This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
The State of Texas
v.
Chris and Helen Petropoulos.
No. 09-0652.

February 1, 2011.

Appearances:

Susan Desmarais Bonnen from the Office of the Attorney General, for Petitioner.

John McClish from Womack, McCliah, Wall, Goster, Brooks, PC, for Respondent.

Before:

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

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: And so the court is ready to hear argument in the single case, State of Texas versus Petropoulos.

MARSHAL: May it please the court, Mrs. Bonnen will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SUSAN DESMARAIS BONNEN ON BEHALF OF THE PETITIONER

ATTORNEY SUSAN DESMARAIS BONNEN: May it please the Court, the question in this case is whether landowners may obtain damages to their remainder property by offering evidence of the value of their whole property only and requesting a directed verdict on the government's value of their remainder property after the taking. This court should answer no to that question and reverse the lower court's decisions for the following three reasons. First, there was no evidence or jury findings to support the recovery of remainder damages. Second, the trial court failed to submit a proper jury question and, third, the testimony of the landowners' appraiser should have been excluded. If this case is not reversed, landowners will have the ability to recover damages to their remainder property whenever the landowners' value of the whole property is greater than the government's value of the whole property regardless of whether the property has actually been damaged.

JUSTICE DALE WAINWRIGHT: Repeat that last statement, the third point.

ATTORNEY SUSAN DESMARAIS BONNEN: Yes. The fact that if this case is not reversed what will be, landowners will be able to do in the future is to recover remainder damages when there's no actual evidence of remainder damages as long as their value of the whole property is greater than the government's value of the whole property because there's always going to be a range. So in effect, by using this sort of manipulation of the law of condemnation, they've created this artificial range that allows them to collect remainder damages in the absence of actually proving any remainder damages. In a partial taking condemnation, the compensation is based on two elements and this has been the law in the state of Texas for the past 150 years. Those two elements are the market value of the part taken and the damage to the remainder property. Now just as sort of an explanation, sort of a background about what appraisers do in condemnation cases. To determine the compensation in a partial-taking condemnation, an appraiser needs to perform four steps. First, appraise the whole property. Second, appraise the part taken. The third step is not actually an appraisal. It's a determination of the value of the remainder property before the taking and that is simply a subtraction of the value of the part taken from the value of the whole.

JUSTICE EVA M. GUZMAN: Does the part taken always have to stand alone as a separate economic unit in order to assess value in the manner in which you're detailing?

ATTORNEY SUSAN DESMARAIS BONNEN: Well, the part taken sometimes isn't an actual full economic unit and in that case, it is normally most appraisers will value it as a pro rata share of the whole. That way the landowner doesn't get cheated just because you're taking a little strip of property. The state can't say well that little strip's not worth anything. The part taken, even though it may not be a full economic unit, takes the value of the whole as a pro rata share.

JUSTICE DEBRA H. LEHRMANN: Can I ask you what do you say about Westgate where the court says we recognize that carpenter questions may not be appropriate where the part taken is a small or irregularly shaped track that's difficult to value as severed land? I mean how does that play into your analysis of the test that we should use?

ATTORNEY SUSAN DESMARAIS BONNEN: Well what Westgate was doing it in the language that you're discussing, it was addressing a particular problem. When, say that the value of the part taken might actually increase in the after. So to make sure that the landowner actually got full value of the part taken, the court was recognizing that you needed a separate question. But what Westgate didn't discuss specifically was a second situation when you would need to determine the value of the part taken separately and you couldn't give sort of the global submission question and that's when there is absolutely no evidence of damage. In that situation, you're not going to give one of the two questions that were discussed in Westgate. I mean Westgate in talking about broad-form submission and that's really what Westgate was about. It recognized that the elements of compensation and a partial-taking condemnation still are the market value of the part taken and the damages to the remainder property, but it said under broad-form submission, you can give two questions, the value of the part taken and the difference between the remainder before and the remainder after the taking or you could give a second submission that just was one question, comparing the value of the whole before with remainder after the taking. But that is not an actual measure of the elements of damage in the condemnation case. That is a collapsing of the two elements and it is a way of doing a broad-form submission and you only get that broad-form submission when there's actually some evidence of remainder damage and that's the problem in this case. There simply wasn't any evidence of remainder damage.

JUSTICE PAUL W. GREEN: The judgment in this case was 300,000 roughly.

ATTORNEY SUSAN DESMARAIS BONNEN: Yes, Your Honor.

JUSTICE PAUL W. GREEN: And the special commissioners found 116 in damages and he didn't like that either. Did they do it wrong too?

ATTORNEY SUSAN DESMARAIS BONNEN: Actually, the landowners had a completely different theory at the special commissioners' level and this came out a little bit in the cross examination of some of the experts where their land planner admitted that in a previous opinion, he had been wrong about the amount of impervious cover. Their original theory was that the impervious cover allowed actually, was reduced in the after and when they did further analysis and we got to trial, they had to admit that that wasn't true and that they had, their appraiser admitted that he had originally valued the property saying that its use was as a gas station and he admitted at trial that that opinion had to be withdrawn because the city wouldn't allow them to put gas stations on that property. So they basically had gone forward at the commissioner's hearing with a theory that they totally withdrew yet they were sitting on this award of $116,000 in a situation where if you only valued the part taken and recognized that there was no damages, the most they could get based on their appraiser's analysis of the whole was about $60,000. So they came up with this new theory where they stipulated to the State's remainder value and basically, this I would suggest is just somewhat of a manipulation or sort of a legal sleight of hand.

JUSTICE DALE WAINWRIGHT: Let me make sure I understand something. As pointed out, the trial court's judgment was for $303,000. Was that number reached by taking the jury's award of $579,000 and subtracting your expert's value of the remainder?

ATTORNEY SUSAN DESMARAIS BONNEN: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: So 579,000 minus 276,000 and the trial judge entered a judgment of 303,000.

ATTORNEY SUSAN DESMARAIS BONNEN: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: Okay, to be offset by the amount that was entered into the registry of the court and withdrawn by the Petropoulos'.

ATTORNEY SUSAN DESMARAIS BONNEN: Correct.

JUSTICE DEBRA H. LEHRMANN: I have another question. There was some testimony of the landowner's appraiser that the location's post condemnation suitability for development had been diminished. Isn't that some evidence of damage?

ATTORNEY SUSAN DESMARAIS BONNEN: No, it isn't, Your Honor, and I can give you several reasons. First, these were just some very vague statements where he said I think it might not be used in the same way after and he never connected these very vague statements to any analysis of the value of the remainder before and the value of the remainder after or explained how this I think it might not be used for the same purpose equals $275,000 in damages. I mean, basically, it was incompetent evidence that is no evidence. But the second reason that it's no evidence is those statements pull in factors that are simply not compensable in a partial-taking condemnation case. What they were saying is well, you know, before we're at grade on a regular roadway and after, we're sitting on an elevated, raised roadway that's a toll road and this Court in the Schmidt case said you can't get damages from diversion of traffic, circuitry of travel or loss of visibility and those were the sorts of things he was alluding to. And even if you put those two reasons aside, these two vague statements, one which was offered in cross examination, were only at the very most a mere scintilla of evidence even if you think that they would be some acceptable evidence of damages. And, finally, if there was some evidence of damage like they claim, why on earth did not the state get a jury question that it would have allowed the jury to decide what the amount of the damages were. The problem was this stipulation did several things. I mean, first, it allows a property owner to get damages without producing any actual evidence of damage given the explanation or get damages that are based on non-compensable factors. Second, it's really kind of an in run about around Daubert and

Robinson because it allows the landowner to present a case with the state not having any opportunity to actually attack the opinion that somehow that the difference between the whole before and the remainder after resulted in, was because of some damage to the property and of--

CHIEF JUSTICE WALLACE B. JEFFERSON: Mrs. Bonnen, to what extent is it relevant to ask whether the State's announcement of the toll road 20 years earlier affected the value of the property today or when it was considered by the commissioners?

ATTORNEY SUSAN DESMARAIS BONNEN: Well that brings up a couple of issues. First, the issue of project influence and, second, the, an issue, the question of whether those sorts of problems are actually competent evidence of damage that can used in a condemnation case. They got the benefit. I mean they introduced some evidence about how the project had been on the board so long and that's why they used sales to value the property that were not from the project area. In fact, both appraisers recognized that there might be project influence and didn't use sales right from that very area and I guess the landowner's appraiser thought there was a lot more project influence because his sales reflected a value of $4 a square foot. The state didn't think it was so significant. Its sales reflected a value of $2 a square foot. But to extent that there was some evidence of that, that was taken into account by the way the appraisers valued the whole property and they got the benefit of that by avoiding the project influence. But project influence itself cannot be used as a reason to get damages, which is the second area of compensation in a partial-taking condemnation and that was covered by this Court in the Westgate case where it specifically said that you can't recover damages based on the length of the time that it takes to get a project built.

CHIEF JUSTICE WALLACE B. JEFFERSON: It's not just length of time though. It's what impact does the amounts would have on the value of the property, on the development. Does it make, if your house next to the tollway may be less valuable than a house that's five miles away. If you're told that this development is going to happen next door, it might increase the value because it could make it more commercially accessible or it might decrease because it's a residential area.

ATTORNEY SUSAN DESMARAIS BONNEN: Well, and the appraisers are supposed to ignore that project influence and value the property in the whole as if none of that was happening and so that's how the landowner is protected from that situation, but you cannot take the fact that the property, that the state is taking the property and that it's going to be used for a toll road. You can't use that factor to damage the property. You can use it with respect to how you value the whole and that affects what the value of the part taken is and so the landowner gets the benefit.

JUSTICE NATHAN L. HECHT: You say that Smith's testimony was vague--

ATTORNEY SUSAN DESMARAIS BONNEN: Yes.

JUSTICE NATHAN L. HECHT: --as to the diminishment post taking and contrary and took in factors that Smith says are non-compensable. As to the vagueness, if he had said well, I agree with Hornsby that the zoning after the taking would be LO and that light office is the most you can do with it and I looked at his analysis and I think he's right about the number, 276,170. Would that take away the vagueness argument that you have?

ATTORNEY SUSAN DESMARAIS BONNEN: Well that would give the State an opportunity if that opinion was supportable, but the problem is.

JUSTICE NATHAN L. HECHT: Well, it's as supportable as Hornsby's is.

ATTORNEY SUSAN DESMARAIS BONNEN: Well, if he were actually adopting it. It's interesting to note that the appraiser was very careful to not actually adopt that testimony. He sort of--

JUSTICE NATHAN L. HECHT: But if he did, that would take away your vagueness?

ATTORNEY SUSAN DESMARAIS BONNEN: Yes, that might take away the vagueness, but it wouldn't provide an explanation of how the property before was one value and the property after was another value. I mean the state should have an opportunity to attack that conclusion that there is this $300,000 spread. But by not actually giving the opinion himself, he avoids that by saying well, my client is accepting that number, not me, because I'm an appraiser and I have ethical standards and I would actually have to support my opinion and that's why he didn't do that.

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

MARSHAL: May it please the Court, Mr. McClish will present argument for the Respondents.

ORAL ARGUMENT OF JOHN MCCLISH ON BEHALF OF THE RESPONDENT

ATTORNEY JOHN MC CLISH: May it please the Court. Counsel. Good morning, I'm John McClish and with Sue Wall. We're here to represent the Petropoulos family in this statutory condemnation case. I am one of the few appellate practitioners, I guess, that's left that actually labors in the trenches of the trial courts. And so I will say from the standpoint of a trial lawyer before you today that we have been given over my career, for 30 years, a series of rules from this court that we are supposed to follow when we actually try a condemnation case. And in this case, it seems to me that the trial court followed those rules to the letter every time he was asked to make a ruling and for that reason, I think that the judgment of the court below ought to be affirmed.

JUSTICE PHIL JOHNSON: Counsel, you would think ordinarily where everyone agrees on the remainder value as you read in the State's appraiser and you adopted him so everybody agreed on that. And then you have two values beforehand, one the State's and one yours, that that might be a good way of doing it. But in Westgate, the Court of Appeals actually held that it was harm not to submit this in a broad form question and the Supreme Court in its opinion said the Court of Appeals handled it right. So with their position being that their appraiser testified there's no difference before and after, same value, $2 a foot. Your appraiser says $4 a foot before. So why should they not get the broad form question so the jury can say well whether it's $2 a foot or $3 a foot or $4 a foot, it's the same after as it was before so that they can blend that testimony because there is testimony that from their appraiser, no difference between before and after. The only spread is $2 a foot or $4 a foot.

ATTORNEY JOHN MC CLISH: One of the rules that has been handed down by this Court for 100 years is that we don't ask the jury questions about things that are not in dispute. We don't give the jury a chance to disregard the undisputed evidence. That's the argument I made to Judge Phillips. He read the cases and agreed that it would be wrong to ask the jury a question that required them to decide what the value of the remainder was when that value was established by the undisputed evidence. And it is the State's position, I think, that he abused his discretion by refusing to submit a question that asked the jury, that inquired of the jury about at matter that was not in dispute. I don't think--

JUSTICE PHIL JOHNSON: Well, but you agreed on the number, but you didn't agree as to why.

ATTORNEY JOHN MC CLISH: I think we did agree as to why, Your Honor. I believe that--

JUSTICE NATHAN L. HECHT: Well the State took the position that it was LO to start with, LO in the end and you said no, it had diminished. So the underlying assumption of Hornsby's testimony was different than yours.

ATTORNEY JOHN MC CLISH: It was and that part of the case, that's why we tried the case for three days, that's what we fought over for three days. Has the pendency of this project killed the market out there? Has it

reduced the value and the use of this property from a commercial retail use to a limited office use that has a much lower value and we won that fight.

JUSTICE NATHAN L. HECHT: But that's the part that puzzles me because it seems to me that if you had said to Hornsby well, but assume, we ask you to assume now that the property could have been zoned GR from the beginning and that Smith's right about the highest and best use. Now what's your view of the remainder? He might have said well, then I agree that the remainder was worth $4 a foot too and the difference would have been basically twice 28,000, but it wouldn't be 303,000.

ATTORNEY JOHN MC CLISH: And my cross examination of Hornsby attacked his assumption that before the taking, the value of this commercial corner on U.S. 290 would have been limited to a limited office zoning. It may well have been that if the State had asked Mr. Hornsby that question and gotten an alternative number out of him that there would have been a question in the evidence about the fair market value of the remainder. They might have been able to create a fact issue as to the fair market value of the remainder and then I probably wouldn't be standing up here arguing that the trial judge did the right thing to not submit a question on that. But I made my evidence and they made theirs and when it came down to the end of the case after everybody had rested and sat down, the value of the remainder was fixed. There was no controversy as to the value of the remainder and given that the rule--

JUSTICE PHIL JOHNSON: That being true, how would a broad form question about the difference give the jury the opportunity to find something out that was not supported by the evidence? We just get an answer, the diminution in value whether it's 276 or whether they valued it at $4 a foot and said it's reduced 20 cents a foot. We don't, all we get is an answer not a finding as to the post-taking value. So how does that, how do we ever get a jury finding that's not supported by the evidence in broad form?

ATTORNEY JOHN MC CLISH: The question that, the Westgate question, what's the different between the value of the whole and what's the difference between the value of the remainder is one of the rules that the court has given us that we have to use when we're in the trenches of trying a condemnation case. But another one of the rules is we don't ask the jury a question that subsumes an undisputed fact.

JUSTICE DALE WAINWRIGHT: So if the State had given no dollar amount on the value of the remainder, what would you have done?

ATTORNEY JOHN MC CLISH: I'm sorry, Your Honor. I don't mean to, I don't know.

JUSTICE DALE WAINWRIGHT: It's an interesting question.

ATTORNEY JOHN MC CLISH: It is; it is. The case would have been, it would have been a different animal. Hopefully, I don't know. I don't know how--

JUSTICE DALE WAINWRIGHT: Because you would have rested, right?

ATTORNEY JOHN MC CLISH: I don't know how it would have gone down.

JUSTICE DALE WAINWRIGHT: See I'm trying to get to the nub of the issue here. There's jury questions and legal sufficiency questions and it seems to me, the State's arguing that in a partial-taking condemnation, the landowner always has to submit evidence of the value of the damages to the remainder or you can't win and I'll ask Mrs. Bonnen if that's an oversimplification of her position or not, but at bottom that seems to be there point. Since you submitted no evidence of the actual damages, you accepted Hornsby's value of the remainder, then you let the judge take the value of the whole minus the remainder and you're happy with the result. The state seems to me in one sense to be arguing that if you just subtract the value of the State's remainder, that number, from your value of the whole, it's always going to put the State at a severe disadvantage because their value of

the whole and your value of the whole are going to be very different. Yours is always going to be higher absent something unusual before the taking and the State's is always going to be lower absent something unusual, correct?

ATTORNEY JOHN MC CLISH: Of?

JUSTICE DALE WAINWRIGHT: Of the whole before the taking.

ATTORNEY JOHN MC CLISH: Generally speaking, we don't come to trial unless there's enough, there's a dispute that's big enough to warrant that, I concede that.

JUSTICE DALE WAINWRIGHT: Okay, so then if the State then puts on evidence the value of the remainder and the landowner's always going to give a higher value for the whole before the taking then that difference, if the landowner can always say that's my damages, then that difference is always going to put the state at a disadvantage. That seems to be at least part of their argument.

ATTORNEY JOHN MC CLISH: And it's a neat-sounding argument until you put yourself in the trench and you realize that you have to stand up in front of those six taxpayers and convince them that the State has missed the value of the whole by half. That's the place you're in if you're trying the case on behalf of the landlord, you have to convince the jury that the State has the value of the whole wrong and that's what we were able to do. We were able to convince them that the State's appraiser in valuing the whole property had not applied the project influence rule correctly and that was where the fight came down. I mean that's where the, if you read the arguments and you read the cross examination of Mrs. Hornsby when he was on the witness stand, that's where the case came down.

JUSTICE NATHAN L. HECHT: Why didn't Smith testify as to the value of the remainder?

ATTORNEY JOHN MC CLISH: Because we told him not to value the remainder, Your Honor, in truth.

JUSTICE NATHAN L. HECHT: Why did you tell him that?

ATTORNEY JOHN MC CLISH: Because we agreed with the State's number. We agreed with their assessment of zoning and we agreed with their value.

JUSTICE NATHAN L. HECHT: Well then why didn't he just say that?

ATTORNEY JOHN MC CLISH: Well I didn't want to--

JUSTICE NATHAN L. HECHT: He couldn't say it. The state says he couldn't say it.

ATTORNEY JOHN MC CLISH: Well because I told him not to appraise the remainder and it would have been contrary to the rules that govern appraisers for him to state an opinion when he hadn't been paid to appraise the value of the remainder. It's, the landowner doesn't come to a condemnation case willingly and he doesn't get reimbursed for his attorney's fees and his expenses. He's got to pay the appraiser to appraise the whole, he's got to pay the appraiser to appraise the remainder and it seems to me that the state is saying that the landowner is not free to agree with the state and embrace their testimony.

JUSTICE NATHAN L. HECHT: Well, but you don't embrace Hornsby's assumptions. You just embrace the number.

ATTORNEY JOHN MC CLISH: With respect to the remainders, we embrace his, all of his assumptions. We think he was right on in zoning. We think he was right on the highest and best use.

JUSTICE NATHAN L. HECHT: But he said it never changed.

ATTORNEY JOHN MC CLISH: Well, he said that the whole. Where we differed with him was in the value of the whole. The remainder we agreed and it does seem to me that in the interest of judicial economy, we ought to not litigate things where the parties can agree.

JUSTICE NATHAN L. HECHT: The State's argument is you can't just take the number, you have to agree, you just can't pull a piece out of the appraiser's testimony and say well I agree with that piece and not take what got you there all the way. You have to take the assumptions that it didn't change. That it started out LO and ended up LO.

ATTORNEY JOHN MC CLISH: I'm unaware of any precedent for that. Since Callejo, it's my impression, at least, that it has been the rule that the number that the appraisers state is the number by which the jury is bound and a jury's got to, in valuing the whole property, you have to value that separately and in valuing the remainder property, you have to value that separately and in Callejo we were told you can't mix post-taking values with pre-taking values to come up with a blend. You can't do that. You have a number before and a number after and the difference is the measure of damages.

JUSTICE NATHAN L. HECHT: The state argues that by taking Smith's number, you show a diminishment that takes into account factors that Schmidt does not allow to be compensated. What's your response to that?

ATTORNEY JOHN MC CLISH: Here I am in the trench, Your Honor. Many times we have been, we and I'm talking about the condemnees [inaudible]. We have been before the court and the court was examining whether our value that we assess to the remainder contained Schmidt damages, contained damages that were not properly thought of, not properly considered by the trier of fact. So this time out of the sky, the state comes up with a number that we can agree with and their appraiser says, on his oath, I didn't count any Schmidt damages in this. This opinion of the value of the remainder is in harmony with the decisions of the Texas Supreme Court.

JUSTICE NATHAN L. HECHT: But the reason for that is because he didn't think it changed. If he thought it had changed, then the question of Schmidt damages would come up.

ATTORNEY JOHN MC CLISH: Yes, sir. And--

JUSTICE NATHAN L. HECHT: I mean that's right, right?

ATTORNEY JOHN MC CLISH: And to go back one step to Westgate and one step before that to Callejo, it's the court's instruction to us when we're trying a case that there's a value of the whole and there's a value of the remainder and those two things are not to be decided as one; it's two separate questions. You have to use separate evidence to decide one and separate evidence to decide the other and mixing and blending of those two things is not allowed.

JUSTICE PHIL JOHNSON: Callejo also said future condemnation cases should be submitted broadly in terms of the difference in value rather than asking separate questions? Now how is what we have here any different from asking a separate question about the value before and the value after?

ATTORNEY JOHN MC CLISH: This is the rare case where the parties did not disagree on both into that question. This is the unusual case where the--

JUSTICE PHIL JOHNSON: I agree with that, but how is this different from asking two questions. You're in-

structing the jury as to one answer and you're asking the jury as to the other. You're effectively submitting two questions to the jury it seems to me like and Callejo says we don't do that and then Westgate says we don't do that. We submit the difference to them in broad form. It's mandated by the rules and so I'm having trouble reconciling those.

ATTORNEY JOHN MC CLISH: And I'm, my answer, my explanation is when the value of the remainder or the whole is established by the undisputed evidence, that is the parties shake hands and agree that that's how much it's worth, then the trial of the case and a court's charge ought to be limited to where there's a dispute. The landowner ought not be forced to come to a remainder conclusion if he looked at the State's appraisal and says that's right.

JUSTICE PHIL JOHNSON: Well he has come to a conclusion, hasn't he?

ATTORNEY JOHN MC CLISH: We accepted it. We read their remainder testimony in the evidence.

JUSTICE PHIL JOHNSON: And he shouldn't be forced to come to a conclusion, but in fact he has come to a conclusion. We'll go with that. He does it because it's in his interest.

ATTORNEY JOHN MC CLISH: I'm sorry; he shouldn't be forced to pay his appraisal to come to a conclusion if he agrees with the conclusion that the state has reached. It's not, we shouldn't spend a day of the trial court's time litigating an issue that we agree on and that's the best answer I have.

JUSTICE PHIL JOHNSON: We're not telling you and I'm not saying you have to litigate something that you're disagreeing on, but the question is how do you submit it?

ATTORNEY JOHN MC CLISH: Well we submit it two ways. We ask for the question that the court gave and we also ask for a directed verdict on the value of the remainder with a Westgate charge and that was the place where the trial court had the choice of granting a broad form question and an instruction as to the value of the remainder.

JUSTICE PHIL JOHNSON: Let me ask another question. They took a little bit less than a third of an acre and left three and a quarter acres or something like that. And the value of the three and a quarter acres, your position is 276?

ATTORNEY JOHN MC CLISH: Yes sir, $2 a foot.

JUSTICE PHIL JOHNSON: $2 a foot. And the value of the third of an acre that cannot be used for anything other than the road is over $300,000. It seems that there may be a problem in not telling the jury what they're doing when you end up with that.

ATTORNEY JOHN MC CLISH: That was not the position we took at trial and that's not the position I'm taking here before you.

JUSTICE PHIL JOHNSON: That's what we ended up with here in the result given the way it was submitted to the jury. Three and a quarter acres is worth 276 and a third of an acre is worth over $300,000.

ATTORNEY JOHN MC CLISH: No, sir, that's not my position today and it was not my position at the trial court. My position in the trial court was considering the fact that this project had been looming over this market and killing this market for more than 20 years by time of trial, 30 years now, that the value and the use of the property was something different in the real world assuming the project and assuming that the condemnation was going to occur. It was something very different than that value would have been had there been no announcement of a project and no pending condemnation. That was our point at trial and it's my point here today.

The project influence rule exists. It's been handed down to us to use. It exists to keep the government from rigging the market, to keep them from devaluing properties with the announcement of a project.

CHIEF JUSTICE WALLACE B. JEFFERSON: But sometimes people see this kind of announcement as increasing the value of property. You go out there and you start buying when you know a toll road's coming because it's going to increase traffic and money's going to be coming down the highway.

ATTORNEY JOHN MC CLISH: Absolutely. The product influence rule is to keep either side from rigging the market. It started I guess with the DFW airport and the project influence rules probably started with Corbin. But it's to make certain that neither the increase or the decrease in the value of property caused by the project is measured in the landowners' damages because either way that's not fair. In this case, it falls to the landowners' detriment that the project had been announced and was pending for so long, but I would be the first to concede that there were probably properties on 290 that benefitted from that. The whole up [inaudible] to major intersections, it goes both ways. In a condemnation project like this, I've been around long enough to learn there's winners and losers and in this case, I believe the evidence showed and I think the jury believed that Mr. Petropoulos in net was a big loser and I think that's what our position was at trial. And I have one other thing that I would like to say to the court and I'll sit down and give you back the rest of my time. Assuming the jury followed the law, which was to give effect to the undisputed evidence, how would the case have come out any different if we had submitted a Westgate question only? Their verdict would have been the same if they had followed the law and given heed to the undisputed evidence. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF SUSAN DESMARAIS BONNEN ON BEHALF OF PETITIONER

JUSTICE DAVID M. MEDINA: Can you answer that last question? It's a pretty significant question. How would the case have been different.

ATTORNEY SUSAN DESMARAIS BONNEN: Yes, Your Honor. It would have come out different in that the state would have had an opportunity to actually argue to the jury that if the value was really $4 a square foot in the before that because there was no evidence of damages other than Mr. Hornsby's opinion that the value had not be reduced at all, then the jury could believe that the value of the remainder after was also $4 a square foot and that the only difference that they should find is a difference which accounted for the value of the part taken, which would have been about a $55,000 verdict. I mean the project influence argument that he's making, that supports his appraiser's value of the property at $4 a square foot. It certainly doesn't support the result that got his client $21 a square foot for this third of an acre. That was the outcome of the way that this case was tried. There are several layers of errors in this case. I mean that's why it's so confusing. You know the first error was a fact that the trial court didn't agree to exclude Mr. Smith's testimony because this value of the whole standing alone. You know before Petropoulos had even adopted the State's number, that value just standing alone doesn't by itself have any relevance in a condemnation case because the issues are the market value of the part taken and the damages to the remainder, not what is the whole value of the property. The second error is the fact that there was no evidence of damages introduced. The State's appraiser said the same value of the property remainder before the taking and after the taking, no damages and the landowner's appraiser said I have not even analyzed the remainder property. And this suggestion that well the landowner shouldn't have to spend money, I think, is somewhat specious given that the landowner's appraiser did do, did analyze the remainder in his first appraisal for the special commissioner's hearing. He didn't do this because this was a theory that Counsel was going to attempt to try this case on and on that basis, he told his appraiser not to value the remainder property. But the second error is the fact that where you had no damages test evidence at all introduced, the state was entitled to a directed verdict on the issue of the remainder damages and the only issue of any that should have been submitted to the jury was the question what is the value of the part taken. But the third error then when the court refuses to grant the State's directed verdict on remainder damages was giving this submission that submits

only the value of the whole to the jury. I mean if you assume, which I guess maybe the trial court assumed that maybe that there was some evidence of damages, then the state was entitled to have the jury determine that number not to have that taken away by this so-called stipulation, which since the state didn't agree to it I would suggest that it wasn't really a stipulation.

JUSTICE DALE WAINWRIGHT: Do you contend that the landowner has to always in a partial-taking case submit evidence of damages to the remainder to be entitled to recover?

ATTORNEY SUSAN DESMARAIS BONNEN: Yes. I mean they need to do some sort of analysis showing that there's a difference in value between the remainder before the taking and the remainder after the taking in order to be able to go forward on an issue that includes remainder damages. I mean the problem with the Westgate submission of the whole before and the remainder after is that it makes an assumption that there is, in fact, some remainder damages and there are three Court of Appeals opinion cases that specifically say when there's no remainder damages, the only issue that gets submitted is the value of the part taken, that you don't use the Westgate global submission of the difference between the whole before and the remainder after. For all of these reasons and as I've said before, if this case is not reversed, landowners in the future will be able to recover damages based on nothing, really pulling them out of thin air by just making sure that their value of the whole is greater than the State's value of the whole and then stipulating to the State's remainder number and get damages in any case without submitting any evidence of damages, explaining how the property has actually been reduced in value and allowing them to take into account non-compensable factors without the state having an opportunity to actually challenge them about that. For these reasons, we ask that you reverse the lower court's judgments and render a judgment for the state in the amount of the value of the part taken, the only evidence which was introduced of $28,750. Thank you.

JUSTICE PHIL JOHNSON: Can I ask one question?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

JUSTICE PHIL JOHNSON: It seems as though if we're talking, the damages is the difference between the value before and the value after.

ATTORNEY SUSAN DESMARAIS BONNEN: The value of the remainder before the taking and the remainder after the taking. Yes, Your Honor.

JUSTICE PHIL JOHNSON: And there is evidence that the remainder before is $4 a foot. You may not like it, you may not agree with it, but there was testimony that was admitted that it's $4 a foot before.

ATTORNEY SUSAN DESMARAIS BONNEN: Well there was testimony that the whole was that before, but since they didn't actually determine what the value of the part taken was and subtract it from the value of the whole, they never themselves ever came up with a value of the remainder before the taking.

JUSTICE PHIL JOHNSON: Okay, so you're saying they never, there's no evidence on their side of the remainder because they just said it was the whole property, that it was $4 a foot.

ATTORNEY SUSAN DESMARAIS BONNEN: Yes.

JUSTICE PHIL JOHNSON: Alright. If we assume there is testimony if you'll let me ask you to assume there's testimony, $4 a foot for the remainder before and then your appraiser that they read into evidence and used as their appraiser on the value after is $2 a foot. Then it seems like we actually, in fact, have evidence of before and after. So that would damage your argument on no evidence it seems like because the evidence in these cases is the value.

ATTORNEY SUSAN DESMARAIS BONNEN: But they did know even if they had this value of the remainder before the taking and they don't have their own number of the value of the remainder after the taking, they've done no analysis to explain why there's been a reduction in value. I mean it's just still--

JUSTICE PHIL JOHNSON: And that, but there is evidence of after?

ATTORNEY SUSAN DESMARAIS BONNEN: Yes.

JUSTICE PHIL JOHNSON: And there is evidence of before?

ATTORNEY SUSAN DESMARAIS BONNEN: If they had done that work. But there's no evidence to explain the difference and if there is some evidence to explain the difference, then the state was entitled to have a jury decide what that difference was not to have that decision taken away from a jury. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted and that concludes the argument for this morning. The Marshall will adjourn the court.

MARSHAL: All rise.

2010 WL 5676552 (Tex.)

END OF DOCUMENT