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Supreme Court of Texas.  
TTS Charter School, Inc. d/b/a Universal Academy  
v.  
C2 Construction, Inc.  
No. 09-0794.

December 7, 2010.

Appearances:

Thomas A. Fuller of Fuller Law Group, PLLC, for petitioner.  
Kristofer S. Monson of the Office of the Attorney General for amicus curiae, for petitioner.  
Brian W. Erikson of Quilling, Selander, Lownds, Winslett & Moser, PC, for respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 09-0794, LTTS Charter School v. C2 Construction.

MARSHAL: May it please the Court, Mr. Fuller will present argument for the petitioner. Mr. Monson will present argument for the Amicus, the State of Texas. Petitioner has reserved five minutes for rebuttal and with the first 10 minutes.

ORAL ARGUMENT OF THOMAS A. FULLER ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS FULLER: May it please the Court. Charters schools are public schools. They are funded with the state taxpayers' money and hold those funds in trust for the benefit of their students. Charter school funds are considered public funds for all purposes under state law. A graduate of a charter school rece-

ives a diploma from a Texas public school. Because charter schools are public schools, I would like to make two points to the Court today. The first is they fit underneath one of the definitions, at least one of the definitions of governmental unit under the Civil Practice and Remedies Code Section 101.001. In particular, under Section 3, subsection D, there are an organ of government deriving their status and their authority from the State of Texas, from the constitution or the legislature passing law under the constitution.

JUSTICE DAVID M. MEDINA: Is receiving the public funds, is that sufficient for it to qualify under that chapter?

ATTORNEY THOMAS FULLER: Your Honor, I would think not, that just mere receipt of public funds is not a good test for whether an entity becomes governmental and I'm afraid that the Court of Appeals confused part of our argument in that it may have taken us to be saying that because we have governmental characteristics, we are a governmental unit and an organ of government and that was not our argument. Our argument was the statute gives us our steps.

JUSTICE NATHAN L. HECHT: Then why, why does Section 12.1056 so very pointedly give you immunity from liability and not mention immunity from suit?

ATTORNEY THOMAS FULLER: Well, I'm not certain as to the answer. However, Section 12.1056 is silent as to immunity from suit and we do know that when 12.1056 was passed and in its reincarnation, think it was last amended in 2001 that there was only one immunity statute in place in this state that courts could have looked to and that would have been those dealings with immunity and liability under the Tort Claims Act. There was no subchapter I of chapter 271 of the local government code at that time.

JUSTICE NATHAN L. HECHT: Well, but the Tort Claims Act says immunity from suit is waived to the extent of immunity from liability or vice a versa, I can't remember which. It ties the two together.

ATTORNEY THOMAS FULLER: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And here there's no question that you waived immunity from liability.

ATTORNEY THOMAS FULLER: Agreed.

JUSTICE NATHAN L. HECHT: You got sued on a contract.

ATTORNEY THOMAS FULLER: Because it's a contract, yes.

JUSTICE NATHAN L. HECHT: So the only question is immunity from suit.

ATTORNEY THOMAS FULLER: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: It just seems strange that 1056 would make this big point about immunity from liability that doesn't seem to matter very much.

ATTORNEY THOMAS FULLER: It is peculiar, no doubt, but we do have another statute in Chapter 12, Section 12.103 that guides us to the application of other laws as they relate to charter schools, and in 12.103 the legislature created a rule for us that in situations outside of the education code, the laws and rules pertaining to public school also govern charter school.

JUSTICE DEBRA H. LEHRMANN: Are the schools' records subject to the Public Information Act?

ATTORNEY THOMAS FULLER: They are. They are. And in 2001, the legislature brought in a specific refer

ence and my friend, opposing counsel and also the Court of Appeals have pointed out that there are specific references in Chapter 12 to certain laws where you're considered a local governmental unit in this instance or you're a governmental entity in this instance and they've both made the point that well does that render 12.103 surplusage because it refers to the application of other laws and when those would apply to a charter school. The answer may be yes, but that is a better result than the answer that, if you follow the line of thought offered in opposition to that, which is if the only instances where a charter school can be a local governmental entity or a governmental unit or any other sort of statute applies to a charter school are contained within the four corners of Chapter 12, then there's no purpose for 12.103. It is rendered useless.

CHIEF JUSTICE WALLACE B. JEFFERSON: Going back to the question about a governmental unit and whether they are a governmental unit, I want to ask you a few questions. Can charter schools be for-profit entities?

ATTORNEY THOMAS FULLER: No, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is that by statute or what?

ATTORNEY THOMAS FULLER: That is by statute. There are, I believe, four different types of entities that can apply for charter and the only non-governmental type entity itself would be a nonprofit 501(c)3. The other -

JUSTICE NATHAN L. HECHT: Does it matter your argument which kind it is? Do you think they are all governmental entities?

ATTORNEY THOMAS FULLER: I do for as a charter school. As a charter school, they are an arm of the state and I think the Court laid out a test in the Ben Bold Palito case that is very applicable here and --

CHIEF JUSTICE WALLACE B. JEFFERSON: Well just to follow up a little bit, would you, if a charter school could be and I'd be curious to know where it says it cannot be for profit, but if it could, would you think that would change your analysis on whether it would be immune as a governmental unit or not?

ATTORNEY THOMAS FULLER: That could. That could change the analysis. Early in Chapter 12, the legislature sets forth the different types of entities that may apply. Only these entities need apply and the only one that could conceivably be brought by an outside group, a group that was not springing forth from a governmental unit would be a nonprofit 501(c)3 and the legislature has set up, along with the commissioner and the State Board of Education a rather rigorous application process for charter schools so that we don't have an open-door as some of the articles and things that we sometimes read about charter schools would make you think. There is actually quite a bit of governance and quite a bit of accountability to elected officials, the State Board of Education who have the right to revoke a charter for noncompliance. Charter schools, their students take the same tests and the same, they are held to the same accreditation standards as all public schools in our state. They are -

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there other examples where there's immunity when the institution is not run by an elected official or public official?

ATTORNEY THOMAS FULLER: Well, certainly. I believe this Court considered that recently in Klein v. Hernandez. Also, under the definition of a governmental unit under Section 101.001, you find emergency service organization and that is defined to be an organization organized under 501(c)3 run by its members.

JUSTICE EVA M. GUZMAN: Does the fact that you hold this corporate charter, does that impact where you

derive your authority from or your status, how does that play into the analysis?

ATTORNEY THOMAS FULLER: Your Honor, to be a charter school, a charter schools derives its authority exclusively from one place.

JUSTICE EVA M. GUZMAN: So what does that corporate charter do?

ATTORNEY THOMAS FULLER: The corporate charter allows the charter school to apply to be a charter school. They meet the criteria set forth by the State Board of Education to become a charter school. Once they become a charter school, their authority as a public school derives exclusively from statute.

JUSTICE EVA M. GUZMAN: And does your corporate charter mandate that or the provisions in there mandate that once you gain this status then all of your authority will be derived from the [inaudible]?

ATTORNEY THOMAS FULLER: I'm not positive. I know that there are certain requirements for what must be stated affirmatively in a corporate charter during that application process. I'm not exactly sure of what all is derived.

JUSTICE DON R. WILLETT: If it derives from statute and there are multiple statutes are here that we sort of knit together to kind of paint a public character on this, but I was sort of listing them in kind of preferential order from most slam dunk in nature to least. You've got the admin code, you've got the education code, civil practice and remedies code, I mean which one sort of most clearly kind of bolster your case, which ones do you try to fit more snugly within?

ATTORNEY THOMAS FULLER: Well, for status, we have 12.105 of the Educations Code, which is titled "status" and it reads an open-enrollment charter school is part of the public school system of this state and I think from that statute we get a very clear, I think that that's probably the beginning point, Your Honor. That's probably the top of the priority list.

JUSTICE DON R. WILLETT: What's below that?

ATTORNEY THOMAS FULLER: Below that would be Section 11.002.

JUSTICE DON R. WILLETT: Do this for me. Think about that and come back on rebuttal and tell me.

ATTORNEY THOMAS FULLER: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counsel. The Court is ready to hear argument from the State of Texas.

ORAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF THE PETITIONER, FOR AMICUS CURIAE

ATTORNEY KRISTOFER MONSON: May it please the Court. As important as legal status of charter schools is and it is an important question, the Court need not address it to resolve the issue presented in this case. In Texas A&M University v. Koseoglu, the Court held that when a plea to the jurisdiction was based on sovereign immunity, you don't look to 101.003 to determine whether there is interlocutory public jurisdiction over the case. Instead, the case has to be resolved in the understandably question or subject matter jurisdiction whether the assertion of immunity is appropriate. However, in this case, the issue presented is restricted to the question of interlocutory public jurisdiction and the State is not taking the position on the underlying question of immunity. And the State urges the Court, given the fact that the petitioner's brief does not address fully the substantive

question of immunity. Not to resolve this case, although it has power to do so, without further briefing in which the parties join issue on the substance of whether charter schools have immunity, governmental immunity from suit in the first instance.

JUSTICE DALE WAINWRIGHT: Does that suggest that at least conceptually the office of the Attorney General see some daylight between governmental entities that have immunity versus some that don't have immunity absence of legislative pronouncement?

ATTORNEY KRISTOFER MONSON: No, I'd say, I guess I'd say the opposite. Well we have, I'm not going to speculate about the --

JUSTICE DALE WAINWRIGHT: Normally, we'd assume that absent of legislative pronouncement, every governmental entity has immunity and every governmental entity is a governmental unit that's entitled to interlocutory appeal. You're saying don't decide the immunity issue and I'm wondering there may be some practical reasons, but I'm wondering if there's conceptually your pointing out or saying that there's some governmental units that do have immunity and some that may not again absent a legislative enactment.

ATTORNEY KRISTOPHER E. MOORE: Well the, that is true, but I don't think the difference is common law. The defense come from the statutes to create governmental entities, which can in the first instance waive immunity from suit. So the University of Texas at Tyler, for example, its organic statute says University of Texas of Tyler does not have immunity from suit.

JUSTICE NATHAN L. HECHT: Is there any other example like that? We know that that example and took, but is there any other one?

ATTORNEY KRISTOFER MONSON: Not in university context. I haven't done an exhaustive review, but certainly, if we're trying to establish a rule, it's possible that the legislature could create any number of entities in which it withholds immunity from suit in the first instance.

JUSTICE NATHAN L. HECHT: We never found one, but is there a, can you hypothesize a reason why the legislature might do that?

ATTORNEY KRISTOFER MONSON: Well certainly and I think it has to do with the core fundamental issue in this case, which is when private, when government, you have public private interaction to fulfill a governmental purpose. At some point, you're going to bleed over the line and not be entitled to the full status of government, but there's a lot of gray area in the middle.

JUSTICE NATHAN L. HECHT: But why the University of Texas at Tyler be liable, be open to suit on a contract no matter what when the University of Texas at Austin would not be?

ATTORNEY KRISTOFER MONSON: But didn't the legislature got together enough votes to write that into the relevant statute and it was the legislature's choice.

JUSTICE NATHAN L. HECHT: On torts, it doesn't make any difference right? Because you still have to come under the Tort Claims Act.

ATTORNEY KRISTOFER MONSON: That's true, but it does make one important practical difference which is that the University of Texas at Tyler can't file a plea to the jurisdiction saying this isn't the use of property. They have to win on a motion for summary judgment and they have to win an appeal from the final judgment. They can't prevail in interlocutory appeals. So there's a practical distinction there.

JUSTICE NATHAN L. HECHT: But the organic statute probably preceded the interlocutory appeal statute, I

don't know.

ATTORNEY KRISTOFER MONSON: It did by seven years, yes.

JUSTICE NATHAN L. HECHT: So there was a period of time where that didn't matter.

ATTORNEY KRISTOFER MONSON: That's right, that's right.

JUSTICE NATHAN L. HECHT: Asking you one further question on the issue you're not going to opine on, 12.1053 specifically says that the contract claims act and the Chapter 271, subchapter B apply and the importance of both of those seems to be the waiver of immunity from suit.

ATTORNEY KRISTOFER MONSON: Absolutely.

JUSTICE NATHAN L. HECHT: Since the entity has already waived immunity from liability by contracting. So can you think of any reasons why the legislature would make a point of saying these apply to open-enrollment charter schools unless they otherwise had immunity from suit?

ATTORNEY KRISTOFER MONSON: I think that's consistent with the text of those statutes, but 105.6 could also be read the other way and I think it's a question of the legislature's intent, but the State's not here to say anything beyond the issue presented. I would like really quickly to point out that to the extent the Court reaches 101.003, it should avoid the Court of Appeals' over narrow reading of subsection D, which would create problems when you have private public partnerships that carry out governmental functions and would have immunity from suit under the Ben Polt-Palito test. The Tort Claims Act should reach wide enough to encompass those entities. Otherwise, they would not have immunity, they would be entirely immune from tort claims and it certainly can have been the legislature's intent to immunize I believe any governmental entity that carries out any public function immune from the waiver of immunity created by the Tort Claims Act.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Erickson will present argument for the respondent.

#### ORAL ARGUMENT OF BRIAN W. ERIKSON ON BEHALF OF THE RESPONDENT

ATTORNEY BRIAN ERIKSON: May it please the Court. Universal contends that it is a local government entity, no ifs, ands or buts, and that's why it's entitled to an interlocutory appeal under section 51.0148. Now contrast to Universal's position with that of another open-enrollment charter school, this is a recent case, November 16, 2010. It's the Ohnesorge v. Winfrey Academy Charter School case. The cite for it is 2010 Westlaw 4612455. It comes out of the Dallas Court of Appeals. In that case, it was a whistleblower act case and Ohnesorge sued Winfrey Academy claiming that it violated the whistleblower protection act, but the charter school contended, hey, we can't have any liability on the whistleblower protection act because that only applies to local government entities and other governmental types and we're not a local government entity. The plaintiff in that case made the same sorts of arguments that Universal has made in this case. The trial court said, of course, an open-enrollment charter school was not a local government entity and upheld Winfrey's argument that there was no jurisdiction and no claim under the whistleblower protection act and the Dallas Court of Appeals agreed and dismissed the case. Now, an open-enrollment charter school cannot be a governmental entity only when it chooses and only when it pleases it. Appearances are important. The law needs to make sense to the public. I represent a contractor. We had business dealings with an open-enrollment charter school. Open-enrollment charter schools don't look like governmental entities. They don't act like governmental entities. They're not accountable to the public like governmental entities. When a contractor deals with an open-enrollment charter

school and they don't get paid, they sue the open-enrollment charter school. At the time that Universal filed its plea to the jurisdiction in the trial court in this case, 2007, there was 17 suits on file against Universal.

JUSTICE NATHAN L. HECHT: But you yourself admit that a charter school has governmental entity status for some purposes.

ATTORNEY BRIAN ERIKSON: Absolutely.

JUSTICE NATHAN L. HECHT: Why not for appeal?

ATTORNEY BRIAN ERIKSON: Well, they're considered to be, the statutes are clear. They're considered to be some sort of a governmental entity for certain purposes, but when you come to Section 51.0148 and if you go look at the Tort Claims Act, the definition of 101.001, they don't define open-enrollment charter schools.

JUSTICE DEBRA H. LEHRMANN: Well doesn't the Education Code refer to them as public schools?

ATTORNEY BRIAN ERIKSON: Oh, absolutely.

JUSTICE DEBRA H. LEHRMANN: So what do you say about that?

ATTORNEY BRIAN ERIKSON: Well simply because they teach public school doesn't make them a public school district and doesn't make them a local government entity or any other sort of government entity.

JUSTICE DALE WAINWRIGHT: These charter schools are created by statute right? And their charter has to be approved by the SBOE. I mean, 12.104a says an open-enrollment charter school has the powers granted to schools under this title.

ATTORNEY BRIAN ERIKSON: Yes. Yes.

JUSTICE DALE WAINWRIGHT: So but for that statute, they couldn't operate or exist.

ATTORNEY BRIAN ERIKSON: That's correct. That's correct.

JUSTICE DALE WAINWRIGHT: If the legislature --

ATTORNEY BRIAN ERIKSON: Now, if you look at charter school system, it's a little like outsourcing and if you take a governmental function and you outsource it, that does not mean that the outsourced company thereby becomes a governmental entity and that particular instance was looked at in the *Steves v. Correctional Services Corporation* case 428 F. Supp.2d 580 Eastern District Texas. There an inmate sued a private prison correctional company for mistreatment and the court looked at it and the court said no, no, simply because you're doing what would ordinarily be a governmental function, handling fan inmate, doesn't convert you into a sovereign immunity situation or give you governmental immunity unless there's a statute that says that you get it and the court contrasted that situation with the *GLF Construction Corporation v. LAN STV* case that's 414 F.3d 553 out of the Fifth Circuit. There DART, Dallas Area Rapid Transit, had contracted with some engineers, LAN/STV for administrative and other services that were basically DART kind of services and there's a statute that said that DART could do that. DART did it. Somebody sued, GLF Construction Corporation sued LAN/STV and the court looked at it and the court said no, no, no, there's a statute that says that this entity, which is doing DART administrative tasks gets the same immunity that DART gets and so therefore that entity doing the governmental functions that by statute were protected and afforded governmental immunity was able to escape liability.

JUSTICE NATHAN L. HECHT: The state doesn't take a position on whether the school is immune from suit, but you do?

ATTORNEY BRIAN ERIKSON: Yes, I certainly do.

JUSTICE NATHAN L. HECHT: You say they're not.

ATTORNEY BRIAN ERIKSON: Absolutely.

JUSTICE NATHAN L. HECHT: So what's your answer to why 12.1053 applies the contract code statutes, contract claim statutes?

ATTORNEY BRIAN ERIKSON: I'm glad you asked that question because it's an important question. It applies subchapter B, subchapter B tells the open-enrollment charter school how to go about construction procurement. It does not apply subchapter I, which is section 271.151 and following. Section 271.151 and following has a definition of what charter schools are and it's a very circumscribed. I mean, it has a definition of what local governmental entities are that are applied that that particular section applies to and it's a very circumscribed definition. The definition says that it applies to political subdivisions, municipalities, public school districts, junior college districts, special purpose districts or authorities and then a list of varieties of those kinds of things. Never mentions an open-enrollment charter school, doesn't mention organ of government. Now Universal tries to shoehorn its way into organ of government. That's not mentioned in section 271.151. They are supposed to comply with section 271.021 that gives them specific things about how they're supposed to do their contracting. Now, --

JUSTICE DALE WAINWRIGHT: In your brief, to follow up on that question, you argue that the liability that you say is owed here by the charter school did not arise from the operation of the school. If in your opinion the liability arose from the operation of the school, would you agree that there's immunity under 12.1056?

ATTORNEY BRIAN ERIKSON: There would be immunity to liability if it hadn't been waived. By entering into a contract, the school certainly waived it and that's the teaching of the *Tooke v. City of Mexia* case. You enter into a contract, you waive immunity to liability. Now, courts are careful not to extend the blanket of sovereign immunity to every entity which at first blush exhibits the characteristics of a governmental entity. That's a quote from the *Alamo Workforce Development Corporation v. Vann* case 21 S.W.3d 428. Now, the problem in this particular instance is that Universal not only has a contract with the state, but has a corporate charter setting itself up as a 501(c)3 so it can engage in nongovernmental activity. It can teach school like it's doing with the state. It can teach preschool. It can hold a daycare. It can hold a car wash. It could do anything that its corporate charter with the state allows. Public school districts, on the other hand, basically do governmental functions. As a matter of fact, in the *Gravely v. Lewisville Independent School District* case, the court there said no Texas appellate court so far as we know has ever held that a school district has served in a nongovernmental capacity.

JUSTICE EVA M. GUZMAN: But they do all of that not for profit.

ATTORNEY BRIAN ERIKSON: Well, supposedly, yes. Now --

JUSTICE EVA M. GUZMAN: Okay. And if they it not for profit, does that further though the purposes of the legislative enactment in an alternative manner of educating our students?

ATTORNEY BRIAN ERIKSON: The legislature wanted them to be a not for profit for certain purposes. But charter schools can raise money from other functions. They don't have to rely on state funding only. They get money. In this case, Universal subleases a portion of the space that my client built for them at the City Center Shopping Center to an affiliate that they're connected with and they collect money and they could do a whole variety of other things. They could get donations. They could conduct whatever other business they want to do and collect money, that sort of thing. They would still be a nonprofit, but unlike school districts, the people that own the charter school don't have to submit financial statements for themselves to the state. So there could be



lots of funny accounting that goes on.

JUSTICE DAVID M. MEDINA: Public schools do the same thing. They get taxes to run their schools, but the students will go and solicit neighbors for money to buy something for a specific art project or a baseball project or booster club. They're doing similar acts.

ATTORNEY BRIAN ERIKSON: Yes, sir.

JUSTICE DAVID M. MEDINA: Except there's no accounting for all that money.

ATTORNEY BRIAN ERIKSON: There are certain things the state doesn't pay for, extracurricular activities, sports, that sort of stuff.

JUSTICE DAVID M. MEDINA: They pay for it, but perhaps --

ATTORNEY BRIAN ERIKSON: Not enough.

JUSTICE DAVID M. MEDINA: Not enough, yeah.

ATTORNEY BRIAN ERIKSON: Yes.

JUSTICE EVA M. GUZMAN: How is the profit what you're calling sort of profit making impact the analysis then? What is the significance if that were true?

ATTORNEY BRIAN ERIKSON: I don't think that it matters much except it's an accountability issue and I don't think that because public school districts, the public votes for the members. The public votes for the trustees. The public has input as to what happens. There is public accountability. But a charter school, that doesn't happen.

JUSTICE DON R. WILLETT: Well the SBOE can certainly revoke a charter.

ATTORNEY BRIAN ERIKSON: It can. Absolutely.

JUSTICE DON R. WILLETT: How's that not capital "A" accountability?

ATTORNEY BRIAN ERIKSON: Well, that leads to another issue. If you follow the way that Universal's argument that it is a governmental entity for whatever purposes and to whatever extent that it can convince the court that it is, then there's no provision in the statutes that waive its immunity to suit. Now it has immunity to liability, but there's nothing in the education code that waives immunity to suit. So if there's no waiver of its immunity to suit, if it's somehow converted into a governmental entity, then the state board may not be able to sue it. You're running into a *City of Galveston v. State of Texas* problem where this Court held that the State can't sue another sovereign without an expressed waiver of sovereign immunity and the attorney general couldn't go after the charter school.

JUSTICE PHIL JOHNSON: But that doesn't change anything. I mean if that's that way throughout the government, that really doesn't change anything does it because that's the way we've held. So what's the problem?

ATTORNEY BRIAN ERIKSON: Well, charter schools heretofore, up to now, have not been held to be a governmental entity for all purposes.

JUSTICE PHIL JOHNSON: All I'm saying is what's the problem with they're not being sueable by one governmental entity because neither are any other governmental entities under the city of Galveston case. That

doesn't really change anything does it?

ATTORNEY BRIAN ERIKSON: Well, yes it does because the commissioner for the State Board of Education is supposed to get back money that is overallocated and there's the Scott v. Alphonso Crutch case where Alphonso Crutch, open-enrollment charter school, had sued the Commissioner of Education Scott, saying hey, you've taken too much money back from us. Well, if they're held to be a governmental entity, it's going to be a lot more difficult for the State Board of Education to take back money and it's going to be harder for the Attorney General to police charter schools that run amuck. Now there are currently authorized 215 charter schools. Some of the charter schools have multiple campuses so at last count there were about 314 or 315 different campuses. Of the charter schools that have been created, 77 have basically gone out of business, had their charters revoked, they abandoned it, they expired, whatever. So for those 77, if they were holding money that the State wanted back and they were somehow governmental entities, the State might have a hard time getting the money back. In the Education Code, Section 12.1056 immunity from liability is not really in play here. There's no torts alleged. It's a breach of contract case. So immunity from liability is waived. And so if there's no torts, then the Tort Claims Act is not really in play either and the immunity inquiry should be over. They had immunity from liability. It's a benefit to them. The Rosencrans v. Altschuler case shows how it can be a benefit. That's a case where someone had sued a charter school and a supervisor at a charter school and they pled a special exception under 12.1056. They're immune from liability and the court agreed. Now, --

JUSTICE NATHAN L. HECHT: If there were a tort, then 12.1056 would protect them as far as the Tort Claims Act goes.

ATTORNEY BRIAN ERIKSON: You would have to then go look at how school districts how they could be liable for tort and other certain things, yes.

JUSTICE NATHAN L. HECHT: But their 12.1056 immunity would not be waived except for torts except by the Torts Claims Act.

ATTORNEY BRIAN ERIKSON: Well it would be waived to the same extent as the school district.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY BRIAN ERIKSON: Now there's a statute in the Education Code and it's 22.0511 that talks about the liability that people working at the school, teachers and whatnot have and what the extent of that liability is and when courts have looked at how to apply Section 12.0156, they haven't gone to the Tort Claims Act. They went to the other liability statutes that talk about schools like 22.0511, which is what the court did in the Rosencrans v. Altschuler case.

JUSTICE PHIL JOHNSON: Now the legislature created these entities and if the legislature wants them to be liable, let's assume for a moment that they were governmental entities and they had immunity. All the legislature has to do in January and February is pass a law saying we waive immunity from suit. I mean, it's, so that solves the problem as far as you. It doesn't solve your client's problem, but it does put it back over the legislature where they created these things. Am I missing something on that?

ATTORNEY BRIAN ERIKSON: Your Honor, it absolutely could, but the way the case law is, the statutes are, the legislature doesn't have to act because the legislature gave immunity from liability, but never gave immunity to suit. Under one of the statutory construction documents --

JUSTICE PHIL JOHNSON: Another question, does the legislature actually give immunity or does the legislature waive immunity?

ATTORNEY BRIAN ERIKSON: In Section 12.1056, it states that --

JUSTICE PHIL JOHNSON: I know what it says, but I'm asking you. It seems like we're talking about the legislature giving immunity. Haven't all the cases said that the legislature waives immunity? Is there --

ATTORNEY BRIAN ERIKSON: Well without that statute, section 12.1056, an open-enrollment charter school would just be like any other contractor doing business with the state. They are outsourcing, teaching of students. They're a contractor. They're given immunity for certain purposes.

JUSTICE DALE WAINWRIGHT: Really? Do you think that the water irrigation district would be the same? The legislature has to say that a public district regulating water has immunity before that governmental unit would have immunity?

ATTORNEY BRIAN ERIKSON: Well -- If it's a governmental entity and there's no question it's a governmental entity and obviously it has immunity. They all have.

JUSTICE DALE WAINWRIGHT: Because I think it was assumed in Justice Johnson's question, that's a governmental entity.

ATTORNEY BRIAN ERIKSON: If it's a governmental entity, it has sovereign immunity as part of [inaudible].

JUSTICE DON R. WILLETT: I agree there are governmental bodies under the Public Information Act.

ATTORNEY BRIAN ERIKSON: Well, they are considered to be a governmental entity for various purposes. For example, they are considered to be a governmental body for the purpose of the open meetings of public information law and that's Section 12.1051. They're considered to be local government for the purposes of its recordkeeping. That's section 12.1052. They're considered to be a governmental entity for purposes of purchasing and contracting under Section 12.1053.

JUSTICE PHIL JOHNSON: Which brings us back to one of the first statements that you made when you came up here. When you stood up you said if it looks like something and it acts like something and it talks like something, why isn't it that? To paraphrase what you said. So the legislature has said over here it looks a governmental entity. It is a governmental entity. Over here it is. Over here, it looks like that the legislature has kept making it look like a governmental entity.

ATTORNEY BRIAN ERIKSON: The legislature has said is that it considers open-enrollment charter schools to be a governmental entity or a governmental body, not that it is a governmental entity or a governmental body. They could have made --

JUSTICE PHIL JOHNSON: But it said it considers it to be. They're the ones that created it and that's, it seems like they consider it to be and we look for legislative intent as to what it is it seems like, do we not?

ATTORNEY BRIAN ERIKSON: Yes, sir, and the legislative intent is is that they are a governmental body or a governmental entity for certain select purposes and that's all statutorily set out. Not for all purposes. Now the fact that the legislature has chosen to give a private entity immunity from liability is not unusual. It's happened many times. For example, owners, lessees or occupants of agricultural land have limited liability under Civil Practice and Remedies Code Section 75.002. Public utilities that allow access to their easements have limited liability under Civil Practice and Remedies Code Section 75.0021. Landowners have limited liability for acts or omissions of fire fighters or peace officers under Section 75.006. People who donate food have limited liability under Section 76.004. Now none of those, and there's more, none of those reference the Tort Claims Act. The liability can be determined based on the statutes and the legislature's grant of limited liability.

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, I see that your time has expired. Do you want to con-

clude your thought?

ATTORNEY BRIAN ERIKSON: Yes, thank you, Your Honor. Simply put, there are no statutes that give an open-enrollment charter school immunity to sue. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Court will hear rebuttal.

REBUTTAL ARGUMENT OF THOMAS A. FULLER ON BEHALF OF PETITIONER

ATTORNEY THOMAS FULLER: Justice Willett, I have considered the question that you posed to me.

JUSTICE DON R. WILLETT: You had a lot of time.

ATTORNEY THOMAS FULLER: And I would state that the constitution of our state directs for the legislature to create public education and it gives them broad discretion as to how they do that. Being a part of that, charter schools derive common law immunity and, as such, the legislature chooses when it waives that immunity and in a sense we are arguing for a waiver of our immunity. We are arguing that in the underlying case that 271.151, etc., would apply to our case, but we do embrace the immunity, the common law immunity and we are arguing that we would be a local governmental unit under that statute. If the Court has no further questions, I will surrender to the remainder of my time.

JUSTICE DON R. WILLETT: What about for whistleblower act purposes?

ATTORNEY THOMAS FULLER: Well that's interesting, the Winfrey case from Dallas. That, of course, is the same Court of Appeals from which we are appealing and they cited our case numerous times in that opinion as a precedent for finding that a charter school would not be a governmental unit and would not have those characteristics that it would need. They, again, rejected the arguments that we had made and the plaintiff in that case had reiterated a number of the arguments that we had made. Directly to your question, that's a statute that's outside the education code and it refers to its application to public schools to public school districts. Do I believe that would apply to a charter school? Yes, I do.

JUSTICE NATHAN L. HECHT: So you're consistent in your disagreement with the Dallas Court of Appeals.

ATTORNEY THOMAS FULLER: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Fuller. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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