

NO. 09-0223

IN THE SUPREME COURT OF TEXAS

SHARYLAND WATER SUPPLY CORPORATION

Petitioner

vs.

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

Respondents

PETITIONER'S BRIEF ON THE MERITS

J. W. Dyer
State Bar No. 06316020

Sharon Almaguer
State Bar No. 01108100
Dyer & Associates
1352 West Pecan Boulevard
McAllen, Texas 78501
Telephone: (956) 686-6606
Facsimile: (956) 686-6601

**ATTORNEYS FOR SHARYLAND WATER
SUPPLY CORPORATION**

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. 55.2(a), Petitioner certifies that the following is a complete list of all parties to this litigation and the names and addresses of all counsel.

<u>Party</u>	<u>Appellate Counsel</u>	<u>Trial Counsel</u>
Sharyland Water Supply Corporation (“ <i>Sharyland</i> ”)	J. W. Dyer Sharon Almaguer Dyer & Associates 1352 West Pecan Boulevard McAllen, Texas 78501	J. W. Dyer Sharon Almaguer Dyer & Associates 1352 West Pecan Boulevard McAllen, Texas 78501
City of Alton, Texas (“ <i>Alton</i> ”)	Eileen M. Leeds Willette & Guerra, L.L.P. 1534 E. 6th Street, Suite 200 Brownsville, Texas 78520	Eileen M. Leeds Willette & Guerra, L.L.P. 1534 E. 6th Street, Suite 200 Brownsville, Texas 78520
Carter & Burgess, Inc. (“ <i>C&B</i> ”)	Stephen L. Tatum Cantey & Hanger, L.L.P. 600 W. 6 th Street, Ste. 300 Fort Worth, Texas 76102-3685 Jeffrey D. Roerig Roerig, Oliveira & Fisher, LLP 855 W. Price Road, Suite 9 Brownsville, Texas 78520	Tolbert L. Greenwood Cantey & Hanger, L.L.P. 600 W. 6 th Street, Ste. 300 Fort Worth, Texas 76102-3685 Jeffrey D. Roerig Roerig, Oliveira & Fisher, LLP 855 W. Price Road, Suite 9 Brownsville, Texas 78520
Turner, Collie & Braden, Inc. (“ <i>TCB</i> ”)	John B. Wallace Barker, Lyman, P.C. 3600 One Houston Center 1221 McKinney Street Houston, Texas 77010-2009	Marcus Montalvo Montalvo & Ramirez 900 N. Main McAllen, Texas 78501

Cris Equipment Company, Inc. ("Cris")	Christopher Funk Walker & Twenhafel P.O. Drawer 3766 McAllen, Texas 78502-3766	Walter J. Passmore The Passmore Law Firm P.O. Drawer 3187 McAllen, Texas 78502
--	---	---

TABLE OF CONTENTS

	<u>Page:</u>
IDENTITY OF PARTIES AND COUNSEL	ii
TABLE OF CONTENTS	iv
INDEX OF AUTHORITIES	vi
REFERENCES IN THIS BRIEF	ix
STATEMENT OF THE CASE	x
STATEMENT OF JURISDICTION	xii
ISSUES PRESENTED	xiii
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENTS	8
ARGUMENTS	9
Issue 1. Does the law fail to afford Sharyland Water Supply Corporation a remedy, legal or equitable, against City of Alton for its illegal conduct?	9
Issue 2. Do the Court of Appeals' rulings on City of Alton's immunity from suit and liability contradict previous decisions of other courts?	19
Issue 3. Does the Economic Loss Rule bar Sharyland Water Supply Corporation's negligence claim?	21
Issue 4: Does Tex. Loc. Gov't Code Section 271.153 bar Sharyland Water Supply Corporation from recovery of damages?	26

Issue 5:	Was the evidence legally sufficient to establish that Sharyland Water Supply Corporation was a third-party beneficiary of the Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company contracts?	27
Issue 6:	Did the Court of Appeals err in ruling that Sharyland Water Supply Corporation cannot recover attorney’s fees against City of Alton except for certain fees attributable to the Declaratory Judgment Action?	33
Issue 7:	Did the Court of Appeals err in overturning the award against Respondents jointly and severally?	33
Issue 8:	Did the Court of Appeals err in overturning the award of attorney’s fees against Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company?	34
Issue 9:	Did the Court of Appeals err in upholding the trial court’s denial of Sharyland Water Supply Corporation’s request for injunctive relief and specific performance? . . .	34
CONCLUSION		44
CERTIFICATE OF SERVICE		46
APPENDIX		47

INDEX OF AUTHORITIES

Page:

CASES

<i>Boatland of Houston, Inc. v. Bailey</i> , 609 S.W.2d 743 (Tex. 1980)	32
<i>C. & R. Transp., Inc. v. Campbell</i> , 406 S.W.2d 191 (Tex. 1966)	32
<i>Carnes v. Meador</i> , 533 S.W.2d 365 (Tex. Civ. App. -Dallas 1976)	30
<i>City of Beaumont v. Bouillion</i> , 896 S.W.2d 143 (Tex. 1995)	13
<i>Cobb v. Harrington</i> , 190 S.W.2d 709 (Tex. 1945)	14
<i>Director of Depart. of Agriculture and Environment v. Printing Industries Ass'n.</i> , 600 S.W.2d 264 (Tex.1980).	14
<i>Dittmar v. City of New Braunfels</i> , 48 S.W. 1114 (Tex. Civ. App. 1899, no writ)	40
<i>Downer v. Aquamarine Operators, Inc.</i> , 701 S.W.2d 238 (Tex. 1985)	40
<i>Elabor v. Smith</i> , 845 S.W.2d 240 (Tex. 1992).	18
<i>El Paso County Water Improvement Dist. No. 1 v. Grijalva</i> , 783 S.W.2d 736 (Tex. App. -El Paso 1990, writ denied per curiam, 795 S.W.2d 705 (Tex. 1990).	20
<i>Engelman Irrigation District v. Shields</i> , 2008 W.L. 1974344 (Tex. App. -Corpus Christi 2008).	19
<i>Engelman Irr. Dist. v. Shields Bros., Inc.</i> , 960 S.W.2d 343 (Tex. App. - Corpus Christi 1997).	19
<i>Federal Sign v. Texas Southern Univ.</i> , 951 S.W.2d 401 (Tex. 1997)	13, 18
<i>Fleet v. Fleet</i> , 711 S.W.2d 1 (Tex. 1986)	32
<i>H. E. Butt Grocery Co. v. Johnson</i> , 226 S.W.2d 501 (Tex. Civ. App. - San Antonio 1949, writ ref'd n.r.e.)	32

<i>Knebel v. Capital Nat'l Bank</i> , 518 S.W.2d 795 (Tex. 1974)	33
<i>MCI Telecommunications Corp. v. Texas Utilities Elec. Co.</i> , 995 S.W.2d 647 (Tex. 1999)	29, 30
<i>Nueces Cty. v. Ferguson</i> , 97 S.W.3d 205 (Tex. App. -Corpus Christi 2002, no pet.)	13
<i>Operation Rescue - Nat'l v. Planned Parenthood of Houston and S. E. Tex., Inc.</i> , 975 S.W.2d 546 (Tex. 1998)	39
<i>Powers v. Standard Accident Ins. Co.</i> , 144 Tex. 415, 191 S.W.2d 7 (Tex. 1945)	32
<i>Reata Construction Corp. v. City of Dallas</i> , 197 S.W.3d 371 (Tex. 2006) ...	11
<i>Rodriguez v. U. S. Security Associates, Inc.</i> , 162 S.W.3d 868 (Tex. App. -Houston 14 th Dist 2005)	29
<i>Steele v. City of Houston</i> , 603 S.W.2d 786 (Tex. 1980)	13
<i>Texas & New Orleans R.R. Co. v. McGinnis</i> , 130 Tex. 338, 109 S.W.2d 160 (Tex. 1937)	32
<i>Texas Employers Ins. Ass'n v. McKay</i> , 146 Tex. 569, 210 S.W.2d 147 (Tex. 1948)	32
<i>Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc.</i> , 372 S.W.2d 525 (Tex. 1963)	14
<i>Tex. Natural Res. Conservation Comm'n v. IT-Davy</i> , 74 S.W.3d 849 (Tex. 2002)	16
<i>Tooke v. City of Mexia</i> , 197 S.W.3d 325 (Tex. 2006)	16, 20

STATUTES, RULES AND CODES

22 Tex. Admin. Code § 131 (West 2009)	7
22 Tex. Admin. Code § 137.55 (West 2009)	7

30 Tex. Admin. Code § 290.44(e) (West 2009) 4, 21, 26

30 Tex. Admin. Code § 317.13(1)(B)
now 30 Tex. Admin. Code 217.53(d)(3)(B)(iii)
(West 2009) x, 1, 3, 7, 12, 17, 22, 28, 35, 36

Tex. Civ. Prac. & Rem. Code § 38.001 (West 2009) 34

Tex. Govt. Code § 22.001(a)(2)(6) (West 2009) xii

Tex. Loc. Gov't Code § 271.153(a) (West 2009) 12, 14, 26, 27

Tex. Loc. Gov't Code § 271.151-160 (West 2009) 14

REFERENCES IN THIS BRIEF

Record References:

References to the Clerk's Record are denoted as "CR _____", which refers to the page number of the record.

Reference to the Supplemental Clerk's Record are denoted as "SCR _____", which refers to the page number of the record.

References to the Reporter's Record are denoted as "____ RR _____", which refers to the volume and page number of the record.

Reference to the Supplemental Reporter's Record are denoted as "SRR _____", which refers to the volume and page number of the record.

Exhibits to the Reporter's Record are denoted as Exhibit "____", which refers to the number of the exhibit.

Appendix References:

References to Petitioner's Appendix are denoted as ("Petitioner's Appendix Tab _____") which refers to the tab number of the Appendix.

STATEMENT OF THE CASE

Nature of the Case: Injunction, Breach of Contract and Negligence case arising from Respondents' installation of a sewer system leaking raw sewage, and in violation of industry, engineering and common law standards of care, including 30 Tex. Admin. Code § 317.13, now 30 Tex. Admin. Code 217.53(d)(3)(B)(iii) (West 2009), resulting in damage to Petitioner's potable water supply system and an ongoing contamination/public health hazard.

Trial Judge: Hon. Rose Guerra Reyna.

Trial Court: 206th Judicial District Court of Hidalgo County, Texas.

Disposition by Trial Court: Judgment in favor of Petitioner, Sharyland Water Supply Corporation, against all Respondents, awarding damages and attorney's fees to Petitioner, Sharyland Water Supply Corporation, but denying Petitioner's claims for injunctive relief and specific performance. (Petitioner's Appendix Tab A, Tab B).

Parties in Court of Appeals: Sharyland Water Supply Corporation, City of Alton, Texas, Turner, Collie & Braden, Inc., Carter & Burgess, Inc. and Cris Equipment Company.

District of Court of Appeals: Thirteenth District, Corpus Christi, Texas.

Justices Who Participated in the Decision: Justices Yanez, Rodriguez and Garza.

Author of the Opinion Hon. Nelda V. Rodriguez

Citation: *City of Alton v. Sharyland Water Supply Corporation*, 277 S.W.3d 132, Tex. App. -Corpus Christi, February 5, 2009 (No. 13-06-00038-CV).

*Disposition of Case by
Court of Appeals:*

The Court of Appeals overturned the trial court's judgment on damages and attorney's fees, and ruled that Petitioner has no recoverable remedy against Alton, TCB, Cris and C&B, thus leaving the leaking and illegal sewage system in place with no recourse by Petitioner. The Court of Appeals remanded the issue of attorney's fees on Petitioner's declaratory judgment claim. The Court of Appeals upheld the denial of Petitioner's request for injunctive relief and specific performance. (Petitioner's Appendix Tab C).

STATEMENT OF JURISDICTION

This Court has jurisdiction under TEX. GOV'T. CODE § 22.001(a)(2) and (6) (West 2009).

Importance. The Court of Appeals committed an error of law of such importance to the State's jurisprudence that it should be corrected. Clear guidance from this Court regarding the remedies available against municipalities to enforce state regulations and contractual obligations designed to protect drinking water supplies is necessary to preserve the purpose of such contracts, enforce legislatively enacted public safety regulations, and to protect the public from physical harm.

Conflicts. The Court of Appeals' analysis of governmental immunity and liability issues in this case conflicts with previous decisions of this Court and the Court of Appeals' sister courts allowing suits and recovery against bodies politic under circumstances where there is illegal conduct.

ISSUES PRESENTED

1. Does the law fail to afford Sharyland Water Supply Corporation a remedy, legal or equitable, against City of Alton for its illegal conduct?
2. Do the Court of Appeals' rulings on City of Alton's immunity from suit and liability contradict previous decisions of other courts?
3. Does the Economic Loss Rule bar Sharyland Water Supply Corporation's negligence claim?
4. Does Tex. Loc. Gov't Code Section 271.153 bar Sharyland Water Supply Corporation from recovery of damages?
5. Was the evidence legally sufficient to establish that Sharyland Water Supply Corporation was a third-party beneficiary of the Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company contracts?
6. Did the Court of Appeals err in ruling that Sharyland Water Supply Corporation cannot recover attorney's fees against City of Alton except for certain fees attributable to the Declaratory Judgment Action?
7. Did the Court of Appeals err in overturning the award against Respondents, jointly and severally?
8. Did the Court of Appeals err in overturning the award of attorney's fees against Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company?
9. Did the Court of Appeals err in upholding the trial court's denial of Sharyland Water Supply Corporation's request for injunctive relief and specific performance?

STATEMENT OF FACTS

The opinion of the Court of Appeals is generally correct as to the pertinent facts stated. However, the opinion omits certain facts relied on by Petitioner in briefing to the Court and misstates the successor statute to 30 Tex. Admin. Code § 317.13 as being 30 Tex. Admin. Code § 217.1-33 when the successor statute is 30 Tex. Admin. Code 217.53(d)(3)(B)(iii) (West 2009).

The most important facts of this case are neither complicated nor in dispute. The City of Alton (“*Alton*”), and its contractors, Respondents Carter & Burgess, Inc. (“*C&B*”), Turner, Collie & Braden, Inc. (“*TCB*”) and Cris Equipment Company (“*Cris*”), built a sewer system in the same easements used by Sharyland Water Supply Corporation (“*Sharyland*” or “*Petitioner*”) for its potable waterlines. The sewer system was constructed in violation of 30 Tex. Admin. Code § 317.13, now 30 Tex. Admin. Code 217.53(d)(3)(B)(iii), without any regard for maintaining statutorily mandated minimum separation distances where the sewer lines cross the waterlines. Sewer lines were laid directly on top of Sharyland’s existing waterlines. There was no attempt made to center the sewer lines over the waterline joints and, instead, sewer line couplings were installed directly over waterline couplings, with no attempt to encase the sewer pipe. Exhibit “1”; 7 RR 254-257.

Alton, with full knowledge that the sewer system was illegally constructed, allowed continued construction of the system, presently maintains the system in such illegal state, and inexplicably released the Respondents, C&B, TCB and Cris

from liability in connection with the illegal construction by not pursuing claims against them to judgment. 4 RR 25-27, 47-57, 68-69, 103-104, 206; 5 RR 176-178; 6 RR 262-265; Exhibit "1"; CR 2178; 4 RR 30-36; CR 76. The existence of the illegal sewer system on top of and in proximity to Sharyland's potable water lines presents a dangerous and intolerable condition for which the law must afford a legal or equitable remedy. This Court is being asked to review this case to determine if the law of this state mandates the unabated continuance of this hazard without the availability of any remedy against Alton or the other Respondents.

Alton contracted with C&B, TCB and Cris to construct the sewer system according to plans for the sewer project which were approved by the Texas Water Development Board and prepared in consultation with Sharyland. Exhibit "90"; 4 RR 16-19. Respondent Cris was the general contractor on the sewer project. Defendant C&B was the overseeing project engineer and TCB was site engineer/inspector. Exhibit "2"; 5 RR 103-108; Exhibit "2"; 8 RR 104-109; Exhibit "2"; 7 RR 241-257. The jury found Sharyland to be a third-party beneficiary of the contracts between Alton and the Respondents.

The plans mandated that the sewer lines be installed as specified in the regulatory standard. Exhibit "90"; 3 RR 128. 5 RR 34-71, 149-178; 6 RR 262-294; 8 RR 34-40; Exhibits "1", "2", "10", "37", "65", "69", "90", "101", "109"; 5 RR 104-116. State regulations require that any Alton sewer lines maintain minimum separation distances and other safeguards intended to protect waterlines from

sewage contamination. 30 Tex. Admin. Code § 317.13(1)(B), now 30 Tex. Admin. Code 217.53(d)(3)(B)(iii) (West 2009). 4 RR 9-16; Exhibit “104”. The statute requires:

Where a sanitary sewer crosses a waterline and the sewer is constructed of cast iron, ductile iron, or PVC with a minimum pressure rating of 150 psi, an absolute minimum distance of six inches between 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.

30 TAC §317.13(1)(B) (West 2006). The reasons for the regulation are to protect the waterpipes from sewage contamination. 4 RR 9-16; 5 RR 134-136; Exhibit “104.”

These regulations are also consistent with sound engineering practices and the common law standard of care. Even though Respondents had no discretion regarding the installation of Alton’s sewer lines in any manner which deviated from the regulatory standard, Respondents did not even feign attempts to comply with the law. 4 RR 9-16; 5 RR 134-136; Exhibit “104”; Exhibit “1”; 3 RR 99-102; 4 RR 41-56, 63-64, 103-104, 260; 7 RR 254-257. Instead, Respondents improperly installed Alton’s sewer lines, in clear violation of 30 Tex. Admin. Code § 317.13, without any regard for maintaining the statutorily mandated minimum separation distances where the sewer lines cross the waterlines. The only criteria Cris used to install the lines was to determine that the sewer lines were laid with three (3) feet

of cover. 7 RR 254-257. The sewer lines were installed over the waterlines, not out of necessity, but solely for Cris' convenience. 7 RR 254-257.

Respondents TCB and C&B, the engineers entrusted to protect the public from harm, participated in the illegal installation by failing to require that the terms of the statute were followed. 3 RR 99-102; 4 RR 41-56, 63-64; 7 RR 254-257; Exhibit "1." Thus, by their placement and installation of the sewer lines, whenever someone flushes a toilet in Alton, the raw sewage is drawn down through the leaking sewer lines and transported directly above and onto Sharyland's waterlines, presenting an untenable and continuing contamination hazard to the public's drinking water supply. Exhibit "1."

The configuration and manner of installing Alton's sewer system causes Sharyland's potable water system to be in violation of state law, as Sharyland is also required by law to maintain its waterlines consistent with the statutory safeguards mandated by 30 Tex. Admin. Code § 290.44(e) (West 2009). Prior to the illegal installation by Alton and the other Respondents, Sharyland's system complied with the law. Now, and as a result of the Respondents' conduct, Sharyland's pipes are in violation of Texas law as they are not laid in accordance with the statutory requirements. 30 Tex. Admin. Code § 290.44(e). Neither Sharyland nor its members bear any culpability for this harm, and Sharyland is entitled to recover damages or an equitable remedy to once again bring its system into compliance with the law. 30 Tex. Admin. Code § 290.44(e) (West 2009).

The Respondents were directly notified of the violations during construction after Sharyland 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. 4 RR 25-27, 47-56, 68-69; 5 RR 176-178; 6 RR 262-265; Exhibit "1". When the improper installation and leakage issue was initially brought to Alton's attention, Alton agreed there was a problem and demanded that the contractor, Cris, correct the problem. When Cris demanded more money to do so, Alton reversed its position. CR 2178; 4 RR 30-36. Thus, Alton and the other Respondents intentionally decided to leave the sewer lines as constructed, to continue with the flawed style of construction, and to not correct the sewer lines to conform with the terms of Alton's contracts with Sharyland, with state law, or with industry, engineering and common law standards of care. 4 RR 56-57, 103-104, 260.

The existence of this sewer system in continuous violation of state law poses a public health danger to the tens of thousands of Sharyland's members and to all of Alton's citizens who drink potable water provided through the system. Sharyland experiences one hundred to one hundred fifty (100-150) breaks in its lines during a normal year, many of which remain undetected for a period of time. 4 RR 57-60. Prior to Sharyland's discovery of a leak, it is probable that sewage from the surrounding area will enter and contaminate the system before Sharyland can

repair the leak and disinfect the line. 5 RR 39-41, 65-71, 194-195; 4 RR 57-60.

The monetary damages awarded by the jury are not an adequate remedy to prevent the ongoing hazard that these sewer lines pose to Sharyland's water system. 4 RR 106-108; 2 SRR 42-45. Sharyland's damages include the cost to move the waterlines under the Alton sewer lines. 5 RR 195-197, 205-210; Exhibit "115"; Exhibit "116". Relocating the water lines will necessitate shutting off water service to many of Sharyland's members/customers while the work is being done, which could be for an extended period of time. This would disrupt essential water service. If the waterline must be moved, the line will be severed which increases the risk of contaminating the line and the consequential risk to water users by such contamination. 2 SRR 42-45; 5 RR 62-66.

However, if Alton is required, by the equitable remedies of a permanent injunction and specific performance, to relocate its sewer line as Sharyland requests, there is a much lower risk of contaminating the waterline, and the remedial work will only require disruption of sewer service to one customer at a time and only for a short period of time. There is reduced risk of contaminating a waterline under these circumstances. The cost of requiring Alton to move the sewer line crossings is less than the damages required to move the waterline as awarded by the jury to Sharyland. 2 SRR 42-45; 5 RR 62-66, 134.

Sharyland's request for equitable relief, to require that Alton bring its sewer lines into compliance with state law, is necessary to remediate the hazard. These

sewer lines belong to Alton and unless a court orders Alton to fix them, Sharyland has no right to do so. Such court order and relief also has the added benefit of greatly reducing the remedial cost, reducing the risk of contamination, and limiting the disruption of the public's sewer and water service. 2 SRR 42-45; 5 RR 62-66, 134.

At the onset of this litigation, Alton filed third-party claims against Cris, TCB and C&B, the parties who actually participated in the wrongful installation of the sewer lines despite their contractual obligations and common law duties otherwise. CR 76. These duties, including the heightened duty which engineers like TCB and C&B owe the general public as a condition of their license, were to insure that the sewer lines were installed in compliance with the statute. Texas Engineering Practice Act and Rule 22 Tex. Admin. Code Chapter 131 and 137 (West 2009); 30 Tex. Admin. Code § 317.13; CR 76; 3 RR 99-102; 4 RR 41-56, 63-64; 7 RR 254-257; Exhibit "1"; 7 RR 254-257.

Incredibly, Alton made the decision to drop its third-party claims, thus relieving Cris, TCB and C&B of any responsibility to remedy the problem on behalf of Alton and its citizens. Alton took this action with complete knowledge of the circumstances of the installation and its non-compliance with Texas law. A crucial issue to be decided by this Court is whether courts of this state will allow a municipality to hide behind the shield of governmental immunity when the municipality has intentionally refused to comply with public safety statutes designed

to protect the public's health, safety and welfare, and when the municipality has intentionally acted to absolve and release those most responsible for the breach of those statutes, thus allowing the illegal, unsafe and hazardous condition to persist to the detriment of the public.

SUMMARY OF THE ARGUMENT

Despite acknowledging that the sewer lines installed by Alton and the other Respondents violate the law, all principles of sanitation, and the contracts between Alton and Sharyland, the Court of Appeals essentially ordered the continuance of this public health hazard and deprived Sharyland, who is not culpable in any way, of any remedy. The Court of Appeals relies on the doctrine of governmental immunity to postulate that a municipality, like Alton, is excused from specifically performing under its contracts despite its enjoyment of the benefit of the contract. The Court of Appeals incorrectly substituted its judgment for the Judgment of the jury and the trial court to deprive Sharyland of any remedy against the Respondents, Alton, Cris, TCB and C&B, who installed the sewer system in clear violation of the law.

Sharyland is asking this Court to determine whether Alton and the other Respondents are permitted to violate, with impunity, Texas law intended to protect the integrity of the public's drinking water and mandating the installation of sewer lines in a manner consistent with sound engineering and safety principles. As set forth herein, Sharyland maintains that the Court of Appeals' rulings are in error and

that Texas law does not sanction Respondents' conduct nor fail to provide a remedy, legal or equitable, to Sharyland. The existence of Alton's illegal sewer installation poses a significant health hazard to the citizens of Alton and other customers who rely on Sharyland for their potable water. The law and the public policy of this state should not and does not tolerate the maintenance of this hazardous condition. This is a state and nation of laws. A city cannot be allowed to flagrantly act in violation of the law, especially laws specifically enacted by the legislature to protect public health and safety. A policy of enforcing public safety statutes on equal, if not greater, terms as adhering to other legal principles, such as governmental immunity, is warranted in this case and in similar cases where municipalities like Alton have so clearly acted in violation of, and with complete disregard for, the law to the detriment of their citizens. The passage of time and deterioration of the Alton sewer system only increases the hazard of allowing this illegal condition to persist.

ARGUMENTS

Issue 1. Does the law fail to afford Sharyland Water Supply Corporation a remedy, legal or equitable, against City of Alton for its illegal conduct?

The Court of Appeals' ruling on governmental immunity denies Sharyland any remedy for Alton's wrongful conduct and is error. No law or case exempts Alton or other governmental entities from the Legislature's mandated safeguards for the

installation of sewer lines or from judicial accountability for intentional defiance of state law and dereliction of duties to citizens. This situation is unlike any other reported decision in terms of the extreme harm posed to thousands by Alton's malfeasance and misconduct. Such misconduct should not be sanctioned by this Court and the unabated existence of this hazard is simply not tenable under our jurisprudence of law and equity. The Court of Appeals' decision should be reversed because governmental immunity is not, and should not be, applicable under the facts of this case and Sharyland should either be able to recover its property damages or obtain an equitable remedy to require Alton to bring the sewer system into compliance with state law. Sharyland urges the Court to consider the following arguments and reverse the Court of Appeals' decision denying Sharyland a remedy on the basis of governmental immunity.

A. *Counterclaim Waived Immunity.* Sharyland urges the Court to reverse the Court of Appeals' ruling that Alton did not waive immunity when it filed its counterclaim. The Appellate Court's analysis of Alton's counterclaim as merely seeking to void the parties' agreement is inaccurate. The counterclaim sought affirmative relief, and specifically demanded that Sharyland be divested of its property by requesting that the trial court rescind Sharyland's easements and award a portion of the Sharyland water supply system to Alton. CR 138, 3281.

By suing and affirmatively seeking that Sharyland be divested of high-value property and requesting attorney's fees, Alton did, in fact, assert an affirmative

claim for damages as described in the *Reata* case. *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371, 376-77 (Tex. 2006). Had the trial court granted the relief Alton requested and seized Sharyland's water system and easements, the Court of Appeals' ruling would lead to the conclusion that Sharyland would have suffered no damages as a result of the taking of its property. Such a conclusion is illogical and wrong. The Court of Appeals' analysis of the immunity issue draws an arbitrary and false distinction between a governmental entity seeking money and Alton's affirmative claim requesting an award of Sharyland's valuable assets. The legal maxim now established by the Court of Appeals is that waiver of immunity only occurs if the remedy sought by the governmental entity is expressed *solely* in dollars and cents. By its conduct in seeking that it be awarded Sharyland's property and seeking attorney's fees, Alton clearly waived immunity and is liable for Sharyland's damages.

Moreover, the *Reata* case holds that a governmental entity does not have immunity from claims germane to, connected with, and properly defensive to the governmental entity's own claims to the extent the other party's claims act as an offset against the governmental entity's recovery. *Reata*, 197 S.W.3d at 377. Clearly, Sharyland's claims for breach of contract, declaratory judgment and equitable relief seeking to uphold the validity of, and to enforce its agreements with Alton, are germane to, connected with and properly defensive to Alton's counterclaim. Under the ruling in *Reata*, Alton clearly waived immunity as to all of

Sharyland's claims. The Court of Appeals' ruling to the contrary is error, clearly contradicts the ruling in *Reata* and should be overturned.

B. Governmental Immunity Does Not Bar Sharyland's Equitable Claims.

The Court of Appeals' ruling barring Sharyland from the recovery of any equitable relief under the extraordinary circumstances of this case is plainly error. The Court of Appeals incorrectly ruled that Tex. Loc. Gov't Code § 271.153(a) provides an adequate remedy barring equitable relief, while also ruling that the statute affords Sharyland no relief at all. A basis of the Court of Appeals' erroneous decision is its mis-characterization of Sharyland's claims for specific performance and injunctive relief as claims solely to enforce performance under a contract. The Court of Appeals has incorrectly decided all aspects of this issue. The Court of Appeals also erroneously rules that the requested equitable and declaratory judgment relief is simply another claim for money and thus, is barred by immunity.

First, the Court of Appeals' ruling disregards the fact that, apart from the terms of the contract, Alton has a legal obligation to install and maintain its sewer lines as required by Texas law. Alton has no immunity from that obligation. 30 Tex. Admin. Code § 317.13, now 30 Tex. Admin. Code § 217.53. The record is clear that Alton had no discretion, either by contract or by law, over the manner in which its sewer lines were to be installed. Exhibit "39"; Exhibit "2"; 30 Tex. Admin. Code § 317.13. The terms of the requested judgment ordering injunctive and specific performance relief represented the terms of the statute, and required that the sewer

pipes be installed as the Legislature mandated. CR 3751-3803. It is error for the Court of Appeals to disregard these mandated statutory safeguards under any theory of governmental immunity when it is undisputed that Alton has violated the statute and continues to engage in unauthorized and illegal conduct, thereby endangering its citizens' potable water supply and risking the health and safety of thousands.

Similarly, Sharyland's declaratory judgment action seeks clarification of Sharyland's rights under the subject statutes relating to installation of the sewer lines as well as injunctive relief and specific performance of Sharyland's contracts with Alton which require Alton to comply with state law. CR 3335; Exhibit "37"; Exhibit "55." Nowhere in its pleadings does Sharyland allege that it is seeking damages in connection with its declaratory judgment or equitable relief claims and there is no basis to conclude that these claims constitute a suit for money damages.

Sovereign immunity does not bar due course of law claims or bill of rights claims under Texas law. See, e.g., *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995); *Nueces Cty. v. Ferguson*, 97 S.W.3d 205, 221 n.23 (Tex. App. -Corpus Christi 2002, no pet.). Further, sovereign immunity does not bar a suit that alleges a violation of a self-enacting state constitutional provision. *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980). Moreover, "[a] private litigant does not need legislative permission to sue the State for a violation of state law." *Fed. Sign*

v. Tex. S. Univ., 951 S.W.2d 401, 404 (Tex. 1997) (citing *Dir. Of the Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W.2d 264, 265-66 (Tex. 1980) (holding legislative consent not required for suit for injunctive relief against state agency to halt unauthorized printing activities); *Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc.*, 372 S.W.2d 525, 530 (Tex. 1963) (holding legislative consent not required for declaratory judgment suit against Highway Commission to determine the parties' rights); *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709, 712 (Tex. 1945) (holding legislative consent not required for declaratory judgment suit against State Comptroller to determine parties' rights under tax statute). Thus, a party can maintain a suit to determine its rights under law without legislative permission. *Id.* The acts of Alton in failing to correct the improper sewer installations are unlawful and unauthorized. From the inception of this case, all Sharyland has ever sought from Alton is Alton's compliance with state law in the installation and maintenance of the sewer lines. The Court of Appeals errs in characterizing Sharyland's claim for equitable relief as a claim for money and in barring those claims under governmental immunity.

Additionally, the Court of Appeals further erred in ruling that Sharyland has an adequate remedy in a breach of contract action under Texas Local Gov't Code § 271.151-160 which precludes a claim for equitable relief. The Court of Appeals cannot properly reach that conclusion when the Court of Appeals has also ruled that Sharyland could not recover any damages under Tex. Loc. Gov't Code §

271.153(a). It is completely illogical to hold that a remedy which the Court of Appeals construes to afford no relief at all is also an adequate remedy.

Under these circumstances, where the Court of Appeals has foreclosed any possibility that Sharyland can recover damages to bring its water system back into compliance with Texas law, the only adequate remedy left would be an order by the Court in equity. Sharyland's fight with Alton has never been about money. All along Sharyland has repeatedly requested that Alton install the sewer system consistent with its contractual agreements and the law. Sharyland has sought equitable relief to require Alton to install the system correctly and under the circumstances of this case, where Alton has intentionally violated the law to the detriment of its citizens, equitable relief is entirely appropriate.

It is undisputed that Sharyland brought the problem to Alton's attention during construction of the sewer system and that initially Alton agreed there was a problem and demanded that its contractors, Respondents Cris, C&B and TCB, fix the problem. 4 RR 20-36. However, since that time, and after Cris demanded more money, Alton has reversed course and has decided to leave the sewer lines as constructed in continual violation of state law. Exhibit "1"; 4 RR 30-36. Alton has also intentionally released the other Respondents from any liability for their wrongful conduct. Even when Sharyland located state funding available to Alton so that Alton could fix the problems, Alton refused despite the public health danger that the existence of the system poses as installed. SCR 39; Petitioner's Appendix Tab E.

Money is only at issue because Alton has abrogated its responsibilities to safeguard its citizens, and the Court of Appeals' rulings regarding governmental immunity have only further insulated Alton from those responsibilities. In the absence of the availability of an equitable remedy against Alton, Sharyland is entitled to recover damages necessary to repair its system and restore its system's compliance with state law. The Court of Appeals' ruling, immunizing Alton from any responsibility to Sharyland and the thousands who remain exposed to this constant and ongoing contamination hazard, is error requiring this Court's action.

C. *Equitable Waiver of Immunity Appropriate.* Sharyland is cognizant that, while the Supreme Court has implied that a circumstance resulting in the equitable waiver of immunity exists, it has never articulated a circumstance where an equitable waiver of immunity might be appropriate. However, this Court has not foreclosed the existence of such a waiver. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002). *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006). Sharyland believes that if ever there were an appropriate case to utilize the doctrine, this is the case, given the extent of Alton's misconduct and abuse of its power to the detriment of its citizens.

The peaceful co-existence of waterlines in proximity to sewer lines is only possible because the placement and installation of sewer lines, from the house to the sewer plant, is highly regulated and those regulations are generally observed and enforced. Individual residence yardlines, which run from the house to the

publicly owned sewer service lines (stubouts), are governed by local building and plumbing codes and local enforcement officials. The remainder of the sewer line system, from stubout to the sewer plant, is governed by 30 TAC § 317.13 (now 30 TAC § 217.53(d)(3)(B)) which regulates the installation of sewer lines in proximity to waterlines. These regulations are comprehensive because to allow any gap in regulatory authority would frustrate the purpose of the statutory scheme, which purpose is to prevent contamination of potable water by sewage.

Equitable waiver is entirely appropriate in this case because Alton's conduct in this matter is particularly outrageous and reprehensible. It is undisputed and consistent with the jury's verdict, that Alton allowed the system to be illegally installed even after the illegality was brought to Alton's attention during construction. Alton's continued actions of maintaining the sewer system in an illegal and dangerous configuration plays Russian Roulette with the health and safety of thousands who rely on Sharyland's system for potable water. It is within the Court's equitable powers to mandate Alton's compliance with the law and its contracts. This action is justified to safeguard Sharyland and the public from harm caused by Alton's ongoing illegal conduct of maintaining its leaking sewer pipes in place. Sharyland respectfully asks: does the Court intend to allow Alton to continue to breach and flagrantly disregard these validly implemented public safety laws with impunity? Alton's conduct is clearly egregious and dangerous. This is conduct which cries out for a remedy, either in the form of an equitable remedy against Alton

to require Alton to bring the sewer system into compliance or in the form of damages awarded to Sharyland to allow Sharyland to repair the damages to its system and restore its system's compliance with state law.

It is entirely appropriate for this Court to recognize an equitable waiver of immunity as allowed in the *Federal Sign v. Texas So. University*, 951 S.W. 2d 401, 408 n.1 (Tex 1997) case. The actions of Alton in this case demand the attention of the Court and justify acknowledgment that an equitable waiver of immunity is applicable under these extraordinary circumstances.

D. The Tooke and Reata cases should not be applied retroactively in this case. Petitioner is mindful that, although this Court's decisions usually apply retroactively, this Court has also said that exceptions are recognized when considerations of fairness and policy dictate prospective effect only. The Court has adopted factors for determining when to apply a decision retroactively, including (1) whether the decision establishes a new principle of law by either overruling clear past precedent on which the litigants have relied; and (2) whether retroactive application of the rule could produce substantial inequitable results. *Elabor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). The contracts and conduct at issue in this case preceded the *Tooke* and *Reata* decisions by decades. If ever there was a case where these governmental immunity decisions should not be applied retroactively, Petitioner submits that this case is appropriate for prospective

application only given the grave public health hazard posed by Alton's conduct in this case.

Issue 2: Do the Court of Appeals' rulings on City of Alton's immunity from suit and liability contradict previous decisions of other Courts?

The Court of Appeals' analysis of the governmental immunity and liability issues in this case conflicts with numerous decisions of other lower courts, including most recently, the case of *Engelman Irrigation District v. Shields*, 2008 W.L. 1974344 (Tex. App. -Corpus Christi 2008), wherein the Court of Appeals, in response to Engelman's immunity claim, cited *Federal Sign* and other cases, to hold that a private litigant does not need the Legislature's permission to sue the State for violation of state law or to protect a private party's rights. There is no distinction between Sharyland's claims seeking to compel Alton to comply with state law in the construction of its sewer system through declaratory judgment, specific performance or injunctive relief, and any other private party seeking to protect its rights against illegal state conduct.

The Court of Appeals' rulings in this case also contradict the previous ruling in the *Engelman Irr. Dist. v. Shields Bros., Inc.*, 960 S.W.2d 343 (Tex. App. -Corpus Christi 1997) case wherein the Court of Appeals affirmed the trial court's judgment holding a governmental entity, Engelman Irrigation District, liable to Shields for damages arising from Engelman's breach of its *implied* contractual obligation to provide *water service* to Shields and finding that Engelman had waived

immunity. See also, *El Paso County Water Improvement Dist. No. 1 v. Grijalva*, 783 S.W.2d 736, 739 (Tex. App. -El Paso 1990, writ denied per curiam, 795 S.W.2d 705 (Tex. 1990)). The Engelman case is analogous to this case in that Sharyland has performed under the contract with Alton in exchange for which Alton was to provide a *service*: the installation of the sewer system in a specified manner. Alton failed to construct the sewer system as required under the contract. Thus, as in *Engelman*, Alton breached a duty to provide a *service* and Sharyland never received the service Alton promised.

Cases like *Engelman* and *Grijalva* and this case, where the governmental entity has already received compensation for a service yet fails to deliver the service, are distinguishable from cases like *Tooke* where the non-governmental party merely seeks money damages from the governmental entity for lost profits from services never rendered to the governmental entity. *Tooke v. City of Mexia*, 197 S.W.3d at 332. In this case, Sharyland seeks equity from the Court to require Alton to deliver the construction services it promised, in exchange for the water service which Sharyland has already provided and for which Alton has already received years of benefit. This Court has yet to decide on the applicability of governmental immunity in a case such as this where the governmental entity receives the benefit of a contract and then fails to perform its part of the bargain. This issue is unlike the issues presented in *Tooke* and its progeny and should not be barred by that precedent.

Unless this Court declares that the judgments rendered in the *Engelman* and *Grijalva* cases do not survive the *Tooke* decision and are no longer the law, then the Court of Appeals' present rulings on immunity contradict those previous decisions. The Court should clarify whether the *Tooke* case overturns cases like *Engelman* and *Grijalva*, decided prior to the *Tooke* decision, in that *Tooke* is not applicable in contractual arrangements such as *Engelman* and *Grijalva* and the case at bar.

Issue 3: Does the Economic Loss Rule bar Sharyland Water Supply Corporation's negligence claim?

The Court of Appeals has misapplied and misconstrued the economic loss rule. The Court of Appeals' ruling that Sharyland may not recover under a negligence claim against Cris, C&B and TCB because it has not sustained "property damage" is error. Prior to Respondents' wrongful conduct, Sharyland had uncontaminated easements wherein it laid potable water pipes which, at that point, were installed in the manner required by Texas law. As a result of the Respondents' wrongful negligent conduct, Sharyland's easements and water pipes are now contaminated by sewage and are no longer in compliance with Texas law. 30 Tex. Admin. Code § 290.44(e). Sharyland was expressly granted easements in paragraph 5 of its contract with Alton to locate its waterlines. Exhibit "37." Respondents had no legal right to interfere with Sharyland's use of the easement by introducing a hazardous condition, and to violate Texas law, which in turn

rendered Sharyland's water system no longer in compliance with Texas law. Sharyland is entitled to recovery for the damages to its water delivery system.

The only bar to Sharyland's recovery of those damages is the Court of Appeals' erroneous application of the economic loss rule. The basis of the ruling is that Sharyland has not sustained "property damage." Sharyland's property damages were not deemed theoretical by the jury in this case, who awarded damages so that Sharyland could make necessary repairs to bring Sharyland's system into compliance and to safeguard the water system from hazards posed by the Alton sewer system. CR 3474; Petitioner's Appendix Tab B. Sharyland submits that the Respondent's actions, by its improper installation of the sewer system, resulted in material changes to Sharyland's system and violated its easement rights and these damages are properly recoverable.

Prior to the wrongful and negligent acts of C&B, Cris and TCB, Sharyland operated its water supply system without the interference of Alton's improperly installed sewer lines. Sharyland had that right by its contract with Alton, by Texas law (30 TAC § 317.13) which specifies the manner in which the sewer pipes were to be installed, and by common law and engineering standards of care owed by Respondents, Cris, C&B and TCB to Sharyland and the general public.

After the improper and negligent installation of the sewer lines, a representative sample of sewer and waterline crossings were excavated. Exhibit "1"; 4 RR 25-27, 68.69. Sixty of the sixty-six excavated crossings did not comply

with 30 TAC § 317.13 and a rolled gasket resulting in a leak was found. Exhibit “1”; 4 RR 25-27, 68-69; 5 RR 176-178; 6 RR 262-265. It is not unreasonable to extrapolate these results throughout the system. Before the installation of the sewer lines, Sharyland’s waterlines and easements did not have sewage leaking on them and were not exposed to a contamination hazard from leaking sewer pipes. Before the installation of the sewer lines, Sharyland’s waterlines complied with state regulations governing the separation distance between waterlines and sewer lines. Before the installation, whenever a waterline break occurred, Sharyland’s operating procedures and easements were unaffected by the presence of sewer lines. Exhibit “1”; 4 RR 68-73. These are not imagined conditions. All of Sharyland’s claims are factually supported.

Sharyland has always maintained that the wrongful installation of the sewer system rendered Sharyland’s system to be no longer compliant with state law. By their wrongful acts, Respondents have exposed Sharyland’s system to the continuing presence of sewage in Sharyland’s easements and above its waterlines. This condition creates an ongoing contamination hazard to Sharyland’s employees and members and to Alton’s citizens. Sharyland concedes that no one, that we know of, has become seriously ill or died as a result of the fact that the sewer pipes were improperly laid over Sharyland’s water pipes. However, the damage to Sharyland’s now non-compliant system is already present. If this Court concludes that damages are only manifested in the face of a water-borne contagion, or a

corroded water pipe, then the analysis ends here. However, Sharyland does not believe that the law allows these Respondents to damage Sharyland's system in the manner that they have, with impunity, and to the continued detriment of the thousands who rely on the system for their drinking water.

Sharyland sought recovery in this suit for equitable relief to require that the sewer lines be installed properly where they cross Sharyland's system or, in the alternative, for damages to repair its system to again bring the system into compliance with state law. This Court is being asked to determine if Sharyland must suffer the harm to its system without any remedy or recourse against these Respondents.

In considering the damages to Sharyland and the harm to the public, it is important to note that both the sewer lines and the waterlines are made of PVC and are undetectable from the surface. PVC lines can only be found by excavation and because the sewer lines are located and laid over the waterlines, there is a high probability that the sewer line will be struck first during excavation and without prior notice of its existence and placement. PVC pipe degrades and becomes brittle over time and the conditions which create the contamination hazard will continue to increase accordingly, along with the potential harm to the public. 5 RR 39-41, 65-71. 194-195. This illegal placement of the sewer lines means that when Sharyland encounters a leak in its waterline, Sharyland has to excavate through the overlaid sewer line, and if damaged and breached, sewage will leak down into the

already leaking waterline and surrounding area. That an outbreak has not yet occurred is fortunate but that does not alleviate the harm to Sharyland caused by having its system damaged by the Respondents' wrongful acts.

By its contract with Alton, and by law, Sharyland had a right to operate its system free of the interference of a leaking, improperly and illegally constructed sewer system. The jury found that Alton breached its agreement with Sharyland, and that Respondents C&B, TCB and Cris, breached the standard of care. CR 3474; Petitioner's Appendix Tab B. All Respondents, by their actions, have materially altered and damaged Sharyland's system. Either Respondents must be held liable for the cost to restore Sharyland's system to its condition prior to Respondents' wrongful acts or Alton should be required through equitable relief to bring the sewer system into compliance.

The record is clear that Sharyland's damages are the costs associated with the requirement to repair the lack of proper separation between Alton's sewer lines and Sharyland's water delivery system caused by the Respondents' negligent conduct. 5 SRR 174-212; Exhibit "114"; Exhibit "115" and Exhibit "116." The law does not require, as a condition of recovery, that sewage corrode and destroy the waterlines as concluded by the Court of Appeals. Nor does the law require that the water supply be contaminated and the public be infected by water-borne diseases before Sharyland can recover damages from the Respondents to remediate the harm caused by their negligence.

In the absence of an explicit ruling otherwise, Sharyland's waterlines are in an illegal configuration requiring corrective measures. Sharyland must be allowed to recover specific performance by Alton or be awarded damages to bring its water pipes into compliance with 30 Tex. Admin. Code § 290.44. The damages to Sharyland's system exist today, and will exist tomorrow and every day thereafter until the sewer lines are installed properly or Sharyland's waterlines are encased or relocated. Under these circumstances, the Court of Appeals' determination that Sharyland has not been damaged is error.

Issue 4: Does Tex. Loc. Gov't Code Section 271.153 bar Sharyland Water Supply Corporation from recovery of damages?

The Court of Appeals' reading of Tex. Loc. Govt. Code § 271.153(a) is too limited and does not consider that the damages Sharyland seeks are not consequential but are direct damages due as a result of Alton's failure to install the sewer system as required by law and by its contracts, as well as by Alton's continued maintenance of the illegal installation. Sharyland seeks damages to recover amounts necessary to bring the crossings of Alton's sewer lines over Sharyland's waterlines into compliance with the law and the contracts. These are properly considered charges due and owed by Alton under the contracts and also represent "compensation for the increased cost to perform the work" resulting from Alton's delays in maintaining the safety of the waterline/sewer line connections as required under the contracts and by law.

If Section 271.153(a) applies, then it must be read in the context of contracts as they exist in this case, where services are due and owed by the governmental entity, those services are not provided, and the non-defaulting party is forced to pay others to provide, or otherwise perform those services due and owed by the governmental entity. Section 271.153(a) does not limit or foreclose recovery of damages by Sharyland where the evidence shows that Sharyland is entitled to compensation for performing the work required of Alton under the contracts. The Court of Appeals' ruling to the contrary is error.

Alternatively, if Tex. Loc. Gov't Code § 271.153 bars recovery by Sharyland, then the statute cannot serve as the basis for a ruling that the statute itself is an adequate remedy, thus barring the recovery of equitable relief.

Issue 5: Was the evidence legally sufficient to establish that Sharyland Water Supply Corporation was a third-party beneficiary of the Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company contracts?

The evidence was legally sufficient to support the determination that Alton and the Respondents, Cris, C&B and TCB intended in their respective contracts to confer a direct benefit on Sharyland and that Sharyland was a third-party beneficiary of those contracts. The Court of Appeals' ruling is incorrect and is imposing its own determination when it states that the subject contracts do not reference any third-parties or indicate any intent to discharge any obligations owed to Sharyland. The contract plans and specifications themselves, developed with

the active help and participation of Sharyland, who was no stranger to the contracts, detail the location and placement of the waterlines within Sharyland's easements as they relate to the sewer lines and require that the installation of the sewer lines be performed as provided in those plans and specifications. 5 RR 34-36, 42-57, 67-71, 96-97, 104-116; 6 RR 285-294; 8 RR 39-40; Exhibit 2, Exhibit 65, Exhibit 69, Exhibit 82; Exhibit 90, Exhibit 109.

All parties intended that the plans and specifications be terms of the contracts and all parties knew that failure to perform the installation as required by those plans and specifications would harm Sharyland by subjecting the waterlines to contamination with sewage. The plans and specifications complied with 30 Tex. Admin. Code § 317.13. 4 RR 9-16; 5 RR 134-136; 7 RR 74; Exhibit 69; Exhibit 90; Exhibit 109. Alton, along with all of the other Respondents, intended that the contracts provide for the installation of the sewer lines in a manner to protect Sharyland's interests by observing the state law mandated safeguards. Were it not for the existence of Sharyland's waterlines, the provisions for installing the sewer lines in relation to the waterlines in the plans and specifications would not have been a part of the contracts to build the sewer project. 5 RR 34-62. Each of the Respondents were aware of the existence of the Sharyland waterlines in proximity to the sewer line installation. Exhibit "69"; Exhibit "90"; Exhibit "109"; Exhibit "1"; Exhibit "37"; Exhibit "101"; 4 RR 96-97. Before the project even began, TCB noted that the placement of the sewer lines crossed the existing waterlines and noted that

“vertical conflicts are possible at these locations.” Exhibit “35”; Exhibit “90”; Exhibit “2”; Exhibit “37.” This was not “general beneficence” as advocated by the Court of Appeals. These contractual obligations were clearly required to comply with existing contractual obligations owed by Alton to Sharyland, as well as to comply with general standards and the mandatory laws applicable to the installation of sewer lines in proximity to waterlines. These are facts properly determined by the jury.

Having intended to confer a benefit on Sharyland, there was nothing in the contracts which prevented Sharyland from enforcing the obligations to Sharyland which the Respondents undertook in those contracts. If these facts are not clearly evident, then why are the locations of Sharyland’s waterlines and easements and the details of how the crossings were to be made included in the contract documents at all? The Court of Appeals should not have dismissed the jury and trial court’s determination on this issue. The appellate court’s ruling and analysis on this issue is flawed and is error.

The record is clear that Sharyland was a third-party beneficiary of the TCB/Alton contract. In determining whether a third-party can enforce a contract, the intention of the contracting parties is controlling. *MCI Telecommunications Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999); *Rodriguez v. U. S. Security Associates, Inc.*, 162 S.W.3d 868 (Tex.App.--Houston 14th Dist. 2005). Whether the parties intended to benefit a third-party is a matter to be determined

by the contract as a whole, construed in the light of the circumstances under which it was made. *Carnes v. Meador*, 533 S.W.2d 365 (Tex.Civ.App.--Dallas 1976), writ refused n.r.e.). To determine the parties' intent, courts must examine the entire agreement when interpreting a contract and give effect to all the contract's provisions so that none are rendered meaningless. *MCI*, 995 S.W.2d at 652.

Sharyland was an intended beneficiary of the Respondent's respective contracts. These contracts, as their core obligation, required that TCB and C&B perform engineering and inspection services in connection with the project to ensure that Cris, the contractor, properly installed the sewer lines in accordance with the plans and specifications. These plans and specifications, as they detailed sewer line and waterline crossings, were developed only for the sole benefit of Sharyland. 5 RR 34-36, 42-62, 67-71, 96-97; 6 RR 285-294; 8 RR 39-40; Exhibit "2"; Exhibit "69"; Exhibit "90"; Exhibit "109." There is no threat that Alton's sewer lines can ever be contaminated by Sharyland's potable waterlines. TCB and C&B, as the professional engineers hired to oversee the installation, were charged with the heightened responsibility to understand the plans and specifications, and to remain on-site to make sure that the construction was performed correctly in accordance with those plans and specifications. TCB and C&B were each required, under their respective contracts, to verify that Cris adhered to the plans and specifications instead of Cris' self-created criteria for installing the lines, which consisted of laying the lines wherever it could maintain three feet of cover, without

any regard to the placement of the waterlines. 5 RR 130-149; Exhibit "5"; Exhibit "2."

These contracts, by requiring installation and inspection of the project to make sure construction proceeded according to the contract documents, including the plans and specifications, were intended to and did benefit Sharyland by assuring the protection of Sharyland's waterlines from contamination by sewage. The protection of Sharyland's waterlines was also a contractual obligation owed to Sharyland by Alton in the Water Supply Agreement and the Water Service Agreement. It is clear that the contract documents, including the plans and specifications for the project, fulfilled a legal obligation by Alton to Sharyland to construct the sewer line crossings in the manner required by law, with the sewer lines, wherever possible, crossing underneath the waterlines. The only "person" to benefit from these particular plans and specifications detailing the manner of installing the sewer lines in proximity to the waterline was Sharyland. 5 RR 34-62; Exhibit "90"; Exhibit "2." Thus, Sharyland was not merely an incidental beneficiary of the contracts. The facts of this case and a reasonable construction of the contracts support the finding that Sharyland was clearly an intended beneficiary of the contracts.

Additionally, there was no error in submitting a jury question on the issue of Sharyland's status as a third-party beneficiary. In the case, the trial court submitted the issue to the jury, thus impliedly finding that the matter was controverted and that

the intent of the parties under the subject contracts was a fact issue. In the alternative, Sharyland would argue that even if the question should not have been submitted to the jury, the error is harmless, and by entering the judgment, the trial court impliedly made all findings necessary to support its judgment. Submission of an improper jury question is harmless error if the jury's answers to other questions render the improper question immaterial. *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 750 (Tex. 1980) *Texas & New Orleans R.R. Co. v. McGinnis*, 130 Tex. 338, 109 S.W.2d 160, 163 (1937); A jury question is considered immaterial when its answer cannot alter the effect of the verdict. *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986); *C. & R. Transp., Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Powers v. Standard Accident Ins. Co.*, 144 Tex. 415, 191 S.W. 2d 7, 9 (1945). Submission of an immaterial issue is not harmful error unless the submission confused or misled the jury. *H.E. Butt Grocery Co. v. Johnson*, 226 S.W.2d 501, 504 (Tex. Civ. App. -- San Antonio 1949, writ ref'd n.r.e). When determining whether a particular question could have confused or mislead the jury, we "consider its probable effect on the minds of the jury in the light of the charge as a whole". *Texas Employers Ins. Ass'n v. McKay*, 146 Tex. 569, 210 S.W.2d 147, 149 (1948).

Submission of the third-party beneficiary question required the jury to find that Sharyland was a third-party beneficiary before reaching the question of breach and resulting damages. Had the question not been posed and instead been decided by the trial court, the jury would have been instructed that Sharyland was a third-party

beneficiary and then the jury would still have been required to answer the questions on breach and damages. By entry of the Judgment and the trial court's denial of TCB's pre-and post-verdict motions, the trial court obviously resolved the issue, either as a factual matter, in which case the Judgment relies on the jury's finding, or as a matter of law, in which case the jury's answer is merely superfluous and immaterial. In either instance, the finding that Sharyland is a third-party beneficiary is fully supported by the evidence.

Issue 6: Did the Court of Appeals err in ruling that Sharyland Water Supply Corporation cannot recover attorney's fees against City of Alton except for certain fees attributable to the Declaratory Judgment Action?

The Court of Appeals errs when it concludes that Sharyland may not recover attorney's fees for breach of contract or equitable relief. Sharyland incorporates its arguments and authorities set forth in Point of Error Nos. 1, 2 and 9 herein. Immunity does not bar the recovery of attorney's fees against Alton. Additionally, Sharyland is entitled to an award of attorney's fees in equity for Alton's wrongful conduct. *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799 (Tex. 1974).

Issue 7: Did the Court of Appeals err in overturning the award against Respondents jointly and severally?

The Court of Appeals errs when it concludes that joint and several liability and the award of attorney's fees against C&B, TCB and Cris were wrongfully awarded by the trial court. Sharyland incorporates its arguments and authorities set

forth in Issue Nos 3 and 5 herein. Joint and several liability is appropriate where Sharyland is a third-party beneficiary of the subject contracts, or in the alternative, where Sharyland is not barred from recovery of its damages under the economic loss rule.

Issue 8: Did the Court of Appeals err in overturning the award of attorney's fees against Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company?

The Court of Appeals errs when it concludes that award of attorneys fees against C&B, TCB and Cris were wrongfully awarded by the trial court. Sharyland incorporates its arguments and authorities set forth in Point of Error No.5 herein. Sharyland was properly awarded attorney's fees against all Respondents in this case. As a third-party beneficiary of the subject contracts, Sharyland is entitled to recovery of attorney's fees for the breach of contract under Tex. Civ. Prac. and Rem. Code §38.001 (West 2009).

Therefore, the trial court correctly awarded attorneys fees to Sharyland and the fees are recoverable against Respondents TCB, C&B and Cris, jointly and severally.

Issue 9: Did the Court of Appeals err in upholding the trial court's denial of Sharyland Water Supply Corporation's request for injunctive relief and specific performance?

The Court of Appeals errs when it characterizes Sharyland's claims for specific performance and injunctive relief as claims solely to enforce performance

under a contract against Alton and as a claim for money. Sharyland's claims for specific performance and injunctive relief seek to require Alton to comply with 30 Tex. Admin. Code § 317.13. Apart from, yet consistent with, the terms of the contracts between Alton and Sharyland, Alton has a legal obligation to install and maintain its sewer lines as required by Texas law. Alton has no immunity from its obligation to comply with valid public safety laws. Alton had no discretion, either by contract or by law, over the manner in which its sewer lines were to be installed. Sewer lines, for reasons of public safety, have to be installed under waterlines or other safeguards have to be taken as provided by 30 Tex. Admin. Code § 317.13.

The terms of the requested injunctive and specific performance order specifically mirrored the terms of the statute and required that the sewer pipes be laid as the Legislature mandated. CR 3751-3803. It is not only Sharyland, by its contracts with Alton, who has mandated the manner in which the installation of the sewer lines in proximity to waterlines in this manner must be performed. The Legislature also mandates this action. It is error for the Court of Appeals to disregard these mandated statutory safeguards under a theory of governmental immunity, or under the sham of an "adequate remedy" that is no remedy at all, when it is undisputed that Alton has violated the statute and continues to engage in unauthorized and illegal conduct endangering its citizen's potable water supply and risking the health and safety of thousands.

First, the Court of Appeals is incorrect in its statement that Sharyland does

not dispute that Alton performed the contract. The record is clear that Alton did not perform under the contract because the contract required that the sewer lines be installed in accordance with applicable regulations. Alton installed the sewer lines in an illegal configuration, and the jury found a breach of the contract. CR 3474. As set forth in Issue No. 1 above, Alton has no immunity from the consequences of its wrongful conduct. Exhibit 37, Exhibit 101.

Sharyland's claim for equitable relief is different than its claim for breach of contract because the claim for equitable relief seeks Alton's compliance with Texas law. The Court of Appeals grievously errs in ruling that Sharyland has an adequate remedy in its breach of contract action which precludes a claim for equitable relief. From the inception of this case, all Sharyland has ever sought from Alton is Alton's compliance with 30 Tex. Admin. Code § 317.13 in the installation and maintenance of the sewer lines. The Court of Appeals errs by mis-characterizing Sharyland's claim for equitable relief as a claim for money. There is evidence that Alton could acquire Texas Water Development Board grants to remediate the dangerous condition posed by the illegal sewer pipe installation. Petitioner's Appendix Tab E.

At the onset of this litigation, Alton did sue the other Respondents, the parties who actually participated in the wrongful installation of the sewer pipes, despite their contractual obligation and common law duties to install the sewer pipes properly. Mysteriously, these actions were later dropped. Sharyland and the consumers of its potable water should not bear the burden of Alton's complete disregard for the

safety of its citizens. It is error for the Court of Appeals to conclude that Sharyland has an adequate legal remedy when the Court of Appeals has ruled that damages to remediate Alton's illegal sewer system are not recoverable either from Alton or from the other Respondents. Under these circumstances, where it is uncontroverted that this illegal and dangerous condition exists, and where the Court of Appeals has foreclosed any possibility that Sharyland can recover damages to bring its water pipes back into compliance with Texas law, the only adequate remedy left would be an order by the trial court in equity. The Court of Appeals' ruling otherwise is clearly error and sanctions the wrongful conduct of Alton and the other Respondents to the detriment of Sharyland and the thousands who remain exposed to this constant contamination hazard.

The record is clear that Sharyland is entitled to equitable relief and specific performance because the equities weigh heavily in favor of the granting of such relief. The judgment sought by Sharyland included the following relief in lieu of damages from Alton:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that specific performance of the Water Supply Agreement and Water Service Agreement be granted and the City of Alton, and its employees, agents, successors and assigns are ordered to excavate each sewer pipe lateral constructed in the City of Alton/City of McAllen Wasterwater Improvement Project where it crosses Plaintiff's waterline and install the sewer pipe lateral in the following manner:

- A. With an absolute minimum distance of six (6) inches between outside diameters of the crossing sewer pipe lateral and the Plaintiff's waterline; and

- B. With the sewer pipe lateral being located below the waterline where possible; and
- C. With the sewer pipe lateral being constructed of a continuance section of pipe, without joints or couplings, from a point of beginning nine (9) feet from the Plaintiff's waterline on one side to a point being nine (9) feet from the Plaintiff's waterline on the opposite side of the waterlines; and
- D. In lieu of conforming with paragraph C, immediately above, the crossing sewer pipe may be encased in a joint of 150 psi pressure class pipe at least eighteen (18) feet long and two (2) nominal sized larger than the crossing sewer pipe lateral, and in such case the space around the carrier pipe shall be supported at minimum five (5) feet intervals with spacers or be filled to the spring line with washed sand and this encasement pipe shall be centered on the crossed waterline and both ends sealed with cement grout or a manufactured seal;

CR 3572. The requested equitable remedies, in lieu of damages, will be more effective in protecting human health, and the potable water supply.

If recoverable, the relief granted by a monetary damages award will result in requiring Sharyland to relocate the waterlines. Relocating the water will necessitate shutting off water service to many of Sharyland's members/customers while the work is being done, possibly for an extended period of time. This would disrupt essential water service. If the waterline must be moved, the line will be severed which increases the risk of contaminating the line and the consequential risk to water users by such contamination. 2 SRR 42-45; 5 RR 62-66.

However, if Alton is required, by the equitable remedies of a permanent

injunction and specific performance, to relocate its sewer line as Sharyland requests, there is a much lower risk of contaminating the waterline, and the remedial work will only require disruption of sewer service to one customer at a time and only for a short period of time. There is reduced risk of contaminating a waterline under these circumstances. The cost of requiring Alton to move the sewer line crossings is less than the damages required to move the waterline and the award by the jury to Sharyland. 2 SRR 42-45; 5 RR 62-66.

Thus, by ordering Alton to remediate the problem, instead of awarding monetary damages to pay for moving the waterlines, the necessary remediation:

- would be less disruptive to the citizens of Alton and to members/customers of Sharyland;
- would be safer and would pose essentially no risk of contamination of water delivery to customers in the area who depend on the service; and
- would conserve public economic resources.

The testimony presented clearly establishes that the legal remedy in this case, an award of money damages to Sharyland, is not as complete, practical, prompt, and efficient as the requested equitable remedies.

The issuance or denial of a permanent injunction is reviewed for abuse of discretion. *Operation Rescue - Nat'l v. Planned Parenthood of Houston and S. E. Tex., Inc.*, 975 S.W.2d 546, 560 (Tex. 1998). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and

prejudicial error of law, or if it fails to analyze or apply the law correctly. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

The trial court erred in denying Sharyland's claims for injunctive relief and the remedy of specific performance because the record establishes without question that the legal remedy of damages in this case is not as complete, practical, prompt and efficient as the requested equitable remedies. The trial court's denial of the equitable remedies under these circumstances was arbitrary and unreasonable. The Court of Appeals erred in upholding the trial court's decision where the Court of Appeals denied Sharyland all relief.

Sharyland would also note that equitable relief was appropriate in this case because the law does not afford an adequate remedy in cases where a citizen's use of water from a water system is interfered with. *Dittmar v. City of New Braunfels*, 48 S.W. 1114, 1116 (Tex. Civ. App. 1899, no writ) (the use of water is a necessity, and its want may be immediate and pressing, and it is difficult to see how a judgment for damages would be compensation for being deprived of the use of water, which is absolutely necessary, not only to make life enjoyable, but to sustain it). Thus, an equitable remedy is the only adequate remedy in cases where a citizen's use of water from a water system is interfered with. *Dittmar v. City of New Braunfels*, 48 S.W. 1114, 1116 (Tex. Civ. App. 1899, no writ).

The *Dittmar* case is instructive because it illustrates the overriding importance of maintaining water service. Sharyland's case for equitable relief centers on

maintaining the integrity of the water supply and avoiding disruption of water service to a large number of customers. Damages, as a result of forcing Sharyland to interrupt service and to expose its members to potential contamination and inconvenience in order to move its waterlines, are simply not calculable or compensable by the award of money alone.

In this case, the problem is clear. The sewer lines were improperly installed. Where the sewer lines intersect Sharyland's existing waterlines they were installed above, not below the waterlines, without maintaining the required separation distance and, without proper encasing of the sewer pipe, where required. The trial court was presented with two very clear alternatives to remedy the problem. The trial court could award to Sharyland the damages found by the jury to allow Sharyland to move its waterlines, with all of the attendant disruption of water service and threat of contaminating the water supply. The other alternative would be to award equitable relief requiring Alton to move or fix its sewer pipe crossings to comply with the contracts between the parties and state law. Based on the uncontradicted evidence, the monetary cost of equitable relief is less expensive and the effect less disruptive to the public, with no threat of contamination of the waterline and the water supply. The trial court thus abused its discretion and failed to properly apply the law to the evidence by electing to award monetary damages and not to fully protect all concerned by requiring specific performance and injunctive relief. The Court of Appeals compounded the error by denying Sharyland

all recovery, legal and equitable.

Contamination of the potable water presents a serious health hazard to the thousands of people who are the members/customers of Sharyland and who depend on Sharyland for their potable water supply. Testimony regarding the serious hazard that raw sewage poses to the water supply was uncontradicted by Defendants and is indisputable as a matter of common knowledge. 5 RR 67-71. The Court heard testimony that documented that a leak in the sewer line where it crosses Sharyland's waterline has already been detected and that other leaks have already occurred or are reasonably likely to occur over time, creating a condition where contamination of the waterline has occurred or is likely to occur. 4 RR 57-72; 5 RR 39-41, 65-71, 194-195.

There was evidence that state funding might be made available to remediate the problem, resulting in no or minimal cost to Alton. Petitioner's Appendix Tab E. Were we dealing with rational, thoughtful, and prudent city leadership interested in conserving resources and protecting its citizens, the courts would not be placed in this position as Alton would readily agree to the equitable relief sought. In this case, however, in the absence of considered responsible governance, it was incumbent upon the trial court to weigh the equities in favor of conserving public resources and diminishing the substantial risk of contamination to Alton's citizens and other users of Sharyland's water.

There is clearly no way to calculate in monetary terms the total damages to

Sharyland and its customers, the risk involved and, in the event of contamination of the waterlines, the cost and harm resulting from disruption of the water supply and harm caused by illnesses to water users. Such damages cannot be calculated or measured by any certain pecuniary standard. Money damages are not and cannot be a substitute for the performance by Alton under its Water Supply Agreement and Water Service Agreement with Sharyland. Exhibit "37"; Exhibit "55." The harm to Sharyland from continued operation of the improper sewer line crossings, many of which are leaking, is imminent and irreparable.

Sharyland requests that this Court consider Sharyland's argument that equitable relief and specific performance against Alton is appropriate in lieu of damages as the least disruptive, safest and most economical remedy to remediate the contamination created by the illegal sewer pipes. Without the Court's mandate that Alton bring its sewer pipes into code compliance, Sharyland can only perform remedial measures on its pipeline system to bring its system into compliance, a task which is more dangerous and disruptive to the general public, and more expensive than equitable relief. Equitable relief, by injunctive and specific performance, is appropriate in this case. The trial court erred in denying the equitable relief and the Court of Appeals erred in failing to reverse that decision and in depriving Sharyland of a remedy.

CONCLUSION

Respondents should not be allowed to violate state law mandated standards for the installation of Alton's sewer system without consequence. It is error to overturn a valid judgment against the Respondents leaving Sharyland with a compromised water delivery system with no recovery of any kind to repair the damage caused by the Respondents' wrongful conduct. Sharyland did nothing wrong in this case. With no recovery, Sharyland, its members, the citizens of Alton and the public served by Sharyland's water system, will continue to remain endangered by Alton's hazardous and illegal sewer system. Meanwhile, by its Opinion and Judgment, the Court of Appeals absolves and shields Alton, its contractor Cris, and its engineers, TCB and C&B, from any liability, thereby sanctioning their wrongful conduct. This is not justice and this is not the law of this State. Sharyland maintains that the law does not require Sharyland and the public to wait until drinking water contamination occurs and someone gets sick, or dies, in order to obtain relief for the violation of a state law which was enacted to prevent contamination from occurring. The current situation cries for an immediate intervention to prevent a catastrophic outbreak of water borne diseases. Sharyland respectfully urges this Court to reconsider the previous rulings in this case, the public policy of this state, and give equal, if not greater, weight to the enforcement of the public safety statutes at issue in this case. Sharyland requests that this Court grant this Petition for Review, reverse the Court of Appeals' judgment and affirm all relief granted in the trial court's judgment including, but not limited to, the award of

damages and attorney's fees in an amount sufficient to allow Sharyland to move and protect its waterlines in the manner mandated by state law, or in the alternative, that the Court grant the injunctive and specific performance relief sought by Sharyland to require that Alton bring its sewer system into compliance with state law.

Respectfully Submitted,

Dyer & Associates

1352 West Pecan Boulevard
McAllen, Texas 78501
Telephone: (956) 686-6606
Facsimile: (956) 686-6601

J. W. Dyer
State Bar No. 06316020
Sharon Almaguer
State Bar No. 01108100

**ATTORNEYS FOR PETITIONER
SHARYLAND WATER SUPPLY
CORPORATION**

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing **Petitioner's Brief on the Merits** has been served on the _____ day of September, 2009, to the following in the manner indicated:

CMRRR: 7007-3020-0000-5172-8738

Mr. Blake A. Hawthorne, Clerk
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

CMRRR: 7007-3020-0000-5172-8776

Mr. Christopher Funk
Attorney At Law
P.O. Drawer 3766
McAllen, Texas 78502-3766

CMRRR: 7007-3020-0000-5172-8745

Ms. Eileen M. Leeds
Willette & Guerra, L.L.P.
1534 E. 6th Street, Suite 200
Brownsville, Texas 78520

CMRRR: 7007-3020-0000-5172-8783

Mr. Stephen L. Tatum
Cantey & Hanger, L.L.P.
600 W. 6th Street, Ste. 300
Fort Worth, Texas 76102-3685

CMRRR: 7007-3020-0000-5172-8752

Mr. Marcus Montalvo
Montalvo & Ramirez
900 North Main
McAllen, Texas 78501

CMRRR: 7007-3020-0000-5172-8790

Mr. Jeffrey D. Roerig
Roerig, Oliveira & Fisher, LLP
855 W. Price Road, Suite 9
Brownsville, Texas 78520

CMRRR: 7007-3020-0000-5172-8769

Mr. John B. Wallace
Lyman, Twining, Weinberg & Ferrell,
P.C.
3600 One Houston Center
1221 McKinney Street
Houston, Texas 77010-2009

J.W. Dyer

APPENDIX

- | | | |
|----|--|-------|
| A. | Judgment of the Trial Court | Tab A |
| B. | Jury Charge and Verdict | Tab B |
| C. | Opinion on Rehearing and Judgment of the Court of Appeals | Tab C |
| D. | 30 TAC § 317.13(1)(B), now 30 Tex. Admin. Code
217.53(d)(3)(B)(iii) (West 2009) | Tab D |
| E. | Texas Water Development Board Letter to City of Alton dated
May 12, 2005 | Tab E |