



For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.  
The State of Texas, Petitioner,  
v.  
Central Expressway Sign Associates, et al., Respondents.  
No. 08-0061.

January 13, 2009.

Appearances:

Susan D. Bonnen, State of Texas Attorney General Transportation Division, Austin, TX, for petitioner.

Joe H. Staley, Jr., Law Offices of Joe H. Staley, Jr., Dallas, TX, for respondent, Central Expressway Sign Associates.

Sydney N. Floyd, Rothfelder & Falick, L.L.P., Dallas, TX, for respondent, Viacom Outdoor, Inc.

Before:

Chief Justice Wallace B. Jefferson; Harriet O'Neill Dale Wainwright, Scott A. Brister, David Medina, Paul w. Green Phil Johnson and Don R. Willett, Justices.

CONTENTS

ORAL ARGUMENT OF SUSAN D. BONNEN ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF JOE H. STALEY, JR. ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF SUSAN D. BONNEN ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated, please. The Court is ready to hear argument now in 08-0061, State of Texas v. Central Expressway Sign Associates.

MARSHALL: May it please the Court, Ms. Bonnen will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SUSAN D. BONNEN ON BEHALF OF THE PETITIONER

ATTORNEY SUSAN D. BONNEN: May it please the Court. The issue in this case is whether valuation of a billboard site acquired through condemnation may be based on advertising revenue generated by the billboard operator. There are three primary reasons why the answer to this question is no. Valuation of a billboard site may not be based on advertising revenue. First, loss of business income is not compensable in Texas condemnations. Second, billboard advertising revenue is, in fact, business income and, third, no exception should be made for billboards or billboard sites. First, it is clear that loss of business income is not compensable in the State of Texas. There is longstanding precedent that holds such. For example, in the Herndon case, which was a writ-refused case, the Court held that evidence of gross revenue and

profits from the landowner's grocery and restaurant business could not be considered in determining the value of property acquired in condemnation. In the *Reeves v. City of Dallas* case, the Court that held that evidence of profits from a lessee's restaurant and dance hall business could not be considered in determining condemnation damages even though it was alleged that the business could not, in fact, be relocated. Second, it is fairly self-evident that.

JUSTICE SCOTT A. BRISTER: Could you, you could, can't consider it at all.

ATTORNEY SUSAN D. BONNEN: Um, it is only, um, no, the advertising revenue cannot be considered at all. Although, if it is connected to the actual rental income, it may be considered in that way.

JUSTICE SCOTT A. BRISTER: If it's part of the rent, you could consider it.

ATTORNEY SUSAN D. BONNEN: Um, yes.

JUSTICE SCOTT A. BRISTER: How about if it was, um, a friend or an old lease or for whatever reason, uh, your rent was below what the market would bear, uh, could, could somebody make an argument yes, I know this is what I'm, I'm only collecting \$100 a month, but it's worth a lot more than that because it's on Central Expressway and I could get a, lease it to somebody for a whole bunch of money. So could, could you argue kind of indirectly, um, see how valuable it is. It's really worth more than what I'm currently receiving.

ATTORNEY SUSAN D. BONNEN: Um, no, Your Honor, in that situation, you wouldn't look to the advertising revenue, but what you could do is you could look at the market rental rates instead of looking simply to the actual rental that was being received in that case.

JUSTICE SCOTT A. BRISTER: Assuming everybody in the market is not a charity giving away their lease.

ATTORNEY SUSAN D. BONNEN: Assuming that and I, I think you can assume that with billboards. Um.

JUSTICE SCOTT A. BRISTER: Most markets.

JUSTICE HARRIET O'NEILL: And let me make sure I understand the, the joint venturer's testimony in the case about the value, um, and I didn't go back and, and look at their testimony, but did they take the, um, revenue stream for the life of the lease and capitalize it and reduce it to present value, is that what happened?

ATTORNEY SUSAN D. BONNEN: They took the.

JUSTICE HARRIET O'NEILL: Is that how they came up with their 2.5 to 2.8?

ATTORNEY SUSAN D. BONNEN: They took the advertising revenue stream and capitalized it. In other words, they took \$168,000 a year and capitalized it and, um, said well that's, um, what the land is worth.

JUSTICE HARRIET O'NEILL: And did they take into account that the son had been moved and was generating revenue at another site?

ATTORNEY SUSAN D. BONNEN: No, they did not. You know, the fact that billboard advertising revenue is, in fact, business income can be determined simply by looking at all the activities that are involved in the outdoor advertising business. You know, the outdoor advertising company has to have personnel who do many things. They have to secure and maintain permits. They have to erect and illuminate billboards. They have to maintain and repair those billboards. They actually have to get out there and pursue these advertising contracts. The two contracts that are in the record in this case are, are simply examples of the amount that you could get by, uh, somebody having a contract for the sign. One of those contracts was just for a month. So you have to have a generous, a lot of business activity that is going on by the



billboard advertising company.

JUSTICE HARRIET O'NEILL: I noticed that in the briefing, but why does that matter? I mean, let's say that this were, uh, mom and pop who leased this sign and just allowed somebody to put one sign up on it. Why would that be any different?

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: I mean, I've read the arguments about.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: How it's so labor intensive and.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: Strategically operated, but I don't, I didn't understand the difference that would make based on the laws you've argued it.

ATTORNEY SUSAN D. BONNEN: Well, there was, that would have made, even if it were operated, if the billboard were being operated by the owner, you still need to look at the amount of income that is being generated by the land, not that is being generated by the business and you do that by looking at rental income, um, even if it were owner operated, if you are doing an income approach, which is just one of the approaches to value property, then you look at rental income. You don't look at business income. I mean, it's the same way with any other commercial property, if you're doing an income approach.

JUSTICE HARRIET O'NEILL: So I think your answer is it really doesn't matter.

ATTORNEY SUSAN D. BONNEN: No, it doesn't matter. It doesn't matter. Um, you know, other courts in other states have held, in fact, that income from billboards is a function of the outdoor advertising business and is not generated solely from a real property interest and the appraiser, the state's appraiser in this case, actually testified that the advertising revenue from the billboard was business income and that the revenue that was being received by Viacom included payment for more than just for the sign. Now, there is no reason to make an exception for billboards or billboard sites. I mean, there is an exception that is recognized in the Herndon case that says that if the revenues are derived from the intrinsic nature of the real estate itself as, for example, revenue from a quarry or revenue from a farming act-um, activity where the land actually produces the materials from which the revenue is derived, that is not the situation that we have here. I mean to the extent that the advertising revenues stem from the high traffic counts on the state's adjoining highways, they're not based on the intrinsic nature of this real estate. Instead, they're based on the public investment and the use of the adjoining property as highways and this Court has repeatedly held that a landowner has no vested interest in the traffic passing by his or her property. If you make an exception for billboards or billboard sites, the exception is going to effectively swallow the rule. If we have to value billboard sites based on business income received by the operator, then why shouldn't every other commercial enterprise be valued in that way? The exception effectively would allow every property owner to come in and argue that it, the business it was operating on the property was actually, it's profitability was due more to the land itself than on the other factors that, that make businesses profitable and that their property should be valued by the actual profits as a business and what you would have, you could have two businesses side by side or two commercial pieces of property. Um, say, for example, um, two restaurants. One's a very high-end restaurant and one's a McDonald's. Well, in this market, um, that high-end restaurant, um, may be about to

go bankrupt because it's not getting any business, but if the land and the improvements are exactly the same and then they're in the same location, then that property for condemnation purposes should be valued equally. The McDonald's that is still making a great profit in our economy should not have a higher or the property on which McDonald's sits should not have a higher value than the property on which the high-end restaurant sits.

JUSTICE DAVID M. MEDINA: Excuse me, but sometimes the properties are very similar. It's, it's about location, location, location. You can have pick a, pick a service station. Similar type of product, one in one corner, the other directly across the street. In the neighborhood where we live, there is one that cannot stay in business, it doesn't matter what kind of gas station is there.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE DAVID M. MEDINA: And one right across the street, which seems to be as difficult to get to as the other one, thrives. And so, why, why can't you do something different in evaluating?

ATTORNEY SUSAN D. BONNEN: Well, to the extent that the location is, is, in fact, a factor in, uh, the, um, example that you suggest, that will be taken into account by the amount of rental income that is brought in by the property and, you know, you would do that by looking at rental income of similarly situated properties. And so location is taken into account, but it cannot be taken into account simply by saying that all of the profits of the business are somehow tied to its location and that we value property simply by looking at the profits of a business.

JUSTICE HARRIET O'NEILL: What if you had a situation where, um, there was so much regulation of where you could put a billboard that in a high-profile area because of grandfathering clauses, truly there was only one spot for a billboard in a, in a densely urban area.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: I mean, I realize that's almost impossible to imagine, but theoretically could it then be so unique and tied to the, to the quality or to the type of land that it is that in considering the regulatory restrictions that it really could not be replaced, that, that you, if you can't put it somewhere else would you, um, think that another valuation method would apply?

ATTORNEY SUSAN D. BONNEN: Um, no, Your Honor. The problem is is that you would still be allowing compensation for the business as opposed to compensation for the property. Um, for example, there's a very recent case out of the Austin Court of Appeals that, unfortunately, I did not cite in my brief. It's, um, the AVM-HUO Limited, uh, case in which a, uh, a party actually sued based on inverse condemnation because they were no longer -- after a condemnation, they could no longer relocate their sexually oriented business because of, of zoning regulations. They had nowhere to put their business and so they sued for damage to the business and the Court said that it did not matter that they could not relocate their business, that they were not entitled to compensation and it specifically relied on the Reeves case and the fact that the Reeves case, um, took that into account that the business could not be relocated. Um, you know, normally businesses can be reloc-relocated, but the Court should not change the rules simply because there are times when there are going to be incidental business losses that a party is not compensated for. I mean, obviously, when the state takes property, it's for a public purpose-to build roads or, you know, other entities that take property and build hospitals, to build schools and,



you know, for the common good, sometimes there are incidental losses that are not compensated. When your home is taken for a public purpose, you get the market value, but you don't get the intrinsic value that your home has to you. I mean, in the same sense when commercial property is taken, you get the market value of the property, but you don't get compensation for potential damage to your business. If we had a case-by-case analysis of this issue with respect to every, every condemnation of a commercial property trying to determine well, was the business profitability based more on location than on other factors, um, again the rule would be swallowed and there would be vast amounts of litigation over this, this very factor with every landlord and tenant claiming that the business' profitability was based more on location than it was on other factors. In this case, this billboard was properly appraised by or, I'm sorry, the billboard site was properly appraised by the state's appraiser. Mr. Wall valued the easement as if it were owned by one person, valuing the property itself as he was required to under the Undivided Fee Rule, which embraces all of the interests, uh, in the property. So he valued the correct property and he used an appropriate approach. He used the income approach in the way it is always used, by looking at the rental income that was brought in by the property. However, he was not allowed to testify. The jury was entitled to hear his testimony about the true value of the property and because it was not allowed to hear his testimony, there is reversible error. So for that reason, the Trial Court erred. The Trial Court also erred in admitting the testimony of CESA's principals for the same reasons that their testimony that we've already talked about, their testimony was based on a capitalization of all of the advertising income. For that same reason, the testimony of CESA's principals was incompetent and thus there's no evidence to support the jury's verdict. These are independent reasons, all of them as to why this case should be reversed.

JUSTICE HARRIET O'NEILL: If we were to say that that's an appropriate measure, if we were to agree with opposing counsel's position that you could capitalize advertising revenue and, um, that would be your condemnation award or that should be included, um, is there any sort of credit that should be, um, given because the sign was removed and there was some mitigation?

ATTORNEY SUSAN D. BONNEN: Um, you know, certainly, there are a lot of things that should be taken into account if you're going to look at the advertising revenue and value property that way. I mean, you'd need to look at all the various expenses of the business and, you know, it would basically be allowing, given that the billboard has, in fact, been relocated, if you do that, you are allowing a property owner to recover for lost opportunity cost and that is something that's never been compensable in condemnation. I mean, this advertising revenue stream is still out there and being received by Viacom because they've been able to relocate the billboard to another location and, therefore, they shouldn't be compensated because they haven't actually suffered any loss. For all of these reasons, we ask that you reverse the judgments of the lower Courts.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Staley and Ms. Floyd will present argument for the Respondents. Mr. Staley will open with the first 10 minutes.

JUSTICE DAVID M. MEDINA: Mr. Stanley, I'm just going to ask this question while it's fresh on my mind. Has your client suffered any

ORAL ARGUMENT OF JOE H. STALEY, JR. ON BEHALF OF THE RESPONDENT

ATTORNEY JOE H. STALEY, JR.: I'm sorry, I couldn't.

JUSTICE DAVID M. MEDINA: Has your client suffered any loss?

ATTORNEY JOE H. STALEY, JR.: Suffered plenty of loss if, uh, we don't win this case. Um, my client, uh, who is the owner of this piece of property has lost his property to the state. They've, they've taken away probably one of the best signboard locations in the city of Dallas and, uh, and then he would have lost a significant amount of money, uh, if the Court rules as the state would ask you to. This piece of property is worth a lot of money. It's probably one of the best billboard sites. It's the high-five in Dallas and it, the land itself, he's, he has lost the right to put a signboard on his property and, uh, and that's a significant loss for him. I'm sorry; I hope that answers your question.

JUSTICE DAVID M. MEDINA: Yes, I just was.

ATTORNEY JOE H. STALEY, JR.: Yes, sir.

JUSTICE DAVID M. MEDINA: The, the response from your adversary was.

ATTORNEY JOE H. STALEY, JR.: I don't represent the signboard company. I just represent the people that own the land.

JUSTICE DAVID M. MEDINA: Okay, but your response, the response from your adversary was that your client suffered no loss.

ATTORNEY JOE H. STALEY, JR.: Well that's, uh, uh, I hate to use the word "insanity," but that borders on it.

JUSTICE HARRIET O'NEILL: Well let me, uh, here's what I'm having a hard time understanding.

ATTORNEY JOE H. STALEY, JR.: Yes, ma'am.

JUSTICE HARRIET O'NEILL: As the easement holder and not the advertising company, the revenue that you are receiving is the rental from what Viacom pays. So if.

ATTORNEY JOE H. STALEY, JR.: What I'm receiving?

JUSTICE HARRIET O'NEILL: Yes.

ATTORNEY JOE H. STALEY, JR.: Yes, but the rental that's being received is the rental that's being received on the property put to its highest and best use, which is as a signboard and understand that, understand that.

JUSTICE HARRIET O'NEILL: Which is, which is reflected in the rent that Viacom's paying.

ATTORNEY JOE H. STALEY, JR.: Well, but, but, we, how that's, the law is, as I understand and always has been, that that pro-how that is split is no concern of the State.

JUSTICE HARRIET O'NEILL: So you are.

ATTORNEY JOE H. STALEY, JR.: That is the second issue. I'm sorry.

JUSTICE HARRIET O'NEILL: You are advocating for Viacom's position then.

ATTORNEY JOE H. STALEY, JR.: I am advocating for CESA's position and also Viacom's position.

JUSTICE HARRIET O'NEILL: Let me take out Viacom.

ATTORNEY JOE H. STALEY, JR.: Yes, ma'am.

JUSTICE HARRIET O'NEILL: And present that that position will be argued forcefully.

ATTORNEY JOE H. STALEY, JR.: Right.

JUSTICE HARRIET O'NEILL: Let me just look at the easement holder.



ATTORNEY JOE H. STALEY, JR.: Yes.

JUSTICE HARRIET O'NEILL: It's hard for me to understand why the easement holder is out more than they would have been entitled to if you take the remainder of the rent, capitalize it, reduce it to present value, why is that not the value for the easement holder?

ATTORNEY JOE H. STALEY, JR.: Because the issue submitted in this case was the highest, was the fair market value of the land and the law in Texas is that you use the Unified Fee Rule and you come up with that value of the whole property as if was owned by one person and then that, that and the second issue in a condemnation case is divided. It was improper for the State's witness to come in and to say well I found that their, their interest was worth zero and it used the test that's used in the second in determining the second issue, that is contract value versus market value and, therefore, the contract value and the market value are the same, that means zero. The point of it is that the State is required to and they admit that they have to use the Unified Fee Rule and that's exactly what the Unified Fee Rule is. When you answer that first issue, then you appraise the fair market value of the land and that was the issue submitted and that's the issue that was entered.

JUSTICE SCOTT A. BRISTER: The Undivided Fee Rule is people that owns different interests in real estate.

ATTORNEY JOE H. STALEY, JR.: I'm sorry, Your Honor.

JUSTICE SCOTT A. BRISTER: Viacom doesn't have any interest in real estate.

ATTORNEY JOE H. STALEY, JR.: The Undivided Fee Rule applies in all imminent domain cases as I understand it.

JUSTICE SCOTT A. BRISTER: Right, but it's to, it's to real estate. It doesn't cover business income.

ATTORNEY JOE H. STALEY, JR.: That's true.

JUSTICE SCOTT A. BRISTER: And so, I mean, I'm. If the property, if your easement is really worth \$1,000,000 or \$168,000 whatever it is a year because that's what you can get, shouldn't, you should, that's just an argument you should raise your rent isn't it?

ATTORNEY JOE H. STALEY, JR.: Well, location, location, location and location generates the income, not the business and that's what all the testimony was. There was, the Court needs to understand.

JUSTICE HARRIET O'NEILL: But I think you just said, location generates the business.

ATTORNEY JOE H. STALEY, JR.: No, it generates the income.

JUSTICE HARRIET O'NEILL: I mean, it generates the income.

ATTORNEY JOE H. STALEY, JR.: Yes.

JUSTICE HARRIET O'NEILL: So location, location, location, location, rent, rent, rent. I mean, your, your rent is a reflection of the value of the location.

ATTORNEY JOE H. STALEY, JR.: That's exactly right and the rent that was received in this was \$168-mil-ah, thousand dollars a year.

JUSTICE SCOTT A. BRISTER: Not by your claim.

ATTORNEY JOE H. STALEY, JR.: For the property.

JUSTICE SCOTT A. BRISTER: That's (unintelligible)

ATTORNEY JOE H. STALEY, JR.: Under Undivided Fee Rule, you don't have two, you don't have two clients. You don't have two people. You only have one person and that one person got \$165,000 or \$168,000 a year.

JUSTICE SCOTT A. BRISTER: I'm just wondering how far that goes if I've got, uh, two identical properties as they say and the market rate's \$1,000 a month and one of us gets somebody who's a great

business person and makes a gillon dollars a month, that doesn't make that land more valuable.

ATTORNEY JOE H. STALEY, JR.: But the, but the, but in this case, the testimony was exactly as I presented it to you under the Unified Fee Rule and there was no objection to it. The State never raised one scintilla of evidence.

JUSTICE SCOTT A. BRISTER: That's because, that's because the Trial Judge struck everybody's experts.

ATTORNEY JOE H. STALEY, JR.: Well, he struck them rightfully so, Your Honor, and I objected.

JUSTICE SCOTT A. BRISTER: So that, so that and I'm, and I wanted to just ask you this. I know it's always been the, the law in Texas that an owner can say what the value of their property is, but this is very technical property. Does it make sense that we strike all the experts and just have the people least likely to know get on the stand?

ATTORNEY JOE H. STALEY, JR.: Yes, and I'll show you exactly why.

JUSTICE HARRIET O'NEILL: But it and, and I'm curious to hear why, but it really doesn't matter because everybody's used this method that or they use the same method as the expert that was struck and so we're really focused on the legal question as to whether the business profits.

ATTORNEY JOE H. STALEY, JR.: And, and the legal question is whether or not -- I think the issue was raised -- is whether you should have been struck, stricken and it should have been because here's what he testified to. Under the Unified Fee Rule, in this instance, Viacom owned the lease and there was a leasehold interest and a, and a lessee's interest and here's what he testified to. Did you consider the interest of Viacom in making your appraisal? What's the, what interest did Viacom is the lessee's successor to (unintelligible)? Yes, I did not consider their interest in this appraisal. That's a violation of the Unified Fee Rule. Mr. Wall, what were you asked to do in this case? To value CESA's interest. It's not CESA's interest. The jury has defined its value of the Undivided Fee and so in this case, he didn't do that. You testified under oath in your Deposition that you only valued the entry of CESA, didn't you? That's correct. The fee simple interest of CESA. CESA didn't own a fee-simple interest. CESA owned a leased fee interest. You came up with the fair value of 360, did you not? Yes. Is that for the CESA's interest? That's for CESA's interest. They took Viacom's interest and CESA's interest and that was the issue being tried. What's the fair market value of the land considering both of those interests put together and the judge addressed it properly. I think valuing the land according to CESA's easement interest only is the wrong way to appraise the land according to all the guidance I'm given by the Texas Supreme Court and I agreed to that. He was absolutely dead on.

JUSTICE HARRIET O'NEILL: Well how do you, how do you reconcile the, the well-established principle that business profits don't, aren't compensable in (unintelligible).

ATTORNEY JOE H. STALEY, JR.: It's not business profits. It's rent and that's what all the testimony is. We have 50 pages of testimony from Mr. Randy Perry about the fact that it's rent generated by the location, that it is not business income. There was not a single objection in 50 pages of testimony. The problem with this case is is that the State never objected to anything and all, all the testimony came in and the testimony is dead on that it was rent, not, uh, a business income and there is no objection to any of that. There's no objection to anything that our witnesses testified to insofar as the



value of the land is concerned and they used the Unified Fee Rule, both of them. They both testified that they knew what fair market value was. They both defined it. They've both been in the real estate business for a significant period of time. They have both had more than just this one billboard and, therefore, they, they properly did it. So that, that was the, that was the primary, uh, uh, uh, issue, the first. There's only two issues in this case and that is should that testimony have been stricken and, secondly, was their testimony sufficient to sustain, to sustain the verdict and in both of those, I have to say that I think, uh, our position is absolutely correct. I take real umbrage at Counsel getting up and telling you what her witness testified to in this case. Her witness didn't testify to anything and also they didn't challenge anything and, and I think the Court knows that, that what they're talking about insofar as to what they want this Court to decide is not in this case. Whether or not this is business income or rental income, that's coming down the pike. You have four cases coming right at you as to whether or not it was realty or personalty, whether or not it was, it was, uh, rental income or whether it was business income. That's not the issue in this case. There is not a scintilla of evidence that it was business income. There was no objection to the fact that we testified that it was rent. There was no objection to the manner in which the witnesses evaluated the property and so it would be improper it seems to us and that the and to in some way overturn this verdict or this judgment when that was what happened in, in the trial. I had prepared a very flowery and wonderful presentation for you today, which I'm sorry that you're going to miss and I'm very sorry for all these attorneys general who are here who have come to hear it, uh, me get up and talk, but, uh, I would just like to say that that's our posture in this case. It's pretty simple. There's only two issues-should he have struck the testimony? No doubt, no doubt. The guy didn't appraise the property properly and so he struck him. They didn't have a backup witness. That's not, you know, that's not where I'm going. Also, would the, would the testimony that was given substantiate the verdict? No doubt about it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Staley, uh, your time's expired.

ATTORNEY JOE H. STALEY, JR.: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: And we'll hear the flowery testimony from Ms. Floyd.

ATTORNEY JOE H. STALEY, JR.: All right. Thank you very much, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you.

ATTORNEY SYDNEY N. FLOYD: May it please the Court, I don't know how flowery I'm going to be in 10 minutes, but I would like to, first of all, before I go into a few prepared remarks, address a couple of questions that were asked. Uh, Justice O'Neill asked about whether or not there should be any credit, uh, in circumstances similar to this and I would tell the Court this: that the procedures in effect that are in the, uh, Texas Administrative Code, TxDOT's code, have a specific provision and have had so for years that if an outdoor advertising sign company, a billboard owner elects to select a relocation permit in lieu of compensation, that owner must sign a waiver of damages and that waiver is found in 43 Texas Administrative Code 21.160E. So this doomsday argument that the State's presented in their briefs about oh the taxpayers are going to have these enormous burdens because they're going to have pay millions in compensation and then the billboard owner's going to get a relocation permit and relocate is simply not

true. The waiver provision has been in the, uh, been the law for a very long time and it just specifically provides that if they select relocation, they must sign a written waiver of imminent domain damages.

CHIEF JUSTICE WALLACE B. JEFFERSON: Does this, does the case turn on whether there was an objection to the characterization of the money received as rent versus business income or profits?

ATTORNEY SYDNEY N. FLOYD: Perhaps to a certain extent, Your Honor, and I would like to address that directly because they, the State's position here is we will not create an exception for billboards. Our position is that you should not create an exception for billboards among all other income-producing properties. As this Court said on many occasions, there are three recognized and acceptable approaches to valuating property in imminent domain. The income approach is one of them and it's routinely used for income-producing property-hotels, office buildings and the State is incorrect when they say that that approach is only good when you're looking at rent received by an owner for like a, uh, uh, a lessee interest. It is the property, um, the property if it's a lessee, uh, his less, leasehold is, uh, appraised as approved and as far as hotels, for example, go and billboard structures, that must take into consideration the income stream of that property. We're not talking about business of profits. They're speculative and that's an entirely different situation that possibly needs to be looked at case by case, but the income approach is particularly appropriate.

CHIEF JUSTICE PAUL W. GREEN: How, how was Viacom's interest divided up between Viacom and CESA?

ATTORNEY SYDNEY N. FLOYD: How was the interest divided up?

JUSTICE PAUL W. GREEN: How was your, how was your interest, assume that the judgment stands. I mean what is the relationship between Viacom and CESA over the division of this condemnation award given the relationship of the parties?

ATTORNEY SYDNEY N. FLOYD: A little bit of background. I really don't have too much time to go into it, but in the, um, special commissioners awarded something like, um, \$850,000 to Viacom. When they settled with the State, they redeposited that into the registry of the Court.

JUSTICE PAUL W. GREEN: Oh it's, there's already an agreement that (unintelligible)?

ATTORNEY SYDNEY N. FLOYD: There was an agreement. There are two agreements in play here. One is an agreement between Viacom and the State by which Viacom redeposited the award minus the expenses that were incurred in "relocating the sign", taking it down and erecting a new sign on a new site and those are, uh, regulated by State regulations also. There was also an, an agreement between CESA and Viacom. Um, that raises another point. The State complains about the inequity of this result of this trial and I submit to the Court that if there was an inequity, the State was in control of the circumstances of that trial. They had several procedures available to it to posture this case differently, to give the Trial Court an option. First of all, they had already settled with two other, uh, property interest owners and what they did there is they entered into partial dismissals, which removed those people from the cases, from the case. They choose not to do that with Viacom because they had a continuing argument with Viacom about some interest, the State did, some interest on the award that was returned. So they wanted to keep Viacom in the case. They made that decision. When the, when it went to trial, Viacom, who is a property owner, and I believe, Justice Brister, you asked if Viacom had any real



estate interest. Of course, they did with, they were the lessee. And Texas law could not be clearer that a lease is a property interest that must be compensated for in an imminent domain situation. Nevertheless, they had that opportunity to do a partial summary, a partial dismissal, just as they did with the others, which would have postured this case differently. The reasons, um, unique to themselves, whatever their situ--.

JUSTICE SCOTT A. BRISTER: But, but with Viacom, I mean, part of the, its revenue is because it's Viacom. I mean, part, part of the, if, if we value this whole property as to adding together the rental value of the land, of the easement and the rental income and the income from advertising services, we're compensating partly in their business income, the provision of services to companies that want to advertise. Right?

ATTORNEY SYDNEY N. FLOYD: I'm not, I would not agree with that. Now I will say.

JUSTICE SCOTT A. BRISTER: Well let me put it, let me put it this way. I understand that the Unified, Undivided Fee Rule, if I own property and a hotel on it, uh, that I'm running myself, then I get to value the whole thing, how much that hotel is worth to me. But if Hyatt's running the hotel and I'm just getting rent from them putting it on there, uh, presumably maybe the hotel would do better because it's Hyatt, but I don't get to, that doesn't make that we Undivided Fee says we value it as if I owned the whole thing and operated the hotel. When we add a big company like Hyatt, uh, that makes the property more valuable than it would be just to me if I, if it was Brister's Hotel and so it seems to me the way, if you split those two out, uh, and add them back together, you get something bigger than this, if this was just CSEA and CSEA's billboard and anybody CSEA could sell to. Aren't you ending up with a bigger pie?

ATTORNEY SYDNEY N. FLOYD: No, Your Honor. No, Justice Brister, not really because you're not really dividing and adding again, the United, Undivided Fee Rule says you, you do value it as if owned by one person. In other words, you would value it under the assumption, the presumption that the billboard, its ability to generate income.

JUSTICE SCOTT A. BRISTER: Right.

ATTORNEY SYDNEY N. FLOYD: Is all owned by one person.

JUSTICE SCOTT A. BRISTER: Viacom is a big company.

ATTORNEY SYDNEY N. FLOYD: Yes, but the same.

JUSTICE SCOTT A. BRISTER: Has lots of connections, has lots of salespeople, has lots of clients that rely upon them and if it was me and my billboard, I probably couldn't make \$168,000 a month.

ATTORNEY SYDNEY N. FLOYD: If you, if you owned a billboard at that location, yes you could.

JUSTICE SCOTT A. BRISTER: Hm.

JUSTICE HARRIET O'NEILL: But isn't that reflected in the rent?

ATTORNEY SYDNEY N. FLOYD: In the rent to the, say the fee owner or the leasehold (unintelligible) is to their interest.

JUSTICE HARRIET O'NEILL: To the, the rent to the easement holder.

ATTORNEY SYDNEY N. FLOYD: Yes, for their value, valuation, what needs to be remembered is that the lee-lessee's interest must also be valued and their interest, a leasehold, a valid real estate interest is an income-producing leasehold and under Texas law, it's a perfectly valid and even a preferred method of valuing the property.

JUSTICE HARRIET O'NEILL: Why would a restaurant be different because a restaurant is income earning? I mean, I don't.

ATTORNEY SYDNEY N. FLOYD: I'm, okay, it's, it's a distinction that

is sometimes difficult to key on to, but here's a couple of, a couple of ways that I found that's very helpful for looking at it. The income approach is valid when the income-generating capacity can be transferred with the real estate. It doesn't depend on how good the food is. It doesn't depend on that business acumen or the capital invested, but in this situation, if Viacom had wanted to sell and these are bought and sold in the marketplace because they're very valuable, if Viacom had wanted to sell this improved lease, this improved leasehold, that generating, income-generating capacity would have been transferred with the land because the income is the chief source value of that property. It's not the beauty. It's, it's not, it's a commercial property and that's what a willing buyer would look to in making a decision as to whether or not it wants to buy the property.

JUSTICE HARRIET O'NEILL: How is that different from a restaurant?

ATTORNEY SYDNEY N. FLOYD: A restaurant, again I will go back to the example that the, uh, income-generating capacity would not necessarily be transferred or connected to the location of the restaurant. Obviously.

JUSTICE HARRIET O'NEILL: I, I bet the restaurant association would disagree with you on that.

ATTORNEY SYDNEY N. FLOYD: Yes. I'm sure they would, but that's not the primary. That is not the primary. Obviously, clearly certainly would not dispute that in any commercial establishment, access off the freeway may be important. Where it is located in town, but that's not what primarily generates their revenue. What primarily generates the revenue of a McDonald's or a Gallery Furniture is the, the business acumen, the capital they've invested, etc., etc., and not where the property is located.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you very much.

REBUTTAL ARGUMENT OF SUSAN D. BONNEN ON BEHALF OF PETITIONER

ATTORNEY SUSAN D. BONNEN: May it please the Court. First, in response to Justice Medina's question about CESA's losses, the State recognizes that CESA has suffered a loss and, um, it's the State's belief that they're entitled to \$360,000 for that loss based, if you use an income approach and an income approach should be based on the rental income and what they lost was the right to receive the rental income, not the right to receive the advertising income. Now I believe there has been a misunderstanding perpetrated about the Undivided Fee Rule and what that means. The way that it was referred to by Respondents seems somehow to be that it means that you added together the interest and act as if one person owns a lot of different interest, but that's not what the Undivided, uh, Fee Rule says. You, under this rule, you act as if the property is actually owned by one person. If a property is owned by one person, you can't have a leasehold and a leased fee. The landlord and tenant are never the same person.

JUSTICE HARRIET O'NEILL: Well, let's, let's use that analogy and take me through.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: The proper valuation method if I own a home.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: On property and I lease it to you and then you turn around and you sublease it.



ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: Um, to someone else and my rental to you is \$10 a month.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: And your rental to that someone else is \$100 to the subtenant is \$100 a month. How do I value that interest?

ATTORNEY SUSAN D. BONNEN: Well, your example would suggest that that the first rental, um, person is not receiving the market rate.

JUSTICE HARRIET O'NEILL: Yes.

ATTORNEY SUSAN D. BONNEN: And, and if that is, in fact, true, in that situation, you would look at the market rent.

JUSTICE HARRIET O'NEILL: Okay, okay, so presume then that the market rent is \$100.

ATTORNEY SUSAN D. BONNEN: Yes.

JUSTICE HARRIET O'NEILL: As reflected in the sublease. Then, under your analysis, I would be entitled to a bonus payment of the difference, 90, I mean 10 and a 100.

ATTORNEY SUSAN D. BONNEN: Um.

JUSTICE HARRIET O'NEILL: Because I'm, that's a benefit.

ATTORNEY SUSAN D. BONNEN: If the property, um, yes, yes, there would be.

JUSTICE SCOTT A. BRISTER: Actually you'd split 10 to her and 90 to the.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE SCOTT A. BRISTER: To her.

ATTORNEY SUSAN D. BONNEN: Right.

JUSTICE SCOTT A. BRISTER: So I'm (unintelligible).

ATTORNEY SUSAN D. BONNEN: Well that would be a bonus value.

JUSTICE HARRIET O'NEILL: Well how is that different here if people are, I mean, why wouldn't this sign operate the same way like a house.

ATTORNEY SUSAN D. BONNEN: Uh-huh.

JUSTICE HARRIET O'NEILL: It's, I've got my lease to you for X amount. Then you lease it out to others for a higher amount.

ATTORNEY SUSAN D. BONNEN: Well, first of all.

JUSTICE HARRIET O'NEILL: Why wouldn't you do it the same way?

ATTORNEY SUSAN D. BONNEN: We're not basing the valuation just on the fact that the property has been subleased to a third person. That in and of itself doesn't create the value. We're only looking at the market rent. With, um, the billboard situation, you have to look at the market rent, too. You don't look at the advertising income. I mean, with the home situation, there is no business income component that.

JUSTICE HARRIET O'NEILL: So would have it been appropriate, I mean, is one way to have valued this property would be to look at what third parties were paying for the sign and, and say that that, take out the middleman and say that if the owner couldn't have, could have gotten that revenue from third parties, then that's what the fair market of the rent should have been.

ATTORNEY SUSAN D. BONNEN: Um, Mr. Wall did look at, um, fair market rents for billboard sites and, and he took that into account and determined that the actual rent that was being received was comparable to fair market rent for other billboard sites, you know, so that, in fact, was done in this case.

JUSTICE DAVID M. MEDINA: I know you're running out of time and probably have some things you want to tell us, but you just briefly address this billboard and why this isn't correct or all correct, (unintelligible).

ATTORNEY SUSAN D. BONNEN: Ab, absolutely, Your Honor. The, the

confusion that came about in this case is the fact that under the Undivided Fee Rule, what Mr. Wall should have been valuing was the easement, which was, was the land, the predominant interest. Now the fact that that easement was owned by CESA, who was then, in turn, um, leasing it to Viacom. Every time that Mr. Wall said he was leasing or and he was valuing the easement, the respondents or respondent CESA tried to characterize that as only a valuation of a part of the property, but the easement is a predominant interest. If you value the easement, you are valuing all of the interest. I mean, the whole idea of the rule is that you don't create value simply by having a multiplicity of interests. A piece of property that is owner operated should be valued the same as a piece of property that is subject to a lease. If the lease in itself doesn't create different values and yes, he valued the easement and, and they argue that because he valued the easement, which was the whole property, that he somehow only valued CESA's interest, but that simply is not true. Under the Undivided Fee Rule, by valuing the easement, he was taking into account all of the interest and, you know, this case certainly does not turn on the testimony characterizing the income as rent. Even the Court of Appeals recognized that the income being brought in by Viacom was business income and not rent by its very nature that it's being paid to Viacom and that it's being paid for advertising contracts. All of that was in the record. That's what makes it business income. You can't, um, pretend that that's not true simply because somebody characterizes business income as rent. Um, for all of these reasons, we ask that you reverse the judgments of the lower Courts. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Bonnen. The cause is submitted. That concludes the arguments for this morning and the Marshall will adjourn the Court.

MARSHALL: All rise.

2009 WL 151212 (Tex.)