



Case No. A10-1149

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Amcon Block & Precast, Inc.,

Appellant,

vs.

Michael Paul Suess,

Respondent.

**APPELLANT'S BRIEF, ADDENDUM
AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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ISSUES PRESENTED

Is the sole corporate owner and officer of a corporate commercial contractor who commits theft by diverting construction funds required to be held in trust by Minnesota Statutes 514.02, civilly liable to the subcontractor who should have been paid with trust funds? The District Court ruled that only the corporation is civilly liable under section 514.02.

I. STATEMENT OF THE CASE

Michael Suess is the sole owner of MSC Concrete, a now dormant and insolvent corporate contractor which failed to pay Amcon, its subcontractor, for concrete products used on a commercial construction project. MSC Concrete received payment by the project owner for the concrete products supplied by Amcon, but Suess diverted the funds for other purposes in violation of trust obligations imposed on persons receiving payment for lienable produces and services under Minnesota statutes section 514.02. He then transferred all of the assets of MSC Concrete to his new solely owned corporation MPS, Inc, leaving the old corporation without funds to pay Amcon.

Suess violated Minnesota Statutes section 514.02, which requires that any person who receives payment for lienable services or products must hold the funds in trust for the subcontractor who did the work. Intentional violation of the trust obligation is a crime, and persons who cause a corporation to commit that crime are criminally responsible as an aider and abettor. Minn. Stat. §605.05, Subdivision 1; State v. Bren, 704 N.W.2d 170, 174 (Minn. Ct. App. 2005) (President of Bren Homes, a bankrupt corporation, properly held criminally responsible for section 512.02 violations).

In addition, section 514.02 subdivision 1a(1) says that a person injured by a violation of the trust obligations of section 514.02, subdivision 1, may bring a civil action and recover damages, against the person who committed the theft. T.E.S. Construction, Inc. v Chicilo, 2010 Minn. App. LEXIS 92, (officer and director of Chicilo Homes, Inc, civilly liable under section 514.02 as a person who has committed theft).¹

The civil liability provisions of subdivision 1a(1) were inserted shortly after this Court's holding in Energy & Air System, Inc. v. Kuettel, 580 N.W.2d 62 (Minn. App. 1998), that the criminal provisions of section 514.02 did not create an implied civil right of action against the president of a corporation, Robert Kuettel, for committing the crime of theft.² Despite the plain language implementing the civil liability found wanting in Kuettel, the District Court nonetheless found that the civil liability falls only on the insolvent corporation stripped of assets by its sole owner Sues.

The District Court' rationale was that when the legislature added the civil liability provisions in 2000, it impliedly exempted corporate officers like Sues from the civil liability provisions for commercial construction projects, and that holding is the central issue in this case. Subdivision 1(1) imposes civil liability upon persons in the position of

¹ See also State v. Boyce, 2007 Minn. App. Unpub. LEXIS 1070. (Sole owner of Boyce Built Construction could be convicted of felony failure to use payment proceeds in violation of section 514.02 even though he was acquitted of theft by swindle); Duluth Superior Erection, Inc. v. Concrete Restorers, Inc., 665 N.W.2d 528 (Minn. Ct. App. 2003).

² In 2000, the legislature added the civil liability provisions of by adding subdivision 1(a), 2000 Minn. Laws ch. 430, § 1.

Suess who themselves commit the crime of theft. Subdivision 1(2) does not remove that liability as the District Court believed. Rather, it provides an additional source of liability, in residential cases only, as to persons who receive the diverted proceeds of the crime if they (a) have escaped criminal responsible for the theft, but (b) have knowingly receive proceeds of the payment as salary, dividend, loan repayment, capital distribution or otherwise.

The District Court believed that the subdivision 2(2) liability somehow impliedly narrowed the civil liability imposed by subdivision 2(1). We show in this brief that the plain language of section 514.02 provides two forms of civil liability. The first applies to corporate actors who cause their corporation to commit theft, because corporate officers who cause the theft, are themselves criminally responsible for the theft. The second form of liability is for individuals who are not found not criminally responsible for the theft, but who receive the proceeds, but fail to return the proceeds for their intended purpose. Contrary to the District Court's holding, we show that the primary purpose of the civil liability provisions is to assure that corporate officers and other key actors who commit the crime of theft are civilly responsible in damages. We show that the plain language of Section 514.02 holds corporate officers who aid and abet the crime of diversion of trust assets civilly responsible. The construction imposed by the District Court not only fails to comport with the plain meaning of the statutory language, but it eviscerates its primary purpose—to reverse the holding of the Kuettel case, and extend civil liability to corporate

officers such as Kuettel and Suess.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Michael Suess was sole owner of a small corporation, MSC Concrete. (Supplemental Hatton Affidavit, Paragraphs 3-4). He was in charge of the corporate checkbook and wrote corporate checks to pay himself, his few employees, his bank, and the corporate creditors³. MSC Concrete ordered \$33,770.22 in concrete products from Amcon. Strusz Affidavit, paragraphs 4-9. Amcon invoiced for the services, pursuant to the parties' contract, but despite repeated demands, was not paid. In May of 2009, Amcon served MSC Concrete and Suess with a statutory notification under Section 514.02 subdivision 2, giving Suess fair notice to honor his trust obligation. Hatton Affidavit, paragraph 4. Suess failed to comply with the provisions of section 514.02, subdivision 3 requiring him to provide any evidence within 15 days of his receipt of the Notice of Nonpayment that MSC or Suess properly used the trust Proceeds to meet his trust obligation. See Section 514.02, subdivision 3. Hatton Affidavit, paragraph 5.

Suess had long ago received payment from his customers intended to reimburse Amcon for concrete delivered by Amcon in the corporate account, and those funds should have been held in trust, until released to Amcon. Instead, Suess diverted those funds elsewhere. In fact, federal income tax returns provided to the District Court showed that

³ Amcon provided the District Court with a summary of 1,119 checks by MSC Concrete, Inc. drawn on its bank account. Michael P. Suess signed every check.

during tax year 2006, his company had 1.8 million in gross sales, but \$1.2 million in cost of goods sold. During that year, Suess paid himself at least \$78,000 out of corporate accounts, despite the fact that Amcon's invoices remained unpaid. Then, as Amcon pressed Suess for payment, Suess created a brand new construction company by the name of MPS, Inc., MPS being Suess's initials. See attachments to Hatton Supplemental Affidavit. Suess created this new corporation to conduct the same business in the same location as the old. He cleaned out the old corporate account and, acting as both the sole officer of MPS and the sole officer of MSC, he transferred all of the assets of MSC to MPS, leaving MSC completely dormant and without assets⁴

We brought this case on behalf of Amcon contending that Suess violated the trust provisions of Section 514.02 and that as a person who committed a section 514.02 violation, Suess was personally liable to Amcon. Suess contended, on the contrary, that only a corporation can be liable for section 514.02 violations, even where the owner and President of the corporation knowingly and intentionally causes that violation. To test Suess's legal contention, the parties agreed to a stay of discovery in hopes of resolving

⁴ In a November 6, 2008, letter, Suess' same attorney as here stated "MPS Construction Co. is engaged in ongoing business. MSC Concrete, Inc. is not." (Supplemental R. Hatton Aff. Ex. C.) Going further, he states further collection against MPS will be considered by him to be "tortious interference with contract and will take appropriate steps to stop your efforts". (Id.) Amcon was never told of the asset transfer until well after its judgment was entered. Suess is clearly a sophisticated business person having enough unilateral control of his business to transfer the assets to a new entity in addition to writing every check for MSC. (Supplemental R. Hatton Aff. Ex. A.)

the case as a matter of law—to wit, whether Suess was correct, as a matter of law, that a corporate officer can never be civilly liable under section 514.02 subdivision 1 when he commits theft of funds subject to the statutory trust.

The District Court began its analysis of this problem by viewing it as implicating a possible veil piercing issue, in which a corporate officer becomes derivatively liable for a corporate debt.

Since this matter concerns the personal liability of an officer and shareholder of a corporation, before beginning the statutory interpretation of Minn. Stat. § 514.02, subd. 1a (1), some background information is helpful in order to understand how this statute fits within the framework of Minnesota law. The general rule in Minnesota is that shareholders, directors, and officers of a corporation have limited liability. See Minn. Stat. § 302A.425; Groves v. Dakota Printing Services, Inc., 371 N.W.2d 59, 62 (Minn. Ct. App. 1985). As a result, civil shareholder liability may be expanded only under certain circumstances, such as specific statutory language or by piercing the corporate veil⁵. Addendum page 4.

To determine whether the limited liability provisions of corporate law could be circumvented, the Court reasoned, it must first determine whether a corporate officer could be person who committed the theft under subdivision 1. Addendum page 6. We contended, on the contrary, that the criminal culpability of corporate officers for diverting trust funds had already been resolved in the Court of Appeals. See Section III-A below.

⁵ Actually, the concept that a corporate officer or employee is liable for his wrongdoing is not a departure from the general rule. Veil piercing becomes an issue only when a creditor of the corporation seeks to make the officer derivatively liable for the debts or other contractual obligations of the corporation. The statute does not deal with derivative liability, but rather liability for the wrongdoing of the officer. See Section A of Argument, *infra*.

The Court found that the term “person” was ambiguous in this context. It wrote: “While the term ‘person’ is not defined within Minn. Stat. § 514.02, it is stated elsewhere in the Minnesota Statutes that the term ‘person’ may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.” Minn. Stat. § 645.44, subd. 7. The Court asserted that no prior appellate decision addressed whether a person could be responsible for the theft under subdivision 1a⁶. Evidently, deeming the statute ambiguous, the District Court focused on the intent of the statute by considering the eight factors listed in Section 645.16. Citing to other cases in which corporate officers have been held criminally liable for wrongdoing, State v. Williams, 324 N.W.2d 154, 157 (Minn. 1982); State v. McBride, 9 N.W.2d 416, 419 (Minn. 1943) she reasoned that the plain language of section 514.02 precluded such a conclusion because of the provisions imposing liability upon persons who knowingly received diverted proceeds found in subdivision 1a(2).

⁶ We argued that the issue has been resolved by the persistent holding that corporate officers are criminally culpable for theft under the statute. State v. Harris, 158 N.W. 829 (1916) (under revised statute, contractor's diversion , "with intent to defraud," of moneys paid him by the owner for improvements constituted larceny); State v. Reps, 223 N.W.2d 780, 42-43 (Minn. 1974) (Section 524.02 imposes a trust character on the payments, and it is a knowing violation of that trust, rather than a failure to pay a debt, which the statute makes punishable.); Duluth Superior Erection, Inc. v. Concrete Restorers, Inc., 665 N.W.2d 528 (Minn. Ct. App. 2003); State v. Bren, 704 N.W.2d 170, 174 (Minn. Ct. App. 2005) (President of Bren Homes, a bankrupt corporation, properly held criminally responsible for section 512.02 violations); T.E.S. Construction, Inc. v. Chicilo, 2010 Minn. App. LEXIS 92, (officer and director of Chicilo Homes, Inc, civilly liable under section 514.02 as a person who has committed theft). See Section B of Argument, *infra*.

She noted that subdivision 1a(2) makes certain corporate fiduciaries of residential contractors liable if they are not themselves criminally responsible, but have knowingly received the proceeds. She reasoned that extending liability to knowing recipients of funds somehow expressed an intent to constrict the liability of corporate officers who committed the crime of theft by diverting them out of the trust. She explained, “As a result, it would seem that if the term ‘person’ could be interpreted to include not only a corporation but also its officer and sole shareholder as Plaintiff suggests, then the last sentence of subdivision 1(b) would be unnecessary.” She continued: “Consequently, here, where only commercial projects are at issue, the ‘person who committed the theft under subdivision 1’ must only refer to MSC Concrete, Inc., and not its shareholders and/or officers.” The District Judge further suggested that the language added to section 514.02 subdivision 1 making officers and shareholders criminally responsible if they are “responsible for the theft,” was intended to constrict criminal liability for corporate officers for commercial projects.

After summary judgment was entered, we filed this appeal. Shortly thereafter, this Court issued its decision in T.E.S. Construction, Inc. v Chicilo, 2010 Minn. App. LEXIS 92) affirming a civil liability judgment against an officer and director of Chicilo Homes, Inc, because he was a person who committed theft.

III. ARGUMENT

The District Court pointed to two provisions of the 2000 amendments to section

514.02 as impliedly removing the liability of corporate officers involved with commercial construction projects who aid and abet the crime of theft by diverting trust funds. The first was the civil liability provisions added by the 2000 amendments. The amended statute expressly afforded civil liability to persons who commit the theft by diverting funds, thus expressly reversing the Kuettel case legislatively. Section 514.02, Subd. 1a(1). The subdivision 1a(1) language establishing this liability does not distinguish between commercial and residential projects. Quite the contrary, it plainly applies to both. The second extended civil liability to persons who knowingly receive diverted funds in the case of residential construction projects. The District judge found that the expansion of liability to recipients of funds in residential cases impliedly removed civil liability to persons who transferred the funds. We discuss that reasoning in Part B of our argument.

The second provision discussed by the District Judge was the explicit enumeration of criminal liability as to certain agents of residential contractors, such as shareholders, directors, and corporate officers. The District Court found that this enumeration impliedly removed the criminal responsibility for aiders and abettors who cause the corporation to divert funds if commercial construction is involved. We discuss that rationale in our argument section C. But first, in section A, we discuss the history of section 514.02, and then show that Minnesota law has historically been hostile to the idea that corporate officers can immunize themselves from criminal responsibility when they

cause their corporation to commit a crime.

A. Minnesota Statutes Section 514.02 plainly imposes criminal liability upon corporate officers who commit theft.

Minnesota Statutes Section 514.02 imposes a trust on the proceeds of payments received by a person contributing to an improvement to real estate for the benefit of those persons who furnished the labor, skill, materials, or machinery contributing to the improvement. The statute provides that proceeds of payments received by a person contributing to an improvement to real estate “shall be held in trust by that person for the benefit of those persons who furnished the labor, skill, materials, or machinery contributing to the improvement”⁷. The fiduciary responsibility, however, does not require segregation of funds in separate accounts, and does not subject the contractor to the fiduciary provisions of Chapters 520, et seq.⁸ When Sues wrote checks out of the corporate accounts in violation of the trust obligation, he caused the corporation to violate the statutory trust obligation.

⁷ “Proceeds of payments received by a person contributing to an improvement to real estate within the meaning of section 514.01 shall be held in trust by that person for the benefit of those persons who furnished the labor, skill, material, or machinery contributing to the improvement.

⁸ The statute continues: Proceeds of the payment are not subject to garnishment, execution, levy, or attachment. Nothing contained in this subdivision shall require money to be placed in a separate account and not commingled with other money of the person receiving payment or create a fiduciary liability or tort liability on the part of any person receiving payment or entitle any person to an award of punitive damages among persons contributing to an improvement to real estate under section 514.01 for a violation of this subdivision 514.02 .”

For nearly a century, intentional violation of the statutory duty to hold construction payments in trust for the intended supplier has been a crime. The modern version of Section 514.02 states that when “a person fails to use the proceeds of a payment made to that person for the improvement,” the person “shall be guilty of theft of the proceeds of the payment and is punishable under section 609.52.”⁹

In the early part of the twentieth century, the legislature enacted the predecessor to section 514.02¹⁰, and since that time, it has been clear that persons who divert funds required to be held in trust are subject to prosecution for the crime of theft. State v. Harris, 158 N.W. 829 (Minn. 1916) (under revised statute, contractor’s diversion , "with intent to defraud," of moneys paid him by the owner for improvements constituted larceny); State v. Reps, 223 N.W.2d 780, 42-43 (Minn. 1974) (Section 524.02 imposes a trust character on the payments, and it is a knowing violation of that trust, rather than a

⁹ If a person fails to use the proceeds of a payment made to that person for the improvement, for the payment for labor, skill, material, and machinery contributed to the improvement, knowing that the cost of the labor performed, or skill, material, or machinery furnished remains unpaid, and who has not furnished the person making such payment either a valid lien waiver under section 514.07, or a payment bond in the basic amount of the contract price for the improvement, conditioned for the prompt payment to any person entitled thereto for the performance of labor or the furnishing of skill, material, or machinery for the improvement, shall be guilty of theft of the proceeds of the payment and is punishable under section 609.52.

¹⁰ The trust obligation arises from an original attempt to impose criminal liability on persons who divert construction funds which was struck down in Meyer v. Berlandi, 40 N.W. 513 (Minn. 1888), on the grounds that mere non-payment of a debt cannot be a crime.

failure to pay a debt, which the statute makes punishable.); Duluth Superior Erection, Inc. v. Concrete Restorers, Inc., 665 N.W.2d 528 (Minn. Ct. App. 2003); State v. Bren, 704 N.W.2d 170, 174 (Minn. Ct. App. 2005) (President of Bren Homes, a bankrupt corporation, properly held criminally responsible for section 512.02 violations); T.E.S. Construction, Inc. v Chicilo, (2010Minn. App. LEXIS 92) (officer and director of Chicilo Homes, Inc, civilly liable under section 514.02 as a person who has committed theft).

When the legislature amended section 514.02, the law regarding corporate officer criminal responsibility for aiding and abetting corporate theft or other crimes was well-embedded in Minnesota law. It is difficult to imagine that the legislature might have accidentally or obliquely removed that fundamental concept by innuendo. Corporate officer criminal liability flows directly from the aiding and abetting statute, section 605.05 subdivision 1, which states that “A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Moreover, a person liable under subdivision 1, is also liable under subdivision 2 “for any other crime committed in pursuance of the intended crime if reasonably foreseeable by the person as a probable consequence of committing or attempting to commit the crime intended.”

Minnesota follows the doctrine that a corporate officer commits a crime when he directs to corporation to commit that crime. State v. McBride, 9 N.W.2d 416, 419 (Minn.

1943). The Minnesota courts have been persistently hostile to the claim by corporate officers directing a crime that only their corporation is culpable. For example, in State v. McBride, the Court rejected the contention by a corporate principal that only the corporation should be held culpable for the acts of corporate employees in violating state liquor laws:

It is of no assistance to Horrigan to suggest that McBride was hired by the corporation. A corporation is only "an artificial person, created by law, or under authority of law, from a group or succession of natural persons." 2 Dunnell, Dig. & Supp. § 1969, and cases there cited, and "if it is to function at all in its chosen or granted field of operation, it must act through or by means of human direction. It is impotent otherwise." State v. McBride, 9 N.W.2d 416, 419 (Minn. 1943)...

The Court continued, "Where the corporation is used by an individual as an instrument of fraud, or to hinder and delay and, if possible, defraud creditors, or for other wrongful purposes, 'courts will go as far as necessary in disregarding the corporation and its doing in order to accomplish justice.'" "It is the universal rule," the Court explained, "that an officer or agent of a corporation cannot avoid responsibility for his act on the ground that it was done in his official capacity, nor can he assert that acts in corporate form are not his acts merely because they are carried on by him through the instrumentality of the corporation which he controls and dominates and which he has employed for that purpose."

In State v. Lux, 50 N.W.2d 290 (Minn. 1951), the Court considered a statute that made it unlawful for "any person" to sell or plant mis-labeled agricultural seed. The

Court rejected the contention of corporate employees that since the corporation sold the seed, they were not criminally liable as persons who sold the seed:

Although a director or other officer of a corporation is not ordinarily criminally liable for acts performed by other officers or agents of the corporation, he is criminally liable for his own acts, although done in his official capacity, if he participated in the unlawful act, either directly or as an aider, abettor, or accessory. State v. McBride, 9 N.W.2d 416, 420 (other citations omitted).

In State v. Williams, 324 N.W.2d 154 (Minn. 1982) the Supreme Court rejected a similar argument in connection with the crime of theft, stating:

As we held in State v. McBride, 9 N.W.2d 416 (Minn. 1943), corporate officer is criminally liable for his own acts, even if done in his official capacity, and he is liable either directly as a principal or as an aider and abettor.

In Greene v. Environmental Dev. Corp., 415 N.W.2d 374 (Minn. Ct. App. 1987), this Court acknowledged the applicability of the Williams-McBride principles to the theft of trust funds held under Section 514.02, albeit in the context of an attempt to trace and place a lien on assets diverted by the corporate officer. Then, the year after, in an unpublished case, State v. Halvorson, 1988 Minn. App. LEXIS 1010, this Court applied the Williams principle to section 514.02, writing:

Halvorson's apparent argument for avoiding the Williams rule is that the offense is a strict liability offense, requiring no mental state, and therefore posing no bar to corporate criminal liability. Cf. State v. Christy Pontiac-GMC, Inc., 354 N.W.2d 17, 19-20 (Minn. 1984) (evidence that must be presented to establish a corporation is guilty of a specific intent crime). The possibility of corporate criminal liability, however, does not affect a corporate officer or employee's criminal liability for his own acts.

Nor is Halvorson's alleged shield from civil liability relevant to his criminal liability under the statute.

The holding that a corporate officer is not criminally liable for diversion is not only completely contrary to the repeated holdings of appellate courts, it would completely undermine the statutory purpose. These cases—involving diversion of funds—only arise when the corporation is insolvent. For, if the corporation remains solvent, then the wronged party can collect its loss in a direct civil action for the debt itself against the corporation. The District Court's construction eviscerates the criminal provisions by essentially meting out justice only against insolvent corporations lacking the financial capability to pay a fine, leaving nobody capable of serving the prescribed incarceration.

Section 514.02 is part of a comprehensive effort by the legislature to protect contractors, subcontractors and their suppliers from providing services and materials to a construction project without compensation. The comprehensive goal of Chapter 514 is to avoid forcing owners, contractors or subcontractors from having to pay twice for the same goods or services, while also assuring that the contractors, subcontractors and their suppliers are actually paid once. It has been inherent in the construction trades that the contractor, subcontractor or supplier typically does not get paid until after services and materials have actually been supplied. Non-payment of any contractor or subcontractor can lead to Chapter 514 liens against the property, and can inflict significant damage on innocent parties. The Section 514.02 trust obligation and the accompanying criminal and civil liability is an important component of the legislative design to avoid infliction of

losses on innocent owners and contractors. Holding that the statute's sole operational force merely serves to subject a corporation to meaningless criminal liability is hardly consistent with the statutory purpose.

B. The District Court Erred in Holding that Section 514.02 subdivision 1a(2) removes the civil liability which otherwise would fall on Corporate officers.

As explained in the introduction above, in Energy & Air System, Inc. v. Kuettel, 580 N.W.2d 62 (Minn. App. 1998), the Court of Appeals held that the criminal provisions of section 514.02 did not create an implied civil right of action for the diverted funds against a corporate officer. The Kuettel case arose from a civil action brought by the defrauded subcontractor Energy & Air System, Inc against the Kuettel, the President and 50% shareholder of the corporate roofing contractor, Robert W. Kuettel Roofing, Inc. The Kuettel decision did not rest upon the Court's belief that Kuettel was not a person who committed the crime. The liability of a corporate officer with requisite intent for crimes committed in the course of corporate business was fundamental in Minnesota when Kuettel was decided. Rather, Kuettel recognized that the corporate officer was criminally responsible under existing precedent, but found that there was no implied civil action against the corporation or its corporate officer, both of whom committed the crime. State v. Williams, supra; State v. McBride, supra. The Kuettel case rested entirely upon the Court of Appeals analysis of whether the criminal statute created an implied civil right of action. The Court wrote:

We have repeatedly held that "[a] criminal statute gives rise to a civil cause of action only if it appears by express terms or clear implication to have been the legislative intent."The express language of the statute clearly does not create a civil cause of action. Likewise, nothing in the statute suggests that the legislature intended to create a civil cause of action. In the absence of express statutory language or a clear implication of authority, we cannot find that Minn.Stat. § 514.02, subd. 1, creates a civil cause of action.

The legislature reacted to the Kuettel decision by creating an express right of action designed to assure that defrauded contracts in the position of Energy & Air System would have redress. The legislation, adopted in 2000, provided two forms of civil liability. One form of civil liability extended to persons who committed the theft such as corporate officer Kuettel¹¹. The second form of civil liability applies to persons who have not committed the crime, but knowingly receive the proceeds in the case of residential construction.

Subdivision 1a reads as follows:

Subd. 1a. Civil action. A person injured by a violation of subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney fees, and receive other relief as determined by the court, including, without limitation, equitable tracing. A civil action under this subdivision may be brought: (1) against the person who committed the theft under subdivision 1; and (2) for an improvement to residential real estate made by a person licensed, or who should be licensed, under section 326B.805, against a shareholder, officer, director, or agent of a corporation who is not responsible for the theft but who knowingly receives proceeds of the

¹¹ The use of the singular does not suggest that only one person can commit the theft. See Minn. Stat. Sec. 645.08(2) ("the singular includes the plural; and the plural, the singular" In fact, if two individual proprietors committed the theft, we would not be paralyzed from suing either on the grounds that only one must have committed the theft).

payment as salary, dividend, loan repayment, capital distribution, or otherwise.

The District Court wrongly found the statutory language allocating civil liability to the person who committed the theft ambiguous. In effect, she turned the meaning of the phrase “the person” upside down. There should be no doubt that the word “person” applies to natural persons. It would be completely counterintuitive to use the word “person” when the intent is to immunize natural persons, but extend liability to corporations only. If the legislature had extended to extend liability only to the contractor, and not to the person who causes the contractor to commit the crime, use of the word “person” would have been a rather strange way of imparting that intent, especially in light of the Minnesota precedent holding corporate officers criminally responsible for causing their corporations to commit crimes.

The judge thought that the extension of civil liability to persons knowingly receiving the proceeds of the theft found in subdivision 1a(2) justifies an inference that only officers, directors, shareholders or agents of corporations engaged in residential construction are liable. She mistakenly believed that there would be no point in providing for civil liability against recipient of diverted funds, unless the person who diverted the funds were not liable. She thought that the statutory language providing for an additional civil liability “Against a shareholder, officer, director, or agent of a corporation who is not responsible for the theft, but who knowingly receives proceeds...” signified the legislature’s intent that directors, officers, and shareholders could not be liable for theft

for diverting the proceeds.

Actually, the subdivision 1a(2) language tells us exactly the opposite and reinforces the plain intent that persons diverting the funds are civilly liable. Subdivision 1a(1) liability deals with persons who commit theft by diverting it out of the trust for non-trust purposes. The crime could be committed by Sues whether he personally received the money or not. It occurred whether he diverted the funds to his general creditors, or if he paid it to employees, or if he diverted it to himself. His wrongdoing under subdivision 1a(1) did not depend upon actually receiving the proceeds, but required a showing of the general criminal intent called for by the crime of theft. Under subdivision 1a(1) the issue is not who received the money, but who caused the money to be applied in violation of the trust. Sues was a perpetrator of the theft, because he caused the transfer—in this case either to himself or his new corporation—but the receipt is not a necessary element of the crime, nor is it an element of the subdivision 1a(1) liability.

The fact that subdivision 1a(2) extends civil liability to certain other classes of persons who receive diverted funds is simply not inconsistent in any way with the express provisions in subdivision 1(a)(1) to provide civil liability to persons who knowingly receive the proceeds. The distinction between the two acts is akin to the difference between the act of theft and the act of receiving stolen property. The fact that a pawnbroker may be criminally or civilly responsible for receiving stolen property does not imply that a pawnbroker cannot be criminally or civilly responsible for theft.

Subdivision 1a(2) is designed only to inflict liability on shareholders, officers, directors, or agents who are “not responsible for the theft.” It defies common sense that the legislature intended that corporate officers who are responsible for the theft would be liability free, but that those who did not commit the crime would have that liability. On the contrary, the extension of the liability to officers “not responsible for the theft”, assumes that others are responsible for the theft, and that their liability has been covered by subdivision 1a(1).

The District Court contended that the statute should be construed to implement the general scheme and overall purpose of the legislation. But the Court’s construction achieves exactly the opposite result, in both commercial and residential cases. As stated above, the legislation itself was passed in the immediate wake of a Court of Appeals decision holding that a corporate officer is not civilly liable for causing his corporation to commit the crime of theft. Energy & Air System, Inc. v. Kuettel, 580 N.W.2d 62 (Minn. App. 1998). But the court’s construction would still immunize persons in Kuettel’s position. When the legislature wrote 514.02, it was writing against the background that it was well established that an officer who causes a corporation to commit a crime also commits that crime. Since the corporate perpetrator is insolvent, restricting civil liability to the corporate perpetrator would offer effectively no relief. Providing the civil liability relief only in the case of unincorporated contractors is unnecessary, because the unincorporated contractor is already civilly liable, whether it commits the crime or not.

C. The District Court Erred in Concluding that by Language which Assures that Certain Corporate officers and agents Criminally Liable are Liable, Impliedly Repeals the Liability of other Corporate officers and agents.

The District Court evidently believed that the insertion of the sentence “For an improvement to residential real estate made by a person licensed, or who should be licensed, under section 326B.805, a shareholder, officer, director, or agent of a corporation who is responsible for the theft shall be guilty of theft of the proceeds” was intended to repeal wholesale the existing criminal responsibility for corporate officers as to commercial improvements. This conclusion does not arise from the language of the statute, for as the District Court conceded, the post-2000 statute leaves in tact all of the other language which otherwise plainly applies to both commercial and residential properties. Throughout the statute, the definition of improvement is left untouched and un-narrowed, and thus the entire scheme of the section continues to apply to commercial construction. The definition of person, and the scope of proceeds subject to the trust obligation, remains in tact precisely as it existed before the amendment. There is no language which seeks to repeal aider and abettor liability which plainly exists under the criminal code.

The 2000 amendments began by explicitly adding a new section clarifying that the

proceeds intended to pay for improvements to be held in trust¹². The historic purpose of the trust provisions has been to make sure that the funds are treated differently from general assets of the corporation, and specifically to eliminate constitutional objections to the criminal liability that flows from diversion of the trust assets. Compare Meyer v. Berlandi, 40 N.W. 513 (Minn. 1888) with State v. Bren, 704 N.W.2d 170, 174 (Minn. Ct. App. 2005) (history of statute discussed). There is no hint in this new statutory section that corporations engaged in commercial construction are relieved from the trust obligation. On the contrary, the statute applies to proceeds of payments received by a person contributing to an improvement to real estate within the meaning of section 514.01.

Section 25 of Chapter 430 of the 2000 Session laws, which implemented the post-Kuettel amendments also added “Proceeds of payments received by a person for labor, skill, material, or machinery contributing to an improvement to real estate within the meaning of section 514.01,” to the list of property exempt from levy, thus preventing general creditors from levying on property held in trust, whether for commercial or residential construction. Once again the comprehensive scheme of the trust obligation extended to all contractors and subcontractors, whether dealing with residential or non-

¹² The amendment inserted the following language. (a) Proceeds of payments received by a person contributing to an improvement to real estate within the meaning of section 514.01 shall be held in trust by that person for the benefit of those persons who furnished the labor, skill, material, or machinery contributing to the improvement. Proceeds of the payment are not subject to garnishment, execution, levy, or attachment.

residential construct. Extension of the levy exemption to commercial contractors dealing in the corporate form, while immunizing the controlling owner from criminal and civil liability would create a situation where the owner could protect corporate assets from all creditors, and yet transfer the otherwise immunized assets to a new corporation with virtual impunity.

If the authors of this legislation had intended to constrain the trust obligation to residential construction only, they could have accomplished that objective in a simple and straightforward manner, by explicitly limiting the trust obligation to residential real estate, but they did not. The section refers us directly back to section 514.01, which is the umbrella description of all improvements covered by Chapter 514.01. Thus, the plain intent of the statute is to impose a trust obligation as to the proceeds of both commercial and residential construction. Moreover, the trust obligation plainly applies to all persons who receive the proceeds of construction. When the funds come into the hands of a corporate officer, or when they are paid back out into the hands of a corporate officer, the corporate officer has received the proceeds of construction, and the statute impose the trust obligation upon him, equally with the corporation he controls.

With the insertion of the new subsection, renumbering pushed the criminal responsibility provisions into subdivision 1(b). Here again, the language of the criminal liability provisions evince no intent to restrict the criminal liability to commercial transactions. The crime arises “If a person fails to use the proceeds of a payment made to

that person for the improvement...” The term person is not restricted to residential contractors, and the term improvement is defined in subdivision 1(a) as all improvements. Had the authors intended to express the intent to remove aiding and abetting liability for corporate officers, they could have done so in a simple straightforward way, by explicitly narrowing the class of improvements, or by narrowing the class of persons covered. But the language is as broad and comprehensive before the amendment as it was before. The criminal liability still by its plain terms covers all improvements and all persons.

The issue, then, is whether the addition of explicit criminal liability at the end of the section should be construed as impliedly repealing criminal liability for aiders and abettors that had already existed. One problem with this approach is that it leaves persons doing business in the partnership or sole proprietorship capacity criminally responsible for diversion of trust funds when they engage in commercial construction, but would immunize only persons from criminal culpability if they happen to choose the corporate business form. For, whatever conclusion might be drawn from the last sentence, it cannot be fairly argued that if Sues's company were not a corporation, that he would be exempt from criminal prosecution.

The section relied on by the District Court enumerates certain instances when the corporate officers and shareholders are liable; it does not purport to remove liability for the contractor or subcontractor itself. Under the District Court's opinion, commercial trust proceeds are still the subject of criminal culpability. One would have to infer, then

that the legislature intended to punish persons in Sues's position, but only if they fail to incorporate. The result would be to inflict the criminal liability primarily on the smallest and least sophisticated of commercial sub-contractors, while exonerating sophisticated contractors who choose to flaunt the intent of the trust provisions.

As a matter of simple statutory construction, it is impossible to infer that the itemization of specific instances when liability for theft might fall on certain specified persons is designed impliedly to constrict the general liability provisions. The concept that enumeration of specific instances constricts the general is especially unpersuasive when the specific enumeration is added to a statute which has historically allocated criminal liability to all aiders and abettors. Moreover, we have in the theft statute, section 609.52, numerous specific examples which clearly do not limit the applicability of other sections of the theft statute. The theft statute section 609.52 is replete with overlapping specific and general provisions where the theft of any particular property may fall under a variety of enumerated definitions. These enumerations are not designed to constrict the others, but rather to make absolutely sure that the enumerated thefts are included. The inclusion of theft of a motor vehicle in subdivision 2(17) for example, does not imply that thefts of other kind are no longer subject to criminal prosecution.

It is more likely that when the legislature enumerated specific instances, it was simply trying to nail down specific circumstances where persons responsible for the operations of residential contractors, licensed or unlicensed, would clearly be criminally

responsible. The District Court's logic assumes—without clear proof— that the universe of persons found guilty under the “a shareholder, officer, director, or agent of a corporation who is responsible for the theft shall be guilty of theft of the proceeds” adds no other potentially culpable parties beyond the universe of culpable parties found responsible under the provisions of the prior sentences, but that is not at all immediately obvious. The enumeration includes directors and agents “responsible for the theft” and says that the result of their responsibility is that they “shall be guilty of theft of the proceeds.” The legislature may have been concerned that agents, directors and shareholders, as opposed to controlling officers like Suess, were not clearly responsible under the previously existing language.

The evidence against Suess is far stronger than the evidence required for the enumerated parties. He controlled the corporation entirely. He completely controlled the checkbook. He created a substitute corporation to accept the assets of the old corporation, paid himself monies out of the corporation leaving unpaid trust obligations, and transferred operations to the new corporation. He is not a mere agent or director, he is not even merely a shareholder or officer, but the controlling shareholder and the controlling officer. The case against him rests on evidence far beyond the evidence required to hold an agent of the corporation “responsible for the theft.” In many cases, a prosecutor seeking to convict would much prefer to go to the jury with an instruction finding the defendant guilty if he is an agent of the corporation responsible for the theft,

than the more general provisions of the previous sentence. The assertion that there is no set of facts under which an agent or shareholder might be acquitted under one provision, but not the other, is simply not established.

Finally, we fundamentally disagree with the District Court's implicit suggestion that evisceration of the enforcement provisions as to persons in the position of Sues, is somehow consistent with the general scheme and plan of the statute. The entire sweep of Minnesota cases dealing with criminal culpability of persons who commit a crime through the corporate instrumentality is that allowing persons like Sues to use the corporate entity to commit a crime with impunity is foreign to notions of justice. Doing so represents an abuse of the corporate privilege, which has never been granted in Minnesota to enable individuals to escape criminal culpability. It is inconsistent also with the plain language of the aiding and abetting provisions of the criminal code, which seek to hold persons who assist in the perpetration of a crime equally responsible. If the legislature intended to eliminate Sues's culpability as an aider and abettor, it should have done so in clear and precise language.

D. The District Court's Decision is Inconsistent with this Court's Subsequent Decision in T.E.S. Construction, Inc. v Chicilo.

Our position is fully consistent with this court's decision in T.E.S. Construction, Inc. v Chicilo, 2010 Minn. App. LEXIS 92, issued contemporaneously with our appeal. Stephen Chicilo was an officer and director of Chicilo Homes, Inc. On behalf of the

corporation, Chicilo hired respondent T.E.S. Construction Inc. (TES) to provide framing services for several construction projects.

Appellant then submitted pay-order requests, which included mechanic's lien waivers and invoices, to the construction lenders. But instead of requesting that the lenders pay TES for the framing services it had performed, appellant requested that the lenders pay SP Framing Inc. (or some variation of that name). The construction lenders issued checks to SP Framing, and these checks were deposited into a bank account in that corporation's name. Appellant was the sole officer, shareholder, director, and employee of SP Framing; the address of SP Framing is identical to the address of Chicilo Homes.

Chicilo argued that he could not be civilly liable, unless he had been first convicted of the offense. This Court disagreed. It held that a corporate officer who himself commits a criminal offence by causing the corporation to divert trust funds is civilly liable, whether a conviction follows or not. The Court held that the statute unambiguously makes a person in Chicilo's position civilly liable.

IV. CONCLUSION

A corporate officer who diverts trust funds is subject to criminal liability under the repeated holdings of this Court. The District Court's decision should be reversed with

instructions to apply the civil liability provisions of subdivision 1a(1) to the undisputed facts before the District Court, resulting in judgment for the plaintiff.

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Respectfully Submitted,

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