ORAL ARGUMENT – 10/10/01
00-1146
STATE V. BRISTOL HOTEL

LAWYER: The state requests that you reinstate its condemnation suit for two reasons. First, the state made a prima facie showing that Bristoll Hotel was served with notice of the special commissioner's hearing. And second, in this case, death penalty sanctions were in no way justified.

O'NEILL: How do you get over the hearsay objection?

LAWYER: It's our position that the hearsay objection simply does not apply to a return of citation.

O'NEILL: Why not? I mean it is hearsay you would admit?

LAWYER: Yes. I would admit that it is hearsay. However, there's a long line of cases that hold that the way...

BAKER: What's the exception to the hearsay rule that you would say apply?

LAWYER: Well I would suggest that Texas Rule of Evid. 8038 would apply. And under that rule the return can be considered not hearsay, because it should have been admitted as a public record setting forth the activities of the probate court and its duly appointed commissioners.

BAKER: Well that's not right. Isn't it clear that the notice is a piece of paper prepared by somebody that's with one of the parties?

LAWYER: Yes. In actuality, the state does end up preparing the notice. But the statute says that that is done under the direction of the special commissioners.

O'NEILL: Where is it filed in public record?

LAWYER: It is filed in the court in which the condemnation suit is filed.

O'NEILL: And you would say if it's filed in the TC where the suit is pending it then is a public record?

LAWYER: Yes in this instance. I think you have to look not only at the Tex. Rules of Evid, but you have to look at the case law specifically dealing with condemnation.

BAKER: If that's the rule, then anything that anybody files in the lawsuit becomes a public record and is admissible into evidence?

LAWYER: No.

BAKER: Well why wouldn't that rule that you just proposed apply in that way?

LAWYER: I certainly think that if the holding is based on the Tex. Rules of Evid, that it should be limited to this particular circumstance in a return of a citation in a condemnation suit.

BAKER: Well this is not a citation. It's a notice of service. Would you agree there's a difference? Citation is issued by the clerk of the court, put in the hands of a sheriff or constable and served, and then returned. This notice is prepared by an employee of the State of Texas ostensibly served and then filed. And there is a case that distinguishes between the two isn't there?

LAWYER: Actually there are two cases that distinguish between the two. The Rotello(?) case and the Baird(?) case. And for a number of reasons we believe that those cases should not in fact be followed. They make a distinction saying that in a regular case the citation is served by a constable or a sheriff and, therefore, that's why it is granted regularity. But we believe that the same regularity should be attached to a service of notice in a condemnation for a number of reasons. First, if you apply the CA's decision and the Baird(?) and the Rotello(?) decision as it has to be a sheriff or a constable that performs service for there to be regularity...

BAKER: No, we're not saying that. Because we've also said that this is not a judicial proceeding. It's an administrative proceeding unless and until the objections to the award are made. And, therefore, this particular process is not accorded the same level of veracity as a citation issued by the clerk and served by the constable. Do you agree with that?

LAWYER: No, I don't.

BAKER: Well we've said that haven't we?

LAWYER: I don't believe that this court has made any rulings specifically with respect to the service of notice as did the Baird and Rotello cases. And if you apply the Baird and Rotello cases as they are written in the CA's opinion, then a return on service of citation served by a private process server would also not be entitled to any presumption of regularity. Because a private processor to serve a citation only has to swear that they are 18, and that they are not interested in the lawsuit. That's all it requires. They are not an actual officer of the court.

BAKER: But that is a judicial proceeding and there are rules that require an order of the court before you can have a private processor serve it. Is that right?

LAWYER: Yes, there is. That is correct.

BAKER: So they are ostensibly operating under a judicial order with the authority to serve under whatever requirements there are for citations?

LAWYER: Yes. But the requirements are not that they...

BAKER: So you are not willing to recognize the difference between a regular judicial proceeding and the pre-objection procedure in a condemnation case?

LAWYER: Not with respect to the sort of importance that should be attached to the return in a condemnation case. I think what's important to realize is that the law regarding how service and notice of these hearings has been in effect for over 100 years as to how the notice is actually to be carried out. We are following statute when we serve these notices this way.

And I think it's really important that this court consider the case of Sauve v. State. That case was cited by the CA in support of its opinion. And it's also been cited by Bristol. That case was a writ refused case. Therefore, this court indicated that it agreed with that opinion in all respects.

What is important about the Sauve case is it states that a return of service of notice of a hearing in a juvenile certification hearing was valid on its face and, therefore, carried a presumption of the truth of the facts stated on the return and of regularity. And what is important is this was not a regular civil proceeding. This was a juvenile certification proceeding under the family code. And under the family code it said that notice of this hearing could be served by any suitable person directed to make service by the court. In this case, the person that actually affected the service was a probation officer.

HANKINSON: Once again, we are tied back by the court authorizing the service. And as I believe your opponent has pointed out that that's not what's going on here. In fact it is usually an employee of the condemnor who is actually doing the service, who is an interested person in the proceeding. And you would agree that that is allowed under condemnation law?

LAWYER: Yes.

HANKINSON: That's usually the way it's accomplished?

LAWYER: Yes.

HANKINSON: It seems to me that that's a distinction between the case that you've cited and the present case?

LAWYER: I would point out that in the Sauve case, that even though the statute said that it was supposed to be served by a suitable person under the direction in court, it was actually nothing in the record to indicate that the court had actually directed this particular probation officer to make the service. And obviously a juvenile probation officer would have an interest in the hearing.

But with respect to the way that TXDOT normally carries out its service,

certainly in most cases within the state of Texas, it is done according to statute. This service of notice...

HANKINSON: But I think the point is as the questions that Justice Baker has been asking you point out the difference between this service and citation as occurs in the course of an ordinary civil proceeding. And you would acknowledge that they are different types of notices and in fact are accomplished under different authority and by different means?

LAWYER: Yes, I would definitely agree there are differences.

HANKINSON: The service was not even complete. It had a blank on it in terms of who accomplished the service. Is that correct?

LAWYER: Yes.

HANKINSON: What is the effect of that and why wouldn't that be fatal _____?

LAWYER: It is our position that that blank has no effect. I believe you have a copy of that service notice in front of you. There is a blank that says: by _____(blank). We would suggest to the court that that was merely surplusage. That is a line is in which the person doing the service could have actually filled in her own name, which has been done by our servers in some instances to again indicate that they were the person that was performing service.

O'NEILL: Well doesn't that mean by mail or by hand delivery? That's what that blanks for. We don't know by this whether she mailed it on the 17th at 11:25 a.m., or hand delivered it.

LAWYER: No, we do not believe that that was the purpose of that line.

BAKER: But you prepared it didn't you?

LAWYER: Yes.

O'NEILL: I served it. I, Susan Kelley, served it at 11:25 by delivering a copy of the same by _____. It wouldn't make since to say Susan Kelley again. So it's got to be by hand delivery or by certified mail, return receipt requested or something.

LAWYER: It is true that that also could have been filled in to the blank. But it's our position that that too would have been surplusage, because the service of notice said it was done by delivery. And there are a number of cases that hold that the word 'delivery' means in person. So the word 'delivery' substitutes for the phrase in person. And this service of notice was in fact sufficient.

ENOCH: To make this process valid, the notice has to be served?

LAWYER: That is correct.

ENOCH: Now is this different than a citation to a party which starts a lawsuit? I guess what I'm asking, I'm wondering what all this arguments about. They obviously knew about it before the hearing was held. They didn't show up. They can argue, what does it matter whether or not the TC admits this notice. All the TC has to decide is whether or not they were properly served. And the TC can say they weren't _____. Or is the act of notice a substitute requirement as opposed to simply a notice requirement? In other words, we're not here asking whether or not the property owners received notice. We are here asking whether or not the state has the authority by statute to proceed with a condemnation. And so the notice is not a notice question. It's merely a prerequisite to the cause of action. Does that make a difference whether or not this piece of paper actually gets into evidence?

LAWYER: We agree with your understanding of this. We believe that it is merely important that the state actually show that all the proper procedural steps have been taken. And one of those procedural steps is actually preparing and serving this notice. And that all we need to do...

ENOCH: But there has to be - the paper itself is not _____ fact. That wouldn't be hearsay. But within the paper the actual service is another element, and it would be hearsay in that paper.

LAWYER: And to that extent, we believe that it should be treated like the return on a service of citation in a regular civil proceeding. This issue comes up at the point in time when the case is factually(?) converted to a regular civil proceeding.

ENOCH: But in a civil proceeding if a party had actual notice and came down to court, the TC would be deciding whether or not the service had actually been effectuated so you had jurisdiction over this person. But if they don't do their steps properly, they've got jurisdiction to say up here in court. This delivery keeps them from proceeding on a condemnation whether or not they had actual notice of the hearing or not. That actual delivery is a prerequisite for maintaining the cause of action.

LAWYER: And it's our position that we should be allowed once we get to the TC to prove that that delivery was in fact made.

BAKER: Well that's your burden under the law isn't it?

LAWYER: Yes it is. But we believe that a prima facie case is made by the actual introduction of the service of notice, or even by the fact that it's in the record. Just as in a regular civil proceeding. And then if they can present at least some testimony to rebut that, and preferably some corroborative testimony, then presumably we would have to bring in some additional evidence to prove our service like we attempted to do.

O'NEILL: If the CA's opinion were to stand, what happens? Do you just file a new one?

LAWYER: We would file a new lawsuit, but it would be fundamentally a different lawsuit. We had obtained a right to possession of this property. A writ of possession was entered for the landowner, and that was taken away from us, and we were required to return the property. A new lawsuit would effectively be a completely different lawsuit, because the date of taking would be some 4-years later, the values would be different. And we would have since had to pay over $100,000 in fees and penalties. It would effectively be a different lawsuit.

O'NEILL: I guess my question is, couldn't you have decided when the TC ruled that this was defective - well, okay, let's cut our losses and go ahead and do a new one and get it corrected right now, we can do this right, rather than put all the - it seems to me that if time has gone by, that was a judgment call on y'all's part?

LAWYER: Well we would have had to go ahead and pay $94,000...

O'NEILL: So you get a better deal.

LAWYER: Yes. And I think we asked this court really to make a ruling on the laws that should be. Because I think the result of the CA's ruling is all that a landowner has to do is allege that we haven't taken some particular step, and then we have to go find witnesses. The return of service is no good. We actually have to go and find a witness from out-of-state possibly to come in and testify to those facts just merely based on their allegation or they're saying just prove it.

BAKER: But you were on notice of this jurisdictional assertion from April 1998 weren't you?

LAWYER: It is true.

BAKER: And in this particular case, the witness was your employee. Where?

LAWYER: In Dallas. But that is not always the case. Some times people have to be served out of state.

BAKER: Well I understand that . But don't we have discovery for those things? Don't we take depositions and things?

LAWYER: Yes.

RODRIGUEZ: And you could have filed a motion for leave for the ability to amend your discovery answers to include that person's name?

LAWYER: Yes. Well we asked for leave during the actual hearing. We only realized

either Thursday or Friday before a Monday hearing that this witness had in fact not been named. It was a mere inadvertence.

BAKER: Would you comment on the rule 11 agreement, which is pretty well ignored in your briefing?

LAWYER: I believe that this court should not interpret the rule 11 agreement to basically deny the state any protections under rule 93.6, or the principles of TransAmerican for several reasons. First, because the agreement was not the basis of the TC's exclusion of Ms. Kelley.

BAKER: But it's in the record, and can support the TC's ruling. Would you agree with that?

LAWYER: Yes.

BAKER: Then what is the standard of review of a TC's decision on whether to admit or exclude evidence?

LAWYER: There are several other reasons...

BAKER: No, what is the standard of review on the TC's decision to admit or exclude evidence?

LAWYER: I think that this court can look to other evidence in the record...

BAKER: No. Answer my question first.

LAWYER: I think is abuse of discretion.

BAKER: If there is some evidence to supports a TC's ruling that's in the record, can there be an abuse of discretion?

LAWYER: No, but we don't believe that there is any evidence.

BAKER: Well is the part of the order that's in the record something the TC could have looked at, but not talked about?

LAWYER: Yes, it is possible. But we do not believe that would support the ruling.

BAKER: I understand what you might not believe, but it is part of the record.

LAWYER: Yes.

BAKER: And you never, that I can tell, disavowed the statement in that order. The parties agree, plural?

LAWYER: That is correct. In the TC we did not disavow it.

BAKER: And never asked for it to be set aside or said it wasn't made or anything like that?

LAWYER: No, we did not allege that in the TC. But there are several other reasons why you cannot rely on that agreement to deny us our basic protections under the discovery rules. By its very terms, that agreement doesn't apply to requests for relief made during the actual hearing. It simply said, don't do this or this up until the time of the hearing.

BAKER: When was the date of the hearing?

LAWYER: May 24.

BAKER: And what did that order say? Between now and May 24? It included May 24 didn't it?

LAWYER: It said no more witnesses designated prior to May 24, 1999. If that agreement, however, is interpreted to not deny the state any avenue of relief under 193.6 or under the principles of TransAmerican, then what is going to happen is that...

BAKER: Well I don't understand how this is a death penalty sanction. What is the basis of TransAmerican statement that it becomes a death penalty sanction? What's the underlying principal to that statement that you've been foreclosed forever to litigate the merits of your claim?

LAWYER: I'm not sure that it says forever. But we have in fact...

BAKER: Well the order in those kind of case are usually dismissed with prejudice or take nothing judgments. Would you agree to that?

LAWYER: That is very likely.

BAKER: And your briefs concede that this is a preliminary jurisdictional hearing and the merits are never reached, so your merit assertions are still viable. Is that correct?

LAWYER: It is true that we can refile this case.

BAKER: So how can that be a death penalty sanction?

LAWYER: The reason is because this particular condemnation suit to condemn this piece

of property at this point in time when we actually needed it for a road project. A road project that we've had to redesign and work around this piece of property. We were never allowed to acquire that property as of the initial date of taking.

BAKER: Well that kind of goes back to Justice O'Neill's question: Why didn't you just quit in May of 1999 and start over again?

LAWYER: Well we didn't because we believed that the rulings made by the TC were vastly unfair and very wrong, and that we should not be foreclosed from an opportunity to actually appeal the case.

O'NEILL: If we were to uphold the CA's decision, the posture would be that they have no appeal to the DC, right, and the commissioner's award would stand?

LAWYER: The commissioner's award would not stand as a judgment in the condemnation suit. Objections were filed by the landowner, and so the commissioner's award would not stand. What would happen is we would go back - I assume we would have another hearing where we were actually allowed to present Ms. Kelly's testimony with respect to service, and they could present any evidence that they might have with respect to service. And if the court then decided that service was in fact sufficient, then we would go forward and have a trial on the merits of the value of property at that time.

HECHT: But if the CA is affirmed, you pay $100,000 and start over?

LAWYER: Yes. Four years later, the property values...

HECHT: No commissioner's award, no nothing. You pay the attorneys' fees and the expenses and start over.

LAWYER: Yes.

PHILLIPS: And you still need the property even though you've redesigned the project?

LAWYER: Yes. Currently there are fewer frontage road lanes in front of this particular property. Somewhat of a bottleneck and we're eventually going to have to go back and fix that.

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RESPONDENT

MCCLISH: It strikes me that the court is being asked to reverse the judgments of the lower courts, the TC and the CA, because the trial judge abused her discretion by excluding palpable hearsay, by enforcing a rule 11 agreement that the parties made on the record, and the gov't never asked to be let out of. And by denying them a continuance in the middle of the trial after they had

already had one continuance, in a case that was trial to the court that had been pending for 14 months, a case where they had the burden of proof and they had the burden of going forward to trial, denying them a continuance so that they could try to get out of their rule 11 agreement after they had announced ready and after the trial had started.

PHILLIPS: But you knew about this witness and in fact you listed the witness yourself in the answers to discovery?

LAWYER: I want to be really clear about that, because the persons with knowledge of relevant facts and the witness list had been thrown around kind of like they are interchangeable. It's my judgment and my practice, and I believe the court's intent with the new rules that persons with knowledge of relevant facts and the witness list are not the same anymore. You can't hide who it is that's going to testify for you. And the 300 names of people that have all of the relevant facts are now entitled to the other side's witness list. The parties in this case exchanged interrogatories and exchanged witness lists. And it is true that Ms. Kelly was named as a person with knowledge of relevant facts in our discovery responses along with probably 20 or 25 other people with the state who we happened to know had some connection with the case. We've tried hard to make complete discovery responses and name everybody from the state who we believed from the record and from the depositions that we took and from the discovery we did name as persons with knowledge of relevant facts everybody that probably knew something about the case.

Ms. Kelly was never on my witness list or anybody else's witness list, and I never had any idea that they intended to call her as a witness at trial until they spoke her name

ENOCH: Of course you're taking the position they had to call her.

LAWYER: I've never thought they were going to be able to make their case. I never thought they were going to make out notice in this case. My clients told me they didn't get notice...

HECHT: I'm sorry. They told you what? Did they testify to that that they didn't get it?

LAWYER: I didn't bring a witness to testify to that.

HECHT: Well it's cited in your brief.

LAWYER: I testified at the trial as to when we knew, we had actual notice of the case.

HECHT: It says, Bristol's designated representative does not recall being served with notice of the hearing: reporter's record, page 11.3 to 23. Is that right?

LAWYER: That's where we read the interrogatory response to the court.

HECHT: So that was Mr. Kline?

LAWYER: Yes.

HECHT: And he testified he didn't remember?

LAWYER: He testified that he did not recall receiving - he gave a sworn interrogatory answer that he did not recall being served with the notice.

HECHT: But he didn't say he didn't get it?

LAWYER: No sir.

HECHT: And nobody said they didn't get it?

LAWYER: Well we filed a verified pleading that said we don't believe that we were served with response.

HECHT: Well I don't believe I am, and I didn't get it are two different things. Did anybody say at trial or at this hearing - I didn't get it?

LAWYER: No. And I say that in the context of this is a large, multi-national corporation that has got a lot of litigation going on and Mr. Kline gets probably a lot of things stuck in his hand.

HECHT: Well if he told you he didn't get it why not just say in the interrogatory answer, I didn't get it?

LAWYER: Because he wouldn't tell me that he didn't get it.

HECHT: You just said a minute ago he told you that he didn't get it.

LAWYER: He didn't remember receiving this notice. But he was unable to say categorically among all the pieces of paper that had been handed to me by someone, I know for a fact that I did not get this one.

ENOCH: Going to your statement that you had no idea about Ms. Kelly, but your position has been that unless Ms. Kelly actually sits on the witness stand, they can't prove that notice was delivered. So as a part of the entire case, she certainly would have known at least based on the position that they had to produce this witness. Or not until after the case was tried did you think, well wait a minute, this notice somehow was hearsay?

LAWYER: I thought they probably needed Ms. Kelly to prove their case when they didn't take Mr. Kline's deposition, they didn't send us an admission. They accepted our interrogatory

answer where we said, he doesn't remember being served and we don't think he got served.

ENOCH: Do you agree that the piece of paper itself is not an operative fact for purposes of condemnation?

LAWYER: Yes.

ENOCH: So the piece of paper as an operative fact is admissible?

LAWYER: The piece of paper has to be in the court's file. I don't know if it has to be admitted into evidence. But it has to be in the court's file to give the special commissioners even the authority to go forward.

ENOCH: And so when it was offered into evidence, it was error for the TC to exclude it?

LAWYER: No, the TC admitted it as an operable fact, but excluded it as hearsay the resuscitation of service contained within.

ENOCH: So your argument is there is no evidence as a part of the process that it was served. We know we had the notice. We know they did what they were supposed to, but we have no evidence that it was served.

LAWYER: I want to be really clear with you. I do not believe the notice was properly served. And the evidence in the trial is that I gave testimony about is that I did not know about this hearing until 1 week before it was scheduled to go and we found that out by accident.

OWEN: Doesn't this really come down to rule 11 agreement, because they didn't have to give notice till 11 days before the hearing. So you're not going to know in time to supplement your discovery within the 30-day time period who served that notice. So it's kind of ludicrous to suggest that you have to list the name of the person who served the notice in your discovery response.

LAWYER: The hearing that we're talking about now is one that happened well before the _____ of discovery.

OWEN: Had this gone forward as scheduled, you would not have had the ability to object to the failure to designate Ms. Kelly in discovery responses because the statute allows you to serve this within 11 days before the hearing. Isn't that correct?

LAWYER: The hearing that I was talking to Judge Enoch about and the notice that I'm contemplating is at the administrative stage long before any discovery is ever exchanged. This was a notice of the hearing to come and present your case before the special commissioners as required

by the statute to be served 11 days before. But the discovery is not exchanged until the objections are filed and until formal service of citation of the objections as affected by the constable. So the hearing that I was talking about happens long before there is any discovery. We are not entitled to know the names of the witnesses they are going to call except we have to trade appraisals now. The administrative hearing is before the powers of the court are ever invoked.

The rule 11 agreement had to do with the discovery that was going to take place on the merit's trial for the jurisdictional proof which happened 14 months after the hearing before the special commissioners and the objections were filed and served.

HANKINSON: And that hearing took place without your client's participation?

LAWYER: Yes.

HANKINSON: No one was there?

LAWYER: No ma'am. The law is very, very clear that if we show up at the hearing, we waive our right to complain about both notice and good faith negotiations. And we were not willing to make that waiver because we believed that we had the claim.

O'NEILL: How do you respond to their argument that if we allow the CA's opinion to stand it's going to put them in a horrible box in every case that an objection is made to the service. They are going to have to call people in from out of town. How do you respond to that? Which seems to be the reason they brought it here is to get some broader principal that they don't have to go to that effort.

LAWYER: I kind of get the feeling that the case may really be moot and that that may be the only reason it's here. This has been the burden that has been on Texas condemnors since at least 1880.

PHILLIPS: Do we have any cases before Baird(?) and Rotello(?)?

LAWYER: Yes. Both sides have cited cases that go back before there was a Southwest Reporter. There are cases in Texas Reports...

PHILLIPS: This is nonadmissible and it doesn't stand on its own?

LAWYER: That says the government had the obligation to prove that they gave written notice to the landowner.

PHILLIPS: But how do you do that? Are there any case other than Baird or Rotello(?)?

LAWYER: _____ v Koonce(?) to a lesser extent, which is an opinion of this court,

where the service of notice was made by the constable and they tried to bootstrap the fact that a constable had made the service in the administrative level into saying that the court should for the first time read into that return the presumption of its validity and excuse them from making proof otherwise.

HANKINSON: Are you saying then that before the state proceeded with the administrative hearing, the state was aware that you were going to take the position that there was a probable disservice and with the good faith of the negotiations?

LAWYER: The evidence shows that there was.

HANKINSON: Your position is that your client does not recall getting the required notice. You all did find out about the hearing beforehand and chose not to participate because of the notice problem and the good faith negotiations issue and the state was aware of that and chose to proceed with the hearing at that point in time?

LAWYER: The evidence in the case is that I called the gov't attorneys when I found out that the case was set and said, I believe there's a jurisdictional problem. If you will put the commissioner's hearing off, reschedule to a later date from a month or two, so that we can have a fair chance to get up to speed on this case and we can join issue, we will show up at the hearing and waive our jurisdictional challenge. And they weren't interested in that. That's the evidence that's in the case.

O'NEILL: I'm not sure I heard an answer to my question, is that there would be no way to remedy and therefore they have to bring a live person every time this issue comes up?

LAWYER: I occasionally represent the condemnor. Most of the time I represent the landowner. We always try to get this information if there's a challenge by an admission or by an interrogatory. And if the answer comes back, you didn't serve us, obviously we are aware of the fact that there's a problem and we try to take whatever depositions are necessary to ascertain whether there really was a problem, whether they really didn't get served. Certainly I think it would be prudent of the condemnor to always name the person that made the service.

O'NEILL: Let me make sure I understand, because I understand your argument is it's the condemnor's burden to show notice. So the condemnor would then send out request for admissions in every case?

LAWYER: So you got served with this notice at least 11 days before the hearing.

O'NEILL: So it's that easy. And this argument that the sky is falling and they are going to have to bring somebody in for every case just doesn't work?

LAWYER: I take it as a serious threat in the rules, that if I don't admit facts that are not

in serious dispute, that the court should tax against me and my client the other side's cost in going to Dallas and taking the deposition to prove the fact of service is in fact true.

O'NEILL: But if they say deny, then you're putting them to their proof and they would have to bring in a live witness?

LAWYER: Which is exactly what we would have done in this case.

HECHT: But if they just say they don't remember, then what?

LAWYER: I think they would have to know at that point at least that they need to bring their witness who remembers - who says, yeah, I served him, this when and this is how.

OWEN: Isn't it correct now that constable and sheriffs are not the only people nowadays that serve citations? There's a whole host of people who are not constables or officers of the court who service citations.

LAWYER: Yes.

OWEN: Why is that any different when the statutes particularly says any person who is competent to testify can serve this notice? How is that materially different from citation issued by someone who is competent to testify?

LAWYER: Because of the nature of the way that condemnation practice goes. But in specific, although there may be many people besides the sheriff or the constable that are now authorized to go and serve process, each of those persons is qualified by and acting as an agent on behalf of the court. And one of the things they have to do is swear that they are not interested in the litigation.

OWEN: They are court reporter's runners in a lot of cases aren't they? They are people that the court reporter hires from college. They are not officers of the court.

LAWYER: But they take an oath and they take an oath that they are not interested, that they don't care, they don't have any dog in the fight.

OWEN: If the legislature said, we say that as a legislature it's okay to have a person, any person who is competent to testify to serve this notice, why shouldn't we give that equivalency to our rule that says or the legislature rule that says anybody basically can serve these citations?

LAWYER: Because the person that actually serves the citation and practice in the way that it goes is always them. It's always somebody who is an employee of one of the parties.

OWEN: As long as the legislature says that's okay, why should we quibble?

LAWYER: Maybe we shouldn't. Maybe we should change the rule of law so that we say we are going to give those returns of service that are made by interested persons when you're not subject to the court's direction, we are going to give those the same presumption of validity from now on that we have previously given to the return to service by a constable in a civil litigation. But that would be clearly contrary to the controlling law that existed when the trial judge made her ruling in excluding this document has hearsay in which she refused to give it that presumptive validity.

OWEN: But all these cases are constable or the sheriff before the law changed. Those old cases talk about constables and sheriffs were decided way before. The law now lets just about anybody to serve a citation.

LAWYER: It seems to me that in extending the group of people that can actually serve process in a civil litigation, as I read that legislation the legislature was pretty clear to keep one thing, one requirement in there, which is, you're only eligible to do this if you're not interested in the litigation. You can't be an interested party and be served.

OWEN: They specifically said in other statutes in these types of cases, you can serve the notice as long as you are competent to testify. Their call.

LAWYER: That's right. I agree with the CA on this. I think that the qualification of you must be competent to testify might be telling condemnor something, which is not only must you be competent to testify to serve this citation, you better be ready to testify if the landowner comes in and files a verified denial that he didn't receive the notice.

HECHT: He hasn't done that has he? Did he file a verified denied he did not receive?

LAWYER: No.

HECHT: You keep saying this and it troubles me. Because you keep saying he didn't get it, and then you keep saying well we don't really know whether he did or he didn't. And then you say well we believe he didn't, but nobody will ever say he didn't. So which is it? Did he ever say, did anybody ever say we did not get this notice?

LAWYER: The record says he does not recall being served and he does not believe that he was served.

PHILLIPS: The controlling authority that the courts couldn't go against was a writ dismissed case from the Houston First, and a no writ case from the Houston First.

LAWYER: I think that the City of Houston v. Koonce(?), which is one of your cases, says the same thing.

PHILLIPS: And that was controlling?

LAWYER: Which is that the condemnor may not look to resuscitation and the award of the commissioners or the other documents in the court's file for proof of jurisdictional facts when those jurisdictional facts are in controversy. Because those documents are hearsay. They are out of court brought in to prove the truth of the matter asserted where it's in controversy.

I can understand treating the constable's return or the sheriff's return as a business record and getting it in, but not where it's their records, not where it's their people.

PHILLIPS: You thought along they wouldn't be able to prove service and get to first base?

LAWYER: We didn't think it would happen.

PHILLIPS: How did you end up with $92,000 in attorney's fees?

LAWYER: There is evidence on that. I'm the guy that tried the Hipp(?) case and the Dowd(?) case, as you may recall. And that's the one where the Austin CA I think very wisely said, we're not going to try these jurisdictional issues along with the value case anymore because that's wasteful and that's silly. If you're going to have a challenge for jurisdiction, let's have it up front, let's have it soon, so the parties don't have to spend a lot of money getting ready for a value trial if jurisdiction is going to be defeated. The record shows that we tried hard, even though it's their burden to come forward at trial, we tried hard to get this thing tried, and they didn't want to come to a jurisdictional trial. We finally got it tried on the 4th setting, and we set it every time. It's not like we were dragging our feet and cranking the crank and run up the attorneys' fees. We just really didn't have no choice but to prepare all value cases and jurisdictional cases because the case had gone on so long. It was reaching the point where it was close to the limit even for the jury merits of the administrative rules for how soon cases should be disposed of. It was 14 months old when we finally got the jurisdictional tried.

HECHT: You said earlier that it sounded to you the case might be moot. You're not giving up the $94,000 in attorney's fees?

LAWYER: I don't think that my clients should have to give up the $94,000 on attorney's fees.

HECHT: But I mean that's still at stake?

LAWYER: Yes. And I meant no disrespect by saying that the case has been moot and it's outside the record and doesn't belong in here.

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REBUTTAL

LAWYER: Bristol makes a distinction between witness lists and naming persons with

knowledge of relevant facts. The fact of the matter is, they never asked us for a witness list. All they asked us for was to name persons with knowledge of relevant facts. And we did inadvertently, and we said this at the hearing, that we forgot to name Ms. Kelley. This was a person that they knew about that. They knew about it. They named her themselves. They knew about it because her name was on the service of citation. They knew about it because we turned over that document in discovery.

O'NEILL: But isn't there a law that says you can't just cross-designate someone else's list of people with relevant facts and say, well we're going to file our own and supplement whatever they've listed. The law is clear, you can't do that. If you want to call somebody you have to list them don't you?

LAWYER: Generally it's important that you list your own witnesses. But the question is, whether we're entitled to the relief under 193.6. And there are actual cases decided by the CA where they have held that there is no unfair surprise or unfair prejudice in the particular situation where the opposing party actually listed the witness. And so while we're not advocating this as a regular practice...

BAKER: What cases are those?

LAWYER: Rutledge v. Stainer(?). A couple of days ago, I filed a short supplemental letter that listed these cases. They are very new cases out of three CA's: Elliott v. Elliott, and the Best Industrial Uniform Supply Co.

I would also point out that contrary to the assertion made by Bristol's counsel, there were no cases before Baird(?) and Rotello(?) saying that the return on citation in a condemnation case was hearsay.

The Koonce(?) case says that the state cannot rely on _____ citations in the judgement. That there actually has to be some proof. But it does not say that the proof can't be a valid return of service. It simply says you can't just put it in the award that the person was in fact actually served.

ENOCH: Actually isn't that a fundamental principal of if the judgment recites that there was service, then that establishes there was service?

LAWYER: I think that in a regular lawsuit, say if it comes up in an attempt to reverse a default judgment, the court has to actually look to the record and determine that there's a valid return of service, that just the statement in the judgment itself isn't sufficient. And I think that's something similar to what the court was doing in the City of Houston v. Koonce case. But there are a long line of cases and they are all cited in our briefs specifically saying that the way you prove up all of these procedural steps is to actually introduce into evidence all of these documents, including the service of notice and the return. And Baird and Rotello were contrary to those cases. And this court could

not have even reviewed the Baird and Rotello cases, because they were appeals from the denial of a temporary injunction. So this court had no jurisdiction to consider those cases and determine whether the law in those cases was correct. And that's why one of them is a no writ, and the other one was writ dismissed for lack of jurisdiction.

It's also important to note that there has in fact been absolutely no evidence introduced in this case that Mr. Kline did not receive service. What Mr. McClish is referring to as evidence that he did not remember is simply allegations made by Mr. McClish during the hearing. And these are not actual evidence. There is absolutely no evidence in this record.

O'NEILL: What's wrong with the construct they proposed if all you have to do is send request for admissions and then that would either take care of the problem or alert you that you need to be there with someone with evidence of notice?

LAWYER: If you look at the facts of this case presumably any landowner could allege that they didn't remember and, therefore, put us to the burden of providing someone to provide live testimony.

BAKER: Your argument assumes or has the premise that a plea to the jurisdiction for failure to properly serve notice is an ordinary and regular thing that appears at every condemnation suit. Is that correct?

LAWYER: It is oftentimes we get very general pleas to the jurisdiction on all bases. Because I think that they take the position that because we have some burden that they can put us to the proof on everything.

BAKER: That's not entirely unusual in our jurisprudence system is it?

LAWYER: No, it is not.

HANKINSON: You think that if they participate in the administrative proceeding that they can still come forward in the judicial proceeding and say that the statutory prerequisite of notice was not met, and, therefore, there could be a commissioner's rule without jurisdiction to proceed?

LAWYER: Yes, I believe Bristol cited some case law to that effect in his brief.