
NO. 07-1050

IN THE
SUPREME COURT OF TEXAS

ZACHRY CONSTRUCTION CORPORATION, ET AL.,

Petitioners,

V.

TEXAS A&M UNIVERSITY,

Respondent.

On Petition for Review From the Court of Appeals
For the Tenth District of Texas
Waco
No.10-05-00139-CV

JOINT REPLY OF
TEXAS AGGIE BONFIRE COMMITTEE AND SCOTT-MACON, LTD.

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES	111
ARGUMENT	2
I. TEXAS A&M UNIVERSITY CONTINUES, JUST AS IT DID BELOW, TO ADVOCATE A POSITION ON THE CONTRIBUTION CLAIMS IN QUESTION THAT IS IN DIRECT CONFLICT WITH (AND IGNORES) ALL RELEVANT AUTHORITIES AND PRINCIPLES	2
II. TABC AND SCOTT-MACON ADOPT BY REFERENCE THE REPLY FILED BY THE ZACHRY DEFENDANTS PERTAINING TO THE "RESPONSIBLE THIRD PARTY" ISSUES	5
III. TABC AND SCOTT-MACON ADOPT BY REFERENCE THE REPLY FILED BY THE ZACHRY DEFENDANTS PERTAINING TO THE FAILURE OF THE COURT OF APPEALS TO FOLLOW TEXAS RULE OF APPELLATE PROCEDURE 47 AND THE DEPRIVATION OF THE PARTIES' RIGHTS TO APPELLATE DUE PROCESS AND TO EQUAL PROTECTION OF THE LAW	6
IV. TEXAS A&M UNIVERSITY'S COMPLAINT SURROUNDING PETITIONERS' STATEMENTS OF FACTS IS AS MISLEADING AND MEANINGLESS AS THE ALLEGED STATEMENT OF FACTS SET FORTH BY TEXAS A&M UNIVERSITY	6
PRAYER	7
CERTIFICATE OF SERVICE	9

INDEX OF AUTHORITIES

<u>Texas Case Law:</u>	<u>Page(s)</u>
<i>City of Denton v. Mathes</i> , 528 S.W.2d 625 (Tex. App.-Fort Worth 1975, writ n.r.e.)	4
<i>City of San Antonio v. Johnson</i> , 103 S.W.3d 639 (Tex. App.-San Antonio 2003, pet. denied)	4
<i>Fibreboard Corp. v. Pool</i> , 813 S.W.2d 658 (Tex. App.-Texarkana 1991, writ denied)	5,6
 <u>Texas Rules of Procedure:</u>	
TEX. R. App. P. 9.7	5,6

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Pursuant to Rule 53 of the Texas Rules of Appellate Procedure, Petitioners, Texas Aggie Bonfire Committee ("TABC") and Scott-Macon, Ltd. ("Scott-Macon"), file this reply to the response to petitions for review filed by Texas A&M University. In support thereof, TABC and Scott-Macon show as follows:

ARGUMENT

I. TEXAS A&M UNIVERSITY CONTINUES, JUST AS IT DID BELOW, TO ADVOCATE A POSITION ON THE CONTRIBUTION CLAIMS IN QUESTION THAT IS IN DIRECT CONFLICT WITH (AND IGNORES) ALL RELEVANT AUTHORITIES AND PRINCIPLES.

As Martin Luther King, Jr. once remarked, "An injustice anywhere is a threat to justice everywhere." MARTIN LUTHER KING, JR. With that powerful and true remark in mind, it bears repeating that the contribution and responsible third party issues pending before this Court reach well beyond the parties and the heavily disputed facts surrounding the tragic collapse of the 1999 Texas A&M University Bonfire; the issues reach to the heart of all litigants and all lawsuits pending across the State of Texas. Make no mistake, whether it's solely as a responsible third party (which Texas A&M University lacks standing to contest, which requires nothing of Texas A&M University, and which does not subject Texas A&M University to any risk of legal liability), whether it's as a contribution defendant, or whether it's as both, it is important that the jury in this case be allowed to consider the responsibility of Texas A&M University for the collapse of the 1999 Texas A&M University Bonfire. Yet, on a much broader scale, if the court of appeals' decision, which completely ignored, misconstrued, and directly contradicted the plain language of the Texas Tort Claims Act (the "TTCA"), prior opinions of other Texas appellate courts, including this Court, and prior opinions of other jurisdictions faced with similar controversies, is not reviewed (and, ultimately, overturned) by this Court, then the confusion brought about by that flawed decision will threaten the very foundation of justice everywhere across our state. To that end,

it cannot be emphasized enough that the case and the issues pending before this Court are of great importance to Texas jurisprudence and require this Court's guidance and clarification to remove, at a bare minimum, unnecessary uncertainty in the law and unfairness to litigants and citizens across the State of Texas.

Not only is Texas A&M University's unwillingness to accept responsibility for its role in the collapse of the 1999 Texas A&M University Bonfire extremely disappointing from a humanitarian standpoint, especially given Texas A&M University's deep involvement in and control over Bonfire, which, of course, took place on its front lawn, but Texas A&M University's unwillingness to accept and recognize the long standing authorities and principles, both in this jurisdiction and other jurisdictions, that a defendant's right of contribution is derived from a plaintiff's right of recovery is disappointing (and wrong) from a legal standpoint. Sadly, rather than defend its conduct before the fine citizens of Brazos County, Texas, Texas A&M University asks this Court, as it asked the court of appeals, to shelter the truth by holding, contrary to all relevant authorities and principles, that the contribution claims in question are categorically barred under the TTCA. And, by issuing a judgment in direct contradiction with the only authorities and principles on point, all of which recognize that contribution claims are derivative claims, and, by failing to analyze Plaintiffs' rights, if they had chosen, to pursue a claim against Texas A&M University, the court of appeals committed a grave error of law that mandates review by this Court.

For good reason (i.e., because it highlights the lack of merit in Texas A&M University's argument), Texas A&M University continues to do everything in its power to direct the reviewing courts' attention away from the factually similar and issue identical case of *City of San Antonio v. Johnson*, 103 S.W.3d 639, 642 (Tex. App.-San Antonio 2003, pet. denied) (holding that whether or not the City of San Antonio was immune from the contribution claims brought by the defendants depended upon whether or not the City of San Antonio would be immune from a claim asserted by the plaintiff). In fact, when the issues pending before this Court first made their way up the appellate ladder, Texas A&M University failed to disclose, like it failed to disclose here, the existence of *Johnson*. Of course, when Texas A&M University was challenged on its failure to disclose *Johnson*, Texas A&M University argued only that it was not required to alert the court of appeals of such case because it was an opinion of a sister appellate court, and, as a result, "non-binding authority." (Appellant's Reply to the Zachry Defendants/Appellees' Brief at 11-12.)

In the end, regardless of whether or not *Johnson* or any of the other cases cited were "binding" on the court of appeals, the fact is that the court of appeals' holding surrounding the contribution claims in question directly contradicts the *only* authorities on point. *See, e.g., City of Denton v. Mathes*, 528 S.W.2d 625, 632 (Tex. App.-Fort Worth 1975, writ n.r.e.) (holding that the defendant's right of contribution and indemnity was available under the TTCA "even though [the defendant] sustained no personal injuries."). Thus, now, more than ever, this Court needs to provide its guidance and clarification on the issue of

contribution claims against governmental entities. Otherwise, not only will the parties in this lawsuit be left wondering how twenty-plus years of law was turned on its head in one, unexplained sentence from the court of appeals, but litigants, attorneys, and trial judges across the State of Texas will be uncertain in the law, which will lead, inevitably, to unfairness and inconsistency at the courthouse. And, as this Court is well aware, unfairness and inconsistency at the courthouse, especially when, as here, the inconsistency deals with an issue of law, leads to unnecessary and very expensive appeals. Practically speaking, if this Court refuses to grant review, then a well settled and a well reasoned area of the law (i.e., that a defendant's right of contribution is derived from a plaintiff's right of recovery against the contribution defendant) will be thrown into a state of turmoil. Accordingly, this Court should request the record and merits briefing.

II. TABC AND SCOTT-MACON ADOPT BY REFERENCE THE REPLY FILED BY THE ZACHRY DEFENDANTS PERTAINING TO THE "RESPONSIBLE THIRD PARTY" ISSUES.

To save this Court from redundant briefing, TABC and Scott-Macon hereby join in, adopt, and incorporate, in all things and as if set forth fully herein in the names of TABC and Scott-Macon, the reply filed by the Zachry defendants pertaining to the "responsible third party" issues. TEX. R. APP. P. 9.7; *see also Fibreboard Corp. v. Pool*, 813 S.W.2d 658,666 (Tex. App.-Texarkana 1991, writ denied) (recognizing that "adoption of points in multi-party appeals should be encouraged to conserve words, paper, and the eyesight of the members of the judiciary.").

III. TABC AND SCOTT-MACON ADOPT BY REFERENCE THE REPLY FILED BY THE ZACHRY DEFENDANTS PERTAINING TO THE FAILURE OF THE COURT OF APPEALS TO FOLLOW TEXAS RULE OF APPELLATE PROCEDURE 47 AND THE DEPRIVATION OF THE PARTIES' RIGHTS TO APPELLATE DUE PROCESS AND TO EQUAL PROTECTION OF THE LAW.

To save this Court from redundant briefing, TABC and Scott-Macon hereby join in, adopt, and incorporate, in all things and as if set forth fully herein in the names of TABC and Scott-Macon, the reply filed by the Zachry defendants pertaining to the failure of the court of appeals to follow Texas Rule of Appellate Procedure 47 and the deprivation of the parties' rights to appellate due process and to equal protection of the law. TEX. R. AP P. P. 9.7; *see also Fibreboard Corp.*, 813 S.W.2d at 666 (recognizing that "adoption of points in multi-party appeals should be encouraged to conserve words, paper, and the eyesight of the members of the judiciary.").

IV. TEXAS A&M UNIVERSITY'S COMPLAINT SURROUNDING PETITIONERS' STATEMENTS OF FACTS IS AS MISLEADING AND MEANINGLESS AS THE ALLEGED STATEMENT OF FACTS SET FORTH BY TEXAS A&M UNIVERSITY.

Contrary to Texas A&M University's argument surrounding "Petitioners' Statements of Facts," and, for that matter, contrary to the statement of disputed facts argued by Texas A&M University, the statement of facts set forth by TABC and Scott-Macon complies with Rule 53.2(g) of the Texas Rules of Appellate Procedure. After all, the contribution issue or point presented to and pending before this Court is centered on the fact that the court of appeals failed to, among other things, address the facts briefed and necessary for determining whether or not Texas A&M University would be immune from a claim asserted by Plaintiffs. As noted previously, because the court of appeals' decision that the

contribution claims are categorically barred under the TTCA was based on an error of law (i.e., the court of appeals ignored the fact that a defendant's right of contribution is derived from a plaintiff's right of recovery), the court of appeals did not attempt to apply the heavily disputed facts of this case to the contribution issue presented. Frankly, if, as Texas A&M University would have this Court believe, contribution claims against a governmental entity are categorically barred under the TTCA, then it begs the following question: Why did Texas A&M University feel it necessary to set forth any "alleged" facts and/or to complain about the alleged lack of facts set forth by TABC and Scott-Macon? Regardless, the pleadings below contained more than sufficient facts to affirmatively demonstrate the trial court's jurisdiction. (16.SCR.2411-85; 16.SCR.2394-2410.) All other facts, including those set forth by Texas A&M University, are heavily disputed and implicate the merits of the case, which requires resolution by the finder of fact. Thus, unlike Texas A&M University, TABC and Scott-Macon complied, in all parts, with Rule 53.2(g) of the Texas Rules of Appellate Procedure. Accordingly, this Court should request the record and merits briefing.

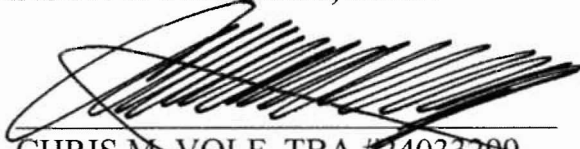
PRAYER

Based on the foregoing, Petitioners, TABC and Scott-Macon, pray that this Court request the record, request (and permit) full briefing on the merits, grant review, and then reverse the judgment handed down by the court of appeals and render judgment affirming (or alternatively dismissing Texas A&M University's appeal from) the trial court's orders denying the pleas to the jurisdiction and motions to dismiss and sever. Petitioners, TABC and Scott-Macon, pray also for such other and further relief to which they may be entitled.

Respectfully Submitted,

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I, CHRIS M. VOLF, do hereby certify that the original and thirteen (13) true and correct copies of this joint reply were sent by overnight messenger and/or hand-delivery to Blake Hawthorne, CLERK OF THE SUPREME COURT OF TEXAS, P.O. Box 12248, Austin, Texas 78711-2248, and identical copies were forwarded to the following attorneys of record and interested persons by mailing same by certified mail (return receipt requested), on this 4th day of April, 2008:

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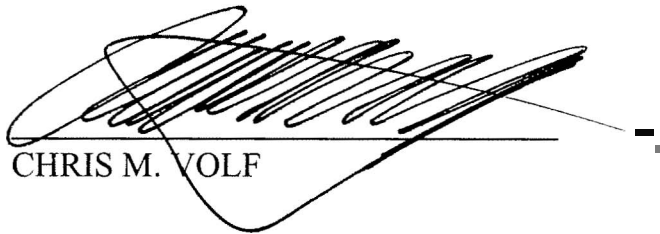
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