

No. _____

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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
Fourth Court of Appeals at San Antonio, Texas

=====

PETITION FOR REVIEW

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8. 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 pleading or proof that the agency relationship existed? (*unbriefed issue*)

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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.
- Trial Court:* The Honorable Karen Pozza, 407th Judicial District Court, Bexar County.
- 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. *Alamo Community College District v. Browning Construction Company*, No. 04-02-00808-CV, ___ S.W.3d ___, 2004 Tex. App. Lexis 318, 2204 WL 60975 (Tex.App.–San Antonio January 14, 2004, pet. filed)(“Opinion”)(see, Appendix, Tab C).
- Court of Appeals' Disposition:* Affirmed the judgment of the trial court.

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, No. 04-02-00808-CV, ___ S.W.3d ___, 2004 Tex. App. Lexis 318, 2204 WL 60975 (Tex.App.–San Antonio January 14, 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, pet. filed), all finding that the clause does not waive immunity, with *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 448-49 (Tex. App. - Fort Worth 2001, no pet.), *Goerlitz v. City of Midland*, 101 S.W.3d 573 (Tex.App.–El Paso 2003, pet. filed), *Bates v. Tex. State Tech. Coll.*, 983 S.W.2d 821 (Tex.App–Waco 1998, pet. denied), finding immunity waived.

(2) it involves an unanswered question of law currently pending before the Supreme Court as a certified question from the United States Court of Appeals for the Fifth Circuit, regarding whether or not the State of Texas recognizes pass-through agreements between general contractors and their subcontractors.

See, City of Dallas v. Interstate Contracting Corporation, 320 F.3d 539, 543-544 (5th Cir. 2003), Case No. 03-0152 (Tex. 2003)(submitted, awaiting opinion April 23, 2003).

(3) 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) judicially waived sovereign immunity for intentional torts despite the immunity established in the Texas Tort Claims Act in breach of contract claims for delay damages when intentional tortious conduct, such as fraud, is alleged on the part of the sovereign;
- B) judicially imposing a legal duty upon an owner in Texas for the adequacy of design absent any express warranty to undertake design responsibility for delay;
- C) judicially allowing architectural design to be factually proven in Texas without testimony from a reasonable and prudent member of that profession;
- D) 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;
- E) 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 BCC in contracting with the non-suited subcontractors and settling their disputes between them;

- F) affirming the trial court’s *sua sponte* instruction to the jury that the architects were to be considered as agents of the owner, absent pleading or proof that the agency relationship existed;
- G) finding that there was a modification to the contract.

ISSUES PRESENTED

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” 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 individual 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. *Unanswered Certified Question From the U.S. Fifth Circuit to this Court.* When are pass-through agreements between a general contractor and subcontractors, such as those found in this matter, recognized under Texas law, in view of the pending certified question presented to this Court on this issue by the United States Court of Appeals for the Fifth Circuit? (*unbriefed issue*)
4. *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? (*unbriefed*)

issue)

5. 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? (*unbriefed issue*)
6. 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 an litany of choices in violation of *Casteel*? (*unbriefed issue*)
7. 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 BCC in contracting with the non-suited subcontractors and settling their disputes between them? (*unbriefed issue*)
8. 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 pleading or proof that the agency relationship existed? (*unbriefed issue*)
9. 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? (*unbriefed issue*)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Alamo Community College District (“ACCD”) submits this Petition for Review of the decision of the Fourth Court of Appeals at San Antonio upholding the trial court’s judgment in accordance with the jury’s verdict, which awarded the plaintiff over \$3,000,000 on its breach of contract claims against ACCD. The appellate court erroneously concluded that sovereign immunity did not bar this matter. First, the Texas Legislature has not waived a junior college district’s sovereign immunity from suit in a breach of contract claim with clear and unequivocal language, so sovereign immunity bars this suit. Additionally, the Texas Tort Claims Act does not provide for waiver of sovereign immunity from liability in this case, where an allegation of intentional acts by ACCD, including fraud, has provided an exception to the application of a contract clause, which states that “no damages for delay” are to be paid to the contractor-plaintiff.

STATEMENT OF FACTS

The appellate court’s opinion has minimal factual discussion. Additional pertinent information includes a legislative background: Alamo Community College District (“ACCD”) is a junior college community district organized pursuant to Chapter 130 of the Texas Education Code (“TEC”), its particular service area being defined in TEC Section 130.162. TEX. EDUC’N CODE §§130.001 *et seq.*, 130.162 (Vernon 1991 and Vernon Supp. 1998). Under TEC Section 130.084, its 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). There is no enabling statutory language contained within the TEC 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).

This controversy began when ACCD instituted a bidding process for the construction of a new college campus in northwest Bexar County; Browning Construction Company (“BCC”), 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 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. Included within it were two drop-dead construction dates – and a specification that “time is of the essence.” 10 RR 55: 5-18; 10 RR 56: 5-11. Neither deadline was met. 11 RR 11:17.

BCC complained that the design was at fault; the architects responded that BCC 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 BCC. 5 RR 134: 21-135:1.

The conflict escalated into a global monetary settlement, after BCC threatened to walk the project before either phase of the campus was finished. 5 RR 155:8 - 156:1; 6 RR 125:14 - 128:17. However, in the settlement, ACCD steadfastly refused to pay for delay

costs: these expenditures, which BCC claimed resulted from construction delay, ACCD maintained were covered by the agreed-upon “no damages for delay” provision in the contract. Rather than settle, 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. BCC’s own expert concurred that the language placed 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, ACCD hired an independent expert to review the delays and determine who was responsible for BCC’s claims – the expert concluded that BCC caused its own problems. 17 RR 108:4 - 109:25.

Meanwhile, BCC’s perception was that ACCD had obtained BCC’s agreement on the global settlement before ACCD rejected BCC’s delay claims, albeit ACCD knew at the time that it would not pay them. BCC felt it had been manipulated by ACCD. 6 RR 135:17 - 136:12; 6 RR 140:1-12.

During this time, disgruntled subcontractors remained unpaid. Valentine Plumbing Company actually sued BCC for payment, arguing in part that BCC’s lack of manpower on the site had damaged them. 14 RR 167:12-21. BCC countered that ACCD was responsible for the extra costs due to the delay. BCC 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 BCC. CR 1; 15 RR 151:23 - 157:4.

(These agreements were separate from BCC'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 BCC got nothing in this lawsuit, they got nothing. *Id.* The BCC 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.

Trial was had for six weeks. 1 RR 1; 21 RR 38. No architect testimony was provided to define the design error. Further, BCC never explained how it was truly harmed regarding subcontractor claims against it: if BCC lost, it was not damaged because the subcontractors had waived any remaining claims against the builder. 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.

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to solve two critical immunity dilemmas existing for sovereign entities in this state: (1) the conflict between the circuits regarding whether a “sue and be sued” clause constitutes waiver of immunity from suit, including clarifying if *Missouri Pacific R.R. v. Brownsville Navigation District*, 453 S.W.2d

812 (Tex. 1970) has been overruled by this Court's more recent precedent; and (2) if sovereign immunity from intentional tort liability can be judicially recognized contrary to the Texas Tort Claims Act.

ACCD argues that the Legislature must waive sovereign immunity from suit, and since there is no clear and unequivocal waiver of a junior college district's sovereign immunity, immunity remains. First, the "sue and be sued" language in TEC Section 11.151 speaks to the capacity of an individual trustee to act on behalf of a legal entity. The use of this phrase, standing alone, is not legislative waiver of sovereign immunity for independent school districts. (The Dallas Court agrees; the San Antonio Court does not.) Second, assuming *arguendo* that such phrasing is a waiver of immunity, TEC Sections 130.084 and 130.162 (which define ACCD's service area and provide that junior college districts overall are governed by the "general law" for the control and management of school districts), do not constitute the Legislature clearly and unambiguously waiving sovereign immunity for junior college districts, particularly ACCD. There has not been a stark and obvious legislative relinquishment of ACCD's sovereign immunity from breach of contract cases. ACCD is immune from suit. *Obayashi* is wrong.

Regarding immunity from liability, the Texas Tort Claims Act defines when a sovereign can be held liable for its tortious conduct, and a sovereign's intentional acts remain immune. This is absolute. The judicial exceptions to the application of a "no damages for delay clause" in a construction contract cannot be allowed to circumvent this barrier. Allowing this case to stand as precedent endangers and exposes school districts,

college districts, and other sovereigns alike, to liability in varied contractual situations. It is far-reaching in its impact. ACCD is immune from liability.

ARGUMENT

I. This Court should exercise jurisdiction to resolve a conflict between circuits regarding the question of whether sovereign immunity from suit is waived by a statute's "sue and be sued" clause; specifically, as that clause is found in Texas Education Code Section 11.151 regarding trustees of independent school districts, and the subsequent application of that statute to the state's junior college districts and particularly, ACCD, via that Code's sections 130.084 and 130.162.

This petition presents an important core issue concerning subject matter jurisdiction in this state: whether sovereign immunity from suit has been waived by the legislative use of a "sue and be sued" clause in a statute. Specifically, is the jurisdictional impact of TEC §11.151 - which provides trustees of independent school districts with the ability to contract for the body corporate, and to sue and be sued on its behalf - tantamount to waiving the school district's immunity? Thereafter, can the subsequent application of that statute to junior college districts via TEC §130.084 and §130.162 constitute a waiver of immunity from suit for these college districts, as well?

The court of appeals in this case answered this question "yes," while Alamo Community College District respectfully submits that the correct answer is "no." This Court should exercise its discretionary jurisdiction by granting this petition and definitively resolving this legal question.

A. Overall conflict between the courts of appeal regarding the impact of a "sue and be sued" clause upon sovereign immunity requires this Court's resolution.

The lower appellate courts' published opinions in this matter involves an important

point of law, revealing a continuing conflict between the circuits which merits clarification and correction by this Court. TEX.R.APP.P. 56.1(a)(2),(4),(5). In sum, the conflict arises from there being more than one reasonable construction of the “sue and be sued” clause, *i.e.*, it speaks to the capacity of an individual to be sued on behalf of a body corporate, in lieu of evidencing a legislative intent to waive sovereign immunity for that body and to allow subject matter jurisdiction to attach.

Correspondingly, a conflict has arisen on whether or not this Court’s recent precedent clarifying the determination of legislative waiver of immunity implicitly overrules its 1970 decision in *Missouri Pacific R.R. v. Brownsville Navigation District*, 453 S.W.2d 812, 814 (Tex. 1970). *See, Wichita Falls Hospital v. Taylor*, 106 S.W.3d 692, 697-698 (Tex. 2003); *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); *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1980). Added to this conundrum is recent legislative guidance:

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)(“Section 311.034”).

It is imperative to this state’s jurisprudence that the viability of *MoPac* be determined by this Court in view of its more recent analysis as well as the Legislature’s latest input.

Whether or not courts have subject matter jurisdiction over certain entities depends upon this Court's clarification; currently, a conflict exists between the circuits as to what is the proper resolution. Even commentators debate the proper outcome.¹

Specifically, a number of Texas appellate courts have interpreted "sue and be sued" language, as the phrase has been found in various statutes, applying to various sovereign entities. A conflict exists. For example, the following appellate courts have read the clause as *not* waiving immunity: *Satterfield & Pontikes Const., Inc. v. Irving Indep. Sch'l Dist.*, 123 S.W.3d 63, 66 (Tex.App.–Dallas 2003, pet. filed); *City of Dallas v. Riata Const. Corp.*, 8 S.W.3d 392, 393 (Tex.App.–Dallas 2002, pet. filed); *Jackson v. City of Galveston*, 837 S.W.2d 868, 871 (Tex.App.–Houston [14th Dist.] 1992, writ denied); *Townsend v. Memorial Med. Ctr.*, 529 S.W.2d 264, 267 (Tex.Civ.App.–Corpus Christi 1975, writ ref'd n.r.e.); *Childs v. Greenville Hospital Auth.*, 479 S.W.2d 399, 401 (Tex.Civ.App.–Texarkana 1972, writ ref'd n.r.e.).

Meanwhile, the following opinions have read the same clause to find a waiver of immunity: *Tarrant Cty. Hosp. Dist. v. Henry*, 52 S.W.3d 434, 448-449 (Tex.App.–Fort Worth 2001, no pet.); *Alamo Community College District v. Obayashi Corp.*, 980 S.W.2d 745, 748 (Tex.App. – San Antonio 1998, pet. denied); *Alamo Community College District*

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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).

v. Browning Const. Co., No. 04-02-00808-CV, ___ S.W.3d ___, 2004 Tex. App. Lexis 318, 2204 WL 60975 (Tex.App.– San Antonio 2004, pet. filed); *Goerlitz v. City of Midland*, 101 S.W.3d 573 (Tex.App.–El Paso 2003, pet. filed), *Bates v. Tex. State Tech. Coll.*, 983 S.W.2d 821 (Tex.App–Waco 1998, pet. denied).

It is important to the state overall for this court to resolve the impact of a “sue and be sued clause” upon sovereign immunity, in light of its most recent precedent. Additionally, it is important that independent school districts, and thereby, junior college districts, have uniformity under the law regarding sovereign immunity and with that, uniformity regarding subject matter jurisdiction in this state.

B. The “sue and be sued” clause of Texas Education Code Section 11.151 as it applies to independent school districts does not constitute waiver of immunity: it clarifies the capacity of the board of trustees to be sued on behalf of the body corporate. Nevertheless, there is a conflict regarding this jurisdictional issue for school districts in Dallas and in San Antonio.

The Dallas Court of Appeals recently held that capacity was the reasonable construction of “sue and be sued” language, based upon this Court’s most recent guidance regarding the waiver of sovereign immunity, as well as the Legislature’s recent adoption of Texas Government Code Section 311.034. The Dallas court found that independent school districts retain their sovereign immunity from suit. *Satterfield*, 123 S.W.3d at 66.

The San Antonio Court of Appeals in this case, meanwhile, finds sovereign immunity has been waived by the same language in the same statute. In doing so, the court points to a constraint it deems imposed by this Court’s 1970 opinion in *MoPac* (“... we are bound by *MoPac* unless the Supreme Court overrules it ...”,), and remains firm on its 1998 opinion

in *Obayashi. Opinion*, p. 8.

Obviously, as it stands, independent school districts in Dallas enjoy sovereign immunity at this time, while independent school districts in San Antonio do not, based upon the positions taken by their respective courts of appeal.

C. The legislative intent regarding junior college districts is not clear and unambiguous regarding waiver of their sovereign immunity.

Chapter 130 of the Texas Education Code provides the 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 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).

The express consent of the Texas Legislature to waive sovereign immunity from suit for junior college districts in breach of contract cases must be demonstrated within the language of the statute. *Travis Cty.*, 77 S.W.3d at 248; *see*, TEX. GOV'T CODE §311.034 (Vernon Supp. 2003). Specifically, this Court provided 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 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. *Wichita Falls Hospital*, 106 S.W.3d at 697-698. Furthermore, the Texas Legislature has provided clarification in 2003, that a statute is not to be read as intending to waive immunity “ ... unless the context of the statute indicates no other reasonable construction.” TEX.GOV’T CODE §311.034 (Vernon 2003).

In the case at bar, the Fourth Court has held that the Legislature intended to waive the sovereign immunity of junior college districts by the language contained in Sections 130.162 and 130.084 of the Texas Education Code. In making this decision, the Fourth Court has not include any analysis using the factors provided by this Court in *Wichita Falls*, nor has it opined on the application of the rationales provided in *Travis Cty.*, or *It-DAVY*; instead, in the case at bar, it has determined that, “we reiterate our holding in *Obayashi* and hold that ... the Legislature has clearly and unambiguously waived immunity for community college districts.” *Opinion*, p. 9.

In doing so, the court of appeals has held to an 1998 analysis without consideration of this Court’s more recent guidance. The San Antonio court has erred. Holding to old law, it never addressed the *Wichita Falls* factors required by this Court, nor did it conform to the reasonable construction mandate of the legislative directive. It did not attempt to form cohesion between the old and the new. The findings of the court of appeals in support of its jurisdictional analysis regarding college districts are simply incomplete and incorrect. This court should squarely reject the court of appeals’ decision that the Texas Legislature has

clearly and unambiguously waived the sovereign immunity of junior college districts, and particularly, that of the Alamo Community College District.

II. *Sovereign immunity from liability for intentional torts under the Texas Tort Claims Act cannot be judicially abrogated. Sovereign immunity from intentional tort liability cannot be circumvented by an exception to the application of a construction contract’s “no damages for delay” clause, such as fraud.*

This petition involves an important and wide-ranging issue concerning sovereign immunity from liability. Succinctly, can there be waiver of sovereign immunity from tort liability in a breach of contract case? The court of appeals in this case answered this question “yes,” while the Petitioner respectfully submits that the correct answer is “no.” This Court should exercise its discretionary jurisdiction by granting this petition and definitively resolving this far-reaching legal question.

The Texas Supreme Court has held that sovereign immunity from liability exists for a governmental entity’s tortious conduct except in certain instances, as defined by the Texas Legislature. *Texas Dep’t of Transportation v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Dallas Cty. MHR v. Bossley*, 968 S.W.2d 339, 341 (Tex.) *cert. denied*, 525 U.S. 1017 (1998). Accordingly, the Legislature has waived sovereign immunity for tort liability involving property damage, personal injury, or death. Tex.Civ.Prac.Rem.Code §§101.001, *et seq.*, 101.021 (“The Texas Tort Claims Act,” or “TTCA”). The TTCA includes a section specifically stating that there is no waiver of intentional tort immunity. TTCA §101.057(2). Further, junior college districts and school districts are specifically held subject to the TTCA’s limited waiver of immunity *only* when the matter involves motor vehicles. TTCA

§101.051; *see, Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978).

In this case, the entirety of the Petitioner’s liability is founded upon exceptions to applying the contract’s “no damages for delay” clause. *See, City of Houston v. R.F. Ball Const. Co.*, 570 S.W.2d 75, 77 (Tex.Civ.App.–Houston [14th Dist.] 1978, writ ref’d n.r.e.); *Green Int’l v. Solis*, 951 S.W.2d 384 (Tex. 1997). Each exception was based upon purported conduct by the entity, *see, e.g.*, fraud (Jury Question No. 11), equitable estoppel (Jury Question 5), waiver (Jury Question 4).

Immunity from liability was found to be waived by ACCD’s intentional activity, not only as to the other party in its construction contract, but also as to three subcontractors tangentially involved through mid-litigation pass-through agreements. At trial, intentional conduct was first found on the part of the college district, and then applied in this contract case to circumvent ACCD’s affirmative defense of a clear “no damages for delay” clause.

By a serpentine trail of faulty legal analysis, ACCD continues to be held liable for millions of dollars in delay damages under a contract that pointedly stated ACCD would not be responsible for them. Findings of intentional conduct have been used against this sovereign, in blatant disregard of the protection conspicuously provided to it by the TTCA. This is wrong. An improper waiver of sovereign immunity from tort liability has occurred, a judicial encroachment into legislative boundaries, which this Court should correct.

Prayer

Because the “sue and be sued” clause contained within Texas Education Code Section 11.151 is not language clearly and unambiguously waiving sovereign immunity from suit for

independent school districts, and because the language contained in Texas Education Code Sections 130.162 and 130.084 provides no clear legislative intent to waive the sovereign immunity of junior college districts, the court of appeals' decision that Alamo Community College District has no sovereign immunity from suit is wrong. ACCD is immune from suit. Accordingly, ACCD asks this Court to grant its Petition for Review, reverse the judgment of the court of appeals, and dismiss this case for want of jurisdiction, and in the alternative, as there has been no waiver of sovereign immunity from tort liability, to reverse the judgment in this matter on this ground, as well as the additional grounds that there were fundamental errors made by the appellate court regarding modification of the contract; the owner's legal duty for design; no evidence of either design mistake or any overall agency with the architect; and errors in submission within the charge, regarding defining the duties breached as well as how damages were to be legally calculated, with ACCD asking as well that this Court hold that the invalid pass-through agreements be deemed void as a matter of law and the judgment reversed accordingly. ACCD also requests such other and further relief, general or special, to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF FILING AND 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 Petition for Review together with its incorporated Appendix was served upon Browning Construction Company, Plaintiff/Appellee/Respondent, 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 March 24, 2004:

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