNEY LEE H. SHIDLOFSKY: I suppose we could, yes. I mean at this case, there is breach, there's no tort allegations that would allow --

JUSTICE HARRIET O'NEILL: No, I understand, but it's that I understand you've agreed to responsible third party.

ATTORNEY LEE H. SHIDLOFSKY: That is correct.

JUSTICE HARRIET O'NEILL: So even if they are not added, that could be submitted.

ATTORNEY LEE H. SHIDLOFSKY: That is correct.

JUSTICE HARRIET O'NEILL: But we don't know --

JUSTICE DALE WAINWRIGHT: Sorry. And of course that makes your case for your client much more complicated. Instead of one target, you've got 21.

ATTORNEY LEE H. SHIDLOFSKY: And that was --

JUSTICE DALE WAINWRIGHT: You'd prefer not do that, I take it?

ATTORNEY LEE H. SHIDLOFSKY: And that was, that was the whole point of how we started this, to streamline our case. That is correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

REBUTTAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF PETITIONER

ATTORNEY CRAIG A. MORGAN: It's readily apparent that there is no way that these cases can be tried in two separate proceedings without severely prejudicing if not completely eviscerating Scoggins' right, contractual rights against the subcontractors. The plaintiffs haven't suggested any. When pressed by this Court on those questions, their answers continually fall back to, "Well, that's Scoggins' problem. We want to streamline the case," and so forth. But listen carefully, all they want to do is streamline this case for the School District. Now it's true that their case would be easier if it's just the School District against Scoggins. The trial would be easier, the evidence would be easier, the charge would be simpler, the case would be over quicker, but that's not the point.

JUSTICE NATHAN L. HECHT: I'm not sure, how would the evidence be any different? It looks like it's going to be the same.

ATTORNEY CRAIG A. MORGAN: Well, the evidence about the existence of defects would be the same, that's true, but they wouldn't --

JUSTICE NATHAN L. HECHT: Well -- it looks like all the evidence would be [inaudible] .

ATTORNEY CRAIG A. MORGAN: The trial, the trial would be longer because there would be more people cross-examining the experts, and so forth, and they would have to be more specifically directed against which subcontractor did which work, so the trial would be somewhat longer. The evidence about the defects would be exactly the same. But there is no question that it will be easier for the School District, so that comes back to the question I indicated was the fundamental question at the heart of this proceeding, whether the interests of this defendant in having its contractual rights and liabilities determined in a fair and timely manner is entitled to the same weight and dignity as the interests of this plaintiff in having its contractual claims determined in a fair and timely manner? Now if the answer to that is no, as the District suggests, then what really matters is streamlining this litigation for them, and all the subsequent problems are simply ours, well, then the Trial Court's order was probably correct and should be allowed to stand. If the answer, however, is yes, that our rights to enforce our contractual remedies under the contracts concerning this project are entitled to just as much dignity and weight and should be given just as much respect as the contractual rights of the District, then the Trial Court's order has to be wrong and must be corrected.

JUSTICE DAVID MEDINA: Are we to ignore when the motion to leave was filed and when the joinder was filed, if it was or within 30 days, we're not to consider that? If it's the day before trial, are we're to say the Trial Court abused its discretion because the Trial Court is not going to streamline this when the joinder was late?

ATTORNEY CRAIG A. MORGAN: Well, that's not what happened here, Your Honor. This wasn't the day before trial, it was four months before the trial setting, which --

JUSTICE DAVID MEDINA: Well, what's the problem with the trial order? Is that not an issue?

ATTORNEY CRAIG A. MORGAN: I'm sorry, I don't under the question.

JUSTICE DAVID MEDINA: Is it not an issue when you joined the third parties?

ATTORNEY CRAIG A. MORGAN: Oh, if it were belatedly and unreasonably delayed, that would be a factor, but that's clearly not the case here. In fact, the Trial Court setting, it's curious that the Trial Court setting, the District contends is only four months off and was so critical and critically needed to protect, at that very same

hearing they said was going to be moved to September by agreement of the parties. And besides, it was 13 months ago and it's long since passed, there's no trial setting here. And the District's only suggestion is that well, Scoggins should have named every single of the 60 subcontractors in this lawsuit and brought them all in within 30 days so that the Trial Court wouldn't have discretion to deny the motion. That's just nonsense.

JUSTICE PAUL W. GREEN: So I see what you're saying essentially is that you should be able to control which parties you want to bring in to try this case rather than the Trial Court.

ATTORNEY CRAIG A. MORGAN: No, Your Honor.

JUSTICE PAUL W. GREEN: It's not true in every case that you would want to bring in all the subcontractors. I can see a scenario where in defending the case against you, the general contractor, you would have, you're friendly with all your subs, they all come in and testify, "Yeah, there's no defect here, we're all singing out of the same hymnal," but there may be circumstances where you want to create, well, you want to be able to go after them in an adversarial situation, and you get to pick the ones that you want to do that with, and that's, that's what you're trying to do here?

ATTORNEY CRAIG A. MORGAN: I don't, I'm sure I don't understand the question. We brought in all 20 of the subcontractors whose work was allegedly defective.

JUSTICE PAUL W. GREEN: Right.

ATTORNEY CRAIG A. MORGAN: Or sought to bring them in.

JUSTICE PAUL W. GREEN: Right, but you could have said, "Well, we'll just, but we'll leave them, we'll stay on friendly terms with them and let them come in and testify for us that that work is not defective after all."

ATTORNEY CRAIG A. MORGAN: Well, if you wanted to completely abandon all of our contractual rights of indemnity against them, which is what that would do, because there is simply no way to enforce those rights meaningfully against, against the subcontractors in a second proceeding at which you will just have to guess at what the results were, what the basis of the results were in the first proceeding.

JUSTICE HARRIET O'NEILL: Now my understanding is in some of these construction contracts, is it true that you have some subs who then subcontract out some of their work?

ATTORNEY CRAIG A. MORGAN: That's true.

JUSTICE HARRIET O'NEILL: And then so what would happen with those subs? Would they be entitled to then bring in their subs?

ATTORNEY CRAIG A. MORGAN: I don't know. I guess it would depend upon the terms of their contract, contract.

JUSTICE HARRIET O'NEILL: But it would seem to be the same.

ATTORNEY CRAIG A. MORGAN: Contracts.

JUSTICE HARRIET O'NEILL: I mean I --

ATTORNEY CRAIG A. MORGAN: Well, to the extent that they have similar contractual obligations and rights, then yes. But my understanding is that that was not done extensively here, but it does happen, yes.

JUSTICE PHIL JOHNSON: Well, what is the, how are we going to judge and what kind of rule are we going to give some Trial Court in regard to when, when we allow or when they have to allow the subs to be brought in, or it's an abuse of discretion? Is it we know it when we see it, or do you have something?

ATTORNEY CRAIG A. MORGAN: Well, Your Honor, the rule that we urge is simply this, that where a property owner sues a general contractor

alleging defects in a construction project, and the work at issue was done by subcontractors, and the general contractor has a contractual right to claim against those subcontractors for any damages caused by their defective work, the general contractor may join those subcontractors as third party defendants so that everyone's rights can be determined in one proceeding unless the property owner shows that joinder will cause it substantial prejudice by unreasonable delay, and there should be a presumption that where that motion to join occurs within the Trial Court's scheduling order, that there is no such substantial prejudice by unreasonable delay, and there has been no such showing here.

JUSTICE PHIL JOHNSON: So you're contending for simply a shifting of the burden for them to show --

ATTORNEY CRAIG A. MORGAN: Yes.

JUSTICE PHIL JOHNSON: -- you get to bring them in --

ATTORNEY CRAIG A. MORGAN: Well, it's not simply a shifting of the burden.

JUSTICE PHIL JOHNSON: Well, right, right, bad choice of words. You get to bring them in unless the other party shows substantial delay and burden.

ATTORNEY CRAIG A. MORGAN: Yes. And these are claims that arise out of the same facts, the same circumstances, and any contrary rule will eviscerate the general contractor's contractual rights. Thank you.

JUSTICE DALE WAINWRIGHT: One final question, if I may, Chief. If you, if you were allowed to bring in the subcontractors, but the School District did not allege negligence, could you allege negligence against the subs from the third party basis? And would that help you with your indemnity issue?

ATTORNEY CRAIG A. MORGAN: I believe we could probably sue certainly under a claim of negligence against them, contending whether damages that they caused us as result of their negligence was the liability to which it exposed Scoggins to the School District, but my guess is that would be entirely redundant however of the contractual claims. But that wouldn't bind the School District, I mean their claim could still remain just a breach of contract so that it wouldn't come under Chapter 33.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Morgan. The cause is submitted, and the Court will take a brief recess.

[End of Audio recording.]

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