

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

Appealed from
The Thirteenth Court of Appeals, Corpus Christi - Edinburg
No. 13-06-00038-CV

RESPONDENT, CITY OF ALTON'S BRIEF ON THE MERITS

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STATEMENT OF JURISDICTION

The legal issues in this case, *to wit*, the application of §317.30 T.A.C. and §271.151 *et seq.* TEX. LOCAL GOV'T CODE, do not create jurisdiction under §22.001(a)(2) TEX. GOV'T CODE. There can be no issues of importance to the jurisprudence of this State under 30 T.A.C. §317.30 because that regulation no longer exists. The TCEQ has changed the regulation. This Court should never have to deliberate the application of that regulation again. Thus, any decision this Court makes *vis-a-vis* the application of that particular regulation will affect only the outcome of this case. Additionally, the Thirteenth Court of Appeals correctly applied §271.151 *et seq.* TEX. LOCAL GOV'T CODE and followed the precedent set by this Court since its enactment. Should this Court reverse the decision of the Thirteenth Court of Appeals, it will be creating conflict with itself. On that basis, this Court should deny Sharyland's Petition for Review.

Sharyland's attempt to create jurisdiction is not supported by its own arguments. There are no conflicting decisions in this Court on the application of §271.151 *et seq.* Sharyland has only identified conflicts with decisions of other Courts of Appeals, and is referring to opinions which existed on the issue of contract claims prior to this Court's decision in *Tooke* and the enactment of §271.151 *et seq.* Sharyland did not identify a single case, *post-Tooke* or §271.151 *et seq.* in which this, or any other Court wrote an opinion which conflicted with the one at issue here.

Thus, Sharyland has not shown that any of the basis for this Court's jurisdiction have been met.

STATEMENT OF FACTS

The statement of facts in the Opinion of the Thirteenth Court of Appeals is essentially correct. Respondent Alton (hereinafter "Alton" or "City of Alton") objects to Petitioner Sharyland's (hereinafter "Sharyland") supplementation of the facts because it is exceedingly inaccurate and is a gross misrepresentation of the evidence. Respondent Alton hereby incorporates and adopts the objections and corrections articulated by Respondents Cris Equipment Company, Turner, Collie & Braden, Inc. and Carter & Burgess, Inc. as if set forth verbatim herein.

STATEMENT OF THE ISSUES

- Sharyland's Issue No.1: Does the law fail to afford Sharyland Water Supply Corporation a remedy, legal or equitable, against City of Alton for its illegal conduct?
- Sharyland's Issue No.2: Do the Court of Appeals' ruling on City of Alton's Immunity from suit and liability contradict previous decisions of other Courts.
- Sharyland's Issue No.3. Does the Economic Loss Rule bar Sharyland Water Supply Corporation's negligence claim?
- Sharyland's Issue No.4: Does Tex. Local Gov't Code §271.153 bar Sharyland Water Supply Corporation from recovery of damages?
- Sharyland's Issue No.5. Was the evidence legally sufficient to establish that Sharyland Water Supply Corporation was a third-party beneficiary of the Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company contracts?
- Sharyland's Issue No.6: Did the Court of Appeals err in ruling that Sharyland Water Supply Corporation cannot recover attorney's fees against City of Alton except for certain fees attributable to the Declaratory Judgment Action?
- Sharyland's Issue No.7. Did the Court of Appeals err in overturning the award against Respondents, jointly and severally?
- Sharyland's Issue No.8. Did the Court of Appeals err in overturning the award of attorney's fees against Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company?
- Sharyland's Issue No.9: Did the Court of Appeals err in upholding the trial court's denial of Sharyland Water Supply Corporation's request for injunctive relief and specific performance?

SUMMARY OF THE ARGUMENT

The Thirteenth Court of Appeals committed no error when it waived immunity for the City of Alton on the breach of contract claim. It is unclear why Sharyland continues to insist the Court of Appeals did not waive immunity when it unequivocally did. The Court of Appeals applied the analysis that this Court has approved in considering contracts under §271.151 *et seq.* TEX. LOCAL GOV'T CODE.

The factual basis Sharyland relies upon to proclaim the imminent disaster that has been awaiting for years (with not one report of problems) are not part of the record in this case. Those were not the facts as testified to by the witnesses presented at trial. They are made up. Sharyland has no support for its position, just as it has no support for the inapposite argument it makes about conflicts of opinions. This Court made a ruling in *Tooke* that clarified the law as to contractual claims against governmental entities. Then the legislature passed §271.151 *et seq.* TEX. LOCAL GOV'T CODE. Any case prior to those acts would be implicitly overruled. To argue that there is a conflict with decisions prior to *Tooke* and the statute is disingenuous. The Thirteenth Court of Appeals properly applied the statutory provisions of §271.151 *et seq.* TEX. LOCAL GOV'T CODE. Those provisions do not allow for the recovery sought by Sharyland under the contract on which it sues.

However, the Court of Appeals, probably feeling sorry for Sharyland, found a way to try to get the attorney some relief by awarding attorneys' fees when the trial court granted a partial motion for summary judgment. (CR 2328) The Court of Appeals called it a

declaratory judgment so fees could be granted. However, the motion granted was not a declaratory judgment nor were fees prayed for therein and should not have been granted.

The Court of Appeals was absolutely correct in upholding the trial court's decision to deny equitable relief to Sharyland. The case law is replete with cases that tell us that if there is an adequate remedy at law (at the time of prosecution of the case, not after a trial) then equitable relief is not available. The law does not say that you can ask for equitable relief after you have won a jury trial and Sharyland has given this Court no authority that supports that argument. The subject court got that one right and so did the Court of Appeals.

RESPONDENT'S ARGUMENT

Sharyland's Issue No.1: Does the law fail to afford Sharyland Water Supply Corporation a remedy, legal or equitable, against City of Alton for its illegal conduct?

Sharyland does not really address the matter, as stated, in the argument following this first issue. Sharyland argues the subject of immunity under this issue. The City of Alton does not know how to make Sharyland understand that the Thirteenth Court of Appeals WAIVED immunity for the breach of contract claim. The Court of Appeals did not find there was an equitable waiver or a waiver by filing a counterclaim, but on Page 11, of the Opinion, it states "Sharyland argues Alton's immunity from suit has been waived by the Texas Local Government Code. *See* TEX. LOCAL GOV'T CODE §§271.151-.160. In this case, WE AGREE." (Emphasis added). That cannot be stated any more clearly.

Illegal conduct. Sharyland's entire case was predicated on their position that the Defendants violated 30 TAC §317.13 which describes separation distances celiain sewer lines should have from water mains. The TNRCC (now TCEQ) said that the regulation did not apply to the particular sanitary sewer lines at issue here. The City of Alton is a poor, rural municipality that did not build any part of this sewer system itself. It relied entirely on the State of Texas and those organizations that the State required Alton to use to properly install the system. One of those was the Texas Water Development Board. At the time the issues which were made the basis of this lawsuit arose, all those entities, including the TWDB and TCEQ looked at the issue and made a determination that the construction was being performed pursuant to the regulations and guidelines those professionals were subject to. The City, of Alton made no decisions. It hired the experts the State told it to hire and followed the experts' advice.

It is a complete misrepresentation to this Court to state that there are leaking pipes and that Sharyland's water is being contaminated. In fact, to date, there has not been one reported leak that did not occur by itself. Sharyland, in order to promote its lawsuit, dug up numerous connections it thought would be in violation of the regulations. They found one small, recent leak that was believed to have been caused by Sharyland's digging. The testimony at the trial was conclusive, that in order for any contamination to occur to Sharyland's water such a series of events would have to occur simultaneously as to be nearly

impossible. Yet, Sharyland would have this Court believe disaster is imminent. That is just not true.

The response to this issue as worded by Sharyland is in the affirmative. The law does provide Sharyland a remedy, a legal one, and Sharyland pursued this remedy. The law does not provide that Sharyland will win, only that it may have its issues presented to a judge and jury, and Sharyland had its day (actually weeks) in court.

Sharyland's Issue No.2: Do the Court of Appeals' ruling on City of Alton's Immunity from suit and liability contradict previous decisions of other Courts.

The short response, is no, the Court of Appeals' ruling is entirely consistent with those of other courts that are applying the law as it stands today. Interestingly, Sharyland relies on an unpublished/unreported case to support its argument on this issue. *Engelman Irrigation District v. Shields*, 2008 WL 1974334(Tex. App. - Corpus Christi 2008) In *Engelman*, the district, through the same attorney that represents Sharyland here, argued that the district was immune from the declaratory judgment being sought. The same attorney now argues that the City of Alton does not have immunity under the same law. In that case, the Thirteenth Court of Appeals came to exactly the same decision as it did here. The Court of Appeals correctly

concluded that immunity is waived under certain circumstances¹ for declaratory judgment actions. However, that is not the issue articulated in this appeal.

It is disingenuous to argue that a Court of Appeals is contradicting its own opinions because it is now following a decision from *this* Court. Prior to this Court's decision in *Tooke*, there were conflicts among several Courts of Appeal. Those conflicts are what gave this Court the jurisdiction to take up *Tooke*. One would hope that the appellate courts that had held differently before *Tooke*, would render *post-Tooke* opinions in keeping with the holding of this Court. In so doing, those opinions would be inconsistent with each other. However, that is not the kind of conflict which would give this Court jurisdiction. In its Brief, Sharyland does not identify a single case that conflicts with the Thirteenth Court of Appeals decision or that applies this Court's holding in *Tooke*, or §271.151 *et seq* differently.

¹"Sovereign immunity does not bar due course of law claims or bill of rights claims under Texas law. *See, e.g., City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995); *Nueces Cty. v. Ferguson*, 97 S.W.3d 205, 221 n. 23 (Tex.App.-Corpus Christi 2002, no pet.). Further, sovereign immunity does not bar a suit that alleges a violation of a self-enacting state constitutional provision. *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980). Moreover, a private litigant does not need legislative permission to sue the State for a state official's violations of state law." *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 404 (Tex. 1997) (citing *Dir. of the Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W.2d 264, 265-66 (Tex. 1980) (holding legislative consent not required for suit for injunctive relief against state agency to halt unauthorized printing equipment and printing activities); *Tex. Highway Comm'n v. Tex. Ass'n of Steel Imps., Inc.*, 372 S.W.2d 525, 530 (Tex. 1963) (holding legislative consent not required for declaratory judgment suit against Highway Commission to determine the parties' rights); *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709, 712 (Tex. 1945) (holding legislative consent not required for declaratory judgment suit against State Comptroller to determine parties' rights under tax statute)). In this regard, a state official's illegal or unauthorized actions are not acts of the State and sovereign immunity does not bar an action to determine or protect a private party's rights against that state official who has acted without legal or statutory authority. *Fed. Sign*, 951 S.W.2d at 404. Thus, a party can maintain a suit to determine its rights without legislative permission. *Id.* Accordingly, suits that merely seek to compel officials to act as required by law do not attempt to subject the state to liability, and they do not implicate sovereign immunity. *Powell v. Tex. Dep't of Crim. Justice*, No. 13-06-00192-CV, 2008 Tex.App. LEXIS 936, at *16, 2008 WL 330722 (Tex.App.-Corpus Christi Feb. 7, 2008, no pet.)" *Engelman Irr. Dist. v. Shields*, not reported in S.W.3d, 2008 WL 1974334 (Tex.App. - Corpus Christi 2008).

Sharyland's Issue No.3. Does the Economic Loss Rule bar Sharyland Water Supply Corporation's negligence claim?

This issue is not asserted against the City of Alton. As such, Alton defers to, and incorporates as if set forth verbatim herein, the arguments, as to this issue, as presented to this Court in the briefs of co-defendants Turner, Collie & Braden, Inc., Cris Equipment Company, and Carter & Burgess, Inc.

Sharyland's Issue No.4: Does Tex. Local Gov't Code §271.153 bar Sharyland Water Supply Corporation from recovery of damages?

Sharyland's brief is replete with unsupported statements and arguments that have no basis in law or fact, certainly not the facts in this record. Sharyland completely misrepresents the facts to this Court when it states or even makes the implication it has had to perform any work for which it requires payment. The manner in which Sharyland just makes up the facts is truly unbelievable. If we could support our arguments with made up facts, no appellate lawyer could lose. There was absolutely NO evidence of any expenditures made by Sharyland to correct any perceived damage. Under §271.153 the only damages Sharyland can recover are any amount "due and owed". There are no such amounts.

The Court of Appeals held that the evidence of the amount of money Sharyland could one day, maybe, have to incur was not money "due and owed" under the contract. Furthermore, the Court of Appeals correctly stated that the "monetary damages" presented by Sharyland could be considered consequential damages which are not recoverable under

the statute. Thus, to the extent that Sharyland presented evidence of any monetary damages that are recoverable, §271.153 bars recovery from the City of Alton.

Sharyland argues that, if that is the case, then, they are then entitled to equitable relief. That argument is circular. Sharyland is proposing that because of a post-trial result, it should have had a pre-trial right to equitable relief. This Court has much power, but it cannot push back the clock. If Sharyland was entitled to equitable relief it had to have been at a pre-trial stage and then Sharyland would not have been entitled to a trial. The "right" to equitable relief does not arise because Sharyland has not prevailed as it hoped on appeal.

Sharyland's Issue No.5. Was the evidence legally sufficient to establish that Sharyland Water Supply Corporation was a third-party beneficiary of the Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company contracts?

This issue is not asserted against the City of Alton. As such, Alton defers to, and incorporates as if set forth verbatim herein, the arguments as to this issue that have been presented to this Court in the briefs of co-defendants Turner, Collie & Braden, Inc., Cris Equipment Company, and Carter & Burgess, Inc.

Sharyland's Issue No.6: Did the Court of Appeals err in ruling that Sharyland Water Supply Corporation cannot recover attorney's fees against City of Alton except for certain fees attributable to the Declaratory Judgment Action?

Sharyland does not support this issue with any authority other than to say immunity does not bar the recovery of attorney's fees. Alton has never argued that it does. The Court of Appeals did not base its opinion regarding attorneys' fees on the issue of immunity. There

is no special immunity from paying for a prevailing party's attorney's fees, if they are an element of damages recoverable under the particular legal theory on which the party prevailed. Sharyland barely touches this issue, and has not provided this Court any guidance as to why the Court of Appeals' decision is wrong.

The problem with the issues of attorneys' fees is that Sharyland did not pray for attorneys fees for its motion for summary judgment. (CR2628) The only "declaratory judgment" is in the title of its petition. The trial court granted a partial summary judgment and no fees for that motion were requested. Even if the court wants to call the motion filed by Sharyland a declaratory judgment because of how it issued the order, no fees were prayed for. The Court should not be granting fees when they have not been requested. Thus, if this Court finds it has jurisdiction, this part of the Court of Appeals opinion, granting unsought attorney's fees should be overruled.

Sharyland's Issue No.7. Did the Court of Appeals err in overturning the award against Respondents, jointly and severally?

This issue is not asserted against the City of Alton. As such, Alton defers to, and incorporates as if set forth verbatim herein, the arguments as to this issue presented to this Court in the briefs of co-defendants Turner, Collie & Braden, Inc., Cris Equipment Company, and Carter & Burgess, Inc.

Sharyland's Issue No.8. Did the Court of Appeals err in overturning the award of attorney's fees against Carter & Burgess, Inc., Turner, Collie & Braden, Inc. and Cris Equipment Company?

This issue is not asserted against the City of Alton. As such, Alton defers to, and incorporates as if set forth verbatim herein, the arguments as to this issue presented to this Court in the briefs of co-defendants Turner, Collie & Braden, Inc., Cris Equipment Company, and Carter & Burgess, Inc.

Sharyland's Issue No.9: Did the Court of Appeals err in upholding the trial court's denial of Sharyland Water Supply Corporation's request for injunctive relief and specific performance?

As stated above, Sharyland is making up the facts as it goes, without any regard to what the truth and evidence was and is. Parties can seek either remedies at law or equity, but not both for the same issues, at the same time. When there is an adequate remedy at law, equity does not lie. *Wilson N. Jones Mem'l Hasp. v. Huff*, 188 S.W.3d 215,218 (Tex.App.-Dallas 2003, pet. denied). An adequate remedy at law is one that is as complete, practical, and efficient to the prompt administration of justice as is equitable relief. *Huff*, 188 S.W.3d at 218. A probable right of recovery is shown by alleging a cause of action and presenting evidence tending to sustain it. *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593,597 (Tex.App.-Amarillo 1995, no writ). What the hundreds of cases that discuss this process and legal reasoning mean, is, if you can get a trial for legal (monetary) damages, that is your remedy, not equity. Here, Sharyland got a three week trial and jury verdict for damages. That, by anyone but Sharyland's definition, is an adequate remedy at law.

Also, Sharyland's argument is backwards. It argues that since *on appeal* Sharyland does not recover the damages it sought, somehow, that changes whether it had a sufficient

remedy at law when it went to trial in this case. The undersigned could not find a single case in support of that legal proposition.

The Court of Appeals correctly interpreted Sharyland's request for equitable relief action as one which attempted to control state action, for which immunity is not waived. See *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849 (Tex. 2002). Thus, the Thirteenth Court of Appeals was correct in its analysis of this claim. Parties may seek declaratory relief against *state officials* who allegedly act without legal or statutory authority. See, e.g., *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994) (suit challenging state officials' construction of compulsory school-attendance law); *WD. Haden v. Dodgen*, 308 S.W.2d 838, 838 (suit against state official for wrongfully imposing a statutory tax burden). Such suits are not considered "suits against the State." *Dodgen*, 308 S.W.2d at 840 (citing the rule announced in *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709, 712 (1945)). This is because suits to compel state officers to act within their official capacity do not attempt to subject the State to liability. *Griffin v. Hawn*, 161 Tex. 422, 341 S.W.2d 151, 152 (1960); *Griffin*, 341 S.W.2d at 152. Therefore, certain declaratory judgment actions against state officials do not implicate the sovereign immunity doctrine. See *Cobb*, 190 S.W.2d at 712. In contrast, declaratory judgment suits against governmental entities seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are "suits against the State". *Dodgen*, 308 S.W.2d at 840 (citing *Herring v. Houston Nat'l Exch. Bank*, 113 Tex. 264, 253 S.W. 813, 814 (1923)). That is because such suits

attempt to control state action by imposing liability on the State. *See Griffin*, 341 S.W.2d at 152; *TNRCC v. IT-Davy*, 74 S.W.3d at 860.

The legal analysis of the Court of Appeals was correct. Sharyland is clearly attempting to ask this Court to reverse its decision in *Tooke* and not apply the law as enacted and interpreted by this Court.

CONCLUSION AND PRAYER

Other than sidestepping the statutory issue of the application of §317.13, the Opinion of the Thirteenth Court of Appeals was correct. However, because of the omission, a motion for partial summary judgment was held to be a declaratory judgment on which the Petitioner "prevailed" and the Court of Appeals found the City of Alton to be responsible for Sharyland's attorneys fees attributable to that motion. (Sharyland did not even attempt to segregate its fees.) Thus, to the extent the trial court's ruling on this issue was clearly wrong, as set forth in the briefs filed by the Co-defendants, it should be corrected under a *de novo* review.

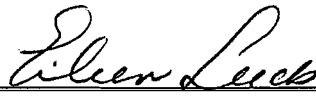
However, Sharyland's primary argument in its Petition for Review is that the Court of Appeals incorrectly applied the case and statutory law of immunity and contractual claims against a governmental entity. It did not. Their analysis was correct. As such, the City of Alton prays that this Court deny Sharyland's Petition for Review. Should the Court grant the Petition for Review, the City of Alton prays it find that the trial court should have applied the position of the TCEQ, that the regulation did not apply to the facts of this case, as that entity

enacted the regulation and its opinion is entitled to greater weight than anyone who testified on Sharyland's behalf. Additionally, should the Petition be granted, the City of Alton prays that this Court find that no attorneys' fees should be awarded for the reasons stated above.

WHEREFORE, PREMISES CONSIDERED, the City of Alton prays that this Court deny Sharyland's Petition for Review and grant the City of Alton all other relief to which they may be entitled.

Respectfully submitted,

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I hereby certify that on this 9TH day of November, 2009, a true and correct copy of the Respondent's Brief on the Merits has been forwarded to all counsel of record and to the clerk of this Court as indicated below:

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