

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
CRIS EQUIPMENT COMPANY, INC'S RESPONSE TO PETITION FOR
REVIEW

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STATUTES, RULES AND CODES

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

MISCELLANEOUS

Webster’s 7th New Collegiate Dictionary, 1969 4

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.

RESPONSE TO REPLY TO PETITIONER'S STATEMENT OF FACTS

Sharyland has not distorted the record. The jury heard all of the evidence regarding the construction of the sewer system, including evidence that Cris and the Respondents made no attempt to determine whether the sewer lines could be installed under the waterlines or whether minimum separation distances could be maintained. Evidence clearly showed that there was no attempt 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. 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. 3 RR 99-102; 4 RR 41-56, 63-64; 7 RR 254-257. The jury did not agree with Cris' argument that there was no harm and that the installation was done properly. The jury awarded damages to safeguard Sharyland's damaged water system which was left vulnerable to a contamination hazard as a result of the Respondents' wrongful conduct.

ARGUMENTS

Response to Reply to Sharyland's Issue No. 4 and Cris' Issue No. 1

Sharyland has compensable damages which are recoverable and are not barred by the economic loss rule. The damages to Sharyland's system exists today, and will exist tomorrow and every day thereafter until the sewer lines are installed properly or Sharyland's waterlines are encased. Sharyland is not seeking economic loss damages. Sharyland is

seeking damages for the harm done to its property, its system, which is no longer in compliance with state law. 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, to obtain relief for the violation of a state law enacted to prevent contamination from occurring. The current situation cries for an immediate change to prevent a catastrophic outbreak of water borne diseases. Sharyland incorporates herein its arguments regarding the economic loss rule issue in its Reply to Carter & Burgess, Inc.'s Response to Petition for Review and in its Reply to Turner, Collie & Braden, Inc.'s Response Opposing Petition for Review. The Court of Appeal's ruling that Sharyland has no compensable damages is error.

Response to Cris' Issue No. 2

The trial court correctly decided the applicability of the § 317.13 issue. This issue was exhaustively briefed by the parties in competing motions for summary judgment. CR 147, 976, 1463, 1549, 2328, 2427, 2622, 2639, 2648, 2660, 2695, 2713, 3045,3081,3163, 3303. The basis of the Respondents' objection to the trial court's ruling is the erroneous assertion that the opinion testimony of TNRCC (now Texas Commission on Environmental Quality ("TCEQ")) employees precludes the trial court from finding that the statute applies to the sewer crossings at issue in this case. Respondent's reasoning was rejected by the trial court who recognized that the testimony of the TNRCC employees, Laughlin and Herrin, was not a formal policy determination by the TCEQ on the issue and was not consistent with a reading of the law.

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, the sewer lines be installed below the waterlines where possible and, where not possible, that safeguards in the statute be implemented. The trial court was asked to decide the meaning of "sewer" in the context of the regulation.

Cris and the other Respondents asked that the trial court create an arbitrary distinction between the term "sewer" and a "sanitary sewer residential service connection" so as to only apply the regulation to the installation of the sewer main and to exempt the stubouts of the Alton system from the statute's requirements. The construction of the statute advocated by the Respondents would have created a gap in the regulation for the transport and handling of sewage, and would have left the stubouts free of any regulation. Even the TNRCC employees agreed that these sections of the system were regulated. CR 2328; CR 2346-2358; CR 2385-2406. The arguments advanced by the Respondents was properly rejected by the trial court because a gap in regulation would frustrate the purpose of the Chapter 317 to provide a comprehensive regulatory scheme to sewage systems, would not have been protective of human health, and is not supported by the language of the regulation itself. The trial court was correct in ruling that 30 TAC §317 applies to all sewers owned by the public, within the public right-of-way which are constructed in close proximity to waterlines because otherwise the guidelines would no longer be comprehensive.

Since TNRCC has never issued a formal agency determination regarding the meaning

of the terms "sewer" and "sanitary sewer" as used in 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 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.

The testimony of the TNRCC employees was that the agency generally does not apply the wording in §317.13 to instances concerning "service laterals" within the public right-of-way. This construction is unreasonable because it causes a "gap of regulation" since the local authority's jurisdiction stops at the right-of-way. CR 2335. The reason given by these agency engineers for this interpretation is interesting because it is not based on sound engineering practice nor the language of the regulation but is based on their interpretation of the "workload" to the agency that would result from "sheer numbers." CR 2335-2336. While the TNRCC (TCEQ) may be bound by the practical limitations of its enforcement

budget and available enforcement personnel in determining whether and what regulations will be enforced, this Court is under no similar constraint and should not disturb the ruling of the trial court that the statute should be applied as written.

The construction of the statute provided by Laughlin and Herrin is clearly not reasonable and is contradicted by the plain language of the statute. Their informal opinion should not be given deference because the TNRCC/TCEQ has never issued formal guidance regarding the applicability of the statute. Moreover, these employees testified that the only basis for their opinion was the extra workload that would beset the agency if TNRCC applied the regulation as written. The trial court's ruling with respect to § 317.13 was entirely appropriate given the unreasonable construction of the rule attributable to Laughlin and Herrin and the clear language and purpose of the statute.

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 Cris Equipment Company, Inc.'s Response to Petition for Review** has been served on the 26th day of June, 2009, to the following in the manner indicated:

Via CMRRR: 7007-3020-0000-5172-8318

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