

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 REPLY BRIEF ON THE MERITS

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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?**
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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?

ARGUMENT AND AUTHORITIES

1. San Jacinto's attempted distortion of Landowner's position.

Having neither the facts nor the law on its side, San Jacinto Gas Transmission Company (“San Jacinto”) attempts to create confusion. On page 2 of Respondent’s Brief on the Merits, San Jacinto said, “While Petitioner continues to press the argument that a condemning authority cannot negotiate for rights which it allegedly cannot condemn the argument remains a purely hypothetical one...” and “Petitioner essentially asks this court to engraft upon existing law, by judicial fiat, the requirement that a condemnor may negotiate only for easement terms which it will later condemns.” Kutach Family Trust, Darryl Wayne Kutach, Trustee (“Landowner”) has only taken the position that if a condemnor is going to threaten to drag a landowner 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:

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.
(MidTexas Pipeline Co. v. Dernehl, 71 S.W.3d 852, 861 (Tex.

App.–Texarkana 2002, pet. filed in Case No. 02-0320, briefs on the merits requested) copy of the opinion at APX. TAB 10 of Petitioner’s Brief on the Merits)

San Jacinto’s attempt to distort its legal obligations, its burden of proof, 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 abuse of the threat of condemnation.

If San Jacinto was conducting negotiations openly, honestly, and without deceit or fraud, which is the standard set forth in *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), San Jacinto would have sent the Landowner a form of easement attached to its final offer letter that was limited to only the rights it was going to sue Landowner to obtain, *i.e.* delete the clauses that would allow San Jacinto (i) to transport any substance other than natural gas through the pipeline, (ii) assign the easement to any person or entity regardless of whether they or it can condemn, and (iii) make a title warranty claim. That is a very straight forward and **simple** step that is (i) **easy** to comply with and (ii) **easy** to prove and, thus, one this Court should reaffirm as the minimum requirement.

2. San Jacinto’s Problem

The problem San Jacinto has in all of its cases and the reason it must seek to distract the Court from the established law and the facts, is that if the Landowner had told San Jacinto

that the money San Jacinto was offering was adequate but the Landowner only wanted San Jacinto to limit the easement to the transportation of natural gas, (ii) make the easement nonassignable, and (iii) delete the warranty of title provisions, San Jacinto would have declared negotiations futile.

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 at APX. TAB 16 of Petitioner’s Brief on the Merits and Petitioner’s Motion for Rehearing in Case No. 01-0294 at page 10 at APX. TAB 6 of Petitioner’s Brief on the Merits)(emphasis in originals)

How is that position going to help reduce litigation other than through oppression and intimidation?

San Jacinto did not offer any evidence that it would have accepted an offer from a landowner, at San Jacinto’s dollar amount, if those three rights were deleted from the form of easement. Nor did San Jacinto offer any evidence as to why it would not accept an easement from a landowner for only the rights San Jacinto could condemn. It was San Jacinto’s burden of proof, not the Landowner’s burden of proof.

3. *San Jacinto harassed Landowner.*

Having admitted it never would have made an offer and never would have accepted a counteroffer from Landowner for only the rights it could condemn, irrespective of the dollars, San Jacinto must have been hoping to simply wear down Landowner during negotiations. A brief summary of San Jacinto's negotiation contacts suggests that if San Jacinto was really operating under the futility concept, it would have given up earlier than it did. If it is not oppressive behavior it is certainly offensive behavior to keep after a landowner knowing that a pipeline easement for only the rights that can be condemned will NEVER be accepted, even if the landowner agrees to the pipeline company's dollar offer.

- 7/11/96 Conversation: Met with Landowner and explained easement. The Landowner said he would rather not have the pipeline since he had never been paid for damages from the last pipeline to cross the property. (CR 182)
- 7/16/96 Conversation: Landowner did not want to hear any proposal. (CR 182)
- 7/18/96 Letter: Sent to the Kutach Family Trust offering to buy pipeline easement for natural gas and referencing a form of easement as being attached. (CR 159-160) The form of easement was not attached to the affidavit.
- 8/6/97 Conversation: Landowner still opposed to pipeline but would meet with San Jacinto. (CR 181-182)
- 8/8/96 Conversation: made appointment to meet with Landowner. (CR 181)
- 8/9/96 Conversation: Landowner still opposed to pipeline. (CR 181)
- 8/13/96 Conversation: Landowner had not discussed the

proposal. (CR 180)

- 8/15/96 Final Offer Letter: Sent to Darryl Wayne Kutach, Trustee referencing “For a Natural Gas Pipeline” but the form of easement enclosed with the Final Offer Letter, although not attached to Mr. Dunwoody’s affidavit, which San Jacinto admitted was the form of easement the Landowners were **required** to sign in order to accept the final offer (Request for Admission No. 7 at APX. TAB 13 of Petitioner’s Brief on the Merits CR 97 and San Jacinto’s Response at APX. TAB 14 of Petitioner’s Brief on the Merits CR 109) would have allowed for the transportation of “oil, petroleum products, or any other liquids, gases or substances which can be transported through a pipeline. . .” (CR 100; at APX. TAB 13 of Petitioner’s Brief on the Merits, at the bottom of the first full paragraph). **Was the Final Offer Letter referencing “For a Natural Gas Pipeline” open and honest, without deceit as required by *State v. Hipp*, 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 (Tex. 1993) (per curiam) when the enclosed form of easement (CR 100 at APX. TAB 13 of Petitioner’s Brief on the Merits), if signed, would have granted the right to transport any substance?**
- 8/16/96 Conversation: Called the Landowner about resurvey. (CR 180)
- 8/18/96 Conversation: Landowner gave permission to resurvey. (CR 180)
- 8/19/96 Conversation: The Landowner will meet to finalize the offer and right-of-way agreement. (CR 180)
- 8/30/96 Conversation: Mr. Dunwoody meets with Mr. Noel and

Mr. McElya and discusses general concepts.¹

- 9/4/96 Conversation: Mr. Dunwoody asked what information was needed. (CR 233)
- 9/6/96 Fax: Sent to Mr. Noel from Mr. Dunwoody with offers and forms of easements. (CR 268-289)
- 9/11/96 Statement and Petition in Condemnation filed. CR 10.²
- 9/19/96 Letter: Sent to Mr. Dunwoody asking if San Jacinto would restrict the easement to natural gas and no assignability. (CR 290)
- 9/20/96 Phone message: Mr. Dunwoody said San Jacinto would not accept a non assignable easement. (CR 233)

Summary of Contacts:

What caused San Jacinto to stop approaching the Landowner? The Landowner merely stating it did not want the pipeline was not enough for San Jacinto to declare negotiations futile. San Jacinto contacted the Landowners fourteen (14) times after being told the Landowners did not want the pipeline. Mr. Dunwoody's affidavit merely recited conclusions without factual detail that would support the conclusion that further negotiations were futile and did not identify what "unacceptable" terms the Landowners required or why the Landowners' terms were unacceptable. CR 156. The Landowners objected to Mr. Dunwoody's conclusory and unsubstantiated statements. CR 204-205; and 224-225.

¹ For a clear, direct, and fact based affidavit as compared to Mr. Dunwoody's vague and conclusory affidavit, see Mr. Noel's affidavit at CR 232-234.

² The condemnor is required to make a good faith offer **before** filing a condemnation proceeding. Since the offer is time critical, any offers or negotiations after the proceeding is filed are irrelevant. *Texas-New Mexico Power Co. v. Hogan*, 824 S.W. 2d 252, 254 (Tex. App.--Waco 1992, writ denied). Even though post-filing negotiations are irrelevant, San Jacinto's statement on 9/20/96 of not giving up assignability is consistent with its pre-filing position in all the cases.

Bottom line, San Jacinto **never** discharged its statutory duty to make an offer for only the rights it could condemn.

4. Audish v. Clajon supports Landowner's position.

San Jacinto's reliance on *Audish v. Clajon Gas Co.*, 731 S.W. 2d 665 (Tex. App.–Houston [14th Dist.] 1987, writ ref'd n.r.e.) is interesting because the decision points out that overreaching in negotiations is not new. San Jacinto's recitation of the facts in *Audish v. Clajon Gas Co.*, *id.*, like its reading of *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), ignores the relevant portions of the opinion. Landowner does not dispute that a condemnor can amend its condemnation petition to take less property or rights, **if** the condemnor's needs have changed since the original legitimate concept of the project and filing of the condemnation petition, which was the case in *Audish v. Clajon Gas Co.*.

San Jacinto gave the wrong impression in its Brief on the Merits when it stated, "Clearly, Clajon negotiated for more rights than it condemned and for which there was a public necessity." (Respondent's Brief on the Merits at page 20) Clajon negotiated for the right to lay two pipelines and Clajon actually condemned for the right to lay two pipelines in 1981. The opinion states, "The **easement described in the written offer** of June 9th **was the easement sought in the suit filed** June 10th, JD-24." (731 S.W.2d at the middle of left column of page 672)(emphasis added) In 1984, **three years after** it originally filed a petition

to condemn for two pipelines, Clajon realized it did not need to install the second pipeline and amended its petition to reduce the number of pipelines from two to one. (731 S.W.2d at the bottom lower left column of page 672) San Jacinto's characterization of *Audish* Opinion is misleading.

However, the opinion is also instructive on the issue the Landowner has raised and the one San Jacinto ignores: an offer for rights that will not be condemned does not satisfy the jurisdictional prerequisite of a good faith offer. Before making the offer for two pipelines to transport natural gas, it should be noted that Clajon had filed a condemnation proceeding based upon an offer for only an easement for an **unlimited number of pipelines to transport "natural gas, crude oil, or related petroleum products"**. (731 S.W.2d at the top of the right column of page 667) Once it was apparent the landowner was not going to be overrun by Clajon's oppressive tactic of demanding easement rights Clajon, as a gas utility could not possibly condemn, Clajon dismissed the original condemnation proceeding and made an offer for only the rights it could actually condemn to obtain, two pipelines **for the transportation of natural gas only**, since it, just like San Jacinto, was a gas corporation (731 S.W.2d at the top of the right column of page 667), which can only condemn an easement to transport natural gas. Rather than following the roadmap set forth in *Audish v. Clajon Gas Co.* of making an offer for what would be condemned, San Jacinto ignored the law and the landowners' rights. San Jacinto wants to take the benefits provided by the condemnation statutes and ignore or abuse the duties imposed by the statutes.

5. San Jacinto has no evidence to support its conduct.

In order for the Landowner to accept San Jacinto's dollar offer, San Jacinto required the Landowner to sign an easement that would grant San Jacinto:

- **The right to transport anything that will pass through a pipeline;**
- **Unrestricted assignability; and**
- **Warranty of title.**

San Jacinto did not offer any evidence that it would have accepted an offer from a landowner, at San Jacinto's dollar amount, if those three rights were deleted from the form of easement. Nor did San Jacinto offer any evidence as to why it would not accept an easement from a landowner for only the rights San Jacinto could condemn.

San Jacinto's judicial admission in its Brief on the Merits and Motion for Rehearing in this Court in Case No. 01-0294 that San Jacinto would NEVER give up the three rights Landowners are complaining about 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"; (ii) the unrestricted right to assign the easement to any person or entity; and (iii) the obligation of the Landowner to warrant and defend title to the easement. 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 of Petitioner's Brief on the Merits at CR 109. 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 of Petitioner's Brief on the Merits and San Jacinto's Response to Request for Admission No. 7 at CR 109 in APX. TAB 14 of Petitioner's Brief on the Merits.)

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 her costs of the appeals.

Respectfully submitted,

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