NO. 02-0216

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

KUTACH FAMILY TRUST, DARRYL WAYNE KUTACH, TRUSTEE,

Petitioner,

V.

SAN JACINTO GAS TRANSMISSION COMPANY,

Respondent.

On Petition for Review from Case No. 01-99-00959-CV
in the First Court of Appeals, Houston, Texas

PETITIONER'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

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Respondent, San Jacinto Gas Transmission Company

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STATEMENT OF THE CASE

Nature of the Case: San Jacinto Gas Transmission Company ("San Jacinto") filed this condemnation proceeding to acquire a natural gas pipeline easement from Kutach Family Trust, Darryl Wayne Kutach, Trustee ("Landowner"). Landowner disputes that San Jacinto complied with its statutory duty to make a good faith offer prior to filing the condemnation proceeding.

Trial Court: The Honorable Larry D. Wagenbach, Judge, County Court at Law One, Fort Bend County, Texas.

Trial Court Disposition: On March 13, 1998, Judge Wagenbach signed an order granting San Jacinto's motion for partial summary judgment on the jurisdictional prerequisites to maintaining a condemnation proceeding and denied the Landowner's cross-motion for partial summary judgment on the good faith negotiations jurisdictional prerequisite. *See* APX. TAB 1. After a jury trial on the damages for the taking of the natural gas pipeline easement, Judge Wagenbach entered a Final Judgment granting San Jacinto the natural gas pipeline easement. *See* APX. TAB 2.

Court of Appeals: First Court of Appeals in Cause No. 01-99-0959-CV; Justice Terry Jennings, joined by Justice Adele Hedges and former Justice Frank C. Price participating by assignment. The opinion was issued on December 13, 2001, and is reported at 65 S.W.3d 791. The opinion and judgment are attached at APX. TAB 8.

Court of Appeals Disposition: The First Court of Appeals issued its first opinion on July 27, 2000, authored by Justice Michol O'Connor which reversed the trial court and rendered in favor of the Landowners. The court of appeals' first opinion is attached at APX. TAB 4. San Jacinto timely filed a motion for rehearing. Justice O'Connor retired on December 31, 2000. On December 13, 2001, a new opinion was issued which affirmed the trial court. The Landowners' timely filed motion for rehearing was denied on January 23, 2002.

Related Petitions for Review: There are eight other Petitions for Review on the identical legal issues with virtually identical facts but with somewhat different procedural postures. Those Case Nos. are 02-0213; 02-0214; 02-0215; 02-0217; 02-0320; 02-0321; 02-0326; and 02-0359.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal because the opinion of the court of appeals is in direct conflict with this Court's denial of the petition for review in *Hubenak v. San Jacinto Gas Transmission Co.*, 37 S.W.3d 133 (Tex. App.–Eastland 2001, pet. denied) and the recent holding in *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852 (Tex. App.–Texarkana 2002, pet. filed in Case No. 02-0320, briefs on the merits requested) and because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. TEX. GOV'T CODE § 22.001(a)(2) & (a)(6) (Vernon 1988).

ISSUES PRESENTED

1. The Texas Property Code requires, as a jurisdictional prerequisite, that a condemnor negotiate with a landowner in good faith, prior to filing a condemnation proceeding. San Jacinto admitted it demanded rights it could not condemn and that it would **NEVER** limit its precondemnation offer to only the rights it could legally condemn. Does the summary judgment record demonstrate, as a matter of law, that San Jacinto did not negotiate in good faith, as the Texarkana Court of Appeals would hold, or at least raise a genuine issue of material fact on the good faith negotiation issue, **as the Eastland Court of Appeals determined on identical facts**?

2. The Texas Penal Code has provisions that are designed to discourage people and entities from making false and deceptive statements with respect to property. San Jacinto has admitted it would **NEVER** have made an offer to the Landowner for only the rights it could legally condemn and threatened to condemn rights it could not legally condemn. Should Texas' courts declare behavior that the Texas Legislature has defined as criminal to be good faith in the context of a condemnation proceeding?

3. The case was before the First Court of Appeals on traditional **cross-motions for partial summary judgment** on the jurisdictional issue of good faith negotiations. The First Court of Appeals held that the trial court's granting of San Jacinto's motion for partial summary judgment created an **implied fact finding** that San Jacinto negotiated in good faith and, based upon that erroneous conclusion of an implied fact finding, applied the no evidence standard of review to the implied fact finding. Have the standards for review of traditional summary judgment motions been changed in Texas?

STATEMENT OF FACTS

This case started as a statutory condemnation case whereby San Jacinto Gas Transmission Company ("San Jacinto"), respondent and plaintiff in the trial court, sought to condemn a 0.84 acre permanent easement and a 1.05 acre temporary easement for the construction, operation, and maintenance of a twelve inch pipeline **only** to transport natural gas over a 63.9 acre tract of land owned by Kutach Family Trust, Darryl Wayne Kutach ("Landowner"), petitioner and defendant in the trial court (CR 10). San Jacinto, a gas utility, can only condemn an easement to transport natural gas. On March 13, 1998, the trial court granted San Jacinto's traditional motion for partial summary judgment on the jurisdictional right to take issues and denied the Landowner's traditional cross-motion for partial summary judgment on the jurisdictional issue of the statutorily required precondemnation good faith negotiations (CR 367, APX. TAB 1; CR 371-372, APX. TAB 2). Additionally, the trial court entered a written order overruling the Landowner's objections to the affidavit and deposition testimony of David M. Dunwoody (CR 369, APX. TAB 3). After a jury trial on damages for the taking of the easements, a final judgment was entered on May 28, 1999, granting San Jacinto the permanent and temporary easements for the construction, maintenance, and operation of the twelve inch **natural gas** pipeline (CR 370-376, Apx. Tab 2). The Landowner appealed the trial court's granting of San Jacinto's motion for partial summary judgment and the denial of its motion for partial summary judgment.

On July 27, 2000, the First Court of Appeals released its first opinion, authored by

Justice Michol O'Connor, which reversed the trial court's granting of San Jacinto's motion for partial summary judgment and rendered judgment for the Landowner on its cross-motion for partial summary judgment *Hubenek v. San Jacinto Gas Transmission Co.,* No. 01-99-00959-CV, 2000 Tex. App. LEXIS 4971 (Tex. App.–Houston [lst Dist.] July 27, 2000) (APX. TAB 4). San Jacinto filed a motion for rehearing with the First Court of Appeals.

On January 4, 2001, the Eastland Court of Appeals handed down its opinion in *Hubenak v. San Jacinto Gas Transmission Co.*, 37 S.W.3d 133 (Tex. App.–Eastland 2001, pet. denied)(APX. TAB 5), which involved the same trial judge, the same pipeline project, the same operative personnel for San Jacinto and the same procedural posture, traditional cross-motions for partial summary judgment on the jurisdictional issue of good faith negotiations. The Eastland Court of Appeals remanded the case back to the trial court to conduct an evidentiary hearing. This Court ordered briefing on the merits of San Jacinto's Petition for Review of that decision. In its Brief on the Merits in Case No. 01-0294 (at page 19; APX. TAB 16) and in its Motion for Rehearing in Case No. 01-0294 (at page 10; APX. TAB 6), San Jacinto judicially admitted that it **NEVER** would have made the landowner an offer for only the rights it could condemn. San Jacinto's Motion for Rehearing of the denial of its Petition for Review was denied on November 29, 2001.

On December 13, 2001, nineteen months after its first opinion, Justice Terry Jennings[1] authored the second opinion of the First Court of Appeals in this case, which,

[1]On November 8, 2001, Justice Jennings was designated to participate in the case because of the retirement of Justice Michol O'Connor on December 31, 2000. (APX. TAB 7)

based upon an assumption of implied fact findings from the traditional motion for summary judgment, applied a "no evidence" standard of review and affirmed the trial court's granting of San Jacinto's motion for partial summary judgment and denial of the Landowner's cross-motion for partial summary judgment. *Hubenak v. San Jacinto Gas Transmission Co.,* 65 S.W.3d 791 (Tex. App.–Houston [lst Dist.] 2001, pet. filed in Case No. 02-0213, briefs on the merits requested)(APX. TAB 8). The First Court of Appeals' second opinion is in direct conflict with the Eastland Court of Appeals' decision in the related Hubenak case and the Texarkana Court of Appeals' decision in *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852 (Tex. App.–Texarkana 2002, pet. filed in Case No. 02-0320, briefs on the merits requested) (APX. TAB 10) on the substantive issue of good faith negotiations and in direct conflict with probably a hundred of this Court's opinions on the standard of review of traditional summary judgment motions.

There are numerous cases before the Court on essentially identical facts. The three immediately preceding case numbers to the one assigned this case, Case Nos. 02-0213, 02-0214, and 02-0215 are the three companion San Jacinto cases to this one decided by the First Court of Appeals. Case Nos. 02-0217, 02-0320, 02-0321, 02-0326, and 02-0359 are cases involving MidTexas Pipeline Company ("MidTexas") out of the Corpus Christi and Texarkana Courts of Appeal which involve the same operatives for the pipeline company as are involved in the San Jacinto cases. However, in four of the five MidTexas cases (Case Nos. 02-0320; 02-0321; 02-0326; and 02-0359), the trial court held an evidentiary hearing and ruled against MidTexas; thus, those four cases are in a different procedural posture.

SUMMARY OF THE ARGUMENT

Except as to the particular tract of land, on virtually identical facts as this case involving the same pipeline company, the same San Jacinto operatives, the same pipeline project, the same trial court, and the same procedural posture (appeal of the trial court's ruling on traditional cross-motions for partial summary judgment on the jurisdictional issue of good faith negotiations), this Court, after having requested and received briefs on the merits, denied San Jacinto's Petition for Review (Case No. 01-0294) of the Eastland Court of Appeals' decision to remand the proceeding to the trial court to conduct an evidentiary hearing because genuine issues of material fact were raised, *Hubenak v. San Jacinto Gas Transmission Co.*, 37 S.W.3d 133 (Tex. App.–Eastland 2001, pet. denied)(APX. TAB 5). Additionally, the decision below is in direct conflict with *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852, 861 (Tex. App.–Texarkana 2002, pet. filed under Case No. 02-0320, briefs on the merits requested) (APX. TAB 10), in which the court stated:

> . . . **a threat or pretense of condemnation made by the condemnor on land or for rights not subject to condemnation and made in order to obtain additional property or rights constitutes a wrongful act and an abuse of the right of eminent domain.** (emphasis added)

San Jacinto's negotiation tactics of threatening to sue landowners for rights San Jacinto cannot possibly condemn is not only arbitrary and capricious, a well recognized

reason for determining a lack of good faith negotiations, but such behavior is the kind of behavior the Texas Legislature has defined to be criminal.

The First Court of Appeals opinion, after acknowledging that procedurally the appeal involved the review of the trial court's rulings on traditional cross-motions for summary judgment, stated that the trial court made an **implied fact finding** and that a "no evidence" standard of review would be used to determine if the trial court's **implied fact finding** from the traditional cross-motions for partial summary judgment was appropriate.

Contrary to San Jacinto's assertion that "While Petitioner continues to press the argument that a condemning authority cannot negotiate for rights which it allegedly cannot condemn..." (Response to Petition for Review at page 3), Landowner has only taken the position that if a condemnor is going to threaten a landowner with the prospect of being dragged involuntarily into the legal system, that the condemnor restrict its threats to only the rights it can lawfully condemn. As the Texarkana Court of Appeals stated in *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852, 861 (Tex. App.–Texarkana 2002, pet. filed under Case No. 02-0320, briefs on the merits requested)(APX. TAB 10):

> **In response to the Motion for Rehearing, we add the following: This opinion does not say and does not imply the condemnor cannot make offers for and purchase property and rights which it cannot acquire by condemnation proceedings. However, such an offer should be made separate and apart from**

> **the offer made as a prerequisite by law to condemnation. This does not mean the property to be condemned cannot be a part of the separate offer, as long as the owner is given the opportunity to sell at a specific price only that property subject to condemnation.**
> (emphasis added)

San Jacinto's attempt to distort its legal obligations and the position of the Landowner should be viewed for what they are - desperate attempts to distract the Court's attention from San Jacinto's illegal and criminal abuse of the threat of condemnation. This Court has acknowledged the power of condemnation and the potential for abuse, as occurred in this case, when it adopted the following language referring to the power to condemn:

> The exercise of such a necessary power, but one which could be exercised very **oppressively**, ought to be, and is, very strictly regulated.
> (emphasis added)

City of Houston v. Derby, 215 S.W.2d 690, 692 (Tex. Civ. App.–Galveston 1948, writ ref'd).

ARGUMENT AND AUTHORITIES

A. San Jacinto has admitted it NEVER would have made an offer for only the rights it could legally condemn.

After numerous appellate proceedings, San Jacinto finally judicially admitted the reality that even if landowners agreed to San Jacinto's dollar offers and all of the terms of San Jacinto's proposed easement form except for any one of the following three rights San Jacinto cannot and did not condemn (i) the right to transport any substance through the pipe, (ii) the unrestricted right to assign the easement to any person or entity, or (iii) a warranty of title, San Jacinto would unilaterally declare negotiations futile. Because of the importance of that judicial admission to this case, San Jacinto's judicial admission will be quoted in full.

> The appellate court went on to state that if the negotiations were futile, the landowner argues it was "only because of San Jacinto's insistence on the three rights." *Id at 5.* ***Indeed, the company insisted on them; they were not negotiable. Negotiations were at an impasse. Negotiations were futile.*** (San Jacinto Brief on the Merits in Case No. 01-0294 (at page 19; APX. TAB 16) and Petitioner's Motion for Rehearing in Case No. 01-0294 (at page 10; APX. TAB 6)) (emphasis in originals)

Since San Jacinto's admission is so fundamental to an analysis of whether San Jacinto made an open and honest offer, without deceit or fraud, for only the rights it could condemn, it bears repeating.

> ***Indeed, the company insisted on them; they were not negotiable.***

How can San Jacinto claim it made a good faith offer when it admits it **NEVER** would have made an offer to the Landowner for only the rights it could condemn?

San Jacinto's judicial admission is consistent with San Jacinto's admission in the trial court that the Landowner was **required** to grant San Jacinto (i) the right to transport "oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipeline" (first full paragraph of CR 100; APX. TAB 13); (ii) the unrestricted right to assign the easement to any person or entity (last sentence of CR 100; APX. TAB 13); and (iii) the obligation of the Landowner to warrant and defend title to the easement (second full paragraph of CR 100; APX. TAB 13). For the ease of the Court's reference, the language in the form of Right-Of-Way Agreement San Jacinto **required** the Landowner to sign, which would have conveyed the substantial and valuable property rights described above, is highlighted on the form of Right-Of-Way Agreement in APX. TAB 13 at CR 100. Those rights would have been conveyed if the Landowner had signed the form of easement San Jacinto admitted the Landowner was **required** to sign in order to accept San Jacinto's final monetary offer. (*See* Request for Admission No. 7 at CR 97 in APX. TAB 13 and San Jacinto's Response to Request for Admission No. 7 at CR 109 in APX. TAB 14.)

San Jacinto admitted in discovery responses and judicially admitted to this Court that it never would have made an offer to the Landowner for only the rights it could and did condemn. Is that not the kind of **oppressive** conduct this Court warned had to be guarded

against in 1948? Would it not be better public policy to reaffirm the existing cases and Texas Supreme Court precedent that hold that a condemnor has to make at least one offer to a landowner for the rights it is going to condemn, a requirement that (i) is easy for a condemnor to comply with and (ii) simple for a condemnor to subsequently prove?

B. San Jacinto has the burden of proof.

The burden of proof is **undeniably** on a condemnor to plead and **prove** compliance with the jurisdictional prerequisites to bringing a condemnation proceeding. *Amason v. Natural Gas Pipeline* Co., 682 S.W.2d 240, 242 (Tex. 1984) ("...the condemnor becomes the plaintiff for the purpose of proving its right to condemn"); *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex. Civ. App.–Galveston 1948, **writ ref'd**) ("In order for the City to vest the county court with jurisdiction to condemn appellees' land, **it had to first allege, and then during the proceedings prove**, that it had failed to agree with the appellees on the value of their **land to be taken**.")(emphasis added). In *State v. Hipp & Dowd*, 832 S.W.2d 71, 75 (Tex. App.–Austin 1992), *writ denied as to Hipp & rev'd on other grounds as to Dowd, State v. Dowd*, 867 S.W.2d 781 (Tex. 1993) (per curiam) it was explicitly stated:

> The State has the burden of pleading and **proving** that before initiating the condemnation proceeding it was "unable to agree" with the landowner as to the amount of damages that would result **from the taking** of the landowner's property, **absent** such pleading and **proof**, the

> **trial court lacks jurisdiction** to entertain the proceeding or grant the requested relief. (emphasis added)

San Jacinto's claim that it is somehow the Landowner's obligation to prove the obvious, that the additional property rights are valuable, is another example of San Jacinto's desperate need to try and avoid its burden. If San Jacinto could have found an appraiser to testify that (i) the right to transport any substance through the pipe, (ii) the unrestricted right to assign the easement to any person or entity, or (iii) a warranty of title were worthless, how hard would it have been for San Jacinto to have provided such an affidavit in either its traditional motion for partial summary judgment or in response to the Landowner's traditional cross-motion for partial summary judgment. There is no evidence to support San Jacinto's fictional claim that the three substantial property rights complained about are not valuable.

C. Jurisdictional Prerequisite of Good Faith Negotiations

In order to avoid the necessity of a condemnation proceeding, the statute and Texas courts interpreting the statute require a condemnor to negotiate in good faith with a landowner for the property rights the condemnor is attempting to acquire, prior to filing a condemnation proceeding. *Schlottman v. Wharton County*, 259 S.W.2d 325, 330 (Tex. Civ. App.–Fort Worth 1953, writ dism'd); *Texas-New Mexico Power Co. v. Hogan,* 824 S.W.2d 252, 254 (Tex. App.–Waco 1992, writ denied) (good faith negotiations are time critical and

negotiations that occur after a condemnation proceeding are begun are irrelevant).

1. Statutory Requirement of Good Faith Negotiations

The statute that requires a condemnor to negotiate in good faith with a landowner prior to filing a condemnation proceeding is set forth in TEX. PROP. CODE ANN. §21.012 (Vernon 1984)(APX. TAB 15), the relevant part of which states:

> "(a) If . . . a corporation with eminent domain authority . . . wants to acquire real property for a public use but is unable to agree with the owner of the property on the amount of damages, the condemning entity may begin a condemnation proceeding by filing a petition in the proper court.
> (b) The petition must:
> * * *
> (4) state that the entity and the property owner are unable to agree on the damages."

This Court and lower courts have interpreted the statute and its predecessor statute. In *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex. Civ. App.–Galveston 1948, writ ref'd), this Court approved of the Galveston Court of Appeals' statement that, "[i]n order for the City to vest the county court with jurisdiction to condemn appellees' land, it had to first allege, and then during the proceedings prove, that it had failed to agree with the appellees on the value of their **land to be taken**." (emphasis added) More recently, the Austin Court of Appeals held that a condemnor's precondemnation offer must be a *bona fide* (good faith) offer for the rights the Plaintiff **seeks to acquire in the proceeding**. *State v. Hipp & Dowd*, 832 S.W.2d 71, 78 (Tex. App.–Austin 1992), *writ denied as to Hipp & rev'd on other*

grounds as to Dowd, State v. Dowd, 867 S.W.2d 781, 783 (Tex. 1993) (per curiam).

2. Judicial Interpretation of Good Faith

Good faith negotiations in an eminent domain case have been defined as follows:

> ". . . while a single offer by the condemnor may satisfy the unable-to-agree requirement, the offer made must be a *bona fide* offer. **In order to be bona fide, the offer must be made "[i]n or with good faith; honestly, openly, and sincerely; without deceit or fraud."** Black's Law Dictionary 160 (5th ed. 1979); *see also State Bd. of Ins. v. Professional & Business Men's Ins. Co.*, 359 S.W.2d 312, 322-23 (Tex. Civ. App. 1962, writ ref'd n.r.e.). **In the context of eminent domain proceedings, the offer must not be arbitrary and capricious**; rather, it must be based on a reasonably thorough investigation and honest assessment of the amount of just compensation due the Landowner **as a result of the taking**." *State v. Hipp & Dowd*, *id.* at 78. (emphasis added).

San Jacinto's offers were arbitrary and capricious because (i) acceptance of San Jacinto's offer would have **required** the Landowner to convey substantial property rights San Jacinto could not condemn and (ii) San Jacinto has admitted it **NEVER** would have made an offer for only the rights it could condemn.

3. San Jacinto Required the Landowner to Grant Excessive Rights

During negotiations prior to the condemnation proceeding being filed, acceptance of San Jacinto's offer **required** the Landowner to grant San Jacinto three valuable property

rights which San Jacinto cannot obtain in this condemnation proceeding:

i. the right to transport "oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipeline" (first full paragraph of CR 100; APX. TAB 13);

ii. the right to assign the easement to any person or entity (last sentence of CR 100; APX. TAB 13); and

iii. the obligation of Landowner to warrant and defend title to the easement (second full paragraph of CR 100; APX. TAB 13).

Those rights would have been conveyed if the Landowner had signed the form of easement San Jacinto has admitted the Landowner was **required** to sign in order to accept San Jacinto's final monetary offer. (*See* Request for Admission No. 7 at CR 97 attached in APX. TAB 13 and San Jacinto's Response to Request for Admission No. 7 at CR 109 attached in APX. TAB 14). As an example, as recorded by San Jacinto's own right of way agent, the Landowner did not want the assignability provision and asked San Jacinto to delete it. As recorded by San Jacinto's own right of way agent, San Jacinto refused to delete the assignability provision. Attached at APX. TAB 11 (CR 157) is a sheet from San Jacinto's Daily Right of Way Negotiations Report in Case No. 02-0214 documenting the Landowners' request to delete assignability and San Jacinto's refusal to delete assignability. See the yellow and pink highlighting in APX. TAB 11 (CR 157), which is the same report involved in the *Hubenak* Eastland case (Case No. 01-0294; CR 321) attached hereto for convenience at APX. TAB 12.

Logic dictates that for a final offer to fit within the definition of good faith as defined

by the Texas courts as set forth above, the final offer must only seek to acquire the rights that the condemnor is going to obtain in the condemnation proceeding. Texas courts have agreed with that logic as demonstrated below:

- *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex. Civ. App.–Galveston 1948, writ ref'd), the Court said, "[i]n order for the City to vest the county court with jurisdiction to condemn appellees' land, it had to first allege, and then during the proceedings prove, that it had failed to agree with the appellees on the value of their **land to be taken**." (emphasis added);

- *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852, 861 (Tex. App.–Texarkana 2002, pet. filed under Case No. 02-0320, briefs on the merits requested) (APX. TAB 10), the court said, ". . . **a threat or pretense of condemnation made by the condemnor on land or for rights not subject to condemnation and made in order to obtain additional property or rights constitutes a wrongful act and an abuse of the right of eminent domain."** (emphasis added);

- *Ryan v. State,* 21 S.W.2d 597, 598 (Tex. Civ. App.–Waco 1929, no writ), the Court required precondemnation negotiations ". . . as to the amount of damages which would be sustained by him **as a result of the condemnation**." (emphasis added);

- *Audish v. Clajon Gas Co.,* 731 S.W.2d 665, 672 (Tex. App.–Houston [14th Dist.] 1987, no writ), the Fourteenth Court of Appeals unequivocally stated, "The **easement described in the written offer** of June 9th **was the easement sought in the suit filed** June 10th, JD-24." *Id.* (emphasis added); and

- *State v. Hipp & Dowd*, 832 S.W.2d 71, 78 (Tex. App.–Austin 1992), *writ denied as to Hipp & rev'd on other grounds as to Dowd, State v. Dowd*, 867 S.W.2d 781, 783 (Tex. 1993) (per curiam) the Court said, ". . . the offer must not be arbitrary and capricious; rather, it must be based on a reasonably thorough investigation and honest assessment of the amount of just compensation due the Landowner **as a result of the taking**." (emphasis added)

It is hard to imagine any transaction in which the parties could agree on the amount to be paid before an agreement on what is being sold is made. Thus, before the amount of a dollar offer even becomes relevant, it is necessary to examine whether San Jacinto was behaving arbitrarily and capriciously and even fraudulently in the conduct of negotiations. "The term "fraud" as applied to the institution of condemnation proceedings would be any act, omission or concealment, which involved a breach of legal duty, trust or confidence, justly reposed and is injurious to another, **or by which an undue and unconscientious advantage is taken of another.** Boucher v. Texas Turnpike Authority, Tex. Civ. App., Texarkana 1958, 317 S.W.2d 594, 601, citing from Kellum v. Smith 1857, 18 Tex. 835, 836." *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex. Civ. App.–Fort Worth 1961, writ ref'd n.r.e.) (emphasis added).

4. San Jacinto's Attempted Misdirection

San Jacinto hangs its entire argument on the contention that the "unable to agree" requirement of the TEX. PROP. CODE ANN. § 21.012 (Vernon 1984) is satisfied by **only** an offer of money, irrespective of the rights demanded in exchange for that money.[2] For a

[2]The First Court of Appeals' reference at footnote 4 on page 800 of its Opinion gives the misimpression that San Jacinto offered adequate compensation during negotiations for the additional rights San Jacinto required the landowners to grant. The misimpression created by the court's footnote is revealed by the **fact** that in Case No. 02-0213, the jury awarded the landowner more than eight times San Jacinto's real estate appraiser's estimate of value, and more than three times the amount the Special Commissioners awarded the landowner. In Case No. 02-0215, the jury awarded more than two and one half times the amount the special commissioners awarded and almost one and a half times as much as San Jacinto offered, for a multi-product, assignable, and warrantied easement. As the Court knows from its experience, lots of things go into a jury's determination of damages during any given trial; therefore, an analysis of whether an offer was

condemnor to use the threat of eminent domain in an effort to intimidate and coerce landowners into granting rights that cannot legally be condemned is arbitrary, capricious, and, as the term fraud is defined in condemnation cases, fraudulent.

San Jacinto does not have the statutory authority to condemn property for an easement to transport "oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipeline." San Jacinto has judicially admitted it is a natural gas utility pursuant to TEX. UTIL. CODE ANN. § 181.001 (Vernon 1998), formerly TEX. REV. CIV. STAT. ANN. art. 1435 (Vernon 1980) (CR 10 at paragraph I). As a natural gas utility, San Jacinto only has the power to condemn an easement for a pipeline to transport natural gas. TEX. UTIL. CODE ANN. § 181.004 (Vernon 1998), formerly TEX. REV. CIV. STAT. ANN. art. 1436 (Vernon 1980). San Jacinto only pled for an easement to transport natural gas (CR 11 at paragraph IV). Therefore, San Jacinto's **requirement** that the Landowner grant San Jacinto the right to transport "oil, oil products, or any other liquids, gases or substances which can be transported through a pipeline" in the pipeline in the proposed easement was arbitrary, capricious, and fraudulent and did not qualify as a good faith offer.

San Jacinto cannot and did not condemn a warranty of title or the unrestricted right to assign the easement. San Jacinto has admitted it could not condemn a warranty of title (*see* the last sentence of footnote 4 on page 12 of San Jacinto's Response to Petition for

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made in good faith and was not arbitrary, capricious, or fraudulent, should be based upon something other than the retrospective outcome of a jury's determination of damages. That is why analyzing the rights a condemnor required the landowner to convey is a bright line **nonsubjective** test of whether part of the offer was made in good faith.

Review in this case). While San Jacinto has not admitted it cannot condemn the unrestricted right to assign the easement to any other person or entity, the landowner extensively briefed the issue in Respondents' Brief on the Merits in Case No. 01-0294 at pages 13-19, to which San Jacinto did not file a Reply Brief. Irrespective of whether or not unrestricted assignability could be condemned, the First Court of Appeals correctly held that San Jacinto did not actually condemn any right to assign the easement. *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791, 801 (Tex. App.–Houston [1st Dist.] 2001, pet. pending, briefs on the merits requested)(APX. TAB 8).

D. San Jacinto's negotiation tactics are criminal.

The Texas Legislature has enacted the following criminal statute with respect to tricking people into signing a document affecting property:

> **§ 32.46. Securing Execution of Document by Deception**
>
> (a) A person commits an offense if, with intent to defraud or harm any person, he by **deception**:
>
> (1) causes another to sign or execute **any** document affecting property or service or the pecuniary interest of any person; (emphasis added) TEX. PENAL CODE ANN. § 32.46(a)(1) (Vernon Supp. 2001)(APX. TAB 17).

The Texas Legislature has defined criminal **deception** as:

> (A) Creating or confirming by words or conduct a **false impression of law or fact** that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true; (emphasis added) TEX. PENAL CODE ANN. § 31.01(1)(A) (Vernon Supp. 2001)(APX. TAB 18).

Any attempt to argue that those statutes are irrelevant because the Landowner never did sign the form of easement attached to the final offer letter which San Jacinto has admitted the Landowner was required to sign in order to accept the final offer (*See* Request for Admission No. 7 at CR 97 in APX. TAB 13 and San Jacinto's Response to Request for Admission No. 7 at CR 109 in APX. TAB 14) is ineffective because the Texas Legislature closed that loophole by enacting Section 15.01 of the Texas Penal Code which states:

> **§ 15.01. Criminal Attempt**
>
> (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but **fails** to effect the commission of the offense intended. (emphasis added) TEX. PENAL CODE ANN. §15.01(a) (Vernon 1984)(APX. TAB 19).

San Jacinto's overt threat to sue the Landowner to acquire the rights San Jacinto could not and did not condemn is in the next to last paragraph of the "FINAL OFFER" cover letter delivered with the form of Right of Way Agreement the Landowner was **REQUIRED** to sign. (*See* Request for Admission No. 7 at CR 106 in APX. TAB 13 and San Jacinto's Response to Request for Admission No. 7 at CR 119 in APX. TAB 14) In that FINAL OFFER letter San Jacinto stated:

> If you elect to reject this offer, TECO and CENTANA may institute a condemnation suit in the court of Fort Bend County, to acquire the rights described in the Right of Way Agreement. (CR 173; APX. TAB 20)

Contrary to San Jacinto's evocative claims that the Landowner is asking the Court to "legislate", as the Court can readily see, neither the Landowner nor the Texarkana Court of Appeals usurped the Texas Legislature's power. San Jacinto's true objection, like all criminals, is that it has been caught. The Landowner has merely pointed out the relevant statutes and case law and the Texarkana Court of Appeals applied the appropriate legal analysis to the statutes enacted by the Texas Legislature, as was its duty.

The appropriateness and the applicability of those criminal statutes to civil proceedings is demonstrated by their inclusion in the Texas Pattern Jury Charge, compiled by attorneys and judges without a vested interest in condemnation proceedings. Pages 262 and 263 of the Texas Pattern Jury Charge on Damages are reproduced on the following two pages for the Court's convenience.

As a policy matter, does this Court really want to declare that behavior, which the Texas Legislature has unequivocally defined as criminal, is considered good faith behavior in the context of a condemnation proceeding?

E. The First Court of Appeals' "IMPLIED FACT FINDING" from traditional cross-motions for summary judgment is in error.

Procedurally, this appeal was before the First Court of Appeals on the trial court's rulings on traditional cross-motions for partial summary judgment on the jurisdictional good faith negotiations issue, just like proceeding in *Hubenak v. San Jacinto Gas Transmission Co.*, 37 S.W.3d 133 (Tex. App.–Eastland 2001, pet. denied)(APX. TAB 5). The First Court of Appeals clearly stated, "The issue in these cases was determined on **cross-motions for summary judgment.**" However, the First Court of Appeals then mixed apples and oranges when it stated:

> In *Hipp*, the appellate court presumed the trial court made an implied finding that the condemnor did not negotiate in good faith. *Id.* In the current appeals, however, we presume the reverse is true: **we presume the trial courts made implied findings** that San Jacinto negotiated in good faith. (APX. TAB 8; 65 S.W.3d at 798)(emphasis added)

Since the standard of review of traditional summary judgments has been clearly stated by this Court on numerous occasions, the Landowner is unable to explain the basis for the

First Court of Appeals statements about an implied fact finding by the trial court in a traditional summary judgment procedure as justifying a legal sufficiency (no evidence) review which would "...consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary" (APX. TAB 8 at page 791, highlighted for the Court's ease). The error appears to be a misreading of the *Hipp* Case. The *Hipp* Case cited by the First Court of Appeals discusses a **jury** finding **after** a trial (evidentiary hearing). Landowner is unaware of any case applying a legal sufficiency test to an **implied finding of fact** from a traditional summary judgment proceeding, because there are no determinations of disputed facts in a summary judgment proceeding to which a legal sufficiency test would be applied. In *IKB Industries v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997), this Court stated:

> [N]ot that a summary judgment is not a trial within the meaning of the rule, but that "findings of fact and conclusions of law have no place in a summary judgment proceeding". *Linwood*, 885 S.W.2d at 103. The reason findings and conclusions "have no place" in a summary judgment proceeding is that for summary judgment to be rendered, there cannot be a "genuine issue as to any material fact", TEX. R. CIV. P. 166a(c), and the legal grounds are limited to those stated in the motion and response, *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993). In other words, if summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response. **The trial court should not make, and an appellate court cannot consider, findings of fact in connection with a summary judgment.** (emphasis added)

Neither findings of fact nor **implied** findings of fact have any business in a trial court order or appellate court analysis of traditional motions for summary judgment or traditional motions for partial summary judgment. If the record and San Jacinto's judicial admissions do not establish that judgment should be entered in favor of Landowner because San Jacinto did not make a good faith offer and never would have made a good faith offer, then at least the First Court of Appeals judgment should be reversed and the case should be remanded to the trial court to conduct an evidentiary hearing, as was done in *Hubenak v. San Jacinto Gas Transmission Co.*, 37 S.W.3d 133 (Tex. App.–Eastland 2001, pet. denied)(APX. TAB 5). As a civil procedure point of law, the First Court of Appeals statements about the standard of the appellate review of a traditional motion for summary judgment need to be corrected.

F. Landowner objected to the conclusory and hearsay evidence offered in support of San Jacinto's motion for partial summary judgment.

San Jacinto offered the affidavit of David M. Dunwoody attached to San Jacinto's Amended Motion and Response to the Landowner's Cross-Motion for Partial Summary Judgment (CR 155-157) and portions of Mr. Dunwoody's deposition (CR 346-358) in support of its claim of good faith negotiations. The Landowner repeatedly objected to the conclusory and hearsay evidence and to any evidence contrary to San Jacinto's admission that the Landowner was required to grant San Jacinto an easement (i) for the transportation of substances other than natural gas, (ii) unrestricted as to assignability, and (iii) warranting title to San Jacinto. (CR 204-205; 224-225; 338; and 363-364) The trial court overruled

Landowner's objections (CR 369; APX. TAB 3). There is no evidence San Jacinto made a good faith offer to the Landowner **prior** to this condemnation proceeding being filed.

Mr. Dunwoody's affidavit is not competent summary judgment evidence because it is not based on personal knowledge, is missing exhibits, contains hearsay statements, and merely recites legal conclusions rather than stating facts necessary to support legal conclusions and the Landowner timely objected to the affidavit and deposition testimony of David M. Dunwoody on those grounds (CR 204-205; 224-225; 338; and 363-364). The trial court improperly overruled the Landowner's objections to the affidavit of David M. Dunwoody (CR 369; APX. TAB 3 and CR 371; APX. TAB 2). The affidavit does not demonstrate that Mr. Dunwoody was testifying from personal knowledge. TEX. R. CIV. P. 166a(f); TEX. R. EVID. 602; *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). The affidavit did not recite facts supporting the conclusory statements that ". . . demands. . . that require unacceptable terms have to be refused" such as identifying any allegedly unacceptable demands the Landowner made. Mr. Dunwoody's conclusory statements regarding futility of negotiations are not competent summary judgment evidence because Mr. Dunwoody did not recite any facts from which a legal conclusion of futility of negotiations could be drawn. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984). Further, the affidavit is incomplete on its face since the forms of easement agreements referenced in the letters attached to Mr. Dunwoody's affidavit were not included with his affidavit. *See Guthrie v. Suiter,* 934 S.W.2d 820, 824-25 (Tex. App.--Houston [1st Dist.] 1996, no writ). Therefore, Mr. Dunwoody's affidavit is not competent summary judgment evidence to raise

even a genuine issue of material fact as to San Jacinto's alleged but unpled affirmative defense of futility of negotiations.

The deposition testimony of Mr. Dunwoody (CR 240-267) and the affidavit (CR 231-233) offered by the Landowner conclusively established the lack of facts to support the conclusions drafted for Mr. Dunwoody to sign (CR 242 at lines 10-24), all of which established the following:

1. Mr. Dunwoody could not recall when he first spoke to Mr. McElya or Mr. Noel. (CR 245 line 16 to CR 246 line 8; CR 250 line 25 to CR 251 line 5; and CR 252 line 16 to CR 254 line 2);

2. No substantive conversation between Mr. Dunwoody and Mr. McElya or Mr. Noel occurred prior to Plaintiff's Original Statement Petition for Condemnation being filed on September 11, 1996. (CR 231 at paragraph 4 and CR 245 line 16 to CR 249 line 12);

3. Mr. Dunwoody could not remember any specifics about futility of negotiations. (CR 245 line 16 to CR 249 line 12);

4. The deposition of Mr. Dunwoody demonstrated that warranty of title and unrestricted assignability were non-negotiable items and a landowner's refusal to grant them would result in Plaintiff declaring negotiations were futile, even without consideration of the money involved. (CR 243 lines 9-11 and lines 17-24; CR 244 lines 6-8; CR 328 lines 15-20; and CR 329 lines 9-18);

5. Mr. Dunwoody did not instruct the right of way agents to inform the landowners that San Jacinto Gas Transmission Company could not condemn oil, petroleum products, or any other liquids or substances which can be transported through a pipeline. (CR 255 line 9 to CR 261 line 8); and

6. Contrary to the blanket general inference that negotiations with Mr. McElya and Mr. Noel would be futile, CR 298-306 is a copy of an easement granted by The Mary Blahuta Living Trust to TECO Industrial Gas Company and Centana Intrastate Pipeline Company, the partners in San Jacinto (CR 2) for a pipeline easement across the tract of land involved in Case No. 02-0214.

Good faith negotiations are time critical and negotiations that occur after a statement and petition in condemnation are filed are irrelevant. *Texas-New Mexico Power Co. v. Hogan,* 824 S.W.2d 252, 254 (Tex. App.–Waco 1992, writ den'd). San Jacinto did not offer any factual or admissible evidence that it ever made the Landowner an offer only for the rights it sought to condemn. Landowner timely objected to San Jacinto's conclusory and hearsay evidence and obtained a written order overruling her objections to San Jacinto's inadequate and inadmissible evidence (CR 369; APX. TAB 3).

G. San Jacinto did not offer any evidence in support of its claims that the three additional property rights are not valuable.

San Jacinto has the burden of proof with respect to making a good faith offer. *Amason v. Natural Gas Pipeline* Co., 682 S.W.2d 240, 242 (Tex. 1984) ("...the condemnor becomes the plaintiff for the purpose of proving its right to condemn"); *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex. Civ. App.–Galveston 1948, **writ ref'd**) ("In order for the City to vest the county court with jurisdiction to condemn appellees' land, **it had to first allege, and then during the proceedings prove**, that it had failed to agree with the appellees on the value of their **land to be taken**." (emphasis added)). San Jacinto did not offer any evidence to support its argument that the three additional property rights are not valuable. San Jacinto's own actions demonstrate the additional property rights are indeed valuable, otherwise why did San Jacinto engage in the oppressive tactic of requiring landowners to grant the three valuable property rights in order to avoid being dragged into the judicial system?

CONCLUSION

San Jacinto did not offer any evidence it ever made the Landowner an offer for only the rights it sought to condemn. All of the evidence demonstrates that San Jacinto's tactics constituted a wrongful act and abuse of the right of eminent domain.

PRAYER

The Court should grant the Petition for Review, reverse the First Court of Appeals' judgment, render judgment that the trial court lacked jurisdiction, and remand the case to the trial court for a determination of the Landowner's remedies as a result of the dismissal or reverse the court of appeals judgment and remand the case to the trial court to conduct an evidentiary hearing on the good faith negotiations issue and award Landowner its costs of the appeals.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of June, 2002, a true and correct copy of the foregoing Petition for Review has been forwarded by regular mail to Thomas E. Sheffield, Attorney at Law, 3027 Marina Bay Drive, Suite 207, League City, Texas 77573.

/s/
William D. Noel