

**NO. 09-0223**

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**IN THE SUPREME COURT OF TEXAS**

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**SHARYLAND WATER SUPPLY CORPORATION**  
*Petitioner*

**vs.**

**CITY OF ALTON, CARTER & BURGESS, INC., CRIS EQUIPMENT  
COMPANY AND TURNER, COLLIE & BRADEN, INC.**  
*Respondents*

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**RESPONDENT CARTER & BURGESS, INC.'S  
RESPONSE TO PETITIONER'S BRIEF ON THE MERITS**

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**RECORD REFERENCES**

For clarity, references to the Clerk’s Record and Reporter’s Record will appear as follows:

1. Clerk’s Record – C.R. [Vol. #], [p. #]
2. Reporter’s Record – R.R. [Vol. #], [p. #]
3. Appendix – App. [#]

## **STATEMENT OF THE CASE**

Respondent Carter & Burgess, Inc. (hereinafter “C&B”) generally agrees with the Statement of the Case found at pp. x-xi of Petitioner Sharyland Water Supply Corp.’s (hereinafter “Sharyland”) merits brief. However, C&B objects to Sharyland’s description of the Nature of the Case on p. x and Disposition by the Court of Appeals on p. xi as containing argument which is not permitted under Texas Rule of Appellate Procedure 55.2(d). C&B further objects to those portions of Sharyland’s Statement of the Case because they contain factual allegations unsupported by the record regarding the condition of the sanitary sewer system at issue and conclusions of law regarding the scope and applicability of state regulations that are incorrect. All of that constitutes argument and, in addition to being factually and legally unsupported, it is inappropriate and in violation of the Texas Rules of Appellate Procedure.

## **ISSUES PRESENTED**

Pursuant to Texas Rule of Appellate Procedure 55.3(c)(2), C&B presents the following issues 1 through 9. Issues 1 through 9 were presented below to the Court of Appeals. The Court of Appeals disposed of this matter based on its determination of Issue 1 and 2(d), below. Each issue presented in the Court of Appeals provides adequate grounds for the Court of Appeals’ judgment and adequate, independent grounds for affirmance by this Court. For the Court’s convenience, C&B has responded to the Issues Presented by Sharyland as presented by Sharyland, and as listed in the table of

contents, incorporating its arguments and issues presented below into the response to Sharyland's Issues Presented.

Each of the issues listed below are addressed where noted in the text. These issues are also presented, where appropriate, as independent grounds to either deny the Petition for Review or affirm the Opinion and Judgment of the Court of Appeals.

**1.**

C&B entered into a contract with Alton to provide project management services for a sewer system construction project. At no time did C&B have a contractual relationship with Sharyland.

- a. Did the trial court err by submitting an issue to the jury asking whether Sharyland was a third-party beneficiary of the contract between C&B and Alton?
- b. Was the evidence of Sharyland's alleged third-party beneficiary status legally or factually sufficient to support the jury's finding that Sharyland was a third-party beneficiary of the C&B/Alton contract?
- c. Did the Court err in entering a judgment based on the jury's finding that Sharyland was a third-party beneficiary of the C&B/Alton contract?

**2.**

C&B's duties under its contract with Alton were delineated in 17 paragraphs of the contract between them.

- a. Did the trial court err in determining that C&B's duties under the contract included on-site inspection of the construction even though the contract contained no such duty?
- b. Did the trial court err in submitting a negligence issue to the jury with regard to C&B when there was no evidence that C&B had breached a duty under the contract?

- c. Did the trial court err when it held that the Texas Engineering Practice Act and the rules and regulations promulgated thereunder establish new or different duties owed by C&B to Sharyland separate from and in addition to whatever common law or contractual duties might apply to C&B's performance under its contract with Alton?
- d. Did the trial court err in submitting a negligence issue to the jury with regard to C&B when Sharyland's negligence claims are barred by the economic loss rule?
- e. Did the trial court err in entering judgment against C&B based on the jury's negligence finding since there was no evidence to support that finding?
- f. Did the trial court err in entering judgment against C&B and in favor of Sharyland when there is no evidence that C&B owed a duty to Sharyland or that any duty C&B owed to Sharyland was breached?

**3.**

(Not Reached by the Court of Appeals)

Did the trial court err in entering a judgment against C&B awarding damages since there is no evidence that Sharyland suffered any damage whatsoever, or any damage proximately resulting from anything C&B did or failed to do?

**4.**

(Not Reached by the Court of Appeals)

Did the trial court err when it held that Tex. Admin. Code §317.13 applied to the construction of side laterals from the sewer mains to the individual houses served by the new system?

**5.**

(Issue Number 6 in the Court of Appeals, Not Reached by the Court of Appeals)

Did the trial court err by entering a judgment against C&B in favor of Sharyland for damages for breach of contract when there was no evidence, or, in the alternative,

insufficient evidence of damages to justify the submission of a damage issue to the jury and to support the jury's answer?

**6.**

(Issue Number 7 in the Court of Appeals, Not Reached by the Court of Appeals)

Did the trial court err by entering a judgment against C&B in favor of Sharyland based upon a claim of professional negligence when:

- a. There was no evidence of any breach by C&B of an applicable standard of care;
- b. There is no evidence that any alleged breach by C&B of the applicable standard of care was the proximate cause of any damage suffered by Sharyland.

**7.**

(Issue Number 8 in the Court of Appeals, Not Reached by the Court of Appeals)

Did the trial court err by awarding contract damages against C&B in excess of the value of the compensation C&B received from Alton under C&B's contract with Alton, despite the contractual language limiting any damages for breach of C&B's contract with Alton to the liquidated amount of \$99,984.88, equal to C&B's compensation under its contract with Alton?

**8.**

(Issue Number 9 in the Court of Appeals, Not Reached by the Court of Appeals)

Did the trial court err when it entered a judgment awarding attorney's fees to Sharyland against C&B:

- a. When, as a matter of law, Sharyland was not entitled to recover attorney's fees from any Defendant; and

- b. When Sharyland failed to segregate the attorney's fees attributable to its claims against each individual Defendant.

**9.**

(Issue Number 10 in the Court of Appeals)

Did the trial court err in imposing joint and several liability against C&B?

- a. The jury apportioned less than 50 % responsibility against each defendant, and there is therefore no legal basis for imposing joint and several liability against C&B on Sharyland's negligence claims.
- b. There is no legal basis for imposing joint and several liability against C&B under Sharyland's contract claims because the contracts and the duties thereunder were separate for C&B and each other defendant.

**STATEMENT OF JURISDICTION**

C&B takes no position regarding the importance of (1) the governmental immunity issues in this case, or (2) the remedies available against municipalities. Regarding the claims against C&B, of which no mention is made in Sharyland's Statement of Jurisdiction, the Court of Appeals correctly applied Texas law on both the tort and contract claims brought against C&B and this Court need not exercise jurisdiction over those claims. Sharyland's Issue Numbers 3 and 5 were resolved correctly using well established principles derived from long-standing precedent from this Court and a correct application of that precedent to the evidence. As such, the Opinion below is in no need of correction and the Opinion, as written, will contribute to clarity in this state's jurisprudence on the issues it addressed.

Issue Numbers 7 and 8 pertain specifically to the award of damages and attorneys' fees in this case, which is specific to the issues presented in this specific case. *See*

PETITIONER’S BRIEF ON THE MERITS, p. xiii. The Court of Appeal’s correct decision regarding the economic loss rule and the third-party beneficiary doctrine should not provide the basis of this Court accepting discretionary review of this appeal. Thus, Issue Numbers 7 and 8 are moot and their resolution will not contribute to the jurisprudence of the State. *See* TEX. GOV’T CODE § 22.01(a)(6).

### **STATEMENT OF FACTS**

The facts recited in the Court of Appeals opinion at 277 S.W.3d pp. 138-140 are correct. *See City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 138-140 (Tex. App.—Corpus Christi 2009, pet. filed). The following supplements the Court of Appeals’ findings.

In the late 1990’s Alton obtained financing from the Texas Water Development Board to construct its sewer system. Regulations applicable to state-funded projects required Alton to retain the services of L. L. Rodriguez and Assoc. (“Rodriguez”) to design the system, Turner, Collie & Braden, Inc. (“TCB”) to inspect and oversee the construction of the system (Ex. 2), and C&B as project manager (R.R. 9, p. 205; Ex. 49). Cris Construction Company (“CRIS”) was hired to actually construct the system (Ex. 2). Alton had separate contracts with each of the engineering companies and with CRIS, and C&B’s contract with Alton specifically enumerated C&B’s duties, responsibilities and contractual obligations to Alton (Ex. 2). C&B had no contractual or other business relationship with Sharyland (Ex. 2).

Rodriguez's design called for the installation of sewer mains running under streets in a pre-existing utility easement (Ex. 90). Residential service lines, or "stub-outs," extended from the main to the border of the easement in front of each residence, and yard lines were to extend from each house to connect with the stub-out at the property line (Ex. 90). CRIS built the system to the private property line and Sascon Construction Company got the contract to build and connect the yard lines to the stub-outs (Ex. 90). Because the water main and the sewer main ran parallel to each other in some locations, the stub-outs in those places had to cross the water main to connect with the yard lines on the side of the street where the water line was closest to the edge of the easement (R.R. 6, p. 23).

Because the sewer system was to be installed in the same right-of-way occupied by the pre-existing water system, Rodriguez provided Stuhlman with copies of the sewer system drawings for review (R.R. 3, p. 19). On behalf of Sharyland, Nichols approved the drawings (R.R. 7, pp. 132-133, Ex. 109). It was generally agreed that the drawings showed a design that satisfied Sharyland (R.R. 3, p. 62) and the design was approved by the Texas Water Development Board (R.R. 3, pp. 133-134). With full knowledge of how the system was built and all of Sharyland's objections, the State of Texas has not required any part of the sewer system to be changed (R.R. 3, pp. 30-31, 93).

The existence of the sewer system has not interfered with the operation of Sharyland's water system (R.R. 2, pp. 273-275), and in the four years prior to trial that the sewer system had been installed, there had been no instance of injury, contamination

or illness caused by the sewer system as installed (R.R. 3, pp. 277, 282). In fact, the water system transports water under pressure, which prevents contaminants from entering the system (R.R. 3, p. 282).

Rodriguez's plans specified what CRIS was to do when a stub-out had to cross a water line. They provided that sewer lines (1) may be placed no closer than 6 inches from the water line; (2) that sewer lines would be run under water lines, and (3) that sections of sewer pipe crossing water lines should be centered so that the ends of the section of sewer line that crosses under (or over) the water line are equidistant from the water line (R.R. 7, p. 217, Ex. 69). Importantly, the design specifications also stated that those construction guidelines should be followed "where possible" (*Id.*; Ex. 5).

### **C&B's Obligation to Alton**

The C&B/Alton contract was one of a series of contracts that the Texas Water Development Board ("TWDB") required Alton to enter in order to obtain state funding for the sewer system (Ex. 2<sup>1</sup>; R.R. 9, pp. 205, 210, Ex. 49). Alton hired C&B as its "project manager" (Ex. 2, p. 187, *et seq.*; App. 2), as required by the Alton/TWDB contract (Ex. 49, p. 10). Alton also hired TCB to provide "Engineering and Inspection Services" (Ex. 2, p.170; App. 3).

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<sup>1</sup> Ex. 2 is found in Vol. 15 of the Reporter's Record. It comprises contracts between Alton and L.L. Rodriguez, TCB, C&B and CRIS Equipment. It appears that the original exhibit was sequentially page numbered in the upper right-hand corner of each page, and that the exhibit was admitted with those pages somewhat out of order. Page references to Ex. 2 will be to the pagination described above as the pages appear in the Reporter's Record in the upper right-hand corner of the page.

Relevant to the issues involved in this appeal, the Alton/C&B contract described the duties assumed by C&B as follows:

Task 3.

Insure that the project complies with all local, state and federal regulations relevant to the planning and construction of a wastewater collection and transmission system.

(Ex. 2, p. 189; App. 2).<sup>2</sup>

Nowhere in the Alton/C&B contract is there a provision requiring that C&B inspect the construction of the system (Ex. 2, pp. 187-192; App. 2). In fact, Task 12 of the Scope of Services requires C&B to review “the engineer’s recommendation for the Resident Project Inspector and advise the Owner; thus, demonstrating that a different company altogether was to be retained to provide inspection services ...” (Ex. 2, p. 190; App. 2).

TCB’s contract with Alton provided that it was to provide “Resident Inspection Services” (Ex. 2, p. 181, par. 2(b); App. 3), including “inspecting of completed work for compliance with ‘Contract Documents’” (Ex. 2, p. 179 Sec. C(1); App. 3).

None of the contracts between Alton and the various engineering and construction firms involved in this project provided that Sharyland was to be a third-party beneficiary (App. 2, 3, 4).

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<sup>2</sup> The Alton/C&B contract contains 17 “Tasks” in the Scope of Services section (Ex. 2, pp. 189-193; App. 2). None of the remaining 16 Tasks are relevant to this case.

The contract between Alton and C&B specifically described C&B's duties (Ex. 2, App. 2).<sup>3</sup> First, the contract was for services as "EDAP Grant Project Manager" (Ex. 2; App. 2, p.187). The scope of services envisioned as project manager were contained in an attachment that consisted of 17 "tasks" (Ex. 2; App. 2, p. 189-193). Of them all, only one "task" involved a review of the details of the project: Task 3 (Ex. 2; App.2, p. 189).

The contract also limited C&B's liability resulting from the services it rendered to an amount no greater than the fee it earned under the contract -- \$99,984.88 (Ex. 2; App. 2, pp. 188, 191).

Significantly, the contract did not oblige C&B to inspect the ongoing construction (Ex. 2; App. 2). Rodriguez's contract included construction inspection duties (Ex. 2, p. 77; App. 4, p. 77).<sup>4</sup> TCB was also retained by Alton to, among other things, "provide general engineering review of the work of the contractor as construction progresses to ascertain that the contractor is conforming with the design concept" (Ex. 2, p. 178; App. 3, p. 178).<sup>5</sup> There would be no logical reason to duplicate services in C&B's contract that two other individuals and entities had been specifically engaged to perform.

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<sup>3</sup> A copy of the Alton/Carter & Burgess contract is attached as App. 2. Carter & Burgess is utilizing the pagination from the Reporter's Record in the upper right-hand of the Exhibit.

<sup>4</sup> A copy of Alton's contract with Rodriguez is attached as App. 4. Carter & Burgess is utilizing the pagination from the Reporter's Record in the upper right-hand of the Exhibit.

<sup>5</sup> A copy of Alton's contract with TCB is attached as App. 3. Carter & Burgess is utilizing the pagination from the Reporter's Record in the upper right-hand of the Exhibit.

### **Construction of the Sewer Lines**

Beginning in September of 1999, several months after the construction had begun (R.R. 4, p. 19), Sharyland became aware of problems arising during the construction process (R.R. 4, p. 30, Ex. 21). When Sascon began hooking houses to the stub-outs, they had trouble locating the stub-outs, and they encountered situations where water lines were crossed by sewer lines on top and where stub-outs either stopped short of or extended past the homeowners' property lines (R.R. 4, pp. 20-21, 27).

Stuhlman complained to Alton and to C&B in September of 1999 (Ex. 32) and again in October (Ex. 26). Thereafter, Alton's attorney, on February 14, 2000, proposed a meeting to discuss issues regarding the sewer construction that were raised in earlier correspondence (Ex. 39). In it, Alton's counsel described the three areas of concern arising from the construction and Sharyland's decision to excavate and inspect five sites which revealed:

- (1) sewer pipelines within six inches and on top of a water line;
- (2) sewer lines that were not centered while crossing a water line; and
- (3) sewer line with couplings immediately over the water lines.

(Ex. 34).

Shortly after the controversy arose, John Cook, a C&B engineer based in Fort Worth, took over the project manager duties after his predecessor left the company (R.R. 9, pp. 185-186). When Cook took over responsibility as project manager, a substantial majority of the service lines had been connected (R.R. 9, p. 186). Cook

learned of the controversy regarding construction of the stub-outs about one month before all parties met at CRIS Construction (R.R. 10, p. 10). Cook investigated the contract requirements and communicated with two individuals of the Texas Natural Resource Conservation Commission (“TNRCC”), Jeff Crawford and David Loffland (R.R. 10, p. 11).

After consultation with TNRCC<sup>6</sup> and with Rodriguez, Cook concluded that TNRCC regulations do not prohibit properly constructed residential sewer service lines from crossing over water lines (R.R. 10, pp. 10-14). Further, along with TCB, C&B and Rodriguez concluded that the construction was in substantial compliance with the plans and specifications (Ex. 79, 80).

### **Factual Inaccuracies in Sharyland’s Brief on the Merits**

Several points raised by Sharyland lack substantiation by the record. For example, on page 4 of Sharyland’s Brief on the Merits, Sharyland states that “the raw sewage is drawn down 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*. See PETITIONER’S BRIEF ON THE MERITS, p. 4 (emphasis added). To support this assertion, Sharyland cites to Exhibit 1. Exhibit 1 is a table showing the locations where the sewer line crosses the waterline. Nothing in Exhibit 1 establishes that there is a contamination hazard to the public’s drinking water supply. Furthermore,

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<sup>6</sup> The trial court erroneously excluded deposition testimony from the TNRCC employees, Louis C. Herrin, III and David D. Laughlin in which they said that the regulation that Sharyland contends was violated did not even apply to the situations at issue (R.R. 11, pp. 99-102). That testimony was included in the Record in a bill of exception (R.R. 8, pp. 224-230; R.R. 11, pp. 34, 173-176).

without citations to the record, Sharyland asserts that “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.” There simply is no factual support in Exhibit 1 to support this conclusion.

In its discussion regarding Issue Number 3, and without citation to the record, Sharyland states, “By their wrongful acts, Respondents have exposed Sharyland’s system to the continuing presence of sewage in Sharyland’s easements and above its waterlines.” *See* PETITIONER’S BRIEF ON THE MERITS, p. 23. There is no evidence in the record, and Sharyland has not provided records citations to establish, that there is an actual contamination of Sharyland’s waterline. Sharyland continues to argue that there is an ongoing contamination hazard to Sharyland’s employees and members and to Alton’s citizens, without records citation.

The majority of the record references cited by Sharyland would require a large inference to reach the conclusion for which Sharyland contends the record supports. For example, in its discussion of Issue Number 5, Sharyland states, “The contract plans and specifications themselves, developed with the active help and participation of Sharyland, who was no stranger to the contracts, detail the location and placement of the waterlines within Sharyland’s easements as they relate to the sewer lines and require that the installation of the sewer lines be performed as provided in those plans and specifications.” *See* PETITIONER’S BRIEF ON THE MERITS, p. 23. Even a liberal reading of

the record cited by Sharyland does not provide factual support for the statement that Sharyland was “no stranger to the contracts.” At most, the record citations establish that Sharyland was asked to review the plans to indicate the location of its waterline. These are just a few examples of the factual inaccuracies found in Sharyland’s Brief on the Merits.

## **SUMMARY OF THE ARGUMENT**

### **1. Economic Loss Rule**

The economic loss rule bars Sharyland’s tort claim against C&B.

No evidence is presented and none exists to support the claim that Sharyland’s water system has suffered property damage. There have been no instances of contamination of Sharyland’s water supply, and no Sharyland customer has been harmed by an instance of contamination. Therefore, the only “damage” relates to the installation of the sewer system, and the maintenance and other expenses that may or may not have been incurred by Sharyland as a result of the construction.

Because there has been no property damage, the economic loss rule restricts recovery to a breach of contract claim. Sharyland’s attempts, unsupported by anything other than unsupported assertions and hyperbole, to assert some damage recoverable in tort, are unavailing.

### **2. Third Party Beneficiary**

Sharyland’s argument that it is a third party beneficiary of the C&B/Alton contract fails for several reasons. First, there is absolutely no mention of Sharyland in the

C&B/Alton contract, so there is no evident intent to make Sharyland a third party beneficiary sufficient to overcome the strong presumption against the creation of such a status.

Second, C&B's contractual duty and obligation to Alton is not the type of "indebtedness, contractual obligation or other legally enforceable commitment," that is owed to and can be enforced by a third party. *See MCI Telecomm Corp. v. Texas Utilities Electric Co.*, 995 S.W.2d 647, 651 (Tex. 1999). Further, C&B contracted to provide services that did not include responsibility for on-site inspection of the construction. Because it is undisputed that the plans and designs for the system were not objectionable, and because C&B's relevant responsibility under its contract with Alton tasked it to see that the designs were acceptable, C&B did not breach a contractual duty to owed Alton, much less to Sharyland, to inspect the construction of the sewer system.

Further, Sharyland has not proven that the system was incorrectly constructed. The Texas Natural Resource Conservation Commission has taken the position that the regulation Sharyland alleges was breached does not apply to the situation Sharyland complains of.

The Court of Appeals correctly applied the settled law of the state to determine that the economic loss rule bars Sharyland's tort claim against C&B. The Court of Appeals also determined that Sharyland was not a third party beneficiary of the C&B/Alton contract, it correctly determined that the judgment against C&B and the imposition of joint and several liability based on that judgment were erroneous.

## ARGUMENTS & AUTHORITIES

1. **Response to Issue No. 3: The Corpus Christi Court of Appeals Did Not Err In Ruling that the Economic Loss Rule bars Sharyland Water Supply Corporation's Negligence Claim (Incorporating C&B's Issue Numbers 2, 3, 5, 9, and 10 in the Court of Appeals)**

This Court has long held that tort claims and contract claims are and should remain distinct causes of action. Beginning in the 1970s and continuing into the early 1990s, this Court has attempted to draw and maintain a distinction between causes of action in tort and causes of action in contract. Noting that contractual relationships can create duties under contract and tort law, this Court stated that the “nature of the injury most often determined which duty or duties are breached.” *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986).

This Court has noted with approval the observation that:

Tort obligations are in general obligations that are imposed by law – apart from and independent of promises made and therefore apart from the manifest intention of the parties – to avoid injury to others.

W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS. § 92 at 655 (5<sup>th</sup> Ed. 1984) (cited by *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991)). From that observation came this distinction:

If the defendant's conduct – would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort. Conversely, if the defendant's conduct ... would give rise to liability only because it breaches the parties' agreement, the plaintiff's claim ordinarily sounds only in contract.

*Id.*

The Court of Appeals correctly drew that distinction. Because Sharyland alleged and proved no damage other than those that would be incurred from an alleged failure to follow the design specifications, the only basis for that claim was in contract.<sup>7</sup> That analysis of this Court’s precedent regarding the distinction between tort and contract claims correctly resulted in a determination that Sharyland does not have a tort claim against C&B.

Sharyland argues that the Court of Appeals misapplied and misconstrued the economic loss rule because it incorrectly determined that Sharyland has not sustained “property damage.” *See* PETITIONER’S BRIEF ON THE MERITS, p. 21. Without providing the Court with any citations to the record, Sharyland argues with absolutely no factual support that, due to C&B’s allegedly wrongful conduct, Sharyland’s easements and water pipes are now contaminated with by sewage and are no longer in compliance with Texas law. In fact, the record establishes otherwise. The existence of the sewer system has not interfered with Sharyland’s operation of its water system (R.R. 2, pp. 273-275), and in the four years prior to trial that the sewer system had been installed, there had been no instance of injury, contamination or illness caused by the sewer system as installed (R.R. 2, pp. 277, 282). In fact, Sharyland’s fresh water system transports water under pressure, which prevents contaminants from entering the system (R.R. 2, p. 282).

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<sup>7</sup> Whether Sharyland, as opposed to an actual contracting party, could pursue that claim depends upon Sharyland’s status as a third party beneficiary of the C&B/Alton contract, which status it does not enjoy. *See infra* pp. 22.

Sharyland further argues that “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 those damages are properly recoverable.” *See* PETITIONER’S BRIEF ON THE MERITS, p. 22. These alleged “material changes” again are presented without any supporting record references. Even assuming those “changes” occurred or exist, they effect the exterior of the system only, and are therefore merely economic in nature. Sharyland has not proven that it or any of its customers have sustained any injury separate from the hypothetical damage to the system, and the record does not provide any support for such an argument. *See* PETITIONER’S BRIEF ON THE MERITS, p. 21-26.

The economic loss rule bars tort claims when a party claims only economic injury to the subject matter of the contract itself. *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991); *Jim Walter Homes*, 711 S.W.2d at 618. The nature of the injury most often determines which duty or duties are breached. *Jim Walter Homes*, 711 S.W.2d at 618. “When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone.” *Id.* (emphasis added).

The economic loss rule works to bar recovery in negligence and strict liability causes of action when the only loss sustained is economic loss rather than loss as a consequence of personal injury, property damage, or a duty that does not depend on or derive from a contract between parties. *Jim Walter Homes*, 711 S.W.2d at 618. Simply stated, under the economic loss rule, a duty in tort does not lie when the only injury claimed is one for economic damages resulting from the breach of a purely contractual

obligation. *Trans-Gulf Corp. v. Performance Aircraft Servs., Inc.*, 82 S.W.3d 691, 695 (Tex. App.—Eastland 2002, no pet.). The economic loss rule provides that, in tort cases, economic damages are not recoverable unless they are accompanied by actual physical injury or property damage, which would result in liability completely independent of the fact that a contract exists between the parties. *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

“‘Economic loss’ has been defined as ‘damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property. ...’” *Bass v. City of Dallas*, 34 S.W.3d 1, 9 (Tex. App.—Amarillo 2000, no writ); *Thompson v. Espey Huston & Assocs.*, 899 S.W.2d 415, 421 (Tex. App.—Austin 1995, no writ) (quoting *2134 Lincoln Park West Cond. Ass’n v. Mann, Gin, Ebel & Frazier, Ltd.* 555 N.E.2d 346, 385 (Ill. 1990)). These are precisely the type of damages that Sharyland sought in the underlying litigation.

In its live pleading, Sharyland argued that the acts it complained of have “actually and proximately cause[d] damage to Sharyland by causing increased costs in operation and costs to place barriers to mitigate the hazard caused by the Defendants.” (C.R. 12, p. 3347). Sharyland further argued that it has and/or will incur the *costs associated* with increased safety precaution and maintenance measures it takes when repairing its lines, attorneys’ *fees*, expert *fees*, court *costs*, and lost interest on these sums.” (C.R. 12, p. 3347) (emphasis added). In fact, Sharyland employee Stuhlman testified that when

excavating around sewer lines to fix leaks in water lines, it has not had to incur extra costs because of the presence of the sewer lines. (R.R. 2, p. 275; R.R. 4, p. 209-13). Finally, Sharyland argued that it suffered damage for the decrease in market value of its property, and other damages as a result of the maintenance of a nuisance condition on its property (C.R. 12, p. 3347). There was no allegation of property damage or personal injury in Sharyland’s trial pleading (C.R. 12, p. 3347).

Even on appeal to this Court, Sharyland acknowledges that the damages it seeks are “the costs associated with the requirement to repair the lack of proper separation between Alton’s sewer lines and Sharyland’s water delivery system.” *See* PETITIONER’S BRIEF ON THE MERITS, p. 25. Sharyland’s Brief on the Merits does not provide this Court with a legal basis and analysis of precedent for concluding that its negligence claims are not barred by the economic loss rule.

Several courts of appeals in Texas have considered what constitutes “property damage” in the context of the economic loss rule. In *Trans-Gulf Corp. v. Performance Aircraft Services, Inc.*, 82 S.W.3d 691, 695 (Tex. App.—Eastland 2002, no pet.), the Eastland Court of Appeals determined that the economic loss rule barred the plaintiff’s claim for *additional costs incurred* because of a faulty fuel tank repair. Similarly, at the trial court level, Sharyland requested damages for the costs to place barriers allegedly required to mitigate the damages allegedly caused by the Respondents (C.R. 12, p. 3347). That is merely an additional cost for repair that is barred by the economic loss rule. *See id.*

In *Express One International, Inc. v. Steinbeck*, 53 S.W.3d 895, 899 (Tex. App.—Dallas 2001, no pet.), the Dallas Court of Appeals held that the costs associated with filing a lawsuit and identifying Steinbeck as the person who had posted a message on an internet message board simply amounted to economic harm. Thus, the claims were barred by the economic loss rule. *Steinbeck*, 53 S.W.3d at 899. Similarly, Sharyland’s claims for “attorneys’ fees, expert fees, court costs” are merely claims for the cost of litigation, which are merely economic losses and cannot support a judgment against C&B for negligence. *See id.*

In *Coastal Conduit & Ditching v. Noram Energy Corporation*, 29 S.W.3d 282, 285-902 (Tex. App.—Houston [14th Dist.] 2000, no pet.), the Fourteenth Court of Appeals concluded that a contractor’s claim for increased location costs based on a gas company’s failure to properly lay or mark its pipelines were economic damages, which were barred by the economic loss rule. Likewise, Sharyland complains that it has suffered damages that include the costs associated with increased safety precaution and maintenance measures it takes when repairing its lines (C.R. 12, p. 3347). At most, this is a claim that Sharyland will experience additional costs associated with locating and excavating around the sewer line, which would amount to nothing more than a claim for economic loss. *See id.* at 285-902.<sup>8</sup>

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<sup>8</sup> For example, had the sewer lines been installed in such a way as to improperly encroach on a right-of-way owned exclusively by Sharyland, any damages resulting (i.e., trespass or the cost of relocation) would have been purely economic and would not have been recoverable in a tort claim. Had the company installing the sewer system crushed or broken one of Sharyland’s water lines while digging the ditch for the sewer line, the costs associated with that repair would be recoverable in tort.

The evidence presented at trial (as opposed to Sharyland's unsupported claims in its brief), showed only that certain sewer laterals were constructed over, rather than under, certain of Sharyland's water mains, and that certain sewer lateral line joints were closer than 10 feet from the water line (Ex. 1; R.R. 4, pp. 182-183). As Sharyland's own employees agreed, it did not show that Sharyland's system had been contaminated, that any Sharyland customer had been sickened by contamination of Sharyland's water supply, or that any part of Sharyland's system had been destroyed or physically damaged (R.R. 2, pp. 273-275, 277, 282).

Because none of those things have happened, and because the configuration of the sewer system is the only thing that is even arguably incorrect,<sup>9</sup> the only complaint involves the sewer system as constructed and that is the subject of the contracts between the Respondents and the City of Alton. Therefore, this Court's jurisprudence holds that Sharyland has no tort claim against C&B and the Court of Appeals correctly so held.

**2. Response to Issue No. 5: The Corpus Christi Court of Appeals Did Not Err in Determining that, as a Matter of Law, Sharyland Water Supply Corporation Does Not Qualify as a Third-Party Beneficiary to the Contract Between Carter & Burgess, Inc. and the City of Alton (Incorporating C&B's Issue Numbers 1, 8, and 9 in the Court of Appeals)**

Over C&B's and TCB's objection, the trial court submitted to the jury a question asking whether Sharyland was a third-party beneficiary of the contracts between Alton and each of the other Appellees (C.R. 12, pp. 3478-3499). Based on the jury's finding that Sharyland was a third-party beneficiary of C&B's contract with Alton, and breach of

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<sup>9</sup> In fact, the regulation Sharyland contends was violated by the construction does not apply to lateral lines, see p. 34, *infra*.

contract findings, the jury awarded damages to Sharyland. The decision to submit that question was erroneous because there was no evidence to support it.

**A. Sharyland is Not a Third Party Beneficiary to the C&B/Alton Contract**

The Court of Appeals correctly determined, as a matter of law, that Sharyland was not a third party beneficiary of the contract between C&B and Alton. That determination was based on the unambiguous language of the C&B/Alton contract, the long-established presumption against conferring third party beneficiary status on non-parties to a contract, *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (per curiam), and ample authority from this Court and numerous Courts of Appeal. Texas law on this subject simply does not permit Sharyland to pursue a breach of contract action against C&B.

In February 1995, Alton, Texas engaged the services of C&B as a project manager for the construction of its waste water collection system (Ex. 2, p. 187; App. 2, p. 187).<sup>10</sup> The documents memorializing this relationship are executed only by representatives of Alton and C&B. (Ex. 2, p. 187; App. 2, p. 187). The contract does not reference any third parties nor does it indicate or even infer any intent to discharge any obligation or confer any benefit on third parties; it is unambiguous in its description only of the duties and obligations agreed to between Alton and C&B (Ex. 2, pp. 187-193; App. 2, pp. 187-193).

When a contract is not ambiguous, the construction of the written instrument is a question of law for the court. *MCI*, 995 S.W.2d at 650-51; *see Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *City of Pinehurst v. Spooner Addition Water Co.*, 432

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<sup>10</sup> Again, C&B is referencing the page numbers in the upper right-hand corner of the Appendix.

S.W.2d 515, 518 (Tex. 1968); *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193, 196 (Tex. 1962). The Texas Supreme Court will review the trial court's legal conclusions *de novo*. *MCI*, 995 S.W.2d at 651; see *Barber v. Colorado Indep. Sch. Dist.*, 901 S.W.2d 447, 450 (Tex. 1995). A trial court's submission of jury questions is reviewed under an abuse of discretion standard. *Toles v. Toles*, 45 S.W.3d 252, 263 (Tex. App.—Dallas 2001, pet. denied). An incorrect jury instruction requires reversal if it “was reasonably calculated to and probably did cause the rendition of an improper judgment.” *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995); TEX. R. APP. P. 61.1(a).

A third party may only recover on a contract made between other parties if: (1) the other parties intended to secure some benefit for that third party, and (2) the contracting parties entered into the contract directly for the third party's benefit. *MCI*, 995 S.W.2d at 652. Sharyland cannot sue to enforce a contract to which it is not a party if it receives only an incidental benefit from that contract. *Id.*; *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002). To qualify as one for whose benefit the contract was made, Sharyland must show that it is either a donee beneficiary or a creditor beneficiary of the contract. *MCI*, 995 S.W.2d at 652; *First Union National Bank v. Richmond Capital Partners I, L.P.*, 168 S.W.3d 917, 928 (Tex. App.—Dallas, 2005, no writ). A third party is a donee beneficiary if the performance promised under the contract will, when rendered, come to the third party as a pure donation. *MCI*, 995 S.W.2d at 65. Sharyland failed to establish that either C&B or Alton intended to confer any benefit on Sharyland, whether as a “pure donation” or by any other mechanism.

As a matter of law, Sharyland does not qualify as a third party “creditor” beneficiary to the contract between C&B and the City of Alton. One is a creditor beneficiary of a contract if the performance comes to that third party in satisfaction of a legal duty owed to that party by the promisee. *Id.* Such a legal duty may consist of an indebtedness, a contractual obligation, or other legally enforceable commitment. *Id.* The Alton/C&B contract does not reference any duties owed to Sharyland or any other third parties, and the record contains no evidence of any such obligation owed by either Alton or C&B to Sharyland. Therefore, Sharyland failed to meet even the baseline qualification for assertion of rights as a third party beneficiary.

Texas courts have consistently refused to recognize or create third party rights through implication. *Lomas*, 223 S.W.3d at 306; *Texas Bank and Trust v. Lone Star Life Insurance Company*, 565 S.W.2d 353, 357 (Tex. Civ. App.—Tyler 1978, no writ); *MJR Corp. v. B&B Vending Company*, 760 S.W.2d 4, 12 (Tex. App.—Dallas 1988, writ denied); *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 311 (Tex. App.—Dallas 2001, pet. denied); *Union Pacific R.R. Company v. Novus International, Inc.*, 113 S.W.3d 418, 422 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, rhn’g overruled and pet. denied). Rather, Texas authorities have set and consistently upheld a strict standard for the creation and enforcement of third party beneficiary rights under contracts, noting a presumption against, not in favor of, the creation of third party rights. *Dallas Firefighters Association v. Booth Research Group*, 156 S.W.3d 188, 193 (Tex. App.—Dallas 2005, pet. denied).

The facts of the *MCI* are instructive on this issue. In that case, Missouri Pacific Railroad and MCI entered into a contract whereby MoPac granted a license to MCI to lay fiber optic cable in MoPac's right-of-way. *MCI*, 995 S.W.2d at 649. Although that contract made indirect references to the rights of prior licensees, it also specifically stated that it was not for the benefit of any party not a signatory thereto. *MCI*, 995 S.W.2d at 649-650. TU Electric had been granted a license under an earlier contract with MoPac to run electric lines on MoPac's right-of-way. *Id.* at 649. When MCI's work in the right-of-way allegedly caused damage to some of TU Electric's transmission poles, TU Electric sued on the MCI contract claiming rights as a third party beneficiary. *Id.* at 650. The Court held that while the provisions in the contract regarding prior licensees had an effect on how MCI was to perform its part of the contract, as to TU Electric's third party claims, the clear language in the contract that it not be construed as being for the benefit of any nonsignatory would control, and therefore, TU Electric was not a third party beneficiary. *Id.* at 651.

The intention of the contracting parties is controlling in such a case, and third party beneficiary claims succeed or fail according to the provisions of the contract upon which suit is brought. *MCI*, 995 S.W.2d at 651; *Union Pacific*, 113 S.W. 3d at 422. If there is any reasonable doubt as to the intent of the contracting parties to confer a direct benefit on the third party, then the third party claim must fail. *First Union*, 168 S.W.3d at 929. The intention of the contracting parties to confer a direct benefit on a third party must be clearly and fully spelled out or enforcement by the third party must be denied.

*MJR Corp.*, 760 S.W.2d at 12. Neither the Alton/C&B contract nor the record contain any evidence of an intent to confer any benefit on Sharyland or any other third party (Ex. 2, pp. 187-193; App. 2, pp. 187-193).

In *MCI*, a section of the contract acknowledged certain protections that TU was entitled as an earlier licensee to the right-of-way. *MCI*, 995 S.W.2d at 651. However, even a written mention of the earlier licensees was not enough to impose third-party beneficiary status upon TU. *Id.* at 651-52. Likewise, Sharyland's argument that it was an intended beneficiary of the contract because Sharyland reviewed the plans to show the general location of its waterlines was not enough to confer third-party beneficiary status upon it. *See id.*

In *Dallas Firefighters Association v. Booth Research Group*, the Dallas court acknowledged the third party beneficiary rulings of the 1999 *MCI* case, but added that recovery as a third party beneficiary will be denied *unless* (emphasis added) (1) the obligation of the bargain-giver is fully spelled out; (2) it is unmistakable that a benefit to the third party was within the contemplation of the primary parties; and (3) the primary parties contemplated that the third party would be vested with the right to sue for the enforcement of the contract. *Dallas Firefighters*, 156 S.W.3d at 193. The Alton/C&B contract meets none of the three tests described in *Dallas Firefighters* and that test is consistent with this Court's treatment of the issue in *MCI*: (1) there is no mention of any obligation of either Alton or C&B to any third party, (2) there is no reference to any intended benefit to a third party, (3) and there is not any reference to the rights of any

third party to enforce the contract (Ex. 2, p. 187-193; App. 2, p. 187-193). Furthermore, the record contains no indication of any kind that either Alton or C&B contemplated the rights of third parties or had any intent to confer any rights on third parties.

As stated above, the contracting parties' intent to designate a third party as a beneficiary of their contract must be clearly expressed in unambiguous language in the contract. *MCI*, 995 S.W.2d at 651; *Ortega v. City National Bank*, 97 S.W.3d 765, 773 (Tex App.—Corpus Christi 2000, no pet.). A presumption exists that the parties contracted for themselves unless it “clearly appears” that they intended a third party to benefit from the contract. *MCI*, 995 S.W.2d at 651; *Dallas Firefighters*, 156 S.W.3d at 193. If there is a reasonable doubt about the intent to confer third-party beneficiary status, those doubts must be decided *against* the third party. *MCI*, 995 S.W.2d at 651; *Dallas Firefighters*, 156 S.W.3d at 193.

The C&B/Alton contract was not ambiguous and contained no mention whatsoever of a third party or an intent to confer third-party beneficiary status on anyone or anything (Ex. 2, pp. 187-193; App. 2, pp. 187-193). Therefore, Sharyland did not have standing either to enforce the agreement or to seek damages from a breach of that agreement. The Court of Appeals correctly determined that, as a matter of law, Sharyland cannot assert a claim as a third-party beneficiary of that contract and the trial court's submission of that issue was incorrect.

In the Court below, Sharyland argued that the error, if any, was harmless because had the question not been submitted to the jury, the trial court would have necessarily

determined as a matter of law that Sharyland was a third party beneficiary. Based on the above analysis, this argument is flawed. Had the trial court properly decided that, as a matter of law, Sharyland was not a third party beneficiary of the C&B/Alton contract, the issue of breach and damages would never have been submitted to the jury, and the jury would not have had an opportunity to assess damages against C&B for breach of contract. Thus, the Court of Appeals was correct in determining that the submission of the jury question was harmful error. *See Reinhart*, 906 S.W.2d at 473.

**B. The C&B/Alton Contract Does Not Impose A Duty On C&B Regarding the Alleged Construction Problems (Incorporating C&B's Issue #2 in the Court of Appeals)**

Even if the C&B/Alton contract were to be interpreted to create some beneficiary status in Sharyland, the contract itself provides no basis for liability on C&B for the allegedly improper construction of the sewer system.

**1. Duty for Design Professionals**

Texas case law holds that a design professional's duty can only arise if the injury in question arose from the scope of the contracted services. The scope of the duty depends on the particular agreement between the parties. *Dukes v. Philip Johnson/Alan Ritchie Architects, P.C.*, 252 S.W.3d 586, 594 (Tex. App.—Fort Worth 2008, pet. denied) (holding that the scope of a design professional's duties and responsibilities is determined by the valid, applicable contract).

In *Graham v. Freese & Nichols, Inc.*, 927 S.W.2d 294 (Tex. App.—Eastland 1996, writ denied), an injured dam worker sued an architect/engineering firm after he fell

from a catwalk and was paralyzed. The architect/engineering firm had been engaged to provide services at the dam. *Id.* The Court held that worker safety was outside the scope of the firm's contracted services. *Id.* at 295-96. Therefore, the architect/engineering firm owed no duty to the injured worker. *Id.* at 296.

*Romero v. Parkhill, Smith & Cooper, Inc.*, 881 S.W.2d 522, 524 (Tex. App.—El Paso 1994, writ denied), involved an engineering firm engaged by the City of El Paso in relation to construction of a sewage treatment plant. A masonry worker fell through a hole in the roof of the plant and was injured. *Id.* The scope of the engineering firm's contract, though, did not extend to premises safety. *Id.* at 526-27. An official of the City of El Paso actually testified that he would have expected the engineering firm to notify the general contractor of any unsafe conditions. *Id.* at 527. The Court found the city official "totally unqualified to testify as to [the engineering firm's] duties and responsibilities under the...contracts." *Id.* The court instead relied on the competent evidence of the actual scope of the engineering firm's work. *Id.* The court of appeals affirmed the trial court's summary judgment that the company owed no duty to the injured worker. *Id.* at 524.

The court in *Hanselka v. Lummus Crest, Inc.*, 800 S.W.2d 665, 666 (Tex. App.—Corpus Christi 1990, no writ), affirmed summary judgment for a design professional in a personal injury action by a factory worker alleging a fall from a ladder/platform assembly utilized in day-to-day factory operations. *Id.* A review of the

contract showed the defendant design professional was not specifically involved in the design or construction of the ladder/platform assembly itself. *Id.* at 667-68.

The plaintiff argued that the defendant's obligations regarding design of the factory itself should somehow also extend to the "safety of employees" and the "safe operation" of the plant. *Id.* at 666-67. The plaintiff further argued that the designer was negligent in failing to inspect the plant at completion, anticipate and design or provide for safer alternatives in using the assembly regardless of the factory owner's own obligations, which "resulted in others designing and installing the unsafe ladder from which she fell." *Id.* at 666-67.

Finding that the plant owner was solely responsible for the design, construction and decision to install the ladder assembly, the court held "as a matter of law" that the designer "owed [the plaintiff] no duty in connection with the ladder and platform." *Id.* at 666-68; *accord, Wochner v. Johnson*, 875 S.W.2d 470, 476 (Tex. App.—Waco 1994, no writ) (seller of materials and plans for home owes no duty where seller not involved in design or construction of staircase on which plaintiff fell sustaining injuries); *IOI Systems, Inc. v. City of Cleveland*, 615 S.W.2d 786, 790 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (limiting extent of duty of design professionals).

The vast majority of courts outside Texas similarly refuse to extend liability to engineers and architects for events outside their scope of services.<sup>11</sup>

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<sup>11</sup> See, e.g., *Nauman v. Harold K. Beecher & Assocs.*, 467 P.2d 610, 614-15 (Utah 1970) (architect "had no right or duty to interfere" with aspects of project outside of its contracted scope); *Busick v. Streator Township High School Dist.*, 600 N.E.2d 46, 47 (Ill. App. 1992) (summary judgment for "supervising" project architect in worker's personal injury action for lack of duty, where "accident was not related to the

Again, the C&B/Alton contract was one of several that the state required Alton to enter into to obtain funding for the sewer system. (Ex. 2; App. 2; R.R. 9, pp. 205, 210; Ex. 49). C&B was hired as Alton's "Project Manager" (Ex. 2, pp. 187, *et seq.*; App. 2). TCB was hired to provide "Engineering and Inspection Services" (Ex. 2, p. 170; App. 2). The C&B/Alton contract contains no language requiring C&B to inspect the construction of the system. (Ex. 2; App. 2). Task 12 of the Scope of Services section of the C&B/Alton contract required C&B to review "the engineer's recommendation for the Resident Project Inspector advise the Owner...." (Ex. 2, p. 190; App. 2, p. 190), explicitly recognizing that another entity with whom Alton was to contract was to provide inspection services.

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architect's job functions or area of expertise," where contractor "designed, constructed and maintained" decontamination unit where plaintiff fell, and where alleged "dangerous condition" on premises involved escape of asbestos fibers rather than water on floor which was actual source of injuries and would have been present regardless); *Pugh v. Butler Tel. Co. Inc.*, 512 So.2d 1317, 1320 (Ala. 1987) (summary judgment for engineer; inspections/other activities had "nothing to do with" safety of employees, but were for benefit of owner to ensure overall compliance with plans/specifications and contract); *Peterson v. Fowler*, 493 P.2d 997, (Utah 1972) (summary judgment for architect who had nothing to do with faulty scaffolding killing worker, and owes duty only to client to see building properly constructed and safe for its ultimate purpose; denial of request for construction of different type of scaffolding insufficient to create liability); *Walker v. Wittenberg, Delony & Davidson, Inc.*, 412 S.W.2d 621, 626, 629-30 (Ark. 1966) (directed verdict for architect; employee's injury did not involve a risk "inherent in the work" itself); *Heslep v. Forrest & Cotton, Inc.*, 449 S.W.2d 181, 184-85 (Ark. 1970) (jnov for engineers with no contractual right or power to supervise acts causing injury [employer's noncompliance with safety code]; no negligence as matter of law); *Luterbach v. Mochon, Schutte, Hackworthy, Juerisson, Inc.*, 267 N.W.2d 13,15-16 (Wis. 1978) (summary judgment for architect in worker's personal injury action; no liability for "nondesign-related injuries," absent responsibility for construction "means and methods"; mere "general supervision and direction" insufficient); *Hanna v. Huer, Johns, Neel, Rivers & Webb*, 662 P.2d 243, 251-52 (Kan. 1983) (recognizing principle that liability does not extend to injuries caused by unsafe conditions over which design professionals have no duty of inspection or supervision); *Walters v. Kellam & Foley*, 360 N.E.2d 199, 207-11 (Ind. App. 1977, trans. denied) (directed verdict in employee's personal injury action; no legal duty regarding safe work performance/procedures or to "inspect, reject or warn of a piece of equipment dangerous only with regard to the method of its installation," not within architect's/engineer's scope of services); *Parks v. Atkinson*, 505 P.2d 279, (Ariz. App. 1973) (summary judgment for architect in employee's personal injury action for negligent supervision of another's unsafe work performance; no liability absent specific duty in agreed scope of services).

The only one of 17 enumerated “tasks” C&B agreed to perform in the C&B/Alton contract relevant to this case required C&B to:

Insure that the project complies with all local, state and federal regulations relevant to the planning and construction of a waste water collection and transmission system.

(Ex. 2, p. 189; App. 2, p. 189). Because the inspection services were specifically and explicitly contracted to others, (Ex. 2, p. 178; App. 3, p. 178) (Ex. 2, p. 77; App. 4, p. 77), C&B’s services would not logically include inspection also. Thus, C&B’s responsibility regarding the actual construction were centered on the plans, which no one contends were not in compliance with all applicable regulations. Therefore, even if Sharyland was a third party beneficiary of the C&B/Alton contract, which Texas law provides that it was not, C&B met any obligation it owed to Sharyland.

Finally and alternatively, if Sharyland is a third party beneficiary of the C&B/Alton contract (which it is not), then it is bound by all of its terms, including the damage limitation provision. *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005) (stating, “[W]hen a nonparty consistently and knowingly insists that others treat it as a party, it cannot later ‘turn its back on the portions of the contract, such as an arbitration clause, that it finds distasteful.’ A nonparty cannot have its contract and defeat it too.”). The C&B/Alton contract has a liquidated damages clause (Ex. 2; App. 2). The contract limits C&B’s liability resulting from the services rendered to an amount no greater than the fee it earned under the contract - \$99,984.88 (Ex. 2; App. 2 pp. 188, 191). Sharyland cannot selectively rely upon a part of the contract to establish liability and

ignore the liquidated damages provision. Thus, if Sharyland can sue for a breach of a duty created by the contract, all of its terms must be applied and it can only recover from C&B what the contract provides.

**C. The Sewer System Was Constructed Properly (Incorporating C&B's Issue #4 in the Court of Appeals)**

Fundamental to Sharyland's entire claim that the sewer system was improperly constructed is the contention that 30 Texas Administrative Code Rule 317.13<sup>12</sup> ("Rule 317.13" is attached hereto as App. 1) applies to that portion of Alton's sanitary sewer system about which Sharyland complains. Specifically, Sharyland has contended, and the trial court incorrectly found, that Rule 317.13 governs the construction of lateral sewer lines running from a sewer main to an individual house. The Court of Appeals did not reach that issue, but the trial court's determination of that issue was incorrect as a matter of law.

The trial court granted a partial summary judgment finding that Rule 317 did apply to sewer service lines crossing water mains (C.R. 11, pp. 3303-04). This was despite summary judgment evidence from TNRCC (the agency charged with promulgating and applying Rule 317) that Rule 317.13 did not apply to sewer laterals crossing water mains (C.R. 7, pp. 2436-41, 2534-7, 2539-40, 2602-09, 2622-38; C.R. 10, pp. 3009-34).

At trial, the court erroneously permitted testimony from Sharyland's witnesses about the applicability of Rule 317.13 and excluded contrary testimony from the

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<sup>12</sup> A copy of 30 Texas Administrative Code section 317.13 is attached hereto as App. 1.

defendant's witnesses, resulting in a bill of exceptions offered by C&B and the other trial court defendants (R.R. 8, pp. 224-31; R.R. 11, pp. 173-176).

TNRCC's interpretation of Rule 317.13 as being inapplicable to the construction of service lines was neither plainly erroneous nor inconsistent with the language of the Rule, which is the standard for overruling an agency's interpretation of its rules. *BFI Waste Sys. of North America Inc. v. Martinez Environmental Group*, 93 S.W.3d 570, 575 (Tex. App.—Austin 2002 pet. denied).

The Rule refers only to "sanitary sewers" and that term is not defined anywhere in the entire Title 30 of the Texas Administrative Code. When asked, TNRCC employees Herrin and Laughlin testified that the agency considered the words referred to sewer mains running down the middle of the street, not the lateral lines branching off to each individual house (C.R. 7, pp. 2436-41, 2534-7, 2539-40, 2602-09, 2622-38; C.R. 10, pp. 3009-34). This interpretation is intuitive because the amount of flow in a sewer main is constant and of much greater volume than an individual house lateral, which may only be active several discreet times per day. Thus, the risk of contamination is much greater from a sewer main than from a service line to an individual residence. (Ex. 62, 81).<sup>13</sup>

Based on the treatment of Section 290.44(e) and Rule 317.13, the TNRCC has clarified beyond argument that it does not apply those rules to service lines. Thus, the

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<sup>13</sup> The TNRCC subsequently amended 30 Texas Administrative Code section 290.44(e)(5)(B)(ii) (Ex. 4), dealing with the installation of fresh water systems around existing sewer systems consistent with the interpretation it gave to Rule 317. It determined that Rule 290 did not apply to individual services lines, and it later amended Subsection 290.44(e) to make it clear that Rule 290 applies when a water main crosses waste water mains but not when a water main crosses individual service lines. *See* 30 TEX. ADMIN. CODE § 290.44(e)(4)(B)(i), (ii), (iii) and (iv).

trial court's decision on summary judgment was erroneous and resulted in an erroneous instruction to the jury about the applicability of Rule 317.13 that resulted in an improper verdict.

Sharyland has consistently relied on the language of Rule 317.13 as the sole basis for its claim that Alton's sewer system was improperly installed. With the language properly applied consistently with the TNRCC's interpretation, there is no other aspect of the sewer system alleged by Sharyland to have been constructed improperly and there is no factual basis for the verdict and judgment in the trial court. The Court of Appeals' reversal and rendition of the judgment was therefore proper for this reason, even though it was not reached.

3. **Response to Issue No. 7: The Court of Appeals Did Not Err In Overturning the Award Against Respondents, Jointly and Severally, Because the Court of Appeals Correctly Determined That Carter & Burgess Is Not Liable to Sharyland Water Supply Corporation**

Having correctly decided that C&B was not liable to Sharyland on either a breach of contract or negligence cause of action, the Court of Appeals correctly held that C&B could not be held jointly and severally liable for the damages asserted by Sharyland. *See* Opinion, p. 31-32. In order for C&B to be held jointly and severally liable, there must have been a finding that C&B was liable for the damages for which Sharyland seeks recovery. *See* TEX. CIV. PRAC. & REM. CODE § 32.003. As discussed in C&B's Responses to Issues 3 and 5, above, C&B cannot be held responsible for the damages asserted by Sharyland under a breach of contract or negligence claim. Further, a court cannot impose joint and several liability against defendants under a breach of contract

theory unless the defendants are parties to the same contract or promise. *See Southwestern Drug Corp. v. Taylor*, 131 S.W.2d 955, 955-56 (Tex. 1939); *CTTI Priesmeyer, Inc. v. K&O Ltd. P'ship*, 164 S.W.3d 675, 685 (Tex. App.—Austin 2005, no pet.). Thus, the Court of Appeals' decision in this regard should not be overturned.

**4. Response to Issue No. 8: The Court of Appeals Did Not Err in Overturning the Award of Attorneys' Fees Against Carter & Burgess**

Sharyland argues that it is entitled to attorneys' fees under Texas Civil Practice and Remedies Code Section 38.001 because it was a third-party beneficiary of the subject contracts. *See* PETITIONER'S BRIEF ON THE MERITS, p. 34. As discussed above in C&B's response to Issue Number 5, Sharyland does not qualify as a third party beneficiary to the contract between C&B and the City of Alton. Therefore, there is no basis for assessing attorneys' fees against C&B. *See* TEX. CIV. PRAC. & REM. CODE § 38.001.

**CONCLUSION AND PRAYER**

The Court of Appeals got it right. It determined that Texas law and the language of the C&B/Alton contract simply did not support Sharyland's claim that it was a third party beneficiary of that contract and could therefore sue for breach.

It also correctly determined that the record disclosed no property damage or personal injury caused by the presence and construction of the sewer system at issue, thus eliminating Sharyland's tort claim.

Finally, as presented to but not reached by the Court of Appeals, there is no evidence of any damage suffered by Sharyland or its customers and C&B was not contractually responsible for construction inspection.

Further, the Texas Natural Resource Conservation Commission has taken the position that the regulation upon which Sharyland's entire claim is based does not apply to that part of the sewer system about which it complains. For those and the other reasons presented, Carter & Burgess prays that this Court either decline to grant the Petition for Review or if granted, affirm the opinion and judgment of the Court of Appeals.

Respectfully submitted,

*/s/ Stephen L. Tatum*

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**CERTIFICATE OF SERVICE**

A true and correct copy of the above and foregoing Respondent Carter & Burgess, Inc.'s Response to Petitioner's Brief on the Merits has been served on the 8th day of October, 2009 to the following via Certified Mail, Return Receipt Requested:

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