

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 TURNER, COLLIE & BRADEN, INC.'S
RESPONSE OPPOSING PETITION FOR REVIEW

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STATUTES, RULES AND CODES

30 Tex. Admin. Code § 290 (West 2009) 2, 3

30 Tex. Admin. Code § 290.41(e) (West 2009) 3

30 Tex. Admin. Code § 317.13(1)(B)/
now 30 Tex. Admin. Code 217.53(d)(3)(B) (West 2009) v, 2, 3, 4, 6, 7, 8

Texas Water Code § 5.103 6

Texas Water Code § 5.105.15 Tex. Reg. (April 16, 1990) 6

MISCELLANEOUS

Webster’s 7th New Collegiate Disctionary, 1969 7

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.

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's account of the record is not inaccurate as alleged by Turner, Collie & Braden, Inc. ("TCB"). Sharyland did everything it could short of litigation to persuade the Respondents to comply with their contractual and common law obligations which required the installation of the sewer system in a manner consistent with the law and sound engineering practices. TCB was the site engineer on the project, the Respondent with the on-site responsibility to inspect and ensure compliance with the plans and specifications and provide an engineering review of the contractor's work. Exhibit "2"; 5 RR 103-108. The plans and specifications provided the criteria for building Alton's sewer lines where they cross Sharyland's waterlines. Exhibit "69"; Exhibit "90"; Exhibit "109". The Design Engineer specified that where Alton's sewer lines had to cross over Sharyland's waterlines, the sewer lines would be constructed using pipe with a minimum pressure rating of 150 psi, with a minimum separation distance of six (6) inches, and with one length of pipe centered on the waterline. 4 RR 14-16; 7 RR 74; Exhibit "69"; Exhibit "90"; Exhibit "109". The design of the sewer project was consistent with state regulations, sound engineering practices and the common law standard of care. 3 RR 128. TCB was negligent in the performance of those duties. Exhibit "1."

When Sharyland discovered that Alton's sewer lines were being constructed in a way that threatened the safety of Sharyland's waterlines, Sharyland immediately complained to Alton and asked Alton to correct the problem. 4 RR 20. At first Alton agreed. 4 RR 20.

Alton then contacted the other Defendants and requested that the sewer lines constructed in the proximity of Sharyland's waterlines be changed so that they were below Sharyland's waterlines where possible, and where it was not possible, changed so that there was a minimum of six (6) inches of separation between the sewer lines and the waterlines, and that a joint of sewer pipe be centered on Sharyland's waterlines in accordance with the plans and specifications of the sewer project and applicable law. 3 RR 22; 4 RR 79-82; Exhibit "19."

Then, Alton, inexplicitly, intentionally decided to leave the sewer lines as they were originally constructed and to not change them to conform with the law. 4 RR 82-90. 4RR 56-57, 103-104, 260; CR 3281. Sharyland even excavated a representative sample of the sewer line/waterline crossings and discovered that sixty out of sixty-six crossings were in violation of 30 TAC § 317.13 and the requirements of the plans and specifications. Even after being presented with the discovery of violations in over ninety percent (90%) of the excavated crossings and the discovery of a present leak, Alton and these Respondents did nothing. It is clear that Alton and the other Respondents knew there was a problem, yet they refused to take any corrective action, thus necessitating Sharyland's suit.

TCB misstates the record with respect to the discussions with the Texas Water Development Board and the Texas Natural Resource Conservation Commission ("*TNRCC*"). It is important to note that, the TNRCC never inspected the Alton sewer project. CR 2401. TNRCC representative, David Laughlin testified that he did not know if the sewer lines were constructed in a manner consistent with the § 290 regulations, having only seen the plans

for the project. CR 2401.

Section 290 regulations which govern the installation of waterlines in proximity to sewer lines was not the statute applicable to Alton's installation of the sewer lines in proximity to waterlines. The statute applicable to Alton is 30 TAC § 317.13, now 30 TAC 217.53(d)(3)(B). The letter referenced by TCB as Exhibit "62" is a letter from the TNRCC dated February 29, 2000, which merely states that TNRCC has approved construction of this project and that the **specifications** complied with TNRCC's 30 TAC § 290. Nothing states that the TNRCC had approved the construction in the ground.

No one disputes that the plans and specifications for the project were correct and called for installation of the sewer lines in accordance with 30 TAC § 317.13. If the Respondents had, in fact, installed the sewer lines as required by the plans and specifications, Alton's sewer system would not, today, overlay Sharyland's water system. The letter goes on to state that § 290.41(e) does not apply to sanitary service laterals which is a technically correct statement inasmuch as the section 290 regulations govern the installation of waterlines and not sewer lines which, at the time, were subject to the section 317 regulations.

As set forth more fully herein, the trial court's ruling regarding the applicability of 30 TAC § 317.13 to the sewer line/waterline crossings in this case was correct and should not be reviewed by this Court.

REPLY TO SUMMARY OF THE ARGUMENT

Sharyland has suffered harm to its system and is entitled to recovery which will restore its system to compliance with state law mandating minimum separation distances and other safeguards to ensure that cross contamination between water and sewer systems are avoided. Sharyland is not fear mongering. TCB argues, without any authority, that waterlines and sewerlines exist in proximity without incident. Sharyland would point out that, to the extent TCB's statement is true, peaceful co-existence is only possible because the placement and installation of sewer lines, from the house to the sewer plant, is regulated and those regulations are generally observed and enforced. In the case of the yardlines, which run from the house to the publicly owned sewer service lines (stubouts), these lines are governed by local building and plumbing codes and local enforcement officials. The remainder of the sewer line system 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. There is no gap in regulation because to allow such would frustrate the purpose of the statutory scheme which is to prevent contamination of potable water by sewage.

The problem in this case is that these Respondents did not comply with those regulations and did exactly what the statute, sound engineering practice and common sense prohibits. The sewer lines were placed on top of the waterlines, in many places with no separation at all, so that any breach of the sewer line will cause sewage to fall onto the waterline. Exhibit "1." That contamination has not yet occurred does not mean that, as the

system ages, the hazard is removed. Instead, the passage of time and deterioration of the system only increases the hazard. The Court should grant review and afford Sharyland a remedy to address the damage to its system.

ARGUMENTS

Reply to Response to Sharyland's Issue 4.

TCB inaccurately contends that Sharyland did not own any easements. To the contrary, Sharyland was granted easements in paragraph 5 of its contract with Alton to locate its waterlines. Exhibit "37." The fact that the easements were not exclusive does not mean that these Respondents were given license 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's damages were not deemed theoretical by the jury in this case, who awarded damages so that Sharyland could make necessary repairs to safeguard the water system from hazards posed by the Alton sewer system. The only bar to Sharyland's recovery of those damages is the Court of Appeal's erroneous application of the economic loss rule. The basis of the ruling is that Sharyland has not sustained "property damage." 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.

Reply to TCB's "Other Grounds" argument.

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 clear reading of the law.

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, 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.

Respondents asked that the trial court make a distinction between "sewer" and a "sanitary sewer residential service connection" so as to only apply the regulation to the

installation of the sewer main and exempt the stubouts of the Alton sewer system from the requirements of the regulation. The construction of the statute as advocated by the Respondents would create a gap in regulation regarding the transport and handling of sewage which would not be protective of human health, and is not supported by the language of the regulation itself. 30 TAC §317 clearly applies to all sewers within the public right-of-way constructed in close proximity to waterlines. 30 TAC §317.1(a) indicates the purpose of this Chapter is to set minimum guidelines for "the **comprehensive** consideration of domestic sewage collection, treatment, or disposal systems." Any contrary definition would frustrate the purpose of the Chapter because 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.

TNRCC employees agreed that these sections of the system were regulated but that the agency generally does not apply the wording in §317.13 to instances concerning "service laterals" within the public right-of-way. CR 2328, CR 2346-2358; CR 2385-2406. Each acknowledged, however, that the construction of the statute 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. This is the "practical approach" to which TCB refers. 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. The evidence of this case makes clear that the Alton sewer system was constructed in a manner which violates 30 TAC § 317.13, and Sharyland should be afforded a remedy for that violation. TCB cites no authority or record references for its assertion that the agency has formally interpreted this rule in the manner advocated by TCB and the other Respondents.

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

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