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IN THE SUPREME COURT OF TEXAS

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**ALAMO COMMUNITY COLLEGE DISTRICT,**

**Petitioner and Cross-Respondent**

**v.**

**BROWNING CONSTRUCTION COMPANY,**

**Respondent and Cross-Petitioner**

=====

On Petition for Review from the  
Fourth Court of Appeals at San Antonio, Texas

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**REPLY BRIEF OF PETITIONER**

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Reba Bennett Kennedy  
State Bar of Texas No. 11296800  
Law Offices of Reba Bennett Kennedy  
Jefferson Bank Building, Suite 600  
1777 Northeast Loop 410  
San Antonio, Texas 78217  
Telephone: (210) 820-2602  
Telecopier: (210) 826-1179

Wade B. Shelton  
State Bar of Texas No.18211800  
Shelton & Valadez, P.C.  
The Vogue Building, Suite 500  
600 Navarro  
San Antonio, Texas 78205  
Telephone: (210) 349-0515  
Telecopier: (210) 349-3666

William T. Armstrong  
State Bar of Texas No.01327500  
Langley & Banack, Inc.  
Trinity Plaza II, Suite 900  
745 E. Mulberry  
San Antonio, Texas 78212  
Telephone: (210) 736-6600  
Telecopier: (210) 735-6889

**ATTORNEYS FOR PETITIONER**

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## REPLY TO STATEMENT OF JURISPRUDENTIAL IMPORTANCE

The present controversy brings before this high court issues worthy of its consideration, including not only whether or not community college districts are immune from suit in this state, separate and apart from independent school districts, but also whether or not certain previously unrecognized damage models (such as *Eichlaey*) are valid under Texas law; whether or not owners have an implied duty of warranty to general contractors in Texas; etc.. Sovereign immunity from suit is not the only *reason d'etre* for this court's review of the lower appellate court's determinations in this case, and suggesting an overlapping dependence upon *Mexia's* determination for this matter's outcome is optimistically misplaced<sup>1</sup>.

### SUMMARY OF THE ARGUMENT IN REPLY

This reply does not address every issue brought before this court, because additional briefing is unnecessary. As for a concise synopsis of the matter at hand, this is a breach of contract case between a community college district and a general contractor where the breach is, by definition, design error in plans and specifications supplied to the contractor – making it essentially an architectural malpractice case without any architectural expertise to support the award. The architects are not parties. ACCD continues to assert its governmental immunity, both from suit and from liability.

The general contractor sued ACCD for damages resulting from construction delays

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<sup>1</sup>*See, e.g.,* Petitioner's Brief on the Merits, p. xiv.; *City of Mexia v. Tooke*, 115 S.W.2d 618 (Tex.App. – Waco 2003, pet. granted)

despite a no damage for delay clause in the contract, urging various exceptions to the provision as well as its modification. There is no express warranty. Agency was assumed by the trial court *sua sponte* in the charge as between the owner and the architects. Damages were assessed against ACCD inappropriately, via improper methodology and without sufficient jury guidance or causation proof. In sum, harmful error has occurred in many areas, which have state-wide implication in their use as precedent if not corrected by this high court. To the extent necessary, ACCD therefore replies to certain of the arguments addressed in Browning’s response brief, below.

## **ARGUMENT AND AUTHORITIES**

### *I. ACCD Has Immunity from Suit.*

#### *A. “Sue and be sued” is not meaningless if there is immunity.*

Focusing upon the phrase at issue, “sue and be sued,” Respondent provides several arguments that cannot withstand scrutiny. First, the act of conferring capacity of a legal fiction via statutory language such as the phrase “sue and be sued” is not “... largely meaningless....” because it is immune from suit.<sup>2</sup> Sovereign immunity from suit has its limitations: it does not make the sovereign impervious to any litigation whatsoever.<sup>3</sup>

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<sup>2</sup>Brief of Respondent, p. 10.

<sup>3</sup>*See, e.g., Owen v. City of Independence*, 455 U.S. 622 (1980)(municipalities without immunity and subject to liability under 42 U.S.C. §1983, Civil Rights Act); *Verizon Md. Inc. v. Pub. Serv. Comm’n of Maryland*, 535 U.S. 635 (2002)(claim based upon federal Telecommunications Act against state public service commissioners not barred by Eleventh Amendment); *California v. Deep Six Res.*, 523 U.S. 491 (1998)(state sovereign immunity does not bar federal jurisdiction over an in rem proceeding where the state does not own the in rem in question); *see also, Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)(Congress may abrogate state sovereign immunity pursuant to its

Elucidating which individuals represent a particular governmental entity remains necessary, and obviously meaningful, regardless of immunity.

B. “*Sue and be sued*” cannot mean capacity and waiver of immunity – simultaneously.

Second, the argument that the phrase “sue and be sued” can now mean capacity and waiver of immunity simultaneously blatantly reflects the absence of clarity in this situation. The waiver must be both “clear and unambiguous.” *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); *Wichita Falls Hospital v. Taylor*, 106 S.W.2d 692, 697-698 (Tex. 2002)(the statute must constitute a clear waiver, beyond doubt, and ambiguities are resolved by retaining immunity). It is *exactly* because the statutes<sup>4</sup> in question are not clear and unambiguous, and can be read with an alternative, reasonable construction to explain solely party capacity, that Alamo Community College District remains immune from suit.

C. “*Sue and be sued*” has been used in different ways.

Third, the phrase “sue and be sued” has been used in different ways: it does not necessarily reflect the governmental entity in its usage; instead, it can refer to the human beings involved in positions of responsibility for that entity. For example, in *MoPac*<sup>5</sup>, the

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Article I powers); *Ex parte Young* and *Fitzpatrick v. Bitzer*, 427 U.S.445 (1976)(Congress may abrogate state sovereign immunity pursuant to its Section Five power).

<sup>4</sup>Tex. Educ’n Code §11.151(a) as applied to ACCD via Tex. Educ’n Code §130.084 .

<sup>5</sup>*Missouri Pacific R.R. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970), see, Tex.Rev.Civ.Stat.Ann. Art 8263h, §46 (Vernon 1954).

statute read:

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.

In the case at bar, the following two statutes are involved, distinct in their focus upon the individuals serving as trustees of the district in question, and their respective powers and duties:

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.

... [T]he 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.

TEX EDUC'N CODE §11.151(a)<sup>6</sup>

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<sup>6</sup>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

In the *MoPac* statute, the language deals with “suits; judicial notice,” and expressly focuses upon the navigation district itself and the legislative requirement that courts recognize this legal fiction as a valid entity. However, in the two statutes impacting ACCD, the individuals serving as trustees are given their scope of duties, including the clarification that *should* the District be sued, these human beings together will act on behalf of the legal fiction.

The phrase “sue and be sued” in the two instances does not serve the same purpose, nor it does not impact the same type of entity or individual. “Sue and be sued” cannot always mean the same thing: there is not one, simple ‘plain meaning’ to this phrase.<sup>7</sup> Therefore, even if *MoPac* remains as a waiver of immunity from suit for navigation districts, this does not necessary translate into a blanket application of its succinct holding and cursory rationale as is found in the Respondent’s perspective.

*D. “Sue and be sued” in Texas Local Gov’t Code §262.007 is not alone waiver of immunity*

As for Texas Local Gov’t Code §262.007(a), its phrasing of “sue and be sued, plea and be impleaded, or defend and be defended” defines a county in Texas as being the entity itself as the party with capacity, and *then* defines the scope of the immunity waiver involved in its section (d)(which waives sovereign immunity from suit for counties in these particular

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district must pay any costs associated with the assistance.

<sup>7</sup>See, Brief of Respondent, p.11.

types of contracts) and its section (e)(which maintains the county’s immunity in federal courts).<sup>8</sup> Contrary to the Respondent’s reading, the Legislature did not use “sue and be sued” for the purpose of waiving immunity here; it used two subsequent subsections to do so.<sup>9</sup>

The Respondent argues that this particular statute is the “clearest legislative adoption” of *MoPac*, coming after this court’s decision in *Travis County*.<sup>10</sup> Pulling language from the Texas Senate, the Respondent urges that section (d) is not itself the waiver of immunity but

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<sup>8</sup>Local Gov’t Code §262.007 in its entirety, emphasis added:

§ 262.007. Suit Against County Arising Under Certain Contracts

(a) A county that is a party to a written contract for engineering, architectural, or construction services or for goods related to engineering, architectural, or construction services may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract. A suit on the contract brought by a county shall be brought in the name of the county. A suit on the contract brought against a county shall identify the county by name and must be brought in a state court in that county.

(b) The total amount of money recoverable from a county on a claim for breach of the contract is limited to the following:

(1) the balance due and owed by the county under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work required to carry out the contract;

(3) reasonable and necessary attorney's fees that are equitable and just; and

(4) interest as allowed by law.

(c) An award of damages under this section may not include:

(1) consequential damages, except as allowed under Subsection (b)(1);

(2) exemplary damages; or

(3) damages for unabsorbed home office overhead.

***(d) This section does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.***

***(e) This section does not waive sovereign immunity to suit in federal court.***

<sup>9</sup>Brief of Respondent, p. 12.

<sup>10</sup>Brief of Respondent, p. 13-14.

merely a “clarification” of it, based upon Senator Wentworth’s comments. However, it is exactly sections (d) and (e) that place this statute within the parameters of *Taylor* and Texas Gov’t Code §311.034. Absent these two sections, its section (a) can be read as merely a party capacity determination for the entity. Immunity is actually waived – *in part* – for the county within these two subsections (d) and (e), and the legislative intent explained by Senator Wentworth effectively imposed.

*E. “Sue and be sued” in other statutes are still being found not to be a waiver: Beaumont joins Dallas and Corpus Christi.*

Absent this type of clarification, legislation containing merely the phrase “sue and be sued” does not meet the *Taylor* standards for a blanket, broad-brushed waiver of immunity from suit. For example, several “sue and be sued” statutes have been recently held ineffective to waive immunity.<sup>11</sup> The Beaumont Court of Appeals has found that Texas Local Gov’t Code §§51.013, 51.033, and 51.075 are *not* waivers of sovereign immunity from suit, with each of their “sue and be sued” phrases *not* constituting waiver. *City of Roman Forest v. Stockman*, No. 09-03-408CV, 2004 Tex.App. Lexis 6931, 21 I.E.R. Cas (BNA) 1063 (Beaumont July 29, 2004)(construing, in part, a pre-*MoPac* statute). This, in addition to the pending cases before this court involving lower appellate determinations of immunity waiver based upon either the language of “sue and be sued,” or “plea and be impleaded.” In

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<sup>11</sup>*See e.g., City of San Antonio v. Butler*, 131 S.W.3d 170, 176 (Tex.App. - San Antonio 2004, pet. filed), where the Fourth Court of Appeals issued its opinion the same day as the present matter that “sue and be sued” in the city’s charter does not waive immunity from suit when tort claims are involved due to Texas Tort Claims Act §101.025(a), regardless of any potential impact by *MoPac*.

*Stockman*, the Beaumont court therefore joins the Dallas and Corpus Christi appellate courts in applying *Taylor* to find no waiver of immunity when “sue and be sued” is used.<sup>12</sup>

*F. The Legislature Did Speak in Passage of Texas Gov’t Code §311.034*

As for Texas Gov’t Code §311.034, which the Legislature passed to expressly explain to those reviewing its statutes that an waiver of sovereign immunity must be clear and unambiguous, Respondent argues that this action by the Legislature “has no implications” for *MoPac*, since *MoPac* “was decided under an equivalent common-law standard.”<sup>13</sup> The Respondent also suggests that the Legislature’s failure to take the time to acknowledge a case which the high court has rarely noticed, is its implicit adoption of *MoPac* as law.<sup>14</sup>

However, this does not comport with *Taylor*, where this high court first reviewed the historical background of the sovereign immunity concept and thereafter explained that it has repeatedly held the Legislature as the appropriate body to determine the scope of sovereign immunity.<sup>15</sup> It is evident from the rationale of *Taylor* that this Court respects and accedes to the legislative voice in sovereign immunity.

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<sup>12</sup>*See, e.g., Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, 123 S.W.3d 63, 66-68 (Tex. App.--Dallas 2003, pet. filed); *City of Dallas v. Reata Constr. Corp.*, 83 S.W.3d 392, 398 (Tex. App.--Dallas 2002), *rev. on other grounds*, 47 Tex. Sup. Ct. J. 408, 2004 Tex. LEXIS 303,2004 WL 726906 (Apr. 2, 2004); *Townsend v. Memorial Med. Ctr.*, 529 S.W.2d 264, 267 (Tex. App.--Corpus Christi 1975, writ ref’d n.r.e.).

<sup>13</sup>Brief of Respondent, p. 12

<sup>14</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; Brief of Respondent at 15.

<sup>15</sup>*Taylor*, 106 S.W.3d at 695.

It would also appear that in this very statute, the Legislature is drawing a line in the sand regarding assumptions regarding immunity, and by its own language, implicitly disapproving the broad application of *MoPac* that Respondent is arguing should remain. *Taylor* explained the 2001 amendment to the Code Construction Act as being a ratification of the high court’s decisions such as *Federal Sign*, *Galveston Med. Ctr.*, and *Duhart*, with it being “settled in Texas” that a statute must be clear and unambiguous before it can waive immunity.<sup>16</sup>

The Legislature has not remained silent, as the Respondent suggests, regarding *MoPac* and its implications, or applications: the Legislature has spoken to require clarity and no ambiguity in its statutes, as written, before any waiver of immunity can be legitimately said to exist. And, the plethora of conflicting opinions pending before this court for review concerning the phrase itself suggest ambiguity must indeed exist regarding usage of “sue and be sued,” or its counterpart, “plea and be impleaded.”

*G. “May be sued” is a different phrase from “sue and be sued.”*

At times, the Respondent veers from the phrase “sue and be sued” to the phrase “may be sued,” which has been used in several pieces of legislation, the latter distinctively from the first.<sup>17</sup> The phrase “may be sued” has been used in *Taylor* to reference various legislative provisions where immunity was clearly waived, several examples being provided – none of

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<sup>16</sup> *Taylor*, 106 S.W.3d at 695, citing *Fed. Sign*, 951 S.W.2d at 405; *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177, 37 Tex. Sup. Ct. J. 444 (Tex. 1994); *Duhart*, 610 S.W.2d at 742. .

<sup>17</sup>Brief of Respondent, p. 11

which involve the “sue and be sued” language before the court today.<sup>18</sup>

*H. Stare decisis and “sue and be sued” – is there a “MoPac” rule?*

The Respondent argues for a “Missouri Pacific rule” and that the doctrine of *stare decisis* must control in this matter, an argument which has been maintained in the lower court’s decision in this case.<sup>19</sup> However, to apply *stare decisis*, one must first look to the preliminary opinion itself, and in *MoPac*, this court wrote<sup>20</sup>:

In our opinion Article 8263h is quite plain and gives general consent for District to be sued in the courts of Texas in the same manner as other defendants.

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

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<sup>18</sup>*Taylor*, 106 S.W.3d at 697, note 6: “*See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 101.025(a) (“Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.”); *Id.* § 63.007(b) (“The state’s sovereign immunity to suit is waived only to the extent necessary to authorize a garnishment action in accordance with this section.”); *Id.* § 81.010(d) (“Governmental immunity to suit is waived and abolished only to the extent of the liability created by Subsection (b).”); *Id.* § 101.025(b) (“A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.”); *Id.* § 103.002(a) (“A person may bring a suit against the state under this chapter, and the state’s immunity from suit is waived.”); TEX. GOV’T CODE § 2007.004(a) (“Sovereign immunity to suit . . . is waived and abolished to the extent of liability created by this chapter.”); *Id.* § 554.0035 (“A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter.”); TEX. PROP. CODE § 74.506©) (“The state’s immunity from suit without consent is abolished with respect to suits brought under this section.”); *see also* TEX. GOV’T CODE § 554.0035 (“A public employee whose employment is suspended or terminated or who is discriminated against in violation of Section 554.002 is entitled to sue . . . .”) *amended by* Acts 1995, 74th Leg., ch. 721, § 3, eff. June 15, 1995.”

<sup>19</sup>Brief of Respondent, p. 15-16; *see, Opinion*, p. 9.

<sup>20</sup>*MoPac*, 453 S.W.2d at 813.

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.

*MoPac* does not state anything more than this *statute* – when read as a whole – is “plain” ... *MoPac* does not rule regarding the phrase “sue and be sued” alone. It never addresses the phrase itself.<sup>21</sup> This court has *never* held that “sue and be sued” are “magic words” automatically read as waiver of immunity.<sup>22</sup>

*I. Cohesion Exists in the Law: MoPac is not a Thorn in the Side*

Contrary to the Respondent’s perception that asserting “sue and be sued” is *not* a waiver *is* an argument against *MoPac*, this is not true. What *MoPac* provides is a judicial determination of the statute in question as a whole. *MoPac* reviewed other statutes, past and present, impacting the navigational district in question, and held based upon investigation of that one statute.<sup>23</sup> This court’s scant return to the 1970 case suggests that it has read *MoPac* to be limited to an interpretation of article 8263h, as well. *See, Texas A&M University-Kingsville v. Lawson*, 87 S.W.3d 518, 521 & n.21 (2002).

As encapsulated in *Taylor*, this court has a precedential litany containing a specific perspective on legislation dealing with waiver of immunity. *MoPac* fits within that progeny

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<sup>21</sup>A. Craig Carter, *Is Sue and Be Sued Language a Clear and Unambiguous Waiver of Immunity?* 35 St. Mary's L. J. 275, 280 (2004) (“More significantly, the *Missouri Pacific* opinion cites no prior cases interpreting sue and be sued language and contains no discussion of whether the phrase “sue and be sued” might have an alternative meaning.”)

<sup>22</sup>*See, Taylor*, 106 S.W.3d at 697, where “magic words” were exemplified by the phrase, ‘sovereign immunity to suit and liability is waived.’

<sup>23</sup>*MoPac*, 453 S.W.2d at 813.

as long as *MoPac* is read as it was written – and not expanded and stretched to force waiver of immunity where the Legislature has not been specific and clear. This reading would address the concerns voiced in *Taylor* as well as the Legislature’s in Texas Gov’t Code §311.034.

It would also leave this court in this case<sup>24</sup> with only two questions. First, whether Tex. Educ’n Code §11.151 constitutes a waiver of immunity from suit. Second, whether or not Tex. Educ’n Code §§130.162 and 130.084 can be logically combined with Tex. Educ’n Code §11.151 to find that there is clear and unambiguous waiver of immunity from suit for a community college district, considering the admission by the lower court that there is ambiguity in dovetailing various sections of the Texas Education Code together in order to find ACCD is immune from suit.<sup>25</sup>

## *II. ACCD Has Immunity from Liability*

Regarding immunity from liability, ACCD has been found responsible based upon either findings of misrepresentation on its own part by the jury, or findings based upon the court’s erroneous consideration of actions by owner ACCD as synonymous with the

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<sup>24</sup>Fiscally, it would leave this court the larger issue, together with *Satterfield*, regarding the impact of waiver of immunity from suit on independent school districts which are presently on the “brink of financial disaster.” Selby, W. Gardner, San Antonio Express-News, “*School Funding Fix Ordered*,” 16 September 2004 (*quoting* John Folks, Northside Independent School District superintendent: “We need the Legislature to act. We can’t wait. School districts are basically on the brink of disaster.”)<www.mysanantonio.com> (16 September 2004).

<sup>25</sup>*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 . . .”).

activities of its architects.<sup>26</sup>

Contractually, the “no damages for delay” clause can be avoided via judicial exceptions to its application, based upon tortious conduct of a breaching party; however, they cannot be allowed to circumvent the immunity from liability barrier existing for governmental entities. *A common law exception to the imposition of a contractual clause cannot be used to avoid sovereign immunity from torts.*

Immunity from liability protects the state from 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). The Legislature waived sovereign immunity for tort liability involving property damage, personal injury, or death. Tex.Civ.Prac.Rem.Code §§101.021<sup>27</sup>; *Dallas Cty. MHMR v. Bossley*, 968 S.W.2d 339, 341 (Tex.) *cert. denied*, 525 U.S. 1017 (1998). The legislature then excluded junior college districts and school districts from the application of the Texas Tort Claims Act *en toto*, except as to motor vehicles. TTCA §101.025. Intentional torts are not covered by the Texas Tort Claims Act. TTCA §101.057(2).

In this case, the judicial exceptions to the application of the no delay damages contractual clause – which are reflected in the jury’s findings – therefore do not apply to entities with governmental immunity. Nevertheless, in this case, this has happened; allowing the *Opinion* to stand without correction will provide precedent which endangers and exposes

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<sup>26</sup>These arguments have never been waived by ACCD. *See*, Appellant’s Brief to the Fourth Court of Appeals, pp. 1 -16.

<sup>27</sup>THE TEXAS TORT CLAIMS ACT, Tex.Civ.Prac.Rem.Code §§101.001, *et seq.* (“TTCA”)

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

*III. Economic Risk for Construction Delays Contractually Avoided by ACCD and Nevertheless, Imposed*

In various ways, the College District contracted away from assuming economic responsibility for the construction aspects of a new college campus, including but not limiting to: (1) inserting a “no delay for damages” clause benefitting the District; (2) removing the standard modification language from the contract, including but not limited to an automatic assumption of changes orders being modifications; (3) providing language within the documents that notified the contractor that it would be responsible for design review and compliance; (4) limiting the relationship of the Architect to the District and omitting the automatic representative role; and (5) not warranting the design itself. Nevertheless, ACCD has been found responsible for bearing the economic risk of construction delay.

When read as a whole, the intent of the parties was clear: ACCD was avoiding undertaking responsibility for either the architect or the contractor, especially insofar as delays in construction, and at the end of the day, it has been found responsible for both. To that end, ACCD continues to argue:

*A. Owners do not imply a warranty of design to their general contractors*

*Emerald Forest* had a similar provision to the notice provision referenced by the

Respondent in this case, and found that there was no warranty to be implied upon the owner. Here, this parties entered into a contract where it was specified that the general contractor – not the College District – would undertake responsibility for the design. The contractor was warned on the contract documents that it would be bearing this risk.<sup>28</sup> The owner did not expressly warrant the design. To find a warranty, a notice provision limiting the contractor’s liability has been inappropriately used.

Owners in Texas, especially those outside the private sector, need to know if they need to specify in their contracts that they are NOT warranting design, which is the lesson of the lower court’s opinion. Owners need to know if silence no longer is enough. ACCD is not responsible for the design in this case via warranty.

*B. No Modification of the Contract via Change Order*

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,

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<sup>28</sup> P.Ex 49, Instructions to Bidders, ¶ 6; D.Ex 50, S-1 (language appearing on each of the volumes of the construction documents. *18 RR p. 10:3-19*); *see*, Brief of Petitioner, pp. 1-4.

pet'n denied).

As previously discussed in briefing, clearly there was no meeting of the minds regarding the delay damages in this case (as well as inadequate consideration, and the absence of Board approval). As the Plaintiff's own expert agreed, this language constituted a reservation of rights, not a modification, and the court of appeals legally erred in finding otherwise.<sup>29</sup> Respondent provides its own support for this argument when it suggests that Jaime Browning understood that future consideration would be given to the delay costs – even if Jaime Browning believed this to be true, Jack Pellek testified this was not ACCD's understanding. There simply isn't a meeting of the minds here. There has been no modification of the contract.

*C. Architectural Evidence of Architectural Error*

This case involves a general contractor holding the College District responsible for alleged architectural malpractice without the architects being parties to the case. The case is based upon breach of contract between the owner and the contractor.

Browning argues that while ACCD is being held responsible for architectural malpractice, defining this as ACCD's basic breach of its contract with Browning, that Browning need not prove the malpractice itself. This is faulty logic.

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<sup>29</sup>Browning's delay expert, Phil Apprill, characterized the language found on change orders in question as "a bilateral reservation of rights." 17 RR 24:1 - 27:8. ACCD representative Jack Pellek testified that 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. 5 RR 106:2 -107:1; 5 RR 114:3-24.

If ACCD is being held responsible for the malpractice of its architects, then malpractice must be proven. State law is clear that architectural malpractice involves the testimony of an expert in architecture.<sup>30</sup> Browning admits none was provided.

Therefore, there has been no proof of the breach. There is no proof of the design error.

If this is not corrected by the high court, ACCD faces an attempt to recoup losses from an architect who may well provide expert testimony that there was no design error in this case. The District will be caught between a rock and a hard place. As will other, future litigants if general contractors are allowed to circumvent this evidentiary standard.

### **PRAYER**

The Petitioner respectfully requests that this Court grant its 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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Reba Bennett Kennedy  
State Bar of Texas No. 11296800

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<sup>30</sup>*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).

Law Offices of Reba Bennett Kennedy  
1777 Northeast Loop 410, Ste. 600  
San Antonio, Texas 78217  
Telephone: (210) 820-2602  
Telecopier: (210) 826-1179

Wade B. Shelton  
State Bar of Texas No. 18218800  
Shelton & Valadez, P.C.  
600 Navarro, Ste. 500  
San Antonio, Texas 78205  
Telephone: (210) 349-0515  
Telecopier: (210) 349-3666

William T. Armstrong  
State Bar of Texas No. 01327500  
Langley & Banack, Inc.  
745 E. Mulberry, Ste. 900  
San Antonio, Texas 78212  
Telephone: (210) 736-6600  
Telecopier: (210) 735-6889

ATTORNEYS FOR ALAMO COMMUNITY COLLEGE DISTRICT

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 Reply Brief 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, service occurring on October \_\_\_\_, 2004:

P. Michael Jung  
State Bar of Texas No. 11054600  
Strasburger & Price, L.L.P.  
4300 Bank of America Plaza  
901 Main Street  
Dallas, Texas 75202  
Telephone: (214) 651-4300  
Facsimile: (214) 659-4022

Stanley Curry  
State Bar of Texas No. 05274000  
Richard C. McSwain  
State Bar of Texas No. 24002588  
Curry & Associates, P.C.  
45 Northeast Loop 410, Suite 495  
San Antonio, Texas 78216  
Telephone: (210) 366-3850

Facsimile: (210) 366-3898

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Reba Bennett Kennedy

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