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Supreme Court of Texas.
PR Investments and Specialty Retailers, Inc., Petitioners,
v.
The State of Texas, Respondent.
No. 04-0431.

March 21, 2007

Appearances:

H. Dixon Montague, Vinson & Elkins, LLP, Houston, TX, for PR Investments.
W. Allyn Hoaglund, Hoaglund Law Firm, Houston, TX, for Specialty Retailers, Inc.
Danica Lynn Milios, Office of the Attorney General, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Texas Supreme Court Justices, en banc.

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear the argument in 04-0431, PR Investments and Specialty Retailers, Inc. versus The State of Texas.

THE COURT MARSHAL: May it please the Court, Mr. Dixon Montague would present arguments for the petitioner. The petitioner is to reserve five minutes for rebuttal.

ORAL ARGUMENT OF H. DIXON MONTAGUE ON BEHALF OF THE PETITIONER

MR. MONTAGUE: May it please the Court. It is vital that the errors of the Court of Appeals be corrected. If we are to have a fair and efficient condemnation process in the state. The Texas Department of Transportation's actions in this case implicate both the substantive and procedural rules of the condemnation laws in this state. The Texas Rules of Civil Procedure as well as the inherent power of a trial court to rule its court fairly and efficiently and in accordance with the law. The condemnation case that is involved here is what we, in the condemnation practice, at least referred to as a partial taking case. The property that is involved had a multi-story office complex and

distribution facility on it that was being leased and to the front part of it was reserved for retail commercial development. The State of Texas ...

JUSTICE MEDINA: Mr. Montague, as, as I understand these facts, there were some negotiations going on, on which plan was going to be used. And from my reading, it appears that, perhaps, a tenant wasn't informed of the final plan. And that, that issue concerns me because as I read this work, it seems to me that that would be, I guess into the sense, some type of trial by ambush. And because I didn't have notice as, as I, as I read it, they didn't have a notice of this proceeding or the final proceeding.

MR. MONTAGUE: Justice Medina, there was a tenant involved. The tenant was leasing the multi-story office complex and distribution facility. An agreement was made with the tenant as well as with PRI prior to the special commissioner's hearing in this case that the state would construct its facility in accordance with a specified plan that would provide acceleration and deceleration lanes into the property to provide safe access. And that without it, the tenant told the state as did PRI, that the tenant would leave the property and as a result, it would cause the PRI in excess of \$5 million in damages. The state looking at the safety concerns that both PRI and Specialty Retailers had did its engineering design work and concluded that they were justified and requesting the acceleration and deceleration lanes changed its plan in order to incorporate those acceleration and deceleration lanes into its plans so that the property could have safe access in and out. As a result of that, Specialty Retailers was induced not to participate in the condemnation process and did not participate at the special commissioner's hearing with the exception of calling PRI thereafter to confirm that in fact, the state did represent in that administrative hearing, that it was going to construct its project in accordance with the plan that the state represented the Specialty Retailers, that it was going to do with acceleration and deceleration lanes. At this, hearing the state's word to this ...

JUSTICE BRISTER: Could have all have been fixed with a short continuance, couldn't it?

MR. MONTAGUE: No, sir. It could not.

JUSTICE BRISTER: Why not?

MR. MONTAGUE: Article I, Section 17 is at the very heart of this case. Article I, Section 17 provides that 'in determining the compensation to which a property owner is entitled, there is a special commissioner's process that is established.' And the reason is because the constitution in Article I, Section 17 provides that before a condemning authority may take possession of one's property, the property owner must first be paid adequate compensation. The legislature has established the special commissioner's process in order to determine a compensation that shall first be paid. Those special commissioners listen to the evidence of the condemning authority as to what it plans to do with the use of the property. If in this case, the state comes in and represents that it plans to use the property in a specified way.

CHIEF JUSTICE JEFFERSON: Well, why shouldn't we apply a certain level of instruction to the phrase intended use. I mean, the state intended to use the condemned property to build a controlled access highway and that was true when the condemnation proceedings were instituted and it was true at the time of trial. So why didn't they satisfy both Article I, Section 17 in the condemnation procedures here?

MR. MONTAGUE: It could have, your Honor, it, it certainly could

have, in connection with the case, it could have come to the Special Commissioners Hearing and stood simply on its pleadings stated that we are taking this property for highway purposes, a generic statement. If that were the case as this Supreme Court has said in the *Gleghorn versus City of Wichita Falls* (545 S.W.2d 446) case and *Creighton versus State* (366 S.W.2d 840) and in all of those cases that you see Justice Magee citing in *City of Pearland versus Alexander* (483 S.W.2d 244). If the state had done that, then the property owner was entitled to put on evidence at that Special Commissioner's Hearing of the fullest extent to which the state could use the property condemned in order to determine the damages at the special commissioners' hearing that the condemnor would be obligated to first pay as a condition for taking that property and using it. However, in this instance, the condemning authority chose not to stand on its generic pleading, giving the property owner the opportunity to come in and put on evidence of the fullest extent to which the state could put the property. But instead, chose to, to limit the use to which it was going to put its property, specifically defining that use to a plan with acceleration and deceleration lanes in order to keep down the amount of compensation to which both Specialty Retailers and PRI were entitled. So much so that Specialty Retailers decided not even to participate in the process because it was satisfied.

JUSTICE BRISTER: But, but, I mean, it is a trial *de novo* in the, in the county court.

MR. MONTAGUE: It is a problem.

JUSTICE BRISTER: Yeah, with the short continuance, we could've considered all of that. Yes, we would have skipped part, I'm, I'm just concerned. We're, we're trying, we're trying to avoid declaring lots of things to jurisdiction. And you're just getting, you know, then people, you know, if this jurisdictional, then 30 years from now or hundred years from now, Oops, sorry, there was no jurisdiction, pay no attention to that judge. With all the problems that that has with it. And I'm, I'm just concerned with your argument that you can't, if you, what if you didn't tell the special commissioners, it's jurisdictional, I mean, there's a lot of things that might change in how you're going to use the property you're going to take. Is every one of those going to be jurisdictional?

MR. MONTAGUE: No, your Honor. With, with respect, this is not a matter of subject-matter jurisdiction. It has absolutely nothing whatsoever to do with subject-matter jurisdiction. Once the case is appealed from the special commissioners' award to the trial court, the trial court has subject-matter jurisdiction of that cause. It has subject-matter jurisdiction of not only the compensation dispute from which there has been an appeal. But also, every other issue that there might be in the condemnation process including good faith negotiations, including other issues dealing with the right to take. Isn't that matters, of a matter jurisdiction that's subject to collateral attacks? Because those types of jurisdictional elements that the trial court can consider maybe waived by either the property owner or the condemning authority depending on what the circumstances are.

CHIEF JUSTICE JEFFERSON: Well, I'm confused, didn't the trial court say that it was divested to the jurisdiction by the, the state's change from this Sparks plan to the Corder plan?

MR. MONTAGUE: In the context that it did not have jurisdiction to award the state title to the property that it was claiming, that it didn't have jurisdiction to sign a judgment divesting title from the property owner, investing it in the condemning authority. That's the

context in which the jurisdictional state ...

JUSTICE BRISTER: What kind of jurisdiction is that?

MR. MONTAGUE: The power to proceed in the condemnation case.

JUSTICE O'NEILL: Well, as, as, as jurisdiction of an appellate nature, I mean, is that, they were saying that we don't have a necessary prerequisite to be able to render a judgment.

MR. MONTAGUE: That ...

JUSTICE O'NEILL: - it's, it's, it's outside of our appellate function, it would be as though we sent something back for further review in the Court of Appeals that we hadn't resolved yet. That we might, well, that's not a good example. But, but something goes back to the trial court to resolve before its ripe to come up for review.

MR. MONTAGUE: That is right. In the context of the compensation equation and, and here's what's most important and this maybe very helpful to understand. As getting back to Article I, Section 17, if there is the obligation for the condemning authority to first pay the property owner, just compensation as a condition to occupying and using the property owner's property. And the legislature has established the special commissioners' process in order to do that. And then you have a condemning authority who comes to that process and puts on evidence, specific plans in order to try to keep that compensation down. And then subsequent thereto changes those plans after the special commissioners' process is over, increasing those damages to the property owner by millions of dollars. Then that property owner is not adequately compensated for his property as initially before possession is taken.

JUSTICE O'NEILL: Well, that was going to be my question. What part does the commissioners' award played in the trial *de novo*. Can the trial court abate and send it back to the special commissioners in light of the changed circumstances? Can the trial court take the, the different factors into account and change the commissioners' award? Or is the trial court bound to only affirm the dollar amount or not affirm the dollar amount? What was the trial court's authority, vis-a-vis, the damage award by the commissioners.

MR. MONTAGUE: It is a trial *de novo* on the compensation award made by the special commissioners. However, what the Supreme Court has said in *State versus Nelson* (334 S.W.2d 788) as well as the number of other cases, that if the compensation facts are substantially and materially changed from those presented to the special commissioners, then the Court does not have authority to this title in the condemning authority for the property that the condemning authority seeks. And the reason is very simple and I could use this example in this case based on the plan that the condemning authority posted it to-- for the use of the property, the damages, awarded by the special commissioners were \$200,000. However, if the state had pursued the plan that was now going to pursue at trial, pursuing at trial, if it presented that at the special commissioners' proceeding, the property owner would have had in excess of \$5,000,000 worth of damages. So here is the property owner without that adequate compensation that the constitution says shall first be paid as a condition ...

JUSTICE BRISTER: Of course, that's always true. That's true in every condemnation case where the county court judgment is higher than the special commissioners judge.

MR. MONTAGUE: But the only distinction is, as this Supreme Court has said, that those compensation facts that are presented at the county court level must be the same compensation facts presented at the special commissioners' hearing.

JUSTICE: Right. So your argument is not based on, 'You hadn't paid

me enough. You took it without paying me and you took it paying me a little now and more later.' Your argument is just if the facts are different, you can't do it.

MR. MONTAGUE: That's correct. That's exactly right. If they ...

JUSTICE BRISTER: Now, my problem is, isn't that going to always be true? Don't people, I mean, you know, state, governments decide they going to do toll roads and then not do toll roads and then put it on two-year moratorium and all this stuff. Well, well how are we ever going to decide these cases?

JUSTICE MEDINA: And then doesn't the statute provide for a change of plans in these condemnation proceedings.

MR. MONTAGUE: Well, it, it's as simple as this, is that if the condemning authority wants to condemn the property, then it must go to the special commissioners' hearing with the plans that it intends to put the property to so that the special commissioners can-- determine the compensation to which the property owner is entitled. So that amount can first be paid to the property owners at condition to possession.

CHIEF JUSTICE JEFFERSON: You know, it almost sounds to me like your argument really, should be made to the legislature. That the statute, if there, if there is abuse that's occasioned by the, sort of, bait and switch tactics that you allege here. Then, legislature can conduct hearings and then safeguard property owners if the condemning authority, you have it shown across to cross the state, changing their use dramatically from what they presented at the, to the special commissioners.

MR. MONTAGUE: This Court has, has put in that safeguard.

CHIEF JUSTICE JEFFERSON: Well, I'm, I'm, what I'm looking at right now is the statute. The statute says, the state has to describe the land, it has to state the purpose, it has to state the property owner's name and an inability to agree. And it seems to me that they took down each one of those elements in, in presenting this, this condemnation proceeding. So what, where does the statute provide the levels specificity that you're asking for here.

MR. MONTAGUE: You're looking at 21.012. What you need to be looking at is 21.041 and 21.042. And the reason is that not only are you looking at the particular statute, you're looking at the evidence that's put before the special commissioners in order to determine compensation regarding the use to which the property is put. It's 21.041 and 042 that its material to this case.

JUSTICE WAINWRIGHT: So what, Counsel, assuming all the parties are operating in good faith. Your client's believe, there's an agreement on the plan to be pursued, the Sparks Plan, not the Corder plan as I understand it. And there are legitimate questions that the state has. Perhaps based upon the objections made to the commissioners' findings. So some changes were made not to the land as to be condemned but some of the surrounding effects like the lane, the signage, the signals, that kind of thing. Then what should have happened in this case? Is the state legitimately believes there's heightened safety concerns about the Sparks plan? And that there should be changes made?

MR. MONTAGUE: The state is free to make those changes. The consequence is, if those changes are substantial and material, then the process should go back to the special commissioners and the special commissioners should decide compensation based on that new plan so that the property owner maybe adequately compensated during the condemnation process. For example, here ...

JUSTICE WAINWRIGHT: So the trial judge's judgment should have

said, dismissed without prejudice but not based on jurisdiction.

MR. MONTAGUE: It, it was, it did say dismissed without prejudice and with respect to the jurisdiction to which you were speaking, it simply said it did not have authority to vest title in the state for the property that was being acquired. That's what it said here. And, and it did so rightfully because if the condemning authorities allowed to put on evidence of one plan that keeps the damages down, for example, at \$200,000 and switches that, there's a bait and switch after the special commissioners' hearing and causes \$5 million in damages. Then here's the property owner during the whole judicial process having \$5 million worth of damages to his property but not having the compensation in order to try to react to it during the whole process.

JUSTICE WAINWRIGHT: So are you saying that the trial court's judgment was accurate as being misconstrued on appeal? That it did not really base the dismissal on jurisdiction?

MR. MONTAGUE: It was not a matter of subject-matter jurisdiction. And the-- Court of Appeals did or in that regard. It has nothing whatsoever to do with subject-matter jurisdiction.

CHIEF JUSTICE JEFFERSON: Any other questions?

JUSTICE MEDINA: on rebuttal I'm going to ask you about Justice Anderson's, opinion, dissent in that.

MR. MONTAGUE: Well, you may want to ask me now because of Mr. Hoaglund [inaudible] for rebuttal.

JUSTICE MEDINA: It's okay.

CHIEF JUSTICE JEFFERSON: Well, take that half on rebuttal with Mr. Hoaglund. The Court is now ready to hear argument from the respondent.

THE COURT MARSHAL: May it please the Court, Ms. Danica Milios will present argument for the respondent.

ORAL ARGUMENT OF DANICA LYNN MILIOS ON BEHALF OF THE RESPONDENT

MS. MILIOS: May it please the Court. This case calls upon the Court to decide whether it really meant what it said in Human Act when it held that the elements of the condemnation petition are not jurisdictional. If they ...

JUSTICE O'NEILL: I understand, everybody concedes that there is subject-matter jurisdiction. There were some confusion in the County Court of Law. But as I read the briefs and, and I didn't quite get that from the Court of Appeal's opinion. But what I get from the briefs is , we're not really talking about subject-matter jurisdiction.

MS. MILIOS: That might be what the landowners are calling it now, Justice O'Neill, but the arguments are the same. The landowners' argument is that there is something special about the special commissioners' hearing. That the special commissioners don't consider it and the landowner is damaged, the landowner is prejudiced. But the end game here is not the special commissioners' hearing. The end game is just and adequate compensation for the landowner. The special ...

JUSTICE O'NEILL: It, it strikes me that, it's how much importance he put in the special commissioners' proceedings. Because if we follow your position all the way through, then that just becomes a *pro forma* didn't really matter what you do before the special commissioners because you can start all over, do whatever you want to when you get to the trial *de novo*.

MS. MILIOS: That's really not right. Both parties have, have a

good incentive to put everything that they know before the special commissioners. The parties, including the state and any condemning authority, like a pipeline or a railway, are going to behave rationally. If they know what they're going to do and in good faith, that's what they're going to build, and like Mr. Montague represents, if that, if putting that plan on can help limit the damages to the state or to the condemning authority, then they will do that and ...

JUSTICE BRISTER: Let, let me follow through and then what happens. Somebody, you, you've got a shopping center and the state wants to take it, build frontage row down it and there's going to be plenty access, that's fine. And so you have special commissioners. They give you the money you're satisfied with, the money for the land. You take it and that's the end of it. And then the state, when they build a highway, decides they want wall on the frontage row. So that this, they have, you're absolutely cannot get to it because they build this big wall. Now, what do I do to get my money for diminished access now that the condemnation proceeding is all over.

MS. MILIOS: We'll file an inverse condemnation claim against the state. And you ...

JUSTICE BRISTER: And I haven't waived anything, it's all taken, I can do all that [inaudible]. They've changed the plans and so and do I, do I go back through the special commissioners?

MS. MILIOS: No, you file an inverse condemnation claim directly against the state. There's nothing about that changed, there's nothing in the statute that requires the state to come to the special commissioners with the plan, the fact that the state has changes the plan. It doesn't, it doesn't prejudice the landowner at all.

JUSTICE MEDINA: Well, does it, does it causes more time and expense and waste of judicial resources and then you put perhaps a landowner the disadvantage from rightfully getting what he or she should have been entitled to in the first place, had the plan been revealed to them as it was also going to be laid out?

MS. MILIOS: Let, let me answer those questions not in, not in the order that you ask them, Justice Medina. If the landowner and the condemning authority agree with the price that the special commissioners put on it and the condemning authority deposits that money to registry of the Court and the landowner withdraws the money, the case is over. And then if the state changes the plan wherein Justice Brister's hypothetical, and the landowner immediately has a lawsuit for inverse condemnation. But to, to answer really was underlying your questions. Condemnors are going to behave rationally. They are not going to bait and switch because that will setup condemnors in the situation of, potentially having to pay twice.

JUSTICE MEDINA: Well, that what it looks like happened here quite frankly, as I read these briefs that you had some, that you some party rely on what the state was presenting to them and then for whatever reason, decided not to participate in the final resolution of this matter.

MS. MILIOS: Well, no, no, Specialty Retailers didn't participate in the special commissioners' hearing. No landowner is required to participate in the special commissioners' hearing. And even though they don't participate, they can still file objections and have they day in Court. Now, Specialty Retailers was, was there at the trial court and found out about the change, a couple of days after PR Investments found out about the change. So the, the amount of time between the two-landowner parties, the tenant and the landowner is not substantial at all. The timing of the change, you're right, is not ideal. But you

know, we have to look at this whole thing in the spectrum. Prior to the ...

JUSTICE HECHT: Let me ask you though, I'm not sure about your argument that the condemnor might have to pay twice. Why? It's like to me like in the inverse condemnation case, the condemnor claimed a credit for whatever they'd paid so far.

MS. MILIOS: Well, and I think that's possible. And I'm not, I don't, I ...

JUSTICE HECHT: Is it possible, wouldn't it always happen?

MS. MILIOS: It would depend on what the damages were. Certainly if the landowner ...

JUSTICE HECHT: You can't, surely, the Court is not, I'll make you pay twice for the same thing.

MS. MILIOS: What I'm saying is there are situations where, if the landowners are right, that condemning authorities are going to lie behind the lot and try to limit the damages they pay by putting on evidence of the, the least invasive plan possible to limit the damages now in the trial court. Tricked the landowner into taking that amount of money. The condemning authority is going to pay for that, all right?

JUSTICE HECHT: But how much were they going to pay? More than they would have had to pay anyway? Because the landowner now is being put out. They've got to file two cases instead, they've got to participate in two cases instead of one.

MS. MILIOS: Right, and, and the waste of time for judicial resources and as well as the, the condemning authority's resources militate against the condemning authority doing that in the first place.

JUSTICE HECHT: Well, but I, if I were nefarious condemning authority, not the state, of course. And, and I just wanted to run the other guy out. I'd say, 'Well, how long could I keep it up? I mean, we're here forever but at some point he's going to say, 'Well, I give up.'

MS. MILIOS: You mean, could the condemning authority continue to change the plan, continue to change the plan.

JUSTICE HECHT: Yeah.

MS. MILIOS: Certainly, the trial court has it within its discretion at some point. I mean, if, if we're going to spin your hypothetical out Justice Hecht and a trial court could probably find that the condemning authority was behaving in an abusive manner, that the litigation tactics were abusive. That should result in the trial court saying, 'You can't change the plan anymore. You have to go to trial based on what you're going to do ...

JUSTICE HECHT: Let me ask you one question.

MS. MILIOS: - or what you state you want to do."

JUSTICE HECHT: If, if you came in early on and this was totally in good faith, and no question about that and you said, 'Well, yes, you know, this is the evidence we've put on before the commissioner.' But we've been looking at this, and we need to change this. And pretty much everybody says, well, that's right. But that does rather significantly change the obvious value of what's been lost. At that point, does the County Court have any interim authority to say, 'Well, I'll let you change course here, but you got to put up another amount of money for the landowner to withdraw or something to'-- is there any interim authority to compensate the landowner for this interim taking before a final judgment?

MS. MILIOS: No, no. The only, the only arguable window that the Court could certainly leave open would be discovery sanctions if the

State with it was behaving in abusive manner. But in your hypothetical, no, that's not the case. But remember if, if, if the party has objected to the, to the landowner's right to take-- pardon me, I've got my parties all backwards-- if the landowner has objected to the condemner's right to take, the, the condemner's not going to withdraw the money from the registry of the Court because we're going to be contesting the value. And so the, the landowner's not getting compensated anyway. It's not like the landowner takes that money and runs off and now got some money that it can work with. The, the endgame here is just compensation for the landowner. The State, the State from the beginning of the process to the end of the process can change what the road is.

JUSTICE JOHNSON: Counsel, let me-- the, the Court of Appeals Judge-- the conclusion is that the trial court erroneously dismissed the State's condemnation, condemnation action and awarded excess of sanctions. So they, they said that they reversed it and remanded it for further proceedings, now, further proceedings including not limited to the trial court's consideration of what monetary sanctions should be assessed against the State in regard to the way this is conducted. Does the State have any objection to that ruling of the Court of Appeals?

MS. MILIOS: Well, we haven't raised that as an issue before the Court-- but for the Court, of course. But we, we do disagree that just changing the, the road plan could ever, by itself could ever be abuse of behavior. The State has a duty.

JUSTICE JOHNSON: Okay, but that, but that would be for the trial court to -

MS. MILIOS: Yes.

JUSTICE JOHNSON: - this-- under this, under this judgment, you go back, and the trial court is going to look at it. Would one of those options in the state's view be that the trial court could have abate the proceeding and remand for further proceedings before the commissioners?

MS. MILIOS: The parties I, I really think agree that there's no way to go back to this particular special commissioners. The, the, the group has been disbanded. I suppose the trial court could find the case to a new set of special commissioners. But then we're starting over again with a whole new process. Again, we're introducing more ways into the system that the Court said in *Hubenak* (1415 S.W. 3d 172) was unnecessary when the whole purpose of the trial *de novo* is to give the landowner the opportunity to demonstrate its, its damages.

JUSTICE JOHNSON: But if we stay with this judgment of the Court of Appeals, then we leave it to the trial court to decide what to do instead of mandating the trial court just dismissed and we start all over. We, we leave it to the trial court's judgment.

MS. MILIOS: The, the amount of money that the State must pay to PR Investments if any would be within the trial court's discretion. If the Court stays with the Court of Appeals' opinion, the, the, the case goes back to the trial court for the condemnation trial. And at that point, PR Investments and Specialty Retailers will be able to put on their evidence of what they say the impact on their land is going to be because of the State's change back to the original plan. And let me point out that it's not the case that the landowners are having confronted by the State with a completely new and different plan that they had never heard of. The plan came, let's say, came to the proceedings with plan A. I can't remember the names that the Court's put on the, the cases. I go with plan A and plan B. It came to the proceedings with plan A. It changed plan B on PR Investments and

Specialty Retailers' request. And then after, it's determined that in, in actuality that was not the best road, the safest and the most cost effective road for the State to build and those are perfectly legitimate reasons for the State to decide change the road plan.

CHIEF JUSTICE JEFFERSON: Can, can I ask you what is 21.0195(c) mean when it says, 'If the condemning authority fail to bring the proceedings properly.'

MS. MILIOS: I think that has to refer back to 21.012. If the condemning authority fails to bring a proceeding properly, it has to fail to file its petition properly. And we know from *Hubenak* that those elements are not jurisdictional. So what we-- under *Hubenak*, if a condemning authority files its petition, it fails to comply with one of those elements, the trial court abates the proceedings, gives the condemning authority the opportunity to cure. If the condemning authority does not cure it, then we know from *Hubenak*, dismissal is proper. If that happens, 21 ...

JUSTICE O'NEILL: *Hubenak* was a different matter. I mean, *Hubenak* didn't involve the facts that went to the amount of compensation. It was more of a procedural hurdle that, that didn't go through the special commissioners.

MS. MILIOS: Well, the, the good faith offer of course would be something that is going to be before the special commissioners. I mean

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JUSTICE O'NEILL: Well ...

MS. MILIOS: - the special commissioners are going to consider what both sides view that ...

JUSTICE O'NEILL: It, it's an element, but it's not something that commissioners use as a fact to base their compensation award on. It's a different, it's a different element -

MS. MILIOS: Well -

JUSTICE O'NEILL: - entirely.

MS. MILIOS: - I think the special commissioners would at, at least consider what the State considered to be the value of the property in coming to its determination of the value of the property that is one of the elements that the special commissioners considered. And, again, we have to remember that the special commissioners' hearing is not recorded. It's not reviewed by the trial court. Justice O'Neill, you asked what does the trial court do, does it, does it review for substantial evidence that efficiency could it affirm the decision of the special commissioners. No, to all of that, the special commissioners' award isn't even admissible in the trial court.

JUSTICE WAINRIGHT: Then what are, if any from the State's position, the binding effects of the special commissioners' decisions on the trial *de novo*? What limitations are -

MS. MILIOS: None.

JUSTICE WAINRIGHT: - created?

MS. MILIOS: There are no limitations. The parties are not limited in what evidence they put on before that. You'd ask a question?

JUSTICE WAINRIGHT: There's some case law, some language and some of our opinions. It says there are some limitations that the *de novo* trial is an appeal. And the language says that, that, that inherently creates some limitations.

MS. MILIOS: Well, if you're referring to *State versus Nelson*, now, okay, I, I with a little pass, little pass where I should have-- yes, the trial court cannot consider additional property. That was not the subject of the condemnation proceedings before the special commissioners. That is a real and substantial limitation on the trial

court. Thus the trial court cannot consider parties that have, have not been made a party to the proceeding by the filing of the petition and, and then going to the special commissioner. But beyond that ...

JUSTICE WAINRIGHT: Those are the only two. (This part includes part of the previous comments from Ms. Milios)

MS. MILIOS: Those are the only two. What the Court said in *State versus Nelson* that the, the appellate-- the trial court's jurisdiction is appellate as opposed to original of the current does not bring with it and import into the eminent domain trial court's position everything we know about the relationship between trial courts and appellate courts. We've discussed why the special commissioner does not like a trial court, no record, you don't have to be there, no rules of procedure, there's no, there's no legal findings being made there. Let's talk about the trial court in an eminent domain proceeding. It doesn't review. I'm sorry. That's right. It doesn't review. It, it determines anew. It has all of the evidence come in and value of the property because that's the point. The Court couldn't ...

JUSTICE HECHT: And-- let, let me ask you though if-- do you think it's possible for a condemning authority to change course substantially during the proceeding to the prejudice of the landowner.

MS. MILIOS: Change the road plan?

JUSTICE HECHT: Change the, the highway plan, the construction plan, whatever there is. I mean, is it possible that in this, from your perspective, that in this process, a, a, a change would be so substantial that there would be a prejudice to the landowner in the process?

MS. MILIOS: There, there wouldn't be because the landowner will always be able to put on whatever evidence it needs to in the trial court to demonstrate the harm.

JUSTICE HECHT: Well, your view is it, it can't be. The landowner cannot be prejudiced in this situation.

MS. MILIOS: The only way the lender that could have been prejudiced in this situation is if the trial court wouldn't allow a continuance allow the continuance and would have required the landowners to go to trial based on the state's late change in the plan without giving them the opportunity to view that.

JUSTICE BRISTER: Well, if the-- but if the trial court had granted continuances always calls money. Continuances usually are conditioned on paying the fees of whoever went at fault. But that-- I don't see how under 21.0195, the trial court could do that. Is there some way because

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MS. MILIOS: Well ...

JUSTICE BRISTER: - you wouldn't be dismissing it?

MS. MILIOS: No.

JUSTICE BRISTER: You just continue it.

MS. MILIOS: No. The trial court couldn't dismiss-- I think the only the trial court could award some fees for that-- for the inconvenience of having to go back and redo things would be under its inherent power for discovery abuse. But again, there would have to be some ...

JUSTICE BRISTER: And the, and the State won't object to that if the trial court does that.

MS. MILIOS: I guess I can't make that representation, Justice Brister. We don't think changing the plan could ever be abusive. And in this case it wasn't abusive.

JUSTICE BRISTER: Well, obviously, I mean, that's, well, that's the problem here. If you can't dismiss it, then the State can do this, and

they have to pay Mr. Montague's not insubstantial fees to go through all these again. And you're going to say that's just tough.

MS. MILIOS: Well -

JUSTICE BRISTER: And that just didn't seem quite fair, does it?

MS. MILIOS: Well, you know, it's never fair for defendants to have to pay their attorney's fees because they've been sued by plaintiffs. But we as a society have decided that we're not going to compensate you for your attorney's fees unless you fall within the particular confines of a statute. In this case, that's 21.0195, and it requires dismissal.

JUSTICE BRISTER: But let me ask you though. To take a hard case, if the condemning authority said it was going to build a highway and-- but allow access and that's the plan so that damages are really very small and then at-- in the County Court, they changed the plan and said, 'No, we're going to build it, but we're going to deny on using the same property, but now, we're going to deny access.' So now the damages are potentially much greater, you-- and your view that there's no prejudice to the landowner in that change.

MS. MILIOS: There's no prejudice if the legislature has decided to compensate Justice Hecht.

JUSTICE HECHT: But I'm just trying to get it whether there's a, a prejudice at all.

CHIEF JUSTICE JEFFERSON: But you are also saying there's a remedy in that situation.

MS. MILIOS: Yes, the landowner can file their inverse condemnation claim. But I take you to, to mean that there is cost involved in that.

JUSTICE: Yes.

MS. MILIOS: Absolutely. There are-- you know, it used to be the case that the State could just take property, and the landowner had to file a suit in order to get compensation. Well, the legislature has put these Property Code provisions into place to create the structure. I would like to go back to your question, Justice Wainwright about the appellate jurisdiction of the trial court because you have-- think back. Let's go back all the way in 1958, two years before *Nelson*. In *Texas Power & Light versus Cole* (3065 S.W.2d 762), the Court acknowledged a situation where it condemned or changed, amended its petition to reduce the scope of its acquisition in the trial court. The Court approved that change. It said that condemning authority had the absolute right to do that. It acknowledged that ...

JUSTICE O'NEILL: But this isn't scope of the acquisition. This is, this is a redesign of the plan that affects the amount awarded.

MS. MILIOS: Yes. But the, but the scope of the acquisition was different from what the special commissioners were considering which is exactly what the landowner say in this case is the whole problem. And in fact, *Cole* is a tougher case, right, because that was the petition. This case is not even the petition. It's not over any place required in the, in the property code for the State to come forward with that.

JUSTICE O'NEILL: But would you agree that, that in the trial *de novo*, the, the rules that govern trials in general apply?

MS. MILIOS: Yes.

JUSTICE O'NEILL: And so if-- why don't we treat it just like a trial amendment that if somebody's going to try to amend their petition then they have to pay the other side whatever prejudice that amendment causes. You don't dispute that, that could be the case.

MS. MILIOS: I certainly think the Court could leave that as an option open. Yes, I do. But that, that remedy forecloses this dismissal notion. It, it also exposes what really is going on here. The landowners didn't want the continuance. They objected to-- the State

asked for the continuance. The trial court was going to give the landowners a continuance. The landowners objected to it. They wanted this case dismissed so they could get their attorney's fees because that's the only way they can get their attorney's fees in this case.

JUSTICE WAINWRIGHT: There's another layer on top of the statutes here, maybe not a layer supposedly consistent with what's going on with the litigation which is the Rules of Procedure. The Court had a docket control order, which govern the parties, which said amend by a certain date. It said discovery had to be supplemented by a certain date. The State did neither in a timely fashion. Why hasn't the trial court been within its authority to say you can't go to trial in the old plan because you did not comply with an order of the Court.

MS. MILIOS: Well, first, the Court would have been authorized to allow the amendment for good cause or still allow supplementation for good cause. We would argue that the, the, the State's engineers, they're over here working on the road, just trying to come up with the best road, not coming up with the road that they want to go forward with until the unfortunate time has passed. The discovery cutoff would be good cause. But I would agree with you that there, there could be circumstances where a trial court could say-- would be-- I, I would say very unwise and wasteful of judicial resources to require the State to go to trial on a, a plan that it does not intend to build, that everyone knows it's going to change and build a whole another plan and then setting up the inverse condemnation claim and a whole another lawsuit and the State's potentially having to pay for using two plans, right? It's going to be [inaudible] on a ...

JUSTICE WAINWRIGHT: Well, petitioners would frame the question I'm sure differently that the trial court was not necessarily requiring the State to go to trial on a plan it did not intend to build. But the trial court was going to preclude the statement going to trial on a plan that he didn't disclose, he was going back to in the timely fashion. Those are two different things.

MS. MILIOS: Yes, sir. And how would the trial-- the trial couldn't proceed.

JUSTICE WAINWRIGHT: The State knew in a timely fashion that it was not planning to build the Sparks Plan. It was going back to the Corder Plan.

MS. MILIOS: No, that is not the case at all. The, the, the Assistant Attorney General informed ...

JUSTICE WAINWRIGHT: According to the briefs -

MS. MILIOS: I'm sorry?

JUSTICE WAINWRIGHT: According to the briefs, before that November and December deadlines, the State was aware of its decision in which plan it was going to proceed on soon enough to have disclosed that within the deadline set in the docket control order.

MS. MILIOS: Well, my understanding was the State was making the decision during that time. It was reviewing the documents but that the final decision was not made until after the discovery cutoff. The background rule is, the background rule here is the State as the owner of the roads and of the of the [inaudible] are in-charge with the responsibility to protecting the driving public has to have the flexibility to change the roads.

JUSTICE WAINWRIGHT: What, what if-- let me assume that the State was aware of its decision to go back to the original plan before the discovery deadline, would your answer change?

MS. MILIOS: If the landowners could show that there was some abusive conduct on the part of the State and not disposing that ...

JUSTICE WAINWRIGHT: No, I'm, I'm limiting my question to compliance or noncompliance with the Court's order, the docket control order. Assume the State knew or had the facts to have determined prior to the discovery deadline, supplementation deadline that was going to go back to the first plan but didn't disclose it before the deadline, would your answer change?

MS. MILIOS: I'm, I'm going to have to say no, Justice Wainwright. There has to be the ability for the State to change the road plans. And there has to be ...

JUSTICE WAINWRIGHT: So the State does not have to, to comply with the trial court's order?

MS. MILIOS: Absolutely not. But your hypothetical ...

JUSTICE WAINWRIGHT: What are you saying?

MS. MILIOS: Well, if, if your hypothetical is including that the State is intentionally not telling the landowner that it's going to change the plans with the-- for abusive reasons, then there is, then there-- the trial court has authority to control that. But ...

JUSTICE WAINWRIGHT: But not ascribing a motive. It may have been negligence. I don't know. But assume it didn't happen.

MS. MILIOS: Well, if there's negligence, if there is-- it applies-- it, it-- then there's no abuse of discovery conduct, and there is no reason to prevent the State from-- and, and all the parties from going to trial, having one trial on what's really going to happen when the, the remedy would be a continuance. So the landowner can get it stuffed together and go to trial on the right.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thanks for your time.

THE COURT MARSHAL: May it please the Court. Mr. Allyn Hoaglund will present the rebuttal for petitioners.

REBUTTAL ARGUMENT OF ALLYN HOAGLUND ON BEHALF OF PETITIONER

MR. HOAGLUND: May it please the Court. I'm here for Specialty Retailers. My name is Allyn Hoaglund. To address one of the issues concerning the State, the State announced already at the trial of this case and sought to go to trial on the new plan, the Corder Plan, that would materially prejudice Specialty Retailers and PRI. It was only after the trial court refused to allow them to go forward with that plan that they then moved for a continuance after we've been down there for a couple of days. The situation here was ...

JUSTICE: Why does an inverse condemnation cure all these?

MR. HOAGLUND: Well, the problem with the inverse condemnation is the *Parrat* (175 S.W.2d 243) rule. As I understand the *Parrat* rule, in the event that there was a, a--an opportunity to claim what your damages were in the eminent domain case, you are then precluded in a subsequent case to have the opportunity to make those claims. And so here, when you materially change in prejudice the landowner and in particular, like Specialty Retailers when you'd make promises back in 1998 in February of '98 before there ever was a special commissioners' hearing. Specialty Retailers felt like they were satisfied. They had reasonably safe access to their office complex and that they were, in effect, didn't need to proceed in the lawsuit anymore.

JUSTICE BRISTER: But the, but the question is: Isn't two, three, whatever month continuance and let's fight it all out now more

efficient than closing this down, pay several hundred thousand dollars in attorney's fees, whatever it is, start over at special commissioners and over a two-year process, do it all over again.

MR. HOAGLUND: Absolutely not. What should be done is what the trial court did here. It did not have appellate jurisdiction. It did not have the power to proceed because of the material change. The case should have been dismissed as it was with prejudice. And in the State, if they wanted to change their plan, would then have afforded instead of making representations to Specialty Retailers which they had, which they had agreed to not to pursue. They can start with a new condemnation action. And within 30 days, they could have through this.

JUSTICE BRISTER: I suppose-- So your answer is: 'Yes, we need to do it the more, the much more expensive and inefficient way because that's the way the statute requires it to be done.'

MR. HOAGLUND: Well -

JUSTICE BRISTER: No question that's-- that would be more inefficient to start all over and do it at two years again.

MR. HOAGLUND: I don't think it would be because in this instance what's happened is by the bait and switch that we argued from, from the State's perspective, Specialty Retailers didn't even go to the special commissioners' hearing as mandated by the legislature and didn't have an opportunity then to deal with the issue that we're dealing with here now -

JUSTICE O'NEILL: Well, let me ask you -

MR. HOAGLUND: - which is a, which is a material change.

JUSTICE O'NEILL: - what, what difference does that make if the special-- I think what I'm hearing and condemnation's not my area but I think what I'm hearing is the special commissioners' proceeding is really intended to, to see if, if the landowners will accept what the special commissioners award. And they don't have to go any further. And that, that's the amount that, that-- that's the purpose of the special commissioners' proceeding. Their decision is not admissible in the trial *de novo*. There'd be nothing to prevent the trial court from hearing evidence on the Sparks Plan and awarding a higher amount based on the Sparks Plan. So if that's the case, what, what appellate jurisdiction are we talking about other than just the original description of the property?

MR. HOAGLUND: Because as I understand the legislature's mandate, the whole purpose of this is one, for a quick take so the, so the State or the governmental authority can get possession of the property in a short period of time but then to comply to Article I, Section 17 of the Texas Constitution to be sure that there's just compensation that is paid into the registry of that Court through the special commissioners' hearing based upon what the State in this instance limited they're used to and limited their intended used to. And so from the perspective of, of what has happened is in this instance, Specialty Retailers never was afforded that opportunity as it relates to the special commissioners' hearing that it is mandated. And, and that's what should be done not a continuance where they're then deprived of that opportunity like in this instance. The State would have not occurred one nickel in attorney's fees or expenses in this case had the State not materially changed their plan and in this instance now because we're here before this Court. Some nine years later, they've incurred \$100,000 in cost if they never would have incurred but for the State's decision that were ...

CHIEF JUSTICE JEFFERSON: Counsel, hold on one second or ...

MR. HOAGLUND: I'm sorry, Justice O'Neill.

JUSTICE O'NEILL: Did, did the tenant seek to have that proceeding done that the tenant request that we go back and have special commissioners appointed so I can go through that process now on this different plan?

MR. HOAGLUND: Yes. What we did was we moved for a dismissal without prejudice so that they could start over again and go through the proper proceeding for bringing this, this action as opposed to what they tried to do with the bait and switch substantially materially affecting the landowners.

JUSTICE: So they asked to start over, but they didn't specifically request, 'Judge, send us down to the commissioners for the Sparks Plan.'

MR. HOAGLUND: Well, well, the commissioners that they already heard the Sparks Plan as the special commissioner.

JUSTICE O'NEILL: I mean the, the Corder Plan.

MR. HOAGLUND: The Corder Plan. The commissioners have been disbanded. There's no way to go back to the commissioners. That's why the procedure is that you have a dismissal under 21.0195 as it relates to when you do not properly bring the proceeding and then you start over again and go through the process that the legislature has set up and that the Article I section 17 of the Texas Constitution required. And in this instance, it's just a complete travesty and, and fundamental and unfair to what has happened to Specialty Retailers and PRI simply because the State decided, 'Well, we've done away with Specialty Retailers because they agreed to what we want to do. And now, let's concentrate on PRI and our litigation tactic because that's what the record reflects' because this was a purely a litigation tactic by the State in an effort to lower the damages which they otherwise would have to pay to the PRI. And what happened here is the young Attorney General didn't see the forest for the trees because what in effect happened by changing the plan brought in millions of dollars worth the damage because, because of the unreasonably unsafe access Specialty Retailers was going to-- is going to move if that's the case because they cannot put their employees to this kind of danger.

CHIEF JUSTICE JEFFERSON: Thank you. Thank you. Thank you, Counsel. Your -

MR. HOAGLUND: Thank you very much.

CHIEF JUSTICE JEFFERSON: - your time has expired and the cause is submitted to Court. We'll take a brief recess.

THE COURT MARSHAL: All rise.

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