

No.: 09-0223

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IN THE  
SUPREME COURT OF TEXAS

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SHARYLAND WATER SUPPLY CORPORATION  
Petitioner

VS.

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

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Appealed from  
The Thirteenth Court of Appeals, Corpus Christi - Edinburg  
No. 13-06-00038-CV

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CITY OF ALTON'S RESPONSE TO SHARYLAND'S PETITION FOR REVIEW

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June 11, 2009

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## STATEMENT OF JURISDICTION

The Court of Appeals did not commit an error of law of such importance to the States' jurisprudence that it should be corrected, nor does the Court of Appeals' Opinion conflict with any opinion of its sister courts that have properly applied this Court's reasoning regarding governmental immunity after *Reata* and *Tooke*. Petitioner Sharyland's implication that there is a different standard when there is "illegal conduct" is wrong and deceptive.

## ISSUES PRESENTED

Reply Issue No. 1: The Court of Appeals applied the correct law and analysis to the issue of governmental immunity.

Reply Issue No. 2: The Court of Appeals failed to reach an important issue which would have been dispositive of the case at that time, and according to recent legislation, which upholds the TCEQ f/k/a TNRCC's testimony, has materially altered the correctness of the trial court's ruling.

Response to Petitioner's Issue No. 1: Does the law fail to afford Sharyland Water Supply Corporation a remedy, legal or equitable, against City of Alton for its illegal conduct?

Response to Petitioner's Issue No 2: Do the Court of Appeals rulings on Alton's immunity from suit and liability contradict previous decisions of other Courts?

## **STATEMENT OF FACTS**

The statement of facts in the Opinion of the Thirteenth Court of Appeals is basically correct. Respondent Alton (hereinafter “Alton” or “City of Alton”) objects to Petitioner Sharyland’s (hereinafter “Sharyland”) supplementation of the facts because it is exceedingly inaccurate and is a gross misrepresentation of the evidence. Respondent Alton hereby incorporates and adopts the objections and corrections articulated by Respondents Cris Equipment, Inc., Turner Collie & Braden and Carter & Burgess as if set forth verbatim herein. Of particular note, is Carter & Burgess’ statement on page *ix* of their Response regarding Petitioner Sharyland’s propensity to constantly misrepresent the facts “in the apparent belief that if one repeats a factually unsupported claim often enough it will be deemed true...”.

## **SUMMARY OF THE ARGUMENT**

The Thirteenth Court of Appeals committed no error when it waived immunity for the City of Alton on the breach of contract claim. It is unclear why Sharyland presented the arguments it did unless it is attempting to imply that there is some other kind of waiver, one that would exist in a world without §271.151 *et seq.* TEX. GOV’T CODE. There is no other “kind” of waiver. The argument is simple, if §271.152 applies, immunity is waived. That is what the Thirteenth Court of Appeals held, and correctly so.

More importantly, though, because of the vitriolic nature of Sharyland’s Petition for Review which is cast in a hypothetical case which Sharyland may wish it had, because the

facts according to Sharyland, were not a part of the evidence in this case, the City of Alton must address the now, statutorily, incorrect nature of the trial court's ruling. The dispositive issue in this case was whether 30 TAC §317.13 dealing with separation distances for service lines, applied in this case. It is the trial court's ruling on that issue which is the source of Sharyland's invective towards Alton. Several authorities for the TCEQ f/k/a TNRCC testified the separation distances did not apply to the types of lines at issue in this case. The statute, now, 30 TAC §217.1-.33, specifically §217.2(5) explicitly states that. The trial court was wrong in granting a motion for partial summary judgment, which the Court of Appeals characterized as a declaratory judgment. That decision skewed the entire case. The Court of Appeals should have reached that issue, as the one issue would have disposed of the case.

However, since Sharyland's primary argument in its Petition for Review is on the issue of immunity, and the Court of Appeals did not err on that issue, the Petition should be denied.

### **ARGUMENT AND AUTHORITIES**

**Reply Issue No. 1: The Court of Appeals applied the correct law and analysis to the issue of governmental immunity.**

Governmental immunity. The Court of Appeals goes through several analyses regarding whether the City of Alton had immunity from suit on the breach of contract issue. It concludes that immunity was waived under §271.151 *et seq.* TEX. GOV'T CODE. Despite this holding, Sharyland argues that the Court of Appeals erred and misconstrued the law. Sharyland's analysis is not only incorrect (the Court of Appeals did not err in their

interpretation and application of the law) but an exercise in futility when the Court of Appeals held that §271.152 TEX. GOV'T CODE applied and waived immunity. The very purpose of that statute is to waive immunity for the proper types of contracts. Sharyland does not even acknowledge the Court's application of §271.151 *et seq.* which was ultimately the basis for the Court of Appeals' decision. The Thirteenth Court of Appeals correctly applied the law to the facts and analyzed the issues pursuant to the rules that have come down from this Court and many other Courts of Appeal that have had occasion to apply this statute. Their analysis was exactly on point.

In its first issue, Sharyland's discussion of Alton's counterclaim and equitable waiver are irrelevant. Immunity was waived pursuant to §271.152 TEX. GOV'T CODE. Sharyland's argument regarding immunity for its equitable claims demonstrates its misunderstanding of the Court of Appeals' holding. The Court of Appeals applied and followed this Court's holding in *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002) when they stated that immunity is not waived when a claimant seeks specific performance against a state officer, and is not attempting to impose contractual liabilities on the State. The Court of Appeals read through and analyzed the claims articulated by Sharyland. Moreover, Sharyland continues to ignore the "fundamental rule of equity" that equity will not lie unless an adequate remedy at law (i.e. breach of contract case) does **not** exist. *American Housing Res., Inc. v. Slaughter*, 597 S.W.2d 13,15 (Tex. App.-Dallas 1980, writ ref'd n.r.e.) The case that was tried for three weeks and submitted to jury was for breach of

contract, a legal remedy. Having an adequate remedy at law does not mean “winning” an adequate remedy at law.

There was no error in the Court of Appeals analysis and holding on the issue of governmental immunity. What they held is the law in the State of Texas. However, Sharyland seems to argue that there is some other standard which should be applied when the governmental entity is engaging in “illegal conduct”.

**Reply Issue No. 2: The Court of Appeals failed to reach an important issue which would have been dispositive of the case at that time, and according to recent legislation, which upholds the TCEQ f/k/a TNRCC’s testimony, has materially altered the correctness of the trial court’s ruling.**

Illegal conduct. Sharyland’s entire case was predicated on their position that the Defendants violated 30 TAC §317.13 which contained the separation distances certain sewer lines should have from water mains. Their vituperative characterization of Alton’s conduct in their Petition for Review is unconscionable as it not supported by a single fact or piece of evidence.

Although every co-Defendant exhorted the Court of Appeals to reverse the trial court’s finding that 30 TAC §317.13 applied to this case, the Court of Appeals did not reach the issue. That issue would have been dispositive of the case, as a reversal of the trial court’s Order granting partial summary judgment on that issue would have rendered all other issues moot. Under TRAP §47.1 the Court of Appeals should have decided that issue. Under TRAP §53.4 this Court should consider this issue and reverse and render as a matter of law.

As discussed in the Responses filed by Cris Equipment, Inc. and Turner Collie & Braden, Inc. the trial court erred in its finding that §317.13 applied to the facts of this case. Alton hereby adopts and incorporates these arguments herein as if set forth herein verbatim. The agency charged with promulgating and interpreting Rule 317, TCEQ f/k/a TNRCC, said the separation distances did not apply to service lines (7 CR 2436-41, 2534-37, 2539-40, 2602-09). The trial court incorrectly ruled contrary to the TNRCC's interpretation fatally skewing the jury's consideration. See TCB's Appellate Brief pgs. 28-36.

The Court of Appeals correctly noted that 30 TAC §317.13 is now 30 TAC §217.1-.33. The legislature has now codified the very issue that was in dispute in this case, whether the separation distances (or §317.13) applied to these connections. The engineers from the TCEQ f/k/a TNRCC testified that they did not. The Texas legislature has now clarified that issue beyond doubt. The regulation specifically excludes service laterals from its system:

217.2(5) Building lateral - a pipe that conveys raw wastewater and connects the plumbing of a structure to an on-site component or a collection system. **A building lateral is privately owned and is not a part of a wastewater collection system.** (Emphasis added).

This was exactly what the TCEQ f/k/a TNRCC engineers stated. Regardless, instead of giving the Agency interpretation substantial deference, the trial court completely disregarded this testimony when it granted Sharyland's partial summary judgment. This was an error of statutory interpretation. Because it is a matter of statutory construction that may be reviewed *de novo*, *Johnson v. City of Ft. Worth*, 774 S.W.2d 653, 656 (Tex. 1989) and because (under TRAP §47.1) this was an issue that was not raised by the Court of Appeals and would have

been a dispositive issue, this Court should review this issue and dismiss this case.

The Court of Appeals did not err in their Opinion, except by omission, when they did not rule on the statutory issue. As a result, the Court of Appeals found that the granting of the motion for partial summary judgment was equivalent to a declaratory judgment, making it possible to find Alton liable for a portion of Sharyland's attorneys fees. However, as stated above, the Court of Appeals should have considered the statutory issue, and should have found the trial court erred there, too, in ignoring the Agency's interpretation of their own regulatory scheme. The Court of Appeals should have found that 30 TAC § 317.13 did not apply to the facts of this case and as a result, the granting of the motion for partial summary judgment was error, nullifying any liability for attorney fees.

**Response to Petitioner's Issue No. 1: Does the law fail to afford Sharyland Water Supply Corporation a remedy, legal or equitable, against City of Alton for its illegal conduct?**

No. There was no illegal conduct. Other than repeating its alarmist rhetoric, for which there is no basis, Sharyland cannot accept that after convincing the trial court to rule incorrectly it will not walk away with hundreds of thousands of dollars for the impending environmental disaster which would occur only in the fictitious scenario postulated by Sharyland's attorney, because even their witnesses denied it could happen. Sharyland refuses to accept the law. It is not immunity that is protecting Alton from paying for damages that have not occurred, it is the law, specifically §271.151 *et seq.* TEX. GOV'T CODE. (As well as the Court of Appeals finding that there were no damages.)

Curiously, Sharyland does not even address the application of §271.152 TEX. GOV'T CODE, that it should not be applied or was applied incorrectly. The bottom line of Sharyland's argument is that there has got to be some way it can recover all this money, after all it was successful in getting the trial court to rule with it. If the law, §271.151 *et seq.*, is correct, and they cannot get any money there, then the immunity argument may work, *something* has to work. They will even try guilt.

**Response to Petitioner's Issue No 2: Do the Court of Appeals rulings on Alton's immunity from suit and liability contradict previous decisions of other Courts?**

Of course. Especially, if those cases are prior to and contrary to this Court's more recent decisions. It would be impossible for this Court to specifically cite every case in every jurisdiction that is potentially overturned by a more recent decision. That is why attorneys are charged with "lawyering", keeping up to date with the cases they cite and, in fact, Sharyland's attorney, who argued *Engelman Irrigation District v. Shields Bros., Inc.*, 960 S.W. 2d 343 (Tex. App. -Corpus Christi 1997), should have seen it negatively cited in *Tooke v. City of Mexia*, 197 S.W. 3d 325 (Tex. 2006). Moreover, since *Tooke*, §271.151 *et seq.* TEX. GOV'T CODE has taken the place of case law to waive immunity in contract cases involving governmental entities. Hence, Sharyland's Issue No. 2 is not clear when the Court of Appeals found immunity was waived and applied the proper statute in a breach of contract case. Since its passing, this statute waives immunity for certain types of contracts and a discussion of *Tooke* and *Reata* is inapposite.

The other issues in Sharyland's Petition for Review were directed to the other co-Appellees/Defendants and will not be discussed.

### **CONCLUSION AND PRAYER**

Other than sidestepping the statutory issue of the application of §317.13, the Opinion of the Thirteenth Court of Appeals was correct. However, because of the omission, a motion for partial summary judgment was held to be a declaratory judgment on which the Petitioner "prevailed" and the Court of Appeals found the City of Alton to be responsible for Sharyland's attorneys fees attributable to that motion. (Sharyland did not even attempt to segregate its fees.) Thus, to the extent the trial court's ruling on this issue was clearly wrong, and the Court of Appeals failure to correct this error could result in a misapplication of the interpretation of that statute (although it is no longer on the books, there may be cases that still may apply it) it should be corrected under a *de novo* review.

However, because Sharyland's request in its Petition for Review is for a review of the Court of Appeals correctly decided Opinion on the issue of immunity, the City of Alton prays that this Court deny Sharyland's Petition for Review.

WHEREFORE, PREMISES CONSIDERED, the City of Alton prays that this Court deny Sharyland's Petition for Review and grant the City of Alton all other relief to which they may be entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 11<sup>th</sup> day of June, 2009, a true and correct copy of the above and foregoing instrument has been forwarded to counsel of record as noted hereunder:

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