

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
CARTER & BURGESS, INC.'S RESPONSE TO PETITION FOR REVIEW

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**ATTORNEYS FOR SHARYLAND WATER
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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.

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

REPLY TO STATEMENT OF THE CASE

Carter & Burgess, Inc. ("*C&B*") continues to insist that Alton's sewer system does not leak raw sewage and that Sharyland has not suffered damages to its system in the face of clear evidence otherwise. Prior to the wrongful acts of C&B and the other Respondents, 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 Equipment Company ("*Cris*"), C&B and Turner, Collie & Braden, Inc. ("*TCB*"). 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. We know that sewage has leaked onto Sharyland's waterlines. 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 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 Alton's citizens. The reason for the enactment of regulations specifying that where possible sewer lines are to be installed below waterlines and where not possible that safeguards must be taken is for public's health and safety. 30 TAC § 317.13; 4 RR 9-16; 5 RR 134-136. Respondents did not even feign attempts to comply with the law. Exhibit "1"; 3 RR 99-102; 4 RR 41-56, 63-64; 7 RR 254-257. C&B's argument that Sharyland's water supply system has been completely undamaged when the water system is now overlaid by sewer pipes, is subjected to leaking sewage, and is no longer in compliance with state law was not accepted by the jury, is not credible and should be rejected by this Court.

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

C&B continues to insist that unless and until a contamination outbreak occurs, Sharyland has suffered no damages. 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 crossed 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.

The issue of whether 30 TAC § 317.13 applied to the entirety of Alton's sewer system up to the "yardlines," which are owned by individual property owners and are not a part of Alton's system (referred to as "building lateral" in City of Alton's Response), was exhaustively briefed to, and correctly decided by, the trial court. CR 147, 976, 1463, 1549, 2328, 2427, 2622, 2639, 2648, 2660, 2695, 2713, 3045, 3081, 3163, 3303.

As set forth more fully below, C&B and all the Respondents have confused the testimony of the Texas Natural Resource Conservation Commission ("*TNRCC*") witnesses regarding the requirements imposed by § 317.13. Neither of these witnesses testified that § 317.13 was not applicable. Their testimony was that TNRCC did not choose to "enforce" the regulation as to that part of the Alton system running from the sewer main to the yardline, sometimes called "stubout," because the agency lacked the personnel to enforce the statute as written. CR 2335-2336. The regulation itself does not make any distinction with respect to a sewer main or a stubout and does not use this terminology, instead using the term "sewer" throughout the regulation. 30 TAC § 317.13.

ARGUMENTS

Reply to Response to Issue No. 4 - The Economic Loss Rule does not Bar Sharyland Water Supply Corporation's Negligence Claim

The economic loss rule does not bar Sharyland's recovery in this case. The basis of C&B's argument has always been its contention that Sharyland has suffered no injury/damages as a result of the illegal installation of the sewer lines. C&B's argument should be rejected because Sharyland and its property have been damaged by the wrongful acts of the Respondents.

Before the installation of the sewer lines, Sharyland's waterlines and its easement did not have sewage leaking on them. Before the installation of the sewer lines, Sharyland's waterlines 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. It is important to note that both the sewer lines and the waterlines are made of PVC and are undetectable from the surface. They 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 notices of its existence and placement. 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.

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. Alton breached its agreement, the other Respondents breached the standard of care, and by their actions they have materially altered Sharyland's system. These Respondents must be held liable for the cost to restore Sharyland's system to its condition prior to Respondents' wrongful acts or be required through equitable relief to bring the sewer system into compliance.

C&B and the other Respondents continue to argue that these conditions are speculative, however, they are not. After the installation of the sewer lines, a representative sample of the crossings were excavated revealing that sixty out of sixty-six crossings were

installed improperly over the waterline and leaking sewage was found. Exhibit "1"; 4 RR 68-73. This condition exists today and will continue to exist until the sewer system is brought into compliance by the Respondents or the Respondents pay for Sharyland to encase its water pipes to bring its system into compliance. 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. That an outbreak has not yet occurred is fortunate but does not alleviate the harm to Sharyland caused by having its system damaged by the Respondents' wrongful acts.

Contrary to C&B's assertion, the requirements of 30 TAC § 290.44, which is the mirror regulation to § 317.13 and governs the installation of waterlines in proximity to sewer lines, was raised at trial in connection with repairs to the system required to bring the system into compliance. 5 RR 54-65.

C&B's claim that there is "no evidence that Sharyland's waterlines are "not in compliance with 30 TAC § 290.44" is plainly incorrect. Exhibit "1." Respondent C&B's negligent installation in the sample excavations occurred at a rate of 90.9% inasmuch as sixty out of sixty-six excavated sewer lines were installed improperly, with the sewer lines crossing above the waterlines, not the "six out of sixty-six times" stated in C&B's Response. Assuming C&B meant to say that it was not possible to place the sewer lines under the waterlines in six out of sixty-six times (a contention which the evidence clearly does not support), then C&B is conceding that it "was possible" to install the sewer lines properly

under the waterlines in sixty out of sixty-six times, which Respondents clearly did not do. Exhibit "1."

The fact of the matter is that these Defendants made no attempt to determine whether the sewer lines could be installed under the waterlines or whether minimum separation distances could be maintained. There was no attempt to center the sewer lines between 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. 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. TCB and C&B did not challenge this criteria or take any steps to correct the improper sewer line installations despite their obligations as engineers on the project. These Respondents made no effort whatsoever to properly install the sewer lines in compliance with 30 TAC § 317.13. They had a job which they wanted to finish in the fastest, most expedient way possible without regard to public safety regulations.

Additionally, 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 C&B's incorporation of TCB's arguments on the § 317.13 issue, Sharyland incorporates herein its Reply to Turner, Collie & Braden, Inc.'s Response Opposing Petition in Review, its Reply to Cris Equipment Company, Inc.'s Response to Petition for Review and its Reply to City of Alton's Response to Sharyland's Petition for Review.

The opinion testimony of the TNRCC (now Texas Commission on Environmental Quality ("TCEQ")) personnel was not a formal policy determination by the TNRCC/TCEQ on the issue. The trial court was asked to decide the meaning of "sewer" in the context of the regulation and properly determined that 30 TAC §317.13 clearly applies to all sewers within the public right-of-way and coming in close proximity to waterlines. The TNRCC promulgated 30 TAC § 317 under Texas Water Code § 5.103 and §5.105. 15 Tex. Reg.(April 16, 1990). It is undisputed that the purpose of §317.13 is to protect the public and human health from sewage cross-contaminating potable waterlines. 4 RR 9-16; 5 RR 134-136. Thus, the statute mandates that where sewer lines cross waterlines that the sewer lines be installed below the waterlines where possible and, where not possible, that safeguards in the statute be implemented. Without a formal agency determination, 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 within Alton's system that carry off water or waste matter.

The trial court's construction of the statute based on the meaning of "sewer" as a conduit to convey water or waste matter allows a clear consistent construction of 30 TAC §317.13 and it is consistent with the whole of Chapter 317. This harmonizes the apparent

interchangeable usage of "sanitary sewer" and "sewer" as used in 30 TAC §317.13. Sewer is the operative word.

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." However, the statute makes no such distinction. The operative word is "sewer" and all other words used are modifiers. To imply such a construction would bring disharmony and ambiguity into §317.13 and the whole of Chapter 317, and cause the statutes to become vague and of no effect, thus harming the public interest in protecting human health and the environment. The trial court's determination on this issue which was not disturbed by the Court of Appeals, was correct.

C&B further complains that certain excerpts of the TNRCC witnesses' (Herrin and Laughlin) depositions were excluded as evidence. However, there was no error in the exclusion of irrelevant sections of the Laughlin and Herrin deposition testimony. The admission and exclusion of evidence is committed to the trial court's sound discretion. *Gee v. Liberty Mut. Fire Ins. Co.* 765 S.W.2d 394, 396 (Tex.1989).

The part of the testimony of Herrin and Laughlin which the trial court excluded in its order was limited to the testimony regarding the detailed basis of their opinions in reference to the application of the statute that was contrary or different than the Court's ruling on the application of the law. 11 RR 175-176. The proffered evidence that was excluded was represented by counsel to only address the issue of the applicability of 30 TAC § 317. To

the extent that tendered testimony was outside of this representation and, hence, the trial court's order, then Respondents failed to obtain a ruling on the admissibility of that testimony and has waived any objection. To the extent the tendered testimony was limited to the narrow sphere of testimony identified by trial counsel and by the trial court, then, there was no error in the ruling as the exclusion of that testimony was based on the trial court's proper ruling that the statute applied to the sewer crossings as a matter of law.

Moreover, given the overwhelming evidence of the breach of the contract and failure to install the crossings in accordance with the plans and specifications, any limited exclusion of this testimony did not cause the rendition of an improper judgment.

Reply to Partial Response to Unbriefed Issue No. 6.

Contrary to C&B's argument, C&B and all of the Respondents brought the third party beneficiary issue to the Court of Appeals as an insufficient evidence point of error. (See Brief of Appellant, Carter & Burgess, Inc., C&B's Issue 1(a).) In further proceedings, this Court may properly consider this issue and all subsidiary issues in connection with Unbriefed Issue No. 6.

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 brings 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 Carter & Burgess, Inc.'s Response to Petition for Review** has been served on the 26th day of June, 2009, to the following in the manner indicated:

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