ORAL ARGUMENT – 1-03-01
00-0070
INTERSTATE NORTHBOROUGH V. STATE OF TEXAS

MONTAGUE: In this condemnation case in which part of the property owner's property was taken, the property owner sought to recover damages to its remaining property based solely on the use to which the property taken was proposed to be put by the state. The damage's evidence in the case was that the state proposed to put the property taken for use for two retaining walls, 6-1/2 feet tall, a concrete slab which was to be occupied by frontage road, a high-speed frontage road, in the place of what was the property's front yard. The right-of-way line that was established after the taking was within 12-1/2 feet of the office building, whereas before it was within 46 ft. As a result of this taking, the office building was left in non-conformity with the deed restrictions of the subdivision in which the property was situated as well as the city of Houston's building set back ordinance.

HECHT: But you don't claim damage from that?

MONTAGUE: We claim damages for that, yes.

HECHT: For the nonconformity?

MONTAGUE: We do. We claim damages for all of those elements of damages that I have just stated as they relate to the use of the property taken.

OWEN: And you also claim damages for closing off one of the driveways?

MONTAGUE: We do not claim damages for the closing off of the driveway itself. No, we do not. We claim damages with respect to the driveways in order to get the costs to cure the problems associated with the taking. And that cost to cure figure was somewhere around $279,000, the state was somewhat less than that. But that was the sole evidence confined to the loss of access of that driveway. Simply to close it.

The roadway is cutting directly across. There is an exhibit in the briefs that we have attached. As a matter of fact the state did too. The frontage road that you see in the picture that you just held up has been expanded. The frontage road is 96 feet away from the property before. And it has been expanded within 12-1/2 feet out. The power lines are not there any longer. They are moved closer to the building.

HANKINSON: How many lanes then is the access road now?

MONTAGUE: It is 3 lanes, where it was 2 before. In the case as I said, we confined our

damage's evidence solely to the use of the part taken. And the consequences of the diminution in the market value as a result solely of the use of the part taken.

We did not as the state suggests go outside the boundaries of that which was taken in order to try to get any damages to the remainder property. We did not seek to go out like the property owners did in State v. Schmidt, to recover damages for things that occurred off of the property taken. The evidence was confined solely to that which was taken. Interestingly enough in the case the state on cross examination of the property owner's damages expert inquired: Mr. Lewis, in connection with your opinion of damages, did you not compensate the property owner for the loss of the front yard? And he responded: No, I did not. I compensated the property owner for the use of the part taken and the placement of the frontage road thereon within 22-1/2 feet of the building with a right-of-way being 12-1/2 feet from the building.

HECHT: How is this any different from a residential neighborhood where a street is widened and houses along the street or highway perhaps complain that now the proximity of the roadway to the residence makes the houses less valuable all up and down the street?

MONTAGUE: The distinction is that in this case, the property owner confined its damage's evidence solely to the use of the property taken. In the hypothetical that you just posed, the property owners have the expectation it would seem to me that the right of way that was out in front of their houses would be used for the right of way purposes for which they had acquired it earlier. So to the extent that some changes or modifications are made within the confines of the existing right of way, then the property owners generally will have to suffer the consequences of that change within the right of way.

HECHT: But if they need an extra foot all along - if they need to expand the right of way all up and down the street wouldn't that under your theory give each of the homeowners compensable damages?

MONTAGUE: No, not at all.

HECHT: Why not though?

MONTAGUE: That was the factual scenario in State v. Schmidt. What we did as distinguished from State v. Schmidt is confine our damages evidence solely to the uses to which the property was going to be taken to determine if in fact it diminished the remainder property's market value. And the scenario that you just stated where one foot is taken, the property owner may very well be able to put on proof as to the use to which that 1 foot wide strip was put, to determine whether there was any permanent diminishment in the market value. But not go outside of that 1 foot in order to...

OWEN: But that's 15 feet, and they are much closer - there front door is much closer

to the curb where the cars are going back and forth. And everybody concedes that because they are so much closer to the curb, that the value of the home has been diminished. Do they recover or not?

MONTAGUE: Absolutely. They should recover to the extent that the loss that is attributed to the remainder is as a result of the taking and use of the property by the state...

OWEN: Did your expert confine the evidence to just the additional feet that was added to the runway, or was it the total proximity to the access road? Now that's where I'm having difficulty. How did your expert if he did try to parse it out in that manner and not just have it proximity to the access road but proximity to the part that was taken?

MONTAGUE: He did confine it solely to the use of the property taken, and the manner in which he did it is he looked at that which was constructed on the property taken as well as the proximity of the new right of way line in relation to the building to show that the building was non-conforming with the deed restrictions in the city of Houston's building setback after. But he stated time and again in examination and cross-examination that his damage's estimate was confined solely to the uses of the property taken. He was asked as I said, and it's on 1116 and 1117 of the record, Mr. Lewis did you go outside of the property taken with respect to any of that area between the old right-of-way line and the old frontage road and attribute any damages to the loss of that, if there were any? He said, No I did not. I confined my damages only to the use to which the state was putting the property that it took from the property owner.

Interestingly enough Justice Owen, in connection with the use to which the state was putting the property between its old right-of-way line and the frontage road which was some green space, today that area is still green space substantially. It is no different from what it was before. The problem that the property owner had here is where it had a landscaped and bermed front yard before, the property the state has come and taken that property away from the property owner and put in its place a concrete slab which is now a highspeed frontage road and two concrete retaining walls going along much the front of the property that are 6-1/2 feet tall, which has changed the appearance of the property. And as I said because of the establishment of the new right away line has made the use of the property nonconforming.

But the damages in this case, and please let me make this clear, were confined solely to the use of the property taken and nothing else.

OWEN: But you just got through saying that one of the things you were complaining about is now a high speed access road. And not all of that access road was taken. So how do you parse that out? That's my problem.

MONTAGUE: You mean essentially all of the access road was not constructed within the property taking?

OWEN: Right.

MONTAGUE: Essentially all of it was with the exception of one of the three lanes that was not. And that was around 9 feet of one of the 12 foot lanes that was not. But that question was asked. That specific question was addressed in the testimony to the evaluation witness. And he said, I confined my damage's evidence solely to the use of the property.

OWEN: He says he did, but how did he demonstrate that? You're complaining that now we've got all this highspeed traffic that we didn't have before, but part of that is because you're using property that wasn't taken for that high speed access road. So how do you parse that out?

MONTAGUE: With respect to that one lane, that part of that one lane that's farthest away from the building that is not on the property taken, that one lane could not be used at all without the taking of the property from Interstate Northborough. There could be no traffic traveling on that one-lane. It was absolutely essential in order to build that one lane for the state to acquire part of Interstate Northborough's property. That's somewhat why Justice Hecht said in the Schmidt opinion when he used the Campbell v. United States analysis that is modified in US v. 15.65 acres. But with respect to that which was done, it was the high speed lane that really was the closest to the building that caused the problem with respect to safety concerns.

OWEN: Well in Schmidt we talked about State v. Clark. And we gave the example of where they were erecting an elevated structure over a parkway, and we said you have to evaluate the damages as if the elevated structured had always existed. I'm trying to square your damage model with the language in Schmidt that we cited.

MONTAGUE: My damages model was confined only to the uses of the property taken. As in Clark, the court allowed the recovery of damages solely attributable to the park that was across the street from Mr. Clark's property. In that case, even though Mr. Clark did not own one square inch of that park across the street from his property, this court stated in that case that when the state converted the use of that parkland property across the street from Mr. Clark's property that Mr. Clark was entitled to damages as a result of the conversion of the park.

OWEN: But he wasn't entitled to the damages because it was being used as an elevated highway. We clearly said that he doesn't get damages for that.

MONTAGUE: No. You said with respect to the change of the park on which part of the highway structure was constructed, Mr. Clark was entitled to damages for that.

OWEN: But as if the elevated structure already existed.

MONTAGUE: No. Mr. Clark claimed damages not only for the conversion of the park from a park to a state highway project, but also the changes in the existing state highway right-of-way

outside the boundaries of the park from what it was before to an elevated structure. What the court said in Clark is, we are not going to allow the property owner to recover for the change in the use of the existing right-of-way the state owned before from what it was to an elevated structure; however, when we come to the park property, we will allow Mr. Clark to put on evidence of the change and use from a park to an elevated structure. That's what Clark stood for.

BAKER: I'm somewhat non_____ about your first issue that the Schmidt dichotomy about damages doesn't apply at all here, and how do you get to that conclusion?

MONTAGUE: In Schmidt, the court dealt solely with the use of property off of that which was taken. And in connection with that, it said if we are talking about uses of property off of that which are taken, then the community damages rule comes into play.

BAKER: When you get all said and done, your real bottom line is what we've asked for are not community damages. They are special to our property because of the use the property has been put to.

MONTAGUE: Correct.

BAKER: So it seems that if you have to rely on these being special damages, that the 's a theory does apply, but this result that the CA reached is improper in your view?

MONTAGUE: Well interestingly enough, the community damage rule was formulated by the legislature in 1879 when the constitution of this state was changed from the 1869 constitution in which compensation was only allowed in the event of a taking and damages that flow from the taking itself. In 1876, the constitution was changed in order to allow a property owner to recover not only in the event of a taking, but also in the event of a damage even though not one square inch of his or her property was taken.

BAKER: It's the remainder.

MONTAGUE: Exactly. After that point is when the community damages rule arose. There was no such thing as community damages rule before. Interestingly enough if we look at the federal cases...

BAKER: But that rule exist now.

MONTAGUE: As it relates to damages claimed off of the property that was taken. And the uses of property off of that which was taken. That's what the community damages rule focuses on and if you look at 21.042(d) of the property code it states in there, interestingly enough it's broader written than this court has been willing to apply, in the event of a condemnation of part of a person's property, you look at the property owner's damages. Not simply damages to the property owner's

remainder of property, but the property owner's damages caused by the condemnation. But it says a qualification is we are not going to allow a property owner to recover all damages that arise out of the project for which the condemnation action was instituted. We are going to put some limitations on that. And the limitations we're going to put on that is that if the type of damage that the property owners claiming outside of the use of the part taken is the type that is experienced in common with the community generally, then those damages are not going to be allowed. Thus, I asked the court, in the instance of Interstate Northborough's property, how is the damage where the property owner's property is a non-conforming use now, because it's no longer in compliance with the deed restrictions, how is any other property along the freeway project impacted by this building being in nonconformity with the deed restrictions?

BAKER: Well your question poses the answer that it's special damages to the owner under the rule that you are quoting.

MONTAGUE: Yes. And my point is this, is that the SC of the US as well as this court in State v. Carpenter has said that in every instance when we are talking solely about the uses of the property taken, we don't get in to this community damages stuff. Because as Carpenter said, all circumstances, all factors, every circumstance that there is with respect to the use of the property taken should be considered in determining diminution in the property's remainder value. As the opinion in Schmidt...

BAKER: Even so this particular case under its facts could involve and probably does involve, but you haven't asked for it, diversion of traffic, inconvenience of access, impaired visibility of the ground level building and disruption of construction activity.

MONTAGUE: It could. But we didn't ask for it. Because in the instance of those things, those we felt were community damages to which the property owner would not be entitled to compensation as a result of those things happening.

BAKER: So isn't this a necessity to look at the evidence and determine as the jury did or didn't do, Is this community or special? And your view is, it's all special because it's directly related to the use of the property it was put to.

MONTAGUE: It certainly is my opinion based on what the law is that any use to which the property taken is per se special. Because it affects the property owner's ownership and is percular to that property owner different from any other property owner up and down the freeway.

BAKER: So we still have to contend with the theory of community damages when in some cases that's all that people are asking for?

MONTAGUE: I consider that the community damages rule operates somewhat like an exclusionary rule of damages. And what I'm saying is that there is no exclusionary rule or limiting

rule with respect to the use to which the property is taken and any damages attributable solely to that use. Now the community damages rule may come into play with respect to the use of the property taken if the property owner is complaining that it is that use of the property taken in combination with properties outside of that which were taken that is causing damages to the remainder much like the Austin CA recently in Butler v. State. The property owner in that case was talking about diversion of traffic, _____ of travel and those issues. But in that case all the part of the highway structure was constructed on the property taken. In order to make his case of diversion of private _____ of travel, he had to go outside the bounds of the property that was taken in order to get there. But when the Austin CA addressed specifically that which was constructed on the property taken and the complaint that centered on that, it said the community damages rule does not preclude consideration of that by the jury in the determination of damages to the remainder.

BAKER: Your fourth issue in this case was that the CA erred in failing to dispose of about 5 points of the state's claims in the CA. And that they should have done that. But there is no argument, there's no brief to show us what those are and there is no citations to authority and I would assume that you're waiving that fourth issue in this case?

MONTAGUE: I think that's the state that did that, not us.

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RESPONDENT

BONNEN: Petitioner is effectively asking this court to overturn State v. Schmidt, State v. Hill and Felts v. Harris County, all of which were decided in the last 7 years. There are three reasons why the court should instead uphold the judgment of the CA. First, INP's alleged damages are noncompensable community damages. Second, INP's damages do not stem solely from the use of the part taken.

ENOCH: Is it your position that there was no diminution in the value of the remainder property as a result of moving the property line to within 12 feet of the side of the building?

BONNEN: In the CA it was our position that any diminution in the remainder value had to do with the change in the economy, and to do with the landowner's failure to keep the building maintained. However, even if some of that diminution in value could be attributed to the moving of the frontage road lanes, the courts have held simply that if it's community damages that it's not compensable, which we certainly do contend that every damage that they claim is basically community.

OWEN: Under Justice Hecht's example, where you have a residential street and assume they take 15 or 20 feet out of the front yard and the front door is therefore much closer to the moving traffic, is it your position that that's community damage and noncompensable?

BONNEN: Yes. It is our position that that would generally be community damage.

OWEN: How is that community damage when the only houses that suffer the damages are the ones that front on the road?

BONNEN: Well the community damages rule is a rule which applies when the damages are of the type that affect neighboring landowners or of the type that affect the community in general. And certainly if everyone when a road is widened all the neighboring landowners are in fact affected.

We are certainly not contending that that aren't many, many instances in which landowners are entitled to remainder damages in instances where we widen the roadway. One of the examples raised by an amicus brief was the suggestion that whenever we widen a roadway next to a gasoline station that they won't be able to recover any remainder damages, that's certainly not true. Generally in those sort of instances, you have a situation where pumps have to be moved, underground storage tanks have to be moved, and we're responsible. We have to pay those remainder damages either for the moving of those types of things or if they can't be moved because there's not enough room on the property, you have to pay for the reduction in value of the remainder property. With the example of a residence it is very likely and very possible that some of those residences might suffer impairment of access type damages. We would have to pay for that.

HECHT: Why isn't the nonconformity with the ordinance and deed restrictions special damages here?

BONNEN: In some instances that in fact might be a special damage. But in this case, although a couple of the witnesses mentioned that there was a legal nonconformity, with the deed restrictions and the city provisions, there was no witness that ever testified that that legal nonconformity resulted in a reduction of the market value. Simply look at the record, they never said that that element would affect what a willing buyer would pay a willing seller.

HECHT: Say this was a daycare center with a playground, and the frontage road was 150 feet away and the parents felt safe leaving their kids there because it was fenced in and it was a long way from the frontage road, but then when they moved the highway it got much closer, so much closer that there was some apprehension that you wouldn't want your kids playing out there that close to the street. Would that be a compensable taking, compensable damages?

BONNEN: In some instances it might. And that certainly not what we have in this case. This area wasn't actually used for people to do anything on. It was only used for appearance. But in that particular case with a playground, we would have to pay for the moving of that playground onto a different location onto the property possibly. Now if that were not possible and if you could say that the taking of that playground actually rose to the level where it affected the ownership interest of the property owner, then that in fact might be compensable. And, too, in that case you're talking about with the playground an effect of the actual physical use of the property, which I think

is what the statute means when it talks about the community damages rule.

HECHT: Why isn't that the case here? Why doesn't this landowner contend that unlike all the other people along the road, and I know some evidence was excluded about buildings north and south, but unlike people along the road generally we're being impacted because of the special problems that proximity causes in this case?

BONNEN: For a couple of reasons. First of all, it's our position that aesthetic damages are a lot like the noise damages that you talked about in Felts. And in Felts, you said that the damage had to rise to a level that it actually affected the ownership interest, such that you wouldn't even have any property. In this case, there is no such evidence to that effect. What we have is an office building that may be getting slightly lower occupancy rates and slightly lower rental rates. Basically, simply a reduction in value.

PHILLIPS: How much land was taken in Felts?

BONNEN: In Felts, I don't believe that any land was ultimately taken.

PHILLIPS: And in Heal how much was taken?

BONNEN: A very small amount.

PHILLIPS: And in Schmidt?

BONNEN: I think about a 5-foot wide strip of land was taken in Schmidt.

The taking in this particular case did not affect the physical use of this property. There may have been a slight reduction in value. But this property is still being used as an office building. And certainly if we allow damages in this particular case, then every landowner up and down the highway is going to be able to claim damages for loss of aesthetics and damages for slightly increased traffic hazards.

BAKER: Aren't the facts in this case directly contrary to that argument you're making now. At least Interstate says that the property to the north was not affected at all because there is nothing built on it, and the property to the south had a whole lot more distance between the access road and its building, so they didn't suffer the same kind of damages, which is why they say their situation involves special damages. Don't we have to look at the facts to answer the question that you're arguing?

BONNEN: No. With respect just to factually, there were some specific instances possibly of property along this stretch that wasn't affected, but there was also specific instances of properties that were affected. But what the court said in Felts and Schmidt is that you have to look at the type

of the injury to determine whether it is community. It's not just a matter of counting buildings to see how many were affected and how many weren't affected. The fact of the matter is aesthetic damage and damage due to safety concerns are damages of the type that generally affects the entire community and generally affects all of the neighboring landowners.

ENOCH: That would make sense if your objections is, I just don't like a highway running next to my property. It doesn't seem to me to make sense that if a highway is now within 5 feet of my front door, and I'm complaining about the highway, I can't be compensated just because it's a highway going by my front door. It seems to me that the proximity is a special damage to the property, and it seems to me that a nonconforming building which affects what other building could be built there or where it could be placed there, is a real damage to the remainder, and it might be suffered by people all up and down the highway if a lot of their land is taken for the highway and it's now put next to a bunch of buildings that no longer can be built there if they were to start over. It seems to me just because a lot of people have it doesn't make it community. And just because it may be community doesn't mean it's not special to a particular person because of a specific placement for that person. It seems to me there is some real damage to the remainder here.

BONNEN: In this case there was certainly no evidence that there was any plan to move the building, or that if they were moving the building, that there wouldn't in fact be enough room. And as I indicated earlier, no witness ever made a connection between market value and just the legal nonconformity. A legal nonconformity does not require a property owner to do anything. They don't have to move the building back. It just exist as a legal nonconformity.

But specifically with your question about proximity and why it can't be in and of itself compensable. There are a number of reasons that it cannot be. And one of the reasons is that this court in Schmidt said that we should not focus on location, that we should focus on the type of injury. And just to say it's closer in proximity to my property is doing nothing more than focusing on location.

BAKER: But there are several CA cases that disagree with what you said and haven't allowed damages for new proximity to the highway. Exactly what they are complaining about here.

BONNEN: I would agree that there are a number of cases that somewhat in passing seems to suggest that proximity would in fact be compensable. But none of those cases face the issue head on. A couple of them involved a legal nonconformity. In both of those cases, there was actual testimony that the legal nonconformity would affect the market value.

HECHT: It seems to me that it's one thing to say there has to be a qualitative difference, but it's another thing to say that if you have undeveloped land with a shed on the back and the state comes along and takes 1 or 2 feet of the far side of it, that's mere proximity and no compensable injury. But if you've got a residence with a 40 foot front yard that shrinks to 5 feet, that's also noncompensable because it's the same thing. It seems they are quite different.

BONNEN: I believe what you need to do is you have to look behind the word proximity and see what is the actual damage that is being complained about. Is it aesthetic damage? Is it just slightly increased traffic hazards? Because proximity in and of itself, I would suggest, is not inherently damaging. It's only because of the common injuries associated with proximity that proximity could be said to be damaging. So with each particular case, certainly with respect to a residence, if the damage arises to the level that you can say that the ownership interest has been severely impaired as the court mentioned in Felts, or if you deny material and substantial access to the property, those sort of remainder damages would be collectable. But under Schmidt, under the cases decided by this court, community type damages are not, in fact, compensable in that particular instance.

HECHT: And these are all legal issues?

BONNEN: Yes, they are. I would suggest that it would be unfair for the state to have to pay damages based solely on the location of an improvement when the benefits of that location cannot be used by the state to offset actual damages. In other words, the fact that a roadway has been improved or the fact that you're now closer to a roadway, and that's a good thing because you can get to a lot of places and town more easily, those are benefits that we cannot offset against any damage. And it would seem unfair to hold the state responsible to pay for any sort of strictly locational type damages when they can't receive any benefit of those type of changes.

The bottom line is that if the state cannot widen a roadway without paying aesthetic damages to every landowner abutting the roadway, then the cost of building roadways is going to become even more prohibitedly expensive.

Community damage rules as suggested by the petitioner, INP, does not apply when damages result solely from the use of the part taken. That is their position. And certainly it's a position that we disagree with in every which way. Section 21.042 of the Texas Property code provides for the recovery of remainder damages. I've given you a copy of that provision to have in front of you. Section C deals with the actual recovery of remainder damages; and §D makes such considerations subject to the community damage rule. Nowhere in that statute is there written in any sort of exception saying well this doesn't apply in the situation where the landowner is saying that its damages results solely from the use of the part taken.

But even in this case, even if you were to accept that there were some such exception, in this case INP as a matter of law has not established that its damages resulted solely from the use of the part taken.

Now petitioner keeps repeating well that Mr. Lewis, its appraiser, confined its damages. And it is true in response to questions whenever Mr. Lewis was asked: Well did you confine your damages to those resulting solely from the use of the part taken? He said, Yes. But it was not his decision to decide what the law is. And this is in fact a legal question. As suggested in

the Clark case, which was mentioned by Justice Owen, what the expert has to do if they are going to make this contention that their damages result solely from the use of the part taken, the expert actually has to make an assumption that, in this case the assumption would be that all the new main lanes have already been built, and that one frontage road that was on the state's existing right-of-way had already been built. Make that assumption in giving its opinion and then decide exactly what damages result from the use of the part taken. And specifically say, I'm talking about these two frontage road lanes which are on the part taken. That's not what the witness did in this case. The witness just stated a legal conclusion. And that legal conclusion is to be made by this court.

And when this court looks at the dispositive facts over which there is absolutely no dispute it will see that one of the three frontage road lanes was built primarily on the state's existing right-of-way. And repeatedly, the witness says when they were talking about damages, talked about damages emanating from the entire frontage road. They didn't talk about damages just from the two lanes.

Over fifty percent of the buffer zone that they say they lost was existing state right-of-way. Now this is illustrated very graphically in the exhibit that you have in front of you. This is a portion of defendant's exhibit 4, the aerial photograph. This was before the taking. It shows the 96 foot ride green buffer zone. The state's existing right-of-way line is just right of those telephone poles. So over half of this area that they lost, the loss of which they say caused them damages was existing state right-of-way.

So as a matter of law regardless of the fact that their witness stated some legal conclusion their damages for a loss of a buffer zone do not stem solely from the use of the part taken. They stem possibly from the loss of that entire area - over 50% of which...

ENOCH: It seem to me in one case where they took a sliver of some land in order to widen an exit ramp or an entrance ramp, and then there was a claim for damage of the remainder is one kind of case. It seems to be another whether it's a sliver or not a sliver land you build a large retaining wall that blocks a view or hides the property or something even if it is on a small portion of the land, but if it's taken for the purpose of erecting this retaining wall it seems to me that that would have some particular special damage to the remainder because of drive up appeal, or the market value of the property, not because of how much or how little property was taken, but because precisely if the aesthetic interference that occurs as a part of how this particular piece of property was taken was used, in this case you argue it's just a aesthetic. But it does seem to me that if they take the property and they erect a retaining wall, do these sorts of things within a few feet of the building, they are causing some diminution in value of the remainder, but the difference is that they did take some land in order to make these changes as opposed to others where they simply made changes to the land the state already owned and the reluctance to award damages just to neighbors along the right-of-way because they just have a different _____.

BONNEN: Even though there may have been some aesthetic damage, this court has said over and over again that we are not going to pay for every reduction in market value. And I would suggest that this is simply one of those situations of aesthetic damage where the court should not allow the payment in this sort of instance. But, two, in this sort of case where the damages can be clearly said to have resulted both from the use of the state's existing right-of-way and also possibly from some of the part of the land taking, in the Clark case they established a three-part exception that was supposed to apply when you could not establish that your damages result solely from the use of the part taken. Clearly that exception would have applied to this case, but the landowner has taken the position all along that that exception that they did not need to meet that exception, they made no attempt to meet that exception.

I don't know whether they could have met that exception or not in this case. But in Clark and followed up in Schmidt, a case in which they discussed Clark, they said there is this three-part exception where some of the damages stem from the use of the state's right-of-way and some of the damages may stem from the use of the part taken, you need t use this exception.

I think it's the state's position that even under this exception that the landowner would not be able to recover. But in this case, they made absolutely no attempt to meet the elements of that exception. And under the holding in Clark and under Schmidt that is the only way they could have gotten around the fact that their damages do not result solely from the use of the part taken.

HANKINSON: At the beginning of your argument you said there were three reasons why we should rule for the state, and you never told us number three.

BONNEN: Our third reason why INP is not entitled for reversal is that they were not entitled to loss of access damages. Although they stated upon first stepping up here that they were not asking that, they cannot escape the fact that Mr. Lewis said that there were four reasons why there were $1.5 million damages. One of those four reasons was loss of access. He never separated out that loss of access by the closure of one driveway out. So at least in part, some of the damages stemmed from a noncompensable element. And if you find that any of these damages are noncompensable that the landowner was allowed to testify about, then the state is entitled to a new trial. We ask that you affirm the judgment of the CA.

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REBUTTAL

MONTAGUE: With respect to the loss of access, the loss of access to which Mr. Lewis, the appraiser was referring, was a loss of access to some front parking spaces that have to be essentially closed off as a result of some curbing, which is shown in Defendant's Ex. 18. It had nothing to do with the type of substantial and material impairment of access cases like those addressed in Schmidt, _____ v. City of Waco and things such as that.

BAKER: Is there a problem that the court found that there was substantial and material access law, as a matter of law?

MONTAGUE: The substantial and material impairment of access that we addressed pre-trial dealt with whether the property owner was entitled to damages for the cost to cure the two driveways, because they were rendered unsafe as a result of the taking within 12-1/2 feet of the office building.

By the time we got to trial, the state conceded that we were entitled to that cost to cure, so that impairment of access question went out the door.

When we are talking about the office buildings, for example on the highway, the one immediately south of the Interstate Northborough building was the Northborough Center building in which the state came in and moved an exit ramp next to the building causing damages to that property because of the unsafe access with which it was left.

This court has reviewed that case and found that the CA in holding in favor for the property owner said there was no error.

With respect to the change in economy being the problems attributable to Interstate Northborough's problems. The CA specifically acknowledged in its opinion that of the three buildings in the neighborhood with which Interstate Northborough mostly competed before the taking, more than any others in comparing that situation after the taking it saw that those three buildings with which it competed before increased in occupancies up to 95 to 98%, getting $12-$14 rents.

ABBOTT: Isn't that a fact issue anyway?

MONTAGUE: It is a fact issue.

ABBOTT: And that's been determined by the fact finder?

MONTAGUE: That's exactly right. Just with respect to opinion as to what the damages are, that's a fact question.

OWEN: What about her argument that over ½ of the area with the buffer zone was already in the state's right-of-way and that you all sought damages for loss of that buffer zone?

MONTAGUE: All I ask you to do is look at the record. Because we did not seek damages for that buffer zone. That was the state's right-of-way. And as I pointed out earlier, if you look at the exhibits, the exhibits show that that green space area, that buffer zone area, is the same after as it was before.

One interesting point, too, that I would ask the court to look at with respect to the State v. Clark case is the subsequent decisions out of this court in City of Ft. Worth v. Corbin and City of Houston v. Barshot when it says when you're looking at the market value of property before, you shall not take into consideration the scope of the project in determining what that market value is before. You are not to consider certain things as to what the ultimate rights are with respect to the types of things looked at in Clark.

As far as the damages issue here concern, to the extent the court has any problems with whether the community damages rule applies thereto, I think that is a fact finding for the jury, at least that's what the SC told us in State v. Carpenter, which this court recently said was probably the most well settled as any in our jurisprudence can be. A community damages instruction was given to the jury telling it to disregard any community damages, telling it to disregard any damages that others suffered in common with Interstate Northborough. So that instruction was given to the fact finder to disregard those types of damages. And I will tell you, the evidence was so controlled too at the TC itself.

As far as the state is concerned it's hard for me to understand out of fairness that somebody, some government can come in and take your front yard and put there on a concrete slab that they used for a high speed frontage road, construct two 6-1/2 foot retaining walls next to your building, and put your building within 12-1/2 feet of the new right-of-way line making it nonconforming and not have to pay any money for that.

O'NEILL: What evidence do you have that your damages would have been any less if the state had only gone up to the existing right-of-way?

MONTAGUE: We would have no damages because that was not the case. That was not what we were confronted with in the case at bar. All we were confronted with are the facts that we had to address in the case at bar, and what we did in the case at bar is confine our evidence solely to the use of the property taken, not to the state's new use of its existing right-of-way. We did not attribute any damages evidence to that. We confined it solely to the use of the property taken.

O'NEILL: I hear what you're saying, but why were you damaged more by the smaller strip of land taken that went beyond the right-of-way? In other words, would you have not been damaged to the same extent aesthetically if the state had only gone to the existing right-of-way?

MONTAGUE: Not at all. Because before our building would have been left 46 feet away, we still would have had our landscaped and bermed front yard, the berm being within our property, the landscaping - the trees and so forth - being within the bounds of our property. The separation between the building and the existing frontage road lane, if it was constructed within the state's right-of-way would have been 56 feet away from the building itself, 46 feet being the right-of-way line and the state required by federal government to build the roadway 10 feet away from existing right-of-way. So we would have had 56 feet between a new frontage road if constructed within the

state's right-of-way and the building itself. So we would have been protected that way.

As far as aesthetics are concerned, people spend millions of dollars on landscape architects and landscaping to improve the value of your property. Here, those were taken away and as a result this property was damaged solely as a result of that.

Let me once again say though, and Justice Hecht I need to go no further than the opinion you wrote in State v. Schmidt and in particular the cases that you cited in there, the US SC cases, all of which said, including State v. Carpenter, when you're looking at the taking of a property and you're confining your evidence solely to the usage of the property taken, that there is no exclusionary rule, there is no community damages rule that limits the evidence with respect to diminution attributable solely to those uses.

I was listening to Ms. Bonnen up here and she did not cite one instance in the record where the property owner attributed any damages through the testimony of any of its witnesses to anything other than the use of the property taken. However, she is asking this court to as a matter of law find that irrespective of what experts testified to in a condemnation case as to what they attributed the damages to, that as a matter of law the court should not allow any of that evidence in.

OWEN: What if it was just noise within the use of the property actually taken that the noise level was very high, tenants complained and moved out. Is that compensable?

MONTAGUE: I think the noise would be connected with uses both on and off the property taken - vehicles coming and going from the property.

OWEN: Let's assume that they put in a new road very close to your building that did not exist before. It was all on property taken. And the only complaint was from tenants saying it's just too noisy. We are going to move out of this side of the building that's closest to the freeway now. Would that be compensable?

MONTAGUE: If the property owner can prove that that noise damage is special and unique to his or her property, yes it is compensable as Justice Enoch said in Felts v. Harris County. But otherwise, it would not be. That would be generally a community type of damage.

OWEN: Even though it's totally been the property taken?

MONTAGUE: If it's confined totally within the property taken and the property owner can make the tie that that noise damage is in fact causing damages to the...

OWEN: But you concede that community damages, the concept still applies?

MONTAGUE: No, I do not concede that. If it's solely confined, if the evidence solely is that the damages are coming from that part taken and not from any other property outside of that which was taken that are causing the diminution, I think then in that event he should be able to recover because he's able to prove as a matter of law that the use to which the property is being put is causing a diminution in the market value. That's what Campbell v. United States said. That's what United States v. Grizard(?) said. All of those cases cited in Schmidt. They held that proposition to be true.