ORAL ARGUMENT – 1/30/02
01-0150
GUADALUPE-BLANCO RIVER AUTHORITY. VS. KRAFT

HEATH: This case involves the appraisal of a 30 ft by 4,600 ft. strip in a condemnation proceeding. And the issue is whether the Daubert, Robinson, Gammill reliability standards applies to the apprisal testimony.

The majority opinion of the CA begins by recognizing as it must, the Gammill v. Jack Williams Chevrolet that provides that expert testimony must be relevant and reliable if it's to be admissible. And that the DC has a duty to act as a gatekeeper to ensure that that reliability decision is made before the testimony is presented to the jury. By the time the CA gets to its holding, however, it has in essence read those requirements out of Texas jurisprudence, at least insofar as appraisal testimony in condemnation cases is concerned.

The CA's majority concluded in the specific context of appraisal testimony that if one party is permitted to present evidence of market value, then the other should be allowed to present evidence based on its competing theory. Even though the comparable sales are allegedly based on the wrong assumptions and are not truly comparable, the perceived flaws of the testimony of the experts are matters properly to be tested in the crucible of adversarial proceedings. They are not the basis for truncating that process.

In other words, according to the majority of the CA, admit the evidence notwithstanding the objections as to reliability of the expert's methodology, and let the jury with the assistance of course of cross-examination and competing testimony determine which testimony is correct. And I would suggest that is exactly the opposite of what the US SC in Daubert and this court in Robinson and Gammill.

O'NEILL: At what point does this go to the weight and not the admissibility? Isn't that the line we've got to draw? At some point the jury should be allowed to determine these various components on their own and weigh the measures of them.

HEATH: Certainly there is a point where you start looking at the weight of the evidence. But the court has drawn the line in Gammill and in Robinson that we initially make a reliability determination and a relevance determination and determine that the expert testimony is relevant before we let this testimony with the cloak of coming from an expert and having that special status that _____ expert testimony...

O'NEILL: But we've got case law that says, generally this type of analysis goes to the weight and not the admissibility. And how do we square that in this type of case? At what point does it become so attenuated that we have to decide it as a matter of law?

HEATH: Certainly in this case, I think it was for the very simple reason that the testimony in this case and the methodology in this case was focused on something that was not at all the issue before the court. The issue before the court and the jury was what's the value of this 30ft by 4,600 ft strip that was over at the backside of the property. And what the expert did was evaluate it and gave a value to some other piece of property that wasn't even in the same geographic location. It wasn't reliable to establish the value of that property.

PHILLIPS: If this case were coming up 10 years ago before Daubert, would you win or lose?

HEATH: I think 10 years ago we would win, not necessarily on the same standard. I I think we would win because there wouldn't be reliable testimony. It wouldn't be relevant testimony. Obviously, before Daubert, we wouldn't have the gatekeeper hearing, and the issue wasn't raised in that sense. But it wouldn't have been reliable testimony. For example, one of the pieces of testimony dealt with the value of land that was residentially subdivided land. This land was not. The law even 10 years ago as reaffirmed in Sharboneau just last May is that that sort of appraisal is not relevant to unsubdivided land.

PHILLIPS: You notice that we left this issue open.

HEATH: Well it was left open - I think that the general rule I would submit was recognized that existed in Willy and I think the court left open the possibility that a subdivision development analysis would be performed as sort of a separate noncomparable theory.

PHILLIPS: I mean left off the issue of whether appraisal testimony is screened under Daubert.

HEATH: I would suggest though in Gammill, the decision was made that all expert testimony is subject to Daubert.

ENOCH: It is generally accepted in the appraisal field that one way to appraise property is by the use of comparables. So the appraiser gets up on the stand. And the appraiser says, I appraise this property using comparables. Objection. I'm gonna want a Robinson hearing. Okay. So whoever is _____ the witness, he puts the witness back upon the stand and says, Mr. Witness you're an appraiser. Yes. And you've got all the appraiser degrees? Yes. You've had all the education an appraiser has? Yes I have. And you've appraised this property? Yes. And what methodology did you use? I used the appraisal method. Does that satisfy the Robinson test?

HEATH: No. I think that doesn't, because the burden is to show that the methodology is reliable. And it's not just that the methodology is reliable...

ENOCH: Well the appraisal methodology, the comparable methodology is accepted in the industry for appraising property.

HEATH: That's correct. But you also have to show that the facts that you are looking at and the assumptions that you are looking at correspond to the conclusion that you are making. If we look at Burrows Welcome(?), I believe is the case, where the antiseptic spray was sprayed on somebody's foot. And the question was, is that testimony reliable because the expert testified that there would be the possibility or it would cause frost bite assuming there was no discoloration. It turns out there was discoloration. If the facts and the assumptions don't correspond to what you're talking about and what the court has to decide it's not relevant. In this case, even though the appraisal methodology and the comparable sales methodology is fine methodology, we don't question that, the assumptions that were made don't correspond to the questions that were before the court. The expert didn't and couldn't connect the dot from A to B. And that's what he has to do in the Robinson case.

ENOCH: What should the expert have done in this case to connect the dot from A to B?

HEATH: I think he had a very difficult problem because his methodology was so flawed. His methodology was instead of valuing the land that is taken, I'm going to instead give you evaluation for a piece of property, not that's long and skinny, but is compact and roughly square, and not that's located at the back of the property, but that instead is located over by the utilities and on the state highway. And that, I think, that methodology is not reliable for giving us the value of the property that was actually taken.

ENOCH: If he had said that I'm using the appraisal method what else do you say now is the burden at the Robinson hearing for the plaintiff to get from the witness to establish liability?

HEATH: I think he has to show that his assumptions are relevant to the question being answered by the ______, that has to be answered by the jury. So in other words, I think as a general principle you have to appraise it. I think Sharboneau was very clear in saying that you have to look at and you have to appraise and you have to give an answer about the property that's taken, not some hypothetical, not some speculative piece of property. In Sharboneau the problem was, that the answer was for something that was speculative.

HANKINSON: Why isn't this like Sharboneau then in the question of relevancy and not reliability?

HEATH: I think they are intertwined. I think it is neither reliable nor is it relevant. I think it's not relevant because it's a different piece of property.

HANKINSON: But those are two different legal inquires. And I understand you hang your hat here on reliability.

HEATH: I think a methodology is not reliable if it doesn't answer the question that the jury has to answer. If it doesn't address the questions that the jury has to answer.

HANKINSON: But doesn't that make it irrelevant?

HEATH: I think in that case they are intertwined.

HANKINSON: And that to me sounds like relevancy as opposed to reliability?

HEATH: And I think you cannot separate them in that instance.

HANKINSON: What could the party offering the testimony of this expert have done to make an appropriate record under Robinson that could have established reliability? What is it that you say is missing?

HEATH: What he could have done is explain how the testimony that he gave got us to the answer the jury was supposed to get to, which is the value of the property that's over at the back end of the property that's taken that's at the back end of the track. He didn't do that. He didn't connect the dots. He didn't go from A to B.

HECHT: But you don't think he can?

HEATH: I don't think he can. That's correct. Now I think had he given other testimony that he had a different methodology, had he had different assumptions, he could have gotten there. But if you start out by saying, I'm not valuing this 4,600 ft piece of property that's 3/4 mile from the nearest utility I'm going to assume that it has utilities. And I'm going to assume that it's sitting on state highway 123, when in fact it's 3/4 miles away. You can't get from A to B in that circumstance. And I think that the methodology was fatally flawed.

ENOCH: Windham was a circumstance where there was a strip of land being taken, and the argument between the parties was how much additional land you have to add to it to create an economic unit that can otherwise be appraised. Neither the landowner nor the condemnor used the strip of land. They both appraised that land by adding more land to it to create an economic unit, and then using a pro rata share on it. And the argument was just over which more land was to be used. If in this case the appraiser or the landowner had testified that in the comparable method it's appropriate to take a small strip of land that is not able to be valued and add it to other land in order to produce a unit that can be appraised, would he have satisfied Gammill?

HEATH: Yes.

ENOCH: And so this evidence was reliable and relevant?

HEATH: If he had done that, but he didn't do that. Because what he did was he moved it somewhere else and his land that he valued did not even include the land actually taken.

ENOCH: What he needed to testify to was that in the appraisal method, not only is it

permissible to include the strip of land in more land in order to get the proper appraisal, but the land has to be at the frontage area not at the back?

HEATH: I think you would have to say that the tract that you value and that you use in this pro rata methodology has to include the tract of land taken. Your economic unit has to include the area taken. What he valued was in a different physical location. Page 87 of the transcript says, I moved it or I assumed it was over on 123. It's not. It's 3/4 mile away.

BAKER: Would it be a fair statement that the example that the appraiser used was a made up example?

HEATH: I think it was a made up methodology.

BAKER: Did not in anyway resemble the piece of land condemned?

HEATH: Absolutely.

BAKER: So therefore the premise that he based his whole appraisal on was a faulty one?

HEATH: Absolutely. The difference between this for example and Sharboneau is, in Sharboneau...

BAKER: So that supports your argument that what he said was neither reliable nor relevant because it didn't appraise the piece of land that was condemned?

HEATH: Absolutely. In fact in Gammill, the seatbelt, they said if you would have showed us how this could have happened, you didn't show us that it did happen. You didn't connect the dots to show that it did happen. Here it never could have happened.

BAKER: The other point I think is whether you preserved your error that we've been discussing. Is that correct?

HEATH: That has been raised and the objection was made before the expert testified or gave his opinion that under Robinson and Gammill it was not reliable and that a hearing had to be held.

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RESPONDENT

AUSTIN: First thing I would like to do...

BAKER: On the preservation thing, it's my understanding that the petitioner points to

the record at pages 54-56 to show that the objection to your expert's testimony was made timely and sufficient to apprize the TC. Do you agree or disagree with that?

AUSTIN: It was made timely. It was a generic objection that could apply from anything to an airplane crash to a zipper. It simply said that the testimony was unreliable because it did not comport with the Daubert concept. Now that does not tell us _______ did not comport to the Daubert concept.

BAKER: But isn't it your burden when that's raised to show that it is both reliable and relevant?

AUSTIN: It is our responsibility, but when all is said and done if the other party has specific objections, the objection must be specifically made. A generic objection is insufficient. At the outset of this, I would like to take issue with my opposing counsel's statement that the issue is whether the Daubert rule applies. Quite plainly by its terms, the Daubert rule applies. The difficulty comes in the fact that the Daubert rule was basically annunciated to exclude pseudo science. That is, to give the judge apparently regarded as a person with superior knowledge and interlect...

BAKER: But what about Gammill? Doesn't Gammill take the issue way beyond junk science and say basically that rule 702's reliance and relevant factors apply to any expert?

AUSTIN: Yes. We don't have any problem with that.

BAKER: Then why wouldn't it apply to appraiser in a condemnation case?

AUSTIN: We do not have any problem with the proposition that it applies to appraisal testimony. The problem is, that the rule as annunciated was intended for pseudo science...

BAKER: But doesn't Gammill say we're going to have cases where the "five factors in Robinson or the 6 factors in Texas and the 5 factors in federal cases will not fit the TC's analysis?" But that still doesn't mean you're not supposed to do one is it?

AUSTIN: For example, the Daubert rule requires that the opinion of the appraiser be subjected to concurrent review by its peers.

BAKER: Well do you say that you think you have to apply that factor here, or that it's not a necessary one and let's look to something else to determine?

AUSTIN: That's exactly the argument I am making, that when you try to fit a size 12 appraisal into a size 9 Daubert configuration...

BAKER: That doesn't mean you're not supposed to do an analysis to determine whether it's relevant or not.

AUSTIN: You should do it the best you can. But an appraisal as to the value of real estate is erratically different expert opinion than whether silicon causes breast cancer. I think the Daubert rule is predicated upon the responsibility of the judge to protect the jury from pseudo scientific testimony.

BAKER: I'm not understanding what the basis of your argument is. If you agree the theory applies why doesn't this case require such an analysis, and if does, what kind of analysis do you think the TC should have done?

AUSTIN: Well it does apply, and it does require an analysis. The difference is that a evaluation opinion as to land has nothing to do with science or pseudo science.

BAKER: Well let's say we all agree with that. So that's not an issue with the court. What should be done when that objection is made and the request for a Daubert hearing is made within the context of a condemnation case and appraiser's proposed testimony?

AUSTIN: What was done was properly done by Judge Rodriguez, the trial judge in this case. She took the Daubert standard, put it up against the testimony that was offered, and then made her best decision that she could under the circumstances that she had. And this is a matter strictly within the discretion of the TC. The judge I think must be presumed and the evidence bears out did the best job that she could in trying to fit the Daubert rule to an appraisal testimony.

HANKINSON: As I understand Mr. Heath's argument, he claims that under Gammill there is an analytical gap in the expert's testimony. And that is that by reconfiguring the property before doing the comparison with other properties that by doing that, and there was no nexus between that type of analysis and the actual facts in this case, and that that is fatal that Gammill in fact requires that there be that nexus in order to avoid analytical gaps that are fatal to an expert's opinion. Would you respond to that argument?

AUSTIN: The fact is in this particular case there were no over market sales of rights-of-way, strip rights-of-way in Guadalupe County, Texas. So neither party had direct comparables that they could apply to the equation. Obviously there were two alternatives: the landowner relied upon the reconfiguration to a unit that was economic; on the other hand, the condemnor's appraiser wanted it to be 3.350 seconds of the value of the mother tract. Now this is very unfair to the landowner, because it is considered the judgment of the state or the Guadalupe River Authority that they need a tract of land 30ft wide and 4,600 ft long. By that determination of convenience and necessity the River Authority casts upon the landowner the burden of accepting that strange configuration.

HANKINSON: If the complaint is that there's an analytical gap because there's no nexus between the reconfiguration and the actual facts in the case, then wasn't it incumbent upon you in offering the expert to show that that was an accepted methodology within the appraisal industry to do that type of reconfiguration and, if so, then there is nothing in the record that indicates that to my understanding?

AUSTIN: Well there is because we called to the attention the textbook that's widely accepted in Texas, Rayburn on condemnation that was supportive of our position. On the other hand, you will see in your briefs in this court a quotation from the American Institute of Appraisers.

HANKINSON: Let's go back to what the record says. What is specifically in the record that shows that this reconfiguration approach as part of the methodology for doing a comparable sales analysis is accepted in the appraisal industry?

AUSTIN: In the record I believe there is some mention of the Windham case and also Rayburn on Condemnation.

HANKINSON: Do you agree that having done this reconfiguration which you say was required by the circumstance because there was no other way to do comparable sales, that the line of cases interpreting rule 702 would require that there be proof that this was an accepted methodology in order to be reliable?

AUSTIN: Yes, and I think that we offered sufficient proof in the form of an outside source which is Rayburn.

HANKINSON: And what does the record reflect that this secondary material by Rayburn, what does it reflect? Does it support and show that this reconfiguration approach was an accepted methodology within the industry?

AUSTIN: We know that the reconfiguration approach, at least in situations that have so far presented themselves is quite acceptable under Texas law. Now on the other hand...

ENOCH: Are you relying on Windham for that?

AUSTIN: Yes, we do.

HANKINSON: You're relying on Windham as legal basis for approach. And that depends on our interpretation of Windham. My question still goes back to does Rayburn, if that's what you rely upon in the record, reflect the fact that doing this type of reconfiguration was part of the methodology on a comparative sales analysis show that it is an accepted method within the industry?

AUSTIN: To my thinking it does. It requires a lot of inference. Let me point out this. There was a swearing match between two appraisers. One of the appraisers said, I did it the right way; and the other said, no, no, no I did it the right way. We offered the only outside evidence of procedure within the industry. Now I notice before the SC they have used for the first time a quotation from a publication of the American Institute of Appraisers. The Appraisal Institute. This is highly respected of course, but this did not appear in the TC. It did not appear in the CA. It appears for the first time in the SC. So, essentially when the judge has a swearing match between two experts, then all she can do is rely upon their respective testimony. And unless she has some

guidance from a third source, which I believe the Daubert rule specifically anticipates, then the judge has to do the best she can on what she hears. And there was no evidence introduced, no standards introduced from the outside that would contradict either of these appraisers' testimony.

ENOCH: Could a court in an appraisal of real estate just realize that what the appraisers say are subjective, just decide that I'm hearing two experts. This is a strip of land and the back end of some property that is several hundred acres large. And the strip is at the back of that, very little frontage road on a 4-lane highway. And the owner buys it for $100,000, and we are here 3 years later, we're still in the country, the basic use of the land hasn't changed. And there's an argument between the appraisers as to whether this strip of land is worth $2,100 an acre or it's worth $20,000 an acre. Could a judge just listen to the testimony between the two appraisers and just from the judge's own knowledge of the community and real estate values just determine one appraiser is just out the window?

AUSTIN: Yes. And that's what she did.

O'NEILL: How does your economic unit which is fairly hypothetical differ from what we talked about in Sharboneau, the hypothetical subdivision? How do you distinguish those two?

AUSTIN: In my opinion, I think that there needs to be a second look taken at this problem. Obviously, when you have a government carrying out a proprietary function, they are out to make money. And the strip of right-of-way is a link in a chain of a valuable pipeline that has a value in and of itself. So in the broader philosophical sense, yes, it is an economic unit and it would not be taken and used if it were not an economic unit in the broader sense. In this case the testimony was to the contrary.

O'NEILL: Well, I'm still trying to link up the difference between the hypothetical subdivision in Sharboneau and your hypothetical economic unit here?

AUSTIN: Well I think I can assist you in that respect. We have had a long history in Texas of landowners trying to create hypothetical subdivisions and losing in the courts because they did try to create hypothetical subdivisions. Now what the appraiser in Sharboneau did was to take the piece of land and to say, well now if we develop this land we can sell all of this land for X number of dollars. And then we back out the hypothetical cost, and then give the landowner the hypothetical profit. I knew that case was headed for reversal because while that may be the law in some states it's certainly not in Texas.

O'NEILL: But didn't you do the same thing here? You took a hypothetical configuration that wasn't this configuration, you compared it to a hypothetical close to a highway that's no close to a highway. I'm trying to figure out the difference between the hypotheticals here.

AUSTIN: The difference is this. This case is unique like all pipeline cases, like all strip right-of-way cases because the configuration is imposed at the pleasure and for the pure convenience

of the gov't. Now we all know and this is probably the strongest factor in the valuation of real estate, that a small acreage to 3 acres is going to sell for much, much more than 247 acres. Now if the landowner is tied to the average value concept, he is going to be compelled to make a sale under very disadvantageous positions, under force of condemnation when if he sold that same strip on the open market, he would get the small acreage price. And so the objective of the appraiser was to give him the small acreage price in this case. And the only way he could do it was by virtue of a reconfiguration.

OWEN: The CA quotes from Rayburn in its opinion. Is there any other section of Rayburn that's in the record that's not in the CA's opinion?

AUSTIN: No. The problem is that there are several elements of comparability. One of which is configuration, and one of which is size. Well size is highly important. A 3 acre tract is quite valuable. Comparability should be disregarded entirely or at least severely downgraded where the buyer has the power by virtue of the exercise of governmental concepts of imminent domain to impose whatever configuration that the buyer wants.

BAKER: Then under that theory, would this reconfiguration land be worth more or less if it didn't have utilities?

AUSTIN: It would be worth more if it has utilities.

BAKER: Would it be worth less if it didn't have them?

AUSTIN: Yes it would.

BAKER: Would it be worth more or less if it was not on the highway?

AUSTIN: It depends on which highway and what the purpose is. If you're talking about highway 123, it would be worth more for commercial reasons. It would be less for residential reasons. And the highest and best use in this case was ultimately for residential.

BAKER: But would property on a highway be worth more than property that's not on a highway?

AUSTIN: Yes, depending on the purpose.

BAKER: What about just pure access?

AUSTIN: Well this particular tract had good access on two paved roads. One to the north and one to the south.

BAKER: What about where the strip was?

AUSTIN: The strip had access to two paved roads. One on the north and one on the south.

BAKER: Well if you took away some of these elements that the appraiser put in to this reconfigured piece of 3-acre land, wouldn't that change its value?

AUSTIN: Oh, yes.

BAKER: When you take the factors that he used for this reconfigured piece of land and compare them to the factors of the land that's being condemned, there's a pretty broad difference between those two.

AUSTIN: Oh yes. And there's a great difference between this 3-acre long strip, and the 247 acre mother strip out of which it was taken.

BAKER: But isn't the purpose of the comparable sale theory of appraisals to get comparable sales to the piece of property being condemned?

AUSTIN: Yes it is. But there are no comparable sales of strips in Guadalupe Co, Texas.

BAKER: Is there a law that says you're limited to the county for looking for comparables?

AUSTIN: No. I suppose that you could go as far as you wanted to.

BAKER: Well isn't the idea of a comparable sale to get a sale that's as close as possible to the condemned land to make the comparison a valid one?

AUSTIN: Yes. But this is where the process of imminent domain in and of itself clouds the issue. Because no landowner in this right mind is going to sell that 3 acre strip across the center of his property for a prorated portion of what the entire property is worth.

BAKER: The law still says that even under those adverse circumstances what the landowner is entitled to is the reasonable fair market value of whatever is condemned and whatever loss there may be to the remainder. Isn't that right?

AUSTIN: Let's make this assumption. You go into an art supply house, you buy 3 lbs of modeling clay. They charge you .50 cents a pound for it. The value for a 100 lb sack is $6. That's the difference. Because the state can take this right-of-way that they've acquired and they want to acquire it at the wholesale price and form it into any shape they wish to form it whether the landowner likes it or not. Now if he's selling 3 acres, the landowner is entitled to the 3 acre price.

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REBUTTAL

HEATH: The issue before the jury in this case is what is the value of the land taken? And that's what has to be answered. I think it is clear from the record in this case that the expert testimony that was offered by the landowner did not address that issue. It wasn't relevant. It wasn't reliable. As we have talked about it today, we've talked about the Windham situation, the possibility of reconfiguring, and reconfiguring land by adding additional land to develop an economic unit, because this was not an economic unit, and the testimony by the landowner's expert was that it was not a unit. It had no value at all in that configuration. You can add land to it and develop a configuration that is an economic unit as was done in Windham. And we could argue whether it ought to be the entire 273 acre tract of land, or maybe 100 acres, or 50 acres or something, but it would contain the land taken and would go to the value of the land taken.

RODRIGUEZ: Do you agree that there were no comparable sales with that sort of configuration?

HEATH: There were no sales of that specific - there were no long pipeline type easement sales.

The appropriate methodology we believe which is the one that was discussed in Windham and which both experts used in Windham, is that you take the property, add property to it to develop an economic unit. And once you get that economic unit, then you appraise it, determine what the value of that is and take a pro rata share of that. So in this case if it's 100 acre tract, you can determine what that 100 acres would sell for. If this 3.21 acres, it would be 3.21% of what the 100 acres would sell for. And that's what was done in Windham. There's a lot of discussion in Windham as was appropriate as to whether it ought to be a 19 acre tract verses a 60 acre track, or whatever it happened to be...

JEFFERSON: Are there materials in Rayburn or anywhere else where a reconfiguration is done and then valuation?

HEATH: I am aware of nothing which would permit reconfiguration of the property and moving it to a different side so it's a different property. I know of nothing that would permit that.

HANKINSON: As I understand Texas law, a landowner can testify in a condemnation suit about the value of the property that is being taken. How does that square with Gammill and Robinson?

HEATH: That testimony is not 702, expert testimony. It doesn't come in with the same sort of ora or imprimatur that expert testimony comes in.

HANKINSON: Nothing under current law would preclude that rule from still applying in allowing the landowner to get on the stand and say, I think that my property is worth x dollars?

HEATH: Right. And the jury could take that for what it's worth, but it's not going to be worth the same thing as a trained appraiser as the landowner's expert was. We didn't question his qualifications. We questioned his methodology.

In this case the only evidence supporting the jury verdict was the testimony of Mr. _________, the landowner's expert. It was unreliable. It should have been excluded. And there is no evidence to support that verdict. The only remaining evidence in the record is that offered by River Authority's expert, and we would urge that the court reverse the CA and render judgment...

ENOCH: The witness says he uses comparables. Did he need to say that in doing comparables it is permissible to take the narrow strip of land and reconfigure it to an economic unit and then compare it to other property that size. And if he had said that, would the court have been required to accept his testimony, or allow his testimony to be admitted?

HEATH: If he had taken that and had made it into an economic unit by adding land that included that...

ENOCH: No by reconfiguring it. Just as happened in this case, Mr. _______ on the Robinson hearing said, that to do a comparable it is permissible to take the land and reconfigure it in order to create an economic unit to compare with others. That's permissible in the appraisal method. Would the court have been obligated to admit his testimony?

HEATH: I think except that the appraisal method would have to have included the land so it would have been to create a larger economic unit.

ENOCH: But how does the court know when he says he reconfigured it rather than adding land that that somehow defeats the methodology part of the scientific method, so the court could keep that testimony out?

HEATH: In this case it's very clear. On page 87 and 88 of the transcript he said, not only did he reconfigure it but he moved it to a different part of the property and put it on the highway on Hwy 123 when it was 3/4 mile away.

ENOCH: Taking just what you said, if he had said that in the Robinson hearing that that is an appropriate way to do the appraisal method, would the court have to have admitted the testimony?

HEATH: I think the court has to make a judgment as to whether that is a reliable methodology. As this court has said in Gammill and other cases, just because the expert says it's so doesn't make it so. The DC has a gatekeeper function to determine if that is an appropriate methodology.

HANKINSON: In Sharboneau when we agreed with the City of Harlingen when we remanded

the case to the TC, if we agree with you in this case is that also the appropriate disposition to remand?

HEATH: I think you can render in this case. In that case, that was not actually a - that was a trial court court. In this case, I think the appropriate remedy is to render at least remand with instructions that a judgment be entered in the amount of the evidence in the record, which is something like $7,000...

HANKINSON: And that's the money that your client offered?

HEATH: That's correct.

HANKINSON: But that still requires a fact finding on the part of the jury, because the jury is not obligated to accept what your expert says. So how could we render in light of the fact that the jury always has the discretion in hearing the testimony to weigh it and determine whether it's appropriate or not?

HEATH: That was the only testimony that was in the record.

HANKINSON: But we're precluded from doing fact finding. Would we be required to do that if we rendered? Wouldn't we be doing some fact finding? We would be accepting that testimony and determine that that was the appropriate amount to be paid as compensation?

HEATH: It would be undisputed testimony on our part certainly.

HANKINSON: I understand. But even undisputed testimony is always subject to the jury deciding what weight to give to it. Correct?

HEATH: Well we know the jury gave at least some weight, and determined that there was a higher value. I think you can assume...

HANKINSON: I understand. But do you see my problem in terms of a render?

HEATH: I see your argument.

HANKINSON: So your position still is that we should render?

HEATH: Yes. We would argue to render.