ORAL ARGUMENT – 02/19/03
02-0213
HUBENAK V. SAN JACINTO GAS TRANSMISSION CO.

NOEL: These nine cases are before the court on the trial court's handling of the landowner's plea to the jurisdiction in these condemnation proceedings. The nine cases can be divided into two groups. The first five cause numbers 213-217 were handled in the TC on _____ traditional cross motions for partial summary judgment on the jurisdictional prerequisite of good faith negotiations which is required in the condemnation proceeding. The last four cases 320, 321, 326 and 359 were all handled in the TC at a supplemental hearing on the landowner's supplemental plea to the jurisdiction, and evidentiary hearing. And after that evidentiary hearing the TC entered its order of dismissal. So there are two different procedural ways these cases were before the court.

OWEN: In the summary judgment cases was one of the grounds in the summary judgment that the landowners did not want a pipeline across their land at all?

NOEL: That was stated by some of the landowners.

OWEN: But was that a basis for the motions for partial summary judgment?

NOEL: Not directly. The condemning authorities indicated in their summary judgment evidence notes by the negotiators of comments that the landowners made. However, on a procedural matter that would be an affirmative defense if they are going to claim that negotiations were futile because the landowner never would have agreed to any kind of easement. And they did not plead futilities negotiation. As an affirmative defense, which would be an excuse for them not to make a good faith offer, it's clearly an affirmative defense. They didn't plead it.

I think before you even get to that question, the first question is would the pipeline company have ever made an offer for only the rights they could condemn? They have judicially admitted in this court in a prior Hubenak case 01-0294, in their brief on the merits and in their motion for rehearing they said "the right to transport any substance that can be pushed through a pipeline", something no condemning authority in Texas can condemn.

ENOCH: If the court concludes that the mere fact that the condemning authority attempts to obtain more rights through its offer to purchase than it could through condemnation, is there anything left in the cases to review on the good faith question?

NOEL: No. That is the _____ issue. If a condemnor admits that they would never, never make an offer to a landowner for only the rights they can condemn, is that bad faith as a matter of law? I believe it is because it's arbitrary. Why won't you make an offer for only the rights you can condemn.

OWEN: Under your theory do we have to decide whether they could have condemned an assignable easement or whether they could have condemned an easement for a liquids pipeline?

NOEL: No. For several reasons. First of all, they've admitted they are a gas utility and that they do not have the power to condemn for anything other than the...

OWEN: I thought all gas pipelines carried some liquids.

NOEL: There are some entrained in the stream of gas but no one's claiming that they are trespassing because of this entrained liquid.

OWEN: I also thought that these easements were routinely assigned for example if a company was bought out by another utility they were routinely assigned without any further payment to the landowner.

NOEL: It really depends on the easement document itself. As the court struggled with the issue in the Marcus Cable case, and they noted in that case that this easement was specifically assignable. In this case they have admitted that they did not even try to condemn the right to assign...

OWEN: Are you saying that no easement that was obtained by condemnation in Texas if the company is sold for example that the easement is _____. Is that your position?

NOEL: I believe that you cannot condemn the right to assign. The court has ordered briefs on the merits in William Bell v. Exxon Pipeline Co. I will present the court with about 30 pages of why I don't think you can condemn the right to assign, and even if you can condemn the right to assign, you have to at least plead that you are trying to acquire the right to assign the easement.

The case goes back really to Alley v. Carlton about 1867 Texas SC case that said easements engrossed, which are easements that do not benefit the land across which they go, are not assignable absent an agreement between the parties. And that makes sense because if it doesn't benefit your property, you certainly don't want to burden subsequent owners with it. So it has to be assignable by agreement.

Orange County v. CITCO Petroleum very clearly defines that pipeline easements are easements engrossed.

OWEN: How does the fact that a pipeline might carry liquids as opposed to natural gas liquids in the stream change the burden on the subservient estate or the value of the easement?

NOEL: They are different hazards. As an example if this was a gas liquid pipeline such as ethane, something like that where it's heavier than air. If you have a leak that's natural gas it will dissipate to the atmosphere. If you have gas liquids somewhat like a seminole - it will hoover

on the ground and migrate along the ground...

OWEN: Is there evidence the difference in what's carried in the pipeline affects the value of the easement?

NOEL: Not in these particular cases. There isn't in this record. There are various appraisers that have various opinions on that issue. But again, that goes back to they are demanding that they be granted rights that they cannot condemn. We're talking about rights. That's kind of abstract. Let's put it into something concrete. Texas Highway Dept. transportation board says we need 20 feet to widen some street or some highway. Alright they need 20 feet. Well what if the highway department comes along and says you know what? The transportation board doesn't know what they are doing. We're going to demand that the landowners gives us 100 feet in width. Even though we only need 20 feet, we want 100 feet. And under the pipeline company's theory if they go out and get an appraiser and appraise that 100 feet and offer what they think the 100 feet is worth, then they've complied with good faith negotiation. I don't think so. Because you can only condemn what is necessary, what the public needs.

ENOCH: On that point though, the seller doesn't have to sell 100 feet.

NOEL: You see this is condemnation. And so in order not to be sued the seller is going to have to sell 100 feet.

PHILLIPS: What if, in your example, the condemning authority offers money for 100 feet and the response is no, I'm not going to sell any of it, I'm not going to sell 1 feet, I'm not going to sell an easement. Go away. If the ____ get's that definitive an answer have you complied with good faith?

NOEL: I don't think so, because I think the duty is on them to make a good faith offer. In this case, they have admitted that they never would have accepted an offer for only that which they could condemn. And really the people that are being harmed by this are not necessarily the clients that we represent. It's all the people out there that receive that final offer letter that said here is our easement, here is our dollar offer, and if you don't sign this we're going to condemn it.

Who wants to be sued? Does anybody want to be sued?

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RESPONDENT

SHEFFIELD: I think that the issues in all of these cases are reasonably well joined and I think they've been briefed to the point of confession frankly. I think that it has always to be enough if you offer somebody more than what their property is worth. Never mind frankly what any of the ancillary rights...

OWEN: Where is the evidence in the record that says that if you back out the ancillary right your offer was more than what the property you could condemn was worth?

SHEFFIELD: I don't think there is any evidence in the record from which you can draw an inference that the inclusion or exclusion of any of those rights would have affected market value and the amount of compensation should have been offered...

OWEN: We just don't know one way or the other from the record do we?

SHEFFIELD: No we don't. But I think that the fact the futility has conclusively shown when as in _____ Cusak(?) the company makes an offer and in no uncertain terms they are told we don't want a pipeline on this property. I think that satisfies that standard as a matter of law at that point as to futility.

ENOCH: If this court defines good faith offer to be a reasonableness standard based on the rights that are being requested and the interest that are being negotiated over, you would never have a decision about the threshold that wouldn't require a jury finding would you? I mean if we said good faith really depends on how much you offered based on the ancillary right you are requesting, we would never get past a fact question on the threshold of whether or not there was a good faith offer.

SHEFFIELD: I think that may be right.

ENOCH: If good faith is a threshold to bringing condemnation, do you have a rule that would help us determine when the offer was not bonafide or the offer was not in good faith or something that doesn't depend on balancing the amount you offer verses the rights...

SHEFFIELD: I understand. And the case that always comes to my mind is City of Houston v. Hammons in which the City of Houston negotiated for an abrogation easement, a flyover easement on a property. That's what they negotiated for. What they condemned, however, was the fee simple interest in the property. And I think there's a presumption at play in those cases that that would most certainly have an impact on market value. And the court in that case said that that was not good faith. We have the opposite situation which obtains in these cases where the company negotiated for more rights than it may or may not have been able to condemn. And the lawyer simply made a judgment about what to condemn and what not to condemn, what's worth fighting about and what's not worth fighting about. The landowners in these cases don't argue about any of that. As to the rule of law, I think although Hipp, and Dowd and some of the other cases don't come right out and say it, I think what the rule of law should be is this: Is there sufficient evidence for a condemning authority to come to the reasonable conclusion that the parties are not going to agree on damages. And I think that that is conclusively shown on the evidence which is overwhelming in each and every one of thee cases. In Dernehl for instance, the appraised amount of the property was some $10,000 or something like that. Mr. Dernehl immediately said before he ever sees a final offer letter or a form right of way agreement, I want $120,000. The company was not willing to pay $120,000 or

even a factor of 5 over the appraised value. And I think it's reasonable at that point to come to the conclusion that the parties are not going to agree.

JEFFERSON: Do you agree that futility is an affirmative defense?

SHEFFIELD: No. I do not. The only authority for the proposition that it is, is Maddison Rayburn's Treatise on Condemnation. I think the pleading requirements for a condemnation case are exclusive contained in §21.012 of the Property Code. Which by the way doesn't say anything about good faith, higher duties or anything of that nature. What it says is that you have to prove that the parties are unable to agree. Those are the pleading requirements.

ENOCH: Do you concede then that there would be some evidence that it was not a good faith negotiation if the utility offered $10,000 and the buyer came back and said he wouldn't accept less than $12,000. And then that was it.

SHEFFIELD: I think that's sufficient to establish good faith negotiations. I think frankly that it would be a horse race if - I think that if you're going to complain about these three ancillary issues, once the condemning authority has met its burden of proof and conclusively shown the fact of futility or inability to agree, frankly I think if you're going to say that these three ancillary rights have something to do with the likelihood of your signing an agreement, I think you as a landowner need to come down to the courthouse and prove that.

ENOCH: So the utility offers $5,000 based on their appraisal, and the buyer comes back and says I'm not going to sell it for less than $10,000 based on his appraisal. You say that's a good faith offer. So they would not have the opportunity to come forward and say that your appraiser was employed by the utility and he had a memo that said you are supposed to offer half of what the market value of the property is. You don't think you could proceed under your standard of what's reasonably offered?

SHEFFIELD: I think that's a different circumstance. If the condemning authority says we're going to offer half of what the market value is, I think that would be a situation of good faith. But that doesn't obtain in any of these cases because the landowners were consistently offered frankly more than what the property was worth.

JEFFERSON: But there is no offer on the proposed condemned property. So how can you say there's a disagreement about the damages for which there would be a condemnation if there is no offer precisely tied to that property?

SHEFFIELD: There is no evidence in the record that any of those terms would have an impact on the market value.

JEFFERSON: Whose burden would that be to present evidence on that issue?

SHEFFIELD: I think it would be the landowners. Once the condemning authority has an appraisal for a pipeline easement...

JEFFERSON: The condemning authority has the obligation to show an inability to agree.

SHEFFIELD: That's right.

JEFFERSON: So wouldn't they have to show that an offer for the property that is subject to condemnation would not have been accepted?

SHEFFIELD: I don't think you have to show that. Under Hubenak and Kusack I think clearly the law is that the condemning authority can negotiate for anything that any other party may want to negotiate for the voluntary transfer of easement.

JEFFERSON: How do you know the landowner is unable to agree on the property if there has not been an offer for that property? Wouldn't that be your obligation?

SHEFFIELD: I don't think it matters. Once the condemning authority has met the relevant legal standard, I think that the landowner has to prove that it would have made a difference in the market value of the property. If these are ancillary rights in the right of way agreement, the form of agreement that was sent, I don't think it's the case that the condemning authority has to disprove every conceivable negative concerning the materiality of terms contained in the right of way easement agreement. For instance it contains a lot of terms like relocate the pipeline, put up _____ protection leads and pipeline makers and the like. I don't think it's the case that a condemning authority has to go through all of those terms and disprove the negative and show that they would not have had an impact on market value unless the landowners joined that.

JEFFERSON: Why wouldn't the rule of law that we're talking about here be simpler by saying at the very minimum the condemning authority must make an offer on the land that is proposed to be condemned. They can start there and then there is all kinds of negotiations that can happen with respect to ancillary rights, but at the very least do that.

SHEFFIELD: I don't think on the facts of any of these cases that that would have made a difference. If that had been the rule before any of these cases were filed, then that's just another hoop for a condemning authority to jump through. And they could very well have done that. What's offensive about that their Dernehl(?) opinion is that it's retroactive. There's nothing you can do about that now. No one knew that the Dernehl court was going to say this is what you have to do now.

ENOCH: Do you agree with Ms. Noel that really the only issue in this case is whether or not the mere fact that the utility requested ancillary rights that they could not get under condemnation established that the negotiation was not in good faith?

SHEFFIELD: That is precisely the issue.

ENOCH: So if the court concludes that it is not in bad faith to request ancillary rights as a part of the negotiating tools, that's the end of this case?

SHEFFIELD: That is the end of this case. That I believe is the answer...

ENOCH: We don't get into argument of whether they offered more money or less money?

SHEFFIELD: I think that's right. I think it's important to keep in mind that the good faith negotiation requirement too is merely a condition precedent to filing a lawsuit.

HECHT: What does that mean?

SHEFFIELD: It doesn't raise a constitutional issue in an eminent domain case because there is no taking until such a time as there is a commissioner's hearing and possession of the property is taken.

HECHT: Is it jurisdictional?

SHEFFIELD: That's a good question. I know the court drops that footnote in either the Hipp or the Dowd case. I don't think that the court needs to reach that issue because I think all of the cases should be affirmed with the exception of Dernehl and it's two sister cases which should be reversed and rendered on this legal issue.

HECHT: But it makes a big practical difference whether you're dealing with a pending case that you can go back and fix, or whether you never had a case to start with.

SHEFFIELD It makes an enormous difference which way it's treated. If the court were to find bad faith, then what happens is your case gets dismissed if it is jurisdictional and you pay a hefty load of penalties to the landowner in terms of attorney's fees under the statute, temporary damages and the like. In keeping with the spirit of the rule, which is to keep the parties from going to the courthouse if it's not necessary, I think that frankly it probably should be treated not unlike a DTPA demand letter. The case could be abated and then we could all find out for sure if the court thought that there was a default. You could make an offer for precisely those things and I bet you dollars to donuts every time they would say no, and we would need to go back and try the lawsuit.

PHILLIPS: So you think it's not jurisdictional and our 30 years of cases that have stated that well we're over-reading the law?

SHEFFIELD: I think we've all operated under the assumption that it is. And frankly, I don't think the court needs to reach that issue. But I'm not entirely sure that that issue has been squarely

faced either by this court or some other CA. And there may be some cases I'm missing, but I think practitioners and litigants have sort of operated under the assumption. I don't know that the argument has been made and I don't know that it's really joined here either.

OWEN: How do we get at good faith unless there is some evidence about ancillary rights? Let's suppose you had gone in and asked for 100 foot easement in the beginning and offered some money for it. And then when you got to condemnation proceedings you only asked for a 50 foot wide easement, so that we're talking apples and oranges basically. How would you show the offer you made was in good faith unless you put on some evidence of what the 100 foot was worth?

SHEFFIELD: I think that's enough. You do a reasonably thorough investigation - you hire an appraiser. That's what that means. And then you make an offer on that basis for the 100 foot easement...

OWEN: What did the appraiser say about these impertinent rights that are at issue?

SHEFFIELD I don't think the appraiser said anything about those rights. Those are rights which are built in to the concept of market value.

OWEN: Is there evidence of that?

SHEFFIELD: That is not in the record. What is in the record is that the company hired an appraiser in each and every instance and they appraised the property for the taking of a pipeline easement and the offer was made on that basis.

OWEN: Did it specify what kind of pipeline easement?

SHEFFIELD: No. It did not.

OWEN: Is that in evidence?

SHEFFIELD: No it's not. What was actually taken of course is in evidence.

OWEN: In you're proving that we made a good faith offer and we relied on this appraisal, is there any evidence about what the appraisal actually appraised?

SHEFFIELD: No. it's not in the record. What is in the record is that the appraiser appraised the taking of a pipeline.

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RANEY: I think it's real important to remember this, that 21.012(b)(4) does not say that the pleading has to show that you were unable to ____ with damages in every single term, condition,

expressed or implied that may necessarily be involved in an easement in condemnation. It does not say that. And I think that we're here quite frankly on a jurisdictional issue. While I agree with my co-counsel that the remedy for fixing it may be different than the way it has been handled in the past, the truth of the matter is you don't have to get to the issue of whether an express warranty clause or whether assignability clause or whether an expanded use is authorized because this is a threshold issue of jurisdiction. Did we demonstrate that we negotiated and we were unsuccessful? Because it's after jurisdiction attaches that one would get in to the issue of so how much is too much? how much can you take? what are the incidents that are inherent in the easement whether it be gotten through voluntary negotiations or through the condemnation process? And I would think all of this is becoming entirely complicated because we have failed to recognize the unique differences between a voluntary easement and one in condemnation. For example, the landowner signs a voluntary easement. The judge signs the petition of condemnation. Does that mean that you can't specifically enforce the agreement because it's not signed by the landowner? Well of course not. We've ignored the inherent differences between a real property instrument and a judgment that gets you to the same place but has different facets to it. And if there is a difference legally or should be, then you will address that after jurisdiction attaches and not before.

I believe that those rights were subsumed in the offer that was made. I believe that those rights were inherent in the condemnation process except for the expended use. It may well be true that the gas pipeline couldn't put some fluids down through the condemnation process that they might be able to voluntarily agree to get. But other than that, I'm not prepared to stand before this court today and say that it's wrong. The law acts as a substitute for the warranty of title in a condemnation judgment. It's no longer as important to the pipeline company to get an express warranty if you've got a judgment in condemnation that says you have the right to be there. That's just one of the inherent differences I think that are prevalent in what you could get voluntarily and what you could get...

PHILLIPS: You're saying that the agreed settlement you would get would not have the same legal force as a condemnation judgment, so that if you're going to settle you need a larger bundle of rights?

RANEY: I'm saying that I believe that there are rights that one gets through a judgment in condemnation as a matter of law, that you would have to negotiate for in a voluntary easement because the law would not give you those instant rights under an easement that the law would give you under condemnation judgment. And that's why I believe there is an inherent difference.

PHILLIPS: Briefly those rights are?

RANEY: There are cases that say that the easement for public use is assignable. Otherwise, under the SC decision in North Shore RR Co you would be giving someone an easement in condemnation for less than what they would otherwise be able to use to take care of the public use. And that's just one example of the rights there.

But I would ask the court to also look at BMC Software Belgium v. _____ 83 S.W.3d 789. That is y'all decision last year that deals with the threshold question of jurisdiction in a special appearance case. And I would suggest to the court that reviewing the threshold question by a trial judge in determining whether he/she has jurisdiction in a case, is like a special appearance...

OWEN: Why isn' this more like Dubie(?)? It's just a statutory requirement . It's not jurisdictional.

RANEY: I've just assumed as has been said that the 30 years of law that this was something jurisdictional and to me the easiest way to fix this is to recognize that a de novo standard of review by the judge who would necessarily look at the facts and the law necessary for his/her ruling on whether or not to go forward with the case should be handled on a de novo basis much the same way that you would in a special appearance.

The good faith requirement that we're talking about here today has as its purpose preventing needless trips to the courthouse, not creating a jurisdictional never, never land that ads a burden to this system.

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McELYA: For approximately 35 years I have represented almost exclusively landowners having properties condemned from various condemning authorities. I appreciate the court's questions so far. However, I don't think the court truly grasps the magnitude or severity of the problem.

OWEN: We've got a statute that simply says the petition must state that the entity and the property owner are unable to agree on the damages. It doesn't say anything about jurisdiction. It just says that's got to be in the petition. And by the time we got to the courthouse wouldn't it clear in your case that we had a jury trial. They did not agree on the damages. So what's the harm if the offer wasn't precisely tailored to what was ultimately condemned? It was clear by the time you got to trial that the landowner was not going to accept what the condemning authority was offering.

McELYA: It wasn't clear because the condemning authority had never made an offer.

OWEN: You got to trial. You teed up. You put your experts on. And you were saying it was worth this, and they were saying it's worth that. There was clearly no agreement. Now why should we reverse the whole condemnation proceeding when there clearly was not a meeting of the minds on damages?

McELYA: These are not arms-length free market transactions where either side is at liberty to walk away from. My clients were not made offers. They were threatened with litigation if they didn't give condemning authorities something they were not entitled to have. My clients obviously didn't give it to them. That's why were are here.

OWEN: Your clients didn't agree when you got to trial either. When the condemning authority narrowed it down to just the natural gas pipeline with none of the bells or whistles that you are complaining about, you still did not agree that the compensation that they were saying the jury should award was adequate. So clearly there was never an agreement on the damages.

McELYA: That time we were before a court that had no jurisdiction to grant relief sought by the condemning authority. It was an exercise in futility destined to head here. And it is jurisdictional. It always has been.

HECHT: It's only been since 1948. That's a long time. But in the meantime, we decided in the Duvie(?) petroleum case that sometimes these statutory requirements are just prerequisites to going forward but not jurisdictional.

McELYA: This court has a long line of decisions saying that because it is a statutory cause of action and a grant of privilege by the legislature, that the provisions dictated by the legislature for the exercise of power of eminent domain would be strictly construed. There are numerous legislative enactments granting the power of eminent domain for specific purposes. As a basic prerequisite for the TC to obtain judicial jurisdiction, there must be a condemning authority before them acting within the confines of the legislation giving him the power that they claim. And in strict compliance, and in this court's words "without any _____ and presuming all disputed facts in favor of the landowner there must be strict compliance with §21 of the property code.

ENOCH: On the strict compliance issue, I am troubled by having a rule on this that creates a fact issue anytime the landowner and utility don't agree on what ought to be paid for what's being asked for. It seems to me you would always have that. The rule that I'm concerned about that the Hubenak's argue for - or the denial says they should have , I don't know how you would ever say that there was a good faith offered by the utility so long as the seller didn't agree. The utility makes an offer, the seller says you're asking for more than you are entitled to. And then the utility doesn't make another offer. Your position is that that's not a good faith offer and that can only be because they didn't come back with another offer or is that solely because of what they requested in their first demand was not a good faith demand. In other words the buyer does not have to negotiate. You look at the very first piece of paper that comes. If that piece of paper makes an offer for something even the buyer doesn't think you are entitled to, then that's the end of the discussion. It's not good faith. And unless the utility comes forward and essentially negotiates against itself it can never get a good faith negotiation.

McELYA: In these cases though we specifically inquired at the condemning authorities, would they accept an easement that consisted only of what they were legally entitled to take? And they said no. That's not negotiable. Give us what we want, whether we're entitled to it or not or we will sue.

HECHT: Is it fair to say on the other side that the landowners were not willing to give the land for what the condemnors could legally take it for under any _____?

McELYA: No. That's not fair. We can't fight that windmill but we will lose. It could have been worked out had they been willing to take what they were legally entitled to pay. I don't advise my clients to fight right to take issues needlessly unless I feel there is one. The Justice has mentioned that there is entrained liquids and gas. That's true. But it fails to grasp the magnitude of the _____, an easement that will transport anything that will go through a pipe. That's what they were demanding.

OWEN: By the time that you got to the courthouse they narrowed it down to natural gas pipeline. They've alleged in their petition "we think it's worth X" and you still weren't willing to accept that.

McELYA: But they had sued us without ever negotiating with us as required by the law. Anything that goes through a pipe includes hydro_____ cyanide.

OWEN: But they dropped that. By the time you got to the courthouse steps they said, okay, here's what we are trying to condemn, and here's what we think is the value of it. And you said we disagree.

McELYA: Mr. Sheffield has stated to the Corpus CA that they got 90-95% of their easements without litigation. To me that means 90-95% of those landowners were cheated. Now I am here because we didn't give it to them. If any of my clients had given it to them, on that case I would be in front of a grand jury.

ENOCH: Ultimately your clients want to avoid the condemnation because they say it wasn't in good faith. But in fact the clients won on that point. We don't have to sell that to you. We're not going to agree to sell that to you. And the utility said ok, then we will go through condemnation and the utility didn't get those rights. And so they ended up only paying for the rights that the buyers said is the only thing they could obtain. Isn't that how this is supposed to work?

McELYA: No. Because the clients are denied the opportunity to resolve it without the expense of litigation. They have to come in to court.

OWEN: If you were willing to accept once the petition got filed and they were only condemning wh\at they could legally condemn, and you were willing to accept what they say the value of that was, why didn't you go into court at that point and say, we're willing to take their offer, but they didn't make a good faith offer and we want our expenses in having to show up at the courthouse door.

McELYA: Because by that time we were before a forum that had no jurisdiction. Either one of us probably could have reversed any rendition by that court. I find it impossible to believe that MidTex's and San Jacinto are before you asking you to state that as a public policy good faith negotiations are the same thing that the legislature has declared criminal. Under §3246 of the penal

code, if you secure the execution of a document affecting real property by deception, and deception is defined in 3101, and that value is more than $1,500 it's a felony. And they are asking you to call felonies good faith simply because there's a one time offer of money made.