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Supreme Court of Texas.
Sharyland Water Supply Corporation, Petitioner,
v.
City of Alton, Carter and Burgess, Inc., Cris Equipment Company and Turner, Collie and Braden, Inc., Respondents.
No. 09-0223.

March 24, 2010.

Appearances:

J. W. Dyer, Dyer & Associates, McAllen, TX, for petitioner.
Eileen M. Leeds, Willette & Guerra, LLP, Brownsville, TX, for respondent City of Alton.
Stephen L. Tatum, Cantey Hanger LLP, Fort Worth, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in 09-0223, Sharyland Water Supply Corporation v. City of Alton and others.

MARSHAL: May it please the Court, Mr. Dyer will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF J. W. DYER ON BEHALF OF THE PETITIONER

ATTORNEY J. W. DYER: May it please the Court. Normally I wouldn't start out by talking about the facts of the case, but I think that the Court needs to have a firm grip on the position that Sharyland finds itself in because I think that this Court is one that's supposed to indicate to the citizens of the State how they're supposed to conduct business and how they're supposed to act and I have no idea how Sharyland could have acted any different than they did. In the 1970's, early, late, excuse me, in the late '60's, early 70's,

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Sharyland Water Supply Corporation was formed by the residents of the rural communities with some government funding to provide water service to the rural communities in the rural area. This area was a community that was later to become Alton. In the '80's, the City of Alton incorporated and in so doing decided that they wanted to try to expand their facilities and promote growth within the city and so they came and they asked Sharyland if they were to get federal funding to put in some more water lines, would Sharyland take over those water lines and provide water service. Sharyland's policy was to provide water service to existing customers and they wanted to promote growth and they wanted to put in water lines so they could have new customers as well as provide fire service to the area as well as provide water to their own facility and Sharyland entered into an agreement, a series of agreements with them. They used the federal funding, the state, excuse me, the city used the federal funding to put in more water lines. They gave those water lines to Sharyland along with easements. They entered into service agreements and water supply agreements with Sharyland whereby Sharyland would provide those services. Sharyland had no obligation to provide fire service water, but they did so. At the time that all this was done, the state of the law was the MoPac v. Browns Navigation District. Sue and be sued meant that the city could be sued. There was not any requirement that the consequential damages would not be allowed or attorneys' fees would not be allowed and, in fact, when the sewer lines were built, that was the status of the law, excuse me, when the water lines were built, that was the status of the law. When the sewer lines that are the heart of this case, were built, that was the status of the law. When this lawsuit was filed, that was the status of the law and when it went to trial, that was the status of the law. So that was the only thing that Sharyland knew that it was going to be operating under. But we find ourselves in a little bit of a quandary now because we got stuck in the middle because there was a realization and took that sue and be sued didn't mean that it had waived governmental immunities to sue. And so we sit here today faced with that. The changes that the legislature made don't really address the situation that Sharyland's in. Sharyland is not asking for money for services that it's rendered. I mean that's the type of situation that the legislation that followed took, local government code 271.151 and so on coverage. We're asking for performance. We're asking that the state laws to protect the public health be followed.

JUSTICE PAUL W. GREEN: Well, let me ask you this. The failure of the project as you assert in the construction of the sewer lines affecting the water lines, how did that affect the value of your property interest in what Sharyland owned?

ATTORNEY J. W. DYER: You know, it's not like you go out and water, you sell a water system and it has a value. The problem is is that you have an untenable situation that has to be changed and so the value, I guess, the diminution in value is what's it going to take to make it right. You either move the water line or you insulate the water line by putting steel casing around it where the or some other remedy that is allowed under Chapter 290 of the Water Code. You can't leave it like it is. That's the problem. Is normally, normally this situation might be an inverse combination-type thing because you'd leave it that way and the city would say okay now, we have taken that right and you would pay for that right, but you can't leave it that way.

JUSTICE PAUL W. GREEN: But, as I understand it, you own the water system, the easements and so forth, by virtue of grants from the City of Alton.
ATTORNEY J. W. DYER: And some private easement, yes, sir. And that is and so when you start talking about issues with respect to the normal scenario, you'd either have -- this isn't a temporary situation so you don't have a temporary damage-type situation. You don't have an inverse condemnation situation because you can't leave it the way that it is. So it really speaks for an equitable relief.

JUSTICE NATHAN L. HECHT: Is there evidence that this kind of contamination ever happens or has happened?

ATTORNEY J. W. DYER: There was some evidence. Albeit, well okay, if you're talking about contamination, part of the argument was well look, you got a pressurized water line and you got a non-pressurized sewer line so how are you going to get sewer in the water? And the testimony was that there are occasions, primarily when there's water line breaks that you don't know are there because that happens. You have a water line break. The water's coming out, but it's going down on the ground faster than it's going up so it never comes to the surface. You don't see it. There was a testimony about how in 1989 there was a freeze and it froze all the pumps on the water system and as a result, the upper section of the system

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drained downward, actually drained out of water and drained into the lower section. Alton happens to be on the higher section. So if you have a water line leak and you have sewer that's been leaking around it as was found in one occasion, then you are going to introduce sewage into the line.

JUSTICE NATHAN L. HECHT: If the pump's clear.

ATTORNEY J. W. DYER: If the pumps go or whatever causes the pressure in the system to go down. Now, the other situation is is when you know you have a leak on a system, I know that between here and half a mile away I have a leak and I have to take that line down. Now these sewer lines are not marked. They are not made of metal. No one knows exactly where they are. No one knows which ones are leaking and which ones aren't leaking. So now I'm going to go out there and I'm going to repair a line. So I start digging down. What am I going to hit first? I'm going to hit the sewer line first because it's on top and it's not marked. There's no way of knowing it. Odds are I'm going to break that sewer line.

JUSTICE NATHAN L. HECHT: The only places that it's on top are the side laterals going off to the homeowners?

ATTORNEY J. W. DYER: That's correct. You have a main water line. You have a main sewer line and everywhere where they've decided to put a stub off so that later sewer service could be connected in, they came up, went over the water line and went to the right-of-way line and plugged it. Now, some of those presumably are used and some of those are presumably unused and so, yes, to the extent that you're going to say well, if there's a house over there, then you know there's a sewer line somewhere in here. Well that's true, but where? Is it on this side of the property? See, what they did was they, most of these house had septic tanks. A few of them had outhouses. Most of them had septic tanks or cesspools and those were to be decommissioned and a line run out to the new sewer line. We don't know where those septic tanks were and the fact of the matter is is when we were going out to try to locate these, even though it was only a few months after they had been put in, it was still difficult to find them and now, after several years, it's even more difficult to find them, but, yes. I mean, you know that within 100 feet of somewhere, but you don't know was it here or is it over there and when you're digging, when you've got a man down there. He's trenching. He's trying to poke around and find that and you're using a backhoe, invariably you're going to hit something. If you hit it, this is not, see, that's why they put, that's what, they don't say you can't put sewer lines on top of water lines. They say you can, but you got to take certain protection, excuse me, because this is what's going to happen and sewer lines, these sewer lines are not made out as heavy a product as is required if you're going to do it right for the very reason that that backhoe's going to probably hit it and nick it and then you're going to have a leak. So that's the situation, the reality that they've got to deal with. So really, honestly from the very beginning, all Sharyland wanted was them to put it in right and when they bowed their neck, said no we're not, we're charging on and we're doing it just this way, then Sharyland had nothing to do but bring a suit and try to require specific performance and during the temporary injunction hearing, the Council said if there's something wrong, we'll fix it. We don't think there's anything wrong with 317. I didn't, you know I didn't really think that Section 317, now 217, was really the focus of things until I read this morning the little blurb that's in the informational packet and it seems like some of the staff and they are, they're challenging whether 317, now 217, applies. I want to point out one thing. Even if this Court were to say, you know what? 317 doesn't apply, now being 217, doesn't apply to this section. I mean when you do that, what you do is you take a part of the entire system of sewage from the commode or the sink to the discharge stream on the sewer plant and you say there's a little piece in here that's unregulated because right now, under the current reading of the law, it's regulated. You've got local plumbing codes that deal with it on personal property. Once it gets on the public property, the TCEQ regulations apply and if you say no, this one doesn't apply, it still doesn't solve the problem because the issue before the Court was not just the application of 317, but also did it meet engineering standards, the normal, everyday engineering standards in industry practices and the finding was that it didn't meet those as well because even as the TCEQ representatives that testified said, 317 at least is the industry standard, is at least the engineering standard that should be applied. So simply saying 317 doesn't apply still doesn't resolve the problem because they breached the standards that apply in public anyway. It's my position it does apply.

JUSTICE PAUL W. GREEN: So it has to be your position that the city was required to do certain things

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under the Code when putting in the sewer system.

ATTORNEY J. W. DYER: They were.

JUSTICE PAUL W. GREEN: And, of course, you had a contract with the City to supply water.

ATTORNEY J. W. DYER: We had several contracts with the City, yes.
JUSTICE PAUL W. GREEN: So by their failure to comply with the Code, that would be your allegation is the breach of the contract they had with you.

ATTORNEY J. W. DYER: That's correct.

JUSTICE PAUL W. GREEN: Well, if the City by acting through its sewer director, lacking another term to use here, failed to perform those things, couldn't Sharyland have sued the city official in charge of doing this and required through some of the injunctive procedures or something to force that person to comply with the act?

ATTORNEY J. W. DYER: If such a person actually existed, there was no such person, that's why they sued Sharyland, that's why they sued the City.

JUSTICE PAUL W. GREEN: But there are city officials involved, the mayor.

ATTORNEY J. W. DYER: The City Council that had authorized this work had hired these engineers to basically take care of doing those aspects of it, in other words, making sure that the work was being done right, the field engineer, the TCB, was the one that was supposed to be looking in the trench to make sure that it was being done right and Carter & Burgess was supposed to be looking over their shoulders and make sure they were doing their job and make sure that it was getting paid right, that everything was meeting the codes and the standards. They basically subcontracted out that work to those individuals.

JUSTICE PAUL W. GREEN: I guess I'm looking for a remedy. As you described it when you first started about the situation with respect to the sovereign immunity or the governmental immunity situation, what remedies do companies like yours have under these circumstances? The court of appeals said that you don't have a damages remedy here.

ATTORNEY J. W. DYER: On the immunity issue, if you say we got caught in the cracks between the realization and took that sue and be sued doesn't mean that, then all I can tell from looking at the current rulings that this Court has made is that you look at conduct. Well, what was the conduct here? What was the different conduct and I know that you all have said that simply signing a contract, that's not enough. Simply retaining the benefits alone and maybe arguing about how much you should be paid or paid for it, that's not enough, but in this case, it was more than that. They were told they were doing it. First of all, they're violating the statute. Second of all, or a regulation. Second of all, they are after it's pointed out to them, then they say you know what? At first, they say you're right and they go to the engineers and the contract and they say make it right and for some strange reason, all of a sudden it comes back and says no, we're not going to make them do that. They can do it that way. I guess when I say strange reason, I understand that the engineers went and said look, we don't think 317 applies, but when you start looking at why they said 317 didn't apply, it makes no sense. The only reason that the TCEQ officials that they talked to, who happened to be good friends of theirs, said 317 applied, when you took their deposition, the only reason they said it didn't apply was because if they took the position it applied, it was going to, they just couldn't handle the workload. That was the only response and in addition to that, if you look at the section of 317 that I'm referring to, it not only has regulations about how, the spacing differences, but it also has regulations in that same area, same section, not off somewhere else about the type of pipe that you can use and the grades that you're going to use and this was really covered deeply in a motion for summary judgment on the 317 and so questions related to it really can be answered there, but their response, when I asked them, so if it doesn't apply, if sewer doesn't mean this particular place, these stub-outs, if they're not covered, then that means that they can be made out of anything. They could be made out of paper. He says, no, no, no, you have to make them this way. Here's the standard. It's right in the next paragraph.

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JUSTICE PHIL JOHNSON: Say you have one official that's responsible for this or is it the whole Council? Do they not have a set manager?

ATTORNEY J. W. DYER: I was not aware that, no one ever took the position that there was a person at the City that was responsible and I'm not aware of one. They had hired the engineers to oversee this and take care of it and they were and my understanding was they were, the city manager, I guess, would be the only person and quite honestly, if we had realized that we needed to do something different to trigger some of this, I think their conduct at trial would have been different. If we had known we needed to sue an individual or if we'd had known you know what? We're not providing any fire protection anymore. We're just cutting you off. The City would have sued us. The City did sue us. The City sued us to recover these easements in these pipes and so under that, I believe they've waived their immunity.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Dyer. The Court is now ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Tatum and Ms. Leeds will present argument for the Respondents. Ms. Leeds will open with the first five minutes.

ORAL ARGUMENT OF EILEEN M. LEEDS ON BEHALF OF THE RESPONDENT

ATTORNEY EILEEN LEEDS: May it please the Court, Counsel. I would first like to address the issue of the officials because I believe Justice Green and Johnson are going to maybe El Paso v. Heinrich (284 S.W.3d 366) and whether or not if this is a an equitable claim, do you have a city official against whom you could have asserted an equitable claim and gotten specific performance. At the time, I.T. Davey was the law and that says the same thing as El Paso v. Heinrich. It still says if you sue a city official, you can still get the same relief. No city official was ever sued. The thing that occurred in this case is that Sharyland came to the City, said you're doing it wrong. The City went to its engineers and said, hey, Sharyland is saying you're doing it wrong. The engineers went to the TNRCC and asked them to determine whether we were doing it wrong. Everybody said it's not being done wrong. 317.13, a regulation, does not apply to what Sharyland is complaining about.

JUSTICE EVA GUZMAN: Were there industry standards that it was not compliant, in compliance with?

ATTORNEY EILEEN LEEDS: No, the TNRCC, who is, tells us how to do it, said this was in compliance with their standards. The particular pipes that were being complained of, this regulation doesn't apply to them.

JUSTICE EVA GUZMAN: Are there engineering standards or industry standards outside of 317 that this project was not in compliance with?

ATTORNEY EILEEN LEEDS: No.

JUSTICE NATHAN L. HECHT: So the City is not worried about contaminated water?

ATTORNEY EILEEN LEEDS: The City was not because it was asking its experts and they were asking their experts. All of the information the City got was that it's in compliance and in the trial, one of the experts came in and testified as to the Mr. Dyer said that the kind of plumbing that was being used was not good enough. Well, the testimony was that it was a Cadillac system. The pipes they used were, I believe, 220 psi pipes for these laterals that are coming from one house. They have no pressure in them at all and the piping that was being used is for pressurized water and so he testified that he didn't believe any of these pipes unless somebody actually went down and broke one, they would ever have reason to break

CHIEF JUSTICE WALLACE B. JEFFERSON: How is sewage getting in the water supply or do you disagree that that's happening?

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ATTORNEY EILEEN LEEDS: It is not. It has never happened. There has never been one single leak that has been found except for when Sharyland went out and started digging up for purposes of the lawsuit, they found one leak and it wasn't in the pipes that we're talking about. It was actually in a yard. A gasket had rolled and the belief was that it was leaking because of the digging up. Not one other instance has occurred since this land has been put back to rest. No damages, no water contamination at all.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Johnson?

JUSTICE PHIL JOHNSON: You said it's a Cadillac system, but didn't the jury find for Sharyland in this case?

ATTORNEY EILEEN LEEDS: Yes, they did.

JUSTICE PHIL JOHNSON: So they apparently didn't buy the Cadillac system story?

ATTORNEY EILEEN LEEDS: They didn't believe the Cadillac system. Correct.

JUSTICE PHIL JOHNSON: Okay.

JUSTICE PAUL W. GREEN: If it does happen sometime down the road that some residents of the city complain about contaminated water and said come to the city and complain about that, who you going to point to?

ATTORNEY EILEEN LEEDS: Who are we going to point to?

JUSTICE PAUL W. GREEN: As being the blame for it. It can't be Sharyland.

ATTORNEY EILEEN LEEDS: No, it couldn't be Sharyland because obviously I don't think they point to anybody. They'd fix it. The problem is that all of the experts agreed that in order because of the pipes at issue are unpressurized even though they tried to at first during part of the trial argued that these hose laterals were pressurized and would blow up if they broke, these are unpressurized pipes taking waste water from one house. Because these pipes have so little in them, there would have to be a break in the pipe, in very close proximity to a pressurized water line. The experts testified that for the likelihood of that pressurized water line to have a crack in it, a break in it and have suffered negative pressure such that it would be sucking in the sewage instead of blowing out its water would be just so unlikely as to be unheard of and not one of them, not one of the experts had ever heard of such a thing happening, not one. So the probability of this leaking of a house lateral getting into a water main, a pressurized water main was virtually improbable.

JUSTICE EVA GUZMAN: And does that, is that a different circumstance when they're digging or when there is a problem and because of the proximity and the type of material used though, so is there this huge potential out there for a serious problem if there's some digging that takes place?

ATTORNEY EILEEN LEEDS: No. If there is some digging, then it depends on what they're digging for. If they're digging because a water line has broken, water should be spewing out because it's pressurized and so all of the protections that are in water, the pressure, the chlorination, the anti-contamination materials that they have to have anyway, is likely, most likely to not be contaminated down the line because they're going to cut the water off before. If this water line breaks and they go digging and they break a sewer line, it's not going to go anywhere because the water has been cut off and the experts testified the likelihood of this happening is highly improbable that all the pieces would line up, such.

JUSTICE HARRIET O'NEILL: If that's the case then why this regulation?

ATTORNEY EILEEN LEEDS: Because it's talking about water mains and sewer mains. They don't want the collection tubes of the sewers that have a lot more sewage in them in close proximity with the water

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mains and I believe 217 addresses that. The new regulation addresses the fact that these regulations go to the collection pipes and not the single, nothing in them has lateral.

JUSTICE HARRIET O'NEILL: 317 says water lines.

ATTORNEY EILEEN LEEDS: Pardon?

JUSTICE HARRIET O'NEILL: 317 says water lines.

ATTORNEY EILEEN LEEDS: Right.

JUSTICE HARRIET O'NEILL: It doesn't say mains.

ATTORNEY EILEEN LEEDS: No. And that now is 217.

JUSTICE HARRIET O'NEILL: Well, okay, but it still says water lines.

ATTORNEY EILEEN LEEDS: Correct.

JUSTICE HARRIET O'NEILL: So back to my question, if there's just virtually no likelihood of something like this ever happening, why have the regulation in the first place?

ATTORNEY EILEEN LEEDS: Well because they, the TNRCC said that's the way we interpret it. That's the way we look at it in the field.

JUSTICE HARRIET O'NEILL: So the TNRCC thought it was important.

ATTORNEY EILEEN LEEDS: The TNRCC thought it was important and that's the way they interpreted it that it did not apply to the kinds of house laterals that were being, that were at issue.

JUSTICE DAVID M. MEDINA: Let me ask you a fact question, just, these all involve PVC piping and so there's no cast iron, which obviously breaks? Okay.

ATTORNEY EILEEN LEEDS: I don't have any time left, but I just wanted to quickly address the immunity issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: We will use your co-counsel's time, but that's all right for us.

ATTORNEY EILEEN LEEDS: A minute?

ATTORNEY STEPHEN TATUM: [inaudible].

ATTORNEY EILEEN LEEDS: Mr. Dyer was incorrect in terms of how the court of appeals applied immunity. The court of appeals waived immunity for the City of Alton and you know all of the discussion that Plaintiffs went through or Appellants went through on, you know how they gave Alton immunity is just not relevant because the court of appeals waived immunity and applied the statute 271, 153 and you know related statutes the way this Court has told it to apply. So we would ask that you affirm the court of appeals. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

ATTORNEY STEPHEN TATUM: May it please the Court, Steve Tatum on behalf of the design professionals that are, were defendants in the court below and successful appellants in the court of appeals. I want to take my time to discuss the issues that are particularly relevant to the design industry that were raised in this case, the economic loss rule and its application by the court of appeals and the issues relating

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to a portion of appellants' presentation, not presentation this morning, but written presentation regarding a duty issue that the Sharyland Water Supply Corporation felt was raised in this case. I want to start with the economic loss rule though. This case really is a classic example of why the economic loss rule exists and why this Court has recognized its existence in years past. I recognize there's been no writing on that for some time from this body, but --

JUSTICE NATHAN L. HECHT: It's not clear about privity.

ATTORNEY STEPHEN TATUM: Excuse me?

JUSTICE NATHAN L. HECHT: It's not clear about privity.

ATTORNEY STEPHEN TATUM: It isn't clear about privity. The issue regarding privity, I think the problem with eliminating or with restricting the operation of the economic loss rule to parties in privity is that it would swallow the rule, quite frankly. The whole purpose of the economic loss rule is to allow parties in commercial situations -- I mean there's several justifications for it, but the main reason for it is to allow parties in commercial situations to provide for risk, contractually or otherwise, with insurance. If the economic loss rule was restricted to parties that already have a contract with each other, presumably they've already provided for whatever risks are involved in their relationship in that contract. Then there's no purpose for the rule because the rule will have, I mean --

JUSTICE NATHAN L. HECHT: The purpose to address it in the contract. To be sure it's addressed. The purpose is to be sure it's addressed in the contract. For example, in a products case, you want to make sure that the manufacturer and the purchaser have if they're worried about the risk of blowing up, they should address that in the contract, they can do that. But how can parties who are not, don't have a contract, address those issues? Your point is they should go get one.

ATTORNEY STEPHEN TATUM: Well there's two responses to that. In the first place, it particularly in the situation that we're looking at here involving construction projects with many participants, one-on-one contracts between different levels of service providers and artisans and so forth, the -- at least several states have recognized that that milieu, that combination of one-to-one contracts, effectively and efficiently provides for risk allocation and so forth even though a party to a contract with a party over here has no privity at all with a contract door on a different aspect of the project.

JUSTICE NATHAN L. HECHT: Why should you use the economic loss rule when you could use the Hadley rule? It seems like the economic loss rule is sort of heavy-handed in that as you say milieu and that the more efficient way to cabin in the duties that people are going to owe each other is through the old Hadley rule that you're not responsible for unforeseeable consequences.

ATTORNEY STEPHEN TATUM: Well because there has to be some risk allocation and I think if you --

JUSTICE NATHAN L. HECHT: Hadley does that. It does some of that.

ATTORNEY STEPHEN TATUM: Well, it, unforeseen consequences.

JUSTICE NATHAN L. HECHT: It does it on a [inaudible] instead of looking at the kinds of damages, it looks at, I mean it does look at the kind of damages, but it looks at foreseeability and why isn't that a better restriction, if you will, on unlimited duty than economic loss rule?

ATTORNEY STEPHEN TATUM: Because foreseeability, there is potentially no limit to what is foreseeable from a particular circumstance. A hypothetical, for example, a contractor on an apartment building because of the actions of a negligent subcontractor, that building's completion is delayed. A person who had a lease to enter that building and set up a residence in that building is delayed because the building is delayed. That person is faced with delayed penalties where that person is living and so forth. The building is faced with potential penalties from the lessee that was going to come in and replace the person.

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JUSTICE NATHAN L. HECHT: It never ends.

ATTORNEY STEPHEN TATUM: And you can't end.

JUSTICE NATHAN L. HECHT: But what had Hadley taken it?

ATTORNEY STEPHEN TATUM: And all of those are foreseeable really.

JUSTICE NATHAN L. HECHT: Well, they're foreseeable in the sense that under the rule that everything's going to go wrong, it's kind of foreseeable, but it is hard to expect that a subcontractor should know that a tenant's finish out -- a contractor is going to be delayed and not paid because of work that the subcontractor doesn't do right.

ATTORNEY STEPHEN TATUM: Well that's true, but without the economic loss rule, that subcontractor would have to try to anticipate those things and that's the problem. The way the economic loss rule works out is it's the nature of the damage and not foreseeability that it depends upon. That is easily determinable. It's fairly clear in a commercial situation whether damages or commercial or property damage or bodily injury, it's pretty simple to figure that out and so you don't have a potential jury issue in every single piece of litigation arising out of a commercial delay situation where a jury has to find out whether it was or has to determine whether this particular step in the damage chain was foreseeable or whether it's the next one and there's really no principled way to draw a line. It has to be, in my view, I mean I think it's, if the first delayed lessee is foreseeable, but the second isn't, that's an arbitrary distinction.

JUSTICE NATHAN L. HECHT: But it seems, the problem with economic loss rule in that context is that if you do actually know that economic loss is eminent, you're told. They say, look, if you don't get to work, we're going to have this loss and we're going to hold you responsible. The economic loss rule would cut them off when the Hadley rule wouldn't.

ATTORNEY STEPHEN TATUM: Well, again, the economic, but the economic loss rule would encourage the discussion of those issues upfront so that we wouldn't wind up in a courthouse every time.

JUSTICE NATHAN L. HECHT: You can't have a contract with somebody that doesn't want a contract.
ATTORNEY STEPHEN TATUM: Well that's true, but, again, in a construction situation, like the one we're faced with here, different parties deal with different aspects of the risks that something like that's going to go wrong and the economic loss rule in jurisdictions all over the United States, including this Court, is basically going to recognize there's an efficient way to encourage economic activity and to permit the at least quantification of risk involved. The economic loss rule, so I believe we believe that this Court's earlier jurisprudence and the guidance and jurisdictions all over the United States that have adopted the economic loss rule in situations regardless of privity is, from a policy standpoint and from a legal standpoint, the appropriate disposition of this issue and the court of appeals got that right.

JUSTICE DALE WAINWRIGHT: You said that our earlier jurisprudence supports the economic loss rule's application as you see it. Have we ever held this Court ever held that? It looks like there's Courts of Appeals' opinions, Fifth Circuit, has this Court ever so held?

ATTORNEY STEPHEN TATUM: Well it has been observed, Dean Powers has observed in an article that was written some time ago that this Court in several of the early Nobility Homes (557 S.W.2d 77) being one of them, sort of a precursor to or an application of an ABA doctrine similar to the economic loss rule. This Court has actually never expressly adopted the economic loss rule in this type of situation so this would be an issue of first impression at least as far as clarity is concerned.

JUSTICE NATHAN L. HECHT: Sometimes, the loss in value can be shown by cost of repair.

ATTORNEY STEPHEN TATUM: Right.

JUSTICE NATHAN L. HECHT: Why isn't the evidence of cost of repair here, some evidence of property

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damage for purposes of economic loss rule. court of appeals held it wasn't. I'm just not sure why.

ATTORNEY STEPHEN TATUM: Well, simply because it is in cases under every jurisdiction that's looked at this, the cost of repair to the object of the contract itself is an economic loss, not property damage, not held to be property damage. If in the course of digging the trench to lay the sewer line, we had, someone had knocked the water main that was right next to it, broken it or something, that's obviously property damage, but that hasn't happened and in the many years that this system has been in place side by side with the fresh water system, there has been not one instance of any type of property damage or bodily injury.

JUSTICE PHIL JOHNSON: So if the sewage were to get into the water system and we had a lot of people sick in Alton, then you can be sued?

ATTORNEY STEPHEN TATUM: That would be bodily injury.

JUSTICE PHIL JOHNSON: But you can't be sued now because that's bodily injury.

ATTORNEY STEPHEN TATUM: Yes, sir.

JUSTICE PHIL JOHNSON: You can't prevent it. No one can make you, no one could make you keep from making those people sick, but they can sue you after they get sick, is your position.

ATTORNEY STEPHEN TATUM: Well, our position is that --

JUSTICE PHIL JOHNSON: Well that has to be your position, it seems like. Then you have personal injury. We have to wait for people to get sick and die before anyone can sue your client.

ATTORNEY STEPHEN TATUM: That's the way the tort system works in this state. There has to be damage. There has to be some damage. There's never, there isn't a situation that I'm aware of in which this Court has allowed recovery of injuries where damages for an injury that might occur in the future sometime. In the Postahaske case that this Court handed down several years ago, involving asbestosis and mesothelioma, the Court, this Court didn't allow or didn't approve of the recovery of damages for the worst disease until, unless and until that worst disease manifested itself.

JUSTICE DAVID M. MEDINA: But the Court also said they can go forward with the asbestosis claim and then later if mesothelioma developed, they could go forward with that claim as well.

ATTORNEY STEPHEN TATUM: Exactly and my point being that you couldn't get the damage until it occurred, at least in that circumstance. That's not a tight analogy, but I think it's at least an indication that this Court and the tort system in this state has always depended on the existence of injury before there's been an ability to recover tort damages for that injury. This system may never fail. It hasn't failed yet. It may probably never will fail. As was pointed out earlier, the regulations that were alleged to have been violated by the, by this construction have been approved and the actual construction was viewed onsite by representatives of the TNRCC and they approved it and said it didn't need to be redone or replaced or any such thing. I believe that under those circumstances, the economic loss rule here, it's a very clear application. I think the court of appeals got it right and I believe that this Court should affirm.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

JUSTICE DAVID M. MEDINA: Mr. Dyer, I don't want to take away from your legal analysis, but you said at the beginning that the facts were very important here and you gave us the facts. I could not help but notice that you appeared to disagree with Ms. Leeds' statements about some of the facts that the engineering experts testified that there could never be any cross-contamination. Now having had the experience of dropping sewage tanks and then later cutting them off and dropping a sewage line to tie into a main and then laying the water line on top of that, just generally how it's done, I believe, that the sewage pipe's at the bottom. The water line's at the top and they connect into the main line. You seem to not agree with what her statement that there could never ever be a cross-contamination there. If that's the case, I'd like

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to hear your thoughts on it because I'm no expert on the field, but I disagree with it as well.

REBUTTAL ARGUMENT OF J. W. DYER ON BEHALF OF PETITIONER

ATTORNEY J. W. DYER: If a water system is leaking, there was plenty of testimony that water systems leak and you don't know where the leak is because it goes down on the ground and doesn't surface. It kept going across a piece of sand or whatever oftentimes happens. If in the course of needing to repair a line for whatever reason, there's a break or whatever, you don't take, you take large sections of line out of service at a time. You don't know where sewer lines are leaking and the water line is leaking in that long expanse of line. I know I have to go and do a repair on the line, but I don't know what else is going on that mile or so of line. So I shut the pressure off. Everything drains down. I go repair it. I don't know what's getting in that line at other locations along there where there's leaking sewer lines and now I have a water line that had a leak, has no pressure and that sewage is leaking into it. I repair. I do whatever I'm going to do now. I pressurize the line. That doesn't push that sewage out. It just pushes the sewage down the line and then again the instances that I talked about before where for other reasons the pressure in your system goes down. You may have a large main line break three miles away and before you can get it set, shut down, it has sucked all the water out of everything that's up above and so, again, you've got a negative pressure up there that is pulling in whatever's next to it if you've got a leak and you're relying on your chlorinization that's normally in the system, the residual, to take care of that. These are all things that were addressed by the TCEQ and that's why the regulation was the way that it is. The fact of the matter is is that the TCEQ or then the TNRCC has never formally said anything about this. Two people on their staff have given depositions about what their interpretation was. The court did not believe, the trial court did not believe that their reasonings for saying that this small section of the public's sewer system was not regulated for this purpose only didn't believe their reasoning behind it and said no, it applies. Those same TCEQ officials that testified to that were engineers and said that the TCEQ regulation, while it didn't apply as a regulation, stated the engineering standard to be applied and the industry standard. That is the standard. It's the same. And not only that, but in the contracts that were shown to Sharyland before this thing was built, the design engineer put that exact language in there to say that this is how the system was to be built and the TCEQ never came and inspected the project. When they were asked about whether this requirement satisfied it, they showed them the design criteria that was written up by the design engineer and the TCEQ said yes, that's fine. They were looking at what was, they were being told this is how it's going to be built, but that's not how it was being built. After the fact, the TCEQ, the local guys, I mean, fellows in Austin had already testified we don't think it applies and the local guys said well then we're not going to get involved in the litigation. I mean, it is what it is. We'll see how it turns out at the end and in the meantime, that's the way it is. This rolled gasket, the only way you roll a gasket, a gasket, this is not glued pipe. This is gasketed pipe. A gasket sits in a gland in the bell of the pipe. When you take the spigot and you shove it in there, that gasket is supposed to roll over it. If you catch the edge of the pipe on the end of the gasket and you push it out and you have a rolled gasket or a fish mouth gasket, the gasket is no longer providing a seal. It only occurs during installation. That was what was found in the one pipe that they found that was leaking. Sixty-six pipes were dug up. One of them had a rolled gasket. That gives some indication that it's going to happen and that does happen and so to say that we don't know that it's happening today is ludicrous. We don't know if it's happening today. All we know is no one has come in and sued us because they're sick and said that this is the reason. And, finally, one minute or two if I might on the economic. There was physical damage. Physical encroachment is physical damage. There was an encroachment. They did tear up pipes when they were building it. They fixed them. We didn't sue them for the broken pipes. We sued them for the encroachment. We sued them for the leaking sewage and we sued them for the denial of unrestrained use. We had an easement right to use our pipe in a certain way and access our pipe in a certain way and we can't do that now. That's not any different than the Goose Creek case, School District case against Jarrar Plumbing (74 S.W.3d 486). I think that you do have physical damage here and even if you don't and you say well there's no third-party beneficiaries so there's no contract, there's no privity, then I think that the economics look, well the economic loss rule should not be applied to precludes a fix. Somehow this system's got to get fixed. It can't be just left the way it is. So I'd ask that you consider these things and overturn the court of appeals and reinstate the damages that were awarded by the trial court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Dyer and Counsel. The cause is submitted.

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That concludes the arguments for this morning. The Marshal will adjourn the Court.

MARSHAL: All rise.

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