

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

**SHARYLAND WATER SUPPLY CORPORATION'S REPLY TO
CITY OF ALTON'S RESPONSE TO SHARYLAND'S PETITION FOR REVIEW**

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STATUTES, RULES AND CODES

30 Tex. Admin. Code § 217.1 -.33 (West 2009) 2

30 Tex. Admin. Code § 217.2(5) (West 2009) 2, 4

30 Tex. Admin. Code § 217.2(7) (West 2009) 5, 6

30 Tex. Admin. Code § 317.13(1)(B)/
now 30 Tex. Admin. Code 217.53(d)(3)(B) (West 2009) v, 1, 2, 3, 4, 5, 6

Tex. Govt. Code § 271.151 (West 2009) 2, 3

MISCELLANEOUS

Webster’s 7th New Collegiate Dictionary, 1969 5

RECORD REFERENCES

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.

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.

REPLY TO STATEMENT REGARDING JURISDICTION

This case is entirely appropriate for consideration by this Court as a case involving important legal issues concerning the remedies and relief available to enforce 30 TAC § 317.13 and to protect the public's drinking water supply.

REPLY TO STATEMENT OF FACTS

Sharyland has not misrepresented the facts of this case. In response to City of Alton's ("*Alton*") incorporation of the Statement of Facts submitted by Respondents Cris Equipment Company, Inc. ("*Cris*"), Turner, Collie & Braden, Inc. ("*TCB*") and Carter & Burgess, Inc. ("*C&B*"), Sharyland incorporates herein its Reply to each of those Statements of Facts as set forth in its Reply to Cris Equipment Company, Inc.'s Response to Petition for Review, Reply to Turner, Collie & Braden, Inc.'s Response Opposing Petition for Review and Reply to Carter & Burgess, Inc.'s Response to Petition for Review.

REPLY TO SUMMARY OF THE ARGUMENT

Sharyland does not have a "hypothetical" case. Sharyland has the reality of a water system which is overlaid by Alton's illegally constructed sewer system in violation of Sharyland's rights under its contract with Alton and under the law. Sharyland has a right to operate a water supply system free of a contamination hazard, free of operational hazards caused by the overlaid sewer pipes, free of sewage contamination of Sharyland's easements as granted by Alton in Paragraph 5 of the contract, and free of the damage to the water system which Respondents have caused to be non-compliant with state law. Exhibit "1"; 4 RR 57-79; Exhibit "37."

As more fully set forth below, the trial court's ruling regarding the applicability of 30 TAC § 317.13 was correct and consistent with the regulation's purpose of setting minimum guidelines for the "comprehensive consideration of domestic sewage collection,

treatment or disposal systems," protecting the public and human health from sewage cross-contamination of potable waterlines, and TCEQ's broader mandate to protect human health and the environment. 4 RR 9-16; 5 RR 134-136. 30 TAC § 317.13(a). 30 TAC § 317.1.

Alton's cite to 30 TAC § 217.1-.33 and specifically § 217.2(5) as the successor statute to § 317.13 is incorrect. To the extent the Court of Appeals used the same cite, the Court of Appeals is also incorrect. The successor statute to § 317.13 is 30 TAC § 217.53(d)(3)(B), found in Petitioner's Appendix, Tab D. Section 217.2(5) cited by Alton is the definition for the term "building lateral" which is a sewer line, sometimes called a "yardline" owned by the individual property owner, located on the property owner's private property, and which "is not a part of a wastewater collection system." In this case, the building laterals (yardlines) were installed by Sascon and form no part of the Alton sewer system at issue in this case. Exhibit "90". Thus, Alton's argument that the definition in § 217.2(5) excludes Alton's service laterals from the requirements of § 317.13, now § 217.53(d)(3)(B), is clearly erroneous inasmuch as § 217.2(5) deals with a completely different pipe than that at issue in this case.

ARGUMENTS

Response to Reply Issue No. 1 - The Court of Appeals did not apply the correct law and analysis to the issue of governmental immunity.

The Court of Appeals did not apply the correct law and analysis to the issue of governmental immunity. Alton's claim that Sharyland did not acknowledge the Court of Appeal's application of Tex. Gov't Code § 271.151 et. seq. to this case is incorrect.

Sharyland's unbriefed issue No. 5 "Does Tex. Loc. Gov't. Code Section 271.153 bar Sharyland Water Supply Corporation from recovery of damages?" clearly raised the issue of the Court of Appeal's waiver determination. However, the court ruled that Sharyland could not recover damages for the breach. Thus, having allowed the claim, the Court of Appeals denies any remedy.

Under the Court of Appeal's ruling, Sharyland does not have an adequate remedy at law, or a remedy in equity. Sharyland is damaged and, according to the Court of Appeals, has no remedy at all. The discussions regarding equitable waiver and waiver by counterclaim are not irrelevant given the Court of Appeal's ruling that Tex. Loc. Gov't. Code § 271.153 bars Sharyland's recovery of damages.

Sharyland urges this Court to apply the law and consider the public policy of this state to address the existence of Alton's illegally constructed sewer system by allowing the condition to be remediated through injunctive relief requiring that Alton correct the sewer system or awarding damages to Sharyland so that it can undertake remedial measures. Governmental immunity should not bar recovery for Alton's illegal conduct, particularly when that conduct compromises the public's health and safety.

Response to Reply Issue No. 2: The Trial Court did not Err in its Ruling that 30 TAC § 317.13 was Applicable to the Installation of all of the Alton Sewer System.

The trial court did not err in ruling that 30 TAC § 317.13 applies to the sewer lines at issue in this case. In response to Alton's incorporation of Cris and TCB's arguments on this issue, Sharyland incorporates herein its arguments set forth in its Reply to Cris

Equipment Company, Inc.'s Response to Petition for Review and Reply to Turner, Collie & Braden, Inc.'s Response Opposing Petition for Review.

The sewer system at issue in this case is owned by Alton and is comprised of service mains and residential service lines or stubouts which extend from the sewer main through Sharyland's easement and public right-of-way to the property line in front of each residence. C&B, as contractor, and TCB and Cris, as engineers, contracted to install and oversee construction of the Alton system including these stubouts/residential service lines. To carry service from the stubout to the residence, it is necessary to construct yet another line which connects the residence to the Alton sewer system by connecting to the stubout. The line from the stubout to the residence is privately owned by each individual landowner and forms no part of the Alton sewer system. This privately owned line is called a yardline or under the newly adopted 30 TAC § 217.2(5) it is called a "building lateral." Contrary to Alton's argument, the definition of "building lateral" in § 217.2(5) has no application to the trial court's determination that § 317.13 applied to the sewer lines/waterlines crossings in the construction of the Alton sewer system. Section 217.2(5) deals with a completely separate line that is not even at issue in this case. Moreover, it is important to note that these yardlines are not unregulated as they are typically governed by local building and plumbing codes and local code enforcement.

The successor to § 317.13, § 217.53(d)(3)(B), does not use the term "building lateral" anywhere in the regulation. The pertinent term in the successor statute is "collection system"

pipe. "Collection system" is defined in 30 TAC § 217.2(7) as "pipes, conduits, lift stations, force mains and all other constructions, devices and appurtenant appliances used to transport wastewater." The definition of "collection system" describes the Alton sewer system exactly, including the Alton stubouts/service lines as these are clearly pipes used to transport wastewater. Sharyland would agree that the legislature has clarified the issue, but the clarification is in favor of Sharyland's position and the trial court's ruling.

The opinion testimony of the Texas Natural Resource Conservation Commission ("TNRCC") (now Texas Commission on Environmental Quality ("TCEQ")) witnesses was not a formal policy determination by the TNRCC/TCEQ on the issue of § 317.13 applicability. In the absence of a formal agency determination, the trial court was asked to decide the meaning of "sewer" in the context of the regulation. The trial court was presented with a statute wherein the terms "sanitary sewer" and "sewer" are used interchangeably throughout the Chapter and in §317.13. The dictionary defines "sewer" as a noun, referring to an artificial, usually subterranean, conduit to carry off water or waste matter. (*Webster's 7th New Collegiate Dictionary, 1969*). A clear and unambiguous construction of the word "sewer" would be that the term is clearly meant to include all conduits that carry off water or waste matter. In the instance of "sanitary sewer" it can be seen that "sanitary" is an adjective describing sewer. A construction based on the meaning of "sewer" as a conduit to convey water or waste matter allows a clear and consistent construction of 30 TAC §317.13 and it is further supported by the purpose underlying the whole of Chapter 317.

This construction is also consistent with the successor statute and its definition of "collection system." 30 TAC § 217.2(7); 30 TAC § 217.53(d)(3)(B).

In their briefing to the trial court, the Respondents attempted to draw a false distinction between a "sewer" and a "sanitary sewer residential service connection" to argue that the statute did not apply. However, the statute and its successor make no such distinction. The operative word in the statute is "sewer" and all other words used are modifiers. To imply the construction of the statute advocated by Alton and the other Respondents would bring disharmony and ambiguity into §317.13 and the whole of Chapter 317, thereby causing the statutes to become vague and of no effect. Acceptance of the Respondents' arguments would frustrate the purpose of the statute and harm the public interest in protecting human health and the environment. The trial court's determination on this issue, that § 317.13 was applicable to the entirety of Alton's sewer system, was not disturbed by the Court of Appeals and was correct.

Reply to Response to Petitioner's Issue No. 1 and Issue No. 2.

As set forth above, Alton's sewer system is illegally constructed. Sharyland is merely requesting that this Court determine that Alton does not enjoy immunity for the consequences of its wrongful conduct which affects not only these parties, but the public at large whose drinking water is endangered. Sharyland's fight with Alton has never been about money. All along Sharyland has 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. Sharyland brought the problem to Alton's attention during construction and initially Alton agreed there was a problem and demanded that its contractor 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 continuous violation of state law. Exhibit "1"; 4 RR 30-36. 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 as installed poses.

Alton initially filed third-party claims against Respondents Cris, TCB and C&B. CR 76. However, Alton inexplicably withdrew and never pursued those claims and has refused to take any action seeking redress against Cris, TCB and C&B for their breach of contract and negligence in the improper installation of the sewer system.

Money is only at issue because Alton has abrogated its responsibilities to safeguard its citizens, and this Court's 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.

CONCLUSION AND PRAYER

For all of the foregoing reasons, Sharyland respectfully urges this Court to reconsider the previous rulings in this case. Sharyland requests that this Court grant the 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 **Sharyland Water Supply Corporation's Reply to City of Alton's Response to Sharyland's Petition for Review** has been served on the 26th day of June, 2009, to the following in the manner indicated:

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