

NO. 09-0223

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IN THE SUPREME COURT OF TEXAS

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SHARYLAND WATER SUPPLY CORPORATION  
Petitioner

v.

CITY OF ALTON, CARTER & BURGESS, INC., CRIS EQUIPMENT COMPANY,  
INC. AND TURNER, COLLIE & BRADEN, INC.  
Respondents

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CRIS EQUIPMENT COMPANY INC.'S RESPONSE TO PETITION FOR REVIEW

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## RESPONDENT'S ISSUES

### **Reply to Sharyland's Issue No. 4**

The Court of Appeals Correctly ruled that the economic loss rule bars Sharyland's negligence claim against Cris

### **Cris's Issue No. 1**

Without evidence of any damages, Sharyland could not recover on either its negligence or breach of contract theory regardless of whether the economic loss rule applied.

### **Cris's Issue No. 2**

The trial court erred in holding that 30 T.A.C. §317.13 applies to service connections and in so instructing the jury.

## **Reply To Petitioner's Statement of Facts**

Sharyland Water Supply Corporation's ("Sharyland") Statement of Facts contains argument impermissible under Texas Rule of Appellate Procedure 53.2(g), and unfairly distorts the record with several factual misrepresentations and argument of facts outside the record.

In its Statement of Facts, Sharyland states that Cris Equipment Company, Inc. ("Cris") improperly installed the sewer lines in issue in clear violation of 30 Tex. Admin. Code §317.13, and that "leaking sewer lines" causes raw sewage to be "transported directly above and onto Sharyland's waterlines, presenting an untenable and continuing contamination hazard to the public's drinking water supply." Petition for Review, Pg 1. Sharyland also states that it "excavated samples of the crossings of the sewer lines and waterlines and discovered that, of the 66 excavated crossings, in seven subdivisions, 60 were incorrectly installed and sewage was already leaking over Sharyland's waterlines." Petition for Review, Pg 2.

First, Cris disputes that 30 Tex. Admin. Code §317.13 ("317.13") even applies to the crossings of residential sewer service connections and waterlines, the types of crossings at issue in this case. This issue is discussed in detail below in Cris's Issue No. 2.

Second, Sharyland would have this Court believe that Alton has a rinky-dink sewer system, which is showering a substantial number of Sharyland's waterlines with raw sewage, presenting an imminent threat to the health and safety of the public. The

record reflects otherwise as discussed in detail below in the Response to Sharyland's Issue No. 4. Simply put, there is no evidence of any other leaking sewer lines, much less any damage to Sharyland's waterlines and/or contamination of its water supply.

### **Summary of Argument**

The Court of Appeals correctly reversed and rendered a take nothing judgment against Sharyland because Sharyland suffered no injury or damages to its waterlines or water supply system. In addition, Sharyland produced no evidence of a "reasonable probability" of future damage to its water lines or future contamination of its water supply system. The Court of Appeals was correct in holding that the economic loss rule barred any recovery by Sharyland against Cris on its negligence cause of action because Sharyland suffered no property damage. Without evidence of damages, Sharyland also could not prevail on its negligence or breach of contract causes of action, both of which require damages as an essential element for recovery. Finally, the trial court erred in ruling and instructing the jury that 317.13 applied to the crossings in issue. Although the Court of Appeals did not address this issue on appeal, it does provide another ground for reversal of the trial court, further supporting this Court's denial of Sharyland's Petition for Review.

### **Reply to Sharyland's Issue No. 4**

**The Court of Appeals correctly ruled that the economic loss rule bars Sharyland's negligence claim against Cris**

Under the economic loss rule, a duty in tort does not lie when the only injury claimed is one for economic damages. *Trans-Gulf Corporation v. Performance Aircraft*

*Services, Inc.*, 82 S.W.3d 691, 695 (Tex.App.-Eastland 2002, no pet.); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 288-89 (Tex.App.-Houston [14th Dist.] 2000, no pet.); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex.App.-Houston [14th Dist.] 2000, no pet.). To be entitled to damages for negligence, a party must plead and prove either a personal injury or property damage, as contrasted to mere economic harm. *Express One Intern., Inc. v. Steinbeck*, 53 S.W.3d 895, 899 (Tex.App.-Dallas 2001). This line of cases taken together stands for the proposition that there is no remedy in damages under a negligence action when the only injury claimed is economic harm or damage.

At trial, Sharyland sought damages for “increased costs in operation and costs to place barriers to mitigate the hazard caused by Defendants” and for “costs associated with increased safety precautions and maintenance measures it takes when repairing its lines.” 11 CR 3335-3352 (¶35); 2 RR 273-276; 4 RR 63-64, 70-73; 5 RR 64-65; 6 RR 44-46. Sharyland merely alleged economic damages it would incur to mitigate a perceived threat of harm which had not, and may never occur. The Court of Appeals correctly held that these increased operational costs did not constitute property damage. *City of Alton v. Sharyland Water Supply Corporation*, 277 S.W.3d 132, 154 (Tex.App. –Corpus Christi 2009).

At trial, Sharyland did not introduce any evidence that its waterlines or water supply system had sustained actual damages in the past, or would sustain damages in the future. Sharyland’s evidence of past damages was based on the approximately \$15,000.00 it spent in digging up various locations to determine whether or not a problem

existed, at its attorney's direction, prior to the filing of its lawsuit. 3 RR 99-100; 4 RR 106-108, 200-201; 8 RR 66. There was no evidence that Sharyland spent any money on repairs for the perceived problems at these locations. 4 RR 213, 282-285. In one instance, Sharyland discovered fluid dripping from a sewer coupling and notified Alton; Alton repaired the leak. 4 RR 66-69; Ex 1 (SWSC 0000520-0000524). Sharyland also notified the TNRCC, which then sent a representative out to investigate. The TNRCC concluded no further action was necessary as it could not document any impact on the environment or human health. 4 RR 286-291; Ex. 52A and 52B. There was no evidence that this particular leak caused any damage to Sharyland's water distribution system.

Sharyland's evidence of future damages was premised entirely on speculation and concern about the potential contamination of its water supply system. 2 RR 278-279; 8 RR 47-48. The future damages sought by Sharyland were for the costs for repairs and/or modifications of its water supply system which it claimed were necessary to prevent a problem that it perceived may occur in the future. 5 RR 205; Ex. 114. Specifically, Sharyland envisioned a "doomsday" scenario of contamination of its water supply system which would have to include the contemporaneous events of (1) a break in the sewer line, (2) a break in the water line in proximity to the break in the sewer line, and (3) a loss of pressure in the water line creating a vacuum or negative pressure that could pull sewage into the water distribution system. 5 RR 64-71, 247-248; RR (Briggs) 9-12. At trial Sharyland acknowledged that there had been no such contamination of its water supply system. 2 RR 278-283; 3 RR 41; 4 RR 127-129; RR (Briggs) 9-12. There was no testimony or evidence that such contamination "in reasonable probability, will be

sustained in the future,” as was required in the instruction submitted to the jury on this issue. 12 CR 3474-3499 (Questions Nos. 6, 13); 6 RR 114; 7 RR 356-357. David Laughlin, a high level TNRCC engineer, and a disinterested witness, testified that the threat of contamination alleged by Sharyland was “very remote” and “very rare.” 7 RR 366-369. Louis Herrin, another high level TNRCC engineer testified that there were no health and safety risks associated with Alton’s sewer system. 7 RR 356-358.

The law is clear that, absent actual injury, there can be no recovery for fear of injury. Damages must be shown with reasonably certainty, and “recovery cannot be made for damages that are remote, contingent, speculative, or conjectural.” *Geo Viking, Inc. v. Texas-Lee Operating Company*, 817 S.W.2d 357, 360-361 (Tex App-Texarkana, writ denied 839 S.W.2d 797). Absent actual damages, a person cannot recover damages for fear of injury in the future resulting from having been placed at risk. *See Temple-Inland Forest Products Corporation v. Carter*, 993 S.W.2d 88 (Tex. 1999) (absent physical injury, workers could not recover mental anguish damages for fear of possibly developing asbestos-related diseases that they did not currently have and may never have); *City of Tyler v. Likes*, 962 S.W.2d 489, 500 (Tex. 1998) (“[a] person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because he has been placed in a perilous position. Nor is mere fright the subject of damages.”).

Sharyland failed to establish that any repairs were necessary because it introduced no evidence of a “reasonable probability” of future damage to its water lines or future contamination of its water supply system. 6 RR 112-114; 7 RR 356-357; *See MCI*

*Telecommunications Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 647, 654 (Tex.1999) (with respect to recovery of future damages, Texas follows the reasonable probability rule); *McKnight v. Hill & Hill Exterminators, Inc.*, 689 S.W.2d 206, 207 (Tex.1985) (“Uncertainty as to the fact of legal damages is fatal to recovery. . .”).

The Court of Appeals was correct in reversing and rendering that Sharyland take nothing as the economic loss rule bars its negligence cause of action.

### **Cris’s Issue No. 1**

**Without evidence of any damages, Sharyland could not recover on either its negligence or breach of contract theory regardless of whether or not the economic loss rule applied.**

The fact that Sharyland introduced no evidence of past or future damages, as detailed above, also prevents it from recovering on either its negligence or breach of contract theory (as a third-party beneficiary). This issue was raised by Cris in its appeal (Issue No. 4), but was not addressed by the Court of Appeals as it reversed and rendered on other grounds. Cris presents this issue to this Court pursuant to Rule 53.4 of the Texas Rules of Appellate Procedure because it provides another ground for reversal, and further supports this Court’s denial of Sharyland’s Petition for Review.

### **Cris’s Issue No. 2:**

**The trial court erred in holding that 30 T.A.C. §317.13 applies to service connections and in so instructing the jury.**

A core issue in this case involved the applicability of 30 T.A.C. §317.13 Appendix E – Separation Distances (“317.13”) to the service connections installed by Cris. Ex. 104.

In its pleadings, Sharyland asserted that 317.13 applied to the crossing of a service connection and a water line, and that Cris was negligent in not complying with this regulation during construction of Alton's sewer system.<sup>1</sup> 11 CR 3335-3352 (¶¶ 16, 29). Cris' position, based on testimony of high level TNRCC engineers, was that 317.13 applied only to sewer mains, not to the service connections. Sharyland and Cris both moved for a pretrial partial summary judgment on this issue, and the trial court ultimately ruled that 317.13 did apply to service connection crossings at issue. 7 CR 2328-2426, 2622-2639; 10 CR 3002-3053; 11 CR 3301-3302, 3303-3309. Over Cris' objection, the trial court included an instruction in the jury charge that 317.13, and its rules on separation distances, applied to the service connection crossings. 12 RR 58-60; 12 CR 3474-3499 (Question No. 11). Cris appealed the trial court's ruling on the applicability of 317.13 (Issue No. 3), but the Court of Appeals did not address this issue as it reversed and rendered that Sharyland take nothing on other grounds.

Cris presents this issue to this Court pursuant to Rule 53.4 of the Texas Rules of Appellate Procedure because it provides another ground for reversal, and further supports this Court's denial of Sharyland's Petition for Review. More importantly, Cris presents this issue to address and respond to Sharyland's allegations that Cris knowingly

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<sup>1</sup> Alton's sewer system consists of main sewer lines, residential service connections, which are also known as "stub outs" or "service lines," and yard lines. 5 RR 21-25, Ex. 113; 5 RR 28-34, Ex. 36, 36A. The service connections are perpendicular to, and run from the main sewer line to the residential property line, where they connect with the yard line. Ex. 36A. The yard line runs from property line to the individual homes to complete each residential connection. Ex. 36A. The service connections are the only portion of Alton's system in issue in this case. 5 RR 23. Some of Alton's residential service connections cross Sharyland's water mains. 5 RR 23. The reason for these crossings is that, in some locations, both Alton's sewer main and Sharyland's water main are located in the street and, consequently, some of the residential service connections must cross the water main to connect to the yard lines on one side of the street. Ex. 36A.

constructed the sewer system in “clear violation” of 317.13, without any regard for the health and safety of the public. This is simply not the case.

The Texas Natural Resources Conservation Commission or TNRCC (now the Texas Commission on Environmental Quality or TCEQ) is the state agency which issued and administered 317.13. 2 RR 250; Ex. 104. The relevant portion of 317.13, and the portion upon which Sharyland based its claims, is contained in 317.13 (1)(B) Appendix E – Separation Distances which provides that:

[w]here a sanitary sewer crosses a water line and the sewer is constructed of..... PVC with a minimum pressure rating of 150 psi, an absolute minimum distance of 6 inches between the outside diameters shall be maintained. In addition the sewer shall be located below the waterline where possible and one length of the sewer pipe must be centered on the waterline.

Ex. 104. There is no dispute that the PVC used to construct Alton’s sewer system complied with the regulation by having a minimum pressure rating of 150 psi. 11 CR 3335-3352 (¶ 16). Sharyland alleges that Cris violated 317.13 by constructing many of the service connections so that they crossed over Sharyland’s water main when they could have gone under, by not maintaining the required separation distances, and/or by not centering the sewer pipe on the waterline. 11 CR 3335-3352 (¶ 29).

Louis C. Herrin, III and David D. Laughlin were top level TNRCC engineers who testified at pretrial depositions that 317.13 did not apply to the crossing of a service connection and water main, the type of crossing at issue in this case. 7 CR 2522-2572, 2600-2679; 10 CR 3018-3034. Herrin’s official title with TNRCC was “Engineer 5,” and he was in charge of the plan and specifications for wastewater treatment systems, as well

as the chief rules writer for his section. 10 CR 3019-3022. Herrin testified that 317.13 Appendix E applied to service mains, but not to service connections. 7 CR 2607 (pg 62-63); 10 CR 3029-3030. He also testified that no part of Alton's sewer system, including the service connections installed by Cris, violated 317.13 or any TNRCC regulation. 10 CR 3027-3028. Laughlin is an engineer with the TNRCC who reviews engineering plans for water systems improvements to both new and existing systems. 7 CR 2531(pg 8-11). He also testified that TNRCC regulations, including 317.13, do not apply to service lines. 7 CR 2534-2535 (pg 21-27), 2544-2545 (pg 63-64).

By legislative mandate, the TNRCC/TCEQ has the duty of reviewing and approving plans for public water and sewer systems. TEX. HEALTH & SAFETY CODE § 341.035; TEX. WATER CODE § 26.034; 30 TEX. ADMIN. CODE §§ 290.39, 317.1. The agency reviews plans to check their technical feasibility and to safeguard water quality. 30 TEX. ADMIN. CODE §§ 290.39, 290.44, 317.1, 317.2, 317.13. In carrying out this work, the Texas Legislature requires the TNRCC/TCEQ to issue and administer rules such as Sections 290.44 and 317.13 which govern the design of public water and sewer systems. TEX. HEALTH & SAFETY CODE § 341.035; TEX. WATER CODE § 5.103.

The construction of a statute by the administrative agency charged with its enforcement is entitled to substantial deference, as long as the construction is reasonable and does not contradict the plain language of the statute. *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex.1994); *Houston v. Nelson* 147 S.W.3d 589, 591 (Tex.App.— Corpus Christi 2004, no writ.). When there is vagueness, ambiguity, or room for policy determinations, courts defer to an agency's interpretation unless it is plainly inconsistent with the language of

the rule. *BFI Waste Sys. of N. Am. v. Martinez Env'tl. Group*, 93 S.W.3d 570, 575 (Tex.App.-Austin 2002, pet. denied). In addition, deference is especially appropriate when regulations involve technical and regulatory matters which fall more within the expertise of the agency than the court. *See Flores v. Employees Ret. Sys.*, 74 S.W.3d 532, 545-46 (Tex. App.—Austin 2002, pet. denied). Statutory construction presents a question of law that an appellate court reviews *de novo*. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex.1989)

Herrin and Laughlin's construction of 317.13 as representatives of the TNRCC should be given deference as their testimony sought to clarify vagueness and ambiguity as to whether the regulation applied to service connections. Their interpretation that 317.13 did not apply to service connections was reasonable, especially considering the policy reasons behind this interpretation. Herrin testified that 317.13 applied to sewer mains (and not service connections) because the mains are full of sewage most of the time, whereas the service connections are empty most of the time. 7 CR 2608 (pg 75-78). Thus, it is less likely that a service connection is going to cause contamination as opposed to a sewer main. 7 CR 2608 (pg 77). The construction of the regulation by Herrin and Laughlin was reasonable, and was not plainly inconsistent with the language of the regulation. In addition, 317.13 involves technical and regulatory issues more appropriate for agency interpretation and deference than judicial interpretation. The importance of such an agency interpretation was highlighted by Sharyland's own witnesses, Randall Winston and William Shea. Winston and Shea are professional engineers who testified that engineers should be able to rely on guidance and clarification from an enforcing

agency such as the TNRCC/TCEQ regarding regulatory issues. 6 RR 148-151; 8 RR 155-157. Winston also testified that a contractor such as Cris should be entitled to rely upon the guidance and professional judgment of engineers regarding plans and specification issues. 6 RR 148-151. Certainly, if engineers and, in turn, contractors are entitled to rely on agency interpretations in determining how to proceed on a project, the same deference should be given to that interpretation in a court of law.

The trial court erred in holding that 317.13 applied to service connections, and in so instructing the jury. As this error provided another grounds for reversal, this Court should deny Sharyland's Petition for Review.

### **Conclusion and Prayer**

This Court should deny Sharyland's Petition for Review because there is nothing wrong with Alton's sewer system. The sewer system has not caused any damage or injury to Sharyland's waterlines, or water supply system, and there is no reasonable probability that it will cause any damage or injury in the future. The Court of Appeals was correct in reversing the trial court and rendering that Sharyland take nothing from Cris.

Respectfully submitted,

/s/ Christopher A. Funk

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing document was forwarded on this the 28 day of May, 2009, to the following counsel of record and interested parties:

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