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Supreme Court of Texas
The State of Texas, Petitioner,
v.
Charles Lynn Brownlow and Marlene H. Brownlow, Respondents.
No. 08-0551
December 16, 2009

Oral Argument

Appearances:Lisa Marie McClain, Office of the State Attorney General, Austin, TX, for petitioner.

William G. ‘Bud‘ Arnot, III, Arnot & Associates, Houston, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0551, State of Texas vs. Brownlow. Justice Guzman is not sitting [inaudible].

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

ORAL ARGUMENT OF LISA MARIE MCCLAIN ON BEHALF OF THE PETITIONER

ATTORNEY LISA MARIE McCLAIN: May it please the Court, the issue in this case is whether the Court has jurisdiction over a claim for the inverse condemnation of dirt excavated from an easement acquired for highway purposes. There are three reasons why the court of appeals' judgment should be reversed. First, the easement includes the right to use the materials excavated. Second, the Brownlows were already

compensated for the dirt. And third, the court of appeals decision contradicts sound public policy. The general rule is that an easement for roadway purposes includes the right to take all the materials in the easement and can use them to construct, repair or improve a roadway.

JUSTICE DALE WAINWRIGHT: How far down does this right that you claim to use all the materials from the easement go? I assume for the retention pond they only went down a few feet relatively speaking, would it continue down a thousand feet, would it include valuable minerals down there. How far down does your argument extend?

ATTORNEY LISA MARIE McCLAIN: Well, Justice Wainwright, in this case the depth extends only to the extent granted in the easement, and the construction site plan notes very clearly that the cut volume for this particular easement is 87,544 feet, and I can't offer you all of the --

JUSTICE DALE WAINWRIGHT: Cubic meters.

ATTORNEY LISA MARIE McCLAIN: Pardon me, cubic meters is the amount that will be pulled out of that easement. I can't stand here and do the math unfortunately to tell you exactly how deep that will be, but I believe that this particular pond is about 12 feet deep, and it's a 12-acre-sized pond with a depth of about 12 feet.

JUSTICE DALE WAINWRIGHT: So are you saying if the construction then went deeper than 12 feet, you'd acknowledge that something was owed to the Brownlows.

ATTORNEY LISA MARIE McCLAIN: Sure, because we're constrained by the limits of the easement that we've acquired.

JUSTICE DALE WAINWRIGHT: If in that first 12 feet there was a gold deposit?

ATTORNEY LISA MARIE McCLAIN: We cannot take those rights, they're precluded by statute for the State to take those types of interests and we specifically exclude those in our petitions for condemnation.

JUSTICE DALE WAINWRIGHT: Can you be a little more specific? There's a statute that precludes what?

ATTORNEY LISA MARIE McCLAIN: The taking of oil, gas and other mineral rights, and so when we write our petitions for condemnation, we specifically exclude those from anything we can take in the easement.

JUSTICE HARRIET O'NEILL: Does it matter that this is a mitigation type detention facility? And the reason I ask that is we look at the specific terms of the grant, and the grant here says, “The State seeks and prays for the acquisition for highway purposes.” It doesn't say for highway construction purposes, so if land is taken that the highway is going to be constructed on, then you know an argument, I can understand the argument that whatever you take out to construct the highway is included within the grant. But when we say “for highway purposes,” and it's a mitigation pond, isn't that a different scenario?

ATTORNEY LISA MARIE McCLAIN: Well no, Justice O'Neill, it's not a different scenario because a detention pond is indeed a highway purpose. The Texas Transportation Code authorizes --

JUSTICE HARRIET O'NEILL: It's a highway purpose, but it's not a highway construction purpose, and most of these cases that you've cited have talked about for highway construction purposes, and you're not using this piece of property for construction purposes. You're using it for highway purposes, but more in mitigation as opposed to for construction.

ATTORNEY LISA MARIE McCLAIN: That's right, it is for mitigation, but but for the construction of the highway, the mitigation pond wouldn't be needed. It's necessary because of the construction of the highway because we've taken dirt and put more dirt into the floodplain. As a result, we have to offset that dirt with a detention facility. So but for the construction of the highway, the detention pond is --

JUSTICE HARRIET O'NEILL: I understand that, but it just seems to me like a different thing, that if you're going to condemn land to use the land for construction purposes, if the dirt -- or I could see that being included within the terms of the grant, but here it seems to be serving a different purpose. It helps with the highway, but it doesn't really deal with the construction of it.

ATTORNEY LISA MARIE McCLAIN: Well, the dirt that we're taking from the detention pond will be used elsewhere in construction of the highway.

JUSTICE HARRIET O'NEILL: Well, that's the whole question.

ATTORNEY LISA MARIE McCLAIN: Right.

JUSTICE PAUL W. GREEN: In fact it was used some miles down the road, it wasn't even used at that site, am I correct on that?

ATTORNEY LISA MARIE McCLAIN: No. Actually, Your Honor, the record reflects that it was used directly adjacent to the pond. In the testimony of Michael Christley, who was the TxDOT project engineer for this project, he was asked by Mr. Noel whether or not it was being used next to it, and indeed it is. It's an adjacent, I believe it's about 600 feet from the end of the pond to the San Bernard River, and it was used there.

JUSTICE DALE WAINWRIGHT: But it wasn't on the easement itself?

ATTORNEY LISA MARIE McCLAIN: It wasn't on the easement. The pond fills the entire easement, and then the dirt was taken from the easement and used on the construction of the highway adjacent to that.

JUSTICE DALE WAINWRIGHT: In lacking that material for improvement of the roads, they would otherwise have had to buy the material?

ATTORNEY LISA MARIE McCLAIN: The material would have to come from someplace, yes, that's correct.

JUSTICE DALE WAINWRIGHT: Could the State take that filler soil and sell it?

ATTORNEY LISA MARIE McCLAIN: Under a 1990 Attorney General opinion, yes, it could, and I recognize that's not binding on the Court, but it is, of course, persuasive authority, and under that opinion the Attorney General dealt with the question of whether or not the movement of trees and shrubs from a county right-of-way was an un-constitutional taking, and the answer was no, and they relied on the Brown and Mullaly cases, which, of course, we're relying on in answering that question. But the thing that they added was, if an easement owner may take trees and shrubs and dispose of them by destruction, it may dispose of them in another fashion, including sale, without com-pensation to the owner.

JUSTICE DALE WAINWRIGHT: So I could give the State an easement to cross my land, the State could decide, let's say we've got a 1,000-acre ranch, the State could decide to take the top 10 feet of soil or gravel off that land, sell it for profit and all I get is the value of the easement without at least from my standpoint knowing that there was going to be some sale of valuable parts of that then, the property that the easement is on.

ATTORNEY LISA MARIE McCLAIN: Well, first the easement would have to expressly state that purpose, and TxDOT can't go out and just condemn detention facilities, you know, separate and apart from a roadway construction project, so there would have to be the authority to take that type of easement and define within that easement what could be taken, but in addition to that, when your land was valued for your easement in that particular scenario that you give, the Before and After Rule requires that in measuring the value of that easement, we look at the difference between the value of the property prior to the acquisition and the value to the property after, and the value to the property after would have to reflect the absence of that dirt, as was done in this case.

JUSTICE DALE WAINWRIGHT: So your fundamental position is that this easement put the landowner on notice under the law that the gravel and dirt that was on that easement could be used by the State for any purpose, sale or highway construction, but that is notice that the owner had in entering this transaction?

ATTORNEY LISA MARIE McCLAIN: Yes, Your Honor, the easement in conjunction with the -- well, actually if you turn to the agreed judgment, the agreed judgment embodies the purpose for which the acquisition is being made, and the acquisition is for highway purposes. The acquisition can come through either a fee or an easement. In this case the easement's specific purpose is a detention facility, and by virtue of describing the detention facility that is to be opened up, constructed and maintained, that certainly tells you that there will be an excavation of dirt.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is this true with -- is this how the State handles condemnation when, for example, the easement would take property that is lined with oak trees or other timber, for a side road or for another detention pond. In that instance, would the State own the trees and get to sell those, or is that negotiated [inaudible] condemnation happened?

ATTORNEY LISA MARIE McCLAIN: Well, the fee owner still retains ownership in the trees, however the State's interest in --

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm saying the trees are removed during the process of constructing the highway or building the detention pond. Who owns those trees?

ATTORNEY LISA MARIE McCLAIN: Well, the fee owner owns the trees, however the State's interest in promoting a public use such as construction and maintenance of its highways overrides the individual fee interest, property interest in those trees. So if those are in the State's right-of-way and the State needs to clear those in order to maintain its roadways, it may do so.

JUSTICE HARRIET O'NEILL: But who is entitled to the lumber, I mean if the trees were sold for a profit -- I think that's the end part of the question -- then who would be entitled to the profit from the lumber sale?

ATTORNEY LISA MARIE McCLAIN: Well, presumably TxDOT would be entitled to anything that it had to pay to have those, have the trees taken down, but that's not the issue we have obviously in this case. We've got something where we've got materials under the ground that are not being pulled up and sold for a profit, they're being used elsewhere.

JUSTICE DALE WAINWRIGHT: You have to consider the broad implications of your case, not just your case. I'm also interested in who gets the profit from the lumber made from the trees?

ATTORNEY LISA MARIE McCLAIN: Well, in the instance of that type of case, I assume that TxDOT could either try to work out something with the landowner or perhaps --

CHIEF JUSTICE WALLACE B. JEFFERSON: But your argument would be, I think, if it's consistent with what you're arguing here, is that the State can sell the trees for profit or use them for construction in other areas. I mean the State would own the trees because that was kind of incident to that easement.

ATTORNEY LISA MARIE McCLAIN: That is true, and especially under the Attorney General opinion where it talks about disposal of trees.

JUSTICE DON R. WILLETT: But what's the citation, what's the opinion number for that opinion?

ATTORNEY LISA MARIE McCLAIN: It's JM1241, Your Honor.

JUSTICE DON R. WILLETT: That's a long time ago.

JUSTICE PHIL JOHNSON: I'm sorry, say that again, please.

ATTORNEY LISA MARIE McCLAIN: It's 1990, JM1241.

JUSTICE DALE WAINWRIGHT: So your rational would be that the owner of the land would have considered the trees and who gets the profit from the trees in valuing the easement. Is that your argument?

ATTORNEY LISA MARIE McCLAIN: That's true. Yes, that's correct, Your Honor. I mean certainly anything that's taken in an easement should be valued at the time we pay for that easement, and it should be considered, and the landowner will have been paid from the easement.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what's the evidence that that occurred here, or do we have any that the soil was part of the negotiation that resulted in this agreed judgment?

ATTORNEY LISA MARIE McCLAIN: Well, the evidence, Your Honor, again is that the express language of the easement itself that talks about the opening up construction, constructing and maintaining of a detention facility as well as the construction plan sheet, which very clearly indicates the cut volume that's going to come from this particular -- in order to dig this facility, they're going to have to cut a certain amount of dirt out of the ground, and that was initialed by the Brownlow's attorneys, so they were aware of the situation. This was attached to the petition for con-demnation early on, so that was known for some time.

JUSTICE HARRIET O'NEILL: The Brownlows --

JUSTICE NATHAN L. HECHT: Is the judgment language typical, is this the typical --

ATTORNEY LISA MARIE McCLAIN: Yes, Your Honor, it is.

JUSTICE NATHAN L. HECHT: You use it all the time?

ATTORNEY LISA MARIE McCLAIN: Yes, sir, we do.

JUSTICE HARRIET O'NEILL: The Brownlows claim that the dirt is worth 300 and something thousand dollars, do you agree with that?

ATTORNEY LISA MARIE McCLAIN: Well, Your Honor, I honestly don't know what it would be worth because I don't know what the current market for that would be in Brazoria County. I believe they're basing that on calculations they've done related to what we've paid our contractor who dug the dirt. But our contractor bids come in as competitive bids and they base their prices on how much dirt they're going to need to get from the facility that we offer, in this case this pond, and what they may need to acquire somewhere else, and so the bids fluctuate somewhat, but if they needed more --

JUSTICE HARRIET O'NEILL: Well, let's just say that it was worth $300,000, for the purposes of argument, just the dirt itself. It would seem to be a pretty bad result here to get $50,000 for a piece of property when the dirt alone was worth 300 something.

ATTORNEY LISA MARIE McCLAIN: Well, it would be a bad result, Your Honor, if that was the way things normally worked, but the Pieratt case tells us that if you have any damages, you are to present those at the time of the condemnation, and as I mentioned, they knew how much dirt was being removed at the time of the condemnation, and if there was a market for that dirt in Brazoria County as they are now claiming, they could have easily found out about what that sells for and come up with

some estimate of damages. They don't need to be precise at that point, but they need to come up with some idea of their damages.

JUSTICE PAUL W. GREEN: What the language did you point to in the judgment that says that it's okay for the State to take material off the property and use it somewhere else?

ATTORNEY LISA MARIE McCLAIN: In the agreed judgment, turn to page 2, it's in paragraph 1, and it says, “The plaintiff sought and prayed for the acquisition for highway purposes through this permanent easement the detention facility.” And so this language coupled with the existing case law, Brown and Mullaly, which expressly state that we may take materials from one street to another or one roadway to another for the use in improving, constructing and maintaining makes that clear.

JUSTICE PAUL W. GREEN: In the decretal portions of the judgment, what would you point to?

ATTORNEY LISA MARIE McCLAIN: Let's see. The permanent easement -- pardon me -- it's in part 5 on page 7, “It's ordered adjudged and decreed that a permanent easement in the land described in Exhibit 8A, attached hereto for the purpose of opening, constructing and maintaining a detention facility” -- and let's see -- we've got our highway language in here as well. I mean I don't think that it's necessary that it be in these decreeing portions as well since we've got the language here in the agreed judgment that everyone signed off on.

JUSTICE PAUL W. GREEN: But somebody looking at this judgment that wouldn't have a background that you have and can look at this and say, “Okay, yeah sure.” You can look at this and it's easy to see that somebody has a right to take that material off the site and use it for some other purpose without compensation. Do you think that's reasonable --

ATTORNEY LISA MARIE McCLAIN: I think it's reasonable --

JUSTICE PAUL W. GREEN: -- by reading this language?

ATTORNEY LISA MARIE McCLAIN: I think it's reasonable when you read the entire agreed judgment together because you do read what those highway purposes are. It expressly states that we're seeking the acquisition for highway purposes.

JUSTICE PHIL JOHNSON: What's the difference between an easement where you can take it and sell it and fee title?

ATTORNEY LISA MARIE McCLAIN: What's the difference between the two? Well, for the fee, we would have all rights -- it would be very clear, every right that we have, we could do anything we wished essentially with the project or with the --

JUSTICE PHIL JOHNSON: Well, isn't that what you're doing with the 87,000 cubic feet of dirt?

ATTORNEY LISA MARIE McCLAIN: Well no, Your Honor, because it's limited by the easement language. It's limited by the number of meters that are

depicted in the plat and it's also limited by the language that we use in the easement. And I see I'm nearly out of time. Can I answer more questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Ms. McClain. The Court is now ready to hear argument from the Respondents.

MARSHALL: May it please the Court, Mr. Arnot will present argument for the Respondents.

ORAL ARGUMENT OF WILLIAM G. “BUD” ARNOT, III ON BEHALF OF THE RESPONDENT

ATTORNEY BUD ARNOT, III: Mr. Chief Justice, Justices of the Court, in the State's brief they use the word “roadway” and “road” 45 times. In the reply brief they use it 13 times. In their opening statement I lost count, I believe it was six; I did not keep count of the number of questions from the Bench about roadway. However, nowhere in this judgment after the words of grant, “ordered adjudged and decreed” under the judgment under review is the word “road” or “roadway” used. It is conspicuously absent from this judgment and the language under review. In inter-preting this judgment we will apply the basic principles of contract construction. We will get words that are plain, ordinary, generally accepted meaning and there is no ambiguity. If we turn to the judgment, not in the recitations of what was sought, I would suggest that this Court in paragraph 2 where the State contends that they sought and prayed for acquisition for highway purposes, that was not given in the judgment. They may have asked for it, this Court could as easily substitute the words “cause of action” or “emotional distress.” When we go to the words of grant of this judgment, it says it is ordered, adjudged and decreed, and this is what the language that the Court must construe. A permanent easement [inaudible] to the property described in Exhibit A for the purposes of opening, constructing and maintaining a detention center, a detention facility -- excuse me -- in, over and across the land, together with the right at all times of ingress, egress, regress, in and over and across the land for the purposes of making additions to the improvements on or repairs to the said detention or any part thereof.

JUSTICE HARRIET O'NEILL: Okay, let's take that language.

ATTORNEY BUD ARNOT, III: All right.

JUSTICE HARRIET O'NEILL: And if you apply the Before-and-After Rule, the value of the easement before the taking and the value of the easement after the taking, considering its use, which would be a whole.

ATTORNEY BUD ARNOT, III: All right. Justice --

JUSTICE HARRIET O'NEILL: And wasn't that what he was compensated for?

ATTORNEY BUD ARNOT, III: Justice O'Neill, the State tries to add words to the plain meaning of this contract in three areas. One is a misapplication of the Damage Rule, which I think is perhaps the most insidious. The second is by adding extraneous facts that are not in evidence and have yet to be tried. And the third is trying to extend by

im-plication the scope of this easement. Specifically to address your before-and-after damage model, think with me, if you will, a damage model never defines property ownership. Rather, property ownership defines the type of damage model that you use. If what is granted is the right to open, construct and maintain a detention pond, then that is the before and the after that you are concerned with, and yes, that is before and after. But what happens if you extend or try to enlarge this scope, if you will, of the specific easement by taking additional property from this easement that's not under the scope and using it somewhere else for a different purpose?

JUSTICE HARRIET O'NEILL: Well, but the question is what's implied within the grant.

ATTORNEY BUD ARNOT, III: Correct.

JUSTICE HARRIET O'NEILL: And so if it's before is property without a detention facility, and after is --

ATTORNEY BUD ARNOT, III: Property --

JUSTICE HARRIET O'NEILL: -- with the whole, then implied is that the dirt is going to go away and it's -- wouldn't that be encompassed within the Before and After Rule?

ATTORNEY BUD ARNOT, III: What is implied is that the dirt can be used for any purposes for opening; the dirt is taken out, maintaining, building tank walls around it, repairing, using that dirt to repair it as those walls crumble, not for a different purpose. The only thing that flows from the implication, and as the State said in the Brown and Mullaly case, the early -- this is not a bar ditch case, this is not a case where the dirt is removed from the sides of the road and used to maintain the road, or once that the State has a right to the road to take that fill and repair the road in other places. This is a mitigation pond required by the Corps of Engineers, unrelated -- related yes, to the Highway De-partment but not by -- I mean to the Highway Development, but not by implication. It's required to take the overfill of the San Bernard River and it's required by the -- it's a mitigation pond, so as the San Bernard leaves its banks, I guess this thing fills up, and then it slowly trickles back, and the dirt is to be used for those purposes. Now --

JUSTICE NATHAN L. HECHT: I suppose in the proceedings in the trial court, this problem never came up?

ATTORNEY BUD ARNOT, III: This is not developed because the only easement, Justice, was for this detention pond. And let me quickly say --

JUSTICE NATHAN L. HECHT: Well, so I'm wondering in different circumstances if you just have this easement, but the property is not 250 acres, it's 20 acres or it's just a little bigger than the detention pond itself, and the landowner couldn't take the dirt.

ATTORNEY BUD ARNOT, III: Correct.

JUSTICE NATHAN L. HECHT: Could the State force the landowner to take the dirt and haul it off at his own expense?

ATTORNEY BUD ARNOT, III: I think that's a very good question. We're not proposing a rule of law where the State can come along and say, “We want to create a detention pond,” and then turn around to the fee owner and say, “Now get our dirt out of our hole.”

JUSTICE NATHAN L. HECHT: Yeah.

ATTORNEY BUD ARNOT, III: We're not implying that. We're claiming that they have --

JUSTICE NATHAN L. HECHT: Well, I understand you're not, but I'm wondering why that's not involved here?

ATTORNEY BUD ARNOT, III: Well, I think by statute that the State has like ten years to use this soil for the purposes in the easement, and if they don't, then it reverts to the fee owner. And in that situation --

JUSTICE NATHAN L. HECHT: So the State then could make the fee owner take the dirt?

ATTORNEY BUD ARNOT, III: Probably, and I can't imagine a situation where the fee owner wouldn't want the dirt. As a matter of fact, the fee --

JUSTICE NATHAN L. HECHT: Well, I could easily imagine. I mean if he has a house right next door, and he doesn't want anything to know about dirt or anything, he's just letting the State have the pond because they can take it anyway, but the last thing he wants is --

ATTORNEY BUD ARNOT, III: It's cubic meters.

JUSTICE NATHAN L. HECHT: -- 87,000 cubic meters of dirt in his front yard.

ATTORNEY BUD ARNOT, III: Well, evidently there is a market for it because the State wants it.

JUSTICE NATHAN L. HECHT: Yeah.

ATTORNEY BUD ARNOT, III: But let me, let me sort of address something that does concern me, and that is this concept of a double recovery, number one, and does this really pass the smell test? This is not a situation where the Brownlows played “Got you,” and sat silent. This is a situation where they entered into a contract and an agreed judgment, and what was the purpose of that sole purpose of the scope of that easement. And when they recognized at that time, that the dirt was going to be not removed from the hole, but removed from the hole and not used for purposes of the mitigation pond but relocated somewhere down the road for unrelated purposes, that is a second taking, and always.

JUSTICE NATHAN L. HECHT: And help me with this. There are several numbers in the briefing, dollar figures --

ATTORNEY BUD ARNOT, III: Correct.

JUSTICE NATHAN L. HECHT: But it costs something to take, to dig the dirt up --

ATTORNEY BUD ARNOT, III: That's true.

JUSTICE NATHAN L. HECHT: -- and do the excavation.

ATTORNEY BUD ARNOT, III: Correct.

JUSTICE NATHAN L. HECHT: And then the dirt is worth something once you dig it up.

ATTORNEY BUD ARNOT, III: Correct.

JUSTICE NATHAN L. HECHT: Is there any way to compare in the numbers that exist what that is? I mean is the dirt worth more than it cost to dig it up?

ATTORNEY BUD ARNOT, III: We know in easement law that we're not to get the enhanced value, would you say, of removing it. Okay, this is the value before and after, and now that you take it out, all of a sudden it's got this enhanced value as processed gravel, for example, that that's not included in it, and that of course is not what we are arguing. We contend that the State has an absolute right to use that soil --

JUSTICE NATHAN L. HECHT: I understand, but let me just focus on one question.

ATTORNEY BUD ARNOT, III: Okay.

JUSTICE NATHAN L. HECHT: And that is, you know, it's sitting out there and there's the field, and it's going to cost something to excavate it.

ATTORNEY BUD ARNOT, III: Correct.

JUSTICE NATHAN L. HECHT: -- and then once it's excavated you can sell it and it will be worth this much. Is there anything in the record that gives any comparison of those numbers?

ATTORNEY BUD ARNOT, III: Well, there are numbers in the record that are recited, but there are no findings of fact concerning those numbers. The findings of fact, they're contained in the judgment, contrary to 299(a), but there's no findings of fact and this really is a question of law, and this was a jurisdictional question where no facts were presented at the trial court.

JUSTICE NATHAN L. HECHT: If there had been, it seemed like it wouldn't be immune -- if the landowner were claiming the dirt, he would only be entitled to the net value of it.

ATTORNEY BUD ARNOT, III: I think that's for a fact finder, and I think upon remand that may well be deter-mined, but to me this offer and acceptance and what the Commission did is very much a collateral attack

on an existing judgment, sort of like the settlement rule. I can think of all sorts of reasons not to consider any of this extraneous facts, but I come back to that this is a question of law, contract and verification, a plain meaning rule, question of law for the Court to decide what does this term “for detention purposes” [inaudible] --

CHIEF JUSTICE WALLACE B. JEFFERSON: There is an amicus brief, and I think it was from a place for a water district or something like that --

ATTORNEY BUD ARNOT, III: Correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- that says if we went your way, there would be a byproduct and that is that these condemning agencies or authorities would condemn the land, the entire land, not just an easement, if they're going to be burdened with this new fee, you know, that -- so it would work for your case and benefit your client today, but in the future it would hurt landowners because there would be more than just an easement taken, but condemnation of the whole, a bigger portion of the property.

ATTORNEY BUD ARNOT, III: I don't think that the sort of fear of hysterics that this is going to damage the law of easements is well-founded. First of all, this is an agreed judgment; this is a contract between two consenting parties who were represented by attorneys. The State certainly knew how to provide for this excess use and put language in their contract to expand the scope of this easement when they were contracting and making this agreement. I don't think perhaps contrary to the State's position that this is the same agreement if you're going to, the same language you're going to find in every judgment. I don't think so. I think this is a very narrow case and I think it should be read very narrowly and I think it should be decided very narrowly.

JUSTICE DALE WAINWRIGHT: If the soil that was --

JUSTICE HARRIET O'NEILL: Let me just follow up on that question. I think, would your answer also be that that could just be put in the purpose language? This will be different if it said, “For the purpose of opening, constructing and maintaining a detention facility for the purposes of highway construction”?

ATTORNEY BUD ARNOT, III: Correct. I believe that language would expand the scope of the easement, and the Brownlows would not have a complaint. Mr. Wainwright?

JUSTICE DALE WAINWRIGHT: If the soil were not used for some valuable purpose with the liquidated value attached, the detention pond was excavated and the soil was all used for the retaining walls, then your clients wouldn't be here today making their argument, would they?

ATTORNEY BUD ARNOT, III: That's correct.

JUSTICE DALE WAINWRIGHT: So it's only when the excavated soils used are sold for some valuable purpose, then it's --

ATTORNEY BUD ARNOT, III: Well, not sold for a valuable purpose, but used outside the scope of the easement. I think your example --

JUSTICE DALE WAINWRIGHT: Of course it has to be of value. If it's used for something that's not of value, then you don't have a claim for damages.

ATTORNEY BUD ARNOT, III: It's an unconstitutional taking, and I would assert there is no de minimis in-fringement upon constitutional rights, okay? But I think your example of what happens if they dug this up and they found a mineral present, for example gold, in the soil, very appropriate. Now the State says, “Yeah, well, we have a statute that says we're not to consider that.” But that is a perfect example of one of those, we didn't really think about this being there when we took the soil out, and the enhanced value is not needed for the purposes of constructing a detention pond. So even though that is treated by statute, a lot of these are treated by statute, I think we have to return to the language of the agreed judgment.

JUSTICE HECHT: And in that regard, if the -- what is the difference in value between this easement and the fee minus the minerals?

ATTORNEY BUD ARNOT, III: I don't know that that's been determined. I think that is a fact issue that may be determined, and I don't know whether it's germane or not, Justice Hecht, because we always know in subsequent takings in these situations, it turns out that when you have to go back and redo something, it tends to be more expensive than it would have the original, and it's not lost on me that the State started this condemnation over two years, approximately two years before their highway plan, as they talk about, was initiated. So in their hurry to do this, sometimes mistakes are made, and I think also in answering your question, Justice Hecht, what would happen if the State decided, “Whoa, you know, we made that bend too big, we need to straighten this road out. So we need to come back and we just we need five more acres here,” you know. Do they have the right to do that without? That's an additional taking. You asked before and after, Justice O'Neill, and I'm thinking, you know, of the easement cases where they retain the right to put in a two-inch flow line and it's buried underground. Now they want to come back and put in a 15-inch high-pressure gas transmission line. That's outside the scope of the taking. On the surface once the land is buried, I doubt that anybody could tell much difference.

JUSTICE HARRIET O'NEILL: Well, you know now that I'm thinking about the before and after in light of your argument, would your argument, would it be fair to say your argument would be that the way you would value the after, would be, if the soil were used and were still on the site for the opening, constructing and maintaining the facility, then you'd evaluate the after with the soil still on the property?

ATTORNEY BUD ARNOT, III: We've been compensated for that. I think the original taking --

JUSTICE HARRIET O'NEILL: So you'd say --

ATTORNEY BUD ARNOT, III: -- contemplates using the soil --

JUSTICE HARRIET O'NEILL: That's what I'm saying. You would say the after would include the dirt being on the property, because it's to be used for the opening, constructing, maintaining.

ATTORNEY BUD ARNOT, III: Right.

JUSTICE PHIL JOHNSON: Well, let me ask this then. What if instead of what if they take outside the confines of what they need for the detention, and they take another 10 or 15 acres and pile this stuff up, pile the dirt up 25 feet over there, and the dirt they don't need to construct the detention center and build it and protect it because some people go swimming in those things and they drown, so they have to do all those things. You've got this big pile of dirt over here --

ATTORNEY BUD ARNOT, III: I think that --

JUSTICE PHIL JOHNSON: It's not being used for anything other than just being sit there because they don't know, they can't take it and use it for a road, can the landowner take it? Or is that the State's dirt?

ATTORNEY BUD ARNOT, III: I think that the State, if they take the additional acreage or let's say they put the soil on the original easement. Remember, a permanent easement can terminate also at some time. This is not a fee, it's going to come back, and I would assume that the dirt has to be returned from somewhere. But under statutes my understanding, the State has ten years to make use of that soil for those purposes. I would assume that it would be like a take down, where you take a bulldozer and you dig out a divot in the ground and use that soil to build what we would call a take down. All right.

JUSTICE PHIL JOHNSON: And you're saying if they build it twice as high, but leave the dirt there, it's still all right?

ATTORNEY BUD ARNOT, III: Yes. We would absolutely concede with that. You know, Justice O'Neill, in looking at your Marcus Cable case --

JUSTICE HARRIET O'NEILL: I thought you might like that case.

ATTORNEY BUD ARNOT, III: Huh?

JUSTICE HARRIET O'NEILL: I thought you might like that case.

ATTORNEY BUD ARNOT, III: Yeah, well this is what I like. The intent of the parties as expressed in the grant determines the scope of the interest conveyed, and we focus on the terms of the granting clause. We're not here trying to expand the law or ask for any rule that is different than exists. The State relies on extraneous facts in their pleadings are prudent. Again, they attach an affidavit, that must mean there must be some sort of facts and if there are facts then how can it be dismissed for want of jurisdiction? They want to go beyond the actual scope of the plain meaning of this language for roadway purposes, and finally they want to confuse the damages. So let me just say this in closing: The State took a permanent easement for a single purpose of building a water detention facility. The text is clear, it's unambiguous. What is not conveyed is retained, and the Court of Appeals' opinion below, neither modifies or changes any of the Law of Easements in Texas or any of the cases cited by the State. It correctly

applies the law to the facts in this individual case. And we respectfully would ask this Court to affirm the opinion below.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Arnot.

REBUTTAL ARGUMENT OF LISA MARIE MCCLAIN ON BEHALF OF PETITIONER

ATTORNEY LISA MARIE McCLAIN: I'd like to begin by just addressing a couple of the questions that came up during counsel's presentation. First, Justice Hecht, you had asked whether or not the State would be able to force a landowner to remove dirt. The answer to that is no, and as is probably apparent, had we left the dirt on their land, because it wouldn't fit within the confines of the easement, we would have been in a similar situation of the Stappers case, which is cited in our brief, or we would have had to then condemn an additional easement to place the dirt that came out of the detention pond. Also with respect to whether or not the Brownlows were appropriately compensated for the dirt, to answer what Justice O'Neill had been asking earlier, why is it worth $300,000 or would it be? And the answer is the dirt is valued as it lies in place in the ground. In this case that value was included in the $55,000 that they were awarded for the easement. The $300,000 number that they're giving you, while I can't give you all of the calculations that went into it, is based on the cost of extracting that dirt, compacting that dirt, and it's probably around $300,000 to do that. That's probably reasonable.

JUSTICE HARRIET O'NEILL: But it does appear from the decrial language of the agreed judgment that it's fairly specific that the easement is for the purpose of opening, constructing and maintaining the detention facility. And in fact, if you go on down to the right of ingress, egress and regress, it's for the purpose of “adding to, improving and repairing the detention facility.” So there is nothing about going in and removing dirt and taking it offsite, and there is nothing about the use of dirt for construction, for highway construction purposes.

ATTORNEY LISA MARIE McCLAIN: In the, the only language in the decreeing paragraphs, and specifically in paragraph six, at the very bottom of page seven it discusses the fact that this property is for a permanent easement for public use. The public use is defined and laid out elsewhere in this agreed judgment, which is the highway purposes.

JUSTICE HARRIET O'NEILL: Where? Because it, all I see --

ATTORNEY LISA MARIE McCLAIN: It's on page 2.

JUSTICE HARRIET O'NEILL: Well, on page 2, paragraph 1, all it says is the Court finds that the plaintiff sought and prayed for acquisition for highway purposes, and it just sort of quotes the petition. Is that what you're relying on?

ATTORNEY LISA MARIE McCLAIN: Yes, Your Honor, because highway purposes are broad, and the types of purposes that may be allowed are defined by that Texas Transportation Code, and this purpose, the detention facility is specifically set out in 203.052(b)8 of the Transportation Code. So if the Transportation Commission determines that it's necessary and convenient for the construction of a roadway or for

roadway purposes to get an easement in order to build the detention facility, they have the authority to make that determination by the Texas Transportation Code. If I may quickly touch on the public policy concerns. I know that Counsel has said that we're getting a little worked up over the implications of this case, but actually the points raised in the amicus brief along with some others are very valid concerns. I'll address two of the main problems with upholding the court of appeals opinion in this case. First, there could be multiple proceedings potentially for condemnation, because the State may take an easement and need to go back in a year or two and open up or improve or widen a roadway. Well, when they do that, they're potentially subject to an inverse condemnation claim every time they do that for the easement materials. The other really im-portant concern here that is --

JUSTICE NATHAN L. HECHT: I'm not sure I understood that.

ATTORNEY LISA MARIE McCLAIN: I'm sorry. If we go back, if we have to go back and make any improve-ments to a roadway and that requires, for example, widening the roadway and widening into the easement, we again at that point will be digging up some materials from the easement and at that point in time we may have a landowner who owns the fee come back and say, “Your easement doesn't entitle you to do that. You owe me for the dirt underneath,” and we would --

JUSTICE NATHAN L. HECHT: But couldn't you settle that at the front end and just say, “We get to use the dirt”? The Respondent says if the decrial portion of this judgment said “for highway purposes,” he wouldn't be here.

ATTORNEY LISA MARIE McCLAIN: Yes, Your Honor, we could do that at the front end. The problem is the we already have several easements existing out there that are written this way, and they may be subject to these types of inverse claims for as long as the statute of limitations for this would run.

JUSTICE HARRIET O'NEILL: But that would just be a problem with the crafting of the judgment. I mean how would a landowner if they didn't want the dirt taken off the property, I presume that they could have certainly made it clear that this doesn't include excavated dirt, but you know if they had intended just to limit the use of the dirt, it seems like they did, “opening, constructing and maintaining.”

ATTORNEY LISA MARIE McCLAIN: Well again, Your Honor, our position is that the detention facility is in fact part of a highway, a larger highway purpose, and the Brown and Mullaly cases make clear, there had been long-standing cases that it's exactly what you can do. You can take the dirt anywhere on a project and use it elsewhere, and other commentators such as CJS, ALR, have upheld this general rule that an easement for highway purposes includes the right to take those materials.

CHIEF JUSTICE WALLACE B. JEFFERSON: You had these two policy arguments. One was multiple proceedings. What was the second?

ATTORNEY LISA MARIE McCLAIN: I'm sorry. It was essentially that we're going to end up in a position where water utilities, like the ones who filed the amicus brief, are going to have to condemn greater interest

than what they actually need, and you're going to end up in a position where they're paying more money and taking more property than they need, and the property owner is left with less rights and no property.

JUSTICE HARRIET O'NEILL: Or they're just going to pay for it.

ATTORNEY LISA MARIE McCLAIN: Pardon? I'm sorry.

JUSTICE HARRIET O'NEILL: Or they're just going to put it, put the language in. I mean it could be that this was just not drafted well. Everybody says the sky is falling, but it sounds like the rule that the other side wants would be easily, could easily remedy the problem by including it in language of the --

ATTORNEY LISA MARIE McCLAIN: Perhaps for future cases, but for the cases that we have, or the easements we have outstanding now, not so much. And I see that I'm out of time, so we respectfully request that you reverse the decision of the court of appeals and affirm the decision of the case by the trial court.

CHIEF JUSTICE JEFFERSON: Thank you, counsel. The cause is submitted and the Court will take another brief recess.

MARSHALL: All rise.

[End of proceedings.]

The State of Texas, Petitioner, v. Charles Lynn Brownlow and Marlene H. Brownlow, Respondents.
2009 WL 5113429 (Tex.) (Oral Argument)

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