

NO. _____

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

PETITION FOR REVIEW

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Pursuant to TEX. R. APP. 53.2(a), Petitioners certify that the following is a complete list of all parties to this litigation and the names and addresses of all counsel.

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Record References:

References to the Clerk's Record are denoted as "CR ____", 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 in violation of 30 Tex. Admin. Code § 317.13, now 30 Tex. Admin. Code 217.53(d)(3)(B)(iii) (West 2009), and in violation of industry, engineering and common law standards of care, 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*, —S.W.3d—, 2009 WL 270167, 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 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 Appeal's analysis of governmental immunity and liability issues in this case conflicts with previous decisions of this Court and the Court of Appeal's sister courts allowing suits against bodies politic and engineers 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 Appeal's rulings on Alton's immunity from suit and liability contradict previous decisions of other courts?
3. Did the Court of Appeals err in ruling that a professional negligence claim against an engineer requires privity of contract?
4. Does the Economic Loss Rule bar Sharyland Water Supply Corporation's negligence claim?
5. Does Tex. Loc. Gov't Code Section 271.153 bar Sharyland Water Supply Corporation from recovery of damages? (Unbriefed issue).
6. Was the evidence legally sufficient to establish that Sharyland Water Supply Corporation was a third party beneficiary of the Carter & Burgess, Inc., Turner, Collie and Braden, Inc. and Cris Equipment Company contracts? (Unbriefed issue).
7. Did the Court of Appeals err in ruling that Sharyland Water Supply Corporation cannot recover attorney's fees against Alton except for certain fees attributable to the Declaratory Judgment Action? (Unbriefed issued).
8. Did the Court of Appeals err in overturning the award against Respondents jointly and severally. (Unbriefed issue).
9. Did the Court of Appeals err in overturning the award of attorney's fees against C&B, TCB and Cris. (Unbriefed issue).
10. 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? (Unbriefed issue.)

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.

The most important fact of this case is neither complicated nor in dispute. The City of Alton ("*Alton*") built a sewer system with full knowledge that it was being illegally constructed and presently maintains this sewer system in a manner that allows raw sewage to leak onto Sharyland Water Supply Corporation's ("*Sharyland*" or "*Petitioner*") potable waterlines. Exhibit "1." The Respondents' improper installation of Alton's sewer lines, in clear violation of 30 Tex. Admin. Code § 317.13, now 30 Tex. Admin. Code 217.53(d)(3)(B)(iii) (West 2009), means that, 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. The configuration and manner of installing Alton's sewer system also causes Sharyland's potable water system to be in violation of state law. 30 Tex. Admin. Code § 290.44(e) (West 2009). 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.

Standards set out in state regulations dealing with sewer line construction are terms

of contracts between Alton and Sharyland and between Alton and the other Respondents, Carter & Burgess, Inc. ("*C&B*"), Turner, Collie & Braden, Inc. ("*TCB*") and Cris Equipment Company, Inc. ("*Cris*"). 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. The jury found Sharyland to be a third-party beneficiary of the contracts between Alton and the Respondents. Petitioner's Appendix Tab B. 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 regulation is also consistent with sound engineering practices and the common law standard of care. Respondents have no discretion regarding the installation of Alton's sewer lines in any manner which deviates from the regulatory standard. 4 RR 9-16; 5 RR 134-136; Exhibit "104."

The plans for Alton's sewer project were approved by the Texas Water Development Board and prepared in consultation with Sharyland. Exhibit "90"; 4 RR 16-19. The plans mandated that the sewer lines be installed as specified in the regulatory standard. Exhibit "90"; 3 RR 128. 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. Cris, C&B and TCB had full knowledge that the manner of construction of Alton's sewer system

did not conform to the regulation. 4 RR 56-57, 103-104, 260; CR 3281.

The Respondents' improper installation of the sewer lines was not out of necessity, but for the Respondents' convenience. Exhibit "1"; 3 RR 99-102; 4 RR 41-56, 63-64; 7 RR 254-257. Respondents made no attempt to construct the sewer lines under the waterlines, to maintain minimum separation distances or to undertake any of the other safeguards, such as encasing the sewer pipe as required by law. Exhibit "1"; 7 RR 254-257. 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. Alton and the other Respondents intentionally decided to leave the sewer lines as constructed 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; CR 3281.

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, in connection with Sharyland's request for specific performance and for injunctive relief and declaratory judgment, 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 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 a court order 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.

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 is excused from performing under its contracts despite its enjoyment of the benefit of the contract. This Court is asked 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, Petitioner maintains that the Court of Appeal's rulings are in error and that Texas law does not sanction Respondents' conduct nor fail to provide a remedy, legal or equitable, to Sharyland.

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 Appeal's 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 with respect to an 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 Appeal's decision should be reversed because governmental immunity is not, and should not be, applicable under the facts of this case.

A. ***Counterclaim Waived Immunity.*** Sharyland urges the Court to reverse the Court of Appeal's ruling that Alton did not waive immunity when it filed its counterclaim. The Appeal Court's analysis of Alton's counterclaim as merely seeking to void the parties' agreement is inaccurate. The counterclaim sought affirmative relief, that Sharyland be divested of its property by requesting that the 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). The Court of Appeal's 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.

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. Sharyland's claims for 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 Sharyland's claims. The Court of Appeal's 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 also erred when it characterized Sharyland's claims for specific performance and injunctive relief as claims solely to enforce performance under a contract. Apart from the terms of the contract, Alton has a legal obligation to install and maintain its sewer lines as required by Texas law and Alton has no immunity from that obligation. 30 Tex. Admin. Code § 317.13, now 30 Tex. Admin. Code § 217.53. Alton had no discretion, either by contract or by law, over the manner in which its sewer lines were to be installed. The terms of the requested injunctive and specific performance order specifically mirrored the terms of the statute, and required that the sewer pipes be installed as the Legislature mandated. It is error for the trial court, and then the Court of Appeals, to disregard these mandated statutory safeguards under a theory of governmental immunity 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.

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 its contracts which require Alton to comply with state law. CR 3335. Nowhere does Sharyland allege that it is seeking damages in

connection with its declaratory judgment claims. From a review of Sharyland's pleadings, there is no basis to conclude that Sharyland's declaratory judgment action is 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.

The Court of Appeals, after ruling that damages are not recoverable either from Alton or from the other Respondents, further erred in ruling that Sharyland has an adequate remedy in its breach of contract action which precludes a claim for equitable relief. 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. The Court of Appeal's ruling, immunizing Alton from any responsibility to Sharyland and the thousands who remain exposed to this constant and ongoing contamination hazard, is error.

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. 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.

Alton's conduct in this case is particularly outrageous and reprehensible because Alton allowed the system to be illegally installed even after the illegality was brought to Alton's attention during construction. Alton's continued actions in 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 the harm caused by Alton's ongoing illegal conduct of maintaining its leaking sewer pipes in place. 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.

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 this Court has also said that, although its decisions usually apply retroactively, 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* decision by decades. If ever there was a case where the *Tooke* governmental immunity decision 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 Appeal's rulings on Alton's immunity from suit and liability contradict previous decisions of other Courts?

The Court of Appeal's 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 the *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 Appeal's 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.

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 Appeal's 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: Did the Court of Appeals err in ruling that a professional negligence claim against an engineer requires privity of contract?

The Court of Appeals erred when it ruled that a professional negligence claim requires privity of contract, relying on the accounting malpractice case of *Ervin v. Mann Frankfort Stein & Lipp CPAS, LLP*, 234 S.W.3d 172, 182 (Tex. App. -San Antonio 2007, no pet.) as the basis of the ruling. Engineers, C&B and TCB, by virtue of the type of service they perform, are held to a different standard than accountants or attorneys. Numerous Texas cases recognize that a duty is owed by a professional engineer to both the owner (with whom the engineer frequently shares privity) and others such as contractors, suppliers and affected parties, with whom the engineer does not have privity, but who rely on the work of the engineer. See, *City of San Antonio v. McKenzie Cost. Co.*, 150 S.W.2d 989 (Tex. 1941);

I.O.I. Systems, Inc. v. City of Cleveland, Texas, 615 S.W.2d 786 (Tex. App. -Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Associated Architects & Engineers, Inc. v. Lubbock Glass & Mirrors Co.*, 422 S.W.2d 942 (Tex. App. - Amarillo 1967, writ ref'd n.r.e.); *Cook Consultants, Inc. vs. Larson*, 700 S.W.2d 231, 234 (Tex. App.-Dallas 1985, writ ref'd n.r.e.); *Thomson v. Espey Huston & Associates, Inc.*, 899 S.W.2d 415, 422 (Tex. App. -Austin 1995, no writ). This duty extends to persons, even in the absence of privity, because a project's plans and specifications are such an integral part of the construction process that it is reasonably foreseeable that parties who are not in privity of contract with the engineer will suffer injury when the engineer's services prove defective.

Also, engineers owe a statutory duty to protect the general public as a condition of their license under the Texas Engineering Practice Act and Rules, 22 Tex. Admin. Code, Chapter 131 and 137 (West 2009). The Court of Appeal's ruling has failed to address this clear statutory duty, and any ruling limiting this statutory duty to only those who contract with the engineer is error. This is particularly clear in this case where the plans and specifications for the project were developed in consultation with Sharyland for the purpose of complying with contractual obligations owed to Sharyland and where the very installation specifications were mandated by laws intended to protect Sharyland and its members. 4 RR 16-19. The Court of Appeal's reliance on an accounting malpractice case for the proposition that TCB and C&B as engineers may only be sued for negligence by those with whom they contract is erroneous and contradicts previous decisions of this Court and other appellate

courts as well as the terms of 22 Tex. Admin. Code § 137.55 (West 2009).

Issue 4: 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 Appeal's 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).

The record is clear that Sharyland's damages are to repair the actual harm and damage to its water delivery system caused by the Respondents' negligent conduct. SRR 174-212. 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. Under these circumstances, the Court of

Appeal's determination that Sharyland has not been damaged is error.

CONCLUSION

Respondents should not be allowed to violate state law mandated standards for the installation of Alton's sewer system without consequence. It is simply error to overturn a valid judgment against the Respondents leaving Sharyland with a compromised water delivery system and 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. This is not justice and this is not the law of this State. Sharyland respectfully urges this Court to reconsider the previous rulings in this case. Sharyland requests that this Court grant this Petition for Review, reverse the Court of Appeal's 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 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,

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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing **Petition for Review** has been served on the 18th day of March, 2009, to the following in the manner indicated:

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APPENDIX

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| 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 |