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IN THE SUPREME COURT OF TEXAS

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**ALAMO COMMUNITY COLLEGE DISTRICT,**

**Petitioner**

**v.**

**BROWNING CONSTRUCTION COMPANY,**

**Respondent**

=====

On Petition for Review from the Court of Appeals for the  
Fourth Judicial District of Texas at San Antonio, Texas  
Cause No. 04-02-00808-CV

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**PETITIONER'S BRIEF ON THE MERITS**

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District One . . . . .	Bernard Weiner
District Two . . . . .	Denver McClendon, Lt. Col. USAF Retired
District Three . . . . .	Jennifer Ramos
District Four . . . . .	Marcelo S. Casillas
District Five . . . . .	Roberto Zarate (Assistant Secretary)
District Six . . . . .	Dr. Gene Sprague (Chairman)
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## STATEMENT OF THE CASE

*Nature of the Case:* This is a breach of contract lawsuit brought against Alamo Community College District by Browning Construction Company for reimbursement of damages to the contractor and three of its subcontractors resulting from construction delays in the completion of the Northwest Vista College Campus in northwest Bexar County, Texas.

*Trial Court:* The Honorable Karen Pozza of the 407<sup>th</sup> Judicial District Court in Bexar County, Texas, Cause No. 2000-CI-05250.

*Trial Court's Disposition:* Judgment in accordance with the jury's verdict, awarding plaintiff over \$3,000,000 of delay damages in a breach of contract claim.

*Court of Appeals:* Fourth Court of Appeals; Justice Karen Angelini, joined by Justices Paul W. Green and Catherine Stone, No. 04-02-00808-CV, *Alamo Community College District v. Browning Construction Company*, 131 S.W.3d 146 (Tex. App. – San Antonio 2004, pet. filed) (“Opinion”)(*See*, Appendix to Petition for Review, tab C).

*Court of Appeals' Disposition:* Affirmed the judgment of the trial court.

*Requested Disposition from This Court:* Petitioner seeks a reversal of the court of appeals' opinion, a reversal of the trial court's judgment, and (1) dismissal of this case for want of jurisdiction due to the Petitioner's sovereign immunity, or (2) alternatively: (a) rendition of judgment that the Respondent takes nothing on its claims, or (b) reversal and remand for a new trial.

## STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this case under Section 22.001(a)(2),(3),(4), and (6) of the Texas Government Code because:

(1) it involves a matter in which the courts of appeals are divided, *i.e.*, whether statutory inclusion of a “sue and sued” clause constitutes waiver of sovereign immunity from

suit by the Texas Legislature, including specifically waiver of sovereign immunity from suit for independent school districts and thereby, junior college districts.

**Compare, regarding school districts.** *Alamo Community College District v. Browning Construction Company*, 131 S.W.3d 146 (Tex.App.–San Antonio 2004, pet. filed) and *Alamo Community College District v. Obayashi*, 980 S.W.2d 745, 747-748 (Tex.App. – San Antonio 1998, pet. denied) with *Satterfield & Pontikes Const. Inc. v. Irving Indep. Sch’l District*, 123 S.W.3d 63 (Tex.App. – Dallas 2003, pet. filed); **see also**, *Jackson v. City of Galveston*, 837 S.W.2d 868, 871 (Tex. App. - Houston [14th Dist.] 1992, writ denied); *Townsend v. Mem’l Med. Ctr.*, 529 S.W.2d 264, 267 (Tex. Civ. App. - Corpus Christi 1975, writ ref’d n.r.e.); *Childs v. Greenville Hosp. Auth.*, 479 S.W.2d 399, 401 (Tex. Civ. App. - Texarkana 1972, writ ref’d n.r.e.); *City of Dallas v. Reata Const. Corp.*, 83 S.W.3d 392, 398 (Tex. App. - Dallas 2002), *reversed on other grounds*, No. 02-1031, 47 Tex. Sup. C. J. 408 (Tex. April 2, 2004), all finding that the clause does not waive immunity, **with** *United Water Serv., Inc. v. City of Houston*, No. 01-02-01057, 2004 Tex.App.Lexis 3988 (Tex.App. – Houston [1<sup>st</sup> Dist.] 2004, pet. filed); *Goerlitz v. City of Midland*, 101 S.W.3d 573, 577 (Tex.App.–El Paso 2003, pet. filed), *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 448-49 (Tex. App. - Fort Worth 2001, no pet.), *Bates v. Tex. State Tech. Coll.*, 983 S.W.2d 821, 827 (Tex.App–Waco 1998, pet. denied), *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343, 348 (Tex.App. – Corpus Christi 1977) *pet. denied per curiam*, 989 S.W.2d 360 (Tex. 1998); *Loyd v. ECO Res., Inc.*, 956 S.W.2d 110, 122-123 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1997, no pet.), *Knowles v. City of Granbury*, 953 S.W.2d 19, 23 (Tex.App.–Fort Worth 1997, pet. denied), finding immunity waived.

(2) it involves errors of law committed by the court of appeals, these errors being of such importance to the jurisprudence of the state that correction by the supreme court is required, *i.e.*,

A) the error of judicially waiving immunity from suit for Alamo Community College District, despite the absence of any clear and unambiguous waiver of its immunity by the Texas Legislature;

B) the error of judicially waiving sovereign immunity for intentionally tortious conduct despite the immunity established in the Texas Tort Claims Act when breach of contract claims for delay damages uses intentional tortious conduct alleged on the part of the sovereign - such as fraudulent misrepresentation - allowing circumvention of immunity from liability and leaves governmental entities dealing with construction agreements open to challenge, state-wide;

- C) the error of judicially imposing by implication a legal duty upon an owner in Texas for the adequacy of design when the owner declined any express warranty to undertake design responsibility for delay, when no such implied warranty exists in Texas law;
- D) the error of judicially allowing architectural design to be factually proven in Texas without testimony from a reasonable and prudent member of that profession, providing precedent for proving design error without evidence of a architectural design standard from a design expert, i.e., an architect;
- E) the error of holding broad-form jury submission regarding various contractual duties within a sophisticated, voluminous document (a) without instruction and (b) with an anti-*Casteel* litany of choices;
- F) the error of holding broad-form jury submission regarding a damage question which contained bases unrecognized in Texas law, i.e., (1) instructing for a calculation of damages under the *Eichleay* method; (2) providing for recovery under a “total cost” theory of damages; and (3) providing for the litigation costs incurred by Browning in contracting with the non-suited subcontractors and settling their disputes between them;
- G) the error of affirming the trial court’s *sua sponte* instruction to the jury that the architects were to be considered as agents of the owner, absent any pleading nor any proof that the agency relationship existed;
- H) the error of finding that a modification to the contract without factual or legal support.

## ISSUES PRESENTED<sup>1</sup>

1. *Immunity from Suit with a “sue and be sued” clause.* Has the Texas Legislature waived a junior college district’s sovereign immunity from suit in a breach of contract claim with clear and unequivocal language? Specifically, does the “sue and be sued”

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1

Issue No. 3 in the Petition for Review, dealing with pass-through agreements, has been omitted from the briefing, due to this Court’s determination that these agreements are recognized under Texas law, in an opinion issued during the pendency of this matter in *City of Dallas v. Interstate Contracting Corp.*, \_\_\_ S.W.3d \_\_\_, 47 Tex.S.Ct.J. 434 (April 16, 2004).

language in Texas Education Code (“TEC”) Section 11.151:

- A. first, clearly and unambiguously waive sovereign immunity from suit for independent school districts (or does it define the capacity of a board of trustees to act for the entity), and
  - B. second, thereby waive immunity for junior college districts, including ACCD, under TEC Sections 130.162 and 130.084?
2. Judicial Exceptions to Immunity from Liability for Intentional Torts in the TTCA. Are there judicial exceptions to sovereign immunity from tort liability in the Texas Tort Claims Act? Specifically, can judicially recognized exceptions to the application of a "no damages for delay" clause in a construction contract circumvent a sovereign's immunity for intentional torts, such as fraud?
  3. Defining an Owner's Implied Duty in Texas to the Contractor for Design. When does an owner in Texas have any legal duty to the general contractor for the adequacy of design absent an express warranty to undertake design responsibility?
  4. How to Prove Design Error without Architectural Expertise. Can error in architectural design be factually proven in Texas without testimony from a reasonable and prudent member of that profession?
  5. Submission Errors in the Charge – Liability. Did the Court of Appeals err in holding that the broad-form submission of Jury Question 1 by the trial court was not fatally defective, when it allowed the jury to determine that various contractual duties were breached within a sophisticated, voluminous document (a) without instruction and (b) with a litany of choices in violation of *Casteel*?
  6. Submission Errors in the Charge - Damages. Did the Court of Appeals err in affirming the trial court's submission of a damage question which contained bases unrecognized in Texas law, *i.e.*, (1) instructing for a calculation of damages under the *Eichleay* method; (2) providing for recovery under a “total cost” theory of damages; and (3) providing for the litigation costs incurred by Browning in contracting with the non-suited subcontractors and settling their disputes between them?
  7. Submission Error, Assumption of Agency. Did the Court of Appeals err in affirming the trial court's *sua sponte* instruction to the jury that the architects were to be considered as agents of the owner, absent either any pleading or any proof that the agency relationship existed?

8. *Error in Contract Interpretation.* Did the Court of Appeals err in finding that there was a modification to the contract in its *de novo* review of the trial court's determination?

## STATEMENT OF FACTS

### A. Legislature's Exiguous Definition of the Junior College Community District

ACCD is a junior college community district organized pursuant to the Texas Education Code ("TEC"), with its' particular service area defined in code section 130.162. TEX. EDUC'N CODE §§130.001 *et seq.*, 130.162 (Vernon 1991 and Vernon Supp. 1998).

The ACCD board of trustees' ". . . powers and duties . . . in the management and control of the junior college . . ." are governed by ". . . the general law governing the . . . management and control of independent school districts as the general law is applicable." TEX. EDUC'N CODE §130.084 (Vernon 1991)(emphasis added). There is no enabling statutory language for ACCD, individually and specifically. *See, Alamo Community College District v. Obayashi*, 980 S.W.2d 745, 747-748 (Tex.App. – San Antonio 1998, pet. denied). There is no statutory language specifically dealing with the immunity of ACCD.

### B. Construction of New College Campus Results in Present Controversy

The present controversy began when ACCD instituted a bidding process for the construction of a new college campus in northwest Bexar County; Browning, a local, family-run organization, was awarded the contract. (5 RR 109:6 - 112:16; 11 RR 15:4-8; 3 RR 133:11 - 134:23; 11 RR 7:2-10.) The written contract thereafter negotiated between these parties, based upon an industry-standard form, contained both general and specific conditions. (13 RR 76: 8-23; 3 RR 165:9 - 167:19; P.Ex 49.)

The contract itself also included the plans and specifications for the project, as

provided by the architectural joint venture, Beaty Saunders Chesney Morales Fly. (*Id.*; 3 RR 172:17 - 179:22). This collaboration of architects had also obtained the work through a bidding procedure, similar to that experienced by Browning. (5 RR 109:6 - 112: 16; 8 RR 9:1-22; 8 RR 15:1-18.) Browning contractually agreed to turn their architectural design into a reality.

Included within the construction contract were two clear, agreed-upon construction deadlines – and a specification that “time is of the essence.” (10 RR 55: 5-18; 10 RR 56: 5-11.) It was understood that the college needed a specific time frame for completion, since students were to arrive in the fall of 1999, expecting classrooms. (3 RR 171:13 - 172:5.) This drop-dead date was a conspicuous part of the bidding documents. (*Id.*; 10 RR 52:10-18.)

Pointedly, Browning started asking that those critical deadlines be moved *before* it ever formally signed the contract. Browning, however, voiced no complaint about the deadlines until after it had the job through the bidding process, and after it had been issued the notice to proceed. (10 RR 69:19 - 70:12). Ultimately, neither deadline was met. (11 RR 11:17.)

Contained within the contract between ACCD and Browning were critical provisions that warned of the absence of the Owner’s warranty for the project, such as:

Bidders are required to *thoroughly familiarize themselves* with all of the provisions of the Instructions, Conditions, Requirements of the Contract, the Bond, the Drawings, and Specifications. They are further *required to inspect the site* of the Work and *inform themselves of all conditions affecting the execution of the work to be performed* under this contract. If any person contemplating submitting a bid for this contract is in doubt as to the true

meaning of the Specifications, or other Bid Documents, or any party thereof, he may submit to the Director of Procurement and Material Management . . . on or before seven (7) work days prior to the scheduled bid opening, ***a request for clarification.***

P.Ex 49, Instructions to Bidders, ¶ 6 (Emphasis added)

The structural system for this project shall not be constructed by using the structural drawings alone. These drawings were developed from data derived from the architectural drawings and secondarily from MEP, civil, and other discipline's documents. **It is intended that the construction proceed by utilizing all of the information contained in the entire set of construction documents taken as a whole. Failure to do so will result in errors which shall be corrected at the contractor's expense.**

D.Ex 50, S-1 (and appearing on each of the volumes of the construction documents. *18 RR p. 10:3-19*)(Emphasis added)

Also included within the contract between ACCD and Browning was a limitation upon the Architect's ability to represent the District. Instead of the standard form language, identifying the Architect as the Owner's representative, new language was included<sup>2</sup>:

The Architect will provide administration of the Contract as described in the Contract Documents. The Architect will advise and consult with the Owner. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

***replaced*** the following:

The Architect will provide administration of the Contract as described in the Contract Documents, and will be the Owner's Representative (1) during construction, (2) until final payment is due, and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 12.2. The Architect will advise and consult with the Owner. The

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<sup>2</sup>P.Ex.49: Original Condition 4.2.1 was revised, as shown, in Supplemental Condition 4.2.1.

Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

Therefore, to consider whether or not the ACCD allowed the Architect to act on its behalf requires a review of the contract itself. In doing so, the contract language demonstrates ACCD not taking responsibility for work of either the architectural or construction professionals, and that the Architect acted for ACCD only in instances of required expertise, where ACCD had no viable choice, as for example when an architect formally acknowledges substantial completion of a project by his professional certification. *See, P.Ex.49, Supp.Cond.9.8.1.*

During construction, Browning complained that the design was at fault; the architects responded that Browning was failing in its job as general contractor, by failing to properly man the site; failing to obtain proper site and shop drawings; and ignoring various contract requirements. (*10 RR 58:2 - 60:15; 18 RR 184:3 - 186:8; 19 RR 109:1-4; 19 RR 113:20-114:20; 19 RR 14:6-17; 19 RR 74:14 - 75:13.*) ACCD's own site representative also concluded that the problems were caused by Browning. (*5 RR 134: 21-135:1.*)

**C. Conflicts Resolved – Except for the Delay Damage Costs**

Browning threatened to walk the project before either phase was finished. (*5 RR 155:8 - 156:1.*) With the assistance of an independent, third-party facilitator, a global settlement was reached on many monetary issues in a substantial amount. (*6 RR 125:14 - 128:17; P.Ex. 208*) However, ACCD steadfastly refused to pay for overhead expenditures

and other costs that Browning claimed resulted from construction delay. This refusal was based upon the agreed-upon “no damages for delay” provision in the Contract.

While negotiator Jack Pellek, as ACCD representative, attempted to work out a way to pay Browning’s delay damages claim, the ACCD Board did not agree they were owed; even Pellek acknowledged that he did not believe that Browning was “entitled to them per se.” (5 RR 153:10-12.) Moreover, negotiator Jaime Browning, as Browning representative, worked with Jack Pellek with the understanding that everything they discussed would be subject to Board of Trustee approval. (6 RR 36:19 - 40:8.) There was no settlement of the delay damages. At most, ACCD would agree to disagree until the project was finished, and said so in language thereafter appearing on every change order from number 18 forward in the series of orders (which completed at number 82). (5 RR 178:11 - 180:11; 5 RR 181:13-19; 6 RR 171:25.)

The global settlement was successful in that construction continued. As for the impact of the language added to the change orders, Browning’s own expert concurred with ACCD that this addition, repeated upon change orders 18 through 82, was not a contract modification, but instead a “reservation of rights.” (17 RR 24:1 - 27:8.)

After the project was done, Browning had received over \$19,000,000.00 in compensation; however, the delay damages remained unpaid. ( P.Ex. 398.) ACCD looked at the delay damage claims: it hired an independent expert to review the delays and determine who was responsible for Browning’s claims – the expert concluded that Browning

caused its own problems. (17 RR 108:4 - 109:25.)

Browning argued that ACCD had obtained Browning's agreement on the global settlement before it rejected Browning's delay claims, although ACCD knew at the time of the global settlement that it would not pay them. (6 RR 135:17 - 136:12; 6 RR 140:1-12.) Browning felt manipulated in the negotiation and resolution of the global settlement claims.

Meanwhile, ACCD steadfastly maintained that under the contract, the parties had agreed not only that contractor delay damages were not to be compensated, but the contract provision could not be waived without its written alteration, and that the Board of Trustees for ACCD never did anything more than keep the project moving toward completion by agreeing to negotiate the delay damages issue after the college was built. (5 RR 175:16-20; 6 RR 171:1-6) ACCD's position was that it had not rejected the delay damages *en toto* during the global settlement; instead, the parties had simply postponed the decision on how to deal with them until the project was finished.

**D. Suit is Filed; Three Subcontractors Enter the Fray**

During this time, disgruntled subcontractors remained unpaid. Valentine Plumbing Company actually sued Browning for payment, arguing in part that Browning's lack of manpower on the site had damaged them. (14 RR 167:12-21.) Browning countered that ACCD was responsible for the extra costs due to the delay. Browning then brought this lawsuit, together with Valentine and two other main, and unpaid, subcontractors. (CR 1.)

Initially joining as co-plaintiffs in this case, these three subcontractors later nonsuited

after entering into “pass through” agreements with Browning. (*CR 1; 15 RR 151:23 - 157:4.*)

(These agreements were separate from Browning’s settlement with Valentine Plumbing for \$100,000.00 to drop its lawsuit. (*4 RR 103:2-14.*)) Victoria Air agreed to enter into its pass through agreement only if it was guaranteed payment of \$150,000.00; the others entered without monetary compensation. (*Id.; 15 RR 151:4-22.*) All agreed that if Browning got nothing in this lawsuit, they got nothing. (*Id.*) The Browning suit against ACCD claimed actual damages totaling a little over \$3,000,000 – consisting of approximately \$1,000,000 as delay damages for the “pass through” subcontractors. (*CR 1, 73; 4 RR 101:8-17.*)

#### **E. Jury Trial Was Had.**

Trial was had for six weeks. (*1 RR 1; 21 RR 38.*) No architect testimony was provided to define the design error, and there was simply **no** expert testimony provided regarding architectural standard of care in order to define how the architectural design was in error.

Despite numerous objections at the charge conference, the jury was provided a charge containing many errors. (*CR 80, 81, 82, 83; 20 RR 126-167.*) It returned a verdict in favor of the contractor the same afternoon that deliberations began. (*21 RR 73:19, 35: 9-19.*) ACCD’s motions for a new trial, to modify the judgment, and for a judgment notwithstanding the verdict, were all summarily denied. (*CR 87, 91, 95, 99*) Upon appeal, the appellate court affirmed the trial court’s judgment. (*Opinion*)

### **SUMMARY OF THE ARGUMENT**

The cornerstone of the court of appeals' opinion sets upon a fatally flawed foundation: its finding that there has been a legislative waiver of immunity from suit for ACCD, in view of this Court's recent holdings, including but not limited to its discussion in *Wichita Falls Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003). Essentially, the lower appellate court relies upon its 1998 holding in *Obayashi* as well as a myopic dependence upon this Court's 1970 cursory opinion in *MoPac*,<sup>3</sup> without revisiting an immunity analysis. Not only is this Court's 2003 four factor analysis of immunity in *Taylor* not discussed, it is ignored.

Currently, a conflict exists between the circuits regarding immunity from suit, and whether or not this Court has implicitly overruled *MoPac*. This Court's current, explanatory demarcation of the boundaries between legislative and judicial roles in waiver of immunity is clear, and the San Antonio court of appeals has openly refused to follow this guidance. It is an error which must be corrected.

Regarding immunity from liability, judicial exceptions to the application of a "no damages for delay" clause in a construction contract do exist, based upon tortious conduct of a breaching party; however, they cannot be allowed to circumvent the immunity from liability barrier existing for governmental entities. This has occurred in this case; allowing the *Opinion* to stand without correction will provide precedent which endangers and exposes

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*ACCD v. Obayashi Corp.*, 980 S.W.2d 745 (Tex.App. – San Antonio 1998, pet. denied) ("*Obayashi*"); *Missouri Pacific R.R. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970) ("*MoPac*" or "*Missouri Pacific*").

school districts, college districts, and other governmental and sovereign entities alike, to tort liability in a variety of contractual situations.

ACCD is immune from liability. Neither findings of misrepresentation by the jury, nor the remaining findings based upon the court's erroneous consideration of owner ACCD as synonymous with the architects in this case, can be allowed to circumvent immunity from liability in this contract case. The judicial exceptions to the application of this particular contractual clause do not apply to entities with governmental immunity.

The *Opinion* contains several other errors worthy of this Court's analysis and correction. There are insupportable legal assumptions. First, an implied warranty has been imposed upon the owner, ignoring longstanding Texas law whereby an owner does not implicitly warrant architectural designs to a sophisticated industry professional – especially at Browning's level of expertise. Second, in plain error, the *Opinion* allows design error in the architectural plans and specifications to remain as the pivotal fact in this case without any evidentiary basis to support it. Both mistakes impact upon a wide scope of circumstances involving construction law and if left to stand, will significantly lower the burden of proof needed to find owners of property responsible for the gaffes of a professional architect.

Third, the *Opinion* inaccurately holds that there has been a legal modification of the construction contract via certain language appended to change orders. This legal determination was, confoundedly, without evidence to support the legal prerequisites to a modification's existence (*e.g.*, consideration), and despite an admission by Browning's

expert that the orders' language constituted merely a "reservation of rights," and ACCD's explanation that there was never any intent to modify. If left unchanged, the *Opinion* lessens the standard needed to establish a modification of a contract, especially worrisome in situations with sophisticated instruments, such as the construction contract in question.

Additionally, serious charge errors exist in this case that have a wide-ranging and misguided impact upon precise jury guidance to be given by future trial courts, if left uncorrected. First, the jury was told by the trial court to consider ACCD as synonymous with the architects by definition, even though no party requested such an instruction, and Browning did not plead nor prove either agency or apparent authority between the owner and the architect. This trial court drafting error applied to *every* question in the charge, and remains uncorrected. Its impact cannot be overemphasized: for example, the jury was specifically instructed to consider ACCD and the third party architects as one entity throughout the *entirety* of the charge, thereby impacting such issues as determining the applicable exceptions to applying the "no damages for delay" clause – despite legal barriers against an agent being responsible in this situation.

Second, the jury was not given any help in researching the volumes of documents that make up the contract itself. Not one page or paragraph reference to the complicated contract is found within the Charge. Further, the Charge allowed the jury to assess damages under three separate damage models that are not recognized under Texas law. The *Opinion* allows them to remain. Both these decisions should not stand.

## ARGUMENT AND AUTHORITIES

### *I. ACCD is immune from suit.*

There is scant legislation that deals precisely with the Alamo Community College District: chapter 130 of the Texas Education Code (“TEC”) provides the overall organizational structure for junior college districts in Texas, with the particular service area for ACCD being defined in its Section 130.162. TEX. EDUC’N CODE §§130.001 *et seq.*, 130.162 (Vernon 1991 and Vernon Supp. 1998). In providing for the scope of power for the board of trustees for these types of college districts, the TEC states:

The board of trustees of junior college districts shall be governed in the establishment, management and control of the junior college by the general law governing the establishment, management and control of independent school districts insofar as the general law is applicable . . .

TEX. EDUC’N CODE §130.084 (Vernon 1991)<sup>4</sup>.

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<sup>4</sup>Insofar as the general law governing the establishment, management and control of independent school districts, Texas Education Code §11.151 provides:

(a) The trustees of an independent school district constitute a body corporate and in the name of the district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other moneys or funds coming legally into their hands.

(b) The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. All powers and duties not specifically delegated by statute to the agency or to the State Board of Education are reserved for the trustees, and the agency may not substitute its judgment for the lawful exercise of those powers and duties by the trustees.

(c) All rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office. The trustees may, in any appropriate manner, dispose of property that is no longer necessary for the operation of the school district.

(d) The trustees may adopt rules and bylaws necessary to carry out the powers and duties provided by Subsection (b).

(e) A school district may request the assistance of the attorney general on any legal matter. The district must pay any costs associated with the assistance.

Immunity from suit<sup>5</sup> denies subject matter jurisdiction over the governmental entity unless the state legislature has “clearly and unambiguously” waived the immunity either in a statute or in a resolution. *Travis County v. Petzel & Assoc., Inc.*, 77 S.W.3d 246, 252 (Tex. 2002); *Texas Natural Resources Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 857 (Tex. 2002); *Taylor*, 106 S.W.3d at 697-698. Recent consideration of legislative consent to waiver has held that very specific language from the Legislature is needed before immunity from suit can be waived. *Travis Cty.*, 77 S.W.3d at 752.

Moreover, in 2003, the Texas Legislature provided its own guidance in explicit wording:

***In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.*** In a statute, the use of "person," as defined by Section 311.005 to include governmental entities, does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction.

TEX.GOV'T CODE §311.034 (Vernon 2003)(“TGC§311.034”)(emphasis added).

Accordingly, this Court has provided four factors to be used in judicially determining legislative intent regarding sovereign immunity from suit: (1) the statute must contain a clear waiver, beyond doubt; (2) ambiguities are resolved by retaining immunity; (3) waiver will

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Petitioner recognizes that while precedent has used the terms “sovereign immunity” and “governmental immunity” reciprocally, the two concepts actually involve protection of two categories of entities: ‘sovereign,’ the State and certain of its divisions, and ‘governmental,’ the State’s political subdivisions. *Taylor*, 106 SW.3d at 694, n.3.

be found only if the statute requires joinder of the entity in a lawsuit for which liability otherwise would not attach; and (4) the waiver will often be accompanied with simultaneous measures to insulate public resources from the reach of judgment creditors. *Taylor*, 106 S.W.3d at 697-698.

The Legislature has provided many, varied examples of its clear and unambiguous waiver of immunity. As Justice Jefferson provided in *Taylor*, these examples include: (1) TEX. GOV'T CODE § 2007.004(a) ("Sovereign immunity to . . . liability is waived and abolished to the extent of liability created by this chapter."); (2) *Id.*, § 2007.024(c) ("Sovereign immunity to liability is waived to the extent the governmental entity elects to pay compensation under this subsection."); (3) TEX. NAT. RES. CODE § 52.035(c) ("The state waives its right to claim sovereign immunity in any action commenced against the state. . . ."); (4) TEX. CIV. PRAC. & REM. CODE § 110.008 ("Subject to Section 110.006, sovereign immunity . . . from liability is waived and abolished to the extent of liability created by Section 110.005. . . ."); and (5) *Id.*, § 101.021 (expressly imposing liability on a governmental unit for property damage and personal injury). *Taylor*, 103 S.W.3d at 696, n.5.

Nevertheless, in the case at bar, the San Antonio court has inaccurately and inappropriately held that the Legislature intended to waive immunity from suit for Alamo Community College District by its formulation and passage of the language contained solely in TEC §§ 130.162 and 130.084, as combined with TEC § 11.151, dealing with independent

school districts. *Opinion*, p. 9 ( “. . . we reiterate our holding in *Obayashi* and hold that . . . the Legislature has clearly and unambiguously waived immunity for community college districts.”).

Obviously, this Court has never addressed whether TEC§11.151 constitutes a waiver of immunity from suit. Neither has this Court addressed whether or not TEC§§130.162 and 130.084 can be logically combined with TEC§11.151 to find that there is clear and unambiguous waiver of immunity from suit for a community college district. The Fourth Court of Appeals, therefore, provided its own analysis with reliance on its 1998 decision in *Obayashi*.

The lower court’s decision was based upon two grounds: first, the court’s blind adherence to the succinctly formed determination in *MoPac* regarding the impact of the clause “sue and be sued,” and second, its prior 1998 opinion in *Obayashi*, which strung the statutes together to find a waiver of immunity while admitting the ambiguity of the legislation involved. *Opinion*, p. 9; *see, Obayashi* 980 S.W.2d at 748 (“[w]e agree the waiver is not specific to ACCD, as it is with some universities . . .”). It was inconsequential that the equitable basis for *Obayashi*’s holding already had been expressly declined by this high court. *It-Davy*, 74 S.W.2d at 857.

Interestingly, while the *Opinion* voices its loyalty to precedent in place, *i.e.*, *MoPac* and *Obayashi*, it does take the proactive step of stating that the waiver is “clear and unambiguous” as to ACCD. *Opinion*, p. 9. The appellate court thereby implicitly

undertakes the current enunciated standard of this Court, but stops short of saying that *MoPac* withstands *Taylor* — it is silent as to *Taylor*. It does not hold this, because it cannot.

The *Opinion* is glaringly wrong. It has clung to its old law, it has never addressed the *Taylor* factors required by this Court, nor has it conformed to the Legislature’s own directive. Failure to enter into this analysis was misplaced in part upon its argued adherence to the respect that a lower appellate court owes to the high: *MoPac* was argued a mandatory basis for decision until the San Antonio court was told otherwise. *Opinion*, p. 9.

The assumption relied upon in the *Opinion* is that *MoPac*’s ruling that the legislative use of the phrase “sue and be sued” in a statute dealing with navigation districts, to wit: “... all navigation districts established under this Act may, by and thru the navigation and canal commissions, sue and be sued in all courts of this State,” is “quite plainly” voicing not only waiver of immunity for that navigational district, but also silently providing for a unilateral legislative waiver of immunity for *all* uses of that statutory phrase, regardless of the entity involved. *Id.*; *see, MoPac*, 453 S.W.2d at 813.

To do so is to read *MoPac* too broadly, which was the conclusion of the Dallas court of appeals in its recent analysis of TEC §11.151 and whether or not immunity had been legislatively waived for independent school districts. *See, Satterfield*, 123 S.W.3d at 67-68. The Dallas court finds that immunity has not been waived, respecting this Court’s instructions in *Taylor, et al. Id.* Instead, the Dallas court found the language in TEC§11.151 is more reasonably construed to explain the party capacity of an independent school district

trustee. *Id.*

Indeed, the entirety of TEC§11.151 generally defines the trustees' capacities or powers: their ability to buy property, receive monies, oversee school management, and dispose of district property is also described in the statute. *Id.* Contrarily, *MoPac* considered a statute narrow in its' focus: the provision deals solely with courts, and lawsuits in them. *MoPac*, 453 S.W.2d at 813; *see*, Tex.Rev.Civ.Stat. Ann. Art 8263h, §46 (Vernon 1954)<sup>6</sup>.

The San Antonio court considered *Satterfield. Opinion*, p.9. It disregarded the Dallas court's reasoning, opining that Dallas was wrong not to accede to *MoPac* as determinative precedent. *Id.* Rather than delve into the clear material difference between the statute considered in *MoPac* and TEC§11.151, and apply the Court's factors as enunciated in *Taylor*, the appellate court decided that it would lean upon the legal concept of *stare decisis*, and expressly opined that the Dallas court was wrong not to do so, as well. *Id.*

This blatant conflict between the positions of the San Antonio and Dallas courts extends past those two circuits and their divergent perceptions of the "sue and be sued" clause in TEC§11.151: other appellate courts are divided on this issue, as well as the similar

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<sup>6</sup>Tex.Rev.Civ.Stat. Ann. Art 8263h, §46 (Vernon 1954) provides: "Suits; judicial notice. All navigation districts established under this Act may, by and through the navigation and canal commissioners, sue and be sued in all courts of this State in the name of the navigation district, and all courts of this State shall take judicial notice of the establishment of all districts."

language, “plead and be impleaded,” and the impact of *MoPac* upon both clauses.<sup>7</sup> The proper impact of *MoPac* is also the subject of current commentators.<sup>8</sup>

Interestingly, the absence of fiscal concern in *MoPac* is not addressed specifically by the appellate courts as they rely upon the 1970 case. *See, e.g., Tooke*, 115 S.W.3d at 621-624. Moreover, the silence of this Court in elucidating *MoPac*’s impact cannot be assumed to imply approval of it. For example, the Court’s silence regarding the “sue and be sued” clause in its recent opinion in *Reata* can be read as supporting immunity, while the Court’s

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***Regarding school districts and ‘sue and be sued’, compare, Alamo Community College District v. Browning Construction Company***, 131 S.W.3d 146 (Tex.App.–San Antonio 2004, pet. filed) and *Alamo Community College District v. Obayashi*, 980 S.W.2d 745, 747-748 (Tex.App. – San Antonio 1998, pet. denied) with *Satterfield & Pontikes Const. Inc. v. Irving Indep. Sch’l District*, 123 S.W.3d 63 (Tex.App. – Dallas 2003, pet. filed); ***regarding municipalities and ‘sue and be sued’, compare,*** *Jackson v. City of Galveston*, 837 S.W.2d 868, 871 (Tex. App. - Houston [14th Dist.] 1992, writ denied); *City of Dallas v. Reata Const. Corp.*, 83 S.W.3d 392, 398 (Tex. App. - Dallas 2002), *reversed on other grounds*, No. 02-1031, 47 Tex. Sup. C. J. 408 (Tex. April 2, 2004), with *United Water Serv., Inc. v. City of Houston*, No. 01-02-01057, 2004 Tex.App.Lexis 3988 (Tex.App. – Houston [1<sup>st</sup> Dist.] 2004, pet. filed); *Goerlitz v. City of Midland*, 101 S.W.3d 573, 577 (Tex.App.–El Paso 2003, pet. filed), *Knowles v. City of Granbury*, 953 S.W.2d 19, 23 (Tex.App.–Fort Worth 1997, pet. denied); ***regarding other governmental entities and ‘sue and be sued,’ compare,*** *Townsend v. Mem’l Med. Ctr.*, 529 S.W.2d 264, 267 (Tex. Civ. App. - Corpus Christi 1975, writ ref’d n.r.e.); *Childs v. Greenville Hosp. Auth.*, 479 S.W.2d 399, 401 (Tex. Civ. App. - Texarkana 1972, writ ref’d n.r.e.); *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 448-49 (Tex. App. - Fort Worth 2001, no pet.), *Bates v. Tex. State Tech. Coll.*, 983 S.W.2d 821, 827 (Tex.App–Waco 1998, pet. denied), *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343, 348 (Tex.App. – Corpus Christi 1977) *pet. denied per curiam*, 989 S.W.2d 360 (Tex. 1998); *Loyd v. ECO Res., Inc.*, 956 S.W.2d 110, 122-123 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1997, no pet.). ***For ‘plea and be impleaded,’*** see *City of Mexia v. Tooke*, 115 S.W.2d 618 (Tex.App. – Waco 2003, pet. granted), and cases cited therein.

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*See*, Miles T. Bradshaw, *Sovereign Immunity in a Breach of Contract Case: "The King Can Do No Wrong" and School and Community College Districts May Be Crowned "King for a Day,"* 6 -1 Texas State Bar School Law Section Report 3 (Winter 2004); A. Craig Carter, *Is Sue and Be Sued Language a Clear and Unambiguous Waiver of Immunity?* 35 St. Mary's L. J. 275 (2004); Michael Shaunessy, *Sovereign Immunity and the Extent of the Waiver of Immunity Created by the Texas Tort Claims Act*, 53 Baylor L.Rev. 87 (Winter 2001).

silence in its expressly overruling *MoPac* cannot be found as tacit approval of *MoPac*'s impact, given the scant returns this Court has made to that case.<sup>9</sup> *See, City of Dallas v. Reata Const. Corp.*, 83 S.W.3d 392, 398 (Tex. App. - Dallas 2002), *reversed on other grounds*, No. 02-1031, 47 Tex. Sup. C. J. 408 (Tex. April 2, 2004).

Furthermore, distinction has not been made regarding the traditional use of the phrase “sue and be sued,” which involves describing how a corporation or an estate – as legal entities and legal fictions -- have the power to bring suit and to be sued in their own name, rather than having their underlying individual owners (*e.g.*, shareholders, heirs, or beneficiaries) as named parties. *See, Tex.Bus.Corp.Act* art. 2.02§A(2)(Vernon 2003)(corporations); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 549-550 (Tex.1981)(corporations); *Price v. Anderson's Estate*, 522 S.W.2d 690, 691 (Tex. 1975)(estates).

Additionally, this Court has not articulated how the “sue and be sued” clause impacts legislative immunity as it applies to distinctly different entities, be they cities or a coalition of colleges or a local school district, in view of the “reliable guidepost” of financial concern voiced by both this Court and the Legislature in 2003. *Taylor; TGC§311.034. MoPac* is too succinct and too void of rationale for its compendary holding to be given the weight and power that the San Antonio court contends it wields.

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<sup>9</sup>This Court has referenced *MoPac* less than ten times in thirty-four years: three being irrelevant, and the remaining being undeterminative. *See, e.g., Satterfield (dissent, J.Lang)*, 123 S.W.3d at 71., n.2.

ACCD has immunity from suit because the Texas Legislature has not clearly and unequivocally waived that immunity, including providing legislation on how any judgment resulting from waiver will be paid from the public coffers. ACCD is a district encompassing several colleges, and the Legislature should be allowed to state clearly whether the immunity from suit is waived for this type of entity. Policy decisions, such as consideration and budgeting of the specific fiscal impact of any judgments brought against the district, with consequences that are distinguishable for ACCD from other types of entities, *e.g.*, navigation districts or municipalities, are best left to the Legislature. *See, Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 413 (Tex. 1997)(Hecht, J., concurring).

Indeed, the Legislature has already done some clear and unambiguous immunity budgeting for college districts: *e.g.*, it specifically considered the fiscal impact of the Texas Tort Claims Act, providing statutorily that junior college districts are totally immune from the impact of the Act, except as it applies to motor vehicle claims. TTCA §101.025; see *Issue 2, supra*.<sup>10</sup>

The ACCD legislation simply fails the *Taylor* test for waiver of immunity; the legislation is insufficient to warrant the waiver; and an error has occurred which confirms this Court's concern and the need for this Court's correction. ACCD is immune from suit.

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<sup>10</sup>Any argument that the Texas Prompt Pay Act waives immunity from suit for all entities to which it applies fails: this Act applies to such governmental entities as the Supreme Court of Texas, the Court of Criminal Appeals of Texas, as well as the Texas Legislature, for which immunity from suit obviously has not been waived. *See*, Tex.Gov't Code Ann §§2251.001, 2251.043 (Vernon 2000).

## 2. *ACCD is immune from liability*

In the Texas Tort Claims Act, the Legislature waived the immunity for unintentional tort liability of governmental entities when the judgment against them involves claims based upon property damage, personal injury, or death. Tex.Civ.Prac.Rem.Code §§101.021<sup>11</sup>; *Dallas Cty. MHMR v. Bossley*, 968 S.W.2d 339, 341 (Tex.) *cert. denied*, 525 U.S. 1017 (1998). Immunity from liability protects an entity from the impact of a judgment even if the Legislature has consented to the lawsuit. *Texas Dep't of Transportation v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

However, the Legislature excluded both junior college districts and school districts from the application of this Act *en toto*, except when the tort involves motor vehicles. TTCA §101.025. Moreover, the Legislature has categorically stated that intentional torts are not covered by the Act: all governmental entities remain immune from liability for these claims. TTCA §101.057(2). Therefore, junior college districts such as ACCD are held responsible only for unintentional tort claims involving motor vehicle claims. *Id.*

This obviously includes immunity to any fraud claims. *TRST Corpus, Inc. v. Financial Center, Inc.*, 9 S.W.3d 316, 322 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1999, *pet. denied*)(*fraudulent transfer*); *Ho v. Univ. of Texas at Arlington*, 984 S.W.2d 672, 683 (Tex.App.–Amarillo 1998, *pet. denied*)(*fraud*). To constitute a claim, there is the seeking of affirmative relief: if relief is sought, a claim is being made. *See, Kuehnoefer v. Welch*,

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<sup>11</sup>THE TEXAS TORT CLAIMS ACT, Tex.Civ.Prac.Rem.Code §§101.001, *et seq.* (“TTCA”)

893 S.W.2d 689, 692 (Tex.App.–Texarkana 1995, writ denied).

In contract law, a provision for “no damages for delay” can be disregarded when certain judicial exceptions apply; these include when the delay: (1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation or other bad faith on the part of one seeking the benefit of the provision; (3) has extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; or (4) is not within the specifically enumerated delays to which the clause applies. *Green Int’l v. Solis*, 951 S.W.2d 394, 391 (Tex. 1997), *citing City of Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 & n.1 (Tex. Civ. App. -- Houston [14th Dist.] 1978, writ ref’d n.r.e.).

Here, Browning asserted a fraud claim, urging it as an exception to the application of the no damages for delay clause with its contract with ACCD; the jury agreed, and found ACCD had committed fraud in this case in its answer to Jury Question 11. However, in its *Opinion*, the appellate court mistakenly finds that the jury is not asked a “fraud question,” but instead is asked whether or not the “fraud caused the delays.” *Opinion*, p. 9.

In order to meet the *Green* exception to the no damages for delay clause, Browning had to prove fraud. While it is true that a claim includes relief sought, Browning *was* seeking relief: after proving damages as an necessary element of fraud, Browning was seeking relief from its contractual agreement that it would bear the risk of any delay damage. Asking that there be a judicial redistribution of economic risk after the parties had already agreed to

Browning bearing that economic risk *is* affirmative relief.

Similarly, ACCD was found to be estopped from relying upon the no damages for delay clause because of actions “by words or conduct made a false representation or concealed material facts with the knowledge of the real facts or with the knowledge or information that would lead a reasonable person to discover the facts,” with the intent that Browning rely upon its deception, to its detriment in Jury Question 5. This is merely another attempt at imposing liability upon the governmental entity based upon allegations of intentional bad conduct to collect contract damages.

Browning is using allegations of intentional tortious conduct to hold ACCD responsible for contract damages it incurred, together with three of its subcontractors. The Legislature has not allowed this waiver of immunity, and in holding otherwise, the San Antonio court erred.

ACCD is immune from liability from intentionally fraudulent conduct, regardless of whether or not it was asserted directly as a claim, or as a vehicle to overcome a no damages for delay clause. TEX.CIV.PRAC.REM.CODE §§ 101.021, 101.025, 101.057(2). To allow otherwise is to allow a contract case, with intentional tort findings as a subset to its damage award, to circumvent immunity – which creates vulnerability state-wide as entities balance the risk of construction.

Insofar as the remaining judicial exceptions under contract law to the application of a no damages for delay clause, ACCD has been held indirectly responsible for activities

undertaken by the architects in this matter. This has been done by the trial court's *sua sponte* decision that the jury should perceive the Owner and the Architect as one.

Liability in this case is based upon two core factual bases. First, liability is based upon the actions of ACCD in refusing to ignore the no damages for delay clause and thereafter take fiscal responsibility for the construction delays in various settlement negotiations. Second, ACCD has been found liable based upon the actions of the architects in purported errors in design and activities surrounding them, such as professional disagreements within requests for information, etc.

Insofar as its own actions, ACCD is immune from liability for any purported tortious conduct on its part, and ACCD continues to assert that there has been no waiver or modification of the underlying no damages for delay clause.

Insofar as the architects, ACCD has been held responsible in a breach of contract case for delay damages via judicial exceptions to its contractual "no damages for delay clause" for the unsubstantiated malpractice activity of the architectural joint venture. ACCD's immunity from liability cannot be circumvented in this manner.

ACCD argues elsewhere in its briefing against this error as being valid: there is no evidence of malpractice, there is no evidence of agency, etc. Here, ACCD urges that its immunity from liability cannot be disregarded insofar as ACCD being held responsible through the contract clause exceptions for the torts of a third party, or for its own purportedly false representations.

This Court's holding in *Green* cannot be read to allow this circumvention of the immunity for liability of governmental entities. It is an important issue which must be clarified by this Court.

**3. ACCD had no legal duty for design error without an express warranty**

Since 1907, Texas law has provided that an owner has no duty to the contractor for adequacy of design unless the owner expressly warrants the design. *City of San Antonio v. Forgy*, 769 S.W.2d 293, 297 n. 1 (Tex.App. – San Antonio 1989, writ denied); *Emerald Forest Utility Dist. v. Simonsen Const. Co.*, 679 S.W.2d 51, 52-53 (Tex.Civ.App.– Houston [14<sup>th</sup> Dist.] 1984, writ ref'd n.r.e.); *Turner, Collie & Braden v. Brookhollow, Inc.*, 624 S.W.2d 203 (Tex.Civ.App. – Houston [1<sup>st</sup> Dist.] 1981), rev'd on other grounds, 642 S.W.2d 160 (Tex. 1982); *Lonergan v. San Antonio Loan & Trust*, 101 Tex. 63, 104 S.W. 1061 (1907). Inasmuch as the contractor's ability to know the quality of the plans and specifications is equal to that of the owner, if not superior, Texas does not impose a warranty upon the owner. *Emerald Forest*, 679 S.W.2d at 52-53; *Forgy*, 769 S.W.2d at 297, n.1.

In assessing where to place the risk of design error, an experienced contractor's ability to know the quality of the plans and specifications places the risk upon the contractor in lieu of the owner. *Forgy*, 769 S.W.2d at 297; see, *Emerald Forest*, 679 S.W.2d at 52-53; *Turner*, 624 S.W.2d at 164-165.

Fairness is a factor in interpretation of the contract. For example, *Fleetwood* found the architects unfairly hid information from the bidders to the project. *North Harris County*

*Junior College District v. Fleetwood Const. Co.*, 604 S.W.2d 255 (Tex.Civ.App. – Houston [14<sup>th</sup> Dist.] 1980, writ ref'd n.r.e.). In *Emerald Forest*, fairness found that the general contractor had enjoyed an adequate opportunity during the bidding process to question the integrity of the design documents. Having bid and been awarded the contract, *Emerald Forest* held there would be no warranty for the design thereafter placed upon the owner. *Emerald Forest*, 679 S.W.2d at 52-53.

*Emerald Forest* dealt with a provision similar to that used by the San Antonio court to find an implied warranty, and held that the provision was a notice provision which, if acted upon by the contractor, would limit any later liability he would have to the owner – it did not act to create a duty for the owner that the owner had not agreed upon. *Emerald Forest*, 679 SW.2d at 54. Similarly, in *Forgy*, the contractor found errors during the course of construction, just as Browning did, and attempted to shift responsibility to the owner, unsuccessfully. *Forgy*, 769 S.W.2d at 297

ACCD did not expressly warrant the adequacy of the architects' design in the Browning contract. Browning has contended that faulty plans and specifications were the cause of its delay damages. Therefore, it is only by implying a warranty upon the owner that the purported damage due to architectural design error can be assessed against ACCD.

The San Antonio Court has done just that, as it finds the contract ambiguous and interprets the contract's notice provisions regarding the contractor's duty to report its perceived issues with construction details equal to that of the Owner undertaking

responsibility for the Architect's error. *Opinion*, p. 10-11. The sophistication of the parties, the status of the owner as a college district, as well as the repeated provisions that ACCD attempted to place within the document to protect itself from responsibility for either the contractor or the architect, are considerations not discussed by the court. *Id.*

Importantly, there was no complaint regarding the bidding phase in the present case, nor with the amount of time that Browning had to review the plans and specifications prior to entering its award-winning bid. Indeed, when Browning was invited to bid on the project, it received specific instructions (*see*, Instructions to Bidders, Contract ¶6, emphasis added)(P.Ex.49):

Bidders are required to ***thoroughly familiarize themselves*** with all of the provisions of the Instructions, Conditions, Requirements of the Contract, the Bond, ***the Drawings, and Specifications***. They are further ***required to inspect the site*** of the Work and ***inform themselves of all conditions affecting the execution of the work to be performed*** under this contract. If any person contemplating submitting a bid for this contract is in doubt as to the true meaning of the Specifications, or other Bid Documents, or any party thereof, he may submit to the Director of Procurement and Material Management . . . on or before seven (7) work days prior to the scheduled bid opening, ***a request for clarification***.

Thus, Browning agreed to investigate and to exercise independent judgment concerning the design documents, the conditions of the work site, and to ask for clarification if need be. In sum, Browning expressly assumed responsibility for the sufficiency of the plans and specifications. *Great American Ins. Co. v. North Austin Mun. Utility Dist. No. 1*, 902 S.W.2d 488, 500 (Tex.App. — Austin 1993), *aff'd in part, rev'd in part on other*

*grounds*, 908 S.W.2d 415 (1995); *Emerald Forest*, 679 S.W.2d at 53. Also, the experienced contractor was in as good a position as the college district (if not better) to know whether the plans and specifications were sufficient for the intended purpose. *Emerald Forrest*, 679 S.W.2d at 52-53.

Moreover, Browning agreed to the substitution of the no damages for delay clause for the standard form's clause, which had initially placed that risk upon the Owner: an owner expressing its unwillingness to risk delay damages is arguably one who has also intentionally not guaranteed the design expert's work. Therefore, there is no justification for imposing a legal duty on a college district to insure the sufficiency of the plans and specifications. ACCD did not expressly warrant these plans in the contract – the contract as a whole reveals ACCD repeatedly attempting to limit its responsibility insofar as the work of both the architect and the contractor.

The San Antonio therefore errs when it interprets the contract to find ACCD warranted the architect's designs in the same contract where ACCD expressly did not take responsibility for any construction delays on the part of the contractor. To do so creates the impression that future owners will be forced to expressly disclaim any responsibility for the design documents, despite the owner's sophistication, or status as a governmental entity.

This Court's ruling that the San Antonio court is wrong is necessary to insure that owners are protected from implied warranties after the fact, especially when those warranties involve sophisticated issues such as architectural design. This Court's 1907 precedent in

*Loneragan* must be confirmed as still being good law in this state, with *Loneragan's* focus upon *specific* contractual language demonstrating adoption of the risk being validated. ACCD did not warrant against design error.

#### **4. Architectural design error must be proven by an architect**

In order to establish a design defect in plans and specifications, expert testimony must be provided by someone qualified to discuss the defects in this type of work. An architect must establish this error as a fact. It has been held that a licensed architect must testify regarding the work of another licensed architect, and a directed verdict is proper absent this type of expertise being provided. *Prellwitz v. Cromwell, Truemper, Levy, Parker and Woodsmale, Inc.*, 802 S.W.2d 316, 318 (Tex.App. – Dallas 1990, no writ); *see, Southland Lloyd's Ins. Co. v. Tomberlain*, 919 S.W.2d 822, 827 (Tex.App. – Texarkana 1996, writ denied).

However, even if the argument is made that someone may not need an architectural license in order to testify to design defects in plans and specifications, *e.g., Southland Lloyd's*, 919 S.W.2d at 827, there has been an admission by the Plaintiff's witnesses that they were giving no testimony regarding architectural standard of care.<sup>12</sup> Browning had no

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The maximum that Browning admits to discussing under oath is the issue of “constructibility,” while continuing to allege error by the architects. Constructibility, by their own testimony, cannot equal architectural standard of care. James Browning, for example, testified he was not speaking as an expert in architecture since he was not an architect; his testimony was limited to “constructibility”. (4 RR 112:3 - 113:11). Defective work by an architect simply has not been explained in the evidence. Nor has “constructibility” been defined or explained by the Plaintiffs as any type of legal standard or industry concept.

architect as a designated or testifying expert. It provided no architectural testimony to prove architectural design error as a critical fact in this case.

There was plain error in holding ACCD liable to Browning for any damages allegedly based upon defective plans and specifications. No expert testimony by an architect was given, and the plaintiff's burden of proof regarding this basic fact was not met.

The San Antonio court suggests that there is a distinction to be made because this case involved a contract claim for breach of contract, instead a tort claim for malpractice. However, whether or not there has been an error in architectural design is a basic fact, which cannot be dependent upon whether or not the claim is based upon contract or tort law.

There was a need to bring more to the San Antonio court, and it erred in not recognizing that there was no evidence of architectural design error in this case. As it stands, should the owner takes its claim based upon the exposure of this judgment to the architect, architectural expertise may well find no error, and the owner is left in a ludicrous position: liable to the contractor for design error that the malpractice case finds not to exist.

Design error is a fact that does not change from case to case. This Court's efforts are needed to clarify that proof of professional design error by an architect cannot be had absent an architect, period.

5. ***No guidance on contract specifics violates Casteel in Jury Question 1.***

Harmful charge error occurred, over objection<sup>13</sup>, and without relief from the San Antonio court in the broad-form submission of the breach of contract issue in Jury Question 1, both in: (a) the absence of any instruction on the specific contractual provisions at issue in this sophisticated, voluminous document; and (b) with an insupportable litany in its subsection (b).

(a) *No guidance is provided in Jury Question 1 on contract specifics.*

The trial court has broad discretion in the submission of broad-form jury questions. *Interstate Northborough Partnership v. State*, 66 S.W.2d 213, 224-5 (Tex. 2001). However, the submission must allow for a jury to be properly instructed in the law. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000). Explanatory law instructions and controlling fact issues must be provided to the jury or reversible error occurs. *Id.*

For breach of contract, there must be shown: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the breach. *Palmer v. Espey Huston & Assocs., Inc.*, 84 S.W.3d 345, 353 (Tex.App.–Corpus Christi 2002, pet. denied). However, when the jury does not receive details regarding how the contract may be breached, it is reversible error. *Comm. Bank of Texas, N.A. v. Luce*, 92 S.W.3d 636, 640

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<sup>13</sup>Jury Question 1 was submitted over proper objection: ACCD objected to the convoluted form of the question itself. Not to any need for a separate instruction. As in *Luce*, harmful error occurred.

(Tex.App. -- Beaumont 2002, no writ).<sup>14</sup> For example, in *Luce*, the jury was not provided details regarding the contract factually, in order to base a legal determination of breach, and the error resulted in a remand of the matter. *Id.* The jury must be given the power to define the specific breach of duty involved.

A breach of contract action depends upon the exact language of the contract, not a general feeling the jury has regarding the circumstances involved. ACCD objected to Jury Question 1 because it failed to reference the jury to the contract provisions purportedly breached, which involved such sophisticated issues as what "reasonable time extensions" might be. (20 RR 141:21-149:23; CR 86.)

The jury was left to speculate regarding the contract contents, and left to its own devices in plowing through the voluminous document in search of factual support for the claims asserted. (CR86). This, despite the Plaintiff's burden to show the specific provision being breached.

Specifically, contract references were not provided for such breaches as: (1) refusing to grant reasonable time extensions; (2) failing to secure timely issuance of building permits; (3) providing inaccurate or incomplete information in response to Browning's requests for information; (4) refusing to make reasonable adjustments of the Contract for time impact and associated General Condition cost related to Change Order 19; and (5) assessing liquidated

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<sup>14</sup>In *Luce*, the jury question was: "On Walter Luce, Jr.'s claim against Commercial Bank of Texas for breach of contract do you find in favor of Walter Luce, Jr., or Commercial Bank of Texas." *Luce*, 92 S.W.3d at 639.

damages against Browning without justification or cause. (20 RR 141:21-149:23; CR 86.)

The failure to assist the jury in referencing the contract for which this breach of contract case is based was an abuse of the court's discretion. Reversible error occurred, which was left uncorrected by the lower appellate court.

(b) *Jury Question 1(b) violates Casteel in its litany without clarification, creating error and prohibiting meaningful appellate review.*

Furthermore, over objection, subsection (b) of Jury Question 1 provided a litany of four possible contract breaches, with the jury's single "yes" answer giving no clarification as to which of the four, or all of the four, was factually found to be a breach of the agreement. (20 RR 141:21-149:23; CR 86.) For example, two portions of the litany are legally in question: the owner's duty to provide "complete and accurate drawings," and the owner's duty to correct design errors. Meaningful appellate review is impossible in this situation: no one can discern to what contract provisions the "yes" applies. *See, Casteel, supra*. Ascertaining jury meaning here is like "loading mercury with a pitchfork."<sup>15</sup> Error has occurred in this portion of the charge as well, for which ACCD seeks relief.

6. ***There was reversible error in submitting damages on bases unrecognized in Texas law, specifically: (1) instructing for a calculation of damages under the Eichleay method; (2) providing for recovery under a "total cost" theory of damages; and (3) providing for the litigation costs incurred by Browning in contracting with the non-suited subcontractors and settling their disputes between them.***

Delay damages in construction situations have been calculated in several ways,

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<sup>15</sup>Richard Brautigan, *Loading Mercury With a Pitchfork: [Poems]* (1976).

depending upon the situation. However, not all calculation methods are recognized in Texas law as being legally valid.

For instance, contractors may calculate their delay costs by using a set formula: they calculate their overhead rate per day, then multiply it by the number of days construction has gone past the deadline. This has been labeled the “*Eichleay*” calculation method: it has never been recognized under Texas law as a proper measure of damage. In *Chilton Ins. Co. v. Pate & Pate Enterprises, Inc.*, 930 S.W.2d 877, 892 (Tex.App.– San Antonio 1996, writ denied), the San Antonio court defined the measure after clearly stating, “We have found no Texas cases authorizing the use of *Eichleay* to calculate damages,” and thereafter declining to approve it.

Afterwards, while no published opinions have approved of the measure, the Houston courts (both the First District and the Fourteenth) have relied upon the *Chilton* description as an **approval** of the measurement, albeit in nonpublished opinions.<sup>16</sup> This is an erroneous reading of the *Chilton* discussion.<sup>17</sup>

Nevertheless, this calculation method was included in the court’s charge under Question 3 regarding “(2) additional home office overhead costs,” with the jury being

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<sup>16</sup>*VIV Electric Co. v. STR Constructors*, No. 14-9800551-CV, 2000 Tex.App. LEXIS 4327, June 29, 2000 (Houston, 14<sup>th</sup> District); *Rowan Cos. v. Southwest Tenant Const., Inc.*, No. 01-95-1514-CV, 1999 Tex.App. LEXIS 1067, February 18, 1999 (Houston, 1<sup>st</sup> District).

<sup>17</sup>And, without any waiver of the issue, despite the San Antonio Court’s statement. *Opinion*, p.161. *Chilton* was cited as the court’s own authority – and the only published opinion in the state – regarding this method of calculating damages, with its recognition that no court had seen fit to recognize the method as proper for a jury. *See*, Tex.R.App.P.38.1(h).

instructed to calculate by multiplying the daily rate of overhead by the number of days the job was extended. As such, there was error in the charge as a matter of law. (20 RR 151:4-8.)

The San Antonio court erred either by not correcting this mistake, or by approving *Eichleay* as a valid measure for damages to be used by a jury. This Court's clarification is therefore needed on this issue, as well as the remaining damage bases, upon which the San Antonio court erroneously failed to render any opinion. *Opinion*, p. 21.

Another method used in the industry for calculating delay costs is the "total cost method," which totals the actual costs incurred by the contractor plus his overhead and profit, and then compares that total sum to his pre-construction estimate. *See, Wunderlich Contracting Co. v. U.S.*, 351 F.2d 956, 968 (Ct.Cl.1965). Texas does not recognize the "total cost" method, however.<sup>18</sup> *City of Beaumont v. Excavators & Contractors*, 870 S.W.2d 123, 140-141 (Tex.App.--Beaumont 1993, writ denied); *City of Houston v. R.F. Ball Const. Co., Inc.*, 570 S.W.2d 75, 78 (Tex.Civ.App.--Houston [14th Dist.] 1978, writ ref'd n.r.e.). The Texas stance against the "total cost" calculation method is based upon the rationale that a contractor needs to provide a factual basis of specific damage: the delay amounts need to be factually connected to the purported breaches, and the total cost method avoids that evidentiary burden. *Id.*

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<sup>18</sup>In doing so, Texas joins several jurisdictions which do not approve of the method. *See, e.g., John F. Harkins Co. v. Schl. Dist. of Philadelphia*, 313 Pa.Super. 425, 460 A.2d 260 (1983).

Jury Question 3 fails to address the issue of causal connection and provides for a total cost method of damage calculation and recovery. It was error as a matter of law to allow a total cost method calculation of damages in this case. (20 RR 152:9 - 157:7).

Finally, while Texas law does allow a contractor to seek litigation costs pursuant to his contract under Section §38.001 *et seq.* of the Texas Civil Practice and Remedies Code, this cannot be extended to include attorneys' fees involved in negotiating a settlement with its subcontractors and the creation of "pass-through" agreements. As a matter of law, these litigation costs should not have been included in the damage portion of the charge. Error therefore exists in the submission of Jury Question 3 which was not corrected by the San Antonio court, and requires redress.

**7. Unrequested and Unpled Charge Assumption Was Without Basis and Clear Error**

Agency must be alleged if a party seeks to hold a principal liable for the acts of its agent. *See, Southern Cty. Mutual Ins. Co. v. First Bank & Trust*, 750 S.W.2d 170, 172 (Tex. 1988). Then, facts must be shown so the fact-finder can determine if the party acted as an agent or as an independent contractor: (1) did a written contract govern the relationship between the two that either gave one the right to control the work or did it create an independent contractor relationship; (2) did one have the right to control the means and details of the other's work, and (3) if the one had the right to control the specific activity of the other that caused the plaintiff's injury. *Thompson v. Traveler Indem. Co.*, 789 S.W.2d 277, 278 (Tex. 1990); *Elliott-Williams Co. V. Diaz*, 9 S.W.3d 801, 804 (Tex. 1999).

If actions were undertaken outside the defined agency relationship, apparent authority must be pled and proven, by showing: (1) a reasonable belief in the agent's authority; (2) the belief was generated by some holding out or neglect of the principal; and (3) the party must justifiably rely on the authority. *Baptist Mem. Hosp. System v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1999); *Moody v. EMC Services, Inc.*, 828 S.W.2d 237, 241-242 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1992, writ denied).

Whether or not an architect is an agent of the owner is dependent upon the specific contractual circumstances of the case at bar. *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, 630 S.W.2d 365, 371-372 (Tex. 1982); *see, Midland v. Waller*, 430 S.W.2d 473, 477 (Tex. 1968)(contract language specifies agency). It is not assumed. *Johnson*, 630 S.W.2d at 371-372.

Finally, regarding the application of any judicial exception to a “no damages for delay” clause, agency is critical. The acts which set up such an exception must be proven to be that of the contracting party itself, not the act of a third party. *Green Int’l v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997). Otherwise, it would be an indemnity agreement. *Id.*

Here, the general instructions preceding the jury questions improperly instructed the jury that in answering *any* question contained in the charge, they were to automatically consider the architects as agents of ACCD. (CR 86). *Every* reference to “ACCD” within the charge therefore encompasses the architects as well.

There is no pleading that the plaintiffs sought to find the architects to be agents of the

owner, either under a contract provision or under the principles of apparent authority. (CR 73) Browning did not plead agency or apparent authority, and – tellingly – it did not attempt to include agency in the charge: this was the trial court’s unilateral inclusion.

Browning succinctly alleged “ACCD and its Architect” in its petition, describing the independent contractor relationship that existed between them. The appellate court erred that this put ACCD on fair notice absent special exception that it would be held vicariously liable for the acts of its architects, and the issue was not tried by consent.

Looking to the contract, ACCD had limited the architect’s role in its contract with Browning. Indeed, the Contract specifically stated (P.Ex 49, Supplemental Conditions ¶ 4.2.1):

The Architect will have authority to act on behalf of Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with the other provisions of the Contract.

Supplemental condition 4.2.1 was revised to exclude language found in the contract’s general conditions, **removing** language stating that the architect would be the Owner’s overall representative. The language relied upon in *Midland* to show an agency relationship between the owner and the architect was **expressly eliminated** from the Browning contract. This contract language, together with the independence of the architects - acting in their professional, licensed capacities as independent contractors - does not lend itself to any need for a special exception to clarify what was understood under the contract already.

Second, the contract between ACCD and Browning is silent on the Architect acting

as ACCD's agent with regard to the issues inquired about in the Charge. The Charge argues for payment – and seeks to avoid the “no damages for delay” clause in order to do so. The governmental entity could not delegate payment decisions.

Third, the actions referenced by the appellate court to support its position that the contract created an agency relationship between ACCD and the architectural joint venture is misplaced: the referenced duties are either specific to the expertise of the independent contractor, such as issuing a certificate of substantial completion (9.8.1) – an act legally required to be done by an architect, or they are subject to the owner's *separate* approval, such as issuing construction change directives (*e.g.*, 7.3.1, 7.3.10). None of these section 4 duties turn the architect from contractor to agent. The Owner never abandoned its control to the architect; the architect and the contractor clearly were both independent contractors within their areas of expertise, when the contract is read as a whole. The contract demonstrates that the junior college district was not willing to be responsible for the work of either the architect OR the contractor. *P.Ex.49*.

Fourth, ACCD refused to pay delay damages, ACCD negotiated the language in the change orders, and ACCD had to approve separately all issues regarding monetary compensation for which Browning complains. In the major decisions, its Board of Trustees had to formally act on behalf of the entity. The contract provisions referenced by the San Antonio court simply do not allow for the architects having the right to control the specific activity of ACCD that purportedly caused Browning's injury. There is no evidence that the

architects acted as agents of ACCD regarding the causes of action pled by the plaintiffs, *i.e.*, breach of contract, quantum meruit, fraud, or violation of the Prompt Pay Act.

Further, the law is clear that the acts which set up such an exception to the “no damages for delay clause” must be proven to be that of the contracting party, not the act of a third party. *Green Int’l*, 951 S.W.2d at 399. For example, Browning sought to hold ACCD liable under the exception of “active interference,” as it was given to the jury for consideration in Question 7. (CR86). However, not only does the jury question incorrectly omit the phrase “with Browning’s performance”<sup>19</sup> but there is a failure to recognize first, that under the law which recognizes this exception, there is no extension of the exception to the acts of an agent, or an agent’s agent, if proven; and secondly, it does not recognize that the architects are not authorized under the contract to act as ACCD’s agent regarding ¶ 8.3.3 (the no damages for delay provision). *Id.* Harmful error has occurred which has resulted in an improper judgment due to this failure to delineate the architect’s involvement, alone.

The entirety of the Charge contains error because of the improper symbiosis of ACCD with the architectural joint venture into one entity. The impact upon this matter, as well as upon the jurisprudence of the state if left uncorrected, is so conclusive that it deserves this Court’s consideration and correction.

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<sup>19</sup>Which was done despite objection at the charge conference. (20 RR 160:23 - 162:10)

**9. The Contract Was Not Modified**

Modification of an agreement under Texas law must stand on its own as a contract: it must have an offer, an acceptance, as well as a meeting of the minds and separate consideration to support the modification. *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). Whether or not there has been a question of modification is dependent upon evidence showing the parties' intention: it is a question of fact within the burden of proof of the party arguing that a modification has occurred. *Id.*

A change order by definition constitutes a modification of the contract, and thereby must stand on its own as a contractual agreement. *See, Jensen Const. Co. v. Dallas Cty.*, 920 S.W.2d 761, 770 n.3 (Tex.App-Dallas 1996, writ denied). To bind the parties as a contractual agreement, there must be within the change order (1) an offer; (2) an acceptance of the terms of that offer without change; (3) a meeting of the minds; (4) each party's consent to the terms; (5) execution and delivery with intent to be mutual and binding; and (6) consideration. *Copeland v. Alsobrook*, 3 S.W.3d 598, 604 (Tex.App.– San Antonio 1999, pet'n denied).

In this case, there was not sufficient evidence of any consideration being given to ACCD by Browning for alteration of the original contract – eliminating the no damages for delay clause – regarding extended general conditions or time extensions. No evidence exists regarding separate consideration being given by Browning to support any modification of the original contract regarding these change orders' "adjustment to the contract."

The promise to continue performing, as already required by Browning under the original contract, is the only evidence of anything being offered by Browning to support the language contained in these change orders. This is not separate consideration to support the modification. This is the performance that serves as consideration for the original contract.

Browning has argued that it was justified in abandoning the contract, and its continued performance in the face of this opportunity to quit the project is consideration for the change order modifications. However, there is no evidence of justifiable abandonment, as that term was contractually agreed upon by Browning in the Contract.

The following contract provisions explain how delays were to be addressed, how they were to be compensated, and how any time extensions were to be provided. They are:

- A. Paragraph 1.1.2 of the Supplementary Conditions of the contract, which provides that the Contract Documents form the Contract for Construction and that **"[t]he Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral."**
- B. Paragraph 1.1.1 of the General Conditions originally included a change order with its definition of the term **"modification,"** making change orders automatically an alteration to the contract; however, **the parties removed change orders from this automatic characterization by exclusion of the paragraph's definition: change orders were not modifications by definition.**
- C. Paragraph 8.3.3 of the Supplementary Conditions provides: **"[t]he Contractor shall receive no claim for compensation or damages for delays or hindrances to the Work occasioned by any act or neglect of the Owner, other provisions of the Contract notwithstanding, and further agrees that he shall be fully compensated for all delays solely by an extension of time."**
- D. Paragraph 8.3.1 of the Supplementary Conditions, which provides: **"[i]f the**

**Contractor is delayed at any time in the progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or by unavoidable causes beyond the Contractor's control which the Architect and Owner determine may justify delay, then the Contract Time may be extended by Change Order for such reasonable time as the Architect and Owner may determine.”**

Modification was clearly contemplated as the contract was negotiated: ¶1.1.1 of the contract dealing with defining the term was expressly deleted as “not applicable” by Browning and ACCD, and no new language was substituted for this provision. (P.Ex.49)

Negotiated language also appears on orders for changes to the work, numbers 18-82, as admitted into evidence by the Plaintiff (P.Ex.6):

**“[a]ll items contained in this Change Order have been agreed to by the parties concerned except that future consideration will be given to the adjustment of the contract for time impact and associated general conditions cost relating to this Change Order [emphasis added].”**

Jack Pellek, who served as Director of Facilities for ACCD throughout the construction of the Project, testified that because the College District was bound by statute to act through its Board of Trustees, any alteration of the contract’s pricing would have to be made with Board approval. (5 RR 106:2 -107:1; 5 RR 114:3-24). Pellek explained that this language was understood at the time to merely agree to disagree, unless and until some agreement could be reached in the future, in order to keep construction moving. *Id.*. ACCD’s facilities director explained,

... [W]e being the District, to agree to those sorts of things, so we came up with a way to sign our names and proceed with those parts of the changes that had to be made and deferred talking about the other parts that we couldn’t agree on to some date in the future. (6 RR 171:1-6)

Browning's delay expert, Phil Apprill, corroborated this explanation by characterizing the language as "a bilateral reservation of rights." (17 RR 24:1 - 27:8.) Then, James Browning testified that as he negotiated with Pellek for this language to be inserted into the Change Orders, he understood that any "adjustment of the contract" by the Owner needed a resolution by the Board of Trustees. (6 RR 36:19 - 40:8). There is no evidence that any resolution was ever passed by the Board of Trustees for the Alamo Community College District to adjust the contract and include these two items -- extended general conditions and time extensions -- as any basis for compensation by the general contractor. The Board never passed such a resolution -- it never agreed to any contract modification for delay damages to be paid to Browning.

No meeting of the minds ever existed between ACCD and Browning that the language found on the change orders constituted a legal modification of the contract. Evidence exists from both ACCD and Browning that substantiates the absence of this legal element.

Browning sued ACCD for breach of the main contract between them, claiming damages for extended general conditions and for time extensions during the construction of the Northwest Vista College campus. (CR73) ACCD answered with the affirmative defense that Browning failed to meet a condition precedent to the collection of any additional funds from Defendant outside of the original Contract, because the ACCD Board of Trustees did not authorize any expenditure of funds outside the terms of the Contract; and because Browning failed to comply with a condition precedent by failing to submit specifics of time

or monetary amount on each change order as required by the Contract on either of these issues. (CR 44)

Browning rested its case without presenting any evidence regarding any legal modification of the original contract regarding extended general conditions or time extensions. There is not sufficient evidence to support a modification of the contract because there is not sufficient evidence of consideration, and the factual absence of any proof of approval by the Board of Trustees for ACCD. There is, moreover, clear evidence of no meeting of the minds here.

It was an abuse of discretion to have the jury consider the change orders as being contractually valid, including but not limited to submitted Question 6 in the charge. It was an omission for the appellate court to leave this uncorrected. Accordingly, this Court's consideration and correct of this mistake is requested, especially insofar as bears on any future review of this controversy.

### **Conclusion and Prayer**

Conflict exists here – not only between the circuits, but between a single, succinct opinion issued by this Court over thirty years ago in *MoPac* and a number of its more recent analyses – *Travis County*, *IT-Davy*, *Taylor* – as well as the unequivocal directive of the Legislature in 2003, with Texas Gov't Code §311.034. If immunity from suit exists for the Petitioner, then this controversy is immediately resolved due to an absence of subject matter jurisdiction.

It does exist. ACCD therefore requests the case be dismissed in its entirety after the reversal of the lower court judgments.

Absent that, a number of issues remain for this Court's review, with both the petitioning entity – as well as other, future entities dealing with construction delays -- needing the Court's examination and correction of several serious errors. Construction contracts regularly deal with the risk of delay in the completion of the project, and which party undertakes that economic risk, and there are issues within this case that impact these agreements in the future. This is especially true when the owner of the construction project is a governmental entity, such as ACCD.

For governmental entities, the *Opinion's* circumvention of immunity from liability by respecting a judicial exception based upon fraudulent conduct to the application of a particular contract clause is of extreme importance. In construction contracts where a “no damages for delay” provision exists, the governmental entity not only contracts that it will not be responsible for construction delays, it relies upon the longstanding protection afforded it under Texas law against tort liability. This case allows rulings based upon factual findings of fraudulent conduct against a governmental entity to stand, contending that the absence of tort damages being asserted directly distinguishes the situation from a tort encompassed by immunity. In doing so, the governmental entity becomes liable for delay damages. This is a dangerous, erroneous, and unnecessary ruling to place into precedent.

An entity's tortious conduct cannot render it liable, directly under tort law or

indirectly under contract law. It is immune. This holding must be changed.

Additionally, the role of the owner in a construction project in Texas is endangered here. This has been done in several ways. First, the San Antonio court placed a warranty upon the governmental entity to guarantee the adequacy of the architect's design. To do so, *Lonergan* was stretched to pull contract language involving the limiting of the general contractor's liability into a warranty by the owner. The warranty is implied from the notice provision alone. Left to stand, the *Opinion* forces direct warranties into contracts and the resulting arguments interpreting them: prudent entities are being forced to state the negative, in what has been assumed in the law for years: that they are not warranting the architect.

Second, the San Antonio court has allowed design error to be assumed, without an architect defining or explaining the error, if there was one. The *Opinion* apparently distinguishes a tort matter from a contract one: in doing so, it creates a lesser evidentiary burden for the contract plaintiff. This exposes future owners to the same situation that ACCD unfortunately finds itself: liable by a jury for purported design error to the contractor, but vulnerable to an architect denying any responsibility for reimbursement to the owner, because no architect error ultimately exists. This must be corrected by the Court.

Finally, albeit that the contract was negotiated to curtail the responsibility that the owner would have regarding either the architect or the contractor, the *Opinion's* result has been disregard the "no damages for delay" clause, making the owner fiscally responsible for the contractor's delay as well as the purported design mistakes of the architect. The party

with the least construction or architectural expertise has become responsible for the work of both, despite its attempt to contract around it. When the owner is a governmental entity, this is of special concern.

Other errors exist that, while impacting future construction contracts, are more particular to the case at bar. They involve egregious errors in the Charge.

First, aside from the immunity from liability issue dealing with fraudulent conduct, the judicial exceptions to the “no damages for delay” clause have been tainted, as well as the remainder of the Charge, because the *Opinion* improperly allows the trial court judge’s instruction that “ACCD” includes both the owner and the architects, *en toto*, to stand unchanged. No party requested the instruction, nor did the parties contract that these two entities would be considered as one. Agency was not pled nor proven nor shown as a matter of law, nor was any apparent authority; the lower court’s error corrupted the Charge as a whole by unilaterally inserting this definition. This is an error worthy of this Court’s consideration and correction, as not only charge error but an implicit expansion of *Green Int’l*.

Additionally, charge errors occurred of a magnitude worthy of review and repair: the Jury was given Jury Question 1, without any instructions on how to wade through the cumbersome documentation – no page numbers nor paragraph numbers were provided, despite *Casteel*; and the Jury faced Jury Question 3, which not only contained damage models never authorized by a Texas court, but some which had been straight-out disapproved

in Texas law. The *Opinion* does not correct these basic charge errors, for which the Petitioner seeks relief from this court.

Lastly, to the extent necessary, there is the issue of whether the contract was modified by the repetitive phrasing added to certain change orders in this case. It was not, and future resolution of this matter necessitates this Court's confirmation that the change orders do not deserve such characterization.

Factually, this case involves a governmental entity that contracted for the construction of a new college campus - and after paying over \$19,000,000.00 for the project, consistently refused to pay for damages resulting from construction delays, in accordance with an agreed-upon no damages for delay clause. Contractually, the entity attempted to expressly limit its responsibility for the actions of both the contractor and the architect. Nevertheless, it has been found liable for approximately \$1,000,000.00 of construction delay damages attributable to three of the subcontractors, and \$2,000,000.00, for the general contractor. It is not disputed that the contractor maintains that the delays were purportedly caused by errors in the architect's plans and specifications; nevertheless, these errors in design have never been explained or identified by an architect. The contractor admittedly provided no expert testimony from an architect.

The actions of the entity that purportedly brought liability upon itself involved alleged intentional misrepresentations regarding its intent to pay delay damages during negotiations with a contractor threatening to walk the project. This, despite tort immunity for such

entities, and despite evidence of an agreement merely to disagree, or a reservation of rights, until the campus was completed.

The impact of the lower court's opinion upon similarly situated entities cannot be underestimated. Construction contracts are commonplace for college districts, school districts, and other governmental entities. Aside from the obvious immunities, this case bears upon the drafting and negotiating – and litigating – of future governmental construction contracts, overall.

Therefore, the Petitioner respectfully requests that this Court grant the petition for review and reverse the judgment of the court of appeals and the trial court, dismissing this case for want of jurisdiction, or alternatively, (1) render judgment that the plaintiff take nothing on its claims or (2) remand this case for a new trial. Petitioner also requests such other and further relief to which it shall show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the original of this document with eleven (11) copies was timely filed with the Clerk of the Texas Supreme Court pursuant to Rules 4.1(a), 9, and 53 of the Texas Rules of Appellate Procedure. I also certify that a copy of this Brief on the Merits was served upon Browning Construction Company, Plaintiff/Appellee/Respondent/Cross-Petitioner, through its counsel of record as identified below, by United States Postal Service first class, certified mail, with a return receipt requested, both filing and service occurring on August \_\_\_\_\_, 2004:

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