

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
1/2 Price Checks Cashed
v.
United Automobile Insurance Company.
No. 10-0434.

February 3, 2011.

Appearances:

Gavin N. Lewis of The Law Offices of Gavin N. Lewis, for Petitioner.

Douglas W. Alexander of Alexander Dubose & Townsend, LLP, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF GAVIN N. LEWIS ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF GAVIN N. LEWIS ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The court is ready to hear argument in 10 matter 434, 1/2 Price Checks Cashed versus United Automobile Insurance Company.

MARSHAL: May it please the court, Mr. Lewis will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF GAVIN N. LEWIS ON BEHALF OF THE PETITIONER

ATTORNEY GAVIN LEWIS: May it please the court. [inaudible] in Texas when presented with the issue of whether a check is a contract [inaudible] held that checks are contracts. Case law across jurisdictions, legal authorities such as Cordin, Wiliston [inaudible], they all agree. The statement of contract and restatement second [inaudible] classify negotiable instruments, including checks, be contracts. So when the court below held that a check was not a contract and the drawers' liability clearly statutory, it seemed to me that either the overwhelming authority was wrong or the definition of contract [inaudible]

JUSTICE DAVID M. MEDINA: Would it says it's not a contract or only that it's governed by a statute?

ATTORNEY GAVIN LEWIS: Excuse me?

JUSTICE DAVID M. MEDINA: Was the decision below's, did it state specifically that this is not a contract. I don't think that's what it said. I think it said it's governed by the statute.

ATTORNEY GAVIN LEWIS: It said it was statutory liability and that it wasn't the contract for purposes of Section 38.

JUSTICE DAVID M. MEDINA: And it's not.

ATTORNEY GAVIN LEWIS: I would have to disagree with that, Justice Medina.

JUSTICE DAVID M. MEDINA: Why is that?

ATTORNEY GAVIN LEWIS: Because a check [inaudible]

JUSTICE DAVID M. MEDINA: I understand the check could be a contract, but under the statute, how do you prevail?

ATTORNEY GAVIN LEWIS: The statute itself [inaudible] attorney fees, but the cases for an oral or written contract. Now contract is not the same thing as a cause of action or breach of contract. I submit that they're different. A contract is a broader term. A contract is a promise, which the law will enforce, and it can describe a number of different causes of action. Breach of contract is one. Because all negotiable instruments are a formal contract. The vast number of authorities would agree that a check was defined with the statutes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is a \$100 bill a contract?

ATTORNEY GAVIN LEWIS: Well, Article 3 excludes money. So in that sense, no. Negotiable instruments have been deemed as formal contracts by virtue of their form. They [inaudible] in accordance with 3104 and the rules which determine them to be a contract include them being payable to order or payer signed by the maker or drawer in a fixed amount payable on demand.

JUSTICE DEBRA H. LEHRMANN: Would the Court of Appeals' decision basically make these types of law-suits just almost impossible or very impractical?

ATTORNEY GAVIN LEWIS: Absolutely.

JUSTICE DEBRA H. LEHRMANN: Want to comment on that?

ATTORNEY GAVIN LEWIS: As I understand the purpose for Section 38, why Section 38 was amended to include suits for a contract, one of the reasons was because there wasn't access to the courthouse for smaller cases. The smaller cases no one could afford an attorney or pay an attorney to prosecute a smaller suit because the attorney fees would outweigh the award.

JUSTICE DAVID M. MEDINA: But you do have recourse to a criminal action, right?

ATTORNEY GAVIN LEWIS: I'm sorry?

JUSTICE DAVID M. MEDINA: The courthouse is open to go through criminal proceeding.

ATTORNEY GAVIN LEWIS: Yes. Criminal court would be a different situation because--

JUSTICE DAVID M. MEDINA: But doesn't that allow--

ATTORNEY GAVIN LEWIS: Not every dishonored check case is a criminal case. If fraud is involved or some sort of kiting is happening, possibly there's a criminal action, but, again, that's a higher standard. It's a different standard of proof.

JUSTICE EVA M. GUZMAN: Counsel, I wanted to ask you about the brief that was filed by opposing Counsel and they discussed financial or he discusses financial instruments. It talks about letters of credit under 5.11 I think it was, and how the legislature specifically provided for the recovery of attorneys' fees in the context of the letter of credit that was dishonored and the legislature did not do so in the context of financial instruments checks. Would you respond to that argument?

ATTORNEY GAVIN LEWIS: Yes, I would say that, first of all, a letter of credit under Article 5 is a different animal than an instrument under Article 3.

JUSTICE EVA M. GUZMAN: Are they both financial instruments?

ATTORNEY GAVIN LEWIS: They are both financial instruments, but by virtue of them being governed by a different article, the issue isn't whether a letter of credit is a contract. It's, in this case, whether or not a check is a contract and I would say that it's a contract not only because of all the authorities saying that it's a contract. The UCC defines it as a contract.

JUSTICE EVA M. GUZMAN: The UCC also has a very comprehensive risk allocation scheme and if we're looking at these provisions, why wouldn't the legislature provide for attorneys' fees in the context of the check?

ATTORNEY GAVIN LEWIS: Well, the comprehensive legislative scheme applies when you're talking about issues of fraud or forgery or conversion, issues which involve torts primarily. This is a case where the drawer has issued a check and then failed to pay it, failed to honor his drawer's obligation. Now the reason it's not a completely statutory obligation is because he signed the check. He's voluntarily assented to governance by Article 3. He's committed himself to pay on the instrument if it should be dishonored.

JUSTICE EVA M. GUZMAN: Was there an expressed promise though ultimately between where this check ended up?

ATTORNEY GAVIN LEWIS: Well, an expressed promise in that a check is a negotiable instrument and everybody recognizes a check as being a payment device. It's an expressed promise because when one receives a check, they know what they're getting and they know it's a negotiable instrument and they know it's a promise, an unconditional promise of payment.

JUSTICE DAVID M. MEDINA: Amici argues that we should overturn the Timeout Groceries and [inaudible] and [inaudible] this impacts the cash checking business. Why should we even be concerned about that?

ATTORNEY GAVIN LEWIS: Well, the first reason would be to be in line with the rest of the jurisdictions. The cross jurisdictions when this issue has come up or matters of venue or matters of any other reason that a determination on the nature of an instrument has arisen, whether a check is a contract generally is determined to be a contract. As it stands now, to be a completely statutory obligation is, well it's out of line with the rest of the jurisdictions. It's against the treatise material. It's against 140 years of history in Texas, Texas jurisprudence.

JUSTICE DAVID M. MEDINA: I agree with you. It's a contract, but I don't see where in this statute that it provides for attorneys' fees and Amici says that we should be concerned about that because it would inhibit, prohi-

bit perhaps people that don't have checking accounts, traditional checking accounts to negotiate checks. Why should we be concerned with it? It seems like a policy issue.

ATTORNEY GAVIN LEWIS: Well, we should be concerned about it because the vast number of transactions that occur in the State of Texas won't only affect the check-cashing companies and those who cash checks, but those who take checks as part of their ongoing businesses. In this, as it stands, whoever receives a check from a payee won't have the right to collect that check against the drawer if the amount of the check outweighs, excuse me, if the attorneys' fees outweigh the amount of the check.

JUSTICE DON R. WILLETT: Is your recovery rule absolute no matter what the amount of the check, no matter what the amount of the attorneys' fees?

ATTORNEY GAVIN LEWIS: I don't understand the question.

JUSTICE DON R. WILLETT: You go into a hardware store and buy a couple of screws. You pay for it with a check. It cost you a dollar and the check bounced. The hardware store is pretty tenacious and they go after you, but their fees really start racking up. So no matter the amount of the check, however small, and no matter the amount of the attorneys' fees however large, you would say recovery is unlimited.

ATTORNEY GAVIN LEWIS: Well, the beauty of the attorney fee statute is that to recover attorney fees under Chapter 38 notice, a 30-day notice and no tender within those 30 days has to take place before liability attaches and I would say to give a potential defendant fair warning of a suit that may be coming and then him tendering payment, there won't be a suit at all. I think that's the reason that the statute is written.

JUSTICE DON R. WILLETT: But if there is a suit, you would say the sky's the limit in terms of attorneys' fees, no matter what the underlying transaction was worth.

ATTORNEY GAVIN LEWIS: It's not necessarily about the amount. It's about the promise. It's about the promise of payment. The reason we enforce contracts is promises ought to be kept. It's a societal principle that we've built economy on. Now whether or not you're speaking of would attorney fees eventually outweigh some magical amount to make this unreasonable, again, I would go back to the tender of payment rule that if no tender is made then the defendant is acting at his peril. It's about the promise, not the amount.

CHIEF JUSTICE WALLACE B. JEFFERSON: Your argument would also apply to electronic transactions if it were an electronic check sent or debit cards or other forms of electronic commerce?

ATTORNEY GAVIN LEWIS: No, Your Honor, the electronic payments and such wouldn't qualify as formal contracts. The formal contracts must be written. They must be on paper.

CHIEF JUSTICE WALLACE B. JEFFERSON: But there's no real difference. So I can pay right now, go through my bank account and pay by check or I can write one out. If I write one out, then there's this, then the possibility of fees for a dishonored occurs, but not if I were to send one electronically and is there a good reason for the difference?

ATTORNEY GAVIN LEWIS: Well, there's more fraud involved, more fraud and more, well, there's more ascent in a written transaction in which a check is created. In a wire transaction, you have a bank as an intermediary. You don't do the transaction yourself or if you do, you're not creating a document that represents a formal contract I would say.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Guzman?

JUSTICE EVA M. GUZMAN: Well, did you have?

CHIEF JUSTICE WALLACE B. JEFFERSON: Please.

JUSTICE EVA M. GUZMAN: When you spoke about formal contracts having to be written, but a contract can be oral. What you actually mean is, I guess, to define the contours of this contract, we look to the statute.

ATTORNEY GAVIN LEWIS: Well, no, ma'am.

JUSTICE EVA M. GUZMAN: Because a contract can be oral.

ATTORNEY GAVIN LEWIS: Yes, Your Honor, but there's two kinds of contracts, two ways to classify contracts historically pointing to Corbin and Williston. One is the formal method. The other is the informal method. Formal method--

JUSTICE EVA M. GUZMAN: Does statute make this one formal?

ATTORNEY GAVIN LEWIS: I would say the statute doesn't specify as long as it's a contract. As long as it's a promise that's enforceable by the courts, by the law. That's what a contract is according to the legislative history and 20 years of case law.

JUSTICE NATHAN L. HECHT: Was payment on this check stopped?

ATTORNEY GAVIN LEWIS: I'm not sure. The record doesn't say and we never found out from the defendant why the check was dishonored. It was returned "refer to maker." Usually in that case, there is a stop payment, but to date we've not had a defense offered as to why the check was unpaid.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Wainwright.

JUSTICE DALE WAINWRIGHT: I'm curious about the distinction you drew between payment by written check and payment by electronic funds transfer. Maybe that's where you can start on rebuttal.

ATTORNEY GAVIN LEWIS: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The court is now ready to hear argument from the Respondent.

MARSHAL: May it please the court, Mr. Alexander will present argument for Respondent.

ORAL ARGUMENT OF DOUGLAS W. ALEXANDER ON BEHALF OF THE RESPONDENT

ATTORNEY DOUGLAS ALEXANDER: May it please the court. I'd like to go straight to Justice Guzman's questions regarding upsetting the plan of the UCC. I think that the case that should centrally guide this court's decision in this case is the 2004 decision in Southwest Bank v. Information Support Concepts, which like this case involved a claim under Article 3 of the UCC. This court described the UCC as a comprehensive and carefully considered allocation of responsibility a carefully allocated liability scheme, a carefully balanced liability provision and this court ultimately concluded that importing Chapter 33, a general statute proportionate responsibility into the UCC and applied it to the UCC would ignore the UCC itself and for its underlying purpose. Exactly the same thing would occur here if this court were to import Chapter 38 regarding recovery of attorneys' fees general provisions into the UCC. I've got a little handout to assist my argument. If you will go to tab 2, what you'll see is Section 3.414, which is the governing statute. If you look at clerk's record, page 8, you'll see

that this is a claim under this statute. This is the way in which one who is a mere endorsee is able to recover on a check, not made payable to the endorsee. What you'll see is this is a comprehensive scheme that allows that type of recovery, makes no provisions for attorneys' fees. Now let's turn to tab 3. Tab 2 dealt with suits on a dishonored check. Tab 3 deals with suits on a dishonored letter of credit, both financial instruments. Highlighted in yellow are all the rights and obligations, provisions similar to what you find with respect to the 3.414, but down here in pink, there is a provision for attorneys' fees and I want to spend some time talking about it. Reasonable attorneys' fees and other expenses of litigation may be awarded to the prevailing party in this type of a suit. Now what this reflects is a very nuanced decision by the legislature and let me explain why. In 1995, when the legislature adopted revised Article 3, the uniform proposal had this provision, but with the word "must." It made the provision of attorneys' fees mandatory. The Texas legislature based upon the recommendation by the committee that was studying say it should not be mandatory. We think it should be discretionary. The legislature adopted that and inserted the word "may." Some other states use "may." Most use "must." Some use "shall." But once again, what this demonstrates, it's a matter of legislative prerogative under the UCC this carefully balanced scheme whether or not we give attorneys' fees. There are three different provisions within the UCC that allow for attorneys' fees. In addition to this one, 5.11, let me cite you a couple more. 3.305, 7.601, these are areas in which, as part of this carefully balanced scheme, the legislature says, ah, here we will allow for attorneys' fees.

CHIEF JUSTICE WALLACE B. JEFFERSON: So we will join a majority trend on this or would we be with the major treatises and academics in interpreting it the way you say or would we be in a minority situation?

ATTORNEY DOUGLAS ALEXANDER: You would be absolutely in the majority and let me go further with respect to that. Absolutely, in fact, uniformly in the majority. What other states have done, if you will turn to tab 4. It is a matter of legislative prerogative to grant attorneys' fees for a suit on a dishonored check. Our research has uncovered 11 states that have done that and they're summarized here. Now what's interesting about each of these provisions though is that they are very nuanced and they differ in certain respects. Go to tab 5. Here's an example of one and I think it's important to discuss it here. This is Oregon's. Oregon, like Texas, has the UCC and its provisions regarding, I mean 3.414 of the UCC in Oregon is the same as we have. It makes no provision for recovery of attorneys' fees on a dishonored check, but Oregon, as a matter of legislative prerogative has said we are going to allow for a recovery of attorneys' fees on a dishonored check although in certain narrowly circumscribed circumstances and it's down here at the bottom in pink. When it's a situation where the drawer of the check has insufficient funds or has no account with a bank or stops payment on the check without good cause. In other words, it's dealing with bad check situations, not our case.

JUSTICE EVA M. GUZMAN: There has been a lot of criticism of Timeout Groceries and I'm sort of interjecting this in there because I think you stated in response to the Chief Justice's question that we would be in the majority and he asked about what the professors for lack of a better word and they have been very critical of Timeout Groceries and so can you respond to that criticism?

ATTORNEY DOUGLAS ALEXANDER: Yeah, I think that the criticism is correct as far as it goes and that's because they've been narrowly focused on the question of is a check a contract and I think that much of the briefing previously filed in this case, there's been a battle on that point, is a check a contract. I think that one would have to concede that a check is a contract and so the criticism is fine as far as it goes, but let me go further and say and explain how this Court dealt with a similar argument in Southwest Bank. The dispute in that case, [inaudible] dispute was does Chapter 33 apply. Well it only applies if you have a tort and so the parties in that case were involved in this wrestling match as to whether UCC provision on conversion was a tort. How did this Court deal with that? Footnote 6, the court says let's assume it is. Let's assume it is. I think that this court could perform a similar analysis here. You can get involved in a lot of rangly as to whether a check is a contract and I will say this, a check is--

JUSTICE EVA M. GUZMAN: You concede a check is a contract?

ATTORNEY DOUGLAS ALEXANDER: I concede that it is a formal contract as stated by all of these treatises

out there. Now, do I think that a claim on a check falls within Chapter 38? No. I don't think that we have a claim on a contract, but I think that this court as it did in Southwest Bank would say well, that's an interesting academic question, but you know what? Let's assume it is. Let's assume that Chapter 38 would otherwise apply. Nonetheless, because what you're trying to do is import it into the UCC, we do not give effect to it because doing so would thwart the underlying purpose of the UCC. That is what this court ultimately concluded in Southwest Bank. Now having said that, let me cite the court to two other cases that you should look at. One is Medical Center.

JUSTICE DALE WAINWRIGHT: Medical City?

ATTORNEY DOUGLAS ALEXANDER: Thank you.

JUSTICE DALE WAINWRIGHT: Yeah, that seems to contradict your argument.

ATTORNEY DOUGLAS ALEXANDER: Okay, it contradicts my argument because that's also a UCC case and here's the distinction.

JUSTICE DALE WAINWRIGHT: Which we allowed attorneys' fees on under Chapter 38.

ATTORNEY DOUGLAS ALEXANDER: Exactly. So why? Why does my argument make sense in the teeth of Medical City? Here's why and I'm not being flip. This is the reason why. It's because that's an Article 2 case. The case you need to look at decided two months after Medical City is JCW Electronics. 257 S.W.3d 701. That was a case, another case, which the proportionate responsibility statute was trying to be imported into the UCC well into the UCC and in that case, the Court says it can be done. Why? Unlike UCC Article 3, the Court concluded, Article 2 does not undertake a comprehensive false scheme. Concurring opinion by Chief Justice Jefferson, who was the author of Medical City two months earlier says Chapter, the statute's provisions, that is the UCC Section 2.715 stand in contrast to the comprehensive legislative false scheme singularly applicable to claims involving negotiable instruments in revised Article 3. Chapter 33 application here would not, therefore, ignore the UCC itself and thwart its underlying purpose. In other words, this Court has drawn correctly a sharp distinction between Article 2 and Article 3. Why? Well, if we go to tab 6. This is the expressed warranty that was at issue in Medical City. Within the four corners of that document, you've got everything you need to sue. You've got promises made by a seller to a buyer. The obligations are all spelled out. You don't need Article 3 to provide you remedies. Now let's go to tab 1. This is the check. This is the supposed contract at issue here. Now, again, I'm conceding that it's a formal contract, but where, pray tell, in this does it say that 1/2 Price Checks gets to sue the drawer of the check.

JUSTICE EVA M. GUZMAN: Well, I guess you're alluding to this expressed promise or this promise, but in this very mobile financial markets and why does that matter? Checks are endorsed over and you're the holder of something and you weren't the original payee. Why is it so significant?

ATTORNEY DOUGLAS ALEXANDER: Well, it's only significant, I mean, I'm not, once again, I think my point here is to sue on a check you have to go through Section 3.414 and that's why when you look at page 8 of the clerk's record, which is the original petition, they cite 3.414. That is what makes it clear that a mere endorsee can make the claim.

JUSTICE DAVID M. MEDINA: I'm sorry, you finished answering that question?

ATTORNEY DOUGLAS ALEXANDER: I'm sorry.

JUSTICE DAVID M. MEDINA: Are you finished with that question?

ATTORNEY DOUGLAS ALEXANDER: Yes.

JUSTICE DAVID M. MEDINA: Mr. Alexander, what would their remedy be then? What would their remedy be?

ATTORNEY DOUGLAS ALEXANDER: In what.

JUSTICE DAVID M. MEDINA: Situation where the check was presented. There were no funds. What are they to do?

ATTORNEY DOUGLAS ALEXANDER: It would be currently, the recover of a \$35 fee, which made applicable by statute, but not attorneys' fees. Now, getting back to Justice Lehrmann's question and I think it's a good one, does that make sense? How is that people are ever going to sue on the check? Personally, I'm sympathetic to that argument. Let's go back to tab 6. I'm sympathetic to that argument to a certain point. I think that the Oregon statute is as good an example as any of one that the Texas legislature might be persuaded to adopt, but importantly here, the Oregon statute talks about prevailing party. We just had another argument about prevailing party. Well, let's think about that. Let's go back to the check. This happens often. My client is an automobile insurance company. This check was to pay off the repair of a vehicle. One of the payees is DBD Motors. Why? Because under Chapter 61 of the Property Code, the lien holder has a mortgage on the vehicle and so you have to have the check not just go to the insured, but also to the lien holder and you don't want to have situations where someone forges that signature so that they can go to Wal-Mart and get the flat screen TV instead of repairing the car and so let's say that my client has a concern that there is a forgery. Well the problem with their argument it's a one-way street. It's a no-risk proposition. That is to say the plaintiff can sue and if they can persuade a JP court and that's where these are litigated, that they that it's not a forgery, they get attorneys' fees. What about my client? What about my client who is legitimately contested that this is a forgery? If he wins, if my client wins, do they get attorneys' fees? No. Now, if we have the Oregon statute, yes. Prevailing party. So I'm sympathetic to the argument. I think that, again, 11 states have been sympathetic to the argument, but they do it under carefully nuanced schemes. They say some prevailing party. Others are unilateral, plaintiffs only, but they're narrowly circumscribed.

JUSTICE NATHAN L. HECHT: Let me take you back to Section 5.111 and paragraph E and you say that the Texas changed "must" to "may."

ATTORNEY DOUGLAS ALEXANDER: Correct.

JUSTICE NATHAN L. HECHT: What does "may" mean in that circumstance? What would guide "may"?

ATTORNEY DOUGLAS ALEXANDER: The commentary doesn't really fully flesh that out other than to point out that it is a departure. That the uniform scheme was "must", but that those on the committee that were proposing the change felt the court should have discretion and I think it's really dealing with situations where a court goes okay, look, in this situation, it seems like they're whatever extenuating circumstances makes me feel like there should not be an award of attorneys' fees and under the uniform scheme and to show truly how nuanced this is, if you really drill down into it, the must language in attorneys' fees came about among the big group, I mean the group that was ALI or whoever does these things, as a tradeoff. The initial proposal being made was there be an award of consequential damages. Well that flipped out the bank so they're going how is that cabined in? Let's not do that. As a tradeoff, why don't we say there can be attorneys' fees that must be awarded to the prevailing party? So there was a debate even at a nationwide scheme. Texas went we're kind of uncomfortable. It's more like I would assume would be more like the situation with the declaratory judgment. That is we all know that in the award of attorneys' fees and declaratory judgments, it's within the discretion of the court. So I think, Justice Hecht, that they're really addressing that type of concern.

JUSTICE NATHAN L. HECHT: The argument might be made just in the abstract without all that history that well, I don't know if a letter of credit is a contract or not and so we'll put in here that you can recover attorneys'

fees to make clear that it is and, therefore, you can get attorney fees like you could under any other contract, but you think the history doesn't bear that out.

ATTORNEY DOUGLAS ALEXANDER: I don't think it does. No, I don't. I think that and I hear that argument, but essentially the argument being made over here is if you have anything that's like a whiff of a contract, then you get attorneys' fees. And when you look at letters of credit, they are grounded in a series of contracts and so I think that that would be parsing the legislature's intent a little too cleverly.

JUSTICE EVA M. GUZMAN: One of the concerns of the Amicus brief is that the check-cashing businesses do serve a segment of Texans who don't have access to traditional banking and that I guess for 140 years of precedent they were able to take these checks and in the event they were dishonored, pursue some remedy. I guess your response would be go to the legislature?

ATTORNEY DOUGLAS ALEXANDER: Yes, that's my response, and, again, I'm sympathetic to it, but who cares what I think? I'm not the legislature. So, again, I think that a good case, back to Justice Lehrmann's question, can be made that on claims, legitimate claims of this type, there should be an award of attorneys' fees, but maybe with caps. Some states cap them. There are so many questions. This is so policy laden. Do we have caps on the attorneys' fees? Do we allow it in suits, outside the insufficient funds or I don't have an account where I'm just writing hot checks. Should it be prevailing party or should it be just the plaintiff.

JUSTICE PHIL JOHNSON: Counsel, on your statutes listed here under tab 4, are there any decisions in those states comparatively similar to the one we're faced with here where you have a statute that says you can recover attorneys' fees on oral or written contracts visa via the UCC.

ATTORNEY DOUGLAS ALEXANDER: I would like to tell you that the answer to that is yes, but I don't think it is.

JUSTICE PHIL JOHNSON: So we have a body of opinion and law and treatises that say a check's a contract and you don't disagree with that. We have a statute that says recover attorneys' fees on an oral or written contract and then we have the UCC that has specific provisions.

ATTORNEY DOUGLAS ALEXANDER: Right.

JUSTICE PHIL JOHNSON: We're the first ones that are going to blend these provisions in this case?

ATTORNEY DOUGLAS ALEXANDER: I think so.

JUSTICE PHIL JOHNSON: To your knowledge?

ATTORNEY DOUGLAS ALEXANDER: To my knowledge. I mean I don't know of any other state that at least on this list, that has the situation of the UCC and a chapter similar to 38. Now having said that, does that mean that you're without any guidance and I say the answer is no. I think that if you look at the principles that are articulated in Southwest Bank, JCW and I say implicitly, in Medical City because Medical City did not directly address the UCC collision, but I think that the principles that are articulated just in those three cases give you the answer, but back to your question, are these states similar in the same to Texas? I think the answer is no.

JUSTICE PHIL JOHNSON: Would you look at that and maybe follow up with a supplemental brief?

ATTORNEY DOUGLAS ALEXANDER: We've looked at it enough that I'm satisfied.

JUSTICE PHIL JOHNSON: When you say you think the answer is no, you're comfortable that the answer is no.

ATTORNEY DOUGLAS ALEXANDER: Well, let me do this. Assume the answer is no unless we tell you otherwise because we will.

JUSTICE PHIL JOHNSON: In some period of time?

ATTORNEY DOUGLAS ALEXANDER: Oh yeah.

JUSTICE PHIL JOHNSON: How long?

ATTORNEY DOUGLAS ALEXANDER: One week.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY DOUGLAS ALEXANDER: One week. If you don't, in fact, we will write within a week and answer your question.

JUSTICE PHIL JOHNSON: Thank you.

ATTORNEY DOUGLAS ALEXANDER: It will probably be a yes or no.

JUSTICE DAVID M. MEDINA: That's very wise.

JUSTICE DEBRA H. LEHRMANN: Yes or no especially.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF GAVIN N. LEWIS ON BEHALF OF PETITIONER

ATTORNEY GAVIN LEWIS: Justice Wainwright, I apologize, could you repeat your question?

JUSTICE DALE WAINWRIGHT: Yes, in responding to the Chief's question about whether attorneys' fees should be awardable to the prevailing party, when the payment is through an electronic transaction instead of a handwritten check, you said the distinction is there is more consent, more assent with a handwritten check. I don't understand that and what's the implications of allowing attorneys' fees to follow thousands, millions, billions of electronic transactions?

ATTORNEY GAVIN LEWIS: I apologize, Your Honor, I can't speak to electronic transactions. I don't know enough about them to make judgment. What I do know is checks, handwritten checks that are governed by Article 3 and formal characteristics that require a signature and an unconditional promise to pay and payable to order or bearer, signed by the maker or drawer makes them contracts effective upon first delivery. It's a longstanding, longstanding rule in the law in classifying contracts as formal contracts as opposed to informal contracts where, of course, agreement of the parties is more important than the formal characteristics.

JUSTICE DALE WAINWRIGHT: Thanks, Counsel, I appreciate your candor. What about the argument from Respondent that the UCC has already decided this question. It's a fairly complex allocations of risks and balances, costs as well as fees and the legislature's already decided that here.

ATTORNEY GAVIN LEWIS: I would disagree, Justice Wainwright, because the carefully allocated liability scheme argument is right on point with issues regarding tort, with issues regarding fraud, with issues regarding forgery, late return of an item, with issues regarding things that come up in banking situations that aren't con-

tracted for. In this case, we don't have any of that. What we have is somebody who's issued a check, made a promise to pay it, but didn't pay it. I must say about Medical City that this court went a long way, I thought, to explain what we should look at when we're attempting to see if Chapter 38 applies to a cause of action within the UCC and I believe what it said was if the UCC, if an action doesn't speak one way or the other to attorneys' fees and it is a contract issue that speaks to liability that the UCC can be supplemented by a law such as this.

JUSTICE DALE WAINWRIGHT: And Respondents would agree for Article 2. Article 2 is different. What do you say?

ATTORNEY GAVIN LEWIS: I say in what way? Because I think the liability in that case is very similar to the liability in this case when you're not talking about unforeseen events which would affect the grateful reliability on a contract.

JUSTICE PAUL W. GREEN: Well in that case, in Article 2, the legislature determined to give an attorneys' fee remedy, but not in Article 3. Why do you suppose?

ATTORNEY GAVIN LEWIS: I'm sorry, in Article 2, they did?

JUSTICE PAUL W. GREEN: Under the letter of credit question. I mean that's clearly.

JUSTICE DALE WAINWRIGHT: Article 5.

JUSTICE PAUL W. GREEN: I'm sorry, Article 5, letter or credit context, which is clearly a contractual promise to pay as well and there is an inclusion of an attorney fee remedy, but they didn't decide to put one in Article 3 and so why do you think that is?

ATTORNEY GAVIN LEWIS: Well, I can say that over the years the courts, the appellate courts have ruled that checks, including cashier's checks, notes, they all had been awarded attorneys' fees and they're governed under Article 3 as negotiable instruments. The award of attorney fees could have indicated to them that maybe they needed to put in a special provision like in Article 5, but they haven't done that so either they're okay with that or Article 5's a different animal.

JUSTICE PAUL W. GREEN: So we should ignore that distinction there?

ATTORNEY GAVIN LEWIS: Well, I think it's a different question. I think whether or not a negotiable instrument in this case is worthy of an attorney fee is more centrally the issue. I think it's, I see my time is up. Thank you, Your Honors.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted and the court will take a brief recess.

MARSHAL: All rise.

2011 WL 471618 (Tex.)

END OF DOCUMENT