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Supreme Court of Texas.
In re State of Texas.
No. 10-0235.

March 3, 2011.

Appearances:

Susan Desmarais Bonnen, for petitioner.

Stephen I. Adler of Barron & Adler, LLP, for respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the second matter today. It's number 10-0235 in re the State of Texas.

MARSHAL: May it please the Court, Miss Bonnen will present argument for the relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SUSAN DESMARAIS BONNEN ON BEHALF OF THE PETITIONER

ATTORNEY SUSAN DESMARAIS BONNEN: May it please the Court, this case raises the question of whether landowners may sever one condemnation case into multiple cases based on conveyances of their property after the filing of a notice of lis pendens and after the filing of suit. This Court should answer no to that question and direct the trial court to vacate the orders of severance because they were an abuse of digression and the state does not have an adequate remedy by appeal. In particular, there are three reasons why the orders constitute an abuse of digression. First, the doctrine of lis pendens prevents severance, second, the court.

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm sorry. I didn't hear the first.

ATTORNEY SUSAN DESMARAIS BONNEN: The doctrine of lis pendens prevents severance. Second, the court improperly split a single cause of action and third, the court improperly split interwoven issues. In addition, there are at least three reasons why the state does not have an adequate remedy by appeal in this matter. First, the state is going to lose its right to determine what property to condemn and possibly to obtain a valid judgment. Second, the state will lose the right to offer evidence of its own theory of the highest and best use and third, a huge amount of time and money will be wasted in trying cases that will ultimately be reversed.

JUSTICE EVA GUZMAN: How do you lose the right to offer evidence of your own theory of the highest and best use if there is simply a scenario where there is competing evidence on highest and best use as divided into separate commercial lots, whether or not they have been divided at the time?

ATTORNEY SUSAN DESMARAIS BONNEN: Well, we lose our right to present such evidence because the cases are divided into eight separate cases and each case will only involve one of the subdivided tracts and the part taken from that subdivided tract and so the state will not be able to present evidence that the highest and best use of the property was as a 39-acre tract and that based on the current market, there simply isn't a market for subdividing the property into eight tracts and having a market to sell those properties.

JUSTICE EVA GUZMAN: What would have happened if they had divided the 39 acres the day before you filed suit. You know they had been negotiating with you and if they did it the day before. What would the difference?

JUSTICE EVA GUZMAN: Well, Your Honor, they're always going to be landowners and landowners' attorneys that attempt to game the system and if they had done this the day before the state filed suit, then the state would not be able to prevent it. But what this Court can do is draw a bright line on the day that the suit is filed and on the day the lis pendens is filed, which the state, as a matter of policy, always does at the same time and in most instances, landowners don't necessarily react to the states, I guess, intents to take property until suit is actually filed. And if this Court draws this bright line, then they certainly will be able to prevent a lot of the multiplicity of suits that landowners are attempting as a new scheme, a way of getting money on condemnation cases and certainly--

JUSTICE EVA GUZMAN: Why isn't it good policy for this Court to clarify the law that landowners can present evidence of highest and best use whether or not at that time they've made the decision to subdivide their commercial property? Why isn't that good policy for Texas?

ATTORNEY SUSAN DESMARAIS BONNEN: Well, Your Honor, that, it's an open question as to whether landowners can present the theory that they want to present. Is there an exception in this instance where they have actually followed through albeit after suit and split the property? But the problem here is the way the whole condemnation process works. We have not had an opportunity yet for a trial de novo. This case has only been through a special commissioner's hearing where the parties present evidence before three laypersons. There is no right to object to evidence. There's no right to challenge peoples' methodologies and, in fact, the theories can change between now and the time that this case is actually tried. So, in effect, what the landowners are trying to do is they're having the tail wag the dog. They're putting these valuation issues in front of the whole de novo trial on valuation and saying that because we have a certain theory, we ought to be able to sever this case and limit what the state can do.

JUSTICE EVA GUZMAN: But you paid their neighbors a higher value because it was subdivided. So why couldn't they introduce evidence of what the value of their land would be?

ATTORNEY SUSAN DESMARAIS BONNEN: Well for a number of reasons. And first just with respect to the neighbors, the amounts that are paid in settlement for condemnation are not going to be admissible in the trial and the court. You shouldn't be deciding this case based on what somebody with a one-acre tract got for their land and just think about economies of scale. Certainly, a party may get more per square foot if they owned one

acre of land than if they own 39 acres of land and, personally, I'd rather own 39 acres.

JUSTICE EVA GUZMAN: But isn't it true that that's going to result in a truer valuation when you look at it that way?

JUSTICE EVA GUZMAN: No, not necessarily, Your Honor. And the fact of the matter is that the state of the law in Texas is that you can't value property that way. That is the, the state of Case vs. Willey. And in that case, this Court said that even if property has highest and best use as a residential or commercial subdivision, it cannot be valued based either or the value of lots in a hypothetical subdivision of that very property or based on the value of already subdivided lots. That is the current status of the law and the state is ready, willing and able to have a fight on that. We can fight about whether that law is correct. We can have a trial where the parties actually introduce evidence under the rules of evidence and the parties are allowed to have Daubert challenges, but what they're trying to do is to prevent the state from ever getting to that point and I just want to read for you, this is out of an article that was prepared by landowner's counsel and presented at a seminar and it's attached as Exhibit G to the state's brief on the merits and it's at the top of page G4. And I would note that I think the author inadvertently referred to condemnees as condemnors and vice versa and I'm going to read it the way that it was intended, but it doesn't affect the intent. In short, condemnees feel Wyndham would allow multiple economic units and condemnors believe Sharboneau would not allow more than one economic unit. Not many landowners want to be the test case when it is so easy to divide the frontage into multiple tracts and avoid the issue altogether.

JUSTICE DALE WAINWRIGHT: Counsel, let me clarify for my purposes and perhaps for the audience too what exactly happened here. There's a 185-acre tract of land. The state filed a petition to condemn and pay compensation for 39.6 acres. After the suit was filed, then the landowners filed, actually a member intervened and wanted to divide that 39-acre tract into several different tracts for purposes of valuation for what the state must pay under the constitution. You acknowledge the state has to pay something, the question is how much and your argument is that the respondent's intervention and trying to divide the tract into separate properties disadvantages, prejudices the state and is improper. What actually did respondents do in dividing that 39 acres into several other tracts? I understand there were different owners for some, was there an actual partition of the land legally?

ATTORNEY SUSAN DESMARAIS BONNEN: Yes it was. Well, it wasn't partitioned with a plat. It was partitioned just with deeds because each of the tracts was larger than 5 acres and apparently you can do that in the location in which the property is located. But it certainly doesn't mean that they might not, a landowner or some other landowner might not attempt to actually plat property and divide the property into many more multiple tracts. But the problem with what they have done and the fact that they did it after suit and the notice of lis pendens is filed is that under the doctrine of lis pendens, these conveyances are subservient to the state's right to acquire the 39-acre tract that it sought in this lawsuit. I mean, effectively, what they've done is defeat the state's adjudication for a 39-acre tract of land and by severing the cases, the state has now been forced to proceed in eight different lawsuits.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well should be, why should we be concerned about that? A lis pendens does not prohibit, prevent the landowner from making a subdivision, right?

ATTORNEY SUSAN DESMARAIS BONNEN: That is correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: So the law, whatever the law is, it is. And earlier, you talked about gamesmanship. You might also think about it in terms of self-interest. If the law permits this sort of action and it results in an increased value in valuation of the property, so be it. That's what people do to protect themselves sometimes against the state, sometimes against a neighbor. They'll drill a well and drain as much and get as much oil and gas out even if it drains their neighbor's property. So why should we be all that concerned?

ATTORNEY SUSAN DESMARAIS BONNEN: In this case, Your Honor, you should be concerned because what they're doing violates the doctrine of lis pendens and that has import in other areas of the law.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you're saying they could, so they're not permitted, lis pendens prohibits the subdivision as a matter of law.

ATTORNEY SUSAN DESMARAIS BONNEN: No, absolutely not. They may convey and I want to be absolutely clear. There's nothing stopping them from conveying the property. What the state's argument is is that they cannot use those conveyances to justify severance of the state's lawsuit into eight separate lawsuits. That's no different from the landowner who is sued involving a piece of property and the defendant just transfers the land and said ha, ha, go sue somebody else for that land, not mine any more and the whole doctrine of lis pendens is to prevent that. Now that's effectively what the landowners have done here. They have said no, you can't sue us in this original lawsuit, which is just sitting on the docket doing nothing. You now have to sue us in these eight new lawsuits.

JUSTICE DON R. WILLETT: If severance isn't proper here, when would it be?

ATTORNEY SUSAN DESMARAIS BONNEN: Well in a condemnation case, I would suggest it would not be proper in any situation where it involved actually splitting property that's been described by the state. I mean certainly in this case, the state was actually acquiring two tracts. It was acquiring a feed tract and it was acquiring a second easement tract presumably those arguably would be separate causes of action and a landowner could sever those. But here the cause of action was for the 39 acres that the state described in its lawsuit. And one of the problems that arises is the state may not be able to obtain a valid judgment in this case. The property description of what we sued for is not going to match the property descriptions in each one of these single cases that the, the description that is in the judgment. Those two things are not going to mach and the landowners say well, you can just combine these two property descriptions and, therefore, get to a valid description of the part taken, but what it does, it puts--

JUSTICE DAVID M. MEDINA: You'd think the landowner would just maximize his private property rights. It seems that that's what's going on here, maximizing the value of its property.

ATTORNEY SUSAN DESMARAIS BONNEN: Well, Your Honor, possibly they could have done this if they had done it before the lawsuit was filed, but the fact of the matter is, the market may not support a higher value for these properties as divided and what they're trying to do is to prevent that determination from ever being made. They don't want to argue that this is an exception to the current state of Texas law. They want to prevent that argument from ever taking place. They want to limit the state to a valuation theory that can only consider say tract A and say value that piece of property completely by itself and don't take into account that it was part of a larger tract. And the market may not support subdivision of those tracts into multiple units and, in fact, it may be that they can't sell them for more just by dividing them and that's all part of the valuation issue that is suppose to be decided at our trial de novo.

JUSTICE PHIL JOHNSON: So would your position be that even if they did subdivide and you, and the trial court did not sever, that they're not going to be able to introduce evidence, separate appraisals for each one of their tracts?

ATTORNEY SUSAN DESMARAIS BONNEN: Well, that's an open question, Your Honor, and that's something that should be decided in the trail court.

JUSTICE PHIL JOHNSON: Right, it's not here. I understand that. Only the severance is here, but if, in fact, that the trial court were to allow that type testimony on remand, if we didn't sever or if we said severance is impro-

per, then it seems like the economic benefit of keeping it all in one lawsuit is diluted some because the state is still going to have to have an appraisal of the whole and then of each individual part. Am I missing something on that?

ATTORNEY SUSAN DESMARAIS BONNEN: Well, Your Honor, if--

JUSTICE PHIL JOHNSON: If the trial court were to allow that evidence.

ATTORNEY SUSAN DESMARAIS BONNEN: If the trail court were to allow that evidence, presumably the state would also be allowed to introduce its own evidence that it should be valued as the single tract that the state was acquiring. So the state--

JUSTICE PHIL JOHNSON: I understand that, but I'm going to the economics of having eight separate lawsuits as opposed to one. If, in fact, the trial court does allow evidence of each individual tract in your lawsuit and does not sever, aren't you still going to have to have an appraisal of your whole on your theory, but then to combat their theories, you're going to have to appraise each individual tract, you're going to have to have an appraiser appraise each one of the individually?

ATTORNEY SUSAN DESMARAIS BONNEN: Well I think that's a decision that the state would have to make, really a trial strategy decision.

JUSTICE PHIL JOHNSON: That could be one of the theories.

ATTORNEY SUSAN DESMARAIS BONNEN: That possibly could.

JUSTICE PHIL JOHNSON: So if, in fact, you decided to do that as a trial strategy, you do, to some extent, dilute the economic benefit of keeping it all in one lawsuit.

ATTORNEY SUSAN DESMARAIS BONNEN: Possibly, Your Honor, but remember another argument that we have is that these issues are all interwoven. For example, at the special commissioner's hearing, the landowner's appraiser came in with eight appraisals, used the exact five sales in each appraisal for five of the tracts. Did exactly the same analysis and came up with exactly the same value. And then there were some minor changes in three of the other appraisals and basically the appraiser just testified one time as to all the sales comparables, all of which were used. So it would be much more economically beneficial to, even if they were allowed this theory, which is something that is an open question under the status of the law, it still would be more economically beneficial to have that heard in one case. Thank you.

JUSTICE DALE WAINWRIGHT: So, is it your position that it is perfectly okay from the state's position for the landowner to subdivide his or her property after the condemnation suit is filed just not for the trial court to sever it into eight separate trials? Is that correct or not?

ATTORNEY SUSAN DESMARAIS BONNEN: Legally, there's nothing preventing them from subdividing their property. It's an open question as to whether that changes how the property can be valued, but it certainly doesn't allow them to sever the lawsuit.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the real parties in the interest.

MARSHAL: May it please the Court, Mr. Adler will present argument for the real parties in interest?

JUSTICE PHIL JOHNSON: Mr. Adler, before you get started, there's been a responsive brief or supplemental brief by the state where they say that the deeds to the individual entities here preceded there actually being

formed and that voids the deeds?

ATTORNEY STEPHEN ADLER: Yes, sir.

JUSTICE PHIL JOHNSON: If that's correct, then it seems like the ballgame's over here because you couldn't sever it out. So would you answer that as a preliminary matter?

ORAL ARGUMENT OF STEPHEN I. ADLER ON BEHALF OF THE RESPONDENT

ATTORNEY STEPHEN ADLER: If the deeds are void, then I agree. We're not entitled to the severance in these cases, but there are multiple reasons why these deeds are not void. These deeds are not void because in order for the deed to be, to have conveyed property, the deed had to have been delivered. There was no evidence that this deed was delivered until it was recorded. The deeds were not recorded until after the corporations were formed. And I would remind the Court that this issue was not raised by the state below at the trial level and on an abuse of discretion standard, this Court can't find an abuse on an issue, especially a fact issue that wasn't raised at that time when we would have been able to put on that evidence. I want to hit three critical points that I think are important to understand in this case and the first one is that these divided tracts looked exactly like what the market looks like. Second, these divisions do not increase the value of this property by a penny. It doesn't increase what the state has to pay by a penny and, finally, the divisions of this property and the value according to these divisions is perfectly consistent with basic tenants of appraisal law. I'd ask the Court to turn to tab three. This is the exhibit that were handed out to the Court today. These are how these properties were divided and I would urge the Court to look at the tracts directly across the street, the tracts immediately to the north and south. Yes, sir.

JUSTICE DAVID M. MEDINA: You just said there's no increased value, essentially no increased burden on the state.

ATTORNEY STEPHEN ADLER: That is correct, sir.

JUSTICE DAVID M. MEDINA: What was the intent of the scheme?

ATTORNEY STEPHEN ADLER: Well, Your Honor, the reason that, to suggest that by spending $300 to get a deed and a survey to formally put these lines, somehow or another, that $300 expenditure triples the value of property is not true and it doesn't follow appraisal law. If this Highway 183 frontage has a higher value, it's because it's Highway 183 frontage and the members of this family don't have to cut up the family farm in order to realize the same price that are being paid for Highway 183 frontage across the way. The market is smarter than that. We reluctantly divided this property not to increase its value because we think that we're entitled the value of the property the way properties in the marketplace are being valued. We divided this because the state is misusing the decisions in Sharboneau and Willey and is going to seek to deny these landowners the opportunity to their day in court to present their valuation based on highest and best use and while the state--

CHIEF JUSTICE WALLACE B. JEFFERSON: But what's wrong with dividing the property in order to increase the value to the landowners? Maybe I, it sounds like you're saying we didn't do that and we wouldn't do that. We don't want an additional cent and I'm wondering why not? Why wouldn't you do it for that exact purpose, to get more money?

ATTORNEY STEPHEN ADLER: In this case, we were not doing that, but I don't think there would be anything wrong with the property owner doing that. And it doesn't have to just be this situation, It could be the situation where the state files its case and its lis pendens and instead of being three month, it could be two years because the data taking occurs in this case because the state decides when the data taking's going to occur by depositing the commissioner's award or waiting until after final judgment and the property owner could get utili-

ties to the property in an intervening period of time. There are lots of things that could change.

JUSTICE DEBRA LEHRMANN: But if we allow this, isn't this going to really frustrate the court's, I mean the state's ability to go through with condemnation proceedings?

ATTORNEY STEPHEN ADLER: It won't frustrate the court's ability at all if you look, I'm sorry it won't frustrate either the state's ability to proceed. It's filing individually condemnation cases on the property across the street and the properties north and south. These properties, if you really want to make sure that property owners don't do this in the future and I don't think that they should. We reluctantly did it in this case. If you could clarify Sharboneau and Willey and say that the Court can't use those as a bar to prevent a property owner from being able to put in their evidence of highest and best use consistent with the neighborhood, then I think you'll remove the incentive for someone to do this. In this case, we went to the state and we said just value the property the way the neighbor's property is being valued and it wasn't based on offers. At the commissioner's hearing, we presented the appraisals that were done by the company that was there testifying and we said when you appraised the properties across the street in the neighborhood, you came up with a different number and they said yes, because they were smaller tracts. If you take away the--

JUSTICE DALE WAINWRIGHT: Counsel, let's look at the exact appraisal. Before the special commissioners, your expert, Mr. Bolton, appraised the eight parcels separately and reached the value of about $4.1 million?

ATTORNEY STEPHEN ADLER: Yes, sir.

JUSTICE DALE WAINWRIGHT: Now the state's appraiser, Mr. Pilkington, testified that the value was about $1.1 million for the entire tract?

ATTORNEY STEPHEN ADLER: Yes, sir.

JUSTICE DALE WAINWRIGHT: What would your appraiser have said, if you know, if he would have appraised the single tract rather than as subdivided into eight pieces of property?

ATTORNEY STEPHEN ADLER: I think our appraiser, if he was asked to value the 39 acres, would have said that the highest and best use of the 39 acres when you look at the neighborhood and the market is to sell in smaller economic units and I think that he would have appraised the property consistent with the smaller economic units and would have come up with the same dollar amount. If your question is what would he appraise it if he was not allowed to make reference to the marketplace and the economic units, I don't know what he would have appraised the property. But if you look at tab one, tab one, Your Honor, is out of the bible for valuation that all appraisers use in litigation. This is the, this is the document, the treatise that the state brought to your attention in their reply and we gave you, by the way, in a pre-submission trial letter the entire chapter, but this comes on page 93 of that and the appraisal rules in exactly this situation provide that the owner should not be forced to take a bulk sales discount if the bulk sale is not the highest and best use of the property and that's what they're trying to do here. It goes on to say that the property owner, that the state, even though they're acquiring this in one transaction, isn't entitled to value it as if it was one transaction and that's what they're trying to do here. It says that in determining compensation, the value is supposed to be determined as if the property were marketed in the most advantageous way possible. That's all we're trying to do here and, finally, at the bottom and I think this is real important from a jurisprudence standpoint. What the bottom says is is that it is the market that decides what the economic units are on a piece of property, multiple economic units or otherwise. It's the market that decides. It's not the size of the taking. The state can't come in by its taking and dictate what the, how the property's supposed to be measured.

JUSTICE DALE WAINWRIGHT: Now you mentioned that if you add up the properties of the other side of Highway 183 to equal approximately the size of the 39-acre parcel your clients own that the valuation would have been higher for the properties on the other side. Of course, they were divided into smaller units before the

state condemned and took.

ATTORNEY STEPHEN ADLER: What I'm saying is that the commissioner hearing was that the state's appraiser valued in the marketplace smaller tracts at the higher amount because they were smaller tracts.

JUSTICE DALE WAINWRIGHT: They were already subdivided before the condemnation suit was filed, right?

ATTORNEY STEPHEN ADLER: They were filed; they were subdivided before the data taking as was ours. They happened to also have been subdivided prior to the filing of the lawsuit; ours was not.

JUSTICE DALE WAINWRIGHT: Okay, so you started talking about, but I don't think you finished explaining what was the purpose for subdividing the lots after the condemnation was filed. You said it's not to increase the value, correct?

ATTORNEY STEPHEN ADLER: Yes, sir. We would argue that the value of this property.

JUSTICE DALE WAINWRIGHT: Then why do it?

ATTORNEY STEPHEN ADLER: We did it, Your Honor, because we knew that the position that the state was taking and while the state's trying to retreat from that position and answer to questions from the bench this morning, if you look at the last two pages of their reply, they make real clear the argument that we have heard continually, which is that Sharboneau and Willey prevent us from being able to put on our evidence of highest and best use. So, and the reason they do that is they say based on Sharboneau and Willey, which don't concern this situation. They concern subdivisions where it was out in the middle of nowhere and you're putting in roads and streets and utilities. There is no uncertainty here. There's nothing hypothetical about these subdivisions. It costs $300 a deed and a survey to get it done, but to the degree that the state is going to stand up and say there's something hypothetical about what we're talking about, well we took care of that. There's nothing hypothetical about the subdivision that we're talking about and we shouldn't have to do it. It's silly for us to do it. It leads to premature subdivisions and a waste of resources, but we did it to take away the argument in case anybody would ever find that to be persuasive.

JUSTICE DALE WAINWRIGHT: You'd agree that as a general proposition, once the state has filed a petition for condemnation for piece of property, the landowner cannot go out and engage in conduct or actions that are going to increase the value post taking?

ATTORNEY STEPHEN ADLER: Absolutely. Post taking, the property owner can't do, anything that happens post date of taking is going to be irrelevant in determining the value of that property.

JUSTICE DALE WAINWRIGHT: What was the date of the take here?

ATTORNEY STEPHEN ADLER: The date of the taking was the date that the special commissioner's award was posted, which followed the special commissioner's hearing and their award.

JUSTICE DAVID M. MEDINA: Doesn't that tie into her lis pendens argument?

ATTORNEY STEPHEN ADLER: It does tie into the lis pendens argument, Your Honor, and I think that the Amicus brief filed by the Farm Bureau, which goes into detail of the history of lis pendens clearly shows that the lis pendens statute is nothing more than a notice statute. It's designed to ensure that there is res judicata effect against a bona fide purchaser, who subsequently purchased a piece of property. Neither of those concerns are present here. In this case, the state is trying to extend lis pendens so that it has a substantive impact. In this case, there is, there is the court got jurisdiction over the race. This is an in rem proceeding. The court got jurisdiction over the race when the state filed its petition. It maintains jurisdiction over that property. No con-

veyances can have the court, force the court to lose jurisdiction over this property and at the end of the day, the state will get judgments giving them exactly the property they seek to take in this case. They get absolutely enforceable judgment. There is no rule that says that the final judgment in a case, the property description has to match the property description that appears in the regional petition. The State v. Nelson case that they cite to is a perfect example of a case where the final judgment description doesn't match the original petition. Clearly, the state has the right to amend its petition at any time it wants to, to take less property. In the Cole case decided by this Court, it's an absolute right that the condemning entity has. The property description in the final judgment in these final judgments will give the state exactly the land it wants.

JUSTICE EVA GUZMAN: What if it had been 200 separate tracts versus the eight that we're dealing with here? How does that impact your severance argument and also the argument about the increased costs and they sort of tie in together.

ATTORNEY STEPHEN ADLER: I think that this 200-parcel argument is a red herring. The court, this is an abuse of discretion standard on a severance issue and the trial court faced with that situation could easily decide that it's not in the interest of justice to divide up that case into 200 parcels. It's just never, and it's never going to happen. If these properties were divided into 200 parcels, they wouldn't be legal lots. They'd have no value. It is a red herring argument. The trial court can take care of it at trial and it's just not something that the Court's going to see.

JUSTICE DALE WAINWRIGHT: It sounds like your arguing that by dividing the 39 acres into eight parcels, that provided a basis for admission of your expert's testimony at least address the state's objection, you believe, to your expert's testimony that eight parcels allows him testify to what he believed to be the highest and best use. So the highest and best use with the property divided was higher, results in a higher valuation than the highest and best use without the property subdivided. Is that a fair inference?

ATTORNEY STEPHEN ADLER: Yes, sir.

JUSTICE DALE WAINWRIGHT: So in some sense, you are actually laying the basis for a higher valuation of the 39 acres by subdividing them than would otherwise be available and perhaps appropriate if they weren't subdivided.

ATTORNEY STEPHEN ADLER: Your Honor, these 39 acres will never sell in the marketplace as a single 39-acre tract. They'll sell in the marketplace consistent with how properties are selling for in this market. If you create a hypothetical situation and say this property has to be developed as if it were going to sell as a single 39-acre park, then, yes, that value would be lower. And in each of these trials, the state has not precluded from suggesting and arguing to the jury if it wants to that the highest and best use of this property is to sell as one piece. And they're not prevented from doing that in any of the eight separate trails. They could in any of those eight separate trials step forward and say the highest and best use of tract C is to sell in conjunction with the surrounding properties as an assembled property and that's a perfectly valid highest and best use argument for them to make.

JUSTICE PAUL W. GREEN: Why is the severance necessary?

ATTORNEY STEPHEN ADLER: Your Honor, we reluctantly divided this property. Had we gotten instruction and direction and guidance from the court prior to doing that, we probably wouldn't have done it in this case. If, and I'm cognizant of the fact that I stand in front of the Court as the respondent here today. If this case goes back down to trial in a single trial so long as we get guidance that says that we're not stopped from putting in our evidence, that trail would probably be okay for us, but there are reasons why you can't do that now and shouldn't do that now. Because if you do that at this point given the posture of this case, you're going to do incredible harm to real established eminent domain jurisprudence and real established lis pendens jurisprudence. With respect to the eminent domain jurisprudence, the date of taking is a bright line and it's a bright like that

this Court has relied on for 150 years to weigh the competing balances of the public and property owners. In the Capital Livestock case, a case you decided, the property owner owned property on the date petition was filed, damages done to the remaining property prior to the date of taking in the case. They contracted away the remaining property or one would imagine for a lower price because it had been damaged. When the case went to trial, they sought damages to the remaining property and this Court said you don't get those damages because while you owned the whole property when the petition was filed on the date of taking in this case, you no longer had the interest in the remainder property so there's nothing to damage. In the situation where there would be a house on a piece of property on the date that the petition is filed, but prior to the date of taking, the house burns down. You want to be able to make sure that the state isn't paying for the house. If gold is discovered in that intervening period of time or utilities are conveyed like I talked about a second ago, this bright line test is something that this Court has used. You do damage, what happens in a situation, it would be okay for us because these are all related parties, but they don't have to be related parties. It could be third parties and independent parties that were involved and that's what troubled the trial court when the action was down below. And again, while we have a short period of time between the filing of the petition and the date of taking in this case, we have other cases where that spread is two or three years' worth of time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it by statute that the case is pending in county court of law? I mean people are talking about valuations of one million to four million. Why is it in the county court rather than the district court, I'm just curious?

ATTORNEY STEPHEN ADLER: It is by statute, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Statute. So the special commissioners and then it goes to the county court after their hearing.

ATTORNEY STEPHEN ADLER: It actually varies by, the statute in Travis County says it goes to the probate court, the probate court then has the right to be able to assign it to a county court of law judge. And, Your Honor, if you were too even though again even though it would be okay with us, I think the damage you would do to lis pendens jurisprudence would be extensive.

JUSTICE DALE WAINWRIGHT: What if we ruled in your favor and you went back to the trial court, we're going to try this case and your experts said you know what? I just figured out if we had subdivided the property into three tracts instead of eight, that would even result in me being able to as an expert validly support an even higher best use for a higher valuation. So let's change it now to three. Would that be appropriate if the trial court agreed with you?

ATTORNEY STEPHEN ADLER: Absolutely. Your Honor, it is the market that decides what's the highest and best use, so it's not the appraiser. The appraiser doesn't come in make up rules. If an appraiser comes in and says if you look at the marketplace, this is the prevailing size. This is the prevailing shape of properties they're selling in the marketplace and this property is susceptible of that and if marketed this way, it's going to bring the value that it would bring in the marketplace then he's entitled to put on that evidence. If he's making stuff up and if he's going beyond what the evidence shows then.

JUSTICE DALE WAINWRIGHT: My hypothesis was based on legitimate evidence and legitimate expert opinion. And so you think it would also be legitimate and appropriate for the trial court to sever to three cases instead of eight based on my hypothetical?

ATTORNEY STEPHEN ADLER: No. I think that in the situation where there's not different property ownerships that the court should not sever the case.

JUSTICE DALE WAINWRIGHT: But if there were, severance into three would be appropriate in your opinion?

ATTORNEY STEPHEN ADLER: Yes, I don't how you, we couldn't have done that in this case.

JUSTICE DALE WAINWRIGHT: As you understand, the state is involved in condemning, the state, local government, county government, city government's involved in condemnation proceedings hundreds if not thousands of times across the state during the course of the year to build city halls, to build roads, city parks, all types of things. Is the ability to subdivide, sever after the condemnation petition is filed in any variety of ways going to create an unmanageable moving target for the government that's trying to build a park or expand a road or what's the problem?

ATTORNEY STEPHEN ADLER: Absolutely not and I have two reasons for that, Your Honor. The first reason is, is that if the court gives guidance and says that Sharboneau and Willey is not going to prevent that expert from presenting evidence, that property owner from presenting evidence to its highest and best use, then there's no incentive to go in and subdivide properties, so it's just not going to happen. And the second instance, Your Honor, we're talking about a timing issue here. The state has conceded that if the property was subdivided prior to the petition being filed, then they would have treated the case differently. The compensation a property owner gets fair market value shouldn't depend on this race to see who subdivides first or files first. That's why the evidence should be allowed to be presented according to its highest and best use. And if there's going to be a race prior to the date that the lis pendens is filed then there's going to be, before the date of taking, then there's going to be a race filed before the lis pendens and if this Court wanted to do further damage to eminent domain law and lis pendens law and say well we're going to make it the date that the property owner learns about the taking six months before, or two years before, or four years before, then there could be a race at that point in time, but we haven't seen that. We haven't seen that and the date of take is always served as the standard. It's a harm, again, Your Honor, that if was going to exist, you would have already seen it. It's not. Your Honor, we would conclude by asking this Court to, first, give direction. We're not asking you to make the evidentiary ruling. We're not asking you to say our evidence is right. We're just asking you to tell the trial court that in a case like this Sharboneau and Willey's prohibition against uncertain and hypothetical subdivisions do not, do not relate to the situation where for $300 you can subdivide a piece of property without cost, without risk, without any of the harms and potential problems that were identified in those cases because with that direction, that's going to put an end to all of this. And then the second thing that we would ask the Court to do would be not to grant the mandamus in this case because if you grant the mandamus in this case, there are a tremendous number of unforeseen problems with respect to lis pendens issues, date-of-take issues that are going to extend well beyond this case.

JUSTICE PHIL JOHNSON: Is the, is the evidentiary issue in front of the court?

ATTORNEY STEPHEN ADLER: It is not. This is, if there was ever a case though where it would be appropriate for the Court to give the litigance guidance recognizing that the state's out making offers tomorrow and their parties in all of these cases, this would be the case we would ask that it be done.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

ATTORNEY STEPHEN ADLER: Thank you.

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

JUSTICE DON R. WILLETT: Mrs. Bonnen I understand your position to be that the doctrine of lis pendens doesn't prevent conveyance, but it does prevent severance. Correct?

REBUTTAL ARGUMENT OF SUSAN DESMARAIS BONNEN ON BEHALF OF PETITIONER

ATTORNEY SUSAN DESMARAIS BONNEN: Yes.

JUSTICE DON R. WILLETT: I'm wondering, is it also true that you believe that the award for all land condemned for a single state project has to be adjudicated in the same proceeding regardless of different ownership?

ATTORNEY SUSAN DESMARAIS BONNEN: Absolutely not. If there are different owners at the time the state files the lawsuit, the state will file separate lawsuits. Opposing counsel has--

JUSTICE DALE WAINWRIGHT: Counsel, one other quick question, I think it's quick. Why are you tying your, I guess you're tying your argument that the severance was improper to the date of filing of the condemnation action because there has to be an action in order to argue about a severance. But in terms of subdividing the property, would you tie that to the date of the taking rather than the date of the filing of the petition, if you were arguing about the subdivision?

ATTORNEY SUSAN DESMARAIS BONNEN: Well in this case, the subdivision took place after the petition was filed and so it goes to the valuation issues, which those valuation issues should not determine how many lawsuits you have and I think you made a very good point, Justice Wainwright, when you said well what if the appraiser's theory changes and that's the problem here we haven't yet had a de novo trial where the parties actually have come to their definitive theory. I think you, this Court recognized in the PR Investments Case that the valuation theories can change after the special commissioner's hearing. But what the landowners have done, they've made an impassioned plea for why they think they have the best theory coming out of the special commissioner's hearing and why this Court should change the law of Willey and Sharboneau and are saying that because of these arguments that they have, they were allowed to sever this lawsuit into eight lawsuits.

JUSTICE EVA GUZMAN: Can you offer competing evidence though? Let's say that the theories do change, you certainly can offer competing evidence about highest and best use and market value. There is nothing about us writing to clarify the law on Sharboneau that prevents you from offering competing evidence. Is that correct or?

ATTORNEY SUSAN DESMARAIS BONNEN: Well, it would depend on what you said when you clarified that law. And it's the state's position that that sort of clarification shouldn't take place in this mandamus over the lis pendens in the severance of lawsuits. I mean there's a lot to the methodology of appraising property and we need to have this heard by the trial court where each party can bring its appraisers and bring its experts and have the trial court look at all of these issues, not--

CHIEF JUSTICE WALLACE B. JEFFERSON: So you want us to answer a very narrow question. The other side wants to answer a question that's not exactly before us, but we're going to take the case as it comes and we're looking at maybe larger issues than either one of you are. Why not? Why wouldn't you, as Justice Guzman said, be able to just have a trial on valuation? They can say it's best in 39 tracts and you can say it's best as one whole one and do that all in one case?

ATTORNEY SUSAN DESMARAIS BONNEN: And we could do that in one case and each party could make its own arguments about the application of Willey and Sharboneau and the state has no problem with that. But they're trying to have this Court decide those issues here today before this case is tried and the parties get an opportunity to introduce evidence under the rules of procedure.

CHIEF JUSTICE WALLACE B. JEFFERSON: But that's part of our answer to where there can or cannot be a severance it seems to me.

ATTORNEY SUSAN DESMARAIS BONNEN: Well, there can't be a severance for any number of reasons and that's because it basically allows them to defeat the state's adjudication for this 39-acre tract of property. And it

possibly prevents the state from obtaining a valid judgment. I mean what it does, the state obviously can amend by its own choice the petition, but what they're saying is we can force you to amend that petition and get new property descriptions and re-plead to take our property in eight tracts and there's certainly no basis in the law for them to force the state to do that. And that's what they're saying that they're entitled to do because they subdivided the property after the state filed its lawsuit. And all of these valuation issues should not determine how many cases we have in this case.

JUSTICE PHIL JOHNSON: Counsel, I have a question. You filed a separate brief indicating that these deeds are void?

ATTORNEY SUSAN DESMARAIS BONNEN: Yes, Your Honor.

JUSTICE PHIL JOHNSON: Opposing counsel says that's just not right. And you haven't argued that at all and if, in fact, you're correct that these deeds are void, we're not even here as far as the real question, are we?

ATTORNEY SUSAN DESMARAIS BONNEN: Um, that's true, absolutely, Your Honor, and we haven't argued that standing up here today, but that's certainly in our briefs and still an argument that the state is making.

JUSTICE PHIL JOHNSON: Is it your position that deeds are void?

ATTORNEY SUSAN DESMARAIS BONNEN: Yes because they transferred the property in April and the LLC's were not formed--

JUSTICE PHIL JOHNSON: I understand the brief. I was just wondering why we didn't hear an argument about it if it's a bona fide position on behalf of the state that the deeds are void and that you win on that basis, we don't even hear about it. Is it a bona fide position of the state that these deeds are void?
ATTORNEY SUSAN DESMARAIS BONNEN: Yes, if this Court relies on the statements that were made in the special commissioner's hearing about when the property was actually transferred, that it was transferred in April. They respond by saying, no, it wasn't really transferred in April and that they have a right to present evidence to that effect.

JUSTICE PHIL JOHNSON: And the fact that that was not raised before the trail court is immaterial as far as you're concerned?

ATTORNEY SUSAN DESMARAIS BONNEN: Well, to the extent that it's just another argument supporting our primary position that there was only one cause of action, we believe that it is something that the Court can still consider. The bottom line is that these are valuation issues that need to be decided. The real estate valuation and litigation article that they attached, that's actually not the bible of appraisal. It's the appraisal of real estate text that is the bible and that hasn't been cited by them for their position. The state should not be forced to amend. We ask that the Court grant the state's petition for writ of mandamus, direct the trial court to vacate the severances and send this back for one trial where we can actually have these issues about Willey and Sharboneau decided in a case where we have evidence introduced on the merits, not in a special commissioner's hearing which is moot at this point. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. That cause is submitted.

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